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(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

relating to the interpretation of certain legal provisions of the revised bank resolution framework in reply to questions raised by Member States' authorities

(2020/C 321/01)

The banking reform package proposed by the European Commission in November 2016 was adopted by the European Parliament and the Council on 20 May 2019 and published in the Official Journal on 7 June 2019. This package includes *inter alia* changes to the Union bank resolution framework through Directive (EU) 2019/879 of the European Parliament and of the Council ([1]), amending Directive 2014/59/EU of the European Parliament and of the Council ([2]) (Bank Recovery and Resolution Directive - BRRD) and Regulation (EU) 2019/877 of the European Parliament and of the Council ([3]), amending Regulation (EU) No 806/2014 of the European Parliament and of the Council ([4]) (Single Resolution Mechanism Regulation – SRMR). This reform implements in the Union the international Total Loss-Absorbing Capacity (TLAC) standard for global systemically important banks adopted by the Financial Stability Board in November 2015 and enhances the application of the minimum requirement for own funds and eligible liabilities (MREL) for all banks. The revised framework should better ensure that banks' loss- absorption and recapitalisation are occurring through private means once they get into financial difficulties and are placed subsequently in resolution.

According to Article 3(1) of Directive (EU) 2019/879, Member States should transpose the provisions of that directive in their national law by 28 December 2020. With the aim to facilitate a timely, consistent and accurate transposition, the Commission intends to provide in the Annex to this Notice the answers to the questions raised by Member States' authorities concerning the interpretation of certain BRRD provisions as well as on their interactions with SRMR, Regulation (EU) No 575/2013 of the European Parliament and of the Council ([5]) (Capital Requirements Regulation – CRR) and Directive 2013/36/EU of the European Parliament and of the Council ([6]) (Capital Requirements Directive – CRD).

([1]) 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 (OJ L 150, 7.6.2019, p. 296).

([2]) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

([3]) Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (OJ L 150, 7.6.2019, p. 226).

([4]) Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

([5]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

([6]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Against this background, the Commission adopts in this Notice answers related to the following legal acts:

— Directive (EU) 2014/59/EU (BRRD), as amended by Directive (EU) 2019/879,

— Regulation (EU) No 806/2014 (SRMR), as amended by Regulation (EU) 2019/877,

— Regulation (EU) No 575/2013 (CRR), as amended by Regulation (EU) 2019/876 of the European Parliament and of the Council ([7]),

— Directive 2013/36/EU (CRD), as amended by Directive (EU) 2019/878 of the European Parliament and of the Council ([8]).

This Notice clarifies the provisions already contained in the applicable legislation. It does not extend in any way the rights and obligations deriving from such legislation nor introduce any additional requirements of the concerned operators and competent authorities. This Notice is merely intended to assist Member States' authorities in the transposition in national law and implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in this Notice cannot prejudge the position that the European Commission might take before the Union and national courts.

In addition, the Commission will soon adopt a Communication containing answers to questions that it received from European Supervisory Authorities (ESAs) in accordance with Article 16b(5) of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. That Communication will clarify certain provisions of BRRD, on which questions have been submitted to it by the European Banking Authority.

([7]) Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

([8]) Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253).

ANNEX

List of Abbreviations

AIFM – alternative investment fund managers;

AT1 instruments – Additional Tier 1 instruments referred to in Article 52(1) CRR;

BRRD – Directive (EU) 2014/59/EU of the European Parliament and of the Council ([1]), as amended by Directive (EU) 2019/879 of the European Parliament and of the Council ([2]);

BRRD I – Directive (EU) 2014/59/EU, without any amendments;

CBR – combined buffer requirement as defined in point (6) of Article 128 CRD;

CCP – central counterparty;

CET1 capital – Common Equity Tier 1 capital referred to in Article 50 CRR;

CRD – Directive 2013/36/EU of the European Parliament and of the Council ([3]), as amended by Directive (EU) 2019/878 of the European Parliament and of the Council ([4]);

CRR – Regulation (EU) No 575/2013 of the European Parliament and of the Council ([5]), as amended by Regulation (EU) 2019/876 of the European Parliament and of the Council ([6]);

ESMA – European Securities and Markets Authority;

External MREL – minimum requirement for own funds and eligible liabilities applicable to resolution entities and referred to in Article 45e BRRD;

G-SII – global systemically important institution;

Internal MREL – minimum requirement for own funds and eligible liabilities applicable to subsidiaries of a resolution entity or of a third-country entity but which are not themselves resolution entities referred to in Article 45f BRRD;

M-MDA – Maximum Distributable Amount related to the minimum requirement for own funds and eligible liabilities referred to in Article 16a BRRD;

MiFID – Directive 2014/65/EU of the European Parliament and of the Council ([7]);

MPE – multiple point of entry;

([1]) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

([2]) 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 (OJ L 150, 7.6.2019, p. 296).

([3]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

([4]) Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253).

([5]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

([6]) Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

([7]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

MREL – minimum requirement for own funds and eligible liabilities;

NCWO – no creditor worse off in resolution than under normal insolvency proceedings;

SEL – subordinated eligible liability;

SFD – Directive 98/26/EC of the European Parliament and of the Council ([8]);

SPE – single point of entry;

SRB – Single Resolution Board;

SRM – Single Resolution Mechanism;

SRMR – Regulation (EU) No 806/2014 of the European Parliament and of the Council ([9]), as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council ([10]);

SRMR I – Regulation (EU) No 806/2014, without any amendments;

TEM – total exposure measure calculated in accordance with Articles 429 and 429a CRR;

T2 instruments – Tier 2 instruments referred to in Article 2(1)(73) BRRD;

TLAC – Total Loss-Absorbing Capacity;

TLAC minimum requirement – harmonised minimum level of the TLAC standard for G-SIIs referred to in Articles 92a and 92b CRR and Article 45d(1)(a) and (2)(a) BRRD;

TLAC standard – TLAC Term Sheet published by the Financial Stability Board in November 2015;

Top-tier banks – resolution entities of resolution groups with assets above EUR 100 billion referred to in Article 45c(5) BRRD;

TREA – total risk exposure amount calculated in accordance with Article 92(3) CRR;

UCITS – undertakings for collective investment in transferable securities.

Unless otherwise provided, all references to articles in this Annex should be understood as references to articles of the BRRD.

A. QUESTIONS RELATED TO THE POWER TO PROHIBIT CERTAIN DISTRIBUTIONS PROVIDED IN ARTICLE 16A BRRD

1. Question (Article 16a)

Article 16a BRRD provides resolution authorities with the power to prohibit certain distributions when an entity breaches the CBR when considered in addition to the MREL. Similarly, Article 141 CRD contains provisions on powers of competent authorities to prohibit certain distributions when an entity breaches CBR when considered in addition to own funds requirements. Although these powers are provided to two different authorities, the relation between them has not been specified. Neither CRD nor BRRD specifies the sequence of applying these two powers when an entity breaches both requirements. Does it mean that the national legislator has flexibility in this respect?

([8]) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

([9]) Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

([10]) Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (OJ L 150, 7.6.2019, p. 226).

Answer

The conditions for the use of the power of resolution authorities to prohibit an entity from distributing more than the M-MDA, i.e. the power to restrict certain distributions, are defined in Article 16a(1) BRRD. That provision provides that this power is activated in the situation where the entity meets its CBR in addition to its own funds requirements referred to in points (a), (b) and (c) of Article 141a(1) of CRD, but fails to meet its CBR in addition to the requirements referred to in Article 45c and 45d BRRD (i.e. MREL).

This implies that when an entity is failing to meet its CBR in addition to its relevant own funds requirements, the entity will not be in the situation referred to in Article 16a(1) even though it may also fail to meet its CBR in addition to MREL. This means that Article 141 CRD will apply exclusively in this case and that the entity will be required to automatically restrict certain distributions under the rules provided in that provision. The powers of resolution authorities to restrict certain distributions under Article 16a BRRD will only be activated where the entity complies with CBR and the relevant own funds requirements, but not with CBR and its MREL.

This ultimately means that Article 141 CRD may not be applied simultaneously with Article 16a BRRD.

2. **Question (Article 16a)**

Is it correct that Article 16a BRRD introduced two phases for the decision of the resolution authority to prohibit an entity from distributing more than M-MDA:

— in the first nine months after the notification of the entity, there is no obligation to set M-MDA and the resolution authority assesses every month whether to exercise that power, and

— nine months after the notification of the entity – there is an obligation to exercise the power to prohibit distributions above the M-MDA except where the resolution authority finds, following an assessment, that at least two of the conditions laid down in Article 16a(3) BRRD are fulfilled?

Answer

The power of resolution authorities to restrict certain distribution of entities provided in Article 16a(1) BRRD is activated only when the entity meets its CBR in combination with the relevant own fund requirements, but not in combination with MREL, i.e. due to a MREL specific breach of the CBR. That power is discretionary. The extent of the discretion depends on the timing of the breach of the CBR as provided in Article 16a(2) and (3) BRRD. In the first nine months following the notification of a breach by the entity, the resolution authority must assess without undue delay from the notification, and then at least every month, whether to exercise or not that power by taking into account the elements referred to in Article 16a(2) BRRD. After nine months, the resolution authority must exercise that power unless at least two of the conditions referred to in Article 16a(3) BRRD are fulfilled.

3. **Question (Article 16a (3))**

According to Article 16a(3), the resolution authority, after consulting the competent authority, must exercise the power referred to in Article 16a(1) except where at least two of the conditions laid down in that paragraph 3 are fulfilled, based on the findings of the resolution authority.

Is it correct that, when assessing the conditions provided by Article 16a(3), the resolution authority needs to consult with other authorities (e.g. competent authority, authority in charge of macro-prudential financial stability)?

Answer

Article 16a(3) itself requires the resolution authority to involve the competent authority in the assessment of the conditions referred in the first subparagraph of that provision.

The first subparagraph of Article 16a(3) requires the resolution authority to consult the competent authority prior to the exercise of its power to prohibit entities to distribute more than the M-MDA. The second subparagraph of Article 16a(3) requires the resolution authority to notify the competent authority of its decision of not applying its power and explain its assessment in writing.

In the first case, the resolution authority is explicitly required to consult the competent authority on the fact that the conditions of Article 16a(1) for not exercising its power are not fulfilled. In the second case, the resolution authority is required to notify and explain to the competent authority in writing its assessment of the fact that the conditions of Article 16a(3) for not exercising its power are fulfilled.

BRRD does not require, but does not prevent, resolution authorities to consult or notify any other authorities (e.g. designated national macro-prudential authorities).

4. **Question CRR (Article 92 (1a)); CRD (Article 141c); BRRD (Article 16a)**

Article 92(1a) CRR provides for the following: 'Tier 1 capital that is used to meet the leverage ratio buffer requirement shall not be used towards meeting any of the leverage based requirements set out in this Regulation and in Directive 2013/36/EU, unless explicitly otherwise provided therein.'

Are institutions required to meet at the same time the leverage buffer requirement provided in Article 92(1a) CRR and the non risk-based TLAC minimum requirement and external and internal MREL?

Answer

According to a combined reading of BRRD (Article 16a(1)) and CRD (the fourth subparagraph of Article 128), CBR should stack only on top of the risk-based components of the requirements set out in Articles 92a and 92b of CRR and Articles 45c and 45d of BRRD (i.e., TLAC minimum requirement and external and internal MREL).

Accordingly, Article 16a BRRD provides resolution authorities with the power to prohibit distributions above the M-MDA only where the concerned institution fails to meet the CBR when considered in addition to MREL calculated on the basis of the TREA (see also recital (24) Directive (EU) 2019/879).

This means that, in what concerns the relation between the CBR and the risk-based TLAC minimum requirement and MREL, BRRD and CRD are explicit in stating that (i) CET1 capital used towards compliance with the TLAC minimum requirement and MREL cannot be used to comply with the CBR and (ii) if the CBR is breached when considered in combinations with risk-based TLAC minimum requirement and MREL, resolution authorities are invested with the power to prohibit distributions above the M-MDA.

However, no parallel provisions exist in what concerns the relation between the leverage ratio buffer requirement referred to in Article 92(1a) CRR and the non-risk based TLAC minimum requirement and MREL. Article 141c CRD considers that the leverage ratio buffer requirement referred to in Article 92(1a) CRR is not met only when the institution does not have sufficient Tier 1 capital to meet at the same time that buffer as well as the requirements in Article 92(1)(d) CRR and 104(1)(a) CRD. No reference is made to the need to comply with the leverage ratio buffer requirement simultaneously with the non-risk based components of TLAC minimum requirement and MREL in the CRD nor in the BRRD. Article 141b CRD only imposes the automatic restrictions on distributions above the leverage ratio related Maximum Distributable Amount when the institution fails to meet the leverage ratio buffer requirement as laid out in the above mentioned Article 141c CRD. There is no provision in BRRD mirroring Article 16a for the leverage ratio buffer requirement, meaning that the resolution authority does not have the power to restrict distributions when the leverage ratio buffer requirement is not met when considered with MREL calculated on the basis of TEM.

Therefore, the second subparagraph of Article 92(1a) CRR cannot be read as preventing the double counting of Tier 1 capital for the purposes of compliance with the leverage ratio buffer requirement, and TLAC minimum requirement and MREL calculated on the basis of TEM. Union law always explicitly provides for (i) the situations where double counting of capital for the purposes of compliance with the buffer requirement and MREL is not allowed and (ii) the consequences for breaching the buffer requirement when considered in combination with MREL. None of this is the case for the leverage ratio buffer requirement.

B. QUESTIONS RELATED TO THE POWERS TO SUSPEND PAYMENT OR DELIVERY OBLIGATIONS UNDER ARTICLES 33A AND 69

5. Question (Article 33a)

Article 33a BRRD provides resolution authorities with the power to suspend certain obligations after the determination that an institution is failing or likely to fail (moratorium). Under Article 33a(3) BRRD, Member States may provide that resolution authorities grant a daily allowance to depositors. In the context of the SRM, for institutions subject to the SRB's remit, the moratorium power should be exercised by national resolution authorities in order to implement all decisions addressed to them by the SRB (Article 29 SRMR).

In order to transpose the national option on daily allowance under Article 33a(3) BRRD, would it be correct to provide that, for institutions under the SRB's remit, the national resolution authority may grant the daily allowance when and to the extent required by the SRB?

Answer

The power to enforce a moratorium is granted to national resolution authorities, also in the context of the Banking Union. National resolution authorities should exercise this power in the form that it is granted in the national law transposing BRRD and in accordance with the conditions laid out in national law. This is reflected in the second subparagraph of Article 29(1)SRMR.

Depending on how Article 33a BRRD is transposed in national law, the power to grant a daily amount and its quantification could be framed more precisely directly in the national transposition law or such law could provide for criteria for the national resolution authority to define it. In any event, these elements should be defined by the national legislator when transposing Article 33a BRRD. The national resolution authority should comply with these criteria when exercising the power.

There is no need to make reference to the SRB in the context of transposition of this provision because the SRB's role derives from Article 29 SRMR, which is directly applicable.

Coordination with the SRB when exercising these powers is nonetheless advisable to ensure full consistency between the SRB's instructions and the powers granted to the national resolution authority by the national transposition law. This should facilitate the smooth execution of the measures taken as part of the resolution scheme.

6. Question (Article 33a(3))

What instruments, elements or criteria contribute to the determination of the adequacy of the daily amount to which depositors should have access? In this respect, an amount covering a minimum daily living cost could be included in the national transposition law. Furthermore, this amount should be mandatory for the resolution authority when deciding to permit the access to an adequate amount of money.

Should this determination be the duty of the resolution authority on a case-by-case basis or should the determination of the adequate level pertain to the national legislator's role?

What other relevant indicators could be taken into account in this context?

Answer

Article 33a gives a wide degree of discretion to the Member States in the context of transposition to define the relevant criteria for the quantification of the daily amount, as well as its application.

7. Question (Article 33a(3) and 69(5))

In relation to the 'appropriate daily amount' referred to in Articles 33a(3) and 69(5), is it the intention of co-legislators that Member States fix the 'appropriate' amount in the national transposition legislation, or is there any flexibility for the resolution authority to take a case by case decision?

Answer

The provision is not specific in this respect and allows flexibility for Member States to decide how to transpose it. Some Member States may want to identify a fixed daily amount directly in the law or provide for specific criteria for its calculation, while others may want to entrust the resolution authority to define the amount in question.

8. **Question (Article 33a(5))**

Article 33a(5) is not clear on what concrete obligations it entails for resolution authorities. It is unclear how an authority can prove that it has 'considered the existing national rules, as well as supervisory and judicial powers', striven to 'safeguard creditors' rights and equal treatment of creditors in normal insolvency proceedings' and 'had regard to the potential application of national insolvency proceedings to the institution or entity'. Has the Commission reflected on any concrete action that may be required to be taken in application of this provision?

Answer

The purpose of this provision is to provide some safeguards to ensure that the extensive moratorium powers granted to the resolution authority are exercised correctly.

The wording provided in Article 33a(5) refers to the fact that the moratorium power under Article 33a can be exercised at the moment of the failing or likely to fail declaration and, at that point, it is possible that a determination on the existence of public interest pursuant to Article 32(1)(c) has not been made. It is therefore possible that, after the moratorium is enacted, the resolution authority concludes that there is no public interest and national insolvency proceedings should apply. These proceedings in certain Member States do not entail the immediate closure of the institution and liquidation of its assets but allow a continuation of the institution. These proceedings are managed by a different authority than the resolution authority.

The conditions laid down in this provision aim at ensuring that the two authorities coordinate and potentially concur on the appropriateness of a moratorium in the specific circumstances at hand. In this respect, the language aims to ensure that the resolution authority considers the potential impact of the moratorium on different categories of creditors and their claims, for example to avoid that a moratorium applied to some of them and not others would create a discrimination in their treatment in insolvency.

9. **Question (Article 33a(11))**

Article 33a(11) stipulates that in the event a resolution authority has exercised the power to suspend payment or delivery obligations in the circumstances set out in Article 33a(1) or (10), the resolution authority must not exercise its powers under Article 69(1), 70(1) or 71(1). However, only Article 33a(1) covers the power to suspend payment or delivery obligations. Article 33a(10) covers the power to restrict secured creditors and the power to suspend termination rights.

Would the exercise of the power to suspend payment or delivery obligations as set out in Article 33a(1) in itself prevent the resolution authority from exercising its powers under Article 69(1) (regarding suspension of certain obligations), Article 70(1) (regarding the power to restrict secured creditors) and Article 71(1) (regarding suspension of termination rights) at a later time? Or are the resolution authority's powers under Article 70(1) and 71(1) only restricted in a situation where the resolution authority has also exercised its powers pursuant to Article 33a(10)?

Answer

The purpose of the provision in Article 33a(11) is to avoid the sequential application of the same power twice. The purpose of this provision is to ensure that the maximum duration of the suspension or restriction of creditors' rights does not exceed the maximum duration of two days, calculated as per the provision in Article 33a(4).

It follows that the limitation only applies with the respect to the repeated exercise of the same power and not to the case that two different powers are exercised at different moments in time.

Therefore, with respect to the specific issue raised in the second part of the question, the resolution authority's powers under Article 70(1) and 71(1) are only restricted in a situation where the resolution authority has also exercised its powers pursuant to Article 33a(10) points (a) and (b), respectively.

C. QUESTIONS RELATED TO THE SELLING OF SUBORDINATED ELIGIBLE LIABILITIES TO RETAIL CLIENTS

10. **Question (Article 44a)**

What is the meaning of the term 'seller' for the purposes of Article 44a?

Answer

Article 44a BRRD applies to investment firms in the meaning of Article 4(1)(1) MiFID, credit institutions, UCITS management companies and AIFM that provide investment services or perform investment activities which lead to the transfer to retail clients of a SEL, i.e. which meet the conditions referred to in Article 72a CRR, except for Article 72a(1)(b) and Article 72b(3) to (5) CRR. Such entities are 'sellers' for the purposes of Article 44a BRRD.

11. **Question (Article 44a)**

Should the protection set out in Article 44a BRRD be extended to individual named instruments or to specific categories of instruments defined in BRRD or CRD?

Answer

The scope of the specific rules concerning the protection of retail clients is defined in Article 44a(1) BRRD.

The first subparagraph of Article 44a(1) BRRD covers as a rule only the selling of 'eligible liabilities that meet all the conditions referred to in Article 72a of Regulation (EU No 575/2013 (CRR) except for point (b) of Article 72a(1) and paragraph 3 to 5 of Article 72b', i.e. SEL. The second subparagraph of Article 44a(1) BRRD provides for an option for Member States to extend the scope of the rules laid down in Article 44a BRRD to the selling of own funds or other bail-inable liabilities, including non-subordinated eligible liabilities.

Article 44a(7) BRRD provides that Member States are not required to apply Article 44a BRRD to liabilities issued before the date of application of Directive (EU) 2019/879 (i.e. 28 December 2020).

12. **Question (Article 44a)**

Where the parties to a transaction are located in Member States which have exercised the national options in Article 44a BRRD differently, is it the location of the issuer, the intermediary or the client that determines which Member State's rules apply?

Answer

If a Member State applies Article 44a(1) to (4) BRRD, the law of the location of the seller applies given that the seller is required in Article 44a(1) BRRD to perform the suitability test under Article 25(2) MiFID as transposed in its respective Member State. If a Member State transposed Article 44a(5) BRRD, 'by way of derogation' from Article 44a(1) to (4), it should ensure that the minimum denomination of SELs issued by entities established in its jurisdiction is of at least EUR 50 000 and that only SELs with a minimum denomination of at least EUR 50 000 can be sold to retail clients in that Member State. The additional rules provided in Article 44a(1) to (4) BRRD will not apply. The cross-border application of these rules depends on the national measures chosen to transpose Article 44a BRRD (i.e. 44a(1) to (4), 44a(5) or 44a(6).

Several scenarios are relevant:

In the first scenario, SELs issued by entities established in a Member State with no minimum denomination rule for SELs (Member State A) are sold to retail clients of a Member State that provided for a minimum denomination rule (Member State B): in such a case, Member State B should ensure that only SELs that comply with the minimum denomination rule may be sold to retail clients in its jurisdiction.

In the opposite scenario, where SELs of an entity from Member State B are sold to the retail clients of Member State A, the sale of such SEL should comply with Article 44a(1) to (4) BRRD. Effectively, this would mean that only one single SEL of EUR 50 000 at maximum may be sold to a retail client if the conditions of Article 44a(1) to (4) BRRD as transposed by Member State A are fulfilled.

SELs issued in a Member State (Member State A) with a minimum denomination of EUR 50 000 may not be sold as such to retail clients in another Member State (Member State B) that applies a higher minimum denomination rule (e. g. EUR 250 000). Only SELs that comply with the minimum denomination rule of the Member State B (i.e. EUR 250 000) may be sold to retail clients in Member State B.

Member States that transposed Article 44a(6) BRRD should ensure that only sales to retail clients of SELs issued by resolution entities established in their respective Member States are subject to Article 44a(2)(b) BRRD (only check of the size of the investment). The sales of SELs issued by resolution entities to retail clients of other Member States will be subject to the laws of their respective Member States. For the sales of SELs to retail clients issued by entities established in other Member States, the Member State exercising the option of Article 44a(6) BRRD will need to decide whether to transpose Article 44a(1) to (4) BRRD or the minimum denomination rule in Article 44a(5) BRRD. This would mean that the sales of such SELs to retail clients should either be subject to an enhanced suitability regime/portfolio check or such SEL should have a minimum denomination of at least EUR 50 000. The *rationale* for applying less stringent rules on sales of SELs to retail clients under Article 44a(6) BRRD is that the market for SELs in a Member State is small and less liquid as quantified in the EUR 50 billion threshold. This *rationale* does not apply to SELs issued by institutions established in another Member State.

13. **Question (Article 44a)**

Having in mind that Article 44a BRRD provides some requirements that pertain to MiFID (which is out of the scope of resolution authorities' competencies), the resolution authority cannot be the only competent authority designated. Could Member States decide to designate the market conduct authority or designate jointly the resolution authority and the market conduct authority to enforce Article 44a BRRD?

Answer

Recitals (15) and (16) of Directive (EU) 2019/879 detail the *rationale* of the rules provided in Article 44a BRRD, their relationship with the resolvability of institutions, how such rules should be enforced and their interaction with the enforcement of the general investor protection rules provided in MiFID.

Recitals (15) and (16) of Directive (EU) 2019/879 specify that:

'(15) In line with Commission Delegated Regulation (EU) 2016/1075, resolution authorities should examine the investor base of an individual institution's or entity's MREL instruments. If a significant part of an institution's or entity's MREL instruments is held by retail investors that might not have received an appropriate indication of relevant risks, that could in itself constitute an impediment to resolvability. In addition, if a large part of an institution's or entity's MREL instruments is held by other institutions or entities, the systemic implications of a write down or conversion could also constitute an impediment to resolvability. Where a resolution authority finds an impediment to resolvability resulting from the size and nature of a certain investor base, it should be able to recommend to an institution or entity that it address that impediment.

(16) To ensure that retail investors do not invest excessively in certain debt instruments that are eligible for the MREL, Member States should ensure that the minimum denomination amount of such instruments is relatively high or that the investment in such instruments does not represent an excessive share of the investor's portfolio. This requirement should only apply to instruments issued after the date of transposition of this Directive. This requirement is not sufficiently covered in Directive 2014/65/EU, and should therefore be enforceable under Directive 2014/59/EU and should be without prejudice to investor protection rules provided *for* in Directive 2014/65/EU. Where, in the course

of performing their duties, resolution authorities find evidence regarding potential infringements of Directive 2014/65/EU, they should be able to exchange confidential information with market conduct authorities for the purpose of enforcing that Directive. In addition, it should also be possible for Member States to further restrict the marketing and sale of certain other instruments to certain investors.'

These recitals provide for the following elements:

— Resolution authorities should examine the investor base of eligible liabilities to identify potential impediments to resolvability resulting from the size and nature of a certain investor base. Significant retail holdings of eligible liabilities may constitute such impediments.

— The rules of Article 44a BRRD intend to ensure that retail investors do not invest excessively in eligible liabilities.

— Resolution authorities should cooperate with market conduct authorities through exchanges of confidential information for the purpose of enforcing MiFID 'if in the course of performing their duties, resolution authorities find evidence regarding potential infringements of Directive 2014/65/EU (MiFID)'.

While Article 44a BRRD does not refer to any specific authority to be responsible for its enforcement, the elements in recitals (15) and (16) of Directive (EU) 2019/879 show the existence of a link between the size of retail holdings of eligible liabilities, the protection of retail investors and the resolvability of institutions.

This means that Member States may designate any appropriate authority or authorities for the enforcement of Article 44a BRRD, including authorities designated under MiFID (market conduct authorities). However, the interaction between general investor protection rules under MiFID, the specific rules of Article 44a BRRD and the powers of resolution authorities to address impediments to the resolvability of institutions due to retail holdings imply that market conduct authorities, relevant authorities responsible for the enforcement of Article 44a BRRD and resolution authorities need to cooperate closely in the exercise of their respective mandates.

14. **Question (Article 44a(1))**

Does the national discretion included in Article 44a(1), last sentence to extend the scope of Article 44a to own funds instruments concern only the provisions of paragraph 1 or all provisions from this Article?

Answer

The second subparagraph of Article 44a(1) provides for an option for Member States to extend the scope of the rules laid down in Article 44a to the selling of own funds or other 'bail-inable' liabilities.

This option is not limited only to the application of Article 44a(1), but instead applies to the entire provision. Article 44a(2), (3) and (5) cross-refer to liabilities referred to in Article 44a(1) in its entirety and not only to liabilities referred to in the first subparagraph of Article 44a(1). This aspect is also clarified in recital (16) of Directive (EU) 2019/879 which provides that:

'In addition, it should also be possible for Member States to further restrict the marketing and sale of certain **other instruments** (emphasis added) to certain investors.'

15. **Question (Article 44a(1))**

How should Article 44a(1)(b) be interpreted, i.e. what is the meaning of the expression the 'seller is satisfied'?

Answer

Article 44a(1)(b) should be interpreted in the sense that, following the performance of the suitability test, the seller considers that an investment in SELs is suitable for the concerned retail client.

16. **Question (Article 44a(5))**

How is the derogation under Article 44a(5) BRRD intended to be applied? Several alternative interpretations are available:

— Is Article 44a(5) BRRD intended as a *de minimis* exception, whereby the additional protections under Article 44a(1) to (4) BRRD do not apply to issues of SELs with denominations set below the minimum denomination amount? This would mean that only the provisions of Article 25 MiFID would be applied to sellers of SELs to retail investors that are below the minimum denomination amount. If this is the correct interpretation, is it also the case that Member States are free to set the *de minimis* threshold at EUR 50 000 or more, as suggested by the words '*at least*'? Such an interpretation could lead to a situation where Member States fix very high thresholds, thereby excluding the additional protections in almost every case.

— Alternatively, is Article 44a(5) BRRD intended as an exception for very high value instruments (valued at EUR 50 000 or more), whereby the additional protections under Article 44a(1) to (4) BRRD do not apply to the sale of instruments constituted in denominations above the threshold fixed by the Member State, on the basis that retail investors are most likely to be investing in lower value instruments?

— Alternatively, is Article 44a(5) BRRD intended to allow Member States to restrict the manner in which issuers constitute SELs falling within the scope of Article 44a(5) BRRD, by legislating that the denomination of those particular instruments should exceed the threshold fixed by the Member State at EUR 50 000 or more?

Answer

In order to ensure that retail investors do not invest excessively in certain eligible liabilities, Member States must either:

(a) transpose the requirements provided in Article 44a(1) to (4) BRRD; or

(b) by derogation from those requirements, apply only the requirement provided in Article 44a(5) BRRD, i.e. minimum denomination of at least EUR 50 000.

Therefore, Member States that decide to set a minimum denomination amount for SELs of at least EUR 50 000 are not required to transpose the provisions laid down in Article 44a(1) to (4) BRRD.

Recital (16) of Directive (EU) 2019/879 clarifies that Article 44a(1) to (4) and Article 44a(5) BRRD should not be transposed cumulatively, but are two alternative options:

'To ensure that retail investors do not invest excessively in certain debt instruments that are eligible for the MREL, Member States should ensure that **the minimum denomination amount of such instruments is relatively high or that the investment in such instruments does not represent an excessive share of the investor's portfolio** (emphasis added).'

17. **Question (Article 44a(5))**

Which entities are intended to be subject to the minimum denomination rule under Article 44a(5)?

Answer

All issuances of SELs and all sales of SELs by the investment firms, credit institutions, UCITS management companies and AIFM to retail clients are subject to the minimum denomination requirement under the option of Article 44a(5).

18. **Question (Article 44a(5))**

Is it correct that the requirement to perform a suitability test under MiFID is not waived when a Member State decides to exercise the option set out in Article 44a(5) BRRD?

Answer

Under Article 25(2) MiFID, the suitability test is required only when investment advice or portfolio management services are provided. Article 44a(1) BRRD provides for a wider scope for the performance of the suitability test for all sales of SEL to retail clients. A Member State that transposes Article 44a(5) BRRD should still ensure that Article 25(2) MiFID is effectively applied.

19. **Question (Article 44a(6))**

Article 44a(6) provides for the following: 'Where the value of total assets of entities referred to in Article 1(1) that are established in a Member State and are subject to the requirement referred to in Article 45e does not exceed EUR 50 billion, that Member State may, by way of derogation from the requirements set out in paragraphs 1 to 5 of this Article, apply only the requirement set out in paragraph 2(b) of this Article'.

Does the threshold of EUR 50 billion cover all resolution entities in a Member State, as a whole?

Answer

Article 44a(6) provides for a specific option for transposition designed for Member States with small and less liquid markets, by derogation from the two alternative possibilities to transpose Article 44a. That option entails a transposition limited only to the requirement provided in point (b) of Article 44a(2), i.e. a minimum size of EUR 10 000 for an investment in SELs by a retail investor.

The criterion to assess the size of the market for eligible liabilities of a Member State is given by the value of the total assets of all resolution entities subject to Article 45e (i.e. external MREL at consolidated resolution group level) that are established in that Member State. To be able to benefit of this option, that value must not exceed EUR 50 billion.

20. **Question (Article 44a(6))**

Should the EUR 50 billion threshold referred to in Article 44a(6) BRRD be assessed only at the moment of the transposition of Directive (EU) 2019/879 or should there be a duty to monitor regularly whether the threshold is no longer met?

Is it necessary to provide for a specific obligation of monitoring the threshold within the national legislation transposing Directive (EU) 2019/879?

Answer

Article 44a(6) BRRD provides for a specific option for a more limited transposition designed for Member States with small and less liquid markets as reflected in the EUR 50 billion threshold provided thereof.

This transposition option is subject to the conditionality of the threshold. It is, therefore, the duty of Member States to monitor and assess regularly whether their markets meet the EUR 50 billion threshold and whether the use of the option provided in Article 44a(6) BRRD is justified. If the threshold is no longer met, Member States should choose between the two main alternative possibilities to transpose Article 44a BRRD and lay down those rules in national legislation.

D. QUESTIONS RELATED TO THE MINIMUM REQUIREMENT FOR OWN FUNDS AND ELIGIBLE LIABILITIES

(a) *General*

21. **Question (General)**

What is the meaning of 'control' under BRRD?

Since the legal text seems to provide no definition, is it reasonable to consider the same definition as the one provided by Article 4(1)(37) CRR? According to that definition, 'control' means the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of the Seventh Council Directive 83/349/EEC ([11]), or the accounting standards to which an institution is subject under Regulation (EC) No 1606/2002 of the European Parliament and of the Council ([12]), or a similar relationship between any natural or legal person and an undertaking.

Answer

Several references are made in the BRRD to the control of a subsidiary by the respective resolution entity (e.g. Article 45b(3)(b), 45f(2)(a)(i) and (iv) and 45f(2)(b)(ii) BRRD). The *rationale* of the reference to 'control' is to ensure that the ownership structure of instruments used by a subsidiary to comply with its internal MREL would not lead, in case of resolution of the resolution group or application of write down or conversion powers to that subsidiary, to it no longer being a subsidiary of the respective resolution entity (i.e., to changes in the group structure or to the scope of consolidation pursuant to Article 18 CRR).

According to Article 4(1)(16) CRR (ex vi Article 2(1)(5) BRRD), '"subsidiary" means:

(a) a subsidiary undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;

(b) a subsidiary undertaking within the meaning of Article 1(1) of Directive 83/349/EEC and any undertaking over which a parent undertaking effectively exercises a dominant influence.

Subsidiaries of subsidiaries shall also be considered to be subsidiaries of the undertaking that is their original parent undertaking.'

Therefore, for the purposes of MREL, references to 'control' should be read as references to the relationship between a parent undertaking and a subsidiary.

22. **Question (General)**

What is the meaning of the wording 'entity which is part of a G-SII'? It seems that this should include a subsidiary or an entity in which a certain participation is held, which was taken into account when the respective institution was identified as G-SII.

Answer

A 'resolution entity that is part of a G-SII', as referred to in Article 45d BRRD, is an institution or entity referred to in points (b), (c) or (d) of Article 1(1) BRRD that is included in the prudential scope of consolidation of the group identified as a G-SII in accordance with Article 131(1) and (2) CRD.

23. **Question (Article 45(11) BRRD I)**

Article 45(11) BRRD I provided the group level resolution authority with the power to waive the individual MREL applicable to the Union parent institution. Is this waiver included in the current BRRD?

Answer

Article 45(11) BRRD I granted the group-level resolution authority discretion to waive the individual MREL requirement of a Union parent institution, subject to certain conditions.

Under the current BRRD, Union parent institutions are not subject to an individual MREL requirement. Hence, the waiver of that requirement is no longer applicable. Such institutions are subject to an MREL on consolidated basis in the following situations:

— as resolution entities, subject to an external MREL on a consolidated basis at the level of the resolution group (Article 45e(1)), or

([11]) Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

([12]) Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

— as Union parent undertakings that are not themselves resolution entities but are subsidiaries of third country entities, subject to an internal MREL on a consolidated basis (the third subparagraph of Article 45f(1)).

(b) ***Mortgage credit institutions***

24. **Question (Article 45A)**

Does BRRD or CRR provide a possibility to exclude from the consolidation scope of the TLAC minimum requirement mortgage credit institutions that are subsidiaries of G-SIIs and that are exempted from MREL under Article 45a(1) BRRD?

Answer

The consolidation scope of the requirements referred to in Article 92a or 92b CRR (the TLAC minimum requirement) is set out in the second subparagraph of Article 18(1) of that Regulation. According to this provision, institutions that are required to comply with the TLAC minimum requirement on a consolidated basis must carry out a full consolidation of all institutions and financial institutions that are their subsidiaries in the relevant resolution group (i. e., entities belonging to the same resolution group).

Article 45a(2) BRRD states that mortgage credit institutions exempted from MREL must not be part of the consolidation referred to in Article 45e(1) BRRD, while the latter provides that resolution entities must comply with their MREL requirements laid down in Articles 45b to 45d BRRD on a consolidated basis at the level of the resolution group.

These provisions cannot be interpreted as derogating from the second subparagraph of Article 18(1) CRR in what concerns the TLAC minimum requirement.

For G-SIIs or entities that are part of a G-SII, Article 45a(2) BRRD would only apply to the part of the MREL requirement determined in accordance with Article 45d(1)(b) BRRD, i.e., the institution-specific additional requirement for own funds and eligible liabilities determined by the resolution authority under the BRRD. That requirement will depend on the chosen resolution strategy for the group (i.e. if the mortgage credit institution will be liquidated or not according to the group resolution plan and thus benefit from the exemption of Article 45a(1) BRRD).

25. **Question (Article 45a)**

Should the mandatory waiver in Article 45a(1) apply in case there is a specific insolvency proceeding rules meeting the conditions in point (a) and (b) for mortgage credit institution at the Member States' level? Or can the mandatory waiver only be granted when the resolution authority considers in the resolution plan that the mortgage credit institution should be wound up under normal insolvency proceedings or other types of proceeding described in Article 45a(1)(a)? In case the chosen resolution strategy is SPE and whole bank bail-in for the banking group (where the mortgage credit institution is a subsidiary of the parent bank), would the conditions for the mandatory waiver be met?

In case the mortgage credit institution is waived from MREL in accordance with Article 45a(1), what prudential components of the mortgage credit institution should be excluded when calculating the consolidated MREL in accordance with Article 45a(2)?

Answer

Article 45a(1)(a) requires that the resolution plan of the mortgage credit institution provides for its winding up in national insolvency proceedings or in other types of proceedings laid down for those institutions and implemented in accordance with Article 38, 40 or 42. The mere existence of such a procedure is not sufficient to justify the granting of the exemption: the exemption can only be granted if the resolution plan foresees the application of such proceedings in case of failure of the mortgage credit institution.

If the group resolution plan provides for the winding up of the mortgage credit institution through the proceedings described in Article 45a(1)(a) and those proceedings ensure that creditors bear losses in a way that meets the resolution objectives as provided in Article 45a(1)(b), the exemption must be granted. In that case, the assets of the mortgage credit institution should not be considered when calculating the TREA and the TEM of the resolution group, but the intra-group exposures of the resolution entity to the mortgage credit institution should be taken into account. In addition, the exposures of the parent entity to the mortgage credit institution arising from capital instruments should be taken into account fully by resolution authorities when calculating the loss absorption amount of the consolidated MREL of the resolution entity, so as to comply with Article 45c(1)(a) and (b). The specific method through which the exposures arising from capital instruments are taken into account in the external MREL of the resolution entity should be decided by the resolution authority, but the chosen method needs to ensure that the resolution entity holds sufficient own funds and eligible liabilities to fully absorb all the losses arising from those exposures.

In case of a mortgage credit institution that is a subsidiary of a resolution entity, if the exemption in paragraph 1 of Article 45a cannot be granted, paragraph 2 of that Article would not apply. Thus, the mortgage credit institution would be part of the consolidation of the resolution group.

26. **Question (Article 45a)**

What is the scope of Article 45a for the purposes of exemptions for mortgage credit institutions provided therein? Should Article 45a apply only to an institution that is only authorised to grant mortgage credit financed by covered bonds? Or should Article 45a also cover other credit institutions that are in practice only granting mortgage credit financed by covered bonds, but are authorized to pursue other activities?

Could a subsidiary that is considered a mortgage credit institution and is exempted under Article 45a be included in a resolution group?

Answer

The scope of Article 45a BRRD is indicated in the introductory part of paragraph 1. Mortgage credit institutions are:

— credit institutions,

— financed by covered bonds

— that are not allowed to receive deposits under national law.

Credit institutions that in practice do not take deposits but who are nevertheless authorised to do so cannot be included in the scope of Article 45a BRRD, as they do not meet the criterion of not being allowed to receive deposits under national law. Therefore, those credit institutions cannot benefit from the exemption provided in Article 45a BRRD.

In this context, the definition of 'specialised mortgage credit institution' in Article 3(8) of Directive (EU) 2019/2162 of the European Parliament and of the Council ([13]) may also be useful. According to that provision, '"specialised mortgage credit institution" means a credit institution which funds loans solely or mainly through the issue of covered bonds, which is permitted by law only to carry out mortgage and public sector lending and which is not permitted to take deposits, but which takes other repayable funds from the public'.

The inclusion of a mortgage credit institution that is a subsidiary of a resolution entity in the resolution group of that resolution entity depends on the strategy provided for in the group resolution plan, according to the second subparagraph of Article 12(1) BRRD.

(c) ***Eligible liabilities for resolution entities***

27. **Question (Article 45b(1))**

Does the second subparagraph of Article 45b(1) BRRD mean that the deductions from the eligible liabilities provided in Article 72e CRR are not applicable to eligible liabilities included in MREL?

Answer

The deduction regime laid down in Article 72e CRR applies only to entities subject to Article 92a and Article 92b CRR (i.e. resolution entities that are a G-SIIs or part of G-SII and certain entities that are part of a non-EU G-SII) and only for the purpose of compliance with those provisions. This regime does not cover:

— entities that are not a G-SII or part of a G-SII, or part of a non-EU G-SII, or

([13]) Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328, 18.12.2019, p. 29).

— the compliance of entities that are a G-SII or part of a G-SII or non-EU G-SII with the additional requirements imposed on them in accordance with Article 45d(3) BRRD.

28. **Question (Article 45b(3))**

Could eligible liabilities issued to 'existing shareholders' be counted for internal MREL to the extent that they are held by a shareholder, irrespective of whether this shareholder has become a shareholder after underwriting or purchasing the liabilities?

Answer

The issuance by a subsidiary of a resolution entity of instruments to an 'existing shareholder' is one of the eligibility condition for the purposes of Article 45f(2)(a)(i) BRRD (internal MREL), Article 45b(3) BRRD (external MREL) and Article 88a(b) CRR (TLAC minimum requirement for G-SIIs or part of G-SIIs identified as resolution entities). If at the time of issuance of the liability the acquiring entity is not a shareholder, the liability will not be eligible for compliance with MREL and the TLAC minimum requirement. To be eligible, the instrument should be issued to an existing shareholder and comply with all other conditions, and should be held thereafter only by existing shareholders.

29. **Question (Article 45b(3))**

With reference to Article 45b(3), how should the wording 'and that subsidiary is part of the same resolution group as the resolution entity' be understood in the context of the entire Article?

Answer

Article 45f(2)(a)(i) BRRD provides for the possibility for a subsidiary of a resolution entity to issue eligible liabilities not only to the resolution entity but also to a minority shareholder under certain conditions. Article 45b(3) BRRD provides that such liabilities must be 'included in the amount of own funds and eligible liabilities of the resolution entity' under the conditions provided therein. These liabilities are subordinated since they are required under Article 45f(2)(a)(ii) to fulfil the condition of point (d) of Article 72b(2) CRR. As such, those liabilities may be used to meet both the external MREL and the external subordinated MREL requirements of the resolution entity under Article 45b(4),(5) and (7) BRRD that is part of the same resolution group as the subsidiary that has issued such liabilities.

30. **Question (Article 45(b))**

Are amortised T2 instruments issued by subsidiaries that are not resolution entities and held by entities outside the resolution group, which are eligible for internal MREL under Article 45f(2)(b)(ii) BRRD, also eligible for external MREL? Should the reference to amortised T2 instruments in the second part of Article 2(1)(71a) BRRD be interpreted as referring to amortised T2 instruments on an individual basis or to amortised T2 instruments on a consolidated resolution group basis?

Answer

Resolution entities can meet their external MREL with the following liabilities:

— Own funds consolidated at the level of the resolution group, as per Article 45e(1) BRRD;

— Eligible liabilities, which include:

  — Bail-inable liabilities that fulfil the conditions of Article 45b BRRD. This Article cross-refers inter alia to Article 72b CRR, where paragraph 2(b) requires that those liabilities be directly issued or raised by the institution (first part of Article 2(1)(71a) BRRD);

  — Tier 2 instruments that meet the conditions of point (b) of Article 72a(1) CRR – meaning, amortized T2 instruments with residual maturity of at least one year (second part of Article 2(1)(71a) BRRD);

— Certain eligible liabilities issued by a subsidiary belonging to the same resolution group to a minority shareholder (Article 45b(3) BRRD).

The definition of Article 2(1)(71a) BRRD makes reference to Article 72a(1)(b) CRR. According to Articles 11(3a) and 18(1) CRR, parent institutions identified as resolution entities that are G-SIIs, part of a G-SII or part of a non-EU G-SIII must comply with Article 92a CRR (i.e., with the TLAC minimum requirement) on a consolidated basis at the level of their respective resolution group. This restricts the scope of the instruments that can be used for compliance with the TLAC minimum requirement and clarifies that, unless otherwise provided (namely for eligible liabilities instruments, which must be directly issued or raised by the institution as per Article 72b(2)(a) CRR), instruments should be counted on a consolidated basis at the level of the resolution group. This applies both to own funds as well as to the part of T2 instruments with a residual maturity of at least one year which, by virtue of Article 64 CRR, no longer qualifies as T2 items and thus cannot be included in the own funds of the institution.

In the context of BRRD and compliance with external MREL, the reference in Article 2(1)(71a) BRRD to Article 72a(1)(b) CRR requires that this provision to be interpreted as having the same scope, i.e., as referring to amortised T2 instruments on a consolidated basis at the level of the resolution group. This interpretation also ensures compliance with Article 45e(1) BRRD, which requires that external MREL be complied on a consolidated basis at the level of the resolution group.

This implies that, for the purposes of Articles 2(1)(71b) and 45b(4) to (9) BRRD, the amortised T2 instruments issued by subsidiaries in the same resolution group to entities external to the resolution group are included in the notion of 'subordinated eligible instruments' and thus should also be used towards compliance with the subordinated component of MREL.

31. **Question (Article 45b(4))**

Should Article 45b(4) be read as applying also to resolution entities that are part of a G-SII?

Answer

Article 45b(4) BRRD should be interpreted as also applying to resolution entities that are part of a G-SII or part of a non-EU G-SII. Indeed, a G-SII group may have more than one resolution entity subject to Article 45b BRRD or a non-EU G-SII may have a resolution entity established in the Union in cases where its resolution plan provides for an MPE resolution strategy. As such, the definitions of 'resolution entity' and 'resolution group' in points (83a) and (83b) of Article 2(1) BRRD should also be compatible with the implementation of MPE strategies, as is explicitly stated in recital (4) of Directive (EU) 2019/879 that reads as follows:

'In line with the TLAC standard, **Directive 2014/59/EU should continue to recognise both the Single Point of Entry (SPE) resolution strategy and the Multiple Point of Entry (MPE) resolution strategy**. Under the SPE resolution strategy, only one group entity, usually the parent undertaking, is resolved, whereas other group entities, usually operating subsidiaries, are not put under resolution, but transfer their losses and recapitalisation needs to the entity to be resolved. Under the MPE resolution strategy, more than one group entity might be resolved. A clear identification of entities to be resolved ('resolution entities'), that is, the entities to which resolution actions could be applied, together with subsidiaries that belong to them ('resolution groups'), is important in order to apply the desired resolution strategy effectively. **That identification is also relevant for determining the level of application of the rules on loss-absorbing and recapitalisation capacity that institutions and entities should apply**. It is therefore necessary to introduce the concepts of 'resolution entity' and 'resolution group' and to amend Directive 2014/59/EU as regards group resolution planning, in order to explicitly require resolution authorities to identify the resolution entities and resolution groups within a group and to appropriately consider the implications of any planned action within the group to ensure effective group resolution.' [emphasis added]

32. **Question (Article 45b(5))**

Although the last subparagraph of Article 45b(5) sets a limit of 10% above which the resolution authority is obliged to assess the risk referred to in point (b) of that provision, does the resolution authority have the discretion to make this assessment even if this limit is not met?

Additionally, Article 45b(5) seems to refer only to the bail-in tool. How would these principles apply in the case of other resolution tools (e.g. bridge bank)?

Answer

The first subparagraph of Article 45b(5) provides for a discretionary power for resolution authorities to request that a certain level of the MREL of resolution entities is met with subordinated liabilities if the conditions of that subparagraph are met. One such condition is referred to in point (b) of that subparagraph –(risk of breach of the NCWO principle). The second subparagraph requires resolution authorities to perform the assessment of the condition referred to in point (b) of the first subparagraph if the limit of 10% laid down therein is reached.

The interaction between the two subparagraphs is that the resolution authority has discretion to assess at any time if the conditions of the first subparagraph are met, including the risk of breach of the NCWO principle. However, it is under the obligation to perform the assessment of the risk of breach of the NCWO principle whenever the threshold of 10% is reached.

Article 37(4) provides that 'resolution authorities may apply the resolution tools individually or in any combination'. The provisions of Article 45b are applied in the same way regardless of whether the bail-in tool is used individually or in combination with other resolution tools. When other resolution tools are used without the simultaneous use of the bail-in tool, the provisions of the first subparagraph of Article 45b(5) should also be applied so as to ensure compliance in resolution with the principle of Article 34(1)(g), also in light of Article 45c(1)(a) and (c).

33. **Question (Article 45b(6))**

Article 128 CRD states that institutions must not use CET1 capital that is maintained to meet the CBR to meet the risk-based components of the requirements set out in Articles 92a and 92b CRR (TLAC minimum requirement) and in Articles 45c and 45d BRRD (external and internal MREL).

The second subparagraph of Article 45b(6) BRRD provides that the own funds of a resolution entity that are used to comply with the CBR are eligible to comply with the requirements referred to in Article 45b(4), (5) and (7) BRRD (MREL subordination requirement).

Does Article 45b(6) relate both to the MREL subordination requirement expressed as percentage of TREA and TEM?

Answer

Article 45(2) BRRD provides that MREL may only be expressed as percentages of TREA (risk-based component) and TEM (non risk-based component).

Therefore, the MREL subordination requirements referred to in Article 45b(4), (5) and (7) BRRD will also need to be expressed as percentages of TREA (risk-based component) and TEM (non risk-based component).

The principles referred to in the fourth subparagraph of Article 128 CRD do not apply to the subordination requirement of MREL when expressed as percentage of TEM (i.e. the CBR is not 'stacked' on the top of the non risk-based component of MREL and, therefore, the CET1 capital used to comply with the CBR will be eligible to comply with the non risk-based component of MREL).

However, CET1 capital used to comply with the CBR cannot be used to meet any MREL requirement, whether subordinated or not, expressed in TREA. The reference to paragraph 5 in Article 45b(6) BRRD was intended to provide for a consistent application of the limit of the prudential formula referred to in Article 45b(7) BRRD, which also applies to non-systemic institutions under Article 45b(5) BRRD.

Therefore, the second subparagraph of Article 45b(6) BRRD and Article 128 CRD are consistent with each other.

34. **Question (Article 45b(8))**

Article 45b(8) BRRD gives Member States the option to set the percentage referred to in the first subparagraph at a level higher than 30 %. Would it be possible for a Member State to set we that level at 100 % by taking into account the specificities of its national banking sector)?

Answer

Article 45b(8) BRRD provides that resolution authorities may apply a higher subordination requirement than 8 % of the total liabilities and own funds only up to a limit of 30 % of all resolution entities that are subject to that provision (G-SIIs, top-tier banks and entities subject to Article 45c(6) BRRD).

The last subparagraph of Article 45b(8) BRRD provides for an option for Member States to set a higher percentage. Therefore, a Member State may decide that a resolution authority should have the power to impose a higher subordination requirement to all resolution entities subject to Article 45b(8) BRRD established in that Member State (by taking account of the specificities of their national banking sector and the number of resolution entities concerned).

This option, however, in practice cannot be applied with respect to entities in the scope of the SRMR since Article 12c(8) SRMR does not provide for such an option. Therefore, all institutions that are in the scope of the SRMR, regardless of whether they are under the direct competence of the SRB or of the national resolution authorities pursuant to the division of tasks of Article 7 SRMR, would not be subject to such an increased percentage. If a participating Member State exercises the option provided for in Article 45b(8) BRRD, that national provision would only apply to the entities that are within the scope of the BRRD pursuant to its Article 1(1) but outside the scope of the SRMR pursuant to its Article 2. This option will cover – mainly investment firms not covered by the consolidated supervision of a parent undertaking.

This ensures that all entities in the scope of the SRM are subject to the same uniform rules and uniform procedures, as laid down in Article 1(1) SRMR. It should be noted that the last sentence of recital 28 SRMR provides that 'Under certain circumstances the national resolution authorities should perform their tasks on the basis of and in accordance with this Regulation while exercising the powers conferred on them by, and in accordance with, the national law transposing Directive 2014/59/EU in so far as it is not in conflict with this Regulation.'.

(d) ***Determination of the MREL***

35. **Question (Article 45c(1))**

How would the size, business and funding models and the risk profile will be used to adjust the MREL of an entity?

Answer

Article 45c BRRD refers to a number of situations where these criteria could have an impact when calibrating the total MREL, such as:

— determining, after consulting with the competent authority, the additional own funds requirements referred to in Article 104a CRD that would be applicable to the entity after resolution (fifth subparagraph of paragraph 3);

— applying the discretion referred to in paragraph 6 to select institutions that would be subject to the application of paragraph 5 and applicable provisions of Article 45b BRRD (by taking into account the conditions linked to the funding model);

— taking into account the minimum bail-in rule (referred to in the fourth subparagraph of paragraph 3 – the interplay with the level of total MREL will vary depending on the business and funding model since they have an impact on the average risk weight of the entity;

— for entities whose preferred resolution strategy is winding up under normal insolvency proceedings or other equivalent national procedures, assessing whether MREL should be limited to the loss absorption amount (as provided for in paragraph 2);

— applying and/or adjusting the amount to sustain market confidence referred to in paragraph 3.

36. **Question (Article 45c(1))**

How would the impact on financial stability mentioned in Article 45c(1)(e) be reflected in the MREL of an entity?

Answer

Article 45c refers to a number of situations where the criterion relating to the impact of financial stability could have an impact when calibrating total MREL, such as:

— applying the discretion referred to in paragraph 6 to select institutions that would be subject to the application of paragraph 5 and applicable provisions of Article 45b ;

— taking into account the minimum bail-in rule (referred to in fourth subparagraph of paragraph 3 of Article 45c;

— for entities whose preferred resolution strategy is winding up under normal insolvency proceedings or other equivalent national procedures, assessing whether MREL should be limited to the loss absorption amount (as provided for in paragraph 2 of Article 45c).

37. **Question (Article 45c(2))**

How would the impact on financial stability be reflected in the adjustment to the loss absorption amount for an entity for which the resolution plan provides that it is to be wound up under normal insolvency proceedings?

Answer

Resolution authorities need to use their discretion when applying this provision. In accordance with Article 45c(9), the assessment of the elements referred to therein would have to be included in the MREL decision.

Material add-ons in the recapitalisation amounts for such institutions would nevertheless be inconsistent with point (b) of the first subparagraph of Article 45c(2), which clarifies that the purpose of the recapitalisation amount is to enable entities to comply with the conditions for authorisation after application of resolution actions or the exercise of write down and conversion powers. In this context, entities that, in accordance with a resolution plan, are to be wound up under normal insolvency proceedings are not expected to need to comply with the conditions for authorisation and, therefore, should not normally have a recapitalisation amount.

Moreover, if a resolution authority assesses that limiting MREL to a loss absorption amount would pose the risk of a significant impact on financial stability or contagion to the financial system, this may indicate that the entity is not feasibly and credibly resolvable under the preferred resolution strategy and its resolvability assessment has to be reconsidered.

In this regard, Article 15(1) provides that an entity is deemed resolvable if 'it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system-wide events, of the Member State in which the institution is established, or other Member States or the Union.'

38. **Question (Article 45c(2))**

Does the Directive allow for not setting MREL for entities whose MREL is equal to own funds requirements (i.e. for entities whose resolution plan provides for their winding up under normal insolvency proceedings or other equivalent national procedures)?

Answer

Article 45(1) provides that institutions and entities referred to in Article 1(1), points (b), (c) and (d) must meet MREL at all times, where required by and in accordance with Articles 45 to 45i.

This set of articles contemplates the following exemptions from MREL, to be granted by the resolution authorities when the conditions provided therein are met:

— Mortgage credit institutions can be exempted under Article 45a;

— Institutions that are subsidiaries of a resolution entity, but are not themselves resolution entities, can be exempted from MREL under Article 45f(3) or (4);

— Central bodies and credit institutions permanently affiliated to a central body can be exempted under Article 45g.

Furthermore, the second subparagraph of Article 45f(1) provides that the application of the requirement laid down in Article 45f(1) (i.e., internal MREL) to an entity referred to in points (b), (c) and (d) of Article 1(1) that is a subsidiary of a resolution entity but is not itself a resolution entity is not mandatory, as it depends on the exercise of a discretionary power of the resolution authority, after consulting the competent authority. However, it should be noted that the third subparagraph of Article 45f(1) requires Union parent undertakings that are not themselves resolution entities, but are subsidiaries of third-country entities, to comply with internal MREL on a consolidated basis. This means that the determination of internal MREL for entities referred to in points (b), (c) and (d) of Article 1(1) that meet the conditions of that third subparagraph is mandatory.

Therefore, unless an entity falls in one of the situations mentioned above, the adoption of a MREL decision by the resolution authority is mandatory, even when the resolution plan provides that the entity is to be wound up under normal insolvency proceedings or other equivalent national procedures. This is further confirmed by the fact that Article 45c(2), second and third subparagraphs, explicitly recognises this situation and provides for the rules on how to calculate MREL for entities in this situation.

39. **Question (Article 45c(2))**

Taking into account Articles 45(1), 45a and the second subparagraph of Article 45c(2), , MREL should be set even if the preferred resolution strategy is liquidation. Should MREL be calculated in this case on an individual or on a consolidated basis?

Answer

Article 45e(1) and (2) provides that the external MREL of resolution entities must be determined and complied with on a consolidated basis at the level of the resolution group. The *rationale* of these provisions is that, within a resolution group, the losses incurred by the entities belonging to that resolution group should be borne by the resolution entity, which should hold sufficient loss-absorbing resources as to cover the needs of the entire resolution group. This objective is achieved through the application of resolution action to the resolution entity and through the upstreaming of losses from its subsidiaries and subsequent down streaming of capital by means of the exercise of the write down and conversion powers in accordance with Article 59. For this reason, resolution entities are required to issue eligible instruments and items to external third-party creditors (see recital (19) of Directive (EU) 2019/879).

On the contrary, the internal MREL of entities that are subsidiaries of a resolution entity, but are not themselves resolution entities must be determined and complied with on an individual basis under Articles 45c(7) and 45f(1) (notwithstanding the situations where internal MREL is to be complied with at consolidated or sub-consolidated level, as referred to in the third subparagraph of Article 45f(1) and (4)(b)). The losses and the recapitalisation needs of these subsidiaries are to be borne, as a rule, by their respective resolution entities through direct or indirect acquisition of own funds instruments and eligible liabilities instruments issued by these subsidiaries (see recital (20) of Directive (EU) 2019/879).

In the case of entities that are part of a group subject to consolidated supervision and whose resolution plan provides that they are to be wound up under normal insolvency proceedings or other equivalent national procedures, the rules explained above for situations of group resolution do not apply. Indeed, the failure of those entities will be dealt with through the normal insolvency proceedings, which take place at the level of a legal entity. In insolvency, the parent undertaking will only be liable for its own losses and will not be required to provide support to its subsidiaries. Moreover, the own funds and certain eligible liabilities issued by its subsidiaries would not be available to absorb losses in the individual liquidation of the parent undertaking. Thus, in these situations of parent undertakings being wound up, it would not be appropriate to set an MREL on a consolidated basis.

Therefore, for parent undertakings whose resolution plan provides that they are to be wound up under normal insolvency proceedings or other equivalent national procedures, their MREL requirement should only be determined and complied with on an individual basis.

40. **Question (Articles 45c(2), (3), (4) and (7))**

When applying Article 45c(2), (3), (4) and (7), it is unclear how the expression 'for an appropriate period which shall not exceed one year' should be interpreted. Does this mean that the recapitalisation amount should be set at the level which ensures market confidence in relation to the entity post-resolution only for one year?

Answer

Article 45c(3) and (7) provide that the amount to sustain market confidence that is included in the recapitalisation amount must be set at the level necessary to sustain that market confidence for an appropriate period that must not exceed one year.

The application of a one year time horizon is proportionate and consistent with the use of the same time horizon for the purposes of calibration of prudential requirements for institutions. This is relevant considering that prudential requirements constitute the key components of the determination of the level of the MREL requirement.

41. **Question (Article 45c(3) and (7))**

Article 45c(3) and (7) BRRD refers to the need of maintaining a certain level of MREL in order to ensure compliance with the conditions for authorisation and the conduct of activities authorised under CRD IV. These provisions apply also for entities covered by Article 1 points (b), (c) and (d) BRRD. However, some of those entities are not subject to authorisation under CRD, but under specific national provisions. For those entities, how should the references to the need to comply with the conditions for authorization be transposed in national legislation?

Answer

To the extent that approval or authorisation of entities referred to in points (b), (c) or (d) of Article 1(1) BRRD is not governed by CRD or MIFID, but by other equivalent national and Union legislative acts, appropriate reference could be included in the national law transposing Article 45c(1)(b) BRRD. In this regard, Article 45c(2)(b) BRRD enables such broader interpretation, since it states that entities have to be recapitalised to the extent necessary to enable them to comply with conditions of authorisation under CRD, MIFID or 'any equivalent legislative act'.

42. **Question (Article 45c(3), 5th sub-paragraph)**

What is the adjustment to the TREA and TEM required under point (a) of the fifth subparagraph of Article 45c(3)?

Answer

When determining the recapitalisation amount, adjustments to the most recently reported values for the relevant TREA or TEM must be made to reflect the effect that the application of the resolution actions set out in a resolution plan would have on TREA and the TEM.

In this context, in accordance with points (a)(ii) and (b)(ii) of the first subparagraph of Article 45c(3), the resolution actions in light of which the most recently reported amounts would have to be adjusted would be those that comprise the preferred resolution strategy.

(e) ***Application of internal MREL to entities that are not themselves resolution entities***

43. **Question (Article 45f(1))**

Does Article 45f(1), regarding internal MREL, also apply to G-SII entities which are not resolution entities?

Answer

The provisions of Article 45f are applicable to all institutions that are subsidiaries of a resolution entity or of a third country entity and are not themselves resolution entities. This also includes G-SII entities.

44. Question (Article 45f(1))

Does Article 45f(1), second subparagraph apply to the entities referred to therein on an individual basis?

Answer

The first subparagraph of Article 45f(1) clarifies that institutions which are subsidiaries of a resolution entity or of a third country entity but are not themselves resolution entities must comply with internal MREL on an individual basis. The second subparagraph of that Article provides resolution authorities with the discretion to apply internal MREL to entities referred to in points (b), (c) and (d) of Article 1(1). The second subparagraph of Article 45f(1) applies on an individual basis as well, unless the entity falls under the third subparagraph of Article 45f(1).

The third subparagraph of Article 45f(1), which stipulates the possibility to comply with the requirements in Articles 45c and 45d, refers only to Union parent undertakings which are subsidiaries of third-country entities.

However, Article 45f(4) allows the resolution authority the possibility to waive the application of internal MREL for a subsidiary that is not itself a resolution entity if several conditions are met, i.e. where both the subsidiary and the parent undertaking are established in the same Member State and are part of the same resolution group and where the parent undertaking complies with external MREL on a consolidated basis.

Therefore, in the context of a waiver of internal MREL as per Article 45f(4), the internal MREL may also be complied with at (sub)consolidated level for entities referred to in points (b), (c) and (d) of Article 1(1). Otherwise, in the absence of a waiver, internal MREL applies on an individual basis, except when the entity is a Union parent undertaking of a third country group.

45. **Question (Article 45f(3))**

Article 45f(3) BRRD gives the resolution authority the possibility to waive the application of internal MREL, provided that the conditions referred to therein are met. However, the conditions referred to in Article 45f(3)(d) to (f) BRRD do not seem to have an equivalent in Article 12h(1) SRMR. When transposing Article 45f(3) BRRD, how should Member States deal with this?

Answer

The reduced amount of conditions for the granting of a waiver from MREL to a subsidiary in the current SRMR in comparison to the current BRRD is consistent with SRMR I and BRRD I, where this was already the case.

Despite the differences between BRRD and SRMR, Member States are required to include in their national law implementing BRRD all the conditions mentioned in Article 45f(3). The scope of BRRD and, consequently, of national laws implementing BRRD, which is laid down in Article 1(1) of that Directive, is different from the scope of SRMR, laid down in Article 2 of that Regulation. SRMR does not include in its scope investment firms that are not covered by the consolidated supervision of a parent undertaking nor branches of institutions that are established outside the Union.

46. **Question (Article 45f(5))**

What is the meaning of Article 45f(5)(g) BRRD, considering that, under the financial collateral arrangements referred to in point (c) of that provision, the collateral always has to be 'provided', i.e., it has to be owned or in the possession of the beneficiary of the guarantee (see Article 1(5) Directive 2002/47/EC of the European Parliament and of the Council ([14]))?

Answer

Point (c) of Article 45f(5) BRRD makes reference to the definition of a financial collateral arrangement provided in point (a) of Article 2(1) of Directive 2002/47/EC, which means 'a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions'. For security financial collateral arrangements, a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, whereby the full ownership of the financial collateral remains with the collateral provider when the security right is established. Directive 2002/47/EC also requires that the collateral is 'provided' and this needs to be proven in writing. The second sub-paragraph of Article 1(5) of Directive 2002/47/EC specifies that such written evidence that the financial collateral has been 'provided' refers to the identification of the financial collateral and that it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account.

Article 2(2) of Directive 2002/47/EC clarifies that references to the financial collateral being 'provided', or to the 'provision' of financial collateral, are to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf. Moreover, any right of substitution or to withdraw excess financial collateral in favour of the collateral provider must not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive.

([14]) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

In light of the above, point (g) of Article 45f(5) BRRD refers to the absence of legal, regulatory or operational barriers for the appropriation or execution of collateral provided, including where resolution action is taken in respect of the resolution entity. This is compatible with the general provisions of Directive 2002/47/EC.

47. **Question (Article 45f)**

Taking into account Articles 44 and 45f, could liabilities other than those eligible for compliance with the institution's internal MREL be bailed-in within the group? In other words, could all liabilities issued by an entity towards other group entities (not necessarily resolution entities) be bailed-in?

Answer

In the event of placing a subsidiary which is not a resolution entity in resolution in deviation from the resolution plan, the resolution authority may apply bail-in powers in relation to existing creditors, including holders of the liabilities referred to in Article 45f(2)(a) (generally the resolution entity) but also other creditors either inside or outside the resolution group, while respecting the hierarchy of claims in normal insolvency proceedings when doing so. According to Article 45f(2)(a)(iii), liabilities eligible for compliance with internal MREL must rank below liabilities that do not meet the conditions referred to in point (i) of that same provision (i.e. they should be subordinated to instruments that cannot be counted towards internal MREL) and that are not eligible for own funds requirements. This means that claims of intra-group creditors linked to instruments that are not eligible for internal MREL would rank senior to those liabilities that are eligible for that purpose. Their ranking in insolvency would need to be taken into account when bailing-in these claims.

In case of application of the bail-in tool to a subsidiary that had not been identified as a resolution entity, in deviation from the resolution plan, by virtue of Article 44(2)(h) BRRD, intra-group claims owed to its subsidiaries that are also not resolution entities but are part of the same resolution group as defined in the resolution plan are mandatorily excluded from the application of bail-in powers (except where they rank below ordinary unsecured liabilities under the relevant national law). However, other intra-group claims owed to group entities are not excluded from the application of bail-in powers due to Article 44(2)(e).

(f) ***Reporting***

48. **Question (Article 45i)**

According to Article 45i(1), entities referred to in Article 1(1) that are subject to MREL must report to their competent and resolution authorities on a series of elements specifically mentioned therein.

Could a Member State provide in the national transposition law that entities should report only to one authority where that authority acts both as a competent authority and resolution authority (typically, the central bank)?

Answer

In line with Article 3(3) 'Designation of authorities responsible for resolution', Member States may provide that resolution authorities are located within central banks. In such a situation, adequate arrangements must be put in place to ensure operational independence between the resolution function and the supervisory or other functions of the relevant authority. In accordance with the second subparagraph of Article 3(3), the resolution authority must be structurally separated and have a distinct reporting line from the supervisory authority.

Article 45i(1) requires clearly that entities must report the specific information mentioned under points (a), (b), and (c) both to the competent and resolution authorities. Given that the information to be provided by the entity is identical, this does not imply an additional burden on the entity. Sending in parallel the required data and information both to competent and resolution authorities ensures a smooth and timely transmission of information, without additional delays.

(g) ***Transitional and post-resolution arrangements***

49. **Question (Article 45M(1) and (6))**

Is it possible to set intermediate targets other than the one referred to in Article 45m(1), second subparagraph (i.e. at 1 January 2022)?

How does the intermediate target relate to the planned MREL for each 12-month period during the transitional period referred to in Article 45m(6)?

Answer

Resolution authorities can only set the intermediate target level mentioned in the second subparagraph of Article 45m (1), i.e., the target level that they must comply with at 1 January 2022.

Under Article 45m(6), resolution authorities must also set a planned MREL for each 12-month period during the transitional period. However, these are of an indicative nature and are not binding to the institution.

50. **Question (Article 45m)**

What happens to decisions adopted by resolution authorities determining an MREL under BRRD I, once the amendments introduced by Directive (EU) 2019/879 to BRRD start being applicable?

Would it be justified to implement a transitional provision at the national level repealing existing MREL decisions until new decisions are taken?

Answer

Directive (EU) 2019/879 does not contain any specific provisions regarding MREL decisions taken before the respective date of application. Until new MREL decisions are taken by resolution authorities on the basis of the current BRRD, the existing MREL decisions taken on the basis of BRRD I remain valid.

The assessment of the legal consequences of such decisions should be carried out in accordance with the legal provisions applicable at the time those decisions were taken (i.e. under BRRD I rules). This means that, when assessing whether an institution complies with an MREL decision taken under BRRD I, the relevant eligibility rules are those found in BRRD I. An institution cannot be deemed to be in breach of an MREL decision taken under BRRD I on the basis of the eligibility rules in the current BRRD.

Thus, there is no need to waive or repeal MREL decisions based on the BRRD I during the transitory period until new MREL decisions based on the current BRRD are taken.

51. **Question (Article 45m)**

What happens to the transitional periods already established in accordance with Commission Delegated Regulation (EU) 2016/1450 ([15])?

Answer

After the date of application of the amendments introduced by Directive (EU) 2019/879 in the BRRD (i.e. 28 December 2020), resolution authorities are required to review any previously adopted MREL decisions in light of the new MREL framework, which entails a different calibration and different eligibility rules. In that context, new transitional periods will have to be determined, so as to ensure compliance with the revised framework.

([15]) Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities (OJ L 237, 3.9.2016, p. 1).

52. **Question (Article 45m(4))**

Would it be possible to decide in advance that a top-tier bank will be subject to Article 45c(6) should the total assets of its resolution group fall to a level below EUR 100 billion? This would be necessary to avoid the application of Article 45m(4) that grants resolution entities referred to in Article 45c(6) a three-year transitional period for complying with the MREL requirements from the date of the decision.

Answer

Article 45m(4) provides that the subordination rules in Article 45b(4) and (7) and the minimum levels of the MREL referred to in Article 45c(5) and (6) do not apply within the three-year period following the date on which the resolution entity starts to be in the situation referred to in Article 45c(5) and (6).

Article 45m(4) is not applicable to a resolution entity referred to in Article 45c(5) (top-tier bank) that falls below the EUR 100 billion threshold and is subsequently deemed as a systemic institution by the resolution authority and made subject to the same treatment as a top-tier bank. The rationale behind the transitional period provided in Article 45m (4) is to allow resolution entities that were previously not subject to any minimum requirements sufficient time to ensure compliance with the newly-applicable minimum requirements. However, systemic institutions that were previously top-tier banks are not in this situation. These resolution entities have already been subject to the same minimum requirements, but under a different legal basis (Article 45c(5) instead of Article 45c(6)).

Thus, the final part of Article 45m(4) – '… or the resolution entity starts to be in the situation referred to in Article 45c(5) or (6)' – does not apply to systemic institutions notified as such under Article 45c(6) and that were previously top-tier banks, due to the fact that they were previously in the situation referred to in Article 45c(5).

The same is true for the inverse situation, where a systemic institution increases the size of its assets above EUR 100 billion and becomes a top-tier bank.

However, it should be noted that the application of Article 45c(6) might lead to stricter requirements than the ones arising from Article 45c(5), by virtue of the second and fourth subparagraphs of Article 45b(4), , according to which the 27% TREA limitation on subordination only applies to resolution entities subject to Article 45c(5), and not to resolution entities subject to Article 45c(6). In that case, the above mentioned reasoning does not apply and the three-year transitional period should apply to that resolution entity.

As such, there would be no need to notify in advance an institution as systemic – which, in any case, would most likely not be legally admissible, due to the fact that a top-tier bank does not meet the conditions of Article 45c(6)(of being part of a resolution group with total assets below EUR 100 bn).

(h) ***Interaction with CRD and CRR provisions***

53. **Question (Article 128 CRD)**

The fourth subparagraph of Article 128 CRD states that institutions must not use CET1 capital that is maintained to meet CBR to meet the risk-based components of MREL (i.e. MREL expressed in terms of TREA). Could CET1 capital used for the purpose of CBR also be used to meet the non-risk based component of MREL (i.e. MREL expressed in terms of TEM)? What is the rationale for such treatment?

Answer

In accordance with the fourth subparagraph of Article 128 CRD, the same CET1 capital cannot be used to comply with

— the CBR, and

— the risk-based component of the requirements set out in Articles 92a and 92b CRR (TLAC minimum requirement) and Articles 45c and 45d BRRD (external and internal MREL).

Therefore, the same CET1 capital can be used to comply with the CBR and the non-risk based component the TLAC minimum requirement and external and internal MREL that is based on the TEM (for these requirements, the non-risk based components are set out in Articles 92a(1)(b) CRR and 45(2)(b) BRRD).

It should be noted that as per the EU prudential framework (CRD and CRR), the CBR stacks on top of the risk-based prudential requirements only (and not on top of the non-risk based leverage ratio requirement). This relationship has been confirmed explicitly in the second subparagraph of Article 141a CRD.

Accordingly, under Article 1(3) of Delegated Regulation (EU) 2016/1450, which was adopted under BRRD I, the CBR was part of the loss absorption amount but only when taken together with risk-based prudential requirements.

Under Article 45(2)(a) and (b) BRRD, MREL is expressed as a percentage of TREA and a percentage of TEM, respectively. As regards the component expressed as a percentage of TREA, the CBR is now excluded from the loss absorption amount of MREL calibration to allow for a more proportionate intervention ladder to prevent that MREL (expressed as a percentage of TREA) is breached every time CBR is breached. The stacking of CBR on top of MREL is also expected to facilitate the intended use of certain macro-prudential measures, such as the countercyclical capital buffer referred to in point (a) of point (6) of the first sub-paragraph of Article 128 of CRD.

54. **Question (Article 72b(3) CRR)**

Does the 3,5 % TREA allowance to use non-subordinated instruments to comply with the TLAC minimum requirement apply only when that requirement is expressed as a percentage of TREA, but not when it is expressed as a percentage of TEM? Could this be clarified in the national transposition of BRRD?

Answer

In accordance with Article 72b(3) CRR, the 3,5 % TREA allowance for non-subordinated eligible instruments is applicable also for the component of TLAC that is expressed as percentage of TEM as from 2022 onwards (by applying an allowance equivalent to 3,5 % TREA in TEM terms). In accordance with Article 494(2) CRR, the same principle holds for the 2,5 % TREA allowance for non-subordinated eligible instruments from 2019 to end-2021.

This is due to the fact that Article 72b CRR lays down the conditions applicable to eligible liabilities instruments for compliance with TLAC. Article 72b(3) CRR, more specifically, does not define different eligibility criteria for the two components of TLAC set out in points (a) and (b) of Article 92a(1) CRR. The reference to TREA in Article 72b(3) CRR is strictly for calculation purposes.

The allowance is not regulated by the BRRD and, therefore there are no provisions in that regard to be transposed. However, as per recital (10) BRRD, provisions of BRRD on subordination of MREL eligible instruments are without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments, as provided for in CRR.

55. **Question (Article 72(l) CRR)**

Under the TLAC standard, the minimum TLAC requirement can be satisfied, inter alia, by regulatory capital instruments other that CET1 issued by subsidiaries forming part of a resolution group only until 2022, if they count towards satisfying minimum regulatory capital requirements and subject to certain conditions (section 11 of the TLAC standard).Article 72l CRR provides that 'the own funds and eligible liabilities of an institution shall consist of the sum of its own funds and its eligible liabilities'. Under Articles 81 to 88 CRR, these own funds include the own funds issued by subsidiaries to third parties without any time limitation.

Is it correct to provide in national legislation that own funds issued by subsidiaries to third parties count towards MREL requirements under both the CRR and the BRRD without any time limitation?

Answer

All regulatory own funds instruments issued by subsidiaries to third parties are eligible for the TLAC minimum requirement for resolution entities and for external MREL (without sunset clause) for the amounts that are eligible for own funds. For the eligibility of own funds for internal MREL under Article 45f(2) BRRD, additional criteria apply.

E. QUESTIONS RELATED TO THE BAIL-IN TOOL

56. Question (Article 44(2))

According to Article 44(2)(f) BRRD, liabilities to third-country CCPs recognised by ESMA under Article 25 of Regulation (EU) No 648/2012 ([16]) are exempted from bail-in. Other protections for these third-country CCPs can be found in Articles 69, 70 and 71 BRRD. However, BRRD does not provide a comparable treatment to securities settlement systems governed by the laws of a third country and to the entities operating those systems.

Where a Member State applies the provisions of the SFD to their domestic institutions which participate directly in securities settlement systems governed by the laws of a third country, as provided in recital (7) of the SFD, does the BRRD intend to provide those third-country systems a similar treatment to the one granted to third-country CCPs recognized by ESMA?

Answer

Article 44(2)(f) BRRD provides that certain short term liabilities 'owed to systems or operators of systems designated in accordance with Directive 98/26/EC [SFD] or to their participants and arising from such participation' are excluded from the scope of application of the bail-in tool.

The exclusion from the scope of application of the bail-in tool laid down in Article 44(2)(f) BRRD does not apply to third-country systems regardless of whether Member States apply or not the provisions of the SFD to their domestic institutions which participate directly in those third-country securities settlement systems as provided in recital (7) of the SFD, as they are not designated in accordance with the SFD. Similarly, the exemptions from the exercise of the powers referred to in Article 69(4)(a), 70(2)(a) or 71(3)(a) BRRD do not apply to those third country systems.

57. Question (Article 44(2))

Under Article 108(2), the expression 'ordinary unsecured liabilities' is used to only refer to senior preferred liabilities. Considering this, should we interpret 'ordinary unsecured liabilities' in the same way when such reference is made in Article 44(2)(h) – i.e., should we exclude from the scope of 'ordinary unsecured liabilities' as referred to in Article 44 (2)(h) senior non-preferred liabilities?

Answer

The terms 'ordinary unsecured claims' used in Article 108(2) and 'ordinary unsecured liabilities' in point (h) of Article 44(2) should be interpreted consistently. Since in Article 108(2) the debt instruments fulfilling the conditions thereof (i.e. senior non-preferred debt) are explicitly required to rank in insolvency lower than 'ordinary unsecured claims' (i.e. senior liabilities), the term 'ordinary unsecured claims' should by definition exclude senior non-preferred debt.

58. Question (Article 48(7))

Is it correct that under the first sentence Article 48(7) institutions are not allowed to have any instruments that rank *pari passu* to own funds items or instruments?

Answer

Article 48(7) requires Member States to modify their national insolvency law to ensure that claims resulting from own funds items rank in insolvency below any other claims that do not result from own funds items. Following the transposition of this provision, it should not be possible for institutions to hold any liability that are not own funds items that would rank *pari passu* with own funds by virtue of the operation of national laws governing normal insolvency proceedings referred to in Article 48(7) (statutory solution).

([16]) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

59. **Question (Article 48(7))**

What is the *rationale* of Article 48(7)? The transposition of this provision appears to be particularly challenging, because the insolvency ranking of an instrument may change if it no longer qualifies as own funds item.

Answer

Article 48(7) requires Member States to modify their national insolvency law to ensure that claims resulting from own funds items rank in insolvency below any other claims that do not result from own funds items. The intention of this provision was to ensure what where own funds items are written down or converted at the point of non-viability of an entity in accordance with Article 59 and 60 or Article 48, there are no other liabilities ranking *pari passu* with or below such items. This will alleviate to a great extent the risks of legal challenge of the actions of competent or resolution authorities on grounds of the violation of the NCWO principle.

If an instrument is no longer an eligible own funds item, national insolvency law should ensure that it may not rank *pari passu* or below own funds items.

F. QUESTIONS RELATED TO THE CONTRACTUAL RECOGNITION OF BAIL-IN

60. **Question (Article 55(3))**

Could the legal opinion on the legal enforceability and effectiveness of the contractual term referred to in Article 55(1) be provided externally, internally or both? Do internal and external opinions have to be regarded as having an equal value for the purposes of Article 55(3)? Should this be left to the discretion of the concerned institution?

Answer

The text is neutral in this respect so both an internal or an external opinion would be in line with Article 55(3).

61. **Question (Article 55(1))**

The first subparagraph of Article 55(1) provides that, as to liabilities which are not excluded by the scope of bail-in and are governed by the law of a third country, the relevant contract must include a clause providing that the counterparty recognizes that the liability may be subject to write down and conversion powers and agrees to be bound to such powers. Such obligation does not apply when: :

(a) the law of the third country or a binding agreement with that third country would allow the resolution authority to exercise its write down and conversion powers (last subparagraph of Article55(1));

(b) the resolution authority decides not to apply that obligation to institutions whose MREL is equal to the loss-absorption amount defined under Article 45c(2)(a), provided that the liabilities within the scope of the first subparagraph of Article 55(1) are not used for meeting the MREL (second subparagraph of Article 55(1));

(c) the insertion of the clause is legally or otherwise impracticable (second subparagraph of Article 55(2).)

Pursuant to the last subparagraph Article 55(2), liabilities for which the institution fails to include the clause or for which a waiver for impracticability has been granted must not be counted towards the minimum requirement for own funds and eligible liabilities.

Is it correct to transpose Article 59(1) and (2)so as to provide that a liability governed by the law of a third country that does not include the recognition clause because there is a binding agreement or statutory recognition by that third country of bail-in powers could still count towards the MREL requirement?

Answer

The third subparagraph of Article 55(1) excludes the application of the obligation to insert the contractual recognition clause if the resolution authority concludes that an agreement with the relevant third country or the law of that third country would give effect to its exercise of write down and conversion powers with respect to the relevant liabilities or instruments.

In such cases, the institution is not under the obligation to insert the clause and (unlike the cases where impracticability is invoked) the exercise of the write down and conversion powers to those liabilities would be effective. Therefore, in case such clause is not inserted, this does not trigger the consequences in the last subparagraph of Article 55(2), i.e. their exclusion from MREL. These liabilities can therefore be counted towards MREL.

62. **Question (Article 55(2))**

With the new provision of Article 55(2) BRRD, which now explicitly excludes liabilities without bail-in recognition clauses from counting towards MREL, AT1 and T2 instruments that are grandfathered by Article 494(1) and (2) CRR may not count for MREL. How can this gap be addressed by resolution authorities?

Answer

Article 55 has included own funds instruments in its scope since the date of application of BRRD I (1st January 2015). Article 45(5) BRRD I already provided that, where the resolution authority was not satisfied that the decision to write down and convert a liability governed by the law of a third-country would be effective (in light of the contractual terms or relevant international agreements, inter alia), the said liability could not count towards compliance with MREL. Therefore, the exclusion from MREL of liabilities that fail to include a contractual bail-in recognition clause (or that do not include it under the impracticability waiver) is not new.

As regards specifically own funds instruments, there could be a difference between the amount that is eligible towards compliance with own funds requirements and the amount that can be used towards MREL compliance, due to BRRD rules applying only for the purposes of MREL. To address any shortfalls in the amount of own funds and eligible liabilities for the purposes of MREL compliance that can arise due to that difference, resolution authorities could take stock of their existing powers, including the power to address or remove impediments to resolvability under Article 17 BRRD or to set a transitional period ending after 1 January 2024, in accordance with the third subparagraph of Article 45m(1)BRRD.

63. **Question (Article 55(7))**

According to Article 55(7), the resolution authority must specify, where it deems it necessary, the categories of liabilities for which an institution or entity may reach the determination that it is legally or otherwise impracticable to include the contractual term referred to in Article 55(1).

Could this be interpreted as referring to a case-by-case assessment or to a specific type of entities (credit institutions, investment firms, other entities under BRRD)?

Answer

The purpose of Article 55(7) is to allow resolution authorities to specify further the conditions and criteria to identify liabilities for which it may be impracticable to add the clause referred to in Article 55(1). In this respect, the legislator took into consideration that the delegated regulation to be adopted pursuant to Article 55(6) can only identify general conditions for a finding of impracticability and cannot cater for the whole variety of different cases which may arise in practice. To this end, BRRD allows a resolution authority to further specify these conditions based, for example, on its knowledge of a certain market.

The provision is not specific as to how these categories should be identified, so it does not prevent that, for example, a distinction is made based on categories of entities provided this does not lead to a discriminatory treatment.

As for the suggestion for a case-by-case identification, this refers to a decision on a specific entity or possibly a specific class of liabilities issued by a specific entity as to whether the insertion of the clause is impracticable or not. In this reading, however, the case-by-case assessment would end up being a duplication of the assessment that the resolution authority should anyway make upon receipt of a notification from an entity pursuant to Article 55(2)..

G. QUESTIONS RELATED TO THE WRITE DOWN OR CONVERSION OF CAPITAL INSTRUMENTS AND ELIGIBLE LIABILITIES

64. Question (Article 59)

Does the term 'eligible liabilities' as referred to in Article 59(1) BRRD refer to all eligible liabilities, or only to eligible liabilities that meet the conditions referred to in point (a) of Article 45f(2) BRRD, except the condition related to the remaining maturity of liabilities as set out in Article 72c(1) CRR?

Answer

The expression 'eligible liabilities' referred to in the first sub-paragraph of Article 59(1) BRRD is intended to refer only to liabilities that are eligible for internal MREL as referred to in paragraph 1a of that Article.

In order to limit the possibility to write-down or convert eligible liabilities only when they are issued by the entity that is subject to internal MREL, appropriate wording in Articles 59 and 60 BRRD, stating "eligible liabilities as referred to in paragraph 1a" (i.e. independently of resolution action and when issued by an entity subject to internal MREL) or similar has been introduced.

Therefore, liabilities of resolution entities that are eligible for external MREL can only be written down or converted through the use of the bail-in tool (i.e., in the context of resolution action).

The extension of the write down or conversion power at the point of non-viability under Article 59 BRRD to include eligible liabilities was made in order to improve operationalisation of the SPE resolution strategy by allowing:

— entities that are not resolution entities to comply with their internal MREL not only by holding own funds instruments but also eligible non-own funds instruments, and

— resolution authorities to write down or convert such instruments at the point of non-viability and without placing the operating subsidiary in resolution.

65. Question (Article 45h(1))

Are liabilities issued by subsidiaries under the third subparagraph of Article 45h(1) included in the scope of:

— The first subparagraph of Article 59(1a) (i.e. subject to the write down and conversion powers);

— Article 45b(3) (i.e. count towards compliance with the external MREL of the respective resolution entity)?

Answer

The last sub-paragraph of Article 45h(1) refers to a possibility that internal MREL is met by a subsidiary issuing instruments to entities not belonging to the same resolution group and in compliance with the conditions of Article 45f(2)(a).

Point (i) of Article 45f(2)(a) includes a possibility to issue eligible liabilities outside the resolution group but only to an existing shareholder of the subsidiary and as long as application of write down or conversion powers in accordance with Articles 59 to 62 would not affect the control of the subsidiary by the resolution entity.

On this basis, instruments issued by the subsidiary to entities outside of the resolution group that are not minority shareholders of that subsidiary would not be eligible for internal MREL as they would not meet the condition referred to in point (i) of Article 45f(2)(a). As such, such liabilities may not be written down or converted at the point of non-viability in accordance with Article 59 and 60.

Therefore, the only instruments issued outside of the resolution group under the second subparagraph of Article 45h (1) that can count towards the internal MREL of the issuing subsidiary are those that are issued to and bought by an existing shareholder, provided that all the other conditions in Article 45f(2)(a) are met. Any other instruments issued by the subsidiary outside of the resolution group and to creditors other than existing shareholders can only be written down or converted through the application of bail-in powers in resolution.

H. QUESTIONS RELATED TO THE EXCLUSION OF CERTAIN CONTRACTUAL TERMS IN EARLY INTERVENTION AND RESOLUTION

66. **Question (Article 68)**

Article 68(5) BRRD I provided that 'A suspension or restriction under Article 69, 70 or 71 shall not constitute non-performance of a contractual obligation for the purposes of paragraphs 1 and 2 of this Article.'

Article 68(5) BRRD currently provides that 'A suspension or restriction under Articles 33a, 69, or 70 shall not constitute non-performance of a contractual obligation for the purposes of paragraphs 1 and 3 of this Article and of Article 71(1).'

— Under BRRD I, a suspension of termination under Article 71 did not give the other party the right to invoke a walk away clause. In the current BRRD, a suspension of termination under Article 71 is no longer mentioned as a power that does not constitute non-performance of a contractual obligation. Does this mean that under Article 68(5) BRRD a suspension of termination under Article 71 can now give a right to invoke a walk away clause?

— Article 68(3) BRRD says that a crisis prevention measure or a crisis management measure must not, per se, make it possible to, in short, invoke a walk away clause. Thus, what is the additional value of the wording 'for the purposes of (…) Article 71' in Article 68(5) compared to Article 68(3)?

— Article 68(5) BRRD I referred to Article 71 as a whole, whereas Article 68(5) of the current BRRD refers only to the paragraph 1 of Article 71. In other words, there is no longer a reference to paragraph 2 of Article 71. Article 71(2) applies to a contract with a subsidiary of an entity under resolution. Does this mean that the suspension of a termination right of a party to a contract with a subsidiary can constitute non-performance of a contractual obligation?

— Article 68(5) BRRD I said a suspension or restriction must not constitute non-performance of a contractual obligation for the purposes of paragraphs 1 and 2 of that article. In the current BRRD, the reference to paragraph 2 has been replaced by a reference to paragraph 3. In other words, the reference to paragraph 2 (which relates to third country resolution proceedings) is no longer made. Does this mean that third country resolution can constitute non-performance of a contractual obligation?

Answer

Article 68(3) BRRD sets out the principle that a crisis prevention or crisis management measure cannot per se be considered as a cause to terminate a contract or take other similar measures. This is however only under the condition that the obligations under the contract continue to be performed. Article 68(5) BRRD aims to ensure that certain actions that can be taken by the resolution authority with respect to the institution under resolution, and which force the institution under resolution to not perform certain obligations under a contract – e.g. a moratorium – are not characterised as non-performance for the purposes of Article 68(3) BRRD, as this would otherwise justify the termination of a contract.

BRRD I included in the list of actions under Article 68(5) also the suspension of termination rights as per Article 71. Article 71 allows in particular the resolution authority to suspend the right of the counterparty to an institution in resolution to terminate a contract.

The reason why Directive (EU) 2019/879 amended Article 68(5) BRRD is that there was no reason to include the suspension of termination rights in this group of actions. The provision in Article 68(5) BRRD relates to actions from the resolution authority which would force the institution to not perform a certain obligation. This is not the case for Article 71 BRRD, which instead prevents the counterparty of the institution from terminating the contract. The exercise of this power by the resolution authority does not force the institution to not perform an obligation, so there is no need to clarify that it does not constitute non-performance for the purposes of Article 68 BRRD.

On this basis, the answers to the specific questions are provided below:

— It is not correct to state that under Article 68(5) BRRD a suspension of termination under Article 71 BRRD can give a right to invoke a termination clause. The change is only meant to delete the reference to the exercise of the power to suspend termination rights as one of the circumstance which would constitute non-performance for the purposes of Article 68(3) BRRD.

— The additional value of the words in Article 68(5) BRRD 'for the purposes of (…) Article 71' compared to Article 68(3) BRRD is that Article 68(3) BRRD contains a general prohibition to (essentially) invoke the fact that the institution is under resolution as a reason, per se, to terminate a contract. This provision, however, does not affect the right of the party to terminate for reasons other than the fact that the institution is in resolution. Article 71 BRRD therefore provides an additional power for the resolution authority to specifically prevent that the party terminates the contract for whatever reason, but only for a limited period of time. Both provisions however only work if the institution performs its obligation. The BRRD language is meant to ensure that moratoria or other powers mentioned in the relevant provisions do not constitute non-performance for the purposes of either Articles 68(5) or 71 BRRD.

— The deletion of the reference in Article 68(5) BRRD to Article 71(2) BRRD does not mean that the suspension of a termination right of a party to a contract with a subsidiary can constitute non-performance of a contractual obligation. Article 68(5) BRRD now only refers to paragraph 1 of Article 71due to the fact that the relevant language on the lack of performance is only contained in that paragraph. In case of suspension of the termination rights of a counterparty of a subsidiary of an institution under resolution, the lack of performance of contractual rights should also not justify the termination of that contract.

— Article 68(2) BRRD does not provide an additional prohibition with respect to powers exercised by third country authorities. It merely states that an action from such an authority would constitute a crisis management or crisis prevention measure if recognised. In such a case, the exclusion of termination rights would apply based on paragraphs 1 and 3 of Article 68 BRRD (which specifically refer crisis management or crisis prevention measures). Therefore, it is sufficient and appropriate to refer to those.

I. QUESTIONS RELATED TO THE CONTRACTUAL RECOGNITION OF RESOLUTION STAY POWERS

67. Question (Article 71a)

The scope of Article 71a is restricted to financial contracts. Could Member States extend in their national transposition law the scope of Article 71a to cover all other contracts?

Answer

BRRD is a minimum harmonisation directive and Member States are empowered to adopt measures that are stricter or additional to those laid down in the Directive, provided that they are of general application and do not conflict with the BRRD and with the delegated and implementing acts adopted on its basis (as per Article 1(2)).

It is, therefore, possible for Member States to extend the scope of Article 71a to all contracts.

68. Question (Article 71a(3))

Article 71a(3) determines when Article 71a(1) must apply by referring to two conditions. Should these two conditions be met cumulatively or alternatively?

Answer

The two conditions are cumulative.

The objective of these conditions is to capture contracts which are either signed or amended after the entry into force of the provision, provided that they would allow the exercise of one of the powers provided in Articles 33a, 69, 70 or 71 or would trigger Article 68 (if they were subject to the law of one Member State).

At the same time, it is our view that the language in point (b) of Article 71a(3) should be interpreted extensively to preserve its function and *rationale*. The provision refers to contracts which provide for termination rights or rights to enforce security interests to which the powers provided in Article 33a, 68, 69, 70 and 71 would apply. An extensive interpretation would fit the functioning of the powers in Articles 68, 70 and 71, as these allow the resolution authority to suspend termination rights or rights to enforce security interest, which may be provided for in the relevant contracts. Articles 33a and 69 (i.e. the moratoria powers), on the other hand, provide the resolution authority with a power to suspend the payment or delivery obligations of any contract. Therefore, while the first group of powers only applies to contracts where a termination clause/security interest enforcement clause is inserted, Articles 33a and 69 apply to any contract where a payment or delivery obligation is foreseen.

As a result, the language in the first sentence of point (b) of Article 71a(3) should be interpreted extensively and entails the application of the provision to all the contracts referred to above.

J. QUESTIONS RELATED TO THE SFD

69. **Question (Article 2(1)(a))**

Article 2(1)(a) of Directive (EU) 2019/879 replaces Article 2(f) of the SFD with the following: '(f) "participant" shall mean an institution, a central counterparty, a settlement agent, a clearing house, a system operator or a clearing member of a CCP authorised pursuant to Article 17 of Regulation (EU) No 648/2012'. Does this mean that the option in the third subparagraph of Article 2(f) SFD does not exist anymore? That option states that: 'A Member State may decide that, for the purposes of this Directive, an indirect participant may be considered a participant if that is justified on the grounds of systemic risk. Where an indirect participant is considered to be a participant on grounds of systemic risk, this does not limit the responsibility of the participant through which the indirect participant passes transfer orders to the system;'

Answer

Recital (33) of Directive (EU) 2019/879 states the following:

'(33) In order to ensure a common understanding of terms used in various legal instruments, it is appropriate to incorporate in Directive 98/26/EC the definitions and concepts introduced by Regulation (EU) No 648/2012 of the European Parliament and of the Council (11) regarding a 'central counterparty' or 'CCP' and 'participant'.'

The rationale of the amendment to Article 2(f) SFD was to incorporate in the SFD the definitions and concepts used in Regulation (EU) No 648/2012, such as 'CCP' or 'clearing member', while not amending the existing national options provided. Although the text of the third subparagraph of Article 2(f) SFD is no longer in force, this does not seem to reflect the legislative intent expressed in the accompanying recital.