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From: Presidency
To: Working Party on Financial Services and the Banking Union (CMDI)
Financial Services Attachés

Subject: Agenda item 6 – Presidency non-paper on BRRD technical topics

1. Introduction

The Presidency intends to address several technical provisions of the CMDI proposal through written procedures. In this non-paper, a third selection of provisions amending the BRRD has been made. They can be divided into two groups: provisions that have already been discussed in Council Working Parties (2. Selected topics with a proposal) and those that have not yet been discussed (3. Selected topics based on the Commission's proposal).

For the topics in section 2. 'Selected topics with a proposal', the Presidency has reviewed the comments and drafting suggestions already provided by Member States and the Commission under the previous Presidencies and, where appropriate, presents, drafting proposals as a possible way forward.

For the topics in section 3. 'Selected topics based on the Commission's proposal', the Presidency launches the written procedure for a first round of comments.

If, following the written procedure, it appears that a particular issue merits a more in-depth discussion, the Presidency will facilitate such a discussion by placing it on the agenda of a subsequent Council Working Party.

2. Selected topics with a proposal

In all the subsections below, the Presidency listed the remarks of the Member States that suggested modifications to the Commission's text. The Presidency proposes to accommodate some of these remarks and, where appropriate, proposes drafting suggestions. The proposed changes are marked against the Commission's proposal.

2.1. Alignment of Article 37(6) BRRD and Article 22(5) SRMR

In the remit of the SRB Legal Network, questions have been raised concerning a divergence in wording between Article 37(6) BRRD and Article 22(5) SRMR. These Articles were originally not intended to be modified by the CMDI proposal but, given the different interpretations of whether the two provisions should be applied in the same way and if not, which of them correspond to the intended purpose, it seems appropriate to address this issue.

Articles 37(6) BRRD and 22(5) SRMR provide that, following the transfer of part of the assets, rights or liabilities of the institution under resolution, the residual institution or entity should be wound up under normal insolvency proceedings. While regulating the same issue, Article 22(5) SRMR does not fully mirror Article 37(6) BRRD.

Article 37 (6) BRRD reads: "*Where **only** the resolution tools referred to in point (a) [sale of business tool] or (b) [bridge institution tool] of paragraph 3 of this Article are used, and they are used to transfer **only** part of the assets, rights or liabilities of the institution under resolution, the residual institution or entity referred to in point (b), (c) or (d) of Article 1(1) from which the assets, rights or liabilities have been transferred should be wound up under normal insolvency proceedings.*"

In Article 22 (5) SRMR the word 'only' (second word of the sentence) is removed: "*Where the resolution tools referred to in point (a) [sale of business tool] or (b) [bridge institution tool] of*

paragraph 2 of this Article are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the residual entity referred to in Article 2 from which the assets, rights or liabilities have been transferred, shall be wound up under normal insolvency proceedings.”

According to some national resolution authorities, Article 37(6) BRRD should be aligned with Article 22(5) SRMR because the word ‘only’ in the BRRD text might be misleading and interpreted in a way that when the sale of business or the bridge institution tool is used in combination with any other tool (including the “supporting” tools of ancillary bail-in (Article 43(2)(b) BRRD) or asset separation), the rule would no longer apply. According to others, without the word ‘only’, Article 22(5) SRMR has the unintended consequence of forcing a bank under resolution to be liquidated whenever the sale of business or the bridge bank tool is used, including when used together with an open-bank bail-in tool.

The two provisions (Article 37(6) BRRD and Article 22(5) SRMR) should be interpreted the same way and are meant to ensure that banks for which continuity of activity after the application of a transfer tool (as a standalone resolution tool or in combination with other tools) is not possible, nor intended, exit the market. On the other hand, the provision of Article 22(5) SRMR cannot be interpreted as forcing a winding up of an institution under resolution where an open-bank bail-in is combined with a partial transfer of the business (e.g. under the sale of business or bridge institution tool). Such situation would not fall under the scope of application of the quoted BRRD and SRMR rules because there would be no ‘residual’ entity (understood as an entity which has been stripped of its business in such a way that it cannot continue operating normally on the market, most likely does not meet the conditions for authorisation and meets the conditions for insolvency or liquidation under the relevant national law).

Some authorities have also raised the question if the two provisions require mandatory winding up under national insolvency proceedings in all cases, even when the conditions for opening national insolvency proceedings are not met. The understanding is that the reference to ‘normal insolvency proceedings’ as used in Article 37(6) BRRD and Article 22(5) SRMR encompasses any national (compulsory or voluntary) winding up proceedings the trigger for which might not be linked to the ‘financial insolvency’ status of the entity (regardless of whether the national insolvency proceedings are triggered on the basis of balance sheet or cash-flow insolvency, and whether the assessment is forward looking or not).

In view of the different interpretations and concerns raised by authorities, there would be merit in amending and aligning the two provisions to further clarify that:

- where the transfer tools are used independently or in combination with other tools any residual entity should be wound up in an orderly manner in accordance with the applicable national law;
- if the open bank bail-in is used in combination with a transfer tool, winding up of the institution under resolution is not required.

Drafting suggestion:

a) Article 37(6) BRRD would be amended as follows:

*“Where ~~only~~ the resolution tools referred to in **paragraph 3, point (a) or (b) of paragraph 3 of this Article** are used **independently or in combination with other resolution tools**, ~~and they are used~~ to transfer only part of the assets, rights or liabilities of the institution under resolution, ~~the any residual institution or entity referred to in point (b), (c) or (d) of Article 1(1) from which remaining after the transfer of the assets, rights or liabilities have been transferred,~~ **and the application of other resolution tools, where relevant,** shall be wound up ~~under normal insolvency proceedings~~ **in an orderly manner in accordance with the applicable national law.**”*

The first subparagraph shall be without prejudice to the application of the resolution tool referred to in paragraph 3, point (d), for the purpose of Article 43(2), point (a), in combination with other resolution tools.”

b) Article 22(5) SRMR would mirror the amendments, which would result in an amendment of the Article as follows:

*“Where the resolution tools referred to in **paragraph 2, point (a) or (b)** of ~~paragraph 2 of this Article~~ are used **independently or in combination with other resolution tools** to transfer only part of the assets, rights or liabilities of the institution under resolution, ~~the any~~ residual entity ~~referred to in Article 2 from which~~ **remaining after the transfer of the assets, rights or liabilities, and the application of other resolution tools, where relevant,** ~~have been transferred, shall be wound up under normal insolvency proceedings-~~ **in an orderly manner in accordance with the applicable national law.**”*

The first subparagraph shall be without prejudice to the application of the resolution tool referred to in paragraph 2, point (d) for the purpose of Article 27(1), point (a) in combination with other resolution tools.”

2.2. Article 30a and Recital 8 BRRD ‘Preparation for resolution’ (including the link with Article 13c SRMR)

The Commission aims to ensure timely action and early coordination between competent authorities and resolution authorities when an institution or entity is still a going concern, but where there is a material risk that the institution or entity may fail. To enhance such cooperation, it introduces a new Article 30a, accompanied by Recital 8 BRRD. Three Member States made the general comment that they welcome the enhancement of cooperation between supervisory and resolution authorities. Some Member States however believe some improvements and clarifications are necessary. Their views are listed in the following paragraphs.

- *regarding paragraph 1:* The Commission proposal foresees that once there is a material risk that the institution or entity may fail, the competent authority should notify the resolution authority as early as possible of such risk (paragraph 1).

Two Member States made the comment that Article 30a(1) point a) BRRD should also refer to supervisory measures taken with respect to investment firms. They propose to include a reference to the Investment Firms Directive (Directive (EU) 2019/2034), which proposal the Presidency would like to accommodate. One Member State commented that the reference to Article 104(1) of Directive 2013/36/EU should be rethought since this Article would only contain measures that the competent authorities can require the institution to take whereas the notification of Article 30a(1) BRRD should also relate to measures to be taken by the competent authorities themselves. However, Article 104(1) of Directive 2013/36/EU does contain provisions (such as points e, l, j, k) allowing the competent authority to take direct action. Should this reference be insufficient, the Presidency welcomes drafting proposals. Another Member State mentions an overlap between Articles 30(1) a) and 81(2) BRRD, while another one proposes to delete Article 30a(1) point a) BRRD because it would be too burdensome for the competent authority to notify the resolution authority of all supervisory actions against an institution. One Member State made drafting proposals to clarify point b) of this paragraph by rewording what was meant by the Commission. The Presidency welcomes the proposed rewording, and therefore suggests to amend point b). Another Member State proposes to delete point b) arguing that a notification at an early stage seems to be too formal and constitutes a time-consuming burden for the competent authorities.

One Member State requested to emphasize the cooperation between the competent and resolution authorities by adding the wording “close” cooperation in the last subparagraph of Article 30a(1) BRRD. However, such close cooperation is already emphasized in Recital 8.

Drafting suggestion:

Article 30a(1) BRRD would be amended as follows:

‘1. Member States shall ensure that competent authorities notify the resolution authorities without delay of any of the following:

*(a) any of the measures referred to in Article 104(1) of Directive 2013/36/EU **or in Article 39(2) of Directive (EU) 2019/2034** they require an institution or an entity referred to in Article 1(1), points (b), (c) or (d), of this Directive to take ;*

*(b) ~~where supervisory activity shows that~~ **the assessment by the competent authority that** the conditions laid down in Article 27(1) of this Directive are met in relation to an institution or entity referred to in Article 1(1), points (b), (c) or (d), of this Directive, ~~the assessment that those conditions are met,~~ irrespective of any early intervention measure;*

(c) the application of any of the early intervention measures referred to in Article 27.

Competent authorities shall closely monitor, in cooperation with the resolution authorities, the situation of the institution or entity and their compliance with the measures referred to in the first subparagraph, point (a), that aim to address a deterioration in the situation of that institution or entity and with the early intervention measures referred to in the first subparagraph, point (c).

- *regarding paragraph 2:* Paragraph 2 lists the elements that the notification in paragraph 1 should contain, which are, on the one hand, the reason for the competent authority’s assessment and, on the other hand, an overview of the alternative private sector measures, supervisory action or early intervention measures that are available to prevent the failure within a reasonable timeframe.

Two Member States requested to clarify the term “material risk” in the BRRD and SRMR. One of them suggested to even discard such wording and rather refer to a “realistic probability”. Three Member States believe the requirement to give a detailed overview of all potential measures might be too burdensome or might delay the notification procedure until there is a full overview of measures available. Such delay in the procedure should indeed be avoided. One Member State therefore suggests to delete point b) and only require competent authorities to give a timeframe for providing the overview of measures. Another Member State raised the additional concern that the overview of measures cannot be binding for an institutional protection scheme, since the decision on possible measures by an IPS should remain in the sole discretion of the IPS. The Presidency interpreted point b) of this second paragraph as a non-exhaustive overview of measures, which overview has no legal effects for the next steps to be considered when the failure of an institution or entity is effectively occurring. It therefore proposes to expressly clarify this interpretation in paragraph 2, as well as in Recital 8.

The third subparagraph states that after receipt of the notification, resolution authorities shall assess, in close cooperation with competent authorities, a reasonable timeframe for the assessment that any private alternative sector measures would prevent the failure of the institution within a reasonable timeframe. One Member State made the remark that since this assessment is taking place prior to the FOLTF assessment, the competent authority should be the decision-making authority rather than the resolution authority. It therefore proposes to reverse their roles by stating that “**the competent authority resolution authorities shall assess, in close cooperation after consultation with resolution competent authorities, what constitutes a reasonable timeframe[...]**”, and that the resolution authority

will then assess the need to implement the resolution strategy. Another Member State suggests to include the statement that such timeframe may be reassessed on a continuous basis, depending on the circumstances of each case. Another Member State proposes to delete this entire subparagraph.

All Member States that made comments on the last subparagraph disagree with the statement that the resolution authorities should set a frequency for the regular meetings with the competent authorities. These Member States wish to have a more flexible frequency based on the circumstances, or by a joint decision of both authorities, rather than have the resolution authority solely deciding the frequency of meetings. The Presidency therefore proposes to delete said statement.

Drafting suggestion:

Article 30a(2) BRRD would be amended as follows:

2. Competent authorities shall notify resolution authorities as early as possible where they consider that there is a material risk that one or more of the circumstances in Article 32(4) would apply in relation to an institution or an entity referred to Article 1(1), points (b), (c) or (d). That notification shall contain:

(a) the reasons for the notification;

*(b) an overview of ~~the~~ **potential** measures which would prevent the failure of the institution or entity within a reasonable timeframe, their expected impact on the institution or entity as regards the circumstances referred to in Article 32(4) and the expected timeframe for the implementation of those measures.*

After having received the notification referred to in the first subparagraph, resolution authorities shall assess, in close cooperation with competent authorities, what constitutes a reasonable timeframe for the purposes of the assessment of the condition referred to in Article 32(1), point (b), taking into account the speed of the deterioration of the conditions of the institution or entity referred to in Article 1(1), points (b), (c) or (d), the need to implement effectively the resolution strategy and any other relevant considerations. Resolution authorities shall communicate that assessment to competent authorities as early as possible.

*Following the notification referred to in the first subparagraph, competent authorities and resolution authorities shall, in close cooperation, monitor the situation of the institution or entity referred to in Article 1(1), points (b), (c) or (d), the implementation of ~~the any~~ relevant measures within their expected timeframe and any other relevant developments. For that purpose, resolution authorities and competent authorities shall meet regularly, ~~with a frequency set by resolution authorities considering the circumstances of the case.~~ **Competent authorities** and **resolution authorities** shall provide each other with any relevant information without delay.*

- regarding paragraph 3: Article 30a(3) BRRD concerns the information-sharing by competent authorities to resolution authorities. The second subparagraph governs the procedure when the necessary information is not already available to the relevant authorities and clarifies that competent authorities shall have the power to obtain that information from the entities. Three Member States commented that next to competent authorities, resolution authorities also should have such power. This would be in line with the provision of Article 11 BRRD regarding resolution plans, stating that the resolution authority has the capacity to request information directly from the institution or entity, without any intermediation by the competent authority. The Presidency accommodates this remark by providing small amendments to Article 30(3), second subparagraph.

Drafting suggestion:

Article 30a(3) BRRD would be amended as follows:

3. *Competent authorities shall provide resolution authorities with all the information requested by resolution authorities necessary for all of the following:*

(a) *updating the resolution plan and preparing for the possible resolution of the institution or entity referred to in Article 1(1), points (b), (c) or (d);*

(b) *carrying out the valuation referred to in Article 36.*

*Where such information is not already available to competent authorities, resolution authorities and competent authorities shall cooperate and coordinate to obtain that information. For that purpose, competent **and resolution** authorities shall have the power to require the institution or entity referred to in Article 1(1), points (b), (c) or (d), to provide such information, including through on-site inspections, and to provide **each other with that information to resolution authorities.***

- *regarding paragraphs 4 and 5: Article 30(4) BRRD gives resolution authorities the power to market the institution or entity to potential purchasers and is complemented by Article 30(5) BRRD which requires the entities to put in place a digital platform for sharing the information that is necessary for such marketing purposes, if requested by the resolution authorities. One Member State commented that the resolution authority should be equipped with such power only after having received the notification of a material risk of FOLTF, prior to such FOLTF notification the competent authority should have the power to request the bank to contact potential purchaser as an early intervention measure. However, the Presidency expressed its views on this remark, which was also included in the discussions of Article 27 BRRD and were part of the non-paper BRRD technical topics distributed on 27 March. Article 30a(4) BRRD gives the power to contact potential purchasers and to put in place a digital platform for sharing the information that is necessary for the marketing of the institution or entity to resolution authorities in the run-up to a resolution, both in parallel with the early intervention measures as well as when such measures have not yet been taken. Granting such powers to competent authorities would create overlap with this Article 30a(4) BRRD, reasoning why the Presidency prefers not to accommodate this remark. Two Member States raised the concern that marketing the entity prior to a FOLTF declaration might precipitate FOLTF. These Member States reiterate that any contact to potential purchasers should be anonymous and strictly confidential as it could hurt a possible recovery effort being pursued by the institution. One Member State builds upon the confidentiality concerns and highlights that Articles 17(1) of Regulation (EU) No. 596/2014 and 39 (2) of BRRD might create inconsistencies whereby on the one hand, entities are obliged to maintain confidentiality, and on the other hand, they are obliged to disclose inside information, and only at their own risk after meeting the appropriate conditions, they have the option to delay the public disclosure of inside information. The member State suggested to include a proportionality clause, and to explicitly refer to Article 84(1) BRRD. The Presidency proposes to include both suggestions in Articles 30a(4) and 30a(5) BRRD.*

Drafting suggestion:

Articles 30a(4) and 30a(5) BRRD would be amended as follows:

4. *The powers of resolution authorities shall include the power to market to potential purchasers, or make arrangements for such marketing, the institution or entity referred to in Article 1(1), points (b), (c) or (d), to potential purchasers, or require the institution or entity to do so, for the following purposes:*

(a) *to prepare for the resolution of that institution or entity, subject to the conditions laid down in Article 39(2) and the confidentiality provisions laid down in Article 84;*

(b) to inform the assessment by the resolution authority of the condition referred to in Article 32(1), point (b).

Where, in the use of the power referred to in the first subparagraph, the resolution authority decides to directly market to potential purchasers, it shall have due regard to the circumstances of the case and to the potential impact of the exercise of that power on the entity's overall position.

5. For the purposes of the paragraph 4, resolution authorities shall have the power to request the institution or entity referred to in Article 1(1), points (b), (c) or (d), to put in place a digital platform for sharing the information that is necessary for the marketing of that institution or entity with potential purchasers or with advisors and valuers engaged by the resolution authority. **In such case, Article 84, paragraph 1, point e) shall apply.**

- regarding paragraph 6: It is furthermore specified in Article 30a(6) BRRD that the determination of the conditions and the prior adoption of early intervention measures should not be a condition for the resolution authorities to prepare the resolution or to exercise the powers in paragraphs 4-5 of Article 30a BRRD. One Member State commented that this paragraph only mentions points b) and c) of the first subparagraph of paragraph 1 whereas the draft needs to be revised to clarify that neither of the circumstances described in points (a) to (c) of the first subparagraph of paragraph 1 shall be necessary conditions. Other Member States commented that there seems to be an overlap with Article 32(3) BRRD stating that the previous adoption of an early intervention measure according to Article 27 BRRD is not a condition for taking a resolution action, and that reference to Article 27 BRRD should be restricted to crisis situations only. The Presidency considers that these three remarks can be accommodated by aligning the wording of this provision with the wording of Recital 8 whereby reference is made to the notification of paragraph 1, rather than detailing the three conditions of points (a) to (c).

Drafting suggestion:

Article 30a(6) BRRD would be amended as follows:

6. The **prior notification by the competent authority in accordance with the first subparagraph of paragraph 1 of this Article** ~~determination that the conditions laid down in Article 27(1) are met and the prior adoption of early intervention measures shall not be a~~ necessary conditions for resolution authorities to prepare for the resolution of the institution or entity referred to in Article 1(1), points (b), (c) or (d), or to exercise the power referred to in the paragraphs 4 and 5 of this Article.

- regarding paragraphs 7 and 8: Resolution authorities are required to inform the competent authorities when taking any actions pursuant to paragraphs 4 and 5 (paragraph 7) and Member States shall ensure that both authorities closely cooperate when considering and taking any actions referred to in this paragraph (paragraph 8). One Member State commented that resolution authorities should also inform competent authorities when exercising the power referred to under paragraph 3, should the Presidency accommodate the remark that resolution authorities and competent authorities both have the powers referred to in Article 30a(3), second subparagraph BRRD. The Presidency therefore proposes to align paragraphs 7 and 8 with the modified text of paragraph 3.

Another Member State suggested to delete the reference to point a) in paragraph 8, first subparagraph point c), since this would already be covered by Article 30a(1), last subparagraph. The Presidency disagrees with this argument since it interprets Article 30a(1) last subparagraph BRRD as

the obligation to cooperate when competent authorities are monitoring the institutions, whereas the cooperation in paragraph 8 is much broader.

Last, one Member State highlighted the importance of ensuring that actions by the competent authorities are not detrimental to the implementation of the resolution strategy. However, since there would be close cooperation between competent and resolution authorities, it would implicitly already be ensured that the actions would not be detrimental to the implementation of the resolution strategy, since paragraph 8 clarifies that both competent as well as resolution authorities should ensure that the actions are consistent, coordinated and effective.

Drafting suggestion:

Articles 30a(7) and 30a(8) would be amended as follows:

7. Resolution authorities shall inform competent authorities of any action taken pursuant to paragraphs ~~4 and 3~~ 3 to 5 without delay.

8. Member States shall ensure that competent authorities and resolution authorities closely cooperate:

(a) when considering taking the measures referred to in paragraph 1, first subparagraph, point (a) of this Article, that aim to address a deterioration in the situation of an institution or entity referred to in Article 1(1), points (b), (c) or (d), as well as the measures referred to in paragraph 1, first subparagraph, point (c) of this Article;

(b) when considering taking any of the actions referred to in paragraphs ~~4 and 3~~ 3 to 5;

(c) during the implementation of the actions referred to in points (a) and (b) of this subparagraph.

Competent authorities and resolution authorities shall ensure that those measures and actions are consistent, coordinated and effective.’;

- concerning Recital 8: Should the Presidency’s drafting proposals for Article 30a BRRD be accepted, Recital 8 should be modified accordingly. Moreover, one Member States provided drafting suggestions to clarify that there is no risk that the expiry of the “reasonable timeframe” set out by the resolution authorities automatically leads to the adoption of a FOLTF decision. Taken into account this clarification, the Presidency proposes to modify Recital 8 as follows:

Drafting suggestion:

Recital 8 would be replaced by the following:

(8) It is necessary to ensure timely action and early coordination between the competent authority and the resolution authority, when an institution or entity is still a going concern, but where there is a material risk that the institution or entity may fail. The competent authority should therefore notify the resolution authority as early as possible of such risk. That notification should contain the reasons for the competent authority’s assessment and an a non-exhaustive overview of the alternative private sector measures, supervisory action or early intervention measures that are available to prevent the failure of the institution or entity within a reasonable timeframe. Such early notification should not prejudice the procedures to determine whether the conditions for resolution are met. The prior notification by the competent authority to the resolution authority of a material risk that an institution or entity is failing or likely to fail or the end of the defined timeframe for the implementation of the measures to address such material risk of failure of the institution or entity should not be a condition for, nor otherwise necessarily imply, a subsequent determination that an institution or entity is actually failing or likely to fail. Moreover, if at a later stage the institution or entity is assessed to be failing or likely to fail and there are no alternative solutions to

prevent such failure within a reasonable timeframe, the resolution authority has to take a decision whether to take resolution action. In such a case, the timeliness of the decision to apply resolution action to an institution or entity can be fundamental to the successful implementation of the resolution strategy, in particular because an earlier intervention in the institution or entity can contribute to ensuring sufficient levels of loss absorption capacity and liquidity to execute that strategy. It is therefore appropriate to enable the resolution authority to assess, in close cooperation with the competent authority, what constitutes a reasonable timeframe to implement alternative measures to avoid the failure of the institution or entity. To ensure a timely outcome and to enable the resolution authority to prepare properly for the potential resolution of the institution or entity, the resolution authority and the competent authority should meet regularly, and the resolution authority should decide on frequency of those meetings considering the circumstances of the case.

- link with Article 13c SRMR: The Presidency wishes to draw Member States' attention to Article 13c SRMR, which mirrors Article 30a BRRD. The same drafting proposals would be transposed to the SRMR article. However, there are some differences between the BRRD and the SRMR text, which the Presidency would like to highlight.

First, paragraphs 1, 2 and 7 of Article 13c SRMR require the SRB to notify the Commission in determined circumstances. One Member State requested the Commission's reasoning for such notification requirement.

Second, the same Member States that commented on the need for both competent and resolution authorities to have the power referred to in Article 30a(3) BRRD, would include such power to the resolution authority in Article 13c(3) SRMR. Since the objective of Article 13c(3) SRMR is also to allow the Board to update the resolution plan and prepare for a possible resolution, as well as to prepare valuations, the Presidency would include the following statement in Article 13c(3), last subparagraph SRMR: "[...] For that purpose, the ECB, **the Board** and the national competent authorities shall have the power to require [...]" The Presidency would like to clarify in this non-paper that it considers it unnecessary to also refer to national resolution authorities since these are covered by the reference to Article 13c in Article 7(3) SRMR.

Third, Article 13c(5) SRMR provides the Board the power to request the entity concerned to put in place a digital platform, but it also provides for an additional power requiring the relevant national resolution authority to draft a preliminary resolution scheme for the entity concerned (Article 13c(5) point b) SRMR). Two Member States made reservations for granting such additional power and requested the Commission to clarify the rationale for such inclusion. The Presidency therefore welcomes any clarification and proposes, in the meantime, to delete point b) of Article 13c(5) SRMR.

2.3. Article 63(1) points (m) and (n) / Recital 32 BRRD 'Resolution powers: qualifying holding and market abuse regulation'

Article 63(1) BRRD lays down the resolution powers that resolution authorities can exercise when necessary to apply the resolution tools. Article 63(2) BRRD allows for derogations of certain requirements when resolution authorities apply the resolution tools and exercise resolution powers. Discussions on this latter paragraph have been launched in the first written procedure for BRRD technical topics, distributed after the Council Working Party of 27 February. However, the Commission also proposes to modify point (m) and to add a new point (n) in Article 63(1) BRRD.

One Member State made the general comment that the introductory wording of Article 63(1) BRRD should be modified to clarify that the listed resolution powers can also play a supporting role. It suggests including the statement that resolution authorities have all the powers necessary to apply or support the application of the resolution tools. Only one Member State provided written comments on

the modification to point m), expressing its agreement with the Commission's proposal of replacing the wording "buyer of a qualifying holding" by "acquirer of a qualifying holding".

With the additional point (n) in Article 63(1) BRRD, the Commission aims to grant resolution authorities the power to initiate the request to delay the public disclosure of inside information in accordance with Article 17(5) of Regulation (EU) No 596/2014 (the 'Market Abuse Regulation'). One Member State made the technical comment that Article 17(5) Market Abuse Regulation does not mention any "request": it is the issuer that may, on its own responsibility, delay the public disclosure of inside information under certain conditions. Therefore, it should be avoided to mention that the resolution authority should "request" to delay the public disclosure and the wording should be modified accordingly. It was brought to the Presidency's attention that the Commission's intention was not only to enable resolution authorities to make notifications for delaying disclosure on behalf of the institution under resolution in accordance with Article 17(6) Market Abuse Regulation, but also to grant resolution authorities the power to delay disclosure on behalf of the institution in accordance with Article 17(5) Market Abuse Regulation (following the consent given by the market authority in response to such notification) or Article 17(4) Market Abuse Regulation (which does not require seeking consent of the market authority). It could be argued that this power is already covered by the power to take control of an institution under resolution, pursuant to Article 63(1)(b) BRRD. However, the Presidency was asked to adjust the wording to clarify the Commission's intentions by moving this provision from Article 63 BRRD to Article 64 BRRD, since it is an ancillary power rather than a general resolution power.

Two other Member States highlighted the importance of extending the power to delay such disclosure for an institution prior to resolution, rather than granting resolution authorities such powers for institutions under resolution only. This argument seems to be in line with the Commission's text of Recital 32, which illustrates the interactions between the resolution framework, in particular when taking actions in preparation for resolution, and the market abuse framework. The Presidency sees merit in accommodating the Member States' suggestion but proposes to add a paragraph to Article 30a BRRD (preparation for resolution) instead of implementing it under Article 63(1) BRRD (general resolution powers). In particular, the exercise of the powers under Article 30a (4), (5) BRRD could create inside information. Such information should generally be considered an intermediate step in a protracted process and would therefore be exempted from the requirement to disclose inside information (see Article 17(1) Market Abuse Regulation as revised by the Listing Act¹). Once the Listing Act has entered into force, only the final event of a protracted process – i.e., the resolution action – will need to be disclosed (not only under Market Abuse Regulation but also pursuant to Article 83(4) BRRD). For additional legal certainty, however, resolution authorities could also be given the power to require an institution to delay disclosure in accordance with Article 17(4) Market Abuse Regulation or request a delay in accordance with Article 17(5), (6) Market Abuse Regulation when they exercise the powers under Article 30a(4), (5) BRRD and appoint an independent valuer under Article 36 BRRD for the purposes of resolution. The Member State's proposed text refers to "entity referred to in points (b), (c) and (d) of Article 1(1)" to allow delaying the disclosure of information within groups.

Furthermore, one Member State suggests to disapply Article 17(7) Market Abuse Regulation. Disclosure under Article 17(7) Market Abuse Regulation is only required when there is a leak, i.e., when the inside information has already been disclosed by another person or entity. Therefore, the Presidency proposes not to take into account this suggestion, unless the need for such a change would be more substantiated.

¹ See [here](#) (p. 122 *et seq.*) for the relevant amendments as agreed in the compromise text of the Listing Act Regulation.

Taken into account the proposed drafting suggestions, the Presidency would suggest replacing the proposed Article 63(1) point (n) BRRD to a new point (g) in Article 64(1) BRRD and introducing a new paragraph in Article 30a BRRD. Recital 32 would reflect the same modifications.

Drafting suggestions:

a) Suggestion to maintain the Commission's drafting for Article 63(1) point (m) BRRD.

b) Suggestion to delete the Commission's drafting for Article 63(1) point (n) BRRD

~~'(n) the power to make requests pursuant to Article 17(5) of Regulation (EU) No 596/2014 on behalf of the institution under resolution.'~~

and to introduce point (g) in Article 64(1) BRRD as follows:

'(g) to decide on behalf of the institution under resolution to delay disclosure to the public of inside information pursuant to Article 17(4) or (5) of Regulation (EU) No 596/2014 and make the notification referred to in Article 17(6) of Regulation (EU) No 596/2014 on behalf of the institution under resolution.'

c) Suggestion to introduce a new paragraph 5a in Article 30a BRRD;

'5a. Member States shall ensure that, when exercising the powers under paragraphs 4 and 5 of this Article or carrying out a valuation in accordance with Article 36, resolution authorities have the power to require the institution or entity referred to in Article 1(1), points (b), (c) or (d), to delay disclosure to the public of inside information pursuant to Article 17(4) or (5) of Regulation (EU) No 596/2014 and make the notification referred to in Article 17(6) of Regulation (EU) No 596/2014.'

d) Recital 32 would be replaced by the following:

~~'(32) There are interactions between the resolution framework and the market abuse framework. In particular, while actions taken **in resolution or** in preparation for resolution **are susceptible of qualifying may qualify** as inside information under Regulation (EU) No 596/2014 of the European Parliament and of the Council, their premature disclosure risks jeopardising the resolution process. **Where such actions are intermediate steps in a protracted process, Regulation (EU) No 596/2014 does not require immediate disclosure. In other cases,** ~~institutions under resolution~~ are able to take steps to address that issue by ~~requesting a delaying in the~~ disclosure of inside information **to the public pursuant to** ~~under~~ Article 17(4) or (5) of Regulation (EU) No 596/2014. However, the right incentives might not always be present at the time of **resolution or** preparing for resolution in order for the institution **or entity** ~~under resolution~~ to take the initiative ~~to make for~~ such a **delay request**. To avoid such situations, resolution authorities should have the power to ~~directly request~~ **require an institution or entity, when preparing for resolution, to** a delay ~~in the~~ disclosure of inside information **to the public** pursuant to Article 17(4) or (5) of Regulation (EU) No 596/2014 **and notify its intention to delay disclosure pursuant to Article 17(6) of Regulation (EU) No 596/2014 where such delay requires the consent of the competent market authority. For** ~~on behalf of an institutions under resolution,~~ **resolution authorities should have the power to take decisions on delaying disclosure and making the relevant notifications on behalf of the institution under resolution.'**~~

2.4. Article 127 BRRD 'Resolution powers: exemption from tender procedures'

As already stated in the previous paragraphs, the Presidency launched a written procedure for Article 63(2) BRRD. Following the (written) discussion on this Article 63(2) BRRD, one Member State

highlighted that resolution authorities should be exempted from other requirements as well. It was raised that resolution authorities need to be prepared to act swiftly in the event of abrupt crises. In order to ensure the preparation for a potential resolution, it is necessary for resolution authorities to contract independent valuers as well as legal and financial advisors and, where applicable, special managers. However, this Member State argues that resolution authorities have divergent interpretations of whether those contracts fall within the scope of national laws transposing Directive 2014/24/EU on public procurement. In particular, the question arises whether those contracts meet any of the exclusion criteria provided in Articles 7-12 of Directive 2014/24/EU. Falling within the scope of said Directive, and thus being required to launch tendering procedures, may lead to excessively lengthy procedures and thus make resolution ineffective.

In order to ensure that the public procurements to contract the services needed for an effective preparation of a resolution, can be carried out within the timelines demanded by a crisis situation; and in view of establishing a level-playing field, this Member State suggests amending Directive 2014/24/EU by adding in Article 10 an additional exclusion for the service contracts needed for the preparation and execution of resolution actions by resolution authorities in accordance with the BRRD. The Presidency invites all Member States to express their views on the inclusion of proposed Article 127 in the BRRD.

Drafting suggestion:

The following Article 127 BRRD would be inserted:

'Article 127 'Amendment to Directive 2014/24/EU'

In Article 10 a new point (k) is added:

'Services needed for the preparation and execution of the resolution tools and powers provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council.'

2.5. Aligning three mandates for ITS with CRR3

It was brought to the Presidency's attention that the CMDI-proposal could be considered as an opportunity to align certain BRRD provisions with CRR3. In particular, three ITS mandates could benefit minor amendments mirroring the new approach to ITS under CRR3. Under the current framework, the empowerments given to EBA to prepare implementing technical standards (ITS) imply that the draft ITS submitted to the Commission are made of a legal act accompanied by technical annexes, in general a set of templates in Excel format and instructions providing details on how the templates must be filled and pointing to the relevant legal references.

This process raises several issues:

- It is cumbersome: the Commission has to formally adopt large documents and subsequently publish in the Official Journal up to thousands of pages of tables and instructions that may not always fit with the format and requirements of the Official Journal.
- It is prone to errors: in the past, several cases of mis-printing led to the adoption of corrigenda for the sole purpose of correcting the publication of such templates in the Official Journal.
- It creates rigidity: an amendment, even minor, of an ITS (for instance to clarify an instruction or amend the content of a given cell based on users' feedback) requires EBA to formally amend the whole ITS, including templates and instructions, and for the Commission to adopt and publish a new Implementing Regulation, which can take many months.
- It is not in line with market practice: practitioners do not open the Official Journal to use the templates, they instead download the Excel files directly from the EBA website.

- It is not future proof: future developments in the area of reporting may soon be incompatible with a paper-driven practice that corresponds to the need to publish even technical annexes in the Official Journal.

CRR3 introduces a new approach to ITS. Changes were agreed in CRR3 negotiations (developed in the technical trilogues) in order to amend, in a targeted way given the late stage of the negotiations, the empowerments for EBA to prepare ITS in order to extract from the content of the ITS itself the templates and instructions. This modification was introduced for the ITS on reporting and the ITS on disclosure for CRR purposes.

Under this revised approach, the draft ITS submitted by EBA to the Commission would be limited to the main legal act, specifying the key provisions related to the reporting or disclosure obligation (frequency, scope, date of submission, etc.) as well as a reference to the annexes (templates and instructions) that would no longer be part of the ITS, hence not directly adopted by the Commission and not published in the Official Journal. Instead, these annexes are considered to be part of 'IT solutions' that would be published by EBA on its website. This approach helps address all the issues of the current system. In particular, it makes the update of ITS much faster and more straightforward: as long as changes would not affect the main legal act, EBA will be in a position to modify the annexes (templates and instructions) to account for any feedback received in a more flexible manner (e.g. Q&As, new legislation impacting certain data points, change of legal reference, updates and corrections, etc.).

The Presidency would therefore suggest to mirror the changes introduced in CRR3 to all (three) relevant ITS mandates in BRRD. The drafting changes will not have any impact on the ITS currently in force, but they will substantially help procedurally when these ITS will be revised in the future.

The drafting suggestions are based on DG FISMA's horizontal manual on the design of reporting requirements. It is applied consistently across all legislative files for new initiatives and has been subject to consultation with the ESAs and the Commission's Legal Service.

Drafting suggestions:

a) Suggestion to modify Article 4(11) BRRD as follows:

*'11. EBA shall develop draft implementing technical standards to specify **the methods and arrangements for delivery of the information to be reported, the frequency and submission deadlines** ~~uniform formats, templates and definitions~~ **and shall develop IT solutions, including, reporting templates, data standards, formats and instructions,** for the identification and transmission of information by competent authorities and resolution authorities to EBA for the purposes of paragraph 7, subject to the principle of proportionality.'*

b) Suggestion to modify Article 11(3) BRRD as follows:

*'3. EBA shall develop draft implementing technical standards to specify **the methods and arrangements for delivery of the information to be reported, the frequency and submission deadlines** ~~procedures and a minimum set of standard forms and~~ **shall develop IT solutions, including reporting templates, data standards, formats and instructions** ~~templates for the provision of information under this Article.~~*

c) Suggestion to modify Article 45j(2) BRRD as follows:

*'2. EBA shall develop draft implementing technical standards to specify **the methods and arrangements for delivery of the information to be reported, the frequency and submission deadlines** **and shall develop IT solutions, including, reporting templates, data standards, formats and instructions** ~~uniform reporting templates, instructions and methodology on how to use those templates, frequency and dates of reporting, definitions and IT solutions, for the~~*

identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 1.'

3. Selected topics based on the Commission's proposal

Member States are invited to provide, in writing, their views and/or drafting suggestions on the following provisions of the Commission's proposal.

- Article 33a(8) (1) BRRD 'Moratoria Notification'
- Article 33a (9) (2) / Recital 22 BRRD 'Moratoria Daily allowance'
- Article 55 BRRD 'Contractual recognition of bail-in'
- Article 91(7), second subparagraph BRRD 'EBA assistance in reaching a joint decision'
- Article 92(3) BRRD 'EBA assistance in reaching a joint decision'
- Article 2 of the Directive amending BRRD 'Transposition'