EUROPEAN BANKING AUTHORITY

BANKING STAKEHOLDER GROUP

CONSULTATION ON EBA/CP/2014/22 ON
RESPONSE TO THE EBA CONSULTATION PAPER DRAFT GUIDELINES
ON THE INTERPRETATION OF THE DIFFERENT CIRCUMSTANCES
WHEN AN INSTITUTION SHALL BE CONSIDERED AS FAILING OR
LIKELY TO FAIL UNDER ARTICLE 32(6) OF DIRECTIVE 20014/59/EU
(EBA/CP/2014/22)

General Comments and Replies to Questions

BY THE EBA BANKING STAKEHOLDER GROUP

London, December 18, 2014

Foreword

The BSG welcomes the opportunity to contribute to the development of the guidelines for the specification of the circumstances when an institution is failing or likely to fail under the Bank Recovery and Resolution Directive (BRRD).

These guidelines will provide the common framework and language to define the starting point of a resolution process which is indispensable for effective resolution rules of EU banks. This document complements the BRRD in enhancing financial stability by ensuring consistently high regulatory standards in this area and a level playing field across the EU, as it reinforces the stable and effective functioning of the banking sector in the European Union.

In the following section, the BSG submits detailed responses to the EBA's questions.

Replies to Questions

1. Do you have any general comments on the draft Guidelines for determining that an institution is failing or likely to fail?

The resolution framework needs to be straightforward, predictable and credible. Achieving a complete convergence across competent authorities or resolution authorities on the definition of when an institution shall be considered as failing or likely to fail will be instrumental in achieving this end and thus in minimising the uncertainties that would, among other effects, penalise banks.

The resolution tools should start at the point of non-viability. For this reason, triggers should be as objective, transparent and predictable as possible; they should however not be automatic, but subject to supervisory judgment. In this sense:

- BSG supports the clarification that the guidelines only establish guidance on a non-exhaustive number of elements to be considered by the authorities when assessing the question of whether an institution is failing or likely to fail, and that there is no automatic decision on the basis of any of the elements addressed in the guidelines.
- In particular, we would like to emphasise that the breach of any particular indicator (e.g., SREP scorings) or the failure to implement a concrete recovery option should trigger discussion among authorities – supervisor and resolution – and the bank management rather than trigger the resolution process. In fact, before any public action is taken, supervisors and resolution authorities should carry out an internal in-depth review of the fundamentals of the bank and its business model. Therefore the objective elements such as an SREP score equal to "F" or 4 should not be viewed on a stand-alone basis, but rather as part of a combination of bank-

specific indicators, banking benchmark indicators, country level indicators and banking sector indicators. Moreover, before making use of public actions it would be advisable to address the problem informally between the credit institutions and the supervisor (meeting with management or a letter of intervention) as is established by ECB Guide to Banking Supervision[1].

- The conditions to start the resolution must be clear, in order to provide the market with reasonable certainty and assist investors to price risk. In addition, we consider that the implementation of the trigger should be consistent across the competent authorities and/or the resolution authority. Uncoordinated practices should be completely avoided and national implementation should be monitored carefully in order not to jeopardise certain funding markets and to maintain the level playing-field.
- In that vein, we have some concerns about the possibility of considering different elements, depending upon whether the competent authority or the resolution authority is making the determination. While we consider that the competent authority has the benefit of conducting the SREP assessment itself, the resolution authority should also be able to benefit from this information. Currently, the draft guidelines suggest that certain elements are only relevant to a determination by a resolution authority, for example the outcome of an AQR exercise.
- Therefore, we consider that coordination and cooperation between the competent authority and the resolution authority is essential and should be focused, not only on consultation and information exchange, but also on the way that both authorities interact with the banks.
- In order to avoid misunderstanding in the determination that an institution is failing or likely to fail, sections two (determination made by the competent authority) and three (determination made by the resolution authority) of Title II of the guidelines should be merged to ensure the consistency criteria (SREP assessment and others that only apply to the resolution authority).

2. Do you consider the level of detail of these draft Guidelines to be appropriate?

Yes, the guidelines are sufficiently detailed. Nevertheless, it is important to clarify the interaction of SREP assessment with other indicators used in the recovery and resolution framework (quantitative and qualitative recovery actions and internal management indicators), in order to have coherence in the measures applicable in the process.

3. Do you consider the examples provided in Box 2 to be sufficiently clear and providing useful guidance?

1 European Central Bank (Nov 2014). Guide to banking Supervision

We consider that Box 1 is useful and helpful in clarifying paragraph 9 of the draft guidelines.

4. Do you have any comments on the proposed specification of circumstances which should be taken into account by the competent authority in determining that an institution is failing or likely to fail?

See our general comments above in question 1 regarding the need for consistency and coordination in the determination by the competent authority and resolution authority that an institution is failing or likely to fail.

Additionally we do not agree with paragraph 20c of section 2 in Title II. In our view, the failure of the implementation of a recovery option, when the recovery plan has been activated, does not necessarily mean that the institution is failing or likely to fail. Although it might be an unsuccessful measure, the institution could nevertheless still be recoverable with additional measures/actions.

Furthermore, paragraph 19 sets out that authorities should consider the result of the valuation of the institution's assets and liabilities to the extent that they are consistent with Article 36 BRRD. However, it remains unclear when a valuation in line with Article 36 should have been undertaken prior to determining that the institution is likely to fail. We assume that the valuation in Article 36 would in principle be the first step to be undertaken prior to implementing resolution actions, but after determining that the institution is failing or likely to fail.

5. Do you reckon that a significant decrease in asset value can be predefined in a quantitative manner? If yes, which threshold would you suggest for that purpose?

No, we consider that a significant decrease in asset value does not in itself mean that an institution is failing or likely to fail. It could be the result of a systemic market movement, and not specific to a particular institution. For that reason, a quantitative threshold for defining a significant decrease in asset value should be unnecessary. Moreover, it is important to keep in mind that any decrease in asset value will have a direct impact on the P&L, and therefore on the capital requirements.

6. Do you have any comments on the proposed specification of objective elements related to capital position which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

We emphasise that macroeconomic and market-based indicators should be evaluated in both absolute and relative terms, in order to identify and differentiate whether weakened indicators are related to systemic or idiosyncratic events. The impacts on banks and potential solutions are completely different, depending on whether the "likely to fail" situation is due to a systemic or idiosyncratic event.

7. Do you have any comments on the proposed specification of objective elements related to the liquidity position which should be taken into account by the resolution authority in determining that an institution as [sic] failing or likely to fail?

See answer to question 6.

8. Do you have any comments on the proposed specification of the circumstances, related to governance arrangements, which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

It seems that paragraph 30 and Box 2 of the guidelines, referring to governance arrangements, do not necessarily indicate that the institution is either failing or likely to fail. In this sense, the BRRD in Article 32 establishes that an institution is failing or likely to fail "when it infringes, or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of authorisation by the competent authority". We are concerned that these elements relate only to governance.

The guidelines should clarify that these elements are linked to others (capital or liquidity requirement) to justify that the institution is either failing or likely to fail, and so as to avoid misunderstanding, the wording "in most cases" should be deleted.

9. Do you have any comments on the proposed specification of the circumstances, related to the institution's operational capacity to provide regulated activities, which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

The indicators proposed in paragraph 31 are sufficiently laid down and covered by other concepts and areas of the guidelines. For that reason we consider it unnecessary to repeat them in paragraph 31.

As an example, we consider that the first indicator: "when an institution can no longer be relied on to fulfil its obligations towards its creditors or becomes unable to make or receive payments", it is likely "to be unable to pay its debts as they fall due" that is included in the guidelines.

10. Do you agree with our analysis of the impact of the proposals in this Consultation Paper? If not, can you provide any evidence or data that would explain why you disagree or might further inform our analysis of the likely impacts of the proposals?

In general terms, we are aligned with the impact proposal.

Submitted on behalf of the EBA Banking Stakeholder Group

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