

The public interest test applied by the SRB and the Commission (DG COMP) and the link with the debate on how to reconcile resolution and State aid proceedings

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1. Legal basis of the public interest test

Public interest test(s) according to BRRD/SRMR	Public interest test according to State aid “crisis framework” (Commission Banking Communication)
Drafting of resolution plan (Article 4(1) BRRD; Article 14(2) SRMR): Insolvency would likely have significant negative effect on financial markets, other institutions, funding conditions or the wider economy	Compatibility of liquidation aid with the internal market (Article 107(3)(b) TFEU; Section 6 Banking Communication): “to remedy a serious disturbance in the economy of a Member State”; financial stability as “overarching objective” <u>Note:</u> The public interest test is subject to the Commission’s wide discretion in State aid matters. The “crisis framework” and its specific criteria will apply only “as long as the crisis persists”.
Calibration of MREL (Article 45(6) BRRD; Article 12(7) SRMR)	
Triggering resolution (Article 32(1)(c) and (5) BRRD; Article 18(1)(c) and (5) SRMR):* <ol style="list-style-type: none"> 1. Resolution is necessary and proportionate to achieve at least one resolution objective 2. Comparison with hypothetical insolvency proceeding (<i>according to the national law and practice applicable to the case at hand!</i>) 	
Bail-in exemptions (Article 44(3) BRRD and Article 27(5) SRMR)	

* Resolution planning (incl. MREL) will guide, but does not replace the SRB’s determination of public interest at FOLTF.

2. Differences in criteria/procedure applied by the SRB/Commission (DG COMP)

SRB public interest test	Commission (DG COMP) public interest test
Impact at European level	Impact at national, even regional level suffices
BRRD/SRMR prohibit compensation of destruction of value with public funds (see Article 31(2) BRRD; Article 14(2) SRMR)	Commission allows for compensation of destruction of value (“piecemeal liquidation”) with State aid
Otherwise criteria in substance rather similar	
Ownership of procedure with SRB	Ownership of procedure with Member State (initiators, providers of data/arguments to back claim of public interest)
No mention of arguments produced by national authorities, argumentation from the perspective of the EU/euro area-level interests	Passive stance of the Commission, reproduction of the arguments of the Member State authorities (see, e.g., Veneto Banca/BPVI State aid decision)

3. Outcome of deviating tests and preliminary assessment

Bail-in in resolution may include senior creditors, depending on the amount of losses incurred. **Burden-sharing** in State aid proceedings does not (as a mandatory precondition) include senior creditors.¹

Senior creditors may therefore end up worse off in resolution than in insolvency if the possibility of liquidation aid continues to exist. This scenario not only is at odds with the objectives that led to the adoption of the BRRD, but also runs counter the NCWO test (Article 34(1)(g) BRRD; Article 15(1)(g) SRMR). The courts have ruled that creditors have no legitimate expectation to receive State aid, i.e. no right to compensation under Article 17(1) CFR and Article 1 of the Protocol to the ECHR (right to property). But can this credibly be maintained if liquidation aid continues to be granted and approved by the Commission?

In paragraph 66 of the Banking Communication (2013) the Commission states the following:

“The Commission recognises that, due to the specificities of credit institutions and **in the absence of mechanisms allowing for the resolution of credit institutions without threatening financial stability**, it might not be feasible to liquidate a credit institution under ordinary insolvency proceedings. For that reason, State measures to support the liquidation of failing credit institutions may be considered as compatible aid, subject to compliance with the requirement specified in point 44 [burden-sharing requirement].”

With the adoption of the BRRD/SRMR, it has become questionable what the remaining role of liquidation aid is. This feeds into the wider debate of how the resolution and State aid frameworks can coexist in the future.

¹ In some cases, Member States did decide to apply burden-sharing also to senior creditors.