

Proportionality in the BRRD: Planning, Resolvability, Early Intervention

Dr. Georgios Psaroudakis, MJur (Oxon)

Attorney-at-Law, Bank of Greece; Ass. Professor, University of Thessaloniki

Athens, 13th February 2017

I. Introduction (1)

- The complex relationship between resolution and proportionality:
 - a) Systemic stability as the particular objective of resolution: art. 31(2) BRRD.
 - b) Resolution as an intervention to private contracts (transferred, modified, terminated, left unexecuted).
- Explicit reference to proportionality in art. 31(2) BRRD *in fine*: " ... avoid destruction of value unless necessary to achieve the resolution objectives" .
- Resolution as an extraordinary (and proportional!) variation of insolvency proceedings.



I. Introduction (2)

Creditor protection is:

- a) part of the objective (if contracts are deemed to be systemically important) – art. 32(1)(c) BRRD (“public interest test”)
- b) limitation of the objective (if contracts are not systemically important):
No creditor worse off – art. 73 BRRD.

“Normal” insolvency proceedings are the counterfactual that typically needs to be averted, but also against which intervention to private contracts within resolution is compared.

II. Resolution planning

- Proportionality as a limitation of planning (*"the less planning the better"*):
 - a) Less information required from less complex institutions.
 - b) Simplified resolution plans (art. 4 BRRD) as regards: a) plan content, b) plan frequency.[Opt-in by Member States]

- Proportionality as a function of planning (*"the more planning the better"*):

At the time of application of resolution tools, value is preserved, if the resolution authority may act promptly and on the basis of previously acquired knowledge.

See in particular art. 3 of EBA/RTS/2014/15 on the content of resolution plans, referring among others to: critical functions to maintain, operational continuity, funding and liquidity, communication with stakeholders.

III. Resolvability Assessment

- Procedural proportionality in the stages of assessment as per art. 4(3)-(4) of EBA/RTS/2014/15:
 - a) resolution strategy identified on the basis of initial information
 - b) feasibility and credibility of the resolution strategy assessed on the basis of additional information
- Substantive proportionality informing the assessment:
 - a) non-feasibility and non-credibility of normal insolvency proceedings: resolution is necessary
 - b) feasibility and credibility of the resolution strategy: resolution is suitable to attain the objective pursued

IV. Impediments to resolvability (1)

- far-reaching powers (in particular as they are based on a forward-looking analysis) of the resolution authority in art. 17 BRRD to address or remove impediments:

among other things, requirements to limit exposures, divest assets, limit or cease activities, reduce complexity, issue eligible liabilities

- procedural proportionality: institution is allowed to propose measures first – art. 17(3),(4) BRRD

IV. Impediments to resolvability (2)

- substantive proportionality, which comes down to factors favouring the intervention of the resolution authority:
 - a) the closer to FLTF, the easier to justify the intervention (in other words, FLTF as a continuum rather than a rupture)
 - b) the more systemically important the bank (size and interconnectedness), the easier to justify the intervention
 - c) the more procedural the intervention itself, the easier to justify (eg reduction of complexity in the corporate structure as opposed to requirement to cease activities)

V. Early intervention (1)

- Early intervention sets forth the transition from corporate governance to insolvency governance:

In the “vicinity of insolvency”, or rather the “vicinity of FLTF”, shareholders’ interest gradually gives way to creditors’ interest, as enforced by the competent authority.

- Triggers (art. 27 BRRD and EBA/GL/2015/03)

Emphasis placed on SREP score (on which see EBA/GL/2014/13), as an overall “4” or an overall “3” with a “4” on a key indicator (internal governance, business model and strategy, capital adequacy, liquidity adequacy) may lead to early intervention.

...

V. Early intervention (2)

...

Still, the competent authority retains significant discretion (in the SREP itself and also):

- to take into account other indicators (“material changes or anomalies” under SREP or other significant events)
- to decide whether to apply early intervention taking into account “the urgency of the situation and the magnitude of the breach”.

Given the complexities involved, a quantitative approach would give rise to a risk of over- and under-inclusiveness.

V. Early intervention (3)

- Proportionality is practically written into the law, in the three-staged approach: early intervention measures, removal of senior management and management body, temporary administrator.

Each stage explicitly requires that the former is inadequate.

The whole of early intervention also functions as the milder alternative to insolvency or resolution.

- Early intervention measures (art. 27 BRRD) in particular: requirements for application of recovery plan, debt restructuring plan, changes in business strategy (among others).
- Temporary administrator (art. 29 BRRD) in particular: duration of appointment, functions, replacing or working with the management body.