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From:	Presidency
To:	Financial Services Attachés
Subject:	CMDI WP of 29/05/24: Presidency's proposed redraft on pecking order and bridge the gap (BRRD)

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(27) Article 44 is amended as follows:

~~(a) paragraph 1 is replaced by the following:~~

~~‘1. Member States shall ensure that the bail-in tool may be applied to all liabilities, including those giving rise to an accounting provision, of an institution or entity referred to in Article 1(1), points (b), (c) or (d), that are not excluded from the scope of that tool pursuant to paragraphs 2 or 3 of this Article.’;~~

(b) paragraph 5 is replaced by the following:

‘5. The resolution financing arrangement may make a contribution as referred to in paragraph 4 where all of the following conditions are met:

(a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other bail-inable liabilities through reduction, write down or conversion pursuant to Article 48(1) and Article 60(1), and by the deposit guarantee scheme pursuant to Article 109 where relevant;

(b) the contribution of the resolution financing arrangement does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured in accordance with the valuation provided for in Article 36.’;

(c) paragraph 7 is replaced by the following:

~~‘7. The resolution financing arrangement may make a contribution from resources which have been raised through *ex-ante* contributions as referred to in Article 100(6) and Article 103 and which have not yet been used, provided that all of the following conditions are met~~  
**In extraordinary circumstances, the resolution authority may seek further funding from the deposit guarantee scheme subject to the conditions laid down in the second and third subparagraph, and only after:**

(a) the resolution financing arrangement has made a contribution pursuant to paragraph 4 and the 5 % limit referred to in paragraph 5, point (b), has been reached; **and**

(b) all liabilities ranking lower than deposits, and not excluded from bail-in pursuant to Article

44(2) and 44(3), have been written down or converted in full.

~~Where Article 109(2b) applies, the resolution authority may seek further funding from the deposit guarantee scheme. In extraordinary circumstances, as an alternative or in addition to the contribution from the resolution financing arrangement referred to in the first subparagraph, where the conditions laid down in the first subparagraph are met, the resolution authority may seek further funding from alternative financing sources. The sum of the contribution of the deposit guarantee scheme under ~~the first~~ **this subparagraph and under Article 109(12b), first subparagraph, point (b)** shall not exceed the counterfactual established under Article 11e(1), point (b) of Directive 2014/49/EU.;~~

~~Where the deposit guarantee scheme contribution amounts to the counterfactual established by Article 11e(1), point (b) of Directive 2014/49/EU and~~

~~The resolution authority may seek further funding from alternative financing sources and the resolution financing arrangement may make a contribution from resources which have been raised through ex-ante contributions in accordance with Article 100(6) and Article 103 and which have not yet been used. Where Article 109(2b) applies, the resolution authority may only seek further funding from alternative financing sources and the resolution financing arrangement may only make a contribution from resources which have been raised through ex-ante contributions in accordance with Article 100(6) and Article 103 and which have not yet been used where the sum of the contributions of the deposit guarantee scheme under the second subparagraph and Article 109(2b) has reached the limit set by the counterfactual established under Article 11e(1), point (b) of Directive 2014/49/EU.~~

(56) Article 109 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

'1. Member States shall ensure that, where the resolution authorities take resolution action with respect to a credit institution, and provided that such action ensures that depositors continue to have access to their deposits, to prevent depositors from bearing losses the deposit guarantee scheme to which that credit institution is affiliated shall contribute the following amounts:

(a) where the bail-in tool is applied, independently or in combination with the asset separation tool, the amount by which covered deposits would have been written down or converted in order to absorb the losses and recapitalise the institution under resolution pursuant to Article 46(1), had covered deposits been included within the scope of bail-in;

(b) where the sale of business or the bridge institution tools are applied, independently or in combination with other resolution tools:

(i) the amount necessary to cover the difference between the value of the covered deposits and of the liabilities with the same or a higher priority ranking than **covered** deposits and the value of the assets of the institution under resolution which are to be transferred to a recipient; and

(ii) where relevant, an amount necessary to ensure the capital neutrality of the recipient following the transfer.

In the cases referred to in the first subparagraph, point (b), where the transfer to the recipient includes deposits that are not covered deposits or other bail-inable liabilities and the resolution authority assesses that the circumstances referred to in Article 44(3) apply to those deposits or liabilities, the deposit guarantee scheme shall contribute:

(a) the amount necessary to cover the difference between the value of deposits, including deposits that are not covered, and of the liabilities with the same or higher priority ranking than deposits and the value of the assets of the institution under resolution which are to be transferred to a recipient; and

(b) where relevant, an amount necessary to ensure the capital neutrality of the transfer for the recipient.

Member States shall ensure that, once the deposit guarantee scheme has made a contribution in the cases referred to in the second subparagraph, the institution under resolution refrains from acquiring stakes in other undertakings as well as distributions in connection with Common Equity Tier 1 capital or payments on Additional Tier 1 instruments, or from other activities that may lead to an outflow of funds.

In all cases, the cost of the contribution of the deposit guarantee scheme **pursuant to the first paragraph, point (b)** shall not be greater than the ~~cost of repaying depositors as calculated counterfactual established~~ by the deposit guarantee scheme under Article 11e(1), **point (b)** of Directive 2014/49/EU.

Where it is determined by a valuation under Article 74 that **for the purpose of Article 109(1), point (b)**, the cost of the deposit guarantee scheme's contribution to resolution was greater than the ~~losses it would have incurred had the institution been wound up under normal insolvency proceedings counterfactual established under Article 11e(1), point (b) of Directive 2014/49/EU~~, the deposit guarantee scheme shall be entitled to the payment of the difference from the resolution financing arrangement in accordance with Article 75.

2. Member States shall ensure that the resolution authority determines the amount of the contribution of the deposit guarantee scheme in accordance with paragraph 1 after having consulted the deposit guarantee scheme on the ~~estimated cost of repaying depositors pursuant~~

~~to~~ **counterfactual established under** Article 11e(1), point (b) of Directive 2014/49/EU and in compliance with the conditions referred to in Article 36 of this Directive.

The resolution authority shall notify its decision as referred to in the first subparagraph to the deposit guarantee scheme to which the institution is affiliated. The deposit guarantee scheme shall implement that decision without delay.’;

(b) the following paragraphs 2a and 2b are inserted:

‘2a. Where the funds of the deposit guarantee scheme are used in accordance with paragraph 1, first subparagraph, point (a), to contribute to the recapitalisation of the institution under resolution, Member States shall ensure that the deposit guarantee scheme transfers its holdings of shares or other capital instruments in the institution under resolution to the private sector as soon as commercial and financial circumstances allow.

Member States shall ensure that the deposit guarantee scheme markets the shares and other capital instruments referred to in the first subparagraph openly and transparently, and that the sale does not misrepresent them or discriminate between potential purchasers. Any such sale shall be made on commercial terms.

2b. The contribution of the deposit guarantee scheme pursuant to paragraph 1, second subparagraph, shall count towards the thresholds laid down in **Article 37(10)**, Article 44(5), point (a), and in Article 44(8), point (a), **provided that:**

**(a) the liabilities and own funds of the institution included in the amount of own funds and eligible liabilities to comply with the requirement as referred to in Article 45(1) have been written down or converted in full, where a maximum share of 2.5% of these liabilities can be excluded pursuant to Article 44(3); and**

**(b) the residual institution, if any, from which the assets, rights or liabilities have been transferred is wound up under normal insolvency proceedings and, where the bridge institution tool is applied, its operations are terminated as soon as possible in accordance with Article 41(5) and 41(6); and**

**c) the institution has not breached its minimum requirement for own funds and eligible liabilities as referred to in Article 45(1) during the 8 to 36 months preceding the determination that the institution is failing or likely to fail.**

Where the use of the deposit guarantee scheme pursuant to paragraph 1, second subparagraph, together with the contribution to loss absorption and recapitalisation made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other bail-inable liabilities, allows for the use of the resolution financing arrangement, the contribution of the deposit guarantee scheme shall be limited to the amount necessary to meet

the thresholds laid down in **Article 37(10)**, Article 44(5), point (a), and in Article 44(8), point (a). Following the contribution of the deposit guarantee scheme, the resolution financing arrangement shall be used in accordance with the principles governing the use of the resolution financing arrangement set out in Articles 44 and 101.

~~However, t~~The first and the second subparagraphs shall not apply to ~~institutions that have been identified as liquidation entities in the group resolution plan or in the resolution plan.~~':

**(i) institutions that have been identified as liquidation entities in the group resolution plan or in the resolution plan or institutions that have been identified as liquidation entities in a previous group resolution plan or a previous resolution plan in the two years preceding the resolution action; or**

**(ii) institutions subject to the transitional arrangement referred to in Article 45m(4a); point (a).**

**In the very extraordinary situation of a systemic crisis, the resolution authority may count the contribution of the deposit guarantee scheme pursuant to paragraph 1, second subparagraph, point (a) and (b) towards the thresholds laid down in Article 37(10), Article 44(5), point (a), and in Article 44(8), point (a) for institutions subject to the transitional arrangement referred to in Article 45m(4a); point (a).**

**Member States may, by taking into account the specificities of their national banking sector, provide that the amount of the contribution of the deposit guarantee scheme in accordance with this paragraph shall not be greater than an amount equal to 62,5% of its target level.**

(c) paragraph 3 ~~is deleted~~ **replaced by the following:**

**3. Member States shall ensure that where this Article, or Article 44(4) or 44(8) is applied, variable remuneration or discretionary pension benefits paid by and on behalf of the institution to the management body and senior management during the last 24 months are subject to a compulsory reimbursement claim.**

(d) in paragraph 5, the second and third subparagraphs are deleted;