

## **BANKING STAKEHOLDER GROUP**

EBA/CP/2021/12

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BSG 2021 045

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Deadline: 17 June, 2021

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### **GUIDELINES ON IMPROVING RESOLVABILITY**

Response to the EBA Consultation Paper on Guidelines for institutions and resolution authorities on improving resolvability (EBA/CP/2021/12)

#### Summary

The EBA Banking Stakeholder Group (BSG) welcomes these Guidelines, which represent further progress towards harmonising the implementation of the Bank Recovery and Resolution Directive (BRRD II) across Member States. It is important that these guidelines are written in a way so that they can function as a helpful tool for institutions in their efforts to fulfil resolvability expectations, and for resolution authorities in their mandate to provide consistent guidance to institutions throughout the Union.

The Guidelines draw on a number of relevant reference documents including, in particular, the FSB's guidance notes on operational continuity, access to FMIs, and bail-in execution, and the SRB's Expectations for Banks ('SRB Expectations'). Accordingly, there are overlaps between the Guidelines and the SRB Expectations, in particular. To assist institutions in applying the EBA Guidelines and SRB Expectations correctly and in a consistent manner it would be helpful if the Guidelines could be cross-referenced to the corresponding provisions in the SRB Expectations, where appropriate. For Member States outside the Eurozone, where no similar guiding documents regarding resolvability have been published, these Guidelines might therefore in some aspects need to be supplemented with more detailed explanations. This could be done, for instance, by inserting links in the relevant sections of the Single Rulebook and/or the Single Rulebook Q&A on Recovery, Resolution and DGS.

#### 1. **Scope of application of the guidelines**

- The BSG strongly supports the EBA's efforts to develop a more harmonised framework, and to promote convergence between Member States. This framework should define clear responsibilities for both banks and authorities. For all banks, and especially for cross-border banks, efficient crisis management procedures are dependent on holistic and unified resolution planning across the group. For institutions to participate in the resolution planning process constructively and effectively, as intended by the Guidelines,

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resolution authorities should be encouraged to formulate their expectations in a clear and detailed manner.

- The BSG appreciates that a balance needs to be struck between the need to provide clarity to institutions as to what is expected of them, and the need to give resolution authorities a sufficient degree of discretionary latitude to adapt their guidance to the circumstances of the individual institution or group. This is of particular importance in the context of applying the principle of proportionality. Where the draft Guidelines make use of qualifiers, such as *'adequate'* and *'sufficient'*, to provide resolution authorities with a degree of discretionary flexibility that might be appropriate due to the practical nature of resolution planning and differences in the degree of complexity among resolution groups, EBA should remind resolution authorities to be transparent and specific in how they apply that discretion.
- The Guidelines should specify the limits within which national resolution authorities may impose more stringent requirements to favour the harmonisation process and where they should refrain from setting requirements that impose excessive costs especially on smaller institutions, in line with the principle of proportionality.
- Resolution planning is dependent on cooperation and dialogue between the bank, the resolution authority and, where relevant, third parties. The Guidelines should encourage a regular dialogue between the competent authorities and the institutions to update the requirements according to the evolution of the bank's operations and market conditions.

## 2. Operational continuity in resolution

- In sec. 4.1.1. (par. 13) the Guidelines introduce the new concept of "relevant services", which is defined as the aggregate of "critical services" and "essential services". Critical services are defined as "services supporting critical functions" and essential services as "core business lines needed for the effective execution of the resolution strategy and any consequent restructuring". These definitions mirror the ones provided in sec. 2.4.2. of the SRB Expectations and provide a useful link to connect an institution's 'critical functions' and 'core business lines', as defined in points 35 and 36 of Art. 2(1) of Directive 2014/59/EU (BRRD II), with the underlying services required to support these activities. We note, however, that it would be desirable, in the interest of regulatory consistency and legal certainty, for these definitions to be enshrined in Level 1 legislation, preferably in Art. 2(1) of BRRD II.
- In this context it is worth pointing out that similar concepts are defined in other legislation: Art. 4(4) and Annex II of Directive (EU) 2016/1148 (NIS 2)<sup>1</sup> define 'operators of essential services', which include credit institutions and financial markets infrastructures (FMIs), among others; points 17 and 18 of Art. 3(1) of the proposed

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<sup>1</sup> Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (Revised Directive on Security of Network and Information Systems; NIS 2), OJ L 194, 19 July 2016, pgs. 1–30

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Directive on digital operational resilience for the financial sector (DORA)<sup>2</sup> provide definitions of ‘critical or important functions’ and ‘critical ICT third-party service providers’. These existing, and proposed, terminological overlaps should be taken into account when using the terms “critical services” and “essential services” in the context of the Guidelines, as well as in any future definitions in Level 1 legislation.

- The BSG notes that the wording in sec. 4.4.1 (par. 17) of the Guidelines which propose contractual provisions to mitigate continuity risk arising from service-level contracts with third parties is unclear: as it stands, the wording could be seen to suggest that the proposed mitigation measures should be taken only in respect of ‘third party contracts governed by third-country laws’. We note that the corresponding provision in the SRB’s Operational Guidance on Operational Continuity in resolution of July 2020 (sec. 3.,4,2.) does not make this distinction and it is unclear why it should be made in the Guidelines.
- Also in sec. 4.4.1. (par. 20) the EBA suggests that institutions should make arrangements to pre-fund payment obligations under third-country outsourced contracts for six months if they are unable, despite their best efforts, to make them ‘resolution resilient’ in accordance with par. 17 and 19 of sec. 4.4.1. We note that this provision differs from the SRB Expectations (sec. 3.4.3., par. 46), which require funding to be provided for ‘a reasonable period of time (minimum six months)’. In practice, the timelines for the implementation of a resolution plan, including the transfer of critical services from one provider to another, if needed, are likely to differ significantly from one institution to another and could well exceed six months in the case of larger, more complex groups. We would therefore recommend aligning par. 20 with the SRB Expectations to provide resolution authorities with the discretion to set a timeframe that is deemed appropriate in the light of the respective institution’s resolution plan.

### 3. Access to FMIs in case of resolution

- The BSG agrees that it is important that institutions have arrangement in place to ensure continued access to the services provided by FMIs. To be able to fulfil the minimum requirements specified in section 4.4.2, banks are dependent on the cooperation, and the timely and correct supply of information from the FMIs. It should be made clear that FMIs are required to cooperate and share the required information with the institution. In this regard, some members of the BSG have raised the question whether it would be more efficient for resolution authorities to enter into a dialogue with the FMIs directly, and thereafter issue common policies/requirements. Instead of requiring each bank to request information from FMIs individually it could be more efficient if such information requests were issued by the resolution authority to the FMIs directly.

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<sup>2</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector (DORA), COM(2020) 595 final, 24 September 2020

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### 4. Management information systems and information system testing

- The BSG agrees that testing of information systems, e.g. by way of 'dry runs', as suggested in sec. 4.3.1. (par. 77) is useful and feasible but notes that this instrument should not be applied disproportionately. 'Dry runs should have the objective of resolving identified issues and not be conceived as a routine activity which would increase the burden on institutions. In addition, sufficient preparation time should be granted to banks and 'dry runs' should avoid disruption to normal course of business.

### 5. Funding and liquidity in resolution

- According to sec. 4.2.1 (par. 71) of the draft Guidelines, institutions should prepare to be able to meet collateral requirements for central bank support in a resolution situation (ELA support). For banks to comply with this requirement it is necessary, however, that central banks are clear in advance about the collateral requirements they would have in a such a situation.
- The Guidelines should clarify if the provisions regarding the access to ordinary central bank facilities (sec. 4.2.1., par. 74) refer to the case of the days before the declaration of 'failing or likely to fail' or if they refer also to the situation post-resolution when the resolution plan, as approved by resolution authorities, has been already put in place. In the latter case, it is difficult for credit institutions to anticipate the post-resolution scenario, considering, in particular the uncertainty regarding the possibility that central banks could grant liquidity post the declaration of 'failing or likely to fail'. This could be relevant in the context of funding the continuing, recapitalised operations of a restructured bank.

### 6. Resolution implementation

- According to sec. 4.5.1 (par. 90) of the draft Guidelines, institutions should prepare a bail-in 'playbook'. Institutions that are under the purview of the SRB have been subject to this requirement for some time under Principle 2.3 of the SRB Expectations. Institutions outside the SRM have not had clear guidance yet on what such a playbook should include and would appreciate if the EBA could provide a template to illustrate how such a playbook should be constructed.
- According to sec. 4.5.4 (par. 119) of the draft Guidelines, the institution, in cooperation with resolution authorities, should develop a comprehensive creditor and market communication strategy for the resolution period. Some members are of the view that there should also be a requirement for the resolution authority to develop a communication plan first., and the institution should draft its communication plan thereafter. These two communication plans should be coordinated.
- Some members are of the view that the process of binding mediation between resolution authorities should become more transparent and adapted to the needs of the market

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participants. In particular, the information shared should be made more transparent, and financial institutions should be consulted.

### 7. Areas of resolvability that require further specification

- The scope covered in the Guidelines follows international standards and European practices. The BSG believes that there is no need to materially expand the scope of policy areas covered at this stage. Instead, the focus should now be on delivering high-quality resolution planning for the policy areas in scope.
- The BSG notes, however, that the Guidelines could provide more comprehensive guidance on training for staff involved in resolution. Such guidance should cover not only those employees referred to in sec. 4.1.3. (par. 61), but all members of staff whose involvement is critical for resolution purposes, including staff that is considered to be relevant for operational resilience and all teams that could eventually be involved on the 'resolution weekend'. Members of the teams within an institution that are considered critical in resolution should have a sound understanding of the resolution framework and know what is expected from them in the event of resolution. This requirement is applied already by the SRB in its regular communication with banks and could be incorporated into these Guidelines, e.g. based on the text in sec. 3.4.7. (par. 49) of the EBA Guidelines on ICT and security risk management (EBA/GL/2019/04).
- Related to the requirement to appoint a member of the management body for the allocation of the work on resolution planning /resolvability, the BSG would suggest a more flexible approach to properly encompass and accommodate also one-tier management body systems, by allowing institutions to appoint a key function holder who is not a member of the Board but reports directly to the Board of Directors.