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signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL on the review of Articles 13, 18 and 45 as regards
EBA's powers to conduct binding mediation to take account of future
developments in financial services law

Delegations will find attached document COM(2017) 661 final.

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the review of Articles 13, 18 and 45 as regards EBA's powers to conduct binding
mediation to take account of future developments in financial services law**

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INTRODUCTION

In accordance with Article 129 of Directive 2014/59/EU on establishing a framework for recovery and resolution of credit institutions and investment firms (“BRRD”) and after consulting the European Banking Authority (EBA), the European Commission has prepared this report to the European Parliament and the Council on the review of the application of Articles 13 (*Group Resolution Plan*), 18 (*Impediment to resolvability: group treatment*) and 45 (*MREL*) as regards EBA's power to conduct binding mediation to take account of developments in financial services.

PROVISIONS

Articles 13, 18 and 45 BRRD are based on the general principle that , with respect to groups decisions in the respective areas should be taken jointly by the resolution authorities concerned. All three provisions set out a period of four months during which an agreement in this respect must be reached. Articles 13 and 18 establish that during this period EBA can be tasked with assisting the authorities in reaching a joint decision with respect to group resolutions plans and impediment to resolvability respectively, if it is requested by a resolution authority. Moreover, the three provisions establish that in absence of a joint decision any resolution authority can, at the end of the four months' period (which counts as conciliation period for the purposes of Article 19(2) EBA Regulation)¹ refer the matter to EBA requesting it to take a binding mediation decision in accordance with Article 19 of the EBA Regulation. In such case, the responsibility to decide on the matter is deferred by the initially responsible resolution authority to EBA. In accordance with Article 19(3) of that Regulation, EBA shall take its decision within one month. The decision of EBA is then binding on the respective resolution authorities.

The following table compares non-binding and binding mediation powers of EBA and shows the subjects of the respective provisions.

¹ Regulation (EU) No 1093/2010 to EBA.

Articles	Non-binding mediation powers (Art.31(c) EBA Regulation)	Binding mediation powers (Art.19(3) EBA Regulation)
Group Resolution Plans (Art. 13)	Upon request of a resolution authority, EBA may assist in reaching a joint decision during the conciliation period (para. 4). (exception: decision may impinge on MS fiscal responsibilities (para. 9))	If decision is referred by a resolution authority to EBA at the end of the conciliation period - on group level (para. 5) - on subsidiary level (para. 6)
impediments to group resolution (Art. 18)	Upon request of a resolution authority, EBA may assist in reaching a joint decision during the conciliation period (para. 5)	If decision at group level (para. 6) or at subsidiary level (para. 7) is deferred by a resolution authority to EBA at the end of the conciliation period in case of measures on - changing legal or operational structures - establishing a parent financial holding - establishing a separate financial holding company to control a subsidiary
MREL (Art. 45)		If decision at group level (para. 9) or at subsidiary level (para. 10) is deferred by a resolution authority to EBA at the end of the conciliation period

In detail, Article 13(4) BRRD stipulates that a *group resolution plan* shall be decided jointly by the group-level authority and the resolution authority of the subsidiaries. EBA can be consulted to assist in this process. In absence of a joint decision on the resolution plan within four months after the information was conveyed, the group-level authority shall take its decision at group level and the resolution authorities of the subsidiaries shall take their decisions at individual level (paragraph 5 and 6, respectively). If however, any resolution authority refers the matter within the four months period to EBA, the group-level authority or the resolution authority responsible for the subsidiary on an individual basis shall defer its decision and await any decision that EBA may take. EBA shall take its decision within a month which then is binding for the relevant authority and be applied by the other resolution authorities concerned.

However, if impediments to resolution are identified by the group-level resolution authority the deadline for the preparation of the group resolution plan is suspended.² In this case the institution has to propose to the resolution authority possible measures to address or remove the substantive impediments within four months. The resolution authority shall assess whether the proposed measures are effective.

If the resolution authority assess that the measures proposed do not effectively reduce or remove the impediments in question, it shall require the institution to take alternative measures. In a group context, pursuant to Article 18 of the BRRD, the group-level resolution authority in cooperation with the consolidating supervisor and EBA must prepare a report on measures to address such impediments.

The Union parent undertaking may submit observations within four months of the date of receipt of the report.

The group-level resolution authority and the resolution authorities of the subsidiaries, within four months of receipt of the observations from the parent undertaking or upon expiry of the deadline to provide them, shall reach a joint decision on the identification of material impediments and relief measures after consulting the competent authority and the resolution authorities of the jurisdictions of relevant branches and after taking into consideration potential observations of the Union parent undertaking. Pursuant to paragraph (5) of Article 18, EBA can be consulted to assist in reaching a joint decision. In absence of a joint decision on the report on impediments to resolvability, the

² Article 17(2) BRRD.

group level authority shall take its decision at group level, and the resolution authorities of the subsidiaries shall take their decisions at individual level. However, during the four month period, EBA can be asked to provide binding mediation³ with reference to measures regarding significant changes to legal or operational structures,⁴ the establishment of a holding company⁵ or the establishment of a holding with the purpose to control the institution.⁶ If any resolution authority refers the matter within the four months period to EBA, the group-level authority or the resolution authority responsible for the subsidiary on an individual basis shall defer their decisions and await any decision that EBA may take. EBA shall take its binding decision within a month.

According to Article 45(9) BRRD on the application of the minimum requirement for own funds and eligible liabilities, the group-level resolution authority and the resolution authority responsible for the subsidiaries on an individual basis shall do everything within their power to reach a joint decision on the consolidated minimum requirement. In absence of a joint decision by relevant resolution authorities on the minimum requirement at consolidated level, a decision shall be taken by the group-level authority after duly taking into consideration the assessment of subsidiaries performed by the relevant resolution authority. In absence of a joint decision on subsidiary level, the decision shall be taken by the respective resolution authorities of the subsidiaries after duly considering the views and reservations expressed by the group-level resolution authority. If any resolution authority refers the matter within a four months period to EBA, the group-level authority, or respectively, the resolution authority responsible for the subsidiary on an individual basis shall defer its decision and shall await any decision that EBA may take within a month, which is then binding for the concerned resolution authorities. The decision shall be reviewed and where relevant updated on a regular basis.

EXPERIENCE GATHERED FROM APPLICATION OF MEDIATION POWERS BY EBA

Since its establishment by Regulation (EU) No. 1093/2010, EBA has received nine requests for mediation out of which three for binding and for six non-binding mediation. Out of such nine cases, two mediation requests have been submitted to EBA on the basis of the BRRD, which came into force on 1 January 2015.⁷ Until now all requests for mediation proceedings (binding, non-binding) have ultimately been settled by an agreement between the parties concerned under the guidance and assistance of EBA. For this reason, so far there was no need to proceed with binding mediation to reach a decision.

Experience from these cases, albeit limited, seems to indicate that the mediation process can be an effective tool to incentivise joint decisions between competent authorities since EBA was able to settle disagreements within the conciliation phase⁸ (or within the non-binding mediation⁹).

Nevertheless, no joint decisions were taken with respect to measures to address or remove substantive impediments¹⁰ and with respect to minimum requirement for own funds and eligible liabilities (MREL).¹¹

Based on this limited experience, challenges for the effective application of its mediation powers could be identified as follows:

- limits to the participation of resolution authorities in mediation panels;
- lack of power for EBA to open a conciliation or a binding mediation on its own initiative
- implications of the current BRRD provision on fiscal safeguards.

³ Article 18(9) BRRD.

⁴ Article 17(5) (g) BRRD.

⁵ Article 17(5) (h) BRRD.

⁶ Article 17(5) (k) BRRD.

⁷ One case related to non-binding mediation, the other concerned originally a request for binding mediation which was subsequently withdrawn and resubmitted as non-binding mediation.

⁸ Article 19(2) EBA Regulation.

⁹ Article 31(c) EBA Regulation.

¹⁰ Article 18 BRRD.

¹¹ Article 45 BRRD.

CHALLENGES IDENTIFIED

1. COMPOSITION OF MEDIATION PANELS

The EBA Regulation limits the participation of resolution authorities in mediation panels. The relevant provisions in this respect limit participation to panels for the settlement of disagreements to voting members of the EBA Board of Supervisors.¹²

As a result, the EBA Regulation excludes the participation of several entities (which are not voting members of the EBA BoS) from mediation panels, including the Single Resolution Board (SRB), the ECB and national resolution authorities.¹³ The reduced participation of resolution authorities creates potentially contradictory situations in case of mediations concerning resolution issues, since the entities that are supposed to manage resolution matters may not articulate their interests and concerns and contribute to relevant mediation decisions.

On the other hand, Article 127 BRRD requires EBA to create a permanent committee for Resolution within EBA composed by senior representatives of resolution authorities for the purpose of preparing decisions of the BoS in accordance with Article 41 and 44 of the EBA Regulation.

Against this background, it may be assessed whether in cases of disagreement involving resolution authorities, the members and substitutes of the Panel could appoint an alternate from the ResCo. Concretely, this would mean that a mediation panel would be composed of the Chairperson of the BoS and of six other members, which should be members of the BoS in cases of disagreement concerning supervisory matters, and members of the ResCo when the disagreement concerns resolution matters. In cases where the disagreement concerns both a resolution matter and a supervisory matter the six other members should comprise three members of the BoS and three members of the ResCo.

In any event this issue will be solved by the recent Commission proposal for a Regulation on the review of the European Supervisory Authorities ("ESAs review") will be adopted.¹⁴ The Commission text, in particular, contains proposed amendments to Article 41 of the EBA Regulation. Should these proposed amendments be confirmed in the final legislative text, panels would be eliminated entirely from the EBA Regulation.

2. POWER OF INITIATIVE

According to Articles 13, 18 and 45 BRRD, EBA has the power to intervene with the objective to foster conciliation and adopt binding mediation measures only upon request of a resolution authority.

It is arguable that foreseeing the possibility for EBA to intervene on its own initiative in the context of conciliation and binding mediation under BRRD would increase the likelihood of joint decisions and reduce the risk of separate decisions by individual authorities. Moreover, the power to adopt binding mediation measures on own initiative might facilitate the EBA's role in the context of mediation panels, as it would allow it to take measures earlier in the process. Thus, enhanced conciliation and mediation powers may lead to more effectiveness by preventing disagreement and enhancing the motivation for resolution authorities to reach an agreement early on.

The Commission proposal for the ESAs review addresses this issue, as it contains proposed amendments to Article 19 of the EBA Regulation¹⁵ and attributes powers to EBA to assist competent authorities to reach an agreement also on its own initiative.

¹² Article 41(2) and 41(3) of the EBA Regulation, as clarified by recital (15) of Regulation 1022/2013 (which amended the EBA Regulation).

¹³ National Resolution Authorities can attend only BoS meetings when they accompany representatives of national administrations.

¹⁴ COM(2017)536 final.

¹⁵ Article 1(9) of the Commission proposal.

3. FISCAL SAFEGUARDS

Article 13(9) BRRD stipulates that EBA may exercise its binding mediation powers only if none of the resolution authorities concerned assesses that the subject matter under disagreement may in any way impinge on its Member States' fiscal responsibilities.

The fiscal safeguard contained in this provision may lead to discrepancies with the corresponding safeguard in Article 38 of the EBA Regulation.

In particular, under Article 13(9) it can be argued that that resolution authorities are conferred the power to *prevent* mediation by EBA by raising that the mediation decision may impinge on a MS' fiscal responsibility and to do so solely on the basis of their own assessment.

Article 38 of the EBA Regulation is more specific. The provision requires EBA to ensure that no mediation decision impinges on the fiscal responsibilities of Member States and provides that Member States may notify, *ex-post* (i.e. after adoption of the decision) their concerns about a mediation decision impinging on their fiscal responsibilities. Also, the notification must be made to both EBA and the Commission, within a certain period after the notification of the decision to the competent authority.

CONCLUSION

Mediation is a key component of the resolution process and can be extremely useful to ensure that decisions with respect to complex issues regarding groups of entities, such as the adoption of a resolution plan, addressing impediments to resolution and the definition of MREL levels, are taken in the form of joint decisions. This is in line with the underlying principles of the BRRD and can facilitate the resolution process.

The Commission proposal on the ESAs review addresses some of the issues highlighted above.

For the remaining issues, and depending on the outcome of the legislative procedure on the Commission proposals on the ESAs review, the Commission will consider them as appropriate and based on further experience gathered in the general review of the BRRD which the Commission is mandated to carry out.¹⁶

¹⁶ Article 129 BRRD.