



An Roinn Airgeadais  
Department of Finance

# Public Consultation on the National Discretions contained in the Risk Reduction Measures Package 2019 Feedback Statement

26 November 2020



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## 1. Introduction

The Department of Finance held a public consultation on the transposition of the national discretions contained in the Capital Requirements Regulation (CRR II), the Capital Requirements Directive (CRDV) and the Bank Recovery and Resolution Directive (BRRD) from the 28 August 2019 to 3 October 2019 ([link](#)).

Together, these Directives and Regulation are known as the 'Risk Reduction Measures' Package. This feedback statement should be read in conjunction with the public consultation document.

Feedback on the implementation of the discretions was sought from any interested parties. One submission was received, from the Banking and Payments Federation of Ireland (BPFI) on behalf of its members.

The Minister would like to thank those who gave input to this consultation for their valuable contribution to the transposition process.

The purpose of this feedback statement is to bring greater transparency and clarity to the transposition process by way of:

- publishing the responses to the public consultation;
- providing a summary of the responses to each question in the public consultation; and
- setting out the decisions which the Minister has taken in relation to the national discretions.

The Minister is no longer inviting responses on these discretions.

The transposition date for the “Risk reduction measures package” is 28<sup>th</sup> of December 2020.

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## 2. Summary of Responses and Minister's Decisions

This section gives a brief summary of the responses to the questions in the Public Consultation and outlines the Minister's decisions. The responses in full are included in the Annex.

### ***Revised CRR and Revised CRDIV***

#### *National 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.

An institution can be defined as 'small and non-complex' if it meets a number of criteria set out in the CRR. One of the criteria is that the value of the institution's assets is on average equal to or less than €5 billion over the four year period immediately preceding the current annual reporting period.

The optional discretion allows the lowering of the €5 billion threshold. The purpose of this discretion is to allow Member States to impose more stringent criteria when considering if an institution qualifies as small and non-complex.

The question posed in the Public Consultation was whether Ireland should exercise the discretion to lower the threshold and if so by how much.

In the response received it was recommended that Ireland should not exercise the discretion to lower the threshold of €5 billion in order to ensure that there is a consistent approach and level playing field across Europe.

In addition to the response received the Central Bank has identified that there are sufficient existing powers in the regulatory framework available to it in order to object to the use of the definition of small and non-complex by institutions.

**On this basis, the Minister has decided not to exercise the discretion of lowering the €5 billion threshold.**

### *National Discretion 2 - CRD Article 94 (4)*

Article 94 establishes principles in relation to Variable Remuneration which can take several forms including bonuses and stock options. These principles are set out in Article 94(1) of CRD.

Institutions that do not fall under the definition of 'large institution' and which have average assets equal to or less than €5 billion over a four-year period preceding the current financial year are exempt from applying some of the remuneration requirements of the Directive. In particular, they would be exempt from certain obligations around the structure of variable remuneration, deferral periods and requirements connected to pension arrangements.

Article 94(4) states that Member States may lower or increase the €5 billion threshold (up to a maximum of €15 billion).

This discretion allows Member States to vary criteria when considering if an institution qualifies for the exemption from the remuneration requirements outlined above.

In the response received it was recommended that Ireland should not exercise this discretion so that staff at banks in Ireland are not disadvantaged relative to European counterparts.

The Minister requested that the Central Bank, based on the criteria specified in the consultation document and the implementation options developed by his officials, provide him with an opinion for the purpose of informing his decision on whether the discretion provided in Article 94(4) of CRD should be exercised, and if so in what manner.

**The Minister and his officials, having considered the contents of this opinion, has decided to exercise this discretion and establish the threshold at €5 billion. The Central Bank will be assigned the authority to increase or decrease the €5 billion threshold in certain situations**

### *National Discretion 3 – CRD Article 94 (5)*

Article 94 establishes principles on the composition of variable remuneration which are designed to avoid excessive risk taking and ensure that variable remuneration is connected to longer term performance. 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 some of the variable remuneration requirements set out in the Directive. These include certain rules on the

structure of variable remuneration, deferral periods and requirements connected to pension arrangements.

Member States have the discretion to remove this exemption and apply all of the principles to all variable remuneration to certain categories of staff, irrespective of how much variable remuneration they earn. If the exemption was removed it would have the effect of imposing stricter requirements to staff who earn a low level of variable.

The question posed in the Public Consultation was whether Ireland should exercise this discretion.

In the response received it was recommended that Ireland should not exercise the discretion as staff who received variable remuneration of €50,000 or less, but not more than one third of total remuneration, would not be likely to be material risk takers. In addition, application of the discretion would result in a disincentive to pay small amounts of variable remuneration which could affect the intended purpose of linking positive performance with rewards that reinforce good culture and behaviours.

The Minister requested that the Central Bank, based on the criteria specified in the consultation document and the implementations options developed by his officials, provide him with an opinion for the purpose of informing his decision on whether the discretion provided in Article 94(5) of CRD should be exercised, and if so in what manner.

**The Minister and his officials, having considered the contents of this opinion, has decided not to exercise the discretion provided in Article 94(5) of CRD, at this point in time. The Minister may, in consultation with the Central Bank, revisit this discretion in the future.**

#### *National Discretion 4 – CRD Article 109 (6)*

Article 109 sets out when the Remuneration requirements of the Directive should be applied on a consolidated basis to banking groups. This means it sets out when a banking group with one or more subsidiaries must apply the regulations to the whole group.

Member States have the discretion to apply the remuneration requirements of the directive to a broader scope of subsidiaries in addition to those outlined in Article 109.

The purpose of this discretion is to act as an anti-avoidance measure and prevent a banking group that is subject to CRD from circumventing the

remuneration requirements by structuring their activities through subsidiaries so that they fall outside the scope of the Directive.

The question posed in the Public Consultation was whether Ireland should exercise this discretion.

In the response received it was recommended that Ireland should not apply this discretion in a manner that could create conflict with other regulatory frameworks.

The Minister requested that the Central Bank, based on the criteria specified in the consultation document and the implementations options developed by his officials to provide him with an opinion for the purpose of informing his decision on whether the discretion provided in Article 109 (6) of CRD should be exercised, and if so in what manner.

**The Minister and his officials, having considered the contents of this opinion, has decided not to exercise the discretion provided in Article 109 (6) of CRD at this point in time. The Minister may, in consultation with the Central Bank, revisit this discretion in the future.**

### ***Revised BRRD***

#### *National Discretion 5 - BRRD Articles 33a(3) and 69(5)*

Where a resolution authority suspends payment obligations of an institution under Article 33a and Article 69 BRRD II, it may, in accordance with Articles 33a(3) and 69(5), provide access for the institution's clients to a certain amount of their funds.

The respondent noted the balance of facilitating the liquidity needs of bank clients without this becoming a liquidity drain on the institution. The respondent suggested three options to be considered, stressing that a flexible approach should be taken in deciding the daily amount:

- *Option 1* To provide clients with daily maximum amount based on percentage of account balance.
- *Option 2* To provide daily maximum amount based on account activity.
- *Option 3* To set a daily maximum withdrawal amount.

**Keeping in mind the ability of a suspended institution to fulfil its liquidity obligations, the Minister will exercise this discretion to permit the resolution authority to set an appropriate daily amount on a case by case basis and with regard to a number of factors.**

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

Article 44a provides that a seller of subordinated liabilities can only sell such liabilities to a retail investor where a number of conditions are met. These conditions, including a suitability test, are intended to prevent retail investors from investing heavily in risky liabilities.

Article 44a(1)(c) offers the discretion to extend these higher conditions to the sale of other instruments that qualify as own funds or bail-inable liabilities. The Public Consultation sought feedback on how this should be transposed in Ireland.

The respondent considers it an appropriate measure to extend the provisions of Article 44a to these other qualifying instruments.

**The Minister has decided to exercise this discretion to extend these conditions to the sale of Additional Tier 1 and Tier 2 capital instruments, excluding all common shares.**

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

Article 44a relates to the sale of certain instruments to retail investors. Leading on from the exercise of the discretion in Article 44a(1)(c), Article 44a(5) allows Member States to, as a consumer protection measure, set a minimum denomination amount for the sale of subordinated liabilities to retail investors. While the EU Directive sets this minimum at €50,000, discretion is provided to States to set a higher amount in order to ensure that retail investors do not invest heavily in these instruments.

The respondent noted that introducing such a minimum threshold would encourage retail clients to take due care and advice before investing, given the nature and scale of the risk to be taken. The Directive set the minimum amount at €50,000, which the respondent agreed was "broadly appropriate."

**The Minister and his officials, having considered the contents of this opinion, has chosen to exercise this discretion and to set the minimum amount at €100,000. The European Central Bank indicated that increasing the minimum denomination to €100,000 would be a suitable measure, as**



**this aligns with the BRRD objective of preventing heavy investment in these instruments by retail clients.**

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

Article 45b outlines the classes of liabilities which are eligible to be included in a specified entity's MREL requirement. Article 45b(8) provides that the resolution authority may require a 30 per cent of institutions within the state meet their MREL requirement using certain liabilities and includes a discretion that Member States may set the percentage at a level greater than 30 per cent with regard to national specificities and the number of relevant institutions operating in the state.

**No responses were received on this discretion. Having considered the specificities of the national banking sector and in particular, the number of relevant institutions, the Minister has decided to set the limit at 100 per cent. This limit may be revised downwards in future to reflect changes in the Irish market if it is deemed appropriate to do so.**

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

This discretion relates to the role of the "third country subsidiaries" when the Union-based "parent" enters into financial difficulty. Article 71a provides that, where institutions and other entities enter into contracts bound by third country law, the contract would contain provisions allowing the EU resolution authority to suspend or restrict certain rights and obligations.

The national discretion in Article 71a(2) would allow Union parent institutions to clarify in their contracts with select third country subsidiaries that the exercise by the resolution authority of its powers to suspend and restrict rights or obligations would not constitute valid grounds for punitive actions by the subsidiary. These actions would include early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts.

The Public Consultation queries how this should be transposed in Ireland. The respondent opined that the benefit of exercising 71a(2) would be limited, as most contracts between Union banks and their Union subsidiaries already include 'stay' language. It was further stated in the response that requiring this in mixed Union - third country financial contracts could be outside EU jurisdiction.

**The Minister and his officials, having considered the contents of this opinion, has chosen to exercise this discretion. From a practicality and**

**market equality standpoint, it was deemed beneficial to apply this contractual requirement to third country credit institutions, financial institutions, and investment firms (or those firms which would be investment firms if they had a head office in the State).**

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### **3. Annex – BPFI Response to the Public Consultation**

The full response from the BPFI to the Public Consultation begins at page 11 of this Feedback Statement.

**BPFI Response to the Department of Finance Consultation  
on the Risk Reduction Measures Package 2019**

**2<sup>nd</sup> October 2019**

[www.bpfi.ie](http://www.bpfi.ie)

## Introduction

Banking & Payments Federation Ireland (BPFI) is the voice of banking and payments in Ireland. Representing over 70 domestic and international member institutions, we mobilise the sector's collective resources and insights to deliver value and benefit to members, enabling them to build competitive sustainable businesses, which support customers, the economy and society.

BPFI welcomes the opportunity to comment on this consultation paper issued by the Department of Finance in relation to the Risk Reduction Measures Package 2019.

## Consultation Questions on the Revised CRR and Revised CRDIV

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

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

Ireland should not exercise the discretion to lower the threshold. It is preferable that Ireland should adopt the recommendations made at European level in order to ensure, insofar as possible, that there is a consistent approach and level playing field across Europe.

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

*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?)*

Ireland should not exercise this discretion, neither increasing or decreasing the threshold. It is preferable that Ireland should adopt the €5bn threshold recommended, so that staff at banks in Ireland are not disadvantaged relative to European counterparts.

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

*Question 3: Should Ireland exercise this discretion?*

Ireland should not exercise the discretion to remove the exemption from the variable remuneration requirements set out in points (l) and (m) and in the second paragraph of point (o) of Article 94. It is preferable that Ireland should adopt the recommendations made at a European level on the basis that €50,000 or less (and provided it does not represent more than one third of the staff member's total annual remuneration) is considered a reasonable approach.

Staff who receive variable remuneration of €50,000 or less are unlikely to be significant risk-takers within the organisation and exercising the discretion to remove the exemption could act as a disincentive to pay a small sum of variable remuneration to staff. Variable remuneration is based on an institutions', business units' and staffs' performance, taking into account risks taken (EBA/GL/22/2015 at 18). The remuneration policy should provide for an effective framework for performance measurement, risk adjustment and the linkages of performance to reward (EBA/GL/2015/22 at 29).

Based on the EBA Guidelines on Sound Remuneration Policies (cited above), one goal of variable remuneration is to link performance to reward, thereby reinforcing positive behaviours based on organisational values and promotion of a customer-focussed culture – rewarding how employees do their work, not just what they do. To apply all of the principles to all variable remuneration could result in a disincentive to provide small amounts of variable remuneration. In turn, this weakens the link between performance and reward. In addition, when variable remuneration is modest (below €50,000 and not more than one third of total remuneration), applying all principles to this level of variable remuneration dilutes the positive incentivisation of good behaviour, positive culture and rewarding positive demonstrations of values (doing the right thing for the customer) in that the benefit felt by the employee is minimal and does not reinforce the link between performance that is aligned to good culture/value and the employee's reward. On that basis, we do not believe that Ireland should apply this discretion.

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

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

The discretion should not be applied in a manner that could create a conflict with other regulatory frameworks where Groups may consist of holding companies, credit institutions, investment firms, asset management and insurance undertakings

## **Consultation Questions on Revised BRRD**

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

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

In order to facilitate the immediate liquidity needs of clients whilst also protecting the bank from a liquidity drain in the form of a run on deposits held, it would be preferable to facilitate a flexible approach, to be determined by individual financial institutions. For example, they might apply a daily maximum amount based on a percentage of the account balance, or based on the expected client needs as indicated by the operational activity on the account over a period. Alternatively, a maximum daily limit of €X could be implemented, taking into account that existing limits on ATM withdrawals.

In a crisis situation, the approach taken here must be capable of being operationalized in a practical and effective manner to avoid unnecessary hardship for clients while ensuring the delivery of a streamlined service at a time of distress and panic for customers.

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

*Question 6: How should this be transposed in Ireland?*

It is considered that it would be appropriate to extend the provisions of this article to sellers of other instruments that qualify as own funds or bail-inable liabilities

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

Introducing a minimum threshold for retail investors would create a minimum entry barrier which would be likely to cause retail investors to ensure that they take due care and advice given the nature and relative scale of the risk being taken. The suggested EU minimum amount of €50,000 would seem broadly appropriate.

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

*Question 8: How should this be transposed in Ireland?*

No comment

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

*Question 9: How should this be transposed in Ireland?*

While it is true that Member States (such as Ireland) could require an undertaking from the Union parent to ensure that its EU subsidiaries include stay language, the benefit would be limited (and perhaps superfluous) as EU member banks (and their subsidiaries) party to a financial contract already have the principal obligation to include such language. However, to require inclusion of such language in third country subsidiaries in financial contracts with no nexus to the EU, seems like an overreach. For example, it could be considered that it would be beyond their jurisdictional purview.

## Other Issues

1. We 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, can the Department of Finance confirm that “The 2014 Implementation Notice exercise of CRR Article 478(2) applies for banks subject to Commission-approved restructuring plans per Regulation (EU) 2016/445 and Guideline (EU) 2017/697” will continue to be applicable.

2. In addition, Page 3 of the Consultation Paper, states that “Comments are also welcomed where the transposition will have an impact on certain other national legislation.”

The Risk Reduction Measures Package deals, inter alia, with “Updated macro-prudential toolkit”. Macro-prudential provisions under the CRR include Article 124 relating to exposures secured by mortgages on immovable property under which the national competent authority has the discretion to set higher risk weights. The Central Bank of Ireland (CBI) has exercised this discretion.

Prior to the introduction of the CRR the national competent authorities also had a discretion under a subject dealing with related subject matter by virtue of the same provision contained in Article 128 under the CRR. This deals, inter alia with loans for financing of land acquisition and development for residential and commercial property; referred to as “speculative immovable property financing”. The relevant reference was the Capital Requirements Directive, Annex VI, Part 1, Standardised Approach – Risk Weight, paragraph 66. The CBI, usefully, provided the following supplementary comment:

20	Para 66	Discretion to risk weight certain items at 150%	Yes	Applies to speculative commercial real estate in Ireland. This is defined as loans for the purposes of Land or building acquisition; or Development or construction in relation to such property. In each case, such lending will cease to be considered speculative if a level of contracted pre-sales or pre-letting of at least 50% of the property (by value) has been achieved. Furthermore, such exposures need not be treated as speculative to the extent that an institution has recourse to contracted: Alternative sources of cash flow; Other realisable security.
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When the CRR came into force in January 2014, this discretion was removed. As a result the CBI's "Implementation of Competent Authority Discretions and Options in CRD IV and CRR" document correctly removed any reference to this subject matter. The "supplementary comment" which provided useful guidance to Banks is no longer in publication. No alternative guidance has been provided in other regulatory publications.

It would be useful if the Department of Finance would consider addressing this anomaly under the up-dated macro-prudential toolkit provisions if this were to be deemed appropriate.

**Contacting Us:**

If you would like to further discuss details of this submission you may contact us at:

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