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COVER NOTE

From:	Else Konig, Chair of the Single Resolution Board
date of receipt:	27 March 2018
To:	Kaloyan Simeonov, Chair of the Risk-Reduction Working Party
Subject:	SRMR Legislative proposal: suggestions for enhancing the regulation

Delegations will find attached the above mentioned letter.

Encl.: [...]

E-MAIL / ~~FAX~~

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Brussels, 26 March 2018
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Kaloyan Simeonov
Chair of the Risk-Reduction Working Party
Via email: k.simeonov@minfin.bg

Re: SRMR legislative proposal: suggestions for enhancing the regulation

Dear Mr. Simeonov,

We have been informed of the initial review of the latest Presidency Compromise text on the proposed amendments to the SRM Regulation as regards the loss-absorbing and recapitalization capacity for credit institutions and investment firms dated 6 March 2018. While the Single Resolution Board (SRB) welcomes the Presidency's efforts to ensure the resolvability of European banks by strengthening the legal framework with regard to the minimum requirements of own funds and eligible liabilities (MREL), we would like to bring to your attention other challenging aspects of the current legal framework which, in the SRB's opinion, would require immediate legislative action so to enhance its functioning. The elements which we provide you herewith are based on the SRB's operational experience and we find them pertinent to address in the context of the on-going legislative debate on possible amendments to the SRM Regulation.

The implementation of SRB decisions:

First of all, we note that, similarly to the current legal framework, the proposed draft Article 12(4) of SRM Regulation still provides for a two-tier approach, i.e. i) for the adoption by the SRB of the decision on the MREL determination and ii) its implementation by the National Resolution Authorities (NRAs). Based on our experience, a one-tier approach, i.e. the Board addressing its decision on MREL determination directly to the entities without the NRAs' intermediation, would not only decrease a number of legal uncertainties, unnecessary burdensome operational complexities and inefficiencies, but would also better serve the objective of the SRM Regulation "to guarantee a level playing field" within the Banking Union.

The current two-tier approach results in complexities at the various procedural and operational implementation stages, in particular, due to the differences in the national administrative legislation according to which the MREL determinations shall be implemented. The practical experience of the SRB, in cooperation with the NRAs, shows that the national implementation of MREL determinations *de facto* leads to (i) delays or various dates for decisions taking effect vis-à-vis the entities, (ii) further amendments or adjustments according to the national administrative law requirements, (iii) different rights and obligations of entities among the different participating Member States, and (iv) the increased possibility to challenge the SRB's decision and the NRAs' implementing acts at EU and national level respectively. Therefore, the current approach significantly reduces

the operational efficiency of the Single Resolution Mechanism and exposes the framework to legal challenges.

A similar issue arises in the context of assessment and removal of impediments to resolvability, where the SRB shall instruct the NRAs to implement measures in this regard (Article 10(11) and (12) of SRM Regulation). Given the number and the wide-ranging nature of the measures that the entities are required to take and the need by the SRB to monitor their implementation, the two-tier approach reduces the SRB's oversight of the process and control over its effectiveness. Overall, the SRM Regulation does not provide an adequate mechanism for the SRB to monitor and verify the compliance with its decision. Our concern is that the two-tier approach could result in lengthy implementation of the required measures and lead to inconsistent outcomes between the participating Member States. We also note that the step preceding the SRB's decision on impediments i.e. preparation of the SRB's report on substantive impediments and assessment of the entity's proposals for removing impediments is, in contrast, exclusively conducted by the SRB without the NRAs' intermediation (Article 10(7)-(10) of SRM Regulation).

It should also be stressed that the SRB's decisions on MREL determination and those on removal of impediments to resolvability are directly linked to the SRB decisions on resolution plans (RP), where for RP decisions the SRB holds an exclusive competence with a one-tier decisions making process. Consequently, possible divergences resulting from the national implementing process of MREL determinations and those on removal of impediments to resolvability might lead to inconsistencies in the SRB's RPs. This would be, in particular, in the cross-border context for entities falling under the SRB direct remit.

In light of the above, and given that the SRB's decisions do not leave any room for discretion for the NRAs' implementation, and that the entities are granted with the right of appropriate judicial review at EU level, and taking into account that under the current SRM Regulation the SRB may already address certain decisions directly to the entities (e.g. decisions on fines, periodic penalty payments), it is questionable whether the current two-tier approach supports the objective of effective and consistent application of the resolution framework in the Banking Union.

MREL breaches:

Second, we positively note that the proposed draft Article 12j(1) aims to strengthen the SRB's powers in case of MREL breaches to some extent by requiring that identified MREL breaches by certain entities shall be addressed by the SRB. However, the catalogue for addressing MREL breaches proposed in paragraph 1(a)-(e) of the above Article includes some measures of different nature, e.g. administrative sanctions, supervisory powers, early intervention measurers, failing or likely to fail (FOLTF) determination. We draw attention to the fact that some of these measures address crisis management and resolution whereas others refer to measures, which may be applied in the course of ordinary resolution planning and supervisory activities. Given that MREL aims to facilitate resolvability in the resolution planning cycle, it is not clear to us what would be the link between the MREL breach and the application of the crisis measures and, in particular, whether an MREL breach alone could justify a FOLTF determination.

Single Resolution Board, Treurenberg 22, B-1049 Brussels, Belgium
Tel: +32 2 490 30 00, http://srb.europa.eu/ Twitter: @EU_SRB

www.parlament.gv.at

Moreover, the proposed provision also divides the discretion of declaring MREL breaches between the SRB, the NRAs as well as competent authorities of participating Member States (European Central Bank or National Competent Authorities), in each case in consultation with each other. In our view, the overlapping nature of those measures will create considerable uncertainty regarding the competences and proper remit of the SRB, the ECB and other authorities.

As a result, the proposed Article 12j, as currently drafted, may give rise to inconsistencies and legal uncertainties and disproportionately complicate the enforcement process. In order to avoid the structural complexities, we would suggest that the catalogue is narrowed down to focus on measures addressing MREL breaches by way of removal of impediments to resolvability in the first instance. Only if the removal of impediments fails to remedy the MREL breach, the next step could involve administrative penalties, such as fines and therefore, would require some legislative reflection under current Article 38 of the SRM Regulation.

In general, the current Article 38(2)(c) read in comparison with Article 38(8) of the SRM Regulation leads to inconsistencies and legal uncertainties as regards the regime for imposing fines in the context of non-compliance with MREL determination or decision on removal of impediments to resolvability. The SRB would very much welcome the appropriate amendment to Article 38(2)(c) that would remove a redundant reference to Article 29 of the SRM Regulation. In light of the above, and taking into consideration so far gained experience by the SRB and the NRAs on those aspects, we consider that it is of utmost importance to address these fundamental issues at this juncture, without postponing it to the future amendments of the SRM Regulation. Therefore, we would like to invite you to reconsider the current proposal that may otherwise compromise the achievement of the objectives of the EU resolution framework.

We stand ready to assist you by proposing specific amendments to the compromise text and we would be at your disposal for any additional discussions on these points.

Yours sincerely,

Elke König
Chair

cc: John Berrigan, Deputy Director-General, DG FISMA, European Commission

Single Resolution Board, Treurenberg 22, B-1049 Brussels, Belgium
Tel: +32 2 490 30 00, http://srb.europa.eu/ Twitter: @EU_SRB

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