



Brussels, 21 November 2017
SRB/CM01/ARES(2017)6412001

Mr. Sven Giegold MEP
European Parliament
Altiero Spinelli 05F163
60, rue Wiertz/ Wiertzstraat 60
B-1047 Bruxelles/Brussels
E-mail address: sven.giegold@europarl.europa.eu
E-mail copy: ip-econ@europarl.europa.eu

Subject: Reply to the request dated 29 March 2016 for further information to the Chair of the SRB, Ms Elke König

Dear Mr. Giegold,

As promised in my last letter on the question of legal obstacles to resolution and resolvability dated 17 March 2017, I am writing to you to share our final observations in response to your request.

As a specialised body, the SRB follows closely the practicalities of everyday resolution-related work at both the EU and national levels and can already build on its first resolution case experience. As a result of this on-going work, we share with you a set of observations that should not only be pertinent for functioning of the Single Resolution Mechanism ('the SRM') but also provide additional basis for further reflexion on ways to strengthen the Banking Union project as a whole. My remarks therefore revolve around three main parts: interactions between the SRB and the national resolution authorities ('the NRAs'), use of resolution tools and other high-level observations.

Firstly, let me start by underlining the complexity that the SRB operates in. This includes a "two stages" process, whereby the SRB, as a Union level body, adopts decisions that the NRAs are required to implement in their national implementing orders – subject to national law requirements, which may overlap with the EU requirements and/or differ in substance. This legal construct implies that SRB decisions are not only subject to a possible legal challenge in front of the European Courts but also, at the same time, "national" implementing parts of SRB decisions are subject to possible legal actions in front of national courts.

Consequently, the ability of stakeholders to challenge an SRB decision under various European and national venues simultaneously severely dents into the legal certainty and uniformity of the application of the rules that the SRB is empowered to maintain throughout the Banking Union. In other words, given the possibility of diverging outcomes as a result of such legal actions, the stakeholders may find themselves treated unequally, undermining – *in extremis* - the SRB's and the Banking union's credibility.



While admittedly there is a “testing of a new system” effect usually manifesting itself via an initially increased litigation activity in front of courts, such trend could also be attributed to the rather high complexity of the applicable legal framework. As confirmed by our experience so far, this stems partly from partial overlaps between the requirements of the EU and national legal orders, be it, for instance, in terms of the need to replicate information contained in SRB decisions in national implementing decisions (i.e. the question of direct applicability), the applicable linguistic regime, general communication requirements and the required level of transparency, the remedies available nationally or the sequence of approvals required under national law. In short, the relations between the SRB and the NRAs and the discretion of national systems when implementing SRB decisions remain to be clarified further – be it through legislative action or jurisprudence.

Moreover, the involvement of other national authorities in the implementation of a resolution action adopted at the SRB level remains equally complicated and still to be fully tested. In fact, in addition to the complexities within the SRB/NRAs relation, there seem to be also other “decision-making residuals” in the system that may interfere with the smooth implementation of SRB decisions. This includes a potential involvement of some national finance ministries requiring prior consent or the statutory role of national courts pre-approving implementing decisions to be adopted by the NRAs. In other words, these additional actors may find themselves “re-assessing” at least some of the factual considerations that the SRB is mandated to take into consideration at the stage of the adoption of the SRB decision such as systematic implications of its decisions. While those remain idiosyncratic to particular national jurisdictions, they decrease the level of legal predictability required, especially in a typical multinational “over the weekend” scenario.

Another example at the border line of the BRRD that adds to the overall complexity of the functioning of the SRM is the role of national labour law requirements. Further to the fact that the BRRD remains vague in terms of the obligation to activate employees representatives consultation mechanisms under national laws, non-harmonised national labour law requirements in resolution influence both the legal “feasibility” assessment of the use of resolution tools - thereby influencing proposed SRB resolution strategies - but could also have an impact on the conclusions regarding public interest assessment as the national labour law regime impacts restructuring options of the resolved entity and – broadly - its economic environment. As a result, it may be extremely difficult to use the sale of business resolution tool in the over the weekend scenario in some jurisdictions - and therefore in all of the banking union countries concerned - as the sale of business may entail complying with the process of staff delegation consultation, which respects its own timelines.



Finally, blurred legal lines complicating the implementation of resolution action in the over the weekend scenario and necessitating further clarifications exist also between the insolvency regimes to which the resolution regime acts as an exception. Such examples would include the link between special managers and insolvency administrators and the divergent national law requirements regarding their appointment (i.e. registration or notification requirements) or the (unclear) possibility of the same person exercising both roles at the same time.

Let me now turn to the question of the use of resolution tools. While their “fit for purpose” test remains largely to be still run in practice at the EU level, it would appear that – in addition to their underlying economic rationale and as mentioned already above – their institutional design has equal impact on their deployment. In this sense, sale of business and bail-in tools appear to be still less “cumbersome” than asset separation and bridge institution tools.

This observation results partially from a number of national law requirements that, if not contradictory with each other, remain, at times, highly incompatible, non-harmonised and subject to diverging interpretations by the NRAs. Those elements span from licensing requirements that depend on the banking activity being transferred to new entities under the asset separation and bridge institution tools to the role of NCAs in the related approval procedures, minimum regulatory requirements for new entities, the role of NRAs as potential shareholders of the new entities or the overall ownership requirements.

Concretely, one can envisage a situation in which a troubled entity is being split, carrying forward functions related to bank deposits, payments systems or other investment-related activities. In addition to any EU law requirements and approval processes, transfer of some of those functions to the new entity may also entail that the latter is subject to a number of individual national-law-specific approval procedures with diverging timelines and requirements.

In other words, the choice to set up a new entity as part of a resolution strategy developed at the SRB level but to be implemented at the national level entails varying degree of non-harmonised legal obligations, approval procedures and interactions with national authorities. In this sense, transferring parts of a failing institution thus becomes national law dependant with only some elements of the EU law applicable directly.

In this regard, as a more high-level observation, there would also appear to be room for improvement regarding existing EU law. This would include, for instance, streamlining decision-making procedures at the EU level or better clarification of the understanding of EU law concepts and terms, which, in light of the existence of numerous EU law instruments, take on a very complex character. This would include, for instance, the concept of state aid in the context of resolution, interactions between the NRAs and the



ECB on the establishment of bridge banks, interaction with the European Commission on the scope of bail-in and potential exclusion of liabilities and any other related procedures that would need to be complied with expeditiously in order for the resolution scheme to be effectively implemented at the national level, clarification of terms and concepts used in the EU law (e.g. "client funds and assets") and their full alignment in the BRRD and the SRMR.

Finally, let me stress that the above-mentioned observations should be analysed as having bearing on not only the practical feasibility of resolution-related work that the SRB is tasked to implement at the EU level but also on the SRB as an independent body that should exercise its powers in the general interest of the Union.

As we go further, we expect that future jurisprudence of the European Courts and our interactions with all the relevant authorities should bring further clarity. Also, our on-going work on setting up MREL should add to the robustness of efficient application of the resolution tools currently available. However, at the same time, the on-going legislative work could equally be an opportunity to provide our legal framework with additional clarity push while keeping the required discretion for the SRB in the future to make a case by case assessment. We stand ready to assist in the process.

In this context, I would like to thank you again for the interest in our work and am looking forward to our future interactions with the European Parliament and the Economic and Monetary Affairs Committee in particular.

Yours sincerely,

Elke König

Chair