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| From:            | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director   |
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| To:              | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of<br>the European Union   |
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| Subject:         | REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT<br>AND THE COUNCIL on the application and review of Directive 2014/59/EU<br>(Bank Recovery and Resolution Directive) and Regulation 806/2014<br>(Single Resolution Mechanism Regulation) |

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Delegations will find attached document COM(2019) 213 final.

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EUROPEAN  
COMMISSION

Brussels, 30.4.2019  
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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution  
Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)**

## I. INTRODUCTION

The Union regulatory framework in the area of financial services has developed substantially, following the financial crisis. Several pieces of legislation were adopted to introduce rules in previously unregulated areas and to revise existing legislation. The overall aim was to address the concerns and weaknesses which emerged during the financial crisis and to reduce the risk of resurgence of (systemic) crises.

In this context, a minimum EU harmonised legal framework applicable in case of bank<sup>1</sup> crises has been introduced in 2014, consisting of the Bank Recovery and Resolution Directive (“BRRD”).<sup>2</sup> The Single Resolution Mechanism Regulation (“SRMR”) complements that harmonised framework.<sup>3</sup> These legislative acts provide effective tools to resolve banks that are “failing or likely to fail”. Whereas the BRRD had to be transposed into national law by each EU Member State, the SRMR is a directly applicable regulation which centralises certain resolution functions and decisions for the Banking Union. Hence, both instruments jointly establish the EU resolution framework.

The BRRD and SRMR established the principle that when a bank is failing or likely to fail, the resolution authority may conclude that there is a public interest in putting the bank under resolution, rather than applying insolvency under national law. Such public interest might for example be due to the fact that the bank provides functions considered critical for the economy, which cannot be interrupted without negative effects on financial stability. If there is no public interest in using resolution, the bank must be wound up, following insolvency rules pursuant to national laws.

As a general rule, a bank must be declared failing or likely to fail when it needs extraordinary public financial support to preserve its viability, liquidity or solvency, and only in specific exceptional cases a bank can receive public support without triggering that determination. These exceptional cases include precautionary recapitalisation, as well as State guarantees to back liquidity facilities provided by central banks and State guarantees on newly issued liabilities.<sup>4</sup>

The framework ensures that shareholders and creditors effectively support losses and establishes a number of resolution tools for the authorities to deal with banks in resolution. Depending on the specific case, authorities may decide to use the sale of business tool, to create a bridge bank or an asset management vehicle, and to carry out bail-in.<sup>5</sup>

The framework also provides for rules concerning the provision of external public financial support to banks in resolution. In order to reduce the risk of bail-out measures financed by taxpayers, it requires the creation of national resolution financing arrangements and the Single Resolution Fund (SRF) – to be funded by all banks on the market – which are the main source of external financial support for banks in resolution.

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<sup>1</sup> BRRD and SRMR apply to credit institutions, investment firms and other categories of financial entities as provided for in Article 1 BRRD and 2 SRMR. However, in the present Report the generic term “bank” is used for short to designate all entities falling into the scope of these legislative acts

<sup>2</sup> Directive 2014/59/EU, of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173, 12.6.2014, p. 190–348)

<sup>3</sup> Regulation 806/2014/EU of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (OJ L 225, 30.7.2014, p. 1–90)

<sup>4</sup> Article 32(4)(d) BRRD.

<sup>5</sup> Bail-in is defined in BRRD/SRMR as “*the mechanism for effecting the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of an institution under resolution [...]*”. See Article 2(1)(57) BRRD and Article 3(1)(33) SRMR.

In addition, the SRMR establishes the Single Resolution Board (SRB), which is tasked with preparing and carrying out the resolution of banks established in the Member States participating in the Banking Union, as well managing the SRF.<sup>6</sup>

Article 129 of the BRRD and Article 94 of the SRMR require the Commission to review the application of the resolution framework and to submit a Report to the European Parliament and the Council. The reports on the application of these legal instruments were due by June and December 2018 respectively. Due to the close links between these instruments it is appropriate to carry out the review jointly for both of them. Moreover, in order to carry out the review, it was necessary to wait for the adoption of the Banking Package (described more in detail below), which amended some important elements of the resolution framework, and particularly the rules concerning the Minimum Requirement for own funds and eligible Liabilities or MREL.

## **II. OVERVIEW OF THE STATE OF PLAY IN THE APPLICATION AND COMPLETION OF THE RESOLUTION FRAMEWORK**

### ***A. State of play of transposition of BRRD***

The transposition deadline for the BRRD was set on 31 December 2014. Only two Member States notified complete transposition of the BRRD within that deadline so that infringement cases for non-communication against the remaining ones were opened.

To date, all Member States have notified complete transposition. The Commission has verified that the BRRD is fully transposed in all Member States and has closed the respective non-communication infringement cases.

The Commission is currently verifying the correctness of national transposition measures.

### ***B. State of play of the implementation of the resolution framework by resolution authorities***

The implementation of BRRD is ongoing in the EU. A number of Member States have set resolution strategies and MREL targets for all the banks under their direct remit. This has allowed banks to start removing impediments to these strategies and build-up MREL resources. Since the introduction of BRRD, a number of resolution colleges have been set up aiming to agree resolution plans, resolvability assessments and MREL between home and host authorities in charge or resolving banking groups in the EU.<sup>7</sup>

In the Banking Union, the Single Resolution Board (SRB) is carrying out the process for the preparation of resolution plans for banks under its remit. In addition, the SRB has developed guidance on critical functions and the operationalisation of bail-in and it is still working on a number of topics, in particular on operational continuity and management information systems. The SRB previously published an “Introduction to Resolution Planning” and is developing a more detailed resolution planning manual for external publication.

With respect to MREL, the SRB approach has evolved from being based on informative targets in 2016, to the inclusion in 2017 of binding requirements for the largest and most complex banks, as well as bank-specific adjustments addressing both quality and quantity of the MREL. The 2018

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<sup>6</sup> In the Banking Union, each national resolution authority is responsible for collecting contributions to the relevant national resolution fund. These are then transferred to the Single Resolution Fund, which is administered by the Single Resolution Board

<sup>7</sup> See EBA report on resolution colleges:

<https://eba.europa.eu/documents/10180/2087449/EBA+Report+on+the+functioning+of+resolution+colleges+-+July+2018.pdf>

MREL guidance on the application by the SRB of the legislative provisions on MREL,<sup>8</sup> was issued by the SRB at the end of 2018. Overall, banks are in a transitional phase and, while some banks at present still face MREL shortfalls, they are on their path towards fulfilling the objectives within the timeframes specified by SRB.

### ***C. Amendments to MREL contained in the Banking Package***

In April 2019, the European Parliament and the Council of the European Union adopted the Banking Package, which included amendments to certain provisions of the BRRD and SRMR but also to the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR).<sup>9</sup> In light of the deadlines in the legislative texts, the new rules are likely to become applicable in the Member States during 2020.

A part of the provisions in the package relates to MREL. In particular, it provides measures to align the existing legislative framework with the relevant international standard issued by the Financial Stability Board on the Total Loss Absorbing Capacity (TLAC) and includes significant changes to the calibration, eligibility criteria and group allocation of the MREL requirement, and the consequences of its breach. In addition, the text tackles the issue of contractual recognition of bail-in for liabilities issued under third-Country laws, as well as the powers of resolution authorities to suspend payments (moratorium powers).

### ***D. Cases of application of provisions in the resolution framework***

So far, there is limited experience on the application of the framework to failing or likely to fail banks.

The case of Banco Popular (June 2017) is the only resolution carried out after entry into force of all the provisions of the SRMR.<sup>10</sup> The resolution scheme of Banco Popular entailed the write down and conversion of the institution's own funds and the sale of the entity under the sale of business tool. In this context, Banco Santander was identified as suitable buyer. No bail-in of liabilities beyond subordinated debt was enacted in this case and support from the Single Resolution Fund was not necessary.<sup>11</sup>

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<sup>8</sup> The relevant documents can be found at [https://srb.europa.eu/sites/srbsite/files/srb\\_2018\\_mrel\\_policy\\_-\\_first\\_wave\\_of\\_resolution\\_plans.pdf](https://srb.europa.eu/sites/srbsite/files/srb_2018_mrel_policy_-_first_wave_of_resolution_plans.pdf) and [https://srb.europa.eu/sites/srbsite/files/public\\_mrel\\_policy\\_2018\\_-\\_second\\_wave\\_of\\_plans.pdf](https://srb.europa.eu/sites/srbsite/files/public_mrel_policy_2018_-_second_wave_of_plans.pdf)

<sup>9</sup> The European Parliament in its plenary session of 16 April 2016 adopted the legislative texts which compose the so called "Banking Package". The text voted are comprised of the following: - European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC (COM(2016)0852 – C8-0481/2016 – 2016/0362(COD)) (Ordinary legislative procedure: first reading); - European Parliament legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms (COM(2016)0851 – C8-0478/2016 – 2016/0361(COD)) (Ordinary legislative procedure: first reading); - European Parliament legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012 (COM(2016)0850 – C8-0480/2016 – 2016/0360A(COD)); - European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (COM(2016)0854 – C8-0474/2016 – 2016/0364(COD)).

<sup>10</sup> The deadline for the application of the provisions concerning the bail-in tool set out in BRRD was 1 January 2016, while for the other provisions the deadline for application was 1 January 2015

<sup>11</sup> The measures were taken pursuant to the SRB Resolution Decision of 7 June 2017 (SRB/EES/2017/08), which was endorsed by the Commission Decision (EU) 2017/1246 of 7 June 2017

Before the case of Banco Popular, the BRRD was applied in November 2015, when the Italian authorities placed into resolution four banks (Banca delle Marche, Banca Popolare dell'Etruria e del Lazio, Cassa di Risparmio di Ferrara and Cassa di Risparmio della Provincia di Chieti). These cases, however, occurred before the date of application of the bail-in provisions.<sup>12</sup> Therefore, only State aid rules on burden sharing (which require write down of equity and subordinated debt) were applied, but no bail-in under the BRRD.<sup>13</sup>

In addition, certain provisions of the resolution framework have been applied in recent cases of banks in distress, which however did not entail the resolution of the institution:

- Certain banks received precautionary liquidity support.<sup>14</sup> Such support was provided to two Greek banks (National Bank of Greece and Piraeus Bank) in April 2015.<sup>15</sup> In December 2016, Monte dei Paschi di Siena was granted it,<sup>16</sup> and in January and April 2017, two mid-sized Italian banks, Banca Popolare di Vicenza and Veneto Banca, also benefited from the same type of support;<sup>17</sup>
- National Bank of Greece and Piraeus Bank received precautionary recapitalisations in November 2015.<sup>18</sup> The same type of support was granted by the Italian authorities to Banca Monte dei Paschi di Siena in June 2017.<sup>19</sup>
- In June 2017 Banca Popolare di Vicenza and Veneto Banca were declared failing or likely to fail by the ECB and the Single Resolution Board found that resolution action was not in the public interest.<sup>20</sup> The resolution framework provides that in this circumstance insolvency rules under national law apply. Hence, the two institutions were put under compulsory administrative liquidation under Italian law.
- Concerning the Latvian bank ABLV, AS and its subsidiary ABLV Bank Luxembourg S.A., after the ECB determined that the banks were failing or likely to fail in February 2018, the SRB took the decision not to initiate resolution action, given the absence of public interest. Subsequently, ABLV AS applied for voluntary liquidation under Latvian law and ABLV Luxembourg AS remained in a suspension of payments regime under Luxembourg law.

Where applicable, the Commission assessed the measure notified by the Member State under the State aid rules for the financial sector, which for capital support require burden sharing of shareholders and subordinated creditors, as well as other provisions, including the submission of a restructuring plan where relevant.

### III. Items for further assessment

#### A. Application of BRRD and SRMR

##### *Precautionary recapitalisation*

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<sup>12</sup> Article 130 BRRD required Member States to apply certain provisions, including those concerning bail-in, starting from 1 January 2016 at the latest

<sup>13</sup> Bail-in provisions under BRRD require write down and conversion of shares and eligible liabilities up to a minimum of 8% of the bank's total liabilities before allowing access to external financial support

<sup>14</sup> Liquidity in the form of State guarantees on central bank facilities or newly issued liabilities pursuant to Article 32(4)(d)(i) and (ii) BRRD and Article 12(4)(d)(i) and (ii) SRMR.

<sup>15</sup> Case SA 41503

<sup>16</sup> Case SA. 47081

<sup>17</sup> Case SA.47149

<sup>18</sup> The aid was authorised by the Commission in Cases SA.43364 and SA 43365. The term "precautionary recapitalisation" designates the provision of own funds to a solvent institution pursuant to Article 32(4)(d)(iii) BRRD/18(4)(d)(iii) SRMR.

<sup>19</sup> The aid was authorised by the Commission in Case SA 47677.

<sup>20</sup> Case SA 45664

Precautionary recapitalisation allows in exceptional circumstances<sup>21</sup> to recapitalise a bank with public money, to address in a timely fashion difficulties which may arise in the context of an unlikely economic scenario (as identified in the adverse scenario of a stress test) and that may affect the financial conditions of solvent institutions. This contributes to creating a forward-looking approach to financial stability and avoiding potential deteriorations that may lead to a bank failure. To ensure that precautionary recapitalisation is used appropriately and within the logic of the resolution framework, BRRD and SRMR require several conditions to be met. These include that the bank is solvent, that public financial support is not used to cover losses that are incurred or likely to be incurred, and that the precautionary recapitalisation is necessary to address a capital shortfall established in a stress test or an asset quality review. Also, the measure must be of temporary nature and proportionate to remedy the consequences of the serious disturbance in the economy of a Member State. Finally the measure is conditional on final approval under the Union State aid framework.

The Commission has observed that there may be a need for further clarification of the conditions and the procedure to grant precautionary recapitalisation, with a view to ensure timeliness and coordination between the relevant actors. For example, the framework does not specify which authority should confirm that the bank is “solvent” before it receives precautionary recapitalisation (nor does it provide a definition of solvency for the purpose of precautionary recapitalisation) and does not indicate which authority should identify the losses that the entity has incurred or is likely to incur in the near future, which cannot be covered via precautionary recapitalisation.

Based on the lessons learnt from the first cases, and in cooperation with the ECB and the SRB, the Commission has developed best practices on certain aspects of the procedure, including the role of the stress tests and their interaction with an asset quality review. The Commission will continue working in this direction.

#### *Early intervention measures*

The BRRD provides supervisory authorities with early intervention powers, which are intended to prevent further deterioration of the financial conditions of an institution and to reduce, to the extent possible, the risk and impact of a possible resolution. These powers are activated when certain specific triggers<sup>22</sup> are met, to allow competent authorities to take measures such as requiring the institution’s management to draw up an action programme or to change the institution’s business strategy or its legal and operational structure. Competent authorities can, in this context, also replace the institution’s management.<sup>23</sup>

The application of early intervention measures so far has been extremely limited, so that only few tentative conclusions can be drawn. The interaction between, and potential overlap of, early intervention powers conferred to competent authorities on the basis of national laws implementing the BRRD and the supervisory powers which they can exercise based on the CRD and the Single Supervisory Mechanism Regulation could merit further analysis.<sup>24</sup> Also, with respect to the banking Union, it could be useful to reflect on replicating the provisions on early intervention powers

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<sup>21</sup> The measure is allowed in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability.

<sup>22</sup> In particular Article 27 BRRD provides for the power of competent authority to activate early intervention measures when “an institution infringes or, due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution’s own funds requirement plus 1,5 percentage points, is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014 [...]”

<sup>23</sup> Such a decision was taken recently by the ECB with respect to Carige bank (Cassa di Risparmio di Genova e Liguria). See <https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190102.en.html>

<sup>24</sup> Specifically, Article 16 SSMR

contained in the BRRD also into the SRMR, to avoid recourse to diverging national transposition measures.

### *Common backstop to the SRF and the Intergovernmental Agreement*<sup>25</sup>

In accordance with past political agreements by Ministers of Finance,<sup>26</sup> and as also confirmed in the outcome of the December 2018 Euro Summit,<sup>27</sup> the common backstop to the SRF, essential to enhance the credibility of the Single Resolution Mechanism (SRM) in the Banking Union, will be established at the latest by the end of the transitional period for the mutualisation of the means in the SRF.

The Commission has repeatedly called for the common backstop to be put in place sooner.<sup>28</sup> In December 2018, the Euro Summit agreed that the early introduction of the backstop would be conditional on sufficient progress in terms of risk reduction to be assessed in 2020.

It appears to be a broadly shared view among the Member States participating in the Banking Union that repayment of the common backstop by the SRF would be confined only to the concerned national compartment(s) in the event that the backstop was to be used before the end of the transitional period.<sup>29</sup> This has an impact on the amounts that can be repaid, and thus borrowed from the common backstop. In order to ensure that, during the transitional phase, full access to the backstop can also be had, where needed, limited changes to the Intergovernmental Agreement (IGA) will need to be agreed soon (in particular because without a rapid change to the IGA there may be limited benefit in early implementation).

One of the available options would be the mutualisation of ex-post and ex-ante contributions, starting from 2021 in order to deliver a common backstop of a credible size and increase the Banking Union resilience.

### *Liquidity in resolution*

Ensuring that a resolved bank continues to have sufficient liquidity to meet its obligations is an essential part of an effective resolution. Liquidity can come from the market or from the normal central bank facilities. When those resources are temporarily insufficient, the SRF might be used to provide liquidity in resolution.

However, given the extent of the potential liquidity needs in resolution, the resources of the SRF, even when supplemented by a backstop of the same or similar size, may not be sufficient to adequately address these needs.<sup>30</sup>

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<sup>25</sup> Agreement on the transfer and mutualisation of contributions to the Single Resolution fund, 14 May 2014, 8457/14: <http://data.consilium.europa.eu/doc/document/ST-8457-2014-INIT/en/pdf>.

<sup>26</sup> Statement of Eurogroup and ECOFIN Ministers on the SRM backstop, 20 December 2013, 18137/13: <http://data.consilium.europa.eu/doc/document/ST-18137-2013-INIT/en/pdf>.

<sup>27</sup> Statement of the Euro Summit, 14 December 2018 and Terms of reference of the common backstop to the Single Resolution Fund.

<sup>28</sup> See, for example, Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank – Further steps towards completing Europe’s Economic and Monetary Union: A Roadmap, 6.12.2017, COM/2017/0821 final and Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on completing the Banking Union, 11.10.2017, COM(2017) 592 final.

<sup>29</sup> Art. 5(1)(e) Intergovernmental Agreement.

<sup>30</sup> See, for example: Eurogroup report to Leaders on EMU deepening, 4 December 2018, <https://www.consilium.europa.eu/fr/press/press-releases/2018/12/04/eurogroup-report-to-leaders-on-emu-deepening/>; “Financing bank resolution: An alternative solution for arranging the liquidity required”, November 2018, W.P. de Groen, In-depth analysis requested by the ECON committee of the European Parliament, available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624423/IPOL\\_IDA\(2018\)624423\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624423/IPOL_IDA(2018)624423_EN.pdf); “How to provide liquidity to banks after resolution in Europe’s banking union”, November 2018, M. Demertzis, I. Gonçalves Raposo, P. Hüttl, G. Wolff, In-depth analysis requested by the ECON committee of the European Parliament, available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624422/IPOL\\_IDA\(2018\)624422\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624422/IPOL_IDA(2018)624422_EN.pdf)

In accordance with Article 73 SRMR, the SRB may contract external borrowings in order to ensure the availability of resources for resolution, when contributions are not (yet) available for such purposes. The Commission considers that the provision allows the SRB to take appropriate means to ensure its workability, including by contracting a limited amount of borrowings outside of a resolution context.

In addition, in Member States outside the Banking Union as well as third country jurisdictions,<sup>31</sup> the provision of liquidity support in resolution is foreseen either with no limits or with limits well above those possible within the Banking Union, often with the possibility of increases.

The Commission therefore strongly supports the ongoing reflections on other sources and solutions for the provision of liquidity support in resolution and calls for these to be agreed upon and implemented in the course of 2019. It is important that resources of sufficient scale are available to provide short-term liquidity support, where needed.

#### *Other issues*

Article 129 BRRD requires the Commission to carry out a reflection on the basis of the conclusions of the Report of the European Banking Authority (EBA) on simplified obligations, issued in December 2017 pursuant to Article 4(7) of the Directive<sup>32</sup> as well as the EBA report on the Minimum Requirement of Eligible Liabilities (MREL) issued pursuant to Article 45(19) BRRD in December 2016.<sup>33</sup>

The EBA report on simplified obligations provides an overview of the application of the BRRD provisions, which allow competent and resolution authorities to require simplified recovery and resolution plans from eligible banks. Eligibility for simplified obligations must be determined based on several factors, as outlined in Article 4 BRRD and the Delegated Regulation on Simplified obligations.<sup>34</sup> The report highlights the different practices and approaches used by competent and resolution authorities with respect to the application of simplified obligations. Against this background, the report recommends continuous monitoring of the remaining divergences.

The Commission takes stock of the report and considers that simplified obligations are an important element of the framework, to ensure efficiency and proportionality of the requirement to develop recovery and resolution plans, as well as to reduce, where appropriate, the administrative burden of competent and resolution authorities. The Commission may therefore reflect on the need for improvements of the framework in this respect, taking into account the outcome of the monitoring of simplified obligations by the EBA.

The Banking Package, adopted by the co-legislators on 16 April 2019, includes several measures to amend the MREL regime and has therefore superseded the requirement for a review based on the EBA report.

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<sup>31</sup> See, for example, the United States' Orderly Liquidation Fund (12 U.S.C. § 5390 (Dodd-Frank Act § 210(n))).

<sup>32</sup> <https://www.eba.europa.eu/documents/10180/1720738/EBA+Report+on+the+Application+of+Simplified+Obligations+and+Waivers+in+Recovery+and+Resolution+Planning.pdf>

<sup>33</sup> <https://eba.europa.eu/documents/10180/1695288/EBA+Final+MREL+Report+%28EBA-Op-2016-21%29.pdf>

<sup>34</sup> Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1075>

## ***B. Interaction between resolution and insolvency and reflection on possible further harmonisation of insolvency***

The resolution regime constitutes a “carve-out” from general insolvency proceedings applicable under national laws. In particular, when a bank is determined to be failing or likely to fail, if there is no alternative private sector measure and it is in the public interest to put that institution in resolution, the harmonised rules contained in BRRD/SRMR apply. In absence of a public interest to put the bank in resolution, the bank is wound up according to insolvency rules pursuant to the applicable national law.

At present, national insolvency laws applicable to failing banks are largely not harmonised, and the application of the insolvency rules at national level vary between Member States. BRRD/SRMR so far only introduced a limited element of harmonisation. In particular, BRRD mandates that certain non-covered eligible deposits have a higher ranking in national insolvency than other ordinary unsecured non-preferred liabilities and that covered deposits rank in insolvency higher than non-covered eligible ones.<sup>35</sup> The insolvency ranking has been further harmonised through the Bank Creditor Hierarchy Directive amending the BRRD.<sup>36</sup> The Directive created a new class of debt (senior non-preferred debt), which ranks in insolvency above subordinated liabilities, but below senior liabilities.

The review clause of the SRMR requires the Commission to assess whether to further harmonise insolvency proceedings for failing or likely to fail institutions.

The differences between insolvency regimes across the Banking Union may be a source of challenges and complexity for the resolution authority, particularly when insolvency is used as counterfactual in the context of measures on cross-border banks in resolution (to meet the “no creditor worse off” principle<sup>37</sup>). More experience is needed to understand whether and how these issues should be addressed. However, the Commission can already identify some elements of bank insolvency laws for failing banks, which may deserve further reflection. These include an assessment on the applicable ranking of claims in national insolvency in different Member States, also with a view to determine whether further alignment between the ranking in insolvency and resolution is desirable.<sup>38</sup> More clarity could be needed on the procedures available at national level for the liquidation or wind up of banks which are declared failing or likely to fail but for which there is no public interest in taking resolution action. The BRRD/SRMR is not specific about how insolvency procedures for these banks should unfold, as these elements are not harmonised and are left to the national legislator to determine.

The Commission launched a study to get a better understanding of these issues.<sup>39</sup> The aim of the study will be to provide a basis for the analysis of divergences in the insolvency frameworks for banks under different national laws and to assess the interactions between these frameworks and the resolution rules. The study should also identify potential policy options for harmonisation, including the possible introduction of administrative liquidation proceedings in the EU.

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<sup>35</sup> Article 108 BRRD

<sup>36</sup> Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy

<sup>37</sup> The principle is codified in Article 34 BRRD and requires that shareholders and creditors do not incur greater losses in resolution than insolvency

<sup>38</sup> In case of harmonisation of the ranking of claims in insolvency, due consideration should be given to the status of certain privileged creditors such as tax authorities, social security institutions, workers/employees

<sup>39</sup> The study was launched further to a request and budget provision made available by the EP for a Pilot Project on the Banking Union. A call for tender was published on 7 September 2018, see <https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:389651-2018:TEXT:EN:HTML&ticket=ST-35512292-rGDZ9PTvzUdNJZvojeKKI1EdXBHdQdHshD8PU99JSVKIfmyXIsA4zPHRCzeoTNQsdCLBE7Iu53KzhFMVrszsG9zW-jpJZscgsw0KeumEE0mYyCS-1dilRzzzQczGl03GpkcVaEJS1fqVDK0xcTDeIqmAExgb>

### *C. Functioning of the SRM and SRB*

The SRMR review clause provides that the Commission should carry out an assessment of several aspects related to the governance and functioning of the Single Resolution Mechanism (SRM) and the SRB.

The items listed for review, which are grouped below for convenience, include:

- assessing the interactions of the SRB (and the SRM in general) with other actors in the resolution process as well as the EBA, the European Securities and Market Authority (ESMA), and the European insurance and Occupational Pensions Authority (EIOPA);
- assessing whether the target level or the reference point of the SRF should be revised;
- assessing the internal governance arrangements of the SRB and other operational issues, and particularly the investment portfolio of the SRB;
- assessing the legal status of the Board as an agency of the Union.

As a preliminary remark, the Commission notes that the SRB assumed full resolution powers in 2016 and it needed time to establish its internal functioning and reach full staffing. There is not, therefore, a sufficient amount of information or experience to carry out an in-depth review.

It is, however, possible to provide a few preliminary considerations.

Concerning the procedure established in the SRMR for the adoption of a resolution scheme<sup>40</sup>, this entails several steps and requires coordination between various actors, including the SRB, national resolution authorities, the European Central Bank, and the Commission. In addition, the procedure requires that, in order to preserve financial stability and avoid a negative impact on the market, the resolution scheme must be adopted and executed in a very short timeframe. Although the procedure poses certain challenges, it ensures that decisions on bank resolution are taken quickly, while preserving the roles and prerogatives of all actors involved.

Outside the resolution procedure, the SRB has worked with national authorities, in accordance with the procedures set out in the framework. In the 2017 resolution planning cycle, the SRB set binding MREL targets at consolidated level for the majority of the largest banking groups within the SRB's remit, and the SRB intends to set binding targets for all groups within its remit by 2020.

Concerning EBA, on 27 November 2017, the Commission published a Report on the role of the EBA with respect to mediation procedures in resolution.<sup>41</sup> The Report addressed some issues that the EBA brought to the Commission's attention. All these issues concern provisions of the EBA founding regulation,<sup>42</sup> which is being amended in the context of ESAs review.<sup>43</sup>

Concerning the revision of the target level and reference point for the SRF, the SRMR lays down that by the end of an initial period of eight years from 1 January 2016, the available financial means of the SRF shall reach at least 1% of the amount of covered deposits of all credit institutions authorised in all participating Member States.<sup>44</sup> Similarly, the BRRD provides that by 31 December 2024, the available financial means of Member States' financing arrangements shall reach at least 1% of the amount of covered deposits of all the institutions authorised in their territory.<sup>45</sup> Member

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<sup>40</sup> Article 18 SRMR

<sup>41</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0661>

<sup>42</sup> Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority)

<sup>43</sup> Commission proposal COM(2017) 536 final of 20 September 2017

<sup>44</sup> Article 69(1) SRMR.

<sup>45</sup> Article 102(1) BRRD.

States may set target levels in excess of that amount, an option that some Member States have used in transposing the BRRD.

A number of Delegated and Implementing Regulations have been adopted since 2014, laying down the modalities related to the ex-ante<sup>46</sup> and ex-post<sup>47</sup> contributions to be collected for the Single Resolution Fund and the national financing arrangements. Subsequently, within the Banking Union, the SRB calculated and, through national resolution authorities, started collecting ex-ante contributions to the Single Resolution Fund.<sup>48</sup> Outside the Banking Union, banks are now contributing to the national financing arrangements.

The EBA adopted a report in October 2016 on the reference point for setting the target level for resolution financing arrangements.<sup>49</sup> The report recommended changing the base for the target level for resolution financing arrangements from covered deposits to total liabilities less covered deposits, in order to reach more consistency with the regulatory framework. However, it also emphasised that resolution authorities and institutions must have certainty about the contributions during the build-up of resolution financing arrangements, and that volatility in the target level during that period should be avoided.

At this stage, the SRF is still being built up and has never been used for any resolution action. The focus should therefore be on reaching the target level and ensuring full implementation of the existing legal provisions. Changes to the target level itself or the reference point and the contributions do not appear necessary at this stage in the process.

Any further assessment could only be undertaken once the entire mechanism to provide funding in resolution will be complete and potentially put to test in concrete cases. It suffices to say at this stage that increased private sector loss-absorbing capacity, particularly as a result of the rules on MREL contained in the Banking Package, and the growth of the SRF can be considered as valid means to reduce the possible exposure of sovereigns to the banking sector.

With respect to the issue of the governance of the SRB and the change of its legal status from agency to EU institution,<sup>50</sup> given its recent creation and the limited practical experience gathered so far, there are not sufficient elements at this stage to suggest changes to the current provisions. In this respect, the Commission underlines that such a change of legal status would require a modification of the Treaty on the Functioning of the European Union (TFEU).

Finally, in view of the potential accession to the Banking Union of non-participating Member States, there may be scope to reflect on the modalities for an acceding Member State to participate in the SRM.

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<sup>46</sup> Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements, and Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund.

<sup>47</sup> Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines.

<sup>48</sup> <https://srb.europa.eu/en/content/ex-ante-contributions-0>.

<sup>49</sup> In accordance with Article 102(4) BRRD. Report on the appropriate target level basis for resolution financing arrangements, EBA-OP-2016-18, 28 October 2016, available at: <http://www.eba.europa.eu/documents/10180/1360107/Report+on+the+appropriate+target+level+basis+for+resolution+financing+arrangements+%28EBA-OP-2016-18%29.pdf>

<sup>50</sup> Article 94(1)(a)(i) SRMR requires that, as part of the review of the legislation, the commission assesses whether "there is a need that the functions allocated by this Regulation to the Board, to the Council and to the Commission, be exercised exclusively by an independent Union institution and, if so, whether any changes of the relevant provisions are necessary including at the level of primary law"

#### IV. CONCLUSION

The Commission takes stock of the issues discussed above, which are based on the limited experience the Commission gained from the application of the resolution framework so far.

The framework has been applied only in a limited number of cases. Out of those, only one case concerned the resolution of an institution under SRMR. It is also worth noticing that a number of these cases dealt with “legacy issues” which accumulated during the financial crisis or before.

In addition, the provisions concerning the bail-in tool and the establishment of the Single Resolution Board became applicable only as of 1 January 2016. Other elements - such as resolution planning for larger and complex institutions and the provisions concerning MREL – require a phasing in to be fully implemented.

Moreover, certain crucial parts of the framework – including the provisions on MREL, moratorium powers and the recognition of liabilities governed by third-country law - are in the process of being amended and, once in place, transition periods will apply.

In light of this, it is premature to design and adopt legislative proposals at this stage.

The Commission will, however, continue monitoring the application of the resolution framework and further assess the issues identified above, also in light of additional elements provided by the recently launched study on the harmonisation of national insolvency laws and experience stemming from possible future application of the resolution framework.

To this end the Commission will also engage in a comprehensive discussion of the topics identified in this report with respect to BRRD/SRMR (as well as issues that may emerge from application of the resolution framework) with experts appointed by the European Parliament, Member States and all relevant stakeholders.

In this context the Commission will also take into account the interaction with policy developments in relation to deposit insurance, including the work of the High Level Group established by the Eurogroup,<sup>51</sup> and the review of the Deposit Guarantee Scheme Directive.<sup>52</sup>

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<sup>51</sup> Eurogroup report to Leaders on EMU deepening of 4 December 2018.

<sup>52</sup> Directive 2014/49/EC.