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Commission proposal for a directive on establishing a framework for the recovery and resolution of credit institutions and investment firms

INTRODUCTION

The Nordic-Baltic Banking Associations, Federation of Finnish Financial Services, Finance Norway, Danish Bankers' Association, Swedish Bankers' Association, Estonian Banking Association, Association of Lithuanian Banks, Association of Latvian Commercial Banks and Icelandic Financial Services Association, represent the major part of the Nordic-Baltic Banking sector. Our cooperation is especially focused on ensuring that the Nordic-Baltic financial market can continue to develop. Since the Nordic-Baltic market is highly integrated, we see a need for an increased harmonisation of the rules and more cooperation among the authorities in the Nordic-Baltic market as well as in Europe as a whole. For that reason, our strong view is that the aim of all legislation at the European level in the area of financial services should be further to integrate the EU's internal market for financial services, while at the same time safeguarding financial stability. In addition to this, the ambition should always be to maintain a level playing field internationally.

KEY POINTS

- The proposed directive leaves too much room for national discretion in many key elements. A higher degree of harmonisation is essential to ensure international level playing field, legal certainty and predictability.

- The directive should avoid any overlap with other regulatory initiatives. For example, the new CRD IV/CRR regime will introduce a high number of new preventive supervisory powers and tools under pillar 2 which are applicable also in early intervention and going concern situations referred to in the directive.

- The directive should state a clear distinction between early intervention and resolution measures in a going concern, and consequently resolution authorities should not intervene in going concern phase. The sanctioning powers should remain with the competent authority since splitting the powers between the competent authority and the resolution authority creates ambiguity and legal uncertainty.

- The recovery and resolution planning should be undertaken at the group level and include sections for subsidiaries.

- Supervisory authorities may not use recovery and resolution plans to intervene in the organisation of banking operations.

- The time at which a crisis management tools can and must be applied (trigger) must be harmonised, predictable and transparent.

- There should be no possibility to appoint a special manager.

- The costs of a bank failure must be borne by its shareholders and holders of subordinated debt. Debt write-down/bail-in should only be used as a last resort and may not place unsecured creditors in a situation worse than a bankruptcy.

- It must be clear that secured assets, including covered bonds, covered mortgage bonds, mortgage bonds, junior covered bonds and derivatives in cover pools/registers are exempted from bail-in.

- It is crucial that the scope and application of bail in is harmonized as broadly as possible in order to ensure competitive equality between Member States. Furthermore, all derivatives should be excluded from the regime to avoid potential risk that applying the bail in rules would have an adverse effect, accelerating a systemic crisis.

- As the scope of bail-in is broad and in agreement with the order of priority of creditors, there is no need for rules on minimum bail-in debt.

- The requirement for liabilities eligible for bail in (if needed) should be based on risk weighted assets (RWA).

- The contributions to financing arrangements should be calculated by taking into account the risk profile of the institution.

- The establishment of a mandatory lending scheme between the EU financing arrangements is not justified. Hence there should be no mandatory loan arrangements between resolution funds/deposit guarantee funds in the EU.

1. General remarks

The objective of the framework

According to the Commission, the objective of the proposed directive is to minimise market uncertainty and provide a clear framework for crisis management in the financial sector. This includes tools for managing banks in crisis more uniformly. The aim is to create a level playing field, strengthen cooperation on the management of financially distressed cross-border banks and minimise the impact of bank sector crises on the financial stability, taxpayer's costs and the real economy.

Nordic & Baltic associations support the objectives of proposed directive and find the directive as an important step towards enhancing long term financial stability and reducing the potential public costs of future financial crises. We however believe that it should also be clearly stated that the aim of the directive is to preserve the value of the

company by minimising the overall costs of resolution in home and host jurisdictions and by ensuring the “no creditor worse off” principle .

There is an overlap between the early intervention and the resolution tools and to some extent it appears more appropriate to use the many proposed early intervention tools (e.g. requirements to negotiate on restructuring and contact potential purchasers) in a resolution phase. A clear distinction between supervision and resolution would provide more certainty and a greater clarity for the purpose of using the different tools. The advantages of splitting the tools provides far more benefits than a mix of different tool aimed to serve different purposes, going concern and resolution. There has to be a clear division between early intervention and resolution also in terms of what triggers should be applied in early intervention and resolution.

We note that the Commission proposal is based on the minimum harmonisation rules and many key elements of the directive leave room for national discretion. We find this approach problematic since the possibility to introduce or maintain specific requirements by the individual country may distort competition between national banking markets. Different rules will lead to problematic resolution of cross border banking groups, which is not in line with the aim of this directive. A harmonized environment is essential when it comes to the investors, among others. It is of utmost importance that investors are able to predict what may happen if a situation occurs. Different rules or interpretations in different countries will inevitably lead to legal uncertainty and ultimately a reduced market. Clear and harmonized rules will create a less problematic situation in the market for financial instruments. If the regulators want to meet their intention to come up with a regulation that will lead to smoother resolution of even systemically important financial institutions, which often are internationally active, the directive cannot open up for different interpretation within the EU or in relation to global regulatory environment.

We find it particularly important that early intervention and resolution triggers should be based on full harmonisation in accordance with the CRR/CRD IV. Another example of an area where national discretion should be minimized relates to the scope of liabilities that can be bailed in.

We also see a great risk that different rules on recovery and resolution tools across jurisdictions may result in national authorities’ inability to react and co-operate efficiently, which could further increase the severity of a crisis. On the other hand, the uncertainty of how powers would be utilized by various national authorities could be detrimental to an institution’s ability to attract investors who find predictability and legal certainty key factors in their investment decisions.

For the abovementioned reasons, we believe that a harmonised framework for the rules on bank recovery and resolution at the highest possible level is crucial at the EU level and globally.

Impacts of the proposal

The proposal contains elements that could have negative impacts on financial stability and also banks economic capacity to conduct business. This emphasizes the need to ensure legal certainty and predictability. Nordic & Baltic associations believe, that the uncertainty of the circumstances that would trigger early intervention or resolution will increase systemic risk and contribute to trigger funding problems earlier in a crisis situation. The lesson from the recent financial crisis was that too many investors avoided uncertainty by pulling out of markets rather than adjusting the price. This is likely to create immediate liquidity problems also for solvent and healthy banks. This was well illustrated by the development in Denmark in 2011, where all banks faced a funding

problem after the senior unsecured debt in some failing banks were bailed in. Therefore the introduction of a bail-in tool needs thorough consideration with regard to possible consequences it would cause to the financial system in a crisis situation.

Before the final endorsement of the directive, careful cumulative impact assessment is also needed with other ongoing regulatory initiatives (CRD IV, DGS Directive, Financial Taxes, reform of the structure of the EU Banking sector etc.).

Link to other legislative initiatives

The Commission should avoid any overlap with other regulatory initiatives. For example, the new CRD IV/CRR regime will introduce a high number of new preventive supervisory powers and tools under pillar 2. These are applicable also in early intervention and going concern situations referred to in the directive.

Also the link between requiring preventive measures under this regime and the possible introduction of measures under the reform of the structure of the EU Banking sector ("Liikanen group") should be explored.

2. Specific comments

Definitions (Article 2)
As a general rule, we feel that definitions must be established in directive and not in the secondary regulations. This is particularly important when it comes to key concepts that form the basis for important parts of the directive, such as the definition of critical functions and core business lines. It is important that basic concepts are defined and well known at the time when new rules are discussed and adopted in order to reach an analysed, transparent and balanced understanding of the full concept of the directive.

It is also important to ensure that the definitions of other relevant directives and this directive are consistent. For example, the term "guaranteed" deposits is used in article 93, which to our understanding refers to "covered" deposits within the meaning of DGS directive.

Designation of authorities responsible for resolution (Article 3).
We agree that the choice of the relevant authority should be left to national discretion. The resolution authority must however, be separated from the supervisory authority since it would not be appropriate if the resolution authority would get too involved in the supervision of the bank in the business as usual phase. To ensure legal certainty and confidentiality, it is important to clearly regulate the division of responsibilities between authorities who use supervisory powers under the CRD and this Directive, respectively. This is of particular importance in cases where the resolution authority is not a separate part of the financial supervision authority as well as in cases where the consolidating supervisor and group level resolution authority are separate authorities.

As stated above, a clear distinction between early intervention and resolution measures should be made, and accordingly, resolution authority should not intervene in going concern phase. We also believe that the sanctioning powers should remain with the competent authority since splitting the powers between the competent authority and the resolution authority creates ambiguity and legal uncertainty. In case the competent authority and the resolution authority are not within the same entity, full cooperation and coordination should be required in order not to duplicate the reporting and oversight burden over the institutions.

Furthermore, strict confidentiality on the exchange of information between authorities must be ensured. It is also important that any decisions and measures taken under this directive by the supervisory or resolution authorities are subject to the right to appeal.

Simplified obligations for certain institutions (Article 4)
We support the principle of proportionality but we believe that national authorities should have the possibility to waive the requirements in specific cases. It remains unclear whether this is possible under the proposed directive. We believe that the waiver would be justified for example in case of small institutions and subsidiaries of the group in drawing up the recovery plan.

Recovery plans (Article 5)
A recovery plan should list a number of measures that an institution can take in the event of problems arising either as a result of its own circumstances or market stress in order that the institution may again satisfy the requirements for carrying on business. In this context, we find it important to point out that a recovery plan must offer a broad range of options to the specific institution and therefore must reflect the specific organisation and business model in each case. It would not be meaningful to perform a quantitative evaluation of the balance sheet in a number of standardized stress scenarios, but rather assess the effectiveness of available recovery options on the key financial metrics in a number of circumstantial examples of severe stress. To reach realistic results the scenarios must be designed to face the circumstances in each case. Flexibility is one key issue and it would not work with a “one size fits all” scenario when it comes to testing the recovery plans. The main goal should be flexible thinking and well analysed operations.

Nordic & Baltic associations find it expedient that the recovery plan could be seen as a natural extension of a Pillar 2 dialogue between the individual bank and the supervisory authority. Accordingly, the recovery plan should focus, should the occasion arise, on how capital and liquidity can be generated in the event of financial distress in order for the bank to be able to continue to meet the supervisory requirements. In the CRD framework rules are set to provide banks to withstand financial stress including prudential rules for capital and liquidity buffers etc. The CRD should therefore make the base and further plans for recovery should emanate and be an extension from those rules. The close connection between the rules has to be recognized and taken into account.

A recovery plan should outline the strategic measures that the institution management may apply if the financial soundness is impaired. A recovery plan must therefore be flexible and should not stipulate in advance which measures to take in a given situation. If the plan is initiated the individual options may be elaborated on in more detail depending on the specific situation.

The institution management alone should be responsible for drawing up and implementing a recovery plan. The requirements regarding the contents of a recovery plan must reflect that management retains full control of the undertaking also in a recovery phase.

According to subparagraph 2, the competent authority may require institutions to update their recovery plans more frequently than once a year. Because the updates are resource-consuming, the directive must specify the conditions under which the authorities may require more frequent updates.

Recovery and resolution plans could include strategic and sensitive information. We therefore find it crucial that the plans are kept strictly confidential and that public disclosure is not required

Assessment of recovery plans (Article 6)
According to subparagraph 4, the competent authority has the power to require the institution to take any measures as it considers necessary to ensure that the potential impediments and deficiencies are removed. In addition to the measures under article 136 of Directive 2006/48/EC the competent authority may also require an institution to take certain further actions.

According to the Directives 2006/48/EC and 2006/49/EC the competent authority has the power to take steps and actions (as part of ownership and fit & proper control) when the institution seeks license as well as during the on-going business. Furthermore, under the upcoming CRD IV the requirements on risk management and recapitalization have been increased as well as requirements on the possibility for the authority to intervene in an early stage. We believe it is important that the competent authority has the power to require the institution to take necessary measures, and that such facilities are provided for in the existing and future directives on capital adequacy. We therefore believe that the powers according to article 136 of Directive 2006/48/EC and in the forthcoming CRD IV are sufficient and adequate in a going concern phase. As a consequence, additional measures listed in subparagraph 4 (a)-(e) should be deleted.

Nordic & Baltic associations believe that there should be a clear distinction between the powers of supervisory and resolution authorities on the intervention based on the assessment of the recovery plan and intervention due to impediments to resolvability. In any case the rules on these measures should be co-ordinated to avoid duplicated and possibly conflicting actions.

Group recovery plans (Article 7)
If the credit institution operates under a group structure, recovery plans shall be made at group level which also includes sections for subsidiaries or other members of the group. It is important to keep a group wide approach both in a business-as-usual situation where there is a need for a robust and comprehensive management, adequate internal control mechanisms and processes to identify, manage, monitor and report the current and potential risks, and in situations where recovery and resolution is applicable. The requirement to apply recovery plan at the single entity level will be against the overall objectives of the directive enabling fast and decisive action, minimising the overall cost and contributing to a smooth resolution of cross- border groups.

Resolution plans (Article 9)
We believe that a resolution plan must be drawn up in close cooperation between the resolution authority, the competent authority and the institution. This is a prerequisite for cross-border groups with activities in third countries where the institution has to draw up both a recovery and a resolution plan. There has to be consistency between the European regulation and US legislation in accordance with the FSB regulations.

If the institution operates under a group structure, the base must be that the resolution plan shall be made at the group level. Furthermore, when authorities are planning resolution measures at a group level, it is essential to remember that groups are differently organized. For those that have integrated financial, technical and business structure it is important that any possible resolution is on a fully integrated group-wide basis. The plan also has to consider, whether a banking group has a centralized liquidity management function. The resolution planning among the authorities should therefore include careful examination of the group so that measures can be planned accordingly.

In practice, a resolution plan should be seen as an extension of the recovery plan and be largely based on the same information as that used for the recovery plan.

We would like to point out that a resolution plan must offer a broad range of options to the individual institution and therefore must be based on the way the institution in question organises its operations. The institution will make relevant general information of its organization etc. available to the crisis management authority and will provide a method by which material regarding loans, creditors, etc. can be obtained at a relatively short notice in a crisis management situation.

Group resolution plans (Article 11)
It is important that the resolution plan identifies ways to finance the group resolution actions and also contains the principles for sharing responsibilities between sources of funding in different Member States.

Assessment of resolvability (Article 13)
The article does not set any timeframe for when such an assessment should be done. We believe the time aspect is critical in order to keep the administrative burden at a low level and to reduce the authorities' intervention in the daily operations of the institution. The assessment of the recovery plan and the assessment of resolvability should be made at the same time or at least be closely coordinated. It seems unnecessary to divide the process into several parts when the various elements are building blocks for the same purpose. According to the directive the resolution authority and the supervisory authority seems to have more or less the same powers when it comes to assessing the plans. This overlap may result in contradictory decisions from the authorities. Before a decision on resolution is made the power should rest with the supervisory authority (in cooperation with the resolution authority when needed). Also in this respect authorities´ requests for information and reporting should be carefully considered and any "excessive" reporting requirements must be avoided.

Furthermore, resolution tools or other measures must not be used for supervisory intervention in the structure or operation of healthy institutions without restructuring or resolution having become objectively necessary.

Powers to address or remove impediments to resolvability: group treatment (Article 15)
Initially it should be noted that the powers in question are addressed in a preventive phase. The tools which are provided for the resolution authority in a going concern bring the authority far into the management of the institution, including the business strategy, the organizational structure and details of the capital structure. Such situation will obviously create an overlap with the powers of the supervisory authority and bring ambiguity on who is responsible for the action taken. Furthermore, banks will be supervised and regulated by two authorities using the same tools which could lead to inconsistent decisions. The possibilities for such intervention (in the early intervention phase and the resolvability phase) also raise the question of who will be responsible for a failure. The responsibility is likely to spill over also on the authorities. In our opinion such involvement is not appropriate for several reasons, for example, it erodes the corporate structure of the bank and makes the liability question diffuse. It is essential to keep the regulation clear, transparent and predictable. Furthermore, intervention in the structure or operation should only be taken if it is objectively necessary.

There are also legal problems related to cross-border situations. It may be difficult to impose measures to the legal structure of an entity which has a registered office in another country, outside the resolution authority´s jurisdiction, let alone enforce such decision. Further, it has to be perfectly clear how such a decision may be appealed. Which country´s court system should be considered competent and which national law should be applicable.

Group financial support agreement (Article 16)
Concerning intra-group financial support agreements, it is important to prevent ring-fencing and to prevent the risk that national interest is prevailing before all the stakeholders´ interests. It is imperative that groups are able to provide for intra-group support to subsidiaries in need, to ensure the most effective allocation of recourses within the group, and more importantly, to be able function and recover as groups.

The term "financial support" is however not defined which means that it could include all kinds of financial support. The purpose of the rule should not be to prevent or hinder the institution to make group financial arrangements under the Company Law Directive and national laws. It is important that the provisions are limited to crisis situations. It is essential that institutions, under normal conditions, are able to use various financial arrangements in accordance with the Company Law Directive and national company laws without prior permission from an authority. As a general principle, institutions should remain free to select the entities they desire to include in such agreements. On the other hand, it is important that the individual institution retains an exclusive right to decide whether it wishes to be a party to such agreements and if so with which group companies. Moreover, it must be up to the institution to decide independently whether to implement the agreements. As the support is provided at arm´s length, there is no need to receive the shareholders' approval.

To serve the purpose, it must be possible to conclude intra-group financial support agreements without increasing the capital or large exposure requirements.

Disclosure (Article 22)
It is important that the details of a group financial support agreement are not disclosed, in particular when it comes to an institution which issues listed financial instruments. This in turn means that such agreements should not be submitted to the shareholders for approval.

Early intervention (Article 23)
According to proposed directive, early intervention must be possible if an institution "does not meet or is likely to breach the requirements of Directive 2006/48/EC". The same criterion is applied in the CRR/CRD IV, which means there is no distinction between intervention according to the CRR/ CRD IV and intervention according to the draft directive. This may create legal uncertainty not only for the individual bank, but also for the market as a whole.

Nordic & Baltic associations find it important to clarify that the different buffers stipulated in CRR/CRD IV can be used without triggering an early intervention measure. A distinction between the CRR/CRD IV and this directive is necessary since the extents of "breaches" under which the CRR/CRD IV may lead to intervention are far too wide to be applicable also in an early interventions phase according to this directive.

Furthermore, some of the requirements in the CRR/CRD IV are minimum requirements, which means that individual Member States may set their own requirements. This could cause a situation in which different Member States use different early intervention triggers, a situation unlikely to create the necessary predictability and level playing field.

For the abovementioned reasons, we find it important that the directive establishes a harmonised early intervention trigger, if the concept of early intervention and special manager is enforced. Different levels of triggers will not be in line with the intentions of this directive or the ideas that have been put forward in the bank union proposal.

To make sure that the early intervention leads to the desired outcome, the measures imposed must be kept strictly confidential without a requirement for publication. Accordingly, it will not be possible to require the institution to renegotiate its liabilities and contact potential purchasers as defined in Article 23 (e) and (g).

Special manager (Article 24)
Nordic & Baltic associations find the option to appoint a special manager under Article 24 extremely problematic in relation to the normal division of responsibilities between the general meeting, the board of directors and the day-to-day management of the bank.

The proposed directive does not clearly state who is responsible for running the institution and the measures to be taken in a recovery phase.

If the powers of the institution management are left in the hands of a special manager appointed by the competent authority, this must imply that the special manager, and ultimately the competent authority, assumes responsibility for the bank's operations, which is not found to be in accordance with the institution being in a recovery phase and thus in principle a going concern and not an undertaking in a resolution phase. This also means that the supervisory authority operates the business and the supervision at the same time. The appropriateness of a regime can be questionable if the supervisory authority takes over the operation of the business before the resolution phase reorganises it and then maybe returns it to the bank.

The appointment of a special manager could also counteract the purpose of the recovery measures as the likelihood of the bank being able to continue operating as a going concern would be extremely low.

In addition, the purpose of appointing a special manager could be achieved by applying Article 23(d).

Coordination of early intervention measures and appointment of special manager in relation to groups (Article 25)
If more than one competent authority decides to take measures under Article 23 or Article 24 and if they have not reached a joint decision, clear escalation paths for the groups of home and host authorities, to the relevant supranational authorities, must be established. Unilateral actions on the part of any of the competent authorities involved, is likely to undermine the function of the group. Furthermore, a lack of quick and effective dispute mediation will leave the institution without clear supervisory guidance in a crisis situation. This problem can materialise if the authorities´ have different triggers or other requirements which are not fully harmonised. It has to be absolutely clear how an institution may act without running the risk of additional measures.

Resolution objectives (Article 26)
According to the recitals bail-in may be used in resolution as a last resource to protect taxpayer. It does however need to be ensured that the bail-in tool is not used as a tool in the recovery phase. In Article 37 subparagraph 2 (a), it is stated that the authority may apply the bail-in tool for the purpose to recapitalise an institution that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorization and to carry on the activities. It seems that the institution should be "maintained as a going concern", so it needs to be clear to all stakeholders that the debt write-down does not occur in the recovery phase (i.e. when the institution is drawing upon the capital buffers stipulated in CRD IV).

Furthermore, the definition of "failing" in Article 27 subparagraph 2 (a) is imprecise and opens up for different trigger points if different capital requirement is implemented in the

Member States. It is essential that the triggers are harmonized, transparent and predictable to be able to reach a harmonized resolution of financial groups.

Conditions for resolution (Article 27)
It appears from the proposed Article 27(a) that resolution is triggered if an institution is "failing or likely to fail", which subparagraph 2 defines partly as an institution that is in breach of or imminently likely to be in breach of the capital adequacy requirements in a way that would justify withdrawal of the authorisation.

As mentioned above it will be not clear when a bank is in breach of the capital adequacy requirements in individual Member States because some of the requirements in the CRR/CRD IV are minimum requirements, which may mean that individual Member States may set their own requirements.

In addition, there are major differences in the EU in the way the individual solvency need (according to Pillar 2) is fixed. This may create a situation in which different Member States apply different resolution triggers, for example, the resolution trigger in one Member State may correspond to the early intervention trigger in another.

Nordic & Baltic associations are of the opinion that full harmonisation of the resolution trigger is extremely critical for the competitive environment in order to make it entirely clear, predictable and transparent when a bank is at risk of being resolved.

General principles governing resolution (Article 29)
The general principles should more explicitly stress the necessity for coordination of the exercise of legal powers, since governments and resolution authorities are national and no authority alone will have the legal power to resolve a cross-border financial group. The debt-write down tool, stays and suspension of cross-default provisions will involve multiple legal systems. Legal effectiveness will be achievable only if resolution authorities are exercising powers under national law in pursuit of a commonly agreed resolution strategy for a whole group.

According to the article the senior management of an institution under resolution shall be replaced. As we understand it the resolution authority should be allowed more flexibility on this point. In the FAQs accompanying the release of the Commission's proposal it is stated that culpable management should be replaced. This is more adequate since the knowledge of senior management may be a valuable source of information about the institution under resolution. An absolute requirement that senior management shall be replaced may furthermore severely limit the possibilities for the institution's shareholders to replace the management in an effort to save an institution already on a path towards failure.

According to the article, senior managers shall bear losses that are commensurate under civil or criminal law with their individual responsibility for the failure of the institution. There should be a limit to the charges imposed on a senior manager to reduce the risk of personal bankruptcy. In addition to the measures according to this directive, there is also a possibility for the competent authority to impose fees according to the forthcoming CRD IV up to EUR 5 million. There should be a requirement on at least negligence for imposing a fee under this directive.

We believe that the creditor protection principle under subparagraph (f) will only be successful if the respective resolution authority is satisfied that acting in support of a foreign resolution authority does not risk liquidation. Therefore, the "no creditor worse off than in liquidation" principle should be stated for all classes of creditors of a group and

not by each entity. The proposed wording will not avoid the problems of unequal outcomes for creditors and blockages of assets by ring-fencing in different markets.

Scope of bail-in tool (Article 38)
According to the Article , "..the bail-in tool *may* be applied to all liabilities that are not excluded from the scope.."). It remains unclear whether a Member State may exclude other liabilities than those listed in subparagraph 2. If this is the case, we find the proposal extremely problematic from the level playing field perspective.

Nordic & Baltic associations consider it crucial that the scope and application of bail-in are harmonised as broadly as possible in order to ensure competitive equality between Member States.

It is also imperative that covered bonds, covered mortgage bonds, mortgage bonds, junior covered bonds and derivatives in a cover pool/register are clearly exempt from bail-in. In order to keep covered bonds workable also after the implementation of the directive, it must include provisions ensuring that the whole package of a covered bond arrangement remains intact during the resolution process and until the covered bonds mature in accordance with the relevant covered bonds legislation. This means that all assets, including over collateralization, the covered bonds and all derivatives should stay together throughout the process. It is important that this is explicitly clear for investors.

We believe that all derivatives should be excluded from the regime to avoid the potential risk that applying the bail in rules would have an adverse effect, accelerating a systemic crisis. It is also important to remove the national discretion on the treatment of uncovered deposits.

Because bail-in is a resolution tool there should generally be agreement between the scope of the bail-in and the order of priority of creditors to avoid upsetting the creditor ranking.

Minimum requirement for liabilities eligible for bail-in (Article 39)
Nordic & Baltic Associations believe that no minimum requirements for bail-in capital should be needed, as all senior unsecured debt, subject to limited exceptions, should be within the scope in a gone concern situation.

In case the minimum requirement would be endorsed, we believe that risk weighted assets (RWA) is a more suitable indicator for the institution´s risk level than gross liabilities. This is because institutions with low risks in the balance sheet are unfavourably treated with a minimum requirement based on the total liabilities. In a bail-in situation, the purpose is to recapitalize the bank and the need for that will naturally be proportionate to the risk level of the firm. Using total liabilities will also treat derivatives very unfavorably since the possibility to use netted amount in accounting is limited. We therefore suggest that the requirement should be established in relation to RWA instead of total liabilities.

Application of minimum requirement to groups (Article 40)
We agree with the proposed directive that the minimum requirement on the level of own funds and "eligible" liabilities should be established on a consolidated basis for groups which are subject to consolidated supervision. To achieve a harmonised application of the requirement and to reach the necessary coordination of the exercise of legal powers among the resolution authorities the group level application should be obligatory. Consequently, the word "may" should be changed to "shall" in the first sentence of subparagraph 1.

According to subparagraph 1 (c) the parent undertaking shall distribute adequately and proportionately the fund collected through the issuance of the debt instruments or loans, among the institutions which are subsidiaries. We believe that requiring proportionate distribution would not be in line with how centralised funding in banking groups works in practice. We therefore propose to delete the word “proportionately”.

Recovery and reorganization measures to accompany bail-in (Article 46)
The purpose of an administrator and a reorganization plan is somewhat unclear compared to the task a special management has. These measures largely appear to represent the same issue as referred to in Article 24.

Group resolution (Article 83)
Co-operation between resolution authorities is crucial to reach a well-functioning framework for resolution of a cross-border institution. The resolution planning for cross-border institutions shall be made at a group level and shall also cover plans for subsidiaries/branches. It might be not easy to apply a group resolution to a cross-border group when relevant subsidiaries are of systemic importance in their national market. It is therefore important to sustain mechanisms that will ensure that adequate decisions are made even when the authorities disagree.

Target funding level (Article 93).
Nordic & Baltic associations find it important that the target level of both resolution funds and DGS schemes are fully harmonised in order to avoid any distortions of competition among jurisdictions. Otherwise there is a danger of a patchwork of national resolution funds and DGS schemes. From a competition point of view it is essential to have a fixed target level in the directive, not at least since the proposed directive comprises a borrowing obligation between national financial arrangements. It is of importance that well capitalised funds are not used for lending to less capitalized funds, which may result in the banks having to contribute to a greater extent than if a harmonised fixed target level was introduced. It is also important to set an equal harmonized target level for the circumstances when a Member State availed itself of the option provided for in article 99(5) and when a Member State has not availed itself to that option.

Ex ante contributions (Article 94)
We support the proposal that the contribution should be calculated by taking into account the risk profile of the institution. It is however important to avoid creating too complicated calculations methods as this may leave room for national discretion and lead to inconsistent treatment between institutions.

We believe that risk weighted assets (RWA) is the most suitable indicator in calculating the share of contribution to a resolution fund on a stand alone basis from each institution. This is because total liabilities would not consider the risk position of the institutions. Using the total liabilities will also treat derivatives very unfavorably since the possibility to use netted amount in accounting is limited.

Borrowing between financing arrangements (Article 97)
The article proposes the establishment of a mandatory lending scheme between the EU financing arrangements in the event that an individual financing arrangement has inadequate funds to cover a failure.

Nordic & Baltic associations oppose the lending obligation as it would be contrary to the objective of the proposed directive which is to minimise the rub-off effect of financial system failure. The mandatory use of financing arrangements in other Member States could cause the problems to be transferred to the contributing Member State when renewing payments to the financing arrangements. Moreover, the proposal is not in line

with the provisions in DGS Directive where borrowing between national schemes is subject to voluntary arrangements.

Use of deposit guarantee schemes in the context of resolution (Article 99)
Nordic & Baltic associations support the national option (subparagraph 5), which make it possible to use deposit guarantee funds as financing in connection with resolution. This type of system is already in use in some countries.

Administrative sanctions and measures (Article 100)
We believe that the sanctioning powers should remain with the competent authority. Splitting the powers between the competent authority and the resolution authority creates ambiguity and legal uncertainty. When there is a decision stating that an institution is under resolution then the sanctioning powers should be transferred to the resolution authority.

Specific provisions (Article 101)
We find it important that the sanction provisions have to be coordinated with the sanctioning powers laid down in other legal acts. A legal or natural person shall not be imposed administrative sanctions more than once for the same or similar default. It is also important that the authority, when deciding the pecuniary sanctions, considers if the institution will still have the ability to continue to meet the financial requirements.

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