Parliamentary scrutiny of the SRB

Discretion in applying the resolution objectives and mechanisms for accountability to Parliament

The Single Resolution Board (SRB) possesses statutory, formal independence by law, and its decisions are guided by a set of objectives whose application requires interpretation and trade-offs. The resulting discretion is balanced by accountability to the EU Institutions, and in particular, to the European Parliament. To support parliamentary scrutiny of the SRB during the 10th parliamentary term, this briefing presents the provisions on accountability in the SRB’s founding legislation and analyses the objectives that the SRB has to pursue - and against which its actions can be judged.

The legislator has entrusted the SRB with a particular space for discretion. It is equipped with a range of far-reaching powers, called resolution tools, which it can apply in different combinations and to different extents, intervening in property rights and private contracts. Rather than clear guidance on when and how to act, or a single objective to pursue, the legislator has given the SRB a range of objectives to pursue (either by taking action - or by not acting and leaving banks to national insolvency proceedings).

Moreover, the legislator has ensured that the SRB can act independently in pursuing these objectives. While the SRB - in its own words - “works closely with the European Commission, the European Central Bank, the European Banking Authority and national authorities”, it can neither seek nor take instructions from anybody, not even from the legislator itself.

This combination of discretion and independence in decision-making is balanced by a requirement for accountability towards EU institutions and certain procedural safeguards. This briefing first describes these arrangements, before turning to a discussion of the individual resolution objectives, their interpretation and interaction. Some points may be of particular interest for parliamentary scrutiny and discussed in this briefing:

- We find that some trade-offs in resolution decisions can only be resolved through preparation in advance. For example, the SRB is required to avoid contagion and to maintain market discipline at the
same time. This can put the SRB into a difficult spot when deciding over debt bail-in, and public pressure to protect creditors can add to the difficulty.

- The SRB should not get into a position where it is **legally obliged to resolve a bank, but cannot** do so in a way that satisfies the resolution objectives. This can only be avoided by preparation; for instance, the funding structure of banks in good times needs to reflect the trade-off faced during resolution.

- However, **preparation - namely, decisions over resolution plans - is itself subject to trade-offs and discretion**. Resolution preparation is costly for banks, earmarking banks for resolution vs. liquidation involves the same discretion as resolution itself. There remains some uncertainty since any bank earmarked in good times for resolution or liquidation may have to be treated differently when it actually fails.

- It is noteworthy that the Commission, and for a part, the Council, take much of the ultimate responsibility for resolution decisions in the SRB’s remit. However, the responsibility for **decisions not to resolve a bank** and for **resolution planning decisions** rests with the SRB.

- Finally, **effective scrutiny requires transparency**, and ideally, publicly available information. We have to accept limits on transparency because of important confidentiality concerns, but further work seems desirable to understand if and where transparency could be enhanced.

### Accountability arrangements

Article 45 of the SRB’s founding regulation requires **accountability to the EU Institutions**. As regards scrutiny by the Parliament specifically, the arrangements are further detailed in an **interinstitutional agreement**. The accountability arrangements consist in a **public annual report** on the one hand, and, on the other, an **obligation to respond to questions** as follows:

- The chairperson has to appear for **public hearings in the competent committee**, upon request and at least once per year. In practice, during the 9th parliamentary term, such hearings took place three times per year in the ECON committee: in spring, summer and autumn, as summarised [here](#). 1

- The SRB is obliged to reply within five weeks to any **questions it receives from Parliament**. As a practical arrangement, it has been agreed that the SRB chairperson receives the questions via the chairperson of the ECON committee and answers in writing. Both the Parliament and the SRB publish the questions on their websites. 15 questions have been answered so far, the last one in April 2022.

- The SRB is also required to appear for **hearings in camera** on request, behind closed doors, with the ECON chair and vice-chairs only. There are no public records of such meetings since the interinstitutional agreement rules out making any records or press statements. More generally, the interinstitutional agreement imposes secrecy on all participants. In return, it also requires openness at the meeting from the SRB. The interinstitutional agreement also regulates the participation of staff from the SRB, Commission and ECB.

- Finally, the SRB is obliged to **cooperate in investigations** by the European Parliament. The power of the Parliament for investigations is provided by Article 226 TFEU and envisages that a special committee is set up to investigate alleged contraventions of Union law and maladministration by Union institutions or bodies. To date, there hasn’t been any such investigation regarding actions of the SRB.

As to the **annual report**, the interinstitutional agreement further details what it has to cover: for instance, the execution of the SRB’s tasks during the reporting period and how they have been shared with national institutions.

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1 For each hearing, the Economic Governance and EMU scrutiny support unit in DG IPOL prepares a **briefing for members** and members regularly request supporting expertise from the **Banking Union panel of academic experts**. A total of 25 papers was accordingly requested and prepared since July 2019.
authorities, the SRB’s administration and its budget. The latest example can be found here; it appears typically in June for the previous calendar year.

The Article on accountability also specifies further what the accountability to the Council entails, namely, similar obligations to respond to questions and to appear for hearings. The following Article 46 entails obligations for responding to national parliaments.

Information availability is an important element of accountability arrangements. We have discussed past resolution decisions in this briefing and in doing so, chiefly relied on the public versions of the SRB’s resolution decisions. Such public versions allow evaluating the main lines of reasoning followed by the SRB. However, a critical assessment of the SRB’s discretion is difficult since much information, and in particular, quantitative information, is omitted from the public version. Considering the discretion in applying the resolution objectives (see discussion further below), a critical assessment would require the availability of certain quantitative information, such as market shares, for example. Comparing different decisions, we note that varying degrees of information were made available, and find that the motivation for the different omissions (i.e. numbers or sentences blackened in the public decision) is not sufficiently explained. Such explanations in the individual instance might be useful for parliamentary scrutiny and might also prevent an eventual bias towards omitting information in cases where it is not strictly required for undisputable confidentiality reasons; more generally, while the legislator rightly imposes professional secrecy on the SRB, transparency towards Parliament and the public might benefit from clarifying the balance between public interest in transparency on the one hand and on the other hand, criteria as to when the failed bank, its acquirer or legal successor will have an overriding interest in confidentiality.

The possibility of hearings behind closed doors allows in principle for discussing also information that the SRB has not disclosed publicly. The restrictions regarding potential participants and the absence of any public records, however, make parliamentary follow-up to such hearings and public political discourse difficult.

The budgetary discharge procedure is an instrument that has allowed the parliament to successfully obtain improvements from several agencies. The discharge report has been used for formulating concrete demands in writing and to connect them with budgetary discharge. However, since the SRB is financed from banking industry contributions rather than from the EU budget, the parliament does not have the same role and leverage as regarding other agencies. The SRB is not subject to parliamentary discharge for its annual budget. That said, the annual Banking Union non-legislative report by the Parliament allows Members to formulate concrete demands to the SRB and the other institutions and bodies involved in the Banking Union. However, by contrast to the Commission and the European Central Bank, the SRB has so far not publicly responded to these reports.

Procedural safeguards

Article 18 of the SRB’s founding legislation defines the resolution procedure and imposes some institutional checks that can be seen as safeguards against the background of the wide discretion in resolution decisions;

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2 For background, the interinstitutional agreement provides: „Only the Chair of the Board and the Chair and the Vice-Chairs of Parliament’s competent committee may attend the special confidential meetings. [...] All participants in the special confidential meetings shall be subject to confidentiality requirements equivalent to those applying to the members of the Board and to its staff. No minutes shall be taken, nor any other recording made, of the special confidential meetings. No statement shall be made for the press or any other media. Each participant in the special confidential meetings shall sign each time a solemn declaration not to divulge the content of those discussions to any third party. “
however, these checks are applied by the Commission and the Council and envisage no role for the Parliament.

Concretely, the SRB does not immediately take a resolution decision itself. It adopts a so-called resolution scheme, which is the draft resolution decision, and forwards it to the Commission. Thereafter, the Commission has 12 hours to make a proposal to the Council: First, it can propose to reject the scheme because there is no “public interest” in pursuing it. If the Council agrees with the Commission that the resolution is not in the public interest, the bank must be “wound up in an orderly manner” under national law. Second, the Commission can propose to modify the amount of money from the Single Resolution Fund (SRF) to be used in the resolution. In both cases, the Commission proposals becomes binding if the Council adopts them by simple majority.

Furthermore, the Commission has 24 hours to reject a resolution scheme if it disagrees with discretionary elements therein other than the assessment whether it is in the public interest or not. If it does, the SRB must modify the scheme within 8 hours in line with the Commission’s reasoning. The same applies if the Council accepts the Commission proposal to modify the use of SRF money.

To sum up, when it comes to the decision to resolve the bank or not, the Commission’s possibility to reject the SRB’s resolution scheme depends on the Council’s agreement. The Council, by contrast, cannot act on its own, and the Parliament has no role at all. Notably, there is also an asymmetry in the Commission’s possibilities: it can intervene against a decision to resolve a bank, but it cannot intervene against a decision not to resolve a bank and to leave it to national insolvency procedures. This is not fully intuitive since either decision results from a discretionary application of the resolution objectives discussed in the following section, and either decision can hurt public interest. The instruments for the Commission to control the SRB’s discretion are tilted against resolution and limited by an overriding control by the Council.

By contrast, regarding other discretionary aspects of the resolution scheme, it is the Commission that ultimately takes responsibility for the application of the law. If it does not agree with the resolution scheme of the SRB, it can effectively impose the amendments it desires. Those other discretionary aspects concern how the resolution objectives are pursued by the use of resolution tools and are in practice closely related to the considerations underlying the public interest assessment, which is also driven by the interpretation and weighing of the resolution objectives. Only regarding the use of the SRF (which is in principle also a question of how the resolution objectives are pursued), the Council can reject the Commission’s desired amendments, but the Council cannot impose its own amendments. In a way, the legislator grants precedence to the SRB’s approach over the Commission’s alternative in this regard, unless the Council specifically prefers the Commission’s alternative.

Finally, there is a more confined power for the Commission to object when the SRB uses its discretion to not expose certain liabilities to losses. This power is more confined because the Commission can only intervene if the protection granted to such liabilities endangers “the integrity of the internal market” and if the SRB violates the conditions under which it may decide to protect certain liabilities. Accordingly, this provision aims at control of the legality of a quite specific aspect of the SRB’s decisions.

While none of these procedural safeguards envisages a role for the Parliament, it is nevertheless important to keep in mind the allocation of ultimate responsibility that results. Parliamentary scrutiny may have to look beyond the SRB accountability and also consider the responsibility of the institutions that vet its

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3 Public interest is given when the resolution scheme is necessary and proportionate to achieve the resolution objectives discussed in the following section. NB de lege lata, public interest is not given if the resolution objectives can be achieved to the same extent by “winding up of the entity under normal insolvency proceedings”; with the CMDI review, the Commission is proposing to prefer resolution over insolvency unless the latter can attain the resolution objectives better - which is unlikely to be ever the case as we discussed in this briefing.
decisions. In particular, for most decisions that concern how a bank is resolved, the Commission ultimately decides whether to go forward with the SRB’s scheme or to apply an amended scheme instead. Intriguingly, the SRB’s decision is more likely to take precedence regarding the more fundamental question of whether the bank is resolved. This is so because the Commission has either no possibility to intervene (for a negative public interest assessment) or because the Council can reject the Commission’s intervention (for a positive public interest assessment). In this context, one has to keep in mind that in case of a negative public interest assessment, national instances may still have the possibility to achieve similar outcomes to resolution, provided that the national insolvency laws allow for that possibility (as we have discussed in this briefing).

Since the legislator has vested the Commission with overriding - but, as discussed, limited - possibility to endorse and reject resolution schemes, an interest in also holding the Commission to account for its role may arise. The legislation does not entail a specific mechanism to this end. The public structured dialogues with the competent Commissioner theoretically provide an opportunity to hold the Commission to account for how it exercises control over the SRB. One may note in this context that the Parliament has recently introduced the possibility in its rules to activate a new format for ‘special scrutiny hearings’, to enable Parliament ‘to question one or more Commissioners, or any other relevant person, on an issue of major political importance’; see also the AFCO report of March 2024. The Council’s role in the resolution process is yet more limited than the Commission’s, but may eventually be decisive. Possibly, the fact that the Council has to provide reasons for its decisions may constitute an entry point for discussions between the institutions and the new ‘special scrutiny hearings’ might again provide a possible format in the future.

Applying the resolution Objectives

In an ideal world, the resolution objectives (see also here and here) would give the resolution authority clear instructions how to act in line with the legislators’ will. In practice, the resolution objectives involve a number of indeterminate legal concepts and their application requires making certain trade-offs (see Box: resolution objectives). Examples of indeterminate legal concepts are “critical” functions and “significant” adverse effects on financial stability. Examples of trade-offs are those between the objectives of protecting public funds and protecting depositors, but also between different sources of financial stability risks. The legislation expressly stipulates that all objectives are “of equal significance” and “shall be balanced, as appropriate”. We will discuss in the following sections how indeterminate legal concepts and trade-offs affect the application of the different resolution objectives.

Box: resolution objectives

- to ensure the continuity of critical functions;
- to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;
- to protect public funds by minimising reliance on extraordinary public financial support;
- to protect depositors covered by the Deposit Guarantee Scheme Directive (DGSD) and investors covered by the Investor Compensation Scheme Directive (ICSD);
- to protect client funds and client assets.

An indeterminate legal concept is a term used in laws, regulations, or other legal provisions whose exact meaning is not clearly defined. These terms require interpretation and concretization by courts or administrative authorities. The use of indeterminate legal concepts allows legislators to respond more flexibly to different situations and developments, as these terms are adaptable and can be specified over time through case law. At the same time, their application creates a certain degree of interpretative latitude.
Critical functions

An example of a critical function could be the bank’s lending business, either in its entirety or with regard to certain segments of borrowers. Should a bank get into trouble and cannot be resolved but need to be liquidated instead, (some of) its borrowers might lose access to credit. Existing loans would usually remain available until maturity, but might not be renewed thereafter, and lines of credit could be cancelled. Some borrowers will find it easy to get credit from elsewhere, others less so. Some may not find a new lender at all - at times for good reasons since the financial situation of some borrowers may well have contributed to the failing bank’s difficulties. In resolution, a write-down or conversion of the bank’s debt (restoring sufficient capital to support the loans) or the purchase of some or all of the lending business by another bank may ensure continuity of lending.

How large would the difficulties of borrowers have to be so that the classification of the bank’s lending as “critical” is justified? The resolution authority has to make a judgement about what level of hardship for borrowers is acceptable. The costs that borrowers incur following a bank closure are complex to assess and differ from one borrower to another, but they can - at least in principle - be estimated. They may depend on factors such as:

- the failing bank’s market share and its private knowledge about its borrowers, which other lenders would need to get access to before being able to step in,
- the local presence of other lenders,
- their expertise and interest in the relevant market segments and so forth.

Criticality may not be exclusively a question of the failing bank’s size if the bank is particularly strong in a given region, industry or other market segment and if some borrowers depend particularly much on its services. However, having a substantiated estimate of the cost of failure for borrowers is just one part of the puzzle: The estimate as such does not yet say whether one would consider the resulting costs as acceptable or unacceptably high - this is ultimately a question of preferences.

In an earlier briefing, we reviewed the practice of the SRB when making this assessment. We derived from the SRB’s practice that it takes market share as a proxy for borrowers’ costs, which may be so because a more in-depth assessment is too complex to perform in the time available when deciding over resolution. It does not, or at least not explicitly, go deeper in its assessment into the factors other than market share mentioned in the previous paragraph.

However, there is no indication in past resolution decisions as to what threshold of market share is making the function critical. Either such market share threshold is used internally while not publicly disclosed, or it is set based on an ad-hoc judgement in each case. From the perspective of political scrutiny, neither of those alternatives would be fully satisfying. As we discussed in that earlier briefing, a good illustration of the judgements involved is that, after the SRB considered the lending function of the Veneto banks to be “not critical”, national authorities stepped in to take quasi-resolution measures under national insolvency law because they considered that a credit crunch could hit local businesses.

Financial Stability

Resolution authorities are required to avoid “significant adverse effects on financial stability”. This has many facets, and to begin with, there are the two facets mentioned in the legislation itself. On the one hand, the actions of the resolution authorities should prevent contagion to other banks and the wider financial system. On the other hand, they should maintain market discipline - absent market discipline, the banking sector as a whole might start taking excessive risks. Notably, these two facets of protecting financial stability are on quite different levels. The former concerns the immediate impacts of a single bank failure, the latter
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concerns rather the longer term impact of the fall-out of that failure on the expectations and behaviour of market participants.

Turning to contagion to begin with, there are different channels to consider. A first channel of contagion are direct losses to counterparties that could potentially destabilise those counterparties and consequentially, the wider financial system. For a bank’s counterparties, resolution per se does not lead to more direct losses than liquidation. At the same time, effective resolution will inevitably entail imposing some losses on some creditors, while the resolution authority should impose those losses avoiding “significant” adverse effects on financial stability. Accordingly, the resolution authority may have to make choices when imposing losses, and potentially exercise some restraint and protect some creditors that are vulnerable and might destabilise the wider financial system. The legislation helps by generally exempting certain creditors from bail-in, and by giving the resolution authority discretion regarding others. This discretion may lead to a trade-off with other resolution objectives, since exclusions may compromise other resolution objectives if they result in insufficient capacity for loss absorption and recapitalisation. It's worth noting that, as discussed here, the resolution authority may be challenged when figuring out at short notice who would be on the receiving end of bail-in, let alone to swiftly appreciate what the consequences of losses for the parties concerned are. These uncertainties might make the resolution authority unduly cautious. It may be advisable to ensure that there is as much certainty ex-ante as possible.

A second channel of contagion can open if counterparties may be destabilised by losing access to liquidity, loans, payments or other services. It may be noted that in this regard, the financial stability resolution objective largely overlaps with the continuity of critical functions discussed above. One may assume that protecting the continuity of critical function in this context comes down to also avoiding significant adverse effects on financial stability.

As a third channel of contagion, there may be consequences for the wider financial system driven by depositors’ beliefs. Regardless of the objective situation, a bank run may start if short-term depositors at some point believe that the bank may run out of money. Therefore, the resolution authority will have to consider if its actions, or its non-action, might make creditors of other banks believe that their money is at risk. On the one hand, creditors of some banks might fear their own bank may experience losses on its interbank deposits from bail-in in resolution. On the other hand, bank creditors might believe the resolution authority’s action reveals something about the state of the banking system or about future actions of resolution authorities. For instance, the fact that the resolution authority imposes losses on a certain class of debt at one bank may cause creditors of other banks to think that they face a higher (bail-in) risk than previously thought and may start to run.

Next to preventing contagion, the resolution authority is also required to maintain market discipline. Creditors will only impose market discipline on banks if they fear losses in resolution. Conversely, if they observe regularly that debt- or more specifically, debt of a comparable class to the one they hold- is spared, they will stop worrying. The resolution authority has to limit exceptions from bail-in if it wants to avoid that market discipline breaks down. Therefore, another trade-off arises: in tendency, more bail-in, in particular of those creditors that are likely to exercise market discipline, may contribute to financial stability in the long run, while the bail-in of the same creditors might lead to risks to financial stability in the short run. It cannot be straightforward to gauge and compare both risks and choose the appropriate action. According to the legislation, the resolution authority should in principle not discount the longer-term financial stability impact of lesser market discipline when comparing it to the more immediate potential risks of bail-in.
Public Funds

A number of the resolution objectives can be reached more easily using public funds. Critical functions might be straightforward to continue if transferred to another bank isolated from the liabilities of the failed bank, which public funds might help absorb. However, the legislator specified that the resolution authority shall protect public funds “by minimising” their use. In other words, the resolution authority is not prevented from using public funds in general. To minimise means to attain the lowest possible value, while respecting applicable constraints. The constraints exist in the other resolution objectives. They should be achieved – for instance, critical functions should continue and significant adverse impact on financial stability should be avoided, and in order to do so, the resolution authority can also use public funds.

Thus, once the other resolution objectives are set, the legislation does not leave discretion regarding the use of public funds to the resolution authority. In particular, the legislation does not require the resolution authority to trade off this resolution objective against other resolution objectives; it should aim at attaining the other resolution objectives and should then decide what the minimum necessary use of public funds is. It is noteworthy that this aspect was not discussed in the SRB’s Veneto banks decisions. Under the heading “Protecting public funds...”. The decisions only mention (and dismiss) the possibility of support from the Deposit Guarantee Scheme, but not from the public budget. Other SRB decisions by contrast specifically state whether there were grounds to expect that in insolvency, extraordinary public funds might get used. The absence of any related discussion in the decisions is all the more remarkable since in the actual liquidation of those banks, public funds were indeed used to an important extent. For the scrutiny over future SRB decisions, this seems to be a key aspect about which the SRB should offer sufficient transparency.

At the same time, when the use of public funds is really necessary in a resolution, it should not be less available than in insolvency. While the SRB may probably assume that the potential provider of public funds will be no less willing to intervene in resolution than in insolvency, the European Commission’s administrative practice, set out in the Banking Communication, might currently be more restrictive for State aid in resolution than for State aid in liquidation proceedings. It would not be in line with the legislation’s objectives if the resolution authority was obliged to refrain from resolution on the grounds that a higher amount of public funding in liquidation could achieve the resolution objectives better than regular resolution proceedings without such funding. The Commission ran a public consultation on its administrative practice for State aid to banks in 2022 but the outcome, planned for the 3rd quarter 2023, appears to be pending.

Finally, it’s worth noting that the resolution objectives can leave the SRB in a situation where it is legally required but unable to act in a certain way: it is quite possible that a certain course of action is required by the resolution objectives, but that the necessary funding is not available. In such constellation, the legislation does not offer a legal way forward to the SRB. The most likely solution in this conflictual constellation might be funding from national public funds, which may be forthcoming provided the national government shares the view that the intended measures of the SRB are in the public interest and provided that the national government has the funds available. Nevertheless, since the perspectives of the national government and the SRB may differ, this outcome cannot be taken for granted and may be more likely to occur than when resolution authority and government sit at the same national level and are more likely to arrive at shared views.

Deposits

Finally, the resolution authority has to protect the deposits that are covered by the deposit guarantee schemes directive. It is noteworthy that this is formulated as an absolute objective, not qualified by
attributes like significant or critical and not subject to any explicit trade-off with other resolution objectives.\textsuperscript{5} As this requirement stands today, it is rather inconsequential: whatever the resolution authority does, and even if it decides not to act, the covered deposits are protected by the deposit guarantee scheme and hence additional protection by the resolution authority has no effect.

**Protection of all the other deposits is not envisaged as a resolution objective in itself.** However, as discussed above, it might nevertheless be the outcome of protecting financial stability. Other potential motivations, such as avoiding hardship for individual savers or SME and corporate borrowers that rely on bank deposits for ongoing business, are not permitted in the bank resolution legislation, although they have played a role in bank crisis management in practice; for instance, in the case of the defunct Silicon Valley Bank, the complete protection of deposits may have been motivated by the dependence of businesses on liquidity deposited in that bank. Also in the case of the already mentioned Veneto banks, the specific liquidation strategy that was chosen instead of resolution resulted in a complete protection of all deposits. Since at least in principle such extended deposit protection de lege lata cannot be a resolution objective in its own right for the SRB, the desire for it could lead to pressure towards finding solutions outside the resolution framework.

It is worth noting in this context that the Commission’s CMDI reform proposes that the resolution authority should aim at the protection of all deposits. Such change would indeed be consequential, as we discussed here. Given that the resolution authority may have to assume that non-covered deposits will be at risk in insolvency, the CMDI reform will likely make resolution the default option. In the subsequent resolution procedure, all depositors will likely be kept whole, for instance by ensuring that the deposits are assumed by another bank. On the one hand, this could at times have a stabilising impact on banks by mitigating the risk of bank runs caused by otherwise non-covered sight deposits. Such risk was for instance highlighted by this policy letter of SAFE, Frankfurt. On the other hand, additional funding for bank resolution would be needed and the resolution authority might be placed in front of a conundrum when trading this objective off against the objective of safeguarding market discipline. In its report, the Parliament did not follow the Commission’s proposal but maintains mandatory protection for covered deposits only while protecting other retail deposits to the extent possible. Some guidance may need to be developed about how such additional protection “to the extent possible” on the one hand can be combined with minimising the recourse to public funds on the other hand.

**Additional constraints**

The same Article 14 that sets the objectives for the SRB’s actions also requires resolution authorities to **minimise the cost** of their action and to **avoid unnecessary destruction of value**. It should go without saying that any authority must take action that is proportionate within the discretion it has by law and that it must act diligently with the resources entrusted to it by law. In the resolution context, the main risk of undue cost and value destruction probably resides in the treatment of the assets of the failed bank.

Haste (or so-called “fire sales”) could be one problem. Trying to market assets - or the whole bank - quickly without generating sufficient interest among candidate buyers implies cost for shareholders, creditors or the resolution fund. A set of studies requested by the ECON Committee illustrates that **buyers of failed**

\textsuperscript{5} The same is true for the resolution objective of protecting investors covered by the Investor Compensation Scheme Directive, client funds and client assets. Since similar considerations apply, we do not treat these objectives in a separate section. It should however be noted that funds covered by the Investor Compensation Scheme Directive have a similar status to covered deposits, while we understand that client funds and client assets are typically only protected in resolution proceedings but also carved out from liquidation proceedings and returned to their owners.
bans regularly make significant profits (see summary here). Literally, there is no aggregate cost or value destruction as referred to in the legislation, but the loss to the resolution fund or to creditors shows up as an increase in the acquirers market value. Nevertheless, the evidence suggests that such profits are in the lower single-digit percentage range of the value in question. And ultimately, the question is not only if the cost might have been lower with better preparation of the sale, but also if taking more time to better prepare or achieving additional publicity would have meant to compromise on other resolution objectives. Most notably, that can be the objective of financial stability, where a swift resolution might contribute to market confidence and lower the risk of contagion. In any case, that trade-off is difficult to quantify. If anything, operational improvements of the sales process and preparatory work before approaching potential buyers might help increasing the proceeds.

Less obviously, different issues of maladministration could in theory result in value destruction. For instance, a decision to liquidate a profitable business line rather than to sell it might reduce franchise value. The same might be true if a non-profitable business line is maintained instead of liquidated. Clarification on that matter could benefit from independent ex-post audits of resolution procedures.

Preparation for resolution

Since actual resolution decisions will have to be made and implemented under time pressure, sound preparations will be key to successful resolution. To this end, the legislation requires the SRB to draw up and update resolution plans for all banks in its remit. The resolution plans reflect (1) whether a given bank would be resolved or not if it were to fail and (2) how the resolution could take place. Underlying this hypothetical resolution approach for each bank are the resolution objectives set out in the previous section. To ensure rigour in the resolution planning process, the legislation entails a list of items that the resolution plans must contain. For instance, the resolution plan must document how critical functions could be separated from the failing bank if necessary and how resolution could be financed, including by a minimum requirement for equity and liabilities that could absorb losses.

The Parliament may wish to pay particular attention to the resolution planning activities in its scrutiny activities. There is a risk that when a bank fails, the resolution plan turns out to be too difficult to implement, possibly as a result of inadequate planning. In such a case, a suboptimal resolution strategy may be implemented that compromises the public interest, for instance by excessively relying on public funds. Possibly worse still, the SRB may find itself forced not to implement a resolution strategy at all when the desirable strategy cannot be carried out, leaving the bank to national insolvency procedures and potentially turning it into an undue burden for national taxpayers or the bank's customers.
Ex-ante, scrutiny can look at the resolution planning cycle booklet, which the SRB publishes at the beginning of the yearly resolution plan update process and which entails links to all policy and operational guidance documents that the SRB intends to follow. Ex-post, scrutiny can consider the yearly resolvability assessment that provides a high-level view to which extent effective resolution plans are in place in the SRB’s view. The SRB presents anonymised findings graphically in so-called heat-maps, where progress to perfect resolvability (“best practice”) is depicted by the movement of a line towards a green zone on the outer edge of the graph (see Figure 1).

A challenge for scrutiny is obviously that the resolvability assessment reflects only the SRB’s view and that it is, presumably for confidentiality considerations, not very detailed and transparent about how the conclusions have been reached. Against this background, it is useful that the occasional reports by the European Court of Auditors provide an independent third-party view based on SRB-internal information. Most recently in this briefing, we have discussed the auditors’ findings and the follow-up by the SRB. As detailed there, the latest such report dates from 2021 and it is unfortunately not straightforward to assess the progress of the SRB in implementing the recommendations from public sources.

Concluding remarks

This briefing has presented the mechanisms for scrutiny and control over the SRB and the scope for discretion in the SRB’s decisions. In this section, we would like to highlight some overarching observations on discretion and scrutiny that emerge from the discussion in this briefing. As regards the trade-off between resolution objectives, a particularly tricky issue is how much protection of debtholders vs. how much bail-in the resolution authority should aim at. The legislation requires the resolution authority to avert significant financial stability risks due to contagion and due to failing market discipline at the same time. A need to strike a balance results: on the one hand, bailing out those liabilities that would trigger a significant financial stability risk when bailed in; on the other hand, bailing in sufficient liabilities so that market discipline remains effective. Regarding the former, we mentioned a recommendation from academia to generally protect demand deposits since they are the key source of financial instability. However, the resolution objectives in the law do not draw such clear line between demand- and longer-term deposits. Thereby, they leave flexibility about deposit bail-in to the SRB. In turn, whether such flexibility is used wisely is an eminent question for parliamentary scrutiny. The assessment is not facilitated by the fact that public pressure may favour protecting more rather than less creditors, for instance for the sake of supporting individuals and SMEs - which, however, is not among the resolution objectives in law.

The cleanest way to strike the balance may involve resolution preparedness: it may be possible to prepare for the bail-out of sufficient liabilities to prevent contagion by ensuring early on that there is enough debt available for bail-in. Such debt can then ensure market discipline by the affected creditors and, at the same time, contribute to financing the resolution measures such as bail-out of other liabilities. Insufficient preparedness on the other hand may lead the SRB into a situation where a bank would have to be resolved but cannot because there is insufficient debt for bail-in without endangering financial stability.

However, also resolution preparedness entails a trade-off. Preparing for resolution and borrowing from creditors that have to expect bail-in is costly for banks. Moreover, the preparations may be more costly for some banks than for others: smaller banks seem to find it more difficult to comply with requirements to borrow debt available for bail-in. Proportionality requires to impose those cost to the extent and only to the extent necessary. If a bank does not meet the public interest test for resolution, it should also not be burdened with requirements that would facilitate its resolution. However, a public interest assessment at the point of failure may get to a different result than one made in good times.
In any case, debt for bail-in is just one facet of resolvability and there are many resolvability problems that may mean that a bank should, but cannot be resolved when needed. This highlights the need to scrutinise not only the actual resolution decisions, but also the quality of the SRB’s preparations for resolution. The Commission and to some extent the Council take important executive responsibility for the resolution decisions since they either endorse or require amendments to the decisions. In the scrutiny of resolution decisions, it is thus important to bear in mind the ultimate responsibility for the final decisions lies in principle with those institutions. It appears that the legislator has largely sought to ensure that the Commission and Council are the ones ultimately taking decisions involving high impact discretion.

However, there are certain high impact decisions for which only the SRB can be held to account. They may deserve thus particular attention of parliamentary scrutiny. First, this is in the case of any negative public interest assessment. The Commission cannot overrule a negative public interest assessment, even though the potential negative impact on achieving the resolution objectives is just as large as that of getting a positive public interest assessment wrong - it is just the mirror image. Second, the decisions that the SRB takes when preparing for resolution, namely the resolution plans, are crucial for ensuring that a resolution is actually feasible when it becomes necessary. Getting them wrong could lead to a situation where a necessary resolution cannot take place. As discussed, the resolution plans essentially involve the same trade-offs as resolution decisions but are under the sole responsibility of the SRB.

Finally, transparency is key for effective scrutiny, and that is true both for the actual resolution decisions as for the SRB’s work on resolvability. As pointed out throughout this briefing, information availability is limited. Therefore, it might be useful to enter into a dialogue with the SRB in view to evaluate if more transparency is feasible. It may be useful to study whether for instance blackening in public resolution decisions is always clearly justified by an interest in confidentiality outweighing the public interest in transparency. In particular when it comes to information about a defunct bank, there is no obvious reason to protect “business secrets” if the business is not continued. As to resolution preparedness, it might also be worthwhile investigating if disclosures by individual banks would allow for a more granular perspective on resolvability than the SRB’s publication. The mandatory Pillar 3 disclosures are rather limited in this regard, although the European Banking Authorities Pillar 3 Hub, once operational, will enhance their accessibility.