

**The Single Resolution Mechanism (SRM) and the
Single Resolution Fund (SRF):**

*Legal aspects of the second main pillar of the
(European) Banking Union*

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SUMMARY TABLE OF CONTENTS

List of Tables

List of Boxes

List of Abbreviations

Introduction to the fifth edition

Introduction to the fourth edition

Introduction to the third edition

Introduction to the second edition

Introduction to the first edition

Chapter 1

The Single Resolution Mechanism and the Single Resolution Fund within the system of the (European) Banking Union

Section A: The (European) Banking Union in a context

1. A brief historical overview of EU institutional arrangements on the stability of the banking system
2. The birth of the Banking Union as a response to the ongoing fiscal crisis in the euro area

Section B: The three main pillars of the Banking Union and their link to the (underlying) single rulebook

1. The first main pillar: authorisation, micro-prudential supervision and prudential regulation of credit institutions
2. The second main pillar: resolution of credit institutions
3. The (still pending) third main pillar: deposit guarantee

Section C: Current developments and the way forward

1. The Commission's current reform agenda: a general overview
2. Risk reduction measures
3. Risk sharing measures: towards establishment of the EDIS
4. The 'uncompleted agenda' and a necessary precondition for the smooth operation of the Banking Union

Chapter 2

The SRM Regulation and the SRF Agreement: General provisions

Section A: General provisions of the SRMR

1. Objective and field of application – participating Member States
2. Relationship with the BRRD – applicable EU and national law
3. General principles governing the operation of the SRM
4. Division of tasks within the SRM
5. Cooperation arrangements
6. Other general provisions

Section B: General provisions of the SRF Agreement

1. Purpose and scope
2. Consistency and relationship with EU law
3. Ratification, approval or acceptance – entry into force – accession
4. Application
5. Other provisions

Chapter 3

The Single Resolution Board

Section A: Legal status, seat and composition

1. Legal status
2. Seat – Headquarters Agreement and operating conditions
3. Composition

Section B: Governance

1. General overview
2. The Board's Plenary Session
3. The Board's Executive Session
4. The Chair
5. Appointment and removal of the Chair, the Vice-Chair and the other full-time members of the Board

Section C: Independence and accountability

1. Independence
2. Accountability

Section D: Investigatory powers and power to impose fines and periodic penalty payments

1. Investigatory powers
2. Power to impose fines and periodic penalty payments

Section E: Institutional safeguards – liability – other aspects

1. Institutional safeguards
2. Liability
3. Other aspects

Chapter 4

Resolution planning and early intervention

Section A: General overview and relationship with the BRRD

1. The structure of the system of rules under the BRRD and the SRM Regulation
2. Resolution colleges – European resolution colleges
3. Simplified obligations for certain institutions

Section B: Resolution planning

1. Resolution plans drawn up by the Board
2. Resolution plans drawn up by the national resolution authorities
3. Assessment of resolvability and removal of substantive impediments to resolvability

Section C: In particular: the minimum requirement for own funds and eligible liabilities (MREL)

1. Definition and governing rules
2. Field of application under the SRMR
3. Conditions applying to the determination made by the Board
4. A comparison to the 'TLAC' standard
5. Pending amendments to the BRRD and the SRM Regulation concerning the MREL and the TLAC

Section D: Early intervention

1. The powers of the ECB and the national competent authorities (NCAs)
2. The role of the Board

Chapter 5

Resolution action

Section A: Resolution objectives and general principles – order of priority of claims

1. Resolution objectives
2. General principles governing resolution action
3. Order of priority of claims

Section B: Resolution tools

1. The relationship with the BRRD and the general principles governing the application of resolution tools
2. The sale of business tool
3. The bridge institution tool
4. The asset separation tool
5. The bail-in tool

Section C: The resolution procedure

1. The conditions for resolution
2. Adoption by the Board and entry into force of the resolution scheme
3. Implementation of decisions concerning resolution
3. Recent relevant decisions of the Board

Section D: Valuation for the purposes of resolution

1. The *ex-ante* valuation(s)
2. The provisional valuation
3. Common provision
4. The *ex-post* valuation in accordance with Article 20(16)-(18)
5. The Board's "2019 Framework for Valuation"

Section E: State aid and aid by the Single Resolution Fund

1. General rules
2. The procedure of Article 19(3) concerning the Commission's Decision
3. Related issues
4. Specific aspects

Section F: Write-down and conversion of relevant capital instruments

1. The relationship with the BRRD
2. The conditions
3. Courses of action
4. Procedural aspects

Chapter 6

The Single Resolution Fund (SRF)

Section A: The provisions of the SRMR: general aspects – optimal size – contributions

1. General aspects
2. The optimal size: establishment of a target level
3. *Ex-ante* contributions
4. *Ex-post* contributions
5. In particular: the use of deposit guarantee schemes (DGSs) in the context of resolution

Section B: The provisions of the SRF Agreement: transfer of contributions and compartments

1. Transfer of contributions
2. Compartments
3. Horizontal provisions

Section C: Liquidity in resolution

1. The issue at stake
2. Alternative public sector backstop funding mechanisms for the Eurozone

Chapter 7:

Concluding remarks and assessments

1. The *status quo*
2. An evaluation of the decisions taken by the Board and the first missing element of a complete Banking Union (BU)
3. Pending developments

Appendix

Primary sources

A. International Law

B. EU Law

1. Treaties - Charters - Protocols - Declarations
2. Regulations
3. Directives
4. Legal acts of the ECB
5. Delegated and implementing acts of the Council *or* of the Commission
6. EBA Guidelines
7. Decisions of the Single Resolution Board
8. Documentation on recent cases relating to the resolution framework
9. Other

Secondary sources

ANALYTICAL TABLE OF CONTENTS

Chapter 1

The Single Resolution Mechanism and the Single Resolution Fund within the system of the (European) Banking Union

Section A:

The (European) Banking Union in a context

1. A brief historical overview of EU institutional arrangements on the stability of the banking system

1.1 The period until the recent (2007-2009) international financial crisis

1.1.1 The conditions before the Maastricht Treaty

1.1.2 The conditions after the Maastricht Treaty and before the Lisbon Treaty

1.1.3 The (no material) impact of the Lisbon Treaty

1.2 The impact of the recent (2007-2009) international financial crisis

1.2.1 Establishment of the European System of Financial Supervision (ESFS)

1.2.2 The European Supervisory Authorities (ESAs) as the first pillar of the ESFS

1.2.3 The European Systemic Risk Board (ESRB) as the second pillar of the ESFS

2. The birth of the Banking Union as a response to the ongoing fiscal crisis in the euro area

2.1 The political decisions of June 2012 and the European Commission's initiatives

2.2 Legislative actions – the new institutional and regulatory framework

Section B:

The three main pillars of the Banking Union and their link to the (underlying) single rulebook

1. The first main pillar: authorisation, micro-prudential supervision and prudential regulation of credit institutions

1.1 The Single Supervisory Mechanism Regulation (SSMR)

1.1.1 General remarks

1.1.2 Key elements of the SSM under the SSM Regulation

1.1.3 The three new bodies of the ECB

1.2 The single rulebook

1.2.1 General overview

1.2.2 The impact of public international banking law

1.3 The relation between the SSMR and the single rulebook

2. The second main pillar: resolution of credit institutions

2.1 The Single Resolution Mechanism and the Single Resolution Fund

2.1.1 The Single Resolution Mechanism Regulation (SRMR)

2.1.2 The Single Resolution Fund (SRF) Agreement

2.2 The single rulebook

2.2.1 General overview

2.2.2 The impact of public international banking law

3. The (still pending) third main pillar: deposit guarantee

3.1 The (single) European Deposit Insurance Scheme (EDIS)

3.1.1 Introductory remarks

3.1.2 The 2015 Commission's proposal for a Regulation establishing the EDIS

3.2 The single rulebook

3.2.1 General overview

3.2.2 The impact of public international banking law

Section C:

Current developments and the way forward

1. The Commission's current reform agenda: a general overview

2. Risk reduction measures

2.1 Finalisation of the 2016 legislative 'banking package'

2.2 Creation of sovereign bond-backed securities

2.3 Increasing the quality of supervision

3. Risk sharing measures: towards establishment of the EDIS

4. The 'uncompleted agenda' and a necessary precondition for the smooth operation of the Banking Union

4.1 The ECB as a lender of last resort in the euro area

4.2 Harmonisation of rules on the winding up of credit institutions

4.3 The link between a more robust EMU and a well-functioning and financial stability-enhancing Banking Union

Chapter 2

The SRM Regulation and the SRF Agreement: General provisions

Section A:

General provisions of the SRMR

1. Objective and field of application – participating Member States

1.1 Objective

1.2 Field of application – participating Member States

1.2.1 Field of application

1.2.2 Participating Member States

2. Relationship with the BRRD – applicable EU and national law

2.1 Relationship with the BRRD

2.2 Applicable EU and national law

2.3 The amendments to the EBA Regulation by Article 95 SRM Regulation

3. General principles governing the operation of the SRM

4. Division of tasks within the SRM

4.1 The (Single Resolution) Board

4.2 The national resolution authorities (NRAs)

4.3 Transfer of resolution powers and responsibilities from NRAs to the Board

5. Cooperation arrangements

5.1 The obligation imposed on the Board to cooperate with the ESAs and the ESRB

5.2 Obligation to cooperate and information exchange within the SRM

5.3 Cooperation within the SRM

5.4 Consultation of, and cooperation with, non-participating Member States and third countries

5.5 Recognition and enforcement of third-country resolution proceedings

6. Other general provisions

6.1 Timetable of implementation

6.2 Power to adopt delegated acts

6.3 Review

Section B:

General provisions of the SRF Agreement

1. Purpose and scope

2. Consistency and relationship with EU law

3. Ratification, approval or acceptance – entry into force – accession

4. Application

5. Other provisions

5.1 Dispute settlement

5.2 Compensation of non-participating Member States

5.3 Review

Chapter 3

The Single Resolution Board

Section A:

Legal status, seat and composition

1. Legal status

2. Seat – Headquarters Agreement and operating conditions

3. Composition

Section B:

Governance

1. General overview

2. The Board's Plenary Session

2.1 Composition

2.2 Tasks

2.3 Meetings

2.4 Decision-making process

3. The Board's Executive Session

3.1 Composition

3.2 Tasks

3.3 Meetings

3.4 Decision-making process

4. The Chair

5. Appointment and removal of the Chair, the Vice-Chair and the other full-time members of the Board

5.1 Appointment

5.1.1 The provisions of the SRM Regulation

5.1.2 The provisions of the Interinstitutional Agreement between the European Parliament and the Board

5.2 Removal

Section C:

Independence and accountability

1. Independence

1.1 General overview

1.2 Institutional independence

1.3 Financial independence

1.3.1 Resources – general provisions on and establishment of the Board's budget

1.3.2 Parts I and II of the budget

1.3.3 Internal audit and control

1.3.4 Implementation of the budget, presentation of accounts and discharge

1.3.5 Adoption of Financial Regulations

1.3.6 Contributions to the administrative expenditures of the Board

2. Accountability

2.1 Accountability vis-à-vis EU institutions

2.1.1 The provisions of the SRM Regulation

2.1.2 The provisions of the EP-SRB Agreement

2.1.2.1 Reports

2.1.2.2 Ordinary public hearings, ad hoc exchanges of views and special confidential meetings

2.1.2.3 Responding to questions

2.1.2.4 Access to information

2.1.2.5 Investigations

2.1.2.6 Code of Conduct

2.1.2.7 Adoption of acts by the Board

2.2 Accountability vis-à-vis national parliaments

2.2.1 Accountability of the Board

2.2.2 Accountability of national resolution authorities (NRAs)

Section D:

Investigatory powers and power to impose fines and periodic penalty payments

1. Investigatory powers

- 1.1 General overview
- 1.2 Requests for information
- 1.3 General investigations
- 1.4 On-site inspections – authorisation by a judicial authority

2. Power to impose fines and periodic penalty payments

- 2.1 Fines
- 2.2 Periodic penalty payments
- 2.3 Right to be heard and right of defence
- 2.4 Disclosure – nature and enforcement – allocation

Section E:

Institutional safeguards – liability – other aspects

1. Institutional safeguards

- 1.1 The Appeal Panel
 - 1.1.1 Composition and task*
 - 1.1.2 The appeals procedure*
- 1.2 Court of Auditors
- 1.3 Actions before the Court of Justice

2. Liability

- 2.1 Contractual liability – personal liability of the staff
- 2.2 Non-contractual liability

3. Other aspects

- 3.1 Privileges and immunities
- 3.2 Language arrangements
- 3.3 Staff and staff exchange – internal resolution teams and internal committees
 - 3.3.1 Staff and staff exchange*
 - 3.3.2 Internal resolution teams and internal committees*
- 3.4 Professional secrecy and exchange of information
- 3.5 Data protection
- 3.6 Access to documents
- 3.7 Protection of classified and sensitive non-classified information
- 3.8 Anti-fraud measures

Chapter 4

Resolution planning and early intervention

Section A:

General overview and relationship with the BRRD

1. The structure of the system of rules under the BRRD and the SRM Regulation

1.1 Recovery and resolution planning

1.2 The minimum requirement for own funds and eligible liabilities (MREL)

1.3 Early intervention

2. Resolution colleges – European resolution colleges

3. Simplified obligations for certain institutions

Section B:

Resolution planning

1. Resolution plans drawn up by the Board

1.1 Administrative provisions

1.1.1 Drawing up and adoption of resolution plans

1.1.2 Review and updating of resolution plans

1.2 Content of resolution plans for individual entities

1.2.1 The provisions of Article 8 SRMR and Article 22 of Commission Delegated Regulation (EU) 2016/1075

1.2.2 In particular: definition and determination of ‘critical functions’ – definition of ‘core business lines’

1.2.2.1 Critical functions

1.2.2.1.1 Definition

1.2.2.1.2 Determination

1.2.2.2 Core business lines

1.3 Content of group resolution plans

2. Resolution plans drawn up by the national resolution authorities

3. Assessment of resolvability and removal of substantive impediments to resolvability

3.1 Assessment of resolvability

3.1.1 The provisions of Article 10 of the SRM Regulation

3.1.2 The provisions of Commission Delegated Regulation (EU) 2016/1075

3.1.2.1 Introductory remarks

3.1.2.2 Credibility and feasibility of liquidation under normal insolvency proceedings

3.1.2.3 Identification of a resolution strategy

3.1.2.4 Assessment of a resolution strategy's feasibility

3.1.2.5 Assessment of a resolution strategy's credibility

3.2 Removal of substantive impediments to resolvability

3.2.1 'Substantive impediments' to resolvability

3.2.1.1 Introductory remarks

3.2.1.2 The Board's Report

3.2.2 Measures by the entity or the parent undertaking concerned and the Board's response

3.2.3 Measures to be taken by national resolution authorities (NRAs)

Section C:

In particular: the minimum requirement for own funds and eligible liabilities (MREL)

1. Definition and governing rules

2. Field of application under the SRMR

3. Conditions applying to the determination made by the Board

3.1 General rules

3.2 Discretions of and additional requirements imposed on the Board

3.3 The Board's MREL policy

3.4 Report by the EBA – legislative proposal by the Commission

4. A comparison to the 'TLAC' standard

5. Pending amendments to the BRRD and the SRM Regulation concerning the MREL and the TLAC

Section D:

Early intervention

1. The powers of the ECB and the national competent authorities (NCAs)

2. The role of the Board

Chapter 5

Resolution action

Section A:

Resolution objectives and general principles – order of priority of claims

1. Resolution objectives

- 1.1 General provisions
- 1.2 The five resolution objectives
- 1.3 In particular: on financial stability

2. General principles governing resolution action

- 2.1 The nine principles
- 2.2 Specific provisions

3. Order of priority of claims

Section B:

Resolution tools

1. The relationship with the BRRD and the general principles governing the application of resolution tools

- 1.1 The relationship with the BRRD
- 1.2 The general principles

2. The sale of business tool

3. The bridge institution tool

4. The asset separation tool

5. The bail-in tool

5.1 Introductory remarks

5.2 General rules

5.2.1 The two purposes of the bail-in tool

5.2.2 Other general provisions

5.3 Exclusions

5.3.1 Mandatory exclusions

5.3.2 Optional exclusions

5.3.2.1 Conditions for optional exclusion

5.3.2.2 Consequences of optional exclusion

5.4 Establishment of the aggregate amount

Section C:

The resolution procedure

1. The conditions for resolution

1.1 Introductory remarks

1.2 The ‘failing or likely to fail’ criterion

1.2.1 Substantive aspects

1.2.1.1 The rule

1.2.1.2 The exemptions

1.2.1.2.1 The three forms of provision of extraordinary public financial support which do not activate the resolution regime

1.2.1.2.2 The conditions for exemption

1.2.2 Procedural aspects

1.3 The criterion of the reasonable prospect for effective alternative private sector measures or supervisory action

1.3.1 Substantive aspects

1.3.2 Procedural aspects

1.4 The ‘public interest’ criterion

2. Adoption by the Board and entry into force of the resolution scheme

2.1 The resolution scheme

2.1.1 Content

2.1.2 Monitoring by the Board of the resolution scheme’s execution

2.2 The procedure for adopting the resolution scheme

2.2.1 Adoption of the resolution scheme by the Board

2.2.2 Courses of action by the Commission and the Council

2.3 Related aspects

3. Implementation of decisions concerning resolution

3.1 Action by national resolution authorities (NRAs)

3.2 Action by the Board

3. Recent relevant decisions of the Board

4.1 General overview

4.2 Banco Popular Español

4.3 Banca Popolare di Vicenza and Veneto Banca

4.4 ABLV Bank, AS and ABLV Bank Luxembourg, S.A.

Section D:

Valuation for the purposes of resolution

- 1. The *ex-ante* valuation(s)**
- 2. The provisional valuation**
- 3. Common provision**
- 4. The *ex-post* valuation in accordance with Article 20(16)-(18)**
- 5. The Board's "2019 Framework for Valuation"**

Section E:

State aid and aid by the Single Resolution Fund

- 1. General rules**
- 2. The procedure of Article 19(3) concerning the Commission's Decision**
- 3. Related issues**
- 4. Specific aspects**

Section F:

Write-down and conversion of relevant capital instruments

- 1. The relationship with the BRRD**
- 2. The conditions**
- 3. Courses of action**
- 4. Procedural aspects**

Chapter 6

The Single Resolution Fund (SRF)

Section A:

The provisions of the SRMR: general aspects – optimal size – contributions

- 1. General aspects**
 - 1.1 Constitution and use
 - 1.2 Administration and investment policy
 - 1.2.1 Administration*
 - 1.2.2 Investment policy*
 - 1.2.2.1 The provisions of the SRM Regulation*

1.2.2.2 *The provisions of Commission Delegated Regulation (EU) 2016/451*

1.3 Purposes of use (mission)

1.4 A specific case: mutualisation of national financing arrangements in the case of group resolution involving institutions in non-participating Member States

2. The optimal size: establishment of a target level

2.1 The steady state

2.2 Specific provisions relating to the initial period

2.3 Specific provisions to (potentially) apply after the initial period

3. Ex-ante contributions

3.1 The key provisions

3.2 In particular: the two components of *ex-ante* contributions

3.3 The discretion given to participating Member States

4. Ex-post contributions

4.1 General overview

4.2 Extraordinary *ex-post* contributions

4.2.1 The provisions of Article 71 SRM Regulation

4.2.2 The provisions of Article 6 of Commission Delegated Regulation (EU) 2017/747

4.2.3 The provisions of Articles 7-8 of Commission Delegated Regulation (EU) 2017/747

4.3 Voluntary borrowing between resolution financing arrangements

4.4 Alternative funding means

4.5 Access to financial facility

4.5.1 The provisions of Article 74 SRM Regulation and the Loan Facility Agreements (LFAs)

4.5.2 Towards a 'common backstop' to the (Single Resolution) Board for the SRF

4.5.3 Current developments

5. In particular: the use of deposit guarantee schemes (DGSs) in the context of resolution

5.1 Introductory remarks

5.2 The provisions of Article 79 SRMR

5.2.1 The conditions

5.2.2 Safeguards

Section B:

The provisions of the SRF Agreement: transfer of contributions and compartments

1. Transfer of contributions

- 1.1 General rules
- 1.2 Transfer of additional *ex-ante* contributions and target level
- 1.3 Temporary transfer between compartments
- 1.4 Contracting Parties whose currency is not the euro

2. Compartments

- 2.1 General provisions
- 2.2 Functioning of compartments
- 2.3 Allocation of returns of investments

3. Horizontal provisions

- 3.1 Respect of the general principles and objectives of resolution – fundamental change of circumstances
- 3.2 Compliance

Section C:

Liquidity in resolution

1. The issue at stake

2. Alternative public sector backstop funding mechanisms for the Eurozone

- 2.1 On the two alternatives
- 2.2 On the role of the ECB in particular

Chapter 7:

Concluding remarks and assessments

1. The *status quo*

- 1.1 General considerations
- 1.2 In particular: on the public interest criterion

2. An evaluation of the decisions taken by the Board and the first missing element of a complete Banking Union (BU)

3. Pending developments

- 3.1 The ‘risk reduction agenda’

3.2 The ‘risk sharing agenda’

3.2.1 Establishment of the common backstop to the Board for the SRF

3.2.2 Establishment of the EDIS

3.3 Liquidity in resolution

Appendix

Primary sources

A. International Law

B. EU Law

1. Treaties - Charters - Protocols - Declarations

2. Regulations

2.1 Council Regulations

2.2 Regulations of the European Parliament and of the Council

3. Directives

3.1 Council Directives

3.2 Directives of the European Parliament and of the Council

4. Legal acts of the ECB

5. Delegated and implementing acts of the Council *or* of the Commission

5.1 Delegated acts

5.2 Implementing acts

6. EBA Guidelines

7. Decisions of the Single Resolution Board

8. Documentation on recent cases relating to the resolution framework

8.1 Banco Popular Español

8.2 Banca Popolare di Vicenza

8.3 Veneto Banca

8.4 Monte dei Paschi di Siena S.p.A.

8.5 ABLV Bank, AS and ABLV Bank Luxembourg, S.A.

9. Other

Secondary sources

List of Tables		
# of Table	Title	Pages
Table 1	The key legal sources of the three main pillars of the European Banking Union	55
Table 2	Addressees of the date by which the main provisions of the key legal sources pertaining to the European Banking Union are applicable	56
Table 3	European banking law before and after the European Banking Union: Elements of continuity and change	57-59
Table 4	The partial Europeanisation of the ‘bank safety net’ (even) with regard to significant credit institutions	60
Table 5	‘Crisis prevention’ and ‘crisis management’ measures under the BRRD	61
Table 6	Key Reports and Commission Communications relating to the Banking Union	72
Table 7	Start of application of the SRMR Articles	95-96
Table 8	National resolution authorities in EU Member States	97-98
Table 9	Own funds instruments	179
Table 10	The conditions for the resolution of credit institutions under Article 18 of the SRM Regulation	221
Table 11	The ‘failing or likely to fail’ criterion according to the 2015 EBA Guidelines	222
Table 12	Alternative forms of (permissible) recapitalisation of credit institutions by public funds (bail-out) in the EU	223
Table 13	The public interest criterion for the resolution of credit institutions under Article 18 SMR Regulation	224

List of Tables (continued)		
# of Table	Title	Pages
Table 14	Definition of the various categories of national authorities mentioned in the SRM Regulation	287
Table 15	Definition of regulated entities	288-289

List of Boxes		
# of Box	Title	Pages
Box 1	Definition of entities	75
Box 2	Aggravating and mitigating factors – adjustment coefficients	130-131
Box 3	Elements to be included in resolution plans under Article 8(9) SRM Regulation	153-154
Box 4	Matters that the resolution authority must consider when assessing the resolvability of an institution or group (Section C of the Annex to the BRRD)	160-161
Box 5	Resolution powers under Article 63(1) BRRD	186

List of Abbreviations

ABoR	Administrative Board of Review
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
AIFs	Alternative Investment Funds
AIFMD	Alternative Investment Fund Managers Directive (2011/61/EU)
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BRRD	Bank Recovery and Resolution Directive (2014/59/EU)
BRRD II	Bank Recovery and Resolution Directive No II (<i>not yet adopted</i>)
BU	Banking Union
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Regulators
CET 1	Common Equity Tier 1
CIWUD	Credit Institutions Winding Up Directive (2001/24/EC)
CMGs	Crisis Management Groups
CMU	Capital Markets Union
COFRA	Cooperation Framework Agreement
CRD IV	Capital Requirements Directive No IV (2013/36/EU)
CRD V	Capital Requirements Directive No V (<i>not yet adopted</i>)
CRR	Capital Requirements Regulation (575/2013)
CRR II	Capital Requirements Regulation No II (<i>not yet adopted</i>)
DGS	Deposit Guarantee Scheme
DGSD	Deposit Guarantee Schemes Directive (2014/49/EU)
DIF	Deposit Insurance Fund
DRI	Direct Recapitalisation Instrument
EBA	European Banking Authority
EBI	European Banking Institute
EBU	European Banking Union
ECAI	External Credit Assessment Institution
ECB	European Central Bank
ECJ	European Court of Justice (Court of Justice of the European Union)

ECOFIN	Economic and Financial Affairs Council
ECON	Economic and Monetary Affairs Committee (European Parliament)
EDIRA	European Deposit Insurance and Resolution Authority
EDIS	European Deposit Insurance Scheme
EEA	European Economic Area
EFSD	European Financial Stability Facility
EIOPA	European Insurance and Occupational Pensions Authority
ELA	Emergency Liquidity Assistance
EMF	European Monetary Fund
EMIR	European Market Infrastructure Regulation (648/2012)
EMU	Economic and Monetary Union
EP	European Parliament
ERCs	European Resolution Colleges
ERL	Eurosystem Resolution Liquidity
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
EUV	Vertrag über die Europäische Union
FICOD	Financial Conglomerates Directive (2002/87/EC)
FMI s	Financial Market Infrastructures
FROB	Fondo de Reestructuración Ordenada Bancaria (Spain)
FSB	Financial Stability Board
G-SIB	Global Systemically Important Bank
G-SII	Global Systemically Important Institution
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation (2016/679)
GFSTs	Government Financial Stabilisation Tools
GLRA	Group Level Resolution Authority
IADI	International Association of Deposit Insurers
ICSD	Investor Compensation Scheme Directive (97/9/EC)
IFAC	International Federation of Accountants

IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IPs	Institutional Protection Schemes
IRTs	Internal Resolution Teams
ISIN	International Securities Identification Number
ITS	Implementing Technical Standard
LCR	Liquidity Coverage Ratio
LDR	Liability Data Report
LFAs	Loan Facility Agreements
MIFID I	Markets in Financial Instruments Directive no. I (2004/39/EC)
MIFID II	Markets in Financial Instruments Directive no. II (2014/65/EU)
MREL	Minimum Requirement for (own funds and) Eligible Liabilities
MoU	Memorandum of Understanding
MPE	Multiple Point of Entry
NCA	National Competent Authority
NCB	National Central Bank
NCWO	No Creditor Worse Off (principle)
NDA	National Designated Authority
NRA	National Resolution Authority
NSFR	Net Stable Funding Ratio
O-SII	Other Systemically Important Institution
OLAF	Office de Lutte Anti-Fraude (European Anti-Fraud Office)
OJ	Official Journal (of the European Union)
PIA	Public Interest Assessment
PONV	Point Of Non-Viability
PSI	Private Sector Involvement
RAP	Resolvability Assessment Process
RESREP	Resolution Reporting
RTS	Regulatory Technical Standard
SIFIs	Systemically Important Financial Institutions
SMEs	Small and Medium Enterprises
SPE	Single Point of Entry
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund

SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation (806/2014)
SRMR II	Single Resolution Mechanism Regulation No II (<i>not yet adopted</i>)
SRR	Special Resolution Regime
SSFIs	Systemically Significant Financial Institutions
SSM	Single Supervisory Mechanism
SSMR	Single Supervisory Mechanism Regulation (1024/2013)
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TLAC	Total Loss-Absorbing Capacity
TSCG	Treaty on Stability, Coordination and Governance (<i>in the EMU</i>)
UCITS	Undertakings for Collective Investment in Transferable Securities

Introduction to the fifth edition

(1) The fifth edition of the present study contains a further update in full of the institutional and regulatory framework governing the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF). Its structure has also been revised, since the Sections of previous editions have been turned into Chapters, each of which (except the last one) comprises several Sections.

All Sections have also been extended and updated, primarily (but not solely) those included in **Chapters 4** (on resolution planning) **and 6** (on the SRF, discussing also briefly, and as appropriate, the proposals on the establishment of the European Deposit Insurance Scheme (EDIS)), while several new secondary sources have been added as well. The (new) **Section C of Chapter 6** briefly discusses for the first time the issue relating to the provision of liquidity in resolution.

(2) The study discusses to some extent the 2016 legislative “banking package” on the amendment, *inter alia*, of the Single Resolution Mechanism Regulation (SRMR) and the Bank Recovery and Resolution Directive (BRRD). Nevertheless, since the proposed legal acts had not yet been published at the time when this study was finalised, a detailed presentation of their provisions is deemed as being outside its scope (at least, at this stage).

(3) Like in previous editions, all primary sources are mentioned, as appropriate, in the main text, and are then listed at the end of the study, along with an extensive list of secondary sources.

The cut-off date for information contained in this study is 30 April 2019.

Athens, May 2019

Professor Christos V. Gortsos

Introduction to the fourth edition

(1) The fourth edition of the present study was mainly elaborated during the author's stay at the European University Institute (EUI) in Florence as a Fernand Braudel Senior Fellow during the winter semester of the academic year 2017-2018. It contains a further full update of the institutional and regulatory framework governing the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF). The author has also benefited from the input which resulted out of a related seminar organised by the Florence School of Banking and Finance at the end of February 2018, in which he was a main instructor.

(2) The structure of the study has been slightly modified, to the extent that **(the previous) Section A has been divided in two Sections, A and B** (and the following were renumbered), in order to take into account all recent developments with regard to the evolution of the European Banking Union (**Section A, under 3**). One of most important developments relating directly to the SRM and the SRF is the proposal submitted in December 2017 by the Commission for a Council Regulation on the establishment of a European Monetary Fund (EMF), the second proposed tasks of which would be to provide the common backstop to the SRM for the SRF. This aspect is discussed in more details in **Section F (at the end of Sub-section 1.1)**.

In addition, on 12 December 2017 the European Parliament and the Council adopted one of the five (5) building blocks of the legislative 2016 "banking package", namely Directive (EU) 2017/2399 which amends the Bank Recovery and Resolution Directive (BRRD) as regards the ranking of unsecured debt instruments in insolvency hierarchy. This aspect is also dealt with briefly in **Section E (under 1.3)**.

Several other Sub-sections have also been extended and updated (primarily in Sections E and F), while several new secondary sources have been added as well, as appropriate.

Athens, 3 June 2018

Professor Christos V. Gortsos

Introduction to the third edition

The third edition of the present study contains a full update of the framework governing the Single Resolution Mechanism and the Single Resolution Fund since 1 January 2016, with due reference also to decisions taken in 2017 by the Single Resolution Board. The cut-off date is 31 July 2017.

Even though the structure of the study is almost identical to that of the second edition, Sub-section 1 of Section A, Sub-section 1 of Section C, Sub-section 2 of Section D and the concluding remarks have been considerably extended. Additional secondary sources have also been added, as appropriate.

Athens, 31 July 2017

Professor Christos V. Gortsos

Introduction to the second edition

The second edition of the present study, only eight months after the first edition appeared, was deemed necessary given the entry into full operation of the Single Resolution Mechanism and the Single Resolution Fund on 1 January 2016. The study has been amended accordingly to reflect this development and take into consideration all the newly adopted legal acts and the secondary sources published after the cut-off date of the first edition, i.e. August 2015.

The structure of the study is almost identical to that of the first edition. The only key modification is in Section B: Sub-sections 4.1 and 4.2 have become Sub-sections 4 and 5 respectively, due to the relatively large extent of the new provisions on accountability (which led to the necessary re-numbering of the previous Sub-sections 5 and 6 into Sub-sections 6 and 7).

Special thanks are extended to Nikos Maragopoulos for his particularly useful remarks and suggestions and to Katerina Lagaria for the outstanding editing of the text.

Athens, 14 April 2016

Professor Christos V. Gortsos

Introduction to the first edition

A. This study, updated until 31 August 2015, aims to provide a systematic and comprehensive review of the provisions of the legal acts which are the sources of the EU Single Resolution Mechanism ('SRM') and the EU Single Resolution Fund ('SRF') that constitute the second main pillar of the European Banking Union ('EBU'). It is structured in six (6) Sections:

(1) **Section A** reviews the main provisions of the SRM Regulation ('SRMR') (under 2) and of the SRF Agreement (under 3), within the framework of the legal acts which constitute the sources of the EBU (under 1).

(2) **Section B** provides a general overview of this new institutional framework, focusing on the various aspects of the Single Resolution Board ('SRB'):

- its legal status, seat and composition,
- its administrative and management structure,
- the Appeal Panel,
- the independence and accountability regime,
- aspects of liability, and
- all other relevant provisions (under 1-6, respectively).

(3) **Section C** deals with the provisions of the SRMR on resolution planning (under 1), with particular emphasis on those pertaining to the minimum requirement for own funds and eligible liabilities (MREL) (under 2) and to early intervention (under 3).

(4) The resolution regime under the SRM Regulation is presented in **Section D**. This Section examines:

- the objectives and principles of resolution,

- the resolution procedure,
- the provisions on write-down and conversion of relevant capital instruments,
- the framework governing the resolution tools,
- the cooperation arrangements, as well as
- the investigatory powers of the Board and its power to impose penalties (under 1-6, respectively).

(5) **Section E** deals with the SRF, and in particular with:

- its constitution, administration, investments, and use under the SRM Regulation (under 1), and
- the specific provisions of the SRF Agreement (under 2).

(6) Finally, **Section F** contains the concluding remarks of the study.

B. All primary sources are mentioned, as appropriate, in the main text, and are then listed at the end of the paper. The study also contains an extensive list of secondary sources. Out of a vast number of commentaries (Kommentare) on the EU Treaties, the author makes reference to that of **Schwarze, Becker, Hatje und Schoo (2012, Hrsg./eds)**.

C. Special thanks are extended to Christina Livada, Nikos Maragopoulos, Dimitris Vovolinis, Irimi Parasyri, Gerry Kounadis, and Sylvia Filippaki for their particularly useful remarks and suggestions. Any errors or omissions are the sole responsibility of the author. Warm thanks also to PhD candidate Katerina Lagaria for the outstanding editing of the text.

Athens, August 2015

Professor Christos V. Gortsos

Chapter 1

The Single Resolution Mechanism and the Single Resolution Fund within the system of the (European) Banking Union

Section A: The (European) Banking Union in a context

1. A brief historical overview of EU institutional arrangements on the stability of the banking system

1.1 The period until the recent (2007-2009) international financial crisis

1.1.1 *The conditions before the Maastricht Treaty*

(1) The creation and entry into operation (gradually, since November 2014) of the (European) Banking Union (hereinafter the ‘BU’, also referred to (frequently by this author as well) as the ‘EBU’) constitutes a major institutional development in the field of financial stability¹ in the European Union (the ‘EU’). This is so, because from the time when the European Economic Communities were established until November 2014, the authorisation and micro-prudential supervision² of credit institutions (the term used in EU banking law to denote ‘banks’³) was an exclusive competence of national supervisory authorities (referred to as national competent authorities, the ‘NCAs’⁴).

¹ There is no single generally accepted definition of the term ‘financial stability’. While some authors define it as the opposite to the concept of ‘financial instability’ by referring to episodes of ‘financial crises’, others define it on the basis of the various properties of a stable financial system. Finally, others formulate an operational definition by introducing a framework which lays down the objectives of regulatory intervention and defines the adequate instruments to achieve them. On the various definitions of the term ‘financial stability’ see **Houben, Kakes and Schinasi (2004)**, pp. 10-11 and 38-42. See also **Allen and Gale (2001)**, as well as **Schinasi (2005)** and **(2006)**.

² ‘Micro-prudential supervision’ means the monitoring by competent authorities, on a preventative basis, of banks’ compliance with the provisions of the regulatory framework. It constitutes one of the components of the so-called ‘bank safety net’, a term used to refer to all measures taken in order to prevent and manage crises in the banking system with a view to preserving its stability; on this term and its components, see **Guttentag and Herring (1986)** and **(1988)**, **Demirgüç-Kunt and Huizinga (1999)** and **Gortsos (2012)**, pp. 90-106.

³ In EU banking law ‘credit institution’ means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account. Use of the term ‘bank’ has never been made therein.

⁴ In certain Member States the competence to exercise micro-prudential supervision was conferred to their central banks, while in others responsible were administrative authorities outside the central bank (albeit usually in close cooperation with it). It is noted in this respect, that, although the safeguarding of financial stability has historically been a major objective of central banks and the micro-prudential supervision over credit institutions a main task of several thereof, an ever increasing number of countries around the world have assigned this supervision since the 1980s to independent authorities other than the central bank. The rationale was that the exercise of supervisory powers by the central bank may give rise to conflicts of interest that

The founding Treaties did not contain any single rule referring to the banking (or in general in the financial) system.

(2) Despite the significant initiatives taken in the mid-1980ies (especially after the implementation of the European Commission's **1985 White Paper** "on Completing the Internal Market", which identified the legislative measures needed to complete the internal market⁵) to establish a single market for banking services, in terms of both negative and positive integration, this aspect was not modified. The conditions for the authorisation and the main aspects relating to the micro-prudential supervision of credit institutions were, at a minimum level, harmonised across the (then) European Community, but it was the NCAs which were responsible to authorise credit institutions and supervise compliance of the latter with micro-prudential regulations, which were harmonised as well.⁶ This same 'principle of decentralised management' with regard to the institutions competent for the preservation of stability in the banking system⁷ also applied to deposit guarantee schemes (the 'DGS').⁸ The operation of these schemes was harmonised as well at a minimum level, but in case of activation of the pay-out procedure, it was (and still is) national deposit guarantee schemes which are called upon to compensate depositors for their covered deposits.⁹ Finally, last resort lending to solvent but illiquid credit institutions was provided by the national central bank (the 'NCB') of the Member State in which they were incorporated.¹⁰

would undermine the efficient achievement of its monetary policy objectives (not least in terms of maintaining price stability). However, this trend has tended to be reversed in the aftermath of the recent (2007-2009) international financial crisis as a result of the relevant failures attributed to independent supervisory authorities in many states all over the world (see **Davies and Green (2010)**, pp. 187-213). For an overview of the debate on whether it is appropriate for a central bank, as a monetary authority, to also perform micro-prudential banking supervision tasks, see by way of mere indication the seminal paper by **Goodhart and Schoemaker (1993)**.

⁵ COM/85/310 final.

⁶ Micro-prudential banking regulation seeks to enforce banks' safety and soundness by limiting their exposure either to insolvency or to liquidity risk (which might lead to insolvency under certain circumstances) and by curbing their risk vulnerability both through limiting their exposure to various categories of financial risks and all other risks associated with the conduct of their business to which they might be exposed, *and* through increasing their capacity to absorb losses incurred in the event of such risks.

⁷ This principle is different from the principle of decentralisation under EU law, specifying the role of national authorities in relation to an EU institution to which specific powers have been transferred for the exercise of exclusive competences (see **Priego and Conlledo (2005)**).

⁸ For an overview of the literature on the functions of DGSs, see **Gortsos (2019a)**, Section 1.1; see also below in **Section B, under 3.2.1**.

⁹ The reference to the legal acts which constituted the sources of EU banking law is beyond the scope of this study; see details in **Gortsos (2016d)**, pp. 2-9.

¹⁰ In accordance with the (predominant) traditional approach (based on the seminal work by **Bagehot**, written already in 1873 and which **Tucker** calls the "classic" Bagehot view, see **(2014)**, p. 16), last-resort lending means the provision of liquidity by a monetary authority, *i.e.* a central bank, to individual solvent banks in exceptional circumstances and on a temporary basis. This power is typically associated with the business of central banks given the synergies existing between the provision of liquidity to the banking system, safeguarding the stability of payments systems, and ensuring financial system stability. In this sense, the close relationship between the monetary and financial systems is highlighted. For more details on the other three (3) alternative approaches (the "free banking school", the "Richmond Fed view" and the "New York view"), see **Tucker (2014)**, pp. 16-19. On this aspect, see also below in **Section C, under 4.1**.

1.1.2 The conditions after the Maastricht Treaty and before the Lisbon Treaty

(1) The launch of the Economic and Monetary Union (the ‘EMU’) on 1 January 1999 did not bring about any changes to the regime on the authorisation and micro-prudential supervision of credit institutions incorporated in any Member State. Contrary to the definition and implementation of the single monetary and foreign exchange policy, for which competences became supranational, the European Central Bank (the ‘ECB’) had not been assigned any supervisory powers for the EU financial system. Rather, the relevant competence remained with the Member States.¹¹

Padoa-Schioppa (2004, p. 121) referred to this state of affairs as “*European regulation with national supervision*”. In the same vein, **Lastra (2006**, p. 298) characteristically noted: “*There is an inevitable tension in the current EU structure: a national mandate in prudential supervision, combined with a single European currency and a European mandate in the completion of the single market in financial services*”. The fact that the micro-prudential supervision of credit institutions did not form part of the ECB’s tasks was one of the main two asymmetries of the EMU. The other is that whereas within the framework of the ‘monetary union’ the EU has exclusive competence on monetary policy for the euro area Member States,¹² the same does not hold for fiscal policy within the framework of the ‘economic union’, since in this field Member States must (just) coordinate their policies within the EU.¹³

In this respect two remarks are noteworthy:

Firstly, competence for both authorisation and micro-prudential supervision of EU credit institutions has remained exclusively (until 4 November 2014) with the authorities designated as such by the Member States. This was also implicit in **Article 105(5)** of the Treaty establishing the European Community (the ‘TEC’) (carried over *verbatim* in **Article 3.3 of the** Statute of the European System of Central Banks (the ‘ESCB’) and of the ECB (the ‘ESCB/ECB Statute’)¹⁴), stipulating the following: “*The ESCB must contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.*”¹⁵ The relevant competence of the ECB was mainly to submit opinions, in accordance with **Article 105(4) TEC** (carried over *verbatim* in **Article 4 of the ESCB/ECB Statute**), within the limits and under the conditions set out in **Council Decision 98/415/EC** of 29 June 1998 “on the consultation of the [ECB] by national authorities regarding draft legislative provisions”.¹⁶

¹¹ For a summary of the various proposals with regard to the creation of supranational financial supervisory authorities in the EU, see **Lastra (2006)**, pp. 324-328, and **Hadjiemmanuil (2006)**, pp. 818-828.

¹² **TFEU**, Article 3(1), point (c).

¹³ *Ibid.*, Article 5(1), first sentence.

¹⁴ This Statute was included in a Protocol annexed to the TEC and the “Treaty on European Union” of 1992. Currently, it is included, broadly unchanged, in **Protocol No 4** “on the Statute of the European System of Central Banks and of the European Central Bank” annexed to the Treaties in force (OJ C 202 (Consolidated version), 7.6.2016, pp. 230-250).

¹⁵ These provisions were in force since the launch of Stage Three of the EMU (Article 116(3), second indent TEC, with a reference to the provisions of Article 105(5)).

¹⁶ OJ L 189, 3.7.1998, pp. 42-43. On the duty to consult the ECB under **Article 127(4) TFEU** and the Opinions submitted by the ECB, see **Lambrinoc (2009)**.

Nevertheless, **Article 105(6) TEC** (carried over almost *verbatim* in **Article 25.2 of the ESCB/ECB Statute**) contained an enabling clause, according to which the Council could assign to the ECB ‘specific powers’ with regard to the prudential supervision of credit institutions, which had not been activated.¹⁷

Secondly, the ECB never assumed the role of the lender of last resort for any solvent credit institution incorporated in a euro area Member State and exposed to illiquidity. Its role was (and still remains) confined to the approval of relevant decisions taken by the NCBs – members of the Eurosystem in accordance with **Article 14.4 of the ESCB/ECB Statute**.¹⁸

(2) The only significant development of that period was the establishment of three EU fora composed of the NCAs in the fields of banking, capital markets and (private) insurance (Committee of European Banking Supervisors (the ‘**CEBS**’) Committee of European Securities Regulators (the ‘**CESR**’) and Committee of European Insurance and Occupational Pensions Supervisors (the ‘**CEIOPS**’), respectively), which were set up following recommendations in the “Final Report of the Committee of Wise Men on the Regulation of European Securities Markets” (the ‘**Lamfalussy Report**’).¹⁹ These Committees were assigned the task to contribute to the procedure on issuing legal acts of EU, since the Committee’s proposals, presented in Chapter II of the Report,²⁰ was mainly the establishment of a special procedure comprising four (4) levels for the issuance by EU bodies of legislative acts on EU securities markets, and the implementation of their provisions by Member States, with the actual involvement of these Committees (the ‘**Lamfalussy process**’).

1.1.3 The (no material) impact of the Lisbon Treaty

The **Treaty of Lisbon**²¹ did not amend the above-mentioned TEC provisions. They are contained (subject to only minor modifications to the legislative procedure) in **Article 127(5), 127(4) and 127(6)**, respectively, of the Treaty on the Functioning of the European Union²² (the ‘**TFEU**’).²³ **Article 127(6) TFEU**, which has been activated to serve as the legal anchor for two major institutional developments after 2009,²⁴ reads as follows: “*The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.*”

¹⁷ On Article 105(5)-(6) TEC, see **Smits (1997)**, pp. 319-362.

¹⁸ See on this also below in **Section C, under 4.1**.

¹⁹ Available at: https://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm. On this Report, see **Ferran (2004)**, pp. 61-74 and 99-107, **Lastra (2006)**, pp. 334-341, **Hadjiemmanuil (2006)**, pp. 815-818, and **Moloney (2014a)**, pp. 861-880.

²⁰ **Lamfalussy Report**, pp. 19-42.

²¹ OJ C 306, 17.12.2007, pp. 1-271.

²² OJ C 202 (Consolidated version), 7.6.2016, pp. 47-200.

²³ The provisions of Article 127(5) TFEU do not apply to Member States with a derogation (Article 139(2), point 3 TFEU, and ESCB/ECB Statute, Article 42.1, respectively), including to the United Kingdom (**Protocol (No 15)**, paragraphs 4 and 7).

²⁴ See just below **under 1.2.3** and in **Section B, under 1.1.1 (1)**.

The phrasing of this TFEU Article *does not rule out the possibility* of conferring upon the ECB specific tasks with regard to the micro-prudential supervision of investment firms and other financial firms operating in capital markets (an option which nevertheless is not contained in any political agenda).²⁵

1.2 The impact of the recent (2007-2009) international financial crisis

1.2.1 Establishment of the European System of Financial Supervision (ESFS)

The above-mentioned institutional arrangements were not amended as a result of the recent (2007-2009) international (or global) financial crisis either.²⁶ The institutional reaction of the EU institutions to that crisis, with a view to enhancing financial stability, was the establishment of the “European System of Financial Supervision” (the ‘ESFS’), on the basis of the proposals made in 2009 by the *High-Level Group on Financial Supervision in the EU* in the so-called ‘*de Larosière Report*’ (after the name of its Chairperson, France’s former central banker Jacques de Larosière) of 25 February 2009.²⁷ The ESFS consists of two elements, presented in brief just below.²⁸

1.2.2 The European Supervisory Authorities (ESAs) as the first pillar of the ESFS

(1) The *first pillar* of the ESFS comprises the three so-called “European Supervisory Authorities” (the ‘ESAs’), which were established by virtue of **Regulations (EU) No 1093/2010, 1094/2010 and 1095/2010**, respectively,²⁹ of the European Parliament and of the Council of 24 November 2010 (adopted on the basis of **Article 114 TFEU**³⁰). The **EBA Regulation ((EU) No 1093/2010)** has already been substantially amended by **Regulation (EU) No 1022/2013** of 22 October 2013³¹ in the prospect of conferring specific supervisory tasks to the ECB within the Single Supervisory Mechanism (SSM).³²

²⁵ For a detailed analysis of this Article, see (in addition to **Smits (1997)** as referred to above), **Hadjjemmanuil (2006)**, pp. 824-825, **Louis (2009)**, pp. 166-168, **Lastra and Louis (2013)**, pp. 82-94 and **Gortsos (2015a)**, pp. 53-54.

²⁶ For a brief overview of the causes of that crisis, see **Gortsos (2012)**, pp. 127-129, with extensive further references out of vast existing literature. Consistent use of the term ‘global financial crisis’ is made, *inter alia*, by the Bank for International Settlements (the ‘BIS’).

²⁷ The Report is available at: https://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf; for an overview, see **Ferrarini and Chiodini (2009)** and **Gortsos (2010)**.

²⁸ On the ESFS and its components, see **Louis (2010)**, **Ferran and Alexander (2011)**, **Gortsos (2010)**, **Tridimas (2011)**, pp. 801-803, **Ferran (2012)**, **Papathanassiou and Zarouras (2012)**, **Schoenmaker (2012b)**, **Wymeersch (2012)**, **Moloney (2014a)**, pp. 907-941, **Thiele (2014)**, pp. 494-519, **Haar (2015)**, **Chiu (2016)**, **Deipenbrock (2016)** and **Walla (2017)**, pp. 153-167 (both mainly on ESMA), and in more details **Schemmel (2018)**.

²⁹ OJ L 331, 15.12.2010, pp. 12-47, pp. 48-83 and 84-119, respectively. From an institutional point of view it is worth noting that these EU agencies, unlike their above-mentioned predecessors (CEBS, CESR and CEIOPS), which were set up by Commission Decisions, were established by Regulations of the European Parliament and of the Council.

³⁰ Article 114 TFEU, which is the legal basis of several of the legal acts discussed in this study, is detailed in **Herrnfeld (2012)**. Regarding this choice, see **Louis (2010)**, p. 149. In relation to the EBA Regulation, see also its recital (17).

³¹ OJ L 287, 29.10.2013, pp. 5-14. On this legal act, see **Schammo (2014)**, **Wymeersch (2014)** and **Gortsos (2015a)**, pp. 64-71.

³² See below in **Section B, under 1.1.2 (3)**.

It is also noted that all three Regulations governing the ESAs are currently under amendment, in view of the need to further enhance and (in certain cases) clarify their powers, improve their governance and enhance their funding base.³³

(2) The ESAs, namely the European Banking Authority (the ‘EBA’), the European Insurance and Occupational Pensions Authority (the ‘EIOPA’) and the European Securities and Markets Authority (the ‘ESMA’), succeeded the three Committees (‘CEBS’, ‘CESR’ and ‘CEIOPS’), which were set up following recommendations in the 2001 ‘Lamfalussy Report’.³⁴ They are *mainly* regulatory authorities composed of national supervisory authorities. According to **Article 8** of their founding Regulations, their main task is the contribution to the “*establishment of high-quality common regulatory and supervisory standards and practices*” (further specified in **Articles 10-16** and **34**), i.e. contribution to the development of the ‘single rulebook’.³⁵ Nevertheless, they have also been endowed with some specifically designated supervisory powers, laid down in **Articles 17-19** of their founding Regulations.

The creation thus of the ESFS did not, literally speaking, lead to the creation of fully-fledged supranational financial supervisory authorities at EU level. By way of exception, the ESMA has *direct* supervisory powers over credit rating agencies in accordance with **Regulation (EC) No 1060/2009** of the European Parliament and of the Council of 16 September 2009³⁶ (as in force) and trade repositories in accordance with **Regulation (EU) No 648/2012** of the same institutions of 4 July 2012³⁷ (the European Market Infrastructure Regulation, ‘EMIR’, as in force).

(3) The Joint Committee is a joint body of the ESAs, governed by **Articles 54-57** of their founding Regulations. It is primarily composed of their Chairpersons (**Article 55(1)**) and serves as a forum to ensure cross-sectoral consistency between them on issue-areas where tasks and powers have been conferred on all of them.

1.2.3 The European Systemic Risk Board (ESRB) as the second pillar of the ESFS

(1) The *second pillar* of the ESFS is the “European Systemic Risk Board” (the ‘ESRB’), established in accordance with **Regulation (EU) No 1092/2010** of the European Parliament and of the Council of 24 November 2010 “on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board”.³⁸ On the basis of this Regulation, which is currently under amendment as well,³⁹ the macro-prudential oversight of the European financial system became the first (and single until 2014) component of the “Europeanised bank safety net”.⁴⁰

³³ COM(2017) 536 final (20.9.2017).

³⁴ See above, **under 1.1.2. (2)**.

³⁵ On this aspect, see also further below, **under 2.1 (3) in finem**. On Articles 10-16 EBA Regulation, see indicatively **Wymeersch (2012)**, pp. 249-255 and 276-277 and in more detail **Schemmel (2018)**, pp. 64-285. Article 34 governs the provision by the EBA of Opinions.

³⁶ OJ L 302, 17.11.2009, pp. 1-31. On this legal act, see by mere indication **Moloney (2014a)**, pp. 637-682, and **Veil (2017)** (both with extensive further references).

³⁷ OJ L 201, 27.7.2012, pp. 1-59. On this legal act, see **Aditya (2013)**, **Ferarini and Saguato (2013)**, **Provino (2015)** and **Sethe, Favre, Hess, Kramer, and Schott (2017, Hrsg.)**.

³⁸ OJ L 331, 15.12.2010, pp. 1-11.

³⁹ COM(2017) 538 final (20.9.2017).

⁴⁰ The objective of macro-prudential oversight is to limit the distress of the financial system as a whole in order to protect the overall economy against significant losses in real output (see

(2) A key conclusion of the *de Larosière* Report was that, at least in the near future, the setting up of supranational supervisory authorities at the European level was neither necessary nor feasible.⁴¹ In particular it suggested that, in any case, **the micro-prudential supervision of financial firms, including credit institutions, should not be assigned to the ECB.**⁴² On the other hand, however, it pointed out that specific tasks concerning the macro-prudential oversight of the financial system should be conferred upon it.⁴³ Subsequently, in connection to the operation of the ESRB specific tasks have been conferred on the ECB pursuant to **Council Regulation (EU) No 1096/2010** of 17 November 2010 “conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board”. Accordingly, the ECB became a part of the ESFS from the time of its establishment.

The legal basis for this Regulation is the enabling clause of **Article 127(6) TFEU**, which was activated for the first time in this case. The second time it was activated was in 2013, when it was used as a legal basis for Regulation (EU) No 1024/2013 of the Council, the so-called ‘SSM Regulation’, which is the main legal source of the first pillar of the BU.⁴⁴

2. The birth of the Banking Union as a response to the ongoing fiscal crisis in the euro area

2.1 The political decisions of June 2012 and the European Commission’s initiatives

(1) Amidst the ongoing fiscal crisis in the euro area, which became manifest in 2010,⁴⁵ the initiative to create the BU was first presented in the Report submitted on 26 June 2012 by the (then) President of the European Council, Herman Van Rompuy, entitled “Towards a Genuine Economic and Monetary Union” (the so-called ‘**Van Rompuy Report**’).⁴⁶ One of the four elements of this Report was the creation of “an integrated financial framework”.⁴⁷ The creation of the BU was tabled immediately afterward at the Euro Area Summit of 29 June 2012, the Statement of which contained a phrase summarising the main rationale behind this initiative:

Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011), section 3). It is one of the instruments adopted in order to meet the objective for addressing the two dimensions of systemic risk: the ‘**time dimension**’, namely the systemic risk’s evolution through time *and* the ‘**cross-sectional dimension**’, namely allocation of risk in the financial system at any given point in time. For an overview of the literature on these dimensions, see **Gortsos (2012)**, pp. 94-98.

⁴¹ *De Larosière Report (2009)*, paragraph 184, second and third sentences.

⁴² *Ibid.*, paragraphs 171 and 172, first sentence.

⁴³ *Ibid.*, paragraph 172, second sentence, and paragraphs 173-182.

⁴⁴ See below in **Section B, under 1.1.1 (1)**.

⁴⁵ For an evaluation of this crisis and the related policy responses, see indicatively **Belke (2010)**, **Eichengreen, Feldmann, Liebman, von Hagen and Wyplosz (2011)**, pp. 47-64, **Athanassiou (2011)**, **Aizenman (2012)**, **Caminal (2012)**, **Stephanou (2013)**, **de Grauwe (2013)**, various contributions in **Ringe and Huber (2014)**, editors), **Hadjiemmanuil (2015a)**, pp. 6-10, **d’Arvisenet (2015)**, **Zimmermann (2015)**.

⁴⁶ Available at: <https://www.consilium.europa.eu/media/33785/131201.pdf>.

⁴⁷ The other three (3) elements were setting up an integrated budgetary framework (‘European Fiscal Union’), an integrated economic policy framework (‘European Economic Union’) and a democratic legitimacy and accountability framework (‘European Political Union’).

*“We affirm that it is imperative to break the vicious circle between banks and sovereigns.”*⁴⁸

The European Summit which was held concurrently on 28-29 June invited the President of the European Council to develop, in close collaboration with Jose Manuel Barroso, President of the Commission, Jean-Claude Juncker, President of the Eurogroup, and Mario Draghi, President of the ECB, a specific and time-bound roadmap for the achievement of a genuine EMU, in accordance with the Van Rompuy Report. This Report, entitled “Towards a Genuine Economic and Monetary Union” (the ‘**Four Presidents’ Report**), was published on 5 December 2012.⁴⁹

(2) Against this political background, the Commission issued on 12 September 2012 an Announcement regarding “A Roadmap for a Banking Union”, a proposal for a Council Regulation “conferring specific tasks on the [ECB] concerning policies relating to the prudential supervision of credit institutions”, and a proposal for a Regulation of the European Parliament and of the Council “amending Regulation (EU) No 1093/2010 (...) as regards its interaction with Council Regulation (EU) No.../... conferring specific tasks on the [ECB] concerning policies relating to the prudential supervision of credit institutions”.⁵⁰ In its Announcement the Commission called on the European Parliament and the Council⁵¹ to reach agreement by end-2012 on the two above-mentioned Regulation proposals, as a first step towards the BU’s creation. It also called them to undertake two actions:

Firstly, to approve, also by end-2012, the proposals for the Regulations and Directives (of the European Parliament and of the Council) on amending the applicable regulatory framework on micro-prudential banking regulation, and setting up a new regulatory framework on macro-prudential banking regulation, establishing pan-European rules on the recovery and resolution of unviable credit institutions (and investment firms),⁵² and amending the existing regulatory framework on deposit guarantee schemes.⁵³ *Secondly*, to examine, in the medium term, how to shape the conditions for the establishment of a supranational entity for the resolution of unviable credit institutions, a supranational resolution fund for covering funding gaps, provided that a decision were to be made in favour of the resolution of an unviable credit institution, and a supranational deposit guarantee scheme, allowing the completion of the BU.

Resolution is the restructuring of (mainly, but not exclusively, systemically important) financial firms (and in particular credit institutions) by a resolution authority through the use of resolution tools in order to resolve problems arising from their exposure to insolvency and avoid an initiation of liquidation proceedings (thus preventing spillover effects of a bank’s failure on the economy) or resort to bail-out measures through public financial assistance facilities. Resolution is also referred to as a “specialised regime for bank failures”.⁵⁴

⁴⁸ **Euro Area Summit Statement, 29 June 2012**, first paragraph, first sentence, available at: https://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf. On the ‘vicious circles’ (also called ‘vicious cycles’, diabolic loops’ or ‘doom loops’) between the banking sector and sovereign bond markets from a historical perspective, see **Mitchener (2014)**.

⁴⁹ Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.

⁵⁰ COM(2012) 510 final, 511 final and 512 final, respectively.

⁵¹ COM(2012) 510 final, section 4.

⁵² COM(2012) 280 final.

⁵³ COM(2010) 369 final.

⁵⁴ See on this **Psaroudakis (2014)**, pp. 62-71 and **Binder (2017a)**, pp. 69-70, who use the term “Sonderinsolvenzrecht der Banken”, as well as **Haentjens (2017)**, p. 220. **Hadjiemmanuil**

The main objectives of resolution are safeguarding financial stability, protecting depositors (whose deposits are covered by DGSs and minimising the possibility of a bail-out through public funds, rather than prioritising creditor value maximisation (which is the key objective of insolvency law and ‘normal insolvency proceedings’).⁵⁵

(3) On the basis of this political agenda, the establishment of the BU should create a ‘Europeanised bank safety net’ consisting of three main pillars:⁵⁶

firstly, a Single Supervisory Mechanism (the ‘SSM’) exclusively for the banking sector (i.e. not for the insurance and securities sectors) and mainly for credit institutions incorporated in euro area Member States, with regard to their micro-prudential supervision (the ‘**first pillar**’);

secondly, a Single Resolution Mechanism (the ‘SRM’) for unviable credit institutions (also mainly incorporated in euro area Member States) and a Single Resolution Fund (the ‘SRF’) to cover any resulting funding gaps, provided that a decision were to be made on the resolution of such credit institutions (the ‘**second pillar**’); and

thirdly, a single deposit guarantee scheme, which coupled with the Single Resolution Board (a part of the SRM) could form a ‘European Deposit Insurance and Resolution Authority’ (EDIRA) (the ‘**third pillar**’).

These pillars should be coupled with a ‘single rulebook’ (‘*einheitliches Regelwerk*’, ‘*recueil réglementaire unique*’)⁵⁷ containing substantive rules on all previous aspects as part of the single market for financial services⁵⁸ and developed either by the EU institutions (legislative acts under **Article 289 TFEU**) or by the EU institutions with the direct involvement of and contribution by the EBA (delegated and implementing acts in accordance with **Articles 290-291 TFEU**).⁵⁹

(2014) makes use of the term ‘special resolution regime (SRR) for banking institutions’, with reference to the work of **Sjöberg (2014)**. See also **Cihák and Nier (2009)** and **Muñoz (2017)**.

⁵⁵ See on this **Haentjens (2017a)**, p. 220. On the concept(s) of resolution, see **Huertas and Lastra (2011)**, pp. 258-267, **Dewatripoint and Freixas (2012)**, **White and Yorulmazer (2014)**, **Armour (2015)** and **Binder (2016a)**, Section 2.2; on the private international law dimensions of resolution, see **Lehmann (2014)**; on the resolution of cross-border banking groups, see **Hüpkens and Devos (2010)**, **Davies (2014)**, as well as **Faia and di Mauro (2015)**; on the case for a credible, worldwide resolution scheme, see **Ringe (2016)**.

⁵⁶ For arguments for or against establishing the Banking Union, see indicatively (out of a vast existing literature) **Louis (2012)**, **Beck (2012)**, **Bofinger et.al (2012)**, **Carmassi, Di Noia and Micossi (2012)**, **House of Lords (2012)**, **Pisani-Ferry, Sapir, Véron and Wolff (2012)**, **Schoenmaker (2012)**, **Sibert (2012)**, **Wyplosz (2012)** and **Herring (2013)**. On various aspects of the functioning of the BU, see also the contributions in **Allen, Carletti and Gray (2013)**, (2014) and (2015).

⁵⁷ The term ‘single rulebook’ is commonly used to refer to the total harmonisation of rules pertaining to the micro- and macro-prudential regulation and the micro-prudential supervision of financial firms. The term was first introduced in June 2009, when the European Council called for the establishment of a “*European single rulebook applicable to all financial institutions in the Single Market*”, i.e. a single set of harmonised prudential rules (**European Council Conclusions, 18/19 June 2009**, 11225/2/09 REV 2, para. 20, first sentence, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf).

⁵⁸ On the link between the BU and the single market, see **Lastra (2013)**, **Binder (2016c)**, pp. 13-15, and **Alexander (2016)**, pp. 258-260.

⁵⁹ On Article 289 TFEU, see **Craig (2010)**, pp. 252-253, **Schoo (2012c)**, pp. 2332-2337, **Craig and de Búrca (2015)**, pp. 126-133 and **Türk (2018)**. On Articles 290-291 TFEU, see

2.2 Legislative actions – the new institutional and regulatory framework

(1) The most significant institutional and regulatory developments towards establishing the BU took place during 2013-2014. Taking into account the normal response time of European institutions, these legislative measures were taken, based on proposals by the Commission, in an exceptionally short timeframe. With the exception of the single deposit insurance scheme, the other components are in place.⁶⁰

The legislative acts which constitute the main *corpus* of the single rulebook are ‘children’ of the recent (2007-2009) international financial crisis. In particular, those on the prudential regulation and supervision of credit institutions and on the deposit guarantee schemes repealed pre-existing legislation in those two issue-areas (see just below in **Section B, under 1.2** and **3.2**, respectively), while that on the resolution of credit institutions introduced for the first time such a regime (**under 2.2**) – all of them under the influence, to a higher or lower degree, from developments in public international banking law after that crisis.

(2) In this respect, it is also worth noting the following:

The three main pillars of the BU, notably the new EU mechanisms and funds, are “children” of the ongoing fiscal crisis in the euro area and are designed to *apply mainly (but not exclusively) to the euro area Member States*.

On the other hand, the ‘single rulebook’, adopted by the European Parliament and the EcoFin Council and further detailed by the Commission and the EBA, is *applicable across all EU Member States*. It is mainly a “child” of the recent (2007-2009) international financial crisis, is part of the single market for financial services and is based on a ‘total harmonisation approach’.

indicatively **Craig (2010)**, pp. 57-66 and 253-255, **Craig and de Búrca (2011)**, pp. 113-118, **Schoo (2012c)**, pp. 2337-2344, **Craig (2018)** and **Schemmel (2018)**, pp. 200-207. On the comitology procedure as applied in accordance with **Regulation (EU) No 182/2011** of the European Parliament and of the Council, which was adopted on the basis of Article 291 TFEU, see **Gortsos (2016a)**.

⁶⁰ For a general overview and assessment of the legal framework on the BU, see indicatively **Binder (2013)**, **Moloney (2014b)**, various contributions in **Castaneda, Karamichailidou, Mayes and Wood (2015)**, editors), **Lastra (2015)**, pp. 355-382, the contributions of the co-authors in **Binder and Gortsos (2016)** and the various contributions in **Busch and Ferrarini (2015)**, editors): On the specific aspect of how the BU framework also impacts on private law relationships (duties), see **Grundmann (2015)**. On the need to extend the framework governing single supervision and resolution also to systemically important non-bank financial institutions in the EU, see **Busch and van Rijn (2017)**.

Section B:

The three main pillars of the Banking Union and their link to the (underlying) single rulebook

1. The first main pillar: authorisation, micro-prudential supervision and prudential regulation of credit institutions

1.1 The Single Supervisory Mechanism Regulation (SSMR)

1.1.1 General remarks

(1) The legislative act establishing the SSM is **Council Regulation (EU) No 1024/2013** of 15 October 2013 “conferring specific tasks on the European Central Bank concerning policies relating to the (micro-) prudential supervision of credit institutions”⁶¹ (the ‘SSMR’), which was adopted on the basis of the above-mentioned **Article 127(6) TFEU**.⁶² The SSM, which is defined as the system of financial supervision composed by the ECB and the NCAs of the Member States participating therein,⁶³ became operative on 4 November 2014.⁶⁴ The SSM’s institutional framework is also governed by several legal acts of the ECB, containing provisions on the detailed operational arrangements for the implementation of the tasks conferred upon it by the SSMR. The most important of these ECB legal acts is **Regulation (EU) No 468/2014** of 16 April 2014 “establishing the framework for cooperation within the SSM between the [ECB] and [NCAs] and with national designated authorities (‘SSM Framework Regulation’) (ECB/2014/17)”,⁶⁵ which further specifies certain provisions of the SSMR.⁶⁶

On the basis of **Article 20(8)-(9) SSMR**, an **Interinstitutional Agreement** between the European Parliament and the ECB was also signed in October 2013 “on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism”.⁶⁷ In addition, in December 2013, the Council and the ECB signed a **Memorandum of Understanding (MoU)** “on the cooperation on procedures related to the Single Supervisory Mechanism (SSM)”, which entered into force on 12 December 2013.

⁶¹ OJ L 287, 29.10.2013, pp. 63-89.

⁶² On this TFEU Article, see also above in **Section A, under 1.1.3**. On the skepticism about using it as legal basis, see **Lastra (2013)**, p. 1197, with further references, as well as **Alexander (2016)**, pp. 264-267.

⁶³ **SSMR**, recital (9).

⁶⁴ *Ibid.*, Article 33(2), first sub-paragraph.

⁶⁵ OJ L 141, 14.5.2014, pp. 1-50.

⁶⁶ Article 24. For a detailed analysis of the SSMR and the SSM Framework Regulation (or certain aspects thereof), see by way of mere indication **Ferran and Babis (2013)**, **Ferrarini and Chiarella (2013)**, **Tröger (2013)**, **Brescia Morra (2014)**, **Gandrud and Hallenberg (2014)**, **Moloney (2014b)**, **Thiele (2014)**, pp. 519-525, **Wymeersch (2014)**, **Wissink et al. (2014)**, **Gortsos (2015a)**, **Grundmann (2016)**, pp. 50-57 and 61-63, and the contributions in **Binder, Gortsos, Lackhoff and Ohler (2019)**, editors). For an overall assessment of the operation of the SSM, see indicatively **European Court of Auditors (2016)** and the various contributions in **Schoenmaker and Veron (2016)**, editors).

⁶⁷ OJ L 320, 30.11.2013, pp. 1-6.

(2) Even though the SSMR is binding in its entirety and directly applicable in all Member States,⁶⁸ its main field of application *ratione personae* are the ‘**participating Member States**’, meaning both the Member States whose currency is the euro (in the SSM Framework Regulation also called ‘euro area participating Member States’) and the Member States with a derogation which have established a close cooperation in accordance with **Article 7 SSMR**.⁶⁹

1.1.2 Key elements of the SSM under the SSM Regulation

The SSM is governed under the SSMR by four key elements, which are broadly consistent with **Article 127(6) TFEU** and (partly) reflect the compromise achieved between the EU institutions and Member States during its elaboration. In particular:

(1) The *first* key element (and subject matter of the SSMR) is the conferral on the ECB of ‘**specific tasks**’ concerning policies relating to the micro-prudential supervision of certain types of financial firms and mainly credit institutions (the ‘**supervised entities**’,⁷⁰), in transfer from NCAs, which are exercised within the SSM with a view to contributing to the safety and soundness of these entities and the stability of the financial system within the EU and each Member State.⁷¹ The specific tasks conferred upon the ECB are set out in **Articles 4(1) and 5(2) SSMR**.⁷²

(2) The *second* key element is the designation of the financial firms, mainly credit institutions with regard to which these specific tasks have been conferred on the ECB. In that respect, **Article 6 SSMR** established, *in principle*, a ‘two-tier system’ with regard to the distribution of powers within the SSM, distinguishing between ‘**significant**’ credit institutions, financial holding companies or mixed financial holding companies, which are *directly* supervised by the ECB and ‘**less significant**’ supervised entities, which are directly supervised by the NCA, both within the SSM.⁷³ This distinction does not apply to the granting and withdrawal of authorisation of credit institutions, as well as the acquisition and disposal of qualifying holdings therein, which are ECB tasks for all credit institutions.⁷⁴ In addition, if necessary in order to ensure consistent application of ‘high supervisory standards’ within the SSM, the ECB, which is responsible for the effective and consistent functioning of the SSM,⁷⁵ may, at any time, decide to exercise directly the supervision of a less significant supervised entity or a less significant supervised group.⁷⁶

⁶⁸ **SSMR**, last sentence.

⁶⁹ *Ibid.*, Article 2, point (1). On the definition of this term and on Article 7 SSMR, see also below in **Chapter 2, Section A, under 4**.

⁷⁰ The term ‘supervised entity’ is defined in Article 2, point (20) **SSM Framework Regulation**.

⁷¹ **SSMR**, Article 1.

⁷² Article 4 is analysed in **Lackhoff (2019)**, who also addresses the (disputable) issue on whether the list of specific tasks laid down in the SSMR is restrictive or not. On Article 5, see **Gortsos (2015a)**, pp. 152-161 and **Alexander (2019)**.

⁷³ **SSMR**, Article 6. This Article is analysed in **Gortsos (2019e)**; see also the Judgment of the European Court of Justice (the ‘ECJ’) of 16 May 2017 in **Case T-122/15 “Landeskreditbank Baden-Württemberg – Förderbank v ECB”**.

⁷⁴ *Ibid.*, Articles 4(1), points (a) and (c) with further reference to Articles 14-15.

⁷⁵ *Ibid.*, Article 6(1), second sentence.

⁷⁶ *Ibid.*, Article 6(5), point (b).

(3) The incorporation of the SSM within the ESFS, without in principle touching upon the current tasks of the EBA and the other components of the ESFS, constitutes the *third* key element of the SSMR.⁷⁷ Accordingly, the ECB has become a part of the ESFS also with regard to the tasks conferred on it by the SSMR.⁷⁸

(4) Finally, the *last* key element is the creation of ‘**Chinese walls**’ within the ECB in order to ensure the effective separation of its monetary policy and other tasks from its supervisory tasks.⁷⁹

1.1.3 The three new bodies of the ECB

On the basis of the above-mentioned key elements governing the SSM, three new internal bodies were established within the ECB. The *first* is the **Supervisory Board**, for the planning and execution of the tasks conferred upon the ECB by the SSMR.⁸⁰ The *second* body, the **Mediation Panel**, was established for ensuring the separation between monetary policy and supervisory tasks and the resolution of differences of views on the part of NCAs of interested participating Member States regarding an objection of the Governing Council to a draft Decision by the Supervisory Board.⁸¹ The purpose of the *third* body, the Administrative Board of Review (the ‘**ABOR**’), is to carry out an internal administrative review of the Decisions taken by the ECB in the exercise of its powers under the SSMR after a request for such a review.⁸²

1.3 The single rulebook

1.2.1 General overview

(1) The authorisation, prudential regulation and micro-prudential supervision of credit institutions in the EU (and not only in the euro area) are governed by two legal acts of the European Parliament and of the Council of 26 June 2013: **Regulation (EU) No 575/2013** “on prudential requirements for credit institutions and investment firms (...)” (‘Capital Requirements Regulation’ or ‘**CRR**’)⁸³ and **Directive 2013/36/EU** “on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)”⁸⁴ (‘Capital Requirements Directive IV’⁸⁵ or ‘**CRD IV**’). Both these legal acts have already been repeatedly amended and are currently under further extensive amendment.⁸⁶

⁷⁷ *Ibid.*, Article 3 and **Regulation (EU) No 1022/2013** (see above **Section A**, under **1.2.2 (1)**).

⁷⁸ **EBA Regulation**, Article 2(2), point (f). As already mentioned above in **Section A (under 1.2.3 (2))**, specific tasks have also been conferred on the ECB with regard to the macro-prudential oversight of the financial system.

⁷⁹ **SSMR**, Article 25(1)-(4). This Article is analysed in **Gortsos (2016f)** and **(2019f)**.

⁸⁰ *Ibid.*, Article 26.

⁸¹ *Ibid.*, Article 25(5).

⁸² *Ibid.*, Article 24.

⁸³ OJ L 176, 27.6.2013, pp. 1-337.

⁸⁴ OJ L 176, 27.6.2013, pp. 338-436.

⁸⁵ In fact, this is a misnomer for the Directive, which addresses several other prudential aspects rather than merely capital requirements.

⁸⁶ See below in **Section C**, under **2.1 (1)**.

The CRR is in force as amended (mainly) in 2017 by two Regulations of the European Parliament and of the Council. The first is **Regulation (EU) 2017/2395** of 12 December 2017 “(...) as regards transitional arrangements for mitigating the impact of the introduction of IFRS 9 on own funds and for the large exposures treatment of certain public sector exposures denominated in the domestic currency of any Member State”,⁸⁷ whose application started on 1 January 2018 and deals with the regulatory impact of the introduction of the new international reporting (accounting) standard ‘**IFRS 9**’ on the classification and measurement of financial instruments.⁸⁸ The second is **Regulation (EU) 2017/2401** of 12 December 2017 “amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms”,⁸⁹ focusing (mainly) on the treatment of securitisation positions.

(2) Adopted on the basis of **Articles 114** and **53(1) TFEU**,⁹⁰ respectively, in force since 1 January 2014 and applying equally to credit institutions and investment firms (jointly referred to as ‘institutions’), these legal acts set the framework governing the following aspects:

firstly, access to activity of the business of credit institutions (granting and withdrawal of authorisation, as well as acquisition and disposal of qualifying holdings),⁹¹ and exercise of the right of establishment and the freedom to provide services in the single market;⁹²

secondly, relations to third countries;⁹³

thirdly, micro-prudential supervision of credit institutions, both on a solo and on a consolidated basis, including the supervisory review and evaluation process (the ‘**SREP**’);⁹⁴ and

fourthly, micro- and (for the first time) macro-prudential regulation of credit institutions.⁹⁵

(3) An integral part of the single rulebook are also the Commission’s delegated and implementing acts, which are adopted on the basis of the power conferred on it in specific Articles of the CRR and the CRD IV in accordance with **Articles 290-291 TFEU**; the majority of these acts are based on draft technical regulatory and implementing standards developed by the EBA in accordance with **Articles 10-14 and 15 EBA Regulation**.

⁸⁷ OJ L 345, 27.12.2017, pp. 27-33.

⁸⁸ On this accounting standard and its implications on financial stability, see **European Systemic Risk Board (2017)**.

⁸⁹ OJ L 347, 12.2.2017, pp. 1-34.

⁹⁰ Article 53 TFEU is analysed in **Schlag (2012)**, pp. 809-818.

⁹¹ **CRD IV**, Articles 8-27.

⁹² *Ibid.*, Articles 33-46.

⁹³ *Ibid.*, Articles 47-48.

⁹⁴ *Ibid.*, Articles 49-117 (of which Articles 97-101 refer to the SREP).

⁹⁵ **CRR** and **CRD IV**, Articles 128-142 (on capital buffers). Macro-prudential regulations addressed to credit institutions (and other financial firms, as well as money and capital markets) are differentiated depending on the systemic risk dimension they are called upon to address. *Inter alia* and in relation to the systemic risk’s time dimension (and notably the financial system’s procyclicality issue) they include rules imposing on credit institutions to set ‘capital conservation buffers’ and ‘countercyclical buffers’ and to take ‘forward-looking provisions’.

Included in the single rulebook are also Guidelines adopted by the EBA, either on the basis of specific provisions of the CRR and the CRD IV or on its own initiative in accordance with **Article 16 EBA Regulation**.⁹⁶

1.2.2 The impact of public international banking law

The (just above-mentioned) rules of the CRR and the CRD IV on the SREP and the micro- and macro-prudential regulation of credit institutions reflect to a large extent the framework developed in 2010 (immediately after the recent (2007-2009) international financial crisis) by the Basel Committee on Banking Supervision⁹⁷ on this field (the ‘**Basel III regulatory framework**’).⁹⁸ It is noted in this respect that the influence of public international banking law⁹⁹ on the shaping of this set of EU banking law rules has been (and remained) extremely significant since the 1980ies.¹⁰⁰

1.3 The relation between the SSMR and the single rulebook

For the purpose of carrying out its tasks under the SSMR and with the objective of ensuring high standards of supervision, the ECB must apply all relevant legal acts which constitute sources of European banking law, i.e. **the CRR and the CRD IV**, as well as the delegated and implementing acts of the Commission adopted on the basis of these legislative acts.¹⁰¹ This EU law is composed of Directives or Regulations. To the extent that *national legislation* is either transposing those Directives or implementing Member States’ options available under those Regulations,¹⁰² the ECB is called upon to apply not only uniform EU law, but also national law, which may vary among participating Member States.

⁹⁶ All these draft technical standards and Guidelines adopted by the EBA are available at: <https://eba.europa.eu/regulation-and-policy/single-rulebook>; the related Q&As are available at: <https://eba.europa.eu/single-rule-book-qa>.

⁹⁷ On this international financial forum (also known with the acronym ‘BCBS’), see **Giovanoli (2010)**, pp. 25-26, **Nobel (2010)**, pp. 189-196, **Goodhart (2011)**, **Wandel (2014)**, pp. 78-79, **Lastra (2015)**, pp. 505-507, as well as **Gortsos (2017a)** and **(2019b)**, pp. 109-129.

⁹⁸ The Basel III framework consists of three Reports of the Basel Committee: “Basel III: A global regulatory framework for more resilient banks and banking systems” (available at: <https://www.bis.org/publ/bcbs189.htm>), “Basel III: The Liquidity Coverage Ratio [LCR] and liquidity risk monitoring tools” (available at: <https://www.bis.org/publ/bcbs238.htm>), and “Basel III: The net stable funding ratio [NSFR]” (available at: <https://www.bis.org/publ/bcbs295.htm>). On the ‘Basel III’ framework, in its original version of 2010, see **Gortsos (2012)**, pp. 254-281.

⁹⁹ Public international banking law is defined as the set of rules of international financial law, which apply exclusively to banks, whereby the following two objectives are sought: the first is to ensure the liberalisation of trade in banking services, and the second consists in ensuring the stability of the banking system, which could be disrupted as a result of the occurrence of contagious bank failures (see **Gortsos (2019b)**, p. 33). Its sources are Reports produced by international financial fora, which contain international financial standards. On the legal nature of these standards, which constitute international soft law, see by way of mere indication **Giovanoli (2010)**, pp. 34-37, **Wandel (2014)** and **Gortsos (2019b)**, pp. 54-55.

¹⁰⁰ On this aspect, see details in **Gortsos (2016d)**.

¹⁰¹ On the equivalent provisions of the SRM Regulation, see below in **Chapter 2, Section A, under 6.2**.

¹⁰² **SSMR**, Article 4(3), first sub-paragraph.

2. The second main pillar: resolution of credit institutions

2.1 The Single Resolution Mechanism and the Single Resolution Fund

2.1.1 The Single Resolution Mechanism Regulation (SRMR)

In 2014, a Single Resolution Mechanism (the ‘SRM’) and a Single Resolution Fund (the ‘SRF’) were established on the basis of **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 (...)” (the ‘SRMR’).¹⁰³ This legislative act was adopted on the basis of **Article 114 TFEU** and (with some exceptions) is applicable (mainly) since 1 January 2016.¹⁰⁴ Its adoption was a necessary complement to the SSMR, as it would constitute a paradox if credit institutions were directly supervised (by the ECB) at European level, but, in the event of a need for resolution (upon a determination made by the ECB that a credit institution is failing or likely to fail), the relevant decision were to be made at national level.¹⁰⁵ The SRM, supported by the SRF, constitutes the second main pillar of the BU.

The analysis of the SRMR is the main focus of this study.

2.1.2 The Single Resolution Fund (SRF) Agreement

The SRF is also governed by the **Intergovernmental Agreement (No 8457/14)** “on the transfer and mutualisation of contributions to the Single Resolution Fund” (the ‘SRF Agreement’).¹⁰⁶ The SRF Agreement is an instrument of public international law; nevertheless, it must be applied and interpreted by the Contracting Parties in conformity with the Treaties (i.e. the TFEU and the Treaty on European Union¹⁰⁷ (the ‘TEU’)) and with EU banking law concerning the resolution of institutions (i.e. the Bank Recovery and Resolution Directive (BRRD)¹⁰⁸ and the SRMR). It is applicable for them also since 1 January 2016¹⁰⁹ and complements the SRMR,¹¹⁰ which established the SRF.¹¹¹ The only Member States which are not Contracting Parties to the SRF Agreement, which is subject to ratification, approval or acceptance by its signatories under their respective constitutional requirements, are Sweden and the United Kingdom.

The SRF Agreement is presented in more detail in **Chapter 2, Section B** below and the SRF, under both the SRMR and the SRF Agreement, in **Chapter 6, Sections A and B**, respectively.

¹⁰³ OJ L 225, 30.7.2014, pp. 1-90.

¹⁰⁴ **SRMR**, Article 99(2); see also below in **Chapter 2, Section A, under 6.1.2**.

¹⁰⁵ See also recital (14) SRMR.

¹⁰⁶ Available at: https://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%208457%202014%20COR%201.

¹⁰⁷ OJ C 202 (Consolidated version), 7.6.2016, pp. 13-45.

¹⁰⁸ See just below, **under 2.2.1**.

¹⁰⁹ **SRF Agreement**, Article 12; see also below in **Chapter 2, Section B, under 4**.

¹¹⁰ **SRMR**, Article 1, second sub-paragraph, second sentence.

¹¹¹ *Ibid.*, Articles 67(1), first sentence.

2.2 The single rulebook

2.2.1 General overview

(1) The single rulebook on banking resolution is governed by **Directive 2014/59/EU** of the European Parliament and the Council of 15 May 2014 “establishing a framework for the recovery and resolution of credit institutions and investment firms”¹¹² (the ‘Bank Recovery and Resolution Directive’ or ‘**BRRD**’).¹¹³ The BRRD, which like the CRR and the CRD IV also applies to investment firms (also jointly referred to therein as ‘institutions’), was adopted on the basis of **Article 114 TFEU** and is applicable (with some exceptions) since 1 January 2015 to all Member States.¹¹⁴

It was the first time that harmonised rules were adopted at the EU level in this field, as opposed to the fields of authorisation, micro-prudential supervision and micro-prudential regulation of credit institutions (macro-prudential regulation under the CRR and the CRD IV is another innovative element), as well as deposit guarantee schemes, for which (as already mentioned¹¹⁵) a regulatory framework has been in place since the late 1980s and mid-1990s, respectively.

Recital (4) BRRD states in this respect the following: “*There is currently no harmonisation of the procedures for resolving institutions at Union level. Some Member States apply to institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern the insolvency of institutions in the Member States. In addition, the financial crisis has exposed the fact that general corporate insolvency procedures may not always be appropriate for institutions as they may not always ensure sufficient speed of intervention, the continuation of the critical functions of institutions and the preservation of financial stability.*”

(2) The BRRD lays down a comprehensive framework of substantive rules on the resolution of credit institutions (and investment firms) and contains provisions pertaining to three main aspects (its pillars):

the *first pillar* contains the so-called ‘**preparatory measures**’, including recovery planning, resolution planning and intra-group financial support agreements (**Articles 4-26**);

the *second pillar* refers to the ‘**early intervention measures**’, including the appointment of a special administrator (**Articles 27-30**); and

the *third pillar* covers the ‘**resolution tools and powers**’ (the most extensively regulated aspect, **Articles 31-86**). All these measures are divided into two categories: ‘crisis prevention’ and ‘crisis management’ ones’.¹¹⁶

‘**Crisis prevention measure**’ means the exercise of powers to direct removal of deficiencies or impediments to recoverability in accordance with Article 6(6), the exercise of powers to address or remove impediments to resolvability under Article 17 or 18, the application of an early intervention measure under Article 27, the appointment of a temporary administrator under Article 29, or the exercise of the write-down or conversion powers under Article 59. On the other hand, ‘**crisis management measure**’ means a resolution action, or the appointment of either a special manager under Article 35 or a person under either Article 51(2) or Article 72(1) (see also **Table 5** below).

¹¹² OJ L 173, 12.6.2014, pp. 190-348.

¹¹³ For an analytical commentary on this legal act, see **Haentjens (2017a)** and the various contributions in **World Bank (2017)** (in particular **Freudenthaler (2017a)** on its scope).

¹¹⁴ **BRRD**, Article 130(1), second sub-paragraph.

¹¹⁵ See above in **Section A, under 1.1.1**.

¹¹⁶ *Ibid.*, Article 2(1), points (101) and (102), respectively.

(3) As in the case of the delegated and implementing acts adopted on the basis of the CRR and the CRD IV,¹¹⁷ the single rulebook consists also of Commission’s delegated and implementing acts. These are adopted on the basis of the power conferred on it in specific Articles of the BRRD in accordance with **Articles 290-291 TFEU** and (mainly) are based on draft technical regulatory and implementing standards developed by the EBA in accordance with **Articles 10-14 and 15 EBA Regulation**. Included in the single rulebook are also, in this case as well, EBA Guidelines adopted either on the basis of specific provisions of the BRRD or on its own initiative in accordance with **Article 16 EBA Regulation**.¹¹⁸

2.2.2 *The impact of public international banking law*

As in the case of the CRR and the CRD IV, the impact of public international law on the BRRD was considerable as well. Its content was heavily influenced by the **2011 Report** of the Financial Stability Board (the ‘FSB’¹¹⁹) entitled “Key Attributes of Effective Resolution Regimes for Financial Institutions”.¹²⁰ They laid down the core elements considered to be necessary for an effective regime governing the resolution of any type of financial institutions that could be systemic in failure, and in particular: the scope of application, the resolution authority, the resolution powers, set-off, netting, collateralisation and segregation of client assets, safeguards, funding of firms in resolution, legal framework conditions for cross-border cooperation, crisis management groups (the ‘CMGs’), institution-specific cross-border cooperation agreements, resolvability assessments, recovery and resolution planning, and access to information and information sharing.

On 15 October 2014, the FSB adopted additional guidance documents which elaborate on specific Key Attributes relating to information sharing for resolution purposes and sector-specific guidance setting out how they should be applied for insurers, financial market infrastructures (the ‘FMIs’) and the protection of client assets in resolution. These documents have been incorporated as annexes into the 2014 version of the Key Attributes, which did not modify the text of the above-mentioned 2011 Key Attributes.¹²¹ In addition, in **October 2016**, the FSB adopted the “Key Attributes Assessment Methodology for the Banking Sector”, which lay down essential criteria guiding the assessment of national bank resolution frameworks’ compliance with the key attributes.¹²² Of specific importance in the application of resolution tools is the ‘**no creditor worse off principle**’ (the ‘NCWO’ principle).¹²³

¹¹⁷ See above, under 1.2.1 (2).

¹¹⁸ As in the case of the CCR and the CRD IV, all these draft technical standards and Guidelines adopted by the EBA are available at: <https://eba.europa.eu/regulation-and-policy/single-rulebook>; the related Q&As are available as well at: <https://eba.europa.eu/single-rule-book-qa>.

¹¹⁹ For details on this international financial forum, see indicatively **Giovanoli (2010)**, pp. 19-25, **Nobel (2010)**, pp. 173-183, **Gortsos (2012)**, pp. 145-150, **Thiele (2014)**, pp. 541-545 and **Gortsos (2019b)**, pp. 62-64.

¹²⁰ Available at: https://www.financialstabilityboard.org/publications/r_111104cc.htm. For an overview, see **Grünewald (2014)**, pp. 79-80 and **Kleftouri (2015)**, pp. 160-165.

¹²¹ Available at: https://www.Financialstabilityboard.org/2014/10/r_141015.

¹²² Available at: <https://www.fsb.org/2016/10/key-attributes-assessment-methodology-for-the-banking-sector>.

¹²³ On this principle, see further below in **Chapter 5, Section A, under 2.1**.

3. The (still pending) third main pillar: deposit guarantee

3.1 The (single) European Deposit Insurance Scheme (EDIS)

3.1.1 Introductory remarks

Unlike the SSM and the SRM, which are already operational, the third main pillar of the BU, i.e. a European Deposit Insurance Scheme (the ‘**EDIS**’), has not yet been put in place. In political terms, its creation was first presented in the June 2012 ‘**Van Rompuy Report**’, which paved the way for the decisions of the Euro Area Summit and the European Summit of 28-29 June on building the BU, and then in the December 2012 ‘**Four Presidents’ Report**’.¹²⁴ The need for the EDIS was further discussed in the so-called ‘**Five Presidents’ Report**’, of 22 June 2015, “Completing Europe’s Economic and Monetary Union”, which was included in the framework of the proposals on the creation of an (EU) ‘**Financial Union**’.¹²⁵

According to that Report, and a follow-up **Commission Communication of 21 October 2015** “On steps towards Completing Economic and Monetary Union”,¹²⁶ the EDIS would increase the resilience against future crises, since one of the conditions for a truly single banking system is for confidence in the safety of bank deposits to be the same across the EU, irrespective of the Member State in which a credit institution operates and. It is also more likely to be fiscally neutral over time than national DGSs, since risks are spread more widely and private contributions are raised over a much larger pool of financial institutions.

3.1.2 The 2015 Commission’s proposal for a Regulation establishing the EDIS

(1) Immediately afterwards, on 24 November 2015, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council “amending Regulation (EU) No 806/2014 in order to establish a European Deposit Insurance Scheme”¹²⁷ (the ‘**proposed SRMR**’). This proposal envisages the establishment of the EDIS through an amendment of the SRMR without any modification of the rules on the functioning of the SRM. According to this proposal, the EDIS will be established by the (amended) SRMR (which established the SRM as well) gradually, in three successive stages: reinsurance, co-insurance and full insurance (see just below, **under (3)**). In all three stages, it will both provide funding to and cover losses of ‘participating DGSs’,¹²⁸ with the level of funding provided and the share of loss covered increasing gradually.

¹²⁴ On both these Reports, see above in **Section A, under 2.1 (1)**.

¹²⁵ This Report was submitted by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz; it is available at: https://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf.

¹²⁶ COM(2015) 600 final.

¹²⁷ Available at: https://ec.europa.eu/finance/general-policy/docs/banking-union/european-deposit-insurance-scheme/151124-proposal_en.pdf.

¹²⁸ ‘**Participating DGSs**’ means DGSs, which are introduced and officially recognised in a participating Member State (**Proposed SRMR**, Article 3(1), point (55)); this includes statutory DGSs, institutional protection schemes (‘**IPs**’) and contractual schemes officially recognised by a Member State as DGSs (for details, see **Gortsos (2014a)**, pp. 37-40).

(2) For the purposes of the EDIS, the SRMR will apply to all participating DGSs and to all credit institutions affiliated to them.¹²⁹ The cover to be provided by the EDIS will be limited to the mandatory functions of DGSs under the **DGS Directive (2014/49/EU)**, i.e. payouts to depositors and contributions to resolution.¹³⁰ The EDIS will be administered by the Single Resolution Board (the ‘**Board**’,¹³¹ to be renamed to ‘**Single Resolution and Deposit Insurance Board**’) in cooperation with the participating DGSs; it will be supported by a Deposit Insurance Fund (the ‘**DIF**’) to be also set up from the outset as part of the EDIS, directly financed by risk-adjusted contributions made by credit institutions.¹³² Accordingly, the Board will become responsible for the administration of both the SRM and the EDIS. In addition, it will administer two Funds: the SRF and the DIF.

Specific safeguards against incorrect or unwarranted access to the EDIS by a participating DGS have also been proposed for all three stages, in order to ensure that only participating DGSs having observed their obligations in relation to the limitation of risk at EDIS level may benefit from its protection.¹³³

(3) According to the proposal, the process of the adoption of which is still halted, the three stages in the evolution of the EDIS should be as follows:¹³⁴

Phase 1: reinsurance: during the first three-year phase (**2007-2009**) the ‘reinsurance approach’ should apply, whereby a national DGS will have access to EDIS funds only when all its own resources are exhausted and it fully complies with the DGS Directive. EDIS funds would provide additional funds to a national DGS only up to a certain level and the latter would access the EDIS only when justified. Use of EDIS funds would be closely monitored, and any such funds found to have been received inappropriately by a national DGS would have to be fully reimbursed.

Phase 2: co-insurance: in **2020**, the EDIS would become a progressively mutualised system (‘co-insurance’), still subject to appropriate limits and safeguards against abuse. During this phase, a national DGS would not be required to exhaust its own funds before accessing EDIS funds and the EDIS would be available to contribute a share of the costs from the moment when the DGS would have been activated and depositors were to be reimbursed, leading to a higher degree of risk-sharing between national DGSs through the EDIS. The share to be contributed by the EDIS would start at a level of 20% and gradually increase to 80% over a four-year period.

Phase 3: full insurance: the EDIS should fully insure national DGSs as of **2024**. This is the same year when the SRF and the requirements of the DGS Directive will be *fully* phased in. The mechanism is equal to that in the co-insurance stage, with the EDIS covering, albeit in this case, a share of 100%.

On the current state of developments in relation to the establishment of the EDIS, see **Section C below, under 3.1**.

¹²⁹ *Ibid.*, Article 2(2), first sub-paragraph.

¹³⁰ On this Directive and on these functions, see just below, **under 3.2.1**.

¹³¹ On the Board, see further below in **Chapter 2, Section B**.

¹³² **Proposed SRMR**, Article 1(2), second sub-paragraph.

¹³³ *Ibid.*, Articles 41i and 41j. On various aspects of this proposal, see **Gros (2015)**, **Carmassi et al. (2018)**, **Brescia Morra (2019)** and in more detail **Gortsos (2019d)**. On the adequacy of Article 114 TFEU as the legal basis for the establishment of the EDIS, see **Herdegen (2016)**.

¹³⁴ *Ibid.*, Articles 41a-41c, 41d-41g and 41h, respectively.

3.2 The single rulebook

3.2.1 General overview

(1) The operation of national DGSs is governed by **Directive 2014/49/EU** of the European Parliament and of the Council “on deposit guarantee schemes”¹³⁵ (the ‘**DGSD**’), which was adopted on 16 April 2014 as part of the single rulebook and repealed **Directive 94/19/EC** of the same EU institutions since 3 July 2015.¹³⁶ Its legal basis being **Article 53(1) TFEU**, it lays down rules and procedures on the establishment and functioning of national DGSs in Member States.¹³⁷ According to this legal act, ‘**deposit guarantee scheme**’ (**DGS**) means a DGS introduced and officially recognised by a Member State in accordance with **Article 4 DGSD**. This covers ‘**statutory DGSs**’ set up by law and usually administered by a public entity, ‘**contractual DGSs**’ to the extent that they are *officially recognised* as DGSs, by complying with the requirements imposed by the DGSD, as well as ‘**institutional protection schemes**’ (the ‘**IPs**’), also to the extent that they are officially recognised as such.¹³⁸

(2) The DGSD substantially modified certain aspects of Directive 94/19/EC, while concurrently containing several innovative elements. In particular:¹³⁹

As to the *elements of continuity*, it is mainly noted that DGSs remain national, even though the merger of DGSs or the establishment of cross-border DGSs is (anymore) not ruled out. In addition, Member States continue not to be liable for the funding adequacy of their DGSs, their responsibility being confined to the establishment and official recognition of at least one DGS in their territory, the ‘**mandatory membership rule**’ for credit institutions and the fact that DGSs are activated when a credit institution’s deposits become ‘unavailable’.

On the other hand, *elements of change* include (*inter alia*) the rules adopted on the supervision of DGSs by designated authorities with regard to their operation, the introduction of provisions pertaining to the financing of DGSs (in that respect *ex-ante* financing is the rule, while *ex-post* financing arrangements are also prescribed and regulated), the fixing of the level of coverage at 100,000 euros *per depositor per* credit institution (minimum *and* maximum), and the gradual reduction of the repayment period from twenty to seven working days at the latest by the end of 2023. It also noted that even though the main function of DGSs, the ‘**payout (or paybox) function**’,¹⁴⁰ has been retained, but ranks first among four functions that DGSs may serve.

¹³⁵ OJ L 173, 12.6.2014, pp. 149-178.

¹³⁶ **DGSD**, Article 21. For a brief overview of this legal act, see **Arnaboldi (2014)**, pp. 53-58 and **Kleftouri (2015)**, pp. 64-75.

¹³⁷ *Ibid.*, Article 1(1).

¹³⁸ *Ibid.*, Article 2(1), point (1), with reference to Article 1(2), points (a)-(c). ‘**IPS**’ means an agreement meeting the requirements laid down in Article 113(7) CRR (*ibid.*, Article 2(1), point (2)). On these three types of DGSs under the DGSD (including an analysis of this CRR Article), see **Gortsos (2014a)**, pp. 37-40.

¹³⁹ This legal act is analysed in **Gortsos (2014a)**.

¹⁴⁰ This traditionally primary function of DGSs is to serve as a ‘paybox’ for depositors, guaranteeing the default-free character of deposits in the event of a bank failure. In this respect, DGSs pursue two (2) objectives: protecting retail depositors and acting as a buffer in the event of a banking crisis and contributing to safeguarding the stability of the banking system (being part of the bank safety net), thus curbing the likelihood of banking panics.

It noted in this respect that, according to **Article 11(2)**, national DGSs should mandatorily use their available financial means also in order to contribute to the financing of credit institutions' resolution in accordance with the conditions, safeguards and limitations set out in **Article 109 BRRD**.¹⁴¹

(3) Unlike the above-mentioned cases of the CRR, the CRD IV and the BRRD,¹⁴² the DGSD does provide for the adoption by the Commission of one only delegated act and of no implementing acts.¹⁴³ It only provides for the adoption by the EBA of Guidelines in accordance with **Article 16 EBA Regulation**.

3.2.2 *The impact of public international banking law*

The impact of public international financial law on the content of the DGSD is less important than in the case of the CRR, the CRD IV and the BRRD, since the majority of the principles contained in the "IADI Core Principles for Effective Deposit Insurance Systems" of **1 November 2014**¹⁴⁴ were already incorporated into EU law. These core principles, adopted by the International Association of Deposit Insurers (the 'IADI'¹⁴⁵), are also a by-product of the recent (2007-2009) international financial crisis and reflect the need for effective deposit insurance in preserving financial stability.

¹⁴¹ See on this also below in **Chapter 6, Section A, under 5**.

¹⁴² See above, **under 1.2.1 (2) and 2.2.1 (3)**.

¹⁴³ This delegated act, based on EBA's draft regulatory technical standards, should provide for the adjustment of the amount of coverage level laid down in **Article 6(1) DGSD** (i.e. 100,000 euros *per depositor per credit institution*), in accordance with inflation in the EU on the basis of changes in the harmonised index of consumer prices published by the Commission since the previous adjustment (*ibid.*, Article 6(6)-(7)).

¹⁴⁴ Available at: <https://www.iadi.org/en/assets/File/Core%20Principles/cprevised2014nov.pdf>. Noteworthy are the differences in terminology between the IADI report and the EU Directives, since the report makes use of the terms 'deposit insurance' instead of 'deposit guarantee', and 'deposit insurance systems' instead of 'deposit guarantee schemes'.

¹⁴⁵ On this international forum and these Principles, see **Gortsos (2016e)**, pp. 8-15.

TABLE 1			
The key legal sources of the three main pillars of the European Banking Union			
	Prudential supervision and regulation of credit institutions	Resolution of non-viable credit institutions	Deposit guarantee schemes
European 'Single Mechanisms'	Single Supervisory Mechanism: <ul style="list-style-type: none"> • Council Regulation (EU) No 1024/2013 ('SSM Regulation') • ECB Regulation (EU) No 468/2014 ('SSM Framework Regulation') • other ECB legal acts 	Single Resolution Mechanism and Fund: <ul style="list-style-type: none"> • Regulation (EU) No 806/2014 of the European Parliament and of the Council ('SRM Regulation'), and Commission's delegated and implementing acts • Intergovernmental Agreement (2014) ('SRF') 	Proposal for a Regulation of the European Parliament and of the Council "amending Regulation EU No 806/2014 in order to establish an 'EDIS' "
Harmonisation of substantive rules ('single rulebook')	<ul style="list-style-type: none"> • Regulation (EU) No 575/2013 of the European Parliament and of the Council ('CRR'), and Commission's delegated and implementing acts • Directive 2013/36/EU of the European Parliament and of the Council ('CRD IV'), and Commission's delegated and implementing acts 	<ul style="list-style-type: none"> • Directive 2014/59/EU of the European Parliament and of the Council ('BRRD'), and Commission's delegated and implementing acts 	<ul style="list-style-type: none"> • Directive 2014/49/EU of the European Parliament and of the Council, and a Commission's delegated act ('DGSD')

TABLE 2		
Addressees of and date by which the main provisions of the key legal sources pertaining to the European Banking Union are applicable		
A. Authorisation - prudential supervision - prudential regulation		
Legal act	Addressees	Date of start of (full) application
Regulation (EU) No 1024/2013 ('SSM Regulation')	19+ Member States	4 November 2014
ECB 'SSM Framework Regulation'	19+ Member States	15 May 2014
Regulation 575/2013 ('CRR')	28 Member States	1 January 2014
Directive 2013/36/EU ('CRD IV')	28 Member States	1 January 2014
B. Recovery and resolution		
Regulation (EU) No 806/2014 ('SRM Regulation')	19+ Member States	1 January 2016
Intergovernmental Agreement on the 'SRF'	19+ Member States	1 January 2016 <i>(upon ratification by Contracting Parties)</i>
Directive 2014/59/EU ('BRRD')	28 Member States	1 January 2015
C. Deposit guarantee		
Directive 2014/49/EU on deposit guarantee schemes	28 Member States	4 July 2015

TABLE 3		
European banking law before and after the European Banking Union: Elements of continuity and change		
A. Prudential requirements		
Financial policy instruments	Institutions/rules	
	Until 31 December 2013	By 2014 (gradually) <i>(italics denote change or new element)</i>
1. Authorisation and micro-prudential supervision of credit institutions	<ul style="list-style-type: none"> • National supervisory authorities • Minimum harmonisation of rules (Directive 2006/48/EC) 	<ul style="list-style-type: none"> • <i>Single Supervisory Mechanism ('SSM Regulation') (for euro area +)</i> • National supervisory authorities (for Member States with a derogation) • <i>Single rulebook ('CRD IV') (for all Member States)</i>
2. Micro- and macro-prudential regulation of credit institutions	Minimum harmonisation of rules (Directives 2006/48/EC and 2006/49/EC)	<i>Single rulebook ('CRR' and 'CRD IV') (for all Member States)</i>
3. Evaluation of recovery plans	–	<ul style="list-style-type: none"> • <i>Single Supervisory Mechanism ('SSM Regulation') (for euro area +)</i> • <i>National supervisory authorities (for Member States with a derogation)</i> • <i>Single rulebook ('BRRD')</i>
4. Resolution planning	–	<ul style="list-style-type: none"> • <i>Single Resolution Mechanism ('SRM Regulation') (for euro area +)</i> • <i>National resolution authorities (for Member States with a derogation)</i> • <i>Single rulebook ('BRRD')</i>
5. Macro-prudential oversight of the financial system	European Systemic Risk Board	European Systemic Risk Board

TABLE 3 (continued)		
European banking law before and after the European Banking Union: Elements of continuity and change		
B. Crisis prevention		
Financial policy instruments	Institutions/rules	
	Until 31 December 2013	By 2014 (gradually) <i>(italics denote change or new element)</i>
1. Adoption of ‘alternative measures’ within the framework of recovery plan evaluation	–	<ul style="list-style-type: none"> • <i>Single Supervisory Mechanism (‘SSM Regulation’) (for euro area +)</i> • <i>National supervisory authorities (for Member States with a derogation)</i> • <i>Single rulebook (‘BRRD’)</i>
2. Repair or removal of impediments to resolvability	–	<ul style="list-style-type: none"> • <i>Single Resolution Mechanism (‘SRM Regulation’) (for euro area +)</i> • <i>National resolution authorities (for Member States with a derogation)</i> • <i>Single rulebook (‘BRRD’)</i>
3. Early intervention - special administrator	–	<ul style="list-style-type: none"> • <i>Single Supervisory Mechanism (‘SSM Regulation’) (for euro area +)</i> • <i>National supervisory authorities (for Member States with a derogation)</i> • <i>Single rulebook (‘BRRD’)</i>
4. Write-down and conversion (without bail-in)	–	<ul style="list-style-type: none"> • <i>Single Resolution Mechanism (‘SRM Regulation’) (for euro area +)</i> • <i>National resolution authorities (for Member States with a derogation)</i> • <i>Single rulebook (‘BRRD’)</i>

TABLE 3 (continued)		
European banking law before and after the European Banking Union: Elements of continuity and change		
C. Crisis management		
Financial policy instruments	Institutions/rules	
	Until 31 December 2013	By 2014 (gradually) <i>(italics denote change or new element)</i>
1. Reorganisation of credit institutions	<ul style="list-style-type: none"> • National authorities (Directive 2001/24/EC) • No harmonisation of rules 	<ul style="list-style-type: none"> • National authorities (Directive 2001/24/EC) • No harmonisation of rules
2. Winding up of credit institutions	<ul style="list-style-type: none"> • National authorities (Directive 2001/24/EC) • No harmonisation of rules 	<ul style="list-style-type: none"> • National authorities (Directive 2001/24/EC) • No harmonisation of rules
3. Deposit guarantee schemes	<ul style="list-style-type: none"> • National schemes • Minimum harmonisation of rules (Directive 94/19/EC) 	<ul style="list-style-type: none"> • From national schemes <i>to the EDIS (proposal)</i> • <i>Single rulebook (Directive 2014/49/EU) (for all Member States)</i>
4. Resolution of credit institutions	–	<ul style="list-style-type: none"> • <i>Single Resolution Mechanism ('SRM Regulation') (for euro area +)</i> • <i>National resolution authorities (for Member States with a derogation)</i> • <i>Single Resolution Fund (Intergovernmental Agreement) (for euro area +)</i> • <i>Single rulebook ('BRRD') (for all Member States)</i>
5. Provision of state subsidies to systemically important credit institutions	<ul style="list-style-type: none"> • Member States • Indirectly the ESM 	<ul style="list-style-type: none"> • Member States • Indirectly the ESM • <i>Directly the ESM ('DRI')</i>
6. Last resort lending to solvent but illiquid credit institutions	National central banks (NCBs) (Emergency Liquidity Assistance (ELA) in the euro area)	National central banks (NCBs) (Emergency Liquidity Assistance (ELA) in the euro area)

TABLE 4 The partial Europeanisation of the ‘bank safety net’ (even) with regard to significant credit institutions		
Financial policy instruments	Scope of application	Level of action <i>(italics denote a national element)</i>
Granting and withdrawal of authorisation	Euro area (+ Member States under close cooperation)	ECB within the SSM (also applicable to less significant credit institutions)
Macro-prudential oversight	EU	ESRB and ECB (specific tasks)
Micro-prudential supervision	Euro area (+ Member States under close cooperation)	ECB within the SSM (with regard to the specific tasks conferred on the ECB)
Recovery planning and early intervention	Euro area (+ Member States under close cooperation)	ECB within the SSM
Recapitalisation by public funds	<ul style="list-style-type: none"> • EU • Euro area • Euro area 	<ul style="list-style-type: none"> • <i>National governments</i> • <i>Indirectly by the ESM</i> • Directly by the ESM (‘DRI’)
Drawing up of resolution plans, assessment of resolvability and resolution	Euro area (+ Member States under close cooperation)	SRB within the SRM (<i>since 1 January 2016</i>)
Winding up	EU	<i>National administrative or judicial authorities</i>
Deposit guarantee	EU	<i>National deposit guarantee schemes</i> European Deposit Insurance Scheme (EDIS) (<i>proposal</i>)
Last resort lending (‘ELA’)	Euro area	<i>National central banks (NCBs) – members of the Eurosystem</i>

Table 5	
‘Crisis prevention’ and ‘crisis management’ measures under the BRRD	
BRRD Article	Relevant measure
‘Crisis prevention’ measures	
Article 6(6)	Exercise of powers to direct removal of deficiencies or impediments to recoverability in accordance
Articles 17 or 18	Exercise of powers to address or remove impediments to resolvability
Article 27	Application of an early intervention measure
Article 29	Appointment of a temporary administrator
Article 59	Exercise of write-down or conversion powers
‘Crisis management’ measures	
	Resolution action
Article 36	Appointment of a special manager
Articles 51(2) and 72(1)	Appointment of a person responsible for drawing up and implementing a business reorganisation plan (under Article 52)

Section C:

Current developments and the way forward

1. The Commission's current reform agenda: a general overview

(1) The legal framework governing the BU and (mainly) the underlying single rulebook is currently under (partial) amendment. The **Commission Communication of 11 October 2017** “On completing the Banking Union”,¹⁴⁶ which is broadly based on the conclusions of the **Commission Reflection Paper** “on the deepening of the economic and monetary union” of 31 May 2017¹⁴⁷ (the ‘**EMU reflection paper**’) (as well as in previous documents submitted by the Council and by the Commission), laid down in this respect the following six priorities, which can be categorised in two groups:

The *first* group contains ‘**risk reduction**’ measures, including: the (quick) adoption of the 2016 legislative ‘banking package’ (for details see below, **under 2.1**), the creation of sovereign bond-backed securities (**under 2.2**), the undertaking of actions to address non-performing loans (the ‘**NPLs**’), in accordance with the **Council Action Plan “on Non-Performing Loans”** of July 2017,¹⁴⁸ and continuation of the attempt to ensure high quality supervision (**under 2.3**).

The *second* group comprises two ‘**risk sharing**’ measures (the implementation of which has been considered that should follow the effective application of the risk reduction ones), and in particular the establishment of the EDIS (see below, **under 3**), and the creation of a ‘common backstop’ to the (Single Resolution) Board for the SRF.¹⁴⁹

(2) The priority character of the above-mentioned actions was further reinforced in the **Commission Communication of 6 December 2017** “Further steps towards completing Europe’s Economic and Monetary Union: A roadmap”,¹⁵⁰ which outlines the comprehensive package of six proposals to strengthen the EMU – including the BU and the **Capital Markets Union**¹⁵¹ (the ‘**CMU**’), which constitute the two pillars of the ‘**Financial Union**’. In addition to the proposal for a Council Regulation on the establishment of the European Monetary Fund, which is discussed in more details below (**under 3.2**) since, *inter alia*, it is the basis for the creation of the ‘**common backstop**’, this package also includes the following:

¹⁴⁶ COM(2017) 592 final.

¹⁴⁷ Available at: https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en.

¹⁴⁸ Its conclusions are available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-non-performing-loans>. The Commission’s proposals are laid down in pp. 17-18 of its Communication.

¹⁴⁹ This aspect is discussed in more detail below in **Chapter 6, Section A, under 4.5.2**.

¹⁵⁰ COM(2017) 821 final, 6.12.1017, pp. 11-12.

¹⁵¹ It is noted that, unlike in the BU case, the CMU project does not explicitly provide for the creation of a single, pan-European securities markets authority, even though the enhancement of efficiency in the supervision of capital markets is a key objective of the CMU project. On the CMU, see **Dixon (2014)**, **Ringe (2015)**, **Véron and Wolff (2015)** and the individual contributions in **Busch, Avgouleas and Ferrarini (2018)**, editors).

firstly, two Communications, “on new budgetary instruments for a stable euro area within the Union framework”¹⁵² and on “a European Minister of Economy and Finance”;¹⁵³

secondly, a proposal for a Council Directive “laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States”¹⁵⁴ in order to integrate the substance of the 2012 “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union”¹⁵⁵ (the ‘TSCG’) into the EU legal framework;¹⁵⁶ and

thirdly, for the period 2018-2020, two proposals for Regulations of the European Parliament and of the Council, the *first* amending the so-called “**Common Provisions**” **Regulation (EU) 1303/2013**¹⁵⁷ “as regards support to structural reforms in Member States”¹⁵⁸ (i.e. to mobilise EU funds in support of national reforms), and the *second* “amending **Regulation (EU) 2017/825**¹⁵⁹ to increase the financial envelop of the Structural Reform Support Programme and adapt its general objective”.¹⁶⁰

2. Risk reduction measures

2.1 Finalisation of the 2016 legislative ‘banking package’

(1) On 23 November 2016, the Commission tabled, on the basis of its **Communication of 24 November 2015** “Towards the completion of the Banking Union”,¹⁶¹ a legislative ‘**banking package**’ concerning the amendment of several aspects of the SRMR, the BRRD, the CRR and the CRD IV with a view to reducing risks in the financial system and further strengthening the resilience of EU credit institutions.¹⁶² In particular:

Firstly, the **Proposal for a Directive** of the European Parliament and of the Council “amending [the BRRD] as regards the ranking of unsecured debt instruments in insolvency hierarchy”,¹⁶³ which provides for the amendment of **Article 108 BRRD**, was adopted on 12 December 2017 (**Directive (EU) 2017/2399**) and has already been published in the *Official Journal*.¹⁶⁴

¹⁵² COM(2017) 822 final, 6.12.2017.

¹⁵³ COM(2017) 823 final, 6.12.2017. This proposal is discussed in **Louis (2018)**, pp. 27-30.

¹⁵⁴ COM(2017) 824 final, 6.12.2017.

¹⁵⁵ This is available at: https://www.consilium.europa.eu/media/20399/st00tscg26_en12.pdf.

¹⁵⁶ On this aspect, see details in **Louis (2018)**, pp. 30-33.

¹⁵⁷ OJ L 347, 20.12.2013, pp. 320-469.

¹⁵⁸ COM(2017) 826 final, 6.12.2017.

¹⁵⁹ OJ L 129, 19.5.2017, pp. 1-16.

¹⁶⁰ COM(2017) 825 final, 6.12.2017.

¹⁶¹ COM(2015) 587 final.

¹⁶² The Commission’s proposals, currently under finalisation, are available at: https://europa.eu/rapid/press-release_IP-16-3731_en.htm?locale=en.

¹⁶³ COM(2016) 0853 final.

¹⁶⁴ OJ L 345, 27.1.2017, pp. 96-101. See on this also below in **Chapter 5, Section A, under 3 (2)**.

Secondly, a combined legislative proposal refers to the amendment of both the SRMR and the BRRD: a **Proposal for a Regulation** of the same institutions “amending the SRMR as regards loss-absorbing and recapitalisation capacity for credit institutions and investment firms”¹⁶⁵ (the ‘**Proposed SRMR II**’) and a **Proposal for a Directive** of the same institutions amending the BRRD “on loss-absorbing and recapitalisation capacity of credit institutions and investment firms (...)”¹⁶⁶ (the ‘**Proposed BRRD II**’). The purpose is to review the minimum requirement for own funds and eligible liabilities (the ‘**MREL**’) and implement in the EU legal framework the total loss-absorbing capacity (the ‘**TLAC**’) standard of the FSB.¹⁶⁷

Finally, the amendments to the CRR under the ‘**Proposed CRR II**’ refer to several aspects, such as the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties and to collective investment undertakings, large exposures, as well as reporting and disclosure requirements,¹⁶⁸ while those to the CRD IV under the ‘**Proposed CRD IV**’ refer to exempted entities, financial holding companies and mixed financial holding companies, remuneration, supervisory measures and powers, as well as capital conservation measures.¹⁶⁹

The vast majority of the proposals on the amendment of the CRR and the CRD IV are broadly based on aspects of the above-mentioned Basel Committee’s “**Basel III regulatory framework**”,¹⁷⁰ which were not included in these legislative acts at the time of their adoption (in 2013). It is noted, however, that the Basel Committee’s framework is under amendment again after the endorsement, on 7 December 2017, by its oversight body, the Group of Central Bank Governors and Heads of Supervision (the ‘**GHOS**’) of the Report entitled “Basel III: Finalising post-crisis reforms”¹⁷¹ (also referred to as the “**Basel IV regulatory framework**”, even though the Basel Committee tends to view it as a complement to “Basel III”). Accordingly, it is expected that in the near future the Commission will submit new proposals for further amendments to the CRR and the CRD IV.

(2) According to the Statement of the Euro Summit meeting, of 29 June 2018, these proposals (as well as all the other pending proposals included in the legislative banking package) should be finalised by the end of 2018.¹⁷² The latest Euro Summit meeting, of **14 December 2018**, called for the final adoption of this package by spring 2019¹⁷³ (a deadline that has been met on 16 April, just at the closing of this study).

¹⁶⁵ COM(2016) 851/2 final.

¹⁶⁶ COM(2016) 0852/2 final.

¹⁶⁷ For a brief overview of the TLAC, see below in **Chapter 4, Section C, under 4**.

¹⁶⁸ COM(2016) 850 final.

¹⁶⁹ COM(2016) 854 final.

¹⁷⁰ See above in **Section B, under 1.2.2**.

¹⁷¹ Available at: <https://www.bis.org/bcbs/publ/d424.htm>. The EBA already conducted and published an *ad hoc* cumulative impact assessment of this new regulatory reform package for the EU banking system (available at: <https://www.eba.europa.eu/documents/10180/1720738/Ad+Hoc+Cumulative+Impact+Assessment+of+the+Basel+reform+package.pdf>).

¹⁷² **Euro Summit meeting** (29 June 2018), **Statement**, point 1. The text of this Statement is available at: <https://www.consilium.europa.eu/media/35999/29-euro-summit-statement-en.pdf>.

¹⁷³ **Euro Summit meeting** (14 December 2018), **Statement**, point 3. On this Statement’s text, see at: <https://www.consilium.europa.eu/media/37563/20181214-euro-summit-statement.pdf>.

2.2 Creation of sovereign bond-backed securities

(1) The creation of sovereign bond-backed securities (or sovereign-backed securities, the ‘SBSs’) is an aspect currently dealt with mainly by the ESRB.¹⁷⁴ It aims at the reduction of systemic risk and the mitigation of financial fragmentation – and ultimately at the reduction of the ‘bank-sovereign loop’. The first above-mentioned goal would be achieved by allowing credit institutions, insurance companies and other investors to diversify their government bond portfolios at relatively low transaction costs, and the second by allowing *all* participating Member States to contribute to the symmetrical supply of low-risk euro assets.¹⁷⁵

The initiative to create SBSs can be viewed as a by-product of the need to overcome *smoothly* a major ‘**regulatory failure**’ linked to the provisions of the CRR, which stipulate, in relation to the calculation of capital requirements for credit risk (mainly under the Standardised Approach, still used by several least sophisticated credit institutions), that claims on Member State governments, if denominated in the local currency, have a zero percent (0%) risk weight.¹⁷⁶ The experience from the ‘voluntary’ haircut on Greek government bonds under the Private Sector Involvement (the ‘PSI’), which resulted in Greek credit institutions suffering extremely severe losses from their participation therein to the extent that their capital basis was depleted, has shown that these provisions are not appropriate. They provide credit institutions with perverse incentives when including government bonds in their portfolios (especially in their banking books).¹⁷⁷ Nevertheless, any (even adequate) increase of risk weights might lead to a distortion of capital markets, given the volumes of higher-risk government bonds involved.

(2) On **24 May 2018** the Commission submitted a “Proposal for a Regulation of the European Parliament and the Council on sovereign bond-backed securities”.¹⁷⁸ Its objective is to lay down a “general framework” for SBBSs in the EU.¹⁷⁹

2.3 Increasing the quality of supervision

(1) With regard to this aspect, and notwithstanding its overall positive assessment of the work of the SSM with regard to the micro-prudential of credit institutions in the euro area,¹⁸⁰ the **Commission** submitted on **20 September 2017** a **Communication** on “Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment”.¹⁸¹

¹⁷⁴ See on this **European Systemic Risk Board (2016)**; see also **Brunnermeier et al. (2016)** and **Demary and Matthes (2017)**.

¹⁷⁵ **European Systemic Risk Board (2016)**, Section 3. On the basic characteristics of the SBSs, see Section 2 and on their design, see Section 4.

¹⁷⁶ **CRR**, Article 114(4). For an analytical study of this case, see **European Systemic Risk Board (2015)**. On the same aspect from a global point of view, see the discussion paper of the Basel Committee of 7 December 2017 on the “Regulatory treatment of sovereign exposures” (available at: <https://www.bis.org/bcbs/publ/d425.htm>).

¹⁷⁷ On the key terms of the PSI following the 26 October 2011 Euro Summit, see **Gortsos (2013)**, pp. 166-169, and more analytically **Zettelmeyer, Trebesch and Gulati (2013)** and **Buchheit (2016)**.

¹⁷⁸ COM(2018) 839 final. The text of the Commission’s Staff Working Document “Impact Assessment” (SWD(2018) 252 final, 24.5.2018) is available at: <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-400473>.

¹⁷⁹ **Proposal for an SBBS Regulation**, Article 1. This proposal is analysed in **Gortsos (2018c)**.

¹⁸⁰ **Commission Communication (11.10.2017)**, Section 7, first paragraph.

¹⁸¹ COM(2017) 542 final.

This was coupled by four **Proposals for three Regulations and one Directive** of the European Parliament and of the Council for the amendment of the Regulations governing the ESAs and the ESRB, of several legal acts constituting the sources of EU capital markets law and of **Directive 2009/138/EC** of 25 November 2009 “on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)”¹⁸² (the ‘**Solvency II**’ **Directive**).¹⁸³

(2) The objective of the proposed amendments to the founding Regulations of the ESAs¹⁸⁴ is to ensure stronger and more integrated financial supervision across the EU by improving their mandates, governance and funding. In addition, there are proposals to enhance the micro-prudential supervision of investment firms, especially in view of the fact that, due to the existing potential for regulatory arbitrage, some large investment firms (in certain cases a part of complex banking groups) carry out investment banking services which are outside the reach of the existing regulatory/supervisory framework and raise concerns of financial stability.¹⁸⁵ Of particular institutional importance (even though outside the reach of the present study) are also the proposals to develop the ESMA into a ‘**Single Capital Markets Supervisor**’, by extending its direct supervision to selected capital market sectors,¹⁸⁶ beyond those of credit rating agencies and trade repositories.¹⁸⁷

3. Risk sharing measures: towards establishment of the EDIS

(1) The progress on adopting the Regulation establishing the EDIS on the basis of the 2015 Commission’s proposal¹⁸⁸ has been slow, predominantly because the previous adoption of the above-mentioned risk reduction measures is considered as a *conditio sine qua non*. Nevertheless, the Commission identified in its **EMU reflection paper** the establishment of the EDIS (ideally by 2019, with a view to be in place and fully operational by 2025) as one of the key outstanding components for the completion of the BU.¹⁸⁹ In this respect, in its above-mentioned **Communication of 11 October 2017** concerning the completion of all parts of the BU by 2018,¹⁹⁰ the Commission submitted a compromise solution, proposing a more gradual introduction of the EDIS compared with the original proposal in only two phases. In particular:

During the more limited ‘*reinsurance stage*’, the EDIS would only provide liquidity coverage to national DGSs, temporarily providing the means to ensure full payouts if a credit institution’s deposits were to become unavailable. National DGSs would need to pay back this support, ensuring that any losses would continue to be covered at national level. During the following ‘*coinsurance stage*’, the EDIS would also progressively cover losses; nevertheless, the migration to this phase should be conditional on progress achieved in reducing risks.

¹⁸² OJ L 335, 17.12.2009, pp. 1-155.

¹⁸³ COM(2017) 536-539 final.

¹⁸⁴ Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-536_en.

¹⁸⁵ **Commission Communication (11.10.2017)**, Section 7, second paragraph.

¹⁸⁶ See above in **Section A**, under **1.2.2 (2)**.

¹⁸⁷ **Commission Communication (20.09.2017)**, pp. 9-10.

¹⁸⁸ See above in **Section B**, under **3.1.2**.

¹⁸⁹ **EMU reflection paper (2017)**, pp. 19-20.

¹⁹⁰ See above, under **1 (1)**.

(2) In the above-mentioned Statement of the Euro Summit meeting of 29 June 2018 it was agreed, again, that work on a roadmap for launching political negotiations on the EDIS should start immediately after the adoption of the above-mentioned risk reduction measures.¹⁹¹ The latest Euro Summit meeting, of **14 December 2018**, which (as already mentioned) called for the final adoption of the 2016 legislative banking package by spring 2019, did not make any explicit reference to the progress of negotiations on the EDIS.

Nevertheless, according to the “Eurogroup report to Leaders on EMU deepening”, of **4 December 2018**,¹⁹² work has started on a roadmap for launching political negotiations on the EDIS in line with the mandate from the June 2018 Euro Summit. In addition, the establishment of a High-level working group was decided to work on the next steps and report to the Euro Summit of June 2019. Nevertheless, the establishment of the EDIS (and the DIF) is not envisaged before the end of 2019.

4. The ‘uncompleted agenda’ and a necessary precondition for the smooth operation of the Banking Union

4.1 The ECB as a lender of last resort in the euro area

(1) In the author’s opinion, the completion of the BU presupposes, two further elements, which are not yet high (or even at all) on the agenda. The first is the provision of last resort lending directly by the ECB, under the “Emergency Liquidity Assistance Mechanism” (the ‘ELA’), which **Lastra and Goodhart (2015)**, at p. 16, correctly consider to be the “*missing fourth pillar of the banking union*”. The role of the ECB in this respect (with regard to all credit institutions established in the euro area) is confined to the approval or rejection of relevant decisions taken by the NCBs – members of the Eurosystem in accordance with **Article 14.4 of the ESCB/ECB Statute** which reads as follows: “*National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.*”¹⁹³

The procedural arrangements governing the provision of emergency liquidity assistance under the ELA were initially contained in an **ECB Communication of October 2014**,¹⁹⁴ and since May 2017 in the **Agreement on emergency liquidity assistance**.¹⁹⁵ These procedures relate to the actions necessitated by the ECB’s Governing Council and to the data to be provided to the ECB in order to make the assessment, pursuant to **Article 14.4 of the ESCB/ECB Statute**, whether the provision of emergency liquidity by an NCB to individual credit institutions interferes with the objectives and tasks of the Eurosystem.

¹⁹¹ **Euro Summit meeting** (29 June 2018), **Statement**, point 1 (second sentence).

¹⁹² The text of this report’s Statement is available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/eurogroup-report-to-leaders-on-emu-deepening/pdf>.

¹⁹³ This Article is analysed in **Smits (1997)**, pp. 99-101.

¹⁹⁴ This Communication (**European Central Bank (2014b)**) is analysed in **Gortsos (2015b)**, pp. 58-63.

¹⁹⁵ Available at: <https://www.ecb.europa.eu/mopo/ela/html/index.en.html>; on this Agreement, see details in **Gortsos (2018b)**, pp. 73-80.

(2) Within this context, the author has proposed and continues to support the view that the ECB *should* act as a lender of last resort *at least* to the solvent but illiquid ‘significant’ credit institutions which are directly supervised by it within the SSM.¹⁹⁶ Officially, this consideration has also been raised, among several policy makers, by the President of the ECB, Mario Draghi, at the ECON meeting of 22 February 2018, where he stated the following: “*The ELA policy should be changed and I personally have argued several times for a centralisation of ELA. This is a remnant from a past time, but to change it we ought to have the agreement of all the members of the governing council, namely all countries in fact. They have to decide that they would abandon this remnant of national sovereignty in monetary policy, because that is what it is.*”

Despite the absence of a general and *direct* financial stability mandate both in the TFEU (**Article 127 TFEU** included) and in the ESCB/ECB Statute, which would constitute a solid legal basis for the assumption by the ECB of this function, the author also argues that the ECB *could* act as a lender of last resort to those credit institutions, since **Article 18.1 (second indent), of the ESCB/ECB Statute** (even broadly interpreted¹⁹⁷) constitutes a solid legal basis as regards the instruments to be used.¹⁹⁸

4.2 Harmonisation of rules on the winding up of credit institutions

(1) Another important missing element in the architecture is the harmonisation at EU level of the rules on the winding up of credit institutions. In particular, the regime for the winding up of insolvent credit institutions is governed by **Directive 2001/24/EC** of the European Parliament and of the Council of 4 April 2001 “on the reorganisation and winding up of credit institutions”¹⁹⁹ (as in force after its amendment, *inter alia*, by **Article 117 BRRD**). This legal act, which also governs the reorganisation of credit institutions, does not provide for a minimum harmonisation of national reorganisation measures and winding up proceedings. It mainly introduced the principle of mutual recognition, whereby (as applied to winding up proceedings) the administrative or judicial authorities of the home Member State, which are responsible for winding up, are solely competent to decide on the opening of winding up proceedings concerning a credit institution, including its branches established in other Member States.²⁰⁰

‘**Winding up proceedings**’ means collective proceedings opened and monitored by a Member State’s administrative or judicial authorities with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure.²⁰¹

¹⁹⁶ See **Gortsos (2015b)**, pp. 63-68, with further reference to **Brescia Morra (2014)** – citing **De Grauwe (2013)** – and **Lastra (2015)**, p. 378. On the ELA, see also **Scouteris and Athanassiou (2016)** and **Hallerberg and Lastra (2017)**.

¹⁹⁷ Nevertheless, the author wishes to highlight the extreme caution with which the ECB (just as central banks in general) accepts to perform tasks and powers based on an expansive reading of regulatory provisions. A case in point is the remark in **Lastra (2012)**, at p. 9, that the recourse to Article 14.4 of the Statute as a legal basis for the ELA is a result of “a restrictive reading” of the ECB’s tasks by the ESCB. See also **Lastra and Goodhart (2015)**, p. 16.

¹⁹⁸ See on this also **Smits (1997)**, p. 269 (under (I)).

¹⁹⁹ OJ L 125, 5.5.2001, pp. 15-23.

²⁰⁰ The provisions of this Directive are analysed in **Peters (2011)** and **Wessels (2017)**, who uses the abbreviation ‘**CIWUD**’ (Credit Institutions Winding Up Directive).

²⁰¹ **Directive 2001/24/EC**, Article 2, ninth point.

On the other hand, ‘**reorganisation measures**’ means measures intended to preserve or restore the financial situation of a credit institution or an investment firm and which could affect third parties’ pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims, as well as application of the resolution tools and exercise of the resolution powers provided for in the BRRD.²⁰²

(2) The debate on setting up the BU did not touch upon the prospect of amending this regime. Accordingly, credit institutions’ winding up proceedings remain national and are expected to remain so at least for the foreseeable future), also activating the repayment procedure of national deposit guarantee schemes (albeit upon an ECB decision for the withdrawal of an authorisation²⁰³). It is noted that, under the DGSD, in the vast majority of cases, the repayment procedure of DGSs is activated by a decision to withdraw a credit institution’s authorisation and wind it up, rendering its deposits ‘unavailable’ and activating the repayment procedure of *national DGSs*.

(3) This aspect became nevertheless topical in June 2017, when the Board decided not to take resolution action in respect of two Italian credit institutions, namely Banca Popolare di Vicenza S.p.A. and Veneto Banca S.p.A. For both the Board assessed that, while the conditions for resolution action of **Article 18(1), first sub-paragraph, points (a)-(b) SRMR** were met, the condition of **point (c)** of that sub-paragraph was not satisfied.²⁰⁴

4.3 The link between a more robust EMU and a well-functioning and financial stability-enhancing Banking Union

(1) The establishment of the BU was *mainly* driven by the need to correct ‘**supervisory failures**’ in the banking system of the euro area Member States, with a view to enhancing its stability, eliminating thus ‘**market failures**’ in the form of negative externalities. Sound macro-economic policies (both monetary and fiscal), nevertheless, are of primary importance as well for securing financial stability. The ongoing fiscal crisis in the euro area has demonstrated in a manifest way how poor fiscal policies, a source of ‘**macroeconomic failure**’, may lead to the destabilisation of the financial system. In fact, fiscal crises tend to spread and become financial crises through the activation of several channels of transmission.

A study of the Committee on the Global Financial System (the ‘**CGFS**’²⁰⁵) identifies four such channels: the impact of negative sovereign ratings on (individual) bank ratings, losses incurred by banks from their sovereign debt holdings, the ‘collateral/liquidity channel’, and losses from state guarantees granted to banks (explicit and implicit).²⁰⁶ Added to these channels is the negative impact on the performance of bank loans (in the event of an economic recession).

²⁰² *Ibid.*, Article 2, seventh point, as amended by Article 117, point (2) **BRRD**.

²⁰³ **SSMR**, Article 4(1), point (a), with reference to Article 14.

²⁰⁴ For further discussion on this issue, see below in **Chapter 5, Section C, under 4.3**.

²⁰⁵ On the CGFS, which was set up in 1971 by the G10 Central Bank Governors as the ‘Euro-Currency Standing Committee’ and was the first international financial forum established, see **Gortsov (2019b)**, pp. 104-107.

²⁰⁶ See **Committee on the Global Financial System (2011)**. For more details, see also **Basel Committee on Banking Supervision (2011)** and **Shambaugh (2012)** pp. 157-162 and 187-190.

(2) The improvement (even at an optimal point) of the functioning of the BU on the basis of the legislative and other proposals discussed above is *per se* not sufficient for achieving the objective of financial stability; macroeconomic stability is a *conditio sine qua non* as well. According to Section III of the Basel Committee’s “**Core Principles for Effective Banking Supervision**” of September 2012, the existence of sound and sustainable macroeconomic policies is one of the preconditions for such supervision.²⁰⁷

It is thus expected that the adoption of the Commission’s above-mentioned proposals of 6 December 2017²⁰⁸ on the deepening of the EMU will pave the way for the necessary institutional arrangements which are necessary in order to enhance efficiency in the conduct of macro-economic (and mainly fiscal) policies in the euro area and are of primary importance for a sustainably smooth operation of the banking (and in general financial) system of participating Member States and the euro area as a whole. The link between a more robust EMU (under the current circumstances by establishing, in particular, a Fiscal Union²⁰⁹) and a well-functioning and, by implication, financial stability-enhancing BU is indispensable.

²⁰⁷ This Report was issued in 1997, revised in October 2006 and then again in September 2012; it is available at: https://www.financialstabilityboard.org/2012/09/cos_061030a.

²⁰⁸ See above, **under 1 (2)**.

²⁰⁹ On this aspect and, in particular, the economic rationale and the design challenges of such a Union see indicatively **Thirion (2017)** (containing, *inter alia*, a comprehensive literature review).

Table 6	
Key Reports and Commission Communications relating to the Banking Union	
Date	Report / Communication
26 June 2012	‘Van Rompuy’ Report “Towards a Genuine Economic and Monetary Union”
5 December 2012	‘Four Presidents’ Report “Towards a Genuine Economic and Monetary Union”
22 June 2015	‘Five Presidents’ Report “Completing Europe’s Economic and Monetary Union”
21 October 2015	Commission Communication “On steps towards Completing Economic and Monetary Union”
24 November 2015	Commission Communication “Towards the completion of the Banking Union” (the basis of the 2016 legislative ‘banking package’)
31 May 2017	Commission Reflection Paper “on the deepening of the economic and monetary union” of 31 May 2017 (the ‘EMU reflection paper’)
20 September 2017	Commission Communication “Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment”
11 October 2017	Commission Communication “On completing the Banking Union”
6 December 2017	Commission Communication “Further steps towards completing Europe’s Economic and Monetary Union: A roadmap”

Chapter 2

The SRM Regulation and the SRF Agreement: General provisions

Section A: General provisions of the SRMR

1. Objective and field of application – participating Member States

1.1 Objective

(1) The objective of the SRMR is laid down in its **Article 1**.²¹⁰ It consists in the establishment of *uniform rules and a uniform procedure* for the resolution of the categories of entities referred to in **Article** and established in the participating Member States (see below, **under 1.2**). These uniform rules and this uniform procedure must be applied by the (Single Resolution) Board, which was established by the SRMR,²¹¹ together with the Council, the Commission and the national resolution authorities (the ‘NRAs’) within the framework of the SRM.²¹²

‘National resolution authority’ (NRA) means an authority designated by a participating Member State in accordance with **Article 3(1)-(3) BRRD**, which provides that the resolution authority must be a public administrative authority or an authority entrusted with public administrative powers. It may be an NCB, a competent ministry, another public administrative authority or authority entrusted with public administrative powers, or (exceptionally) the competent authority for supervision for the purposes of the **CRR** and the **CRD IV**.²¹³ For a list of NRAs in all Member States, see **Table 8** below.

(2) The rationale underlying the decision to establish these uniform rules and that uniform procedure for financial resolution is set out mainly in four recitals of the Regulation:

Firstly, divergences between national resolution rules in different Member States and corresponding administrative practices and the lack of a unified decision-making process for resolution in the BU do not ensure predictability as to the possible outcome of a credit institution’s failure and, subsequently, contribute to lack of confidence in the banking system and market instability.²¹⁴

²¹⁰ On the SRMR, see indicatively **Eckhardt (2013)**, **Gandrud and Hallenberg (2013)**, **Gros (2013)**, **European Central Bank (2014a)**, **Louis (2014)**, **Ignatowski and Korte (2014)**, **Gordon and Ringe (2014)** and **(2015)**, **Alexander (2015)**, pp. 175-186, **Carmassi (2015)**, **Hadjiemmanuil (2015a)**, pp. 16-18, **Wiggins, Wedow and Metrick (2015)**, **Zavvos and Kaltsouni (2015)**, pp. 2-35, **Dermine (2016)**, **Stephanou (2016)** and **Benzing (2018)**.

²¹¹ **SRMR**, Article 42(1), first sentence; on the Board, see details in **Chapter 3** below.

²¹² *Ibid.*, recital (120), first sentence; on the role of the Council and the Commission in the process, see (mainly) below in **Chapter 5, Section C**.

²¹³ *Ibid.*, Article 3(1), point (3).

²¹⁴ *Ibid.*, recital (2).

Secondly, the BRRD does not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups which may affect the overall resolution cost, despite the fact that it confers regulatory and mediation tasks on the EBA. In addition, by providing for national financing arrangements it does neither sufficiently reduce credit institutions' dependence on the support from national budgets nor completely prevent different approaches by Member States to the use of the financing arrangements.²¹⁵

Thirdly, the establishment of a centralised power of resolution entrusted to Board is an integral part of the process of harmonisation in the field of resolution operated by the BRRD and by the set of uniform provisions on resolution laid down in the SRMR. The uniform application of the resolution regime in the participating Member States will be enhanced as a result of it being entrusted to a central authority such as the SRM. Furthermore, the SRM is interwoven with the process of harmonisation in the field of micro-prudential supervision, brought about by the establishment of EBA, the single rulebook on micro-prudential regulation and supervision and, in the participating Member States, the establishment of the SSM. Micro-prudential supervision and resolution are two complementary aspects of the establishment of the internal market for financial services whose application at the same level is regarded as mutually dependent.²¹⁶

Finally, ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which credit institutions operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market. Banking systems in the internal market are highly interconnected, bank groups are international and credit institutions have a large percentage of foreign assets. In the absence of the SRM, banking crises in Member States participating in the SSM would have a stronger negative systemic impact also in non-participating Member States. The establishment of the SRM will, consequently, ensure a neutral approach in dealing with failing credit institutions, increase the stability of the participating Member States' credit institutions, prevent the spill-over of crises into non-participating Member States and thus facilitate the functioning of the internal market as a whole.²¹⁷

(3) The SRMR was adopted with respect to the principles of subsidiarity and proportionality pursuant to **Article 5(3)-(4) TEU**.²¹⁸ It also respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the **Charter of Fundamental Rights of the EU**²¹⁹ (the '**Charter**'), and, in particular, the right to property, the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial and the right of defence, and should be implemented in accordance with those rights and principles.²²⁰

²¹⁵ *Ibid.*, recital (10), second sub-paragraph.

²¹⁶ *Ibid.*, recital (11).

²¹⁷ *Ibid.*, recital (12), third - sixth sentences.

²¹⁸ *Ibid.*, recital (122). On Article 5(3)-(4) TEU, see by mere indication **Craig and de Búrca (2011)**, pp. 96-97, **Lienbacher (2012a)**, pp. 110-129, **Fabbrini (2018)** and **Tridimas (2018a)**.

²¹⁹ OJ C 326, 26.10.2012, pp. 391-407.

²²⁰ **SRMR**, recital (121).

1.2 Field of application – participating Member States

1.2.1 Field of application

The SRMR applies to the following three types of entities (referred to hereinafter as the ‘designated entities’), provided that they established in participating Member States (see just below, **under (2)**):²²¹

firstly, credit institutions;

secondly, parent undertakings (including financial holding companies and mixed financial holding companies) if they are subject to consolidated supervision carried out by the ECB in accordance with **Article 4(1), point (g) SSMR**;²²² and

thirdly, investment firms and financial institutions if covered by the consolidated supervision of the parent undertaking carried out by the ECB in accordance with **Article 4(1), point (g) SSMR** as well.

On the definition of all these categories of firms, see **Box 1** just below.

BOX 1

Definitions of entities

The categories of entities mentioned above are defined in the SRMR in a fragmented way. This reflects the hastiness with which the Regulation was adopted, boldly manifested in the following provision of **Article 3(2)**: “*In the absence of a relevant definition in paragraph 1 of this Article, applicable are the definitions referred to in Article 2 of the BRRD. In the absence of a relevant definition in paragraph 1 of this Article or in Article 2 of the BRRD, applicable are the definitions referred to in Article 3 of the CRD IV.*” Apart from this statement, into account must also be taken the fact that the BRRD and the CRD IV define the above-mentioned types of entities with reference to the CRR, **Directive 2002/87/EC** of the European Parliament and of the Council of 11 February 2003 “on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (...)”,²²³ as in force²²⁴ (the ‘**FICOD**’), and **Directive 2014/65/EU** of the same institutions of 15 May 2014 “on markets in financial instruments (...)”²²⁵ (the ‘**MiFID II**’). On that basis, the following definitions apply:

²²¹ *Ibid.*, Article 2 and recital (22).

²²² According to that Article, as regards the micro-prudential supervision of banking groups on a consolidated basis, the seventh specific task of the ECB consists in the supervision on a consolidated basis over credit institutions’ parent companies incorporated in a participating Member State (including over financial holding companies and mixed financial holding companies), and the participation in the supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities of participating Member States in these colleges as observers, in relation to parent companies not established in one of the participating Member State (**CRR**, Articles 111-118).

²²³ OJ L 35, 11.2.2003, pp. 1-27.

²²⁴ This legal act, as amended mainly by **Directive 2011/89/EU** of 16 November 2011 “as regards the supplementary supervision of financial entities in a financial conglomerate” (OJ L 326, 8.12.2011, pp. 113-141), is analysed in **Gortsov (2017e)**. An (unofficial and, in the author’s opinion, incomplete) consolidated version thereof is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002L0087-20130717>.

²²⁵ OJ L 173, 12.6.2014, pp. 349-496. This legal act repealed, since 3 January 2018, **Directive 2004/39/EC** of the same institutions of 21 April 2004 “on markets in financial instruments (...)” (‘**MiFID I**’, OJ L 145, 30.4.2004, pp. 1-44). Related is also **Regulation (EU) No 600/2014** “on

- (1) ‘**Credit institution**’ means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.²²⁶
- (2) ‘**Parent undertaking**’ means²²⁷ (in principle) a parent undertaking within the meaning of Articles 1-2 of the **Seventh Council Directive 83/349/EEC** of 13 June 1983 “on consolidated accounts”.²²⁸
- (3) ‘**Financial holding company**’ means a financial institution the subsidiaries of which are exclusively or mainly credit institutions, investment firms or financial institutions, at least one of such subsidiaries being a credit institution or an investment firm, *and* which is not a mixed financial holding company.²²⁹
- (4) ‘**Mixed financial holding company**’ means a parent undertaking, other than a regulated entity, which, together with its subsidiaries (at least one of which is a regulated entity with its registered office in the EU) and other entities, constitutes a financial conglomerate.²³⁰
- (5) ‘**Investment firm**’ means (in principle) any legal person whose regular occupation or business is the provision of one or more ‘investment services’ to third parties, and/or the performance of one or more ‘investment activities’ on a professional basis.²³¹ In turn, ‘**investment services and activities**’ means the services and activities listed in **Section A** relating to instruments listed in **Section C of Annex I to MiFID II**.²³²
- (6) ‘**Financial institution**’ means²³³ an undertaking, other than a credit institution or an investment firm, the principal activity of which is to acquire holdings or to pursue any of the activities listed in **points (2)-(12) and (15) of Annex I to the CRD IV**. Included are financial holding companies, mixed financial holding companies, payment institutions (within the meaning of **Directive 2007/64/EC** of the European Parliament and of the Council of 13 November 2007 “on payment services in the internal market (...)”),²³⁴ and asset management companies; excluded are insurance holding companies and mixed-activity insurance holding companies as defined in **Directive 2009/138/EC** of the European Parliament and of the Council of 25 November 2009 “on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)”.²³⁵
- (7) ‘**Institution**’ means a credit institution or an investment firm covered by consolidated supervision in accordance with **Article 2, point (c)**.²³⁶

markets in financial instruments and amending Regulation (EU) No 648/2012” (the ‘**MiFIR**’, OJ L 173, 12.6.2014, pp. 349-496). For an overview of the MiFID II, see by mere indication **Moloney (2014)**, pp. 320-538, **Sethe (2014)**, **Vandenbroucke (2014)**, **Möllers (2015)**, the individual contributions in **Busch and Ferrarini (2017)**, various Chapters in **Veil (2017, editor)** and **Gortsos (2018d)**.

²²⁶ **CRR**, Article 4(1), point (1).

²²⁷ **SRMR**, Article 3(1), point (20), with reference to Article 4(1), point (15) **CRR**.

²²⁸ OJ L 193, 18.7.1983, pp. 1-17.

²²⁹ **SRMR**, Article 3(1), point (16), with reference to Article 4(1), point (20) **CRR**.

²³⁰ *Ibid.*, Article 3(1), point (17), with final reference to **FICOD**, Article 2, point (15).

²³¹ **MiFID II**, Article 4(1), point (1).

²³² *Ibid.*, Article 4(1), point (2).

²³³ **SRMR**, Article 3(1), point (15), with reference to Article 4(1), point (26) **CRR**.

²³⁴ OJ L 319, 5.12.2007, pp. 1-36.

²³⁵ OJ L 335, 17.12.2009, pp. 1-155.

²³⁶ **SRMR**, Article 3(1), point (13).

1.2.2 Participating Member States

(1) For the purposes of the SRMR, as ‘**participating Member States**’ are considered (in consistency with the definition in the SSMR) both the Member States whose currency is the euro *and* the Member States with a derogation²³⁷ which have established a close cooperation in accordance with **Article 7 SSMR**.²³⁸ If a close cooperation between a Member State and the ECB is suspended or terminated in accordance with **Article 7 SSMR**,²³⁹ entities established therein cease to be covered by the SRMR from the date of application of the suspending or terminating decision.²⁴⁰ Nevertheless, the SRMR continues to apply to resolution proceedings which were ongoing on the date of application of such a decision.²⁴¹

(2) **Article 4(3) SRMR** lays down the modalities, criteria and the procedure for the Board to agree with the Member State concerned by termination of close cooperation on the recoupment of contributions transferred by that Member State.

In particular, if the close cooperation is terminated, the Board must decide within three months after the date of adoption of the decision to terminate the close cooperation, in agreement with that Member State, on the modalities for the recoupment of contributions that the Member State concerned has transferred to the SRF and any conditions applicable. Recoupments must include the part of the compartment corresponding to the Member State concerned not subject to mutualisation. If during the initial period, as laid down in the SRF Agreement, recoupments of the non-mutualised part are not sufficient to permit the funding of the establishment by the Member State concerned of its national financial arrangement in accordance with the BRRD, recoupments must also include the totality or a part of the part of the compartment corresponding to that Member State subject to mutualisation in accordance with the SRF Agreement or otherwise, after the initial period, the totality or a part of the contributions transferred by the Member State concerned during the close cooperation, in an amount sufficient to permit the funding of that national financial arrangement. When assessing the amount of financial means to be recouped from the mutualised part or otherwise, after the transitional period, from the SRF the following additional criteria must be taken into account: the manner in which termination of close cooperation with the ECB has taken place, whether voluntarily, in accordance with Article 7(6) SSMR, or not; the existence of ongoing resolution actions on the date of termination; and the economic cycle of the Member State concerned by the termination.

²³⁷ **TFEU**, Articles 139-144, and **Statute**, Articles 42-47. See on this **Potacs (2012)**.

²³⁸ **SRMR**, Article 4(1), with reference to Article 2, point (1) SSMR, and recitals (15)-(17). The second group also includes the Member States which opted out of the EMU, i.e. the United Kingdom and Denmark, in accordance with the (different) conditions laid down in **Protocols (No 15) and (No 16)** attached to the Treaties (Consolidated version, OJ C 202, 7.6.2016, pp. 284-286 and 287, respectively). The position of those two Member States is not equal. **Protocol (No 15)** “on certain provisions relating to the United Kingdom” established that Member State’s right to opt-out from participation in the third stage of EMU, and defined, in case of exercising this right, its ‘special regime’ among Member States with a derogation. On the other hand, **Protocol (No 16)** “on certain provisions relating to Denmark” established Denmark’s right to opt-out from participation in the third stage of EMU, and provides that in case of exercising this right, its regime equals to the one of the other Member States with a derogation. On these two Protocols see **Smits (1997)**, pp. 137-139. In the SSM Framework Regulation this group is defined as ‘participating Member States in close cooperation’ (Article 2, point (15)) and are also referred to as ‘non-euro area participating Member States’.

²³⁹ On the close cooperation procedure, including its suspension and/or termination, see **Gortsov (2015a)**, pp. 183-193.

²⁴⁰ **SRMR**, Article 4(2).

²⁴¹ *Ibid.*, Article 4(4).

Recoupments must be distributed during a limited period commensurate to the duration of the close cooperation. The relevant Member State's share of the financial means from the SRF used for resolution actions during the period of close cooperation must be deducted from those recoupments.²⁴²

2. Relationship with the BRRD – applicable EU and national law

2.1 Relationship with the BRRD

(1) Under EU financial law, it is the BRRD that lays down the substantive rules pertaining to resolution planning with regard to, early intervention in and resolution action taken in relation to credit institutions of designated entities and groups. The SRMR is consistent with the BRRD and adapts its rules and principles to the specificities of the SRM and ensures that appropriate funding is available to the latter.²⁴³ In addition, the SRMR is based on the BRRD and makes such a continuous reference to its provisions (as the reader of this study will realise) that the analysis of the latter is indispensable for the understanding of the former.

It is noted in this context that there several aspects covered by the BRRD are not, **for various reasons**, dealt with in the SRMR. These include *mainly* the following:

- (1) recovery planning (**Articles 5-9 BRRD**)²⁴⁴ and intra-group financial support (**Articles 19-26**),²⁴⁵
- (2) government financial stabilisation tools (**Articles 56-58**);²⁴⁶
- (3) resolution powers (**Articles 63-72**),²⁴⁷
- (4) cross-border group resolution (**Articles 87-92**),²⁴⁸ and
- (5) the ranking of deposits in insolvency hierarchy (**Article 108**).²⁴⁹

(2) On the relation between the two legal acts, **Article 5(1) SRMR** provides that if, in accordance with the SRMR, the Board performs tasks and exercises powers which, under the BRRD, are to be performed or exercised by NRAs, for the application of both the SRMR and the BRRD, the Board is considered to be the 'relevant national resolution authority' or, in the case of a cross-border group resolution, the 'relevant group-level resolution authority'. '**Relevant national resolution authority**' (the '**relevant NRA**') means a participating Member State's NRA in which an entity or a group's entity is established. On the other hand, '**group-level resolution authority**' (the '**GLRA**') means the resolution authority in the participating Member State where the institution or parent undertaking subject to consolidated supervision (at the highest level of consolidation within participating Member States in accordance with **Article 111 CRD IV**) is established.²⁵⁰

²⁴² On this aspect, see also recital (112)

²⁴³ *Ibid.*, recital (18), first and second sentences.

²⁴⁴ See details below, in **Chapter 4, Section A, under 1.1**.

²⁴⁵ On this arrangement, see **Haentjens (2017a)**, pp. 210-213.

²⁴⁶ See details below, in **Chapter 5, Section C, under 1.2.1.2.2**.

²⁴⁷ On this aspect, see **Haentjens (2017a)**, pp. 256-272.

²⁴⁸ On this aspect, see **Haentjens (2017a)**, pp. 285-296.

²⁴⁹ See details below, in **Chapter 5, Section A, under 3.2**.

²⁵⁰ **SRMR**, Article 3(1), points (4) and (27), respectively.

2.2 Applicable EU and national law

The Board, the Council and the Commission, as well as the NRAs are fully embedded into the system of EU financial law adopted by the EU institutions and developed or adopted by the EBA. In particular:

(1) Decisions taken by the Board, the Council and the Commission, as well as (where relevant) the NRAs, are subject to and must be in compliance with the relevant EU financial law and in particular any legislative and non-legislative acts, including delegated and implementing acts in accordance with **Articles 290-291 TFEU**.²⁵¹

(2) Applicable to the Board, the Council and the Commission are the following rules:

Firstly, when exercising the powers conferred on them by the SRMR, they are subject to the binding regulatory and implementing technical standards developed by the EBA and adopted by the Commission by virtue of **Articles 10-15 EBA Regulation**.²⁵²

Secondly, they must make every effort to comply with any EBA's Guidelines and Recommendations relating to tasks to be performed by them. If they do not or do not intend to comply with such Guidelines or Recommendations, the EBA must be informed thereof in accordance with **Article 16(3) EBA Regulation**,²⁵³ which introduces the 'comply or explain principle' and reads as follows: "Within 2 months of the issuance of a guideline or recommendation, each competent authority must confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it must inform the Authority, stating its reasons."²⁵⁴

Thirdly, they must cooperate with the EBA in the application of **Article 25 EBA Regulation** on recovery and resolution procedures and **Article 30** on peer reviews of competent authorities, and respond to requests of collection of information addressed to them by the EBA in accordance with **Article 35**.²⁵⁵ According to the last sentence of recital (32) of the EBA Regulation, in cases where the relevant EU legislation confers discretion on competent authorities, decisions taken by the EBA cannot replace the exercise in compliance with EU law of that discretion. **Recital (18) SRMR** considers that the same principle should extend to the SRMR, while fully respecting the principles enshrined in primary EU law.²⁵⁶ It also states that in light of all key elements relating to its role within the context of the SRMR, the EBA should be able to perform its tasks effectively and to secure the equality of treatment between the Board, the Council, the Commission and the NRAs when performing similar tasks.²⁵⁷

²⁵¹ *Ibid.*, Article 5(2), first sub-paragraph.

²⁵² *Ibid.*, Article 5(2), second sub-paragraph, first sentence and recital (18), third sentence.

²⁵³ *Ibid.*, Article 5(2), second sub-paragraph, second and third sentences. On the EBA's Guidelines and Recommendation see **Wymeersch (2012)**, pp. 276-277.

²⁵⁴ On the 'comply or explain' principle, see **Bianchi, Ciavarella, Novembre and Signoretti (2010)**, **Andersson (2011)**, pp. 91-105, and **Keay (2012)**.

²⁵⁵ **SRMR**, Article 5(2), second sub-paragraph, fourth sentence and recital (18), fourth sentence. On Articles 25 and 30 of the EBA Regulation, see **Wymeersch (2012)**, pp. 286 and 280-281.

²⁵⁶ *Ibid.*, recital (18), sixth sentence.

²⁵⁷ *Ibid.*, recital (18), seventh sentence.

(3) Finally, the Board is also subject to any EBA decisions in accordance with **Article 19 EBA Regulation** on the settlement of disagreements between competent authorities in cross-border situations (usually referred to as ‘binding mediation’²⁵⁸) where the BRRD provides for such decisions.²⁵⁹

2.3 The amendments to the EBA Regulation by Article 95 SRM Regulation

In 2013, major amendments were introduced to the EBA Regulation by **Regulation (EU) No 1022/2013** of the European Parliament and of the Council of 22 October 2013. The EBA Regulation was also amended by **Article 95 SRMR** to the following effect:

Firstly, with regard to the BRRD and the SRMR, the term ‘competent authorities’ includes anymore (also) the NRAs, the Board, as well as the Council and the Commission when taking actions under Article 18 SRMR (on the resolution procedure), except where they exercise discretionary powers or make policy choices.²⁶⁰

In addition, the EBA may organise and conduct peer reviews of the exchange of information and the joint activities of the Board and the NRAs of Member States non-participating in the SRM in relation to the resolution of cross-border groups in order to strengthen effectiveness and consistency in outcomes, developing methods to allow for objective assessment and comparison.²⁶¹

Finally, for the purpose of acting within the scope of the BRRD, the Chair of the Board is an observer to the EBA’s Board of Supervisors.²⁶²

3. General principles governing the operation of the SRM

Article 6 lays down six general principles governing the operation of the SRM.²⁶³

(1) In accordance with the principle of non-discrimination, no action, proposal or policy of the Board, the Council, the Commission or an NRA may discriminate against entities, depositors, investors or other creditors established in the EU on grounds of nationality or place of business.

‘**Depositor**’ means the holder or (for joint accounts) each of the holders of a deposit.²⁶⁴

²⁵⁸ See on this also **Wymeersch (2012)**, pp. 266-271.

²⁵⁹ **SRMR**, Article 5(2), second sub-paragraph, fifth sentence.

²⁶⁰ **EBA Regulation**, Article 4, new point (2)(iv). Recital (118) **SRMR** states on this the following: “*In order to ensure that the Board is assimilated in the ESFS, [the EBA] Regulation should be amended in order to include the Board in the concept of competent authorities established by that Regulation. Such assimilation of the Board and competent authorities pursuant to [the EBA] Regulation is consistent with the functions attributed to EBA pursuant to Article 25 [thereof] to contribute to and participate actively in the development and coordination of recovery and resolution plans and to aim to facilitate the resolution of failing entities and in particular cross-border groups.*”

²⁶¹ *Ibid.*, Article 25, new paragraph 1a.

²⁶² *Ibid.*, Article 40(6), new fourth sub-paragraph.

²⁶³ **SRMR**, Article 6(1)-(7).

²⁶⁴ *Ibid.*, Article 3(1), point (53), with reference to Article 2(1), point (6) **DGSD**.

‘Investor’ means any person who has entrusted money or instruments to an investment firm in connection with investment business,²⁶⁵ with reference to **Article 1, point (4) of Directive 97/9/EC** of the European Parliament and of the Council of 3 March 1997 “on investor-compensation schemes” (the **‘ICSID’**).²⁶⁶

(2) The second principle provides that any action, proposal or policy of the Board, the Council, the Commission or an NRA must be undertaken with full regard and duty of care for the unity and integrity of the internal market.²⁶⁷

(3) In accordance to the principle of due consideration to the resolution objectives and other specific factors, when making decisions or taking action which may have an impact in more than one Member State (in particular when taking decisions concerning groups established in two or more Member States), due consideration must be given both to the resolution objectives referred to in **Article 14**²⁶⁸ and the following factors:

firstly, the interests of the Member States where a group operates, and in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, the economy, the financing arrangements, the DGS or the investor compensation scheme of any of those Member States, and on the SRF;

secondly, the objective of balancing the interests of the Member States involved and of avoiding unfairly prejudicing or protecting a Member State’s interests; and

thirdly, the need to minimise a negative impact for any part of a group of which a designated entity subject to resolution is a member.

The Board, the Council and the Commission must balance these factors with the resolution objectives as appropriate to the nature and circumstances of each case, and comply with the decisions made by the Commission pursuant to **Articles 107 TFEU** and **19 SRMR** on State aid and SRF aid.²⁶⁹

(4) According to the fourth principle, when making decisions or taking actions, in particular regarding entities or groups established both in a participating and in a non-participating Member State, into consideration must be taken possible negative (adverse) effects on non-participating Member States, including on entities established therein, such as threats to financial stability.²⁷⁰

(5) Under the **‘principle of fiscal neutrality’**, decisions or actions of the Board, the Council or the Commission may neither require Member States to provide ‘extraordinary public financial support’ nor impinge on the budgetary sovereignty and fiscal responsibilities of the Member States. **‘Extraordinary public financial support’** means State aid within the meaning of **Article 107(1) TFEU** or any other public financial support at supra-national level, which, if provided at national level, would constitute State aid, and which is provided in order to preserve or restore the viability, liquidity or solvency of a designated entity or of a group of which such an entity forms part.²⁷¹

²⁶⁵ *Ibid.*, Article 3(1), point (54).

²⁶⁶ OJ L 84, 26.3.1997, pp. 22-31. On this legal act, see **Moloney (2014a)**, pp. 835-846.

²⁶⁷ See in this respect also recital (40) **SRMR**.

²⁶⁸ On Article 14 **SRMR**, see below in **Chapter 5, Section A, under 1**.

²⁶⁹ On Article 19 **SRMR**, see below in **Chapter 5, Section E**. On Article 107 TFEU see (out of a vast existing literature) **Craig and de Búrca (2011)**, pp. 1133-1145, **Bär-Bouyssière (2012)**, pp. 1255-1326, and in more detail **Bellamy & Child (2013)**.

²⁷⁰ See in this respect also recital (55) **SRMR**.

²⁷¹ *Ibid.*, Article 3(1), point (29).

(6) Finally, the principle of NRAs' specification right provides that when the Board takes a Decision addressed to them, these have the right to specify further the measures taken in compliance therewith.

4. Division of tasks within the SRM

4.1 The (Single Resolution) Board

The Board, established by the SRMR and operational since 1 January 2015,²⁷² is responsible for the effective and consistent functioning of the SRM,²⁷³ like the ECB for the SSM.²⁷⁴ Subject to the provisions on the cooperation within the SRM,²⁷⁵ it is also responsible for drawing up the resolution plans and adopting all resolution decisions relating to the following categories of entities and groups:²⁷⁶

firstly, the designated entities that are not part of a group (thus, institutions established in participating Member States); '**group**' means a parent undertaking and its subsidiaries that are designated entities;²⁷⁷

secondly, groups which either are considered to be significant in accordance with **Article 6(4) SSMR**,²⁷⁸ or in relation to which the ECB has decided, in accordance with **Article 6(5), point (b) SSMR**, to exercise directly all of the relevant powers;²⁷⁹

thirdly, other 'cross-border groups'; '**cross-border group**' means a group that has designated entities established in more than one participating Member State.²⁸⁰

Hereinafter, these entities and groups are referred to as the '**entities and groups referred to in Article 7(2)**'.

4.2 The national resolution authorities (NRAs)

(1) NRAs have been assigned significant tasks and powers within the SRM. In particular, without prejudice to the responsibilities of the Board for the tasks conferred on it by the SRMR,²⁸¹ they must perform, and are responsible for, **the following tasks** with regard to entities and groups other than those referred to in **Article 7(2)**, i.e. those which are not significant and cross-border:²⁸²

²⁷² *Ibid.*, Article 98(1); on the Board, see details in **Chapter 3** below.

²⁷³ *Ibid.*, Article 7(1).

²⁷⁴ *Ibid.*, Article 6(1), second sentence.

²⁷⁵ *Ibid.*, Article 31(1); see further below, **under 5.3**.

²⁷⁶ *Ibid.*, Article 7(2) and recital (28), first sentence. NRAs must assist the Board in resolution planning and the preparation of resolution decisions (*ibid.*, recital (28), second sentence).

²⁷⁷ *Ibid.*, Article 3(1), point (23).

²⁷⁸ On the classification of supervised entities as significant, see **Gortsos (2015a)**, pp. 104-119.

²⁷⁹ On this see **Gortsos (2015a)**, pp. 179-180.

²⁸⁰ **SRMR**, Article 3(1), point (24).

²⁸¹ See in particular just below, **under 4.3**.

²⁸² **SRMR**, recital (28), third sentence. According to consideration made in the fourth sentence of that recital, under certain circumstances, the NRAs should perform their tasks on the basis of and in accordance with the SRMR, while exercising the powers conferred on them by and in accordance with the national law transposing the BRRD if not in conflict with the SRMR.

Firstly, at the phase of preparation, they must adopt their resolution plans (in accordance with **Articles 8-9**), carry out an assessment of their resolvability (under the procedure laid down in **Article 10**) apply simplified obligations or waive the obligation to draft a resolution plan (see **Article 11**) and determine the minimum requirement for own funds and eligible liabilities (see **Article 12**);²⁸³ the resolution plans and any updates thereof, accompanied by a reasoned assessment of the resolvability of the entity or group concerned, must be submitted to the Board.²⁸⁴ They must also adopt measures during early intervention (in accordance with **Article 13(3)**).²⁸⁵

Secondly, they must adopt resolution decisions and apply resolution tools, in accordance with the relevant procedures and safeguards, provided that the resolution action does not require any use of the SRF and is financed exclusively by the tools referred to in **Articles 21 and 24-27** and/or by the DGS. If the resolution action requires the use of the SRF, the resolution scheme must be adopted by the Board.²⁸⁶ When adopting a resolution decision, they must take into account and follow the resolution plan, unless they assess, taking into account the circumstances of the case, that the resolution objectives can be achieved more effectively by taking actions not provided for therein.²⁸⁷

Finally, they must write-down or convert ‘relevant capital instruments’ in accordance with **Article 21** and the cooperation procedure laid down in **Article 31**.²⁸⁸ ‘Relevant capital instruments’ means Additional Tier 1 instruments and Tier 2 instruments.²⁸⁹ It is noteworthy that deposits, regardless of the amount, do not fall within the definition of this term.

(2) When performing these tasks, NRAs must apply the relevant SRMR provisions and exercise the powers conferred on them under the national law transposing the BRRD.²⁹⁰ They must also inform the Board of the measures to be taken and closely coordinate with it when taking them.²⁹¹

²⁸³ *Ibid.*, Article 7(3), first sub-paragraph, points (a), (c) and (d); on all these aspects, see below in **Chapter 4, Sections B and C**.

²⁸⁴ *Ibid.*, Article 7(3), sixth sub-paragraph.

²⁸⁵ *Ibid.*, Article 7(3), first sub-paragraph, point (b); on Article 13(3), see below in **Chapter 4, Section D, under 2 (1)**.

²⁸⁶ *Ibid.*, Article 7(3), first sub-paragraph, point (e) and second sub-paragraph; on Articles 21 and 24-27, see below in **Chapter 5, Section F and Section B, under 2-4**, respectively.

²⁸⁷ *Ibid.*, Article 7(3), third sub-paragraph.

²⁸⁸ *Ibid.*, Article 7(3), first sub-paragraph, point (e); on Article 31, see below, **under 5.3**.

²⁸⁹ *Ibid.*, Article 3(1), point (51). On the terms ‘Additional Tier 1 instruments’ and ‘Tier 2 instruments’, see **Table 5** below.

²⁹⁰ *Ibid.*, 7(3), fourth sub-paragraph. Any references to the Board in the Articles enumerated exhaustively in this sub-paragraph must be read as references to NRAs with regard to groups and entities other than those referred to in **Article 7(2)**.

²⁹¹ *Ibid.*, Article 7(3), fifth sub-paragraph.

4.3 Transfer of resolution powers and responsibilities from NRAs to the Board

(1) If deemed necessary to ensure the consistent application of ‘**high resolution standards**’ under the SRMR, the Board can exercise the following two powers:

Firstly, since NRAs must notify to the Board any measure taken under the (just) above-mentioned **Article 7(3)** pursuant to **Article 31(1)**, when the latter considers that an NRA’s draft Decision with regard to an entity or a group does not comply with the SRMR or with its general instructions under **Article 31(1), point (a)**, it may issue a ‘**warning**’ to the relevant NRA (within the appropriate timeframe, having regard to the urgency of the circumstances).²⁹²

Secondly, the Board may also decide, *at any time*, to exercise directly all relevant powers under the SRMR with regard to an entity or a group referred to in **Article 7(3)**, in particular if the (above-mentioned) warning is not being appropriately addressed. It may take such a decision either on its own initiative, after consulting the NRA concerned, or upon a request from the latter.²⁹³

(2) Notwithstanding the tasks assigned to NRAs under **Article 7(3)**, participating Member States may decide that the Board should exercise all relevant powers and responsibilities conferred on it by the SRMR in relation to entities and groups, other than those referred to in **Article 7(2)**, established in their territory. In such a case, the following provisions do not apply: **Article 7(3)-(4)** on NRAs’ tasks within the SRM, **Articles 9 and 12(2)** on resolution plans drawn up and the MREL determined by NRAs and **Article 31(1)** on cooperation within the SRM. Member States intending to make use of this option must notify accordingly the Board and the Commission; the notification takes effect from the day of its publication in the *Official Journal*.²⁹⁴

The entities and groups in relation to which the Board becomes responsible to exercise resolution powers and responsibilities on the basis of the above-mentioned, are referred to hereinafter as the ‘**entities and groups referred to in Articles 7(4), point (b) and 7(5)**’.

5. Cooperation arrangements

5.1 The obligation imposed on the Board to cooperate with the ESAs and the ESRB

In order to enhance the effectiveness of the SRM, the Board must closely cooperate with EBA in all circumstances. Where appropriate, it must also cooperate with the ESRB, the EIOPA, the ESMA and the other authorities which constitute the ESFS.²⁹⁵

5.2 Obligation to cooperate and information exchange within the SRM

(1) The obligation to cooperate on the basis of **Article 4(3) TEU** laying down the ‘principle of sincere cooperation’²⁹⁶ and the regime of information exchange within the SRM are governed by the following rules:

²⁹² *Ibid.*, Article 7(4), point (a).

²⁹³ *Ibid.*, Article 7(4), point (b).

²⁹⁴ *Ibid.*, Article 7(5).

²⁹⁵ *Ibid.*, recital (89), first and second sentences.

²⁹⁶ *Ibid.*, recital (88). Article 4(3) TFEU provides that Member States must, *inter alia*, facilitate the achievement of the EU’s tasks and refrain from any measure which could jeopardise the attainment of its objectives (for an analysis, see **Hatje (2012a)** and **Guastafarro (2018)**).

Firstly, the Board must inform the Commission of any action taken to prepare for resolution. With regard to any information received from the Board, the Council and the Commission, members and staff are subject to professional secrecy requirements in accordance with **Article 88 SRMR**.²⁹⁷

Secondly, in the exercise of their respective responsibilities under the SRMR, the Board, the Council, the Commission, the ECB, the NRAs and the NCAs must at each stage (resolution planning, early intervention and resolution) cooperate closely and provide each other with all information necessary for the performance of their tasks.²⁹⁸

In addition, the ECB or the NCAs must transmit to the Board and to the NRAs the group financial support agreements authorised and any changes thereto.²⁹⁹

Fourthly, for the purposes of the SRMR, the ECB may invite the Chair of the Board to participate as an observer in its Supervisory Board; if deemed appropriate, the Board may appoint another representative to replace the Chair for that purpose.³⁰⁰ For the same purposes, the Board is entitled to appoint a representative to participate in the EBA Resolution Committee, which was established in accordance with **Article 127 BRRD**.³⁰¹

Finally, the Board must endeavour to cooperate closely with any public financial assistance facility, including the ESM, in particular in the extraordinary circumstances referred to in **Article 27(9)**³⁰² or when such a facility has granted (or is likely to grant) direct or indirect financial assistance to entities established in a participating Member State.³⁰³

(2) If necessary, the Board should conclude a Memorandum of Understanding with the ECB, the NRAs and the NCAs describing in general terms their cooperation (under **Article 30(2)** and **30(4)** above) in the performance of their respective tasks.³⁰⁴ On this basis, the Board and the ECB concluded on 22 December 2015 the MoU “in respect of cooperation and information exchange” (the ‘**SRB-ECB MoU**’).³⁰⁵

²⁹⁷ *Ibid.*, Article 30(1); on Article 88, see below in **Chapter 3, Section E, under 3.4**.

²⁹⁸ *Ibid.*, Article 30(2) and recital (89), third sentence.

²⁹⁹ *Ibid.*, Article 30(3). As already mentioned, the group financial support agreements are governed by Articles 19-26 **BRRD**.

³⁰⁰ *Ibid.*, Article 30(4). On the ECB Supervisory Board, governed by **Article 26 SSMR**, see **Gortsov (2015a)**, pp. 240-254. By error, in the text of the SRMR reference is made to Article 19 SSMR which governs the institutional independence of the ECB and the NCAs within the SSM.

³⁰¹ *Ibid.*, Article 30(5). The tasks of this Committee are to promote the development and coordination of resolution plans and develop methods for the resolution of failing financial institutions, as well as to prepare EBA decisions to be taken in accordance with **Article 44 EBA Regulation**, including decisions relating to draft regulatory and draft implementing technical standards, relating to tasks that have been conferred on NRAs (which are the Committee’s members).

³⁰² On this Article, see below in **Chapter 5, Section B, under 5.3.2.2 (2)**.

³⁰³ **SRMR**, Article 30(6) and recital (89), last sentence.

³⁰⁴ *Ibid.*, Article 30(7), first sentence and recital (54), first sentence.

³⁰⁵ In accordance with its paragraph 4.1, the MoU is a ‘**statement of intent**’ and does not create, directly or indirectly, any enforceable rights, meaning that its participants must endeavour to fulfil their responsibilities thereunder ‘on a best-effort basis’.

This MoU, which must be reviewed regularly, has been published, subject to the requirements of professional secrecy, on the Board's and the ECB's websites.³⁰⁶ Its provisions *on cooperation* govern institutional representation, communication between participants, external communication, cooperation arrangements for resolution-related activities (in very detailed terms), cooperation relating to other activities, as well as cooperation arrangements with regard to non-participating Member States and with third-country authorities.³⁰⁷

5.3 Cooperation within the SRM

(1) For the effective management of the resolution process of failing credit institutions and other entities, the Board must perform its tasks within the SRM in close cooperation with the NRAs not only for the implementation of its resolution decisions, but also prior to the adoption of any resolution decision, at the stage of resolution planning and/or during the phase of early intervention.³⁰⁸ In addition, in cooperation with the NRAs, it must approve and make public a Framework organising the practical arrangements for the implementation of **Article 31**.³⁰⁹ In order to ensure the effective and consistent application of these requirements, the Board has the following powers:

firstly, to issue guidelines and general instructions addressed to NRAs, providing that the tasks are performed and the resolution decisions are adopted by NRAs;

secondly, to exercise, at any time, its investigatory powers in accordance with **Articles 34-37**;³¹⁰

thirdly, to request, on an *ad hoc* or continuous basis, information from NRAs on the performance of their tasks in accordance with **Article 7(3)**;³¹¹ and

fourthly, upon receipt of draft decisions from NRAs, to express its views and, in particular, indicate their elements that do not comply with the SRMR or with the Board's general instructions.³¹²

In addition, for the purposes of evaluating resolution plans, the Board may request NRAs to submit all information necessary, as obtained by them pursuant to **Articles 11 and 13(1) BRRD** (without prejudice to the above-mentioned **Articles 34-37 SRMR**).³¹³

(2) The relations between the NRAs of participating Member States are not governed by **Articles 13(4)-(10) and 88-92 BRRD**, but by the relevant provisions of the SRMR.

³⁰⁶ **SRMR**, Article 30(7), second sentence and recital (54), second sentence, as well as **SRB-ECB MoU**, paragraphs 16-17. The MoU is available at: https://srb.europa.eu/sites/srbsite/files/en_mou_ecb_srb_cooperation_information_exchange_f_sign.pdf.

³⁰⁷ **SRB-ECB MoU**, paragraphs 5, 6, 7.1, 8, and 10-11, respectively.

³⁰⁸ **SRMR**, Article 31(1), first sub-paragraph, first sentence and recital (89), fourth and fifth sentences.

³⁰⁹ *Ibid.*, Article 31(1), first sub-paragraph, second sentence.

³¹⁰ See below in **Chapter 3, Section D, under 1**.

³¹¹ See above, **under 4.2**.

³¹² **SRMR**, Article 31(1), second sub-paragraph.

³¹³ *Ibid.*, Article 31(1), third sub-paragraph.

The same applies to the joint decision and any other decision taken in accordance with **Article 45(9)-(13) BRRD**.³¹⁴

5.4 Consultation of, and cooperation with, non-participating Member States and third countries

(1) Since the Board has replaced participating Member States' NRAs in their resolution decisions, it must also replace them for the purposes of the cooperation with non-participating Member States. In addition, since many credit institutions operate not only within the EU but internationally, an effective resolution mechanism needs to set out principles of cooperation with the relevant third-country authorities; support to third-country authorities should be provided in accordance with the legal framework provided for in **Article 88 BRRD**.³¹⁵ On the basis of these considerations, **Article 32(1)** provides the following:

Firstly, for the purposes of consultation and cooperation with non-participating Member States or third countries in accordance with **Articles 7-8, 12-13, 16, 18, 55 and 88-92 BRRD**³¹⁶ if a group includes entities established both in participating Member States and in non-participating Member States or in third countries, the participating Member States' NRAs are represented by the Board. This is without prejudice to any approval by the Council or the Commission required under the SRMR.³¹⁷

Furthermore, if a group includes entities established in participating Member States and subsidiaries established, or significant branches located, in non-participating Member States, the Board must communicate any plans, decisions or measures referred to in **Articles 8 and 10-13**³¹⁸ relevant to the group to the competent authorities and/or the resolution authorities of the non-participating Member State concerned, as appropriate.³¹⁹

(2) The conclusion of MoUs is also provided for in this respect; in particular:

Firstly, the Board, the ECB and the resolution and competent authorities of the non-participating Member States must conclude MoUs describing in general terms the way of their cooperation in the performance of their tasks under the BRRD and clarifying, *inter alia*, the consultation relating to decisions of the Board that have effect on subsidiaries established or branches located in the non-participating Member States, where the parent undertaking is established in a participating one.³²⁰

³¹⁴ *Ibid.*, Article 31(2).

³¹⁵ *Ibid.*, recitals (91) and (92), first and second sentences, respectively.

³¹⁶ The specific aspect of cross-border resolution of global banks is discussed in **Hüpkes and Devos (2010)**, **Davies (2014)** and **Faia and Mauro (2015)**.

³¹⁷ **SRMR**, Article 32(1), first sub-paragraph.

³¹⁸ On these Articles, see below in **Chapter 4, Sections B-D**.

³¹⁹ **SRMR**, Article 32(1), second sub-paragraph.

³²⁰ *Ibid.*, Article 32(2), first sub-paragraph and recital (38).

Secondly and without prejudice to the above MoUs, the Board must conclude a MoU with the resolution authority of each non-participating Member State which is home to at least one global systemically important institution (the ‘G-SIIs’), identified as such in **Article 131 CRD IV**.³²¹ Each MoU must be reviewed on a regular basis and be published subject to the requirements of professional secrecy.³²²

(3) The Board is also empowered to conclude, on behalf of the NRAs of participating Member States, non-binding cooperation arrangements in line with the EBA framework cooperation arrangements referred to in **Article 97(2) BRRD** (notifying accordingly the EBA).³²³

5.5 Recognition and enforcement of third-country resolution proceedings

Detailed procedural rules govern the recognition and enforcement of third-country resolution proceedings, unless (and until) an international agreement as referred to in **Article 93(1) BRRD** enters into force with one or more relevant third countries.³²⁴ They will also apply following the entry into force of such an international agreement with the relevant third country, to the extent that recognition and enforcement of third-country resolution proceedings is not governed by it.³²⁵ In particular:

(1) The Board must assess and issue a recommendation addressed to the NRAs on the recognition and enforcement of resolution proceedings conducted by third-country resolution authorities in relation to a third-country institution or a third-country parent undertaking that has one or more ‘Union subsidiaries’³²⁶ established in one or more participating Member States, *or* assets, rights or liabilities located in one or more such Member States or governed by their laws.³²⁷

³²¹ *Ibid.*, Article 32(2), second sub-paragraph. In accordance with Article 131(1) CRD IV, a G-SII must be an EU parent institution, an EU parent financial holding company, an EU parent mixed financial holding company, or an institution, and in any event not an institution that is a subsidiary thereof. The methodology for identifying G-SIIs must be based on the size of the group, its interconnectedness with the financial system, the substitutability of the services or the financial infrastructure provided by the group, its complexity and its cross-border activity; each category must receive an equal weighting and consist of quantifiable indicators (*ibid.*, Article 131(2)). This Article also makes a distinction between ‘G-SIIs’ and other systemically important institutions (the ‘O-SIIs’).

³²² **SRMR**, Article 32(3). A repository of the Cooperation Arrangements signed between the Board and resolution authorities in non-participating Member States (six as of April 2019) is available at: <https://srb.europa.eu/en/content/european-co-operation>.

³²³ *Ibid.*, Article 32(4). On Article 97(2) BRRD, see **Haentjens (2017a)**, pp. 300-301.

³²⁴ On this BRRD Article, see **Haentjens (2017a)**, pp. 296-298.

³²⁵ **SRMR**, Article 33(1).

³²⁶ ‘**Union subsidiary**’ means an institution which is established in a Member State and which is a subsidiary of a third-country institution or a third-country parent undertaking (**BRRD**, Article 2(1), point (84)).

³²⁷ This is required in order to ensure a coherent approach *vis-à-vis* third countries and avoid the taking of divergent decisions in the participating Member States with respect to the recognition of resolution proceedings conducted in third countries in relation to such institutions or parent undertakings (**SRMR**, recital (92) third sentence).

The assessment must be conducted after the Board has consulted the NRAs and, if a **European resolution college** is established pursuant to **Article 89 BRRD**,³²⁸ the resolution authorities of non-participating Member States. It must also give due consideration to the interests of each individual participating Member State where a third-country institution or parent undertaking operates and, in particular, to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States.³²⁹

(2) The Board may recommend the refusal of the recognition or enforcement of the above-mentioned resolution proceedings if it considers that *any* of the following conditions is met:

firstly, the third-country resolution proceedings would have an adverse effect on financial stability in a participating Member State;

secondly, creditors, including in particular depositors located or payable therein, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;

thirdly, recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the participating Member State; or

fourthly, the effects of such recognition or enforcement would be contrary to the national law of the participating Member State.³³⁰

(3) NRAs must implement the Board's Recommendation and ask for the recognition or enforcement of the resolution proceedings in their respective territories, or explain in a reasoned statement to the Board why they cannot implement that Recommendation. Resolution powers in relation to third-country entities must be exercised by NRAs, if relevant, on the basis of the **Article 94(4) BRRD**.³³¹

6. Other general provisions

6.1 Timetable of implementation

6.1.1 The rule

The SRMR entered into force on **19 August 2014** (i.e. the twentieth day following that of its publication in the *Official Journal*).³³² It is binding in its entirety and directly applicable in all Member States (principally) from **1 January 2016**.³³³

³²⁸ On this BRRD Article, see below in **Chapter 4, Section A, under 2**.

³²⁹ **SRMR**, Article 33(2).

³³⁰ *Ibid.*, Article 33(3).

³³¹ *Ibid.*, Article 33(4)-(5). On Article 94(4) BRRD, see **Haentjens (2017a)**, pp. 298-299.

³³² *Ibid.*, Article 99(1).

³³³ *Ibid.*, Article 99(2) and last sentence. According to recital (21), a centralised application of the resolution rules laid down in the BRRD by a single EU resolution authority can be ensured only where the rules governing the establishment and functioning of the SRM are directly applicable in the participating Member States to avoid divergent interpretations across them. Such direct applicability should bring benefits to the internal market as a whole, since it will contribute to ensuring fair competition and to preventing obstacles to the free exercise of fundamental freedoms not only in these Member States but in the internal market as a whole.

From this date onwards, the SRF is also considered to be the participating Member States' resolution financing arrangement in accordance with **Articles 99-109 BRRD**.³³⁴

6.1.2 Derogations

By way of derogation, certain SRMR Articles, exhaustively set out in **Article 99(3)-(5) SRMR**,³³⁵ applied earlier than 1 January 2016. In particular:

Firstly, the following Articles apply from **19 August 2014**:³³⁶ the above-mentioned (in the present Section) **Articles 1-4, 6 and 30**; several Articles on the institutional framework and in particular: on the Board (**42-48**), the participation in plenary sessions (**49**), its two sessions (**50(1), points (a)-(b) and (g)-(p), 50(3), 51, 52(1), 52(4) and 53(1)-(2)**), its Chair (**56**), and its financial provisions (**57-59 and 61-66**);³³⁷ and Articles containing other and final provisions (**80-84, 87-95 and 97-98**).

Secondly, **Articles 69(5), 70(6) and 71(3)** empowering the Commission to adopt delegated acts pursuant to **Article 290 TFEU**³³⁸ and **Article 70(7)** empowering the Council to adopt implementing acts pursuant to **Article 291 TFEU** with regard to various aspects of the SRF apply from **1 November 2014**.³³⁹

Finally, the provisions on the Board's powers to collect information and cooperate with NRAs for the elaboration of resolution plans in accordance with **Articles 8-9** and all 'other related provisions' apply from **1 January 2015**.³⁴⁰

³³⁴ *Ibid.*, Article 96 with reference to Article 99(2) (and 99(6), which is not relevant for the reasons stated just below); **see also recital (124), first and second sentences**. On Article 96, see also below in **Chapter 6, Section A, under 1.1 (1)**.

The SRMR could have applied later on, depending on the date on which the SRF Agreement would have become applicable, after ratification by the participating Member States. In particular, from 1 January 2015, the Board should submit to the European Parliament, the Council and the Commission a Monthly Report on whether the conditions for the transfer of contributions to the SRF have been met. If such Reports had proven that these conditions were not met since 1 December 2015, the application of the SRMR would have been postponed by one month each time and the Board would have been required to submit a further Report each time at the end of that month (*ibid.*, Article 99(6); see also recital (124), third sentence). These provisions did not apply, since the conditions for the transfer of contributions to the SRF were met by end-November 2015; see below in **Section B, under 3.2**. On Articles 99-109 BRRD, see **Haentjens (2017a)**, pp. 304-315.

³³⁵ *Ibid.*, Article 99(2).

³³⁶ *Ibid.*, Article 99(4).

³³⁷ See below in **Chapter 3, Sections B and C**.

³³⁸ See just below, **under 5.2**.

³³⁹ *Ibid.*, Article 99(5). The SRMR Articles applying from 1 November 2014 are analysed below in **Chapter 6, Section A**.

³⁴⁰ *Ibid.*, Article 99(3). As 'other related provisions' should be considered **Article 10** on the assessment of resolvability, **Article 11** on simplified obligations for certain institutions, and **Article 12** on the determination of the MREL. On Articles 8-12 see below in **Chapter 4, Sections B and C**.

6.2 Power to adopt delegated acts

The power to adopt delegated acts pursuant to **Article 290 TFEU** has been conferred on the Commission.³⁴¹ According to standard practice in the field of EU banking law,³⁴² this power is subject to the following conditions:³⁴³

(1) The Articles in relation to which delegated acts should to be adopted³⁴⁴ are those referred to in **Article 19(8)** on State aid and SRF aid, **Article 65(5)** on the contributions to the administrative expenses of the Board, as well as **Articles 69(5), 71(3) and 75(4)** with regard to various aspects of the SRF. The conferral of power to the Commission is for an indeterminate period of time from the relevant dates referred to in **Article 99**.³⁴⁵ On this basis, the Commission adopted the following legal acts (all in the form of Regulations and presented in chronological order of adoption):

- (1) **Delegated Regulation (EU) No 1310/2014** of 8 October 2014 “on the provisional system of instalments on contributions to cover the administrative expenditures of the Single Resolution Board during the provisional period”,³⁴⁶ adopted on the basis of Article 65(5);³⁴⁷
- (2) **Delegated Regulation (EU) 2017/747** of 15 December 2015 “supplementing Regulation No (EU) 806/2014 of the European Parliament and the Council with regard to the criteria relating to the calculation of *ex-ante* contributions, and on the circumstances and conditions under which the payment of extraordinary *ex-post* contributions may be partially or entirely deferred”,³⁴⁸ adopted on the basis of Articles 69(5) and 71(3);³⁴⁹
- (3) **Delegated Regulation (EU) 2016/451** of 16 December 2015 “laying down general principles and criteria for the investment strategy and rules for the administration of the Single Resolution Fund”,³⁵⁰ adopted on the basis of Article 75(4),³⁵¹ and

³⁴¹ *Ibid.*, Article 93(1).

³⁴² With exception of the provision in Article 93(3), all other conditions are almost identical to those laid down in the CRR (Article 462), the CRD IV (Article 148), the BRRD (Article 115) and the DGSD (Article 18).

³⁴³ **SRMR**, Article 93(2)-(7), respectively.

³⁴⁴ On these Articles, see also recital (113) **SRMR**.

³⁴⁵ This is consistent with Article 290(1), second sub-paragraph, first sentence TFEU (“duration of the delegation of power”).

³⁴⁶ OJ L 354, 11.12.2014, pp. 1-5.

³⁴⁷ This Regulation was adopted as early as in October 2014, since the SRMR Article which constitutes its basis (Article 65(5)) is among those which, by way of derogation, apply from 19 August 2014 by virtue of (the above-mentioned) Article 99(4).

³⁴⁸ OJ L 113, 29.4.2017, pp. 2-8.

³⁴⁹ It is worth noting that even though this Regulation was adopted in December 2015 and, according to (the just above-mentioned) Article 99(5), the two SRMR Articles which constitute its basis (Articles 69(5) and 71(3)) apply, by way of derogation, from **1 November 2014** and not from **1 January 2016** by virtue of Article 99(2), it was published in the *Official Journal* on 29 April 2017 and entered into force on 19 May 2017 (Article 9). This legal act is further discussed in more detail in **Chapter 6, Section A, under 2 and 4.2**.

³⁵⁰ OJ L 79, 30.3.2016, pp. 2-9.

³⁵¹ This Regulation applies from 1 January 2016 when the SRF became operational (Article 19, second sub-paragraph); it is further discussed in detail in **Chapter 6, Section A, under 1.2.2**.

- (4) **Delegated Regulation (EU) 2017/2361** of 14 September 2017 “on the final system of contributions to the administrative expenditures of the Single Resolution Board”,³⁵² which was adopted on the basis of Article 65(5) and repealed **Commission Delegated Regulation (EU) No 1310/2014** of 8 October 2014.³⁵³

The delegated act referred to in Article 19(8) has not yet been adopted. It is noted that the Commission is also empowered to adopt delegated acts in accordance with **Article 70(6)** with regard to *ex-ante* contributions to the SRF. The delegation of power is conferred on it for an indeterminate period of time as well, by virtue nevertheless in this case of **Article 115 BRRD**, since these acts are adopted on the basis **Article 103(7) BRRD**. Currently, in force is **Commission Delegated Regulation (EU) 2015/63** of 21 October 2014 “supplementing Regulation No (EU) 806/2014 of the European Parliament and the Council with regard to *ex-ante* contributions to resolution financing arrangements”³⁵⁴).

It is also noted that none of the delegated acts adopted under the SRMR must be based on regulatory technical standards of the EBA (as in the majority of the legislative acts which constitute the sources of EU banking law – *inter alia*, in the BRRD). Nevertheless, **recital (115)** provides that the Commission, in accordance with the established practice, in preparation of draft delegated acts provided for in the SRMR, should consult the EBA. It also provides that it is of particular importance in this area that the Commission, where relevant, should carry out appropriate consultations during its preparatory work with the ECB and the Board in their fields of competence.

(2) The Commission must ensure consistency between delegated acts adopted according to the SRMR and those adopted in accordance with the BRRD.

(3) The delegation of power may be revoked at any time by the European Parliament or by the Council (each acting separately) by a decision putting an end to the delegation specified therein, taking effect the day following the publication of the decision in the *Official Journal* or at a later date specified therein, and not affecting the validity of any delegated acts in force.³⁵⁵

(4) Upon its adoption, the Commission must notify the delegated act simultaneously to the European Parliament and the Council.

(5) A delegated act adopted pursuant to the above-mentioned SRMR Articles can enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months (extendable by another three months) of its notification to these institutions, or if, before the expiry of that period, both these institutions have informed the Commission that they do not object.³⁵⁶

(6) Finally, the Commission may not adopt delegated acts, if the scrutiny time of the European Parliament is reduced through recess to less than five months, including any extension.

³⁵² OJ L 337, 19.12.2017, pp. 6-14.

³⁵³ This Regulation is briefly discussed in **Chapter 3, Section C, under 1.3.6 (2)**.

³⁵⁴ OJ L 11, 17.1.2015, pp. 44-64.

³⁵⁵ This is consistent with Article 290(2), first sub-paragraph, point (a) TFEU.

³⁵⁶ This is consistent with Article 290(2), first sub-paragraph, point (b) TFEU.

6.3 Review

By 31 December 2018 and every three years thereafter the Commission must publish a Report on the application of the SRMR, emphasising on monitoring the potential impact on the internal market's smooth functioning.³⁵⁷ This Report must be submitted to the European Parliament and the Council and be accompanied by appropriate proposals. When reviewing the BRRD, the Commission is also invited to review the SRMR, as appropriate.³⁵⁸ This Report was published on **30 April 2019**.³⁵⁹

With regard to its content, the Report must evaluate the following aspects:³⁶⁰

(1) The *first evaluation aspect* is the functioning of the SRM, its cost efficiency, as well as the impact of resolution activities on the interests of the EU as a whole and on the coherence and integrity of the internal market for financial services. Into account must be taken its potential impact on the structures of the national banking systems within the EU (in a comparative way), and the effectiveness of cooperation and information sharing arrangements within the SRM, on the one hand between the SRM and the SSM, and on the other hand between the SRM, NRAs, competent authorities and resolution authorities of non-participating Member States. In this respect, the Report must assess seven elements:

firstly, the necessity to transfer the functions allocated by the SRMR to the Board, the Council and the Commission exclusively to an independent EU institution and, if so, whether any legislative changes are necessary (including an amendment of the TFEU);

secondly, whether the SRF's investment portfolio (governed by **Article 75**³⁶¹) includes sound and diversified assets;

thirdly, the appropriateness of the cooperation between the SRM, the SSM, the ESRB, the three ESAs and the other authorities which form part of the ESFS;

fourthly, whether the link ('vicious circle') between sovereign debt and banking risk has been broken;

fifthly, the appropriateness of governance arrangements, including the division of tasks within the Board, its relations with the Commission and the Council, and the composition of the voting arrangements in its Plenary and Executive Sessions;³⁶²

³⁵⁷ SRMR, Article 94(1), first sentence.

³⁵⁸ *Ibid.*, Article 94(2)-(3).

³⁵⁹ COM(2019) 213 final, 30.4.2019 (available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190430-report-bank-recovery-resolution_en.pdf). Given that the cut-off date for information included in the present study was the end of April, this Report could not be assessed in details; see nevertheless below in **Chapter 6, Section C (under 2.1)** the Commission's proposals on liquidity in resolution and just below **(under 4)** its considerations on the necessity of legislative action with regard to the harmonisation of insolvency proceedings for failed institutions.

³⁶⁰ SRMR, Article 94(1), second sentence, points (a)-(e).

³⁶¹ See below in **Chapter 6, Section A, under 1.2.2.1**.

³⁶² See below in **Chapter 3, Section B**.

furthermore, the adequacy of the reference point for setting the target level for the SRF and, in particular, whether covered deposits or total liabilities is a more appropriate basis, as well as if a minimum absolute amount for the SRF should be established in order to avoid volatility in the flow of financial means to the SRF and ensure the stability and adequacy of the financing of the SRF over time;³⁶³ and

finally, the necessity of modifying the target level established for the SRF and the level of contributions in order to ensure a level playing field within the EU.³⁶⁴

(2) The *second evaluation aspect* is the effectiveness of the arrangements established with regard to independence and accountability.³⁶⁵

(3) The interaction between the Board and the EBA, between the Board and the NRAs of non-participating Member States and the effects of the SRM on those Member States, as well as between the Board and ‘relevant third-country authorities’ constitutes the *third evaluation aspect*.³⁶⁶

(4) The *final* – but extremely essential – *evaluation aspect* is the necessity of legislative action with regard to the harmonisation of insolvency proceedings for failed institutions. **Recital (123) SRMR** is explicit on this: “*The Commission should review the application of this Regulation in order to assess its impact on the internal market and to determine whether any modifications or further developments are needed in order to improve the efficiency and the effectiveness of the SRM, in particular whether the Banking Union needs to be completed with the harmonisation at Union level of insolvency proceedings for failed institutions.*” It is recalled that **Directive 2001/24/EC** on the reorganisation and winding up of credit institutions does not provide for a minimum harmonisation of national reorganisation measures and winding up proceedings.³⁶⁷

In this respect, the (just above-mentioned) Commission’s Report of 30 April 2018 provides that the Commission launched in September 2018 a study, the objective of which is to analyse divergences in the insolvency frameworks for credit institutions under different national laws, assess the interactions between these frameworks and the resolution rules, identify potential policy options for harmonisation, including the possible introduction of administrative liquidation proceedings in the EU.³⁶⁸

³⁶³ See below in **Chapter 6, Section A, under 2**.

³⁶⁴ *Ibid.*

³⁶⁵ See below in **Chapter 3, Section C**.

³⁶⁶ ‘**Relevant third-country authorities**’ means third-country authorities responsible for carrying out functions *comparable* to those of NRAs or NCAs pursuant to the BRRD (*ibid.*, Article 2(1), point (90)).

³⁶⁷ See above in **Chapter 1, Section C, under 3.2**.

³⁶⁸ **Commission’s Report (2019)**, pp. 8-9.

Table 7	
Start of application of the SRMR Articles	
19 August 2014	
SRMR Article	Relevant measure
Articles 1-4	Subject matter – scope – definitions – participating Member States
Article 6	General principles
Article 30	obligation to cooperate and information exchange within the SRM
Articles 42-48	General provisions on the Board
Article 49	Participation in Plenary Sessions
Article 50(1), points (a)-(b) and (g)-(p), 50(3),	Various tasks of the Plenary Session
Article 51	Meetings of the Plenary Session
Article 52(1) and (4)	Some general provisions on the decision-making in Plenary Sessions
Article 53(1)-(2)	Key aspects of participation in Executive Sessions
Article 56	Appointment and tasks of the Board's Chair
Articles 57-59 and 61-66	Financial provisions (with the exception Article 60 of Part II of the budget on the SRF)
Article 80	Privileges and immunities
Article 81	Language arrangements
Articles 82-83	Staff – staff exchange
Article 84	Internal committees
Article 87	Board's liability
Article 88	Professional secrecy and exchange of information
Article 89	Data protection
Article 90	Access to documents
Article 91	Security rules on the protection of classified and sensitive non-classified information

Table 7 (continued)	
Start of application of the SRRM Articles	
19 August 2014 (continued)	
Article 92	Court of Auditors
Article 93	Exercise of delegation
Article 94	Review
Article 95	Amendment to EBA Regulation
Article 97	Headquarters Agreement
Article 98	Start of the Board's activities
1 November 2014	
Articles 69(5), 70(6) and 71(3)	Transfer of power upon the Commission to adopt delegated acts pursuant to Article 290 TFEU
Article 70(7)	Transfer of power upon the Commission to adopt implementing acts pursuant to Article 291 TFEU with regard to various aspects of the SRF
1 January 2015	
Articles 8-9	Board's powers to collect information and cooperate with NRAs for the elaboration of resolution plans
Article 10	Assessment of resolvability
Article 11	Simplified obligations for certain institutions
Article 12	Determination of the MREL
1 January 2016	
all other Articles	

TABLE 8	
National resolution authorities in EU Member States	
Member State	National resolution authority
Austria	Austrian Financial Market Authority (FMA)
Belgium	National Bank of Belgium
Bulgaria	Bulgarian National Bank
Croatia	Croatian National Bank Croatian Financial Services Supervisory Agency State Agency for Deposit Insurance and Bank Rehabilitation
Cyprus	Central Bank of Cyprus
Czech Republic	Czech National Bank
Denmark	Danish FSA (DFSA) Financial Stability Company (FSC)
Estonia	Financial Supervision Authority
Finland	Financial Stability Authority
France	Autorité de contrôle prudentiel et de résolution (ACPR)
Germany	Financial Markets Stabilization Authority (FMSA)
Greece	Bank of Greece Hellenic Capital Market Commission (HCMC)
Hungary	National Bank of Hungary
Ireland	Central Bank of Ireland
Italy	Banca d' Italia

TABLE 8 (continued)	
National resolution authorities in EU Member States	
Member State	National resolution authority
Latvia	Financial and Capital Market Commission (FCMC)
Lithuania	Bank of Lithuania
Luxembourg	Commission de Surveillance du Secteur Financier
Malta	Malta Financial Services Authorities
Netherlands	De Nederlandsche Bank (DNB)
Poland	Bank Guarantee Fund (DGS)
Portugal	Banco de Portugal
Romania	National Bank of Romania
Slovakia	The Resolution Council
Slovenia	Bank of Slovenia
Spain	Banco de España Fondo de Resolución Ordenada Bancaria (FROB)
Sweden	Sweden National Debt Office (SNDO)
United Kingdom	Bank of England

Section B: General provisions of the SRF Agreement

1. Purpose and scope

(1) Through the SRF Agreement,³⁶⁹ the (twenty-six) Contracting Parties³⁷⁰ made two commitments with a view to supporting the effective operation and functioning of the SRF, which was established by the SRMR.³⁷¹

The *first* commitment is the obligation to transfer to the SRF the contributions raised at national level in accordance with the BRRD and the SRMR.³⁷²

The *second* commitment is to allocate these contributions, during a (transitional) ‘**initial period**’, to different ‘**compartments**’ corresponding to each Contracting Party. This period started on 1 January 2016 (i.e. the date of application of the SRF Agreement³⁷³) and will elapse on the date when the SRF reaches the target level provided for in **Article 68 SRMR** (i.e. at least 1% of the amount of covered deposits of all credit institutions within the BU) but not later than 31 December 2023 (i.e. eight years after the date of the Agreement’ application).³⁷⁴ The compartments’ use is subject to a ‘**progressive mutualisation**’; the compartments will cease to exist at the end of the initial period.³⁷⁵

(2) The Agreement applies (mainly) to the Contracting Parties participating in the SSM and the SRM in accordance with the relevant provisions of the SSMR and the SRMR (i.e. to the participating Member States, in the Agreement referred to as the ‘Contracting Parties participating in the SSM and the SRM’).³⁷⁶ It does not affect common rules established under EU law nor does it alter their scope, since its content is confined to the specific elements concerning the SRF which remain within the competence of Member States; it is rather designed as complementary to the BRRD and the SRMR and as supportive and intrinsically linked to the achievement of EU policies, in particular the establishment of the internal market for financial services.³⁷⁷

³⁶⁹ On the SRF Agreement, see by way of mere indication **Burke (2015)**, **Hadjiemmanuil (2015a)**, pp. 26-29, **Zavvos and Kaltsouni (2015)**, pp. 36-49 and **Wolfers und Volland (2018)**. On the financing of resolution actions in general, see **Goodhart (2012)**, **Nieto and Garcia (2012)** and **Grünewald (2014)**, pp. 29-48.

³⁷⁰ As already mentioned in **Chapter 1 (Section B, under 2.1.2)**, the only Member States which are not Contracting Parties to the SRF Agreement are Sweden and the United Kingdom.

³⁷¹ **SRF Agreement**, Article 1(1), points (a) and (b) respectively; see also recital (9).

³⁷² It is noted that this obligation does not derive from the BRRD and SRMR but directly from the SRF Agreement (*ibid.*, recital (7), fourth and fifth sentences).

³⁷³ See below, **under 3**.

³⁷⁴ See also Article 3(1) point (37) **SRMR** and recital (12) **SRF Agreement**.

³⁷⁵ All these aspects are further analysed in **Chapter 6, Section B**.

³⁷⁶ **SRF Agreement**, Article 1(2). The phrasing of this provision is not fully accurate (hence the addition by this author of the term ‘mainly’), since certain provisions of the Agreement apply also to non-participating Member States (see below, **under 4, 5.1 (2) and 5.2**); see also Article 12(1) (**under 4** below).

³⁷⁷ *Ibid.*, recital (11).

It is also noted that the Contracting Parties' intention was the preservation of a level playing field and the minimisation of the overall cost of resolution to taxpayers. When designing the contributions to the SRF and their tax treatment, they also undertook to consider the overall burden on the respective banking sectors.³⁷⁸

2. Consistency and relationship with EU law

(1) The SRF Agreement is an instrument of public international law and, as such, the rights and obligations laid down therein are subject to the principle of reciprocity, i.e. the equivalent performance of those rights and obligations by all Contracting Parties. Accordingly, the breach by any Contracting Party of its obligation to transfer the contributions towards the SRF entails the exclusion of the entities authorised in its territory from access thereto. The power to determine and declare such a breach is granted to Board and the Court of Justice of the European Union (the 'ECJ').³⁷⁹

(2) The Contracting Parties must apply and interpret the Agreement in conformity with primary and secondary EU law and, in particular, with the above-mentioned **Article 4(3) TEU** on the 'principle of sincere cooperation'³⁸⁰ and with the legal acts of secondary law which constitute the sources of EU financial law in relation to the resolution of institutions, namely the BRRD and the SRMR.³⁸¹ It applies insofar as it is compatible with EU law and does not encroach upon the EU's competence to act in the field of the internal market for financial services.³⁸²

3. Ratification, approval or acceptance – entry into force – accession

(1) The SRF Agreement is subject to ratification, approval or acceptance by the Contracting Parties in accordance with their respective constitutional requirements. The respective instruments must be deposited with the General Secretariat of the Council (the 'Depositary'), who must notify the other Contracting Parties of each deposit and the date thereof.³⁸³

³⁷⁸ *Ibid.*, recital (10).

³⁷⁹ The Contracting Parties recognised that in such a case the only legal consequence would be the exclusion of the Contracting Party having committed the breach from financing under the SRF, while the others' obligations would remain unaffected (*ibid.*, recital (20)). On the ECJ, see by way of mere indication **Tridimas (2018b)**.

³⁸⁰ Accordingly, participating Member States must ensure that financial resources are uniformly channelled towards the SRF in order to guarantee its proper functioning (*ibid.*, recital (8), last sentence).

³⁸¹ *Ibid.*, Article 2(1).

³⁸² *Ibid.*, Article 2(2). For the purposes of the Agreement, applicable are the definitions set out in **Article 3 SRMR** (*ibid.*, Article 2(3)).

³⁸³ *Ibid.*, Article 11(1). See also recital (14), according to which the Agreement must be ratified by all participating Member States, namely those whose currency is the euro and those whose currency is not the euro but participate in the SSM and the SRM upon the establishment of a close cooperation with the ECB in the meaning of **Article 7(2) SSMR** (still none).

(2) The Agreement entered into force on **1 January 2016**, i.e. the first day of the second month following the date when the respective instruments were deposited by participating Member States representing at least 90% of the aggregate of the weighted votes of all participating Member States, according to **Protocol (No 36)** “on transitional provisions”³⁸⁴ attached to the Treaties.³⁸⁵

(3) The SRF Agreement is open to accession by Member States other than the Contracting Parties (i.e. currently Sweden and the United Kingdom); accession will be effective upon depositing the instrument of accession with the Depositary, which must notify accordingly the other Contracting Parties. Following authentication by the latter, the Agreement’s text must be deposited in the Depositary’s archives.³⁸⁶

4. Application

(1) In principle, the SRF Agreement applies among all Contracting Parties that have deposited their instruments of ratification, approval or acceptance provided that the SRMR has previously entered into force (which is the case).³⁸⁷ Subject to this general provision, since **1 January 2016** (i.e. the same date when it entered into force³⁸⁸) it applies among the participating Member States.³⁸⁹ On the other hand, the Agreement does not apply to the non-participating Member States which have deposited their respective instruments;³⁹⁰ it will apply to them as from the date when the decision abrogating their derogation (as defined in **Article 139(1) TFEU**) or their exemption (as referred to in **Protocol (No 16)** “on certain provisions relating to Denmark”) takes effect or, otherwise, as from the date of entry into force of the ECB decision on close cooperation referred to in **Article 7(2) SSMR**.³⁹¹

³⁸⁴ Consolidated version, OJ C 202, 7.6.2016, pp. 322-326.

³⁸⁵ **SRF Agreement**, Article 11(2). With the exception of Luxembourg, all other participating Member States whose currency is the euro had ratified the Agreement by December 2015.

³⁸⁶ *Ibid.*, Article 13. According to recital (15), these Member States should accede with full rights and obligations, in line with those of the (other) Contracting Parties, as from the date when they effectively adopt the euro as currency or, otherwise, as from the date of entry into force of the ECB decision on close cooperation.

³⁸⁷ *Ibid.*, Article 12(1).

³⁸⁸ See just above, **under 3 (2)**.

³⁸⁹ **SRF Agreement**, Article 12(2), first sentence (adapted). Articles 12(2), second sentence and 12(3) are not applicable (and the first sentence of Article 12(2) has been referred to as adapted) in view of the fact that (as already mentioned) the Agreement entered into force on 1 January 2016 and participating Member States had ratified it. In this respect it is simply noted that **Declaration no. 2** contained in the **Annex to the SRF Agreement** on “Declarations of intent by the Contracting Parties and observers of the Intergovernmental Conference that are members of the Council to be deposited with the SRF Agreement” provides for the following: “*The signatories to the (...) Agreement on the transfer and mutualisation of contributions to the SRF declare that they will strive to complete its process of ratification in accordance with their respective national legal requirements in due time so as to permit the SRM to be fully operational by 1 January 2016.*”

³⁹⁰ In the author’s knowledge, as of April 2019, no single non-participating Member State had deposited its instruments of ratification, approval or acceptance.

³⁹¹ **SRF Agreement**, Article 12(4), first sub-paragraph, first sentence and second sub-paragraph.

Nevertheless, these Member States are already part of the ‘**special agreement**’ referred to in **Article 14(2)** for the purpose of submitting to the ECJ disputes concerning the interpretation and enforcement of **Article 15** on compensation for non-contractual liability and costs related thereto.³⁹²

(2) Subject to **Article 8** (governing the transfer by participating Member States whose currency is not the euro (and have thus established a close cooperation with the ECB) to the SRF of a specific amount of contributions raised in their territory),³⁹³ the Agreement will cease to apply to these participating Member States from the date of termination of such a cooperation in accordance with **Article 7(8) SSMR**.³⁹⁴

5. Other provisions

5.1 Dispute settlement

(1) Any Contracting Party, either disagreeing with another on the interpretation of any provision of the SRF Agreement or considering that another has failed to comply with its obligations thereunder, may bring the matter before the ECJ, the judgment of which is binding on the parties to the proceedings. If the ECJ’s finds that a Contracting Party has failed to comply with its obligations under the Agreement, the latter must take the necessary compliance measures within a period set by the ECJ. If such measures are not taken, the use of compartments of the Contracting Parties, as laid down in **Article 5(1), point (b)**,³⁹⁵ is ruled out in relation to institutions established and authorised in its territory.³⁹⁶ The above provisions constitute a ‘**special agreement**’ between the Contracting Parties within the meaning of **Article 273 TFEU**.³⁹⁷

(2) As already mentioned,³⁹⁸ by virtue of **Article 14(2)**, Member States whose currency is not the euro and have ratified the SRF Agreement are *ipso facto* parties to the (just above-mentioned) special agreement for the purpose of submitting to the ECJ any dispute concerning the interpretation and enforcement of **Article 15** on compensation for non-contractual liability and costs related thereto.³⁹⁹ On the other hand, any Member State whose currency is not the euro but has not ratified the SRF Agreement may become as well party to this special agreement for that same purpose by notifying the Depository (i.e. the Council’s General Secretariat) of its intention. This Member State becomes then party to the agreement upon communication of its notification to the Contracting Parties by the Depository.⁴⁰⁰

³⁹² *Ibid.*, Article 12(4), first sub-paragraph, second sentence. On the application to these Member States of the ‘special agreement’ referred to in Article 14(2), see below, **under 5.1 (2)**.

³⁹³ See below in **Chapter 6, Section B, under 1.4**.

³⁹⁴ **SRF Agreement**, Article 12(4), third sub-paragraph.

³⁹⁵ See below in **Chapter 6, Section B, under 2.2**.

³⁹⁶ **SRF Agreement**, Article 14(1) and recital (22), first sentence.

³⁹⁷ *Ibid.*, Article 14(2). Article 273 TFEU reads as follows: “*The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties*” (emphasis added). For a commentary, see **Schwarze (2012d)**. On the application of Article 14, see also below in **Chapter 6, Section B, under 3.1**.

³⁹⁸ See above, **under 4 (1)**.

³⁹⁹ On Article 15, see just below, **under 5.2**.

⁴⁰⁰ **SRF Agreement**, Article 14(3) and recital (22), second sentence.

5.2 Compensation of non-participating Member States

(1) The SRF Agreement lays down an arrangement whereby participating Member States committed to reimburse jointly, promptly and with interest each non-participating Member State for the amount it may have paid in own resources, corresponding to the use of the EU general budget, in cases of non-contractual liability and costs related thereto, in respect of the exercise of powers by EU institutions under the SRMR.⁴⁰¹ In such a case, the amount that each non-participating Member State will be deemed to have contributed to that liability and the related costs must be determined *pro rata* on the basis of its respective gross national income, as determined in accordance with **Article 2(7) of Council Decision 2007/436/EC, Euratom** of 7 June 2007 “on the system of the European Communities’ own resources” (or with any ensuing EU act amending or repealing it).

The compensation costs must be distributed among the participating Member States *pro rata* (as well) on the basis of the weight of their respective gross national income, as determined in accordance with that Council Decision’s same Article.⁴⁰² Subsequently, each participating Member State’s liability under this arrangement is separate and individual and not joint and several; each of them must respond only for their part of the reimbursement obligation as determined in accordance with the SRF Agreement.⁴⁰³

(2) The Commission is called upon to coordinate any reimbursement action by the Contracting Parties in accordance with the above criteria, by calculating the basis on which payments are to be made, issuing notices to the Contracting Parties requiring payments to be made and calculating interest.⁴⁰⁴

5.3 Review

By 31 December 2017 at the latest, and every 18 months thereafter, the Board must submit to the European Parliament and to the Council a Report on the implementation of the SRF Agreement and in particular on the proper functioning of the mutual use of the SRF and its impact on financial stability and the internal market. In addition, by **31 December 2025** at the latest, on the basis of an assessment of the experience with its implementation contained in the above Reports of the Board, the necessary steps must be taken, in accordance with the Treaties, in order to incorporate its substance into the EU legal framework.⁴⁰⁵

⁴⁰¹ *Ibid.*, Article 15(1) and recital (21), first sentence.

⁴⁰² *Ibid.*, Article 15(2)-(3). The non-participating Member States must be reimbursed on the dates of the entries in the accounts referred to in **Article 9(1) of Council Regulation (EC, Euratom) No 1150/2000** of 22 May 2000 “implementing Decision 2007/436/EC, Euratom on the system of the Communities’ own resources” (OJ L 130, 31.5.2000, pp. 1-12) of the amounts corresponding to the payments from the EU budget to settle the non-contractual liability and costs related thereto following the adoption of the associated amending budget. Any interest must be calculated in accordance with the provisions on interest for amounts made available belatedly applicable to the EU’s own resources and amounts must be converted between national currencies and the euro at an exchange rate determined in accordance with Article 10(3), first paragraph of that Council Regulation (*ibid.*, Article 15(4)).

⁴⁰³ *Ibid.*, recital (21), second sentence.

⁴⁰⁴ *Ibid.*, Article 15(5).

⁴⁰⁵ *Ibid.*, Article 16 and recital (25). To the author’s knowledge, the 2017 Report is not publicly available.

Chapter 3

The Single Resolution Board

Section A:

Legal status, seat and composition

1. Legal status

(1) As already mentioned in the previous Chapter,⁴⁰⁶ the Board was established by the SRMR⁴⁰⁷ and became fully operational on 1 January 2015.⁴⁰⁸ Unlike the ECB which is a Treaty-based EU institution,⁴⁰⁹ it is a (specific) EU agency with a specific structure corresponding to its specific tasks, which departs from the model of all other EU agencies in order to ensure a swift and effective decision-making process in resolution.⁴¹⁰ The Board belongs to the decentralised agencies set up in order to perform technical, scientific or managerial tasks that support the EU institutions in policy making and implementation. According to the revised “**Meroni doctrine**” following a (relatively recent) **ECJ Judgment** (in **Case C-270/12**),⁴¹¹ any conferral of implementing powers needs to be clearly defined by the empowering act, and the exercise of the relevant powers must be effectively controlled by the delegating authority (political control) and be subject to legal review (legal control). As the purpose of this doctrine is the protection of EU institutional balance, it becomes evident that political responsibility cannot be conferred upon executive bodies.⁴¹²

(2) The Board has legal personality.⁴¹³ It enjoys in each Member State (including the non-participating ones) the most extensive legal capacity accorded to legal persons under national law (*inter alia*, the right to acquire or dispose of movable and immovable property and the right to be a party to legal proceedings) and is represented by its Chair.⁴¹⁴

⁴⁰⁶ See above in **Chapter 2, Section A, under 1.1 (1)**.

⁴⁰⁷ **SRMR**, Article 42(1), first sentence.

⁴⁰⁸ *Ibid.*, Article 98(1). Article 98(2)-(3) provides that the Commission was responsible for the Board’s establishment and initial operation, until the latter had the operational capacity to implement its own budget and lays down the powers of its interim Chair (see also recital (119)). These provisions were not activated.

⁴⁰⁹ **TEU**, Article 13(1), second sub-paragraph, sixth indent.

⁴¹⁰ **SRMR**, Article 42(1), second sentence and recital (31), first sentence.

⁴¹¹ Judgment of the Court (Grand Chamber), 22 January 2014, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (Regulation (EU) No 236/2012 — Short selling and certain aspects of credit default swaps — Article 28 — Validity — Legal basis — Powers of intervention conferred on the European Securities and Markets Authority in exceptional circumstances)*, Case C-270/12, EU:C:2014:18. On this case, see by way of mere indication **Repasi (2014)**.

⁴¹² See also recital (26), third sentence **SRMR**; On EU agencies, see **Chiti (2018)**.

⁴¹³ *Ibid.*, Article 42(1), third sentence.

⁴¹⁴ *Ibid.*, Article 42(2)-(3).

It must act in compliance with EU law and (since it is not an EU institution and does not have the power to take final binding decisions), in particular, with the Council and Commission decisions, in accordance with the SRMR.⁴¹⁵

2. Seat – Headquarters Agreement and operating conditions

The Board's seat is located in Brussels (Belgium).⁴¹⁶ The Board should conclude with Belgium a Headquarters Agreement after obtaining the approval of the Board in its Plenary Session and not later than 20 August 2016. This Agreement should lay down the necessary arrangements concerning the accommodation to be provided for the Board in Belgium, the facilities to be made available by that Member State, and the specific rules applicable therein to the Board's Chair, its members in its Plenary Session, its staff and members of their families.⁴¹⁷ Belgium must also provide the best possible conditions to ensure the proper functioning of the Board in its Plenary session "*including multilingual, European-oriented schooling and appropriate transport connections [!]*".⁴¹⁸

3. Composition

In order to ensure that due account is taken of all relevant interests at stake in resolution procedures,⁴¹⁹ the Board is composed of the following: *firstly*, a Chair, appointed in accordance with **Article 56**,⁴²⁰ *secondly*, four further full-time members, also appointed in accordance with **Article 56** (the '**other full-time members**'); and *thirdly*, a member appointed by each participating Member State, representing their NRAs.⁴²¹ Each member, including the Chair, has one vote.⁴²²

In addition, each the Commission and the ECB also designate a representative, which are entitled to participate in the meetings of the Board's Plenary and Executive Sessions as '**permanent observers**', entitled to participate in the debates and having access to all documents. If in a participating Member State there are more than one NRA (e.g. one for credit institutions and their groups and one for investment firms and their groups), a second representative may participate as observer as well without voting rights.⁴²³

⁴¹⁵ *Ibid.*, Article 44. On the compliance of Board's decisions with EU law, see also Article 5(2), first sub-paragraph above (discussed in **Chapter 2, Section A, under 2.2 (1)**).

⁴¹⁶ *Ibid.*, Article 48.

⁴¹⁷ *Ibid.*, Article 97(1). **As of April 2019 this Agreement, even if concluded, was not publicly available.**

⁴¹⁸ *Ibid.*, Article 97(2). There is no doubt that such provisions are not usually included in legislative texts adopted by the European Parliament and the Council.

⁴¹⁹ *Ibid.*, recital (31), second sentence.

⁴²⁰ On this Article, see below in **Section B, under 5.1**.

⁴²¹ **SRMR**, Article 43(1), points (a)-(c), respectively.

⁴²² *Ibid.*, Article 43(2).

⁴²³ *Ibid.*, Article 43(3)-(4).

Section B: Governance

1. General overview

The Board's administrative and management structure comprises the following: a Plenary Session performing the tasks referred to in **Article 50** (see below, **under 2**); an Executive Session performing the tasks referred to in **Article 54 (under 3)**; a Chair performing the tasks referred to in **Article 56 (under 4)**; and a Secretariat, which provides the necessary administrative and technical support on the performing of the tasks assigned to the Board.⁴²⁴

On the basis of the provisions of the Proposal submitted by the Commission, upon establishment of the EDIS, which will be administered by the Board, the latter's composition will (in addition to its existing above-mentioned members) also comprise a member appointed by each participating Member State, representing its designated authority.⁴²⁵ All Board members will participate in the '**Joint Plenary Session**', the establishment of which will modify the current Board's administrative and management structure,⁴²⁶ since the majority of the current tasks in its Plenary Session⁴²⁷ will be transferred to the newly established session.⁴²⁸

Under the proposed new structure, the members of the Board in accordance with its existing structure will participate in its plenary session relating to the SRM (the '**SRM plenary session**'), while all members will participate in its plenary session relating to EDIS (the '**EDIS plenary session**').⁴²⁹ In this session, the Board will evaluate the application of the EDIS, once the DIF's net accumulated use in the last consecutive 12 months reaches the threshold of 25% of the final target level.⁴³⁰

2. The Board's Plenary Session

2.1 Composition

In the Board's Plenary Sessions participate all its members (according to the above-mentioned).⁴³¹ The Board may, if relevant, invite observers, in addition to the permanent ones appointed by the Commission and the ECB (which participate *ipso jure*),⁴³² to participate in the Plenary Session's meetings on an *ad hoc* basis, including an EBA representative.⁴³³

⁴²⁴ **SRMR**, Article 43(5); see also recital (32), first sentence.

⁴²⁵ **Proposed SRMR**, Article 43(1), new point (d).

⁴²⁶ *Ibid.*, amended Article 43(5), point (a) with reference to Article 48a.

⁴²⁷ **SRMR**, Article 50; see just below, **under 2.2**.

⁴²⁸ **Proposed SRMR**, Article 49b.

⁴²⁹ *Ibid.*, amended Article 49 and Article 49a, respectively.

⁴³⁰ *Ibid.*, amended Article 50a, point (a).

⁴³¹ **SRMR**, Article 49 with reference to Article 43(1); see just above in **Section A, under 3 (1)**.

⁴³² See just above in **Section A, under 3 (2)**.

⁴³³ **SRMR**, **Article 51(3)** and recital (35), first sentence.

According to **recital (35)**, since the EBA must in accordance with its founding Regulation assess and coordinate initiatives on resolution plans with a view to promoting convergence in that field, as a general rule, the Board should always invite the EBA when matters are discussed for which, in accordance with the BRRD, the EBA must develop regulatory or implementing technical standards or to issue Guidelines. Other observers, such as a representative of the ESM, should, where appropriate, also be invited to attend the meetings of the Board.⁴³⁴

2.2 Tasks

In this session, the Board has a broad range of resolution and managerial tasks and must act in accordance with the general principles laid down in **Article 6** and the resolution objectives laid down in **Article 14**.⁴³⁵ In particular:

(1) Firstly, it must adopt its own **Rules of Procedure** and those of the Executive Session;⁴³⁶ by 30 November each year, the **Annual Work Programme** for the following year, based on a draft by the Chair and then transmitted for information to the European Parliament, the Council, the Commission, and the ECB; the Board's **Annual Report** (referred to in **Article 45**), which must contain detailed explanations on the budget implementation;⁴³⁷ the **Financial Regulations** applicable to the Board in accordance with **Article 64**;⁴³⁸ an anti-fraud strategy, proportionate to fraud risks, under a cost-benefit analysis;⁴³⁹ and rules for the prevention and management of conflicts of interest in respect of its members.⁴⁴⁰ With regard to the last aspect, the Plenary Session adopted on 25 November 2015 a **Code of Conduct (SRB/PS/2015/13)**,⁴⁴¹ which also applies to the members of the Executive Session, and a **Code of Ethics**.⁴⁴²

(2) It must also adopt and monitor the Board's annual budget in accordance with **Article 61(2)**, approve its final accounts and give discharge to the Chair in accordance with **Article 63(4)** and **(8)**.⁴⁴³

(3) With regard to the SRF, the Board in its Plenary Session must undertake the following:

⁴³⁴ *Ibid.*, recital (35), third - fifth sentences.

⁴³⁵ *Ibid.*, Article 50(2), first sub-paragraph. On Article 6, see above in **Chapter 2, Section A, under 3**, and on Article 14 below in **Chapter 5, Section A, under 1**.

⁴³⁶ Both these documents were adopted on 29 April 2015 by Board decisions and entered into force on the same date (**SRB/PS/2015/9** and **SRB/PS/2015/8**, respectively, available at: https://srb.europa.eu/sites/srbsite/files/srb-rules-of-procedure-plenary-session_en.pdf and https://srb.europa.eu/sites/srbsite/files/srb-rules-of-procedure-executive-session_en.pdf).

⁴³⁷ See below in **Section C, under 2.1.1 (1)**.

⁴³⁸ See below in **Section C, under 1.3.5**.

⁴³⁹ See below in **Section E, under 3.8**.

⁴⁴⁰ **SRMR**, Article 50(1), points (k), (a), (g), (h), (i) and (j), respectively.

⁴⁴¹ Available at: https://srb.europa.eu/sites/srbsite/files/code_of_conduct.pdf.

⁴⁴² The text of this code ("Code of Ethics and good administrative behaviour for staff of the Single Resolution Board" (**SRB/PS/2015/12**)), which is also based on Article 47 SRMR, is available at: https://srb.europa.eu/sites/srbsite/files/srb_ps_2015_12.pdf.

⁴⁴³ **SRMR**, Article 50(1), point (b).

Firstly, it must decide on the use of the SRF, if SRF support in a specific resolution action is required above the threshold of five billion euros for which the weighting of liquidity support is 0,5.⁴⁴⁴ In this case, the draft resolution scheme prepared by the Executive Session is deemed to be adopted unless, within three hours from its submission, at least one member of the Plenary Session has called a meeting of that session; in such a case, the decision on the resolution scheme must be taken by the Plenary Session.⁴⁴⁵

Secondly, if SRF support is required exceeding the above-mentioned threshold of five billion euros, it must decide on the necessity to raise extraordinary *ex-post* contributions in accordance with **Article 71**; voluntary borrowing between financing arrangements (see **Article 72**); resort to alternative financing means (see **Articles 73-74**); and the mutualisation of national financing arrangements (see **Article 78**).⁴⁴⁶

Thirdly, once the net accumulated use of the SRF in the last consecutive twelve months reaches the threshold of five billion euros, it must evaluate the application of the resolution tools, in particular the use of the SRF, and provide guidance to the Executive Session (in particular, if appropriate, differentiating between liquidity and other forms of support), which the latter must follow in subsequent resolution decisions.⁴⁴⁷ Guidance should also focus on ensuring the non-discriminatory application of resolution tools, on avoiding a depletion of the SRF and differentiating appropriately between no-risk or low-risk liquidity and other forms of support.⁴⁴⁸

Finally, it must take decisions on the investments in accordance with **Article 75**.⁴⁴⁹

(4) It must exercise, with respect to the staff of the Board, the ‘**appointing authority powers**’ conferred by the Staff Regulations on the Appointing Authority *and* by the Conditions of Employment of Other Servants of the EU, as laid down by **Council Regulation (EEC, Euratom, ECSC) No 259/68** of 29 February 1968⁴⁵⁰ “laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission” (the ‘**Staff Regulations**’).⁴⁵¹ In this respect, it must adopt, in accordance with Article 110 of the Staff Regulations, a decision based on Article 2(1) of the Staff Regulations and on Article 6 of the Conditions of Employment, delegating to the Chair relevant appointing authority powers and establishing the conditions under which the delegation of powers can be suspended. The Chair may be authorised to sub-delegate those powers.⁴⁵²

⁴⁴⁴ *Ibid.*, Article 50(1), point (c). According to recital (33), fifth sentence, where liquidity support involves no or significantly less risk than other forms of support, in particular in the case of a short-term, one-off extension of credit to solvent institutions against adequate collateral of high quality, it is justified to give such a form of support a lower weight of only 0,5.

⁴⁴⁵ *Ibid.*, Article 50(2), second sub-paragraph and recital (33), fourth sentence.

⁴⁴⁶ *Ibid.*, Article 50(1), point (e); on Articles 71-74 and 78 see below in **Chapter 6, Section A, under 4 and 1.4**, respectively.

⁴⁴⁷ *Ibid.*, Article 50(1), point (d) and recital (33), sixth sentence.

⁴⁴⁸ *Ibid.*, recital (33), seventh sentence.

⁴⁴⁹ *Ibid.*, Article 50(1), point (f); on Article 75, see below in **Chapter 6, Section A, under 1.2.2.1**.

⁴⁵⁰ OJ L 56, 4.3.1968, pp. 1-7.

⁴⁵¹ **SRMR**, Article 50(1), point (l).

⁴⁵² *Ibid.*, Article 50(3), first sub-paragraph

In exceptional circumstances, the Board in its Plenary Session may decide to temporarily suspend the delegation of the appointing authority powers to the Chair and any sub-delegation by the latter and either exercise them itself or delegate them to one of its members or to a staff member other than the Chair.⁴⁵³ It must also adopt appropriate implementing rules for giving effect to the Staff Regulations and the Conditions of Employment in accordance with Article 110 of the Staff Regulations.⁴⁵⁴

(5) The other tasks of the Board in its Plenary Session are:⁴⁵⁵

firstly, the appointment of an Accounting Officer, subject to the Staff Regulations and the Conditions of Employment, who must be functionally independent in the performance of his/her duties;

secondly, ensure the adequate follow-up to findings and recommendations arising from the internal or external audit reports and evaluations, as well as from investigations of the European Anti-Fraud Office;⁴⁵⁶

thirdly, taking all decisions on the establishment of the Board's internal structures and, where necessary, their modification; and

finally, the approval of the framework on cooperation within the SRM referred to in **Article 31(1)** in order to organise the practical arrangements for the cooperation between the Board and the NRAs; this framework was established by a Decision of 28 June 2016 (**SRB/PS/2016/07**)⁴⁵⁷ (the "Cooperation Framework Agreement", 'COFRA').

2.3 Meetings

The Chair convenes and chairs the meetings of the Plenary Session (in accordance with **Article 56(2), point (a)**).⁴⁵⁸ The Board in its Plenary Session must hold at least two ordinary meetings annually. In addition, it meets on the initiative of the Chair or at the request of at least one-third (1/3) of its members. If the Commission's representative requests the Chair to convene a meeting of the Plenary Session, the Chair must provide reasons in writing, if he/she decides not to convene a meeting in due time.⁴⁵⁹ The secretariat of the Plenary Session is provided by the Board.⁴⁶⁰

2.4 Decision-making process

In principle, the Board in its Plenary Session takes decisions by a simple majority of its members.⁴⁶¹ By way of derogation, the following rules apply:

⁴⁵³ *Ibid.*, Article 50(3), second sub-paragraph.

⁴⁵⁴ *Ibid.*, Article 50(1), point (m).

⁴⁵⁵ *Ibid.*, Article 50(1), points (n)-(q).

⁴⁵⁶ See below in **Section E, under 3.8**.

⁴⁵⁷ Available at: https://srb.europa.eu/sites/srbsite/files/srb_ps_2016_07.pdf.

⁴⁵⁸ See also below in the present **Section, under 4**.

⁴⁵⁹ **SRMR**, Article 51(1)-(2).

⁴⁶⁰ *Ibid.*, Article 51(4).

⁴⁶¹ *Ibid.*, Article 52(1), first sentence.

Firstly, decisions with regard to the use of the SRF in accordance with **Article 50(1), points (c)-(d)**⁴⁶² are taken by a simple majority of Board members, representing at least 30% of contributions. The same applies to decisions on the mutualisation of national financing arrangements (in accordance with **Article 78**) *limited to the use* of the financial means available in the SRF.⁴⁶³

Secondly, decisions on the raising of *ex-post* contributions, on voluntary borrowing between financing arrangements and on alternative financing means (in accordance with **Articles 71-74**) are taken by a majority of two thirds (2/3) of Board members representing at least 50% of contributions during the eight-year initial period until the SRF is fully mutualised, *and* a majority of two thirds (2/3) of Board members representing at least 30% of contributions from then on.⁴⁶⁴ The same applies to decisions on the mutualisation of national financing arrangements (in accordance with **Article 78**) *exceeding the use* of the financial means available in the SRF.

In all cases, each member has one vote and in the event of a tie the Chair has a casting vote.⁴⁶⁵ The Rules of Procedure establish more detailed voting arrangements, in particular the circumstances in which a member may represent another member, including, where appropriate, rules governing quorums.⁴⁶⁶

3. The Board's Executive Session

3.1 Composition

(1) The Board in its Executive Session is composed of the Chair, the (four) other full-time members and the permanent observers appointed by the Commission and the ECB.⁴⁶⁷ Board members appointed by each participating Member State, representing their NRAs, participate in the Board's Executive Session according to the following:⁴⁶⁸

Firstly, when deliberating on a **designated entity or a group of entities** established only in one participating Member State, the member appointed by that Member State must also participate in the deliberations and in the decision-making process; in this case applicable are the rules laid down in **Article 55(1)**.⁴⁶⁹

Secondly, when deliberating on a **cross-border group**, the member appointed by the Member State in which the group-level resolution authority (GLRA) is situated and the members appointed by the Member States in which a subsidiary or entity covered by consolidated supervision is established must also participate in the decision-making process; in this case applicable are the rules laid down in **Article 55(2)**.⁴⁷⁰

⁴⁶² See just above, **under 2.2**.

⁴⁶³ **SRMR**, Article 52(2), first sentence.

⁴⁶⁴ *Ibid.*, Article 52(3), first sentence.

⁴⁶⁵ *Ibid.*, Article 52(1)-(3), second and third sentences.

⁴⁶⁶ *Ibid.*, Article 52(4); see also **Rules of Procedure**, Article 9.

⁴⁶⁷ *Ibid.*, Article 53(1), first sub-paragraph, first sentence and recital (32), second sentence.

⁴⁶⁸ *Ibid.*, Article 53(2).

⁴⁶⁹ *Ibid.*, Article 53(3) and recital (32), third sentence; on Article 55(1) see below, **under 3.4**.

⁴⁷⁰ *Ibid.*, Article 53(4) and recital (32), fourth sentence; on Article 55(2) see below, also **under 3.4**.

If relevant, the Board in its Executive Session may invite to participate at its meetings, and on an *ad hoc* basis, observers in addition to the permanent ones, including an EBA representative (having regard to the EBA's tasks), and NRAs of non-participating Member States, when deliberating on a group having subsidiaries or significant branches in those.⁴⁷¹

(2) Since the participants in the decision-making process of the Board in its Executive Session would change depending on the Member State where the relevant institution or group operates, the Chair and the other full-time members must ensure that the resolution decisions and actions, in particular with regard to the use of the SRF, across the different formations of the Board's Executive Session are coherent, appropriate and proportionate.⁴⁷²

3.2 Tasks

(1) The Board's tasks in its Executive Session consist in preparing the decisions to be adopted by its Plenary Session and taking the decisions to implement the SRMR to the fullest extent possible, unless otherwise provided therein.⁴⁷³ In exercising these tasks it must undertake the following:

Firstly, at the phase of preparation for resolution, in must, because of the institution-specific nature of the information contained therein, prepare, assess and approve resolution plans for entities and groups referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b) and 7(5)**) in accordance with **Articles 8 and 10-11**.⁴⁷⁴ It must also apply simplified obligations to certain entities and groups (**Article 11**) and determine the MREL that such entities and groups need to meet at all times (**Article 12**).⁴⁷⁵

Secondly, it must provide the Commission, as early as possible, with a resolution scheme in accordance with **Article 18** accompanied by all relevant information, allowing in due time the Commission to assess and decide *or*, where appropriate, propose a decision to the Council in accordance with **Article 18(7)**.⁴⁷⁶

Finally, it must decide upon the Board's part II of the budget on the SRF in accordance with **Article 60**.⁴⁷⁷

(2) In cases of urgency, the Board in this session may take certain provisional decisions on behalf of the Board in its Plenary Session, in particular on administrative management matters, including budgetary ones and must keep the Board in its Plenary Session informed of its decisions on resolution.⁴⁷⁸

⁴⁷¹ **SRMR**, Article 53(1), third sub-paragraph.

⁴⁷² *Ibid.*, Article 53(5) and recital (34). More detailed rules on the Executive Session's composition are laid down in Article 3 of its **Rules of Procedure**.

⁴⁷³ *Ibid.*, Article 54(1) and recital (33), first sentence.

⁴⁷⁴ *Ibid.*, Article 54(2), point (a) and recital (33), second sentence.

⁴⁷⁵ *Ibid.*, Article 54(2), points (b)-(c); on Articles 8 and 10-12, see below in **Chapter 4, Sections B-C**.

⁴⁷⁶ *Ibid.*, Article 54(2), point (d); on Article 18, see below in **Chapter 5, Section C**.

⁴⁷⁷ *Ibid.*, Article 54(2), point (e); on Article 60, see below in **Section C, under 1.3.2 (2)**.

⁴⁷⁸ *Ibid.*, Article 54(3)-(4).

3.3 Meetings

The Board in its Executive Session must meet as often as necessary. Meetings are convened by the Chair on his/her own initiative or at any member's request and are chaired by him/her.⁴⁷⁹

3.4 Decision-making process

With regard to the decision-making process followed by the Board in its Executive Session, when deliberating on an individual entity or a group established only in one participating Member State, the Chair and the other full-time members may take a decision by a simple majority if all members referred to in **Article 53(1)** and **(3)**⁴⁸⁰ are not able to reach a joint agreement by consensus within a deadline set by the Chair.⁴⁸¹ Equally, when deliberating on a cross-border group, if all members referred to in **Article 53(1)** and **(4)**⁴⁸² are not able to reach a joint agreement by consensus within a deadline set by the Chair, the Chair and the other full-time members may take a decision by a simple majority.⁴⁸³ In the event of a tie, the Chair has a casting vote.⁴⁸⁴

4. The Chair

The Board is chaired by a full-time Chair who is responsible for preparing the Board's work, in its Plenary and Executive Sessions, and convening and chairing its meetings; all staff members; matters of day-to-day administration; the establishment of a draft Board's budget and its implementation (in accordance with **Articles 61(1)** and **63**);⁴⁸⁵ the Board's management and the implementation of its annual work programme; and the preparation, each year, of a draft of the Annual Report referred to in **Article 45**.⁴⁸⁶ In the performance of these tasks, the Chair is assisted by a "dedicated staff".⁴⁸⁷ He/she is also assisted by a Vice-Chair, who must carry out the functions of the Chair in his/her absence or reasonable impediment.⁴⁸⁸ As already mentioned,⁴⁸⁹ for the purpose of acting within the scope of the BRRD, the Chair is an observer to the EBA's Board of Supervisors.⁴⁹⁰

⁴⁷⁹ *Ibid.*, Article 53(1), first sub-paragraph, second sentence and second sub-paragraph.

⁴⁸⁰ See above, **under 3.1 (1)**, first case.

⁴⁸¹ **SRMR**, Article 55(1).

⁴⁸² See above, **under 3.1 (1)**, second case.

⁴⁸³ **SRMR**, Article 55(2).

⁴⁸⁴ *Ibid.*, Article 55(3). The decision-making process is also governed by the (more detailed) provisions of Article 8 of the Rules of Procedure.

⁴⁸⁵ See below in **Section C, under 1.3.1 (3) and 1.3.4**.

⁴⁸⁶ See below also in **Section C, under 2.1.1 (1)**.

⁴⁸⁷ **SRMR**, Article 56(1)-(2).

⁴⁸⁸ *Ibid.*, Article 56(3). It is noted that the Vice-Chair is not a Board member in accordance with Article 43 (see above in **Section A, under 3**).

⁴⁸⁹ See above in **Chapter 2, Section A, under 2.3**.

⁴⁹⁰ **SRMR**, Article 95, point (3) adding a new sub-paragraph to Article 40(6) **EBA Regulation**.

5. Appointment and removal of the Chair, the Vice-Chair and the other full-time members of the Board

5.1 Appointment

5.1.1 *The provisions of the SRM Regulation*

(1) Taking into account the Board's tasks, the Chair, the Vice-Chair and the other full-time members are appointed on the basis of merit, skills, knowledge of banking and financial matters, and of experience relevant to financial supervision, regulation as well as bank restructuring, insolvency and resolution. These members must be chosen on the basis of an open selection procedure, which must respect the principles of gender balance, experience and qualification. The European Parliament and the Council must be kept duly informed at every stage of the procedure in a timely manner.⁴⁹¹

(2) The Chair, the Vice-Chair and the other full-time members may not hold office at national, EU, or international level. Their term of office is five years and, in principle, not renewable.⁴⁹² *Exceptionally*, the term of office of the first Chair was three years, renewable once for a period of five years.⁴⁹³ The Chair, the Vice-Chair and the other full-time members will remain in office until their successors are appointed. A Chair whose term of office has been extended may not participate in another selection procedure for the same post at the end of the overall period.⁴⁹⁴

(3) With regard to the appointment procedure, the Commission, after hearing the Board in its Plenary Session, must provide the European Parliament with a shortlist of candidates for the positions of Chair, Vice-Chair and other full-time members and inform accordingly the Council.⁴⁹⁵ It must also submit a proposal for the appointment of these members for approval by the European Parliament. Upon approval of that proposal, the Council, acting by qualified majority, must adopt an Implementing Decision to appoint these members.⁴⁹⁶

5.1.2 *The provisions of the Interinstitutional Agreement between the European Parliament and the Board*

On 16 December 2015 the European Parliament (for the purposes of this Sub-section, the 'EP') and the Board signed an **Interinstitutional Agreement** "on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism"⁴⁹⁷ (the '**EP-SRB Agreement**').

⁴⁹¹ *Ibid.*, Article 56(4), recital (31), third and fourth sentences and recital (39), fourth sentence.

⁴⁹² *Ibid.*, Article 56(5).

⁴⁹³ This has been the case, since the term of the first Chairperson, Miss Elke König, was renewed.

⁴⁹⁴ **SRMR**, Article 56(7)-(8).

⁴⁹⁵ *Ibid.*, Article 56(6), first sub-paragraph and recital (31), fifth sentence. Apparently, for the appointment of the first members of the Board, the Commission provided the candidates' shortlist without hearing the Board (*ibid.*, Article 56(6), second sub-paragraph).

⁴⁹⁶ *Ibid.*, Article 56(6), third sub-paragraph and recital (31), sixth and seventh sentences.

⁴⁹⁷ OJ L 339, 24.12.2015, pp. 58-65.

According to this Agreement, in their respective roles in the selection procedure, the EP and the Board must aim at the highest professional standards and take into account the need to safeguard the EU interests as a whole and diversity in the composition of the Board. In particular:

Information concerning stages of the selection procedure: to the extent that the Board has been involved, it must keep the EP's competent committee duly and in a timely manner informed of all stages of the selection procedure, such as concerning the publication of the vacancy notice, the selection criteria and the specific job profile, the composition of the pool of applicants (number of applications, mix of professional skills, gender and nationality balance), as well as of the method by which the pool of applicants is screened in order to draw up a shortlist of at least two candidates for each of the positions of Chair, Vice-Chair and four further full-time members of the Board. This does not apply if the Board has not been involved.

Consultation of the Board during informal hearings and questions to shortlisted candidates: when the Commission, having heard the Board, provides the EP with a shortlist of candidates in accordance with Article 56(6) SRMR, the EP's competent committee may consult the Board concerning the shortlisted candidates.

Formal hearings of preferred candidates: when the Commission submits to the EP for approval its proposals for the Board members of the Board, the EP's competent committee may, in the context of a public hearing of each of them, consult the Board on the proposed candidates.

Approval: the EP must inform the Board of its decision concerning the approval of each candidate proposed by the Commission, including the outcome of a vote in the EP's competent committee and plenary. Taking into account its calendar, the EP must aim to take that decision within six weeks of the date of receipt of the proposal from the Commission concerning the candidates.⁴⁹⁸

5.2 Removal

In terms of personal independence, the Chair, the Vice-Chair and the other full-time members may be removed from their office *only* if they no longer fulfil the conditions required for the performance of their duties, or have been guilty of serious misconduct.⁴⁹⁹ The removal is effected by a Council Implementing Decision (adopted in this case as well by qualified majority) on a proposal from the Commission and approved by the European Parliament.⁵⁰⁰ For this purpose, the European Parliament or the Council may inform the Commission that it considers the conditions for the removal of any member from office to be fulfilled, to which the Commission must respond.⁵⁰¹ When the European Parliament informs the Commission about its consideration on the fulfilment of the conditions for the removal from office of any Board member, it may also inform the Board of the same.⁵⁰²

⁴⁹⁸ EP-SRB Agreement, Section II (1)-(4).

⁴⁹⁹ Exactly the same conditions apply with regard to the removal of the Chair of the ECB Supervisory Board in the context of the SSM (SSMR, Article 26(4), first sub-paragraph).

⁵⁰⁰ SRMR, Article 56(9), first sub-paragraph.

⁵⁰¹ *Ibid.*, Article 56(9), second sub-paragraph.

⁵⁰² EP-SRB Agreement, Section II (5).

Section C:

Independence and accountability

1. Independence

1.1 General overview

The SRMR contains specific provisions on the independence of the Board and the NRAs. In particular, the Board's and NRAs' institutional independence is governed by **Article 47 SRMR** (see below, under 1.2); the Board's financial independence is stipulated in **Articles 57-65 (under 1.3)**; its operational independence is guaranteed by **Articles 8-16 and 28-41**, which lay down its necessary powers in order to fulfil its objectives; finally, the personal independence of its full-time members (including the Chair) is governed, as already mentioned, by **Article 56**.⁵⁰³

1.2 Institutional independence

Institutional independence is governed by **Article 47 SRMR** and **Article 4 of the Code of Conduct** for the Board members which provide the following:

(1) When performing the tasks conferred on them by the SRMR, the Board and the NRAs must act independently, in the general interest, and in accordance with the general principles laid down in **Article 6** and the resolution objectives laid down in **Article 14**.⁵⁰⁴ It must also have the capacity to deal with large groups and act swiftly and impartially and should ensure that appropriate account is taken of national financial stability, financial stability of the EU and the internal market.⁵⁰⁵

(2) The Chair, the Vice-Chair and the other full-time members must perform their tasks in conformity with the decisions of the Board, the Council and the Commission. They must act independently and objectively in the interest of the EU as a whole and neither seek nor take instructions from EU institutions or bodies, any Member State's government or any other public or private body. In the deliberations and decision-making processes within the Board they must express their own views and vote independently.⁵⁰⁶ *Vice versa*, neither the Member States and the EU institutions or bodies nor any other public or private body may seek to influence them.⁵⁰⁷ Overall, Board members and other participants in Board sessions must carry out the tasks conferred upon them free from any interference (in particular from industry) that would affect their independence.⁵⁰⁸

⁵⁰³ See above in **Section B, under 5.1.1**.

⁵⁰⁴ **SRMR**, Article 47(1) and recital (39), first sentence, as well as **Code of Conduct**, Article 4(1). On Article 6 SRMR, see above in **Chapter 2, Section A, under 3** and on Article 14 see below in **Chapter 5, Section A, under 1**.

⁵⁰⁵ **SRMR**, recital (39), second and third sentences.

⁵⁰⁶ **SRMR**, Article 47(2) and **Code of Conduct**, Article 4(2).

⁵⁰⁷ **SRMR**, Article 47(3) and **Code of Conduct**, Article 4(3).

⁵⁰⁸ **Code of Conduct**, Article 4(4). Article 8 governs in detail the related issue of 'cooling-off periods'.

(3) Board members must abstain from any other professional activities and resign from any other position that could hinder their independence (or present them with the possibility of using privileged information).⁵⁰⁹

(4) In accordance with the above-mentioned **Staff Regulations**,⁵¹⁰ after leaving service, the Chair, the Vice-Chair and the other full-time members continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.⁵¹¹

1.3 Financial independence

1.3.1 Resources – general provisions on and establishment of the Board’s budget

(1) The Board is responsible for devoting the necessary financial and human resources to the performance of the tasks conferred on it by the SRMR.⁵¹² In the light of the Board’s missions and the resolution objectives laid down in **Article 14**, which include, *inter alia*, the protection of public funds, the SRM’s functioning should be financed from contributions paid by the designated entities established in the participating Member States. The funding of the Board’s budget or its resolution activities may under no circumstances engage the budgetary liability of the Member States.⁵¹³

(2) On the basis of the above, the Board has an autonomous budget, which is not part of the EU budget, must be balanced in terms of revenue and expenditure and comprises two parts: **Part I** for the Board’s administration and **Part II** for the SRF.⁵¹⁴

(3) By 15 February each year, the Chair must draw up a draft budget, including a statement of estimates of the revenue and expenditure for the following year together with the establishment plan, and submit it to the Board for adoption. By 31 March, the Board in its Plenary Session must then, if necessary, adjust the Chair’s draft and adopt the final budget and the establishment plan.⁵¹⁵

1.3.2 Parts I and II of the budget

(1) The *revenues of Part I* consist of the annual contributions necessary to cover the annual estimated administrative expenditure; its *expenditure* covers staff, remuneration, administrative, infrastructure, professional training and operational expenses.⁵¹⁶ This is without prejudice to NRAs’ right to levy fees in order to cover their administrative expenditures, including expenditures for cooperating with and assisting the Board.⁵¹⁷

⁵⁰⁹ *Ibid.*, Article 4(5); see also Article 56(5), second sub-paragraph SRMR (referred to above in **Section B, under 5.1.1 (2)**).

⁵¹⁰ See above in **Section B, under 2.2 (4)**.

⁵¹¹ **SRMR**, Article 47(4).

⁵¹² *Ibid.*, Article 57(1).

⁵¹³ *Ibid.*, Article 57(2) and recital (41); see also Article 6(6) relating to the general principles (presented above in **Chapter 2, Section A, under 3**).

⁵¹⁴ *Ibid.*, Article 58 and recital (97).

⁵¹⁵ *Ibid.*, Article 61(1) and (2), respectively. The **2019 budget** is available at: https://srb.europa.eu/sites/srbsite/files/plenary_session-annex_iii-budget_2019-style_guide_number_update.pdf.

⁵¹⁶ *Ibid.*, Article 59(1) and (2), respectively.

⁵¹⁷ *Ibid.*, Article 59(3) and recital (98).

(2) On the other hand, the *revenues of Part II* consist of the following:

firstly, contributions paid by institutions established in the participating Member States in accordance with **Articles 67(4) and 69-71**,

secondly, loans received either from other resolution financing arrangements in non-participating Member States or from financial institutions or other third parties in accordance with **Articles 72(1) and 73-74**, respectively,

thirdly, returns on the investments of the amounts held in the SRF in accordance with **Article 75**, and

finally, any part of the expenses incurred for the purposes indicated in **Article 76** which is recovered in the resolution proceedings.

Its *expenditure* consists of the expenses for the purposes indicated in **Article 76**, investments in accordance with **Article 75**, as well as interest paid on loans received either from other resolution financing arrangements in non-participating Member States or from financial institutions or other third parties (in accordance with **Articles 72(1) and 73-74**, respectively).⁵¹⁸

1.3.3 Internal audit and control

The internal audit function set up within the Board must be performed in compliance with the relevant international standards, adopted by the International Federation of Accountants (the ‘**IFAC**’).⁵¹⁹ The internal auditor, appointed by the Board, is responsible for verifying the proper operation of the budget implementation systems and the budgetary procedures and must advise the Board on dealing with risks by issuing independent opinions on the quality of management and control systems and recommendations for improving the conditions of operations’ implementation and promoting sound financial management. Internal control systems and procedures suitable for performing the internal auditor’s tasks must be put in place by the Board.⁵²⁰

1.3.4 Implementation of the budget, presentation of accounts and discharge

The implementation of the budget, the presentation of accounts and the discharge of the Chair in respect of the budget implementation are governed by the following rules:

(1) The Chair acts as **authorising officer** and is responsible for the implementation of the Board’s budget.⁵²¹

(2) The Board’s **Accounting Officer** must send, by 1 March of the following financial year, the Board’s **provisional accounts**, accompanied by the Report on budgetary and financial management during the financial year, to the Court of Auditors for observations and, by 31 March of that financial year, submit this Report to the Board members, the European Parliament, the Council and the Commission. By the same date, the Chair must also transmit to the European Parliament, the Council and the Commission the provisional accounts for the preceding financial year.

⁵¹⁸ *Ibid.*, Article 60(1) and (2), respectively; see also below in **Chapter 6, Section A, under 1.3**.

⁵¹⁹ On this international financial forum, and its embedment in the fora adopting international financial standards on capital market regulation, see **Gortsov (2019b)**, p. 99.

⁵²⁰ **SRMR**, Article 62.

⁵²¹ *Ibid.*, Article 63(1).

Upon receipt of the Court of Auditors' observations on these accounts, the Chair, acting in his/her responsibility, must draw up the Board's final accounts and send them to the Board in its Plenary Session for approval.⁵²²

(3) Following the approval by the Board, the Chair must, by 1 July each year, send the **final accounts** for the preceding financial year to the European Parliament, the Council, the Commission, and the Court of Auditors. If observations are received from the Court of Auditors, the Chair must reply by 30 September. These final accounts are published in the *Official Journal* by 15 November each year.⁵²³ The Chair must also submit to the European Parliament or to the Council, at their request, any information referred to in the Board's accounts, subject to the SRMR's professional secrecy requirements.⁵²⁴

(4) The Board, in its Plenary Session, is competent to give discharge to the Chair in respect of the budget implementation.⁵²⁵

1.3.5 Adoption of Financial Regulations

The Board must, after consulting the Court of Auditors and the Commission, adopt internal financial provisions in the form of '**SRB Financial Regulations**' specifying the detailed procedure for establishing and implementing the Board's budget in accordance with (the just above-mentioned) **Articles 61 and 63**. These Regulations must be based, to the extent compatible with the Board's particular nature, on the framework Financial Regulation adopted (for bodies set up under the TFEU) in accordance with **Article 70 of Regulation (EU, Euratom) 2018/1046** of the European Parliament and of the Council of 18 July 2018 "on the financial rules applicable to the general budget of the Union (...)"⁵²⁶ (also referred to as the '**General Financial Regulation**'), which repealed, with effect from 3 August 2018, **Regulation (EU, Euratom) No 966/2012**⁵²⁷ of the same institutions.⁵²⁸ The first Financial Regulation, on the management of Part I of the Board's budget, was adopted on 25 March 2015.⁵²⁹

1.3.6 Contributions to the administrative expenditures of the Board

(1) The designated entities must contribute to Part I of the Board's budget in accordance with the SRMR and the Commission's delegated acts adopted on the basis of **Article 65(5)**.⁵³⁰ The amounts of these contributions must be fixed at a level ensuring that revenue in respect thereof is in principle sufficient for the balancing of Part I of the Board's budget each year.

⁵²² *Ibid.*, Article 63(2)-(4); on the Court of Auditors, see below in **Section E, under 1.2**.

⁵²³ *Ibid.*, Article 63(5)-(7).

⁵²⁴ *Ibid.*, Article 63(9).

⁵²⁵ *Ibid.*, Article 63(8).

⁵²⁶ OJ L 193, 30.7.2018, pp. 1-222

⁵²⁷ OJ L 298, 26.10.2012, pp. 1-96.

⁵²⁸ **SRMR**, Article 64.

⁵²⁹ The consolidated version of this Regulation (of March 2016) is available at: https://srb.europa.eu/sites/srbsite/files/srb_financial_regulation_2015_consolidated_version_march_2016.pdf.

⁵³⁰ See just below **under (2)**.

The Board must determine and raise, in accordance with the delegated acts provided for in **Article 65(5)**, the contributions due by each designated entity in a decision addressed to it, and apply any rules ensuring that they are paid fully in a timely manner. The amounts raised according to the above-mentioned can be used only for the purposes of the SRMR.⁵³¹

(2) On the basis of **Article 65(5)**, the Commission adopted its **Delegated Regulation (EU) 2017/2361** of 14 September 2017 “on the final system of contributions to the administrative expenditures of the (...) Board”.⁵³² This delegated act determines the type of these contributions and the matters for which they are due, the manner in which their amount is calculated and the way in which they are to be paid. It also specifies registration, accounting, reporting and other rules necessary to ensure that these contributions are fully paid in a timely manner.

2. Accountability

2.1 Accountability *vis-à-vis* EU institutions

2.1.1 *The provisions of the SRM Regulation*

For reasons of transparency and democratic control and in order to safeguard the rights of the EU, the Board is accountable to the European Parliament, the Council and the Commission for the implementation of the SRMR.⁵³³ This accountability requirement is governed by the following rules:⁵³⁴

(1) The Board must submit an **Annual Report** to the European Parliament, the national parliaments of participating Member States (in accordance with **Article 46**⁵³⁵) the Council, the Commission and the Court of Auditors on the performance of its tasks under the SRMR. Subject to the requirements of professional secrecy imposed on the Board,⁵³⁶ that report must be published on its website.⁵³⁷ The Chair must present that report in public to the European Parliament and to the Council.⁵³⁸

(2) In addition, the Board must reply orally or in writing to questions addressed to it by the European Parliament or by the Council, in accordance with its own procedures and in any event within five weeks of receipt of a question. It must also cooperate with the European Parliament during investigations, subject to **Article 226 TFEU**⁵³⁹ and the Regulations referred to therein (last sub-paragraph).⁵⁴⁰

⁵³¹ SRMR, Article 65(1)-(4).

⁵³² OJ L 337, 19.12.2017, pp. 6-14.

⁵³³ SRMR, Article 45(1) and recital (42), third sentence.

⁵³⁴ *Ibid.*, with reference to Article 45(2)-(8).

⁵³⁵ On this Article, see just below **under 2.2**.

⁵³⁶ On these requirements, see below in **Section E, under 3.4**.

⁵³⁷ The (last available) **2017 Annual Report** is available at: https://srb.europa.eu/sites/srbsite/files/srb_annual_report_2017_en_0.pdf.

⁵³⁸ SRMR, Article 45(2)-(3).

⁵³⁹ On this TFEU Article, see **Schoo (2012a)**.

⁵⁴⁰ SRMR, Article 45(6) and (8), first sentence.

(3) At the request of the European Parliament, the Chair must, at least on an annual basis, participate in a hearing by the former's competent committee (ECON) on the performance of the Board's resolution tasks. He/she may also be heard by the Council, at its request, on the performance of the Board's resolution tasks. In addition, upon request, the Chair must hold confidential oral discussions with the Chair and the Vice-Chairs of the European Parliament's competent committee, if such discussions are required for the exercise of its powers under the TFEU.⁵⁴¹

2.1.2 The provisions of the EP-SRB Agreement

2.1.2.1 Reports

The Board must submit to the European Parliament (for the purposes of this Sub-section, the 'EP') every year an Annual Report on the execution of the tasks conferred on it by the SRMR, which the Board's Chair must present to the EP at a public hearing. The Annual Report must be made available on a confidential basis to the EP seven working days in advance of the public hearing and of its official publication by the Board on its website in one of the EU official languages.

It must include a detailed explanation of the following nine aspects: execution of the tasks conferred on the Board by the SRMR; sharing of tasks with NRAs; cooperation with other national or EU relevant authorities, with any public financial assistance facility as provided for in **Article 30(6) SRMR** and with third countries, including recognition and assessment of third-country resolution proceedings;⁵⁴² evolution of the Board's structure and staffing, including the number and the national composition of seconded national experts; implementation of the Code of Conduct referred to in **Section IV** of the Agreement;⁵⁴³ amounts of administrative contributions raised in accordance with **Article 65 SRMR**;⁵⁴⁴ implementation of the budget for resolution tasks; and application of the SRMR provisions on the SRF.⁵⁴⁵

2.1.2.2 Ordinary public hearings, ad hoc exchanges of views and special confidential meetings

(1) At the request of the EP's competent committee, the Board's Chair must participate in *ordinary public hearings* on the execution of the resolution tasks conferred on the Board by the SRMR, including a discussion on the SRF. Two such hearings must be held on an annual basis. The Chair of the Board may also be invited to additional *ad hoc exchanges of views* with the EP's competent committee on issues within the Board's responsibility. Applicable to the Board is the principle of openness of EU institutions, bodies, offices and agencies as enshrined in **Article 15(1) TFEU**.⁵⁴⁶

⁵⁴¹ *Ibid.*, Article 45(4)-(5) and (7).

⁵⁴² See above in **Chapter 2, Section A, under 5.2**.

⁵⁴³ See below, **under 2.1.2.6**.

⁵⁴⁴ See just above, **under 1.3.6**.

⁵⁴⁵ **EP-SRB Agreement**, Section I (1).

⁵⁴⁶ On this TFEU Article, see **Biervert (2012)**, pp. 201-202.

(2) Discussions in *special confidential meetings* involve the exchange of confidential information regarding the execution of resolution tasks. With a few exceptions, only the Chair of the Board and the Chair and the Vice-Chairs of the EP's competent committee may attend such meetings. All participants therein are subject to confidentiality requirements equivalent to those applying to the members of the Board and to its staff. No minutes must be taken, nor any other recording made, of the special confidential meetings, and no statement must be made for the press or any other media.

(3) Ordinary public hearings, *ad hoc* exchanges of views and special confidential meetings may cover all aspects of the activity and functioning of the SRM. Persons employed by the EP or by the Board may not disclose to any unauthorised person or to the public information relating to the tasks conferred on the Board by the SRMR and acquired in the course of the application of the EP-SRB Agreement, even after their employment has ended or they have left such employment, unless that information has already been made public or is accessible to the public.⁵⁴⁷

2.1.2.3 Responding to questions

The Board must reply in writing to written questions put to it by the EP at the latest within five weeks of their transmission. Both the Board and the EP must dedicate a specific section of their websites for these questions and answers.⁵⁴⁸

2.1.2.4 Access to information

(1) At the latest within six weeks from the date of an Executive or Plenary Session of the Board, the Board must provide the EP's competent committee with a comprehensive and meaningful record of the proceedings of that session, including an annotated list of decisions, enabling an understanding of the discussions.

(2) In the event of the resolution of an entity, non-confidential information relating to it must be disclosed *ex-post*, once any restrictions on the provision of relevant information resulting from confidentiality requirements have ceased to apply. Such information must include a suitably consolidated balance sheet valued according to the principles set out in the SRMR at the moment the decision to resolve the entity was taken, clearly showing the net asset value of the entity and the value of the classes of assets and liabilities.

In addition, depending on the resolution tools applied, the Board must publish the total amount of losses borne by the different classes of creditors where bail-in was applied, the amount and sources of funding used in the resolution process, and the proceeds of any sales of business units or assets. If **Article 19 SRMR** on State aid and SRF aid applies, non-confidential information relating to the exchanges between the Commission and the Board, as well as the Annual Reports referred to in **Article 19(6)** must be disclosed *ex-post* by the Board to the EP's competent committee. The Board must also publish on its website general guidelines regarding its resolution practices.⁵⁴⁹

⁵⁴⁷ **EP-SRB Agreement**, Section I (2).

⁵⁴⁸ *Ibid.*, Section I (3).

⁵⁴⁹ Article 19 SRMR is analysed below in **Chapter 5, Section E**.

(3) The EP must apply appropriate safeguards and measures corresponding to the level of classification of Board information or Board documents and inform the Board thereof. On the other hand, the Board must inform the EP of the measures taken and the acts adopted in order to apply the security principles contained in the Commission security rules referred to in **Article 91 SRMR**,⁵⁵⁰ including information on the procedures for classifying information and the treatment of classified information.

(4) The Board must inform the EP of the practical implementation of its internal security rules, including classification carried out during the year of the usual types of information handled by the Board and the treatment of classified information (as well as of any modification to the adopted internal security rules, in order to ensure that equivalence of basic principles and minimum standards for protecting classified information is maintained). When classifying information for which it is the originator, the Board must ensure the application of appropriate classification levels in line with its internal security rules, and taking due account of the EP's need to be able to access classified documents for the effective exercise of its competences and prerogatives.

(5) In accordance with **Regulation (EC) No 1049/2001** of the European Parliament and of the Council of 30 May 2001 “regarding public access to European Parliament, Council and Commission documents”,⁵⁵¹ the EP must consult the Board for the assessment of any request addressed to it to access a Board document submitted to it.

(6) The EP and the Board must keep each other informed on the initiation and outcome of any judicial, administrative or other proceedings in which access to Board documents submitted to the EP is sought. The Board may request that the EP maintains a list of persons having access to classified Board information and Board documents disclosed.⁵⁵²

2.1.2.5 Investigations

When the EP sets up a Committee of Inquiry (pursuant to **Article 226 TFEU** and to **Decision 95/167/EC, Euratom, ECSC** of the European Parliament, the Council and the Commission of 19 April 1995 “on the detailed provisions governing the exercise of the European Parliament’s right of inquiry”⁵⁵³), the Board must assist such Committee of Inquiry in carrying out its tasks in accordance with the principle of sincere cooperation. It must “cooperate sincerely” with any investigation by the EP referred to in **Article 45(8) SRMR** within the same framework that applies to committees of inquiry and under the same confidentiality protection as foreseen in the EP-SRB Agreement for the special confidential meetings. All recipients of information provided to the EP in the context of investigations are subject to confidentiality requirements equivalent to those applying to the members of the Board. The EP and the Board must agree on the measures to be applied to ensure the protection of such information.

⁵⁵⁰ On Article 91 SRMR, see below in **Section E, under 3.7**.

⁵⁵¹ OJ L 145, 31.5.2001, pp. 43-48. This legal act is based on **Article 15 TFEU**, according to which citizens and residents of EU countries have a right of access to documents of the European Parliament, the Council and the Commission.

⁵⁵² **EP-SRB Agreement**, Section I (4).

⁵⁵³ OJ L 113, 19.5.1995, pp. 1-4.

The EP must have regard to the public or private interests governing the right of access to EP, Council and Commission documents recognised in the just above-mentioned **Regulation (EC) No 1049/2001**, which are involved in information and documents submitted by the Board in the context of a Committee of Inquiry.⁵⁵⁴

2.1.2.6 Code of Conduct

(1) Before the adoption of the Code of Conduct by its Plenary Session, the Board should inform the EP's competent committee of its main elements. Upon written request of the committee, the Board must inform the EP in writing of the Code of Conduct's implementation. The Board must also inform the EP about the need for any updates.

(2) As already mentioned,⁵⁵⁵ the Code of Conduct was adopted by the Plenary Session on 25 November 2015 (**SRB/PS/2015/13**). According to the EP-SRB Agreement, it has been published on the Board's site and addresses the following:

firstly, in accordance with **Article 47 SRMR**,⁵⁵⁶ the independence of Board members from any EU institution or body, from any government of a Member State and from any other public or private body, as well as their objectivity;

secondly, the performance of tasks by the Board in accordance with principles of public accountability for its actions and full transparency, without prejudice to the safeguards of the adequate confidentiality of the Board's information and documents must be addressed as well; and

thirdly, the operational independence and the avoidance of conflicts of interest between the functions of the NRAs in accordance with **Article 3(3) BRRD**.⁵⁵⁷

2.1.2.7 Adoption of acts by the Board

The Board must duly inform the EP's competent committee of the procedures it has set up for the adoption of its acts, i.e. decisions, guidelines, general and other instructions, recommendations and warnings. In particular, it must inform the committee of the principles and types of indicators or information generally used in developing its acts and policy recommendations, with a view to enhancing transparency and policy consistency. In addition, when conducting a public consultation on draft acts, the Board must submit those draft acts to the EP's competent committee before launching the public consultation procedure. It must also send its adopted acts to the committee and regularly inform the EP in writing about any need to update them.⁵⁵⁸

⁵⁵⁴ **EP-SRB Agreement**, Section III.

⁵⁵⁵ See above in **Section B, under 2.2 (1)**.

⁵⁵⁶ On Article 47 SRMR, see above, **under 1.2**.

⁵⁵⁷ **EP-SRB Agreement**, Section IV.

⁵⁵⁸ *Ibid.*, Section V.

2.2 Accountability *vis-à-vis* national parliaments

2.2.1 Accountability of the Board

For reasons of transparency and democratic control, the national parliaments of the participating Member State or the competent committee thereof have been granted certain rights to obtain information about the activities of, and to engage in a dialogue with, the Board. In particular:

Firstly, by means of their own procedures, they may request the Board to reply (and the Board is obliged to reply in writing) to any observations or questions in respect of the Board's functions.

Secondly, they may invite the Chair (and the Chair is obliged to accept) to participate in an exchange of views in relation to the resolution of designated entities in that Member State together with a representative of the NRA. Such a role for national parliaments is appropriate given the potential impact that resolution actions may have on public finances, institutions, their customers and employees, as well as the markets in the participating Member States.

Finally, the Annual Report must be submitted by the Board directly to these national parliaments and the latter may address to it their reasoned observations thereon. The Board must reply orally or in writing to any observations or questions addressed to it by the national parliaments, in accordance with its own procedures.⁵⁵⁹

2.2.2 Accountability of national resolution authorities (NRAs)

The above-mentioned provisions of SRMR are without prejudice to the accountability of NRAs to their national parliaments, in accordance with national law, for the performance of the tasks not conferred on the Board, the Council or the Commission and the activities carried out by them in accordance with **Article 7(3) SRMR**.⁵⁶⁰

⁵⁵⁹ SRMR, Article 46(1)-(3), recital (42), fourth sentence and recital (43).

⁵⁶⁰ *Ibid.*, Article 46(4). On Article 7(3), see above in **Chapter 2, Section A, under 4.2**.

Section D:

Investigatory powers and power to impose fines and periodic penalty payments

1. Investigatory powers

1.1 General overview

For the purpose of performing its tasks under the SRMR, the Board was given investigatory powers. The regime governing these powers is, *mutatis mutandis*, similar to that of the ECB under **Articles 10-13 SSMR**⁵⁶¹ and covers the following: the powers to request information (see below, **under 1.2**), the conduct of investigations (**under 1.3**) and the conduct of on-site inspections, including the necessary authorisation by a judiciary authority (**under 1.4 and 1.5**, respectively).⁵⁶²

1.2 Requests for information

(1) The Board may, either through the NRAs or directly, after informing them, making full use of all of the information available to the ECB or to the NCAs, require the entities referred to in **Article 2 SRMR**, their employees and/or third parties to whom these entities have outsourced functions or activities to provide all information necessary to perform its tasks. These entities and persons have a duty to supply the information requested, since this is not deemed to infringe the professional secrecy requirements.⁵⁶³ The information obtained directly by the Board must be made available to the NRAs concerned.⁵⁶⁴ The Board is allowed to obtain, on an *ad hoc* or on a continuous basis, any information necessary for the exercise of its functions, in particular on capital, liquidity, assets and liabilities concerning any institution subject to its resolution powers.⁵⁶⁵

(2) On the basis of **Article 34(5) SRMR**, the Board should conclude a MoU with the ECB on a procedure concerning the exchange of information in order to ensure the smooth functioning of the SRM. Certain provisions of the above-mentioned⁵⁶⁶ **SRB-ECB MoU** of 22 December 2015 “in respect of cooperation and information exchange” govern the provision of information for resolution related activities; the exchange of information related to the establishment, suspension and termination of a close cooperation between the ECB and the NCAs of Member States with a derogation; the permissible use of information and the confidentiality regime; data protection; and the exchange of general information relating to their respective fields of competence, *inter alia* in the context of training, conferences and workshops (‘knowledge exchange’).⁵⁶⁷

⁵⁶¹ On this aspect, see **Gortsos (2015a)**, pp. 204-212.

⁵⁶² On the general considerations with regard to the Board’s investigation powers, see recital (93) **SRMR**.

⁵⁶³ *Ibid.*, Article 34(1)-(2) and recital (94).

⁵⁶⁴ *Ibid.*, Article 34(3).

⁵⁶⁵ *Ibid.*, Article 34(4).

⁵⁶⁶ See above in **Chapter 2, Section A, under 5.2 (2)**.

⁵⁶⁷ **SRB-ECB MoU**, paragraphs 7.2, 9, 12, 13 and 14, respectively.

(3) NCAs, the ECB (if relevant) and NRAs must cooperate with the Board in order to verify whether the information requested is already available (wholly or partly) and, in a positive case, provide it to the Board.⁵⁶⁸

1.3 General investigations

(1) Subject to any other conditions laid down in relevant EU law, the Board may, either through the NRAs or directly after informing them, conduct all necessary investigations of any legal or natural person referred to in (the just above-mentioned) **Article 34(1) SRMR** established or located in a participating Member State. To that end, it may require the submission of documents; examine those persons' books and records and take copies or extracts from such books and records; obtain written or oral explanations from those person, their representatives or their staff; and interview any other natural or legal person consenting to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.⁵⁶⁹

(2) The above-mentioned natural or legal persons are subject to investigations launched on the basis of a Board's decision. If a person obstructs the investigation's conduct, the NRAs of the participating Member State where the relevant premises are located must afford, in accordance with national law, the necessary assistance including facilitating the access by the Board to the business premises of these persons in order to facilitate the exercise of those rights.⁵⁷⁰

1.4 On-site inspections – authorisation by a judicial authority

(1) Subject to other conditions laid down in relevant EU law, the Board may, in accordance with **Article 37 SRMR**⁵⁷¹ and subject to prior notification to the NRAs and the relevant NCAs concerned, and, if appropriate, in cooperation with them, conduct all necessary on-site inspections at the business premises of the natural or legal persons referred to in **Article 34(1)**. *Exceptionally*, if so required for an inspection's proper conduct and efficiency, it may carry it out without prior announcement to those legal persons.⁵⁷²

Persons authorised by the Board to conduct an on-site inspection may enter any business premises and land of the legal persons, subject to an investigation decision adopted by the Board pursuant to **Article 35(2)** and have all of the powers referred to in **Article 35(1)**.⁵⁷³ The legal persons are subject to on-site inspections on the basis of a Board's decision.⁵⁷⁴

⁵⁶⁸ **SRMR**, Article 34(6).

⁵⁶⁹ *Ibid.*, Articles 35(1).

⁵⁷⁰ *Ibid.*, Article 35(2).

⁵⁷¹ On this Article, see just below, **under (3)**.

⁵⁷² **SRMR**, Article 36(1).

⁵⁷³ *Ibid.*, Article 36(2); on Article 35, see just above, **under 1.3**.

⁵⁷⁴ *Ibid.*, Article 36(3).

(2) Officials of, and other accompanying persons authorised or appointed by, the NRAs of the Member States where the inspection is to be conducted must, under the Board's supervision and coordination, actively assist the persons authorised by the Board, enjoying the same above-mentioned powers and have the right to participate in the on-site inspections as well.⁵⁷⁵ In addition, if the persons authorised by the Board find that a person opposes an inspection, the NRAs of the participating Member States concerned must afford them the necessary assistance in accordance with national law, including, to the extent necessary, the sealing of any business premises and books or records. If that power is not available to the NRAs concerned, the Board must exercise its powers to request the necessary assistance of other national authorities.⁵⁷⁶

(3) If an on-site inspection provided for in **Article 36(1)-(2)** or the assistance provided for in **Article 36(5)** requires authorisation by a judicial authority in accordance with national rules, such authorisation must be applied for.⁵⁷⁷ In such a case, the national judicial authority must control that the Board's decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive, taking into account the inspection's subject matter. On the other hand, the lawfulness of the Board's decision is subject to review only by the ECJ.

In its control of the proportionality of the coercive measures, the national judicial authority may ask the Board for detailed explanations, in particular relating to the grounds it has for suspecting that an infringement of the decisions referred to in **Article 29** has taken place,⁵⁷⁸ the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, it is not allowed to review the necessity for the inspection or demand to be provided with the information on the Board's file.⁵⁷⁹

2. Power to impose fines and periodic penalty payments

2.1 Fines

(1) The Board must take a decision imposing a fine if it finds that a designated entity has intentionally or negligently committed any of the following three infringements: does not supply the information requested (in accordance with **Article 34**); does not submit to a general investigation or an on-site inspection (**Articles 35-36**, respectively); *or* does not comply with a decision addressed to it by the Board (**Article 29**). An infringement is considered to have been committed '**intentionally**' if objective factors are demonstrating that the entity, its management body or its senior management acted deliberately to commit it.⁵⁸⁰ In cases not covered by the above, the Board may recommend to NRAs to take action in order to ensure that appropriate penalties are imposed in accordance with **Articles 110-114 BRRD** and with any relevant national legislation.⁵⁸¹

⁵⁷⁵ *Ibid.*, Article 36(4).

⁵⁷⁶ *Ibid.*, Article 36(5).

⁵⁷⁷ *Ibid.*, Article 37(1).

⁵⁷⁸ On Article 29, see below in **Chapter 5, Section C, under 3.1**.

⁵⁷⁹ **SRMR**, Article 37(2).

⁵⁸⁰ *Ibid.*, Article 38(1)-(2) and recital (95).

⁵⁸¹ *Ibid.*, Article 38(8).

(2) The basic amount of the fines must be a percentage of the total annual net turnover of the entity in the preceding business year (including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with **Article 316 CRR**). The following limitations apply in this case: for the two first above-mentioned infringements, the basic amount must range between 0,05% and 0,15%; for the third infringement it must range between 0,25% and 0,5%.⁵⁸²

(3) These basic amounts are adjusted, if necessary, by the Board by taking into account the ‘**aggravating or mitigating factors**’ referred to in **Article 38(5)-(6) SRMR**, in accordance with the ‘**adjustment coefficients**’ referred to in **Article 38(9)**.⁵⁸³ In this respect, the following should be noted:

firstly, the relevant ‘**mitigating coefficient**’ must be applied *one by one* to the basic amount; if more than one mitigating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual mitigating coefficient must be subtracted from the basic amount;

secondly, the relevant ‘**aggravating coefficient**’ must also be applied *one by one* to the basic amount; in this case, if more than one aggravating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual aggravating coefficient must be added to the basic amount.⁵⁸⁴

(4) In any case, the fines applied may not exceed 1% of the annual turnover of the entity concerned in the preceding business year. By way of derogation, if the entity has directly or indirectly benefited financially from that infringement and the profits gained or the losses avoided accordingly are determinable, the fine must be at least equal to that financial benefit.⁵⁸⁵

BOX 2

Aggravating and mitigating factors – adjustment coefficients

A. Aggravating factors (Article 38(5), points (a)-(f), respectively)

- (1) the infringement has been committed intentionally;
- (2) it has been committed repeatedly;
- (3) it has been committed over a period exceeding three months;
- (4) it has revealed systemic weaknesses in the organisation of the entity, in particular in its procedures, management systems or internal controls;

⁵⁸² *Ibid.*, Article 38(3), first sub-paragraph. In Member States with a derogation this basic amount must be the corresponding value in the national currency on **19 August 2014**. Details are laid down in the second sub-paragraph.

⁵⁸³ *Ibid.*, Article 38(4), first sub-paragraph. This is consistent with the consideration in recital (95), first sentence, according to which the fines imposed should be ‘proportionate and dissuasive’.

⁵⁸⁴ *Ibid.*, Article 38(4), second and third sub-paragraphs.

⁵⁸⁵ *Ibid.*, Article 38(7), first and second sub-paragraphs. If an act or omission constitutes more than one infringement, applicable is only the higher fine (*ibid.*, Article 38(7), third sub-paragraph).

- (5) no remedial action has been taken since the infringement was identified;
- (6) the entity's senior management has not cooperated with the Board in carrying out its investigations.

B. Adjustment coefficients linked to aggravating factors (Article 38(9), first subparagraph, points (a)-(f), respectively)

- (1) the infringement has been committed repeatedly: for every time it has been repeated, applicable an additional coefficient of 1,1;
- (2) the infringement has been committed over a period exceeding three months: applicable a coefficient of 1,5;
- (3) the infringement has revealed systemic weaknesses in the entity's organisation, *inter alia* in its procedures, management systems or internal controls: applicable a coefficient of 2,2;
- (4) the infringement has been committed intentionally: applicable a coefficient of 2;
- (5) no remedial action has been taken since the infringement was identified: applicable a coefficient of 1,7;
- (6) the entity's senior management has not cooperated with the Board in carrying out its investigations: applicable a coefficient of 1,5.

C. Mitigating factors (Article 38(6), points (a)-(d), respectively)

- (1) the infringement has been committed over a period of less than ten working days;
- (2) the entity's senior management can demonstrate that they have taken all measures necessary to prevent the infringement;
- (3) the entity has brought quickly, effectively and completely the infringement to the Board's attention;
- (4) the entity has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future.

D. Adjustment coefficients linked to mitigating factors (Article 38(9), second subparagraph, points (a)-(d), respectively)

- (1) the infringement has been committed over a period of less than ten working days: applicable a coefficient of 0,9;
- (2) the entity's senior management can demonstrate that all measures necessary to prevent the infringement have been taken: applicable a coefficient of 0,7;
- (3) the entity has brought quickly, effectively and completely the infringement to the Board's attention: applicable a coefficient of 0,4;
- (4) the entity has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future: applicable a coefficient of 0,6.

2.2 Periodic penalty payments

The Board must, by a decision, impose a periodic penalty payment on a designated entity in order to compel it to comply with a decision adopted pursuant to **Article 34**, or on a person not meeting its obligations to supply complete information required *or* to submit to an investigation or an on-site inspection under (the above-mentioned) **Articles 34-36** governing the Board's investigatory powers.⁵⁸⁶ Such a payment must meet the following requirements: be effective and proportionate; be 0.1% of the average daily turnover in the preceding business year; be imposed on a daily basis until the designated entity or person concerned complies with the relevant Board decision (and in any case for a period not longer than six months following its notification); and be calculated from the date stipulated in the decision imposing it.⁵⁸⁷

2.3 Right to be heard and right of defence

On the basis of the 'principle of due process', the following rules have been adopted:

Firstly, before taking any decision imposing a fine and/or periodic penalty payment under (the just above-mentioned) **Articles 38** or **39**, respectively, the Board must grant the natural or legal persons subject to the proceedings the right to be heard on its findings. Such a Board's decision must be based only on findings on which the natural or legal persons concerned have had the opportunity to comment.⁵⁸⁸

Secondly, the right of defence of the persons concerned must be fully complied with during the proceedings as well. These persons are entitled to have access to the Board's file, with the exception of confidential information or internal preparatory Board documents and subject to the legitimate interest of other persons in the protection of their business secrets.⁵⁸⁹

2.4 Disclosure – nature and enforcement – allocation

(1) Board decisions imposing fines and periodic penalty payments under **Articles 38(1)** and **39(1)** must be disclosed, unless such disclosure could endanger the resolution of the entity concerned. Under the following circumstances, the publication must be on an anonymous basis: the information published contains personal data and following an obligatory prior assessment, publication of such data is considered disproportionate; publication would jeopardise either the stability of financial markets or an ongoing criminal investigation; or publication would cause, insofar as it can be determined, disproportionate damage to the natural or legal persons involved. Alternatively, in such cases, publication of the data in question may be postponed for a reasonable period if it is foreseeable that the reasons for anonymous publication will cease to exist within that period. The Board must inform the EBA of all fines and periodic penalty payments imposed and provide information on the appeal status and outcome thereof.⁵⁹⁰

⁵⁸⁶ *Ibid.*, Article 39(1) and recital (95).

⁵⁸⁷ *Ibid.*, Article 39(2)-(4).

⁵⁸⁸ *Ibid.*, Article 40(1).

⁵⁸⁹ *Ibid.*, Article 40(2).

⁵⁹⁰ *Ibid.*, Article 41(1).

(2) Fines and periodic penalty payments imposed in accordance with **Articles 38-39** are of an administrative nature,⁵⁹¹ they are also enforceable, enforcement being governed by the applicable procedural rules in force in the participating Member State where it is carried out. The order for the decision's enforcement must be appended to it only by verification of its authenticity by the authority designated for that purpose by the government of each participating Member State, which must be made known to the Board and the ECJ. Upon completion of these formalities, the party concerned may proceed to enforcement in accordance with national law, by bringing the matter directly before the competent body. Enforcement may be suspended only by an ECJ decision, even though the courts of the participating Member State concerned have jurisdiction over complaints on irregularities in the enforcement's implementation.⁵⁹²

(3) The amounts of the fines and periodic penalty payments are allocated to the SRF.⁵⁹³

⁵⁹¹ *Ibid.*, Article 41(2).

⁵⁹² *Ibid.*, Article 41(3).

⁵⁹³ *Ibid.*, Article 41(4).

Section E:

Institutional safeguards – liability – other aspects

1. Institutional safeguards

1.1 The Appeal Panel

1.1.1 Composition and task

(1) On **18 December 2015**, the Board established the Appeal Panel for the purposes of deciding on appeals submitted.⁵⁹⁴ The Appeal Panel, which adopted and made public its Rules of Procedure in 2016,⁵⁹⁵ must have sufficient resources (financial independence) and expertise to provide expert legal advice on the legality of the Board’s exercise of powers.⁵⁹⁶

(2) The Appeal Panel is composed of five individuals of high repute from the Member States (including the non-participating ones) and with a proven record of relevant knowledge and professional experience, including resolution experience, to a sufficiently high level in the fields of banking or other financial services. Excluded are the current Board staff, and current staff of resolution authorities or other national or EU institutions, bodies, offices and agencies involved in performing the tasks conferred on the Board. These members, and two alternates, are appointed by the Board for a term of five years, extendable once, following a public call for expressions of interest published in the *Official Journal*.⁵⁹⁷

(3) The members are not bound by any instructions⁵⁹⁸ and must act independently (despite the fact that the Appeal Panel’s Secretariat is supported by the Board) and in the **public interest**. For that purpose, they must make a public declaration of commitments and a public declaration of interests indicating any direct or indirect interest, which might be considered to be prejudicial to their independence or the absence of any such interest.⁵⁹⁹

1.1.2 The appeals procedure

(1) Any natural or legal person, including NRAs, may appeal against specific Board’s decisions, if those are either addressed or are of direct and individual concern to it. The decisions against which an appeal can be submitted are confined to those which:⁶⁰⁰

⁵⁹⁴ SRMR, Article 85(1).

⁵⁹⁵ *Ibid.*, Article 85(10); the Appeal Panel’s Rules of Procedure are available at: https://srb.europa.eu/sites/srbsite/files/2016rules_of_procedure_of_srb_appealpanel.pdf.

⁵⁹⁶ *Ibid.*, Article 85(2), second sentence.

⁵⁹⁷ *Ibid.*, Article 85(2), first and third sentences.

⁵⁹⁸ *Ibid.*, Article 85(2), fourth sentence

⁵⁹⁹ *Ibid.*, Article 85(5).

⁶⁰⁰ *Ibid.*, Article 85(3), first sub-paragraph.

firstly (in relation to resolution planning), address or remove impediments to resolvability in accordance with **Article 10(10)**; apply simplified obligations in relation to the drafting of resolution plans or waive the obligation to draft such plans in accordance with **Article 11**; and determine the minimum requirement for own funds and eligible liabilities (MREL) in accordance with **Article 12(1)**,⁶⁰¹

secondly, impose fines and periodic penalty payments in accordance with **Articles 38-41**,⁶⁰²

thirdly, raise contributions to the Board's administrative expenditures in accordance with **Article 65(3)** or raise extraordinary *ex-post* contributions in accordance with **Article 71**,⁶⁰³ and

finally, grant or deny access to documents under the 'public access to documents framework' in accordance with **Article 90(3)**.⁶⁰⁴

(2) The appeal, accompanied by a statement of grounds, must be filed in writing at the Appeal Panel within six weeks of the date of notification of the decision to the person concerned, or in the absence of a notification, of the day on which the decision came to its knowledge.⁶⁰⁵ In principle, an appeal does not have suspensive effect; nevertheless, the Appeal Panel may suspend the application of the contested decision, if it considers that circumstances so require.⁶⁰⁶

(3) If the appeal is admissible, the Appeal Panel must examine whether it is well founded and invite the parties to the appeal proceedings to file observations and make oral representations; it may confirm the Board's decision or remit the case to the latter. Its decision upon the appeal must be taken within one month after its lodging on the basis of a majority of at least three of its (five) members; they must be reasoned and notified to the parties. The Board is bound by the Appeal Panel's decision and must adopt an amended decision regarding the case concerned.⁶⁰⁷

1.2 Court of Auditors

(1) The Board is subject to the audit of the Court of Auditors (governed by **Articles 285-287 TFEU**).⁶⁰⁸ The latter must produce a Report for each 12-month period, starting on **1 April each year**, examining whether sufficient regard was given to economy, efficiency and effectiveness in the use of the SRF (with a view to minimise that use) and whether the assessment of SRF aid was efficient and rigorous.

⁶⁰¹ On all these aspects, see below in **Chapter 4, Sections A-C**.

⁶⁰² See above in **Section D, under 2**.

⁶⁰³ See below in **Chapter 6, Section A, under 4.2.1**.

⁶⁰⁴ See below, **under 3.6**.

⁶⁰⁵ **SRMR**, Article 85(3), second sub-paragraph.

⁶⁰⁶ *Ibid.*, Article 85(6).

⁶⁰⁷ *Ibid.*, Article 85(4) and (7)-(9). An inventory of the cases dealt with by the Appeal Panel is available at: <https://srb.europa.eu/en/content/cases>; for a yearly overview of the Panel's activities, see at: <https://srb.europa.eu/en/content/yearly-overview-panels-activities>.

⁶⁰⁸ On the Court of Auditors and these TFEU Articles, see **Lienbacher (2012b)**, **Craig and de Búrca (2015)**, pp. 67-68 and **Kennedy (2018)**.

The Report must be produced within six months of the end of the period to which it relates.⁶⁰⁹ In addition, following consideration of the final accounts prepared by the Board in accordance with **Article 63 SRMR**,⁶¹⁰ the Court of Auditors must prepare a Report on its findings by **1 December** following each financial year. In particular, it must report on any contingent liabilities arising as a result of the performance of the tasks conferred on the Board, the Council, or the Commission.⁶¹¹ Both these Reports must be sent to the Board, the European Parliament, the Council and the Commission and be made public without delay.⁶¹² The Court of Auditors has the power to obtain from the Board, the Council and the Commission any information relevant for performing its above tasks and those must provide the Court of Auditors with any relevant information requested.⁶¹³

(2) It is also noted that the European Parliament and the Council may request the Court of Auditors to examine any other relevant matters falling within their competence as set out in **Article 287(4) TFEU**.⁶¹⁴

1.3 Actions before the Court of Justice

(1) Judicial proceedings before the ECJ against Board decisions can be based either on **Article 263** or **Article 265 TFEU**.⁶¹⁵ In particular:

Firstly, the ECJ has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission in accordance with **Article 263 TFEU** (on the review of the legality of acts adopted by EU institutions, bodies, offices and agencies and on actions for their annulment).⁶¹⁶ Accordingly, proceeding may be brought before the ECJ in accordance with this TFEU Article contesting a decision taken either by the Appeal Panel or by the Board if there is no right of appeal to the Appeal Panel (e.g. a decision concerning resolution action in respect of a credit institution or another designated entity). Such proceedings may be instituted by Member States, EU institutions, as well as any natural or legal person if the Board's or the Appeal Panel's decision is either addressed or is of direct and individual concern to them.⁶¹⁷

⁶⁰⁹ **SRMR**, Article 92(1)-(3). Within two months of the date on which each such Report is made public, the Commission must provide a detailed written response (also to be made public) (*ibid.*, Article 92(7), first sub-paragraph).

⁶¹⁰ See above in **Section C, under 1.3.4**.

⁶¹¹ **SRMR**, Article 92(4). Within two months of the date on which such a Report is made public, the Board, the Council and the Commission must each provide a detailed written response to be made public (*ibid.*, Article 92(7), second sub-paragraph).

⁶¹² *Ibid.*, Article 92(6).

⁶¹³ *Ibid.*, Article 92(8).

⁶¹⁴ *Ibid.*, Article 92(5).

⁶¹⁵ On Article 263 TFEU, see by way of mere indication **Craig and de Búrca (2015)**, pp. 509-533, and **Schwarze (2012b)**; on Article 265 TFEU, see **Craig and de Búrca (2015)**, pp. 537-539, and **Schwarze (2012c)**. On the judicial review of resolution actions, see **Haentjens (2016a)** and **(2017b)**.

⁶¹⁶ **SRMR**, recital (120), second sentence.

⁶¹⁷ *Ibid.*, Article 86(1)-(2).

Secondly, if the Board fails to take a decision despite its obligation to act, proceedings for failure to act may also be brought before the ECJ in accordance with **Article 265 TFEU** (on actions for failure to act).⁶¹⁸

In both cases, the Board is required to take the necessary measures in order to comply with the ECJ's judgment.⁶¹⁹ It is also noted that, since the ECJ has, in accordance with **Article 267 TFEU**,⁶²⁰ competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of EU institutions, bodies or agencies, these authorities are competent, in accordance with their national law, to review the legality of decisions adopted by NRAs of the participating Member States in the exercise of the powers conferred on them by the SRMR.⁶²¹

(2) As of **April 2019**, judicial proceedings against the Board concerned decisions on *ex-ante* contributions to the SRF, the Board's June 2017 decision on the resolution of Banco Popular Español, and its February 2018 decisions regarding the winding up of ABLV Bank, AS and its subsidiary ABLV Bank Luxembourg, SA.⁶²²

2. Liability

2.1 Contractual liability – personal liability of the staff

The Board's contractual liability is governed by the law applicable to the contract in question. The ECJ has jurisdiction to give judgement according to any arbitration clause contained in such a contract.⁶²³

On the other hand, the personal liability of the Board's staff towards the agency is governed by the provisions laid down in the Staff Regulations or the Conditions of Employment applicable to them.⁶²⁴

2.2 Non-contractual liability

In relation to the Board's non-contractual liability, the SRMR distinguishes between two cases:

Firstly, the Board must, in accordance with the general principles governing the liability of Member States' public authorities, restore any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions including acts and omissions in support of foreign resolution proceedings.⁶²⁵

⁶¹⁸ *Ibid.*, Article 86(3);

⁶¹⁹ *Ibid.*, Article 86(4).

⁶²⁰ On Article 267 TFEU, see **Craig and de Búrca (2015)**, pp. 537-539, and **Schwarze (2012c)**.

⁶²¹ **SRMR**, recital (120), third and fourth sentences.

⁶²² On these cases, see below in **Chapter 5, Section C, under 5**. For a regularly updated inventory of actions against Board's Decisions, see the website of the European Banking Institute (EBI) at: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence>, under Section 3.

⁶²³ **SRMR**, Article 87(1)-(2).

⁶²⁴ *Ibid.*, Article 87(6).

⁶²⁵ *Ibid.*, Article 87(3) and recital (120), second sentence.

It is noteworthy that, unlike the SSMR⁶²⁶ which makes explicit reference to **Article 340 TFEU** in relation to the non-contractual liability of the ECB as a supervisory authority,⁶²⁷ the SRMR is silent on this aspect, even though it can reasonably be argued that the SRB is subject to the same liability regime.

In addition, the Board must compensate an NRA for the damages which it has been ordered to pay by a national court, or which it has undertaken (in agreement with the Board) to pay under an amicable settlement, resulting from an act or omission committed by that NRA in the course of any resolution of entities and groups referred to in **Article 7(2)** (and, if relevant, in **Articles 7(4), point (b)** and **7(5)**).

This obligation does not apply if the act or omission constituted an infringement (which was committed intentionally or with manifest and serious error of judgement) of the SRMR, another provision of EU law or a Board's, Council's or Commission's decision.⁶²⁸ The ECJ has jurisdiction in any dispute relating to both these cases.⁶²⁹

In accordance with **Article 267 TFEU**, the ECJ is also competent to give preliminary rulings, when national judicial authorities exercise their own competence, in accordance with their national law, to determine the non-contractual liability of NRAs of the participating Member States in the exercise of the powers conferred on them by the SRMR.⁶³⁰

3. Other aspects

3.1 Privileges and immunities

Applicable to the Board and its staff is **Protocol (No 7)** "on the Privileges and Immunities of the European Union"⁶³¹ attached to the Treaties.⁶³² On that basis and *inter alia*, the following applies in this respect:⁶³³

Firstly, its premises and buildings are inviolable and exempt from search, requisition, confiscation or expropriation, while its property and assets may not be the subject of any administrative or legal measure of constraint without the ECJ's authorisation. Its archives are also inviolable.

⁶²⁶ SSMR, recital (61).

⁶²⁷ This TFEU Article reads as follows: "*In accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation.*"; see indicatively **Berg (2012)**, in particular p. 2536, and in more detail **D' Ambrosio (2015)**.

⁶²⁸ SRMR, Article 87(4).

⁶²⁹ *Ibid.*, Article 87(5), first sentence. Proceedings in matters arising from such a liability must be barred after a period of five years from the occurrence of the event giving rise thereto (*ibid.*, Article 87(5), second sentence).

⁶³⁰ *Ibid.*, recital (120), third and fourth sentences.

⁶³¹ Consolidated version, OJ C 202, 7.6.2016, pp. 266-272.

⁶³² SRMR, Article 80.

⁶³³ **Protocol (No 7)**, Articles 1-4.

Secondly, its assets, revenues and other property are exempt from all direct taxes, with the exception of taxes and dues amounting merely to charges for public utility services. It is also exempt from all customs duties, prohibitions and restrictions on imports and exports in respect of articles intended for its official use, as well as from any customs duties and any prohibitions and restrictions on import and exports in respect of its publications.

3.2 Language arrangements

Council Regulation No 1 “determining the languages to be used by the European Economic Community”⁶³⁴ is also applicable to the Board, which decides on the internal language arrangements and may also decide on the use of the official languages when sending documents to EU institutions or bodies. It may also agree with each NRA on the language or languages in which the documents to be sent to or by the NRAs must be drafted.⁶³⁵

3.3 Staff and staff exchange – internal resolution teams and internal committees

3.3.1 Staff and staff exchange

(1) Applicable to the Board’s staff are the Staff Regulations, the Conditions of Employment and the rules adopted jointly by the EU institutions for the purpose of applying them. By way of derogation, the Chair, the Vice-Chair and the other full-time members are respectively on a par with a Vice-President, Judge and Registrar of the ECJ regarding emoluments and pensionable age, as defined in **Council Regulation (EC) No 422/67/EEC, 5/67/Euratom**,⁶³⁶ and not subject to a maximum retirement age. For aspects not covered by the SRMR or by that Council Regulation, applicable by analogy are the Staff Regulations and the Conditions of Employment. The Board, in agreement with the Commission, must adopt the necessary implementing measures, in accordance with the arrangements laid down in **Article 110 of the Staff Regulations**.

In respect of its staff, the Board must exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment.⁶³⁷

(2) The Board may make use of seconded national experts or other staff not employed by it. In its Plenary Session it must adopt ‘appropriate decisions’ laying down rules on the exchange and secondment of staff from and among the NRAs to the Board.⁶³⁸

⁶³⁴ OJ 17, 6.10.1958, p. 385.

⁶³⁵ **SRMR**, Article 81(1)-(4). The translation services required for the functioning of the Board must be provided by the Translation Centre of the EU bodies (*ibid.*, Article 81(5)).

⁶³⁶ OJ L 187, 8.8.1967, pp. 1-5.

⁶³⁷ **SRMR**, Article 82.

⁶³⁸ *Ibid.*, Article 83(1)-(2).

3.3.2 Internal resolution teams and internal committees

(1) If appropriate, the Board may establish ‘internal resolution teams’ (the ‘IRTs’) composed of its own staff and staff of the NRAs, as well as observers from non-participating Member States’ resolution authorities. In such a case, it must appoint coordinators of those teams from its own staff, which may be invited, in accordance with **Article 51(3) SRMR**,⁶³⁹ as observers to attend the meetings of its Executive Session. The members appointed by the respective Member States participate in accordance with **Article 53(3)-(4)**.⁶⁴⁰

(2) The Board may also establish ‘internal committees’ to provide it with advice and guidance on the discharge of its functions under the SRMR.⁶⁴¹

3.4 Professional secrecy and exchange of information

(1) Board Members, the Board’s staff and staff exchanged with or seconded by participating Member States carrying out resolution duties are subject to the requirements of professional secrecy in accordance with **Article 339 TFEU**⁶⁴² and the relevant provisions in EU legislation, even after their duties have ceased. In particular, they are prohibited from disclosing to any person or authority confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with their functions under the SRMR. *Exceptionally*, they may disclose such information if it is in the exercise of their functions under the SRMR or in summary or collective form, such that designated entities cannot be identified, or with the express and prior consent of the authority or the entity which provided the information.

Information subject to these requirements may also not be disclosed to another public or private entity, unless due for the purpose of legal proceedings, as well as to potential purchasers contacted in order to prepare for the resolution of an entity according to **Article 13(3) SRMR** on early intervention.⁶⁴³ Observers are subject to the same requirements of professional secrecy as the members and the staff of the Board and staff exchanged with or seconded by participating Member States carrying out resolution duties.⁶⁴⁴

(2) The Board must ensure that individuals providing any service, directly or indirectly, permanently or occasionally, relating to the discharge of its duties (including officials and other persons authorised or appointed to conduct on-site inspections) are subject to the requirements of professional secrecy equivalent to those referred to above.

⁶³⁹ See above in **Section B, under 2.1**.

⁶⁴⁰ **SRMR**, Article 83(3)-(4). On the establishment, scope of activities and composition of IRTs, as well as on IRTs coordinators and sub-coordinators, see Articles 24-26 of the Decision of the Plenary Session adopting its Rules of Procedure (**SRB/PS/2015/9**); on Article 53(3)-(4), see above in **Section B, under 3.1 (1)**.

⁶⁴¹ *Ibid.*, Article 84.

⁶⁴² This TFEU Article provides that the members of the EU institutions, the members of committees, and the officials and other servants of the EU are required, even after their duties have ceased, *not to disclose information of the kind covered by the obligation of professional secrecy*, in particular information about undertakings, their business relations or their cost components. See on this **Hatje (2012b)**.

⁶⁴³ **SRMR**, Article 88(1); on Article 13(3), see below in **Chapter 4, Section D, under 2.1**.

⁶⁴⁴ *Ibid.*, recital (36).

These requirements also apply to observers attending the Board's meetings or from non-participating Member States participating in IRTs. The Board must also take the necessary measures in order to ensure the safe handling and processing of confidential information.⁶⁴⁵

(3) Before any information is disclosed, the Board must ensure that it is not confidential, in particular, by assessing the effects that the disclosure could have on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits. The relevant procedure must include a specific assessment of the effects of any disclosure of the contents and details of resolution plans as referred to in **Articles 8-9 SRMR**, the result of any resolvability assessment under **Article 10**, or the resolution scheme referred to in **Article 18** (on the resolution procedure).⁶⁴⁶

(4) The above provisions do not prevent the Board, the Council, the Commission, the ECB, the NRAs or the NCAs, including their employees and experts, from sharing information with each other and with the following public entities, authorities, schemes and persons: competent ministries, central banks, deposit guarantee schemes and investor compensation schemes, (usually, judicial) authorities responsible for normal insolvency proceedings, resolution and competent authorities from non-participating Member States, the EBA, third-country authorities carrying out functions equivalent to those of a resolution authority (subject to **Article 33**)⁶⁴⁷ or a potential purchaser for the purposes of planning or carrying out a resolution action (subject to strict confidentiality requirements).⁶⁴⁸

3.5 Data protection

According to **Article 89**, the SRMR is without prejudice to the following two aspects relating to data protection:

(1) The first refers to the obligations of Member States relating to their processing of personal data, which is governed by **Regulation (EU) 2016/679** of the same institutions of 27 April 2016 “on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (...) (General Data Protection Regulation)”⁶⁴⁹ (the ‘**GDPR**’).⁶⁵⁰

(2) The second aspect refers to the obligations of the Board, the Council and the Commission relating to their processing of personal data when fulfilling their responsibilities. Relevant in this case is **Regulation 2018/1725** of the European Parliament and of the Council of 23 October 2018 “on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing **Regulation (EC) No 45/2001**”⁶⁵¹ and Decision No 1247/2002/EC⁶⁵²,⁶⁵³.

⁶⁴⁵ *Ibid.*, Article 88(2)-(4).

⁶⁴⁶ *Ibid.*, Article 88(5); on Articles 8-10, see below in **Chapter 4, Section B** and on Article 18, in **Chapter 5, Section C**.

⁶⁴⁷ On Article 33, see above in **Chapter 2, Section A, under 5.5**.

⁶⁴⁸ **SRMR**, Article 88(6).

⁶⁴⁹ OJ L 119, 4.5.2016, pp. 1-88.

⁶⁵⁰ **SRMR**, Article 94(1).

⁶⁵¹ OJ L 8, 12.1.2001, pp. 1-22.

Inter alia, this Regulation applies to the processing of personal data carried out in the process of procurement.⁶⁵⁴

3.6 Access to documents

(1) For reasons of transparency, applicable to the documents held by the Board is the above-mentioned⁶⁵⁵ **Regulation (EC) No 1049/2001** regarding public access to European Parliament, Council and Commission documents.⁶⁵⁶ The practical measures for applying that Regulation are laid down in the **Decision of the Executive Session of the Board** of 9 February 2017 “on public access to the Single Resolution Board documents” (**SRB/ES/2017/ 01**)⁶⁵⁷ (the so-called ‘**Public Access Decision**’, adopted on the basis of **Article 90(2) SRMR**). On the basis of the Decision, the Board provides public access to an online register of documents (the ‘**Public Register of Documents**’).⁶⁵⁸ As of **April 2019**, the Register contained ten categories of documents: on the annual accounts; the Annual Report; the budget; the Board’s Financial Regulation; resolution cases; the Board’s work programme; the Rules of Procedure; the Code of Conduct and the Code of Ethics; the Declarations of the Appeal Panel members; and vacancies

The right of access is not confined to the documents listed in this register; subsequently, when direct access is not given through this, any interested person can apply for access to a document, in any written form, in any of the EU official languages. Access can be refused in relation to documents which, if disclosed, could harm public or private interests protected under the list of exceptions set out in **Article 4 of Regulation (EC) No 1049/2001** and the Public Access Decision.

(2) Board decisions under **Article 8** of that Regulation may be the subject either of a complaint to the European Ombudsman under the conditions laid down in **Article 228 TFEU**⁶⁵⁹ or of proceedings before the ECJ, following an appeal to the Appeal Panel, in accordance with **Article 263 TFEU**.⁶⁶⁰ According to the principle of due process, persons subject to Board’s decisions are entitled to have access to its file, with the exception of confidential information or internal preparatory Board documents and subject to the legitimate interest of other persons in the protection of their business secrets.⁶⁶¹

⁶⁵² **Decision No 1247/2002/EC** of the European Parliament, of the Council and of the Commission of 1 July 2002 “on the regulations and general conditions governing the performance of the European Data-protection Supervisor’s duties” (OJ L 183, 12.7.2002, pp. 1-2).

⁶⁵³ OJ L 295, 21.11.2018, pp. 39-98.

⁶⁵⁴ In this respect, on 22 February 2019, the Board made available a data protection notice for processing of personal data related to procurement, available at: <https://srb.europa.eu/en/advanced-search?title=data+protection>.

⁶⁵⁵ See above in **Section C, under 2.1.2.4 (5)**.

⁶⁵⁶ **SRMR**, Article 90(1).

⁶⁵⁷ Available at: https://srb.europa.eu/sites/srbsite/files/srb-es-2017-01_decision_public_access_to_the_srb_documents.pdf.

⁶⁵⁸ Available at: <https://srb.europa.eu/en/public-register-of-documents>.

⁶⁵⁹ On this TFEU Article, see **Schoo (2012b)**.

⁶⁶⁰ **SRMR**, Article 90(3).

⁶⁶¹ *Ibid.*, Article 90(4).

3.7 Protection of classified and sensitive non-classified information

The Board must apply the security principles contained in the Commission's security rules for protecting EU Classified Information and sensitive non-classified information, as set out in the Annex to **Commission Decision 2001/844/EC, ECSC, Euratom** of 29 November 2001 "amending its internal Rules of Procedure".⁶⁶² This includes applying provisions for the exchange, processing and storage of such information.⁶⁶³

3.8 Anti-fraud measures

(1) For the purposes of combating fraud, corruption and other unlawful activities in accordance with **Regulation (EU, Euratom) No 883/2013** of the European Parliament and of the Council of 11 September 2013 "concerning investigations conducted by the European Anti-Fraud Office (OLAF) (...)",⁶⁶⁴ the Board must accede to the Interinstitutional Agreement of 25 May 1999 concerning internal investigations by the OLAF and adopt provisions applicable to all its staff.⁶⁶⁵ The OLAF may carry out investigations with a view to establishing whether there has been any illegal activity affecting the financial interests of the EU in connection with a contract funded by the Board in accordance with **Council Regulation (Euratom, EC) No 2185/96** of 11 November 1996 "concerning on-the-spot checks and inspections carried out by the Commission to protect the European Communities' financial interests against fraud and other irregularities"⁶⁶⁶ and **Regulation (EU, Euratom) No 883/2013**.⁶⁶⁷

(2) In addition, the Court of Auditors has the power of audit, on the basis of documents and *ad hoc*, over the beneficiaries, contractors and sub-contractors having received funds from the Board.⁶⁶⁸

⁶⁶² OJ L 317, 3.12.2001, pp. 1-55.

⁶⁶³ SRMR, Article 91.

⁶⁶⁴ OJ L 248, 18.9.2013, pp. 1-22. The OLAF was established by virtue of **Commission Decision 1999/352/EC, ECSC, Euratom** of 28 April 1999 (OJ L 136, 31.5.1999, pp. 20-22).

⁶⁶⁵ SRMR, Article 66(1). As of April 2019, information on these two Board actions was not publicly available. It is nevertheless expected that they must be undertaken, since the obligation was due in June 2015.

⁶⁶⁶ OJ L 292, 15.11.1996, pp. 2-5.

⁶⁶⁷ SRMR, Article 66(3).

⁶⁶⁸ *Ibid.*, Article 66(2).

Chapter 4

Resolution planning and early intervention

Section A:

General overview and relationship with the BRRD

1. The structure of the system of rules under the BRRD and the SRM Regulation

1.1 Recovery and resolution planning

(1) Since recovery planning⁶⁶⁹ is considered to be a supervisory function and is, hence, entrusted to supervisory authorities, the SRMR is not dealing with this aspect. Within the BU, it is the ECB which is called upon to carry out supervisory tasks in relation to recovery plans.⁶⁷⁰

(2) Resolution planning (also called ‘living wills’⁶⁷¹), along with recovery planning, constitutes a main element in the preparation phase for resolution. Under the **BRRD (Articles 10-14)**, resolution plans are drawn up and adopted by NRAs, while recovery plans are drawn up by institutions and adopted by the competent authorities (i.e. the ECB or the NCAs, **Articles 5-9 BRRD**).⁶⁷² ‘National competent authority’ (NCA) means a public authority or body officially recognised by national law, which is empowered to supervise institutions as part of the supervisory system of the Member State concerned.⁶⁷³ The term ‘competent authority’ is defined with reference to **Article 4(2), point (i) EBA Regulation**. This Article, as in force after its amendment by **Article 95, point (1) SRMR**, states that, with regard to the BRRD and the SRMR, this term also covers the NRAs of participating Member States, the Board, as well as, in principle, the Council and the Commission when taking actions under **Article 18 SRMR** (on the resolution procedure).⁶⁷⁴

The powers of the Board and the NRAs under **Articles 8-9 SRMR** to draw up and adopt resolution plans are presented below in **Section B, under 1 and 2**, respectively.

(3) The assessment of resolvability is the first step in the resolution-planning process. Under the BRRD, it is governed by **Articles 15-18**⁶⁷⁵ and under the SRMR by **Article 10** (the provisions of the latter are presented in **Section B, under 3** below).

⁶⁶⁹ The term ‘recovery plan’ is defined in the BRRD (Article 2(1), point (32)) as meaning a recovery plan drawn up and maintained by an institution in accordance with Article 5.

⁶⁷⁰ **SSMR**, Article 4(1), point (i).

⁶⁷¹ See on this **Avgouleas, Goodhart and Schoenmaker (2009)**, **Carmassi and Herring (2013)**, as well as **Amorello and Huber (2014)**.

⁶⁷² On both recovery and resolution planning under the BRRD, see **Binder (2015b)**, Section II, **Haentjens (2017a)**, pp. 197-206, **Merc (2017a)** and **Van Heukelen (2017)**.

⁶⁷³ **SRMR**, Article 3(1), point (1) with reference to **Article 2, point (2) SSMR**, which makes further reference to **Article 4(1), point (40) CRR**.

⁶⁷⁴ *Ibid.*, Article 3(1), point (2).

⁶⁷⁵ On these Articles, see **Haentjens (2017a)**, pp. 206-210 and **Merc 2017(b)**.

In this respect, **recital (47) SRMR** makes the following general considerations: “Due to the potentially systemic nature of all institutions, it is crucial that the Board, where appropriate in cooperation with the [NRAs], is able to adopt resolution plans, assess the resolvability of any institution and group and, where necessary, take measures to address or remove impediments to the resolvability of any institution in the participating Member States. The failure of systemically important institutions, including those referred to in Article 131 [CRD IV], could pose a considerable risk to the functioning of the financial markets and could have a negative impact on financial stability. The Board should take due care, as a matter of priority, to establish the resolution plans of those systemically important institutions, as well as to assess their resolvability and to take all action necessary to address or remove all of the impediments to their resolvability, without prejudice to its independence and to its obligation to plan for the resolution and assess the resolvability of all of the institutions subject to its powers.”

It is noted that, as already mentioned,⁶⁷⁶ Articles 8-10 SRMR apply since **1 January 2015**.

1.2 The minimum requirement for own funds and eligible liabilities (MREL)

(1) The application of the minimum requirement for own funds and eligible liabilities (MREL), a specific aspect of resolution planning, is governed by **Article 45 BRRD** and by **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.”⁶⁷⁷ This requirement was introduced in order to ensure that if resolution authorities decide to apply the bail-in instrument in the course of an entity’s resolution there would be sufficient liabilities to absorb losses (**‘bail-inable instruments’**) and to avoid entities structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool.⁶⁷⁸

(2) The rules governing the MREL under the SRMR are laid down in **Article 12** (presented in **Section C** below). This Article also applies since **1 January 2015**.

1.3 Early intervention

(1) Finally, under the BRRD, early intervention is governed by **Articles 27-30** which empower the NCAs to apply the so-called ‘early intervention measures’ (enumerated indicatively in **Article 27(1)**).⁶⁷⁹ In accordance with **Article 2(1), point (101)**, the application of an early intervention measure is considered to be a **‘crisis prevention measure’**.⁶⁸⁰

⁶⁷⁶ See above in **Chapter 2, Section A, under 6.1.2**.

⁶⁷⁷ OJ L 237, 3.9.2016, pp. 1-9.

⁶⁷⁸ **SRMR**, recital (83). For a comprehensive overview of the MREL, see **Maragopoulos (2016)**. See also **Padro and Santillana (2014)**, **Mišković and Országhová (2015)**, **Szczepańska (2015)**, **Merc (2017c)**, **Lamandini (2017)**, as well as **Tröger (2017a)** and mainly **(2017b)**.

⁶⁷⁹ On the theoretical basis for early intervention and on early intervention under EU law before the adoption of the BRRD, see **Krimminger and Lastra (2011)**, pp. 58-61 and 62-66, respectively. See also **Svoronos (2018)**. On Articles 27-30 BRRD, see **Haentjens (2017a)**, pp. 214-218, **Freudenthaler (2017b)**, as well as **Ventoruzzo and Sandrelli (2019)**, Section III, under B. On current international proposals with regard to this aspect, see **Basel Committee on Banking Supervision (2018)**.

⁶⁸⁰ See also above in **Chapter 1, Section B, under 2.2.1 (2)**.

(2) Within the BU, it is the ECB which is called upon to carry out supervisory tasks in relation to early intervention; the role of the Board in relation to early intervention under the SRMR is presented in **Section D** below.

2. Resolution colleges – European resolution colleges

(1) Under the BRRD, with regard to the drawing up of group resolution plans, assessing the resolvability for groups and addressing or removing impediments to resolvability for groups, according to the above-mentioned, GLRAs must establish resolution colleges. These colleges must also ensure cooperation and coordination with third-country resolution authorities. In particular, they must provide a framework for the group-level resolution authority, the other resolution authorities and, where appropriate, competent authorities and consolidating supervisors concerned to perform specifically designated tasks.⁶⁸¹ Their operational organisation is governed by **Articles 50-60 of Commission Delegated Regulation (EU) 2016/1075**.⁶⁸² In addition, the BRRD provides for the establishment of European resolution colleges (the ‘ERCs’) for the cases that a third country institution or third country parent undertaking has ‘Union subsidiaries’ established in two or more Member States, or two or more ‘Union branches’ that are regarded as significant by two or more Member States.⁶⁸³ ERCs are composed by the resolution authorities of Member States where those Union subsidiaries are established or those Union branches are located and their objective is to perform the functions and carry out the tasks specified for resolution colleges with respect to the subsidiary institutions and, in so far as those tasks are relevant, to branches.⁶⁸⁴

(2) The SRMR does not contain any specific provision on these colleges. **Recital (91)** simply states that since the Board replaces the NRAs of the participating Member States in their resolution decisions, it should also replace those authorities for the purposes of the cooperation with non-participating Member States, including in the resolution colleges, as far as the resolution functions are concerned.

3. Simplified obligations for certain institutions

(1) By application of the principle of proportionality, **Article 4(8) BRRD** provides that the NCAs and, if relevant, the NRAs may waive the application of the requirements pertaining to recovery and resolution planning to specific institutions subject to the constraints laid down in **Article 4(9)-(10)**.⁶⁸⁵

⁶⁸¹ **BRRD, Article 88(1)**.

⁶⁸² On the role of resolution colleges under the BRRD, see **Grünwald (2014)**, pp. 110-115.

⁶⁸³ ‘**Union branch**’ means a branch located in a Member State of a third-country institution (BRRD, Article 2(1), point (89)).

⁶⁸⁴ **BRRD, Article 89(1)-(2)**.

⁶⁸⁵ On the basis of **Article 4(5) BRRD**, the EBA adopted on 16 October 2015 Guidelines on the application of such simplified obligations (**EBA/GL/2015/16**) (available at: <https://www.eba.europa.eu/documents/10180/1232502/EBA-GL-2015-16+GLs+on+simplified+obligations-EN.pdf/df9b0518-c938-4b09-8670-689ba9ba52c0>).

(2) Under the SRMR, it is also permitted to apply different or significantly reduced resolution planning and information requirements on an institution-specific basis, and at a lower frequency, while for a small entity of little interconnectedness and complexity the resolution plan can be waived.⁶⁸⁶ In that respect, the Board, either on its own initiative (after consulting the NRA) or upon proposal by an NRA, may apply simplified obligations in relation to the drafting of resolution plans or waive the obligation of drafting such plans. The NRA's proposal must be reasoned and supported by all relevant documentation.⁶⁸⁷ The application of simplified obligations does not affect either the Board's power to take any resolution action or its right to impose full obligations at any time, if any of the circumstances that justified them ceases to exist.⁶⁸⁸

In relation to the procedure for the withdrawal of an NRA's decision to apply simplified obligations or to grant a waiver it is provided that when the NRA which has proposed the application of simplified obligations or the grant of a waiver considers that its decision must be withdrawn, it must submit a proposal to the Board to that end. In that case, the Board must take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the NRA in view of the factors or circumstances referred to in **Article 11(3)** or **(7)-(8)**.⁶⁸⁹

The Board is required to inform the EBA of its application of all these provisions.⁶⁹⁰

⁶⁸⁶ **SRMR**, recital (49), second and third sentences.

⁶⁸⁷ *Ibid.*, Article 11(1)-(2) and recital (50). Article 11(3)-(4) governs the assessment by the Board, and the consequences of the decision to apply simplified obligations or to grant a waiver. It is noted that Article 11 SRMR also applies since **1 January 2015**. Article 11(7) deals with institutions affiliated to a central body which are wholly or partially exempt from national prudential requirements, in accordance with **Article 10 CRR**. Article 11(8) provides that institutions subject to the direct supervision of the ECB under **Article 6(4) SSMR** or constituting a significant share in the financial system of a participating Member State are subject to 'individual resolution plans' and lays down the thresholds when an institution's operations are deemed to constitute such a 'significant share'. Recital (51) (first sentence) clarifies in that respect that, in line with the capital structure of entities affiliated to a central body, for the purposes of the SRMR, the Board (or if relevant the NRAs) are not obliged to draw up separate resolution plans solely on the grounds that the central body to which those entities are affiliated is under the direct supervision of the ECB.

⁶⁸⁸ *Ibid.*, Article 11(5)-(6).

⁶⁸⁹ *Ibid.*, Article 11(9).

⁶⁹⁰ *Ibid.*, Article 11(10).

Section B: Resolution planning

1. Resolution plans drawn up by the Board

1.1 Administrative provisions

1.1.1 Drawing up and adoption of resolution plans

(1) Resolution planning is an essential component of effective resolution; due to the potentially systemic nature of all institutions and in order to maintain financial stability, the Board (or if relevant the NRAs) has the power to resolve any institution.⁶⁹¹ In that respect, for the entities and groups referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**) resolution plans must be drawn up and adopted by the Board.⁶⁹² For this purpose and without prejudice to the Board's investigatory powers,⁶⁹³ NRAs must submit to it all information necessary for the elaboration and implementation of these resolution plans, obtained in accordance with **Articles 11 and 13(1) BRRD** (for institutions and groups, respectively).⁶⁹⁴

In this respect it is noted that, in accordance with **Article 11(1) BRRD**, NRAs have the power to require institutions to cooperate as much as necessary in the drawing up of resolution plans and provide them, either directly or through the competent authority, with all of the information necessary to draw up and implement resolution plans. By virtue of **Article 11(3)**, the Commission has the power to adopt (on the basis of EBA's implementing technical standards) Implementing Regulations in order to specify procedures and a minimum set of standard forms and templates for the provision of that information.

Currently, in force is **Commission Implementing Regulation (EU) 2018/1624** of 23 October 2018 "laying down implementing technical standards with regard to procedures and standard forms and templates for the provision of information for the purposes of resolution plans for credit institutions and investment firms pursuant to [the BRRD], and repealing Commission Implementing Regulation (EU) 2016/1066".⁶⁹⁵ This (extremely detailed) Implementing Regulation governs the data credit institutions must report and the specifications ("minimum procedural and technical reporting requirements") according to which it must be delivered to NRAs. The Board resolution reporting ('RESREP') requirements, which cover the minimum information required by that implementing act, include:

firstly, the Liability Data Report ('LDR'),

secondly, the Critical Functions Report, discussed further below,⁶⁹⁶ and

thirdly, the Financial Market Infrastructures (FMI) Report.⁶⁹⁷

⁶⁹¹ **SRMR**, recital (46), first and third sentences.

⁶⁹² *Ibid.*, Article 8(1).

⁶⁹³ On these powers, see above in **Chapter 3, Section D, under 1**.

⁶⁹⁴ **SRMR**, Article 8(4).

⁶⁹⁵ OJ L 277, 7.11.2018, pp. 1-65; the repealed Regulation was published in the OJ L 181, 6.7.2016, pp. 1-38.

⁶⁹⁶ See below, **under 1.2.2.1.2 (3)**.

⁶⁹⁷ For more detail, see at: <https://srb.europa.eu/en/content/reporting>.

(2) When drawing up and updating resolution plans, the Board may require institutions to assist it.⁶⁹⁸ In principle, resolution plans are drafted by the IRTs.⁶⁹⁹ The date by which the first resolution plans are drawn up is determined by the Board, which must transmit them (including any changes thereto) to the ECB or to the relevant NCAs.⁷⁰⁰ Due to the sensitivity of the information contained therein, resolution plans are subject to the requirements of professional secrecy laid down in **Article 88 SRMR**.⁷⁰¹

(3) The Board must draw up resolution plans after consulting the ECB or the ‘relevant NCAs’, the NRAs, including the GLRA, of the participating Member States in which the entities are established and (if relevant) the resolution authorities of non-participating Member States in which ‘significant branches’ are located. Towards that end, the Board may require the NRAs to submit draft resolution plans and the GLRA to submit a draft group resolution plan.⁷⁰² In order to ensure effective and consistent application, the Board must issue guidelines *and* address instructions to the NRAs for the preparation of draft resolution plans and group resolution plans relating to specific entities or groups.⁷⁰³

In terms of definitions: ‘**branch**’ means a place of business which forms a legally dependent part of an institution, and carries out directly all or some of the transactions inherent in its business.⁷⁰⁴ On the other hand, the term ‘**relevant national competent authority**’ is not defined; by analogy to the definition of the term ‘**relevant NRA**’,⁷⁰⁵ it should be considered as the NCA of a participating Member State in which an entity or a group’s entity is established. The SRMR also does not contain a definition of the term ‘**significant branch**’. This term is referred to in **Article 51 CRD IV**, according to which a branch may be considered as such by the competent authorities of a host Member State with particular regard to the following aspects: *firstly*, whether the market share of the branch in terms of deposits exceeds 2% in the host Member State; *secondly*, the likely impact of a suspension or closure of the operations of the institution on systemic liquidity and the payment, clearing and settlement systems in the host Member State; *thirdly*, the size and importance of the branch in terms of number of clients within the context of the banking or financial system of the host Member State.

1.1.2 Review and updating of resolution plans

Resolution plans and group resolution plans **must be reviewed** (and, if appropriate, updated) at least annually and after any ‘**material changes**’ to the legal or organisational structure or to the business or the financial position of the entity or, in the case of group resolution plans, of the group, including any group entity that could have a ‘**material effect**’ on the effectiveness of the plan or that otherwise necessitates its revision.

⁶⁹⁸ **SRMR**, Article 8(8).

⁶⁹⁹ On the actual involvement of these teams in the drafting, see **Single Resolution Board (2016)**, at various passages.

⁷⁰⁰ **SRMR**, Article 8(12), first sub-paragraph, first sentence and 8(13); see also recital (44), fifth sentence.

⁷⁰¹ *Ibid.*, recital (44), last sentence; on Article 88.

⁷⁰² *Ibid.*, Article 8(2).

⁷⁰³ *Ibid.*, Article 8(3).

⁷⁰⁴ *Ibid.*, Article 3(1), point (22) with reference to Article 4(1), point (17) **CRR**.

⁷⁰⁵ *Ibid.*, Article 3(1), point (4).

For the purpose of this revision or update, the institutions, the ECB or the NCAs must promptly communicate to the Board any change necessitating it.⁷⁰⁶

1.2 Content of resolution plans for individual entities

1.2.1 The provisions of Article 8 SRMR and Article 22 of Commission Delegated Regulation (EU) 2016/1075

(1) The drawing up of resolution plans for individual entities is governed by the following rules:

Firstly, resolution plans must set out options for applying the resolution tools and exercising the resolution powers to the entities and groups referred to in **Article 7(2)** (and if the conditions for their application are met in **Articles 7(4), point (b) and 7(5)**).⁷⁰⁷

Furthermore, they must provide for the resolution actions which the Board may take if an entity or group meets the conditions for resolution and take into consideration relevant scenarios, including that the event of failure may be idiosyncratic *or* may occur at a time of broader financial instability or system wide events; when drawing up and updating resolution plans, the Board must identify any ‘material impediments to resolvability’ and, if necessary and proportionate, outline relevant actions on how these could be addressed in accordance with **Article 10**.⁷⁰⁸

Thirdly, they must be drawn up upon the assumption that none of the following is permitted: any extraordinary public financial support besides the use of the SRF; central bank emergency liquidity assistance; *or* central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.⁷⁰⁹

Fourthly, they must include an analysis of how and when an institution may apply, in the conditions addressed by them, for the use of central bank facilities and identify the assets expected to qualify as collateral.⁷¹⁰

Finally, they must include, quantified where appropriate and possible, the eighteen (18) elements listed in **Article 8(9)** (see **Box 3** below). The relevant information must be disclosed to the entity concerned.⁷¹¹

⁷⁰⁶ *Ibid.*, Article 8(12), first sub-paragraph, second sentence, and second sub-paragraph.

⁷⁰⁷ *Ibid.*, Article 8(5).

⁷⁰⁸ *Ibid.*, Article 8(6), first and third-fourth sub-paragraphs; on the impediments to resolvability, see below, **under 3**.

⁷⁰⁹ *Ibid.*, Article 8(6), fifth sub-paragraph.

⁷¹⁰ *Ibid.*, Article 8(7).

⁷¹¹ *Ibid.*, Article 8(6), second sub-paragraph. It is also noted that, in accordance with **recital (46)**, resolution plans must include procedures for informing and consulting employee representatives throughout the resolution processes where appropriate. If applicable, collective agreements or other arrangements provided for by social partners, as well as by EU and national law on the involvement of trade unions and workers’ representatives in company restructuring processes, should be complied with in this regard.

(2) In relation to the last aspect, **Article 22 of Commission Delegated Regulation (EU) 2016/1075** of 23 March 2016 “supplementing [the BRRD] with regard to regulatory technical standards specifying the content of (...) resolution plans and group resolution plans (...)”⁷¹² groups all these elements in eight broad categories (each further specified):

- (1) a summary of the plan, including a description of the institution or group;
- (2) a description of the resolution strategy considered in the plan, including, *inter alia*, identification of the different resolution actions foreseen;
- (3) a description of the information, and the arrangements for the provision of this information, necessary in order to effectively implement the resolution strategy;
- (4) a description of arrangements to ensure operational continuity of access to ‘**critical functions**’⁷¹³ during resolution;
- (5) a description of the financing requirements and financing sources necessary for the implementation of the resolution strategy foreseen in the plan;
- (6) plans for communication with critical stakeholder groups;
- (7) the conclusions of the assessment of resolvability; and
- (8) any opinion expressed by the institution or group in relation to the resolution plan.

This categorisation (along with the stages of the resolvability assessment process (the ‘**RAP**’) in accordance with **Article 23 of the Commission Delegated Regulation**⁷¹⁴) forms the basis for the Board’s six-step ‘**resolution planning process**’.⁷¹⁵

(3) In relation to the obligation of drafting resolution plans, the Board must take into account the following factors:

firstly, the nature of an entity’s business, shareholding structure, legal form, risk profile, size and legal status and interconnectedness to other institutions or to the financial system in general;

secondly, the scope and complexity of its activities;

furthermore, whether it is a member of an IPS or another cooperative mutual solidarity systems,

in addition, whether it exercises any investment services or activities; and

finally, whether its failure and subsequent winding up under normal insolvency proceedings would be likely to have a significant negative effect on financial markets, on other institutions, on funding conditions, or on the wider economy.

In that respect, it has to ensure application in an appropriate and proportionate way and that the administrative burden relating to resolution plan preparation obligations is minimised.⁷¹⁶

⁷¹² OJ L 184, 8.7.2016, pp. 1-71.

⁷¹³ On this term, see just below, **under 1.2.2.1**.

⁷¹⁴ See below, **under 3.1.2**.

⁷¹⁵ See on this **Single Resolution Board (2016)**, pp. 19-41 (including Figure 10, at p. 20).

⁷¹⁶ *Ibid.*, recital (49), first sentence.

Furthermore, the resolution plan must be applied so as not to jeopardise the stability of financial markets; in particular, in situations of a generalised crisis, characterised by broader problems or even doubts about the resilience of many entities, it is essential to consider the risk of contagion from the actions taken in relation to any individual entity.⁷¹⁷

BOX 3

Elements to be included in resolution plans under Article 8(9) SRM Regulation

- (1) summary of the key elements of the plan;
- (2) summary of the material changes to the institution that have occurred after the latest resolution information was filed;
- (3) demonstration of how ‘critical functions’ and ‘**core business lines**’⁷¹⁸ could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity upon the failure of the institution;
- (4) estimation of the timeframe for executing each material aspect of the plan;
- (5) detailed description of the assessment of resolvability carried out in accordance with **Article 10 SRMR**;
- (6) description of any measures required pursuant to **Article 10(7)** to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with **Article 10**;
- (7) description of the processes for determining the value and marketability of the critical functions, core business lines and assets of the institution;
- (8) detailed description of the arrangements for ensuring that the information required under **Article 11 BRRD** is up to date and at the disposal of the resolution authorities at all times;
- (9) explanation as to how the resolution options could be financed without the assumption of any extraordinary public financial support besides the use of the SRF, any central bank emergency liquidity assistance, *or* any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms;
- (10) detailed description of the different resolution strategies that could be applied according to the different possible scenarios and the applicable timescales;
- (11) description of critical interdependencies;
- (12) description of options for preserving access to payments and clearing services and other infrastructures and an assessment of the portability of client positions;
- (13) a plan for communicating with the media and the public;
- (14) an analysis of the impact of the plan on the institution’s employees, including an assessment of any associated costs, and a description of envisaged procedures to consult staff during the resolution process, taking into account national systems for dialogue with social partners (if applicable);
- (15) the minimum requirement for own funds and eligible liabilities required pursuant to **Article 12** and a deadline to reach that level (if applicable);
- (16) the minimum requirement for own funds and *contractual* bail-in instruments pursuant to **Article 12** and a deadline to reach that level (both, if applicable);

⁷¹⁷ *Ibid.*, recital (49), first and fourth-fifth sentences, respectively.

⁷¹⁸ On this term, see just below, **under 1.2.2.2**.

- (17) description of essential operations and systems for maintaining the continuous functioning of the institution's operational processes; and
- (18) any opinion expressed by the institution in relation to the resolution plan (if applicable).

1.2.2 In particular: definition and determination of 'critical functions' – definition of 'core business lines'

1.2.2.1 Critical functions

1.2.2.1.1 Definition

As mentioned just above,⁷¹⁹ resolution plans and group resolution plans must include, *inter alia*, a description of arrangements to ensure operational continuity of access to 'critical functions' during resolution. The term '**critical functions**' is defined in **Article 2(1), point (35) BRRD** as meaning activities, services or operations the discontinuance of which is likely in one or more Member States to lead to the disruption of services that are essential to the real economy, *or* to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations. Furthermore, **Article 6(1) of Commission Delegated Regulation 2016/778** of 2 February 2016,⁷²⁰ adopted, *inter alia*, on the basis of **Article 2(2) BRRD**, specifies that a function is considered critical, if two criteria are met cumulatively:

Firstly, it is provided by an institution to **third parties** not affiliated to the institution or group.

Secondly, its sudden disruption would likely have a '**material negative impact on the third parties**', give rise to contagion or undermine the general confidence of market participants due to the systemic relevance of the function for the third parties and the systemic relevance of the institution or group in providing the function. The '**disruption of functions or services**' consists in functions and services no longer being provided to a comparable extent, under comparable conditions and of comparable quality, unless the change in providing the function or service concerned takes place in an orderly manner.⁷²¹

Critical functions can include deposit taking, lending and loan services, payment, clearing, custody and settlement services, wholesale funding markets activities, as well as capital markets and investments activities.⁷²²

1.2.2.1.2 Determination

(1) The continuity of critical functions of an institution under resolution is one of the resolution objectives, aims at safeguarding financial stability and the real economy and plays a key role in both the recovery and the resolution planning process.⁷²³

⁷¹⁹ See just above, **under 1.2.1 (2) and Box 3**.

⁷²⁰ OJ L 131, 20.5.2016, pp. 41-47.

⁷²¹ **Commission Delegated Regulation 2016/778**, Article 6(5).

⁷²² *Ibid.*, recital (4).

⁷²³ See below in **Chapter 5, Section A, under 1**.

On the other hand, the identification of critical functions is relevant for the selection of the preferred resolution strategy, which should be designed to maintain critical functions through resolution.⁷²⁴

(2) It is noted that there are no critical functions *per se*; the criticality of functions must be identified and determined in the resolutions plans of credit institutions and groups, which are drafted by the IRTs and then drawn up and adopted by the Board. According to the Commission Delegated Regulation, institutions and resolution authorities should also identify their ‘critical services’ in the recovery and resolution plans, this identification following that of a critical function.⁷²⁵ A service is considered critical where its disruption can present a serious impediment to, or prevent the performance of, one or more critical functions. A service is not considered critical where it can be provided by another provider within a reasonable time frame to a comparable extent as regards its object, quality and cost.⁷²⁶ The determination of a service as critical aims at enabling institutions to ensure their continued availability by providing them through entities or units that are resilient in a failure, or establishing appropriate arrangements where they are supplied by an external provider.⁷²⁷

(3) In order to identify the criticality of functions and in accordance with the ‘two-step’ **approach** adopted by the Delegated Regulation, a self-assessment is performed by institutions themselves when drawing-up their recovery plans *and* then the IRTs must perform a ‘critical review’ of these plans to ensure consistency and coherence in the approaches used by institutions.⁷²⁸

The Board’s 2018 “Critical Functions Report” aims at guiding institutions through this self-assessment and at providing essential information for the IRSs performing the review, while⁷²⁹ the “Guidance on the Critical Functions Report” provides them guidance for completing the Report’s reporting template.⁷³⁰ See also the Board’s 2017 document entitled “Critical Functions: SRB Approach in 2017 and Next Steps”, which serves as a reference to describe the Board’s approach to the identification of critical functions.⁷³¹

In this respect, the assessment of criticality is made in two steps:

Firstly, in the course of the so-called ‘**impact analysis**’, when assessing the material negative impact on third parties, the systemic relevance of the function for third parties and the systemic relevance of the institution or group providing the function, the institution and the resolution authority must take into account the size, market share, external and internal interconnectedness, complexity, and cross-border activities of the institution or group.⁷³²

⁷²⁴ See below, under 3.1.2.

⁷²⁵ **Commission Delegated Regulation 2016/778**, recital (9), first sentence and (8), last sentence.

⁷²⁶ *Ibid.*, Article 6(4).

⁷²⁷ *Ibid.*, recital (10).

⁷²⁸ *Ibid.*, recital (5).

⁷²⁹ Available at: <https://srb.europa.eu/en/content/critical-functions-report>.

⁷³⁰ Available at: https://srb.europa.eu/sites/srbsite/files/2018_guidance_cft.pdf.

⁷³¹ Available at: https://srb.europa.eu/sites/srbsite/files/critical_functions_final.pdf.

⁷³² **Commission Delegated Regulation 2016/778**, Article 6(2), first sub-paragraph. The assessment criteria for the impact on third parties shall include at least the following elements: the nature and reach of the activity, the global, national or regional reach, volume and number of transactions; the number of customers and counterparties; the number of customers for which the institution is the only or principal banking partner; and the institution’s relevance, on a local, regional, national or EU level, as appropriate for the market concerned; the nature of the

Secondly, under the so-called ‘**substitutability analysis**’, a function that is essential to the real economy and financial markets can be considered substitutable if it can be replaced in an acceptable manner and within a reasonable time frame thereby avoiding systemic problems for the real economy and the financial markets.⁷³³

The conclusions of these two analyses allow IRTs to construct the so called ‘**spectrum of criticality**’, which assists the Board and NRAs to assess criticality of functions under different market circumstances.⁷³⁴

1.2.2.2 Core business lines

(1) In accordance with (both) **Article 2(1), point (36) BRRD** and **Article 7(1) of Commission Delegated Regulation 2016/778**, ‘**core business lines**’ means business lines and associated services which represent material sources of revenue, profit or franchise value for an institution or a group of which an institution forms part. Core business lines must be identified on the basis of an institution’s internal organisation, its corporate strategy and the degree of their contribution to its financial results.⁷³⁵ They may rely on activities which do not by themselves generate *direct* profit for the institution, but support its core business lines contributing *indirectly* to its profits.⁷³⁶

(2) That Delegated Regulation also identifies that the main difference between a critical function and a core business line lies in the impact of the activities concerned: critical functions must be assessed from a perspective of their importance for the functioning of the real economy and financial markets and therefore for financial stability as a whole; *on the other hand*, the assessment of core business lines must be based on the importance for the institution itself, such as the level of their contribution to its revenues and profits.⁷³⁷

customers and stakeholders affected by the function (e.g. retail customers, corporate customers, interbank customers, central clearing houses and public entities); the potential disruption of the function on markets, infrastructures, customers and public services. In particular, the assessment may include the effect on the liquidity of markets concerned, the impact and extent of disruption to customer business, and short-term liquidity needs; the perceptibility to counterparties, customers and the public; the capacity and speed of customer reaction; the relevance to the functioning of other markets; the effect on the liquidity, operations, structure of another market; and the effect on other counterparties related to the main customers and the interrelation of the function with other services (*ibid.*, Article 6(2), second sub-paragraph).

⁷³³ *Ibid.*, Article 6(3), first sub-paragraph. When assessing the substitutability of a function the following criteria must be taken into account: the structure of the market for that function and the availability of substitute providers; the ability of other providers in terms of capacity, the requirements for performing the function, and potential barriers to entry or expansion; the incentive of other providers to take on these activities; and the time required by users of the service to move to the new service provider and costs of that move, the time required for other competitors to take over the functions and whether that time is sufficient to prevent significant disruption depending on the type of service (*ibid.*, Article 6(3), second sub-paragraph).

⁷³⁴ This process is analysed in details in the Board’s 2017 document “**Critical Functions: SRB Approach in 2017 and Next Steps**”, pp. 16-19.

⁷³⁵ **Commission Delegated Regulation 2016/778**, Article 7(2), which also lists an indicate list of relevant indicators.

⁷³⁶ *Ibid.*, Article 7(3) and recital (13).

⁷³⁷ *Ibid.*, recital (11).

1.3 Content of group resolution plans

(1) Group resolution plans are governed by **Article 8(10)-(11) SRMR** and by **Article 22 of Commission Delegated Regulation (EU) 2016/1075**. A group resolution plan must include a plan for the resolution of the group as a whole, headed by a ‘Union parent undertaking’ established in a participating Member State, either through resolution at the level of the ‘Union parent undertaking’ *or* through break up and resolution of the subsidiaries. ‘**Union parent institution**’ means a parent institution in a Member State which is not a subsidiary of institution authorised in any Member State, or of a financial holding company or mixed financial holding company set up in any Member State.⁷³⁸ ‘**Subsidiary**’ means (in principle) a subsidiary undertaking within the meaning of **Articles 1-2 of the Seventh Council Directive (83/349/EEC)**. Subsidiaries of subsidiaries are also considered to be subsidiaries of the undertaking that is their original parent undertaking.⁷³⁹

The plan must identify measures for the resolution of the Union parent undertaking, any subsidiaries established in the EU that are part of the group, parent undertakings established in participating Member States, if they are subject to consolidated supervision carried out by the ECB in accordance with **Article 4(1), point (g) SSMR**, and, subject to **Article 33 SRMR** on the recognition and enforcement of third-country resolution proceedings⁷⁴⁰ subsidiaries that are part of the group and are established outside the EU.⁷⁴¹

(2) The six principles governing group resolution plans are the following:⁷⁴²

Firstly, they must set out the resolution actions to be taken in relation to group entities through both resolution actions in respect of the designated entities referred to in **Article 2, point (b) SRMR** and subsidiary institutions *and* coordinated resolution actions in respect of subsidiary institutions, in the scenarios provided for in **Article 8(6)**.

Secondly, they must examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to group entities established in the EU, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of group entities, or particular group entities, and identify any potential impediments to a coordinated resolution.

Furthermore, they must include a detailed description of the assessment of resolvability under **Article 10**.

Fourthly, if entities incorporated in third countries are included in the group, they must identify appropriate cooperation and coordination arrangements with their relevant authorities and the implications for resolution within the EU.

In addition, they must identify measures, including the legal and economic separation of particular functions or business lines, necessary to facilitate group resolution if the conditions for resolution are met.

⁷³⁸ **SRMR**, Article 3(1), point (19) with reference to Article 4(1), point (29) **CRR**.

⁷³⁹ *Ibid.*, Article 3(1), point (21) with reference to Article 4(1), point (16) **CRR**.

⁷⁴⁰ See on this above in **Chapter 2, Section A, under 5.5**.

⁷⁴¹ **SRMR**, Article 8(10).

⁷⁴² *Ibid.*, Article 8(11), first sub-paragraph.

Finally, they must identify how the group resolution actions could be financed and, if the SRF and the financing arrangements from non-participating Member States established in accordance with **Article 100 BRRD** would be required, set out principles for sharing responsibility for that financing between sources of funding in different participating and non-participating Member States. The plans may not assume any extraordinary public financial support besides the use of the SRF and the financing arrangements from non-participating Member States under **Article 100 BRRD**, central bank emergency liquidity assistance, or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

These principles must be set out on the basis of equitable and balanced criteria (taking into account in particular **Article 107(5) BRRD** on the mutualisation of national financing arrangements in the case of a group resolution, and the impact on financial stability in all Member States concerned), and should not have a disproportionate impact on any Member State.⁷⁴³ In addition, the potential impact of the resolution actions in all the Member States where the group operates should be specifically taken into account in the drawing up of the plans.⁷⁴⁴

2. Resolution plans drawn up by the national resolution authorities

NRAs must draw up *and* adopt resolution plans for any entity and group, other than those referred to in **Article 7(2) SRMR** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**), in accordance with the above-mentioned provisions of **Article 8**. The preparation of these resolution plans must be made after consulting the relevant NCAs and NRAs of the (participating and non-participating) Member States, in which significant branches are located, if relevant.⁷⁴⁵

3. Assessment of resolvability and removal of substantive impediments to resolvability

3.1 Assessment of resolvability

3.1.1 The provisions of Article 10 of the SRM Regulation

(1) When drafting and updating resolution plans, the Board must assess the extent to which institutions and groups referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**) are resolvable without the assumption of any extraordinary public financial support besides the use of the SRF, central bank emergency liquidity assistance, or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.⁷⁴⁶ In this respect, it is required:

firstly, to consult the competent authorities (including the ECB), as well as the resolution authorities of non-participating Member States in which significant branches are located (if relevant);⁷⁴⁷ and

⁷⁴³ *Ibid.*, Article 8(11), second and third sub-paragraphs.

⁷⁴⁴ *Ibid.*, recital (51), second sentence.

⁷⁴⁵ *Ibid.*, Article 9(1)-(2).

⁷⁴⁶ *Ibid.*; see also Article 8(6) (**under 1.2.1 (1)** above).

⁷⁴⁷ *Ibid.*, Article 10(1).

secondly, to examine the twenty-eight matters with regard to the resolvability of an institution or a group, which are specified in **Section C of the Annex to the BRRD**⁷⁴⁸ (see **Box 4** below).

(2) On the basis of the recovery plans or group recovery plans submitted by the ECB or the relevant NCA, the Board must identify any actions therein which may adversely impact the resolvability of an entity or a group, and make relevant recommendations to the ECB or the NCA.⁷⁴⁹ In addition, when drafting a resolution plan, the Board must assess the extent to which such an entity is resolvable. The Board must notify accordingly the EBA in a timely manner.⁷⁵⁰ An entity is **‘deemed to be resolvable’**, if it is feasible and credible for the Board to take any of the following courses of action:

firstly, liquidate it under ‘normal insolvency proceedings’;

alternatively, resolve it by applying to it resolution tools and exercising resolution powers, while avoiding, to the maximum extent possible, any ‘significant adverse consequences’ for the financial system (including circumstances of broader financial instability or system wide events of the Member State in which the entity is situated, or other Member States or the EU) and with a view to ensuring the continuity of its ‘critical functions’.⁷⁵¹

‘Normal insolvency proceedings’ means collective insolvency proceedings entailing the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those or generally applicable to any natural or legal person.⁷⁵² For the purposes of **Article 10(3)-(4)** and **(10) SRMR**, the term **‘significant adverse consequences for the financial system or threat to financial stability’** refers to a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardise the orderly functioning, efficiency and integrity of the internal market or the economy or the financial system of one or more Member States.

In determining the significant adverse consequences the Board must take into account the relevant warnings and recommendations of the ESRB, and the relevant criteria developed by the EBA in considering the identification and measurement of systemic risk.⁷⁵³

(3) The conditions for the assessment of a group’s resolvability are similar to those applying to entities. In particular, it is provided that a group is deemed to be resolvable if it is feasible and credible for the Board to either liquidate group entities under normal insolvency proceedings or to resolve them by applying resolution tools and exercising resolution powers in relation to group entities while avoiding, to the maximum extent possible, any significant adverse consequences for financial systems, including circumstances of broader financial instability or system wide events, of the Member States in which group entities are established, or other Member States or the EU and with a view to ensuring the **continuity of critical functions** carried out by those group entities, where they can be easily separated in a timely manner or by other means. The Board must notify accordingly the EBA.⁷⁵⁴

⁷⁴⁸ *Ibid.*, Article 10(6).

⁷⁴⁹ *Ibid.*, Article 10(2).

⁷⁵⁰ *Ibid.*, Article 10(3).

⁷⁵¹ **Lastra, Russo and Bodellini (2019)** (at p. 11) correctly refer to the ‘dichotomy’ between resolution and liquidation.

⁷⁵² **BRRD**, Article 2(1), point (47).

⁷⁵³ **SRMR**, Article 10(5).

⁷⁵⁴ *Ibid.*, Article 10(4).

BOX 4

Matters that the resolution authority must consider when assessing the resolvability of an institution or group (Section C of the Annex to the BRRD)

- (1) the extent to which the institution is able to map core business lines and critical operations to legal persons;
- (2) the extent to which legal and corporate structures are aligned with core business lines and critical operations;
- (3) the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;
- (4) the extent to which the institution's service agreements are fully enforceable in the event of resolution of the institution;
- (5) the extent to which the institution's governance structure is adequate for managing and ensuring compliance with its internal policies with respect to its service level agreements;
- (6) the extent to which the institution has a process for transitioning the services provided under service level agreements to third parties in the event of the separation of critical functions or of core business lines;
- (7) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;
- (8) the adequacy of the management information systems in ensuring that the resolution authorities are able to gather accurate and complete information regarding the core business lines and critical operations so as to facilitate rapid decision making;
- (9) the management information systems, capacity to provide the information essential for the effective resolution of the institution at all times even under rapidly changing conditions;
- (10) the extent to which the institution has tested its management information systems under stress scenarios as defined by the resolution authority;
- (11) the extent to which the institution can ensure the continuity of its management information systems both for the affected institution and the new institution if the critical operations and core business lines are separated from the rest of operations and business lines;
- (12) the extent to which the institution has established adequate processes to ensure that it provides the resolution authorities with the information necessary to identify depositors and the amounts covered by the deposit guarantee schemes;
- (13) where the group uses intra-group guarantees, the extent to which those guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust;
- (14) where the group engages in back-to-back transactions, the extent to which those transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust;
- (15) the extent to which the use of intra-group guarantees or back-to-back booking transactions increases contagion across the group;
- (16) the extent to which the legal structure of the group inhibits the application of the resolution tools as a result of the number of legal persons, the complexity of the group structure or the difficulty in aligning business lines to group entities;
- (17) the amount and type of eligible liabilities of the institution;

- (18) where the assessment involves a mixed activity holding company, the extent to which the resolution of group entities that are institutions or financial institutions could have a negative impact on the non-financial part of the group;
- (19) the existence and robustness of service level agreements;
- (20) whether third-country authorities have the resolution tools necessary to support resolution actions by EU resolution authorities, and the scope for coordinated action between EU and third-country authorities;
- (21) the feasibility of using resolution tools in such a way which meets the resolution objectives, given the tools available and the institution's structure;
- (22) the extent to which the group structure allows the resolution authority to resolve the whole group or one or more of its group entities without causing a significant direct or indirect adverse effect on the financial system, market confidence or the economy and with a view to maximising the value of the group as a whole;
- (23) the arrangements and means through which resolution could be facilitated in the cases of groups that have subsidiaries established in different jurisdictions;
- (24) the credibility of using resolution tools in such a way which meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees and possible actions that third-country authorities may take;
- (25) the extent to which the impact of the institution's resolution on the financial system and on financial market's confidence can be adequately evaluated;
- (26) the extent to which the resolution of the institution could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;
- (27) the extent to which contagion to other institutions or to the financial markets could be contained through the application of the resolution tools and powers;
- (28) the extent to which the resolution of the institution could have a significant effect on the operation of payment and settlement systems.

3.1.2 *The provisions of Commission Delegated Regulation (EU) 2016/1075*

3.1.2.1 *Introductory remarks*

In accordance with **Article 23(1) of Commission Delegated Regulation (EU) 2016/1075**, for the purposes of assessing the resolvability of an entity, the Board must implement a “four-stage strategy”:⁷⁵⁵

firstly, assess the *credibility and feasibility* of liquidating the entity under normal insolvency proceedings (see below, **under 3.1.2.2**);

secondly, if it determines that liquidating the entity is neither feasible nor credible, select the resolution strategy considered mostly appropriate in order to resolve the entity without disrupting its operation (the ‘preferred resolution strategy’; **under 3.1.2.3**);

then, assess the *feasibility* of this preferred resolution strategy (**under 3.1.2.4**); and

finally, assess its *credibility* (**under 3.1.2.5**).

⁷⁵⁵ **Commission Delegated Regulation (EU) 2016/1075**, Article 2; see on this also **Maragopoulos (2016)**, pp. 25-26.

‘Preferred resolution strategy’ means a resolution strategy capable of best achieving the resolution objectives set out in **Article 31 BRRD (Article 14 SRMR)** given the structure and the business model of the institution or group, and the resolution regimes applicable to legal entities in a group.⁷⁵⁶

3.1.2.2 Credibility and feasibility of liquidation under normal insolvency proceedings

Resolution authorities (i.e. the Board and NRAs) must assess the credibility and feasibility of liquidation of the institution or group under normal insolvency proceedings, as well as the impact that liquidation would have in the reliance on extraordinary public financial support as compared to resolution. In this respect:

When assessing the liquidation’s *credibility*, they must consider the likely impact of the institution’s or group’s liquidation on the financial systems of any Member State or of the EU in order to ensure the continuity of access to critical functions carried out by the institution or group and achieving the resolution objectives, taking into account the functions performed by the institution or group and assessing whether liquidation would be likely to have a material adverse impact on any of the following: financial market functioning and market confidence; financial market infrastructures; other financial institutions; and the real economy and in particular the availability of critical financial services.

If the resolution authority concludes that liquidation is credible, it must then assess its *feasibility*.⁷⁵⁷

3.1.2.3 Identification of a resolution strategy

(1) Resolution authorities must assess whether a candidate resolution strategy is appropriate to achieve the resolution objectives given the structure and business model of the institution or group, and the resolution regimes applicable to legal entities in a group.

A resolution action may be taken **in the public interest** if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.⁷⁵⁸

In particular for groups, resolution authorities must assess whether it would be more appropriate to apply a single point of entry or a multiple point of entry strategy.⁷⁵⁹ ‘**Single point of entry (SPE)**’ means a resolution strategy involving the application of resolution powers *by a single resolution authority* at the level of a single parent undertaking or of a single institution subject to consolidated supervision. On the other hand, ‘**multiple point of entry (MPE)**’ means a resolution strategy involving the application of resolution powers *by two or more resolution authorities* to regional or functional subgroups or entities of a group.

In both cases, they must consider, at least, the six matters laid down in **Article 25(3)**.

⁷⁵⁶ *Ibid.*, Article 2, point (3).

⁷⁵⁷ *Ibid.*, Article 24(1)-(3).

⁷⁵⁸ On the public interest criterion, see details below in **Chapter 5, Section C, under 1.4**.

⁷⁵⁹ **Commission Delegated Regulation (EU) 2016/1075**, Article 25(1)-(2).

(2) Resolution authorities must assess whether variants of the resolution strategy are necessary to address scenarios or circumstances where that strategy cannot be feasibly and credibly implemented and consider the extent to which any variant strategy is likely to achieve the resolution objectives and in particular ensure the continuity of critical functions. Measures to remove impediments to variants of the resolution strategy can only be implemented if they do not impair the feasible and credible implementation of the preferred resolution strategy.⁷⁶⁰

3.1.2.4 Assessment of a resolution strategy's feasibility

This assessment contains several layers governed by **Articles 26-31 of the Commission Delegated Regulation (EU) 2016/1075**. In particular, resolution authorities must assess whether it is feasible to apply the selected resolution strategy effectively in an appropriate time frame and must identify potential impediments to the implementation of the selected resolution strategy. In that respect, they must consider impediments to the short-term stabilisation of the institution or group, as well as any foreseeable impediments to a business reorganisation which is required pursuant to **Article 52 BRRD** or otherwise likely to be required if the resolution strategy envisages all or part of the institution or group being restored to long-term viability. Impediments must be classified in at least five categories: structure and operations; financial resources; information; cross-border issues; and legal issues.⁷⁶¹ In this respect, the following is briefly noted:

(1) When assessing whether there are potential impediments to resolution related to the institution's or group's **structure and operations**, resolution authorities must consider at least the following issues: matters addressed in **points (1)-(7), (16) and (18)-(19) of Section C of the Annex to the BRRD**; dependencies of material entities and core business lines on infrastructure, information technology, treasury or finance functions, employees or other critical shared services; whether governance, control, and risk management arrangements are consistent with any planned changes to the structure of the institution or group; whether the legal and franchise structure of the institution or group is consistent with any planned changes to the business structure of the institution or group; and whether appropriate resolution tools are available with respect to each legal entity as required to deliver the resolution strategy.⁷⁶²

(2) When assessing whether there are potential impediments to resolution related to **financial resources**, they must consider at least the following issues: matters addressed in **points (13)-(15) and (17) of Section C of the Annex to the BRRD**; the need to identify and quantify the amount of any liabilities which are likely under the preferred resolution strategy not to contributing to loss absorption or recapitalisation, considering at a minimum specific factors (laid down in point (2)); the size of funding needs in the run-up to and during resolution, the availability of sources of funding, and impediments to the transfer of funds as required within the institution or group; whether appropriate arrangements are specified for losses to be transferred to legal entities to which resolution tools would be applied from other group companies, including if relevant an assessment of the amount and loss-absorbency of intragroup funding.⁷⁶³

⁷⁶⁰ *Ibid.*, Article 25(4)-(5).

⁷⁶¹ *Ibid.*, Article 26(1)-(3).

⁷⁶² *Ibid.*, Article 27.

⁷⁶³ *Ibid.*, Article 28.

(3) When assessing whether there are potential impediments to resolution related to **information**, they must consider at least the following issues: matters addressed in **points (8)-(12) of Section C of the Annex to the BRRD**; the capability of the institution or group to provide information on the amount, and location within the group, of assets which would be expected to qualify as collateral for central bank facilities; and its capability to provide information in order to carry out a valuation determining the amount of write-down or recapitalisation required.⁷⁶⁴

(4) When assessing whether there are potential impediments to resolution related to **cross-border issues**, they must consider at least the following issues: matters addressed in **point (20) of Section C of the Annex to the BRRD**; existence of adequate processes for coordination and communication and assurances on actions to be taken between home and host authorities, including in third countries, to enable delivery of the resolution strategy; and whether law in relevant home and host jurisdictions overrides contractual termination rights in financial contracts that are triggered solely by the failure and resolution of an affiliated company.⁷⁶⁵

(5) In assessing potential impediments to resolution, into consideration must finally be taken the following **legal issues**: whether requirements for regulatory approvals or authorisations necessary to deliver the resolution strategy can be met in a timely manner; whether significant contractual documentation permits termination of contracts on entry into resolution; and whether contractual obligations which cannot be disapplied by the resolution authority prohibit any transfer of assets and/or liabilities envisaged in the resolution strategy.⁷⁶⁶

3.1.2.5 Assessment of a resolution strategy's credibility

After assessing the feasibility of the selected resolution strategy, resolution authorities must assess its credibility, taking into consideration the likely impact of resolution on the financial systems and real economies of any Member State or of the EU, with a view to ensuring the continuity of critical functions carried out by the institution or group, including evaluation of the matters addressed in **points (21)-(28) of Section C of the Annex to the BRRD**. In conducting this assessment, they must consider the likely impact of the implementation of the resolution strategy on the financial systems of any Member State or of the EU. They must also take into account the functions performed by the institution or group and assess whether implementation of the resolution strategy would be likely to have a material adverse impact on any of the following: financial market functioning and market confidence; financial market infrastructures; other financial institutions; and the real economy and in particular the availability of critical financial services.⁷⁶⁷

3.2 Removal of substantive impediments to resolvability

3.2.1 'Substantive impediments' to resolvability

3.2.1.1 Introductory remarks

The Board has the power to require changes to the structure and organisation of entities or groups and take measures which are necessary and proportionate in order to reduce or remove '**substantive impediments**' to the application of resolution tools and ensure their resolvability. In order to respect the right to conduct business laid down by **Article 16 of the Charter**, the following guiding principles are laid down:

⁷⁶⁴ *Ibid.*, Article 29.

⁷⁶⁵ *Ibid.*, Article 30.

⁷⁶⁶ *Ibid.*, Article 31.

⁷⁶⁷ *Ibid.*, Article 32(1)-(2).

firstly, the Board's discretion is limited to what is necessary to simplify the entities' structure and operations solely to improve their resolvability;

furthermore, any measure imposed for such purposes should be consistent with EU law;

thirdly, measures should neither directly nor indirectly be discriminatory on grounds of nationality, and should be justified by the overriding reason of being conducted in the **public interest in financial stability**; in order to determine whether an action was taken in the general public interest, the Board, acting in that interest, should be able to achieve the resolution objectives without encountering impediments to the application of resolution tools or its ability to exercise the powers conferred on it by the SRMR;

finally, action should not go beyond the minimum necessary to attain the objectives sought.⁷⁶⁸

When determining the measures to be taken, the Board or, where applicable, the NRAs, must take into account the warnings and recommendations of the ESRB.⁷⁶⁹

3.2.1.2 The Board's Report

If, in accordance with the above-mentioned assessments, the Board determines (after consulting the NCAs including the ECB) that there are substantive impediments to the resolvability for an entity or a group, it must prepare a Report (in cooperation with the competent authorities) addressed to the institution or the parent undertaking analysing them. This Report must consider the impact on the institution's business model and recommend any proportionate and targeted measures which, in the Board's view, are necessary or appropriate to remove impediments in accordance with **Article 10(10)**.⁷⁷⁰

In addition, it must be notified to the competent authorities and to the resolution authorities of non-participating Member States in which significant branches of institutions which are not part of a group are located; and be supported by reasons for the assessment or determination in question and indicate how that assessment or determination complies with the requirement for proportionate application laid down in **Article 6**.⁷⁷¹

3.2.2 Measures by the entity or the parent undertaking concerned and the Board's response

(1) Within four months from the date of receipt of the Report, the entity or the parent undertaking must propose to the Board '**potential measures**' to address or remove the substantive impediments identified therein. The Board must communicate any measure proposed to the competent authorities, the EBA, and the resolution authorities in non-participating Member States, if significant branches of institutions that are not part of a group are located therein.⁷⁷²

⁷⁶⁸ SRMR, recital (46), fourth-eighth sentences.

⁷⁶⁹ *Ibid.*, recital (46), last sentence.

⁷⁷⁰ On Article 10(10), see just below, **under 3.2.2 (2)**.

⁷⁷¹ SRMR, Article 10(7)-(8); on Article 6, see above in **Chapter 2, Section A, under 3**.

⁷⁷² *Ibid.*, Article 10(9).

(2) The Board, after consulting the competent authorities, must assess whether these measures effectively address or remove the substantive impediments in question and, if this is not the case, it must take a decision, after consulting the competent authorities and, if appropriate, the designated macro-prudential authority.⁷⁷³

This decision must indicate that the measures proposed do not effectively reduce or remove the impediments to resolvability *and* instruct the NRAs to require the institution, the parent undertaking, or any subsidiary of the group concerned, to take any of the ‘alternative measures’ listed in **Article 10(11)**.⁷⁷⁴ In identifying such ‘**alternative measures**’, the Board must undertake the following:

Firstly, demonstrate how the measures proposed by the institution would not be appropriate to remove the impediments to resolvability and how the alternative measures proposed are proportionate in removing them.

Secondly, take into account the threat to financial stability of those impediments to resolvability and the effect of the measures on the institution’s business, its stability and its ability to contribute to the economy, on the internal market for financial services and on the financial stability in other Member States and the EU as a whole.

Thirdly, take into account the need to avoid any impact on the institution or the group concerned which would go beyond what is necessary to remove the impediment to resolvability or would be disproportionate.⁷⁷⁵

3.2.3 Measures to be taken by national resolution authorities (NRAs)

(1) Taking into account the above and in order to reduce or remove the identified impediments, the Board may instruct NRAs to take such appropriate measures designed to remove impediments to resolvability in order to ensure consistency and the resolvability of the institutions concerned.⁷⁷⁶ These can be grouped in three categories:

‘**structural measures**’ associated with the organisational, legal and business structure of the entity, ‘**financial measures**’ related to the entity’s assets, liabilities and products, and ‘**information requirements**’.⁷⁷⁷

(2) In this respect, NRAs may require the entity concerned to undertake the following:⁷⁷⁸

firstly, revise any intra-group financing agreements,⁷⁷⁹ review the absence thereof or draw up service agreements (whether intra-group or with third parties) to cover the provision of critical functions;

⁷⁷³ ‘**Designated macro-prudential authority**’ means (**BRRD**, Article (2)(1), point (106)) the authority entrusted with the conduct of macro-prudential policy referred to in Recommendation B1 of **ESRB Recommendation** of 22 December 2011 “on the macroprudential mandate of national authorities” (**ESRB/2011/3**) (OJ C 41, 14.2.2012, pp. 1-4).

⁷⁷⁴ **SRMR**, Article 10(10), first sub-paragraph; on Article 10(11) see just below, **under 3.2.3**.

⁷⁷⁵ *Ibid.*, Article 10(10), second and third sub-paragraphs.

⁷⁷⁶ *Ibid.*, recital (44), seventh sentence.

⁷⁷⁷ See on this also **Maragopoulos (2016)**, pp. 28-29.

⁷⁷⁸ **SRMR**, Article 10(11), points (a)-(b), (d)-(e) and (g)-(j).

⁷⁷⁹ As already mentioned, these arrangements are governed by **Articles 19-26 BRRD**.

secondly, limit its maximum individual and aggregate exposures, divest specific assets, and limit or cease specific existing or proposed activities;

thirdly, introduce changes to legal or operational structures of the entity or any group entity, either directly or indirectly under their control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;

fourthly, set up a parent financial holding company in a Member State or a ‘Union parent financial holding company’; ‘**Union parent financial holding company**’ means a parent financial holding company in a Member State which is not a subsidiary of a credit institution or an investment firm authorised in any Member State, or of another financial holding company or mixed financial holding company set up in any Member State;⁷⁸⁰

finally, in order to meet the MREL, issue eligible liabilities, and take other steps in order to ensure that any Board decision to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing it (including, in particular, to attempt to renegotiate any eligible liability, Additional Tier 1 or Tier 2 instrument it has issued).⁷⁸¹

NRAs may also impose specific or regular additional information requirements relevant for resolution purposes and/or restrict or prevent the development of new or existing business lines or sale of new or existing products.⁷⁸²

(3) A decision made in accordance with **Article 10(10)-(11)** above must be supported by reasons for the assessment or determination in question and indicate its compliance with the requirement for ‘proportionate application’.⁷⁸³ NRAs must implement the Board’s instructions in accordance with **Article 29** on the implementation of resolution decisions.⁷⁸⁴

⁷⁸⁰ **SRMR**, Article 3(1), point (18), with reference to Article 4(1), point (31) **CRR**.

⁷⁸¹ On these instruments, see **Section C** below.

⁷⁸² **SRMR**, Article 10(11), points (c) and (f).

⁷⁸³ *Ibid.*, Article 10(13).

⁷⁸⁴ *Ibid.*, Article 10(12); on Article 29, see below in **Chapter 5, Section C, under 3**.

Section C:

In particular: the minimum requirement for own funds and eligible liabilities (MREL)

1. Definition and governing rules

(1) Both under the BRRD and the SRMR, the MREL is calculated as the following ratio: the amount of ‘own funds’ and ‘eligible liabilities’ of the institution, *as a percentage* of own funds and *total* liabilities of the institution. For this purpose, ‘derivative liabilities’ are included in the *total liabilities*, on the basis that full recognition is given to counterparty netting rights.⁷⁸⁵

In terms of definitions⁷⁸⁶ (for a summary, see **Table 9** below):

‘**eligible liabilities**’ means the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an entity referred to in Article 2, which are not excluded from the scope of the bail-in tool according to **Article 27(3)**;

the term ‘**own funds**’ is defined with reference to **Article 4(1), point (118) CRR**, according to which ‘own funds’ means the sum of **Tier 1 capital** (i.e. Common Equity Tier 1 (CET 1) and Additional Tier 1), and **Tier 2 capital**;

the capital instruments issued by a credit institution (or an investment firm) and qualify as CET 1, Additional Tier 1 or Tier 2 instruments are defined as ‘**own funds instruments**’;⁷⁸⁷

‘**Common Equity Tier 1 instruments**’ means capital instruments that meet the conditions laid down in **Article 28(1)-(4), Article 29(1)-(5) or Article 31(1) CRR**;

‘**Additional Tier 1 instruments**’ means capital instruments meeting the conditions laid down in **Article 52(1) CRR**;

‘**Tier 2 instruments**’ means capital instruments or subordinated loans meeting the conditions laid down in **Article 63 CRR**;

finally, the term ‘**derivative**’ is defined with reference to **Article 2(5) EMIR**, which in turn makes reference to **Annex I, Section C, points (4)-(10) MiFID II**.

(2) In accordance with **Article 12 SRMR**, the MREL is governed by the following rules:

Firstly, it *may not exceed* the amount of own funds and eligible liabilities sufficient to ensure that, if the bail-in tool were to be applied the losses of an institution or a parent undertaking as referred to in **Article 2** could be absorbed, *and* the Common Equity Tier 1 ratio of those entities could be restored to a level necessary to enable them to continue to comply with the conditions for authorisation and continue to carry out the activities for which they are authorised under the CRD IV.

⁷⁸⁵ **BRRD**, Article 45(1) and **SRMR**, Article 12(4).

⁷⁸⁶ **SRMR**, Article 3(1), points (49), (40), (45), (46), (47), and (43), respectively.

⁷⁸⁷ **CRR**, Article 4(1), point (119).

If an institution's resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in under **Article 27(5)**⁷⁸⁸ or be transferred in full to a recipient under a partial transfer, the MREL may not exceed a certain amount of own funds and eligible liabilities.⁷⁸⁹

Secondly, it may not fall short of the total amount of the own funds and buffer requirements under the CRR and the CRD IV.⁷⁹⁰

*Thirdly, eligible liabilities, including subordinated debt instruments and loans, not qualifying as Additional Tier 1 instruments or Tier 2 instruments must be included in the amount of own funds and eligible liabilities, only if they satisfy the specific six conditions laid down in **Article 12(16)**.*

*Finally, if a liability is governed by the law of a jurisdiction outside the EU, the Board may instruct NRAs to require the institution to demonstrate that any Board decision to write down or convert it would be effected under the law of that jurisdiction, having regard, in particular, to the terms of the contract governing the liability and international agreements on the recognition of resolution proceedings. If the Board is not satisfied that any decision would be effected under the law of that jurisdiction, the liability may not be counted towards the MREL.*⁷⁹¹

2. Field of application under the SRMR

(1) The Board must determine (after consulting the competent authorities, including the ECB) the MREL subject to write-down and conversion powers which must be met all times by the entities and groups referred to in **Article 7(2) SRMR** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**).⁷⁹² *Exceptionally, it may exempt mortgage credit institutions financed by covered bonds under certain conditions.*⁷⁹³ **'Covered bond'** means⁷⁹⁴ an instrument as referred to in **Article 52(4) of Directive 2009/65/EC** of the European Parliament and of the Council of 13 July 2009 "on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)",⁷⁹⁵ (the **'UCITS IV'** Directive), which applies since 18 March 2016 as amended by **Directive 2014/91/EU** of 23 July 2014 of the European Parliament and of the Council "amending Directive 2009/65/EC (...) as regards depositary functions, remuneration policies and sanctions",⁷⁹⁶ (the **'UCITS V Directive'**).⁷⁹⁷

⁷⁸⁸ See below in **Chapter 5, Section B, under 5.3.2**.

⁷⁸⁹ **SRMR**, Article 12(6), first and second sub-paragraphs.

⁷⁹⁰ *Ibid.*, Article 12(6), third sub-paragraph.

⁷⁹¹ *Ibid.*, Article 12(17).

⁷⁹² *Ibid.*, Article 12(1). If the Commission submits a legislative proposal according to **Article 45(18) BRRD**, it must, if appropriate, submit as well a legislative proposal amending **Article 12 SRMR** in the same way (*ibid.*, Article 12(18)).

⁷⁹³ *Ibid.*, Article 12(5).

⁷⁹⁴ *Ibid.*, Article 3(1), point (52).

⁷⁹⁵ OJ L 302, 17.11.2009, pp. 32-96.

⁷⁹⁶ OJ L 257, 28.8.2014, pp. 186-213.

⁷⁹⁷ On the UCITS IV Directive, see **Moloney (2014a)**, pp. 200-269, and **Zetzsche (2017)**.

(2) On the other hand, when drafting resolution plans, NRAs must determine (after consulting the NCAs) the MREL subject to write-down and conversion powers which the entities referred to in **Article 7(3)** are required to meet at all times. In that regard, applicable is the cooperation procedure established in **Article 31**.⁷⁹⁸ In order to ensure effective and consistent application of the provisions on the MREL, the Board is empowered to issue guidelines and address instructions to NRAs relating to specific entities or groups.⁷⁹⁹

3. Conditions applying to the determination made by the Board

3.1 General rules

(1) Within the limits laid down in **Article 12(6) SRMR**,⁸⁰⁰ in order to ensure that an entity can be resolved by the application of resolution tools (including, if appropriate, the bail-in tool) in a way meeting the resolution objectives,⁸⁰¹ the Board's determination of the MREL must be made on the basis of the following three criteria (cumulatively):⁸⁰²

firstly, the size, the business model, the funding model and the risk profile of the institution and parent undertaking referred to in **Article 2**;

secondly, the extent to which the DGS could contribute to the financing of resolution in accordance with **Article 79**,⁸⁰³

thirdly, the extent to which the failure of the institution or parent undertaking referred to in **Article 2** would have significant adverse consequences for the financial system or would be a threat to financial stability (within the meaning of **Article 10(5)**⁸⁰⁴), including due to its interconnectedness with other institutions or with the rest of the financial system through contagion.

(2) Taking into account the above, as well as the provisions of the Commission Delegated Regulation to be adopted in accordance with **Article 45(6) BRRD**, the level of the MREL is the sum of two components:

the *first* component is the '**loss absorption amount**' which would be (usually) equal to total capital requirements applicable to the entity and would serve as a cushion aiming at absorbing losses incurred by that entity;

the *second* component is the '**recapitalisation amount**', which would be the amount of own funds and eligible liabilities that, if written down or converted into equity, would allow the entity concerned not only to meet the minimum capital requirements after the implementation of the preferred resolution strategy, but also to maintain sufficient market confidence.

⁷⁹⁸ See on this above in **Chapter 2, Section A, under 5.3**.

⁷⁹⁹ **SRMR**, Article 12(2)-(3).

⁸⁰⁰ See above, **under 1 (2)**.

⁸⁰¹ On these objectives, see below in **Chapter 5, Section A, under 1**.

⁸⁰² **SRMR**, Article 12(7).

⁸⁰³ On Article 79, see below in **Chapter 6, Section A, under 5.2**.

⁸⁰⁴ See on this above in **Section B, under 3.1.1 (2)**.

The above-mentioned amount is adjusted, downwards or upwards, by three factors:

firstly, the ‘**no creditor worse off principle**’ (NCWO) **adjustment**, which implies that if liabilities likely to be excluded from the bail-in pursuant to **Article 27(5)** total more than 10% of any class of liabilities ranking equally in insolvency, the Board must adjust the level of the MREL in order to avoid putting relative creditors in a worse position than in case of liquidating the entity concerned,⁸⁰⁵

secondly, the ‘**MREL downwards adjustment because of the possible contribution of the DGS**’, which is the reduction of the MREL equal to the amount that the relative DGS is expected to contribute to financing resolution costs; and

thirdly, the ‘**8% of total liabilities and own funds floor constraint**’ in respect of systemically important (at global or national level) entities, which implies that in any case these entities must meet an MREL of at least 8% of total liabilities and own funds.⁸⁰⁶

(3) The Board’s determination must specify the MREL which each institution has to comply with on an individual basis, and the MREL which each parent undertaking has to comply with on a consolidated basis. The determination of the ‘**minimum aggregate amount requirement for own funds and eligible liabilities**’ at consolidated level of an EU parent undertaking established in a participating Member State must be made by the Board, after consulting the ‘consolidating supervisor’, on the basis of the above-mentioned three criteria, and whether the group’s third-country subsidiaries are to be resolved separately under the resolution plan.⁸⁰⁷

‘**Consolidated basis**’ means the basis of the consolidated situation as defined in **Article 4(1), point (47) CRR**, according to which ‘consolidated situation’ means the situation that results from applying the requirements of that Regulation in accordance with Part One, Title II, Chapter 2 to an institution as if that institution formed, together with one or more other entities, a single institution.⁸⁰⁸ ‘**Consolidating supervisor**’ means a competent authority responsible for the exercise of supervision on a consolidated basis of Union parent institutions, and institutions controlled by Union parent financial holding companies or Union parent mixed financial holding companies.⁸⁰⁹

(4) In the case of a group, the Board must also set the MREL to be applied to its subsidiaries on an individual basis, at an appropriate level and having regard to the above-mentioned (**under (1)**) criteria (in particular, the size, business model and risk profile of the subsidiary, including its own funds, and the consolidated requirement set for the group).⁸¹⁰

In this respect, **recital (84)** provides that a ‘top-down approach’ should be adopted when determining the MREL within a group, which should recognise that resolution action is applied at the level of the individual legal entity, and that it is imperative that loss absorbing capacity is located in, or is accessible to, the entity within the group where losses occur.

⁸⁰⁵ On the NCWO principle, see details below in **Chapter 5, Section A, under 2.1 (5)**.

⁸⁰⁶ Systemically important financial entities or institutions are well known under the acronym ‘SIFIs’. Regarding the delineation of the definition of SIFIs, see **Huertas and Lastra (2011)**, pp. 255-258 (who use the term ‘systemically significant financial institutions’ or ‘SSFIs’), and **Hofer (2014)**, pp. 17-21. On policy recommendations to overcome the problems arising out of the operation of SIFIs, see **Carmassi, Luchetti and Micossi (2010)** and **Weber, Arner, Gibson and Baumann (2014)**, pp. 152-171.

⁸⁰⁷ **SRMR**, Article 12(8).

⁸⁰⁸ *Ibid.*, Article 3(1), point (25).

⁸⁰⁹ *Ibid.*, Article 3(1), point (26), with reference to **Article 4(1), point (41) CRR**.

⁸¹⁰ *Ibid.*, Article 12(9).

Accordingly, the loss absorbing capacity should be distributed across the group in accordance with the level of risk in its constituent legal entities and the MREL necessary for each individual subsidiary should be separately assessed. Furthermore, it should be ensured that all capital and liabilities which are counted towards the consolidated MREL are located in entities where losses are likely to occur, or are otherwise available to absorb losses.⁸¹¹

In addition, it is laid down that both a ‘multiple-point-of-entry’ and a ‘single-point-of-entry’ resolution should be allowed,⁸¹² the MREL reflecting the resolution strategy which is appropriate to a group in accordance with the resolution plan. In particular, the MREL should be required at the appropriate level in the group in order to reflect a multiple-point-of-entry or a single-point-of-entry approach contained in the resolution plan, while keeping in mind that there could be circumstances where an approach different from that contained in the plan is used as it would allow, e.g. reaching the resolution objectives more efficiently. Against that background, regardless of whether a group has chosen the one or the other approach, all entities of the group should have at any time a robust MREL to avoid the risk of contagion or of a bank run.⁸¹³

(5) It is noted in this respect that since 2017 the Board started developing ‘**binding targets**’ for major banking groups. As mentioned in its website:⁸¹⁴ “*Looking forward to 2018, these targets will be defined, with an increased focus on quality and internal location of MREL, in particular ensuring that there are sufficient subordinated instruments to implement banks’ preferred resolution strategies. Looking further, beyond 2018, decisions on MREL will be regularly updated in the light of possible changes in the structures and degrees of riskiness of banks, as well as keeping up to date with potential regulatory developments.*”

3.2 Discretions of and additional requirements imposed on the Board

(1) When determining the MREL on an individual or on a consolidated basis, the Board has the following discretions:

Firstly, it may decide to waive the MREL on an individual basis either to a parent institution if the conditions laid down in **Article 45(11) BRRD** are met, or to a subsidiary if the conditions of **Article 45(12), points (a)-(c)** are met.⁸¹⁵

Furthermore, it may decide, either on its own initiative (after consulting the NRA) or upon a proposal by the latter, that the MREL can be partially met on a consolidated or an individual basis through ‘contractual bail-in instruments’, provided that the criteria laid down in **Article 12(6)-(7) SRMR** are fully met.⁸¹⁶ In order to qualify as a ‘**contractual bail-in instrument**’, the Board must be satisfied that the instrument meets two criteria: *firstly*, it contains a contractual term providing that, if the bail-in tool is applied to the institution, the instrument must be written down or converted to the extent required before the write-down or conversion of other eligible liabilities; *secondly*, it is subject to a binding subordination agreement, undertaking or provision under which, in the event of normal insolvency proceedings, it ranks below other eligible liabilities and cannot be repaid until other outstanding eligible liabilities have been settled.⁸¹⁷

⁸¹¹ *Ibid.*, recital (84), first sub-paragraph.

⁸¹² On these concepts, see above in **Section B, under 3.1.2.3 (1)**.

⁸¹³ **SRMR**, recital (84), second sub-paragraph.

⁸¹⁴ See at: <https://srb.europa.eu/en/content/mrel>.

⁸¹⁵ **SRMR**, Article 12(10).

⁸¹⁶ *Ibid.*, Article 12(11). On these criteria, see just above, **under 3.1**.

⁸¹⁷ *Ibid.*, Article 12(12).

(2) The following requirements are also imposed on the Board:⁸¹⁸

Firstly, it must make any determination in accordance with **Article 12(1) SRMR**, and, if relevant, to **Article 12(11)** in parallel with the development and maintenance of the resolution plans.

Secondly, it must address its determination to the NRAs (in which case the latter must implement the Board's instructions in accordance with **Article 29**)⁸¹⁹ and require from them to verify and ensure that institutions and parent undertakings maintain the MREL as determined according to **Article 12(1)**.

Finally, it must inform the ECB and the EBA of the MREL it has determined for each institution and parent undertaking and, if relevant, the requirements laid down in **Article 12(11)**.

(3) As already mentioned in the previous Chapter,⁸²⁰ any natural or legal person, including the NRAs, may appeal before the Appeal Panel against Board's decisions relating, *inter alia*, to the determination of the MREL in accordance with **Article 12(1)**.⁸²¹ In its most recent Decision on this field (**Case 8/18** of 16 October 2018),⁸²² the Appeal Panel noted, *inter alia*, that the MREL determination is, by its very nature, a dynamic exercise in which the Board disposes of a margin of technical discretion, allowing it to adjust its determination to all relevant changes in factual assumptions, adhering nevertheless to the principle of proportionality.

3.3 The Board's MREL policy

The Board developed its first "MREL policy" in 2016,⁸²³ which was followed by the 2017 MREL Policy, in which it adopted its initial binding decisions for major groups.⁸²⁴ In 2018, the Board's resolution planning cycle was split in two waves:

The *first* wave of resolution plans covered the least complex credit institutions and groups that did not have binding targets (i.e. those without global presence); it started in January 2018 and was largely based on the 2017 approach.⁸²⁵

The *second* wave covered the most complex ones, based on an enhanced MREL policy published on 16 January 2019; it introduced a series of new features with a view to strengthening the MREL approach, enhancing credit institutions' resolvability within the BU and preparing them for the upcoming regulatory amendments in the context of the BRRD II and the SRMR II.⁸²⁶

⁸¹⁸ *Ibid.*, Article 12(13)-(15).

⁸¹⁹ On Article 29, see below in **Chapter 5, Section C, under 3**.

⁸²⁰ See above, in **Chapter 3, Section C, under 2.1**.

⁸²¹ **SRMR**, Article 85(3), first sub-paragraph.

⁸²² Available at: https://srb.europa.eu/sites/srbsite/files/case_8_18_decision_anonymised.pdf.

⁸²³ Available at: https://srb.europa.eu/sites/srbsite/files/srb_mrel_approach_2016_post_final.pdf.

⁸²⁴ Available at: https://srb.europa.eu/sites/srbsite/files/item_1_public_version_mrel_policy_annex_i_plenary_session.pdf.

⁸²⁵ Available at: https://srb.europa.eu/sites/srbsite/files/srb_2018_mrel_policy_first_wave_of_resolution_plans.pdf.

⁸²⁶ Available at: https://srb.europa.eu/sites/srbsite/files/public_mrel_policy_2018_second_wave_of_plans.pdf.

3.4 Report by the EBA – legislative proposal by the Commission

On the basis of **Article 45(19)-(20) BRRD**, the EBA submitted on 14 December 2016 a Report to the Commission “on the implementation and design of the MREL framework”,⁸²⁷ which should form the basis for a Commission’s legislative proposal on the ‘harmonised application’ of the MREL,⁸²⁸ contains both a quantitative analysis and a cost-benefit analysis of the introduction of MREL. In the meantime, as already mentioned,⁸²⁹ in November 2016 the Commission submitted a combined legislative proposal reviewing the MREL and implementing the total loss-absorbing capacity (TLAC) standard of the FSB in the EU, by proposing the amendment of both the SRMR and the BRRD (presented in some detail **under 5** below).

4. A comparison to the ‘TLAC’ standard

(1) On **9 November 2015**, the FSB issued a Report entitled: “Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution – Total Loss-absorbing Capacity (TLAC) Term Sheet”.⁸³⁰ These thirteen Principles and this Term Sheet, which form a new international standard for G-SIBs,⁸³¹ lay down the minimum external ‘total loss-absorbing capacity’ standard (the ‘**minimum TLAC standard**’) for the thirty banks identified by the FSB as global systemically important (the ‘**G-SIBS**’)⁸³² and deemed as too-big-to-fail.⁸³³

They also introduce an ‘**internal TLAC standard**’, which refers to the loss-absorbing capacity that resolution entities have committed to ‘material sub-groups’ in order to facilitate co-operation between home and host authorities and the implementation of effective cross-border resolution strategies by ensuring the appropriate distribution of loss-absorbing and recapitalisation capacity within groups outside of the resolution entity’s home jurisdiction.⁸³⁴

(2) The purpose of the minimum TLAC standard, and the main guiding principle, is to ensure (as in the case of the MREL) that, if a G-SIB fails, it has sufficient loss-absorbing and recapitalisation capacity available in resolution for the implementation, with a high degree of confidence, of an orderly resolution that minimises any impact on financial stability ensures the continuity of critical functions *and* avoids exposing taxpayers (i.e. public funds) to loss.⁸³⁵ The other principles refer to the following:

⁸²⁷ Available at: [https://www.eba.europa.eu/documents/10180/1695288/EBA+Final+MREL+Report+\(EBA-Op-2016-21\).pdf](https://www.eba.europa.eu/documents/10180/1695288/EBA+Final+MREL+Report+(EBA-Op-2016-21).pdf).

⁸²⁸ **BRRD**, Article 45(18).

⁸²⁹ See above, in **Chapter 3, Section E, under 1**.

⁸³⁰ Available at: <https://www.fsb.org/2015/11/total-loss-absorbing-capacity-tlac-principles-and-term-sheet>.

⁸³¹ **FSB TLAC Report (2015)**, p. 3 (*in finem*).

⁸³² See at: <https://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf>.

⁸³³ On the TLAC, see **Borsuk (2015)**, **Huertas (2015)**, **Kupiec (2015)**, **Speyer (2015)** and **Szczepańska (2015)**.

⁸³⁴ **FSB TLAC Report (2015)**, Term Sheet, paragraphs 16-17.

⁸³⁵ *Ibid.*, Principle (i).

firstly, the calibration of the amount of the minimum TLAC required (principles (ii)-(v));

secondly, ensuring the availability of the minimum TLAC for loss absorption and recapitalisation in the resolution of cross-border groups (principle (vi));

furthermore, the determination of the instruments eligible to meet the minimum TLAC requirements (principles (vii)-(viii));

fourthly, the interaction with regulatory capital requirements and the consequences of breaches of the minimum TLAC (principles (ix)-(x)); and

finally, the transparency requirements (principle (xi)), the limitation of contagion (principle (xii)) and the review process (principle (xiii)).

(3) The minimum TLAC requirement, which is additional to the minimum regulatory capital requirements under the Basel III regulatory framework of the Basel Committee on Banking Supervision,⁸³⁶ consists of instruments that can be written down or converted into equity by the relevant resolution authority in case of resolution (the ‘**TLAC-eligible instruments**’) and includes: capital instruments, long-term unsecured (subordinated and senior) debt, as well as any other liability or item eligible as minimum TLAC under the Term Sheet.⁸³⁷

(4) With regard to the calibration of the minimum TLAC requirement, the following is laid down:⁸³⁸ as from **1 January 2019**, it will be at least 16% of the group’s risk-weighted assets, increasing to at least 18% from 1 January 2022. In addition, as from **1 January 2019** as well, it will be at least 6% of the Basel III ‘**leverage ratio denominator**’, increasing to at least 6.75% as from **1 January 2022**. Authorities are empowered to set a higher requirement or apply buffers in addition to the above minimum.

(5) On **6 July 2017**, the FSB published a guidance document entitled “Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs (‘Internal TLAC’)”, aimed at assisting authorities in implementing its TLAC standard.⁸³⁹ This document defines a minimum requirement for the instruments and liabilities that should be held by G-SIBs and be readily available for bail-in within resolution, and requires a certain amount of those loss-absorbing resources to be committed to subsidiaries or sub-groups that are located in host jurisdictions and deemed material for the resolution of the G-SIB as a whole (internal TLAC).

On the same day, a second guidance document, entitled “Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution”, was also published with a view to facilitating the continued access to critical financial market infrastructure services in resolution, in accordance with the key objective of effective resolution to maintain the continuity of their critical functions.⁸⁴⁰ This document requires firms in resolution to maintain the continued access to clearing, payment, settlement, custody and other services by FMIs.

⁸³⁶ *Ibid.*, Term Sheet, paragraphs 3 (first sentence) and 6. On the Basel III regulatory framework see above in **Chapter 1, Section B, under 1.2.2**.

⁸³⁷ *Ibid.*, Principles (vii)-(viii), and Term Sheet, paragraphs 7-15; the internal TLAC requirement is governed by paragraph 18 of the Term Sheet.

⁸³⁸ *Ibid.*, Term Sheet, paragraph 4.

⁸³⁹ Available at: <https://www.fsb.org/2017/07/guiding-principles-on-the-internal-total-loss-absorbing-capacity-of-g-sibs-internal-tlac-2>.

⁸⁴⁰ Available at: <https://www.fsb.org/2017/07/guidance-on-continuity-of-access-to-financial-market-infrastructures-fmis-for-a-firm-in-resolution-2>.

It also sets out arrangements and safeguards to facilitate continuity of access to FMIs for firms in resolution that apply at the level of the providers of FMI services, at the level of FMI participants and at the level of the relevant resolution and FMI authorities.

(6) On the basis of the above-mentioned, it is noted that, even though the TLAC and the MREL pursue the same regulatory objective, there are some essential differences between them. In particular:

Firstly, while the MREL applies to the entire perimeter of EU credit institutions, the application of the TLAC is confined to large, systemically important cross-border banking groups.

Secondly, while the level of MREL is determined by resolution authorities on a case-by-case basis institution specific assessment, the TLAC standard contains a harmonised minimum level.

Finally, for the purposes of MREL, subordination of debt instruments could be required by resolution authorities on a case-by-case basis to the extent it is needed to ensure that in a given case bailed in creditors are not treated worse than in a hypothetical insolvency scenario (which is a scenario that is counterfactual to resolution). On the other hand, the minimum TLAC requirement should *in principle* be met with subordinated debt instruments.

5. Pending amendments to the BRRD and the SRM Regulation concerning the MREL and the TLAC

(1) As already discussed,⁸⁴¹ the Commission's legislative 'banking package' of 23 November 2016, includes, *inter alia*, a combined legislative proposal concerning the amendment of both the SRMR and the BRRD, which are reviewing the MREL and implementing the TLAC standard in the EU legal framework. From an operational point of view, the harmonised minimum level of the TLAC standard for G-SIIs (referred to as '**TLAC minimum requirement**') will be introduced in the EU through amendments to the CRR (CRR II). On the other hand, the '**institution specific add-on**' for G-SIIs and the '**institution-specific requirement**' for non-G-SIIs will be addressed through targeted amendments to the BRRD and the SRMR (BRRD II and SRMR II, respectively).⁸⁴² This institution-specific add-on will be imposed when the TLAC minimum requirement is not sufficient to absorb losses and recapitalise a G-SII under the preferred resolution strategy.⁸⁴³

(2) The main objective of the BRRD II is to implement the TLAC standard and to integrate the TLAC requirement into the general MREL rules by avoiding duplication, which would arise from the application of two parallel requirements. Under this proposal the following will apply:

Firstly, both requirements will be met with largely similar instruments, requiring thus the introduction of limited adjustments to the existing MREL rules ensuring technical consistency with the structure of any requirements for G-SIIs.

⁸⁴¹ See above in **Chapter 1, Section C, under 2.1**.

⁸⁴² **Proposed SRMR II**, recital (2), third sentence.

⁸⁴³ *Ibid.*, recital (10), second sentence.

In addition, further appropriate technical amendments to the existing rules on MREL are proposed to align them with the TLAC standard as regards, *inter alia*, the denominators used for measuring loss-absorbing capacity, the interaction with capital buffer requirements, disclosure of risks to investors and their application in relation to different resolution strategies.

Thirdly, the proposal also amends the BRRD with a view to reduce compliance costs of EU credit institutions where their liabilities are governed by the laws of third countries. In this respect, more flexibility will be introduced in the contractual relationships of EU credit institutions with third country entities, by allowing NRAs to waive, subject to certain strict safeguards, the obligation to insert contractual clauses with the aim of recognising in third countries the effects of the bail-in of liabilities governed by the law of such third countries.

The *final* major amendment to the BRRD concerns the application by NRAs of harmonised ‘**moratorium tools**’ in the course of resolution, meaning powers to suspend the execution of credit institutions’ commitments towards third parties (including the repayment of deposits not covered by the DGS, i.e. exceeding 100,000 euros *per* depositor *per* credit institution). The purpose of this new power given to NRAs is to contribute to the stabilisation of a credit institution in the period before, and possibly after, its resolution.

(3) The proposed amendments to the SRMR also relate to the implementation of the TLAC standard in the EU. In particular, the provisions of the SRMR II will apply to the Board and the NRAs of participating Member States when setting and implementing the requirements on loss absorbing and recapitalisation capacity of entities established in those Member States. The relevant provisions will have to be applied consistently in conjunction with those of the CRR II, the CRD V and the BRRD II.⁸⁴⁴

(4) The further analysis of these two proposed legal acts is beyond the scope of the present study (at this stage). It is noted, nevertheless, that Member States will have to comply with the BRRD II and the SRMR II will apply within 18 months from the date of their entry into force (i.e. not before the end of 2020).⁸⁴⁵

⁸⁴⁴ *Ibid.*, recital (2), last sentence.

⁸⁴⁵ **Proposed BRRD II**, Article 9(1), first sub-paragraph and **Proposed SRMR II**, Article 6(2).

TABLE 9
Own funds instruments

Tier 1 (capital) instruments		Tier 2 (capital) instruments
Common Equity Tier 1 (CET 1) instruments	Additional Tier 1 instruments	
common shares	preference shares and debt instruments meeting certain requirements	preference shares and debt instruments meeting certain requirements
share premium accounts related to common shares	share premium accounts related to the above-mentioned instruments	share premium accounts related to above-mentioned instruments
retained earnings		general credit risk adjustments, gross of tax effects, of up to 1,25% of risk-weighted exposure amounts (standardised approach)
accumulated other comprehensive income		positive amounts, gross of tax effects, resulting from the calculation laid down in Articles 158 and 159 (expected loss amounts) up to 0,6 % of risk weighted exposure amounts (IRB approach)
other reserves		
funds for general banking risk		

Section D: Early intervention

1. The powers of the ECB and the national competent authorities (NCAs)

(1) The Board does not have any powers to adopt early intervention measures. Under EU banking law, it is the ECB or (depending on the case) the NCAs which can require an institution or a group to take measures in accordance with **Article 16 SSMR** (on the ECB's supervisory powers⁸⁴⁶), **Articles 27-29 BRRD** (on 'early intervention measures') or **Article 104 CRD IV** (on 'supervisory powers'). They may also take such measures themselves. On the basis of **Article 27(4) BRRD**, the EBA issued on 29 July 2015 Guidelines (**EBA/GL/2015/03**) concerning the triggers for use of early intervention measures.⁸⁴⁷

It is noted that the previous adoption of a measure according to these Articles is not a condition for taking a resolution action.⁸⁴⁸

(2) Within the BU, it is the ECB which is called upon to carry out supervisory tasks in relation to early intervention, if a credit institution or group, in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable micro-prudential supervision requirements.⁸⁴⁹ In this respect, noteworthy is the overlapping between the ECB's supervisory measures under Article 16 SSMR (as well as the NRAs' supervisory powers under Article 104 CRD IV), on the one hand, and the early intervention measures under Article 27 BRRD, on the other hand, since certain measures could be adopted either as supervisory measures or as early intervention ones, while, in addition, the conditions triggering their use are similar. Accordingly, in the majority of the cases, whenever the conditions for supervisory measures are fulfilled, those for early intervention are also met. By application of the principle of proportionality, it is expected that the ECB or an NCA would, in principle, be tempted to take an action as a supervisory measure, as the less intrusive.⁸⁵⁰

(3) Nevertheless, the ECB has made use of early intervention measures. On 6 **September 2017** it decided the imposition of such measures to **Dexia S.A. and Dexia Crédit Local S.A.**. In this respect is required Dexia S.A. to submit by 30 September 2017 a plan ensuring that the conversion into instruments fulfilling the criteria of CET1 pursuant the CRR all its preferred shares (then grandfathered as CET1 instruments), would be made effective as of 1 January 2018.

⁸⁴⁶ See on this **Gortsos (2015a)**, pp. 222-224 and **Bauer-Weiler (2018)**, pp. 775-776.

⁸⁴⁷ The Guidelines are available at: <https://www.eba.europa.eu/documents/10180/1067473/EBA-GL-2015-03+Guidelines+on+Early+Intervention+Triggers.pdf>.

⁸⁴⁸ **SSMR**, Article 18(3); see also below in **Chapter 5, Section C, under 1.1 (1)**.

⁸⁴⁹ **SSMR**, Article 4(1), point (i).

⁸⁵⁰ See e.g. the response of Danièle Nouy, Chairperson of the ECB's Supervisory Board, to the letter of two Members of the European Parliament (Philippe Lamberts and Ernest Urtasun) of 24 January 2018 (available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm_mepletter180125_Lamberts_Urtasun.en.pdf?476e748bf9f81e84e8d2d3c96ff14635).

It also required Dexia Crédit Local S.A. to submit by the same date a plan ensuring that it would, as from 1 January 2018 as well, comply, in accordance with **Article 11(2) CRR**,⁸⁵¹ with the overall capital requirement on the basis of the consolidated situation of Dexia S.A.⁸⁵²

Then, as recently as **2 January 2019**, it decided to appoint temporary administrators and a three-member surveillance committee to take charge of the Italian credit institution **Banca Carige** and replaced its Board of Directors after the resignation of the majority of this credit institution's board members on the same day. This constitutes an early intervention measure aimed at ensuring continuity and pursuing the objectives of a strategic plan. The appointment of the temporary administration resulted in the removal of Banca Carige's management and control bodies.⁸⁵³

2. The role of the Board

(1) The Board must be informed by the ECB or the NCAs of any measure they require an institution or a group to take (or take themselves) in accordance with the above-mentioned Articles of the SSMR, the BRRD or the CRD IV and notify the Commission of any information received.⁸⁵⁴ **Recital (52) SRMR** highlights in this respect that the Board should be empowered to intervene at an early stage where the financial situation or the solvency of an entity is deteriorating and that the information it receives from the ECB or the NRAs at that stage is instrumental in making a determination on the action it might take in order to prepare for the resolution of the entity concerned.

From the date of receipt of this information, and without prejudice to the powers of the ECB and the NCAs under other EU legal acts, the Board must prepare for the resolution of the institution or group concerned. For this purpose, the ECB or the relevant NCA must closely monitor, in cooperation with the Board, the conditions of the institution or the parent undertaking and their compliance with any early intervention measure required of them, *and* provide the Board with all information necessary in order to update the resolution plan and prepare for the potential resolution and for the valuation in accordance with **Article 20**.⁸⁵⁵

⁸⁵¹ This Article provides that institutions controlled by a parent financial holding company or a parent mixed financial holding company in a Member State must comply, to the extent and in the manner prescribed in Article 18 (on the methods for prudential consolidation), with the rules governing own funds (Articles 25-91), capital requirements (Articles 92-386) and large exposures (387-403) on the basis of the consolidated situation of that financial holding company or mixed financial holding company.

⁸⁵² See at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Decision_Dexia_Credit_Local_S_A_Dexia_S_A.pdf?a52e1dfba7cdcd3a84a0f5588f61c7bf.

⁸⁵³ The relevant Press Release of the ECB is available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190102.en.html>.

⁸⁵⁴ **SRMR**, Article 13(1).

⁸⁵⁵ *Ibid.*, Article 13(2). On Article 20, see below in **Chapter 5, Section D**. In this respect, **recital (63)** (second sentence) provides that the valuation of the assets and liabilities of an institution under resolution and, if required, the valuation of the treatment that shareholders and creditors would have received if the entity had been wound up under normal insolvency proceedings should commence already in the early intervention phase.

According to **recital (53)**: “*In order to ensure rapid resolution action when it becomes necessary, the Board should closely monitor, in cooperation with the ECB or with the relevant national competent authority, the situation of the entities concerned and the compliance of those entities with any early intervention measure taken in their respect. In determining whether a private sector action could prevent within a reasonable timeframe the failure of an entity, the appropriate authority should take into account the effectiveness of early intervention measures undertaken within a timeframe set by the competent authority.*”

In this respect, the Board has the following powers (informing accordingly the ECB and the relevant NCAs and NRAs):⁸⁵⁶

Firstly, it may require the institution or the parent undertaking to contact potential purchasers in order to prepare for the institution’s resolution, subject to the criteria specified in **Article 39(2) BRRD** (on the marketing requirements in case of application of the sale of business tool) and the requirements of professional secrecy in accordance with **Article 88**.⁸⁵⁷

Furthermore, it may require the relevant NRA to draft a preliminary resolution scheme for the institution or the group concerned.

(2) Before imposing any additional measure under the above-mentioned (in **Sub-section 1**) provisions of EU banking law on an institution or a group which has not yet fully complied with the first measure notified to the Board, the ECB or the relevant NCA must inform accordingly the Board. In such a case, the ECB or the NCA, the Board and the relevant NRAs must ensure the consistency between any additional measure and any Board action aimed at preparing for resolution.⁸⁵⁸

⁸⁵⁶ *Ibid.*, Article 13(3).

⁸⁵⁷ On the asset separation tool, see below in **Chapter 5, Section B, under 2** and on Article 88, see above in **Chapter 3, Section E, under 3.4**.

⁸⁵⁸ **SRMR**, Article 13(4)-(5).

Chapter 5

Resolution action

Section A:

Resolution objectives and general principles – order of priority of claims

1. Resolution objectives

1.1 General provisions

When acting under the ‘resolution procedure’ referred to in **Article 18 SRMR**,⁸⁵⁹ the Board, the Council, the Commission, and, if relevant, the NRAs as regards their respective responsibilities, must take into account the ‘**resolution objectives**’ and choose the ‘**resolution tools**’ and ‘**resolution powers**’ which, in their view, best achieve the resolution objectives relevant in the specific circumstances of each case.⁸⁶⁰

‘**Resolution power**’ means a power referred to in its Articles 63-72 (see **Box 5** below).⁸⁶¹ The ‘**resolution tools**’ provided for in the EU regulatory framework (and referred to in **Article 22(2) SRMR**) are four: the sale of business tool, the bridge institution tool, the asset separation tool, and the bail-in tool.⁸⁶²

In principle and unless otherwise provided in the SRMR, the resolution objectives are of equal significance and must be appropriately balanced to the nature and circumstances of each case.⁸⁶³ When pursuing them, the Board, the Council, the Commission and, if relevant, the NRAs must seek to minimise the resolution cost and avoid destruction of value, unless necessary to achieve them.⁸⁶⁴

⁸⁵⁹ On this procedure, see **Section C** below.

⁸⁶⁰ **SRMR**, Article 14(1). On resolution powers see indicatively (out of a vast existing literature) **Avgouleas, Goodhart and Schoenmaker (2009)**, **Cihák and Nier (2009)**, **Amorello and Huber (2014)**, **Claessens, Herring and Schoenmaker (2010)**, **Noussia (2010)**, **Attinger (2011)**, individual contributions to the collective volume **Lastra (2011, editor)**, **Babis (2012)**, **Dewatripoint and Freixas (2012)**, **Grünewald (2014)**, **Hadjiemmanuil (2014)** and **White and Yorulmazer (2014)**.

⁸⁶¹ **BRRD**, Article 2(1), point (20). On Articles 63-72, see **Haentjens (2017a)**, pp. 256-272.

⁸⁶² The resolution tools are presented in more detail in **Section B** below.

⁸⁶³ **SRMR**, Article 14(3).

⁸⁶⁴ *Ibid.*, Article 14(2), second sub-paragraph.

BOX 5

Resolution powers under Article 63(1) BRRD

According to **Article 63(1) BRRD**, resolution powers, which are or may be taken exclusively by the competent resolution authorities, include the power to undertake the following, individually or in any combination:

- (1) require any person to provide any information required for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;
- (2) take control of an institution under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the management body of the institution under resolution;
- (3) transfer shares or other instruments of ownership issued by an institution under resolution;
- (4) transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;
- (5) reduce, including to zero, the principal amount of or outstanding amount due in respect of eligible liabilities, of an institution under resolution;
- (6) convert eligible liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution or entity referred to in **point (b), (c) or (d) of Article 1(1)**, a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution or such an entity are transferred;
- (7) cancel debt instruments issued by an institution under resolution except for secured liabilities subject to **Article 44(2)**;
- (8) reduce, including to zero, the nominal amount of shares or other instruments of ownership of an institution under resolution and to cancel such shares or other instruments of ownership;
- (9) require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments;
- (10) amend or alter the maturity of debt instruments and other eligible liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other eligible liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities subject to **Article 44(2)**;
- (11) close out and terminate financial contracts or derivatives contracts for the purposes of applying **Article 49**;
- (12) remove or replace the management body and senior management of an institution under resolution; and
- (13) require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in **Article 22 CRD IV** and **Article 12 MiFID II**.

1.2 The five resolution objectives

The five resolution objectives are the following:⁸⁶⁵

Firstly, the continuity of ‘**critical functions**’ must be ensured.⁸⁶⁶

Secondly, significant adverse effects on financial stability must be avoided, in particular by preventing contagion, **including to market infrastructures**, and by maintaining market discipline. This aspect is further developed below, **under 1.3**.

Thirdly, protect public funds by minimising reliance on extraordinary public financial support. An effective resolution regime should minimise the costs of the resolution of a failing entity borne by the taxpayers.⁸⁶⁷

Fourthly, protect depositors covered by the **DGSD** and investors covered by the **ICSD**. Depositors should be granted access at least to the guaranteed deposits as promptly as possible and in any event within the same deadlines as provided for in the DGSD.⁸⁶⁸

Finally, protect client funds and client assets.

1.3 In particular: on financial stability

(1) As just mentioned, the second resolution objective consists in avoiding significant adverse effects on financial stability, in particular by preventing contagion including to FMIs, and maintaining market discipline.⁸⁶⁹ Unlike the Board’s ‘**critical functions analysis**’, its ‘**financial stability analysis in banking resolution**’, also conducted in the course of its ‘**public interest assessment**’ (the ‘**PIA**’), focuses on the impact of a credit institution’s failure as a whole, including the wider consequences of its inability to fulfil its obligations towards clients and/or counterparties.⁸⁷⁰ Hence, it must assess the economic importance (systemic relevance) of the credit institution concerned, as well as the potential sources of direct and indirect contagion (spillover), the conditions in relation to market discipline and the impact on the real economy from its potential failure. In this respect, the following should be noted:

Firstly, the assessment of the credit institution’s **systemic relevance** can be based on its designation as a ‘systemically important’ one or not, the size of its balance sheet and in particular of its total assets, loans and deposits, the amount of its outstanding senior and junior debt, the amount of its cross-border assets and liabilities, as well as the degree of its interconnectedness to the rest of the financial system.

⁸⁶⁵ *Ibid.*, Article 14(2), first sub-paragraph and recital (58), third sentence. The same objectives are laid down in **Article 31 BRRD**. See on this **Binder (2016a)**, Section 2.3.1.

⁸⁶⁶ Critical functions have been discussed in more detail above in **Chapter 4, Section B, under 1.2.2.1**; on their maintenance as a key resolution objective, see **Stiefmüller (2017)**.

⁸⁶⁷ **SRMR**, recital (73), first sentence.

⁸⁶⁸ *Ibid.*, recital (56) (second sentence).

⁸⁶⁹ *Ibid.*, Article 14(2), first sub-paragraph and recital (73), second sentence.

⁸⁷⁰ See the Board’s document “Critical Functions: SRB Approach in 2017 and Next Steps”, para. 40, at pp. 15-16.

Secondly, in assessing **direct contagion**, the Board is expected to take into account, on the basis of the credit institution's systemic relevance, the potential of direct contagion effects *via* the interbank market, the significance of the risk related to market confidence (and mainly with respect to lending activities and bond markets) and to FMIs, as well as the credit institution's exposure in derivative markets.

Thirdly, the sources of **indirect contagion** are multiple, including contagion through deposits and a general mistrust to the national banking system. Another aspect that has to be assessed in this context, if resolution action were to be warranted and the bail-in resolution tool were to be applied, is the potential that performing loans of households and (mainly) non-financial corporates whose claims on the credit institution under resolution would be written-down or converted into common stocks would become non-performing.⁸⁷¹

In addition, before deciding that resolution action is not warranted on the basis of the public interest criterion and the winding up of the credit institution should be decided, the Board must assess the financial stability impact on the national DGSs, especially if the latter's available funds would not be sufficient for the compensation of covered depositors and resort to *ex-post* contributions from the other participating credit institutions would need to be made. *Vice versa*, before deciding on taking resolution action, the capacity of national DGSs in contributing to the financing of resolution should also be assessed.⁸⁷² The establishment of the EDIS for the Member States participating in the SSM might mitigate these concerns.

Finally, the assessment of the impact on the real economy can be based on data relating to lending flows to non-financial corporates (in the form of loans and bonds) and to households (in the form of mortgage and consumer loans).

2. General principles governing resolution action

2.1 The nine principles

The Board, the Council, the Commission and, if relevant, the NRAs must also take, when acting under the resolution procedure, all appropriate measures to ensure that any 'resolution action' is taken in accordance with the 'general principles governing resolution' laid down in **Article 15**. '**Resolution action**' means the decision to place a designated entity under resolution in accordance with **Article 18**, the application of a resolution tool, *or* the exercise of one or more resolution powers.⁸⁷³ These general principles are the following nine:⁸⁷⁴

(1) Covered deposits are fully protected.⁸⁷⁵ '**Covered deposits**' means the part of 'eligible deposits' that does not exceed the coverage level laid down in **Article 6(1) DGSD** (i.e. 100,000 euros *per* depositor *per* credit institution).

⁸⁷¹ This is considered to be one of most important negative effects from the application of the bail-in tool.

⁸⁷² See also Article 12(7), point (b) **SRMR**. On the role of DGSs in resolution financing, see below in **Chapter 6, Section A, under 5.2**.

⁸⁷³ **SRMR**, Article 3(1), point (10).

⁸⁷⁴ *Ibid.*, Article 15(1) (which repeats, almost *verbatim*, **Article 34(1) BRRD**) and recital (60).

⁸⁷⁵ See on this also below in **Section B, under 5.3.1**, in relation to the application of the bail-in tool.

In turn, ‘eligible deposits’ (a broader term) means deposits that are not excluded from protection pursuant to **Article 5 DGSD**.⁸⁷⁶

(2) The shareholders of the institution under resolution bear first losses.

(3) Creditors bear losses after the shareholders in accordance with the order of priority of their claims laid down in **Article 17 SRMR**,⁸⁷⁷ unless otherwise *expressly* provided for.

(4) Unless otherwise provided in the SRMR, creditors of the same class must be treated in an equitable manner. Where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the ‘public interest’ and should be neither directly nor indirectly discriminatory on the grounds of nationality.

(5) In view of avoiding disproportionate interference with his/her property rights, no creditor may incur greater losses than would have been incurred if a designated entity had been wound up under normal insolvency proceedings at the time that the resolution decision is taken in accordance with the safeguards provided for in **Article 29**.⁸⁷⁸ This so-called ‘**no creditor worse off (NCWO) principle**’, specified in Section 5 (mainly paragraph 5.3) of the **2011 FSB** “Key Attributes of Effective Resolution Regimes for Financial Institutions”, is regarded as the cornerstone of resolution regimes. It provides the following: “*Creditors should have a right to compensation where they do not receive at a minimum what they would have received in a liquidation of the firm under the applicable insolvency regime (“no creditor worse off than in liquidation” safeguard)*”.⁸⁷⁹ **Recital (65) SRMR** makes in this respect the following related considerations: “*In order to ensure that the resolution process remains objective and certain, it is necessary to lay down the order in which unsecured claims of creditors against an institution under resolution should be written down or converted. In order to limit the risk of creditors incurring greater losses than if the institution had been wound up under normal insolvency proceedings, the order to be laid down should be applicable both in normal insolvency proceedings and in the write-down or conversion process under resolution. This would also facilitate the pricing of debt.*” See also **recital (62)** linking the NCWO principle to the proportional interference with property rights.

(6) The management body and senior management of the institution under resolution must, *in principle*, be replaced.

(7) The management body and senior management must provide all necessary assistance for the achievement of the resolution objectives.

(8) Natural and legal persons must be made liable, subject to national law, under civil or criminal law, for their responsibility for the failure of the institution under resolution.

(9) Resolution action must be taken in accordance with all the safeguards provided for in the SRMR.

⁸⁷⁶ **SRMR**, Article 3(1), points (11) and (12), respectively; on Articles 5-6 DGSD, see **Gortsos (2014a)**, pp. 105-111, and 112-114, respectively.

⁸⁷⁷ See just below, **under 3**.

⁸⁷⁸ **SRMR**, recital (62), first and second sentences; on Article 29, see below in **Section C, under 3**.

⁸⁷⁹ On the NCWO principle and its application under EU resolution law, see (by way of mere indication) **Grünewald (2014)**, pp. 92-93, **Wojcik (2015)**, **de Serière and van der Houwen (2016)**, **Grünewald (2017)**, pp. 302-307, and **Haentjens (2017a)**, pp. 272-274. See also the **2016 FSB** “Key Attributes Assessment Methodology for the Banking Sector”, pp. 38-39.

2.2 Specific provisions

(1) Without prejudice to the above-mentioned resolution objectives, when the Board, the Council and the Commission are deciding on the application of resolution tools and the exercise of resolution powers on an institution which is a group entity, they must act in a way minimising both the impact on other group entities and the group as a whole, and the adverse effect on financial stability in the EU and its Member States, in particular in countries where the group operates.⁸⁸⁰

(2) When the sale of business tool, the bridge institution tool or the asset separation tool is applied to a designated entity, that entity must be considered to be the subject of bankruptcy or analogous insolvency proceedings for the purposes of **Article 5(1) of Council Directive 2001/23/EC** of 12 March 2001 “on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses”.⁸⁸¹ In addition, when deciding on the application of resolution tools and the exercise of resolution powers, the Board must instruct NRAs to inform and consult employee representatives if appropriate.⁸⁸²

(3) In relation to the resolution of financial institutions established in a participating Member State it is provided that the Board must decide thereon when the conditions laid down in **Article 18(1)** are met with regard to both the financial institution *and* to the parent undertaking subject to consolidating supervision.⁸⁸³ In relation to a parent undertaking, the Board must take a resolution action when these conditions are met with regard to both that parent undertaking and to one or more subsidiaries which are institutions or, if the subsidiary is not established in the EU, the third-country authority has determined that it meets the resolution conditions under that third country’s law.⁸⁸⁴

⁸⁸⁰ **SRMR**, Article 15(2).

⁸⁸¹ OJ L 82, 22.3.2001, pp. 16-20.

⁸⁸² **SRMR**, Article 15(3) and (4), first sub-paragraph. This is without prejudice to provisions on the representation of employees in management bodies as provided for by national law or by practice (*ibid.*, Article 15(4), second sub-paragraph).

⁸⁸³ *Ibid.*, Article 16(1); on Article 18(1), see below in **Section C, under 1**.

⁸⁸⁴ *Ibid.*, Article 16(2). By way of derogation, and notwithstanding the fact that a parent undertaking does not meet the conditions established in Article 18(1), the Board may decide on resolution action with regard to that parent undertaking when one or more of its subsidiaries which are institutions meet the conditions established in Article 18(1), (4) and (5) and their assets and liabilities are such that their failure threatens an institution or the group as a whole and resolution action with regard to that parent undertaking is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the group as a whole. Where a national resolution authority informs the Board that the insolvency law of the Member State provides that groups be treated as a whole and resolution action with regard to the parent undertaking is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the group as a whole, the Board may also decide on resolution action with regard to the parent undertaking. For these purposes, when assessing whether the resolution conditions are met in respect of one or more subsidiaries which are institutions, the Board may disregard any intra-group capital or loss transfers between the entities, including the exercise of write-down or conversion powers (*ibid.*, Article 16(3)).

3. Order of priority of claims

(1) The application of the bail-in tool to a designated entity (and without prejudice to liabilities explicitly excluded from this tool on a mandatory basis under **Article 27(3)**⁸⁸⁵) is governed by the following rules:⁸⁸⁶

firstly, the Board, the Commission, or, if applicable, the NRAs must decide on the exercise of the write-down and conversion powers,⁸⁸⁷ including on any possible application of **Article 27(5)** on the optional exclusion of certain liabilities from the application of the bail-in tool;⁸⁸⁸

secondly, the NRAs must exercise these powers in accordance with **Articles 47-48 BRRD** (on the treatment of shareholders and the sequence of write down and conversion) and with the reverse order of priority of claims laid down in their national law, including the provisions transposing **Article 108 BRRD**;⁸⁸⁹

thirdly, the relevant DGS is liable in the terms provided for in **Article 79**.⁸⁹⁰

Participating Member States must notify to the Commission and to the Board the ranking of claims against designated entities in national insolvency proceedings **on 1 July of every year** or immediately if there is a change thereof.⁸⁹¹

(2) In accordance with the above-mentioned⁸⁹² **Directive (EU) 2017/2399** of the European Parliament and of the Council, **Article 108 BRRD** as regards the ranking of unsecured debt instruments in insolvency hierarchy has been amended to the following effect for entities referred to in **Article 1(1), points (a)-(d) BRRD**:

Firstly, ordinary unsecured claims resulting from debt instruments with the highest priority ranking among debt instruments in national law governing normal insolvency proceedings have a higher priority ranking than that of “unsecured claims resulting from debt instruments” which meet the following three conditions: the initial contractual maturity of debt instruments spans one year; they have no derivative features; and the relevant contractual documentation related to the issuance explicitly refers to that ranking.⁸⁹³

Secondly, ordinary unsecured claims resulting from debt instruments have a higher priority ranking in national law governing normal insolvency proceedings than the priority ranking of claims resulting from instruments referred to in **Article 48(1), points (a)-(d) BRRD**. It is noted that the instruments referred to in this Article include: Common Equity Tier 1 (CET 1) items, Additional Tier 1 instruments, Tier 2 instruments and subordinated debt that is not Additional Tier 1 or Tier 2 capital in accordance with the hierarchy of claims in normal insolvency proceedings.

⁸⁸⁵ See below in **Section B, under 5.3.1**.

⁸⁸⁶ **SRMR**, Article 17(1) and (2), second sub-paragraph.

⁸⁸⁷ See below in **Section F**.

⁸⁸⁸ See below in **Section B, under 5.3.2**.

⁸⁸⁹ On this Article, see indicatively **Binder (2016b)** and **Haentjens (2017a)**, pp. 312-313.

⁸⁹⁰ On Article 79, see below in **Chapter 6, Section A, under 5.2**.

⁸⁹¹ **SRMR**, Article 17(2), first sub-paragraph.

⁸⁹² See above in **Chapter 1, Section C, under 2.1(1)**.

⁸⁹³ **Directive (EU) 2017/2399**, Article 1, point (2), inserting (new) paragraphs (2)-(3) in **Article 108 BRRD**. Under the same point (2), the new paragraphs (4)-(7) in **Article 108** were inserted as well governing specific grandfathering issues.

Accordingly, this Directive required Member States, to create **a new class of non-preferred senior debt**, which should rank in insolvency higher than (above) own funds instruments and subordinated liabilities that do not qualify as own funds instruments, but lower than (below) other senior liabilities.⁸⁹⁴ The purpose was to enhance the resolvability of the credit institutions incorporated in their jurisdiction and, by implication, facilitate resolution by efficiently meeting the minimum requirement for own funds and eligible liabilities (the ‘MREL’, governed by **Article 45 BRRD** and **Article 12 SRMR**).

⁸⁹⁴ *Ibid.*, recital (10).

Section B: Resolution tools

1. The relationship with the BRRD and the general principles governing the application of resolution tools

1.1 The relationship with the BRRD

As already mentioned, the resolution tools under **Article 22(2) SRMR** are four: the sale of business tool, the bridge institution tool, the asset separation tool, and the bail-in tool.⁸⁹⁵ In the **BRRD** relevant are **Articles 37-55**.⁸⁹⁶ Undoubtedly, the framework governing the bail-in tool is by comparison the most analytical under both the BRRD (**Articles 43-55**) and the SRMR (the lengthy **Article 27**).⁸⁹⁷

1.2 The general principles

The general principles governing the application of resolution tools are the following:

(1) If the Board decides to apply a resolution tool to an entity or group referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**) provided that the relevant conditions are met, and the resolution action would result in losses being borne by creditors or in their claims being converted, it must instruct the NRAs to exercise the power to write down and convert relevant capital instruments (in accordance with **Article 21**⁸⁹⁸) immediately before or together with the application of the resolution tool.⁸⁹⁹

(2) When adopting the resolution scheme in accordance with **Article 18(6)**,⁹⁰⁰ the Board must take into consideration four basic indicators:⁹⁰¹

firstly, the assets and liabilities of the institution under resolution on the basis of the valuation in accordance with **Article 20**;⁹⁰²

secondly, its liquidity position;

⁸⁹⁵ See also recital (68).

⁸⁹⁶ For an overview of these tools see, by way of mere indication, **Binder (2017a)**, pp. 62-67 (under both the BRRD and the SRMR) and **Haentjens (2017a)**, pp. 230-252 (under the BRRD only).

⁸⁹⁷ On the theoretical aspects of the bail-in tool, see **Coffee (2010)**, **Huertas (2012)**, **Goodhart and Avgouleas (2014)**, **Avgouleas and Goodhart (2015)**, **Tröger (2015)**, under 3, and **Dell'Araccia et al. (2018)** (providing also an empirical evidence on its application (Section II)); on the private international law aspects of this resolution tool, see **Lehmann (2017)**; on the provisions of the BRRD governing the bail-in tool, see indicatively **Conlon and Cotter (2014)**, **Hadjiemmanuil (2015b)**, **Wojcik (2016)**, **Grünewald (2017)**, **Haentjens (2017a)**, pp. 240-252, **Jennings-Mares (2017)**, **Ringe and Patel (2017)** and **Tröger (2017a)**.

⁸⁹⁸ On Article 20, see **Section F** below.

⁸⁹⁹ **SRMR**, Article 22(1).

⁹⁰⁰ On Article 18(6), see below in **Section C, under 2.2**.

⁹⁰¹ **SRMR**, Article 22(3).

⁹⁰² On Article 20, see **Section D** below.

furthermore, the marketability of its franchise value in the light of the competitive and economic market conditions; and

finally, the time available.

(3) The resolution tools must be applied to meet the resolution objectives in accordance with the resolution principles. As a rule, they may be applied individually or in any combination; *exceptionally*, the asset separation tool can only be applied in conjunction with other resolution tools in order to prevent an undue competitive advantage for the failing entity.⁹⁰³

(4) If the sale of business and bridge institution tools are used to transfer only part of the assets, rights or liabilities of the institution under resolution, including its systemically important services, the residual designated entity from which the assets, rights or liabilities have been transferred must be wound up under normal insolvency proceedings.⁹⁰⁴ By implication, these resolution tools are also referred to as ‘**gone concern tools**’. In order to protect the entity’s shareholders and creditors during the winding up proceedings, these should be entitled to receive in payment of their claims not less than what it is estimated they would have recovered if the entity as a whole had been wound up under normal insolvency proceedings.⁹⁰⁵

(5) The Board may recover any reasonable expenses properly incurred in connection with the use of the resolution tools and powers in one or more of the following ways: *firstly*, as a deduction from any consideration paid by a recipient to the institution under resolution or, as the case may be, to the owners of instruments of ownership; *secondly*, from the institution under resolution, as a preferred creditor; or *thirdly*, from any proceeds generated as a result of the of the bridge institution’s or the asset management vehicle’s termination of the operation (as a preferred creditor as well). Any proceeds received by NRAs in connection with the use of the SRF must be reimbursed to the Board.⁹⁰⁶

When applying this tool, any net proceeds from the transfer of assets or liabilities of the institution under resolution benefit the entity left in the winding-up proceedings, and any net proceeds from the transfer of instruments of ownership issued by the institution under resolution benefit the owners of those instruments of ownership in the entity left in the winding up proceedings. Proceeds must be calculated net of the costs arisen from the failure of the entity and from the resolution process.⁹⁰⁷

2. The sale of business tool

(1) The sale of business tool consists, within the resolution scheme, of the transfer to a purchaser that is not a bridge institution, of instruments of ownership, assets, rights and/or liabilities of an institution under resolution without the consent of shareholders.⁹⁰⁸ The resolution scheme must establish the following:⁹⁰⁹

⁹⁰³ SRMR, Article 22(4) and recital (72), second sentence.

⁹⁰⁴ *Ibid.*, Article 22(5), and recitals (62), third sentence and (69).

⁹⁰⁵ *Ibid.*, recital (62), fourth sentence.

⁹⁰⁶ *Ibid.*, Article 22(6).

⁹⁰⁷ *Ibid.*, recital (71).

⁹⁰⁸ *Ibid.*, Article 24(1) and recital (70).

⁹⁰⁹ *Ibid.*, Article 24(2).

firstly, the instruments of ownership, assets, rights and/or liabilities to be transferred by the NRA in accordance with **Article 38(1) and (7)-(11) BRRD**;

secondly, the commercial terms, having regard to the circumstances and the costs and expenses incurred in the resolution process, according to which the NRA must make the transfer in accordance with **Article 38(2)-(4) BRRD**;

furthermore, whether the transfer powers may be exercised by the NRA more than once in accordance with **Article 38(5)-(6) BRRD**;

fourthly, the arrangements for the marketing by the NRA of that entity or those instruments, assets, rights and liabilities in accordance with **Article 39(1)-(2) BRRD**; and

finally, whether compliance with these marketing requirements is likely to undermine the resolution objectives in accordance with **Article 24(3) SRMR**.

(2) The Board **is required to** apply this resolution tool without complying with the marketing requirements, when it considers that there is a ‘**material threat to financial stability**’ arising from or aggravated by the failure or likely failure of the institution under resolution, *and* compliance with them would be likely to undermine the effectiveness of the tool in addressing that threat or achieving the resolution objective specified in **Article 14(2), point (b)**.⁹¹⁰ In this respect, applicable are the EBA Guidelines of 7 August 2015 (**EBA/GL/2015/04**), which were adopted on the basis of **Article 39(4) BRRD**.⁹¹¹

3. The bridge institution tool

The bridge institution tool consists, within the resolution scheme, of the transfer to a bridge institution of instruments of ownership, assets, rights and/or liabilities of one or more institutions under resolution.⁹¹² The resolution scheme must establish the following:

firstly, the instruments of ownership, assets, rights and/or liabilities to be transferred by the NRA to the bridge institution in accordance with **Article 40(1)-(12) BRRD**;

secondly, the arrangements for the setting up, operation and termination of the bridge institution by the NRA in accordance with **Article 41(1)-(3) and (5)-(9) BRRD**; and

thirdly, the arrangements for the marketing of the bridge institution or its assets and liabilities by the NRA in accordance with **Article 41(4) BRRD**.⁹¹³

⁹¹⁰ *Ibid.*, Article 24(3). It is noted that, while Article 39(3) BRRD gives NRAs the discretion (“may”) not to comply with the marketing requirements, Article 24(3) SRMR imposes on the Board (“shall”) to do so if the conditions laid down therein (which are identical in the two legal acts) are met. On Articles 38-39 BRRD, see **Haentjens (2017a)**, pp. 232-234, and **Hormaeche Lazcano (2017a)**.

⁹¹¹ These Guidelines are available at: <https://www.eba.europa.eu/documents/10180/1080767/EBA-GL-2015-04+Guidelines+on+the+sale+of+business+tool.pdf>.

⁹¹² **SRMR**, Article 25(1).

⁹¹³ *Ibid.*, Article 25(2); on Articles 40-41 BRRD, see **Haentjens (2017a)**, pp. 234-239, and **Hormaeche Lazcano (2017b)**.

The Board must ensure that the total value of liabilities transferred by the NRA to the bridge institution does not exceed the total value of the rights and assets transferred from the institution under resolution or provided by other sources.⁹¹⁴

4. The asset separation tool

The asset separation tool consists, within the resolution scheme, of the transfer of assets, rights and/or liabilities of an institution under resolution or a bridge institution to one or more ‘asset management vehicles’.⁹¹⁵ The term ‘**asset management vehicle**’ is defined in **Article 2(1), point (56) BRRD** as a legal person meeting the requirements laid down in **Article 42(2)**; the latter provides, that for the purposes this vehicle must be a legal person wholly or partially owned by one or more public authorities (including the resolution authority or the resolution financing arrangement), is controlled by the resolution authority and has been created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution.

The resolution scheme must establish the following:

Firstly, the assets, rights and/or liabilities to be transferred by the NRA to an asset management vehicle in accordance with **Article 42(1)-(5) and (8)-(13) BRRD**. In this respect it is noted that, according to **Article 42(5) BRRD**, the NRA may use the asset separation power to transfer assets, rights, and liabilities only if the market for those assets is such that their liquidation under normal insolvency proceedings could have an adverse effect on financial markets, and the transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution and to maximise the liquidation proceeds.

Secondly, the consideration for which assets, rights and liabilities are to be transferred by the NRA to the asset management vehicle in accordance with the valuation principles of **Articles 20 SRMR** and **42(7) BRRD** and the EU State aid framework; this consideration may have nominal or negative value.⁹¹⁶

5. The bail-in tool

5.1 Introductory remarks

As already mentioned,⁹¹⁷ an effective resolution regime should ensure that systemic entities can be resolved without jeopardising financial stability. The bail-in tool achieves that objective by ensuring that shareholders and creditors of a failing designated entity suffer appropriate losses and bear an appropriate part of the costs arising from the entity’s failure, providing them with a stronger incentive to monitor the entity’s soundness during normal circumstances. It also meets the **FSB Recommendation** that statutory debt write-down and conversion powers should be included in a framework for resolution, as an additional option in conjunction with other resolution tools.⁹¹⁸

⁹¹⁴ *Ibid.*, Article 25(3).

⁹¹⁵ *Ibid.*, Article 26(1) and recital (72), first sentence.

⁹¹⁶ *Ibid.*, Article 26(2); on Article 42 BRRD, see **Haentjens (2017a)**, pp. 239-240 and **Hormaeche Lazcano (2017c)**.

⁹¹⁷ See above in **Section A, under 1.2**.

⁹¹⁸ **SRMR**, recital (73).

5.2 General rules

5.2.1 The two purposes of the bail-in tool

In order to ensure the necessary flexibility to allocate losses to creditors in a range of circumstances, it was considered appropriate to apply the bail-in tool both in two cases:

firstly, when the objective is to resolve a failing entity as a going concern if there is a realistic prospect that the entity viability may be restored, and

secondly, when systemically important services are transferred to a bridge entity and the residual part of the entity ceases to operate and is wound down.⁹¹⁹

On the basis of these considerations, the bail-in tool may be applied for any of the following two purposes:

(1) The *first* purpose is to recapitalise a credit institution (or any other designated entity) meeting the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised under the CRD IV or the MiFID II, and to sustain sufficient market confidence in the institution or entity.⁹²⁰ The bail-in tool may be applied for this purpose only if there is a reasonable prospect that its application, together with other relevant measures (including measures implemented in accordance with the business reorganisation plan required by **Article 27(16)**), will, in addition to achieving relevant resolution objectives, restore the financial soundness and long-term viability of the entity in question. If this condition is not met, any of the other resolution tools must be applied in conjunction with the bail-in tool, as appropriate.⁹²¹

When the bail-in tool is adopted on a stand-alone basis, it is referred to as ‘**going concern tool**’ or ‘**open-bank bail-in**’. In this case, the resolution should be accompanied by replacement of the entity’s management, unless its retention is appropriate and necessary for the achievement of the resolution objectives, and a subsequent restructuring of the entity and its activities occurs in a way that addresses its failure’s reasons, which should be achieved by implementation of a business reorganisation plan. This plan should be compatible with the restructuring plan required to be submitted to the Commission under the State aid framework and, in addition to measures aiming at restoring the entity’s long term viability, include measures limiting the aid to the minimum burden sharing and measures limiting distortions of competition.⁹²²

(2) The *second* purpose for applying this tool is to convert to equity or reduce the principal amount of claims or debt instruments transferred either to a bridge institution with a view to providing capital for that, or under the sale of business or the asset separation tool (guarantee financing).⁹²³

⁹¹⁹ *Ibid.*, recital (74).

⁹²⁰ *Ibid.*, Article 27(1), first sub-paragraph, point (a).

⁹²¹ *Ibid.*, Article 27(2).

⁹²² *Ibid.*, recital (75).

⁹²³ *Ibid.*, Article 27(1), first sub-paragraph, point (b).

5.2.2 Other general provisions

(1) In relation to the bail-in tool, the resolution scheme must establish⁹²⁴ the ‘**aggregate amount**’ by which eligible liabilities should be reduced or converted in accordance with **Article 27(13)**, the liabilities that may be excluded optionally in accordance with **Article 27(5)** and **(14)**, as well as the objectives and minimum content of the business reorganisation plan to be submitted in accordance with **Article 27(16)**. Article 27(16) deals with the business reorganisation plan received by the NRA in accordance with **Article 52(1)-(3) BRRD** from the management body or the person or persons appointed in accordance with **Article 72(1)**, which must be submitted to the Board for further action.

In this respect, it also is noted that on **5 April 2017** the EBA issued three sets of Guidelines relating to the implementation of the bail-in tool. In particular:

Firstly, the **EBA Guidelines** “concerning the interrelationship between the BRRD sequence of write-down and conversion and the CRR/CRD” (**EBA/GL/2017/02**),⁹²⁵ adopted on the basis of **Article 48(6) BRRD**, clarify the treatment of instruments which meet the criteria for recognition as additional Tier 1 capital (in accordance with **Article 52 CRR**) but are progressively grandfathered (in accordance with **Article 484** thereof) since they do not contain a Point of Non-Viability (the ‘**PONV**’) clause, *and* the treatment of Tier 2 instruments, which are progressively amortised in the final five years of residual maturity (in accordance with **Article 64 CRR**).

Secondly, the **EBA Guidelines** “on the rates of conversion of debt to equity in bail-in” (**EBA/GL/2017/03**),⁹²⁶ adopted on the basis of **Article 50(4) BRRD**, provide resolution authorities with guiding principles when setting debt-to-equity conversion rates both in a bail-in context, or when the power to write down and convert capital instruments is not applied in conjunction with any resolution tool, and clarify when to set differential conversion rates for different classes of creditors.

Finally, the **EBA Guidelines** “on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments” (**EBA/GL/2017/04**),⁹²⁷ adopted on the basis of **Article 47(6) BRRD**, clarify the circumstances under which it is appropriate to cancel, transfer, or severely dilute shares or other instruments of ownership.

(2) When the bail-in tool is applied, the relevant DGS is liable in the terms provided for in **Article 79**.⁹²⁸

5.3 Exclusions

5.3.1 Mandatory exclusions

Certain categories of liabilities, whether governed by the law of a Member State or by the law of a third country, may not be subject to write-down or conversion. These are listed in **Article 27(3), first sub-paragraph SRMR** and are the following:

⁹²⁴ *Ibid.*, Article 27(1), second sub-paragraph.

⁹²⁵ Available at: <https://www.eba.europa.eu/documents/10180/1807502/Guidelines+on+the+interrelationship+BRRD+CRR+%28EBA-GL-2017-02%29.pdf>.

⁹²⁶ Available at: <https://www.eba.europa.eu/documents/10180/1807514/Guidelines+on+the+rate+of+conversion+of+debt+to+equity+in+bail-in+%28EBA-GL-2017-03%29.pdf>.

⁹²⁷ Available at: <https://www.eba.europa.eu/documents/10180/1807527/Guidelines+on+the+treatment+of+shareholders+in+bail-in+%28EBA-GL-2017-04%29.pdf>.

⁹²⁸ **SRMR**, Article 17(2), second sub-paragraph.

(1) This first category includes covered deposits, meaning (as already mentioned) the part of eligible deposits not exceeding the coverage level of 100,000 euros *per* depositor *per* credit institution⁹²⁹ (for each holder of a joint account according to his/her/its share therein⁹³⁰). This exclusion is based on the consideration that protection of covered depositors is, as already mentioned, one of the objectives of resolution.

(2) Excluded are also secured liabilities, including covered bonds, and liabilities in the form of financial instruments used for hedging purposes, which form an integral part of the cover pool and, in accordance with national law, are secured in a way similar to covered bonds. ‘**Financial instrument**’ means a contract giving rise to both a financial asset of one party and a financial liability or equity instrument of another; an instrument specified in Section C of Annex I to MiFID II; a derivative financial instrument; a primary financial instrument; and a cash instrument.⁹³¹ The scope of the bail-in tool should not prevent, if appropriate, the exercise of the bail-in powers to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured, *or* to any amount of a deposit exceeding the coverage level of 100,000 euros *per* depositor *per* credit institution). The Board must ensure that all secured assets relating to a covered bond cover pool remain unaffected, segregated and with enough funding.⁹³²

(3) In addition, excluded is any liability arising by virtue of the holding by an institution or designated entity of client assets or client money, including client assets or client money held on behalf of UCITS as defined in **Article 1(2) of the UCITS IV Directive (2009/65/EC)**, *or* alternative investment funds (the ‘AIFs’) as defined in **Article 4(1), point (a) of Directive 2011/61/EU** of the European Parliament and of the Council of 8 June 2011 “on Alternative Investment Fund Managers (...)”⁹³³ (the ‘AIFMD’), provided that such client is protected under the applicable insolvency law.

(4) The fourth category of exclusions includes any liability arising by virtue of a fiduciary relationship between (*inter alia*) a credit institution (as fiduciary) and another person (as beneficiary), provided that such beneficiary is protected under the applicable insolvency or civil law.

(5) Furthermore, excluded are liabilities to (other) credit institutions and to investment firms, excluding entities that are part of the same group, with an **original maturity of less than seven days**. Accordingly, interbank deposits are only bail-inable if their original maturity exceeds seven days. It is noted that, without prejudice to the large exposure rules laid down in **Articles 387-403 CRR** (and to a lesser extent in the CRD IV) and in order to provide for the resolvability of entities and groups, the Board must instruct the NRAs to limit, in accordance with **Article 10(11), point (b) SRMR**, the extent to which other institutions hold liabilities eligible for bail-in, except liabilities held at entities in the same group.⁹³⁴

⁹²⁹ *Ibid.*, Article 3(1), point (11), with reference to Article 2(1), point (5) **DGSD**.

⁹³⁰ **DGSD**, Article 7(1)-(2).

⁹³¹ **SRMR**, Article 3(1), point (38)) with reference to **Article 4(1), point (50) CRR**. The first three categories of instruments are only considered as financial instruments if their value is derived from the price of an underlying financial instrument or another underlying item, a rate, or an index.

⁹³² *Ibid.*, Article 27(4), first and second sub-paragraphs (see also recital (76), first and second sentences).

⁹³³ OJ L 174, 1.7.2011, pp. 1-73. On the definition of AIFs under this Directive, see **Gortsos (2017b)**. On this Directive, see also **Busch and van Setten (2014)**, **Moloney (2014a)**, pp. 269-311 and **Zetzsche (2015)**, editor).

⁹³⁴ **SRMR**, Article 27(4), third sub-paragraph; on Article 10(11), see above in **Chapter 4, Section B, under 3.2.3**.

(6) In order to reduce the risk of systemic contagion,⁹³⁵ liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated under **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”,⁹³⁶ or their participants and arising from the participation in such a system are also excluded.⁹³⁷

(7) In order to ensure continuity of critical functions⁹³⁸ and honour pension entitlements and pension amounts owed or owing to pension trusts and pension trustees,⁹³⁹ excluded are liabilities to employees, in relation to accrued salary, compensation upon termination, pension benefits or other fixed remuneration, except for the variable component of remuneration, which is not regulated by a collective bargaining agreement. This does not apply to the variable component of the remuneration of material risk takers as identified in **Article 92(2) CRD IV**.⁹⁴⁰ Hence, net contributions to employees are excluded from the scope of bail-in.

(8) In order to ensure continuity of critical functions as well, liabilities to a commercial or trade creditor arising from the provision to (*inter alia*) the credit institution or (any other designated entity) of goods or services that are critical to the daily functioning of its operations (including IT services, utilities and the rental, servicing and upkeep of premises) are excluded as well.

(9) Liabilities to tax and social security authorities provided they are preferred under the applicable law.

(10) Liabilities to DGSs arising from contributions due in accordance with the DGSD.

Any other category of liabilities (the so-called ‘eligible liabilities’⁹⁴¹) is subject to write-down or conversion (unless the conditions for their optional exclusion are met (see just below, **under 5.3.2**). This applies, *inter alia*, to provisions taken by the entity, liabilities from credit cards, unless considered to be covered by virtue of point (4) above, the foreign-exchange position, other long-term liabilities, unless considered to be covered by virtue of point (2) above, income from future economic years and accrued expenses (with the exception of the accrued interest owed to the DGS, which is covered by virtue of point (10) above).

5.3.2 Optional exclusions

5.3.2.1 Conditions for optional exclusion

In exceptional circumstances, if the bail-in tool is applied, certain liabilities *may be excluded*, completely or partially, from the application of the write-down or conversion powers, if *any* of the following conditions is met:⁹⁴²

⁹³⁵ *Ibid.*, recital (76), sixth sentence.

⁹³⁶ OJ L 166, 11.6.1998, pp. 45-50.

⁹³⁷ **SRMR**, recital (76), sixth sentence.

⁹³⁸ *Ibid.*, recital (76), fourth sentence.

⁹³⁹ *Ibid.*, recital (76), fifth sentence.

⁹⁴⁰ *Ibid.*, Article 27(3), second sub-paragraph.

⁹⁴¹ The term ‘eligible liabilities’ is defined (**BRRD**, Article 2(1), point (71)) to mean the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of (*inter alia*) a credit institution, *and* are not excluded from the scope of the bail-in tool by virtue of Article 44(2) of that legislative act.

⁹⁴² For the relevant considerations, see **SRMR**, recital (77), first and second sentences.

Firstly, the liability cannot be bailed-in within a reasonable time, notwithstanding the ‘good faith efforts’ of the relevant NRA.⁹⁴³

Secondly, the exclusion is “*strictly necessary and proportionate*” in order *either* to achieve the continuity of critical functions and core business lines⁹⁴⁴ in a manner maintaining the ability of the institution under resolution to continue key operations, services and transactions, *or* to avoid giving rise to widespread contagion (in particular, as regards eligible deposits held by natural persons and micro, small and medium-sized enterprises, which would severely disrupt the functioning of financial markets (including infrastructures) in a manner that could cause a serious disturbance to the economy of a Member State or of the EU).⁹⁴⁵

Thirdly, the application of the bail-in tool to those liabilities would cause such destruction in value that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in.⁹⁴⁶

Exclusions may be applied either to completely exclude a liability from write-down or to limit the extent of the write-down applied to it. The write-down and conversion powers must comply with the requirements on the priority of claims laid down in **Article 17**.⁹⁴⁷

5.3.2.2 Consequences of optional exclusion

(1) If an eligible liability or class of eligible liabilities is excluded, the level of write-down or conversion applied to other eligible liabilities may be increased to take account of such exclusions, provided that the level of write-down and conversion applied to other eligible liabilities complies with the NCWO principle.⁹⁴⁸ When taking such a decision, due consideration must be given to the following aspects:

firstly, the principle that losses should be borne first by shareholders and next by creditors of the institution under resolution in order of preference;⁹⁴⁹

secondly, the level of loss absorbing capacity that would remain in the institution under resolution if these liabilities or class of liabilities were excluded; and

thirdly, the need to maintain adequate resources for resolution financing.⁹⁵⁰

(2) If the losses (cannot be and) have not been passed on fully to other creditors, a contribution from the SRF may be made to the institution under resolution in two cases:

⁹⁴³ *Ibid.*, Article 27(5), first sub-paragraph, point (a).

⁹⁴⁴ On the distinction between these two concepts, see above in **Chapter 4, Section B, under 1.2.2**.

⁹⁴⁵ **SRMR**, Article 27(5), first sub-paragraph, points (b)-(c) and recital (77), last sentence..

⁹⁴⁶ *Ibid.*, Article 27(5), first sub-paragraph, point (d).

⁹⁴⁷ *Ibid.*, Article 27(14)-(15).

⁹⁴⁸ *Ibid.*, Article 27(5), second sub-paragraph and recital (78), first sentence.

⁹⁴⁹ See above in **Section A, under 2.1**.

⁹⁵⁰ **SRMR**, Article 27(12).

firstly, in order to cover any losses which have not been absorbed by eligible liabilities and restore the net asset value of the institution under resolution to zero in accordance with **Article 27(13), point (a)**, *or*

secondly, in order to purchase instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with **Article 27(13), point (b)**.⁹⁵¹

The SRF may only make such a contribution under two conditions:

firstly, a contribution to loss absorption and recapitalisation equal to an amount **not less than 8%** of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in **Article 20(1)-(15)**, has been made as well by shareholders and the holders of relevant capital instruments and other eligible liabilities through write-down, conversion or otherwise; and

secondly, the contribution does not exceed 5% of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the above-mentioned valuation.⁹⁵²

Such a contribution by the SRF may be financed either by its available amounts raised through contributions by designated entities in accordance with **Articles 67(4) and 70-71** or, if these are insufficient, by amounts raised from alternative funding means in accordance with **Articles 73-74**.⁹⁵³ In extraordinary circumstances, further funding may be sought from alternative financing sources after the above-mentioned 5% limit has been reached and all unsecured, non-preferred liabilities (other than eligible deposits) have been fully written down or converted. Alternatively or in addition, if these conditions are met, a contribution may be made from resources raised through *ex-ante* contributions in accordance with **Article 70** and not yet been used.⁹⁵⁴

5.4 Establishment of the aggregate amount

The Board must assess, on the basis of a valuation complying with the requirements of **Article 20(1)-(15)**, the aggregate of the following (both if relevant):⁹⁵⁵

firstly, the amount by which eligible liabilities *must be written down* in order to ensure that the net asset value of the institution under resolution is equal to zero;

⁹⁵¹ *Ibid.*, Article 27(6) and recital (78), first sentence; on Article 27(13), see just below, **under 5.4**.

⁹⁵² *Ibid.*, Article 27(7) and recital (78), second sentence. When calculating the 8% percentage of total liabilities, historical losses which have already been absorbed by shareholders through a reduction in own funds prior to the valuation under Article 20 should not be included (*ibid.*, recital (80)).

⁹⁵³ *Ibid.*, Article 27(8); on Articles 67, 70-71 and 73-74, see below in **Chapter 6, Section A**.

⁹⁵⁴ *Ibid.*, 27(9)-(10) and recital (79). For the purposes of the SRMR, **Article 44(8) BRRD** is not applicable (*ibid.*, Article 27(11)).

⁹⁵⁵ **SRMR**, Article 27(13), first sub-paragraph, points (a) and (b), respectively.

secondly, the amount by which eligible liabilities *must be converted into shares or other types of capital instruments* in order to restore the Common Equity Tier 1 (CET 1) capital ratio of the institution under resolution, or establish the ratio of the bridge institution taking into account any contribution of capital by the SRF under **Article 76(1), point (d)**.⁹⁵⁶

This assessment establishes the aggregate amount by which eligible liabilities need to be written down or converted in order to sustain sufficient market confidence in the institution under resolution or the bridge institution, and enable it to continue to meet, for at least one year, the conditions for authorisation and carry out the activities for which it is authorised under the CRD IV or the MiFID II. If the Board intends to use the asset separation tool (in accordance with **Article 26**), the amount by which eligible liabilities need to be reduced must take into account, as appropriate, a prudent estimate of the capital needs of the asset management vehicle.⁹⁵⁷

⁹⁵⁶ See below in **Chapter 6, Section A, under 1.3**.

⁹⁵⁷ **SRMR**, Article 27(13), second and third sub-paragraphs.

Section C:

The resolution procedure

1. The conditions for resolution

1.1 Introductory remarks

(1) The Board must adopt a resolution scheme in relation to entities and groups referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**) only when it assesses that the ‘**conditions for resolution**’ are met cumulatively.⁹⁵⁸ This assessment is made in its Executive Session⁹⁵⁹ either on receiving a communication or on its own initiative.⁹⁶⁰ The previous adoption of a measure according to **Article 16 SSMR**, **Articles 27(1)** and **28-29 BRRD**, or **Article 104 CRD IV** is not a condition for taking a resolution action.⁹⁶¹

(2) The resolution conditions are three and are presented below in turn:⁹⁶² the *first* is the ‘failing or likely to fail’ criterion; the *second* is the criterion of the reasonable prospect for effective alternative private sector measures or supervisory action; and the *third* is the ‘public interest’ criterion. In this respect, **recital (61)** lays down that the limitations on the rights of shareholders and creditors should comply with **Article 52 of the Charter** and, hence, the resolution tools should be applied only to entities that are failing or likely to fail, and only where necessary to pursue the objective of financial stability in the general interest. In particular, resolution tools should be applied where the entity cannot be wound up under normal insolvency proceedings without destabilising the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions and where there is no reasonable prospect for any alternative private solution, including any increase of capital by the existing shareholders or by any third party, sufficient to restore the full viability of the entity.

(2) The conditions for resolution are laid down in **Article 18(1) SRMR** and in substance (even though not in procedural terms) are identical to those laid down in **Article 32 BRRD**.⁹⁶³ Relevant are also the **EBA Guidelines** of 6 August 2015 (**EBA/GL/2015/07**), adopted on the basis of **Article 32(6) BRRD** and in accordance with **Article 16** of its statutory **Regulation**, “on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail”.⁹⁶⁴ On the other hand, the BRRD does not provide for the EBA to issue Guidelines in relation to the determination of the ‘public interest’ criterion.⁹⁶⁵

⁹⁵⁸ **SRMR**, Articles 18(1), first sub-paragraph and 18(6), first sentence.

⁹⁵⁹ The provision that assessments in this respect must be made in the Executive Session implies that the NRAs are, in principle, not involved.

⁹⁶⁰ **SRMR**, Article 18(1), first sub-paragraph.

⁹⁶¹ *Ibid.*, Article 18(3);.

⁹⁶² For a summary, see also **Table 10** below.

⁹⁶³ On the resolution conditions, see also in **Conlon and Cotter (2014b)**, **Joosen (2014)**, **Binder (2016a)**, Section 2.3.2, **Freudenthaler and Lintner (2017)**, **Haentjens (2017a)**, pp. 221-226 and **Ventoruzzo and Sandrelli (2019)**, Section III, under C.

⁹⁶⁴ Available at: https://www.eba.europa.eu/documents/10180/1156219/EBA-GL-2015-07_EN_GL+on+failing+or+likely+to+fail.pdf.

⁹⁶⁵ See also below, **under 1.4**.

1.2 The ‘failing or likely to fail’ criterion

1.2.1 Substantive aspects

1.2.1.1 The rule

(1) The first condition for resolution consists in the determination that the entity (typically but not exclusively a credit institution) is ‘**failing or likely to fail**’.⁹⁶⁶ In this respect the **first sentence of recital (57) SRMR** provides the following: “*The decision to place an entity under resolution should be taken before a financial entity is balance sheet insolvent and before all equity has been fully wiped out.*” A credit institution is deemed to be in such a situation in *one or several* of the following circumstances:⁹⁶⁷

Firstly, it infringes, or there are objective elements to support a determination that it will, in the near future, infringe the requirements of its authorisation, in a way that would justify its withdrawal by the competent authority. This includes, but is not limited to, the fact that the institution has incurred or is likely to incur losses that might deplete the entirety or a significant amount of its own funds. It is noted nevertheless that, according to **recital (57)** (third sentence) **SRMR**, the fact that a credit institution does not meet the requirements for authorisation should not justify *per se* the entry into resolution, especially if it is still or likely to still be viable.

Secondly, its assets are, or there are objective elements to support a determination that they will, in the near future, be less than its liabilities. **Recital (57)** (fifth sentence) **SRMR** provides that the need for ‘emergency liquidity assistance’ from a central bank should not, *per se*, be a condition that sufficiently demonstrates that an entity is or will be, in the near future, unable to pay its liabilities as they fall due.⁹⁶⁸ In addition, the sixth and the last sentences of the same recital state that, if that facility were guaranteed by a State, an entity accessing it would be subject to the regulatory framework pertaining to State aid.

Thirdly, it is, or there are objective elements to support a determination that it will, in the near future, be unable to pay its debts or other liabilities as they fall due.

Finally, extraordinary public financial support is required, unless that support takes any of the three forms mentioned below (under 1.2.1.2). According to **recital (57)** (thirteenth sentence) **SRMR**, a credit institution should not be considered to be failing or likely to fail solely on the basis that extraordinary public financial support was provided before the entry into force of that legal act, i.e. until 19 August 2014.

(2) The above-mentioned **2015 EBA Guidelines (EBA/GL/2015/07)** further specify the first three of these circumstances, which are referred to as ‘**objective elements**’. The assessment of these elements is carried out in the course of the ‘Supervisory Review and Evaluation Process’ (the ‘**SREP**’). This constitutes the clearest indication of the link between the supervisory and the resolution functions.

⁹⁶⁶ **SRMR**, Article 18(1), first sub-paragraph, point (a).

⁹⁶⁷ *Ibid.*, Article 18(4), first sub-paragraph (points (a)-(d), respectively).

⁹⁶⁸ The term ‘**emergency liquidity assistance**’ is defined in **Article 2(1), point (29) BRRD** to mean the provision by a central bank of central bank money, or any other assistance that may lead to an increase in central bank money, to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems, without such an operation being part of monetary policy. According to **recital (41)** (last sentence) **BRRD**, access to liquidity facilities (including emergency liquidity assistance) by central banks may constitute State aid pursuant to the EU State aid framework. On the emergency liquidity assistance mechanism by NCBs of the euro area Member States (ELA), see above in **Chapter 1, Section C, under 4.1**.

Since **1 January 2019**, the SREP is governed by the **EBA Guidelines** of 19 July 2018 (**EBA/GL/2018/03**), adopted on the basis of **Article 107(3) CRD IV**, “on the revised common procedures and methodologies for the supervisory review and evaluation process (SREP)”.⁹⁶⁹

1.2.1.2 The exemptions

1.2.1.2.1 The three forms of provision of extraordinary public financial support which do not activate the resolution regime

If the extraordinary public financial support required takes any of the following three forms, in order to remedy a “*serious disruption*” in the national economy and preserve financial stability, the resolution regime is not activated:⁹⁷⁰

The *first form* is support granted by means of a State guarantee to back liquidity facilities provided by the central bank on conditions set by it; the *second* is support granted by means of a State guarantee of newly issued liabilities. With regard to both these cases, **recital (57)** (seventh sentence) **SRMR** considers that in order to preserve financial stability, in particular in the case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees of newly issued liabilities to remedy a serious disturbance in the economy of a Member State should not trigger the resolution framework provided that a number of conditions are met (see the recital’s eight sentence).

Even though in principle Member States’ guarantees for equity claims are prohibited,⁹⁷¹ the *third form* is support granted by means of an injection of own funds or purchase of capital instruments “*at prices and on terms that do not confer an advantage upon the credit institution*” (the so-called ‘**precautionary recapitalisation**’).⁹⁷² According to **recital (57)**, the provision of extraordinary public financial support should not trigger resolution where, as a precautionary measure, a Member State takes an equity stake in an institution, including an institution which is publicly owned, which complies with its capital requirements.

1.2.1.2.2 The conditions for exemption

Conditions applying to all three forms

In each of these above-mentioned cases, the guarantee or equivalent measures must meet the following five criteria:⁹⁷³ *firstly*, be confined to solvent institutions; *secondly*, be conditional on final approval by the Commission under the EU State aid rules; *thirdly*, be of a precautionary and temporary nature; *fourthly*, be proportionate to remedy the consequences of the serious disruption; *finally*, not be used to offset losses that the credit institution has incurred or is likely to incur in the near future. In addition, **recital (57)** (tenth sentence) **SRMR** considers that when providing a guarantee for newly issued liabilities other than equity (i.e. in the first two cases), a Member State should ensure that the guarantee is sufficiently remunerated by the credit institution.

⁹⁶⁹ These Guidelines, which also cover supervisory stress testing, are available at: <https://eba.europa.eu/documents/10180/2282666/Revised+Guidelines+on+SREP+%28EBA-GL-2018-03%29.pdf>. They revised the **EBA Guidelines** of 19 December 2014.

⁹⁷⁰ **SRMR**, Article 18(4), first sub-paragraph, point d(i)-(iii).

⁹⁷¹ *Ibid.*, recital (57), ninth sentence.

⁹⁷² See **Micossi, Bruzzone and Cassella (2016)** and **Binder (2017a)**, pp. 69-70.

⁹⁷³ **SRMR**, Article 18(4), second sub-paragraph.

Consequently, these measures do not trigger the resolution of the credit institution concerned, but nevertheless result in a State aid case.⁹⁷⁴ Applicable are the provisions of the ‘**2013 Banking Communication**’ (which was adopted to support measures in favour of credit institutions in the context of the financial crisis),⁹⁷⁵ including those on the conversion of subordinated debt into equity (‘burden sharing’). In accordance with **point (43) of the Communication**, approval is conditional upon conversion of subordinated debt into equity, unless the exception provided in its **point (45)** (“*where implementing such measures would endanger financial stability or lead to disproportionate results*”) applies.⁹⁷⁶

Additional conditions applying in the case of a ‘precautionary recapitalisation’

(1) Support measures in the form of a precautionary recapitalisation may be exempted, only if the following two additional conditions are met:

Firstly, the exemption can only take place under the condition that *neither* the above-mentioned circumstances leading to an assessment that a credit institution is failing or likely to fail (referred to in **Article 18(4), first sub-paragraph, points (a)-(c) SRMR**),⁹⁷⁷ *nor* the circumstances referred to in **Article 21(1)** (with regard to the exercise of the power to write down or convert capital instruments) are present at the time this public support is granted to the credit institution.⁹⁷⁸

Secondly, such support measures are limited to injections necessary to address a capital shortfall established in stress tests, asset quality reviews or equivalent exercises conducted by the ECB, the EBA or national authorities, if applicable, confirmed by the competent authority.⁹⁷⁹ According to **recital (57)** (twelfth sentence) **SRMR**, the provision of extraordinary public financial support should not trigger resolution if an entity is required to raise new capital **due to the outcome of a scenario-based stress test** or of the equivalent exercise conducted by macro-prudential authorities which includes a requirement that is set to maintain financial stability in the context of a systemic crisis, but the entity is unable to raise capital privately in markets. In this respect, on the basis of **Article 32(4)** (fourth sub-paragraph) **BRRD**, the EBA adopted on 22 September 2014 Guidelines (**EBA/GL/2014/09**) on the type of the above-mentioned tests, reviews or exercises which may lead to an extraordinary public financial support.⁹⁸⁰

⁹⁷⁴ On the financing of credit institution resolution and EU state aid rules, see **Grünwald (2014)**, pp. 126-134 and **Smoleńska (2017)**.

⁹⁷⁵ **Communication from the Commission** “on the application, from August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis” (‘Banking Communication’) (OJ C 216, 30.7.2013, pp. 1-15).

⁹⁷⁶ On the relation between the principle of proportionality and the application of the bail-in to subordinated debtholders in application of the Banking Communication, see the recent so-called ‘**Kotnik case**’ (Case C-526/14) of the ECJ (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0526&qid=1470488103569 &from=IT>).

⁹⁷⁷ See just above, **under 1.2.1.1 (1)**.

⁹⁷⁸ **SRMR**, Article 18(4), third sub-paragraph; on Article 21(1), see below, **under 3.1**.

⁹⁷⁹ Such supervisory powers of the ECB are based on **Article 4(1), point (f) SSMR** (see on this **Gortsos (2015a)**, p. 145). The corresponding powers of EBA are based on **Article 32(2) EBA Regulation** (see on this **Wymeersch (2012)**, p. 285, at 9.194).

⁹⁸⁰ Available <https://www.eba.europa.eu/documents/10180/821335/EBA-GL-2014-09+%28Guidelines+on+Public+Support+Measures%29.pdf>.

(2) Accordingly, since applicable in this case are also the provisions of the 2013 Banking Communication, including those on the conversion of subordinated debt into equity, such a recapitalisation leads to a burden-sharing solution which, nevertheless, is less stringent than the one under resolution with the use of ‘government financial stabilisation tools’ (the ‘GFSTs’).⁹⁸¹ This is mainly due to the fact that no contribution is required on the part of senior creditors (including uninsured depositors). In this respect, specific attention should be given to the provision stipulating that, in accordance with **Article 6(6) SRMR** the Council, the Commission and the Board may not adopt decisions or take actions forcing a Member State to provide public financial support.⁹⁸² Nevertheless, the Board may be involved as a resolution authority of ‘significant’ credit institutions in several cases pertaining to the use of GFSTs.

For a summary of all alternative forms of (permissible) recapitalisation of credit institutions by public funds (bail-out) in the EU, i.e. precautionary recapitalisation, resort to GFSTs and use of the direct recapitalisation instrument (the ‘DRI’) of the ESM, which was established in 2014,⁹⁸³ see **Table 12** below.

1.2.2 Procedural aspects

In principle, an assessment of this condition must be made by the ECB after consulting the Board. The Board may also make such an assessment, in its Executive Session as well, provided that it has informed the ECB of its intention and that the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB must, without delay, provide the Board with any relevant information that the Board may request in order to inform its assessment.⁹⁸⁴ When the ECB makes an assessment that this condition is met in relation to an entity or group, it must communicate it without delay to the Commission and to the Board.⁹⁸⁵ Without prejudice to cases where the ECB has decided to directly exercise supervisory tasks relating to entities in accordance with **Article 6(5), point (b) SSMR**, when receiving a communication or intending to make an assessment on its own initiative in relation to an entity or a group referred to in **Article 7(3) SRMR** (i.e. an entity or a group with respect to which competent are the NRAs), the Board must communicate its assessment, without undue delay, to the ECB.⁹⁸⁶

⁹⁸¹ On this form of state aid and the conditions under which it can be provided in accordance with **Articles 37(10) and 56-58 BRRD**, see **Gortsos (2016b)**, **Haentjens (2017a)**, pp. 252-254 and **Huber (2017b)**.

⁹⁸² It is noteworthy, that some Member States (i.e Germany), have not incorporated Articles 56-58 BRRD into their national law on the basis of the argument that these provisions contradict with Article 6(6) SRMR.

⁹⁸³ The legal basis of this ESM instrument is the **Guideline of the ESM Board of Governors** of 8 December 2014 on the modalities, including, *inter alia*, the eligibility criteria for the requesting ESM Member and the institution concerned, and the allocation of specific tasks to the Managing Director of the ESM, the Commission, the ECB and, wherever appropriate, the International Monetary Fund (the ‘IMF’), for providing financial assistance in the form of DRI (available at: <https://www.esm.europa.eu/pdf/20141208%20Guideline%20on%20Financial%20Assistance%20for%20the%20Direct%20Recapitalisation%20of%20Institutions.pdf>). On the DRI, see details in **European Stability Mechanism (2014)**, **Hadjiemmanuil (2015a)**, pp. 29-34 and **Vovolinis (2015)**.

⁹⁸⁴ **SRMR**, Article 18(1), second sub-paragraph.

⁹⁸⁵ *Ibid.*, Article 18(1), third sub-paragraph.

⁹⁸⁶ *Ibid.*, Article 18(2).

1.3 The criterion of the reasonable prospect for effective alternative private sector measures or supervisory action

1.3.1 Substantive aspects

The second condition for resolution consists in that, having regard to timing and other relevant circumstances there is no reasonable prospect that the failure of the credit institution could be prevented within a reasonable timeframe by taking in respect of it any ‘alternative private sector measures’,⁹⁸⁷ including measures by an IPS, *or* any ‘supervisory action’, including early intervention measures in accordance with **Article 27 BRRD** or the write-down or conversion of ‘relevant capital instruments’ pursuant to **Article 59(2) BRRD**.⁹⁸⁸

1.3.2 Procedural aspects

In the context of the SRM, an assessment of this condition must be made by the Board, in its Executive Session as well, or, if applicable, by the NRAs, in close cooperation with the ECB. The ECB may also inform the Board or the NRAs concerned that it considers this condition fulfilled.⁹⁸⁹

1.4 The ‘public interest’ criterion

(1) The third condition for resolution consists in that a resolution action is ‘**necessary in the public interest**’. According to **recital (58) SRMR** (first and second sentences): “*Liquidation of a failing entity under normal insolvency proceedings could jeopardise financial stability, interrupt the provision of essential services, and affect the protection of depositors. In such a case there is a public interest in applying resolution tools.*” On that basis, the SRMR provides that a resolution action is deemed to be in the public interest if two conditions are met cumulatively:⁹⁹⁰

firstly, it is necessary for the achievement of, and is proportionate to, at least one of the resolution objectives laid down in **Article 14 SRMR**; *and*

secondly, winding up of the credit institution under normal insolvency procedures would not meet these resolution objectives to the same extent (see further just below, **under (2)**).

As already mentioned,⁹⁹¹ the EBA is not empowered by the BRRD or the SRMR to issue Guidelines in relation to these aspects.

(2) The second condition that must be met for a resolution action to be deemed being in the public interest is the determination that the winding up of the credit institution under normal insolvency procedures would not meet the resolution objectives to the same extent. Accordingly, in this case the Board must make a comparison with a hypothetical national insolvency scenario, which presupposes profound knowledge of the bank insolvency legislation in all Member States.⁹⁹²

⁹⁸⁷ Such measures include the internal equity financing and the increase of the share capital.

⁹⁸⁸ **SRMR**, Article 18(1), first sub-paragraph, point (b).

⁹⁸⁹ *Ibid.*, Article 18(1), fourth sub-paragraph.

⁹⁹⁰ *Ibid.*, Articles 18(1), first sub-paragraph, point (c) and 18(5).

⁹⁹¹ See above, **under 1.1 (2)**.

⁹⁹² See on this **Grünwald (2017)**, p. 296.

It is only if the Board has (also) determined that normal insolvency proceedings would not achieve the resolution objectives to the same extent as resolution action that the public interest criterion is met; the assessment of critical functions or the meeting of any other resolution objective do not suffice.⁹⁹³

(3) It is noted in this context that, in principle, the SRMR and the BRRD highlight the ‘exceptional’ nature that resolution actions *should* have, irrespective of a credit institution’s size and/or interconnectedness. **Recital (59)** is bold on this: “[However], the winding up of an insolvent entity through normal insolvency proceedings should always be considered before a decision is taken to maintain the entity as a going concern. An insolvent entity should be maintained as a going concern for financial stability purposes and with the use, to the extent possible, of private funds. That may be achieved either through sale to or merger with a private sector purchaser, or after having written down the liabilities of the entity, or after converting its debt to equity in order to effect a recapitalisation.”⁹⁹⁴

As already mentioned,⁹⁹⁵ in accordance with the **Commission Delegated Regulation (EU) 2016/1075**, for the purposes of assessing the resolvability of a credit institution (or any other designated entity), the Board must implement a four-stage strategy the starting point of which is the assessment of the feasibility and credibility of liquidating a credit institution under normal insolvency proceedings. It is only after a determination has been made that liquidation is neither feasible nor credible that the Board should select a preferred resolution strategy, and then assess its feasibility and credibility.

(4) Hence, a decision to resolve a credit institution can be taken only if, in addition to above-mentioned two other conditions, the public interest criterion (also referred to as the ‘public interest test’⁹⁹⁶) is met. If this is not case, the failing or likely to fail credit institution may not be resolved but must be wound up. For an overview, see also **Table 13** below.

2. Adoption by the Board and entry into force of the resolution scheme

2.1 The resolution scheme

2.1.1 Content

(1) In the course of the resolution procedure of **Article 18 SRMR** the Board must adopt a resolution scheme containing the following elements:

firstly, it must establish, in accordance with any decision on State aid or SRF aid, the details of the resolution tools to be applied to the institution under resolution, concerning at least the measures referred to in **Articles 24(2), 25(2), 26(2)** and **27(1)** (with regard to the four resolution tools discussed in Section B) to be implemented by the NRAs in accordance with the relevant BRRD provisions, as transposed into national law;

⁹⁹³ See also the Board’s document “**Critical Functions: SRB Approach in 2017 and Next Steps**”, para. 39, at p. 15.

⁹⁹⁴ See also **BRRD**, recitals (45)-(46); on this see further **Hadjiemmanuil (2015a)**, p. 23.

⁹⁹⁵ See above in **Chapter 4, Section B, under 3.1.2.1**.

⁹⁹⁶ See indicatively **Binder (2019a)** and **Grünwald (2017)**. On the interpretation of ‘public interest’ and the criteria to define it, see also **Lastra, Russo and Bodellini (2019)**, pp. 13-15.

secondly, it must determine the specific amounts and purposes for which the SRF must be used;

in addition, it must outline the resolution actions to be taken by the Board in relation to a ‘Union parent institution’ or particular group entities established in the participating Member States in order to meet the resolution objectives and principles;

finally, it must provide, if appropriate, for the appointment by the NRAs of a special manager for the institution under resolution in accordance with **Article 35 BRRD**; the same special manager may be appointed for all entities affiliated to a group, if that is necessary in order to facilitate solutions **redressing their financial soundness**.⁹⁹⁷

(2) When adopting the resolution scheme, the Board, the Council and the Commission must *in principle* take into account and follow the measures provided for in the resolution plan. Nevertheless, since the best method of resolution should be chosen depending on the circumstances of the case, all resolution tools should be available. In that respect, the Board is given the discretion to assess, taking into account these circumstances, that the resolution objectives will be achieved more effectively by taking actions not provided for therein.⁹⁹⁸ By mere indication, even though the resolution plan may have adopted as a preferred resolution strategy the application of the ‘open bank’ bail-in tool, the Board may decide to apply the sale of business tool. When deciding on the resolution scheme, the Board, the Council and the Commission must, to the extent possible, respectively opt for the scheme that is the least costly for the SRF.⁹⁹⁹

(3) In the course of the resolution process, the Board may amend and update the resolution scheme as appropriate in light of the circumstances of the case. Such amendments and updates are governed by **Article 18**.¹⁰⁰⁰

2.1.2 Monitoring by the Board of the resolution scheme’s execution

(1) The Board must closely monitor the execution of the resolution scheme by the NRAs. In this context, the latter must cooperate with and assist the Board in the performance of its monitoring duty. They must also provide, at regular intervals established by the Board, accurate, reliable and complete information on the execution of the resolution scheme, the application of the resolution tools and the exercise of the resolution powers that might be requested by the Board, including the following seven factors:

firstly, the operation and financial situation of the institution under resolution, the bridge institution and the asset management vehicle;

secondly, the treatment that shareholders and creditors would have received in the liquidation of the institution under normal insolvency proceedings, under application of the NCWO principle;

⁹⁹⁷ **SRMR**, Article 23, first, second and fifth sub-paragraphs, and recital (66), first sentence. The scheme must also address whether the conditions for the write-down and conversion of capital instruments are met (*ibid.*, recital (66), third sentence).

⁹⁹⁸ *Ibid.*, Article 23, third sub-paragraph, and recitals (67) and (85), first sentence.

⁹⁹⁹ *Ibid.*, recital (85), second sentence.

¹⁰⁰⁰ *Ibid.*, Article 23, fourth sub-paragraph.

thirdly, any ongoing court proceedings relating to the liquidation of the assets of the institution under resolution, to challenges to the resolution decision and to the valuation or relating to applications for compensation filed by the shareholders or creditors;

furthermore, the appointment, removal or replacement of professionals (e.g. evaluators, administrators, accountants and lawyers) that may be necessary to assist the NRA, and on the performance of their duties;

fifthly, any other matter that is relevant for the execution of the resolution scheme, including any potential infringement of the safeguards provided for in the BRRD that may be referred to by the Board;

in addition, the extent to which, and the manner in which, they exercise their resolution powers in accordance with **Articles 63-72 BRRD**; and

finally, the economic viability, feasibility and implementation of the business reorganisation plan provided for in **Article 27(16)**.

NRAs must submit to the Board a final report on the resolution scheme's execution.¹⁰⁰¹

(2) On the basis of the information provided, the Board may give instructions to the NRAs as to any aspect of the resolution scheme's execution, and in particular the elements referred to in **Article 23**¹⁰⁰² and to the exercise of the resolution powers.¹⁰⁰³

2.2 The procedure for adopting the resolution scheme

2.2.1 Adoption of the resolution scheme by the Board

Upon fulfilment of the above resolution conditions, the Board must adopt a '**resolution scheme**', which contains three elements:

firstly, it places the entity under resolution;

secondly, it determines the application of the resolution tools to the institution under resolution (in particular any optional exclusions from the application of the bail-in in accordance with **Articles 27(5)** and **27(14)**); and

thirdly, it determines the use of the SRF to support the resolution action in accordance with **Article 76** (on its mission) and in accordance with a Commission decision under **Article 19** (on State aid and SRF aid).¹⁰⁰⁴

Immediately after its adoption, the Board must transmit the resolution scheme to the Commission.¹⁰⁰⁵

¹⁰⁰¹ *Ibid.*, Article 28(1).

¹⁰⁰² On Article 23, see just above, **under 2.1.1**.

¹⁰⁰³ **SRMR**, Article 28(2).

¹⁰⁰⁴ *Ibid.*, Article 18(6); on Article 76, see below in **Chapter 6, Section A, under 1.3**, and on Article 19 in **Section D of this Chapter**.

¹⁰⁰⁵ *Ibid.*, Article 18(7), first sub-paragraph. **Article 23** lays down additional specific rules governing the resolution scheme (see above, **under 2.1.1**).

2.2.2 Courses of action by the Commission and the Council

Given that the Board, as an agency,¹⁰⁰⁶ does not have the power to take final decisions, the powers of the Commission and the Council at this stage are significant:

(1) *Within twenty-four hours* from the transmission of the resolution scheme to the Commission, the latter must either endorse it or object to it with regard to its discretionary aspects, with exception of those on which it must make proposals to the Council (see just below, **under (2)**).¹⁰⁰⁷ In particular, it may prohibit or require amendments to the proposed exclusions from the application of the bail-in in accordance with **Articles 27(5) and 27(14)**, if such an exclusion requires a contribution by the SRF or an alternative financing source, in order to protect the integrity of the internal market.

In such a case, it must set out adequate reasons based on an infringement of the requirements laid down in **Article 27** on the bail-in tool and in the Commission's delegated act (on the basis of **Article 44(11) BRRD**) with regard to the further specification of the circumstances when exclusion is necessary.¹⁰⁰⁸ If the Commission endorses the resolution scheme, this enters into force.¹⁰⁰⁹ On the other hand, if the Commission objects to the resolution scheme with regard to its discretionary aspects, the Board must, *within eight hours*, modify it in accordance with the reasons expressed.¹⁰¹⁰

(2) *Within twelve hours* from the transmission of the resolution scheme by the Board, the Commission may propose to the Council (acting by simple majority) either to object to the resolution scheme, on the ground that it does not fulfil the '**public interest criterion**', or to approve or object to a material modification of the amount of the SRF provided for therein.¹⁰¹¹ In the *first* case, if the Council objects to the placing of an entity under resolution on the ground that the 'public interest criterion' is not fulfilled, this must be wound up in an orderly manner in accordance with the applicable national law. Otherwise, the resolution scheme enters into force.¹⁰¹² In the *second* case, if the Council approves the Commission's proposal (for a material modification of the amount of the SRF provided for in the resolution scheme), the Board must, *within eight hours*, modify the resolution scheme in accordance with the reasons expressed. Otherwise, the resolution scheme enters into force.¹⁰¹³

In all cases, if the Council and/or the Commission exercise their power of objection, they must provide reasons.¹⁰¹⁴ In performing their tasks, they must act in conformity with the principles of **Article 3(3) BRRD**, and make public all relevant information on their internal organisation in this regard.¹⁰¹⁵

¹⁰⁰⁶ See above in **Chapter 3, Section A, under 1**.

¹⁰⁰⁷ **SRMR**, Article 18(7), second sub-paragraph.

¹⁰⁰⁸ *Ibid.*, Article 18(7), eighth sub-paragraph.

¹⁰⁰⁹ *Ibid.*, Article 18(7), fifth sub-paragraph.

¹⁰¹⁰ *Ibid.*, Article 18(7), seventh sub-paragraph.

¹⁰¹¹ *Ibid.*, Article 18(7), third and fourth sub-paragraphs.

¹⁰¹² *Ibid.*, Articles 18(7), fifth sub-paragraph and 18(8).

¹⁰¹³ *Ibid.*, Article 18(7), fifth and seventh sub-paragraphs.

¹⁰¹⁴ *Ibid.*, Article 18(7), sixth sub-paragraph.

¹⁰¹⁵ *Ibid.*, Article 19(1), second sub-paragraph (misplaced).

It is noted that the above-mentioned strict deadlines set in **Article 18(7) SRMR** reflect the consideration made in **recital (56)** (first sentence) according to which in order to minimise a disruption of the financial market and of the economy, the resolution process should be accomplished in a short time.¹⁰¹⁶

2.3 Related aspects

(1) The Board must ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant NRAs. The scheme must be addressed to the relevant NRAs instructing them to take all necessary measures to implement it in accordance with **Article 29**¹⁰¹⁷ by exercising resolution powers. If State aid or SRF aid is present, the Board must act in conformity with a decision on that aid taken by the Commission.¹⁰¹⁸

(2) The Commission has the power to obtain, throughout the resolution procedure, from the Board any information which it deems to be necessary to take an informed decision in the resolution process and relevant for performing its tasks.¹⁰¹⁹ On the other hand, the Board has the power to obtain, in accordance with **Articles 34-37**,¹⁰²⁰ from any person any information necessary for it to prepare and decide upon a resolution action, including updates and supplements of information provided in the resolution plans.¹⁰²¹

3. Implementation of decisions concerning resolution

3.1 Action by national resolution authorities (NRAs)

(1) NRAs must take the necessary action to implement decisions referred to in the SRMR, in particular by: exercising control over the entities and groups referred to in **Article 7(2)** (and, if the conditions for their application are met, in **Articles 7(4), point (b)** and **7(5)**), taking the necessary measures under **Articles 35 or 72 BRRD**, and ensuring that the safeguards provided for therein are complied with. They must also implement all decisions addressed to them by the Board, by exercising their powers under national law and fully informing the Board of their exercise. Any action taken must comply with the Board's decisions under the SRMR. When implementing those decisions, the NRAs must ensure that the applicable safeguards provided for in the BRRD are complied with.¹⁰²²

(2) The institution under resolution must comply with any decision taken, which prevails over any previous decision adopted by the NRAs on the same matter. In addition, when taking action in relation to issues subject to such a decision, NRAs must comply with it.¹⁰²³

¹⁰¹⁶ See also recital (26), first sub-paragraph.

¹⁰¹⁷ On Article 29, see just below, **under 3**.

¹⁰¹⁸ **SRMR**, Article 18(9).

¹⁰¹⁹ *Ibid.*, Article 18(10), first sentence and recital (56), third sentence..

¹⁰²⁰ On these Articles, see above in **Chapter 3, Section D, under 1**.

¹⁰²¹ **SRMR**, Article 18(10), second sentence.

¹⁰²² *Ibid.*, Article 29(1); the safeguards are laid down in **Articles 73-80 BRRD**.

¹⁰²³ *Ibid.*, Article 29(3)-(4).

(3) The Board must publish on its official website either a copy of the resolution scheme, or a notice summarising the effects of the resolution action (in particular on retail customers). The NRAs must comply with the applicable procedural obligations provided for in **Article 83 BRRD**.¹⁰²⁴

3.2 Action by the Board

(1) In order to ensure the efficiency and uniformity of resolution actions in all participating Member States, if an NRA has not applied (or has not complied with) a Board decision, in accordance with the above-mentioned, or has applied it in a way posing a threat to any of the resolution objectives or to the efficient implementation of the resolution scheme, the Board has the power to order an institution under resolution, in the event of action within the resolution procedure, to transfer to another person specified rights, assets or liabilities of an institution under resolution, to require the conversion of any ‘debt instruments’ containing a contractual term for conversion under **Article 21**,¹⁰²⁵ or to adopt any other necessary action to comply with the decision in question in order to address the threat to the relevant resolution objective. A decision referred to in the last case may be adopted by the Board, only if the measure significantly addresses the threat to the relevant resolution objective or to the efficient implementation of the resolution scheme.¹⁰²⁶ Any action by an NRA that would restrain or affect the Board’s exercise of powers or functions of the Board is excluded.¹⁰²⁷

(2) Before deciding to impose any measure the Board must notify the NRAs concerned and the Commission of the measure it intends to take. The notification must include details of the envisaged measures, the reasons for those measures and details of when the measures are intended to take effect, and *in principle* be made not less than 24 hours before the measures are to take effect. *Exceptionally*, the Board may make the notification less than 24 hours before the measures are intended to take effect.¹⁰²⁸

4. Recent relevant decisions of the Board

4.1 General overview

In June 2017, the above-mentioned conditions for resolution under the SRMR have been tested in three cases and have led to differentiated assessments and decisions by the Board (see below, **under 4.2-4.3**) and they have also been tested again in February 2018 (**under 4.4**). In the meantime, the Italian credit institution **Monte dei Paschi di Siena S.p.A.**, whose capital ratios were deemed sufficiently high under the so-called “baseline scenario” under the 2016 stress test carried out by the EBA and the ECB but had a capital shortfall in the “adverse case scenario”, managed to adopt alternative private sector measures in the meaning of **Article 18(1), first sub-paragraph, point (b) SRMR**.

¹⁰²⁴ **SRMR**, Article 29(5).

¹⁰²⁵ On Article 21, see **Section F** below.

¹⁰²⁶ **SRMR**, Article 29(2), first and second sub-paragraphs and recital (87), first and second sentences.

¹⁰²⁷ *Ibid.*, Article 3(1), point (39) and recital (87), last sentence.

¹⁰²⁸ *Ibid.*, Article 29(2), third and fourth sub-paragraphs.

Hence, the credit institution met the “failing or likely to fail” resolution condition laid down in **Article 18(1), first sub-paragraph, point (a) SRMR**.¹⁰²⁹

Accordingly, the Board was not further involved and, on 1 June 2017, the European Commission and the Italian Ministry of Finance reached an Agreement, in principle, on the precautionary recapitalisation of that credit institution in full compliance with **Article 18(4), first sub-paragraph, point (d)(iii)**.¹⁰³⁰ On the basis of that Agreement, the credit institution should dispose of its entire non-performing loans portfolio on market terms, take measures to substantially increase its efficiency (including the imposition of a salary cap for the senior management) and, in line with EU State aid rules on burden-sharing, its shareholders and junior bondholders should contribute to the costs of its restructuring. In addition, it should compensate retail junior bondholders who were “mis-sold” by converting these bonds into equity and buying those shares from the retail investors, and pay retail investors in more secure senior instruments.

4.2 Banco Popular Español

(1) On 7 June 2017, the Board has taken resolution action in respect of Banco Popular Español (“**Banco Popular**”), after having assessed that the conditions for resolution in accordance with **Article 18(1) SRMR** were met. In particular:

Firstly, on 6 June 2017, the ECB concluded that this entity was failing or likely to fail on the basis of **Article 18(4), sub-paragraph, point (c) SRMR**, since taking into account its rapidly deteriorating liquidity situation, the ECB considered that there were sufficient grounds supporting the determination that the Institution would, in the near future, be unable to pay its debts as they fall due.¹⁰³¹

Furthermore, the Board determined that there was no reasonable prospect that any alternative private sector measures or supervisory action would prevent the failure of the credit institution within a reasonable timeframe.

Finally, the Board concluded that resolution action would be necessary in the public interest, in particular in order to achieve the following resolution objectives: *firstly*, ensure the continuity of critical functions, namely: deposit taking from households and non-financial corporations (including SMEs), lending to SMEs, as well as payment and cash services; *secondly*, avoid adverse effects on financial stability. It also assessed that the winding up of Banco Popular under normal insolvency proceedings would not meet those resolution objectives to the same extent.¹⁰³²

¹⁰²⁹ On Article 18(1), see above, **under 1.2.1.1 (1)**.

¹⁰³⁰ On this Article, see above, **under 1.2.1.2**. The European Commission’s Statement on this Agreement is available at: https://europa.eu/rapid/press-release_STATEMENT-171502_en.htm, while its authorisation of that credit institution’s precautionary recapitalisation is available at: https://europa.eu/rapid/press-release_IP-17-1905_en.htm. On this case, see **Hadjiemmanuil (2017)** (an Opinion submitted a month before the Agreement was reached) and **Haentjens (2017b)**, Section 6. See also **De Groen (2016)**, reviewing that credit institution’s financial condition during the very last years before 2017 and concluding that the path towards minimum recapitalisations (backed by public support), even though it was at the edge of failing or likely to fail (“living on the edge”), should be used as an example by supervisory, resolution and competition authorities as to the need for combining extensive recapitalisations with proper resolution (which nevertheless was not followed in 2017).

¹⁰³¹ The ECB Press Release on deeming Banco Popular as failing or likely to fail is available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170607.en.html>.

¹⁰³² On this (first for the Board) resolution case, see **Binder (2017b)** and **Haentjens (2017b)**.

(2) Since all three resolution conditions were met, the Board adopted a resolution scheme in accordance with **Article 18(6) SRMR**. This provided for the application of the ‘sale of business tool’ to Banco Popular, having regard to the results of its valuation carried out in accordance with **Article 20 SRMR**.¹⁰³³ The resolution scheme was approved by the European Commission, in accordance with **Article 18(7) SRMR** on the same day.¹⁰³⁴ Thereunder and following a marketing process, the Board decided to transfer Banco Popular to Banco Santander S.A. It also decided to exercise the power of write-down and conversion of capital instruments prior to the transfer in accordance with **Article 21 SRMR**,¹⁰³⁵ to address the shortfall in the value of the credit institution under resolution.

(3) The Spanish “Fondo de restructuración ordenada bancaria” (Fund for Orderly Bank Restructuring, the ‘**FROB**’), in its capacity as NRA, must take the necessary actions to implement the resolution scheme adopted by the Board and the effective execution of the transfer in accordance with **Article 29 SRMR**.¹⁰³⁶

4.3 Banca Popolare di Vicenza and Veneto Banca

(1) Two weeks later, on 23 June 2017, the Board decided not to take resolution action in respect of two Italian credit institutions, namely **Banca Popolare di Vicenza S.p.A.** and **Veneto Banca S.p.A.** For both these credit institutions the ECB had as well concluded that they were failing or likely to fail on the basis of **Article 18(4), first sub-paragraph, point (c) SRMR**.¹⁰³⁷ Nevertheless, the Board assessed that, while the conditions for resolution action of **Article 18(1), first sub-paragraph, points (a)-(b) SRMR** were met, the condition of **point (c)** of that sub-paragraph, concerning the public interest criterion, was not satisfied. In particular, it concluded that, given the particular characteristics of these credit institutions and their specific financial and economic situation, resolution action with respect to them was not necessary in the public interest, based on the following grounds:

firstly, the functions performed by these credit institutions, e.g. deposit-taking, lending activities and payment services, are not critical since they are provided to a limited number of third parties and can be replaced in an acceptable manner and within a reasonable timeframe;

¹⁰³³ On Article 20, see **Section D** below. The Board’s notice summarising the effects of the resolution action taken in respect of this credit institution, published in accordance with **Article 29(5) SRMR**, is available at: https://srb.europa.eu/sites/srbsite/files/note_summarising_effects_07062017.pdf. An ‘extensive’ non-confidential version of the Resolution Decision, the Valuation Reports and the Resolution Plan of this credit institution, of 2 February 2018, is available at: <https://srb.europa.eu/en/content/banco-popular>. For a related anonymised Decision of the SRB Appeal Panel of 9 November 2017 in the Case 36-17 see: https://srb.europa.eu/sites/srbsite/files/case_36-17_anonymised_decision.pdf.

¹⁰³⁴ The relevant European Commission Press Release is available at: https://europa.eu/rapid/press-release_STATEMENT-17-1502_en.htm. On Article 18(7), see above, **under 2.2**.

¹⁰³⁵ On Article 21, see **Section F** below.

¹⁰³⁶ The Resolution of the FROB Governing Committee adopting the measures required to implement the Board’s Decision is available at: https://www.frob.es/en/Lists/Contenidos/Attachments/419/ProyectedoAcuerdoreducido_EN_v1.pdf.

¹⁰³⁷ The ECB Press Release on deeming these credit institutions as failing or likely to fail is available at: https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170623_en.html.

secondly, their failure is not likely to result in significant adverse effects on financial stability taking into account, in particular, the low financial and operational interconnections with other financial institutions; and

thirdly, Italian normal insolvency proceedings would achieve the resolution objectives to the same extent as resolution, since such proceedings would also ensure a comparable degree of protection for depositors, investors, other customers, clients' funds and assets.¹⁰³⁸

(2) The decisions in respect of these credit institutions were addressed to and must be implemented by Banca d' Italia, in its capacity as NRA. The credit institutions are currently subject to winding up under the insolvency proceedings of Italian law, which does not prevent the bail-out of senior creditors. In addition, on 25 June 2017, the Commission made public its decision to approve State aid of 17 billion euros to facilitate their liquidation under Italian law on the condition that shareholders and subordinated debtholders were bailed-in in accordance with the burden-sharing requirements laid down in accordance with the '**2013 Banking Communication**'.¹⁰³⁹

(3) This development is not compatible with the spirit of the new EU resolution regime, but still not contrary to its provisions. Nevertheless, it apparently raised, *inter alia*, the urgency of the need to harmonise at EU level the rules on the winding up of credit institutions, which, as already mentioned,¹⁰⁴⁰ is an element of the unfinished BU agenda. The author is thus sceptical about the accuracy of the comment made concerning the "circumvention of EU law" by the Italian government.¹⁰⁴¹ In his opinion, it is the "absence of EU law" which permitted the bail-out of senior creditors in this particular case.

4.4 ABLV Bank, AS and ABLV Bank Luxembourg, S.A.

(1) In February 2018, the Board decided not to resolve two further credit institutions on the same ground as in the case of the two above-mentioned Italian banks. In particular, following the decision by the ECB of **23 February 2018** to declare ABLV Bank, AS, Latvia's third largest credit institution, and its subsidiary ABLV Bank Luxembourg S.A. as 'failing or likely to fail',¹⁰⁴² the Board decided, on the same date, after having assessed the conditions for resolution under **Article 18(1) SRMR**, that resolution action was not necessary.

¹⁰³⁸ The Board's notice summarising the effects of the decisions taken in respect of these two credit institutions is available at: https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_banca_popolare_di_vicenza_s.p.a._20.00.pdf, and https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_veneto_banca_s.p.a_20.00.pdf. On the non-confidential version of the Resolution Decision in relation to these two credit institutions, see at: https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf, and at: https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf.

¹⁰³⁹ The Commission approval of State aid for market exit of the two credit institutions is available at: https://europa.eu/rapid/press-release_IP-17-1791_en.htm. On this aspect, see more details in **Grünwald (2017)**, pp. 299-302.

¹⁰⁴⁰ See above in in **Chapter 1, Section C, under 4.2**.

¹⁰⁴¹ See, by mere indication, **Köhler (2017)**. The author nevertheless fully subscribes to the main concern raised in that paper on the credibility of regulators' commitment to bail-in.

¹⁰⁴² The ECB Press Release on deeming these credit institutions as failing or likely to fail is available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224_en.html.

The basis was that it was not in the public interest for these credit institutions to be resolved, since neither of them provided critical functions, and their failure was not expected to have a significant adverse impact on financial stability in Latvia, Luxembourg or any other Member State.¹⁰⁴³

(2) Following that Decision, their winding up is taking place under the relevant laws of Latvia and Luxembourg, respectively, and eligible deposits at these credit institutions are protected up to 100,000 euros in accordance with the Latvian and Luxembourg laws transposing the DGSD.

¹⁰⁴³ The notices of the SRB summarising the effects of the decisions taken in respect of ABLV Bank and its subsidiary are available at: https://srb.europa.eu/sites/srbsite/files/20180223-summary_decision_-_latvia.pdf and https://srb.europa.eu/sites/srbsite/files/20180223_summary_decision_-_luxembourg.pdf, respectively. The non-confidential versions of the Resolution Decisions are available at: https://srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-09_ablv_lv_non_confidential_version_final_0.pdf and at: https://srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-10_ablv_lux_non_confidential_version_final.pdf.

TABLE 10			
The conditions for the resolution of credit institutions under Article 18 of the SRM Regulation			
Criteria	Case 1	Case 2	Case 3
The credit institution is failing or likely to fail	✓	✓	✓
No reasonable prospect for effective alternative private sector measures or supervisory action	✗	✓	✓
A resolution action is necessary in the public interest	✓	✓	✗
Outcome			
	1. Recapitalisation with the use of private sector funds 2. Potential resort to support measures in the form of ‘precautionary recapitalisation’ (add-on)	1. Resolution 2. Potential use of the SRF’s available financial means	1. Winding up under normal insolvency proceedings 2. Activation of national DGS to repay covered depositors
<i>Recent cases</i>	<i>Monte dei Paschi di Siena</i>	<i>Banco Popular Español</i>	<i>Banca Popolare di Vicenza</i> <i>Veneto Banca</i> <i>ABLV Bank, AS</i> <i>ABLV Bank Luxembourg, S.A.</i>

(✗) denotes that this condition is not met

TABLE 11

The ‘failing or likely to fail’ criterion under the 2015 EBA Guidelines

The first condition for resolution consists in that the competent authority (i.e. as the case may be the ECB for significant credit institutions or the NCA for less significant ones) determines, after consulting the resolution authority, that the credit institution is ‘failing or likely to fail’

(1) A credit institution is deemed to be in such a situation upon assessment of *one or several* of the **objective elements** relating to the following areas:

Capital position	<p>(a) It infringes, or there are objective elements to support a determination that it will, in the near future, infringe own fund requirements relating to the continuing of its authorisation, in a way that would justify its withdrawal by the competent authority. This includes, but is not limited to, the fact that the institution has incurred or is likely to incur losses that might deplete the entirety or a significant amount of its own funds</p> <p>(b) Its assets are, or there are objective elements to support a determination that they will, in the near future, be less than its liabilities</p>
Liquidity position	It infringes, or there are objective elements to support a determination that it will, in the near future, infringe regulatory liquidity requirements for continuing authorisation in a way that would justify its withdrawal by the competent authority
Other requirements for continuing authorisation	<p>It infringes, or there are objective elements to support a determination that it will, in the near future, infringe other requirements of its authorisation, in a way that would justify its withdrawal by the competent authority. For that purpose, the competent and/or the resolution authority should consider:</p> <ul style="list-style-type: none"> • governance arrangements, and • the reliability and operational capacity to provide regulated activities

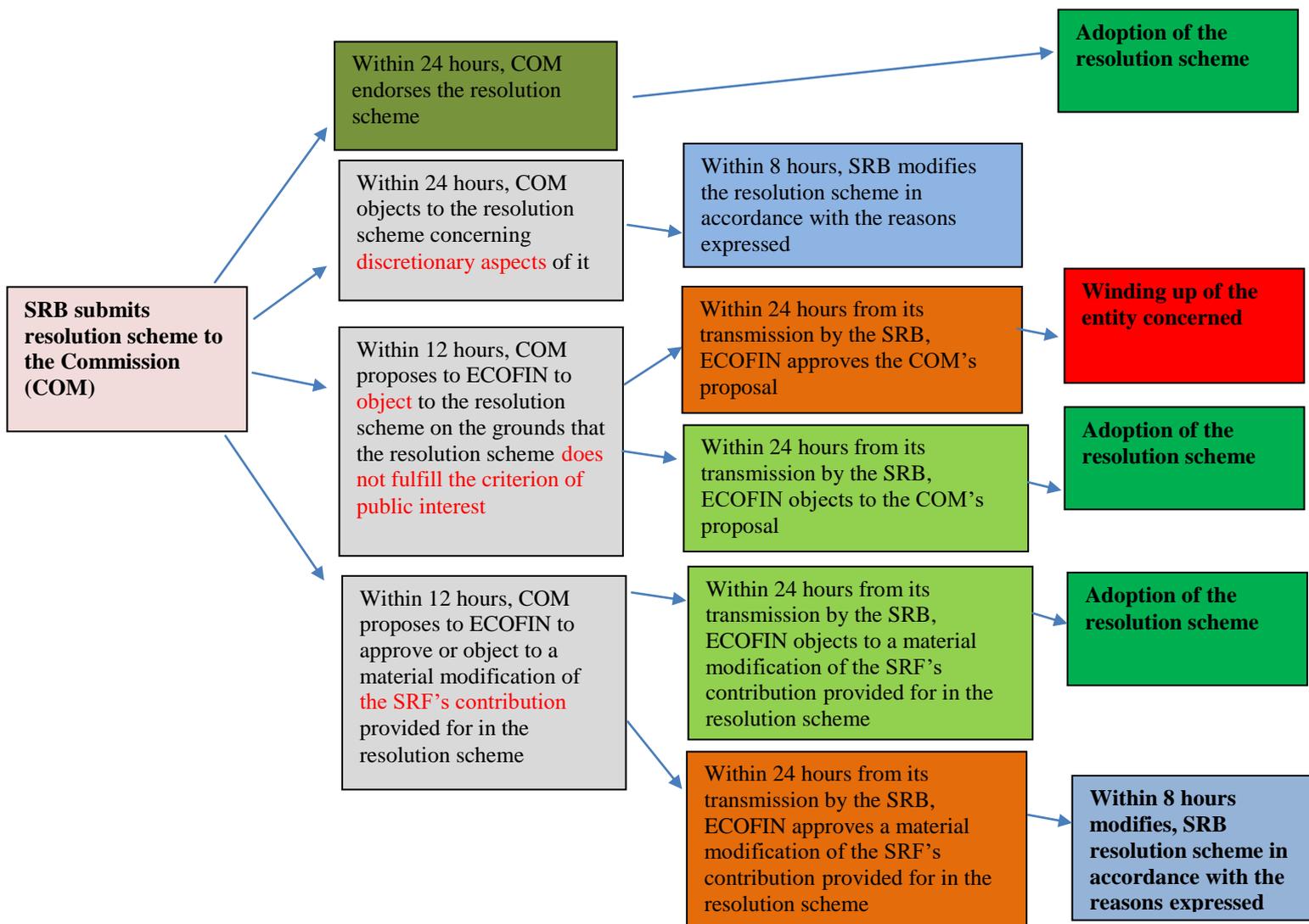
The assessment of the objective elements is usually carried out by the competent authority in the course of the ‘Supervisory Review and Evaluation Process’ (‘SREP’), which is performed in accordance with the “EBA SREP Guidelines (2014)”

(2) ‘Extraordinary public financial support’ is required, unless that support takes any of the three permissible forms

TABLE 12		
Alternative forms of (permissible) recapitalisation of credit institutions by public funds (bail-out) in the EU		
Form	Legal basis	Financial condition
'Precautionary recapitalisation'	SRMR , Article 18(4), point (d)(iii) BRRD , Article 32(4), point (d)(iii)	Solvent credit institutions
Direct Recapitalisation Instrument (DRI)	DRI Guideline (ESM)	Systemically relevant credit institutions or credit institutions posing a serious threat to financial stability unable to meet regulatory capital requirements
Government financial stabilisation tools (GFSTs)	BRRD , Articles 37(10) and 56-58	Credit institutions 'failing or likely to fail'

TABLE 13		
The public interest criterion for the resolution of credit institutions under Article 18 SMR Regulation		
A resolution action is deemed to be in the public interest if the following two conditions are met:		
Necessity for the achievement of, and proportionality to, at least one of the resolution objectives		Winding up of the credit institution under normal insolvency procedures would not meet the resolution objectives to the same extent
Continuity of critical functions	Financial stability analysis	Assessment by the Board on the basis of a comparative hypothetical national insolvency scenario
Assessment by the Board in the course of resolution planning	In relation to the credit institution concerned, assessment by the Board of: <ul style="list-style-type: none"> • its economic importance (systemic relevance) • potential sources of direct and indirect contagion (spillover) from its failure • conditions <i>re</i> market discipline as a result of its failure • impact on the real economy from its failure 	
Other resolution objectives		
Protection of : <ul style="list-style-type: none"> • public funds by minimising reliance on extraordinary public financial support • depositors covered by the DGSD • investors covered by the ICSD • client funds and client assets 		

GRAPH 1: Resolution procedure under Article 18(7) SRMR



Section D: Valuation for the purposes of resolution

1. The *ex-ante* valuation(s)

(1) Specific and (extremely) detailed rules apply to various valuations that must be carried out for the purposes of resolution, the objective of which is the protection of shareholders' and creditors' rights.¹⁰⁴⁴ The valuation framework is governed by **Article 20 SRMR**, the structure of which is very close to that of **Articles 36 and 74 BRRD**. On the basis of Article 36(15) of the latter, the Commission adopted its **Delegated Regulation (EU) 2018/345** of 14 November 2017 "supplementing [the BRRD] with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities".¹⁰⁴⁵

In accordance with **Article 1, point (a)** of that delegated act, '**valuation**' means either the assessment of an entity's assets and liabilities conducted by a valuer pursuant to Article 36(1) BRRD, or the provisional valuation conducted by the resolution authority or the valuer, as the case may be, pursuant respectively to Article 36(2) and (9). Pursuant to **Article 1, point (b)**, '**valuer**' means either the independent valuer within the meaning of **Article 38 of Commission Delegated Regulation (EU) 2016/1075**¹⁰⁴⁶ or the resolution authority when conducting a provisional valuation. A legal or natural person may be appointed as a valuer.

(2) Before deciding on a resolution action or the exercise of the power to write down or convert relevant capital instruments, the Board must ensure that a *fair, prudent and realistic* valuation of the assets and liabilities of a designated entity is carried out by a person independent from any public authority, including the Board and the NRA, and from the entity concerned.¹⁰⁴⁷ If an independent valuation is not possible, the Board may decide to carry out a 'provisional' valuation pursuant to **Article 20(10) SRMR**.¹⁰⁴⁸

(3) The objective of this valuation is to assess the value of the assets and liabilities of a designated entity meeting the conditions for resolution of **Articles 16 and 18**.¹⁰⁴⁹ Its purposes are the following:¹⁰⁵⁰

¹⁰⁴⁴ **SRMR**, recital (63), first sentence.

¹⁰⁴⁵ OJ L 67, 9.3.2018, pp. 8-17.

¹⁰⁴⁶ In accordance with that Article, a valuer is deemed to be independent from any relevant public authority and the relevant entity when the following three conditions are met cumulatively: possesses the qualifications, experience, ability, knowledge and resources required and can carry out the valuation effectively without undue reliance on any relevant public authority or the relevant entity in accordance with Article 39; is legally separated from the relevant public authorities and the relevant entity in accordance with Article 40; and has no material common or conflicting interest within the meaning of Article 41.

¹⁰⁴⁷ **SRMR**, Article 20(1), and recitals (63), third sentence and (64), second sentence. '**Fair value**' means the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the valuation date, as defined in the relevant accounting framework (**Commission Delegated Regulation (EU) 2018/345**, Article 1, point (d)). On the related valuation under **Article 36(1) and (4) BRRD**, see **Huber (2017a)**.

¹⁰⁴⁸ **SRMR**, Article 20(3); on Article 20(10), see below, **under 2 (1)**.

¹⁰⁴⁹ *Ibid.*, Article 20(4).

¹⁰⁵⁰ *Ibid.*, Article 20(5), points (a)-(g).

firstly, to inform the determination of whether the conditions for resolution *or* the conditions for the write-down or conversion of capital instruments are met;

secondly, if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of the designated entity concerned;

thirdly, when the power to write down or convert relevant capital instruments is applied, to inform the decision on the extent of both the write-down or conversion of such instruments *and* the cancellation or dilution of instruments of ownership;

furthermore, if the bail-in tool is applied, to inform the decision on the extent of the write-down or conversion of eligible liabilities;

in addition, when the bridge institution or the asset separation tool is applied, to inform the decision on the instruments of ownership, assets, rights and/or liabilities to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or to the owners of the instruments of ownership,

sixthly, if the sale of business tool is applied, to inform both the decision on the instruments of ownership, assets, rights, and/or liabilities to be transferred and the Board's understanding of what constitutes 'commercial terms' for the purposes of **Article 24(2), point (b)**;¹⁰⁵¹ and

finally, in all cases, to ensure that any losses on the designated entity's assets are fully recognised at the moment when the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.

Even though neither the BRRD nor the SRMR make this distinction, it has become usual to refer to the valuation as to its first component (i.e. informing the determination of whether the conditions for resolution *or* the conditions for the write-down or conversion of capital instruments are met) as '**Valuation 1**' and as to its other components (i.e. determination of the appropriate resolution action and of the applicable resolution tools) as '**Valuation 2**'. Accordingly, 'Valuation 2' must take place after it has been ascertained that the conditions for resolution are met. Both these valuations must be conducted prior to resolution (hence *ex-ante*).

(4) The rules governing this valuation are the following:

Firstly, it must be based on prudent assumptions, including as to rates of default and severity of losses, without prejudice to the EU State aid framework, if applicable.¹⁰⁵²

Furthermore, it must not assume any potential future provision of any extraordinary public financial support, any central bank emergency liquidity assistance, or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to a designated entity from the point at which resolution action is taken or the power to write down or convert relevant capital instruments is exercised.¹⁰⁵³

¹⁰⁵¹ On this Article, see above in **Section B, under 2**.

¹⁰⁵² **SRMR**, Article 20(6), first sentence.

¹⁰⁵³ *Ibid.*, Article 20(6), second sentence.

Finally, it must take account of the fact that, if any resolution tool is applied, the Board may recover any reasonable expenses properly incurred from the institution under resolution in accordance with **Article 22(6)**,¹⁰⁵⁴ and the SRF may charge interest or fees in respect of any loans or guarantees provided to the institution under resolution in accordance with **Article 76** (on the purposes of its use).¹⁰⁵⁵

(5) In respect of this valuation, the SRMR (just like the BRRD) also sets out the following provisions:

Firstly, it must be supplemented by the following information: an updated balance sheet and a report on the financial position of the designated entity concerned; an analysis and an estimate of the accounting value of its assets; and the list of outstanding on-balance-sheet and off-balance-sheet liabilities shown in its books and records, with an indication of the respective credits and priority of claims referred to in **Article 17**.¹⁰⁵⁶ This information must be provided as appearing in the accounting books and records of the designated entity concerned.¹⁰⁵⁷ If appropriate, in order to inform the decisions referred to in **Article 20(5) points (e)-(f)**,¹⁰⁵⁸ the information on the analysis and estimate of the designated entity's assets' *accounting value* may be complemented by an analysis and estimate of the *value* of the assets and liabilities of the entity concerned *on a market value basis*.¹⁰⁵⁹

Secondly, it must indicate the subdivision of the creditors in classes in accordance with the priority of claims referred to in **Article 17** and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if the designated entity concerned were wound up under normal insolvency proceedings. That estimate should not affect the application of the NCWO principle.¹⁰⁶⁰

Furthermore, it must be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power, or of the decision on the exercise of the write-down or conversion power of capital instruments.¹⁰⁶¹ Subject to this, if the requirements laid down in **Article 20(1) and (4)-(9)** above are met, the valuation is considered to be definitive.¹⁰⁶²

Finally, the valuation itself may not be subject to a separate right of appeal but may be subject to an appeal together with the Board's Decision.¹⁰⁶³

¹⁰⁵⁴ On this Article, see above in **Section B, under 1.2 (5)**.

¹⁰⁵⁵ **SRMR**, Article 20(6), third sentence; on Article 76, see below in **Chapter 6, Section A, under 1.3**.

¹⁰⁵⁶ On this Article, see above in **Section A, under 3**.

¹⁰⁵⁷ **SRMR**, Article 20(7), points (a)-(c).

¹⁰⁵⁸ See just above, **under (3)**.

¹⁰⁵⁹ **SRMR**, Article 20(8).

¹⁰⁶⁰ *Ibid.*, Article 20(9).

¹⁰⁶¹ *Ibid.*, Article 20(15), first sentence.

¹⁰⁶² *Ibid.*, Article 20(2).

¹⁰⁶³ *Ibid.*, Article 20(15), second sentence and recital (63), fourth sentence.

2. The provisional valuation

(1) If, due to urgency in the case's circumstances, *either* it is not possible to comply with the requirements laid down in **Article 20(7)** and **(9)** above *or* an independent valuation is not possible (as provided for in **Article 20(3)**¹⁰⁶⁴), a rapid, provisional valuation must be carried out. This must comply with the requirements laid down in **Article 20(4)** above (and, if reasonably practicable, **Articles 20(1), 20(7)** and **20(9)**) and include a duly justified buffer for additional losses.¹⁰⁶⁵

(2) A valuation not complying with all the requirements laid down in **Article 20(1)-(4)** and **(9)** above is considered to be provisional, until an independent person has carried out a fully compliant valuation.¹⁰⁶⁶ The latter *ex-post* definitive valuation is governed by the following rules:¹⁰⁶⁷

Firstly, it must be carried out as soon as practicable, and may be carried out either separately from the (other *ex-post*) valuation referred to in **Article 20(16)-(18)**,¹⁰⁶⁸ or simultaneously with and by the same independent person as that, but must be distinct from it.

In addition, its purposes are to ensure that any losses on the assets of a designated entity are fully recognised in the books of accounts of that entity, and to inform the decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with **Article 20(12)**. This Article provides that, if the *ex-post* definitive valuation's estimate of the net asset value of a designated entity is higher than the provisional valuation's estimate of its net asset value, the Board may request the NRA to exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments that have been written down under the bail-in tool, and instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights or liabilities to an institution under resolution, or as the case may be, in respect of the instruments of ownership to their owners.

(3) Notwithstanding **Article 20(1)**, a provisional valuation conducted under the above is a valid basis for the Board to decide on resolution actions, including instructing NRAs to take control of a failing institution, *or* the exercise of the write-down or conversion power of relevant capital instruments.¹⁰⁶⁹

3. Common provision

Arrangements must be established and maintained by the Board in order to ensure that the assessment for the application of the bail-in tool (in accordance with **Article 27**) and the valuations referred to in **Article 20(1)-(15)** above are based on updated and complete (as reasonably possible) information about the assets and liabilities of the institution under resolution.¹⁰⁷⁰

¹⁰⁶⁴ See above, **under 1 (2)**.

¹⁰⁶⁵ **SRMR**, Article 20(10) and recital (64), third and fourth sentences.

¹⁰⁶⁶ *Ibid.*, Article 20(11), first sub-paragraph, first sentence.

¹⁰⁶⁷ *Ibid.*, Article 20(11), first sub-paragraph, second and third sentences, and second sub-paragraph.

¹⁰⁶⁸ See just below, **under 4**.

¹⁰⁶⁹ **SRMR**, Article 20(13). Under the **BRRD** framework, this provisional valuation is governed by **Article 36(2)** and **(9)-(12)**.

¹⁰⁷⁰ *Ibid.*, Article 20(14).

4. The *ex-post* valuation in accordance with Article 20(16)-(18)

By application of the NCWO principle, for the purposes of assessing whether shareholders and creditors would have received better treatment if an institution under resolution had entered into normal insolvency proceedings, the Board must ensure that a valuation is carried out by an independent person as soon as possible *after* the resolution action or actions have been effected.¹⁰⁷¹ With regard to this valuation (the so-called ‘**Valuation 3**’) the following rules have been established:

(1) It must be distinct from any other valuation (according to the above-mentioned) and determine the following:

firstly, the treatment that shareholders and creditors, or the relevant DGSs, would have received if the institution under resolution with respect to which the resolution action or actions have been effected, had entered normal insolvency proceedings at the time when the decision on the resolution action was taken;

secondly, the actual treatment that shareholders and creditors have received in the resolution of the institution under resolution; and

thirdly (and consequently), whether there is any difference between the two treatments.¹⁰⁷²

(2) It must be based on two assumptions: the institution under resolution with respect to which the resolution action or actions have been effected would have entered into normal insolvency proceedings at the time when the decision on the resolution action was taken, *and* the resolution action or actions had not been effected.

(3) Finally, it must disregard any provision of extraordinary public financial support to the institution under resolution.¹⁰⁷³

5. The Board’s “2019 Framework for Valuation”

On 19 February 2019, the Board published a Report entitled “**Framework for Valuation**”.¹⁰⁷⁴ The objectives of this Report, produced in close cooperation with the EBA, is the provision of an indication mainly to independent valuers (but to the general public as well) of the Board’s expectations regarding the principles and methodologies for valuation reports as laid down in the SRMR (and the BRRD), the provision of necessary indications for achieving the valuation’s goals, as well as the enhancement of comparability and consistency of valuations across future resolution cases. It refers to both ‘Valuation 2’, either provisional or definitive, and ‘Valuation 3’.

¹⁰⁷¹ *Ibid.*, Article 20(16) and recital (63), fifth sentence; on this type of valuation under **Article 74 BRRD**, see **Athanassiou (2014)** and **Merc (2017d)**.

¹⁰⁷² *Ibid.*, Article 20(17).

¹⁰⁷³ *Ibid.*, Article 20(18). For a brief but precise analysis of the valuation framework under (mainly) the BRRD and the SRMR, see also **Lastra and Olivares-Caminal (2018)**.

¹⁰⁷⁴ Available at: https://srb.europa.eu/sites/srbsite/files/framework_for_valuation_feb_2019_web_0.pdf.

The Board's expectation is that, even though the Report is addressed to the independent valuation experts, credit institutions and investment firms will also benefit from a better understanding of valuation in resolution, increasing thus their preparedness for resolution and, ultimately, improving their resolvability. The EBA and the Board also committed to continue cooperating in order to define expectations towards the provision of accurate and timely information necessary for the performance of valuations in resolution.¹⁰⁷⁵

¹⁰⁷⁵ See the relevant Press Release of the SRB of 19 September 2019, available at: <https://srb.europa.eu/en/node/728>.

Section E:

State aid and aid by the Single Resolution Fund

1. General rules

If a resolution action involves the granting of State aid (in accordance with **Article 107(1) TFEU**) or of SRF aid, the adoption of the resolution scheme may not take place until the Commission has adopted a Decision,¹⁰⁷⁶ positive or conditional, concerning the compatibility of the use of such aid with the internal market.¹⁰⁷⁷ In performing the tasks conferred on them by **Article 18 SRMR** on the resolution procedure, EU institutions must act in conformity with the principles established in **Article 3(3) BRRD** and make public in an appropriate manner all relevant information on their internal organisation in this regard.¹⁰⁷⁸

Either upon receipt of a communication or on its own initiative in accordance with **Article 18(1)**, if the Board considers that resolution actions could constitute State aid, it must invite the participating Member State(s) concerned to immediately notify the envisaged measures to the Commission under **Article 108(3) TFEU** notifying accordingly the Commission.¹⁰⁷⁹

2. The procedure of Article 19(3) concerning the Commission's Decision

If the resolution action as proposed by the Board involves the use of the SRF, applicable is the detailed procedure laid down in **Article 19(3)**, leading to a Commission's Decision. This procedure is structured as follows:

(1) Upon fulfilment of the above condition, the Board must make a notification to the Commission, including all information necessary to enable the latter to make its assessments.¹⁰⁸⁰ This notification triggers a **preliminary Commission investigation** during the course of which it may request further information from the Board. The Commission must assess whether the SRF's use would distort, or threaten to distort, competition by favouring the beneficiary or any other undertaking so as to be incompatible with the internal market, to the extent that it would affect trade between Member States. In this respect, it must apply to the SRF's use the criteria established for the application of State aid rules in accordance with **Article 107 TFEU**. The Board is required to provide the Commission with the information deemed necessary in order to carry out that assessment.¹⁰⁸¹

(2) If the Commission has serious doubts as to the compatibility of the proposed SRF's use with the internal market or the Board fails to provide the necessary information pursuant to the Commission's request, the latter must decide to open an "in-depth investigation" (publishing its decision in the *OJ*) and notify the Board accordingly.

¹⁰⁷⁶ See just below, **under 2**.

¹⁰⁷⁷ **SRMR**, Article 19(1), first sub-paragraph and recital (30), first sentence.

¹⁰⁷⁸ *Ibid.*, Article 19(1), second sub-paragraph.

¹⁰⁷⁹ *Ibid.*, Article 19(2). On Article 108 TFEU, see **Craig and de Búrca (2015)**, pp. 1145-1148, **Bär-Bouyssière (2012)**, pp. 1326-1362, and (in extensive detail) **Bellamy & Child (2013)**.

¹⁰⁸⁰ *Ibid.*, Article 19(3), first sub-paragraph.

¹⁰⁸¹ *Ibid.*, Article 19(3), second sub-paragraph.

The Board, any Member State or any person, undertaking or association whose interests may be affected by the SRF's use, may submit comments to the Commission within the timeframe specified in the notification. The Board may submit observations on the comments submitted by Member States and interested third parties within such timeframe as may be specified by the Commission.

At the end of the investigation period, the **Commission must make its assessment** as to whether the SRF's use would be compatible with the internal market or not.¹⁰⁸² In conducting its investigation and making its assessment the Commission is guided by all relevant Regulations adopted under **Article 109 TFEU**, as well as by all relevant (and in force) communications, guidance and measures adopted by the Commission in application of the TFEU rules relating to State aid. Those measures must be applied as though references to the Member State responsible for notifying the aid were references to the Board, and with any other necessary modifications.¹⁰⁸³

(3) The Commission must **adopt a Decision** on the compatibility of the SRF's use with the internal market, addressed to the Board and to the NRAs of the Member State(s) concerned, which may be contingent on conditions, commitments or undertakings in respect of the beneficiary. It may *also* lay down obligations on the Board, the NRAs in the participating Member State(s) concerned or the beneficiary to enable monitoring of compliance therewith. This may include requirements for the appointment of a trustee or other independent person to assist in monitoring. A trustee or other independent person may perform such functions as may be specified in the Commission Decision,¹⁰⁸⁴ which must be published in the *Official Journal*.¹⁰⁸⁵

(4) If the Commission decides that the proposed SRF's use would be **incompatible** with the internal market and cannot be implemented in the form proposed by the Board, it may issue a **negative Decision** addressed to the Board. In such a case, on receipt of the Decision, the latter must reconsider its resolution scheme and prepare a revised one.¹⁰⁸⁶

(5) By way of derogation from **Article 19(3)**, on application by a Member State, the Council may, acting unanimously, decide that the SRF's use is considered to be compatible with the internal market, if such a Decision is justified by "**exceptional circumstances**". If, however, the Council has not made its attitude known within seven days after the application, a Decision must be taken by the Commission.¹⁰⁸⁷

3. Related issues

(1) If the Commission has serious doubts as to whether its decision under **Article 20(3)** is being complied with, it must conduct the necessary investigations, exercising its powers under the regulations and the other measures referred to in **Article 19(3), fourth sub-paragraph** and guided by them.¹⁰⁸⁸

¹⁰⁸² *Ibid.*, Article 19(3), third sub-paragraph.

¹⁰⁸³ *Ibid.*, Article 19(3), fourth sub-paragraph.

¹⁰⁸⁴ *Ibid.*, Article 19(3), fifth and sixth sub-paragraphs.

¹⁰⁸⁵ *Ibid.*, Article 19(3), seventh sub-paragraph.

¹⁰⁸⁶ *Ibid.*, Article 19(3), eighth sub-paragraph.

¹⁰⁸⁷ *Ibid.*, Article 19(10).

¹⁰⁸⁸ *Ibid.*, Article 19(4).

If, on the basis of these investigations, and after giving notice to the parties concerned to submit their comments, it considers that its decision has not been complied with, it must issue a decision to the relevant NRA requiring it to recover the misused amounts within a specifically determined period. The SRF aid to be recovered pursuant to such a **'recovery Decision'** must include interest at an appropriate rate fixed by the Commission and be paid over to the Board. The Board must pay any amounts received under that decision into the SRF and take them into consideration when determining contributions in accordance with **Articles 70-71**.¹⁰⁸⁹ The **recovery procedure** must respect the beneficiaries' right to good administration and access to documents, as laid down in the **Charter (Articles 41-42)**.¹⁰⁹⁰

The Commission is empowered to adopt delegated acts concerning detailed rules of procedure with regard to the calculation of the interest rate to be applied in the event of a recovery decision and the guarantees of the right to good administration and the right of access to documents.¹⁰⁹¹

(2) NRAs are granted, on the basis of their national legislation, the necessary powers to ensure compliance with any conditions laid down in the Commission Decision under **Article 19(3)**, and to recover misused amounts according to a Commission recovery Decision pursuant to **Article 19(5)**.¹⁰⁹²

4. Specific aspects

(1) Without prejudice to the reporting obligations potentially established by the Commission in its Decision, the Board must submit to it Annual Reports assessing the compliance of the use of the SRF with that decision, and make use of its power to request information in accordance with **Article 34**.¹⁰⁹³

(2) Member States or any person, undertaking or association whose interests may be affected by the use of the SRF (in particular the designated entities) has the right to inform the Commission of any suspected misuse of the SRF incompatible with its decision.¹⁰⁹⁴

(3) If the Commission (either following a Board Recommendation or on its own initiative) considers that the application of resolution tools and actions does not respond to the criteria on the basis of which its initial Decision was made, it may review such a Decision and adopt the appropriate amendments.¹⁰⁹⁵

¹⁰⁸⁹ On Articles 70-71, see below in **Chapter 6, Section A, under 3 and 4,2**, respectively.

¹⁰⁹⁰ **SRMR**, Article 19(5); on these Articles of the Charter, see **Voet van Vormizeele (2012)**.

¹⁰⁹¹ *Ibid.*, Article 19(8).

¹⁰⁹² *Ibid.*, Article 19(11).

¹⁰⁹³ *Ibid.*, Article 19(6); on Article 34, see above in **Chapter 3, Section D, under 1.2**.

¹⁰⁹⁴ *Ibid.*, Article 19(7).

¹⁰⁹⁵ *Ibid.*, Article 19(9).

Section F:

Write-down and conversion of relevant capital instruments

1. The relationship with the BRRD

(1) According to **Articles 59-62 BRRD**, NRAs have the power to write down and convert relevant capital instruments, which, as a rule, is used in the context of resolution. It is reminded that ‘**relevant capital instruments**’ means Additional Tier 1 instruments and Tier 2 instruments¹⁰⁹⁶ and that deposits, regardless of the amount, do not fall within the definition of this term. Since the conditions for the write-down and conversion of such instruments may coincide with those for resolution, NRAs must assess whether the sole write-down and conversion of such instruments is sufficient in order to restore the financial soundness of the entity concerned or whether it is also necessary to take resolution action.¹⁰⁹⁷

(2) Under **Article 21 SRMR**, the Board, under the control of the Commission or, where relevant, of the Council, replaces the NRAs in that function as well. It has the powers to assess whether the conditions for the write-down and conversion of relevant capital instruments are met and decide whether to place an entity under resolution, if the requirements for resolution are also fulfilled.¹⁰⁹⁸

2. The conditions

(1) The Board must exercise the power to write down or convert relevant capital instruments in relation to the entities and groups referred to in **Article 7(2)** (and if the conditions for their application are met, in **Article 7(4), point (b)** and **7(5)**), only if it assesses, in its Executive Session, that any of the following five conditions is met:¹⁰⁹⁹

Firstly, the determination has been made by the ECB, after consulting the Board, that the conditions for resolution specified in **Articles 16** and **18** have been met, before any resolution action is taken.

Secondly, the entity will no longer be viable, unless the relevant capital instruments are written down or converted into equity.

Thirdly, the ECB, after consulting the Board, assesses that the group will no longer be viable, unless the write-down or conversion power is exercised in relation to relevant capital instruments issued by a subsidiary (provided that these are recognised for the purposes of meeting ‘own funds requirements’ both on an individual and a consolidated basis). A relevant capital instrument issued by a subsidiary may not be written down to a greater extent or converted on worse terms according to **Article 59(3), point (c) BRRD** than equally ranked capital instruments at the level of the parent undertaking which have been written down or converted.¹¹⁰⁰

¹⁰⁹⁶ **SRMR**, Article 3(1), point (51).

¹⁰⁹⁷ On these BRRD Articles, see **Haentjens (2017a)**, pp. 255-256.

¹⁰⁹⁸ **SRMR**, recital (86).

¹⁰⁹⁹ *Ibid.*, Article 21(1), first sub-paragraph.

¹¹⁰⁰ *Ibid.*, Article 21(6).

Fourthly, the ECB, after consulting the Board, assesses that the group will no longer be viable, unless the write-down or conversion power is exercised in relation to relevant capital instruments issued at the level of the parent undertaking (provided that these are recognised for the purposes of meeting own funds requirements on an individual basis at the level of the parent undertaking or on a consolidated basis).

Finally, extraordinary public financial support is required by the entity or group, except an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity (in accordance with **Article 18(4), first sub-paragraph, point (d)(iii)**).¹¹⁰¹

The assessment of the entity's or the group's viability may also be made by the Board in its Executive Session¹¹⁰² upon the condition that the ECB has been informed of its intention and only if the ECB does not make such an assessment. The ECB must, without delay, provide the Board with any relevant information the Board requests in order to inform its assessment.¹¹⁰³

(2) For the above purposes, a designated entity or a group is deemed to be no longer viable only if *both* the following conditions are met:¹¹⁰⁴

Firstly, the entity or the group is failing or is likely to fail. With respect to this, an entity is deemed to be failing or to be likely to fail, if one or more of the circumstances referred to in **Article 18(4)** occur. On the other hand, a group is deemed to be failing or to be likely to fail, if it infringes, or there are objective elements to support a determination that, in the near future, it will infringe its consolidated prudential requirements in a way that would justify action by the ECB or the NCA, including but not limited to the fact that the group has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds.

Secondly, having regard to timing and other relevant circumstances, there is no reasonable prospect that any action (including alternative private sector measures or supervisory action) other than the write-down or conversion of relevant capital instruments, independently or in combination with a resolution action, would prevent the failure of that entity or group within a reasonable timeframe.

3. Courses of action

(1) If one or more of the above-mentioned conditions are met, the Board, acting under the resolution procedure of **Article 18**, must determine whether the powers to write down or convert relevant capital instruments are to be exercised independently or, in accordance with that procedure, in combination with a resolution action.¹¹⁰⁵

(2) If the Board determines that one or more of the above conditions are met, but the conditions for resolution are not met, it must instruct, without delay, the NRAs to exercise the write-down or conversion powers in accordance with **Articles 59-60 BRRD**.

¹¹⁰¹ See above in **Section C, under 1.2.1.2.1**, third case.

¹¹⁰² **SRMR**, Article 21(1), second sub-paragraph, second sentence.

¹¹⁰³ *Ibid.*, Article 21(2).

¹¹⁰⁴ *Ibid.*, Article 21(3)-(5).

¹¹⁰⁵ *Ibid.*, Article 21(7).

The Board must ensure that before NRAs exercise the power to write down or convert relevant capital instruments, a valuation is carried out in accordance with **Article 20(1)-(15)**,¹¹⁰⁶ for the calculation of the write-down and the level of conversion to be applied to those instruments in order to recapitalise the designated entity or the group.¹¹⁰⁷

(3) If one or more of the conditions referred to in **Article 21(1)**¹¹⁰⁸ are met and the resolution conditions referred to in **Article 18(1)**¹¹⁰⁹ are also met, the Board must adopt a resolution scheme in accordance with **Article 18(6)-(8)**.¹¹¹⁰

4. Procedural aspects

The Board must ensure that the NRAs exercise the write-down or conversion powers without delay, in accordance with the order of the priority of claims¹¹¹¹ and in a way that produces the following results:

firstly, Common Equity Tier 1 items are reduced first in proportion to the losses and to the extent of their capacity;

secondly, the principal amount of Additional Tier 1 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives, or of the capacity of the relevant capital instruments, whichever is lower; and

thirdly, the principal amount of Tier 2 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the same extent as under the previous case.

NRAs must implement the Board's instructions and exercise the write-down or conversion of relevant capital instruments in accordance with **Article 29** on the implementation of decisions adopted under the SRMR.¹¹¹²

¹¹⁰⁶ See on this above in **Section D, under 1-2**.

¹¹⁰⁷ **SRMR**, Article 21(8).

¹¹⁰⁸ See on this above, **under 2**.

¹¹⁰⁹ See on this above in **Section C, under 1**.

¹¹¹⁰ **SRMR**, Article 21(9); on Article 18(6)-(8), see above in **Section C, under 2**.

¹¹¹¹ See above in **Section A, under 3**.

¹¹¹² **SRMR**, Article 21(10)-(11). On Article 29, see above in **Section C, under 3**.

Chapter 6

The Single Resolution Fund (SRF)

Section A:

The provisions of the SRMR: general aspects – optimal size – contributions

1. General aspects

1.1 Constitution and use

(1) The Single Resolution Fund (SRF) was established by **Article 67 SRMR** and is owned by the Board.¹¹¹³ As already mentioned,¹¹¹⁴ since **1 January 2016** it is considered to be the participating Member States' resolution financing arrangement in accordance with **Articles 99-109 BRRD**, replacing the national resolution funds which were established by these Member States in accordance with **Article 100(1) BRRD** and the SRMR's provisions.¹¹¹⁵

(2) The Board may use the SRF only for the purpose of ensuring the efficient application of the resolution tools and exercise of the resolution powers and in accordance with the resolution objectives and the principles governing resolution on the basis of (the above-mentioned) **Articles 14 and 15 SRMR**, respectively.¹¹¹⁶ The SRF is neither a bail-out nor a recapitalisation fund; its mission is laid down in **Article 76**.¹¹¹⁷ The EU budget or the national budgets of participating Member States may, under any circumstances, be held liable for expenses or losses of the SRF.¹¹¹⁸

(3) The SRF must be filled in accordance with the rules on transferring the funds raised at national level towards the SRF as laid down in the SRF Agreement.¹¹¹⁹ The contributions are raised by the NRAs from the designated entities and are transferred to the SRF in accordance with the SRF Agreement.¹¹²⁰ The SRF's use is contingent upon the SRF Agreement and must comply with the principles laid down therein. Accordingly, until the SRF reaches the target level laid down in **Article 69**,¹¹²¹ the Board must use it in accordance with principles based on the two factors governing its functioning:

¹¹¹³ **SRMR**, Article 67(1), first sentence and 67(3), respectively.

¹¹¹⁴ See above in **Chapter 2, Section A, under 6.1.1**.

¹¹¹⁵ **SRMR**, Articles 68 and 96. The obligation to establish national resolution funds applies to all EU Member States.

¹¹¹⁶ *Ibid.*, Article 67(2), first sentence and recital (101), first - third sentences.

¹¹¹⁷ See further details below, **under 1.3**.

¹¹¹⁸ **SRMR**, Article 67(2), second sentence and recital (100), second sentence.

¹¹¹⁹ *Ibid.*, Article 67(1), second sentence.

¹¹²⁰ *Ibid.*, Article 67(4) and recital (100), third sentence.

¹¹²¹ See below, **under 2**.

firstly, its division into national compartments corresponding to each participating Member State, and

secondly, the progressive merger of the different funds raised at national level to be allocated to national compartments of the SRF.¹¹²²

Upon establishment of the EDIS, the DIF will also be established by the SRMR and be owned by the Board. It will be filled by contributions owed to the Board by credit institutions affiliated to participating DGSs, which are to be calculated and invoiced, on behalf of the Board, by them. The Board will only be able to use the DIF in order to provide funding to, and cover the losses of, participating DGS in the three different stages and in accordance with the objectives and the principles governing the EDIS (in accordance with **Article 6**). Its activities may under no circumstances engage the budgetary liability of Member States.¹¹²³

1.2 Administration and investment policy

1.2.1 Administration

(1) The SRF's administration is assigned to the Board and must be carried out in accordance with the SRMR and **Commission Delegated Regulation (EU) 2016/451** of 16 December 2016,¹¹²⁴ which was adopted on the basis of **Article 75(4)**¹¹²⁵ and applies from 1 January 2016, when the SRF became operational. Even though the main scope of this delegated act is to lay down rules concerning the investment by the Board of the amounts held in the SRF referred to in **Article 75(3) SRMR**,¹¹²⁶ it also contains provisions relating to its administration, its risk management and the outsourcing of activities. In particular:

Firstly, the Board should adopt a governance framework (including an allocation of tasks and responsibilities and necessary delegations) in order to ensure an efficient implementation of the investment strategy, internal control standards in order to verify compliance between the implementation of the investment strategy, the investment strategy and the rules set out in the Regulation, as well as any internal rules and procedures necessary for its application.¹¹²⁷

Furthermore, it must comply with the principles of sound financial and risk management; quantify all risks using appropriate measures for the management and control of the respective types of risk, apply multiple risk measures for each type of risk, capture both current and forward-looking aspects, and use both quantitative and qualitative information in order to avoid overreliance on a single risk measure; and must supplement regular risk measurement by stress tests and scenario analysis in order to identify high-risk areas and evaluate financial shocks' combined effects.¹¹²⁸

¹¹²² **SRMR**, Article 77; see also **Section B** below.

¹¹²³ **Proposed SRMR**, Article 74a and recital (26).

¹¹²⁴ OJ L 79, 30.3.2016, pp. 2-9.

¹¹²⁵ **SRMR**, Article 75(1).

¹¹²⁶ **Commission Delegated Regulation (EU) 2016/451**, Article 1(1); on this aspect of the delegated act, see just below, **under 1.2.2.2**. It is noted that the act does not apply to collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Board as referred to in **Article 70(3) SRMR** (*ibid.*, Article 1(2)).

¹¹²⁷ *Ibid.*, Article 14.

¹¹²⁸ *Ibid.*, Article 15.

Finally, the Board in its Executive Session may decide on the full or partial outsourcing of specific activities conferred upon it by **Article 75(3) SRMR**, informing the Plenary Session of upcoming decisions on outsourcing.¹¹²⁹ These activities may be outsourced only to one or more bodies governed by public law,¹¹³⁰ ESCB central banks, international institutions established under public international law or EU institutions, provided that they have an established practice of managing similar investments and without prejudice to the ability of the service provider to contract services from third parties. The investment mandate the service provider must clearly define at least the duration, maturity, eligible universe and benchmarking requirements, as well as establish a framework for regular reporting from the service provider to the Board. Any contract between the Board and a service provider must include clauses governing the Board's cancellation rights, outsourcing chains and non-performance by the service provider.¹¹³¹ If the Board fully or partially outsources activities, it must remain fully responsible for discharging all of its obligations under the SRMR and this Regulation, refer to best business practices on outsourcing within the financial sector,¹¹³² and ensure at all times that the conditions laid down in Article 16(8) are met.

(2) The amounts received from an institution under resolution or a bridge institution, the interests and other earnings on investments, as well as any other earnings only benefit the SRF.¹¹³³

1.2.2 Investment policy

1.2.2.1 The provisions of the SRM Regulation

(1) In relation to the investments made on behalf of the SRF, the Board is required to have a prudent and safe investment strategy as provided for in **Commission Delegated Regulation (EU) 2016/451** and invest the amounts held in the SRF either in obligations of the Member States or of intergovernmental organisations, or in highly liquid assets of high creditworthiness. Investments must be sufficiently diversified (on a sectoral, geographical and proportional basis) and the return on them benefits the SRF.¹¹³⁴ In this respect, the Board must take into account the **Commission Delegated Regulation (EU) 2015/61** of 10 October 2014 “to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions”.¹¹³⁵

¹¹²⁹ *Ibid.*, Article 16(1) and (5).

¹¹³⁰ The term ‘bodies governed by public law’ is defined with reference to Article 1(9) of **Directive 2004/18/EC** of the European Parliament and of the Council and the term ‘ESCB central banks’ with reference to Article 4(1), point (45) **CRR** (*ibid.*, Article 2, points (3) and (4), respectively).

¹¹³¹ *Ibid.*, Article 16(2)-(4).

¹¹³² *Ibid.*, Article 16(6)-(7).

¹¹³³ *Ibid.*, Article 75(2).

¹¹³⁴ *Ibid.*, Article 75(3).

¹¹³⁵ OJ L 11, 17.1.2015, pp. 1-36.

1.2.2.2 The provisions of Commission Delegated Regulation (EU) 2016/451

The **Commission Delegated Regulation (EU) 2016/451** lays down detailed rules, *inter alia*, on various aspects of the investment policy and strategy, which must be reviewed by the Board on an annual basis.¹¹³⁶ In particular:

- (1) **Investment objectives:** The Board must conduct a prudent and safe investment strategy with the objective of protecting the value of the amounts held in the SRF and satisfying its liquidity requirements. It must take into account both the SRF's financial capacity and the expected disbursements according to its mission (under **Article 76 SRMR**), as well as all available information, adequate assumptions and stress scenarios.¹¹³⁷ The investment strategy must include a definition of the risk appetite, quantifying the maximum tolerable potential loss over a defined time horizon with a defined probability.¹¹³⁸ The amounts referred to in Article 1(1) must be invested all together as a single pool of resources, regardless of the SRF's division into national compartments provided for in **Article 77 SRMR**.¹¹³⁹
- (2) **Eligible assets for investment:** The Board must determine the eligibility of assets for investment on the basis of the general requirements for liquid assets of credit institutions laid down in **Article 7(2)** and **(4)-(6)**, and in **Article 7(7), points (a)-(b) of Delegated Regulation (EU) 2015/61**.¹¹⁴⁰ It must invest the amounts referred to in Article 1(1) exclusively in assets which meet the requirements established in **Articles 10(1), 11(1), 12(1), points (a)-(e) and 15(1)** of that delegated act¹¹⁴¹ and, before investing in it, conduct an appropriate assessment of any eligible asset, including an evaluation of its liquidity, creditworthiness and compatibility with the investment objectives. The interaction with the entire investment portfolio should be considered when determining the prudence of an individual investment.¹¹⁴² If any asset loses its eligibility, the Board must progressively reduce the SRF's exposure to it, within a timeframe and in a manner that minimise any impact on market prices (without prejudice to **Article 3**).¹¹⁴³
- (3) **Composition of the portfolio:** The Board must comply with the following requirements on the composition of the SRF's portfolio: a minimum of 60% thereof must be composed of assets which meet the requirements of **Article 10(1) of Delegated Regulation (EU) 2015/61**; a minimum of 30% thereof must be composed of assets which meet the requirements of **Article 10(1), points (a)-(e) and (g)** of that delegated act; and a maximum of 15% thereof must be held in assets meeting the requirements of **Article 12(1), points (a)-(e)** of that delegated act. For these purposes, assets meeting the requirements established in **Article 15(1)** must be treated equivalently to assets underlying the relevant undertaking.¹¹⁴⁴

¹¹³⁶ **Commission Delegated Regulation (EU) 2016/451**, Article 13.

¹¹³⁷ *Ibid.*, Article 3(1).

¹¹³⁸ *Ibid.*, Article 3(2).

¹¹³⁹ *Ibid.*, Article 3(3).

¹¹⁴⁰ *Ibid.*, Article 4(1).

¹¹⁴¹ *Ibid.*, Article 4(2); the requirements for credit institutions referred to in Article 4(3) of Delegated Regulation (EU) 2015/61 do not apply to the Board.

¹¹⁴² *Ibid.*, Article 4(4).

¹¹⁴³ *Ibid.*, Article 4(5).

¹¹⁴⁴ *Ibid.*, Article 5.

- (4) **Sectorial diversification:** Investments of the amounts held in the SRF must be sufficiently diversified across sectors. The Board must limit exposures to individual institutional sectors and to individual sectors of economic activity,¹¹⁴⁵ take into account that correlations between sectors of economic activity may reduce the actual diversification achieved by application of the above limitation and, in addition to the requirements of Article 4(1), also limit indirect exposures to the issuers set out in **Article 7(4) of Delegated Regulation (EU) 2015/61**.¹¹⁴⁶
- (5) **Geographical diversification:** Investments of the amounts held in the SRF must be geographically diversified, taking into account the structure and composition of any SRF expenditure as estimated in Part II of the Board’s budget pursuant to **Article 60 SRMR**. Exposures to eligible assets specified in Article 4 from issuers established in any participating Member State, expressed as a share of the SRF’s total exposures, may not represent more than 1,2 times the share of *ex ante* contributions raised in accordance with **Article 70 SRMR** from the institutions authorised therein. On the other hand, exposures to eligible assets from issuers established in a non-participating Member State or a third country, also expressed as a share of the SRF’s total exposures, must be sufficiently geographically diversified, taking into account criteria such as the size of the economy, the depth and liquidity of the financial market and the additional investment opportunities, including in terms of risk diversification. That exposure may not exceed in any case the above-mentioned highest limit.¹¹⁴⁷
- (6) **Diversification by issuer and issue:** The Board must set a ceiling of up to 30% of any single issue in which amounts held in the SRF may be invested, which may be exceeded only if, given the nature of the investment, the purchase of any amount of a security of that given investment results in ownership of 100% of the corresponding International Securities Identification Number (ISIN). It must set a ceiling of up to 30% for any issuer’s total issues in which amounts held in the SRF may be invested.¹¹⁴⁸
- (7) **Additional criteria on diversification:** Without prejudice to Article 3, the Board must endeavour to diversify investments across maturities, taking into account the elements laid down in **Article 3(1)** and, where relevant, the liquidity and other characteristics of the collateral referred to in **Article 70(3) SRMR**.¹¹⁴⁹
- (8) **Derivatives:** The Board may only use derivatives for market and liquidity risk management purposes (issuing guidelines to specify their eligible uses), as well as derivatives cleared by a central counterparty authorised under **Articles 14-15 EMIR** or recognised under **Article 25** thereof, *or* by a central bank, provided that those are assigned a credit assessment by a nominated external credit assessment institution which is at least “credit quality step 1” under **Article 114(2) CRR**.¹¹⁵⁰

¹¹⁴⁵ ‘Institutional sectors’ means institutional sectors as defined by paragraph 1.28 of Annex A to **Council Regulation (EC) No 2223/96** (OJ L 310, 30.11.1996, pp. 1-469) and ‘sectors of economic activity’ means sections set out in Annex I of **Regulation (EC) No 1893/2006** of the European Parliament and of the Council (OJ L 393, 30.12.2006, pp. 1-39) (*ibid.*, Article 2, points (1) and (2), respectively).

¹¹⁴⁶ *Ibid.*, Article 6.

¹¹⁴⁷ *Ibid.*, Article 7.

¹¹⁴⁸ *Ibid.*, Article 8.

¹¹⁴⁹ *Ibid.*, Article 9.

¹¹⁵⁰ *Ibid.*, Article 10.

- (9) **Currency:** The Board must hedge currency risk into euro or into currencies of participating Member States whose currency is not the euro in order to ensure a limited remaining foreign exchange risk for the SRF. Where applicable, in order to manage the currency risk between these different currencies, it must take into account the elements laid down in **Article 3(1)**.¹¹⁵¹
- (10) **Additional general principles:** For all investment decisions, the Board must take into account the possible repercussions on the SRF's creditworthiness in order to safeguard its prerogatives with respect to alternative funding means and to access to financial arrangements regarding the immediate availability of additional financial means, as established by , as established by **Article 73-74 SRMR**. In addition, without prejudice to Article 3, it must conduct all transactions related to the SRF's investment in a manner limiting any effects on market prices, even in situations of market stress. Finally, as an immediate investment or divestment of the amounts referred to in Article 1(1) might lead to market impacts, it may tolerate some temporary divergence with the general principles and criteria for the SRF's investment strategy.¹¹⁵²

1.3 Purposes of use (mission)

(1) Within the resolution scheme and when applying the resolution tools to designated entities the Board may use the SRF only to the extent necessary in order to ensure their effective application for the following purposes, separately or in combination:¹¹⁵³

firstly, guarantee the assets or the liabilities of an institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;

secondly, **make** loans to an institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle,

thirdly, purchase assets of an institution under resolution;

fourthly, make contributions to a bridge institution or an asset management vehicle;

fifthly, pay compensation to shareholders or creditors if, following an evaluation under **Article 20(5) SRMR**, they have incurred greater losses than they would have incurred, following an *ex-post* valuation under **Article 20(16)**, in a winding up under normal insolvency proceedings;¹¹⁵⁴ and

finally, when the bail-in tool is applied and the decision is made to exclude certain creditors from its scope in accordance with **Article 27(5)**, make a contribution to the institution under resolution instead of the write-down or conversion of certain creditors' liabilities; in this case, the Board may not hold the capital contributed for a period exceeding five years.¹¹⁵⁵

All these outflows constitute expenditures of Part II of the Board's budget.¹¹⁵⁶

¹¹⁵¹ *Ibid.*, Article 11.

¹¹⁵² *Ibid.*, Article 12(1)-(3), respectively.

¹¹⁵³ **SRMR**, Article 76(1).

¹¹⁵⁴ See also recital (63), sixth and seventh sentences; on Article 20(16), see above in **Chapter 5, Section D, under 4**.

¹¹⁵⁵ **SRMR**, Article 76(4)); on Article 27(5), see above in **Chapter 5, Section B, under 5.3.2.1**.

¹¹⁵⁶ See above in **Chapter 3, Section C, under 1.3.2 (2)**.

(2) The Board may use the SRF to take the above-mentioned actions also with respect to the purchaser in the context of the sale of business tool.¹¹⁵⁷ Since (as already mentioned) the SRF is not a recapitalisation fund, it may not be used directly to absorb the losses of a designated entity or to recapitalise it. If the use of the SRF for the purposes mentioned above (**under (1)**) indirectly results in part of the losses of a designated entity being passed on to the SRF, applicable are the principles governing its use pursuant to **Article 27**.¹¹⁵⁸

1.4 A specific case: mutualisation of national financing arrangements in the case of group resolution involving institutions in non-participating Member States

In the case of a group resolution involving institutions established in one or more participating Member States on the one hand, and institutions established in one or more non-participating Member States on the other hand, the SRF must contribute to the financing of the group resolution in accordance with **Article 107(2)-(5) BRRD**,¹¹⁵⁹ which provides the following:

(1) The group-level resolution authority (GLRA) must propose, after consulting the resolution authorities of the institutions that are part of the group and if necessary before taking any resolution action, a **'financing plan'** as part of the group resolution scheme provided for in **Articles 91-92**; the financing plan must be agreed in accordance with the decision-making procedure referred to in these Articles and include nine elements.¹¹⁶⁰ These elements include a valuation in accordance with **Article 36** in respect of the affected group entities; the losses to be recognised by each affected group entity at the moment the resolution tools are exercised; for each affected group entity, the losses that would be suffered by each class of shareholders and creditors; any contribution that DGSs would be required to make in accordance with **Article 109(1)**; the total contribution by resolution financing arrangements, as well as the purpose and form of the contribution;¹¹⁶¹ the basis for calculating the amount that each of the national financing arrangements of the Member States where affected group entities are located is required to contribute to the financing of the group resolution in order to build up the total contribution; the amount that the national financing arrangement of each affected group entity is required to contribute to the financing of the group resolution and the form of those contributions; the amount of borrowing that the financing arrangements of the Member States where the affected group entities are located, will contract from institutions, financial institutions and other third parties under **Article 105**; and a timeframe for the use of the financing arrangements of the Member States where the affected group entities are located, which should be capable of being extended where appropriate.

(2) Unless otherwise agreed in the financing plan, the basis for calculating the contribution of each national financing arrangement must, in particular, have regard to the proportion of the following:

¹¹⁵⁷ **SRMR**, Article 76(2).

¹¹⁵⁸ *Ibid.*, Article 76(3); on the principles of Article 27 governing the use of the SRF, see above in **Chapter 5, Section B, under 5.3.2.2 (2)**.

¹¹⁵⁹ *Ibid.*, Article 78.

¹¹⁶⁰ **BRRD**, Article 107(2)-(3).

¹¹⁶¹ The basis for apportioning this contribution must be consistent with **Article 127(5)** (see just below) and with the principles set out in the group resolution plan in accordance with **Article 12(3), point (f)**, unless otherwise agreed in the financing plan (*ibid.*, Article 107(4)).

firstly, the group’s risk-weighted assets held at institutions and entities referred to in **Article 1(1), points (b)-(d)** established in the Member State of that resolution financing arrangement;

secondly, the group’s assets held at institutions and such entities established in that Member State;

thirdly, the losses which gave rise to the need for group resolution and originated in group entities under the supervision of competent authorities in that Member State; and

finally, the resources of the group financing arrangements which, under the financing plan, are expected to be used to benefit group entities established in that Member State.¹¹⁶²

2. The optimum size: establishment of a target level

2.1 The steady state

(1) **Article 69(1) SRMR** provides that the ‘available financial means’ of the SRF must reach at least 1% of the amount of covered deposits of all credit institutions authorised in the participating Member States (the ‘**target level**’).¹¹⁶³ ‘**Available financial means**’ means cash, deposits, assets and irrevocable payment commitments, which are available to the SRF for the purposes specified in **Article 76(1) SRMR** on the SRF’s mission.¹¹⁶⁴ Irrevocable ‘**payment commitments**’ can be taken into account in order to reach the target level if they are fully backed by collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Board for the purposes of **Article 76(1)**. The share of such commitments may not exceed 30% of the total amount of *ex-ante* contributions.¹¹⁶⁵

In accordance with the same SRMR Article, the target level must be reached by the end of the (transitional) initial period of eight years **from 1 January 2016**.¹¹⁶⁶ As of 30 June 2018, the Board had collected 7.5 billion euros from 3,315 institutions in annual *ex-ante* contributions to the SRF, the SRF holding at that time an amount of 24.9 billion euros.¹¹⁶⁷

Upon establishment of the EDIS, in order to reach a critical mass and to avoid pro-cyclical effects which would arise if it were to rely solely on *ex-post* contributions in a systemic crisis, the DIF’s available financial means will have to reach two subsequent target levels:

by the end of the reinsurance stage, an ‘**initial target level**’ of 20% of four ninth of the sum of the minimum target levels that participating DGSs will reach in accordance with the **Article 10(2) DGSD**, and

¹¹⁶² *Ibid.*, Article 107(5), points (a)-(d), respectively.

¹¹⁶³ See also **SRMR**, recital (105), first sentence. The second sentence of that recital considers, however, that, since the amount of the total liabilities of those institutions would be, taking into account the SRF’s functions, a more adequate benchmark, the Commission should assess whether covered deposits or total liabilities is a more appropriate basis and if a minimum absolute amount for the SRF should be introduced in the future, maintaining a level playing field with the BRRD.

¹¹⁶⁴ *Ibid.*, Article 3(1), point (34).

¹¹⁶⁵ *Ibid.*, Article 70(3).

¹¹⁶⁶ See also recital (106), first sentence.

¹¹⁶⁷ See the Board’s Press Release of 24 July 2018, available at: <https://srb.europa.eu/en/node/596>.

by the end of the co-insurance stage, a ‘final target level’ equal to the sum of the minimum target levels they must reach pursuant to the same Article.¹¹⁶⁸

(2) The initial period may be extended by the Board for a maximum of four years, if the SRF has made cumulative disbursements in excess of 0.5% of the total amount of covered deposits (in accordance with Article 69(1)) and the following three criteria laid down in **Article 4(1) of Commission Delegated Regulation (EU) 2017/747** of 15 December 2015 “supplementing [the SRMR] with regard to the criteria relating to the calculation of *ex-ante* contributions, and on the circumstances and conditions under which the payment of extraordinary *ex-post* contributions may be partially or entirely deferred”,¹¹⁶⁹ which applies from 19 May 2017, are met:¹¹⁷⁰

firstly, the minimum of the number of years required to reach the target level, subject to annual contributions not exceeding two times the average annual contributions over the initial period;

secondly, the business cycle’ phase and the impact that pro-cyclical contributions may have on the financial position of contributing institutions, as specified by the indicators referred to in **Article 3(1)**;¹¹⁷¹ and

thirdly, any additional disbursements of the SRF expected by the Board, after consultation with the ESRB, in the subsequent four-year period.

2.2 Specific provisions relating to the initial period

(1) During the initial period, *ex-ante* contributions to the SRF must be spread out in time evenly until the target level is reached, with due account to the business cycle’s phase and the impact that pro-cyclical contributions may have on the financial position of contributing institutions.¹¹⁷² Upon establishment of the EDIS, during the reinsurance and co-insurance stages, *ex-ante* contributions to the DIF will also be spread out in time as evenly as possible until the respective target level is reached.¹¹⁷³

(2) The criteria for spreading out in time *ex-ante* contributions to the SRF during that period are laid down in **Article 3 of Commission Delegated Regulation (EU) 2017/747**.¹¹⁷⁴ This provides that, when assessing the two above-mentioned parameters, the Board must take into consideration at least the following indicators:¹¹⁷⁵

firstly, in order to identify the phase of the business cycle, the macroeconomic indicators set out in the Annex to the Regulation,¹¹⁷⁶ and

¹¹⁶⁸ **Proposed SRMR**, Article 74b(1)-(2) and recitals (28)-(29).

¹¹⁶⁹ OJ L 113, 29.4.2017, pp. 2-8.

¹¹⁷⁰ **SRMR**, Article 69(3) and recital (106), second sentence. Article 4 of the delegated act was adopted on the basis of **Article 69(5), point (b) SRMR**.

¹¹⁷¹ On this Article, see just below, **under 2.2**.

¹¹⁷² **SRMR**, Article 69(2).

¹¹⁷³ The criteria for the distribution in time of the contributions to the DIF will have to be specified by Commission delegated acts (**Proposed SRMR**, Article 74b(3) and (5)).

¹¹⁷⁴ Article 3 was adopted on the basis of **Article 69(5), point (a) SRMR**.

¹¹⁷⁵ **Commission Delegated Regulation (EU) 2017/747**, Article 3(1).

¹¹⁷⁶ These macroeconomic indicators are: gross domestic product (GDP) Growth Forecast and Economic Sentiment Indicator from the European Commission, and GDP Growth from ECB’s Macroeconomic Projections for the euro area.

secondly, in order to identify the financial position of the contributing institutions, the other indicators set out in that Annex.¹¹⁷⁷

These indicators must be determined in respect of all participating Member States jointly and any Board decision to spread contributions out in time must be applied equally to all contributing institutions established therein.¹¹⁷⁸ In any given contribution period, the level of annual contributions may, by way of derogation, be relatively lower than the average of the contributions calculated in accordance with **Articles 69(1) and 70(2) SRMR** only if the Board verifies that, on the basis of conservative projections, the target level can be reached at the end of the initial period.¹¹⁷⁹

2.3 Specific provisions to (potentially) apply after the initial period

(1) If, after the initial period, the available financial means were to fall below the target level, *ex-ante* contributions, calculated in accordance with **Article 70 SRMR**,¹¹⁸⁰ must be raised until the target level is reached. On the other hand, after the target level has been reached for the first time and if the available financial means have subsequently been reduced to less than two-thirds (2/3) of the target level, these contributions must be set at a level allowing for reaching the target level within six years. In both cases, contributions must take due account to the phase of the business cycle and of the impact pro-cyclicality may have when setting annual contributions.¹¹⁸¹

Upon establishment of the EDIS, after the final target level has been reached for the first time and if the available financial means have, subsequently, been reduced to less than two-thirds of the target level *ex-ante* contributions to the DIF will also be set at a level allowing it to reach the target level within six years.¹¹⁸²

¹¹⁷⁷ In this respect, the Annex lays down five sets of indicators: *firstly*, private sector credit flow over GDP and Change in Total Financial Sector Liabilities from the European Commission's Scoreboard on Macroeconomic Imbalances; *secondly*, Composite Indicator of Systemic Stress and probability of a simultaneous default by two or more large and complex banking groups of the participating Member States from the ESRB's Risk Dashboard; *thirdly*, changes in credit standards for loans to households (for house purchase) and changes in credit standards for loans to non-financial corporations from the ESRB's Risk Dashboard; *fourthly*, indicators on the profitability of large banking groups of the participating Member States contained in the European Banking Authority Risk Dashboard, such as return on equity and net interest income to total operating income; and *finally*, indicators on the solvency of large banking groups of the participating Member States contained in the European Banking Authority Risk Dashboard, such as Tier 1 capital to total assets excluding intangible assets and impaired loans and past-due loans to total loans.

¹¹⁷⁸ **Commission Delegated Regulation (EU) 2017/747**, Article 3(2)-(3).

¹¹⁷⁹ *Ibid.*, Article 3(4).

¹¹⁸⁰ On this Article, see just below, **under 3**.

¹¹⁸¹ **SRMR**, Article 69(4).

¹¹⁸² The determination of annual contributions will have to be specified by Commission delegated acts (**Proposed SRMR**, Article 74b(4)-(5)).

(2) The criteria for establishing the annual contributions after the initial period are laid down in **Article 5 of Commission Delegated Regulation (EU) 2017/747**,¹¹⁸³ which provides that the Board must take into account these two parameters (phase of the business cycle and impact that pro-cyclical contributions may have on contributing institutions' financial position) as specified by the indicators referred to in its (just above-mentioned¹¹⁸⁴) **Article 3(1)**.

3. *Ex-ante* contributions

3.1 The key provisions

(1) In order to reach a critical mass and to avoid pro-cyclical effects which would arise if the SRF had to rely solely on *ex-post* contributions in a systemic crisis, it was considered indispensable that its *ex-ante* available financial means amount at least to a certain minimum target level.¹¹⁸⁵ Accordingly, as a principle, contributions should be collected “*from the industry*” prior to, and independently of, any operation of resolution.¹¹⁸⁶ In this respect, each institution's individual (*ex-ante*) contribution must be raised at least annually and be calculated *pro rata* to the amount of its liabilities (excluding own funds) less covered deposits over the aggregate liabilities (excluding own funds) less covered deposits of all institutions authorised in all participating Member States.¹¹⁸⁷ It is up to the Board (after consulting the ECB or the NCA and in close cooperation with the NRAs) to calculate these contributions on an annual basis in order to ensure that the aggregate amount of individual contributions by all institutions authorised in the participating Member States does not exceed annually 12.5% of the target level.¹¹⁸⁸

(2) Duly received *ex-ante* contributions may not be reimbursed to the contributing entities.¹¹⁸⁹

3.2 In particular: the two components of *ex-ante* contributions

(1) The calculation of *ex-ante* contributions is based on an annual basis on two components:¹¹⁹⁰

The *first* component is a ‘**flat contribution**’ that is *pro-rata* based on the amount of an institution's liabilities (excluding own funds and covered deposits), with respect to the total liabilities (excluding own funds and covered deposits) of all institutions authorised in the participating Member States.

¹¹⁸³ Article 5 was adopted on the basis of Article 69(5), point (c) **SRMR**.

¹¹⁸⁴ See above, **under 2.2**.

¹¹⁸⁵ **SRMR**, recital (104).

¹¹⁸⁶ *Ibid.*, recital (102), first sentence; see also recital (100), third sentence, according to which it should be the financial industry, as a whole, that finances the stabilisation of the financial system.

¹¹⁸⁷ *Ibid.*, Article 70(1).

¹¹⁸⁸ *Ibid.*, Article 70(2), first sub-paragraph.

¹¹⁸⁹ *Ibid.*, Article 70(4).

¹¹⁹⁰ *Ibid.*, Article 70(2), second sub-paragraph.

The *second* component is a ‘**risk-adjusted contribution**’ based on the criteria laid down in **Article 103(7) BRRD**,¹¹⁹¹ under consideration of the ‘proportionality principle’ and without creating distortions between Member States’ banking system structures. Applicable in this case is **Commission Delegated Regulation (EU) 2015/63** of 21 October 2014 “(...) with regard to *ex-ante* contributions to resolution financing arrangements”,¹¹⁹² adopted on the basis of **Article 103(7) BRRD**.¹¹⁹³

The Council, acting on a Commission’s proposal, is empowered to adopt implementing acts (in accordance with **Article 291 TFEU**) in relation to the application of the methodology for calculating individual contributions, and the practical modalities for allocating to institutions the risk factors specified in the delegated acts.¹¹⁹⁴ Relevant in this respect is **Council Implementing Regulation (EU) 2015/81** of 19 December 2014 “specifying uniform conditions (...) with regard to *ex-ante* contributions to the [SRF]”.¹¹⁹⁵

(2) The relation between the flat and the risk-adjusted contributions must take into account a balanced distribution of contributions across different types of institutions. In any case, as already mentioned, the aggregate amount of individual contributions by all institutions authorised in all participating Member States must not exceed annually the 12,5 % of the target level.¹¹⁹⁶

3.3 The discretion given to participating Member States

Participating Member States having already established national resolution financing arrangements before the entry into force of the SRMR were given the discretion to allow those arrangements to use the available financial means, collected from institutions between 17 June 2010 and 1 January 2015 (the date of entry into force of the BRRD), in order to compensate the latter for the *ex-ante* contributions they would be required to pay to the SRF (such restitution being without prejudice to Member States’ obligations laid down in the BRRD).¹¹⁹⁷

¹¹⁹¹ These criteria are the institution’s risk exposure, the stability and variety of its sources of funding and unencumbered highly liquid assets, its financial condition, the probability that it enters into resolution, whether it has benefited from extraordinary public financial support, the complexity of its structure and its resolvability, its importance to the stability of the financial system or economy of Member States or of the EU, and the fact that it is part of an IPS.

¹¹⁹² OJ L 11, 17.1.2015, pp. 44-64.

¹¹⁹³ SRMR, Article 70(6).

¹¹⁹⁴ *Ibid.*, Article 70(7). This is one of the rare cases in EU banking law where the power to adopt implementing acts has been conferred on the Council and not on the Commission.

¹¹⁹⁵ OJ L 15, 22.1.2015, pp. 1-7.

¹¹⁹⁶ SRMR, Article 70(2), third and fourth sub-paragraphs.

¹¹⁹⁷ *Ibid.*, Article 70(5) and recital (103).

4. *Ex-post* contributions

4.1 General overview

Specific rules govern *ex-post* contributions and in particular: the raising of extraordinary *ex-post* contributions in accordance with Article 71 (see below, **under 4.2**), voluntary borrowing between resolution financing arrangements in accordance with Article 72 (**under 4.3**), access to alternative funding means in accordance with Article 73 (**under 4.4**), and access to financial facility in accordance with Article 74 (**under 4.5**).

4.2 Extraordinary *ex-post* contributions

4.2.1 *The provisions of Article 71 SRM Regulation*

(1) If the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the SRF in resolution actions, extraordinary *ex-post* contributions from the institutions authorised in participating Member States must be raised to cover the additional amounts. Such contributions must be calculated and allocated between institutions in accordance with the rules laid down in **Articles 69-70** (just analysed). The total amount of extraordinary *ex-post* contributions per year may not exceed by 300% the annual amount of *ex-ante* contributions.¹¹⁹⁸

(2) The Board may (either on its own initiative after consulting the NRA or upon proposal by the latter) defer, partially or entirely, an institution's payment of extraordinary *ex-post* contributions, if deemed necessary in order to protect its financial position. **Commission Delegated Regulation (EU) 2017/747** must be taken into account. The contributions deferred must be made at a later time when their payment no longer jeopardises the institution's financial position. Such a deferral may not be granted for a period of longer than six months but may be renewed upon request of the institution concerned.¹¹⁹⁹

(3) The specification of the circumstances and conditions under which the payment of *ex-post* contributions may be deferred by the Board is governed by **Article 6** of the above-mentioned¹²⁰⁰ **Commission Delegated Regulation (EU) 2017/747**, which was adopted on the basis of **Article 71(3) SRMR**. **Articles 7-8** of that delegated act, also adopted on the basis of the same SRMR Article, govern the assessment of the deferral's impact on solvency and liquidity, respectively.

4.2.2 *The provisions of Article 6 of Commission Delegated Regulation (EU) 2017/747*

(1) If necessary in order to protect an institution's financial position, the Board may, either on its own initiative after consulting the NRA or upon proposal by an NRA, defer, partially or entirely, its payment of extraordinary *ex post* contributions, in accordance with **Article 71(2) SRMR**, upon the institution's request. In this respect, the latter must provide any information deemed necessary by the Board to conduct the assessment of the impact of the payment of extraordinary *ex post* contributions on its financial position.¹²⁰¹

¹¹⁹⁸ *Ibid.*, Article 71(1) and recital (102), second sentence.

¹¹⁹⁹ *Ibid.*, Article 71(2).

¹²⁰⁰ See also above in **Chapter 2, Section A, under 6.2 (1)**.

¹²⁰¹ **Commission Delegated Regulation (EU) 2017/747**, Article 6(1) and 6(2), first and second sentences.

(2) In order to determine whether the institution meets the conditions for deferral referred to in **Article 6(4)** the Board must take into account all information available to its NCA.¹²⁰² For the same purpose, it must assess the impact a payment of extraordinary *ex post* contributions would have on the institution's solvency and liquidity position.¹²⁰³ If the institution is part of a group, the assessment must also include the impact of solvency and liquidity of the group as a whole.¹²⁰⁴

(3) The Board may defer the payment of extraordinary *ex post* contributions if the conditions for deferral are met, i.e. it concludes that the payment by the institution would result in any of the following:¹²⁰⁵

firstly, a likely breach, within the following six months, of its minimum own funds requirements set out in **Article 92 CRR**;

secondly, a likely breach, within the following six months, of its minimum liquidity coverage requirement set out in **Article 412(1) CRR** and further specified in **Article 4 of the Commission Delegated Regulation (EU) 2015/61**;¹²⁰⁶ or

thirdly, a likely breach, within the following six months, of its specific liquidity requirement set out in **Article 105 CRD IV**.

(4) The Board must limit the deferral period to the extent necessary to avoid risks to the financial position of the institution or its group and regularly monitor whether the above-mentioned conditions for the deferral continue to apply during the deferral period.¹²⁰⁷ Upon the institution's request, it may renew the deferral period, for up to six months, upon determination that the conditions for the deferral continue to apply.¹²⁰⁸

4.2.3 The provisions of Articles 7-8 of Commission Delegated Regulation (EU) 2017/747

(1) The assessment by the Board or the NRA of the impact of the payment of extraordinary *ex post* contributions on an institution's regulatory capital position must include an analysis of the impact such a payment would have on its compliance with the minimum own funds requirements set out in **Article 92 CRR**. For this purpose, the amount of *ex post* contributions must be deducted from the institution's own funds position.¹²⁰⁹ The relevant analysis must cover at least the period up to the next reporting remittance date for the own funds requirement set out in **Article 3 of Commission Implementing Regulation (EU) No 680/2014** of 16 April 2014¹²¹⁰ "laying down implementing technical standards with regard to supervisory reporting of institutions according to [the CRR]"¹²¹¹.

¹²⁰² *Ibid.*, Article 6(2), third sentence; on Article 6(4), see just below, **under (3)**.

¹²⁰³ On these aspects, see just below, **under 4.2.3**.

¹²⁰⁴ **Commission Delegated Regulation (EU) 2017/747**, Article 6(3).

¹²⁰⁵ *Ibid.*, Article 6(4).

¹²⁰⁶ On this delegated act, see also above in **Chapter 2, Section A, under 6.2 (1)**.

¹²⁰⁷ **Commission Delegated Regulation (EU) 2017/747**, Article 6(5).

¹²⁰⁸ *Ibid.*, Article 6(6).

¹²⁰⁹ *Ibid.*, Article 7(1)-(2).

¹²¹⁰ OJ L 191, 28.6.2014, pp. 1-1861 (!).

¹²¹¹ **Commission Delegated Regulation (EU) 2017/747**, Article 7(3).

(2) The assessment by the Board or the NRA of the impact of the payment of extraordinary *ex post* contributions on an institution's liquidity position must include an analysis of the impact such a payment would have on its ability to meet the liquidity coverage requirement provided for in **Article 412(1) CRR** and further specified in **Article 4 of Delegated Regulation (EU) 2015/61**.¹²¹² For the purposes of this analysis, the Board must undertake the following:

firstly, add a liquidity outflow, equal to 100% of the amount payable at the point in time when the payment of extraordinary *ex post* contributions is due, to the calculation of net liquidity outflows as set out in **Article 20(1) of Delegated Regulation (EU) 2015/61**;

secondly, assess the impact of such outflow on the specific liquidity requirements set out in **Article 105 CRD IV**.¹²¹³

The analysis must cover at least the period up to the next reporting remittance date for the liquidity coverage requirement set out in **Article 3 of Implementing Regulation (EU) No 680/2014**.¹²¹⁴

4.3 Voluntary borrowing between resolution financing arrangements

(1) The Board can make a request to voluntarily borrow for the SRF from resolution financing arrangements in non-participating Member States, if the following two conditions are met cumulatively:

firstly, the *ex-ante* contributions are not sufficient to cover the losses, costs or other expenses incurred by the use of the SRF for resolution actions;

secondly, extraordinary *ex-post* contributions are not immediately accessible; (and)

thirdly, alternative funding means in accordance with **Article 73 SRMR**¹²¹⁵ are not immediately accessible on reasonable terms.¹²¹⁶

Decisions on such a request must be made in accordance with **Article 106 BRRD**, while the borrowing conditions are subject to **Article 106(4)-(6)** thereof.¹²¹⁷

(2) The Board may also decide to lend to other resolution financing arrangements in non-participating Member States, if a request is made in accordance with **Article 106 BRRD**. The lending conditions are subject to **Article 106(4)-(6) BRRD** as well.¹²¹⁸

¹²¹² *Ibid.*, Article 8(1).

¹²¹³ *Ibid.*, Article 8(2)-(3).

¹²¹⁴ *Ibid.*, Article 8(4).

¹²¹⁵ See just below, **under 4.4**.

¹²¹⁶ **SRMR**, Article 72(1).

¹²¹⁷ *Ibid.*, Article 72(2).

¹²¹⁸ *Ibid.*, Article 72(3). These provisions are similar to those laid down in **Article 12 DGSD**; on the latter **Gortsos (2014a)**, pp. 96-97.

4.4 Alternative funding means

In order to optimise the cost of funding and preserve its reputation in the event that the amounts raised by *ex-ante* and extraordinary *ex-post* contributions (in accordance with **Articles 70-71 SRMR**) are not immediately accessible or do not cover the expenses incurred by the use of the SRF in relation to resolution actions, the Board may contract for the SRF borrowings or other forms of support from institutions, financial institutions or other third parties offering better financial terms at the most appropriate time.¹²¹⁹ Such support must be fully recouped in accordance with **Articles 69-71** within the loan's maturity period; any expenses incurred are exclusively borne by Part II of the Board's budget.¹²²⁰

4.5 Access to financial facility

4.5.1 The provisions of Article 74 SRM Regulation and the Loan Facility Agreements (LFAs)

(1) If the amounts raised or available under **Articles 70-71** are not sufficient to meet the SRF's obligations, the Board must contract for the SRF financial arrangements (including, if possible, public financial arrangements) regarding the immediate availability of additional financial means.¹²²¹

(2) Within this context, on 8 December 2015 the EcoFin Council endorsed for the SRF a 'Public Bridge Financing Arrangement'.¹²²² This arrangement, which covers, as a last resort, temporary financing shortfalls in the SRF during the initial period, became fully operational on 1 January 2016, through (harmonised) Loan Facility Agreements (the 'LFAs') signed with each participating Member State.¹²²³ On the basis of an LFA, each Member State provides a national credit line to the Board to back its respective national compartment within the SRF during the initial period, should a funding shortfall occur following the resolution of a credit institution. The national credit lines will ultimately be paid back by the credit institutions of the Member State in which a resolution action might take place.

The maximum aggregate amount of such LFAs amounts to 55 billion euros, with a repartition key among Member States, which follows the Commission's 2014 estimates for contributions to the SRF. The aggregate amount and the repartition key should, subsequently, be further reviewed. Overall, LFAs ensure equivalent treatment across all participating Member States in terms of rights and obligations, while incurring no costs for the non-participating ones.¹²²⁴

¹²¹⁹ *Ibid.*, Article 73(1), as well as recitals (102), last sentence and (107).

¹²²⁰ *Ibid.*, Article 73(2)-(3). On Part II of the Board's budget, see above in **Chapter 3, Section C, under 1.3.2**.

¹²²¹ *Ibid.*, Article 74.

¹²²² The relevant Press Release is available at: https://www.consilium.europa.eu/press-releases/pdf/2015/12/40802205789_en_635851667400000000.pdf.

¹²²³ As of April 2019, five participating Member States had signed such an LFA.

¹²²⁴ The terms governing the LFAs are available at: <https://www.consilium.europa.eu/doc/documents/ST-14346-2015-INIT/en/pdf>.

4.5.2 Towards a ‘common backstop’ to the (Single Resolution) Board for the SRF

(1) In line with the EcoFin Council Statement of 18 December 2013,¹²²⁵ a ‘common backstop’ should also be developed during the initial period and be fully operational by its end (i.e. when resources of the SRF will be fully mutualised). The common backstop should be fiscally neutral over the medium-term and ensure equivalent treatment across all participating Member States, as well as incurring no costs for non-participating ones. This issue was underlined in the European Commission’s Report on completing Europe’s Economic and Monetary Union of 22 June 2015 as well, which stated the following: “(...) *Setting up a credible common backstop to the Single Resolution Fund and making progress towards a full level playing field for banks in all Member States should be a priority during the transition period to the creation of the Single Resolution Fund. A back stop should therefore be implemented swiftly. This could be done through a credit line from the European Stability Mechanism (‘ESM’) to the Single Resolution Fund. This backstop should be fiscally neutral over the medium term by ensuring that public assistance is recouped by means of ex-post levies on the financial industry*”.

(2) One of the elements of the comprehensive package of measures proposed by the Commission in its **Communication of 6 December 2017** to strengthen the EMU¹²²⁶ was the proposal for a Council Regulation “on the establishment of the European Monetary Fund” (the ‘EMF’ and the ‘EMF Regulation’). This proposal was submitted on 12 December 2017¹²²⁷ and was to be adopted on the basis of **Article 352 TFEU**. In its Annex, this proposal contains the EMF’s Statute.¹²²⁸ The objective of the EMF, a successor to the European Stability Mechanism (the ‘ESM’),¹²²⁹ would be to contribute to safeguarding financial stability in the euro area and its participating Member States.

In order to achieve this objective, it was proposed that the EMF should be assigned two tasks, the *first* being to mobilise funding and provide stability support under strict policy conditions, appropriate to the chosen financial assistance instrument, to the benefit of its Members which are experiencing, or are threatened by, severe financing problems. This would include, *inter alia*, the provision of direct public financial assistance to credit institutions through the DRI.¹²³⁰ The *second* task would consist in providing credit lines or setting guarantees in support of the Board (the ‘common backstop’).¹²³¹

¹²²⁵ The relevant Press Release is available at: www.consilium.europa.eu/2Fpress%2Fpress-releases%2F2013%2F12%2Fpdf%2FStatement-of-Eurogroup-and-ECOFIN-Ministers-on-the-SRM-backstop%2F&usg=AFQjCNFAyCkKNaetwIR_6g_-WgoLhU-9Xw&bvm=bv.119028448.d.bGs.

¹²²⁶ See above in **Chapter 1, Section C, under 1 (2)**.

¹²²⁷ COM(2017) 827 final, 6.12.2017.

¹²²⁸ **EMF Regulation**, Article 1(2) and recital (18).

¹²²⁹ The ESM was established as an international financial institution by the “Treaty establishing the European Stability Mechanism” of 2 February 2012 (the ‘**ESM Treaty**’), which was concluded outside the EU framework and became operational in October 2012. It succeeded the European Financial Stabilisation Facility (the ‘**EFSF**’), which was established in 2010 by the same group of Member States. The consolidated version of the ESM Treaty is available at: <https://www.esm.europa.eu/legal-documents/esm-treaty>.

¹²³⁰ **EMF Regulation**, Article 19(1), second sentence and **EMF Regulation**, recital (46).

¹²³¹ For a systematic presentation and an assessment of the proposed legal framework on the EMF, see **Gortsos (2017d)** and in particular pp. 28-31 and 53 on the common backstop. On the case for establishing a common backstop, see **Schoenmaker (2014)** and **(2017)** and **Schlosser (2017)** (the 2017 papers completed before the publication of the Commission’s proposal).

Accordingly, the EMF Regulation and the EMF Statute would establish the EMF as a comprehensive crisis management EU body with legal personality,¹²³² which would serve as a ‘lender of last resort’ both for the Member States whose currency is the euro, and for the SRF as well, in the form of the ‘common backstop’. On the other hand, the EMF would not be designed to have any early-intervention powers. The legal basis for the provision of financial support to the SRF by the EMF would be **Article 22 of the EMF Statute**; nevertheless, its ultimate legal basis would be the above-mentioned **Article 74 SRMR**.

4.5.3 Current developments

(1) Any progress on the adoption of this legal act is halted. Nevertheless, in the above-mentioned Euro Summit meeting of **29 June 2018**, agreement was reached that the common backstop should be activated and be provided by a more strengthened ESM. Taking also into consideration the relative urgency of the situation, the Euro Summit noted that the Eurogroup will have to prepare the terms of reference of the common backstop and agree on a term sheet for the further development of the ESM by December 2018.¹²³³

(2) The latest Euro Summit meeting, of **14 December 2018**, agreed on endorsing the terms of reference for the operationalisation of the common backstop, as developed by the Eurogroup, upon the condition that “*sufficient progress has been made in risk reduction*”.¹²³⁴ It also endorsed the term sheet developed by the Eurogroup on the further development, by reform, of the ESM and asked the Eurogroup to prepare, by June 2019, the necessary amendments to the ESM Treaty, including on the common backstop.¹²³⁵ Under the current political agenda, the common backstop will thus be provided by an enhanced ESM.

5. In particular: the use of deposit guarantee schemes (DGSs) in the context of resolution

5.1 Introductory remarks

(1) The DGSD goes beyond the pure ‘payout’ function of DGSs by providing that national DGSs should, on a mandatory basis as well, assist with the financing of the resolution of credit institutions in accordance with the BRRD. In particular, according to **Article 11(2) DGSD**, national DGSs must, *inter alia*, use their ‘available financial means’ (as further specified in **Article 10 DGSD**¹²³⁶) also in order to contribute to the financing of credit institutions’ resolution, where the conditions laid down in **Article 109 BRRD** are met (the ‘**resolution scenario**’).¹²³⁷

¹²³² **EMF Statute**, Article 1, first sentence.

¹²³³ **Euro Summit meeting** (29 June 2018), **Statement**, point 2.

¹²³⁴ **Euro Summit meeting** (14 December 2018), **Statement**, point 1. The terms of reference are annexed to the Statement of the Eurogroup’s report of 4 December 2018 (available at: https://www.consilium.europa.eu/media/37268/tor-backstop_041218_final_clean.pdf).

¹²³⁵ *Ibid.*, **Statement**, point 2. The term sheet is annexed to the Statement as well (available at: https://www.consilium.europa.eu/media/37267/esm-term-sheet-041218_final_clean.pdf).

¹²³⁶ On this Article, see details in **Gortsos (2014a)**, pp. 76-82.

¹²³⁷ For more details on the use of DGSs in the context of resolution under the BRRD under this Article, see **Merc (2017e)** and **Gortsos (2019a)**, pp. 10-15. On the resolution by DGSs in general, see **Beck and Laeven (2006)**.

It is up to the NRAs to determine, after consulting the DGS concerned, the amount by which the latter will be liable.¹²³⁸ In setting this amount, they must cooperate with the NCAs, the ‘designated authorities’ and (if applicable) the relevant administrative authorities from an early stage in the preparation and implementation of the resolution measures.¹²³⁹ ‘**Designated authority**’ means a body which administers a DGS pursuant to the DGSD, or, where the operation of the DGS is administered by a private entity, a public authority designated by the Member State concerned for supervising that scheme pursuant to the DGSD.¹²⁴⁰

(2) Under the SRMR, the use of DGSs in the context of resolution financing is governed by its **Article 79**, which is broadly based on **Article 109 BRRD** but also involves in the process the Board.

5.2 The provisions of Article 79 SRMR

5.2.1 The conditions

(1) The activation of the use of a DGS’s available financial means in order to contribute to the financing of the resolution of credit institutions, which are affiliated to that DGS, is triggered by a Board’s decision to take a ‘resolution action’ in relation to a specific credit institution, provided that this action ensures the continuity of depositors’ access to their deposits. The amounts for which the DGS is liable are those specified in **Article 109(1)** and **(4) BRRD**.¹²⁴¹ In this respect, Article 109(1) makes the following differentiation:¹²⁴²

Firstly, when the ‘**bail-in tool**’ is applied, the DGS is liable to pay the amount by which ‘covered deposits’ would have been written down in order to absorb the losses in the credit institution in accordance with **point (a) of Article 46(1) BRRD**, if such deposits had been included within the scope of bail-in and written down to the same extent as creditors with the same level of priority under national law governing normal insolvency proceedings.¹²⁴³ In such a case, the DGS may not be required to make any contribution towards the costs of recapitalising the credit institution or a bridge institution in accordance with **point (b) of Article 46(1)**.¹²⁴⁴

¹²³⁸ DGSD, Article 11(2), second sentence.

¹²³⁹ *Ibid.*, Article 3(2), first sub-paragraph in conjunction with recital (51), second sentence.

¹²⁴⁰ *Ibid.*, Article 2(1), point (18). On the other hand, ‘**relevant administrative authorities**’ are those which, under **Article 3(1) DGSD**, Member States must identify for the purpose of making the determination that a credit institution’s deposits have become ‘unavailable’ (in accordance with Article 2(1), point (8)(a) thereof). In the majority of cases, they are the NCAs.

¹²⁴¹ SRMR, Article 79(1), first sub-paragraph.

¹²⁴² Article 109(4) BRRD is repeated *verbatim* in Article 79(4) SRMR (see just below, **under (3)**).

¹²⁴³ BRRD, Article 109(1), first sub-paragraph, point (a).

¹²⁴⁴ *Ibid.*, Article 109(1), third sub-paragraph. It is noted that under both **points (a) and (b) of Article 46(1)** when applying the bail-in tool, NRAs must make an assessment on the basis of a valuation compliant with **Article 36**. The difference between the two cases is the subject of the assessment. In particular, while in the *first case* they must assess the amount by which eligible liabilities must be written down in order to ensure that the net asset value of the institution under resolution is equal to zero, in the *second case* they must assess the amount by which eligible liabilities must be converted into shares or other types of capital instruments in order to restore the ‘**Common Equity Tier 1 (CET 1) capital ratio**’ of either the institution under resolution or

In this respect, **recital (81)** provides that, even though covered deposits are not subject to the exercise of the bail-in tool, the DGS contributes to funding the resolution process by absorbing losses to the extent of the net losses that it would have had to suffer after compensating depositors in normal insolvency proceedings. The exercise of the bail-in powers would ensure that depositors continue to have access to their deposits according to the main function of DGSs. “*Not providing for the involvement of those schemes in such cases would constitute an **unfair advantage** with respect to the remaining creditors which would be subject to the exercise of the powers by the resolution authority.*”

On the other hand, when one or more resolution tools (other than the bail-in) are applied, the DGS is liable to pay the amount of losses that covered depositors would have suffered (and the DGS would have to compensate), if (under a hypothetical insolvency scenario) their losses would be in proportion to the losses suffered by creditors with the same level of priority under the national law governing normal insolvency proceedings.¹²⁴⁵ The DGS subrogates then to the rights and obligations of covered depositors in liquidation proceedings for an amount equal to its payment.¹²⁴⁶

(2) In both the above-mentioned cases, the determination of the amount by which the DGS is liable must comply with the conditions pertaining to the valuation for the purposes of resolution (in accordance with **Article 20 SRMR**).¹²⁴⁷

In procedural terms, before deciding that amount and taking fully into account the urgency of the matter, the Board must consult the designated authority concerned.¹²⁴⁸

(3) When eligible deposits of a credit institution under resolution are transferred to another entity through the sale of business or the bridge institution tool, depositors are not insured beyond the coverage level provided for in the DGSD and, hence, do not have a claim (under the DGSD) against the DGS in relation to any part of their deposits that are not transferred, provided that the amount of funds transferred is at least equal to the aggregate coverage level provided for in **Article 6 DGSD** (in principle, 100,000 euros *per* depositor *per* credit institution). Accordingly, claims with regard to deposits remaining in the institution under resolution are limited to the difference between the funds transferred and the coverage level provided for in the DGSD.¹²⁴⁹

the bridge institution. This ratio is one of the three own funds requirements credit institutions must meet in accordance with **Articles 92-94 CRR**; it is equal to 4.5% and is calculated as the ‘Common Equity Tier 1 capital’ of credit institutions expressed as a percentage of their total risk exposure amount (Article 92); in turn, a credit institution’s ‘Common Equity Tier 1 capital’ consists of Common Equity Tier 1 items (in accordance with Article 26(1)), after the application of the adjustments required by Articles 32-35, the deductions pursuant to Article 36 and the exemptions and alternatives set out in Articles 48-49 and 79 (**CRR**, Article 50).

¹²⁴⁵ *Ibid.*, Article 109(1), first sub-paragraph, point (b). On the two alternative approaches (‘gross loss’ vs. ‘net loss’) for determining the extent of a DGS’s liability, see **Aloupi (2018)**, p. 264.

¹²⁴⁶ **SRMR**, Article 79(1), second sub-paragraph (which reflects Article 9(2) **DGSD**; on this aspect, see more details in **Gortsos (2014a)**, pp. 131-132).

¹²⁴⁷ *Ibid.*, Article 79(2) repeating, *mutatis mutandis*, Article 109(2) **BRRD**. On Article 20 **SRMR**, see above in **Chapter 5, Section D**.

¹²⁴⁸ *Ibid.*, Article 79(3).

¹²⁴⁹ *Ibid.*, Article 79(4), repeating *verbatim* Article 109(4) **BRRD**, and recital (82).

5.2.2 Safeguards

(1) Irrespective of the resolution tool applied (in accordance to the above-mentioned **under 5.2.1 (1)**), a maximum limit has been set with regard to DGSs' liability: this may not be greater than the amount of losses that they would have had to bear, if (under a hypothetical insolvency scenario) a credit institution would have been 'wound up' under normal insolvency proceedings (activating subsequently the payout function).¹²⁵⁰ If an *ex-post* 'valuation of difference in treatment' in accordance with **Article 74 BRRD** determines that a DGS's contribution to resolution was greater than the net losses it would have incurred had the institution been wound up under such proceedings, the DGS is entitled to the payment of the difference from the national resolution financing arrangement (in accordance with **Article 75**).¹²⁵¹

(2) Notwithstanding the above, if a DGS's available financial means are used and are subsequently reduced to less than two-thirds (2/3) of its target level in accordance with **Article 10(2) DGSD**,¹²⁵² credit institutions' regular contributions to the DGS to which they are affiliated must be set at a level allowing for reaching the target level within six years. The liability of a DGS may not be greater than the amount equal to 50% of its target level (the '**50% cap**' applying in this case as well) and, in any case, its participation under the SRMR may not exceed the losses it would have incurred in a winding up under normal insolvency proceedings.¹²⁵³

¹²⁵⁰ **BRRD**, Article 109(1), second sub-paragraph, and recital (110), third sentence (see also recital (110) **SRMR**). This should also apply, in the author's opinion, to the case (not specifically addressed in Article 109(1) **BRRD**) that the decision is taken by NRAs to apply the sale of business tool or the bridge institution tool in combination with the bail-in tool (see **Gortsos (2019a)**, p. 14).

¹²⁵¹ *Ibid.*, Article 109(1), fourth sub-paragraph.

¹²⁵² On this Article, see **Gortsos (2014a)**, pp. 78-80.

¹²⁵³ **SRMR**, Article 79(5) repeating almost *verbatim* Article 109(5) **BRRD** (with the exception of the national discretion provided for in the second sentence of the second sub-paragraph). For a detailed analysis of Article 79 **SRMR**, see also **Psaroudakis (2019)**.

Section B:

The provisions of the SRF Agreement: transfer of contributions and compartments

1. Transfer of contributions

1.1 General rules

The Contracting Parties jointly committed to irrevocably transfer to the SRF the (*ex-ante* and extraordinary *ex-post*) contributions raised from the institutions authorised in their territories (in accordance with the criteria laid down in **Articles 70-71 SRMR**)¹²⁵⁴ under the conditions laid down in **Articles 4-10 SRF Agreement**.¹²⁵⁵ In this context, annual *ex-ante* contributions must be transferred **by 30 June** each year (the initial transfer should take place **by 30 June 2016** at the latest)¹²⁵⁶ and extraordinary *ex-post* contributions immediately after their collection.¹²⁵⁷ The amount of 4.3 billion euros in contributions raised by the Contracting Parties under **Articles 103-104 BRRD** before **1 January 2016** were transferred to the SRF in **January 2016**.¹²⁵⁸

1.2 Transfer of additional *ex-ante* contributions and target level

The Contracting Parties must ensure that, where appropriate, they replenish the SRF through *ex-ante* contributions to be paid within the periods laid down in **Article 69(2)-(3) and 69(5), point (a) SRMR**¹²⁵⁹ in an amount equivalent to that required in order to achieve the target level. During the initial period, the transfer of contributions related to replenishment must be distributed between the compartments as follows:¹²⁶⁰

firstly, the Contracting Parties concerned by resolution must transfer contributions to the part of their compartment that has not yet been subject to mutualisation in accordance with **Article 5(1), points (a)-(b)**;¹²⁶¹

secondly, all Contracting Parties must transfer contributions to the part of their compartments subject to mutualisation in accordance with the same Article.

The author notes that the fact that the SRF is operating (and will remain in operation during the entire ‘initial period’ until the end of 2023) under the ‘**mutualisation rule**’ raises unpredictability and credibility concerns.

¹²⁵⁴ See above in **Section A, under 3 and 4.2.1**, respectively.

¹²⁵⁵ **SRF Agreement**, Article 3(1).

¹²⁵⁶ *Ibid.*, Article 3(2).

¹²⁵⁷ *Ibid.*, Article 3(5).

¹²⁵⁸ *Ibid.*, Article 3(3). Article 3(4), applying to amounts disbursed by Contracting Parties’ resolution financing arrangement before the date of application of the SRF Agreement, was not activated.

¹²⁵⁹ See above in **Section A, under 2.2**.

¹²⁶⁰ **SRF Agreement**, Article 6.

¹²⁶¹ See below, **under 2.2**.

1.3 Temporary transfer between compartments

(1) During the initial period and without prejudice to the obligations laid down in **Article 5(1), points (a)-(d)**, the Contracting Parties concerned by resolution may request the Board to temporarily make use of the part of the financial means available in the compartments of the SRF not yet mutualised corresponding to the other Contracting Parties. In such a case, the Contracting Parties concerned must transfer to the SRF extraordinary *ex-post* contributions in an amount equivalent to that received by their compartments in order to allow the other compartments to be refunded.¹²⁶² The amount temporarily transferred from each of the compartments to the recipient ones must be *pro rata* to their size, as determined in **Article 4(2)**,¹²⁶³ and may not exceed 50% of the available financial means within each compartment not yet subject to mutualisation. In case of cross-border group resolution, the allocation of financial means made available between the compartments of the Contracting Parties concerned must follow the key for the distribution of costs laid down in **Article 5(1), point (a)**.¹²⁶⁴

(2) Board decisions on the request for a temporary transfer of financial means between compartments are taken by simple majority of the members in its Plenary Session. In its decision the Board must specify the rate of interest, the period for refunding and other terms and conditions relating to the transfer.¹²⁶⁵ Such a decision enters into force upon the condition that no objection has been expressed by any Contracting Party from whose compartments the transfer has been made within a period of four calendar days since the date of its adoption.¹²⁶⁶ During the initial period, a Contracting Party's right of objection may only be exercised if *any* of the following conditions applies:

firstly, it might require the financial means from the national compartment corresponding to it in order to finance a resolution operation in the near term or the temporary transfer would jeopardise the conduct of an ongoing resolution action within its territory,;

secondly, the temporary transfer would take more than the 25% of its part of the national compartment not yet subject to mutualisation in accordance with **Article 5(1), points (a)-(b)**; or

thirdly, it considers that the Contracting Party whose compartment benefits from the temporary transfer is not providing guarantees of refunding from national sources or support from the ESM in line with agreed procedures.¹²⁶⁷

The Contracting Party intending to object must duly substantiate the occurrence of any of the circumstances referred above. If objections are raised, the Board's decision on temporary transfer must be adopted excluding the financial means of the compartments of objecting Contracting Parties.¹²⁶⁸

¹²⁶² **SRF Agreement**, Article 7(1).

¹²⁶³ See below, **under 2.1**.

¹²⁶⁴ **SRF Agreement**, Article 7(2).

¹²⁶⁵ *Ibid.*, Article 7(3).

¹²⁶⁶ *Ibid.*, Article 7(4), first sub-paragraph.

¹²⁶⁷ *Ibid.*, Article 7(4), second sub-paragraph points (a)-(c), respectively.

¹²⁶⁸ *Ibid.*, Article 7(4), third and fourth sub-paragraphs.

(3) If an institution of a Contracting Party from whose compartment financial means have been transferred is subject to resolution, that Party may request the Board to transfer from the SRF to its compartment an amount equivalent to that initially transferred from it. Upon such a request, the Board must agree immediately on the transfer and the Parties which initially benefited from the temporary use of financial means are held liable to transfer to the SRF the amounts allocated to the Party concerned (in accordance with **Article 7(1)**¹²⁶⁹), on the basis on terms and conditions specified by the Board.¹²⁷⁰

(4) The Board must specify general criteria determining the conditions upon which this temporary transfer takes place.¹²⁷¹

1.4 Contracting Parties whose currency is not the euro

(1) A Contracting Party whose currency is not the euro must transfer to the SRF a specific amount of contributions raised in its territory. This amount must meet two conditions:

firstly, it must be *equivalent* to the part of its national compartment's total target level (calculated in accordance with **Article 4(2)**) if after 1 January 2016 a decision is adopted by the **European Council** abrogating its derogation or its exemption, or (in the absence of any such decision) it becomes part of the SSM and the SRM;

secondly, it must be *equal* to what would have been transferred by the Contracting Party concerned if it had participated in the SSM and the SRM since the date of the SRF Agreement's application.¹²⁷²

(2) Any amount disbursed by such a Contracting Party's resolution financing arrangement in respect of resolution actions within its territory must be deducted from the amounts to be transferred by that Party towards the SRF in accordance with the just above-mentioned) **Article 8(1)**. In such a case, that Party must transfer towards the SRF an amount equivalent to what have been necessary in order to achieve the target level of its resolution financing arrangement in accordance with **Article 102 BRRD** and within the deadlines provided therein¹²⁷³

(3) The Board must determine, in agreement with the Contracting Party concerned, the exact amount of contributions to be transferred according to the above-mentioned (under (1) and (2), respectively) criteria.¹²⁷⁴

¹²⁶⁹ See just above, **under (1)**.

¹²⁷⁰ **SRF Agreement**, Article 7(5).

¹²⁷¹ *Ibid.*, Article 7(6).

¹²⁷² *Ibid.*, Article 8(1). According to recital (23), the transfer of contributions by Contracting Parties which become part of the SSM and the SRM at a date subsequent to the date of application of the SRF Agreement must be made respecting the '**principle of equality of treatment**'. Subsequently, the Contracting Parties participating in the SSM and the SRM at the date of its application should not bear the burden of resolutions to which the national financial arrangements of those participating at a later stage were supposed to contribute; likewise, the latter should not bear the cost of resolutions, arising before the date when they become participating Member States.

¹²⁷³ *Ibid.*, Article 8(2).

¹²⁷⁴ *Ibid.*, Article 8(3).

(4) The costs of any resolution action initiated in the territory of these Contracting Parties before the date when the decision abrogating their derogation takes effect or before the date of entry into force of the decision of the ECB on close cooperation are not borne by the SRF. If the ECB, in its comprehensive assessment of credit institutions referred to in **Article 7(2), point (b) SSMR**,¹²⁷⁵ considers that any institution of the Contracting Parties concerned is failing or likely to fail, resolution costs of resolution actions relating to those credit institutions are not borne by the SRF.¹²⁷⁶

(5) If a close cooperation with the ECB is terminated, contributions transferred by a Contracting Party concerned are recouped in accordance with **Article 4(3) SRMR**.¹²⁷⁷ Such a termination does not affect Contracting Parties' rights and obligations arising from resolution actions having taken place during the period in which they are subject to the SRF Agreement and are related to the transfer of *ex-post* contributions, the replenishment of the SRF and the temporary transfer between compartments.¹²⁷⁸

2. Compartments

2.1 General provisions

(1) As already mentioned, during the initial period contributions raised at national level and transferred to the SRF must be allocated to compartments corresponding to each Contracting Party.¹²⁷⁹ The size of these compartments must be equal to the totality of contributions payable by the institutions authorised in each Contracting Party in accordance with **Articles 69-70 SRMR** as well as the delegated and implementing acts referred to therein.¹²⁸⁰ On 1 January 2016, the Board drew a list detailing the size of each compartment, which is being updated every year and will continue to be updated during the entire initial period.

(2) After the initial period, the compartments will be merged and cease to exist.¹²⁸¹

2.2 Functioning of compartments

Detailed rules govern the Board's power to dispose of the compartments, in five stages, if recourse to the SRF is decided under the SRMR's relevant provisions.¹²⁸² In particular:

The first stage (Article 5(1), point (a))

(1) Initially, costs are borne by the compartments corresponding to the Contracting Parties where the institution or the group under resolution are established or authorised (the '**national compartments**').

¹²⁷⁵ See on this **Gortsos (2015a)**, p. 185.

¹²⁷⁶ **SRF Agreement**, Article 8(4).

¹²⁷⁷ On this Article, see above in **Chapter 2, Section A, under 1.2.2 (2)**.

¹²⁷⁸ **SRF Agreement**, Article 8(5) and recital (24).

¹²⁷⁹ *Ibid.*, Article 4(1).

¹²⁸⁰ *Ibid.*, Article 4(2).

¹²⁸¹ *Ibid.*, Article 5(3).

¹²⁸² *Ibid.*, Article 5(1).

(2) In the case of a cross-border group resolution, costs must be distributed between the different national compartments in proportion to the relative amount of contributions that each of the group's entities has provided to their respective compartments with respect to the aggregate amount of contributions that all group entities have provided to their national compartments.

(3) If a Contracting Party where the parent undertaking or subsidiary are established or authorised considers that the application of this criterion for distribution of costs leads to a large asymmetry between the distribution of costs between compartments and the risk profile of the entities concerned by resolution, it may request to the Board to consider, additionally and without any delay, the criteria laid down in **Article 107(5) BRRD**. If the Board does not follow the request submitted by the Contracting Party concerned, it must explain its position publicly.

(4) Recourse must be had to the financial means available within the national compartments up to the cost that each of them is due to contribute according to the criteria for distribution of costs, in the following manner:

firstly, during the first year of the initial period, recourse should be had to all the financial means available within these compartments;

secondly, during the second and third year of the initial period, recourse must be had to the 60% and 40% respectively of financial means available within these compartments;

finally, during the subsequent years of the initial period, the availability of the financial means in the compartments corresponding to these relevant Contracting Parties will decrease annually by $6\frac{2}{3}$ percentage points.

The decrease per year of the availability of financial means in the national compartments must be spread evenly *per* quarter.

The second stage (Article 5(1), point (b))

(1) If financial means available in the national compartments in accordance with **point (a)** are not sufficient to comply with the mission of the SRF, recourse must be had to the available financial means in the compartments corresponding to all Contracting Parties. The financial means available in these compartments must be supplemented (to the same degree specified in the third sub-paragraph of this point (see just below)) by the remaining financial means in the national compartments corresponding to the Contracting Parties concerned by resolution.

(2) In the case of a cross-border group resolution, the allocation of financial means made available between the compartments of the Contracting Parties concerned according to the above must follow the same key for the distribution of costs among them, as laid down in **point (a)**. If the institution or institutions authorised in one of the Contracting Parties concerned and subject to the group resolution do not need the totality of the financial means available under this **point (b)**, the available financial means not needed must be used in the resolution of the entities authorised in the other Contracting Parties concerned by the group resolution.

During the initial period, recourse to all national compartments must be made in the following manner:

firstly, during the first and second year of the initial period, recourse should be had to the 40% and 60%, respectively, of the financial means available within these compartments;

secondly, during the subsequent years of that period, the availability of the financial means in these compartments will increase annually by $6\frac{2}{3}$ percentage points.

The referred increase *per* year of the availability of the financial means in all the national compartments of the Contracting Parties must be spread evenly *per* quarter.

The third stage (Article 5(1), point (c))

(1) If the financial means used in accordance with **point (b)** are not sufficient to comply with the SRF's mission in accordance with **Article 75 SRMR**, recourse must be had to any remaining financial means in the national compartments under **point (a)**.

(2) In the case of a cross-border group resolution, recourse must be had to the compartments of the Contracting Parties concerned that have not provided enough financial means under **points (a) and (b)** in relation to the resolution of entities authorised in their territories. Contributions by each compartment must be determined according to the criteria for distribution of costs laid down in **point (a)**.

The fourth stage (Article 5(1), point (d))

(1) Without prejudice to the powers of the Board referred to under **point (e)** below, if the financial means referred to in **point (c)** are not sufficient to cover the costs of a particular resolution action, the Contracting Parties concerned referred to in **point (a)** must transfer to the SRF the extraordinary *ex-post* contributions from the institutions authorized in their respective territories, raised in accordance with the criteria laid down in **Article 70 SRMR**.

(2) In the case of a cross-border group resolution, *ex-post* contributions must be transferred by the Contracting Parties concerned that have not provided enough financial means under **points (a)-(c)** in relation to the resolution of entities authorised in their territories.

The fifth stage (Article 5(1), point (e))

Finally, if the financial means referred to in **point (c)** are not sufficient to cover the costs of a particular resolution action and as long as extraordinary *ex-post* contributions referred to in **point (d)** are not immediately accessible, including for reasons relating to the stability of the institutions concerned, the Board may exercise its powers to either contract for the SRF borrowings or other forms of support in accordance with **Articles 72-73 SRMR**, *or* make temporary transfers between compartments in accordance with **Article 7 SRF Agreement**. If the Board decides to exercise these powers, the Contracting Parties concerned referred to in **point (d)** must transfer to the SRF the extraordinary *ex-post* contributions in order to reimburse the borrowings or other form of support, or the temporary transfer between compartments.

2.3 Allocation of returns of investments

Returns of investments of the amounts transferred to the SRF in accordance with **Article 74 SRMR** must be allocated to each compartment *pro rata* on the basis of their respective available financial means. Any claims or irrevocable payment commitments (for the purposes of **Article 75 SRMR**) attributable to each compartment are excluded.¹²⁸³ On the other hand, returns of investments of the resolution operations that the SRF may undertake in accordance with **Article 75** must be allocated to each compartment *pro rata* on the basis of their respective contribution to a particular resolution action.¹²⁸⁴

3. Horizontal provisions

3.1 Respect of the general principles and objectives of resolution – fundamental change of circumstances

(1) The Contracting Parties agreed that the use of the SRF on a mutual basis and the transfer of contributions thereto are contingent upon the existence of a resolution legal framework whose rules are equivalent to and lead at least to the same result of those of the SRMR as laid down in the following Articles thereof and without modifying them:

firstly, the general principles governing resolution in accordance to **Article 15 SRMR**;¹²⁸⁵

secondly, the procedural rules on the adoption of a resolution scheme in accordance with **Article 18**;¹²⁸⁶

thirdly, the rules on the resolution tools laid down in **Article 22(2)**, and notably those concerning the application of the bail-in tool under **Article 27** and the specific thresholds established therein in relation to the imposition of losses on shareholders and creditors and the SRF's contribution to a particular resolution case;¹²⁸⁷ and

finally, the rules on decision making by the Board in accordance with **Articles 52 and 55**.¹²⁸⁸

Those elements of the SRMR constitute an ‘**essential basis**’ for the consent of the Contracting Parties to be bound by this Agreement.¹²⁸⁹

Declaration no. 1 contained in the **Annex to the SRF Agreement** on “Declarations of intent by the contracting parties and observers of the Intergovernmental Conference that are members of the Council of the European Union to be deposited with the SRF Agreement” provides in this respect the following: “*While fully respecting the procedural requirements of the Treaties on which the EU is founded, the Contracting Parties and observers of the intergovernmental Conference that are members of the Council of the EU note that it is their objective and their intention that, unless they all agree otherwise:*

¹²⁸³ *Ibid.*, Article 5(2), first sentence; on Articles 74-75 SRMR, see above in **Section A, under 4.5.1 and 1.2.1**, respectively.

¹²⁸⁴ *Ibid.*, Article 5(2), second sentence.

¹²⁸⁵ See above in **Chapter 5, Section A, under 2**.

¹²⁸⁶ See above in **Chapter 5, Section C, under 2**.

¹²⁸⁷ See above in **Chapter 5, Section B**.

¹²⁸⁸ See above in **Chapter 3, Section B, under 2.4 and 3.4**, respectively.

¹²⁸⁹ **SRF Agreement**, Article 9(1) and recital (17).

(i) Article 4(3) of the SRM Regulation, as on the date of its initial adoption, is not repealed or amended.

(ii) The principles and rules related to the bail-in tool are not repealed or amended in a way that is not equivalent and does not lead to, at least, the same and not less stringent result than that deriving from the SRM Regulation as on the date of its initial adoption.”

(2) If the above rules on resolution are repealed or otherwise amended (including the adoption of bail-in rules in a manner not equivalent or not leading, at least, to the same (and not less stringent) results than those deriving from the SRMR as on the date of its adoption) against the will of a Contracting Party and potentially affecting the above essential basis, that Party may invoke the consequences of any fundamental change of circumstances that has taken place against its will pursuant to public international law (notably the relevant provisions of the **Vienna Convention on the Law of Treaties** of 23 May 1969¹²⁹⁰ and international customary law). In such a case, any other Contracting Party has the following rights:

Firstly, it may, on the basis of **Article 14 of the SRF Agreement** on dispute settlement,¹²⁹¹ submit the matter to the ECJ, which is granted the power to verify the existence of such a fundamental change of circumstances and the ensuing consequences in accordance with public international law. The Contracting Parties recognised that such invocation of consequences after the repeal or amendment of any of the above-mentioned essential elements of the SRMR would amount to a dispute concerning the application of the SRF Agreement for the purposes of **Article 273 TFEU** that can be submitted to the ECJ by virtue of Article 14.

Secondly, it may request the ECJ to suspend the operation of a measure being the object of the dispute; in this case applicable are **Article 278 TFEU**¹²⁹² and **Articles 160-162 of the ECJ’s Rules of Procedure** of 25 September 2012, as in force¹²⁹³ (on the application of *interim* measures).

When deciding on the dispute, as well as on the granting of *interim measures*, the ECJ must take into account the Contracting Parties’ obligations under the Treaties, including those relating to the SRM and its integrity.¹²⁹⁴

This procedure does neither prejudice nor affect recourse to legal remedies under either **Articles 258-260 TFEU** (on enforcement actions against Member States) or **Articles 263 and 265-266 TFEU**.¹²⁹⁵

¹²⁹⁰ United Nations Treaty Series Vol. 1155, I-18232, pp. 332-353 (also available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>).

¹²⁹¹ See above in **Chapter 2, Section B, under 5.1 (1)**.

¹²⁹² On this TFEU Article, see **Craig and de Búrca (2015)**, pp. 461-462 and **Schwarze (2012e)**.

¹²⁹³ OJ L 265, 29.9.2012, pp. 1-42. The consolidated version of these Rules of Procedure (as amended on 18 June 2013 and 19 July 2016) is available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

¹²⁹⁴ **SRF Agreement**, Article 9(2) and recital (18).

¹²⁹⁵ *Ibid.*, Article 9(3). On Articles 258-260 TFEU, see **Craig and de Búrca (2015)**, pp. 429-461 and **Schwarze (2012a)**.

3.2 Compliance

The Contracting Parties must take the necessary national measures in order to ensure compliance with their obligation to jointly transfer the contributions under the SRF Agreement. Without prejudice to the ECJ's powers under **Article 14**,¹²⁹⁶ the Board may consider whether a Party has failed to comply with this obligation. In case of compliance failure, the Board must set a deadline for the Party concerned to take the necessary corrective measures. If the Party concerned does not take such measures, the use of compartments of all Contracting Parties (as laid down in **Article 5(1), point (b)**) is ruled out in relation to the resolution of institutions authorised in its territory, until the Board determines (by a decision taken by simple majority of the Chair and the other full-time members) that the Party concerned has complied.¹²⁹⁷

¹²⁹⁶ See on this above in **Chapter 2, Section B, under 5.1 (1)**.

¹²⁹⁷ **SRF Agreement**, Article 10.

Section C:

Liquidity in resolution

1. The issue at stake

(1) Even though the existence for a credit institution under resolution of sufficient liquidity to meet its obligations is an essential part of an effective resolution, both the SRMR and the SRF Agreement do not contain provisions in relation to the provision of liquidity (and the resulting stabilisation) after the decision has been taken by the Board to resolve a credit institution (and, as the case may be, its group) either as a going-concern (i.e. by application of the (open-bank) bail-in resolution tool provided for in **Article 27 SRMR**, in order to ensure its recapitalisation) or by application of the gone-concern resolution tools (i.e. sale of business and bridge institution tool, **Articles 24 and 25**, respectively).¹²⁹⁸ The only reference to this¹²⁹⁹ is made in **recital (100)** (first and second sentences), which reads as follows: “*There are circumstances in which the effectiveness of the resolution tools applied may depend on the **availability of short-term funding** for the entity or a bridge entity (...). Notwithstanding the role of central banks in providing liquidity to the financial system even in times of stress, it is therefore important to set up a fund to avoid that the funds needed for such purposes come from the national budgets*”.

It is also noted/reminded that, in accordance with **Article 8**, resolution plans must be drawn up upon the assumption that central bank emergency liquidity assistance *or* central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms are not permitted.¹³⁰⁰

(2) On the basis of the above-mentioned, if a credit institution is not in a position, after a resolution action, to cover its potential increased liquidity needs (mainly due conditions of deposits outflow after the bail-in, market volatility and information asymmetries concerning its viability) through internal liquidity sources (such as cash and other liquid assets available for sale or use as collateral) access to the market for borrowed funds or resort to the (standard) monetary policy operations of the ECB,¹³⁰¹ access must be had to alternative public sector ‘**backstop funding** (i.e. liquidity) **mechanisms**’: the available financial means of the SRF and access to the central-bank lending of last resort facilities. This aspect is discussed in more details below, **under 2**.

¹²⁹⁸ When resort is made to the sale of business tool, the liquidity problems may be less severe, to the extent that the acquiring credit institution may be in a better position to fund its liquidity potentially heightened liquidity through internal resources or access to capital markets.

¹²⁹⁹ See also Article 50(1), point (c) **SRMR**, presented above in **Chapter 3, Section B, under 2.2 (3)**.

¹³⁰⁰ *Ibid.*, Article 8(6), fifth sub-paragraph; see above in **Chapter 4, Section B, under 1.2.1 (1)**.

¹³⁰¹ In this respect it is noted that, in accordance with the provisions of **Chapter IV of the ESCB/ECB Statute** on the achievement of the Eurosystem’s objectives, the ECB and the NCBs conduct open market operations and offer standing facilities to credit institutions (on the operational framework governing these instruments, see **Smits (1997)**, pp. 223-288, **Papathanassiou (2001)**, pp. 73-120 and **European Central Bank (2011)**, pp. 93-116. A recapitalised credit institution can raise liquidity through these standard monetary facilities, upon meeting the relevant eligibility criteria and being able to pledge eligible collateral, which must be of such a (high) quality. However, it is questionable whether, after its resolution, such a credit institution would have sufficient amount of collateral eligible for Eurosystem funding.

(3) The above-mentioned concerns have been raised at a global level by the FSB in its **2016 Guiding Principles** “on the temporary funding needed to support the orderly resolution of a global systemically important bank (“G-SIB”)”.¹³⁰² According to these Principles, a credit institution’s ability to use private sources of funding in resolution depends, *inter alia*, on:

firstly, the timing of resolution action;

secondly, the amount and quality of available collateral to the extent of asset encumbrance prior to resolution;

thirdly, the prevailing macroeconomic environment, including market liquidity;

fourthly, market confidence towards the recapitalised credit institutions; and

finally, the existence of an effective public sector backstop funding mechanism.¹³⁰³

In relation to the latter aspect, the Principles provide that such a mechanism must meet specific characteristics, especially in terms of being able to cover the liquidity needs of several credit institutions in case of a systemic crisis and operational capability to grant liquidity in time to address liquidity gaps of the institutions concerned. Furthermore, the backstop funding mechanisms must provide temporary funding under strict conditions in order to mitigate ensuing moral hazard risks.¹³⁰⁴

2. Alternative public sector backstop funding mechanisms for the Eurozone

2.1 On the two alternatives

(1) A first alternative public sector backstop funding mechanism for the Eurozone would be the SRF. As already mentioned,¹³⁰⁵ pursuant to **Article 73 SRMR**, the Board may contract for the SRF borrowings or other forms of support from institutions, financial institutions or other third parties offering better financial terms at the most appropriate time in the event that the amounts raised by *ex-ante* and extraordinary *ex-post* contributions (in accordance with **Articles 70-71 SRMR**) are not immediately accessible or do not cover the expenses incurred by the use of the SRF in relation to resolution actions.¹³⁰⁶

In addition, the common backstop to the SRM for the SRF could also be used.¹³⁰⁷ Its ultimate legal basis being **Article 74 SRMR**, this backstop, when finally adopted, is, nevertheless, not expected to have the necessary funding capacity.¹³⁰⁸

¹³⁰² Available at: <https://www.fsb.org/wp-content/uploads/Guiding-principles-on-the-temporary-funding-needed-to-support-the-orderly-resolution-of-a-global-systemically-important-bank-%E2%80%9CG-SIB%E2%80%9D.pdf>.

¹³⁰³ **Financial Stability Board (2016b)**, pp. 9-11.

¹³⁰⁴ *Ibid.*, pp. 11-14.

¹³⁰⁵ See above in **Section A, under 4.4**.

¹³⁰⁶ This is the proposal made by the Commission in its Report of 30 April 2019 on the application of the BRRD and the SRMR, at p. 7, acknowledging, however, that the amounts of borrowings would be limited. On this Report, see above in **Chapter 2, Section A, under 6.3**. The Commission also remarks that in non-participating Member States as well as third countries (such as the USA), the provision of liquidity support in resolution is foreseen either with no limits or with limits well above those possible within the BU, often with the possibility of increases.

¹³⁰⁷ See above in **Section A, under 4.5**.

(2) Given these severe constraints, the emphasis falls on last resort lending facilities. As already mentioned,¹³⁰⁹ for the euro area available in this respect is the Emergency Liquidity Assistance (ELA), the procedural arrangements of which are laid down, since May 2017, in the “ECB Agreement on emergency liquidity assistance”. ELA is not provided by the ECB but under the *main* responsibility of the NCB of the euro area Member State where the credit institution is established.¹³¹⁰ Hence, the provision of such assistance is at the sole discretion of NCBs, on the condition, however, that the ECB has not prohibited it under the provisions of **Article 14.4 of the ESCB/ECB Statute**. Provision of ELA is allowed during the resolution phase, provided that the following three conditions are met:

firstly, there is a credible prospect of recapitalisation within the next six (6) months, where the minimum thresholds for CET1, Tier 1 and Total Capital ratios are not met;

secondly, the credit institution concerned has sufficient collateral; and

thirdly, insolvency proceedings have not been initiated.¹³¹¹

2.2 On the role of the ECB in particular

(1) In relation to liquidity in resolution, the ECB is currently discussing a new instrument for granting Eurosystem Resolution Liquidity (the ‘ERL’), the activation of which should be based on specific rules. Furthermore, the instrument should provide that the financing is temporary and is replaced by private funding once the credit institution concerned restores its access to capital markets. Potential losses could be minimised if funding from this mechanism has a high priority in national insolvency rankings.¹³¹²

(2) This debate is closely linked to the still unsettled issue on whether the function of the ELA, in cases of resolution or in general, should be centralised at the level of the ECB. As already mentioned,¹³¹³ the author has since 2015 argued that the centralisation of the ELA, at least for the credit institutions directly supervised by the ECB within the SSM, constitutes one of the missing elements for the completion of the BU.¹³¹⁴

¹³⁰⁸ It is noted, that while the combined funds of the SRF and the ESM’s credit line is estimated at 120 billion euros, the liquidity support granted (only) for the restructuring of the banking group Hypo Real Estate exceeded 145 billion euros; see in this respect also **König (2018)**.

¹³⁰⁹ See above in **Chapter 1, Section C, under 4.1 (1)**.

¹³¹⁰ **ECB Agreement (2017)**, Section 2.1.

¹³¹¹ See **European Parliament (2018)**, p. 2 and **Mersch (2018)**. On liquidity in resolution under the existing EU law, see **Ringe (2017)**, **BBVA (2018)**, **Demertzis et al. (2018)** and **Moullin et al. (2018)**.

¹³¹² See **European Parliament (2018)**, pp. 10-11.

¹³¹³ See above in **Chapter 1, Section C, under 4.1 (2)**, with further references.

¹³¹⁴ See **Gortsos (2015a)**, pp. 64-70, with extensive further references.

Chapter 7

Concluding remarks and assessments

1. The *status quo*

1.1 General considerations

(1) EU banking law has changed drastically during the last decade. The new EU institutional framework on the Banking Union (BU) is a “child” of the ongoing (since 2010) euro area fiscal crisis, while the new regulatory framework pertaining to the three main pillars of the BU is a “child” of the recent (2007-2009) international financial crisis. Both these frameworks were adopted under enormous political pressure, reflecting a widespread loss of public trust in the financial system, at least in some Member States, and address most of the causes of these crises. In particular:

The *institutional framework* contains two pan-European mechanisms (i.e. the SSM and the SRM) for the micro-prudential supervision of credit institutions (applicable mainly but not exclusively to the participating Member States), the resolution of such credit institutions (and investment firms) in these Member States and the financing of resolution actions (through the SRF); the third main pillar of the BU, namely the EDIS has not yet been established as yet.¹³¹⁵

On the other hand, the *regulatory framework* (consisting of the CRR, the CRD IV, the BRRD and the DGSD) contains a set of extensive rules which apply to all Member States.

(2) The establishment of the SSM, the SRM and the SRF (which in the euro area has replaced the national resolution funds) constitute bold institutional novelties. The creation of the SSM, the first main pillar of the (still incomplete) BU, is an element of reform, i.e. improved financial supervision, which has been discussed for a long time. However, maintaining resolution tasks on a national scale, while supervision is centralised, would pose considerable risks. In this regard, the IMF starkly stated that: “(...) without a strong SRM complementing the SSM, the credibility and effectiveness of the banking union would be jeopardized”.¹³¹⁶ Thus, the SRM, the second main pillar of the BU, should be viewed as complementary to the SSM and these two components of the BU should be considered in unison, given that shared liability for bank resolutions requires centralised supervisory oversight.¹³¹⁷ In the field of burden sharing, a controversial point raised against the establishment of the BU, the SRF provides a valiant institutional response and one of the remedies against the fragmentation of the single market.

These considerations were highlighted in the above-mentioned ‘**Five Presidents’ Report**’,¹³¹⁸ which stipulated, *inter alia*, the following:

¹³¹⁵ See above in **Chapter 1, Section B, under 3.1** and below, **under 3.2.2**.

¹³¹⁶ See **International Monetary Fund (2013)**, p. 17.

¹³¹⁷ See **Deutsche Bundesbank (2013)**, p. 22.

¹³¹⁸ See above in **Chapter 1, Section B, under 3.1.1**.

“(…) In a Monetary Union, the financial system must be truly single or else the impulses from monetary policy decisions (e.g. changes in policy interest rates) will not be transmitted uniformly across its Member States. This is what happened during the crisis, which in turn aggravated economic divergence. Also, a single banking system is the mirror image of a single money. As the vast majority of money is bank deposits, money can only be truly single if confidence in the safety of bank deposits is the same irrespective of the Member State in which a bank operates. This requires single bank supervision, single bank resolution and single deposit insurance. This is also crucial to address the bank-sovereign negative feedback loops which were at the heart of the crisis.”

(3) Before 2015, when credit institutions were exposed to insolvency and if a ‘private sector solution’ could not be found, their supervisory authorities and the government would traditionally face a ‘dilemma’ between the following options: either to bail-out undercapitalised (usually systemically significant) credit institutions by using taxpayers’ money, judging that a withdrawal of their authorisation would have significant systemic consequences,¹³¹⁹ or to withdraw their authorisation and subsequently activate the respective DGS. Following the implementation in 2015 of the BRRD, Member States were equipped, for the first time, with a comprehensive set of rules (harmonised at EU level) on the recovery and resolution of credit institutions (and investment firms), which also apply to systemically important ones (the main target group). Furthermore, the establishment of the SRM centralised key competences and resources for managing credit institution failures in the euro area (and in other EU Member States which may in the future participate in the SSM under the close cooperation arrangements), thus tackling the risk of further fragmentation of the single market resulting from national authorities being solely in charge of the resolution of (unviable) credit institutions.¹³²⁰

(4) In principle, both the SRMR and the BRRD highlight the exceptional nature that resolution actions *should* have, irrespective of a credit institution’s size and/or interconnectedness. In this context, it is noted that in accordance with **Commission Delegated Regulation (EU) 2016/1075**, for the purposes of assessing the resolvability of a credit institution (or any other designated entity), the Board must implement a four-stage strategy, the starting point of which is the assessment of the feasibility and credibility of liquidating a credit institution under normal insolvency proceedings. It is only after it is determined that liquidation is neither feasible nor credible that the Board should select a preferred resolution strategy and, subsequently, assess its feasibility and credibility.¹³²¹ This also impacts upon the decision taken by the Board or the NRAs on whether the public interest criterion (i.e. the third condition for resolution) is met and, hence, whether the credit institution concerned should be resolved or wound-up under normal insolvency proceedings. If the public interest criterion is not met, the failing or likely to fail credit institution may not be resolved, but must be wound up.¹³²²

¹³¹⁹ On this, see **Padoa-Schioppa (2000)**, pp. 24-26, as well as **Nijskens and Eijffinger (2010)** with regard to the link between bail-outs and last-resort lending.

¹³²⁰ For an analysis on the correlation between fragmentation and national resolution, see **Schoenmaker (2013)**.

¹³²¹ See above in **Chapter 4, Section B, under 3.1.2**.

¹³²² See above in **Chapter 6, Section C, under 1.4**.

(5) A comparison of the Board, fully operating since 1 January 2016, within the SRM and the ECB within the SSM, reveals the following:

Firstly, whilst the ECB, as a Treaty-based institution, functions within a quite wide constitutional context, the Board, as an EU agency, is subject to restrictions inherent to the agency model. For instance, contrary to the ECB's distinct rule-making powers,¹³²³ the Board cannot adopt legally binding EU rules and its scope of powers is demarcated under the SRMR.

Furthermore, the Commission and the Council have powers of objection to the Board's resolution actions.¹³²⁴

Finally, the Board critically relies on NRAs: all resolution schemes are implemented by NRAs, even though the Board may step in the event of a NRA's failure.

1.2 In particular: on the public interest criterion

(1) The Board can take resolution action with respect to a credit institution **in a participating Member State** on the basis of the provisions of the SRMR and the BRRD,¹³²⁵ following the general principles governing the operation of the SRM in accordance with **Article 6 SRMR**,¹³²⁶ the resolution objectives referred to in **Article 14 SRMR**¹³²⁷ and the general principles governing resolution action under **Article 15 SRMR**,¹³²⁸ and with due consideration of the principle of subsidiarity laid down in **Article 1(1), second sub-paragraph BRRD**. According to this BRRD Article, when establishing and applying the requirements under the BRRD and when using the different tools at their disposal in relation to an entity covered by its personal field of application – including credit institutions, and subject to specific provisions, resolution authorities and competent authorities must take account of the following aspects: *firstly*, the nature of its business, its shareholding structure, its legal form, its risk profile, size and legal status, its interconnectedness to other institutions or to the financial system in general, as well as the scope and the complexity of its activities; *secondly*, its membership of an IPS that meets the requirements of **Article 113(7) CRR** or of other cooperative mutual solidarity systems as referred to in **Article 113(6)**; and *finally*, whether it exercises any investment services or activities as defined in **Article 4(1), point (2) MiFID II**.

(2) The public interest criterion, i.e. the third condition for the resolution of credit institutions, other entities and groups, is crucial for the decision taken by the Board, as a resolution authority, to decide – provided that the other two conditions are met¹³²⁹ – on resolving a credit institution that has been determined to be failing or likely to fail or on its winding up under normal (national) insolvency procedures.

¹³²³ SSMR, Article 4(3), and TFEU, Article 132 (on this TFEU Article see **Smits (1997)**, pp. 102-106, and **Louis (2009)**, pp. 200-211).

¹³²⁴ See **above, in Chapter 5, Section C, under 2.2.2**.

¹³²⁵ The relation between the SRMR and the BRRD is governed by Article 5 **SRMR**; see **above, in Chapter 2, Section A, under 2.2.2**.

¹³²⁶ See **above in Chapter 2, Section A, under 3**.

¹³²⁷ See **above in Chapter 5, Section A, under 1**.

¹³²⁸ See **above in Chapter 5, Section A, under 2**.

¹³²⁹ See **above in Chapter 5, Section C, under 1.2-1.3**.

The analysis on the two conditions that must be met for a resolution action to be deemed being in the public interest¹³³⁰ leads to two main conclusions:

Firstly, a proxy in relation to whether the public interest criterion would be met at the stage of resolution action is (or at least is expected to be) already apparent during the resolution preparation and (mainly) resolution planning phase. In particular, this applies mainly with regard to the fulfilment of the *first condition of this criterion*, i.e. whether resolution action is necessary for the achievement of, and is proportionate to, at least one of the resolution objectives. In this respect, appropriate assessments in relation to the first two resolution objectives are of particular importance. The determination of whether and which credit institution's and group's functions are critical will have been included in their resolution and group resolution plans, drawn up and adopted by the Board and (if necessary) updated by it annually. In addition, in parallel to the preparation in terms of resolution planning, the Board must have conducted its 'financial stability analysis in banking resolution'.

In relation to both, the conditions prevailing when resolution action will be required (and decided upon, hence at the so-called 'resolution stage') may have been altered leading to the adoption of courses of action which would be different (and usually more unfavourable for the credit institution concerned, its creditors and its shareholders) from those provided for in accordance with the "four-stage strategy" followed for the purpose of assessing resolvability. In particular, it might be decided, on the basis of the public interest criterion, that either the credit institution should be liquidated under normal insolvency proceedings instead of being resolved, or that the preferred resolution strategy should be modified. It is expected that the resolution scheme adopted by the Board in accordance with **Article 18(6) SRMR** will always be based on (most updated version of) the resolution plan, but the Board is not requested to follow it if the conditions have been modified.

In relation to the *second condition* for the application of the public interest criterion, there is no doubt that the comparison with a hypothetical national insolvency scenario to be made by the Board requires some degree of preparation as well.

Secondly, despite the internal coherence of the system of the SRMR (and BRRD) rules governing the public interest criterion, it is generally accepted that this concept remains discretionary. It is, in particular, noted that only with regard to the first condition for the application of that criterion, a determination must be made by the Board both on the necessity of a resolution action for the achievement of (at least one) resolution objective *and* on the proportionality of the resolution action to such an objective.¹³³¹ As **Grünewald (2017)** (at p. 297) correctly remarks: "*Albeit the concept of public interest is so crucial to justifying administrative intervention, it remains one of the most discretionary areas of the resolution framework. (...) [The resolution] objectives (...) are many and varied and remain themselves of a "generic qualitative nature"*".¹³³²

In this respect, the issuance by the EBA, on its own initiative, of Guidelines clarifying certain at least of the contestable issues at hand would be welcome in terms for the sake of legal certainty, since conditions of ambiguity in this respect are not fully warranted. A second best (but still more feasible in the short-term) solution would be for the Board to publicly clarify its PIA strategy.

¹³³⁰ See above in **Chapter 5, Section C, under 1.4**.

¹³³¹ For a detailed analysis of the proportionality at the resolution stage, see **Binder (2019a)**.

¹³³² See also **Freudenthaler and Lintner (2017)** and **Merler (2017)**.

(8) Even though resolution planning and the resolution procedure are mainly tasks of the Board, some safeguards have been introduced in terms of institutional balance.

Firstly, the Commission and the Council have been granted powers of objection to the decision of the Board in relation to a specific resolution scheme, under the conditions and within the (tight) timeframe laid down in **Article 18(7) SRMR**.¹³³³

In addition, the Board is accountable to the European Parliament, the Council and the Commission for the implementation of the SRMR and in particular on the performance of its tasks thereunder (including in relation to the taking of resolution actions), as well as to the national parliaments of participating Member States.¹³³⁴

Furthermore, the Board is also subject to the audit of the Court of Auditors.¹³³⁵

Finally, in relation to a decision taken by the Board on the resolution of a credit institution, proceedings may be brought before the ECJ in accordance with **Article 263 TFEU**, contesting that decision, the Board being required to comply with the ECJ's judgment. The right of appeal to the Board's Appeal Panel is, on the contrary excluded.¹³³⁶

2. An evaluation of the decisions taken by the Board and the first missing element of a complete Banking Union (BU)

(1) In June 2017, the conditions for resolution under the SRMR have been tested for the first time in three cases leading to differentiated assessments and decisions by the Board: while on 7 June the Board took resolution action in respect of **Banco Popular Español**, after having assessed that the conditions for resolution under **Article 18(1) SRMR** were met, two weeks later, on 23 June it decided not to take resolution action in respect of two Italian credit institutions, namely **Banca Popolare di Vicenza S.p.A.** and **Veneto Banca S.p.A.**, assessing that the public interest criterion (i.e. the third condition for resolution) was not met in view of the particular characteristics of these credit institutions and their specific financial and economic situation. An identical decision was taken on 23 February 2018, i.e. not to resolve, but to wind up the Latvian ABLV Bank, AS and its subsidiary ABLV Bank Luxembourg, S.A.¹³³⁷

(2) In the aftermath of the case of the two above-mentioned Italian credit institutions, these have been wound-up by Banca d' Italia under the insolvency proceedings of Italian law permitting the bail-out of senior creditors. As a matter of fact, in these cases there was no "circumvention of EU law" by the Italian government but the "absence of EU law" which permitted this bail-out. As regards winding up of credit institutions, there is (still) no harmonisation of rules at EU level since, as already mentioned, credit institutions' winding up proceedings remain national, given that **Directive 2001/24/EC** on the reorganisation and winding up of credit institutions (as in force) does not provide for the minimum even harmonisation of national reorganisation measures and winding up proceedings.¹³³⁸

¹³³³ See above in **Chapter 5, Section C, under 2.2.2.**

¹³³⁴ See above in **Chapter 3, Section C, under 2.**

¹³³⁵ See above in **Chapter 3, Section E, under 1.2.**

¹³³⁶ See above in **Chapter 3, Section E, under 1.3.**

¹³³⁷ See above in **Chapter 5, Section C, under 4.**

¹³³⁸ See above in **Chapter 1, Section C, under 4.2.**

It is also noted that the debate on building the BU had not touched upon the prospect of amending that regime. **Article 94(1), second sentence (point (e))** and **recital (123) SRMR** simply state that upon review of the Regulation's application in terms of its impact on the internal market and in order to determine whether any modifications or further developments are required for improving the SRM's efficiency and effectiveness, the Commission should, in particular, assess whether the BU needs to be completed through the harmonisation at EU level of insolvency proceedings for failed institutions.¹³³⁹

The author has been arguing since 2014 that such harmonisation is one of the key missing elements in view of the smooth functioning of the single market in banking services and towards the completion of the BU, hence a constitutive element of the unfinished BU agenda.¹³⁴⁰ Nevertheless, arguments in favour of (urgent) EU-level action to harmonise the national frameworks governing the winding up of credit institutions have since then come to the fore more prominently than ever before.

3. Pending developments

3.1 The 'risk reduction agenda'

(1) As discussed,¹³⁴¹ both the SRMR and the BRRD, along with the CRR and the CRD IV, are currently under amendment, to the extent that the Commission's legislative 'banking package' of 23 November 2016 includes, *inter alia*, a combined legislative proposal concerning the review of the MREL and the implementation of the TLAC standard in the EU legal framework. From an operational point of view, while the harmonised minimum level of the TLAC standard will be introduced in the EU through amendments to the CRR and the CRD IV, the '**institution specific add-on**' for global systemically important institutions (**G-SIIs**), as set out in **Article 131 CRD IV**, and the '**institution specific MREL**' for non-G-SIIs are addressed by means of amendments to the BRRD and the SRMR. The main objective of the proposal amending the BRRD is to implement the TLAC standard and to integrate the TLAC requirement into the general MREL rules by avoiding any duplication which might arise from the application of two concurrent requirements. On the other hand, the proposed amendments to the SRMR also relate to the implementation of the TLAC standard in the EU. In particular, the proposal applies to the Board and the NRAs when setting and implementing the requirements on loss absorbing and recapitalisation capacity of entities established in participating Member States.

(2) Upon finalisation and entry into force of these amendments, the EU resolution framework will be further enhanced and fully harmonised with the relevant international financial standards, which is deemed to be a positive development. Nevertheless, in light of the currently prevailing conditions of fragility in the EU banking system (at least in several Member States, including participating ones), the extent of resort to this framework and its adequacy in dealing with generalised crises is still questionable.

¹³³⁹ See above in **Chapter 2, Section A, under 6.3 (4)**.

¹³⁴⁰ See **Gortsos (2014a)**, pp. 19-20. On this aspect, see also, by way of mere indication, **International Monetary Fund (2018)**, pp. 22-23.

¹³⁴¹ See above in **Chapter 1, Section C, under 2.1** and in **Chapter 4, Section C, under 5**.

It remains to be seen, over the coming years, how many credit institutions will be determined as failing or likely to fail (i.e. the first condition for resolution¹³⁴²), what the use will be of ‘precautionary recapitalisations’ (especially for the largest significant credit institutions) in such cases,¹³⁴³ and how the Board (*mainly* for significant credit institutions in the participating Member States) or the NRAs (for less significant credit institutions in the participating Member States and for all credit institutions in the Member States with a derogation) will deal with such cases.

(3) With regard to this aspect and notwithstanding the rationale underlying the current regulatory reform, the author notes that legal certainty and efficiency dictate a ‘regulatory pause’ (even though current and forthcoming developments signal to the opposite). Taking into account, in particular, the difficulties arising from the appropriate application and interpretation of several provisions of the extensive new regulatory framework in the BU era (CRR and the national legislation having incorporated the CRD IV and the BRRD), the steady state should be reached soon and not be distorted by a new wave of regulations before the recent ones have been fully and adequately absorbed.

In any case, it is his strong belief that the preservation of systemic stability is not a linearly positive function of extensive and extremely detailed micro- and macro-prudential regulations, such as those contained in the Basel III regulatory framework and in the CRR. Emphasis should *mainly* be given to the quality and targeting of regulatory interventions,¹³⁴⁴ the effective micro-prudential supervision of credit institutions (an aspect included in the current Commission’s agenda), as well as the existence of reliable enforcement and sanctioning mechanisms, adequate early warning systems and adequate (solvency and liquidity) crisis management mechanisms.

3.2 The ‘risk sharing agenda’

3.2.1 Establishment of the common backstop to the Board for the SRF

An aspect of important significance which must be assessed refers to the establishment of the common backstop to the Board for the SRF and the amounts to be earmarked in this respect.¹³⁴⁵ Notwithstanding all the legitimate burden-sharing and (mainly) moral hazard concerns that may be raised, the initial ceiling of **60 billion euros** may not prove sufficient in the worst-case scenario (which should not be ruled out), i.e. that one, if not more, of the largest ‘significant credit institutions’ (within the meaning of **Article 6 SSMR**) in the euro area (or any potential participating Member State in close cooperation) were to be resolved. The fact that the common backstop is designed as a measure of last resort (once the amounts raised or available by the *ex-ante* and *ex-post* contributions under **Articles 71-72 SSMR** are not sufficient) and that the 60 billion euros amount may be increased under specific conditions, do not hold, in the author’s opinion, as arguments if the declared goal of the creation of the backstop is *enhancing confidence* in the European banking sector. This holds especially true under the present circumstances of accumulated problems not only for several credit institutions established in weaker national economies of the euro area, but also for credit institutions even in strong national economies of the euro area – again notwithstanding any legitimate burden-sharing and moral hazard concerns, but seriously taking into account the risk of potential spillover effects which still remains in place.

¹³⁴² See above in **Chapter 5, Section C, under 1.2.**

¹³⁴³ See above in **Chapter 5, Section C, under 1.2.1.2.**

¹³⁴⁴ See on this also **Herring and Santomero (2000).**

¹³⁴⁵ See above in **Chapter 6, Section A, under 4.5.2.**

It is the author's opinion, nevertheless, that a potential increase of these amounts and the endowment of the ESM with a higher financial capacity would definitely *signal* an increased potential for efficient crisis management resolution. Irrespective of the course of action to be followed by the resolution authorities (resolution action or liquidation under normal insolvency proceedings), the fact remains that the pool of funds available for the provision of resolution funding aid or for the compensation of covered depositors (respectively) is limited and will remain limited even after the common backstop is adopted and the EDIS is established.

3.2.2 Establishment of the EDIS

(1) The absence of a single European DGS is another (still) missing element towards a complete BU. The DGSD, transposed into the legislation of all EU Member States, participating and non-participating, by 2015, has significantly improved the capacity of national DGSs to compensate depositors in a timely manner; these DGSs are thereafter also called upon to contribute to resolution financing under the conditions laid down in the DGSD. In addition, the case has been made for the Europeanisation of DGSs within the BU (in parallel with the already achieved Europeanisation of banking micro-prudential supervision and resolution), as reflected in the fact that the establishment of the EDIS has been considered to be its third main pillar. Nevertheless, the EDIS, to be supported by the DIF, is not envisaged to be put in place (even under an optimistic scenario) before 2020.¹³⁴⁶

(2) The establishment of the EDIS and the DIF is not a sufficient condition for banking stability in the Eurozone but, without doubt, a necessary one, primarily taking into account the fact that (as already mentioned), under the SRMR, the default scenario for credit institutions deemed (by the ECB) as failing or likely to fail is their liquidation and not their resolution and hence the activation of DGSs in their payout function will not be the exception. The existing capacity of national DGSs in that function may sometimes not suffice, while the raising of extraordinary *ex-post* contributions might, under conditions, trigger indirect negative spillover effects to financial stability (which, *inter alia*, is a resolution objective under **Article 14 SRMR**¹³⁴⁷). In any case, account must be taken of the fact that the pool of funds available for the provision of resolution funding aid (as well as for the compensation of covered depositors) will remain limited, even after the EDIS is established and the common backstop is approved.

(3) Upon its establishment, the EDIS will gradually take over the two mandatory functions of national DGSs under the DGSD: it will serve as a 'paybox' for depositors in case of a payout event and it will also assume the 'contribution to resolution financing' function. At the same time, the SRF will remain the main EU-wide resolution financing arrangement. Both the SRF and the DIF will be administered by the Board. The mere existence of two different funds administered by the same EU agency (i.e. the Board) would not, *per se*, prevent the efficient operation of both the SRM and the EDIS. To the contrary, centralised decision-making, monitoring and enforcement powers to be entrusted to the Board will underpin a framework for setting and subsequently implementing uniform rules on deposit guarantee arrangements,¹³⁴⁸ concurrently further supporting the financing of resolution actions taken by the Board.

¹³⁴⁶ See above in **Chapter 1, Section B, under 3.1** and **Section C, under 3**.

¹³⁴⁷ See above in **Chapter 5, Section A, under 1**.

¹³⁴⁸ On this consideration, see also recital (11) of the **proposed SRMR**.

Nevertheless, significant synergies could be achieved, in the author's view, upon establishment of the EDIS and the DIF and, if and when they reach their steady state,¹³⁴⁹ if the 'contribution to resolution financing' function of the EDIS were to be transferred to the SRF.¹³⁵⁰ *Inter alia*, this proposal is mainly based on the consideration that, since both funds will, in principle, be exclusively funded by contributions of the (same group of) credit institutions to which the (amended) SRMR will apply, the burden-sharing mechanism will not be altered.¹³⁵¹

A simplification of the framework to be in place at the steady state of the BU (notwithstanding also the fact that **Articles 109 BRRD** and **79 SMRM**, which will apply within the EDIS framework as well, are extremely complex and their application is, to a certain extent, unpredictable¹³⁵²) would, according to the author, add value to the credibility of resolution financing arrangements in the EU.¹³⁵³ The implementation of such a proposal is, nevertheless, contingent upon the EDIS reaching the 'full insurance' stage, whereby participating DGSs would be fully insured by it (subject to the conditions laid out in the proposal).

3.3 Liquidity in resolution

(1) Both the SRMR and the SRF Agreement do not contain provisions in relation to the provision of liquidity (and the resulting stabilisation) after the decision has been taken by the Board to resolve a credit institution (and, as the case may be, its group) either as a going-concern (i.e. by application of the (open-bank) bail-in resolution tool provided for in **Article 27 SRMR**, in order to ensure its recapitalisation) or by application of the gone-concern resolution tools (i.e. sale of business and bridge institution tool, **Articles 24 and 25**, respectively). Accordingly, if a credit institution is not in a position, after a resolution action, to cover its potential increased liquidity needs (mainly due conditions of deposits outflow after the bail-in, market volatility and information asymmetries concerning its viability) through internal liquidity sources (such as cash and other liquid assets available for sale or use as collateral) access to the market for borrowed funds or resort to the (standard) monetary policy operations of the ECB, access must be had to alternative public sector 'backstop funding (i.e. liquidity) mechanisms': the available financial means of the SRF and access to the central-bank lending of last resort facilities.

¹³⁴⁹ This comment is made mainly in view of the political consensus to drop the third full insurance stage (see above in **Chapter 1, Section C, under 3**).

¹³⁵⁰ See **Gortsos (2019a)**, Section 4 (3)-(4).

¹³⁵¹ The above-mentioned common backstop to the Board for the SRF, despite its undisputed necessity, definitely constitutes an exception to this consideration.

¹³⁵² A notable example is the determination of the liability of DGSs when one or more other (than the bail-in) resolution tools are applied, which is based on hypothetical insolvency scenarios (see above in **Chapter 6, Section A, under 5.2.1**).

¹³⁵³ For a similar (but not identical) proposal, see **Schoenmaker, D. (2018)**, pp. 318-320, who advocates for the *full integration* of the SRF and the EDIS into a Single Resolution and Deposit Insurance Fund (SRDIF), following similar legislative practices in the US and in Japan (on the US banking resolution framework and its comparison to that in the EU, see **Ventoruzzo and Sandrelli (2019)**, Section IV). Apart from the above-mentioned signaling consideration for keeping the DIF, as a payout fund, separated from the SRF, as a resolution fund, the author wishes to remark that the EDIS itself is not a fund.

(2) The first alternative public sector backstop funding mechanism for the Eurozone would be mainly the common backstop to the SRM for the SRF, which, nevertheless, is not expected to have the necessary funding capacity. Given this severe constraint, the emphasis falls on last resort lending facilities. In relation to liquidity in resolution, the ECB is currently discussing a new instrument for granting Eurosystem Resolution Liquidity (**ERL**), the activation of which would be based on specific rules. Furthermore, the instrument would provide that the financing is temporary and should be replaced by private funding once the credit institution concerned has restored its access to capital markets. This debate is closely linked to the still unsettled issue on whether the function of the ELA, in cases of resolution or in general, should be centralised at the level of the ECB.¹³⁵⁴

¹³⁵⁴ On this issue, see above in **Chapter 6, Section C**.

Appendix

TABLE 14	
Definition of the various categories of national authorities mentioned in the SRM Regulation	
National competent authority (NCA)	A public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned
National designated authority (NDA)	<p>(1) According to Article 458 of the CRR on macro-prudential or systemic risk identified at the level of a Member State, Member States must designate the authority in charge of the application of this Article. This authority is the competent authority or the designated authority</p> <p>(2) In point (8) of Article 128 of the CRD IV on the definition of buffers, 'domestically authorised institution' means an institution that has been authorised in the Member State for which a particular 'designated authority' is responsible for setting the countercyclical buffer rate</p>
National resolution authority (NRA)	<p>A public administrative authority or authorities entrusted with public administrative powers for the resolution of credit institutions, which may be:</p> <ul style="list-style-type: none"> • an NCB, • a competent ministry, • another public administrative authority or authority entrusted with public administrative powers, or • <i>exceptionally</i>, the competent authority for supervision for the purposes of the CRR and the CRD IV

TABLE 15		
Definition of regulated entities		
Point of Article 2(1) BRRD	Entity	Definition
Point (2)	Credit institution	an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account
Point (3)	Investment firm	any legal person whose regular occupation or business is the provision of one or more 'investment services' to third parties, and/or the performance of one or more 'investment activities' on a professional basis
Point (4)	Financial institution	<p>an undertaking other than an institution, the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to the CRD IV</p> <ul style="list-style-type: none"> • including a financial holding company, a mixed financial holding company, a payment institution within the meaning of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 "on payment services in the internal market", and an asset management company, • but excluding insurance holding companies and mixed-activity insurance holding companies as defined, respectively, in points (f) and (g) of Article 212(1) of Directive 2009/138/EC
Point (6)	Parent undertaking	a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC
Point (5)	Subsidiary	<p>(a) a subsidiary undertaking within the meaning of Articles 1-2 of Directive 83/349/EEC</p> <p>(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</p> <p>Subsidiaries of subsidiaries must also be considered to be subsidiaries of the undertaking that is their original parent undertaking</p>
Point (17)	Branch	a place of business which forms a legally dependent part of an institution and which carries out directly all or some of the transactions inherent in the business of institutions

TABLE 15 (continued)		
Definition of regulated entities		
Point of Article 2(1) BRRD	Entity	Definition
Point (9)	Financial holding company	a financial institution, the subsidiaries of which are exclusively or mainly institutions or financial institutions, at least one of such subsidiaries being an institution, and which is not a mixed financial holding company
Point (12)	Parent financial holding company in a Member State	a financial holding company which is not itself a subsidiary of an institution authorised in the same Member State, or of a financial holding company or mixed financial holding company set up in the same Member State
Point (13)	Union parent financial holding company	a parent financial holding company in a Member State which is not a subsidiary of an institution authorised in any Member State or of another financial holding company or mixed financial holding company set up in any Member State
Point (10)	Mixed financial holding company	a parent undertaking, other than a regulated entity, which, together with its subsidiaries - at least one of which is a regulated entity which has its registered office in the Union - and other entities, constitutes a financial conglomerate
Point (14)	Parent mixed financial holding company in a Member State	a mixed financial holding company which is not itself a subsidiary of an institution authorised in the same Member State, or of a financial holding company or mixed financial holding company set up in that same Member State
Point (15)	Union parent mixed financial holding company	a parent mixed financial holding company in a Member State which is not a subsidiary of an institution authorised in any Member State or of another financial holding company or mixed financial holding company set up in any Member State
Point (11)	Mixed-activity holding company	a parent undertaking, other than a financial holding company or an institution or a mixed financial holding company, the subsidiaries of which include at least one institution

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7. Decisions of the Single Resolution Board

Decision of the Executive Session of the Board of 9 February 2017 “on public access to the Single Resolution Board documents” (**SRB/ES/2017/01**) (available at: https://srb.europa.eu/sites/srbsite/files/srb-es-2017-01_decision_public_access_to_the_srb_documents.pdf)

Decision of the Plenary Session of the Board of 28 June 2016 “establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and the national resolution authorities (**SRB/PS/2016/07**) (available at: https://srb.europa.eu/sites/srbsite/files/srb_ps_2016_07.pdf)

Decision of the Plenary Session of the Board of 25 November 2015 “adopting the Code of Conduct for the Members of the Plenary Session and Executive Session of the Single Resolution Board” (**SRB/PS/2015/13**) (available at: https://srb.europa.eu/sites/srbsite/files/code_of_conduct.pdf)

Decision of the Plenary Session of the Board of 25 November 2015 “adopting the Code of Ethics and good administrative behaviour for staff of the Single Resolution Board” (**SRB/PS/2015/12**) (available at: https://srb.europa.eu/sites/srbsite/files/srb_ps_2015_12.pdf)

Decision of the Plenary Session of the Board of 29 April 2015 “adopting the Rules of Procedure of the Single Resolution Board in its Plenary Session” (**SRB/PS/2015/9**) (available at: https://srb.europa.eu/sites/srbsite/files/srb-rules-of-procedure-plenary-session_en.pdf)

Decision of the Plenary Session of the Board of 29 April 2015 “adopting the Rules of Procedure of the Single Resolution Board in its Executive Session” (**SRB/PS/2015/8**) (available at: https://srb.europa.eu/sites/srbsite/files/srb-rules-of-procedure-executive-session_en.pdf)

Decision of the Plenary Session of the Board of 25 March 2015 “on adopting the Financial Regulation of the Single Resolution Board (Board)” (available at: https://srb.europa.eu/sites/srbsite/files/2015-srb-financial-regulation_en.pdf)

8. Documentation on recent cases relating to the resolution framework

8.1 Banco Popular Español

Notice of the Single Resolution Board (SRB) summarising the effects of the resolution action taken in respect of this Spanish credit institution (available at: https://srb.europa.eu/sites/srbsite/files/note_summarising_effects_07062017.pdf)

ECB Press Release deeming Banco Popular as failing or likely to fail (available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170607.en.html>)

Press Release of the European Commission approving the resolution scheme (available at: https://europa.eu/rapid/press-release_STATEMENT-17-1502_en.htm)

Resolution of the FROB Governing Committee adopting the measures required to implement the SRB's Decision (available at: https://www.frob.es/en/Lists/Contenidos/Attachments/419/ProyectodeAcuerdoreducido_EN_v1.pdf)

Decision of the SRB Appeal Panel of 9 November 2017 in the Case 36-17 (anonymised) (available at: https://srb.europa.eu/sites/srbsite/files/case_36-17_anonymised_decision.pdf)

'Extensive' non-confidential version of the Resolution Decision, the Valuation Reports and the Resolution Plan of this credit institution, 2 February 2018 (available at: <https://srb.europa.eu/en/content/banco-popular>)

8.2 Banca Popolare di Vicenza

Notice of the SRB summarising the effects of the decisions taken in respect of Banca Popolare di Vicenza (available at: https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_banca_popolare_di_vicenza_s.p.a._20.00.pdf)

ECB Press Release deeming Banca Popolare di Vicenza as failing or likely to fail (available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170623.en.html>)

Non-confidential version of the Resolution Decision in relation to Banca Popolare di Vicenza (available at: https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf)

Commission approval of State aid for market exit of Banca Popolare di Vicenza (available at: https://europa.eu/rapid/press-release_IP-17-1791_en.htm)

8.3 Veneto Banca

Notice of the SRB summarising the effects of the decisions taken in respect of Veneto Banca (available at: https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_veneto_banca_s.p.a_20.00.pdf)

ECB Press Release deeming Veneto Banca as failing or likely to fail (available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170623.en.html>)

Non-confidential version of the Resolution Decision in relation to Veneto Banca (available at: https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf)

Commission approval of State aid for market exit of Veneto Banca (available at: https://europa.eu/rapid/press-release_IP-17-1791_en.htm)

8.4 Monte dei Paschi di Siena S.p.A.

Agreement of 1 June 2017 between the European Commission and the Italian Ministry of Finance on the precautionary recapitalisation of that credit institution (available at: https://europa.eu/rapid/press-release_STATEMENT-17-1502_en.htm)

Authorisation by the Commission of the precautionary recapitalisation of Monte dei Paschi (available at: https://europa.eu/rapid/press-release_IP-17-1905_en.htm)

8.5 ABLV Bank, AS and ABLV Bank Luxembourg, S.A.

Notice of the SRB summarising the decision taken in respect of ABLV Bank, AS (available at: https://srb.europa.eu/sites/srbsite/files/20180223-summary_decision_-_latvia.pdf)

Notice of the SRB summarising the decision taken in respect of ABLV Bank Luxembourg, S.A. (available at: https://srb.europa.eu/sites/srbsite/files/20180223_summary-decision_-_luxembourg.pdf)

ECB Press Release deeming ABLV Bank, AS ABLV Bank Luxembourg, S.A. as failing or likely to fail (available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html>)

Non-confidential version of the Resolution Decision in relation to ABLV Bank, AS (available at: https://srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-09_ablv_lv_non_confidential_version_final_0.pdf)

Non-confidential version of the Resolution Decision in relation to ABLV Bank Luxembourg, S.A. (available at: https://srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-09_ablv_lv_non_confidential_version_final_0.pdf)

9. Other

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