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Council agrees position on bank resolution

The Council today[1] set out its position on a draft directive establishing a framework for the recovery and resolution of credit institutions and investment firms (*11148/1/13 REV 1*).

It called on the presidency to start negotiations with the European Parliament with the aim of adopting the directive at first reading before the end of the year.

The proposed directive is aimed at providing national authorities with common powers and instruments to pre-empt bank crises and to resolve any financial institution in an orderly manner in the event of failure, whilst preserving essential bank operations and minimising taxpayers' exposure to losses.

The directive would establish a range of instruments to tackle potential bank crises at three stages: preparatory and preventative, early intervention, and resolution.

Institutions would be required to draw up recovery plans, and update them annually, setting out the measures they would take to restore their financial position in the event of significant deterioration. Resolution authorities would have to prepare resolution plans for each institution, setting out the actions they might take if an institution were to meet the conditions for resolution.

Authorities would also have the power to appoint special managers to an institution if its financial situation were to deteriorate significantly or if there were serious violations of the law.

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1 The agreement was reached at a meeting of the Economic and Financial Affairs Council.

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The main resolution measures would include:

- the sale of (part of a) business;
- establishment of a bridge institution (the temporary transfer of good bank assets to a publicly controlled entity);
- asset separation (the transfer of impaired assets to an asset management vehicle)
- bail-in measures (the imposition of losses, with an order of seniority, on shareholders and unsecured creditors).

Bail-in

The bail-in tool would enable resolution authorities to write down or convert into equity the claims of the shareholders and creditors of institutions which are failing or likely to fail. Under the Council's general approach agreed today, eligible deposits from natural persons and micro, small and medium-sized enterprises, as well as liabilities to the European Investment Bank, would have preference over the claims of ordinary unsecured, non-preferred creditors and depositors from large corporations. The deposit guarantee scheme, which would always step in for covered deposits (i.e. deposits below €100,000), would have a higher ranking than eligible deposits.

Exclusions

Certain types of liabilities would be permanently excluded from bail-in:

- covered deposits;
- secured liabilities including covered bonds;
- liabilities to employees of failing institutions, such as fixed salary and pension benefits;
- commercial claims relating to goods and services critical for the daily functioning of the institution;
- liabilities arising from a participation in payment systems which have a remaining maturity of less than seven days;
- inter-bank liabilities with an original maturity of less than seven days.

National resolution authorities would also have the power to exclude, or partially exclude, liabilities on a discretionary basis for the following reasons:

1) if they cannot be bailed in within a reasonable time;

2) to ensure continuity of critical functions;

3) to avoid contagion;

4) to avoid value destruction that would raise losses borne by other creditors.

Resolution authorities would be able to compensate for the discretionary exclusion of some liabilities by passing these losses on to other creditors, as long as no creditor is worse off than under normal insolvency proceedings, or through a contribution by the resolution fund (see below).

Resolution fund

The directive would require member states, as a general rule, to set up *ex-ante* resolution funds to ensure that the resolution tools can be applied effectively. These national funds would have to reach, within 10 years, a target level of at least 0.8% of covered deposits of all the credit institutions authorised in their country. To reach the target level, institutions would have to make annual contributions based on their liabilities, excluding own funds, and adjusted for risk.

An exemption to this rule would allow member states to establish their national financing arrangement through mandatory contributions without setting up a separate fund. However, the member states would have to raise at least the same amount of financing and make it available to their resolution authority immediately upon its request.

Member states would be free to choose whether to merge or keep separate their funds for resolution and deposit guarantee schemes (DGSs). In both cases, the combined target level would be the same. The Council's general approach on a proposed directive on DGSs, agreed in June 2011 (*11359/11*), sets its target level at 0.5% of covered deposits. Lending between national resolution funds would be possible on a voluntary basis.

Resolution funds would be available to provide temporary support to institutions under resolution via loans, guarantees, asset purchases, or capital for bridge banks. They could also be drawn on to compensate shareholders or creditors if and to the extent that their losses under bail-in exceed the losses they would have undergone under normal insolvency proceedings, in line with a "no creditor worse off" principle.

The Council's compromise approach provides flexibility to national resolution authorities, subject to strict criteria and only in exceptional cases, to exclude liabilities and to use the resolution fund to absorb losses or recapitalise an institution. However, such flexibility would only be available after a minimum level of losses equal to 8% of total liabilities including own funds has been imposed on an institution's shareholders and creditors, or under special circumstances 20% of an institution's risk-weighted assets where the resolution financing arrangement has at its disposal ex-ante contributions which amount to at least 3% of covered deposits.

The contribution of the resolution fund would be capped at 5% of an institution's total liabilities. In extraordinary circumstances, where this limit has been reached, and after all unsecured, non-preferred liabilities other than eligible deposits have been bailed in, the resolution authority may seek funding from alternative financing sources.

Minimum loss absorbing capacity

To ensure that institutions always have sufficient loss-absorbing capacity, the Council's general approach provides for national resolution authorities to set minimum requirements for own funds and eligible liabilities (MREL) for each institution, based on its size, risk and business model. A review in 2016 would enable the Commission, based on recommendations by the European Banking Authority, to introduce a harmonised MREL applicable to all banks.

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The proposed directive is aimed at transposing into EU law commitments made at the G20 summit in Washington DC in November 2008, when leaders called for a review of resolution regimes and bankruptcy laws "to ensure that they permit an orderly wind-down of large complex cross-border financial institutions."

Based on article 114 of the Treaty on the Functioning of the European Union, the directive requires a qualified majority for adoption by the Council, in agreement with the European Parliament.