POSITION PAPER

ESBG response to the EBA consultation on draft Regulatory Technical Standards and Guidelines on Business Reorganisation Plans under Directive 2014/59/EU (BRRD)

ESBG (European Savings and Retail Banking Group)

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Dear Sir/Madam,

Thank you for the opportunity to comment on the EBA's consultation on *Draft Regulatory Technical Standards (RTS) and Guidelines on Business Reorganisation Plans under Directive 2014/59/EU (BRRD).*

a) RTS – General comments

Article 2

Notwithstanding the requirement in the Level 1 text, it is not entirely clear to ESBG why the reorganisation plan should repeat information that would normally be available as part of the documentation by the resolution authority established when determining that the institution met the conditions for resolution (especially the issue of an institution being 'likely to fail').

Hence, ESBG recommends making specific reference to existing documentation in this regard. At worst, it could otherwise lead to an account that is inconsistent with that of the resolution authority. At most we would be pleased if the RTS requires the reorganisation plan to include a summary of this existing information.

Article 3

Art. 3(2)(c) draft RTS requires a description of how the institution will be able to provide 'an acceptable financial return'. This concept is rather vague and we believe more detail should be provided to allow for a better interpretation. For example, the paragraph could make reference to a return in line with peer institutions operating in the same/similar markets with comparable business models. What constitutes an 'acceptable' return will also depend on the economic and regulatory environment. Furthermore, this provision might define whether this return should be measured before or after taxes, a factor that is especially relevant where non-profit-related taxes (banking taxes) are levied on institutions.

Art. 3(2)(d) draft RTS refers to the plan needing to outline how the institution will meet its MREL requirement. However, it is not clear to ESBG how this would actually be possible, given that the MREL requirement of an institution after bail-in/resolution is unlikely to be the same as the MREL going into resolution. As such, a decision by the resolution authority on the 'new' level of MREL, together with the indication of an appropriate transition period, is required before this part of the plan can be drafted. The transition period is a critical input for the business reorganisation plan, as it determines the 'appropriate time period' for establishing the MREL referenced in this paragraph. Any provisions in this regard should be aligned with the draft RTS on criteria for determining the MREL (see question 10 in EBA/CP/2014/41: "Should the resolution authority also set a transitional period for the MREL of banks which are undergoing or have undergone a resolution process?").

While Art. 52(6)(c) BRRD makes reference to the 'sale of assets or of business lines', most decisions on (partial) sales or wind-downs should, in our view, be part of the resolution strategy established by the authorities. As such, defining the relevant entities, methods for winding down, etc., as required by Art. 3(4) draft RTS, does not seem appropriate in the context of the reorganisation plan, as this would be duplicating work already done by resolution authorities. The information should be available from the resolution plan/strategy and – as mentioned above under our comments on Article 2 – the reorganisation plan should not set standards that are entirely new. Instead, in ESBG's opinion, it should comment on sales of assets only in the case that the plan foresees actions over and above those already planned under the resolution strategy.

Similar comments are applicable with regard to Art. 3(5) draft RTS. Again, the valuations should, in our view, have been undertaken when implementing the resolution tools. In particular, the valuation of potential proceeds of spin-offs or asset sales should have formed part of determining the losses attributable to bailed-in creditors. It is, therefore, not clear to us why additional valuations would be required for the purposes of this reorganisation plan and where such valuations would fit in the overall framework, in particular with reference to the ex-post valuation required to determine whether the no-creditor-worse-off principle has been respected.

Moreover, ESBG believes that the reference to the recovery plan in Art. 3(8) draft RTS should be revised as it remains unclear why the contents of the recovery plan would not be accessible to the institution. The recovery plan is drawn up by the institution and it should still be available to the institution after a bail-in has been implemented (since the bail-in presumably served to maintain the majority of the existing institution). At any rate, ESBG is concerned about the formulation in paragraph 8 which suggests that the writers of the reorganisation plan might not be aware of the contents of the resolution plan. In our opinion, it would be counterproductive to the timely establishment of a reorganisation plan if this was not the case. At worst, the reorganisation plan could propose measures which are inconsistent with envisaged actions under the resolution strategy prepared by the resolution authority. The reorganisation plan should take into account the planned resolution strategy and its main purpose should be to outline measures that need to be taken into consideration by the institution to support the actions envisaged by the authorities (e.g. changes to policies and procedures, new governance arrangements, improvements in MIS, etc.).

Article 4

Art. 4(1)(b) draft RTS requires a comparison with alternative reorganisation strategies. In our view, it would be essential to specify that this does not entail a requirement to fully flesh out alternative strategies, but rather a need to (briefly) reference alternative actions when discussing the merits of the chosen measures. Given time and resource constraints, the focus of the plan should be on the proposed actions, not on justifications of why other actions were not chosen.

Art. 4(3) draft RTS requires the establishment of a 'worst-case scenario' for the reorganisation plan. While we understand that the Level 1 text uses the term 'worst case assumptions' in Art. 52(4) BRRD, we suggest changing the wording to 'adverse case' as, in ESBG's opinion, the worst case would be the failure of the plan to restore the long-term viability. Moreover, we believe that it is necessary to provide more guidance as to what constitutes an adverse case, since there is otherwise no guarantee that reorganisation plans drawn up by different entities would use comparable assumptions. As such, a definition of 'adverse case' should be added to the definitions in Art. 1 draft RTS (similarly to the definition provided for 'base case' – which we believe to be the correct term to

be used, although the Level 1 text in Article 53(4) BRRD refers to 'best case assumptions'). Given the current lack of clarity on what constitutes an adverse or worst-case scenario, we disagree with the conclusion stated in the impact assessment related to Option 3.2.

Art. 4(4) draft RTS should also be reworded so that it talks about an adverse case instead of a worst case. In addition, 'best-case' should be replaced with 'base case', as this is the wording used in paragraph 3 (and the plan should be based on a 'realistic' (base case), rather than an 'optimistic' (best case) scenario). With respect to the requirement for projections of key financial metrics in Art. 4(4)(c) draft RTS, we refer to our answer to Question 2 below, i.e. that regulatory metrics should not be relevant (and therefore cannot be forecasted) at business line level.

Article 5

ESBG recommends deleting 'at least' from Art. 5(1) draft RTS, as a forecast of performance indicators on a more frequent than quarterly basis is not considered adequate. Monitoring of indicators should take place more frequently to ensure that the milestones can be met (i.e. that the implementation of the measures is moving in the right direction), but setting more frequent targets could be counterproductive as most measures would take time to implement and effects on performance indicators would only be visible over a longer period of time.

Article 7

The meaning of Art. 7(3)(b) draft RTS could be further clarified. In particular, it is not entirely clear how 'the implementation of the measures contemplated in the plan' differs from 'the measures that are realised' in Art. 7(3)(a) draft RTS and the 'upcoming measures' in Art. 7(3)(g) draft RTS. The planned measures (and their anticipated effect) would be set out in the original reorganisation plan. As such, it does not appear necessary to repeat this information in the progress report, if this is implied by the statement in Art. 7(3)(b) draft RTS.

b) RTS – Answers to specific questions

***Question 1:* Do you consider it relevant to define the "reorganisation period"? Do you consider the current definition clear?**

ESBG believes that it is relevant to define the reorganisation period and considers the current definition as sufficiently clear.

***Question 2:* Is the concept of "business line" sufficiently clear? Can measures and performance be provided at a "business line" level?**

As there is no definition given for a 'business line', the concept is not sufficiently clear, in our view. Different institutions will use different concepts for the definition of 'business lines' and the level of granularity could vary significantly. This is, however, not considered a problem, as the business line definition should be proportionate to the activities and business model of a group or entity. This appears to be acknowledged by the EBA, at least in the context of recovery planning (see the EBA

Report "Comparative report on the approach to determining critical functions and core business lines in recovery plans", Section 4).

Having said this, according to Article 3(3)(c) draft RTS, liquidity, regulatory capital adequacy and MREL measures should be provided at group, entity and business line level. However, this requirement cannot be met at business line level, as regulatory ratios (including liquidity measures such as the LCR and NSFR) are only relevant, and can only be calculated at group and entity level (unless a business line is effectively its own legal entity). Where waivers exist, they may not even be relevant at entity level but only at group level.

What is more, the EBA could clarify that information at business line level is only required for measures providing information on financial performance, e.g. P&L contributions by business line and not for regulatory measures that are only relevant at a higher level of aggregation.

Question 3: Do you agree that an institution under resolution should use the reorganisation opportunity to address any shortcomings in the remaining business?

It is ESBG's view that priority should be given to the elimination of shortcomings necessary to ensure the institution returns to be a viable going-concern entity as soon as possible. As such, the reorganisation plan should focus on the areas that caused the problems leading to resolution. In addition, these areas would have been investigated as part of the process to determine that the institution is likely to fail. Addressing shortcomings in the remaining business will require additional analyses, which will likely use resources that could be better deployed to 'fix' the issues that most contributed to the crisis.

Unless shortcomings in the remaining business have been detected as part of the analysis already undertaken and their remediation is directly linked to measures that need to be taken to address the reasons for failure, these should be de-prioritised in order not to divert management attention and resources from activities that are essential for restoring the longer-term viability of the institution.

Question 4: Is it appropriate to consider the impact of the reorganisation strategy and measures on the functioning of financial system and the overall financial stability? Would it be appropriate to further detail the requirement regarding the impact of the reorganisation strategy on specific metrics, such as lending?

ESBG does not believe that the reorganisation plan specifically needs to address these issues as they should have already been considered by the resolution authority when devising the resolution strategy. The resolution strategy should have concluded that bail-in is the most appropriate tool to maintain critical functions of the institution and as such ensure the functioning of the financial system and overall financial stability[1]. The reorganisation strategy and measures – as mentioned above in our comments on Art. 3(8) draft RTS – should focus on activities necessary to support the implementation of the resolution strategy, i.e. the internal changes necessary to ensure that the resolution strategy achieves the objective of restoring the institution's long-term viability.

[1] In accordance with FSB guidance, critical functions are defined as 'activities performed for third parties where failure would lead to the disruption of services that are vital for the functioning of the real economy and for financial stability'.

Furthermore, ESBG does not believe that it would be appropriate to further detail the requirement. It is a key requirement of every resolution strategy that critical functions are maintained. Critical functions (including, as relevant, lending) would have been identified as part of the resolution planning process and the resolution strategy should have set parameters for the functions to be maintained. Hence, an assessment on whether the reorganisation plan is consistent with resolution strategy should be sufficient to ensure that the measures in the reorganisation plan do not impede the functioning of the financial system or the overall financial stability.

c) Guidelines – General comments

Title II

Point 2.5

As already indicated in our comments on the draft RTS, 'worst case' should be replaced with 'adverse case'.

Point 2.6

As outlined above, 'worst case' should be replaced with 'adverse case'. As the assumptions under the adverse case should not require the application of further resolution tools, the adverse case should – at least – be aligned with the assumptions made by the resolution authority when determining the bail-in amount in the resolution strategy, as this should have been based on a conservative valuation, which should have taken into account the potential for any future losses during the reorganisation phase. This would, however, imply that the assumptions underlying the valuation are available to the writers of the reorganisation plan.

Point 2.7

This point mentions 'both authorities', presumably referring to the competent authority and the resolution authority, although this is not clear and should be specified. ESBG does not believe that the provisions in Article 52(7) BRRD actually require both authorities to assess the plan as the Directive states that the resolution authority is responsible for the assessment of the plan and 'the assessment shall be completed in agreement with the competent authority'. In our view, this wording does not entail a separate assessment by the competent authority which seems to be implied by the draft Guidelines. In ESBG's opinion, separate assessments should be avoided as they not only duplicate work unnecessarily but could also lead to divergent views which would then require – potentially lengthy – reconciliation processes.

Furthermore, in our view, the reference to the SREP framework is inappropriate in this case, as the SREP methodology is used by the competent authorities and not the resolution authority. The statement 'insofar as the experience and competence of the resolution authority allows' implies that the resolution authority may not be able to do the full assessment. This is not in line with the requirement that the resolution authority is responsible for the assessment of the reorganisation plans.

Point 3.1

As already indicated in our response on Art. 2 draft RTS, we do not believe that the plan should include an independent account of the causes that triggered the resolution. Rather, the plan should include a summary of the assessment undertaken by the resolution authority in determining that the institution is failing or likely to fail in order to avoid unnecessary duplication of work.

Point 3.3.4

Divestments and spin-offs of entities and business lines should have been part of the resolution strategy, and the reorganisation plan should not contain specific measures in this regard. Therefore, point 3.3.4 does not necessarily have to be included in the proposed Guidelines.

Point 3.3.5

There should not be any additional valuation required for the purposes of the reorganisation plan as far as divestments are concerned. The valuation undertaken for establishing the required amount of bail-in should be the benchmark valuation for this purpose.

Point 4.1

In ESBG's view, the base case of the reorganisation plan should be the business plan of the entity. It is not entirely clear why an institution in resolution would have other business plans with which the reorganisation plan would have to be consistent. In case of any pre-existing business plans, the reorganisation plan should simply override this and become 'the' business plan for the entity.

Point 4.3.2

The meaning and purpose of this statement is not entirely clear and therefore ESBG would like to ask the EBA for further clarification.

Title III

In our opinion, some points under this title exceed the mandate for the Guidelines stemming from Art. 52(13) BRRD. According to this Article, the Guidelines should 'specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority'. One could indeed argue that this puts the entirety of Title III out of scope for the Guidelines. However, we believe that guidance on the cooperation of authorities is helpful in this regard as far as the approval of the plans is concerned.

Nevertheless, points 4 and 5 of Title III, which relate to progress reports rather than the reorganisation plans themselves, are beyond the scope envisaged by the BRRD. Hence they should be deleted, in ESBG's opinion.

Point 3

Art. 52(7) BRRD states that the assessment of the plan should be undertaken within one month of its submission. It is therefore not clear to us why the Guidelines require the establishment of a specific timeline (presumably within the one-month period).

Point 5

The BRRD does not specify a need for the progress reports to be assessed by either the resolution authority or the competent authority. Article 52(10) BRRD simply requires the submission of a report to the resolution authority. As already pointed out in the introduction to this section, ESBG believes that point 5 could be deleted in its entirety as the Guidelines are not meant to address progress reports.

Point 6

ESBG assumes that this point refers to disagreements about the plans rather than the progress reports, despite the fact that this is not entirely clear from the current order of points in this section (if points 4 and 5 were deleted, this issue would be resolved). We do not believe that a referral to the EBA should be included in the procedures, as the EBA mediation process is usually invoked in cases of disagreement between home and host authorities. In this respect, we encourage the involved parties to rethink the EBA's mandate in the future. However, at present and contrary to the statement in the draft Guidelines, the EBA Regulation does not yet give the EBA the right to act as mediator between competent authorities and resolution authorities[2]. Hence, ESBG suggests deleting point 6 in its entirety.

d) Guidelines – Answers to specific questions

Question 4: Is it appropriate to consider the impact of the reorganisation strategy and measures on the functioning of financial system and the overall financial stability? Would it be appropriate to further detail the requirement regarding the impact of the reorganisation strategy on specific metrics, such as lending?

Please see our answer to this question under the questions posed on the draft RTS.

Question 5: Is it feasible to obtain a commitment from the managers of the institution about the implications of the Plan and the appointment of responsible individuals in the institution for the implementation of the Plan?

Given that the plan has to be drawn up by the management body or the person appointed in accordance with Article 72(1) BRRD, we do not fully understand why to separately require this

[2] Article 31 of regulation states: 'The Authority shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union'. It does not give the EBA any rights to fulfil a coordination role between competent authorities and resolution authorities.

commitment. In particular, it is not clear what format would be required to demonstrate the commitment as, presumably, the plan would have been signed/approved by the parties mandated by the BRRD, i.e. management or the person appointed. If an explicit commitment was required, the form in which this would need to be given should be specified further.

<u>Question 6</u>: The BRRD requires for a Plan apply only in the event of use of the bail-in tool to recapitalise an existing institution. Are any of the provisions of the RTS and GL relevant in the event of use of the bridge institution tool, given the requirement that the resolution authority must approve the strategy and risk profile of the bridge institution? If so, which provisions do you consider relevant and why?

Since the BRRD explicitly requires a reorganisation plan only in the event of the use of bail-in to recapitalise an existing institution, the proposed Guidelines and RTS should not be applied in conjunction with other tools.

Leaving aside the legal aspect, ESBG does not consider any of the elements in the draft RTS or Guidelines relevant for a bridge institution. According to Article 40(2)(a) BRRD, the bridge institution itself has to be 'wholly or partially owned by one or more public authorities which may include the resolution authority' and 'is controlled by the resolution authority'. Article 41(1)(b) BRRD also states that the resolution authority either 'appoints or approves the bridge institution's management body'. The resolution authority is also responsible for transferring assets and liabilities to the bridge institution when using the bridge institution tool, so it effectively has control over the risk profile of the bridge institution.

Any business plan of the bridge bank would thus be drawn up by management appointed or approved by the authority and the authority would have control over the bridge bank. Extending the requirements for a plan to the use of the bridge institution tool would in fact only touch upon matters of decision-making within the lines of control from/within the resolution authority to/and the bridge institution and does, therefore, not appear to be necessary.

About WSBI-ESBG (European Savings and Retail Banking Group)

ESBG brings together savings and retail banks of the European Union and European Economic Area that believe in a common identity for European policies. ESBG members support the development of a single market for Europe that adheres to the principle of subsidiarity, whereby the European Union only acts when individual Member States cannot sufficiently do so. They believe that pluralism and diversity in the European banking sector safeguard the market against shocks that arise from time to time, whether caused by internal or external forces. Members seek to defend the European social and economic model that combines economic growth with high living standards and good working conditions. To these ends, ESBG members come together to agree on and promote common positions on relevant matters of a regulatory or supervisory nature.

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