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## Commission services' note on early intervention measures and preparation for resolution

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### **1. General considerations**

Title III (Articles 27-30) of the Bank Recovery and Resolution Directive (BRRD) provides for early intervention measures ('EIMs') that empower competent authorities with the necessary tools to address a significant deterioration in the financial and economic situation of an institution.

According to the EBA's report on the application of EIMs<sup>1</sup>, EIMs have rarely been used in the past. The EBA identified several reasons for this limited use, which included:

- legal ambiguity, in particular with regard to the triggers for EIMs and the sequencing for applying EIMs;
- an overlap of certain EIMs with other supervisory powers, namely those under the Capital Requirements Directive (CRD), the Investment Firms Directive (IFD) and the Single Supervisory Mechanism Regulation (SSMR); and
- the lack of a directly applicable legal basis for the ECB to apply EIMs.

The Commission's proposal seeks to address these shortcomings to provide competent authorities with the necessary legal certainty to facilitate the use of EIMs. Furthermore, it expands the limited provisions in the BRRD requiring cooperation between competent and resolution authorities when the financial situation of an institution starts deteriorating.

The key amendments proposed by the Commission are described below. The Commission proposal also includes amendments to the Single Resolution Mechanism Regulation (SRMR), introducing Articles 13 to 13b, that mirror the BRRD provisions and serve as a directly applicable legal basis for the ECB.

### **2. Clarifications to the conditions for applying EIMs**

The Commission proposes to amend Article 27(1) BRRD to remove the ambiguity found in the existing conditions for the application of EIMs and provide competent authorities with the legal

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<sup>1</sup> EBA, Report on the application of early intervention measures in the European Union in accordance with Articles 27-79 of the BRRD, EBA/REP/2021/12.

certainty necessary to facilitate their use. The proposal maintains an escalation ladder vis-à-vis supervisory measures under CRD/IFD by providing that EIMs may be used, *inter alia*, when the conditions for supervisory measures under the CRD or IFD have been met, but remedial actions have not been taken or are insufficient to address the problems identified by the competent authority.

The proposal removes the existing example of a quantitative EIM trigger, namely '*the institution's own funds requirement plus 1,5 percentage points*', which had been identified by EBA as raising difficulties in interpretation<sup>2</sup> and interfering with a more adequate process of setting institution-specific EIM thresholds.

To give some guidance on the cases in which a competent authority may deem that remedial actions other than EIMs are insufficient, the proposal refers to a '*rapid and significant deterioration of the financial condition*' as an example. However, this does not preclude the competent authority from considering remedial actions other than EIMs insufficient for other reasons, including a gradual but severe deterioration of the financial condition of an institution. The proposed Article 27(1) BRRD, second subparagraph, further clarifies that a competent authority may determine the insufficiency of remedial actions other than EIMs without having previously taken such remedial actions.

The proposal also adds Articles 45e and 45f BRRD to the list of provisions whose infringement or likely infringement entitles the competent authority to apply EIMs, thereby giving the competent authority the power it needs for its mandate to act on MREL breaches in accordance with the existing Article 45k(1)(d) BRRD.

Furthermore, the Commission proposal removes the language in Articles 28 and 29 BRRD that seemed to create an internal hierarchy between the EIMs listed in Article 27, the power to remove the senior management and the management body and the power to appoint temporary managers<sup>3</sup>. These latter two powers are now included in the list of Article 27(1a) BRRD, together with the other EIMs, and are thus subject to the same triggers. This should enhance competent authorities' ability to apply the most appropriate and effective measures in crisis situations. Nevertheless, in light of the more intrusive character of the measures referred to in Articles 28 and 29 BRRD, Article 27(2) BRRD clarifies that competent authorities would still be required to choose the appropriate EIMs in accordance with the proportionality principle, taking into account *inter alia* the seriousness of the infringement or likely infringement and the speed of the deterioration.

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<sup>2</sup> Given that Article 2(1)(51) BRRD defines 'own funds requirements' as '*the requirements laid down in Articles 92 to 98*' CRR, the application of the 1,5% margin would not take into account the additional own funds requirements set under Article 104a CRD that are binding on institutions and should be met at all times. This means that the 1.5% margin could only be breached at a point where the institution is already in breach of its regulatory requirements.

<sup>3</sup> More specifically, the reference in the existing Article 28 BRRD to '*other measures taken in accordance with Article 27 [not being] sufficient to reverse that deterioration*' and the reference in the current Article 29 BRRD to '*Where replacement of the senior management or management body as referred to in Article 28 is deemed to be insufficient by the competent authority to remedy the situation*'.

The existing BRRD provisions left room for the interpretation that the measures in Articles 28 and 29 BRRD could only be applied after the EIMs listed in Article 27 had been previously adopted.

The clarified triggers for EIMs in the BRRD are identical to the EIM triggers in Article 13 SRMR. Discrepancies between the wording of Article 27(1)(a) BRRD and Article 13(1)(a) SRMR merely reflect the differences between Article 102(1) CRD and Article 16(1) SSMR, without, however, leading to differences in substance.

### 3. Adjustments to the EIMs

The list of EIMs put forward in Article 27(1a) of the BRRD proposal eliminates those measures that previously overlapped with the available supervisory powers under Article 104 CRD or Article 39 IFD. More concretely, the proposal deletes the following powers previously listed in Article 27(1)<sup>4</sup> to require:

- the management to examine the situation and draw up a programme to overcome the identified difficulties (point (b));
- the removal or replacement of members of the management body or senior management found unfit to perform their duties (point (d));
- changes to the business strategy (point (f)) or to the operational structure of the institution (point (g)).

Additionally, the measure previously listed under point (h) of Article 27(1) BRRD, according to which the competent authority may acquire, including through on-site inspections, the information necessary to update the resolution plan, prepare for resolution and carry out the valuation and subsequently transmit that information to the resolution authority, was deleted from the list of EIMs and moved to the new Article 30a(3) BRRD. This better reflects the fact that this power was not aimed at remedying the deterioration of the economic and financial situation of the institution concerned, but rather at ensuring that the resolution authority has access to the necessary information to prepare for a potential resolution.

Under the existing text of Article 29(1) BRRD, the temporary administrator must have ‘*the qualifications, ability and knowledge required to carry out his or her functions*’ and be ‘*free of any conflict of interests*’. It was not clear whether this assessment would need to be carried out separately by the competent authority, or if it would form part of the appointing decision. The proposal amends Article 29(1) BRRD to align the assessment criteria with the relevant existing criteria under CRD for the suitability assessment of members of the management body. More specifically, reference is now made to Article 91(1), (2) and (8) CRD<sup>5</sup>. This will ensure a higher

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<sup>4</sup> These powers can be found in Articles (91)(1) and 104(1) CRD, points (c), (e) and (f), Article 16(1), points (c), (e), (f) and (m) SSMR and in Articles 39(2), points (c), (e) and (f) IFD.

<sup>5</sup> Concretely, the temporary administrator is required to be of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties (paragraph 1), commit sufficient time to perform their functions (paragraph 2) and act with honesty, integrity and independence of mind to effectively assess and challenge decisions of the senior management (paragraph 8)). The criterion in Article 91 CRD related to the collective suitability of the management body (paragraph 7) and the restrictions on the number of directorships (paragraph 3) were not deemed relevant for the context under which a temporary administrator is appointed.

level of consistency within the EU when appointing temporary administrators and will allow competent authorities to conduct swifter internal assessments, benefitting from their already established ‘Fit and Proper’ policy stances<sup>6</sup>. Moreover, it is now made clear that the assessment must be made prior to the appointment, i.e. that it is an integral part of the decision appointing the temporary administrator.

#### **4. Preparation for resolution and cooperation between competent and resolution authorities**

A new Article 30a is added to BRRD, building on the text of the existing Article 13 SRMR, to clarify and lay down additional rules on the cooperation between, and the respective responsibilities of, competent and resolution authorities in the run-up to resolution<sup>7</sup>.

Paragraph 1 of Article 30a BRRD requires competent authorities to notify the resolution authority:

- when it adopts certain supervisory measures under CRD or IFD (with those that were previously listed as an EIM being particularly relevant);
- when it considers the conditions for early intervention to be met (even in the absence of a follow-up action); and
- when it applies EIMs.

The competent authority must closely monitor the implementation of those measures (though, in what concerns the supervisory measures, only those that aim to address a deterioration in the situation of the institution concerned).

Paragraphs 3, 4 and 5 of Article 30a BRRD empower the resolution authority to prepare for a possible resolution. The power to market, or make arrangement for the marketing, of the institution concerned is not entirely new, as a similar power can already be found in the existing Article 27(2) BRRD. This possibility continues to be subject to the confidentiality safeguards of Article 84 BRRD. Article 30a(5) BRRD now explicitly empowers the resolution authority to request the institution to set up a virtual data room, where necessary for the marketing of the institution or for carrying out the resolution valuations. Experience has shown that the success of resolution transfer strategies, particularly the sale of business tool, is maximised when the sales procedure begins in a timely way. It can be expected that the more time and information are given to the potential

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These references will need to be updated once CRD VI enters into force.

<sup>6</sup> The same treatment was not provided in Article 35 BRRD for special managers as they are appointed by the resolution authority and assigned with tasks exclusively related to the implementation of resolution actions with a temporary mandate not exceeding the resolution period. They are therefore not subject to a suitability assessment to be conducted by the competent authority – see paragraph 207 of the joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU (ESMA35-36-2319, EBA/GL/2021/06).

<sup>7</sup> See the Commissions’ services note on the interaction and roles of authorities in the CMDI package, submitted for the 7 July 2023 meeting of the CWPFS/BU, for a more detailed explanation on the provisions of Article 30a(2), concerning the early warning of a material risk of a failing or likely to fail event.

purchasers, the less conservative their purchase offers would be. Pursuant to the proposed Article 30a(8) BRRD, these preparatory measures require a close cooperation between competent and resolution authorities, who must also ensure that any actions taken by them are consistent, coordinated and effective. For example, the resolution authority should take care to ensure that a preparatory resolution measure does not unduly impede a recovery effort pursued by the institution.

To dispel any unintended interpretations, Article 30a(6) BRRD explicitly provides that the prior determination by the competent authority that the conditions for early intervention are met, as well as the prior application of EIMs, are not necessary conditions for the resolution authority to start preparing for resolution. This does not entail that the resolution authority would be able to apply its preparatory powers to an institution that does not face any problems – rather, it ensures that the resolution authority does not have to wait for the competent authority to adopt a decision before being able to act.