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Presidency non-paper on DGS preventive measures and treatment of Institutional Protection Schemes officially recognised as DGS

for CMDI Council Working Party meeting on 15/4/2025

Introduction

This non-paper, prepared by the Polish Presidency, provides a brief overview and analysis of the Council objectives and approach to preventive measures possible to be used by deposit guarantee schemes (DGSs) and treatment of Institutional Protection Schemes (IPSs) officially recognised as DGSs (IPS-DGSs) in this context. The non-paper tries to explore also the European Parliament (EP) perceived objectives and approach to the mentioned matters, within the framework of the CMDI proposal. The aim of the non-paper is to facilitate the Presidency's preparation for the political trilogue on 28th April 2025.

This non-paper focuses on the aspects of preventive measures and IPS-DGS specificities, nevertheless it is linked to the Polish Presidency non-paper on alternative measures discussed during the CMDI Council Working Party meeting on 18th March 2025 given that some of the provisions are relevant to both types of measures.

I. Characteristic and role of preventive measures in the crisis management toolbox and specificities of IPS-DGSs

- **Characteristic and role of preventive measures in the crisis management toolbox**

Preventive measures' role is to restore the viability of a bank facing financial difficulties and thus compliance with the prudential requirements as well as to preserve business continuity, credit relationships and uninterrupted access to financial services. This aims to support the maintenance of a high level of public confidence in the banking system and avoidance of the risk of a bank run. Given that preventive measures are applied before insolvency proceedings or resolution action is taken, they can also contribute to preserving a franchise value and reducing costs to the system compared to liquidation or the application of other crisis management tools at a later stage. Furthermore, due to the fact that the least cost test (LCT) principle is applied and given that interventions take place at an earlier stage, i.e. before insolvency or resolution action has been taken, preventive measures seem to be less expensive than reimbursement to depositors and thus cost-effective from the perspective of the DGS and efficiency of resources management. Preventive measures are also less intrusive than for instance resolution which is an ultimate measure.

The use of DGS funds for interventions other than payout under some circumstances is already allowed under existing DGSD and some jurisdictions have in place the relevant mechanisms possible to be applied in order to prevent failure of a bank (preventive measures). The possibility to have in national legislation provisions on preventive measures based on DGSD is available for all Member States, however according to the Commission's Impact Assessment accompanying the CMDI proposal, nine of them have currently transposed this option in national law (Austria, Croatia, France, Germany, Ireland, Italy, Malta, Poland and Spain)[1]. The practical experience with the use of preventive measures since the adoption of DGSD in 2014 is rather limited since the EBA recalls in its document of 23 January 2020[2] cumulatively only few examples of interventions in Italy and Germany where such measures exist as a part of toolbox. Nevertheless, the use of preventive measures in such cases proved to have an added value to be effective in avoiding further deterioration of financial situation in supported banks in distress which could otherwise escalate into failing or likely to fail (FOLTF) scenario.

In the current regime, the requirements for preventive measures taken by DGS are laid down in Art. 11(3) DGSD. DGS may use its financial means for these measures to prevent the failure of a credit institution if a certain set of conditions is met: no resolution action has yet been taken; the DGS has adequate oversight of the application of such measures; the cost of the measure does not exceed the cost of fulfilling the DGS's statutory or contractual mandate; the application is linked to stricter risk monitoring; access to covered deposits must be guaranteed and associated institutions are able to make special contributions if the available financial means fall below 25% of the target level. The DGS also coordinates its approach with the resolution authority (RA) and the competent supervisory authority (CA). Compared to the status quo, both co-legislators' proposals propose significant changes to the regime governing preventive measures by introducing significantly more detailed and binding provisions regarding their adoption, governance, administrative requirements, involvement of authorities, availability of funds and enforcement.

The current DGSD provides that preventive measures can be applied subject to certain conditions and safeguards. However, the Directive does not prescribe the tools (forms of support) that can be used or procedures or organisational arrangements to be established to apply such measures. It provides the necessary flexibility for Member States, especially as to

[1] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the Proposals for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND COUNCIL amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action REGULATION OF THE EUROPEAN PARLIAMENT AND COUNCIL amending Regulation (EU) 806/2014 as regards early intervention measures, conditions for resolution and financing of resolution action DIRECTIVE OF THE EUROPEAN PARLIAMENT AND COUNCIL amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency.

[2] Opinion of the European Banking Authority on deposit guarantee scheme funding and uses of deposit guarantee scheme funds , EBA/OP/2020/02.

which institution is empowered to apply preventive measures, i.e. a DGS or an IPS-DGS. Depending on the national framework, the tools can include guarantee on liabilities, guarantee on assets, capital injection or liquidity support. Given the nature of preventive measures encompassing the use of DGS funds, such interventions could be subject to the State aid control arising from TFEU. According to the ECJ, whether preventive measures constitute State depends on the circumstances of the individual case. Preventive measures do not qualify as state aid unless a sufficient degree of involvement of state authorities can be established. If preventive measures were to qualify as state aid as the case might be, it were subject to the European Commission's assessment of the compatibility with the internal market rules on a case-by-case basis. The Commission's assessment would be conducted based on the TFEU and on the framework created on the basis of the 2013 Commission Banking Communication, taking into consideration all relevant elements of the case, such as the governance and decision-making procedure of the DGS, and the circumstances relating to the measure. Since the qualification of the intervention as State aid would de facto impede the intervention of the DGS in a preventive capacity, as this would trigger a determination of a bank to be FOLTF under the BRRD, such measures are possible only if not qualified as State aid. As evidenced in the abovementioned Commission's Impact Assessment (page 183) some preventive measures were assessed as being private or in line with market conditions and therefore not qualified as State aid.

- **IPS-DGSs specificities**

Preventive measures are tool of particular importance for the functioning of IPS-DGSs. Article 4(2) DGSD opens the possibility for IPS within the meaning of Article 113(7) CRR to be recognised as statutory DGS. In Member States where IPS-DGSs are in place they provide for an additional, industry-funded layer of protection that contributes to financial stability and the protection of depositors without resorting to taxpayer or resolution funds.

In general, the mandate of IPS requires them to safeguard their member institutions' solvency and liquidity in order to prevent their failure. The value of their shared trademark relies on that promise. IPS-DGSs are bound by certain prudential requirements, in particular according to Art. 113(7) of the CRR in conjunction with Article 113(6) CRR. These provisions include obligations such as the ability of the IPS to grant immediate support to an ailing member institution from funds readily available to it. Furthermore, there must be "no current or foreseen material practical or legal impediment to the prompt transfer" of funds to an IPS member institution. IPS are also required to have adequate monitoring and risk-classification systems, which provide a complete overview of the risk situation of the individual members and the IPS as a whole, and must carry out their own risk assessment. Compliance with these requirements is supervised through joint monitoring by the ECB and national authorities.

Considering the above, for these IPS the use of preventive measures is the norm and effectively mandatory rather than a case-by-case decision depending on whether the measure is more efficient in an individual bank's case. This is a key difference to ordinary DGS, which only make occasional use of preventive measures. As a result, the provisions that could potentially limit the availability of DGS funds for preventive measures could have considerably stronger implications for IPS-DGSs, as such provisions might be considered to be in conflict with their mandate and the regulatory requirements outlined above. Member States that have such IPSs in place have argued that a dedicated treatment for IPSs regarding the conditions for the implementation of preventive measures would be the most effective and legally sound solution.

Last but not least, with a view to the role of IPS in the crisis management framework, it is worth noting that – notwithstanding the specific prudential requirements outlined above – all IPS member institutions are fully subject to the crisis management regime, including regarding recovery and resolution planning, the MREL and contributions to resolution financing arrangements including the SRF.

Against this background, from the overall perspective of financial stability and bank clients it seems that the preventive measures constitute an added value in the toolbox similarly to alternative measures, i.e. by supplementing other types of possible interventions by safety net institutions (such as early intervention or resolution), however they are implemented at a different stage than the latter ones. Therefore also the conditions, requirements and terms of use of each type of measures vary significantly.

II. The Council objectives and the EP perceived objectives on preventive measures including IPS-DGSs dimension

The Council objectives

The Commission's proposal on CMDI is aimed providing that the relevant measures and interventions would be applied in a more consistent and predictable manner in the internal market. Given the existence of preventive measures in the current DGSD and the positive experiences of some Member States with the use of preventive measures, the Council acknowledged the added value of such measures in the crisis management toolbox. The Council mandate aims to simplify and streamline the overall process in order to allow for swift action without compromising the authorities' respective powers to ensure the preventive measures taken by DGS are invoked to restore the long term-viability of institutions, ensuring a clear governance, including a decision-making process aligned with the streamlined process, and avoid hindering the proper functioning of IPSs, without compromising on level playing field. With its approach (described in section III), the Council mandate preserves the

applicability of preventive measures in practice. At the same time, it harmonizes their application and ensures a level playing field, while taking due account of the specificities in the national banking sectors and reflecting current practices as well as positive experiences in Member States. It reduces complexity of provisions and ensures that preventive measures remain a viable option across a broad range of financial institutions and crisis scenarios. Finally, it preserves the functioning of IPS, including by preventing possible conflicts between the requirements from the DGSD and the ones from the CRR which remains in line with the objectives of the CMDI review.[3]

The EP perceived objectives

It seems that the EP shares to some extent the Council objectives, especially regarding the distinction between preventive and alternative measures and the use of such measures in a more consistent and predictable manner in the internal market. However, based on the discussions with the EP in the political trilogues also on the other aspects on the CMDI package so far, it seems that at the same time the EP intention is to reach much higher level of harmonisation and to ensure more level playing field. In the Presidency's understanding with reference to preventive measures, the EP pursues the following objectives: alignment of interventions with State aid rules; ensuring a level playing field by aligning the treatment of ,,private" and ,,public" DGSs; ensuring that DGS interventions remain temporary and preventive; guaranteeing transparency and accountability in the process of application such measures. In this context, the EP seems to strike to make preventive measures a mandatory instrument in the toolbox and no longer leave the choice to the Member States, while putting significant restrictions on the use of preventive measures in general, in some respects going beyond the Commission's legislative proposal.

III. The Council and the EP approaches to preventive measures

Bearing in mind the Council objectives and the EP perceived objectives, on the one hand there are differences between approaches proposed by the co-legislators, but on the other hand it seems that there could be some tangent points to work on with a view to find a possible way forward.

[3] Statement by the Eurogroup in inclusive format on the future of the Banking Union, June 2022 ,,While maintaining a level playing field, the improved CMDI framework will take due account of the specificities in the national banking sectors, including by preserving a functioning framework for institutional protection schemes to implement preventive measures."

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a) Obligation vs. option for MS to allow the use of DGS funds for preventive measures (lines 193, 200 DGSD)

The Council mandate maintains the flexibility of Member States to allow or not allow the use of DGS funds for preventive measures and thus shaping their crisis management approaches, while the EP proposes to delete the Member States option and make the transposition of preventive measures into national law obligatory. The Council recognizes country-specific aspects as well as the fact that conducting preventive measures requires the DGS to have appropriate systems and procedures in place for selecting and implementing these measures and monitoring affiliated risks, and reflect this in its organisational setup. Therefore, the Council follows the Commission's proposal to retain preventive measures as an option.

b) Timing of preventive measures – FOLTF vs „no resolution action taken" (line 194 DGSD, also linked to lines 237 BRRD/ 266 SRMR)

As long as there is reasonable prospect that a bank (where relevant a member of IPS-DGS) in trouble can recover without external preventive intervention, this should be the preferred solution. The Council mandate provides for the possibility of taking preventive measures as long as no resolution action has been taken, while the EP proposes to allow them only as long as the credit institution has not been determined as FOLTF which establishes a cut-off date for ability to intervene preventively at earlier stage. The Council mandate strikes a balance between two objectives. While, on the one hand, preventive measures should be used early enough to prevent further deterioration in the financial stability of a bank, Member States also considered it important to avoid setting incentives for a premature use of such measures at a time where there is still the prospect that the financial institution in question might recover without outside intervention. This is in line with the principle that market-based solutions are preferred over interventions by the DGS or RA. The Council's approach is also in line with preserving a well-equipped toolbox for all possible crisis situations, given that moving forward in time the point up to which preventive measures can be taken would deprive the DGS of this important tool in some situations. This is important considering that, in a rapidly deteriorating situation, FOLTF can be declared quickly. In such case, the framework should remain flexible enough to enable the adoption of preventive measures as long as no resolution action has been taken.

Looking at both approaches from a slightly different angle, a reference solely to the FOLTF determination seems not appropriate because it is not a self-standing administrative act. FOLTF determination is part of the decision of the RA under Art. 82(2) BRRD (Art. 18 SRMR) whether or not to take resolution action, which includes several elements. The assessment of the availability of alternative private sector measures is already made and incorporated in this decision. This may lead to the conclusion that in order to make the provisions more up to

practice, a reasonable approach could be to modify Art. 11(3) of DGSD and limit the possibility to use DGS funds to prevent failure of a bank until the RA adopted the decision to take or not the resolution action in order to reflect the procedural steps which precede the resolution action. In this context, if the decision under Art. 82(2)) BRRD is not to take resolution actions when the bank is FOLTF, because there is no public interest and in the assessment of the RA, there are no alternative private sector measures that could prevent the failure of the bank, DGS could still take measures under Art. 11(5) DGSD to preserve the access of depositors to their deposits, followed by or within the national winding up procedure that ensures market exit. If the bank is FOLTF, but there are alternative private sector measures that could prevent the failure, the RA would simply not take a decision under Art.82(2) BRRD.

Q1: Would MSs agree to suggest referring to the decision of the RA under Article 82(2) BRRD as a reasonable approach ? If not, what else could be envisaged ?

c) Application of LCT (lines 195, 244, 244b, 246 DGSD)

Likewise the EP and the Commission, the Council approach also assumes applying LCT before granting preventive measures. Basically, when use of preventive measures, the LCT serves similar purposes that in case of other interventions with DGS funds outside payout, namely to safeguard the use of DGS funds while applying preventive measures cost-effective. Relevant LCT aspects were outlined in the Presidency non-paper on alternative measures prepared for the Council Working Party on 18th March 2025. Similarly to that non-paper, since the LCT issue is a part of a broader concept within the CMDI package where the DGS's role is expanded beyond pure payout function, the Presidency suggests keeping the discussion on the shape and application of the LCT separately and it does not expand the LCT aspects in this non-paper. The Presidency notes however, that when it comes to the application of LCT in preventive measures, the specific role of these measures in the mandate of and requirements towards IPS-DGSs should be considered.

d) Conditions, rules and process for adopting and application preventive measures (lines 205-221n DGSD)

The Commission's proposal contains a significant number of conditions as well as procedural requirements related to the implementation of preventive measures. The Council mandate follows in principle the approach proposed by the Commission, while streamlining the provisions in order to reduce complexity and allow for timely intervention without jeopardising the overall objective of preventive measures, which is to ensure the long-term viability of the financial institution. In relation to IPS-DGSs, the Council mandate provides legal certainty by referring to the authorities, measures and entities involved in the process for the

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adoption of preventive measures in a way that is consistent with the requirements of Art. 113(7) CRR. Furthermore, the Council mandate aims to strike a balance between predictability and flexibility.

According to the Council mandate, the following preconditions and ancillary conditions apply to the implementation of preventive measures (Art. 11a DGSD). Some of them can already be found in the current version of the DGSD, while many others have been added:

- The credit institution together with the application for support must submit also a "Preventive Measures Note".
- The credit institution must maintain access to covered deposits.
- The other credit institutions of the DGS must in principle be in a position to pay extraordinary contributions.
- The credit institution has fulfilled the requirements of previous Post-Preventive Measures Plans, including any repayment obligations agreed therein.
- The DGS has appropriate monitoring procedures and decision-making processes for the selection and implementation of preventive measures and for monitoring the associated risks.
- The DA must confirm that all preconditions and ancillary conditions for preventive measures are met. The DA shall inform the CA and RA. If the DGS is also an IPS, the IPS shall instead confirm to the DA that all preconditions and ancillary conditions for preventive measures are met, providing legal certainty related to the requirements of the CRR.
- If the DGS acquires capital shares as part of preventive measures, these must be sold as soon as economic conditions permit.
- The credit institution that has received the preventive measure is subject to stricter risk monitoring by the CA. In addition, the DGS has more monitoring rights vis-à-vis this credit institution.

Comparing the Council mandate to the EP proposal, there are some similarities and some differences. In conjunction, the conditions, operational requirements and procedures introduced by the EP are more rigid and contain more detailed and arguably more complex and burdensome requirements and procedures. The Council strikes a balance between predictability and flexibility and allow accommodating both a procedure that allows swift action when needed and an enhanced role for the authorities as well as adequate and more detailed analysis at a later stage, in line with the objective of restoring the long-term viability of the financial institution.

Both co-legislators follow a similar approach in principle in that they split the preventive measures note into two parts: one of which would accompany the request for preventive measures, while the other would be submitted after the preventive measure has been granted. The co-legislators proposals differ, however, regarding the contents envisaged for these documents, the process and timeline for their adoption as well as provisions related to their repayment (Art. 11b, 11ba). The Council clarifies further the nature of the preventive measures note to be prepared before the measure is taken. The note would contain preliminary diagnosis of factors causing the deterioration of the bank and a preliminary assessment of the suitability of recovery options. The note is submitted to competent authority for information and it contains only an initial assessment of suitability of recovery options but no reference to the specific measures that will be taken. The EP maintains consultation of the CA on a preventive measures note but also requires a business reorganisation plan to be submitted for approval to the CA 6 months after granting the measures. The assessment of the CA of the business reorganisation plan would include an assessment of the RA to identify any actions that might impede the resolvability of the institution. The EP proposes also to update the recovery plan as required under BRRD in case preventive measures are used (this is the extension of existing update requirements under Article 5(2) BRRD for changes in financial or business situation, as well as organisational and legal changes). The Council further envisages that a post preventive measures plan will be submitted to the CA (and DA) for assessment 6 to 8 months after granting preventive measures (very similar to EP, although Council is not explicit on consequences if CA remains unsatisfied with the post preventive measures note, the EP would not allow for preventive measures to take place anymore).

From the perspective of DGS financial resources' management and its ability to conduct interventions an important aspects is also the replenishment obligations in Art. 11(4) in case where preventive measures are considered to be used. Both the Council and the EP maintain such obligation. The Council follows the Commission proposal to retain current requirements. If a DGS uses available financial means for preventive measures, there are direct replenishment obligations if deposit compensation is to be carried out and the available financial means have fallen below 2/3 of the target level or if the available financial means fall below 25% of the target level. This means that, in practice, a maximum of 75% of the DGS target level can be used for preventive measures. The EP proposes to raise the 25% threshold for extraordinary contributions to 40%, subject to certain conditions, thereby triggering replenishment obligations at an earlier point in time. However, it seems that acknowledging preventive measures as a useful instrument for the protection of deposits also means that the exclusive provision of funds for the instrument of compensation or immediate replenishment obligations after the use of funds for preventive measures should not be set at an excessively

high level. This would significantly reduce the funds available for such measures and at the same time generate high costs for idle capital, in particular in systems that work primarily or exclusively with preventive measures. This seems to be neither in the interest of financial stability nor economically justified and might also contradict the principle of a level playing field.

Q2: Would MSs agree that the objective of both the EP and the Council is to ensure transparency and accountability ?

- **Previous support, exit strategy, dividends, and bonuses (lines 210, 210a, 219, 220, 221h DGSD)**

The Council establishes the requirement that in order to benefit from preventive measures, a credit institution has to be compliant with previous commitments under preventive measures, including repayment schedules for previously granted preventive measures. The EP maintains the Commission proposal that a credit institution cannot be supported by a new preventive measure if it has not fully reimbursed any previous preventive measure. Repayment obligations should be specified in the note that is required for the approval of preventive measures. The EP adds to this the requirement that the institution was not granted preventive recapitalisation during five years preceding its requests for preventive measures. The EP seems to introduce a safeguard here, however in practice this proposal could prohibit follow-up measures, e.g. in reaction to a deterioration in the market environment. The EP proposes also that a preventive measure may not be used to offset losses that the credit institution or entity has incurred or is likely to incur in the near future, unless the absence of this measure leads to a disruption of financial stability. This seems to be inspired by provisions related to extraordinary public financial support (EPFS), which do not seem to be adequate in the context of preventive measures. According to the EP proposal, another additional condition to be imposed on preventive measure beneficiary bank refers to prohibition of dividends and bonuses to be paid until the beneficiary reimburse the support from DGS. On the one hand it seems reasonable to prevent outflow of funds, but on the other hand this can be discouraging for potential new investors. The EP also sets an explicit requirement for an exit strategy from the preventive measures and the Council text refers to a similar requirement to establish an exit strategy to which it refers in the recital concerning the post preventive measures plan (6-8 months after approval of the preventive measure).

- **Consequences of non-compliance (lines 224, 224a, 225, 225a, 225b, 226 DGSD)**

The Council amends to provide a choice between a remediation plan and an updated preventive measures plan. The Council mandate strikes a balance between enforcement

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mechanisms and the flexibility needed to enable the recovery of the bank. It provides for a revision of the post preventive measures plan if this is reasonable due to changed circumstances and in the interest of reaching the preventive measure's objective, that is to allow the credit institution to restore long-term viability. If, however, there is no valid ground (such as an unexpected deterioration in the market environment) for not being compliant with the post preventive measures plan, the credit institution is required to submit a remediation plan. Where the CA is not satisfied that the remediation plan is credible or feasible, the DGS shall not grant any further preventive measures to that credit institution. In that regard, the Council follows the Commission proposal to not require a mandatory FOLTF assessment. In the EP proposal, where the credit institution that has received a preventive measure fails to fulfil its commitments, a one-time remediation plan is required to be submitted (Art. 11c). Where the CA is not satisfied with this plan (or where the credit institution fails to comply with it), the DGS is prohibited from granting further preventive measures to that credit institution and the relevant authorities shall carry out a FOLTF assessment. The EP thereby puts a stronger emphasis on enforcement, while leaving little flexibility to account for changes in external circumstances. The Presidency notes however that since assessment whether an institution is FOLTF is an ongoing task of the CA, is at all times allowed to assess that.

Q3: Would MSs agree that the temporality of the preventive measures is a common objective of the co-legislators and the exit strategy is part of the commitment by the banks which benefit from preventive measures ?

Q4: Would MSs be open to consider the FOLTF assessment in case of non-compliance with the remediation plan under special circumstances ?

- **Rules on capital measures (lines 213, 213a, 218 - 218g, 221g DGSD)**

The Council broadly maintains the Commission proposal that equity instruments acquired by the DGS following capital support measures, be transferred as soon as market and financial conditions allow. Both the EP and the Council provide for flexibility which does not limit the transfer only to the private sector. Regarding the restrictions on capital support through preventive measures, the Council allows the identification of capital raising measures to take place in the new ,,post preventive measures plan" (to be provided within 6-8 months). As the Commission, the Council does not set a maximum amount of capital support but envisages a subsequent analysis of the capital shortfall covered by the DGS. The EP adds more restrictions on capital support through preventive measures. Such support can only cover the current capital shortfall based on an Asset Quality Review, Union wide stress test or Supervisory Review and Evaluation Process. It also requires that capital-raising measures be implemented

within 6 months, and that existing shareholders and subordinated debtholders contribute if appropriate. As part of outflow preventive measures, dividend payments, share buybacks and variable renumeration are not allowed. These restrictions remain in place as long as the DGS has not received back its invested amount.

Q5: Would MSs agree that the objectives of both co-legislators are to ensure that existing shareholders should contribute, that an adequate assessment of capital needs is required, and that a broad array of measures needs to be considered ?

- **RTS on monitoring, decision-making, and cooperation (lines 213b - 213g DGSD)**

The Council maintains DGS flexibility to apply preventive measures in line with already established operational practices. The EP has proposed an RTS for the purposes of converging preventive measures on: a) conditions to impose on institutions benefiting from preventive measures, b) the monitoring systems DGS should have in place when they finance a preventive measure and c) modalities of cooperation between DA, RA and CA in the context of preventive measures. Since there is a high degree of details provided at level 1 text, it may raise doubts whether such RTS would have a real added value, while it may complicate the framework. The current tendency is rather to put efforts aimed at simplifying the regulatory framework and removing unnecessary burdens.

- **Guidelines on the plan/note and remediation plan (line 227 DGSD)**

The EP maintains Commission's proposal of EBA guidelines for the formulation of a remediation plan and of a business organisation plan that credit institutions are to submit 6 months after the approval of the preventive measures. The Council deletes the proposal on guidelines. On the one hand, it could be argued that since the DGSD does not aim to regulate all aspects of preventive measures, the introduction of some convergence in practices could be reconsidered as guidelines could contribute to cost effective use of DGS money and the importance to maintain a level playing field. On the other hand, the above considerations regarding doubts about the added value and additional administrative burden apply. Furthermore, IPS-DGSs in particular usually have highly specified internal requirements regarding restructuring plans in place, given the requirements applicable to them under the CRR. Requirements from EBA Guidelines could overlap and potentially interfere with or contradict these.

Q6. Would Member States see added value in further harmonisation of preventive measures, and if so, on which of the above elements? Or would they consider such harmonisation to be excessive?

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IV. The Council and the EP approaches to IPS-DGSs' specificities in preventive measures

Although preventive measures are assumed to be possible for the use by all DGSs that DGSD is applied to, the IPS-DGSs are specific type of schemes combining functions of both DGS and IPS which activities as mentioned above are not regulated solely in DGSD, but also stem from other EU legislation. Basically, both the Council and the EP recognize the IPS-DGSs specificities and refer to them in their texts. However the approaches of co-legislators differ.

- **IPS-DGSs' segregation of funds (lines 56, 83a-83d DGSD)**

According to ECB views[4], IPS must have the necessary flexibility to provide sufficient and timely support under all circumstances, without legal impediments resulting from the fund being simultaneously used for the purpose of a DGS. In the view of the ECB, these two types of schemes serve different purposes, namely IPS protects their members, while DGS protects depositors, in particular, against the consequences of the insolvency of a bank. For these reasons, the ECB considers a segregated IPS fund to be necessary. The Council text does not include the explicit provisions on build-up of segregated fund for IPS for the fulfilment of mandates other than regulated under DGSD, while the EP does. However, the precise objective of the EP approach is not clear. To the extent that it implies that IPS measures are outside of the remit of the DGSD, this would be a fundamental and disruptive change to the current framework, given that the DGSD's point of reference are the available financial means and that these can be used for preventive measures by both DGS and IPS-DGS, without prejudice to potential additional funds outside the remit of the DGSD. Changing this could also raise legal questions. It is worth keeping in mind that IPS follow a different approach to depositor protection than ordinary DGS. As per their mandate and the CRR, they are obliged to prevent an insolvency and payout scenario under any circumstances and instead take preventive measures. Therefore, limiting their ability to fund preventive measures through available financial means could put the functioning of IPS in danger and would be problematic from and economic and potentially also financial stability perspective.

[4] Letter from the SSM chair Claudia Buch to Mr Markus Ferber on IPS and deposit protection, 28 March 2025. https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter250328_ferber~32437b7350.et.pdf

- **Transitional provisions for IPSs on preventive measures (line 340 DGSD)**

Acknowledging the exacerbated impact that the new provisions would have on IPSs in any case, including the need to adapt their organisational structure, the Commission proposal foresees a transitional period applicable to IPSs. Both co-legislators recognize the need for transitional period for IPSs to adapt to new provisions as well. The Council largely follows the Commission proposal. The EP however believes that a transitional period setting at 36 months from the date of entry into force of the amended DGSD will be sufficient. Given the complexity of the new regime for preventive measures this shortening raises doubts in Member States where IPS-DGSs exist.

- **DGS/ IPS-DGSs vs DA to confirm conditions to carry out preventive measures (lines 212 - 212b DGSD)**

The Commission introduces a requirement that the DA has to check the fulfillment of the relevant conditions before the DGS could intervene in a form of preventive measures. The DA shall notify the CA and the RA. Both co-legislators follow the Commission and acknowledge the role of IPSs, however in a slightly different manner. The Council provides a necessary clarification and distinction that recognises the special regime of IPS-DGSs. The wording similar to the Commission's one is maintained where the DGS is not IPS, while in IPS-DGSs case the confirmation is made by the DGS to the DA as for IPS confirmation of the requirements can only be done by the IPS. The EP requires the IPSs to determine the amount of the available financial means for preventive measures to be notified to the DA.

- **Determination of capital shortfall by the IPS (line 218f DGSD) and approval of business reorganisation plan by IPS (line 220b DGSD)**

The EP appears to reflect the role of IPSs to some extent in its detailed proposal (lines 218-218g) on the process of granting capital support (IPS determines the capital shortfall) and the approval of business reorganisation plan prepared by the beneficiary of preventive measure. The Council does not refer to such issue as it does not propose respective provisions in lines 218-218g at all.

- **Compliance with IPS mandate Article 113(7) CRR (line 200h DGSD)**

In general, IPS-DGSs are affected by all provisions that apply to preventive measures. Given the specific role that preventive measures play due to their specific structure, their mandate and the requirements applicable to such IPS as per the CRR, any restriction on the use of preventive measures that goes beyond the provisions applicable in the status quo can be critical for such IPS and can affect their proper functioning. Therefore, the Council mandate includes a necessary clarification of interplays between relevant EU legislation and provides a legal certainty for relevant institutions. It is the Council proposal exclusively. Given that both

the Commission and the EP state that they do not wish to interfere with the IPS mandate and requirements under Article 113(7) CRR, such a clarification should not be controversial.

- **Notification under Article 30a BRRD not to affect IPS measure, marketing to take account of DGS or IPS (lines 182a, 191a BRRD, lines 206a, 216a SRMR)**

The Council amends (line 182a) the notification conditions (when the CA notify the RA without delay when taking actions in connection with the preparation for resolution), stating that this notification shall not affect any alternative private sector measure, including measures by an IPS, that would prevent the failure or the likely failure of the institution within a reasonable timeframe. The Council text clarifies here that the notification does not limit the CA and/or IPS options. It also ensures that if private sector measures are available to solve the situation without public intervention, these remain the preferred solution and will not be impeded by the notification. The EP proposes a similar approach in line 191a, however an addition made by the Council regarding IPS in the context of their individuality is appropriate clarification.

- **Resolution conditions - IPS consultation on FOLTF (lines 209, 210, 211 BRRD, 241, 243 SRMR)**

One of the objectives of the CMDI review is to provide for better preparation and improving the ability of CA and RA to act decisively and in a coordinated manner when needed. In order to achieve these objectives while also considering the obligation of IPS to be able to act under all circumstances, the Council mandate provides for a consultation of IPS with regard to the FOLTF decision, in line with best practices and without prejudice to the prerogative of the authority over that decision (Art. 32 BRRD). Furthermore, the Council mandate clarifies that preparatory measures and notifications under Art. 30a BRRD shall not affect potential measures by an IPS. This also ensures that private sector measures, which are the preferred solution over public intervention, are not impeded by the notification. This is exclusively proposed by the Council, nevertheless both the Council and the EP provide the consultation with an IPS for the purpose of Art. 32(1)(b).

Q7. Would MSs agree that, given the specific nature of IPS-DGSs, this issue should be addressed in a tailored manner within the general framework on preventive measures ?

Q8. Would MSs see any alternative approaches to preventive measures that could reconcile the positions of the Council and the EP, without compromising on the Council mandate ?