

Risk Reduction Measures Package 2019

(Amendments to CRR, CRDIV and BRRD)

Public Consultation

28 August 2019



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1. Introduction

The purpose of this consultation is to obtain submissions on the transposition of Regulation EU 2019/876¹, Directive EU 2019/878² and Directive EU 2019/879³. Together, these Directives and Regulation are known as the 'Risk Reduction Measures' Package and they amend the Capital Requirements Regulation (CRR), the Capital Requirements Directive (CRDIV), and the Bank Recovery and Resolution Directive (BRRD). Many of the amendments implement international standards that have been agreed by the Basel Committee on Banking Supervision.

The majority of the amendments to CRDIV and BRRD must be transposed on a fully harmonised basis. However, there are a number of provisions in the Directives to which full harmonisation does not apply and Member States are given discretion as to whether and how to apply these provisions. The amendments to CRR will take direct effect, however the Regulation allows for Member State discretion in relation to the definition of 'small and non-complex institutions'.

Sections 5 and 6 of this consultation document set out the discretions contained in the Risk Reduction Measures Package and the Department invites comments on whether these discretions should be availed of, how they should be availed of and clear reasoning for such a position. Comments are also

¹Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 Link to publication in the Official Journal: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0876&from=EN>

²Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures. Link to publication in the Official Journal: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:150:FULL&from=EN>

³ Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC. Link to publication in the Official Journal: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:150:FULL&from=EN>

welcomed where the transposition will have an impact on certain other national legislation.

In responding to this consultation you are invited to:

- Give your views on the specific questions set out below. You do not have to answer every question – you may choose to answer all of the questions or only those which are relevant to you.
- Provide details of any issues or concerns you feel should be considered in dealing with the particular topic being addressed in your response.
- Where appropriate, provide some analysis or views on the regulatory and/or financial impact of the proposed approach.

The comments received will be taken into consideration when deciding how best to transpose the Risk Reduction Measures Package into Irish law.

Please note that the Department does not propose to revisit discretions contained in the original CRR, CRDIV and BRRD and on which decisions were made during the original transposition process in 2013 and 2014. However, if you have a view on how these discretions were implemented, we would welcome comments.

2. Consultation Process

The consultation period will run from 28 August 2019 to 03 October 2019. Any submissions received after this date may not be considered.

HOW TO RESPOND

The preferred means of response is by email to:

RRMConsult@finance.gov.ie

Alternatively, you may respond by post to:

Risk Reduction Measures – Public Consultation
Banking Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

Please include contact details in your response.

When responding, please indicate whether you are contributing to the consultation process as a professional adviser, representative body, business representative or member of the public.

FREEDOM OF INFORMATION

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be shared with the Central Bank of Ireland and may be published on the website of the Department of Finance. Parties should clearly indicate where their responses contain personal information, commercially sensitive information or confidential information which they would not wish to be released under FOI or published.

MEETINGS WITH STAKEHOLDERS

The Department of Finance may also invite key stakeholders to meet with them, including representative bodies and other interested groups or individuals.

AFTER THE CONSULTATION

The submissions received in response to this consultation will be taken into consideration when taking decision on the national discretions contained within

the texts and when transposing the RRM Package as a whole into Irish law. The outcome will be published in due course.

3. Background

In response to the 2008 global financial crisis, EU Member States pursued a number of initiatives to create a safer financial system. These initiatives included the Capital Requirements Regulation⁴ (CRR) and the Capital Requirements Directive⁵ (CRDIV) which were agreed in 2013 and the Bank Recovery and Resolution Directive⁶ (BRRD) which was agreed in 2014.

CRDIV built on previous Banking Directives and enhanced the prudential regulatory and capital requirements for institutions while BRRD established a framework for managing failing institutions. CRR/CRDIV⁷ and BRRD⁸ were transposed into Irish law in 2014 and 2015 respectively.

In November 2016, the European Commission proposed a new package of reforms which aim to update and amend CRR, CRDIV and BRRD, known as the 'Risk Reduction Measures' Package. Many of the proposed amendments implement international standards that have been agreed since 2013 by the Basel Committee on Banking Supervision.

Following agreement between the European Parliament and the Council the Risk Reduction Measures Package was published in the Official Journal of the European Union on 07 June 2019⁹ and Member States are required to transpose the Directives by 28 December 2020.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1563534233172&uri=CELEX:32013R0575>

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1563534277336&uri=CELEX:32014L0059>

⁷ <http://www.irishstatutebook.ie/eli/2014/si/159/made/en/print>

⁸ <http://www.irishstatutebook.ie/eli/2015/si/289/made/en/print>

⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:150:FULL&from=EN>

4. Key Measures included in the Risk Reduction Measures Package

- A binding leverage ratio requirement
- A binding Net Stable Funding Requirement (NSFR)
- A requirement for non-EU institutions having significant activities in the EU to have an EU intermediate parent undertaking
- Revised Pillar 2 framework
- Updated macro-prudential toolkit
- The exclusion of certain banks from the scope of application of the CRR and the CRD
- A number of measures aimed at reducing the administrative burden related to reporting and disclosure requirements for small non-complex institutions, as well as simplified market risk and liquidity rules.
- New supports for investments in infrastructure and increased supports for lending to SMEs which provide a discount on capital requirements in order to encourage such lending by banks
- Revised regulations regarding remuneration practices
- Enhanced Minimum Requirement for own funds and Eligible Liabilities (MREL) rules for Global Systemically Important Institutions (G-SIIs) and top-tier banks
- Amendments to the application, determination and calculation of MREL for resolution entities and certain non-resolution entities
- New powers to address MREL breaches
- A new moratorium power for the resolution authority to suspend an institution's payment obligations
- Amendments to the operation of European Resolution Colleges
- Additional rules regarding the operation of resolution entities which carry out activities outside the EU
- Amendments to the Bank Creditor Hierarchy – these amendments were fast-tracked and completed in early 2019

5. Consultation Questions on the Revised CRR and Revised CRDIV

- **Discretion 1 – CRR Article 4(1)(145)**

Small and non-complex institutions benefit from a proportional reduction in regulation designed to reflect the simplified nature of their business. These include reduced administrative requirements related to reporting and disclosure, and simplified liquidity rules. They may also be exempted from some remunerations regulations.

An institution can be defined as ‘small and non-complex’ if it meets the criteria set out in Article 4(1)(145). One of the criteria is that the value of the institutions assets is on average equal to or less than €5 billion over the four year period immediately preceding the current annual reporting period.

Member States may lower the €5 billion threshold.

- **Question 1:** Should Ireland exercise the discretion to lower the threshold? If so, how much should the threshold decrease by?

- **Discretion 2 – CRDIV Article 94 (4)**

The Directive establishes principles in relation to Variable Remuneration. These principles are set out in Article 94(1) of the Directive. Institutions that do not fall under the definition of ‘large institution’ and which have on average assets equal to or less than €5 billion over a four-year period preceding the current financial year are exempt from the variable remuneration requirements set out in points (l) and (m) and in the second paragraph of point (o) of Article 94.

Member States may lower or increase the €5 billion threshold (up to a maximum of €15 billion).

Question 2: Should Ireland exercise this discretion? If so should Ireland increase or decrease the threshold? If Ireland should increase the threshold, what do you consider an appropriate threshold (up to a maximum of €15 billion?)

- **Discretion 3 – CRDIV Article 94 (5)**

The Directive establishes principles on the composition of variable remuneration. These principles are set out in Article 94(1) of the Directive. However staff who receive variable remuneration of €50,000 or less (and provided that this does not represent more than one third of the staff member's total annual remuneration) are exempt from the variable remuneration requirements set out in points (l) and (m) and in the second paragraph of point (o) of Article 94. Member States may remove this exemption and apply all of the principles to all variable remuneration.

Question 3: Should Ireland exercise this discretion?

- **Discretion 4 - CRDIV Article 109 (6)**

Article 109 sets out when the Remuneration requirements in Articles 92 (Remuneration Policy), 94 (Variable Remuneration) and 95 (Remuneration Committee) should be applied on a consolidated basis to banking groups. This means that a banking group with one or more subsidiaries must apply the regulations to the whole group.

However, Article 109(4) establishes when these requirements are not to be applied on a consolidated basis. In addition, Article 109(5) establishes when these requirements are to be applied to the staff of subsidiaries that would otherwise not come within the scope of CRDIV.

Notwithstanding Articles 109(4) and (5), Article 109(6) states that Member States may apply Articles 92, 94 and 95 on a consolidated basis to a broader scope of subsidiary undertakings and their staff than is set out in Article 109(4) and (5). This discretion provides Member States with the option to apply the

remuneration articles to banking groups on a consolidated basis in situations where Article 109 (4) and (5) require that they be applied on an individual basis.

Question 4: How should this discretion be transposed in Ireland?

6. Consultation Questions on Revised BRRD

- **Discretion 5 – BRRD Article 33a(3) & 69(5)**

Articles 33a and 69 provide that resolution authorities have the power to suspend any contractual payment or delivery obligations of a credit institution or relevant investment firm and certain other entities until midnight of the business day after the resolution authority has published a notice of suspension. Such a suspension does not apply to certain specified payment obligations and only applies where certain criteria are met.

Articles 33a(3) and 69(5) allow that Member States may provide that where this power to suspend obligations is exercised in respect of eligible deposits¹⁰, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits.

Question 5: How should these Articles be transposed in Ireland?

- **Discretion 6 – BRRD Article 44a(1)(c)**

Article 44a provides that a seller of subordinated eligible liabilities can only sell such liabilities to a retail investor provided a number of conditions, including a suitability test, are fulfilled.

Article 44a(1) specifies that Member States may provide that the conditions set down in points (a) to (c) of that Article also apply to sellers of other instruments that qualify as own funds or bail-inable liabilities.

Question 6: How should this be transposed in Ireland?

- **Discretion 7 – BRRD Article 44a(5)**

Article 44a(5) provides that Member States may, after taking into consideration the market conditions, practices and consumer protections in their state, set a minimum denomination amount of at least €50,000, for retail investors to purchase subordinated eligible liabilities. The stated aim of this, as outlined in

¹⁰ Deposits eligible for the Deposit Guarantee Scheme.

Recital 16, is to ensure that retail investors do not invest heavily in certain debt instruments that are eligible for the minimum requirement for own funds and eligible liabilities (MREL).

Question 7: How should this be transposed in Ireland?

- **Discretion 8 – BRRD Article 45b(8)**

Article 45b outlines the classes of liabilities which are eligible to be included in an entity's MREL requirement. The Article also outlines the methodology for determining how much subordinated liabilities certain classes of resolution entities are to have as part of their MREL obligations. These entities include resolution entities of G-SIIs and resolution entities that are part of a 'top-tier' bank resolution group.¹¹

Article 45b(8) states that a limit of 30% of these specified entities may be required to have an amount of subordinated liabilities higher than the default 8% Total Liabilities and own Funds (TLOF), based on specific criteria.

However, the final paragraph of Article 45b(8) provides that that Member States may set this limit at a level higher than 30%, upon consideration of the specificities of the national banking sector and the amount of GSIIs and top tier banks¹² for which the resolution authority sets an MREL requirement.

Question 8: How should this be transposed in Ireland?

- **Discretion 9 – BRRD Article 71a(2)**

Article 71a provides that institutions and other relevant entities shall include, in financial contracts they enter into which are governed by third country law, provisions which recognise that the contract may be subject to the exercise of powers of the resolution authority to suspend or restrict certain rights and

¹¹ Including entities designated as top-tier banks on the basis of a systemic risk in failure

¹² See footnote 11

obligations and that they are bound by the requirements of Article 68 (Exclusion of certain contractual terms in early intervention and resolution).

Article 71a(2) provides that Member States may require Union parent undertakings to also ensure that their subsidiaries established in third countries include in financial contracts which they enter into that are governed by third-country law, terms to exclude that the exercise of these resolution authority powers constitute a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts.

Question 9: How should this be transposed in Ireland?

7. Annex – Extracts from Regulations and Directives

CRR Article 4(1)(145)

(145) 'small and non-complex institution' means an institution that meets all the following conditions:

(a) it is not a large institution;

(b) the total value of its assets on an individual basis or, where applicable, on a consolidated basis in accordance with this Regulation and Directive 2013/36/EU is on average equal to or less than the threshold of EUR 5 billion over the four-year period immediately preceding the current annual reporting period; Member States may lower that threshold;

(c) it is not subject to any obligations, or is subject to simplified obligations, in relation to recovery and resolution planning in accordance with Article 4 of Directive 2014/59/EU;

(d) its trading book business is classified as small within the meaning of Article 94(1);

(e) the total value of its derivative positions held with trading intent does not exceed 2 % of its total on- and off-balance-sheet assets and the total value of its overall derivative positions does not exceed 5 %, both calculated in accordance with Article 273a(3); L 150/16 EN Official Journal of the European Union 7.6.2019

(f) more than 75 % of both the institution's consolidated total assets and liabilities, excluding in both cases the intragroup exposures, relate to activities with counterparties located in the European Economic Area;

(g) the institution does not use internal models to meet the prudential requirements in accordance with this Regulation except for subsidiaries using internal models developed at the group level, provided that the group is subject to the disclosure requirements laid down in Article 433a or 433c on a consolidated basis;

(h) the institution has not communicated to the competent authority an objection to being classified as a small and non-complex institution;

(i) the competent authority has not decided that the institution is not to be considered a small and non-complex institution on the basis of an analysis of its size, interconnectedness, complexity or risk profile;

CRDIV Article 94(4)

By way of derogation from point (a) of paragraph 3, a Member State may lower or increase the threshold referred to therein, provided that:

(a) the institution in relation to which the Member State makes use of this provision is not a large institution as defined in point (146) of Article 4(1) of Regulation (EU) No 575/2013 and, where the threshold is increased:

(i) the institution meets the criteria set out in points (145)(c), (d) and (e) of Article 4(1) of Regulation (EU) No 575/2013; and

(ii) the threshold does not exceed EUR 15 billion;

(b) it is appropriate to modify the threshold in accordance with this paragraph taking into account the institution's nature, scope and complexity of its activities, its internal organisation or, if applicable, the characteristics of the group to which it belongs.

CRDIV Article 94(5)

By way of derogation from point (b) of paragraph 3, a Member State may decide that staff members entitled to annual variable remuneration below the threshold and share referred to in that point shall not be subject to the exemption set out therein because of national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those staff members.

CRDIV Article 109(6)

4. The remuneration requirements laid down in Articles 92, 94 and 95 shall not apply on a consolidated basis to either of the following:

(a) subsidiary undertakings established in the Union where they are subject to specific remuneration requirements in accordance with other Union legal acts;

(b) subsidiary undertakings established in a third country where they would be subject to specific remuneration requirements in accordance with other Union legal acts if they were established in the Union.

5. By way of derogation from paragraph 4 of this Article, and in order to avoid circumvention of the rules set out in Articles 92, 94 and 95, Member States shall ensure that the requirements laid down in Articles 92, 94 and 95 apply to members of staff of subsidiaries that are not subject to this Directive on an individual basis where:

(a) the subsidiary is either an asset management company, or an undertaking that provides the investment services and activities listed in points (2), (3), (4), (6) and (7) of Section A of Annex I to Directive 2014/65/EU; and

(b) those members of staff have been mandated to perform professional activities that have a direct material impact on the risk profile or the business of the institutions within the group.

Notwithstanding paragraphs 4 and 5 of this Article, Member States may apply Articles 92, 94 and 95 on a consolidated basis to a broader scope of subsidiary undertakings and their staff.

BRRD Articles 33a(3) & 69(5)

Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits.

BRRD Article 44a(1)(c)

Member States shall ensure that a seller of eligible liabilities which meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for point (b) of Article 72a(1) and paragraphs 3 to 5 of Article 72b of that Regulation

sells such liabilities to a retail client, as defined in point 11 of Article 4(1) of Directive 2014/65/EU, only where all of the following conditions are fulfilled:

(a) the seller has performed a suitability test in accordance with Article 25(2) of Directive 2014/65/EU;

(b) the seller is satisfied, on the basis of the test referred to in point (a), that such eligible liabilities are suitable for that retail client;

(c) the seller documents the suitability in accordance with Article 25(6) of Directive 2014/65/EU.

Notwithstanding the first subparagraph, Member States may provide that the conditions laid down in points (a) to (c) of that subparagraph shall apply to sellers of other instruments qualifying as own funds or bail-inable liabilities.

BRRD Article 44a(5)

Without prejudice to Article 25 of Directive 2014/65/EU, and by way of derogation from the requirements set out in paragraphs 1 to 4 of this Article, Member States may set a minimum denomination amount of at least EUR 50 000 for liabilities referred to in paragraph 1, taking into account the market conditions and practices of that Member State as well as existing consumer protection measures within the jurisdiction of that Member State.

BRRD Article 45b(8)

Resolution authorities may exercise the power referred to in paragraph 7 of this Article with respect to resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6), and that meet one of the conditions set out in the second subparagraph of this paragraph, up to a limit of 30 % of the total number of all resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6) for which the Resolution Authority determines the requirement referred to in Article 45e.

The conditions shall be considered by resolution authorities as follows:

(a) substantive impediments to resolvability have been identified in the preceding resolvability assessment and either:

- (i) no remedial action has been taken following the application of the measures referred to in Article 17(5) in the timeline required by the resolution authority, or
- (ii) the identified substantive impediments cannot be addressed using any of the measures referred to in Article 17(5), and the exercise of the power referred to in paragraph 7 of this Article would partially or fully compensate for the negative impact of the substantive impediments on resolvability;

(b) the resolution authority considers that the feasibility and credibility of the resolution entity's preferred resolution strategy is limited, taking into account the entity's size, its interconnectedness, the nature, scope, risk and complexity of its activities, its legal status and its shareholding structure; or

(c) the requirement referred to in Article 104a of Directive 2013/36/EU reflects the fact that the resolution entity that is a G-SII or that is subject to Article 45c(5) or (6) of this Directive is, in terms of riskiness, among the top 20 % of institutions for which the resolution authority determines the requirement referred to in Article 45(1) of this Directive.

For the purposes of the percentages referred to in the first and second subparagraphs, the resolution authority shall round the number resulting from the calculation up to the closest whole number.

Member States may, by taking into account the specificities of their national banking sector, including in particular the number of resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6) for which the national resolution authority determines the requirement referred to in Article 45e, set the percentage referred to in the first subparagraph at a level higher than 30 %.

BRRD Article 71a(2)

Member States may also require that Union parent undertakings ensure that their third-country subsidiaries include, in the financial contracts referred to in paragraph 1, terms to exclude that the exercise of the power of the resolution authority to suspend or restrict rights and obligations of the Union parent undertaking, in accordance with paragraph 1, constitutes a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts.



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