

Ensuring the resolvability of banking groups

An analysis of the supervisor's room to manoeuvre

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Abstract

The resolvability of banking groups plays an essential role for the effectiveness of the European resolution regime. In this regard, the European legislator provided the resolution authorities a broad set of powers and duties in order to assess, maintain – or if necessary – establish the resolvability of the banking groups concerned. In Austria, the framework for the recovery and resolution of credit institutions and investment firms (»BRRD«¹) has been implemented by the Federal Act on the Recovery and Resolution of Banks (»BaSaG«²).

The following manuscript analyses the normative parameters, requirements and limits, namely the intervention determinants (the »supervisors' room to manoeuvre«) for ensuring the resolvability of cross-border banking groups, taking into account different (singular or multiple) resolution approaches and the major structural factors, such as the functioning of group resolution planning in cross-border resolution colleges.³

- 1 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 on establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, 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 as well as the Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council, OJ (EU) 2012 L 173, 190.
- 2 Austrian Federal Act on the Recovery and Resolution of Banks (Recovery and Resolution Act – BaSAG), Austrian Federal Law Gazette I 2014/98.
- 3 In order to put greater emphasis on the cross-border aspects of the BRRD, the basic principles of the BRRD are primarily cited and reference is only made to the provisions of the Austrian Federal Act on the Recovery and Resolution of Banks (BaSAG) in the case of special aspects.

Catchwords

intervention, resolvability, banking group

Regulations

BRRD, Austrian Recovery and Resolution Act – BaSAG, EU-SRM-Regulation, Charta of Fundamental Rights – CFR

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I. Background

The lessons learned from the recent financial crisis have prompted the European legislator to introduce minimum standards for the resolution of credit institutions (recital 1 and 10 BRRD). In contrast to normal insolvency proceedings, an effective (and credible!) resolution regime could help to reduce the negative impact of an institution's failure on financial market stability, the real economy and taxpayers.

The core of a functioning resolution regime is the resolvability of failing banks. Since the resolvability does not already exist by nature, both regulatory requirements (BRRD including Level II and III Acts) and **intensive supervisory intervention** are required in certain cases. As these interventions significantly affect the freedom to carry on a business² and the right to property,³ the relevant **determinants** for the activities of the resolution authorities ensuring this kind of resolvability have to be discussed.

II. Legal bases

The provisions on resolvability can be found in Title II Chapter II (incl annex Section C) of the BRRD, which is implemented by Sections 27 to 31 of the Austrian Federal Act on the Recovery and Resolution of Banks (BaSAG). Of increased importance are also art 23 et seq of the Delegated Regulation (EU) 2016/1075⁴ (»Assessment of resolvability«) and the EBA/GL/2014/11.⁵ For the euro

zone, the provisions of the SRM-Regulation⁶ have to be considered too.⁷

III. Overview

The BRRD essentially includes **three interrelated procedure steps to ensure the resolvability of a banking group**:

1. Assessment of the resolvability (hereinafter Chapters IV and V);
2. Removal of major impediments to the resolvability (Chapters VI and VII);
3. Detailed description⁸ of the resolvability in the group resolution plan (Chapter VIII).⁹

In order to make this complex subject area more comprehensible, the individual steps are presented separately. However, the most important networks and spill-overs to other steps are pointed out in each case. This perspective is important for the presentation of the intervention determinants in chapters IX and X.

IV. The concept of resolvability

The concept of resolvability is set out in art 15 and 16 of the BRRD. According to art 16 para 1 second subparagraph BRRD, a group (art 2 para 1 no 26 BRRD) is to be regarded as resolvable

»if it is feasible and credible for the resolution authorities to either wind up group entities under normal insolvency proceedings or to resolve group entities by applying resolution tools and powers to group entities while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system wide events, of the Member States in which group entities are established, or other Member States or the Union and with a view

2 Art 6 of the Basic Law on the General Rights of Citizens (StGG); at EU level see also art 16 Charter of Fundamental Rights (CFR) (»freedom of enterprise«). The European Convention of Human Rights (ECHR) itself does not contain »comparable provisions«.

3 Art 5 of the Basic Law on the General Rights of Citizens (StGG), art 1, 1st additional protocol ECHR with art 17 GRC.

4 Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, OJ (EU) 2016 L 184, 1.

5 EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU. EBA/GL/2014/11 (19.12.2014).

6 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, OJ (EU) 2014 L 225, 1.

7 See *Haentjens/Wessels* (Hrsg), Research handbook on crisis management in the banking sector (2014) 125 et seq.

8 See in particular art 22 of the Delegated Regulation 2016/1075 as well as EBA, Decision of the European Banking Authority on the settlement of a disagreement. Addressed to: Single Resolution Board and Banca Națională a României, 2017 joint decision on group resolution plans and resolvability (27.4.2018) recital 31.

9 See also the case of the mediation procedure in EBA, Decision of the European Banking Authority on the settlement of a disagreement, recital 21 and art 1 of the decision.

to ensuring the continuity of critical functions carried out by the group entities, where they can be easily separated in a timely manner or by other means.«

Resolvability is therefore not an objective, but a **subjective condition**.¹⁰ The competent resolution authority decides solely and exclusively, if the bank is resolvable (taking into account the facts set out in Section C of annex C and, if applicable, art 88 BRRD) or not. In this context, the cumulative elements of the **feasibility** and **credibility** of the resolution regime are of elementary relevance.¹¹ While *feasibility* is based on the **effectiveness the resolution tools in order to achieve the resolution aims** (see appendix Section C no 21 BRRD), the term *credibility* refers in particular to the *»possible impacts on creditors, counterparties, customers and employees and possible actions that third-country authorities may take«* (appendix Section C no 24 BRRD).

By definition (but systematically irritating) *»resolvability«* does not only include the application of resolution instruments according to the BRRD, but also **ordinary insolvency proceedings** (art 2 para 1 no 47 BRRD).^{12,13} In the spirit of the BRRD, liquidation through ordinary insolvency proceedings is always regarded as an *alternative* to the use of resolution tools (cf art 26 Delegated Regulation 2016/1075). If a banking group is actually put under resolution, it is a question of the public interest according to art 32 para 1 lit c BRRD. It is **not a question of its resolvability**. Indeed the definition of *»resolvability«* thus does not primarily **aim** at the use of resolution tools (art 2 para 19 BRRD), but at **reducing adverse effects** on other market participants (e.g. through the uncontrolled cessation of critical functions in accordance with art 2 para 1 no 35 BRRD) and the system (cf art 2 para 1 no 30 BRRD) as such (*purpose*). The term *»resolvability«* therefore does **not** correspond fully with the **objectives of resolution** according to art 31 para 2 BRRD, which ultimately **requires** the use of resolution tools or powers (art 31 para 1 BRRD).¹⁴

In essence, resolvability therefore only exists if, from the point of view of the resolution authority, the liquidation or the resolution of a banking group does **not**

result in any significant adverse effects on the financial market¹⁵

If there is no possibility to resolve the bank, **the resolution authority shall remove the impediments responsible for this** (cf art 17 and 18 BRRD; see below), provided this is compatible with the principle of proportionality (art 17 para 6 lit b BRRD in conjunction with art 21 CFR; see below).

As already mentioned above, *»resolvability«* does not necessarily mean that the banking group will actually be put under resolution in the event of failure.¹⁶ *»Resolvability«* is thus only an **indication for public interest** (art 32 para 1 lit c BRRD).¹⁷

It is worth noting that the European legislator **never** directly assumes a scenario in which the resolvability of an institution or a group **could not ultimately be established** (cf also art 23 para 3 Delegated Regulation 2016/1075).¹⁸ Consequently – but nevertheless counter-intuitively – the resolvability is therefore **not a direct normative factor for the resolution** or use of resolution tools (cf art 32 BRRD).¹⁹ Indirectly, however, the resolvability, albeit not equal, is required within the framework of the of the **public interest test** (art 32 para 5 BRRD).

Conversely, the European legislator thus assumes that **any significant impediment** to ensuring the resolvability can be **eliminated** either by the group itself (art 17 para 3 and art 18 para 3 BRRD) or by alternative measures by the resolution authority (art 17 para 4 and art 18 para 4 BRRD) – without a public *bail-out* or comparable tools.

10 Cf *Jahn/Schmitt/Geier* (Hrsg), *Bankensanierung und -abwicklung* (2016) Titel B Section VII recital 1 and 7.

11 *Jahn/Schmitt/Geier* (eds), *Bankensanierung und -abwicklung* (2016) Titel B Section VII recital 4 talk about the *»intimidating effect against moral hazard«* here.

12 On the problem of the concept of regular insolvency proceedings, see *Merler*, *Critical functions and public interest in banking services: Need for clarification?* (November 2017) recital 4.2.

13 cf *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B, Section VII, recital 6. See also *Binder/Singh* (eds), *Bank resolution* (2016) recital 2.23 et seq.

14 See also *Binder/Singh* (eds), *Bank resolution* (2016) recital 2.20 et seq.

15 Art 10 para 5 of the SRM Regulation provides a concrete definition: *»For the purposes of paragraphs 3, 4 and 10, significant adverse consequences for the financial system or threat to financial stability refers to a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardise the orderly functioning, efficiency and integrity of the internal market or the economy or the financial system of one or more Member States«*. However, the definition differs from the concept of systemic risk under art 3 para 1 no 10 CRD IV.

16 In practice, the effective resolvability is probably only decided in the event of an actual emergency; cf *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B, Section VII, recital 11.

17 This also underscores the **absolute character** of the **resolvability**: Either it exists or it does not exist – if there are major impediments. The public interest, on the other hand, is **relatively conceived**: The resolution tools have already been used, if they are the better alternative to the regular insolvency proceedings (cf art 32 para 5 BRRD).

18 Admittedly, from the point of view of time until the removal of the major impediments, there is no resolvability by definition. This case is likely to be dealt with in *EBA*, *Decision of the European Banking Authority on the settlement of a disagreement* (see recital 35).

19 Conversely, the effective use of resolution tools is one of the prerequisites for resolvability (!). However, the assessment of resolvability shall include a *mapping* of the resolution tools to the resolution objectives (annex Section C no 21).

V. Assessment of resolvability

The resolution authorities shall assess the resolvability when drawing the group resolution plan at the latest (art 12 para 4; see below).

The resolution authorities shall comply with the following testing stages when assessing the resolvability (art 23 para 1 of the Delegated Regulation 2016/1075):

- a. Assessment of feasibility and credibility of liquidation of the institution or group under **normal insolvency proceedings** (art 24 of the Delegated Regulation 2016/1075);
- b. Selection of a **preferred resolution strategy** for the assessment (art 25 of the Delegated Regulation 2016/1075);
- c. Assessment of **feasibility** of the selected resolution strategy (art 26 to 31 of the Delegated Regulation 2016/1075);
- d. Assessment of **credibility** of the selected resolution strategy (art 32 of the Delegated Regulation 2016/1075).²⁰

Lit a (art 24 of the Delegated Regulation 2016/1075) projects the general **conditions for resolution and its principles**, according to which **no creditors shall incur greater losses by using the resolution tools than would have been incurred if the institution or entity had been wound up under normal insolvency proceedings** (art 34 para 1 lit g BRRD).²¹ This first testing stage is consistent and emphasises the *alternative* character of the recovery regime (cf also art 32 para 5 BRRD).

Lit b requires the resolution authorities to define a **resolution approach** in principle (see below). This stage thus narrows the perspective of group resolution planning and allows a **stronger focus** on the activities that are absolutely necessary to ensure resolvability (cf art 25 of the Delegated Regulation 2016/1075).

The implementation of the **third** (lit c) and **fourth** (lit d) testing stage appears to be extremely complex and challenging for the resolution authorities. Accordingly, they have to analyse a **large number of legally determined sub-aspects** in order to qualify a banking group as resolvable (*positive demarcation*).

Thus, art 16 para 2 (in conjunction with annex Section C of the BRRD) requires the assessment of (group) internal control aspects and procedures (no 1 to 12), the assessment of internal and external financial support agreements (no 13 to 15 and 17) as well as the analysis of the complexity of the group (no 16), special cross-border

aspects (no 20, 23) and the assessment of sub-aspects of the impacts on the financial system (no 24 to 28).²²

However, the obligation to analyse and the appropriate consideration of the aspects listed in Section C BRRD of the Annex does not mean that the resolution authority would have to give an affirmative opinion on each of the items referred to therein and to qualify the group as resolvable. The vague wording (*»When assessing the resolvability of an institution or a group, the resolution authority shall take the following facts into account«*) suggests a **holistic valuation method** in which the individual sub-aspects are to be analysed, but the resolvability is to be determined within the framework of the overall picture according to Section C BRRD.²³ This is also supported by art 31 para 3 BRRD, which in principle describes the resolution objectives as being of **equal significance**.^{24, 25}

The above definition of resolvability (feasibility, credibility, adverse effects on the system) also requires indirectly the assessment of resolvability to include a minimum of concrete *projection* with regard to the applied resolution tools (cf art 37 et seq BRRD). Consequently, within the framework of this projection, the **resolution objectives** (art 31) and their **weighing** against each other (note) as well as the **general principles governing resolution** (art 34 and 87 BRRD) must also be taken into account (expressly art 25 para 1 of the Delegated Regulation 2016/1075).

The resolution authorities nevertheless have a **certain degree of discretion** in the allocation of value and prioritisation of the different aspects (cf recital 19 of the Delegated Regulation 2016/1075). However, *bail-out-related* transactions must be compulsory disregarded (cf art 16 para 1 BRRD; *negative demarcation*).

VI. Resolvability as part of resolution planning

The assessment of resolvability is a **fundamental part of group resolution planning** (art 12 para 4 in conjunction with art 16 para 3 BRRD),²⁶ so that the finalisation of resolution planning cannot take place without the

²⁰ cf EBA, Decision of the European Banking Authority on the settlement of a disagreement recital 26.

²¹ cf Jahn/Schmitt/Geier (eds), Bankensanierung und -abwicklung (2016) Title B Section III recital 27.

²² See also for further details art 26 to 32 of the Delegated Regulation 2016/1075 (*feasibility and credibility of the resolution strategy*).

²³ See also Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) Title B, Section VII, recital 30.

²⁴ Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) Title B, Section III, recital 44.

²⁵ Inconsistent, therefore, recital 29 BRRD, which grants increased relevance to the *»overriding argument of public interest in financial stability«* (cf art 31 para 2 lit b BRRD).

²⁶ See also EBA, Report on the functioning of resolution colleges in 2017 (July 2018) and Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) 274 et seq.

assessment of resolvability or the decision to remove the major impediments (cf art 17 para 2 BRRD).^{27, 28} Thus, there shall not actually be a final group resolution plan which could be a significant impediment to the resolution of the group (cf also art 88 para 1 lit d BRRD),²⁹ although assumptions and provisions in art 22 para 7 of the Delegated Regulation 2016/1075 are opposed to this diametrically.³⁰ It should be noted, however, that the existence of a group resolution plan is **not a normative requirement for the actual resolution of a group** (cf art 32 BRRD). However, the existence of a group resolution plan in turn supports the feasibility and credibility of the resolution tools, i.e. the existence of the resolvability.³¹

As part of the resolution planning, the resolution authorities should also select the optimal **resolution approach** for the group, in particular with regard to the allocation of the loss-absorbing capacity within the group (art 12 para 1 BRRD).³² In group resolution plans, a distinction is made between a **single-point-of-entry-approach** (art 2 para 5 of the Delegated Regulation 2016/1075; central resolution via group's top management; »*single point of entry*«) and a **multiple-point-of-entry-approach** (art 2 para 6 of the Delegated Regulation 2016/1075; decentralised resolution; »*multiple points of entry*«) (cf recital 80 BRRD and recital 23 of the Delegated Regulation 2016/1075),³³ although hybrid approaches are also conceivable and permissible.³⁴

Although the approach chosen by the resolution authorities is of great importance in practice, it is **not directly linked to the assessment of resolvability in normative terms**. However, the chosen approach has an **indirect effect** within the framework of the proportionate application (art 17 para 6 lit b BRRD) insofar as the

resolution authorities are required to ensure a comprehensible **consistency** between measures and the chosen resolution approach when assessing the resolvability and, if applicable, when selecting alternative measures pursuant to art 17 para 4 BRRD.³⁵ For example, it would not be permissible to introduce alternative measures that are **not even necessary** for the chosen resolution approach, such as the obligation to build up eligible liabilities on a decentralised basis, if a pure *SPE approach* (recapitalisation via parent company) was chosen.³⁶

From a structural point of view, the assessment of the resolvability of cross-border banking groups is a **joint project** of the respective resolution authorities (art 13 para 4 BRRD). Normally, the resolvability of a group can then only be determined with the consensus of all resolution authorities concerned. In practice, it is precisely the choice of the resolution approach (SPE or MPE) that can lead to conflicts of interest and thus to the prevention of a joint decision-making. In such cases, the BRRD provides for **binding mediation powers** by the EBA on **initiative** of a resolution authority concerned (art 13 para 5 and para 6, respectively second subparagraph BRRD).

Only in cases where the EBA does not intervene,³⁷ or where none of the resolution authorities demands binding mediation by the EBA,³⁸ art 13 para 5 and para 6 BRRD allow **independent national initiatives**,³⁹ albeit within a **narrow framework**: In such a case, the resolution authorities shall nevertheless take into account the »*views and reservations*« of the other resolution authorities concerned (cf art 13 para 5 and 6 BRRD).⁴⁰

27 This strong interlinking is also emphasized in recital 31 BRRD: »Therefore the assessment of the impact on resolvability should be based on the resolvability assessment, on the individual resolution plan, and, where applicable, on the group resolution plan as determined by the joint decision of resolution colleges.«

28 For the specific application of a disagreement between the resolution authorities see EBA, Decision of the European Banking Authority on the settlement of a disagreement recital 19, 25 and 30.

29 This is also consistent with the aforementioned *assumption* about the establishment of the resolvability.

30 Art 22 para 7 of the Delegated Regulation 2016/1075 requires, among other things, information from the resolution authority on »whether or not the institution or group is currently resolvable« (lit. a).

31 However, it seems unlikely that the multitude of normative vicious circles was actually intended by the European legislator.

32 cf Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) Title B Section VII recital 16 et seq.

33 cf Haentjens/Wessels (eds), Research handbook on crisis management in the banking sector 261 et seq. See also Binder/Singh (ed), Bank resolution (2016) recital 14.09 et seq.

34 cf EBA, Decision of the European Banking Authority on the settlement of a disagreement recital 36 to 38.

35 This de facto overlap is clearly emphasised in recital 21 of the Delegated Regulation 2016/1075: »Assessment of resolvability is an iterative process and is only possible on the basis of an identified preferred resolution strategy. Resolution authorities could conclude at the end of the process that an amended or wholly different strategy is more appropriate«. EBA also confirmed this principle in its »Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU, recital 6«. However, the EBA gives the resolution authorities a minimum degree of freedom to change the preferred variant retroactively.

36 For concrete examples see EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU, recital 13 to 17.

37 The EBA shall take the decision within one month, otherwise the legal consequences pursuant to art 13 para 5 and 6 second subparagraph BRRD shall apply.

38 Note: The provisions on group resolution planning do not provide for binding mediation powers of the EBA *ex officio* (there is neither a direct nor an indirect reference to art 19 para 1, second subparagraph, EBA Regulation).

39 Note: From the perspective of the resolution authority responsible for the parent company of the group, the concept of *national solo effort* is admittedly not entirely correct. Finally, the parent company must **ensure** the compliance with the consolidated requirements or the removal of significant (intragroup) impediments on a **global basis**.

40 cf Binder/Singh (eds), Bank resolution (2016) recital 1.42.

The same principles also apply to the implementation of alternative measures to ensure the resolvability of cross-border groups (cf art 18 para 6 and para 7 BRRD). The compulsory consideration of the interests of the other resolution authorities thus constitutes an important dimension in the examination of the proportionality principle (see below) and in turn **significantly limits mutual manoeuvrability**. In practice, it seems very difficult in such a case to maintain a synchronised resolution view of the group. Finally, the failure of the joint decision-making indicates serious differences in the interests of the parties involved. The differences would tend to intensify in the case of isolated national measures, which would **in fact significantly reduce** the possibilities for ensuring the resolvability. This would probably lead to a *lose-lose situation* overall.

VII. Impediments to resolvability

The BRRD does not provide an independent definition of the cases in which there is a **significant impediment** to resolvability (art 17 para 1 and art 18 para 2 BRRD). However, **size** (*»too big to fail«*) and **complexity** (*»too complex to fail«*)⁴¹ are likely to be the main obstacles to resolvability.⁴² The list of facts in annex Section C BRRD is a **non-exhaustive list**. It is important to note that impediments to resolvability do not necessarily relate to the group, its structure or proceedings,⁴³ but may also relate to **exogenous and/or endogenous factors**, such as the impact on the financial system and the behaviour of other market participants (cf section C no 20 and 24 to 28), including issues in third countries.⁴⁴

Therefore, an impediment is in principle any established fact that effectively prevents the 100 % resolvability of the group,⁴⁵ regardless of its inherent economic,

political, legal or psychological nature. A purely **abstract, potential⁴⁶ restriction is not sufficient to qualify it as an impediment** within the meaning of the BRRD.^{47,48} A(n) (significant) impediment thus reduces, by definition, the feasibility or credibility of the resolution regime, or leads to significant adverse effects on the *system* in case of an institution's or a group's failure.

VIII. Catalogue of supervisory measures to remove impediments

If the resolution authority comes to the conclusion that a group is not resolvable, it shall take appropriate measures to ensure the resolvability, in particular to reduce the main impediments (art 17 para 1 and art 18 para 2 BRRD), however, the institution or group shall have the chance to remove the impediment itself or to propose measures to the authority to remove the impediment, before measures are taken by the resolution authority (art 17 para 3 BRRD).

If the resolution authority can **prove** that the activities or proposals of the institution or the group are **not suitable** for ensuring the resolvability, the authority is in principle authorised to take **alternative measures** (art 17 para 4 BRRD). It should also be noted at this point that in art 17 para 6 BRRD, special emphasis is put on the **obligation to**

hindering of the feasibility of the resolution. It is therefore all the more surprising that the BRRD only expressly stipulates measures to remove **major resolution impediments**.

⁴⁶ From the point of view of the BRRD, the wording in EBA/GL/2014/11 according to which the resolution strategy *including foreseeable impediments to the restoration of the long-term viability of an entity* [...] is to be assessed (EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU, recital 4 lit a). In terms of the BRRD system, this makes a **difference between the recovery and resolution regime**. In the latter, *potential* impediments must also be taken into account (cf art 6 para 6 BRRD).

⁴⁷ Art 31 of the Delegated Regulation 2016/1075 is irritating in this respect, since the examples given there are factual, not merely *potential* impediments. Admittedly, it can be difficult to distinguish between individual cases (such as *step-in risks*). However, this should not lead to a situation in which intragroup conflicts of interest and incentive systems are degraded as *purely abstract* impediments. On the contrary, the pure existence of a contractual *option that* impairs the resolvability can be seen as an effective impediment (see also the special case in art 25 BRRD). A quantification of the (predominant) probability that the option will actually be exercised does not appear necessary for the assessment of the resolvability (cf catalogue in Section C BRRD and the wording in art 31 of the Delegated Regulation 2016/1075).

⁴⁸ EBA, Decision of the European Banking Authority on the settlement of a disagreement recital 33, and *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B, Section VII, recital 117 confirm the tendency towards a **strict interpretation** to prove the existence of a major impediment.

⁴¹ The introduction of a separation bank regime can be mentioned as a far-reaching measure to address the complexity problem, cf *Independent Commission on Banking*, Final report on structural and related non-structural reforms to the UK banking sector (12.9.2011).

⁴² *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B, Section VII, recital 28.

⁴³ Impediments may exist, for example, if contractual or factual constructions reduce or destroy the independence or manoeuvrability of the group or individual entities, especially with regard to the continuation of critical functions (art 2 para 1 no 35 BRRD); cf *Binder/Singh* (eds), *Bank resolution* (2016) recital 2.28 et seq.

⁴⁴ For the maintenance of confidence to the market see, inter alia, art 2 of the Delegated Regulation (EU) 2016/1450 (*»MREL«*). Cf EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU.

⁴⁵ The attribute *»essential«* therefore seems to be semantically misleading, since an insignificant impediment does not lead to the complete prevention of the resolvability, but leads to the

state reasons and the nature of the alternative measure as an **administrative act** (which is suitable for appeal).

The non-exhaustive⁴⁹ **catalogue of alternative supervisory measures** can be found in art 17 para 5 BRRD.⁵⁰ Among other things, the catalogue enables the resolution authority to carry out **intensive interventions** in the institution and in the group structure. In essence, the catalogue mentioned in art 17 para 5 BRRD comprises of the following instruments:

- ▷ revision of intragroup financing agreements (lit. a);
- ▷ drawing up service agreements to cover the provision of critical functions (lit a);
- ▷ limitation of the group's maximum individual and aggregate exposures;
- ▷ strengthened the information requirements relevant for resolution purposes (lit c);
- ▷ requirement to divest specific (in particular illiquid assets in the event of stress) assets (lit d);
- ▷ limitation of the business model (lit e and f; see also art 18 para 2 BRRD);
- ▷ structural changes of the group (lit g, h and k);
- ▷ change in the refinancing base (lit i and j).

The resolution authority may thus require the (consolidating) institution to restructure both intra-group links and relationships with third parties in such a way that the resolvability is taken for granted by the resolution authority. In extreme cases, this can also lead to a continuous **structural separation** of entities (e.g. prohibition of mutual risk positioning taking into account art 19 para 4 BRRD for intra-group transactions; prohibition or reduction of operational dependencies; separation of critical functions) or business lines (e.g. separation of investment banking from the other segments; preventive sale of illiquid portfolios, prohibition of activities in certain third countries), and thus the elimination of synergies intended for business policy purposes (e.g. cash pooling) or diversification effects (e.g. diversification of key functions).⁵¹ Consequently, this

can result in the establishment of independent systems, procedures or processes for certain entities in order to increase their independence, as well as to make personnel changes (e.g. in case of conflicts of interest due to personal union). Such alternative measures would thus have far-reaching consequences for the relationship between parent institution and subordinate institutions, and thus for the entire group governance.⁵²

Both the **quantity** as well as the **quality** of the tools available should normally⁵³ enable the resolution authority to **remove** the main impediments to ensuring resolvability.⁵⁴ However, it should be noted that some of the tools mentioned above (could) **seriously interfere with the economic activity** of the institution or group.⁵⁵ Moreover, the extent to which **conflicts of objectives** between the authorities responsible for ongoing supervision and the resolution authorities shall be taken into account appears questionable. The following statement deals with the question in which cases and to what extent the resolution authorities may carry out such intensive interventions.

IX. The supervisors room to manoeuvre (» Intervention determinants »)

The supervisors room to manoeuvre to apply alternative measures in order to ensure the resolvability of a bank

sure that certain sub-groups or entities are separable, resolution authorities should consider requiring groups to organise legal entities following regional blocks or core business lines, in particular if critical functions are attributable to certain business lines while other business lines do not encompass critical functions. This should in particular apply to centralised hedging and risk management, trading and liquidity management, and collateral management, liquidity management or other key treasury and finance functions, unless these functions can be replaced by market transactions with outside parties. In accordance with the resolution strategy, resolution authorities should prevent extensive cross-entity booking and hedging practices, and ensure that entities that are to be resolved separately have sufficient stand-alone booking and risk management. Resolution authorities should consider requiring institutions to put in place effective standalone governance, control and management arrangements in each subgroup or entity«. (EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 13 lit b).

49 Even if the wording according to art 17 para 5 BRRD suggests an exhausted list, a mandatory restriction under secondary law of the catalogue of tools in the area of the national implementation would contradict the minimum level of harmonisation of the BRRD (cf art 1 para 2 BRRD). The demonstrative character of the list is also expressly confirmed by **recital 25 of the Delegated Regulation 2016/1075**. The Member States are thus allowed to expressly anchor further measures within the framework of implementation. However, the Austrian legislator has not made use of this option in § 29 of the Austrian Act on Bank Recovery and Resolution (BaSAG) and has anchored an exhausted list.

50 More detailed explanations on the individual situations and aspects can be found in Title III of the *EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU*.

51 *EBA/GL/2014/11* shows how strong this intrusion can be: » *necessary for the effective implementation of an MPE strategy and to en-*

52 More detailed information on the alternative measures can be found in *EBA, on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 7 to 17*.

53 However, this applies only outside *systemic crises*, in which the credibility of a recovery regime could quickly reach its limits in individual cases, regardless of the use of alternative measures. cf *Jahn/Schmitt/Geier* (eds), *Bankensanierung und -abwicklung* (2016), Title B Section III recital 23.

55 cf *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B Section VII recital 142 et seq.

(or banking group) is **limited in several respects** («Intervention determinants»; see also recital 29 BRRD⁵⁶). **On the one hand**, the application of alternative measures is only permissible in a **subsidiary manner** and only if the measures envisaged by the group itself can be seen as **ineffective or too late**⁵⁷. One noteworthy fact is that the BRRD – even in the event of an imminent resolution «fail or likely to fail» – does not provide for any explicit exception to this subsidiarity, i.e. there are **no contingency powers available for the authorities to remove impediments in the event of imminent danger**.⁵⁸

On the other hand, the resolution authority bears a **multidimensional burden of proof**: The authority shall demonstrate **both the ineffectiveness** of the measures implemented or proposed by the institution or group (by definition related to feasibility, credibility and impacts on the financial system), **as well as the effectiveness of the alternative measures** (suitability⁵⁹ and necessity⁶⁰) and their **proportionality**.

56 »In order to respect the right to conduct business laid down by Article 16 of the Charter of Fundamental Rights of the European Union (the «Charter»), the Board's discretion should be limited to what is necessary to simplify the structure and operations of the institution solely to improve its resolvability. In addition, any measure imposed for such purposes should be consistent with Union law.« (recital 29, third and fourth sentences, BRRD).

57 Pursuant to art 17 para 3 BRRD, the institute must take appropriate measures or propose them to the authority within four months of notification of the existence of major impediments. If this impediment corresponds to non-compliance with the combined capital buffer requirement (art 141a CRD V), this period is reduced to two weeks with regard to BRRD II (see COM (2016) 852 final).

58 On the one hand, art 27 BRRD («early intervention») is structurally upstreamed of the resolution regime (recovery), on the other hand, the examination of the resolution prerequisites requires the consideration of differing elements (art 32 BRRD f) and principles (art 34 BRRD). In practice, a case would in particular be legally problematic, if the impediments to ensuring the resolvability of the resolution authority make it more difficult or impossible to prove the public interest pursuant to art 32 para 5 in conjunction with art 31 BRRD (resolution objectives), for example, if the impediments identified do not prevent significant negative impacts on financial stability (cf art 16 subpara 2 and art 31 para 2 lit b BRRD).

59 »A measure is suitable to reach the intended goal if it is able to materially reduce or remove the relevant impediment in a timely manner« (EBA, guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 5 lit a.) Therefore, the resolution authority cannot demand the removal of impediments to resolution that are not within the sphere of access of the institution or group (e.g. conduct of third parties); cf. Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) Title B Section VII recital 146.

60 »A measure is necessary to reach the intended goal if it is required to remove or materially reduce a substantive impediment to the feasible or credible implementation of the relevant resolution strategy, and if there are no less intrusive measures which are able to achieve the same objective to the same extent.« (EBA, guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 5 lit b.).

However, art 17 para 4 second subparagraph last sentence BRRD indicates the requirement for the **multidimensionality**, according to which the resolution authority must also take into account the «threat to financial stability posed by these impediments»⁶¹, the «effects of the measures on the business activity of the institution», its «stability» and «its ability to make a contribution to the real economy» (!⁶²) in this assessment.

Among the **necessary tools**, the resolution authority has to find the **most moderate mean** that⁶³ meets the above-mentioned requirements. The additional short, medium and long-term costs resulting from the measures, such as restructuring within the group, shall also be taken into account in particular. The negative effects on the **owners of the institute** and their **right to entrepreneurial freedom** pursuant to art 16 GRC as well as the solidity and stability of the institute's ongoing business must also be considered.⁶⁴

Due to the already mentioned mandatory **projection of the resolution tools** in the context of resolution planning and the choice of resolution approach (SPE, MPE), the **requirement of proportionality** required under art 17 para 6 lit b BRRD in conjunction with art 20 CFR also **takes into account the resolution objectives** under art 31 BRRD (extended target conditionality).⁶⁵ The alternative measures must therefore also be suitable for achieving one or more resolution objectives that also correspond to the assumptions of the **selected resolution approach** and the general principles for resolution (art 34 BRRD; e.g. «no creditor worse off»).

Finally, before using the tools, the resolution authority shall «duly consider the potential effect of those measures on the particular institution, on the internal market for financial services, on the financial stability in other Member States and Union as a whole» (art 17 para 7 BRRD) and, in doing so, assess adequately the opinions of the competent authorities and, if applicable, the macroprudential authorities (art 17 para 7 and art 18 para 2 BRRD).

61 Note: The consideration of the «threat to financial stability posed by these impediments» is partly redundant with the definition of resolvability.

62 In view of the central conditions for obtaining a licence in art 11 CRD IV («Member States may not require the application for authorisation to be examined in terms of the economic needs of the market.»), the wording appears irritating from a prudential perspective.

63 cf EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 5 lit c.

64 cf EBA, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU recital 5 lit b and Jahn/Schmitt/Vulture (eds), Bankensanierung und -abwicklung (2016) Title B Section VII recital 148.

65 cf Jahn/Schmitt/Geier (eds), Bankensanierung und -abwicklung (2016) Title B Section III recital 21.

In the case of cross-border groups, the resolution authorities must also take into account, in even broader terms, the » *the potential impact of the measures in all the Member States where the group operates*« (art 18 para 4 BRRD).⁶⁶

X. Conflict of prudential aims

Further intervention limits may result from **conflicts of objectives** between the resolution authority (BRRD) and the authority responsible for ongoing supervision (CRR/CRD).⁶⁷ Thus, the competent authority alone is responsible for assessing the risk profile of an institution or group (art 97 et seq CRD IV⁶⁸). This includes, inter alia, the evaluation of the business model, internal governance, capital and liquidity⁶⁹ of the supervised institution. Even if the statutory tasks of these authorities are closely interlinked in economic terms, the resolution authority may not directly or indirectly **undermine** the responsibilities and results of the competent authorities.⁷⁰ For example, **intensive intervention** by the resolution authority in a business model classified by the competent supervisory authority as sustainable (art 17 para 5 lit e and f BRRD) or intervention in a liquidity buffer judged as appropriate (cf art 86 CRD IV and art 17 para 5 lit c BRRD) would appear to be **very difficult to justify, unless the resolution is not an acute threat** (see below).

The considerations in the case of interventions in the refinancing basis (art 17 para 5 lit i and f BRRD) and the potential shift between *going* and *gone concern capital* (cf art 2 of the Delegated Regulation (EU) 2016/1450) also appear particularly piquant.⁷¹ The possibilities of demanding the institution to establish superordinate financial holding companies appear to be equally conflict-immanent. The implementation of the latter meas-

ure could even result in a change of competence in consolidated supervision in the future (cf COM proposals on art 21a CRD V).⁷²

Remarkable in this respect is recital 29 BRRD,⁷³ which indeed mentions the interaction between the resolution authority and the competent authority, but does not fix it consistently in terms of standards. Only in individual cases the BRRD provides for concrete methods for the (indirect) **resolution of such conflicts of objectives** (see, for example, the right of veto of the competent supervisory authority pursuant to art 25 para 2 BRRD and the mandatory consideration of the results of the SREP in art 4 of the Delegated Regulation (EU) 2016/1450).⁷⁴

In order not to generate any **contradictions** between BRRD and CRR/CRD, the activities of the resolution authority shall not hinder the fulfilment of the tasks of the competent supervisory authority and must be cut down to the bare essentials when alternative measures are taken. However, this **principle** is likely to be relativized or reversed as the institution or group becomes **increasingly destabilised**, possibly even in the presence of a sustainable business model (!).⁷⁵

XI. Interim summary

The analysis of the concept of **resolvability** quickly reveals its complexity, but also its inconsistent classification within the BRRD regime. Intuitively, the concept of resolvability is a central prerequisite for the functioning of the resolution regime. **However, this could not be fully proven** by normative means, especially since the legal interrelationships between resolvability, resolution planning and actual resolution show **large inconsistencies and legal gaps**. In addition, there is no executable scenario within the BRRD considering that an institution is deemed as not resolvable. On the contrary, the European legislator seems to assume that the resolution authority could always ensure resolvability by the application of alternative supervisory measures.

66 See also the general principles for cross-border group resolution under art 87 BRRD.

67 See also *Haentjens/Wessels* (eds), Research handbook on crisis management in the banking sector 84 et seq.

68 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the business of credit institutions and the prudential supervision of credit institutions and investment firms, OJ (EU) 2013 L 176, 338 as amended Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, OJ (EU) 2018 L 156, 43.

69 cf *EBA*, Guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing, *EBA/GL/2018/03* (19.7.2018).

70 Of course, the resolution authority may not use alternative measures to force the institution concerned into a breach of law; cf *EBA*, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU, recital 4 lit b.

71 See also art 2 of the Delegated Regulation (EU) 2016/1450 (»MREL«) as well as *Igl/Krüger/Stepanek/Warnecke*, *Bankenabwicklung und MREL* (2018) 73.

72 See already *Stern*, CRR II & CRD V: (De-)Regulierung mit zittriger Hand, *ZFR* 2017, 56 (57).

73 »Resolution authorities, on the basis of the assessment of resolvability by the relevant resolution authorities, should have the power to require changes to the structure and organisation of institutions directly or indirectly through the competent authority, to take measures which are necessary and proportionate to reduce or remove material impediments to the application of resolution tools and ensure the resolvability of the entities concerned.« (recital 29, first sentence, BRRD).

74 See also *EBA*, Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU, recital 4 lit c.

75 cf *Jahn/Schmitt/Vulture* (eds), *Bankensanierung und -abwicklung* (2016) Title B, Section VII, recital 12.

However, the prerequisites for setting such alternative measures seems are **very defined in a very narrow sense**, so that it would be extremely difficult for a resolution authority to **implement these instruments effectively**.

A **simple balancing** of effectiveness and proportionality between the measures proposed by the institute and the alternative supervisory measures proposed by the authorities (»subsidiarity«) is not **sufficient to comply with the BRRD minimum standards**. This seems irritating as the multitude of additional aspects to be considered by the resolution authority does not correspond to the definition of resolvability. This inherent contradiction within the BRRD between the principle of equal significance of the resolution aims (art 31 para 3 BRRD) and the simultaneous emphasis on **financial market stability as the »overriding argument«** (recital 29 BRRD) also appears remarkable. Since it is difficult for a resolution authority to demonstrate the distributive effect of financial market stability as an argument in the procedure in a comprehensibly granular manner, this dimension of the principle of proportionality appears to be of little help in increasing legal certainty.⁷⁶

Structural limits to the possibilities of intervention are also drawn by the European procedural provisions within the framework of the resolution authorities. This means that the alternative measures shall in principle be taken by **consensus of the authorities involved** or in accordance with the **binding decision of the EBA**. Although independent national initiatives are permissible in some exceptional cases, they further limit the capacity to act of all resolution authorities.

In summary, the resolution authority shall prove the following when taking alternative measures to ensure the resolvability:

1. **Ineffectiveness** of the measures proposed by the institute itself;
2. **Effectiveness** (relevance and suitability) of the alternative supervisory measures;
3. **Proportionality** of the alternative supervisory measures, in particular in relation to the
 - ▶ use of the most moderate means (e.g. cost aspects);
 - ▶ effects on the business activities of the institution/group;
 - ▶ effects on owners (freedom to carry on a business);
 - ▶ impact on the stability of the institution/group;
 - ▶ impact on the ability of the institute/group to contribute to the economy;
 - ▶ impact on **financial stability**;

4. Ensure **compliance with European procedural requirements** (*joint decision, EBA decision or taking into account the views of other resolution authorities*);
5. Ensuring **legal compliance** (in particular CRR/CRD);
6. Ensure consistency with **resolution objectives**;
7. Ensure consistency with the **resolution approach**;
8. Ensuring consistency with the **resolution principles** (e.g. *NCWO*);
9. **No significant impact** on the Member States concerned;
10. **No significant impact** on the internal market for financial services⁷⁷;
11. **No conflict** with tasks of the competent authority.

These requirements clearly show that they, although the European legislator assumes that banking groups will be able to resolve in any case, impose a **heavy burden of argumentation** on the resolution authority in order to achieve this goal.⁷⁸ However, this is consistent insofar as it reduces the negative factual impact of **conflicts of prudential aims** between ongoing supervision (including the macroprudential mandate) and the resolution authority.

Surprisingly, however, this **does not necessarily lead to the conclusion** that banking groups in which there are significant impediments to ensuring the resolvability cannot actually be resolved for reasons of **inconsistency of the facts in the BRRD**. The reason for this is the fact that the resolvability pursuant to art 16 para 1 BRRD is not a direct normative prerequisite for resolution pursuant to art 32 BRRD.

There is much to be said in favour of resolving this supposed contradiction that **the closer the actual resolution of a banking group comes, the stronger the intervention rights of the resolution authorities shall be**. A turning point is likely to be the **moment of early intervention** pursuant to **art 27 BRRD**, as the resolution authority shall prepare the resolution at the latest from that date, and not just by ensuring the resolvability (**art 27 para 2 BRRD**).⁷⁹ Up to this point in time, the focus of official argumentation and action has been on the competent supervisory authorities.⁸⁰ Accordingly,

⁷⁷ See recital 29, fifth sentence, BRRD: »Measures should be neither directly nor indirectly discriminatory on the grounds of nationality, and should be justified by the overriding reason of being conducted in the public interest in financial stability.« and recital 30, leg cit: »Measures proposed to address or remove impediments to the resolvability of an institution or a group should not prevent institutions from exercising the right of establishment conferred on them by the Treaty on the Functioning of the European Union (»TFEU«).«

⁷⁸ Jahn/Schmitt/Vulture (eds), *Bankensanierung und -abwicklung* (2016) Title B Section III recital 43 even talk here of the »ultima ratio«.

⁷⁹ cf Igl/Krüger/Stepanek/Warnecke, *Bankenabwicklung und MREL* 71 to 73.

⁸⁰ Of course, regulatory (»pillar I-like«) regulatory norms of the recovery regime, such as »MREL«, remain unaffected by this.

⁷⁶ cf Jahn/Schmitt/Vulture (eds), *Bankensanierung und -abwicklung* (2016) Title B Section VII recital 152.

the principle of proportionality and the conflicts of objectives addressed must be **interpreted dynamically**.

XII. Key points of the cross-border procedure for the purpose of resolvability

For a correct understanding of the previous statements, the **distribution of roles** between the individual resolution authorities from different Member States involved in group resolution planning should be discussed below (art 12, 13 and 88 BRRD; Sections 25 of the Austrian Federal Act on the Recovery and Resolution of Banks (BaSAG)).

The administrative procedure referred to consists of four different stages:

- a. Section one: The procedure lead by the group resolution authority; at this stage, which may last up to four months, the resolution authorities involved shall draw up a joint resolution plan.
- b. Section two: If the participating authorities do not agree, the competent group resolution authority shall be entitled to establish a group resolution authority autonomously, taking into account the opposed point of views of the other participating resolution authorities.
- c. Section three: In parallel, each national resolution authority has the right, under certain conditions, to draw up individual resolution plans for subsidiaries located in its Member State, taking into account the dissenting votes of the other resolution authorities.
- d. Section four: In parallel, each resolution authority may initiate a mediation procedure before the EBA if this is necessary to draw up a joint group resolution plan and to settle disagreements. In this case, the EBA shall be entitled, if necessary, to issue a binding conciliation decision which shall be binding on all involved resolution authorities. It follows that in sections two and three of the planning procedure, decisions of the competent authorities may be taken only in line with the EBA decision.⁸¹

A. In detail

The procedure for drawing up group resolution plans applies when a **group** consists of a parent⁸² undertaking and several subsidiaries⁸³ which – as in the case in question – operate in several EEA Member States and/or third

countries (article 2 para 1 no 26, no 27 and no 42 BRRD). The subsidiaries are included in the supervision **on a consolidated basis** (art 4 para 1 no 47; art 11 ff, 18 CRR).

In the group resolution procedure, a distinction must be drawn between **three key players** having different rights and obligations: Probably the most decisive role is played by the **»competent authority«** for the **group-level resolution** pursuant to art 2 para 1 no 44 BRRD. It is assigned the task/function of the **»lead entity«**, since it has to take the necessary steps in sections one and two of the procedure in the group processing pursuant to art 13 BRRD and coordinate them with other parties; the competent authority **chairs the resolution committee** pursuant to art 88 BRRD (art 88 para 5 leg cit).

Art 2 para 1 no 44 BRRD assigns the role of the **»competent authority«** for the group resolution procedure to the resolution authority in the Member State in which the consolidating supervisory authority has its registered office.⁸⁴ This authority is further defined in art 2 para 1 no 37 BRRD in conjunction with art 4 para 1 no 41 CRR.⁸⁵

On the other hand, a distinction must be made between the **other national resolution authorities**, which are responsible for resolution planning in relation to individual subsidiary institutions at national level (art 12 and 13 BRRD).

Together, the competent resolution authorities form a so-called **»resolution college«** (art 88 para 2 BRRD), which is responsible for drawing up a group resolution plan (art 88 para 1 subpara 2 lit b BRRD).

A resolution college must therefore be constituted, if a resolution plan is to be drawn up for a so-called **»group«** within the meaning of art 2 para 1 no 26 and 27 BRRD (art 12 and 13 BRRD).

According to the considerations of the EU legislator, a resolution college represents a **»discussion forum«** for all questions in connection with cross-border group resolution. All involved resolution authorities are ex lege obliged to participate in such a college with adequate resources. Such a **»joint project«** can therefore only function, if all the actors involved, in particular the competent group resolution authority and the other resolution authorities, participate in it on an equal footing and with appropriate seriousness (principle of **administrative cooperation**).

⁸¹ There is a correspondingly **»tiered«** transnational administrative procedure.

⁸² Art 2 para 1 no 6 BRRD.

⁸³ Art 2 para 1 no 5 BRRD.

⁸⁴ § 2 no 46 of the Austrian Act on Bank Recovery and Resolution (BaSAG) assigns this role, without further specification, to the authority in the Member State in which the consolidating supervisory authority is located. In addition, sentence 2 par cit appends: Where the consolidating supervisor is the ECB, the group resolution authority shall be the resolution authority in the Member State in which the consolidating supervisor would be located without the application of Regulation (EU) No 1024/2013.

⁸⁵ For the determination of the consolidating authority see the criteria mentioned in art 111 CRD IV.

In primary law, the requirement of administrative cooperation is also expressly anchored in art 4 para 3 TEU (»principle of loyalty«).⁸⁶ This principle is (in conjunction with art 13; 88 BRRD) directly applicable. As a result, the EU bodies involved in a resolution college (SRB; EBA) and the national resolution authorities are obliged to provide mutual support and **comprehensive cooperation** within the framework of resolution planning and the college.

It follows from this that one of the aforementioned parties **may not deviate from the basic procedure laid down in art 13; 88 BRRD during the pending planning procedure** without good reason. A national resolution authority, for example, which is responsible for the planning of a subsidiary may not unilaterally impose certain resolution measures during a pending planning procedure or »threaten« to do so preventively, if its opinion is not followed. Corresponding deviations from the normative intention would therefore have to be classified as illegal or abusive and as a violation of the principle of loyalty or article 13 of the BRRD. Thus art 13 para 2 BRRD also consistently stipulates that **group resolution plans are to be drawn up and updated jointly**.⁸⁷

B. The different process levels

As already mentioned, the group planning procedure consists of four different, possibly overlapping sections of the procedure. Section one represents the standard procedure. Sections two to four of the procedure, which are standardised in art 13 BRRD, should only be carried out according to the scheme of the law or the ratio legis, if the standard procedure cannot be completed.

The group planning procedure has to be interpreted from two different perspectives in order to come up with reasonable or sustainable statements.⁸⁸ The further analysis of the procedure will depend on whether the national resolution authority is the competent authority for the group resolution and therefore has the role

of »lead entity«, or, to the contrary, whether the national resolution authority is not the competent authority for the group resolution and therefore only participates in the procedure in other respects.

Irrespective of the role played by the national resolution authority in group planning, the main motto is the following: The authorities involved in the resolution college must **jointly develop the group resolution plan** and decide on it. This implies that the »lead entity«, i.e. the »competent resolution authority«, coordinates closely with the other resolution authorities involved and, if necessary, also involves the EBA and the other banking supervisory authorities in its planning (cf the emphasis on the duty of mutual cooperation and coordination in art 88 para 2 and para 5 BRRD).

It is the responsibility of the resolution authority responsible for group resolution to promote the procedure within the meaning of art 13 and 88 BRRD and, above all, to involve effectively the resolution authorities involved. In this respect, the »lead entity« plays a leading role in the proceedings; this follows unambiguously from art 88 para 5 BRRD which formulates the duties of the »competent authority« in detail.

The **aim of the resolution college** at procedure level one is to **jointly draw up a group resolution plan** within the four-month period stipulated by secondary law (art 13 para 4 subpara 2 BRRD).⁸⁹

In order to achieve this ambitious goal, the **participation** of the EBA on a consultative basis is provided for during the planning procedure (cf art 88 para 4 BRRD), which must ensure an efficient and coherent functioning of the resolution college. In addition, at the request of the »lead entity«, the EBA may help in reaching an agreement – even before the initiation of an official conciliation procedure pursuant to art 19 Regulation (EU) No 1093/2010 (EBA Regulation).⁹⁰ As the authority responsible for group resolution, the resolution authority shall initiate a reassessment of the group resolution plan, including the minimum capital requirements and eligible liabilities in this case.

During this **first »negotiation and planning phase«**, it is the responsibility of the competent group resolution authority to ensure a **comprehensive exchange of information** within the college and to consult the other supervisory authorities involved; the latter must be granted the right to comment on decisions and to participate in meetings of the resolution college within the four-month period (art 88 para 5 BRRD).

86 For more details see *Streinz*, art 4 para 25 et seq in Streinz (ed), TEU/TFEU³ (2018).

87 A deviation from this procedure is only permitted to the national resolution authorities under the condition laid down in art 13 para 6 BRRD, namely that no joint resolution plan was reached within the four-month period pursuant to that article and that the conciliation procedure before the EBA, insofar as it was invoked – which is probably to be seen as a »conditio sine qua non« in the sense of EU law – has also been completed without a »joint decision«. Further details in the following text.

88 In systematic terms, this also results from the fact that the Member States have implemented art 13 BRRD in two different provisions (cf art 47 and 48 of the German Act on the Recovery and Resolution of Credit Institutions (SAG); art 25 and art 26 of the Austrian Act on Bank Recovery and Resolution (BaSAG), with the first provision covers the competent group resolution authority, while the second addresses the role of the national resolution authority, if it is not the competent group resolution authority.

89 It will then be reviewed and updated annually.

90 The EBA shall not be involved, if one of the resolution authorities concerned is of the opinion that a controversial issue has fiscal implications for the Member State concerned. Both, the BRRD and the relevant Delegated Regulation on BRRD owe further information or specifications on this point.

If there is **no joint decision** by the resolution authorities within the four-month period⁹¹, the resolution authority responsible for the group shall decide on the group resolution plan by itself (**procedure stage two**). The authority shall justify its decision (art 13 para 4 BRRD). Such an individual acting is only permissible under the further condition that no mediation procedure has been initiated before the EBA and, second, that the four-month period expired without result (art 13 para 5 BRRD). In this case, the law imposes a comprehensive **obligation to state reasons** to the competent group resolution authority. The group resolution authority must explain to what extent its decision on the »settlement of the item« (adoption of a group resolution plan) is necessary: the authority shall, among other things, prove to what extent it has taken account of the views and reservations of other settlement authorities and **for what reasons a joint decision within the meaning of art 13 BRRD was not possible**.⁹²

The decision shall then be notified to the resolution authorities concerned and to the group institutions, in particular to the parent company. The decision of the competent group resolution authority is provisionally **binding** on all members of the college involved in the planning process pursuant to art 88 para 2 BRRD as well as on all institutes belonging to the group – at least as long as the decision has a lasting effect. It should also be emphasised here that the other national resolution authorities are obliged to follow the jointly developed proposal for a group resolution plan in their further individual planning for national subsidiaries. They must base their further planning on it.⁹³

91 This deadline is calculated from the time when all the information and analyses relevant to the assessment have been received entirely by the responsible group resolution authority.

92 From a procedural point of view, it follows that other resolution authorities involved have the right to be heard and to comment. However, their comments (the BRRD also refers to them as »reservations«) are not binding on the competent group resolution authority. Secondary law would probably only impose an »obligation to disagree« to the detriment of the responsible group resolution authority.

93 The draft joint group resolution plan thus forms the framework for the national resolution plans to be developed in Section three below. According to the understanding of art 13 para 6 BRRD, the national resolution authority may not easily deviate from this jointly developed proposal, but must clearly explain in its national decision why it could not adhere to the joint proposal. The national resolution authority is therefore not permitted to »deviate« on the basis of the principle of loyalty and the ratio of art 13 BRRD without further ado, but only for valid reasons. This is due to the fact that the resolution authority was already able to formulate its reservations towards the responsible group resolution authority in procedure stage one; procedure stage one represents the standard model from which the members of the resolution college involved should not deviate »simply like that«. Pursuant to art 13 para 4 BRRD, the competent group resolution authority is also obliged to deal comprehensively with the objections of the members of

However, a different procedure applies, if one of the supervisory authorities involved initiates the **mediation procedure** before the EBA, which is based on art 19 EBA Regulation⁹⁴ (cf art 13 para 5 subpara 2 BRRD; **procedure stage four, which runs parallel to procedure stage two**) within the planning period. During the conciliation phase, the resolution authority with group responsibility must postpone its decision »in anticipation of a possible decision« by the EBA pursuant to art 19 para 3 EBA Regulation.

During the mediation process, differences of opinion between the members of the college involved should be reduced as far as possible. This in turn presupposes a comprehensive **willingness to cooperate on the part of the parties involved**; the EBA is also obliged to deal with diverging points of view before adopting a decision pursuant to art 19 para 3 EBA Regulation.

Ideally, the resolution authorities concerned can settle disagreements and reach a joint decision. If the EBA's attempt at conciliation fails, the authority will issue a **binding conciliation decision** within one month from being seized, which regularly provides for various measures to resolve the »conflict« (art 19 para 3 EBA Regulation). This decision is addressed to the resolution authorities of the resolution college and binds them, in particular at procedure stage two and three; the resolution authorities are **not permitted to deviate** from it under EU law.⁹⁵

Normally, the parties involved in the mediation procedure subsequently succeed in reaching a joint decision, as art 13 BRRD intended. Only if the **conciliation procedure** before the EBA **fails**, the competent group resolution authority may **issue its »sole« decision** in accordance with the EBA decision pursuant to art 19 para 3 of the EBA Regulation (art 13 para 5 of the BRRD⁹⁶). The decision issued in this respect by the competent group resolution authority shall have effect at group level and shall be taken into account in their further activities by the members of the resolution college involved.

Another procedure stage (namely stage one combined with stage three and, where applicable, stage four) shall apply if the **national resolution authority is not the group resolution authority**. According to art 13

the resolution college involved and to take these into account as far as possible.

94 Regulation (EU) no 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ (EU) 2010 L 331/12.

95 If the members of the resolution college do not agree with the EBA conciliation decision, the members are entitled to refer the case to the EBA Board of Appeal (art 60 EBA Regulation).

96 The scheme and ratio of art 13 para 5 BRRD clearly show that this »sole« decision, which prescribes a binding group resolution plan, is the exception and is only conceived as an ultima ratio.

para 1 et seq and art 6 of the BRRD, it has an **accompanying position** in the group planning procedure at stage one. As has already been shown, the national resolution authority must initially »only« participate in the common procedure, support the responsible group resolution authority and make a comprehensive contribution to the planning process by means of opinions and analyses. First, the »one-sided« positions-taking, which does not take into account the status quo of the group and only focuses on the interests of a national subsidiary, second, the unwillingness to move away from a position once taken in the interest of the joint decision-making and planning process as well as of the entire group, or third, the lack of willingness to compromise on the part of a participating national resolution authority in general violate the **cooperation obligation** laid down and **owed** in art 4 para 3 TEU; art 13 and 88 BRRD.⁹⁷

During the first procedure stage, the resolution authorities involved should seriously engage themselves for and jointly develop a group settlement plan; it may be necessary to ask EBA for assistance if necessary.

The situation becomes precarious, if no joint decision by the resolution college is reached within four months of the complete submission of all the necessary information and analyses.

Under the assumption that the EBA has not initiated a mediation proceeding pursuant to art 19 EBA Regulation, the national resolution authority is entitled to issue an **individual resolution plan** that applies to the respective **national subsidiary** as the **ultima ratio at procedure level three**.⁹⁸ However, the corresponding »national« group resolution plan is subject to strict legal barriers.

- ▷ First, the national resolution authority responsible for a national subsidiary must give detailed reasons why it could not follow a jointly developed proposal for a group resolution plan. In the sense of the ratio legis, it should be noted here that it is not sufficient for the national resolution authority simply to refer to contrary opinions expressed so far in the group planning procedure and to reverse to its view in the sense of an »insistence decision« due to the principle of loyalty (cf art 13 para 6 BRRD). It is also intended to explain why it is absolutely necessary to maintain its position in the interests of the national subsidiary – hence from a national point of view –

and why an agreement on a common group plan ultimately had to be avoided on the basis of national interests. If it turns out that the objective stated by the national resolution authority or the interests pursued by it could have been achieved equally effectively by the joint group resolution plan, a deviation by the national resolution authority proves to be illegal, as any deviation from the standard procedure laid down in art 13 BRRD requires a valid reason.

- ▷ Second, any individual resolution plan adopted at procedural level three, especially as it may only be adopted as *ultima ratio*, shall be developed in light of the views and reservations of the other members of the resolution college and in accordance with the last proposal for a group resolution plan. In this context, the national resolution authority must convincingly demonstrate the extent to which it has taken into account the views of the other authorities. If, therefore, the national resolution authority unilaterally orders specific planning measures to the detriment of the national subsidiary without taking into account the requirements of art 13 para 6 BRRD or the developed proposal for a group plan, and if the above-mentioned deviation from the standard procedure (the first procedure stage) does not prove necessary to achieve the objectives, the national individual resolution plan adopted at stage three is to be regarded as illegal and countervailable.

This does not apply if the EBA has also initiated stage four – parallel to the third procedure stage – meaning that the EBA has initiated a mediation procedure within the meaning of art 19 EBA Regulation and art 13 para 6 subpara 2 BRRD. In this case, the national resolution authority may only adopt a national resolution plan, if no joint resolution plan has been reached within the conciliation phase. Additionally, the national resolution authority must take the following decision in accordance with the conciliation decision of the EBA pursuant to art 19 para 3 of the EBA Regulation. In such a case, the national resolution authority is prohibited from deviation (art 13 para 6 subpara 2 BRRD).

To put it in a nutshell, the **role of the national resolution authority**, which is not the competent group resolution authority and which participates in a resolution college, is clearly defined and **interpreted strictly**. The national resolution authority must participate in the development of a joint group plan and should contribute its know-how and analyses in the joint planning process.

A **deviation** from a jointly developed proposal for a group resolution plan or from the standard procedure by a national resolution authority is only **permissible for compelling reasons in the public interest** (art 13 para 6 BRRD). In addition, the national resolution authority

97 It is not for nothing that national provisions under art 48 para 1 of the German Act on the Recovery and Resolution of Credit Institutions (SAG) stipulate that the resolution authorities participating in a supervisory college must (seriously) endeavour to take a joint decision on a group resolution plan.

98 *Ultima ratio*, because – from a systematic point of view – art 13 para 6 BRRD takes second place to art 13 para 4 BRRD when a joint group plan has been drawn up.

shall ensure that it takes adequately into account its decision of conflicting opinions or reservations of other resolution authorities or the EBA through a balanced decision.

However, if it is already indicated during the four-month planning phase pursuant to art 13 BRRD that the participating national resolution authority – which is not the competent group resolution authority – is not seriously interested in a joint planning decision and if it rejects a planning proposal developed by other members of the resolution college without valid reasons and therefore demonstrably holds intransigently to its own opinion during the entire planning process, a subsequent »solo effort« by the national resolution authority (hence the deviation from the standard procedure) would have to be qualified as an **abuse of law** or a violation of art 13 para 6 BRRD.

C. Excursus: The role of the SRB in cross-border group planning

If a bank (banking group) is under the supervision of the ECB pursuant to SSM Regulation 1024/2013, the SRB⁹⁹ replaces the relevant national resolution authority or, in the case of cross-border group resolution, the SRB replaces the authority responsible for group resolution (art 2 para 1; 7 para 2 SRB Regulation¹⁰⁰). Instead of the national resolution authority participating in each settlement college, the SRB must therefore carry out the tasks outlined above within the individual procedure stages pursuant to art 13; 88 BRRD (cf also art 8 para 12 and 13 SRB Regulation). Further, the SRB has to ensure that the »uniform resolution mechanism« functions properly (art 7 para 1 SRB Regulation). The national resolution authorities shall cooperate closely with the SRB. Otherwise, the procedure is similar to the one described under XI.B.

XIII. Fundamental legal aspects of the group planning procedure

Actions of resolution authorities or of the SRB pursuant to art 13, 88 BRRD in conjunction with the SRB Regulation are only admissible, if they can be compatible with

the requirements of European fundamental rights. In this context, the fundamental rights anchored in the European **Charter of Fundamental Rights** (CFR) are addressed, which as a rule also favour legal persons.

According to established case law¹⁰¹, the ECJ understands that situations falling »within the scope of the European Union law« are based on or are appraisal-relevant in light of the fundamental European rights (particularly those of the CFR), but not of other fundamental right (e.g. of the national constitutional arrangements or the ECHR);¹⁰² this is because, if necessary, all relevant procedure steps for group resolution plans are fully determined by EU law.¹⁰³

The CFR is used in all possible case constellations which, as a result, constitute an »**implementation of Union law**« (art 51 para 1 leg cit)¹⁰⁴. It follows that »*the fundamental rights guaranteed by the Union law are applicable to the case referred*«. ¹⁰⁵ Thus, as is pointed out in the explanations on the CFR, even when a situation falls within the scope of the fundamental freedoms and even when those freedoms get limited in this way.¹⁰⁶ In the light of the interpretation given by the ECJ in *Åkerberg Fransson*, it can be assumed that the Member States and their institutions¹⁰⁷ have a far-reaching obligation. Nevertheless, according to the Court of Justice, no such situation could be conceived which would be covered by

¹⁰¹ ECJ 11. 7. 2013, C-439/11 P, *Ziegler SA* recital 126; 6. 11. 2012, C-199/11, *Otis* recital 47; 15. 10. 2011, C-256/11, *Dereci* recital 72.

¹⁰² In legal terms, therefore, national fundamental rights are »replaced« by those of the GRC (because of the precedence of EU law). As a result, this usually leads to no appreciable differences. On the one hand, the material and personal scope of application of the national fundamental rights, as measured by the GRC's counterparts, is mostly identical. On the other hand, rights of the GRC can also be asserted before the Constitutional Court (VfGH 19.632/2012 et al).

¹⁰³ In this sense also Jarass, *Charta der Grundrechte der Europäischen Union* 2 (2013) art 53 recital 11.

¹⁰⁴ Pursuant to art 51 para 1 sentence 1 CFR, firstly, the Charter applies to the direct enforcement of Union law for the bodies, the offices and agencies of the Union and secondly to the indirect enforcement of the Member States insofar as they implement Union law, e.g. transpose a directive as defined in art 288 TFEU into national law or apply the national transposition regime.

¹⁰⁵ ECJ 26. 2. 2013, C-617/10, *Åkerberg Fransson* recital 19; 30. 4. 2014, C-390/12, *Pfleger et al* recital 33 et seq; Court of Administration (VwGH) 24. 4. 2013, 2013/17/0136, with reference to Court of Administration (VwGH) 23. 1. 2013, 2010/15/0196. This includes, for example, the areas of the transposition of directives and their application, including the area of non-compliant non-transposition of directives as well as those of indirect immediate implementation of Union law (in particular in the case of regulations). However, it also covers very general matters relating to Union law, in particular cross-border matters (Court of Administration (VwGH) 23. 1. 2013, 2010/15/0196; 19. 9. 2013, 2013/15/0207; 12. 12. 2013, 2013/06/0078).

¹⁰⁶ Established case-law since ECJ 18. 6. 1991, C-260/89, *ERT* recital 43. See also ECJ 30. 4. 2014, C-390/12, *Pfleger* recital 34 et seq (here: art 56 TFEU).

¹⁰⁷ ECJ 26. 2. 2013, C-617/10, *Åkerberg Fransson* recital 19; 30. 4. 2014, C-390/12, *Pfleger* recital 33.

⁹⁹ The SRB (»Single Resolution Board«) refers to the specialist agency referred to in art 42 SRB Regulation, which is responsible for performing the tasks set out in art 2 SRB Regulation within the scope of application of the SSM Regulation.

¹⁰⁰ 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, OJ (EU) L 225, 1.

Union law, if a national provision falls within the scope of the European Union law¹⁰⁸ without the fundamental rights of the Union being applicable.¹⁰⁹

In this case, there unambiguously exist a case of »implementation of European Union law« within the meaning of art 51 para 1 CFR, since the national resolution authorities or the SRB apply the BRRD, the SRM Regulation or the Federal Act on the Recovery and Resolution of Banks (BaSAG), and thus apply secondary Union law or legal provisions that were passed in the implementation of an EU directive – specifically the BRRD.

As the recitals of the BRRD state in various places,¹¹⁰ each procedure stage, therefore also in the area of group resolution planning, pursuant to the BRRD must be carried out **in accordance with art 52 CFR**. Planning that affect the legal sphere of groups and their institutions must be taken for the purpose of safeguarding compelling public interests (e.g. financial stability, etc) and must be absolutely necessary in this respect. The principle of proportionality of the CFR must also be taken into account when setting planning files (art 20 CFR).

1. Resolution planning and freedom of ownership (art 17 in conjunction with art 52 CFR)¹¹¹

Every planning act set within the scope of art 13 BRRD must be compatible with the requirements of freedom of ownership (art 17 para 1 CFR in conjunction with art 1 1st additional protocol of the ECHR).¹¹² The protection of property has long been of fundamental importance in the settled case-law of the ECJ.¹¹³

Art 17 CFR protects property, i.e. any property right which has arisen by virtue of one's own performance

and which is assigned to a person (including a legal person) in accordance with the legal provisions of the Member States or which is legally secured in its creation, which constitutes the substance of economic self-determination and thus forms the basis of economic freedom.¹¹⁴ In abbreviated form, art 17 CFR protects every lawfully acquired possession, namely against inadmissible state restrictions on the right of disposal, whereby disposal here is to be understood as a privately autonomous right to use, dispose, encumbrance and bequeath the property.

Official disposal restrictions – these are regulations on the use of property (»restraints on disposal«) – are laid down »by legislation« in accordance with art 17 para 1 subpara 2 CFR. These barriers must be necessary in the public interest (see also art 52 para 1; 3 CFR in conjunction with art 1 para 2 of the 1st additional protocol of the ECHR).

According to established case law, »private property rights« per se fall within the material scope of protection of the fundamental right.¹¹⁵ Therefore, a company's freedom of disposition is also subject to the qualified protection of art 17 GRC.¹¹⁶ **All instruments of private law** are therefore included in the protection of fundamental rights.¹¹⁷

Restrictions on the right of property, therefore also official planning acts pursuant to art 13 in conjunction with art 88 BRRD, which interfere with the **organizational and private autonomy** of the credit institutions or groups, are only justified, if they correspond to a »general interest« addressed by BRRD and which are »necessary« with regard to this.¹¹⁸ This limited authorisation is addressed to the competent legislator as well as to the competent enforcement bodies – including those of the Member States (such as the resolution authorities). A legal basis is required for any infringement of ownership. This implies that the legislator itself must determine the admissibility, the purpose and limits of infringement of fundamental rights.

The »**general good**« is to be understood as any reasonable – i.e. »generalizable« – public interest or regulatory objective compatible with the Union law and specified in the BRRD or the SRB Regulation. In this context, particularly the functioning of the national and European financial markets as well as the protection of

108 If this has not been opened, then the CFR does not apply either (exemplarily Court of Administration (VwGH) 27.2.2014, 2013/12/0113; ECJ 27.3.2014, C-265/13, *Marcos* recital 30), in particular if there is no sufficient connection to Union law (see e.g. the facts in ECJ 6.3.2014, C-206/13, *Siragusa*).

109 ECJ 26.2.2013, C-617/10, *Åkerberg Fransson* recital 21; see also *Storr* in Fischer/Pabel/N. Raschauer (eds), *Verwaltungsgerichtsbarkeit* (2014) chapter 3 recital 17. In case of doubt, the complainant may be responsible for specifying whether and to what extent the scope of application of the CFR is opened (cf eg the constellation in OGH 12 Os 90/13x).

110 See exemplary recital 13 of the BRRD.

111 A separate analysis of the facts of art 20 CFR; art 7 para. 1 Federal Austrian Constitution (B-VG) is omitted, because within the scope of a review of the facts of art 16 and 17 CFR, an assessment of the objectivity has to be made anyway. Otherwise, the examination of the facts in the light of the principle of equality would not lead to any other conclusion.

112 According to the explanations on art 52 para 3 CFR, art 17 CFR corresponds to art 1 1st additional protocol ECHR (to a large extent).

113 »However, according to established case-law, fundamental rights – including property rights – form an integral part of the general principles of law which compliance the Court of Justice ensures (see, in that sense, the case of 13. 12. 1979, *Hauer* 44/79, *Reports of judgments and Decisions*. 1979, 3727, recitals 15 and 17). (cited after ECJ 18.7.2013, Rs C-501/11P [*Schindler Group*] recital 124).

114 *Frenz*, *Handbuch Europarecht* Vol. 4 (2009) recital 2864.

115 *B. Raschauer*, *Wirtschaftsrecht*³ (2010) recital 221 with further references; *Öhlinger/Eberhard*, *Verfassungsrecht*¹⁰ (2014) recital 867 et seq.

116 See eg *Resch*, *JBl* 2010, 765; also *B. Raschauer*, *Wirtschaftsrecht*³ recital 221 et seq. with further references.

117 See also *K. Korinek*, § 196 recital 22 in *Merten/Papier* (eds), *Handbuch der Grundrechte VII/1*² (2014).

118 eg *Folz*, art 17 CFR recital 9 in *Vedder et al* (eds), *Unionsrecht*⁵ (2012).

depositors can serve as a justification for restricting the individual freedom of discretion and of scope.

Furthermore, restrictions on the right of property shall not affect¹¹⁹ the essence of the fundamental right or in any other way violate¹²⁰ mandatory principles, such as a legally specified division of competences.¹²¹ It follows, for example, that resolution authorities may only draw up plans in accordance with the legal requirements of art 13 BRRD or the national implementing regulations. Deviations from the statutory planning procedure must therefore be absolutely necessary for effective resolution planning.

For encroachments on fundamental rights sub titulo art 17 CFR, the general rule is that they must be revoked as soon as the justification on which they are based subsequently ceases to apply or proves to be non-existent.

In proportion planning acts are within the scope of application of the BRRD and resulting **encroachments** on the ownership's freedom pursuant to art 52 para 1 CFR, if they represent a suitable and necessary means of achieving a certain general interest and if the public interest in the encroachment outweighs the opposing interest of the person concerned.¹²²

The fundamental rights' assessment of group resolution plans within the meaning of art 13; 88 BRRD is carried out according to the following scheme.¹²³

- ▷ First, it must be examined whether a planning act is »in the public interest« (i.e. pursuant to art 52 para 1 GRC for the fulfilment of a justifiable »general interest«).
- ▷ Following up on this, an assessment must be made as to whether the planning act is suitable for achieving the public interest objective. It is important to assess whether a national planning act can lead to achieving the desired objective at all.
- ▷ Once the suitability has been established, the third step is to question whether the respective planning act is necessary in the sense that it constitutes a gentle means of achieving this goal. In other words, it must be examined whether the respective planning act represents the means which restricts the fundamental rights position of the credit institution or group concerned as little as possible. The alternatives available to the resolution authorities should

also be considered. Therefore, at each procedure stage it should be questioned, whether divergent steps taken by national resolution authorities are absolutely necessary or whether a common resolution plan may be sufficient.

- ▷ If the necessity of an encroachment on fundamental rights can also be affirmed, it must be examined at a final level, whether there is **an appropriate relationship** (adequacy or »proportionality in the narrower sense«) between the general good pursued in each case by a resolution plan and the fundamental rights position shortened by a planning act. At this point, therefore, a balancing of the interests at stake must be carried out.

Now there can be no doubt that the graduated and complex group planning procedure under art 13; 88 BRRD can be applied in accordance with fundamental rights, in particular if national resolution authorities fulfil the role assigned to them in accordance with the law. National resolution authorities are therefore free to make use of art 13 para 6 BRRD – interpreted in conformity with fundamental rights – if there are valid reasons to deviate from a jointly developed group plan (*ultima ratio*). Otherwise, it must be assumed that the adoption of a national resolution plan is to be regarded as contrary to fundamental rights.

2. Freedom of employment and enterprise (art 16; 52 CFR)

In addition, planning acts pursuant to art 13; 88 BRD must also be measured in terms of art 16 CFR. Art 16 CFR guarantees a legally enforceable, justiciable fundamental right,¹²⁴ which also protects legal persons.¹²⁵ Art 16 CFR, in accordance with art 119 TFEU (freedom of competition), positively affects the company's right to pursue (independent) economic and business activities in the Member States. For the interpretation of the facts pursuant to art 16 CFR, the doctrine and case law of art 6 of the Basic Law on the General Rights of Citizens, StGG, (freedom of employment) can also be used, since the scope of protection of the two fundamental rights overlaps and the transfer of the national dogmatics to art 16 CFR was not excluded (arg »national practice«).

The **fundamental right of entrepreneurial freedom** protects any self-employed activity which is carried out with a certain regularity and which is directed towards

119 For more details *Öhlinger*, Eigentum und Gesetzgebung, in Machacek/Pahr/Stadler (eds), Grund- und Menschenrechte in Österreich II (1992) 643 (679 et seq).

120 *Hengstschläger/Leeb*, Grundrechte² (2014) recital 8/10; Selected Judgments of the Constitutional Court (VfSlg) 17.981/2006.

121 See *Öhlinger*, Eigentum 671 et seq.

122 *Hengstschläger/Leeb*, Grundrechte recital 8/11 with further references. See also Selected Judgments of the Constitutional Court (VfSlg) 17.817/2006.

123 For more information see eg *Vranes/Rumler-Korinek*, art 52 CFR in Holoubek/Lienbacher (eds), Grundrechtecharta (2014).

124 Cf fundamentally ECJ 22.1.2013, C-283/11 (*Sky Österreich*) recital 45 et seq; confirmed in ECJ 13.2.2014, C-367/12 (*Sokoll Seebacher*) recital 22, according to which art 16 CFR is to be interpreted inter alia in accordance with art 49 TFEU; see further ECJ case 4/73 (*Nold*) recital 12 et seq; Case C-177/90 (*Kühn*) recital 16 (here referred to as the »general principle of Union law« within the meaning of art 6 TEU).

125 *Streinz*, art 16 CFR recital 7 in Streinz, EUV/AEUV² (2012).

achieving economic success;¹²⁶ therefore, credit institutions and their banking businesses are also protected by art 16 CFR. Not only is the commencement of this activity protected from interference, but also the exercise of the entrepreneurial activity.¹²⁷ In this respect, entrepreneurial freedom can be understood as freedom of investment, production and sales.¹²⁸ Entrepreneurial freedom of disposition is closely linked to private autonomy, which is protected by property rights.¹²⁹ However, protection under fundamental rights only exists against those state measures that directly affect the commencement or exercise of employment. If the realization of a certain employment activity is in fact only prevented as a reflex or side effect of a state act, there is no encroachment on fundamental rights as an offence.¹³⁰

Interferences in the entrepreneurial freedom are permissible under similar conditions as interferences in the freedom of ownership (cf there). According to the Constitutional Court and the European Court of Justice, **freedom of enterprise can be restricted** if this interference is required by the public interest (or a sustainable »general good«) and if it is suitable, adequate and otherwise objectively justified in order to attain the objective.¹³¹ Within the framework of the adequacy test, a balance is drawn between the severity of the intervention and the weight of the interests which shall be realized. The question of a less severe measures (necessity), on the other hand, plays hardly any role in the case law on freedom of employment.¹³²

In the scope of application of art 16 CFR, it also applies that the group resolution procedure pursuant to art 13; 88 BRRD can be applied in conformity with fundamental rights, with reference being made to the comments on art 17 CFR:

A national resolution authority may deviate from a jointly developed group resolution plan only, if this is absolutely necessary to fulfil a recognised general interest, i.e. if there are valid reasons for the deviation from the standard procedure in individual cases. If these valid reasons, which the resolution authority must explain in

detail in its decision pursuant to art 13 para 6 BRRD, are not present as a result, a national solo attempt also violates art 16 in conjunction with art 52 CFR.

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126 Cf *Schulev-Steindl*, Wirtschaftslenkung und Verfassung (1992) 111.

127 See Selected Judgments of the Constitutional Court (VfSlg) 11.558/1987; see also *K. Korinek*, Das Grundrecht der Freiheit der Erwerbsbetätigung als Schranke für die Wirtschaftslenkung, in FS Wenger (1983) 243 (254 et seq).

128 *Schulev-Steindl*, Wirtschaftslenkung 128 et seq.

129 Cf *Schulev-Steindl*, Wirtschaftslenkung 114.

130 *Hengstschläger/Leeb*, Grundrechte recital 10/4, See Selected Judgments of the Constitutional Court (VfSlg) 3404/1958; 15.431/1999.

131 See eg Selected Judgments of the Constitutional Court (VfSlg) 19.033/2010.

132 See *Grabenwarter*, Freiheit der Erwerbsbetätigung, in Machacek/Pahr/Stadler (eds), Grund- und Menschenrechte in Österreich II (1992) 553 (603).

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