



EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Danièle NOUY

Chair of the Supervisory Board

Members of the ECON Committee of the European Parliament
European Parliament
60, rue Wiertz
B-1047 Brussels

Frankfurt am Main, 12 April 2016

Re: Request made during the SREP workshop on 20 January

Honourable Members of the European Parliament,

As mentioned during the workshop on the Supervisory Review and Evaluation Process (SREP) held in Strasbourg on 20 January 2016, the ECB has conducted a stocktake of the transpositions into national law of the Bank Recovery and Resolution Directive (BRRD).¹ Further to the interest you expressed in the results of this analysis, I would now like to report on our findings.

The BRRD has now been (fully or, in two cases, partially) transposed in all euro area Member States, albeit with some significant delays.

The BRRD is a minimum set of harmonised rules, which still allows European Union (EU) Member States to prescribe more detailed rules where they deem necessary. The Directive also gives Member States some explicit options regarding its implementation.

As the single supervisor for significant institutions, the ECB has to resort to national law for its supervisory tasks relating to recovery planning and early intervention. Differences in the national approaches to the implementation of the BRRD may therefore imply a different range of supervisory powers, as well as differences in the timelines and in the stakeholders involved in the supervisory processes.

This stocktake, conducted among national competent authorities within the banking union, mainly covered supervisory topics such as recovery planning and early intervention powers, but also looked at the main characteristics of the resolution toolbox, such as the resolution tools available in the Member States and the bank insolvency hierarchies.

The stocktake results show that Member States appear to have remained close to the text of the Directive for most of the topics covered, such as the resolution tools available under national law. However, in view of the sometimes significant differences in the national insolvency regimes and legal systems, the relevant resolution authorities will still need to tailor their approach to fit the Member State's legal context.

¹ Directive 2014/59/EU of the European Parliament and of the Council.

Moreover, we saw a variety of national supervisory approaches in some areas. For example, almost half of the Member States provide for additional early intervention measures by the competent authority, ranging from defining the appropriate accounting criteria for disclosing the bank's financial position to imposing a moratorium (i.e. ordering that the institution be temporarily closed for business).

Also, a few Member States set additional or more detailed requirements for recovery planning (e.g. specific time limits, mandatory inclusion of additional recovery indicators, requirements for mandatory review of the recovery plan by auditors).

Regarding resolution tools, in almost half of the Member States, government financial stabilisation tools are part of the national resolution toolbox in case of bank failure, as a last resort if the use of other resolution tools would not suffice to maintain financial stability.

Furthermore, under the BRRD and the Single Resolution Mechanism Regulation², a harmonised creditor hierarchy was established for (i) the write-down of capital instruments and (ii) bail-in. The BRRD does not, however, harmonise the hierarchies of claims in national insolvency regimes, except for the introduction of a minimum harmonised two-step depositor preference in the insolvency hierarchy.³ Determining the insolvency ranking of other claims is purely within the national remit.

This is important in the case of resolution because some misalignments are present between each Member State's insolvency hierarchy and the BRRD creditor hierarchy – partly owing to the exceptions to bail-in provided for in the BRRD. Hence, such divergences may lead to potential “no creditor worse off” (NCWO) claims by bailed-in creditors. Such claims would be eligible for reimbursement from the resolution fund by the resolution authority. Some Member States have proposed or enacted legislation introducing additional layering in their national hierarchies of claims. These may be useful in mitigating NCWO claims.

Yours sincerely,

[signed]

Danièle Nouy

² Regulation (EU) No 806/2014 of the European Parliament and of the Council.

³ Covered deposits are preferred over all other deposits held by retail investors and small and medium-sized enterprises, which in turn have preferred status over other eligible deposits.