

27 April 2018

PUBLIC

Decision of the European Banking Authority on the settlement of a disagreement

Addressed to: Single Resolution Board and Banca Națională a României

2017 joint decision on group resolution plans and resolvability for [...]

The Board of Supervisors of the European Banking Authority

Having regard to Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC¹ (the 'Regulation' and 'the EBA'), in particular Article 19(3) thereof,

Having regard to Directive 2014/59 of the European Parliament and of the Council of 15 May 2015 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012² ('the BRRD'), in particular Article 13(5) thereof,

Having regard to Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010³ ('the SRM Regulation'), in particular the second subparagraph of Article 5(2) thereof,

Whereas

Parties and subject-matter

¹ OJ L 331, 15.12.2010, p. 1.

² OJ L 173, 12.6.2014, p. 190.

³ OJ L 225, 30.7.2014, p. 1.

- (1) This Decision is addressed to the Single Resolution Board ('the SRB') and Banca Națională a României ('the NBR'). It concerns a dispute between the parties in relation to the current group resolution planning process for [...] ('the Group'). This Decision follows a mediation request in relation to that process (the 'Request') made by the NBR to the EBA on 16 March 2018 in accordance with Article 19(1) of the EBA Regulation.
- (2) [The Group] is a banking group with a number of subsidiaries and participations [...] including [...]
- (3) The SRB is the group-level resolution authority for the Group. The NBR is the resolution authority for [the subsidiary in Romania] ('the Subsidiary').

Procedural history

- (4) On 23 May 2017, the resolution authorities concerned, acting within the resolution college for the Group, made a joint decision approving a group resolution plan for the Group ('the 2016 Resolution Plan'). Article[...] of that decision provided that the approval of the adopted plan shall remain in force until a new version of the group resolution plan is approved in accordance with the process set forth in Article 8 of the SRM Regulation and Commission Delegated Regulation (EU) 2016/1075 ('the Delegated Regulation')⁴.
- (5) The process for adopting a new group resolution plan proceeded thereafter. On [...] November 2017, the SRB communicated to the resolution college the starting date of the four-month period for reaching a joint decision on a new group resolution plan and resolvability assessment in accordance with Article 13(4) of the BRRD.⁵ For this purpose, a draft resolution plan has been developed ('the draft 2017 Resolution Plan').
- (6) Following the EBA's receipt of the Request submitted by the NBR and of the parties' written statements of position and supporting documentation, the EBA held a conciliation meeting between the parties on 27 March 2018 with a view to settling their dispute within the conciliation period set by the EBA – this being the four-month period for reaching a joint decision pursuant to Article 13(4) of the BRRD – in accordance with Article 19(1) and (2) of the EBA Regulation together with Article 13(5) of the BRRD.
- (7) The parties failed to reach an agreement within the conciliation period. Therefore in accordance with Article 19(3) of the EBA Regulation together with Article 13(5) of the BRRD, the EBA is empowered to take a decision requiring the parties to take specific action or to

⁴ Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges. OJ L 184, 8.7.2016, p.1.

⁵ References in this Decision to the BRRD shall be understood to include references to the applicable equivalent provisions of the SRM Regulation.

refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.

- (8) Under the Decision of the European Banking Authority adopting the Rules of Procedure for the settlement of disagreements between competent authorities,⁶ the Chairperson of the EBA convened a panel ('the Panel') which was tasked with proposing a decision for adoption by the EBA under Article 19(3) of the EBA Regulation together with Article 13(5) of the BRRD.
- (9) Upon request to the parties for the purposes of proposing the said decision, the parties provided further documentation and written submissions for the Panel's consideration.
- (10) On 16 April 2018, the Panel agreed to inform the parties of its intention to propose a decision. Having regard to the urgency, complexity and potential consequences of the matter, the Panel set a time limit of two days within which the parties could express their views on the matter.
- (11) On 20 April 2018, having considered the parties' views, the Panel proposed a decision ('the Proposed Decision') to the Standing Committee on Resolution ('ResCo') for final adoption by the Board of Supervisors.
- (12) On 23 April 2018, ResCo approved the Proposed Decision.

Position of the parties

- (13) In its submissions in this case the SRB states that the preferred resolution strategy for the Group should be [...]. In support of this position, the SRB points to a number of factors including that, in its submission, such strategy corresponds to [...].
- (14) The NBR submits, however, that [...] is the only viable strategy for the Subsidiary in view of [...]. In response, the SRB's submissions state [...].
- (15) Overall, the material provided by the parties to the EBA in this case indicates the following points with regard to the position of the parties on the adoption of a new group resolution plan for the Group.
- (16) First, there appears to be no dispute between the parties as to the position that the liquidation of the Group under normal insolvency proceedings would not be feasible.
- (17) Second, the SRB considers [...] to be the appropriate preferred resolution strategy for the purposes of the assessment of resolvability of the Group to be made for the purposes of updating the group resolution plan.
- (18) Third, the NBR does not appear, under all circumstances, to object to the selection of [the SRB's proposed strategy] as a preferred resolution strategy for assessment in accordance with Article 25 of the Delegated Regulation. In its Request, the NBR takes a position that, firstly, [...] is the

⁶ EBA/DC/2014/091 (Rev 2)

only viable strategy but, secondly, the option also exists to sustain [the SRB's proposed strategy] should this prove to become operational [...] in the near future.

(19) Thus in sum, the parties appear to accept that the assessment of resolvability of the Group may proceed on the basis of [the SRB's proposed strategy] as the preferred resolution strategy. However, in that context it appears that the parties disagree as to the extent to which, in accordance with the applicable legislative provisions, the Group may be deemed to be resolvable on the basis of [the SRB's proposed strategy].

(20) The assessment of the EBA on this disagreement may now be set out.

Assessment

(21) The BRRD provides for three interlocking requirements in relation to the process for the assessment of the resolvability of the Group that are particularly significant in the present case. Firstly, the BRRD provides for an assessment of resolvability to be made in relation to the Group and in particular an assessment as to the extent to which the Group is resolvable, with such assessment being made together with and for the purposes of the drawing the group resolution plan. Secondly, the BRRD envisages certain steps being taken to identify any material impediments to the resolvability of the Group. Thirdly, the BRRD requires any resolution plan adopted for the Group to include a detailed description of the assessment of resolvability thus conducted.

(22) The following provisions set out the above requirements.

(23) Article 16(1) of the BRRD concerns the assessment of resolvability for groups and envisages that the group resolution authority, together with the resolution authorities of subsidiaries, shall "*assess the extent to which groups are resolvable*" under conditions set out in the provision.

(24) Article 16(1) of the BRRD goes on to provide that a group shall be deemed resolvable if it is feasible and credible to either wind up group entities under normal insolvency proceedings or to resolve group entities by applying resolution tools and powers to group entities under conditions set out in the provision. The manner in which the assessment of the feasibility and credibility of resolution is to be conducted is further provided for in Articles 26 to 32 of the Delegated Regulation.

(25) Significantly, as indicated, for the present case, the BRRD envisages that the conduct of this resolvability assessment goes hand in hand with the adoption of a resolution plan. In particular, Article 16(3) of the BRRD states:

"The assessment of group resolvability under this Article shall be made at the same time as, and for the purposes of drawing up and updating of the group resolution plans in accordance with Article 12."

(26) Elaborating on this, Article 23(1) of the Delegated Regulation provides that resolvability is assessed by the following sequence of steps:

“Resolution authorities shall assess resolvability based on the following consecutive stages:

(a) assessment of the feasibility and credibility of the liquidation of the institution or group under normal insolvency proceedings in accordance with Article 24;

(b) selection of a preferred resolution strategy for assessment in accordance with Article 25;

(c) assessment of the feasibility of the selected resolution strategy in accordance with Articles 26 to 31;

(d) assessment of the credibility of the selected resolution strategy in accordance with Article 32.”

(27) Moreover as indicated, under the BRRD, the identification of impediments to resolvability is a significant matter which falls to be considered in conjunction with the above provisions. Articles 10, 17 and 18 of the BRRD provide for the identification and, where necessary and proportionate, the obligation and power to address and remove impediments to resolvability.

(28) Article 10(2) of the BRRD provides that *“[w]hen drawing up the resolution plan, the resolution authority shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed, according to Chapter II of this Title.”*

(29) Article 17(1) of the BRRD envisages that when, pursuant to an assessment of resolvability carried out in accordance with Article 16 of the BRRD, a resolution authority determines that there are substantive impediments to the resolvability of that institution, it shall provide notification in this regard.

(30) Article 17(2) of the BRRD provides that the requirement to reach a joint decision on group resolution plans is suspended following the aforementioned notification until the measures to remove the substantive impediments to resolvability have been accepted or decided in accordance with the applicable provisions.

(31) As the description of the above matters to be provided in the resolution plan, Article 10(7)(e) of the BRRD provides that a resolution plan *“shall include ... a detailed description of the assessment of resolvability carried out in accordance with paragraph 2 of this Article and with Article 15”*. In addition, Article 22 of the Delegated Regulation provides for a number of minimum requirements for information to be included in a resolution plan, including, under paragraph 7 of that Article, that a resolution plan must:

“provide the conclusions of the assessment of resolvability, including at least:

(a) whether or not the institution or group is currently resolvable;

(b) a summary of the conclusions of the liquidation assessment required in point (a) of Article 23(1);

(c) a detailed description of any impediments to resolvability identified, and of any measures proposed by the institution or group or required by the resolution authority to address or remove those impediments.”

- (32) In summary, the above provisions envisage the following steps being taken in the present case. The adoption of a new resolution plan for the Group requires an assessment as to the extent to which the Group is resolvable, on the basis of the preferred resolution strategy, in accordance with the considerations of feasibility and credibility under Articles 26 to 32 of the Delegated Regulation. That assessment is to be made together with an identification of any material impediments to resolvability. If it is considered that there are such material impediments, it must then be considered how the impediments could be addressed, including, if required, identifying those impediments as substantive impediments to resolvability. The resolution plan to be adopted must include a detailed description of the assessment of resolvability thus conducted.
- (33) In the present case, the draft 2017 Resolution Plan contains a section on conclusions as to resolvability of the Group. It separately addresses at various points the matter of the resolvability of the Group. Of particular note, it refers to a number of what are described as potential impediments and provides an analysis in relation to these potential impediments. The draft 2017 Resolution Plan does not however establish that these potential impediments are – or are not – material impediments or substantive impediments to resolvability for the purposes of the BRRD. More generally, it appears to the EBA that the various elements in the draft 2017 Resolution Plan do not individually or in combination satisfy the requirements for an assessment of impediments as required by the above legislative provisions. Finally, apart from the draft 2017 Resolution Plan, notwithstanding the extent of the discussions and endeavours of the parties, no assessment of impediments such as would satisfy the above legislative requirements has been put before the EBA for the purposes of the present case.
- (34) In view of the matters set out above, the EBA considers that a resolution plan for the Group would need to include a detailed description of the assessment of resolvability that includes a description of the assessment in accordance with the abovementioned provisions of any identified material and substantive impediments to the resolvability of the Group on the basis of [the SRB’s proposed strategy].
- (35) In connection with the foregoing, it is noted that the draft 2017 Resolution Plan envisages a gradual implementation of measures to give effect to [the SRB’s proposed strategy] for the Group over a period of time. This indicates that, for the purposes of Article 16(1) of the BRRD, in the period between the entry into effect of the resolution plan and the full implementation of all measures deemed necessary to implement the preferred resolution strategy, it may not be feasible and credible to resolve the Subsidiary by applying resolution tools and powers to that entity while avoiding to the maximum extent possible any significant adverse effect on the

financial system of the Member States and with a view to ensuring the continuity of critical functions carried out by the group entities, where they can be easily separated in a timely manner or by other means.

- (36) If such circumstances are duly identified, then, pursuant to the BRRD, in preparing a resolution plan for the Group any pertinent variant strategy should be identified and assessed. Referring to the content of a resolution plan, Article 23(3) of the Delegated Regulation states that “[t]o the extent necessary, [the resolution plan] shall also identify variant strategies to address circumstances in which the strategy would not be feasible or credible.” In this regard Article 23(4) of the Delegated Regulation adds that “[t]he assessments of the feasibility and credibility of the preferred resolution strategy shall include assessment of any variant strategies proposed as part of that strategy.” To that end, Article 23(5) provides that “[r]esolution authorities shall request from the institution or group in accordance with Article 11 of Directive 2014/59/EU such additional information as is necessary to carry out the assessments of the preferred and variant strategies.” Moreover, it follows from the abovementioned BRRD provisions concerning the information which must be included in a resolution plan that any group resolution plan approved for the Group should include a description of the assessment of any variant strategies thus proposed.
- (37) As to the variant strategies which may fall to be considered in the situation referred to in the preceding paragraph, the EBA observes that the NBR has expressed its openness to approve the [SRB’s proposed strategy] for the Group [on certain terms]. In the alternative, the NBR has proposed[...]. It appears to the EBA that the draft 2017 Resolution Plan does not particularly describe these specific proposals.
- (38) In summary, in view of the above matters, any resolution plan for the Group should identify and assess variant strategies to address circumstances in which the preferred resolution strategy would not be feasible or credible in the period between the entry into effect of the resolution plan and implementation of measures deemed necessary to implement [the SRB’s proposed strategy] as the preferred resolution strategy.
- (39) Finally, with regard to the resolution of this dispute, pursuant to Article 87(c) of the BRRD, the SRB and NBR should cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner.

Views of the parties on above assessment

- (40) On 18 April 2017, the SRB and NBR replied to the Panel’s invitation to the parties to express their views on the Proposed Decision. The NBR confirmed that it welcomed the Proposed Decision without objection. In addition to restating its previous submissions, the SRB stated on page 1 of its reply that the SRB “*does not concur with the EBA’s view in the draft decisions that in the 2017 resolution planning cycle material impediments to the resolvability should be included. The resolution plan of the Groups define already a list of potential impediments. Declaring material impediments in the 2017 resolution planning cycle without a proper assessment of the implementation of the measures required by Resolution Authorities (RA) and*

the actions taken by the Groups would be premature.” Page 2 of the SRB’s reply stated: “The 2017 resolution plans for the Groups include an assessment of the resolvability and the actions required to address those potential impediments, which could be executed at the point of resolution. However, this resolvability assessment has not yet allowed the SRB to conclude whether the identified potential impediments to resolvability are material.”

(41) The foregoing reply from the SRB does not affect the position of the EBA as set out in paragraphs 21 to 39 above. As stated in paragraph 32 above, the resolvability assessment in this case is to be made together with an identification of any material impediments to resolvability and, as stated in paragraph 33 above, the draft 2017 Resolution Plan refers to a number of what are described as potential impediments and provides an analysis in relation to these potential impediments but does not establish that these potential impediments are – or are not – material impediments or substantive impediments to resolvability for the purposes of the BRRD. As also stated in paragraph 33 above, more generally, it appears to the EBA that the various elements in the draft 2017 Resolution Plan do not individually or in combination satisfy the requirements for an assessment of impediments as required by the above legislative provisions, and, apart from the draft 2017 Resolution Plan, notwithstanding the extent of the discussions and endeavours of the parties, no assessment of impediments such as would satisfy the above legislative requirements has been put before the EBA for the purposes of the present case. In connection with all of this, the EBA notes that on page 2 of its reply the SRB states that, in this case, the *“resolvability assessment has not yet allowed the SRB to conclude whether the identified potential impediments to resolvability are material”*.

(42) In its reply the SRB also comments that the Proposed Decision does not *“provide sufficient clarity on the steps to be taken by all RA involved for concluding the 2017 resolution planning cycle and the joint decision processes.”* In response, it may be observed that this Decision is not addressed to and is not binding on all resolution authorities, and therefore it would not seem appropriate to prescribe such steps to be taken by all resolution authorities.

Has decided as follows:

Article 1

Any resolution plan adopted by either or both of the parties for [the Group or the Subsidiary] shall include a detailed description of the assessment of resolvability on the basis of the selected preferred resolution strategy. That detailed description shall include, in particular, any material impediments to resolvability identified in accordance with the applicable provisions of the BRRD and the Single Resolution Mechanism Regulation and, where necessary and proportionate, outline relevant actions for how these impediments could be addressed, according to Chapter II of Title II of the BRRD. The detailed description in the group resolution plan shall also include an assessment of any variant strategy considered necessary.

Article 2

The SRB and NBR shall cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner for the purposes of Article 1.

The SRB and NBR shall report to the EBA on the steps taken to comply with Article 1. They shall make their first report within one month from the date of adoption of this Decision and shall thereafter make subsequent reports on a quarterly basis until the adoption of a joint decision approving a group resolution plan. The parties may make these reports jointly or separately.

Article 3

The EBA shall make this Decision public and shall state the identity of the competent authorities concerned and the main content of the Decision, subject to exceptions provided by Union law including where publication is in conflict with the legitimate interests of financial institutions in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.

Article 4

This Decision shall enter into force on the date of adoption.

Either addressee may appeal against this decision to the Board of Appeal of the European Supervisory Authorities in accordance with Article 60 of the EBA Regulation. The appeal, together with a statement of grounds, shall be filed in writing within 2 months of the date of notification of this decision. The appeal shall not have suspensive effect but the Board of Appeal may, if it considers that circumstances so require, suspend the application of this decision.

Done at London, 27 April 2018

[signed]

Andrea Enria

Chairperson

For the Board of Supervisors