Public hearing with Elke König, Chair of the Single Resolution Board

ECON on 22 July 2019

This note is prepared in view of a public hearing with the Chair of the Single Resolution Board (SRB), Elke König who will inter alia present the SRB 2018 Annual Report.

The briefing addresses (i) the role and tasks of the SRB, (ii) the SRB 2018 Annual Report, (iii) the SRB policy in relation to the targets on minimum requirements of own funds and eligible liabilities (MREL), (iv) some follow-up to an individual resolution case (Banco Popular), and (v) recent Banking Union developments including resolution financing and EDIS further to the June 2019 report of Eurogroups's High level working group.

On a more prospective note, this briefing also presents (vi) an external paper on "Lessons from the United States for banking resolution in the Banking Union" which advocates harmonisation and centralisation of bank insolvency proceedings in the Banking Union; (vii) possible limitations of European Parliament's legislative power in the area of resolution, arising from the draft ESM Treaty; and (viii) other policy issues, including recent publications from the SRB and Commission.

1. Role and tasks of the SRB

The Single Resolution Board (SRB) is a European agency created by the Single Resolution Mechanism Regulation (SRMR) as part of the Banking Union. The SRB was set up to deal with banks in difficulties through resolution, an administrative procedure aiming at maintaining the critical functions of a bank, disposing of assets and responsibilities that can no longer be maintained, with minimal costs to taxpayers and the real economy. The European framework for bank resolution is set out in the Banking Recovery and Resolution Directive (BRRD) and in the SRMR.

The SRB's executive management is composed of a Chair, a Vice Chair, and four Board members. The Chair is entrusted with all aspects of day-to-day administration and staff matters.

The **main tasks** of the SRB are related to planning and prevention, early intervention measures, resolution and coordination with national resolution authorities both within the EU and with third countries. The SRB also administers the Single Resolution Fund (SRF), a financing instrument for the resolution of ailing banks, financed by levies collected from all Banking Union credit institutions. The SRB is directly responsible for the resolution of the 127 banks directly supervised by the ECB and banks that qualify as relevant cross border groups. This list is regularly updated.

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The SRB is **accountable** to the European Parliament, the Commission and the Council. Its Chair **presents in public the annual report** to the Council and Parliament and a non-confidential version is published on its own website. At the request of the European Parliament, the Chair shall participate in **hearings** on the performance of the resolution tasks by the SRB. The practical modalities of the accountability arrangements are set out in an Interinstitutional agreement.

For **further information** on the SRB, please see EGOV paper "*Single Resolution Mechanism: main features, oversight and* accountability" and EGOV paper "*Single Resolution Board (SRB) Accountability arrangements and legal base for hearings in the European Parliament*".

2. SRB 2018 Annual Report

On 1 July 2019, the SRB published its 2018 Annual Report, which outlines its main achievements for the priorities it had set itself in the 2018 Work Programme.

In terms of resolution planning, after the European Court of Auditors (ECA) recommended in its 2017 Special report on the SRB that the SRB shall *"determine a date for the completion of a fully compliant resolution plan for each bank under its remit"*. The SRB responded that it aims to *"have fully compliant resolution plans for all its banks by 2020."*

As the ECA pointed out[1], for **resolution plans to be fully compliant** with the legal requirements, the SRB needs to provide a comprehensive **assessment on each bank's resolvability**, including as to whether substantive impediments to resolvability exist and how those impediments can be removed. A legally binding mediation decision[2] taken in June 2018 by the European Banking Authority against the SRB was also motivated by the fact that the disputed resolution plans did not determine whether material impediments to resolvability were an issue. In that respect, it must be noted that the SRB' 2018 Work Programme sets an unambitious target. In 2018, the SRB only aimed to carry out a first identification of substantive impediments to resolution.

The 2018 Annual Report is **unclear as to what has actually been achieved regarding the assessment of impediments to resolvability.** The Key Performance Indicators set out in such report do not explain, for example, in how many resolution plans the SRB has made clear assessments of the banks' resolvability. The paragraph on resolution planning (p. 9) only mentions that the task has not yet been completed: "*Regarding resolution planning [...] certain challenges such as data quality at firm level, the complexity of operationalising instruments through playbooks and further progress on the removal of impediments to resolvability will have to be addressed further in 2019.*"

In the foreword of the 2018 Annual Report, the Chair notably puts the onus on banks to make progress on resolvability (p. 5): "*After all, it is first and foremost up to banks to address concerns about resolvability and to make themselves resolvable, as they know their business structure and how to address possible impediments best.*"

According to the 2018 Work Programme, the SRB had the *"objective of drafting resolution plans for 99% of the groups falling under its responsibility"* by end 2018. According to our calculation, however,

1 The ECA's report reads (p. 27): *"In none of the sampled documents did the SRB conclude categorically whether the bank could actually be resolved. While some chapters contained a brief summary of the assessment of resolvability, in most of them the summary was limited to a few of the identified potential impediments."*

2 The EBA binding mediation decision in June 2018 to settle a disagreement between the SRB and the National Bank of Romania concerned the adoption of resolution plans for two Romanian banking groups. The EBA took the view that those resolution plans did not satisfy the requirements of the BBRD, according to which resolution authorities have to determine whether impediments to resolvability are 'material or substantive', and not just 'potential', as contemplated by the SRB. The SRB, however, did not concur with the EBA that "material impediments to the resolvability' should have been included in the 2017 resolution planning cycle as the resolution plan of the Groups defined a list of 'potential impediments".

by the end of the 2018 planning cycle the SRB fell short of its target, with only **86.5% of banks under its remit having resolution plans** (109 out of 126)[3].

In terms of operationalising the Single Resolution Fund (SRF), 7.5bn euros was collected by the SRB as *ex ante* contributions to the fund, for a total of 24.9bn euros. More recently, on 17 July 2019, the SRB announced that the SRF received 7.8bn euros from 3186 institutions for 2019, bringing the **total amount in the SRF to just under 33bn euros**.

Lastly, in developing its organisational structure, the SRB reinforced its ICT framework and actively recruited staff, with the number of staff increasing by 24% vis-a-vis 2017. However, with 315 temporary agents and 19 seconded national experts, this falls short of the SRB's targets for 2018 (350 temporary agents and 35 national experts respectively) (see 2018 Annual Report).

3. Implementation of MREL Requirements

The minimum requirements for own funds and eligible liabilities **(MREL) is a key component of resolution planning** as foreseen in the BRRD. It requires banks to hold a minimum amount of debt instruments that are easily bail-inable. It provides a buffer that would facilitate the resolvability of banks (depending on their resolution strategy).

Latest policy developments

The SRB is currently implementing the "**Banking Package"** adopted by the co-legislator in spring 2019[4]. For this purpose, the SRB published in June 2019 an update of its MREL policy that takes into account the latest regulatory developments. While most provisions of the Banking Package would only be implemented as of 1st January 2021, once the BRRD is transposed by Member States, some have been introduced by the Capital Requirements Regulation (CRR). CRR is directly applicable as of 27 June 2019. This includes the Total Loss Absorbency Capacity (TLAC) requirements for Global SIFIs[5] and the permission regime for redemption of eligible liabilities[6].

The SRB plans to implement its final BRRD2 MREL policy for all institutions in the resolution planning cycle starting in 2020. These MREL decisions are expected to be communicated to banks at the beginning of 2021. The interim binding MREL is expected to be complied with in 2022 in view of the MREL target deadline of 2024. In that respect, the 2018 Annual Report mentions that "*with the ongoing legislative changes brought by the Risk Reduction Package and the entry into a steady state for resolution planning, the SRB envisages realigning the planning cycles for all types of banks from 2020 onwards with a view to uniformly applying the new legislation*", but does not provide further guidance.

[3] The wording in the 2018 Work Programme leaves room for interpretation. For example, the "Detailed overview of resolution planning activity by Member State", for example, lists resolution plans that are "*to be adopted by the end of the 2018 planning cycle*" (our emphasis), leaving the reader in doubt whether they have actually been adopted in 2018 (see table 1 on p. 12).

[4] In relation to resolution, the Banking package has amended the BRRD/SRMR and the CRR as follows: (i) TLAC requirements have been introduced in the CRR, (ii) other changes introduced in the CRR includes a permission regime for redemption of eligible liabilities, contractual recognition clauses for own funds governed by third country law and disclosure of TLAC capacity, (iii) BRRD has been amended in particular regarding the MREL calibration, subordination rules, internal MREL and moratorium powers.

[5] TLAC refers to the minimum level of subordinated debt which has been set respectively at 16% of TREA (Total Risk Exposure Amount) and 6% of LREM (Leverage Ratio Exposure Amount) in June 2019 and 18%of TREA and 6,75% LREM in January 2022.

[6] All institutions are required to seek approval from the SRB to call, redeem, repay or repurchase eligible liabilities instruments before they reach their contractual maturity.

MREL: where do we stand?

According to the 2018 Annual Report, "*under the current cycle MREL targets at consolidated level will cover most banks under the SRB's remit: 93 binding decisions at consolidated level and 249 binding decisions at individual level are expected to be adopted by the end of the planning cycle*".

Banks are building-up their MREL capacity. In the June 2019 monitoring report on risk reduction indicators, the SRB pointed to appropriate progress: "*overall, banks have made progress in building up the MREL capacity in order to reach the steady-state requirement as set by the SRB. The total MREL still needed to reach the level of that requirement is [...] 7,3% of the total requirements.*" Data displayed in that report show nevertheless that *"**MREL shortfalls remain concentrated** in a few Member States with a shortfall higher than 5% of the total risk exposure amount (TREA), while the average shortfall is equal to 1.8% of the TREA"*. According to the SRB, the *"subordinated component of the MREL shortfalls is limited to and accounts for, on average, 0.2% of the TREA. In absolute amounts, the total shortfall equals €125.1 billion and is concentrated in five MSs with an absolute shortfall higher than €10 billion."*

According to that report, three Global SIFIs (out of 8 in the Banking Union) experience MREL shortfalls. Information on individual banks is not disclosed, but shortfalls are on an aggregated basis particularly evident in five Member States (Spain, France, Greece, Italy and the Netherlands). Subordinated debt instruments (that are required to meet the new TLAC standards of the CRR) are particularly missing in France, Greece and the Netherlands.

4. A resolution case

Banco Popular

Banco Popular Español S.A. (Banco Popular or BPE) was the first (and only, at the moment) institution resolved by the SRB, in June 2017, following a decision by the ECB that the bank was "failing or likely to fail" due to its heavily deteriorated liquidity conditions. On 7 June, the SRB adopted a resolution decision, transferring all shares and capital instruments of Banco Popular to Banco Santander S.A (Santander) for one euro.

On the basis of valuation carried out in line with Article 20 SRMR, the SRB wrote down, prior to the transfer of the shares to the purchaser, the ordinary shares and additional tier one instruments and the banks, and converted tier 2 instruments into shares which were subsequently transferred to the purchaser. The resolution decision was addressed to the Spanish resolution authority (the FROB) for implementation.

The decisions relating to the Popular resolution are available on the SRB website and have been reviewed over time following requests for additional transparency by the SRB Appeal Board[7].

There remains **strong opposition to the SRB decision**, and in fact both creditors and bondholders affected by the decision complained to the SRB Appeal Panel and the Court of Justice[8]. On 6 August 2018, the SRB published a non-confidential version of the BPE "Valuation 3 report", as well as its own preparatory act, i.e. the SRB Notice, in which it takes a preliminary decision not to compensate

[7] On 2 February 2018, the SRB published what it called an 'extensive' non-confidential version of the Resolution Decision, the Valuation Reports and the 2016 Resolution Plan, as well as two additional documents related to the resolution process (Marketing Decision and Sale Process Letter). At that time, the SRB pointed out that certain parts of the documents remained confidential, namely those whose disclosure could (a) undermine the protection of public interests as regards the financial, monetary or economic policy, or (b) undermine commercial interests of BPE and/or its purchaser, or (c) affect the on-going No-Creditor-Worse-Off valuation process. On 31 October 2018, the SRB published updated non-confidential versions of the Resolution Decision, Valuation 1 Report, Valuation 2 Report, Appendices and Addendum, and the 2016 Resolution Plan.

[8] See point 5.4.1 of the SRB 2018 Annual Report for an overview of pending litigation.

former shareholders and creditors of BPE based on the conclusions of the report. The Valuation 3 report, drafted by the audit firm Deloitte that was appointed as independent valuer, aims to establish whether shareholders and creditors affected by the SRB's decision to resolve BPE would have received a better treatment if the bank had been wound up under normal insolvency proceedings. On 2 June, following questions on the Valuation 3 Report as part of the "right to be heard" procedure set out by the SRB, the Board informed creditors and shareholders that it is still **assessing their complaints** and will report in the autumn.

For **further details on Popular resolution**, see previous EGOV briefing.

Other cases

For further information on **individual cases that are not resolution cases** but have deserved special attention in view of banks' financial situation:

- Banca Carige, please see a previous EGOV briefing.
- NordLB case, please see a previous EGOV briefing.

5. Completing the Banking Union

In her political guidelines for the next European Commission 2019-2014, the President-elect of the European Commission, Ursula von der Leyen, committed to "*focus on completing the Banking Union*", adding *"we need a European Deposit Insurance Scheme. […] I will also put forward measures for a robust bank resolution and insolvency framework"* (see Part 6 of this Briefing).

EDIS

The European Deposit Insurance Scheme (EDIS) is still the third missing pillar of the Banking Union. The **Eurogroup** has been mandated by the December 2018 Euro-Summit to start political negotiations, but **has not reached any conclusions yet**. The 2018 EP Banking Union report "*underline[d] that the process for establishing EDIS should continue for the completion of the Banking Union*".

The June 2019 report of the Chair of Eurogroup's High Level Working Group (HLWG) on EDIS outlined an "*illustrative transitional path to the steady state Banking Union*" consisting of four pillars. These pillars are the following: (i) EDIS; (ii) Framework for bank supervision, resolution and insolvency, including resolution financing arrangements and further harmonisation of insolvency law; (iii) sovereign exposures and financial stability implications and (iv) enhancing market integration by means of enhanced supervisory arrangements to defuse home/host issues. As the Chair of the HLWG put it, "*progress will be needed in all areas and therefore a comprehensive approach building on a package of measures is needed*".

For **further background information**, see EGOV Briefing: "Banking Union: what next" (July 2019).

Discussion at the **Eurogroup** has come up against **contrasted views** among Member States both in terms of design and objective and in terms of conditions.

- In terms of design and objectives, as summarised by the June 2019 report of the Chair of the HLWG on EDIS, "*As an initial stage, most members consider that EDIS should include repayable liquidity support. While some consider this to be the end-stage of EDIS, for many it is only a transitional phase to a fully-fledged EDIS. Such an EDIS could provide for partial loss coverage or, in its most ambitious form, full loss sharing*".
- In terms of conditions, the report of the Chair of the HLWG on EDIS notes that "*the gradual implementation of EDIS should be linked to the progress made on the other parts of the*

architecture of the Banking Union and to progress made in addressing legacy risks. A number of members are of the view that further risk reduction in the European banking sector based on certain benchmarks or targets and an Asset Quality Review (AQR) or comprehensive assessment, is needed before moving forward with (parts of) EDIS. For some members, specific quantitative targets should be met, while others would prefer qualitative assessments. Some members consider that the progress already made should allow the implementation of a first liquidity".

The European Parliament has not come to an agreement yet. During the last EP term, the rapporteur draft report (MEP E. De Lange, EPP) has not been voted through.

Liquidity facility to finance banks post resolution

The **Eurogroup** has been mandated to design **new arrangements to provide liquidity** to banks post resolution. Post resolution, banks may be well capitalised but are likely to lack appropriate collateral to resort to central bank's financing or interbank lending. As explained by the ESM, the objective is to provide sufficient assurance to the ECB and national central banks on the quality of collateral. In the absence of a Euro area treasury that would provide appropriate guarantees (as this is the case in the US or in the UK), alternative solutions are being thought through.

Absent adequate resolution financing arrangements, the open-bank **bail-in tool may prove difficult to implement**. As the SSM Chair, Andrea Enria, put it at his hearing on 20 November 2018: *"the point on liquidity in resolution [...] shows how difficult this is [...] that [...] during the weekend you bail-in the creditors and then you put the bank back in the market on the Monday*". That issue is particularly relevant as the chosen resolution tool is the open bank bail-in in the vast majority of plans (as noted in the ECA report on the SRB). In an open-bail-in scenario, the bank would ideally close on a Friday and open again as normal the following Monday, bail-in resolution action having been taken over the weekend. That resolution strategy raises the issue as to whether the bank - that will reopen with an adequate level of capital - will have access to market funding or would have enough collateral to access both normal monetary operation at the ECB or national central banks' Emergency Liquidity Assistance (ELA).

Solutions include the following:

- A guarantee provided by Member States. Guarantee provided by Member States have been suggested in a paper commissioned by the ECON Committee as a temporary solution pending the completion of the Banking Union[9]. This solution has been discarded by the Chair of the SRB, as going against the very principle of the Banking Union. It would also further reinforce the sovereigns-banks loop that the Banking Union was meant to break;
- A guarantee provided by the Single Resolution Fund. Under this proposal discussed at the Eurogroup, the SRF would issue bonds to be used as collateral for repos. The SRB would, according to politico, issue and hold long-term bonds, instead of selling them to investors. The SRB could then lend bonds to a troubled bank in need of collateral. The banking industry (i.e. the SRF) would ultimately bear the risk of a default. As an alternative, the ECB would buy bonds issued by the SRF. That solution would require changes to the ECB collateral policy together with the definition of appropriate haircuts, where appropriate;

[9] See Maria Demertzis, Inês Gonçalves Raposo, Pia Hüttl, Guntram Wolff (Bruegel). The authors suggest that the involvement of national treasuries along with an ESM guarantee would be appropriate as long as the Banking Union remains incomplete. Once banking union is completed, the said guarantee should be provided a 'euro-area fiscal body with recourse to the SRF.

- A guarantee provided by the ESM. That solution would, according to the ESM, require a change to the ESM treaty. The draft ESM Treaty as agreed by the June 2019 Eurogroup does not feature such mechanism.

The Eurogroup has not reached an agreement yet and is expected to continue its discussion in the second half of 2019. According to the Letter of the President of the Eurogroup to the President of the European Council ahead of the June Euro-Summit, discussion would focus on "*the most consensual options for the refinement of current practices and on the proposals on SRB guarantees to the Eurosystem as well as the capacity of the SRB to provide collateral to banks in resolution*".

Absent guarantees provided by ESM**, the question as to whether SRB guarantees - based on ex ante and ex post contributions to be levied from banks - would provide sufficient collateral to finance banks post resolution, remains**. On the other hand, the very existence of liquidity arrangements would provide comfort to interbank markets that would be more likely to provide liquidity post resolution.

For **further background information**, see EGOV Briefing "*Towards new arrangements to provide liquidity to banks in resolution*? - July 2019".

6. Insolvency law in the EU: lessons learnt from the US experience

Further integrating the EU crisis management framework

The Eurogroup is considering ways to improve the resolution framework. As reported by the Chair of the High Level Working Group HLWG on EDIS, "*Broad agreement exists on the need for a **harmonisation** of necessary parts **of bank insolvency law**, including with regard to cross-border groups and the ranking of creditors, while the toolbox for resolution might need to be expanded.*"

Further harmonisation of bank insolvency law in the EU has been advocated by the ECB, the SRB, the IMF and other international organisations, coupled, where appropriate, with new institutional developments:

- The Chair of the SRB, Elke König put it, *"the ultimate goal [...] must be to have in place an EU liquidation regime alongside an EU resolution regime*". In a hearing at the ECON committee, the Chair of the SRB portrayed that FDIC model as a way to wind up small and medium-size institutions while protecting insured depositors;
- In his introductory remarks at the European Parliamentary Week in February 2019, the Chair of the Single Supervisory Mechanism (SSM) Andrea Enria advocated "*a common framework for bank liquidation, enabling a smooth managed exit of defaulted banks from the market, as is the case in the United States, for instance*";
- As part of its July 2018 assessment of the Euro-Area, the IMF recommended to entrust the SRB with administrative liquidation powers, along the lines of the US Federal Deposit Insurance Corporation (FDIC).

In the same vein, the Commission announced in its April 2019 report on the BRRD review that it will particularly engage in a comprehensive discussion of a further possible harmonisation of insolvency law, "*tak[ing] into account the interaction with policy developments in relation to deposit insurance, including the work of the High Level Group established by the Eurogroup, and the review of the Deposit Guarantee Scheme Directive*". The Commission plans to establish a working group involving Member States, relevant stakeholders and representative of the European Parliament to further discuss its study on the differences between bank insolvency laws and on their potential harmonisation (to be published in autumn).[10]

Further **harmonisation of insolvency law raises the issue of its interaction with EDIS, and the appropriate sequencing of harmonised insolvency rules**, where appropriate. In that respect, the Chair of the SRB suggested an incremental approach "*Proposals for harmonisation across the board will inevitably be fraught with political perils and resistance. An incremental approach – such as the one exemplified by the recent harmonisation of the ranking of unsecured debt instruments in insolvency – may be a more palatable solution. The ultimate goal, however, must be to have in place an EU liquidation regime alongside an EU resolution regime*".

For **further background information**, see EGOV Briefing "Further harmonising insolvency law from a Bank resolution perspective - April 2018" and EGOV Briefing "Liquidation of Banks: towards a FDIC for the Banking Union? - February 2019".

"An effective Regime for non-viable banks: US experience and considerations for EU reform" by A. Gelpern and N. Véron

In this paper requested by the ECON committee, Gelpern and Véron argue that EU policy makers can draw valuable insights from the US regime for non-viable banks, with the US experience **giving support to arguments in favour of harmonisation and centralisation of bank insolvency proceedings and deposit insurance in the Banking Union.**

The paper first looks at the features and history of the US regime, finding that it *"has developed an elaborate system of checks and balances to help minimize public costs and moral hazard, while maintaining predictability and credibility for deposit protection."* Turning then to the EU, Gelpern and Véron look at both the features and application of the regime of non-viable banks. They find that gaps and distortions exist, making *"the EU resolution framework much less central than heralded"* and thus less conducive to market discipline, as well as perpetuating the sovereigns-bank loop.

The paper concludes by looking at possible reform options for the EU. The authors argue that *"[t]he shortcomings of the EU status quo are most compellingly addressed through centralisation and empowerment of the SRB as the decision-making hub for a unitary regime that encompasses what is currently covered in EU law by resolution, bank insolvency proceedings, and deposit insurance."* In doing so, deposit protection, creditor rights, controlling moral hazard, predictability and operational effectiveness, transparency, accountability, and financial stability would all be enhanced. In terms of breaking the sovereigns-bank vicious cycle, however, further reforms aimed at completing the Banking Union are likely to be required.

7. Potential limitations to EP's co-decision role for possible forthcoming changes to the resolution framework

The draft ESM Treaty as agreed by the June 2019 Eurogroup makes the backstop to the Single Resolution Fund "contingent upon compliance with the condition of permanence of the legal framework for bank resolution". In other words, should the resolution framework (e.g. MREL or bail-in as agreed upon in the Banking Package) be changed or being re-negotiated, the backstop facility

[10] This study is being conducted in the context of a European Parliament Pilot Project on the Banking Union (Creating a true Banking Union - Research on differences in bank related laws and regulations in Eurozone countries and the need to harmonise them in a Banking Union).

could lapse.[11] That safeguard clause has been introduced at the request of some Member States to ensure that risk sharing be only effective after creditors have been sufficiently bailed in.

In its June 2019 communication on EMU, the Commission voiced concerns about that safeguard clause. According to the Commission, "*the Treaty establishing the European Stability Mechanism must not create obstacles to future amendments of EU legislation, which would give rise to fundamental problems affecting the autonomy of the EU legal order. The EU's banking legislation must remain open to further developments in accordance with the Community method to adjust to changing market circumstances and complete the Banking Union*". **The role and room of manoeuvre of the EP as co-legislator would be affected by this draft ESM Treaty.**

On the other hand, the backstop to the SRF is an ESM instrument that does not feature in the BRRD and may therefore be seen as 'ancillary' to the EU legal order. In addition, where the permanence of the legal framework is no longer ensured, the backstop facility is not automatically suspended but "a comprehensive review will be initiated and a decision by the Board of Governors shall be required to continue the backstop facility" in accordance with Article 18A(8) of the draft ESM Treaty.

That safeguard clause is broad in scope and include "*principles and rules [that] are relevant for preserving the financial means of the Single Resolution Fund*". This means that, for example, changing the 8% bail-in rules or the level of subordinated debt that banks shall hold in accordance with BRRD would no longer be possible if the co-legislator want to keep at the same time and with certainty the ESM backstop to the SRF. It must be noted that changes to the resolution framework have been advocated for by the IMF in its June 2018 FSAP review of the euro area. The IMF suggested introducing a "financial stability exemption" to deal with systemic crisis in a more "flexible" way. This would mean departing from the 8% bail-in requirements for accessing the SRF and public funds, under "strict governance arrangements" as suggested by the IMF.

8. Other policy issues

Disclosure framework

Decisions taken by the SRB, namely on setting MREL levels, on failing or likely to fail assessments or on resolution plans[12], are market sensitive and may affect, if not properly calibrated or explained, the public standing of the institutions or even lead to bank runs. Nevertheless, information is **important for investors** to adequately assess the institution and, in the case of MREL instruments, may facilitate disclosure around their issuance[13].

The then-Chair of the EBA, Andrea Enria, commented that the SRB should disclose **which banks would be bailed in rather** than wound up in the event of their failure, as well as the projected level of bail-in capital they would be required to hold. This proposal would lead to a significant departure from the existing BRRD framework which does not make any distinction between banks

[11] Likewise, the Intergovernmental agreement on the transfer and mutualisation of contributions to the Single Resolution Fund agreed in 2014 makes it "contingent upon the permanence" of the SRM and BRRD bail-in requirements.

[12] In Case 52/2017, concerning Banco Popular, the SRB Appeal Panel requested disclosure of the resolution plan of Banco Popular arguing that the resolution had already taken place and therefore the fact that the Single Resolution Mechanism Regulation did not foresaw publication should not be considered an impediment.

[13] Notably, the Financial Stability Board notes in a consultation paper issued in June 2019 that "*Public disclosures of information on resolution planning and resolvability of a firm can help investors in making informed decisions regarding the risks they may expect to bear in resolution. The focus of this discussion paper is on ex-ante ("peace time") disclosures on resolution planning and resolvability. Such disclosures should help strengthen market discipline and public accountability and additional incentives for firms to remove any remaining barriers to resolvability. Additionally, ex-ante disclosures may clarify expectations and strengthen market confidence in the resolution actions of authorities.*"

that are all potentially subject to all resolution tools. Elke König is said to be "neutral" about disclosing MREL targets and "not fiercely against it".

Most large banks that come under the SRB are listed companies, required under the Transparency Directive and market abuse regime (MAR) to ensure proper disclosure of information necessary for investors to assess their financial standing[14].

The Banking Package amends BRRD and CRR to impose additional disclosure of TLAC and MREL, namely in what concerns composition of own funds and eligible liabilities, their maturity and main features, the ranking of eligible liabilities in the creditor hierarchy and the total amount of liabilities excluded from TLAC.

Notwithstanding, **none of the above requirements deals with disclosure of resolution plans**. Therefore, markets are still unaware of resolution scenarios envisaged for a given institution. On the contrary, in the United States, institutions above a certain threshold[15] disclose parts of their resolution plans. The Financial Stability Board (FSB) has also recently issued a discussion paper focusing on general and firm-specific disclosures on resolution planning and resolvability. The FSB is notably seeking views on which elements of resolution planning and preparedness further disclosure would enhance credibility of resolution.

Additionally, the SRB has been requested in the past to provide additional clarity in its decisions. In particular, the decision on resolving Banco Popular has been heavily contested and the SRB Appeal Panel issued decisions forcing the SRB to disclose (or to provide to the appellant[16]) additional information[17], namely, by reducing the redactions made in previously disclosed documents. The Appeal Board decisions may have an impact on future SRB decisions and, as such, may alter the disclosure regime the SRB is subject to.

The SRB preparedness for Brexit

The SRB has been attentive to the impact of UK leaving the European Union on banks' resolvability. The Chair of the SRB recently provided comfort ("*Preparations have been made, so the situation appears manageable*") and **toned down risks to financial stability derived from Brexit** ("*There may be volatility but given the level of preparedness there should be no imminent risk to financial stability*").

The SRB previously noted that its main issue is the size of outstanding UK issuances and of risks streaming of UK courts no longer recognising resolution actions of EU authorities such as bail-in. Article 55 of the Banking Recovery and Resolution Directive, recently amended through the

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14 ESMA has already focused on the issue by means of a Q & A on MAR. ESMA concludes that MAR disclosure obligations may mandate banks to disclose Pillar II and MREL related decisions and recalls banks will have to assess on a case by case basis and bearing in mind the possible exclusions (namely for financial stability concerns) whether they are obliged to disclose the information they are made aware of.

15 The relevant US law requires bank holding companies with total consolidated assets of $50 billion or more and nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve periodically submit resolution plans to the Federal Reserve and the Federal Deposit Insurance Corporation. A public section of such plans is then disclosed. This disclosure covers, namely, the "US" part of operation of European institutions (see, for example, Santander December 2015). The relevant US agencies also comment on resolution planning (see, as an example, the press release issued December 2018 covering also European institutions).

16 In Case 4/2019, decision of 11 April 2019, the Appeal Panel remit to the SRB its decision that the appellant had the right to obtain information on the date and time the decision to resolve Popular was taken.

17 See, in particular, the Appeal Panel decision in Case 52/2017 of 19 June 2018 (with some others following on it, such as the decision of 29 April 2019, Case 5/2019, and the decision of 19 June 2019, case 18/2018, where the Appeal Panel assessed the Board compliance with its previous decision of 19 June 2018 and required disclosure of additional information regarding Valuation Report 1 and the resolution plan - see paragraph 37 of such decision). Following the Appeal Panel decision in case 52/2017, the SRB published on 31 October 2018 revised versions of a number of documents. The Valuation report 1 available in the SRB website has also been updated in 27 June 2019, presumably following the Appeal Panel decision of 19 June 2019.

Banking Package[18], might mitigate such concerns[19]. In the foreword to the SRB 2019 Work Programme, E. König mentions: "*Existing issuances should meet eligibility, if they contain relevant contractual clauses, as is the case for any other third country issuance. The SRB could address potential shortfalls by granting bank-specific transition periods, in line with previous practices*." It does not seem that the SRB reported how material the **potential ineligibility of liabilities issued under UK law** would be.

In its 2019 work programme, the SRB states that Brexit will possibly increase by ten the number of institutions under SRB remit (due to relocation).

Public Interest Assessment: SRB approach

SRB published in July its approach to "**public interest assessment**" (PIA). PIA is a pre-condition for launching resolution: a bank can only be resolved (instead of liquidated in line with national procedures) if there is a "public interest" in maintaining its critical functions or, put it differently, if liquidation would lead to financial instability. The public interest test is necessary insofar resolution will affect rights of third parties (namely through bail in).

PIA is performed both when preparing resolution plans and whenever a resolution action is envisaged. When assessing PIA, SRB suggests[20] focusing on (a) assessing whether resolution and liquidation put the resolution objectives at risk, (b) assessing the expected effects of a chosen resolution strategy and comparing such effects with those of a liquidation, (c) assessing whether a resolution action is *necessary* and *proportionate*, (d) assessing potential risks to financial stability.

Pending nomination procedures for the SRB

The European Parliament is strongly involved in the nomination procedure for the members of the SRB. The Chair, the Vice-Chair and the members of the Board not representing national resolution authorities are appointed on the basis of merit, skills, knowledge of banking and financial matters, and of experience relevant to financial supervision, regulation as well as bank resolution and are chosen on the basis of an open selection procedure respecting the principles of gender balance, experience and qualification. The Parliament is asked to approve the candidates following a Commission proposal. Council then adopts an implementing decision by qualified majority appointing the nominees.

The mandate of three current members of the SRB will end in December 2019 (Timo Löyttyniemi, Antonio Carrascosa and Dominique Laboureix). Hearings in the competent Committee of the EP with the possible candidates are being planned.

Commission's report on the review of the BRRD

As requested by BRRD, the Commission adopted in April 2019 a report on the application and review of the BRRD. While the Commission concludes that "*it is premature to design and adopt legislative proposals at this stage*" further to the adoption of the Banking Package, the Commission plans to *"engage in a comprehensive discussion"* of issues identified in that report in the context of a working group involving Member States, relevant stakeholder and representatives of the EP in autumn. This working group is likely to feed into the legislative agenda of the next Commission. Issues under review include the following:

[18] Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

[19] The amendments to the provision aim at ensuring a more proportionate application insofar the Commission realised it had had negative impacts. In any case, the provision will require transposition to Member States' legislations.

[20] SRB approach is open to further revisions and may not be considered definitive, as any public interest assessment is time and institution' bound.

- **"Precautionary recapitalisation"**. Precautionary recapitalisation has been used in many instance over the past years (National Bank of Greece, Piraeus Bank, Banca Monte dei Paschi di Siena). The Italian government has planned a precautionary recapitalisation for Carige, if needed (See above). Precautionary recapitalisation is limited to 'solvent bank' with respect to 'losses' that the bank has incurred. The Commission emphasises in its report the need for further clarification of the condition and procedure governing precautionary recapitalisation (i.e. meaning of 'solvent bank', which authority needs to assess these 'losses';
- **Harmonisation of insolvency law**. Further to a request and budget provision made available by the EP for a Pilot Project on the Banking Union, the Commission launched a study on the potential harmonisation of insolvency law. The study would "*identify potential policy options for harmonisation, including the possible introduction of administrative liquidation proceedings in the EU*" (see above);
- Simplified obligations for smaller banks in keeping with the proportionality principle.

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