# E. Resolution

The Bank exercises its mandate as the national resolution authority within the Banking Union, alongside the SRB and the resolution authorities of the other participating Member States.

The principal mission for the Bank, as the national resolution authority, is to contribute towards improving the ability of the Belgian and European authorities to resolve problems arising from the failure of a credit institution or investment firm under Belgian law. The role that these financial institutions play in that context is crucial as they carry primary responsibility for achieving this aim of resolvability.

A key element in this process is the setting by the resolution authorities of a Minimum Requirement for Own Funds and Eligible Liabilities (MREL) which all credit institutions must respect. In 2019 the regulatory framework concerning the MREL underwent significant modification with the adoption of the BRRD2[1]. The transposition of that Directive into Belgian law, which was finalised during the year under review, is among the most notable developments in 2021 in regard to resolution, since it entailed redefining the approach of the Bank and the other European resolution authorities to the calibration of the MREL.

Another feature of the year under review was the continuation of the specific conditions relating to COVID-19. Although those conditions necessitated some adjustments to the resolution authorities' requirements when the crisis erupted in 2020, e.g. postponement of some reporting requirements, they did not entail any special measures in connection with the 2021 cycle of resolution plans, even though the resolvability requirements are being tightened up year by year. That bears witness not only to the importance that all credit institutions attach to the work relating to resolution, but also to the institutions' capability in regard to operational continuity.

## 1. Legislative and regulatory framework

### 1.1 Transposition of BRRD2 and miscellaneous provisions

During the year under review, the provisions of the BRRD2 were transposed into Belgian law by the Law of 11 July 2021[2]. In addition, a number of adjustments were made to the provisions included when the BRRD was initially transposed[3]. First, the introduction of the concepts "resolution entity" and "resolution group" is an important new feature of the BRRD2. The group resolution plans must now identify, within a group, the entities to which the resolution authority expects to apply the resolution instruments in the event of failure, and those which should continue to operate without going into resolution. That distinction permits differentiation between single point of entry

1 Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

2 Law of 11 July 2021 transposing Directive 2019/878 of the European Parliament and of the Council of 20 May 2019, Directive 2019/879 of the European Parliament and of the Council of 20 May 2019, Directive 2019/2034 of the European Parliament and of the Council of 27 November 2019, Directive 2019/2177 of the European Parliament and of the Council of 19 December 2019, and Directive 2021/338 of the European Parliament and of the Council of 16 February 2021, and containing miscellaneous provisions.

3 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 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. 648/2012, of the European Parliament and of the Council.

resolution strategies, in which it is generally only the parent company that goes into resolution, and multiple point of entry resolution strategies in which the resolution tools are applied to both the parent company and some of its subsidiaries, resulting in the break-up of the group.

In addition, the regulatory framework defining the MREL requirements underwent radical revision following up to the transposition of the BRRD2. Thus, the MREL requirement is now expressed as a percentage of both the total risk exposure amount (TREA) and the leverage ratio exposure (LRE) of the institution or entity concerned. This means that institutions or entities now have to satisfy simultaneously the levels set by each of these two calculations. Similarly, the rules on the subordination of the MREL instruments have been tightened up. Thus, alongside the existing category of global systemically important institutions (G-SIIs), a new category of large institutions has been created, namely "top-tier" banks with a balance sheet total in excess of € 100 billion. More prudent subordination requirements apply to this category of large institutions. In that connection, It should also be pointed out that the resolution authorities can apply the MREL regime for top- tier banks to institutions whose total assets are less than € 100 billion and whose failure would be reasonably likely to pose a systemic risk according to the resolution authorities (this is also known as the "fishing option").

*Transposition of the BRRD2 into Belgian law was one of the most notable developments concerning resolution in 2021*

The possibility for resolution authorities to impose a moratorium after the adoption of a resolution measure had already been included in the Belgian legislation following the transposition of the BRRD. With the transposition of the BRRD2, there is now also provision for a pre-resolution moratorium. In practice, the resolution authorities now also have the power to suspend certain contractual obligations for a limited period of no more than two working days before an institution or entity is placed in resolution, i.e. as soon as it is determined that the institution or entity is failing or likely to fail and there is no immediately available private sector measure which, in the opinion of the resolution authorities, could prevent the failure of the institution or entity within a reasonable timeframe. An additional condition specifies that the application of the pre-resolution moratorium must be deemed necessary to avert any further deterioration in the financial situation of the institution or entity. During this moratorium period, the resolution authorities may determine whether a resolution measure satisfies the public interest criterion, choose the most appropriate action, or ensure that one or more resolution tools are effectively applied. In cases where it is deemed desirable that the power to impose such a moratorium should also apply to covered deposits, the Belgian legislature made use of the option offered by the BRRD2 to oblige the resolution authorities to ensure that depositors have access to an appropriate daily amount of those deposits.

The BRRD2 also supplements the existing regulatory framework with a new article covering the situation in which the resolution authority considers that the first two resolution conditions are met (the institution or entity has defaulted or is likely to do so, and there is no other measure that could prevent its failure), but not the condition whereby resolution is necessary in the public interest. In that case, the BRRD2 stipulates that the institution or entity is to be liquidated in an orderly manner in accordance with the applicable national law. The transposition into Belgian law provides that, in such circumstances, the resolution authority shall, on its own initiative, notify the bankruptcy court by means of a summons. It is then for the court to decide on the insolvency conditions.

The existing regulatory framework was also revised in respect of the obligation on institutions to include bail-in recognition clauses in contracts or instruments creating liabilities which come under third-country law. Following the transposition of the BRRD2, it is now acknowledged that, in some circumstances, it may prove legally or otherwise impractical to include such provisions in some contracts. If that is the case, the institution or entity must notify the resolution authority which will then conduct its own assessment.

Finally, another significant adjustment concerns abolition of the prior judicial review and validation of the disposition decision of the resolution authority. That system is replaced by an *ex-post* judicial review. This adjustment aligns the Belgian legal framework with the regime applied in almost all the EU countries and implements a recommendation made by the IMF during the 2017 Financial Sector Assessment Programme

(FSAP)[1]. The possibility of appealing against a disposition decision or a resolution measure remains unchanged.

## 1.2 Revision of the bank crisis management and deposit insurance framework

The negotations on the revision of the bank crisis management and deposit insurance (CMDI) framework continued during the year under review. In the Bank's opinion, that revision which concentrates on the BRRD, the Single Resolution Mechanism Regulation (SRMR[2]) and the Deposit Guarantee Schemes Directive (DGSD[3]) is important for Belgium, as the CMDI initiative is one of the elements leading to completion of the Banking Union. Its aim is to assess the crisis management framework set up in 2014 in order to strengthen certain elements where necessary. In regard to resolution, the preparatory work has shown that two key elements could be addressed. First, the expectation is that a broader interpretation of the public interest test would improve the crisis management framework for small and medium-sized banks. Such a broadening of the public interest test is desirable in that, for most failing credit institutions, it would facilitate resolution within the existing Banking Union framework, under the SRB. Nevertheless, if such a broader interpretation were not possible, it would then be desirable to strengthen the normal insolvency framework by introducing transfer instruments for institutions whose resolution is not considered to be in the public interest. However, in that case the proposed system would need to be consistent and offer the minimum opportunities for potential arbitrage.

Second, the creditor hierarchy, and in particular the preference for covered deposits, could be revised. In a quantitative analysis conducted at the request of the European Commission[4], the EBA shows that, in the event of resolution, the ability of the deposit guarantee systems to intervene is still very limited in view of the super preference enjoyed by covered deposits. Similarly, owing to the intervention conditions of the Single Resolution Fund (SRF), in many cases it might be necessary to proceed with a deposit bail-in before the SRF can intervene. The quantitative analysis shows that introducing a general preference which would go beyond covered deposits to include all deposits, would permit speedier mobilisation of the national deposit guarantee systems and would also reduce the risk of uninsured deposits being included in a bail-in, thereby cutting the risk of exporting the banking crisis to the real economy.

This last point raises governance issues. If more of the resolution costs accrue to the national deposit guarantee systems, it becomes necessary for that to be reflected in the governance of the resolution mechanism, because the governance of the system cannot be based on centralised decision-making if the crisis costs are decentralised and borne by non-mutualised national deposit guarantee systems. It then becomes necessary to introduce a system of checks and balances ensuring that any decisions take due account of national interests.

*A non-mutualised system of national deposit guarantee schemes is acceptable but could hardly be called an EDIS*

One element of that balance will be determined by the characteristics of the future European Deposit Insurance Scheme (EDIS), and in particular the mutualisation of losses between national deposit guarantee systems. An ambitious EDIS providing for mutualisation of losses between national deposit guarantee schemes (DGSs) in the Banking Union, or even the creation of a single deposit guarantee scheme within that Union, is not essential to the smooth operation of the Banking Union as it stands. A non-mutualised system in which the only link between national deposit guarantee schemes is the option of providing credit lines on a mutual basis when necessary would probably be more realistic and widely acceptable, even if such a system could hardly be called an EDIS. In that connection, it should be noted that such a system

1 See the Annual Report 2017, section on Prudential Regulation and Supervision, pp. 183-184.

2 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. 1093/2010.

3 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

4 See EBA replies to the European Commission's call for advice on funding in resolution and insolvency as part of the review of the crisis management and deposit insurance framework, 22 October 2021.

which would not introduce any loss mutualisation between national deposit guarantee schemes would be unable to bring about major changes in the existing balance between home and host countries because the system would remain essentially national. Loss mutualisation at the level of covered deposits is in fact necessary, but insufficient in itself, to ensure a group approach in the event of failure.

During the year under review the European Commission organised two public consultations in order to examine the framework. Its publication of a proposal for revision of the framework, initially scheduled for the fourth quarter of 2021, was postponed to 2022.

### 1.3 Proposal for a Directive establishing a framework for the recovery and resolution of insurance and reinsurance undertakings

In September of the year under review, the European Commission published a proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of insurance and reinsurance undertakings (the "IRDD proposal" or the proposal for an Insurance Recovery and Resolution Directive[1]). This IRDD proposal, developed in conjunction with Solvency II (see sub-section B.2.3), aims to establish a recovery and resolution system for the insurance sector similar to the one that already exists for credit institutions and investment firms, and recently also for central counterparties (CCPs)[2]. The IRRD proposal obviously takes account of the specific nature of the insurance sector's activities. It covers the complete cycle of crisis management, from the preparations for a crisis situation to the resolution of an insurance or reinsurance undertaking.

In order to improve the crisis management preparations, the IRRD proposal – like the BRRD – provides for insurers and reinsurers to draw up recovery plans. These recovery plans have to examine the various available options for managing any crisis that occurs. In particular, the recovery plan determines what measures an insurer or reinsurer can adopt in the event of a serious crisis. Those measures aim to restore the financial health of the insurer or reinsurer implementing them.

Apart from the recovery plans, the IRRD proposal provides for the drafting of resolution plans. As in the case of the banking sector, those plans – which will be devised by a resolution authority to be designated – must include the resolution measures which that authority proposes to adopt if the resolution conditions are met. Those conditions are the same as the ones in force for the banking sector. First of all, it is necessary to ascertain that the insurer or reinsurer is failing or likely to fail. Next, there must be no alternative supervisory action or private sector measures which could solve the situation within a reasonable timeframe. Third, the resolution action must be necessary in the public interest. If the third condition is also

1 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2009/138/EC, (EU) 2017/1132 and Regulations (EU) No. 1094/2010 and (EU) No. 648/2012

2 Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No. 1095/2010, (EU) No. 648/2012, (EU) No. 600/2014, (EU) No. 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132.

met, the resolution authority must apply one of the resolution tools.

The resolution tools planned for insurers or reinsurers are similar to, but not the same as, those applicable to the banking sector. The actual tools are as follows: a) the write-down or conversion tool, b) the solvent run-off tool, c) the sale of business tool, d) the bridge undertaking tool, and e) the asset and liability separation tool.

The IRRD proposal does not introduce any obligation for Member States to define an MREL, nor any obligation to establish a resolution fund or insurance guarantee scheme. However, Member States could voluntarily decide to create such a fund or guarantee scheme.

## 2. Resolvability of credit institutions and investment firms

The resolution plans follow an annual cycle. Year after year, specific elements are examined in more detail. As the resolution plans must be implemented rapidly in the event of an institution's failure, the work during the 2021 resolution cycle was devoted mainly to rendering the resolution strategies operational. The main tool for that purpose is the preparation of playbooks, both for the preferred resolution strategy and for the variant resolution strategy. For Belgian institutions, this concerns playbooks for the bail-in tool and for the sale of business tool. The SRB expects the institutions to test part of these playbooks during the 2022 resolution planning cycle. In that connection, the emphasis will be on both the operational aspects and the data points necessary for determining the conversion rate.

### 2.1 Institutions under the remit of the SRB

Apart from the operationalisation of the resolution plans, certain specific aspects of resolvability are examined in depth in each resolution planning cycle. The SRB document "expectations for banks" [1] is used as the guidance for establishing the annual priorities. For the 2021 resolution planning cycle, the emphasis was on three priorities, namely: a) liquidity and funding during resolution, including examination of the potential causes of liquidity needs, b) management information systems and capabilities for valuation data, and c) operationalisation of the bail-in tool with the aid of a playbook and a management information system for the bail-in data points. For the 2022 resolution planning cycle, particular attention will be paid to the following aspects: a) identification of the assets that could be used as security or collateral for obtaining additional liquidity; in that connection, institutions are asked to conduct an analysis of the assets not used as collateral in normal circumstances, b) plans for reorganising the business after application of the bail-in tool, and c) the possibilities for separating a resolution group or entity.

Since the SRMR2 came into force at the end of 2020, the Bank has been able to ask the SRB to apply the MREL regime for top-tier banks to certain resolution entities which are not top-tier banks (fishing option). During the 2021 resolution plan cycle, the Bank identified all the institutions eligible for implementation of that option. First, the option can only be applied to resolution entities. Institutions or entities not designated as resolution entities, such as certain subsidiaries, are therefore ineligible. Second, the resolution entity concerned must also form part of a resolution group with a balance sheet total of less than € 100 billion. Finally, the Bank must consider that the failure of the entity concerned could reasonably pose a systemic risk. After identifying the resolution entities which meet the application conditions, the Bank conducted a proportionality analysis in order to ensure equality of treatment for less significant institutions and institutions deemed significant but having a balance sheet total of less than € 100 billion. The SRB only needs to consider the Bank's request when taking an MREL decision during the current resolution planning cycle. The option is therefore exercised and reassessed annually, in parallel with the resolution planning cycle.

Resolutions plans are drawn up not only for institutions for which resolution would be effected by applying the resolution tools and powers, but also for institutions which could be wound up via a normal insolvency proceedings. That procedure is followed if the resolution authority decides that it is not in the public interest to put the institution into resolution. The Bank favours a broader interpretation of the "public interest" which would permit the use of resolution tools and powers to deal with the failure of a

1 The SRB's expectations regarding resolvability were published in the form of a document containing guidelines for the banking sector on the measures that institutions must adopt in order to be able to demonstrate their resolvability by the end of 2023. See the SRB's website https://www.srb.europa.eu/system/files/media/document/efb_main_doc_final_web_0_0.pdf.

greater number of institutions. Moreover, the choice of resolution strategy also affects the MREL. The regulatory framework stipulates that if the resolution plan provides for an institution's liquidation via a normal insolvency proceedings, the resolution authority must assess whether it is justified to limit the MREL to the loss-absorbing amount or whether that amount should be adjusted. As mentioned below, the Bank is in favour of an appropriate calibration of the MREL, whereby the loss-absorbing amount would be increased for institutions which could be wound up via a normal insolvency proceedings but whose failure could, in certain cicumstances, affect the stability of the Belgian financial system.

*14 MREL decisions were adopted in 2021 for institutions subject to the direct authority of the Bank*

Since the introduction of the BRRD 2, a distinction has applied between a) decisions on external MREL for resolution entities, and b) decisions on internal MREL for subsidiaries which belong to a resolution group but are not themselves resolution entities. The regulation stipulates that these requirements must be met with effect from 2024. Although the scope is clearly defined in the legislation, decisions on internal MREL are not yet applied to all subsidiaries which come into consideration. That is due to the progressive approach whereby the SRB takes account of the subsidiary's importance within the resolution group. Since the legislation makes no provision for waivers from internal MREL for subsidiaries which are not based in the same country as their parent company, the Bank considers that an MREL should be imposed on those subsidiaries as soon as possible, e.g. during the next resolution planning cycle.

### 2.2 Institutions under the Bank's direct remit

In the case of institutions falling under the Bank's direct authority, 14 MREL decisions were adopted in 2021. For 13 of those institutions, the decision concerned the 2020 cycle, as it had not been possible to finalise it before transposition of the BRRD 2 into Belgian law (see above). In regard to the 2021 resolution planning cycle, the resolution plan and the MREL decision were finalised for one institution.

In Belgium, less significant institutions are divided into three categories, each subject to a different MREL calibration. The first category comprises institutions whose failure would not harm the stability of the financial system in Belgium and which could therefore be wound up by normal insolvency proceedings. This category of institution is subject to an MREL equivalent to their loss-absorbing amount. In other words, the MREL of these institutions is equal to their capital requirements.

The second category comprises institutions whose resolution plan specifies that, in all probability, they could be wound up by normal insolvency proceedings but their failure could in certain circumstances, e.g. in the context of a systemic crisis, affect the stability of the Belgian financial system, particularly in view of their links with Belgium's real economy and the amounts of their covered deposits. For this category of institutions, the amount necessary to absorb the losses was adjusted upwards so that their MREL exceeds their capital requirement. However, this upward revision is calibrated in accordance with the limits imposed by the regulations and by the SRB; their MREL is therefore still below that of institutions in the third category.

This third category comprises institutions for which the resolution plan considers that the public interest criterion would be met in the event of failure. Such a situation would therefore necessitate the use of the resolution tools and powers. In that context, the MREL includes not only a loss-absorbing amount but also an amount for ensuring recapitalisation and market confidence after completion of the resolution procedure.

## 3. Set-up of resolution financing arrangements

The BRRD stipulates that a resolution fund financed by collecting contributions from credit institutions and investment firms must be established in each Member State. Each resolution fund must represent a target level of at least 1 % of the total covered deposits by no later than 31 December 2024.

Under the SRMR, the SRF was established within the Banking Union on 1 January 2016. The SRF replaces the national resolution funds in the case of credit institutions, and investment firms and financial institutions subject to the ECB's consolidated supervision.

The resolution fund is used to support the measures taken by the resolution authorities when a banking group is failing. It can guarantee the assets or liabilities of a failing institution, grant it loans, acquire some of its assets or – under certain conditions – make contributions to it. The resolution fund can also intervene in relation to a bridge institution, an asset management vehicle or even a purchaser if the business is sold. Conversely, the resolution fund cannot directly absorb the losses of an institution in resolution.

In 2021, the institutions subject to the SRF jointly contributed the sum of € 10.4 billion. Of that total, € 357 million came from Belgian institutions required to contribute, as opposed to € 301 million in 2020. That increase is mainly due to the steep rise in the amount of covered deposits, which determine the SRF target amount. This increased the size of the fund to € 52 billion. The SRB considers that the SRF target, which is 1 % of the total covered deposits of institutions approved in the Banking Union, could approach € 70 billion by the end of the transitional period for creation of the fund, which will expire in 2023. However, a further rise in covered deposits in the coming years could drive that target to a higher level.

Apart from its own resources, the SRF will have a renewable credit line from the European Stability Mechanism with effect from the beginning of 2022. This is a supplementary emergency fund which can be used and which can, if appropriate, double the size of the SRF. This credit line is initially supplied by public funds in order to restore market confidence immediately. However, this credit line funded by Banking Union Member States has to be repaid by all the institutions required to contribute to the Banking Union in the years following its use.

During the year under review the General Court[1], followed on appeal by the Court of Justice of the European Union[2], ruled on the actions for annulment brought by a number of institutions from other Member States against the SRB's decisions on the *ex-ante* contributions for 2016 and 2017. One of the points mentioned by the court in its judgment was that the SRB had not correctly fulfilled the obligation to state its reasons when taking the decisions in question, even though the infringement stemmed from the partly illegal nature of Commission Delegated Regulation (EU) 2015/63[3]. Under that Regulation, the SRB is required to include data on other institutions in the basis of calculation[4]. However, since those data are confidential, the individual decisions cannot include an adequate explanation of how the specific institution's contribution is calculated, and the institution concerned cannot verify whether the calculation is correct. Nevertheless, on appeal the Court of Justice of the European Union annulled the decision of the General Court, considering that the statement of reasons need not necessarily include all the data enabling an institution to verify whether the amount of the contribution was correctly calculated. That point of view would inevitably imply the establishment of a calculation method not requiring the use of confidential data on the sector as a whole, which would impose excessive constraints on the legislature's discretionary power in the choice of a calculation method. The EU Court of Justice takes the view that it is sufficient if institutions have enough information to understand, in essence, how their individual situation is taken into account, having regard to the aggregate situation of all the other institutions concerned. Delegated Regulation (EU) 2015/63 therefore does not hinder fulfilment of the obligation to state reasons, and the Court confirmed its legality.

Institutions which are not subject to the SRF, namely Belgium-based branches of third-country credit institutions or investment firms, and Belgian stockbroking firms not subject to the ECB's consolidated supervision of their parent company, are required to pay a contribution to the national resolution fund. After payment of the national resolution fund contributions in 2021, the fund's reserves amounted to just over € 2.1 million. In 2023, the national resolution fund's reserves should reach € 2.6 million, the current target figure.

1 General Court, Landesbank Baden-Württemberg v. Single Resolution Board, case T-411/17.

2 Court of Justice of the European Union, European Commission v. Landesbank Baden-Württemberg, C-584/20, and Single Resolution Board v. Landesbank Baden-Württemberg, C-621/20 (joined cases).

3 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements.

4 The total target for the SRF was set at 1 % of the amount of the covered deposits of all the institutions together, each institution's annual basic contribution being calculated according to the ratio between its liabilities (excluding own funds) after deduction of the covered deposits, and the total liabilities (excluding own funds) after deduction of the covered deposits of all institutions approved in the territory of the Member States as a whole.