German Banking Industry Committee

Die Deutsche Kreditwirtschaft

German Savings Banks Association | Charlottenstraße 47 |
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ONLY BY EMAIL
Single Resolution Board
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GBIC comments on the consultation on the 2021 ex-ante SRF contributions calculation (SRB/ES/2021/13)

March 19, 2021

Dear Mr De Carpentier,

We very much welcome the fact that the SRB is conducting a consultation this year, thus giving institutions the opportunity to estimate their contributions in advance. We were pleased to hear that the associations will also be involved in the consultation. In response to the express request made by the SRB at the video conference with banking associations on 1 March 2021, we have consolidated the comments of our member institutions into these comments.

As the feedback with the provided form by the SRB is only intended for institutions, you will receive our comments with this letter. From the point of view of the many German institutions, this procedure is more efficient and saves resources, also for the SRB, than if more than a thousand institutes each submit an identical statement. We assume that our comments will be taken into account as usual in every consultation.

Our member institutions herewith expressly reserve the right to raise additional aspects in the appeal proceedings and legal actions available for this purpose that can also be taken if necessary.

The documents made available for consultation essentially contain the same information that had previously been provided by the SRB. Since the definition of classes and the allocation of the institutions to them are still not understandable, it is our view that there has been no change in the lack of transparency surrounding the calculation procedure identified by the ECJ. The consultation is not tailored to the specific situation of individual institutions and the related legal issues. Rather, it is a mass consultation consisting of generic questions. This does not meet the minimum standards of a consultation. We also consider the consultation period for the very extensive documents to be very short for a conclusive examination and assessment. In consequence, we therefore again urge designating the 2021 ex ante contributions as provisional.

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Comments on NOTICE ON CONSULTATION PHASE:

As a general principle, we consider the consultation and the aggregated data it provides, as well as the calculation tool, to be helpful. For the upcoming contribution periods, however, we would ask for all consultation documents be made available in other languages, especially German. In particular, the large number of smaller institutions in Germany are facing significant challenges due to the existing language barrier, or are not able to participate in the consultation in the first place. From their perspective, the consultation therefore does not achieve the objective of ensuring a higher degree of transparency.

Comments on ANNEX I TO THE NOTICE:

Part 1 - PROCEDURE:

We would have preferred a longer lead time to plan/prepare for the SRB consultation and a different period for implementation. Firstly, the institutions were informed about the forthcoming consultation with very short notice. Secondly, the consultation period – from 5 to 19 March 2021 – is also very short for a conclusive examination and review. This applies in particular to cases where banking entities to be included by the institution are still involved in follow-up processes for preparing their annual financial statements. A further factor is that the documentation provided is very extensive (a new tool and five text documents with a total of 84 pages (excluding the privacy statement)). A summary by the SRB of significant updates compared with the version in the previous years, as well as a presentation of updates in the documents compared with the previous year would be useful guidance for institutions. This could help ensure a more targeted approach in the review and comparison with criticisms made in the appeal proceedings or legal actions.

The questions in the consultation are generic and are addressed equally to all institutions subject to mandatory contributions. To the extent that the calculation process depends on preliminary legal questions, e.g. the question of whether an institution is subject to mandatory contributions in substance and which balance sheet items are relevant for calculating contributions, it is not possible to infer from the consultation the fact patterns on which the SRB wishes to base the calculation, and which legal conclusions it wishes to draw from this. In our view, the consultation therefore does not meet the minimum requirements for a hearing within the meaning of Article 41(1) and (2)(a) of the Charter of Fundamental Rights of the European Union (CFR). In particular, no preclusive effect can be assumed if individual aspects are not raised until formal appeal proceedings and legal actions.

The consultation notice also states: "Institutions are invited to visit the page regularly during the consultation period, as any update to the documentation will also be published exclusively at this address". In our view, this approach is not "timely". We request that in the event of changes or new information on the subject of the bank levy, the institutions concerned are automatically informed.

Part 5 - ANNUAL TARGET LEVEL:

In our view and that of our member institutions, the SRB's interpretation of Article 69(1) SRMR to the effect that the target level of 1% of covered deposits is dynamic, i.e. that it can only be determined at the end of the initial period in 2023, has no justification, either conceptual or legal. Instead, it should be based on the volume of covered deposits at the start of the SRF's initial period.

Covered deposits are already protected by national deposit guarantee schemes (DGS). The resolution costs in the event of an institution's failure are also not directly linked to the development of covered deposits. The increase in the volume of deposits, due in part to the ECB's extraordinarily expansionary monetary policy, does not make credit institutions more risky. Nor has the sharp rise in deposits increased the probability of resolution. A further factor is that institutions have become more resilient

since the end of the financial crisis, and this trend has continued after the establishment of the SRF, as demonstrated, for instance, by the decrease in institutions' RWAs or in their total assets. The increased stability of credit institutions reduces the probability of resolution and leads to lower potential resolution costs in the event of the failure of an institution. Based on its wording, the EBA also believes that Article 69(1) of the SRMR leaves open the question of whether the level of covered deposits at the start of the SRF's initial period or at the end of the initial period on 31 December 2023 should be used to determine the target level (see EBA/Op/2015/11). Additionally, a dynamic interpretation of Article 69(1) of the SRMR and the resulting increase in the banking sector's contributions to the SRF for 2021 and the coming years is not only disproportionate in respect of the original target size of the SRF, but is also totally incompatible with the leading role that the banks are now playing in supporting economic actors in the current crisis. It is vital for the banks to be able to preserve their profitability and continue to leverage their capital, so that they can continue to meet the financing requirements that will emerge as the economy recovers from the crisis. In our view and that of our member institutions, greater consideration should therefore have been given to the industry's repeated proposals to readjust the SRF's target level.

If the SRB sticks to its dynamic determination of the target level, transparency about the calculations underlying the growth rate for deposits should be significantly enhanced. There is insufficient information in the present SRB draft decision to justify a coefficient of 1.35% in light of the impact of COVID-19 on covered deposits, the unprecedented nature of the growth and the economic cycle.

It is also still unclear, including according to the reasons given in the SRB's draft decision, how the SRB fulfils the requirements of Article 69(2) of the SRMR, according to which "the phase of business cycle and the impact that pro-cyclical contributions may have on the financial position of contributing institutions" must be taken into account when contributions are determined. Although the draft decision recognises the leading role of the credit institutions in overcoming the pandemic, it does not reduce their financial burden through the proposed contributions for the 2021 contribution cycle. The SRB should use the flexibility granted to it by the lawmakers in determining contributions, in particular also in determining the level of IPCs (see our comments below for details).

Part 6 - CALCULATION METHODOLOGY:

General remarks

In its judgments of 23 September 2020 (Cases T-411/17, T-414/17, T-420/17) on ex-ante contributions to the Single Resolution Fund, the General Court of the European Union found that the calculation procedure infringed the obligation under Article 296 of the Treaty on the Functioning of the European Union (TFEU) to state adequate reasons, since the calculation of the contributions was inherently opaque. The SRB and the European Commission have appealed against these decisions. Regardless of the ongoing appeal procedures, the SRB is sticking to its calculation methodology and is trying to reduce the identified lack of transparency for the contribution period through its first consultation process.

In principle, measures that increase the transparency of the procedure for calculating ex-ante contributions to the Single Resolution Fund should be welcomed. However, the concrete consultation procedure does not bring any decisive knowledge gain for the institutions. The documents provided for consultation essentially contain the same information that the SRB had already made available to the institutions for the 2020 contribution period. In particular, the SRB provides the draft text part of the calculation decision for the 2021 contribution period (Annex I to the consultation) as well as various data points, in particular aggregated statistical data on class allocation (Annex II to the consultation). In

contrast to the 2020 contribution period, the institutions are now receiving these documents before the calculation decision is issued.

In our view, the present consultation therefore does not remedy any of the deficiencies identified by the EGC in its judgment in Case T-411/17 Landesbank Baden-Württemberg / SRB. In this decision, the Court held that, on the basis of the reasons provided to it, the applicant was not in a position to verify the amount of its contribution and could not know whether that amount had been calculated correctly or whether it should contest it before the Court. Despite the consultation documents and the calculation tool, it is still not possible to verify the accuracy of the calculation of the contribution. Instead, a bank subject to a mandatory contribution must still rely blindly on the data aggregated by the SRB being accurate, and can only use the calculation tool on, and in reliance on, that basis.

Risk indicator "Membership of an institutional protection scheme"

Based on the data from the tool provided, it is evident that membership of an institutional protection scheme will also only be weighted on a differentiated basis in 2021, reflecting the calculation in previous years. The institutions concerned that belong to an IPS continue to hold the view that the only criterion applicable to this risk indicator is whether, in the opinion of the competent authorities, an institutional protection scheme is recognised as performing its functions in compliance with the requirements of Article 113(7) of the CRR. In this case, membership of an IPS can only have the same effect for all institutions. In this case, differentiations are not possible from a purely logical perspective. In the event of differentiation – as planned again this year – further appeals and legal actions against the contribution notices are inevitable.

PILLAR III: "Importance of an institution to the stability of the financial system or economy"

For pillar III, intra-group and intra-IPS transactions are also to be included in the sum of interbank loans and deposits. This leads to an inappropriate double counting of intra-group and intra-IPS transactions for institutions that do not report on a consolidated level. There is no objective reason to include these internal transactions in the interbank loans and deposits and to treat them differently than in the calculation of the basic contribution.

Deduction of promotional loans

The very limited facility available to date for deducting promotional loans from the measurement basis, which only benefits intermediary institutions that do not extend the loans to final borrowers, appears arbitrary from a legal perspective. The purpose of the government promotional loan business is to provide desirable structural policy incentives, for example in the areas of housing construction and business start-ups, by granting low-interest loans and other financial aid. In Germany and certain other countries, government sponsored loans are granted via the beneficiary's principal bank. Including this financial support mechanism ultimately makes it unnecessarily more expensive and thus runs counter to the promotional purpose. It is therefore necessary to exclude liabilities from the measurement across the entire transmission route, down to the final borrower. The way in which the government promotional loan business is organised (loans granted directly or indirectly by the promotional bank) cannot make any difference to the contributions to the SRF.

Class allocations

The way in which the class allocations are decided is critical for the assessment of the risk indicators. To do this, the number of classes is determined for each individual indicator using a formula based on the values of the institutions subject to mandatory contributions, and the institutions are allocated to the classes, grouped according to their ranking. Class allocation of the risk indicators therefore depends on the level of the population, and an institution is classified through a comparison with all other national or euro area institutions. In the past, it was observed that the best classes were often determined by 'outlier institutions'. The class allocation by the SRB therefore leads to institutions meeting the minimum supervisory requirements finding themselves in the worst classes, with banks with outlier values (such as an LCR above 300%) finding themselves in the best classes as a benchmark for all. Because of the system behind this classification, the calculation formula of the SRF contribution triggers an incentive to exceed the minimum supervisory requirements. In our view, this is not compatible with the mission and objective of collecting contributions. There are therefore arbitrary characteristics in the variation of class allocation. If such an assessment model were not to be completely rejected, as a minimum 'outlier institutions' would have to be eliminated from the assessment.

Part 11 - IRREVOCABLE PAYMENT COMMITMENTS:

According to paragraph 147 of the draft decision, the amount of IPCs will only be 15%, as in the previous years, without any further reasons being given. In our view and that of our member institutions, in the current situation the SRB should exercise the flexibility granted to it by the lawmakers to determine contributions and make full use of the available statutory scope, i.e. define the amount as 30%.

Under paragraph 147, this year, only collateral in the form of cash is again eligible for backing IPCs. Together with our member institutions, we are of the opinion that this does not comply with the wording of Article 103(3) of EU Directive 2014/59/EU. This states that 'The available financial means to be taken into account in order to reach the target level specified in Article 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in Article 101(1).'

In our view, certain securities also meet the definition of the EU Directive (low risk, unencumbered, free disposal) and should be allowed by the SRB as a further option as collateral for IPCs together with cash, which bears negative interest.

Comments on ANNEX II TO THE NOTICE (AGGREGATED STATISTICS):

The aggregated statistical data on class allocation only contain the limits of the individual classes. As in the previous years, the institutions are unable to understand whether the SRB has defined the classes correctly and whether the institutions are consequently assigned to the right class. In particular, therefore, institutions are unable to verify whether steps 2 and 3 in the contribution calculation procedure set out in Annex I to Delegated Regulation 2015/63 have been performed correctly. However, these steps crucially determine the amount of the contributions to be paid. Therefore, there has been no change in the lack of transparency in the calculation procedure identified by the EGC, despite the documents provided for consultation.

The Excel-based calculation tool that the SRB is making available for the first time, as part of the consultation does not change this. Institutions can only use the calculation tool to check whether the tool has taken into account the limits resulting from the aggregated statistical data on class allocation (Annex

II to the consultation) when assigning classes. The institutions are unable to reproduce class allocation itself, even with the help of the calculation tool.

The SRB's approach to evenly distribute the values per risk indicator results in misstating the risk-adjustment factor. As a consequence, dissimilar banks are allocated to the same bin. Bins should be tailored to the related risk, and all banks that meet the relevant regulatory requirements should receive a non-punitive risk factor. Factors should also be less correlated to the bank's size and focus on risk.

Comments on OTHER AREAS:

We believe that following the EGC decision of 23 September 2020, the calls for contributions that will be made on April should be considered as provisional as long as there is no decision by the ECJ, and should be designated as such both at SRB and NRA level. If not, it can be expected that the banks will file lawsuits on a broad front against 2021 contributions in order to protect their rights.

Furthermore, we request that the notifications for the 2021 ex-ante contributions to the SRF also be sent electronically as a pdf file (possibly via a "secure" email) to the known contact persons. This procedure would not only make sense in times of home offices, but would also generally facilitate the work of the institutions, especially in view of the increasing volume of notifications.

We have also submitted this letter to the Federal Financial Supervisory Authority (BaFin): to the attention of Chief Executive Director for Resolution, Dr Thorsten Pötzsch.

We remain at your disposal for any enquiry.

Yours sincerely,
on behalf of the German Banking Industry Committee
German Savings Banks Association

by proxy | by proxy

Dr. Matthias Bergner | Jana Tschiltschke