

EBA/CP/2020/15

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24 July 2020

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## Consultation Paper

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Draft Regulatory Technical Standards on impracticability of contractual recognition of bail-in clause under Article 55(6) of Directive 2014/59/EU

and

Draft Implementing Standards for the notification of impracticability of contractual recognition under Article 55(8) of Directive 2014/59/EU

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# 1. Responding to this consultation

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The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in part 6.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

## Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 24.10.2020. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

## Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

## Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EU) 2018/1725 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions and bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR') as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

## 2. Executive Summary

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Pursuant to Article 55(1) of Directive 2014/59/EU (BRRD) Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of that Directive to include a contractual term by which the creditor or the party to the agreement or instrument creating a relevant liability recognises that that liability may be subject to the write down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority.

Article 55(2) of BRRD provides that if an institution or entity reaches the determination that it is legally or otherwise impracticable to include in the contractual provisions governing a relevant liability a term required in accordance with paragraph 1 of Article 55 BRRD, such institution or entity notifies its determination to the resolution authority.

Article 55(6) of BRRD mandates the EBA to develop draft regulatory technical standards in order to specify:

- (a) the conditions under which it would be legally or otherwise impracticable for an institution or entity to include the contractual term referred to in Article 55(1) BRRD in certain categories of liabilities;
- (b) the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD;
- (c) the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD.

Article 55(8) of BRRD requires that the EBA develop draft implementing technical standards to specify uniform formats and templates for the notification to resolution authorities for the purposes of paragraph 2 of Article 55 BRRD.

**The EBA mandate requires the articulation of cases of impracticability as “conditions of impracticability”. It does not allow the RTS to provide exclusions either from bail-in or from the requirement to include a contractual recognition term.**

This Consultation Paper includes the EBA’s proposal for the draft RTS and draft ITS and explains the approach the EBA has taken in relation to the proposal.

### Next steps

After the consultation period, the EBA will deliver the final draft RTS and final draft ITS to the European Commission.

## 3. Background and rationale

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### 3.1 Objective and process

Directive 2014/59/EU (BRRD) requires Member States to confer on their resolution authorities a number of powers including the powers to write-down or convert relevant capital instruments in accordance with Article 59 of the BRRD (bail-in).

Member States must ensure that the powers may be applied to all relevant liabilities of an institution or relevant entity. Liabilities of an institution or relevant entity may be governed by the law of the Member State of establishment or another Member State in which case the application of the write-down and conversion powers would be effective as a matter of law. However, some liabilities may be governed by the law of a third country. In the absence of a regime to secure the effectiveness of an application of the write-down and conversion powers by a Member State resolution authority it is possible that a third country court may not recognise the effect of the application of the powers by that resolution authority. For this reason, Article 55(1) of the BRRD requires Member States to require institutions and relevant entities to include in relevant agreements a contractual term by which the creditor or party to the agreement creating the liability recognises that liabilities may be subject to the write-down and conversion powers. Additionally, the creditor or party to the contract agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a Member State resolution authority.

The requirement to include contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries is intended to facilitate and improve the process of bailing in those liabilities in the event of resolution.

There might be instances, however, where it is impracticable for institutions or entities to include those contractual terms in agreements or instruments creating certain liabilities that are relevant for the bail-in process, e.g.:

- Where it is illegal under the law of the third country for an institution or entity to include such clauses in agreements or instruments creating liabilities that are governed by the laws of that third country;
- Where the institution or entity has no power at the individual level to amend the contractual terms as they are imposed by international protocols or are based on internationally agreed standard terms as the case might be, for example, for liabilities that arise from guarantees or other instruments used in the context of trade finance operations

However, BRRD provides that a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should not as such be considered a cause of impracticability.

The EBA is mandated under Article 55(6)a) to develop draft regulatory technical standards to specify the conditions of impracticability.

It is important to note that these draft RTS deal with liabilities where it is impracticable to include the bail-in recognition clause in a contract. It recognises a practical impediment for the contractual inclusion of the term but, importantly, it does not exclude that liability from the scope of bail-in. In this respect, this provision is materially different from Article 44(2) BRRD, which mandatorily exempts certain liabilities from the scope of bail-in.

**The mandate for the EBA does not cover exclusions from the scope of bail-in or from the scope of article 55 BRRD. Further, the draft RTS cannot specify certain instruments as “impracticable” as the mandate is to identify the underlying conditions creating the impracticability to include in the contractual provisions the term by which the counterparty recognizes the effects of a possible bail-in.**

The process that would take place in instances of impracticability would follow these steps:

1. In accordance with Article 55(2) BRRD, institutions and entities should **notify the relevant resolution authority if they determine that it is legally or otherwise impracticable** to include the contractual provisions in a contract. The determination should **be based on the conditions of impracticability set in article 1 of the draft RTS**
2. **The notification to the resolution authority should be made in accordance with the draft ITS** provided in this consultation paper and developed by the EBA pursuant to its mandate given in Article 55(8) BRRD.
3. Resolution authorities should assess the institution’s or entity's determination that it is impracticable to include contractual recognition clauses. If it concludes that it is not impracticable to include the contractual term, it shall, **within a reasonable timeframe**, require the inclusion of such term. The reasonable timeframe is set by the EBA in **article 3 of the draft RTS**
4. The resolution authority shall require the inclusion of the contractual term taking into account the conditions defined in article 2 of the draft RTS. **The conditions for the resolution authority to require the inclusion of the contractual term is defined in article 2 of the draft RTS**
5. Where liabilities not including the contractual term of impracticability lead a resolution authority to determine the existence of a substantive impediment to resolvability, it can apply the powers provided in Article 17 BRRD as appropriate to remove that impediment to resolvability.
6. Institutions and entities should be prepared to justify their determination. In addition, in order to ensure that the resolvability of institutions and entities is not affected, liabilities for which the relevant contractual recognition provisions are not included are not be eligible for MREL. Furthermore, bail-in-able liabilities arising from contracts that do not include the contractual term are not excluded from bail-in.

## 3.2 Content

Article 55(6) BRRD requires the EBA to develop draft regulatory technical standards in order to further specify:

- a) the conditions under which it would be legally or otherwise impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to in paragraph 1 of Article 55 BRRD in certain categories of liabilities. Article 1 of the draft RTS describes the conditions of impracticability.
- b) the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD. Article 2 of the draft RTS lays out the conditions for the resolution authority to require the inclusion of the contractual term.
- c) the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD. Article 3 of the draft RTS lays out the reasonable timeframe for the resolution authority to require the inclusion of a contractual term.

Article 55(8) of BRRD requires the EBA to develop draft implementing technical standards to specify uniform formats and templates for the notification to resolution authorities for the purposes of paragraph 2 of Article 55 BRRD.

## 3.4 Draft RTS provisions

### 3.4.1 Conditions of impracticability

Article 1 sets out five conditions of impracticability to include the term for contractual recognition of the powers to write-down or covert relevant capital instruments, as follows:

- The first condition is self-explanatory. It relates to where inclusion of the contractual term is prohibited by virtue of a law from a third country.
- Condition b), again sought to be self explanatory, relates to where the inclusion of the contractual term is prohibited by virtues of an explicit instruction from a relevant third country authority. This condition refers specifically to 'relevant third-country authority' as defined by BRRD in Article 2(1)(90). This term is used since Article 55 and these RTS refer to resolution authorities. It is possible that other types of public authority, (e.g. market conduct or competition authorities) might issue similar instructions, however there is insufficient evidence available at the time of the drafting to define a wider spectrum of third country authorities. The focus of the draft RTS should be on resolution authorities in third-countries and not trying to cover every and each private/public authorities. As currently drafted, the term applies only to resolution authorities in third countries. Respondents who consider that

this should apply to a broader range of public or private authorities should provide practical examples.

**Question for public consultation:**

**1. Are there any third country authorities, other than resolution authorities, that might impose instructions not to include the contractual bail-in recognition term?**

- The third condition aims to capture instruments and agreements that are based on international standards. Under this condition, the RTS aims to capture guarantees or counter-guarantees governed by uniform international industry rules (as for example those set by the International Chamber of Commerce) or comparable industry organizations, as well as instruments used in the context of trade finance operations, where the terms are not negotiable or the institution is, in practice, unable to amend.

**Question for public consultation:**

**2. Can you provide concrete examples of instruments, such as letters of guarantee, governed by the law of a third country which are not used in the context of trade finance and which would be subject to conditions of impracticability?**

- The fourth condition aims to capture liabilities that are based on standard terms that are imposed to the institution by virtue of its membership or participation in non-EU bodies, for example financial market infrastructure entities.
- The fifth condition is designed to capture those liabilities that are not excluded from bail-in and that relate to daily operations (i.e. are not critical to the daily functioning of the institution). This condition should capture for example, travel tickets, liabilities related to hotels or to utilities if they are governed by third country law.

There is an extensive variety of contractual arrangements that may be captured by the obligation to include the contractual term. Accordingly, the EBA believes it is appropriate, when identifying the conditions under which it would be legally or otherwise impracticable to include such term, to refer to legal or factual circumstances under which an institution or entity faces unsurmountable issues rather than identifying specific types of contractual arrangement or types of liabilities.

Further, when specifying the circumstances in which an institution or entity may reach the determination of impracticability pursuant to Article 55 (2) of Directive 2014/59/EU, this Regulation defines those circumstances as precisely as possible as conditions of impracticability.

The burden of proof of impracticability is on the entity or institution making the notification.

A number of criteria have been tested as potential conditions of impracticability, but were not deemed to be within the scope of the RTS for the reasons set out in the table below.

#	Proposed condition	Reasoning for non-inclusion
1	Request of the counterparty to renegotiate the contract and / or an increase in pricing or a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause.	There might be cases in which the refusal / request for renegotiation / repricing affects a relevant contract. In addition, it could be considered that refusal in standard contracts (e.g. ISDA) and not in other contracts introduces an uneven playing field. However, the mandate under Article 55(6) should be interpreted in conjunction with the relevant Recital 26 of Directive (EU) 2019/879 of the European Parliament and of the Council.
2	General reference to “contingent liabilities”	Contingency is not a condition of impracticability per se; as long as the liability (contingent or not) stems out of a contract, that contract should include contractual recognition. If the characteristics of the contract do not allow such a clause, that relevant condition should be identified (from those proposed in the draft RTS). However, the contingent nature of the liability cannot be seen as a reason for impracticability.
3	Conditions referring to short duration of a contract (short maturity)	<p>The argument is that by the time the RA finishes its assessment the contract could have expired.</p> <p>The fact that a contract is of a short duration is not of itself a basis for impracticability.</p> <p>The time for a RA to assess the notification is set as a maximum boundary but it could be performed faster and certainly the RA does not need to wait for the end of the time set in the draft RTS to reply to the applicant institution. Secondly, failure of an institution is unknown and can happen over any time horizon, so excluding some contracts from the requirement to include the contractual term because their maturity is short would imply a confidence that the institution will not fail within that period. Finally, it can be considered that contracts are generally renewable.</p>
4	Conditions relating to a low value contract /liability	Any such condition is, on one hand, subjective, as we do not have any statistical evidence of what is a non-important liability in case of bail-in (also because of a low number of bail-in executions). Secondly, an

		absolute amount would not be suitable to all institutions while a relative amount might have a different interpretation in terms of resolvability depending on a wider context. BRRD sets a requirement to assess the impact of resolvability on an institution in case a 10% threshold is reached within a liability class – the RTS should not propose other thresholds or amounts.
5	The relevant liability arises out of an existing agreement which the entity acquired and for which the entity has no power to amend the terms	This condition refers to an agreement that the institution bought but was not part of the original negotiation process. This situation has not been kept for the list of conditions since it is believed there will be a contract for the acquisition of the instrument that could include the contractual recognitions and it is believed that the underlying instruments is/will become an asset.
6	The liability is contingent to a breach of contract.	Since the liabilities subject to Article 55 have to arise out of a contract in any event, the fact that an underlying liability may be contingent at the time of formation of the contract, does not of itself prevent the inclusion of Article 55 wording in the contract.

**Questions for public consultation:**

**3. Do you agree that the categories of liabilities in the above table do not meet the definition of impracticability for the purpose of Article 55(6)a)?**

**4. Do you consider that there is any condition of impracticability that has not been captured in the analysis?**

### 3.4.2 Conditions for the resolution authority to require inclusion

The draft RTS specify in Article 2 the conditions for the resolution authority to require the inclusion of the contractual term: the resolution authority shall require the inclusion if it disagrees with the institution's determination of impracticability.

In case any of the conditions notified by the institution are met as defined in the draft RTS, the RA cannot require the inclusion. If none of the conditions notified are met as defined in the draft RTS, the RA can refrain from requiring inclusion by taking into account the need to ensure resolvability.

The article referring to the condition for the RA to require inclusion is structured on three building blocks:

- i. The condition – disagreeing with the institution's determination, based on the conditions of impracticability notified and as defined in the draft RTS;
- ii. The criteria that the RA should take into account when considering the need to ensure resolvability. This only applies if none of the conditions of impracticability notified are met. The criteria proposed are aligned with those provided by Annex C of the BRRD for the purposes of the resolvability assessment. The RTS recitals specify that assessing the need for ensuring resolvability for the purposes of article 55 BRRD is not the same as the yearly resolvability assessment of the institution.
- iii. Thresholds – above the thresholds the inclusion is mandatory while below the thresholds the RA has flexibility, by using the criteria discussed in point ii above, to require or refrain from requiring the inclusion. The use of thresholds provides for an enhanced level playing field for institutions (consistent approach) across EU and for decreasing operational burden (automatic process). To stress, thresholds will be used when the RA determines that notified liabilities do not meet the conditions of impracticability.

It is important to note that the RA can always require other actions contemplated by BRRD framework in order to remove impediments to resolvability, depending on how it is satisfied with overall resolvability of the institution.

For the purposes of the need to ensure resolvability in the context of this RTS, the RA does not perform a full resolvability assessment (as required to perform annually in the context of resolution planning) but might consider only targeted characteristics e.g. hierarchy of the liability and/or its maturity and/or the liability value.

Two criteria that have been considered for conditions of impracticability in Art. 1 of the RTS but were discarded in the end (criteria 3 and 4 in §3.3.1), have been now considered among the criteria for the thresholds in Art. 2(2) RTS, to guide the RA in assessing if the inclusion of the clause is necessary to ensure the institution's resolvability. The recourse to the thresholds on value and maturity of the liability pursuant to Art. 2 RTS is without prejudice to the choice of not considering such criteria for impracticability reasons. In any case, the institution cannot notify contracts for impracticability based on their value or maturity. If the contracts do not meet the conditions of impracticability, the RA will always require inclusion above the thresholds and can require inclusion below the thresholds.

### 3.4.3 The timeframe for the resolution authority to require inclusion

Article 3 of the draft RTS determines the reasonable timeframe for the resolution authority to require the inclusion of a contractual term at 3 months, starting from the moment the application is considered complete. This timeframe can be extended, in exceptional circumstances, by the RA of another 3 months.

During a transitional period of one year from the RTS entering into force, the RA can extend the timeframe with an additional 6 months (as opposed to with an additional 3 months outside the transitional period).

## 3.5 Draft ITS provisions

The consultation paper also seeks comments on the draft ITS that specifies the information to be provided by institution in a notification to the RA.

The EBA defines in the draft ITS the data required in a notification and the definition of these data points. While the EBA also provides a table version (Excel) and a data point model (taxonomy) of these information points, it is up to the RA to determine the actual system to be used at national level for submitting the notifications. This is because there might be instances where certain systems are in place and it would be easier to use them.

Consistency at EU level is achieved as the data required is consistent; moreover as the data point definitions are not altered, transformations from one system to another should be easy to perform. Considering existing capabilities of managing big data, where information is not stored in a specific format, the EBA favours this approach of data point definitions that should be consistent. For example, a template would require the information in a certain order; however, the RA might wish to process that information using various algorithms (re-order, calculations etc.), which would be facilitated by the use of specific data systems.

The draft ITS requires institutions or entities making the notification to distinguish between contracts creating new liabilities and contracts amending existing liabilities. The template to fill in is the same, but in case of amending existing liabilities the institution needs to indicate this and update only the values that change if the contract/instrument has been notified before. The institutions also needs to inform if it considers the changes to be material or not.

Further, the draft ITS proposes the possibility to notify categories of liabilities that meet conditions of impracticability. However, this option is only to be used if the relevant resolution authority deems it necessary to use provisions of article 55(7) BRRD. The values to be used for N01.02 (categories) are to be defined by each RA that will decide to make use in practice of art 55(7) BRRD provisions.

The ITS would allow for a notification to include both N01.02 and N01.02 notifications at the same time (i.e. group notification of individual contracts and of categories).

Finally, the draft ITS requires institutions to provide the outstanding values in template N02.00 for all insolvency rankings for which liabilities are notified. The information in this template is necessary to allow RAs to observe provisions of subparagraph 5 of article 55(2) BRRD.

In general, values in the notification will be nominal values or expected maximum values (in case of framework agreements and notification by category). This is the case as the institution is expected to notify before actually entering a contract and therefore there is no underlying value. However, values provided in template N02.00 have to be actual outstanding amounts as they would reflect, in part, how the previously notified contracts behave.

Being aware of the difficulty to process huge amounts of data with a high frequency, the draft ITS proposes that the values in N02.00 will reflect the outstanding amounts as per last concluded quarter.

The entry into force is currently set at three months, similarly with the RTS. This is to balance the time institutions need to create the technical capabilities for using the ITS for notifications but short enough not to allow notifications to be made without the ITS and RTS in place.

#### Questions for public consultation:

**5. Do you agree with EBA's approach for developing the draft ITS?**

**6. Do you consider reasonable 3 months for entry into force of the ITS, as allowing enough time to set-up the proper and adequate capabilities to notify with this ITS?**

#### Ongoing international work in this area

The EBA is aware of ongoing international work in relation to statutory and contractual approaches to the recognition of the exercise of write-down and conversion powers and other resolution powers. In particular, the EBA notes the Financial Stability Board's (FSB) Thematic Review on Bank Resolution Planning published in April 2019 that acknowledges *"Challenges to cross-border enforceability of resolution actions that have been identified in resolution planning include: [...] the operation of recognition of bail-in in practice (timeliness, competing regulatory requirements, understanding of regulation on contractual recognition, impracticability of wide scope of requirement to include bail-in contractual recognition clauses)."*

## 4. Draft regulatory technical standards

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**COMMISSION DELEGATED REGULATION (EU) .../..**

**of XXX**

**[...]**

**supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards for the contractual recognition of write-down and conversion powers**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and 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, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, and in particular Article 55(6) thereof,

Whereas:

- (1) The conditions referred to in Article 55(6), point (a) of Directive 2014/59/EU should allow for an appropriate level of convergence in relation to the cases that should qualify as impracticability, whilst at the same time enable resolution authorities to take into account differences in legal systems.
- (2) Institutions or entities should not be required to include into the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of Directive 2014/59/EU where such inclusion would be illegal in the relevant third-country, or where the institution or entity concerned is unable to amend those contractual provisions, in particular where those contractual provisions are concluded in accordance with internationally standardised terms or protocols,

where they are not bilaterally negotiated. Trade finance products, such as guarantees, counter-guarantees, letters of credit or other instruments, used in the context of supporting or funding trade transactions are typically among those contracts issued subject to internationally recognised standard terms or rules which may be set by an internationally recognised industry organisation and may be required to be governed by the laws of a non-EU jurisdiction.

- (3) In any event, when making its determination of impracticability, the institution or entity should note that neither the unwillingness of counterparties to include the contractual term required under Article 55 (1) of Directive 2014/59/EU nor an increase in the price of the liability should be considered as the institution or entity being unable to include the contractual term in accordance with this Regulation.
- (4) According to Article 55(2), third subparagraph, of Directive 2014/59/EU, a resolution authority may refrain from requiring the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where it considers that such an inclusion is not necessary in ensuring the resolvability of the institution or entity. The conclusions of the analysis of the impact on resolvability, for the purposes of Article 55 of Directive 2014/59/EU, should be consistent with those under the resolvability assessment regulated in the Chapter II, Title II, of the same Directive. However, only for the purposes of this Regulation, agreements or instruments creating liabilities with long maturities or high value should be considered needed for ensuring resolvability, hence, the inclusion of the contractual terms should not be waived when its inclusion is practicable. Outside these agreements or instruments creating liabilities, when assessing the impact on resolvability, resolution authorities should have due regard to a number of elements in the way determined in this Regulation.
- (6) After receiving a complete notification of impracticability, a resolution authority should have a reasonable timeframe to evaluate the notification. Notifications can vary in complexity. It is therefore appropriate that a resolution authority, in special circumstances and after a preliminary assessment, should be allowed to extend the timeframe to require inclusion of the contractual term for a predetermined period of time. Such extension should be duly notified to the relevant institution or entity. Considering the novel nature of the notification and its assessment, resolution authorities should be allowed to extend such extension for an additional six months during the first year after entry into force of this Regulation.
- (7) In order to provide institutions and competent authorities with sufficient time to adapt their systems or procedures to apply the conditions and process set out in this Regulation, it should apply from [3 MONTHS AFTER ITS PUBLICATION IN THE OJ].

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (EBA) to the Commission.

[(9) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>1</sup>,]

HAS ADOPTED THIS REGULATION:

#### *Article 1*

### **Conditions under which it would be impracticable to include the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities**

1. The conditions under which it would be legally or otherwise impracticable for an institution or entity as referred to in Article 1(1), point (b), (c) or (d) of Directive 2014/59/EU to include into the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of that directive, shall be the following:

- (a) the inclusion of the contractual term would be in breach of the law of the third country governing the liability;
- (b) the inclusion of the contractual term would be contrary to an explicit and binding instruction from a relevant third country authority of the third country the law of which governs the liability;
- (c) the liability arises out of instruments or agreements concluded in accordance with and governed by internationally standardised terms or protocols which the institution or entity is unable to amend;
- (d) the liability is governed by contractual terms to which the institution or entity is bound pursuant to its membership of, or participation in, a non-Union body, including financial market infrastructures, and which the institution or entity is in practice unable to amend;
- (e) the liability is owed either to a commercial or trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning and where the institution or entity is in practice unable to amend the terms of the agreement concluded on standard terms.

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<sup>1</sup> 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 L 331 15.12.2010, p. 12).

2. For the purposes of paragraph 1, points (c) and (d) and (e), an institution or entity shall be deemed to be unable to amend the instruments or agreements or contractual terms where the instrument, agreements or contractual terms can only be concluded under the terms set by the counterparty or counterparties or by the applicable standard terms or protocol.

**Questions for public consultation:**

**7. Do you agree with EBA's proposed conditions of impracticability?**

**8. Can you provide examples of instruments or contracts for which it would be impracticable to include the contractual recognition which are not captured by the above proposed conditions?**

**9. Are the proposed conditions of impracticability clear and meeting their purpose?**

*Article 2*

**Conditions for the resolution authority to require the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities**

1. The resolution authority shall require the inclusion into the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where the resolution authority has concluded on the basis of the institution's or entity's notification that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation are fulfilled and where either the amount of the liability created by the relevant agreement or instrument is equal to, or more than EUR 20 million, or where the remaining maturity of that agreement or instrument is equal to, or longer than 6 months.

2. The resolution authority, for the purpose of ensuring resolvability, may require the inclusion into the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where the resolution authority has concluded on the basis of the institution's or entity's notification that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation are fulfilled and where the agreement's or instrument's value creating the liability is less than EUR 20 million and the remaining maturity of that agreement or instrument is shorter than 6 months. When assessing whether such inclusion is necessary for ensuring resolvability, the resolution authority shall have regard to one or more of the following elements or to any other element, as appropriate:

(a) the amount and type of the agreement or instrument;

- (b) the feasibility of using resolution tools;
- (c) the credibility of using resolution tools in a way that meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees and possible actions that third-country authorities may take;
- (d) the ranking of the liability in normal insolvency proceedings under national law;
- (e) the maturity of the liability and the revolving nature of the contract, where applicable.

**Questions for public consultation:**

**10. Is the article providing the conditions for the Resolution Authority to require inclusion clear?**

**11. Do you agree with EBA's proposal for the conditions for the resolution authority to require the inclusion of the contractual term?**

**12. What is the likely amount of the liabilities to be notified under article 55 BRRD, as average per liability and as expected maximum per liability? What is the expected average maturity of the liabilities to be notified under article 55 BRRD?**

*Article 3*

**The reasonable timeframe for the resolution authority to require the inclusion of a contractual term**

1. The reasonable time frame referred to in Article 55(2), third subparagraph, of Directive 2014/59 shall be three months, counting from the day the resolution authority receives the notification referred to in Article 55(2), first subparagraph, of that Directive.
2. Where the notification referred to in Article 55(2), first subparagraph, of Directive 2014/58 is incomplete, the resolution authority shall specify to the institution or entity which information is missing. The time frame referred to in paragraph 1 of this Article shall only start when all missing information has been submitted.
3. The resolution authority may in cases of complex notifications, extend the time frame referred to in paragraph 1 by three months, and until [*insert the date one year after the date of entry into force of this Regulation*], by six months. The resolution authority shall inform the institution or entity of the extension thereof and of the reasons for the extension.

**Questions for public consultation:**

**13. Do you agree with EBA's proposal for the reasonable timeframe for the resolution authority to require the inclusion of the contractual term?**

*Article 4*

**Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. *[N.B. entry into force for the RTS and ITS to be aligned]*

It shall apply from [3 MONTHS AFTER ITS PUBLICATION IN THE OJ].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission*  
*The President*  
*[For the Commission*  
*On behalf of the President*

*[Position]*

## 5. Draft implementing standards

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**COMMISSION IMPLEMENTING REGULATION (EU) No .../... laying down  
implementing technical standards specifying uniform formats and templates for  
notifications with regard to the impracticability of the contractual recognition of write-  
down and conversion powers when applying bail-in**

of **XXX**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and 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, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, and in particular Article 55(8) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) [XXXX/XX]<sup>2</sup> lays down the conditions under which it would be legally or otherwise impracticable for an institution or entity to include into the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of Directive 2014/59/EU, as well as the conditions and the reasonable timeframe for the resolution authorities to require the inclusion of such provisions.
- (2) In order to ensure an appropriate level of convergence in the process by which a resolution authority determines a notification of impracticability, it is appropriate to specify uniform formats and templates for the notification to the resolution authority of a determination of impracticability.
- (3) In order to provide institutions and competent authorities with sufficient time to adapt their systems or procedures to implement the process set out in this Regulation, it should apply from [3 MONTHS AFTER ITS PUBLICATION IN THE OJ].
- (4) This Regulation is based on the draft regulatory implementing standards submitted by the European Banking Authority (EBA) to the Commission.

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<sup>2</sup> [to insert full reference to the Delegated Act]

[(7) The EBA has conducted open public consultations on the draft implementing standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>3</sup>,]

HAS ADOPTED THIS REGULATION:

#### *Article 1*

### **Core information for the purpose of a notification of impracticability**

When making a notification under Article 55(2) of Directive 2014/59/EU, the institution or entity referred to in Article 1(1), points (b), (c) or (d) of that Directive shall submit to the resolution authority the information specified in the templates set out in Annex I in accordance with Article 2 and the instructions set out in Annex II.

#### *Article 2*

### **Format for the submission of information**

Institutions or entities as referred to in Article 1(1), points (b), (c) or (d), of Directive 2014/59/EU shall submit the information referred to in Article 1 of Delegated Regulation [...] in the data exchange formats and representations specified by resolution authorities, respecting the data point definitions included in the single data point model referred to in Annexes III and IV, including the validation rules.

#### *Article 3*

This Regulation shall enter into force on the twentieth day following the day of its publication in the *Official Journal of the European Union*. [*N.B. entry into force for the RTS and ITS to be aligned*]

It shall apply from [3 MONTHS AFTER ITS PUBLICATION IN THE OJ].

#### **Questions for public consultation:**

**14. How much time do you need to implement the technical specifications provided in this draft ITS?**

<sup>3</sup> 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 L 331 15.12.2010, p. 12).

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission  
The President*

*[For the Commission  
On behalf of the President*

*[Position]*

**Questions for public consultation:**

**15. Do you consider the draft ITS comprehensive for submitting a notification of impracticability?**

**16. Do you consider the templates and instructions clear?**

**17. Do you have any suggestions or proposals in relation to the draft ITS template and the instructions to fill it in?**

**18. Do you find any specific piece of information required in the template as hard to provide or unclear how to fill in?**

## **ANNEX**

**Annex I – Templates** - See separate file

**Annex II – Instructions** - See separate file

**Annex III – Single data point model (DPM)** *[to be added after the public consultation]*

All data items set out in Annex II shall be transformed into a single data point model which is the basis for uniform IT systems of institutions and competent authorities.

**Annex IV – Validation rules** *[to be added after the public consultation]*

The data items set out in Annex I shall be subject to validation rules ensuring data quality and consistency. The validation rules shall meet the following criteria:

- a) define the logical relationships between relevant data points;
- b) include filters and preconditions that define a set of data to which a validation rule applies;
- c) check the consistency of the transmitted data;
- d) check the accuracy of the transmitted data;
- e) set default values which shall be applied where the relevant information has not been transmitted

## 6. Accompanying documents

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### 6.1 Draft cost-benefit analysis / impact assessment

1. Article 55(6) of the Directive (EU) 2019/879 of the European Parliament and of the Council (from now on BRRD) amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC mandated the EBA to develop regulatory technical standards to specify:
  - a. the conditions under which it would be legally or otherwise impracticable for an institution to include the contractual term referred to in article 55(1) BRRD.
  - b. the conditions for the resolution authority to require the inclusion of the contractual term.
  - c. the reasonable timeframe for the resolution authority to require the inclusion of a contractual term.
2. Additionally, article 55(8) of the same Directive mandated the EBA to develop regulatory technical standards to specify uniform formats and templates for the notification to resolution authorities for the impracticability of including the contractual terms as defined in article 55 (1).
3. The current draft RTS and draft ITS aim to answer to the mandates in articles 55(6) and 55(8) respectively.
4. As per Article 10(1) of the EBA regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any RTS developed by the EBA shall be accompanied by an Impact Assessment (IA) annex which analyses 'the potential related costs and benefits' before submitting to the European Commission. The same request applies to any ITS developed by EBA as per Article 15(1) of the aforementioned EBA regulation. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.
5. For the purposes of the IA section of the Consultation Paper, the EBA prepared the IA with cost-benefit analysis of the policy options included in the regulatory technical standards described in this Consultation Paper. Given the nature of the study, the IA is mainly high-level and qualitative in nature including quantitative analysis when possible.

#### A. Problem identification

1. The primary problem that this RTS aims to address is to answer the aforementioned mandates. Article 55 (1) of the BRRD requires the inclusion of the contractual term by which the possibility



to write down the instrument and conversion powers are recognized. Nevertheless, the second paragraph of the same article recognizes that there could be occasions where the inclusion of such contractual term is impracticable. In these circumstances, institutions shall notify the resolution authorities.

2. The existing regulation states that Member States must ensure that the powers to write-down or convert relevant capital instruments in accordance with Article 59 of the BRRD are to be applied to all relevant liabilities of an institution or relevant entity. However, this is not straight forward for some liabilities governed by the law of a third country. In the absence of a regime to secure the effectiveness of an application of these powers, Member States need to require institutions and relevant entities to include in relevant agreements a contractual term by which the creditor or party to the agreement creating the liability recognises that liabilities may be subject to the aforementioned powers. There might be instances, however, where it is impracticable for institutions or entities to include those contractual terms in agreements or instruments creating certain liabilities that are relevant for the bail-in process.
3. The existing regulation does not identify under which conditions the inclusion of the contractual term would not be practicable. There is also no clarification on when the resolution authority should require the inclusion of this contractual term and the time frame to do it. Also, not format nor content has been specified for the notification to Resolution Authorities by institution regarding the impracticability of inclusion of the contractual term for specific contracts.

## B. Policy objectives

### a. Draft RTS [XXX]

4. The main objective of the draft RTS is to answer the mandate established in article 55(6) of the BRRD.
5. As a result, the general objective of the RTS is to complete the framework around the obligation of including a contractual term pursuant to article 55 (1). This framework will specify further details to when the inclusion of this contractual term is illegal or impracticable.
6. The specific objectives of the RTS are:
  - a. To define the list of conditions under which the inclusion of the term is impracticable.
  - b. To define the conditions under which the resolution authorities may request the inclusion and the timeframe to do it, pursuant to a notification of impracticability.

### b. Draft ITS [XXX]

7. The main objective of the draft ITS is to answer the mandate established in article 55(8) of BRRD.



8. As a result, the specific objective of the draft ITS is to define the format and content of the notification to resolution authorities about the impracticability of including the contractual term in certain contracts governed by the law of a third country.

### C. Baseline scenario

9. Currently, the BRRD requires the inclusion of the contractual term in general without identifying any conditions under which this inclusion is impracticable. General conditions of impracticability linked to the inclusion of the term in contracts governed by the law of a third country have not been articulated.
10. When an institution determines and notifies a case of impracticability to include the contractual term, the resolution authority, after analysing the relevant notification, may require its inclusion. Under the current scenario, there is not a clear definition on under which conditions this requirement is needed. Also, there is not a definition of the timeframe to do this requirement. The draft RTS aims to address both these aspects.
11. Additionally, there is no obligation of following a specific format or content when notifying resolution authorities that there is a condition that makes it impracticable to include the contractual term. Institutions could notify the resolution authorities in non-standardised ways and including different content in the notifications to resolution authorities for the impracticability of including the contractual terms.

### D. Options considered

#### a. Draft RTS [XXX]

12. When drafting the present draft RTS, the EBA considered several policy options under three main areas:

**1) Regarding the specification of conditions of impracticability to include the term for contractual recognition of the bail-in powers the following options have been considered:**

- a. **Whether the impediments due to the law of a third country or to an explicit and binding instruction from a relevant third-country authority in the third-country whose law governs the liability, the following two options have been considered:**

Option 1: To specifically consider it as a condition of impracticability

Option 2: Not to consider it as a condition of impracticability

- b. **Whether instruments and agreements that are based on international standards and/or standard terms that are imposed to the institution by virtue of its membership or participation in a body governed by the law of a non-EU country, should be considered as contracts that meet the condition of impracticability:**

Option 1: To consider instruments and agreements that are based on international standards as contracts that meet the condition of impracticability.

Option 2: To consider both, instruments and agreements that are based on international standards or on standard terms that are imposed to the institution by virtue of its membership or participation in a **body governed by the law of a non-EU country** as contracts that meet the condition of impracticability.

Option 3: Not to consider instruments and agreements that are based on international standards or on standard terms that are imposed to the institution by virtue of its membership or participation in a **body governed by the law of a non-EU country** as contracts that meet the condition of impracticability.

- c. **Whether liabilities that are not excluded from bail-in and that relate to daily operations but are not necessarily critical to the daily functioning of the institution should be considered as contracts that meet the condition of impracticability:**

Option 1: To consider them as contracts that meet the condition of impracticability.

Option 2: Not to consider them as contracts that meet the condition of impracticability.

- d. **Whether the request of the counterparty to renegotiate the contract and or an increase in pricing or a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should be considered as contracts that meet the condition of impracticability:**

Option 1: To consider it as a condition of impracticability.

Option 2: Not to consider it as a condition of impracticability.

- e. **Whether the contingent nature of the liability should be considered as a reason for impracticability.**

Option 1: To consider it as a condition of impracticability.

Option 2: Not to consider it as a condition of impracticability.

- f. **Whether some specific conditions of the contract such a short maturity or low value of the contract, should be considered as conditions of impracticability.**

Option 1: To consider a short maturity of the contract as a condition of impracticability.

Option 2: To consider a low value of the contract as a condition of impracticability.

Option 3: To consider both, a short maturity and a low value of the contract as a condition of impracticability.

Option 4: Not to consider neither the low value of the contract, nor the short maturity of it as conditions of impracticability.

- g. **Whether the cases when the liability arises out of an existing agreement which the entity acquired and for which the entity has no power to amend the terms should be considered condition of impracticability.**

Option 1: To consider it as a condition of impracticability.

Option 2: Not to consider it as a condition of impracticability.

- h. **Whether those cases when the liability is contingent to a breach of contract should be considered as conditions of impracticability.**

Option 1: To consider it as a condition of impracticability.

Option 2: Not to consider it as a condition of impracticability.

**2) Regarding the conditions under which the resolution authority may require the inclusion of the contractual term and the specification of the timeframe to require this inclusion the following options have been considered:**

**a. Whether a strict requirement for the inclusion of the term is needed in all the cases where it is not considered impracticable to include the contractual term:**

Option 1: To require the inclusion of the term in all those cases where the RA does not agree with the institution's determination of impracticability.

Option 2: To require the inclusion of the term in those cases where the RA does not agree with the institution's determination of impracticability and the inclusion of the term may be needed to guarantee the resolvability of the institution. The list of appreciations to consider the resolvability of the institution would be fixed and strict.

Option 3: To require the inclusion of the term in those cases where the RA does not agree with the institution's determination of impracticability and its inclusion may be needed to guarantee the resolvability of the institution. The list of appreciations to consider the resolvability of the institution would be define up to certain specificity but remaining flexible.

Option 4: To use thresholds, above which the RA would always require the inclusion of the term and below which the RA would have flexibility on its decision, if Options 2 or 3 are to be used.

**b. Whether the reasonable timeframe for the resolution authority to require the inclusion of the term should be keep flexible or to be a strict timeframe**

Option 1: To define a completely flexible timeframe

Option 2: To define a strict time frame but allowing some flexibility under certain circumstances

Option 3: To define a strict time frame without any flexibility

**c. Whether the reasonable timeframe for the resolution authority to require the inclusion of the term should be align with the resolvability cycle**

Option 1: To align the timeframe with the resolvability cycle.

Option 2: Not to align the timeframe with the resolvability cycle.

**d. About the need of a explicit mention to the need of a complete notification to trigger the beginning of the timeframe:**

Option 1: Not to include an explicit provision covering the need of a complete notification.

Option 2: To include an explicit provision covering the need of a complete notification.



13. When drafting the present draft ITS, the EBA considered several policy options under four main areas:

e. **The content of the notification to resolution authorities about the impracticability of including the contractual terms.**

Option 1: To define a standardised template with predefined content to be included by all institutions when notifying resolution authorities about the impracticability of inclusion of the term. No information would be accepted outside this standardised template.

Option 2: To define a standardised template with predefined content to be included by all institutions when notifying resolution authorities about the impracticability of inclusion of the term but to allow some flexibility allowing Institutions to provide supporting documents and the possibility to resolution authorities to request additional information.

Option 3: To allow institutions to use free content when notifying resolution authorities about the impracticability of inclusion of the term.

f. **The system that should be used to notify the resolution authorities about the impracticability of including the contractual terms.**

Option 1: To have a standardised system for the notifications.

Option 2: To allow resolution authorities to select the most adequate system.

g. **Whether a notification is needed in those cases where there are new contracts amending existing liabilities.**

Option 1: To request notification in those cases where there are amendments to existing liabilities.

Option 2: To request notification for contracts amending existing liabilities only in cases of material amendments.

Option 3: Not to request notification for contracts amending existing liabilities.

h. **Whether the notification should include the possibility of using categories of liability as defined in article 55(7) of BRRD.**

Option 1: not to include categories in the ITS;

Option 2: to reference each notified liability to a category, as defined by the relevant resolution authority, if applicable;

Option 3: to define a specific sheet in the draft ITS to be used in case categories are specified by the resolution authority and the notification could be done for a category of liabilities at the same time;

E. Assessment of the options and the preferred option(s)

a. **Draft RTS [XXX]**

14. Regarding the **conditions of impracticability** to include the term for contractual recognition of the bail-in powers, the EBA has followed a mixed approach. On one hand, the EBA has identified



the legal impediments and problems that institutions may face to include the contractual term under certain circumstances. On the other hand, the EBA has evaluated the number of contracts<sup>4</sup> that might be affected by each of the conditions of impracticability, in order to estimate the potential number of notifications that the resolution authorities may receive. This last factor is important to ensure that the resolution authorities are not overloaded and are ready and prepared to process all the notifications.

15. To evaluate the number of contracts that could fall under each condition, the EBA launched a questionnaire to banks to identify what would be the range of contracts affected by each of the conditions (See Annex I). It is important to note that the conditions evaluated by this quantitative assessment have a slightly different wording in comparison to the conditions finally included in the draft RTS as the agreement on the drafting of the draft RTS has evolved since the launch of the questionnaire. As the analysis is based on ranges and the drafting modifications are not significant, the EBA is of the view that conclusions obtained could be extended to the conclusions included in the current draft RTS.

16. To begin with, it seems problematic to include such term when it is against the law of the third country governing the liability or to an explicit and binding instruction from a relevant third-country authority in the third-country whose law governs the liability. In order to provide an adequate level of legal certainty, the preferred option is Option 1, to specify that when the inclusion of the contractual term is prohibited by the law of a third country or by instruction from an authority in that country it is considered as a condition of impracticability. Regarding how many contracts could be potentially affected by these two conditions, institutions were asked to provide a range for the number of new or materially amended contracts in the last four months that would follow under those conditions (independently). 25% of the respondents<sup>5</sup> indicated that this information was not available. 73% of the respondents, indicated that they had less than 50 contracts new or materially amended in the last 4 months for which the inclusion of the contractual term was against the law of the third country governing the liability. Only 1 respondent (1%) indicated that they had more than 1000 new or materially amended contracts in the last 4 months for which the inclusion of the contractual term was against the law of the third country governing the liability. Regarding the number of new or materially amended contracts in the last 4 months for which the inclusion of the contractual term was against an explicit and binding instruction from a relevant third-country authority in the third-country whose law governs the liability, 73% of the respondent indicated that they had less than 50 contracts and only one respondent (1%) indicated that it had between 100 and 500 contracts.

17. Additionally, it does not seem plausible to modify the conditions included in **standardised contracts** such as guarantees or counter-guarantees governed by international standards in order to be accepted internationally, as well as the conditions in other instruments used in the

<sup>4</sup> To estimate the number of contracts affected by each condition and the number of potential notifications, the EBA launched a quantitative questionnaire. Results included in this analysis are based on a sample of 67 institutions that reported their answers to the EBA. Some of the responses presented inconsistencies. In those cases, the inconsistent responses have not been considered for this analysis. More details about the sample and breakdown by country are provided in annex I.

<sup>5</sup> Sample of 67 banks. See annex I.



context of trade finance operations and where the terms are not negotiable or the institution is in practice unable to amend. Also, by applying the same reasoning as in the paragraph before, other types of standardised contracts such as those subject to standardised terms by virtue of its membership or participation in non-EU bodies, for example financial market infrastructure entities, may not be modifiable or amendable in practice. For these reasons, the preferred option is Option 2: to consider both, instruments and agreements that are based on international standards or on standard terms that are imposed to the institution by virtue of its membership or participation in non-EU bodies as contracts that meet the condition of impracticability. Regarding, how many contracts could be potentially affected by these two conditions, institutions were asked to provide a range of the number of new or materially amended contracts in the last four months where a) the liability arises out of instruments and agreements concluded in accordance with internationally standardised terms or protocols and which the institution or entity is in practice unable to amend and b) the relevant liability has been created on standard terms to which the entity is bound pursuant to its membership in a non-EU body and which the entity has in practice no power to amend. Regarding a), 19% of the respondents<sup>6</sup> reported that the information was not available and the majority of the respondents (63%) reported having less than 50 contracts compliant with these characteristics. Additionally, institutions were asked to identify the subset of contracts that were trade finance instruments/letter of guarantee. In this case, there were less than 50 contracts for 64% of the banks. Regarding b), 22% of the respondents<sup>7</sup> reported that the information was not available and the majority of the respondents (78%) reported having less than 50 contracts compliant with these characteristics.

18. Regarding those liabilities that are not excluded from bail-in and that relate to daily operations that are not critical to the daily functioning of the institution (for example, travel tickets, liabilities related to hotels or to utilities if they are governed by third country law), they are still subject to bail-in but the cannot be amended in practice by the institution. These are standardised contracts, generally imposed by a supplier. Negotiation between the supplier and the buyer is unlikely due to the small amount per contract, the standardised approached prevailing in the industry and the retail approach of not negotiation with the buyer. Therefore, the preferred option is Option 1: To consider them as contracts that meet the condition of impracticability. Regarding, how many contracts could be potentially affected by this condition, institutions were asked to provide a range of the number of new or materially amended contracts in the last four months where the relevant liability is owed either to a commercial or trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning and the entity has in practice no power to amend the terms of the contract concluded in accordance with standard terms. 21% of the respondents<sup>8</sup> reported that the information was not available and the majority of the respondents (76%) reported having less than 50 contracts compliant with these characteristics.

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<sup>6</sup> Sample of 66 banks. See annex 1.

<sup>7</sup> Sample of 66 banks. See annex 1.

<sup>8</sup> Sample of 67 banks. See annex 1.



19. Regarding specific request of the counterparty or its refusal to include the term, even in those cases where the refusal is insurmountable and affects a relevant contract, including the refusal per se as an impracticability case is against recital 26 of the Level 1 text that establishes that a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should not as such be considered as a cause of impracticability. For these reasons the preferred option is Option 2: Not to consider it as a condition of impracticability.
20. Regarding the contingent nature of the liability, it should not be considered per se as condition of impracticability. As long as the contingent liability stems out of a contract, that contract should include contractual recognition. If some specific characteristics of the contract do not allow such a clause, these conditions should be analysed on specific bases but 'contingency' is not considered as a condition of impracticability (Option 1).
21. Regarding the consideration of some specificities of the contract as conditions of impracticability, the short duration of a contract could be considered as a problem as the RA may not have enough time to assess the notification as the contract may expire before that. Against this, it should also be considered that the time frame to assess the notification is an indication, and that RA may perform it faster. Additionally, a failure of an institution is unknown and can happen over any time horizon which indicates that no exclusion based on maturity should be done. Moreover, many contracts are generally renewable which would in practice extend their original maturity. For these reasons, it does not seem appropriate to consider the short duration of a contract as a reason for impracticability. Another specificity that could be considered problematic is the low value of the contract, nevertheless, there is no statistical evidence of the value of non-important liability in case of bail-in. Additionally, the determination of what is considered a low amount is complicated as an absolute amount would not be suitable to all institutions while a relative amount might have a different interpretation in terms of resolvability depending on a wider context. This refers to the fact that the BRRD sets a requirement to assess the impact of resolvability on an institution in case a 10% threshold is reached within a liability class. For these reasons it does not seem appropriate to consider the low value of a contract as a condition of impracticability. The preferred option is Option 4: Not to consider neither the low value of the contract, nor the short maturity of it as conditions of impracticability.
22. For the cases where the liability arises out of an existing agreement which the entity acquired and for which the entity has no power to amend the terms. There is a contract for the acquisition that should include the bail-in clause and it is likely that the instruments will become an asset so there is no reason to consider them as a condition of impracticability (Option 2).
23. For the cases the liability is contingent to a breach of contract the fact that they may, at the time of formation of the contract, be contingent does not of itself prevent the inclusion of the term pursuant to Article 55 BRRD as the liabilities have to arise out of a contract in any event. Therefore the preferred option is Option 2 (Option 2: Not to consider it as a condition of impracticability.)



24. Regarding the specification of the **conditions under which the resolution authority may require the inclusion of the contractual term**, there might be cases where the resolution authority disagrees with the institution's determination of impracticability but where it considers the institution's resolvability is not affected. In those cases, it seems necessary to allow for some grade of flexibility to require inclusion only in cases where it is needed to ensure the resolvability of the institution or entity. This option would reduce the burden to both institutions and resolution authorities, avoiding triggering the process in the cases where the resolvability of the entity will not change due to the non-inclusion of the term. In this sense, the preferred option is to require the inclusion of the term in those cases where the RA does not agree with the impracticability determination and the inclusion may be needed to ensure the resolvability of the institution.
25. Performing the assessment to ensure resolvability in this specific context (as opposed to a fully fledged resolvability assessment under resolution planning) the EBA proposes considering a number of criteria (value of the liability, its maturity, hierarchy in insolvency proceedings etc.) for harmonization and ease of application. These criteria, however, do not have specific pre-determined values, to avoid being considered impracticability conditions. Additionally, each institution is different and also the resolvability considerations might evolve over time even for the same institution. The preferred option is Option 3: To require the inclusion of the term in those cases where the RA does not agree with the institution's determination and not to require inclusion if the RA agrees with the institution's decision or if it disagrees with such a decision but concludes that the inclusion would not help ensure the resolvability of the institution. The list of appreciations to consider for resolvability in this specific context is defined up to certain specificity but remaining flexible in terms of cut-offs.
26. Further, in order to deliver more clarity to RAs and to institutions, and to provide a level playing field, the draft RTS proposes the use of thresholds. In those cases where the notified liability does not meet the conditions of impracticability and it is above the thresholds, RAs will always require inclusion. Differently, in those cases where the liability is below the threshold the RAs will have flexibility to apply the criteria proposed by the RTS. The thresholds refer to the contract's maturity and value. Therefore, Option 4 is to be used in conjunction with Option 3.
27. Regarding the **grade of flexibility** in the specification of the **timeframe for the resolution authority to request the inclusion of the contractual term**, the time that the RA will need to analyse the notification and all the relevant information to conclude if the inclusion of the term is necessary, may vary on a case by case basis. Nevertheless, a completely open timeframe will not provide certainty and security to institutions to understand when they could be requested to include the contractual term, making more difficult their daily operational work. However, in some specific circumstances where the analysis of the information received is considered complex, additional time might be needed by the resolution authority to analyse the relevant information. For this reason, the preferred option is option 2: to define a strict time frame but allowing some flexibility under certain circumstances.



28. Regarding the possibility of **alignment between the timeframe for the resolution authority to request the inclusion of the contractual term and the resolvability cycle**, the resolvability cycle has a duration of 1 year, nevertheless, notifications could be received within any point of this resolvability cycle, allowing the RA in some cases up to 11 months to request the inclusion of the term and in some other cases only a few days. For this reason, the preferred option is Option2: Not to align the timeframe with the resolvability cycle.

29.Regarding whether it is necessary to explicitly mention that the **timeframe is triggered from the moment a complete notification is received**, it is believed that a an explicit mention will help harmonise practices in EU. In any case, the moment in which the start of the timeframe is trigger is the moment when a complete notification is received. For this reason the preferred option is Option 2: to include an explicit provision covering the need of a complete notification.

**b. Draft ITS [XXX]**

30.Regarding the **content of the notification**, a standardised template with all the relevant fields will guarantee that all institutions are providing the necessary information to the resolution authorities to evaluate. This will allow RA to perform an easier analysis process, reducing their burden and the time to evaluate each notification. Institutions may benefit of a shorter period to receive an outcome and more importantly will help their process when providing a notification towards RAs. Additionally, having a standardised template will help institutions to develop experience to produce such template, easing the notification process. Nevertheless, in some specific cases, some additional information could be necessary to properly evaluate the notification in a timely manner. In those cases, allowing some flexibility to proportionate this additional information seems the best option to ensure that the notification will be processed on time. Therefore, the preferred option is Option 2: To define a standardised template with predefined content to be included by all institutions when notifying resolution authorities about the impracticability of inclusion of the term but to allow some flexibility allowing Institutions to provide supporting documents and the possibility to resolution authorities to request additional information. Regarding the **system to be used to notify** resolution authorities, there might be instances where certain systems are already in place in the different jurisdictions. Requesting the use of a specific system standardised for all jurisdictions will request an additional technical and economical effort for jurisdictions using a system different to the selected one. Additionally, institutions and resolution authorities should become familiar with the designated system which will request an additional burdening for them. Separately, consistency at EU level would be achieved as the data required would be the same as a standardised template with the same definition to all data points would be in place. For these reasons, the preferred option is Option 2: To allow resolution authorities to select the most adequate system.

31.Regarding the requirement to notify in the cases a new contract amends an existing liability: it can be argued that changes of an existing contract would be similar as entering into a new contract (when a notification is required). Further, if there is no notification of changes to existing notified contracts, the RA risks not having the full information on the institution. For example, a substantial increase in the amount of the contract or in its maturity should be re-



notified to properly evaluate the consequences of the non-inclusion of the contractual term. For these reasons, the preferred option is Option 1: To request notification in those cases where there are contracts amending existing liabilities.

32. Regarding whether the notification should include the possibility of using categories of liability, article 55(7) of BRRD indicates that the resolution authority shall specify, where it deems it necessary, the categories of liabilities for which it is impracticable to include the contractual term. Therefore, the template to report this impracticability should include the possibility to identify categories. In those cases where the resolution authority decides to specify the categories of liabilities for which it is impracticable to include the contractual term, reporting the full amount of liabilities in the same template is more efficient and less burdening for institutions. For this reason, the preferred option is Option 3: to define a specific sheet in the draft ITS to be used in case categories are specified by the resolution authority and the notification could be done for a category of liabilities at the same time.

**Questions for public consultation:**

19. Do you agree with the draft Impact Assessment? Can you provide any numerical data to further inform the Impact Assessment?



## ANNEX I: EBA questionnaire for institutions – identifying potential volumes of notifications under conditions of impracticability for contractual recognition of bail-in

33. On 06/03/2020 the EBA launched a quantitative questionnaire to evaluate the number of contracts that could follow under each of the conditions of impracticability of inclusion of the contractual term that were being analysed to answer the mandate in article 55(1) of the BRRD.
34. The survey sought to identify the number of notifications that would have been sent by institutions to resolution authorities based on BRRD article 55 provisions and based on the conditions described in the survey, for contracts entered into or renewed in the past 4 months. As a guidance for this reference, the period of 4 months should be considered to be October 2019, November 2019, December 2019 and January 2020.
35. It is important to note that the conditions evaluated by this quantitative assessment have a slightly different wording in comparison to the conditions finally included in the RTS as the agreement on the drafting of the RTS has evolved since the launch of the questionnaire. As the analysis is based on ranges and the drafting modifications are not significant, the EBA is of the view that conclusions obtained could be extended to the conclusions included in the current RTS.
36. All questions were asked separately for contracts under third country law (UK not included as third country law) and under UK law (as considered to become third country law). The expected response was a range (less than 50 contracts, between 50 and 100 contracts, between 100 and 500 contracts, between 500 hundred and 1000 contracts, more than 1000). If for a specific institution and condition there were more than 1000 contracts, the specific number of contracts was requested. Additionally, a default option for information not available was included.
37. The specific wording of the questions and conditions that were analysed in the survey is the following:

Question A: Considering the contracts under **third country law / UK law** that the institution entered into or materially amended in the last 4 months, what would have been the number of notifications the institution would have made under article 55(2) BRRD. i.e. contracts determined as impracticable to include the contractual term, based on the conditions a) to f) set below?

Question B: Select the most appropriate range for each of the conditions in the table below. The appropriate range for each condition should be based on the number of contracts governed by third country law that the institution entered into or materially amended in the last 4 months, and that would meet the respective condition. The number of contracts that falls under each of the conditions should be assessed independently. For example: If a contract falls under condition a) and e), it should be count under both conditions.



**Condition a):** it is illegal under the law applicable in the third country for an entity to include the contractual term referred to in Article 55 (1) of Directive 2014 /59/EU;

**Condition b):** it is contrary to an explicit and binding instruction, based on a legal obligation, from a third-country authority for an entity to include the contractual term referred to in Article 55 (1) of Directive 2014/59/EU;

**Condition c):** the relevant liability arises out of instruments and contracts concluded in accordance with internationally standardised terms or protocols, that the entity has in practice no power to amend;

Number of notifications in relation to trade finance instruments/letter of guarantee, as a subset of condition c).

**Condition d):** the relevant liability has been created on standard terms to which the entity is bound pursuant to its membership in a non-EU body and which the entity has in practice no power to amend;

**Condition e):** the relevant liability is owed either to a commercial or trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning and the entity has in practice no power to amend the terms of the contract concluded in accordance with standard terms;

**Condition f):** the relevant liability does not fall within the scope of A.44(2)(f) BRRD and arises out of an agreement between the entity and a financial market infrastructure in accordance with standard terms set by such financial market infrastructure and which the entity has in practice no power to amend.

38. 67 Institutions responded to the quantitative questionnaire. The conclusions included in the impact assessment are based on the responses of this 67 participating banks. In the cases when the responses from an institutions are considered contradictory, the answer of this institutions have been removed from the analysis.

Country	Number of participating institutions
Austria	6
Belgium	3
Croatia	3
Cyprus	1
Czechia	3
Denmark	3
Estonia	2
France	2
Germany	4

Greece	3
Hungary	4
Ireland	5
Italy	2
Latvia	2
Malta	3
Netherlands	1
Norway	1
Portugal	3
Romania	4
Slovenia	5
Spain	5
Sweden	2
<b>Total</b>	<b>67</b>

## 6.2 Overview of questions for consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the following specific questions:

1. Are there any third country authorities, other than resolution authorities, that might impose instructions not to include the contractual bail-in recognition term?
2. Can you provide concrete examples of instruments, such as letters of guarantee, governed by the law of a third country which are not used in the context of trade finance and which would be subject to conditions of impracticability?
3. Do you agree that the categories of liabilities in the above table do not meet the definition of impracticability for the purpose of Article 55(6)a)?
4. Do you consider that there is any condition of impracticability that has not been captured in the analysis?
5. Do you agree with EBA's approach for developing the draft ITS?
6. Do you consider reasonable 3 months for entry into force of the ITS, as allowing enough time to set-up the proper and adequate capabilities to notify with this ITS?
7. Do you agree with EBA's proposed conditions of impracticability?
8. Can you provide examples of instruments or contracts for which it would be impracticable to include the contractual recognition which are not captured by the above proposed conditions?
9. Are the proposed conditions of impracticability clear and meeting their purpose?
10. Is the article providing the conditions for the Resolution Authority to require inclusion clear?
11. Do you agree with EBA's proposal for the conditions for the resolution authority to require the inclusion of the contractual term?
12. What is the likely amount of the liabilities to be notified under article 55 BRRD, as average per liability and as expected maximum per liability? What is the expected average maturity of the liabilities to be notified under article 55 BRRD?
13. Do you agree with EBA's proposal for the reasonable timeframe for the resolution authority to require the inclusion of the contractual term?
14. How much time do you need to implement the technical specifications provided in this ITS?
15. Do you consider the draft ITS comprehensive for submitting a notification of impracticability?
16. Do you consider the templates and instructions clear?
17. Do you have any suggestions or proposals in relation to the draft ITS template and the instructions to fill it in?



18. Do you find any specific piece of information required in the template as hard to develop or unclear how to fill in?

19. Do you agree with the draft Impact Assessment? Can you provide any numerical data to further inform the Impact Assessment?