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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC

(Text with EEA relevance)

{SWD(2016) 377}
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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The proposed amendments to Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD) are part of a legislative package that includes also amendments to Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR), to Directive 2013/36/EU (the Capital Requirements Directive or CRD) and to Regulation (EU) 806/2014 (the Single Resolution Mechanism Regulation or SRMR).

Over the past years the EU implemented a substantial reform of the financial services regulatory framework to enhance the resilience of financial institutions in the EU, largely based on global standards agreed with the EU's international partners. In particular, the reform package included Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR) and Directive 2013/36/EU (the Capital Requirements Directive or CRD), on prudential requirements for and supervision of institutions, Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD), on recovery and resolution of institutions and Regulation (EU) No 806/2014 on the Single Resolution Mechanism (SRM).

These measures were taken in response to the financial crisis that unfolded in 2007-2008.The absence of adequate crisis management and resolution frameworks forced governments around the world to rescue banks following the financial crisis. The subsequent impact on public finances as well as the undesirable incentive of socialising the costs of bank failure have underscored that a different approach is needed to manage bank crises and protect financial stability.

Within the Union and in line with the significant steps that have been agreed and taken at international level, Directive 2014/59/EU (Bank Recovery and Resolution Directive (BRRD)[1] and Regulation (EU) No 806/2014 (Single Resolution Mechanism Regulation (SRMR)[2] have established a robust bank resolution framework to effectively manage bank crises and reduce their negative impact on financial stability and public finances. A cornerstone of the new resolution framework is the "bail-in" which consists of writing down debt or converting debt claims or other liabilities into equity according to a pre-defined hierarchy. The tool can be used to absorb losses of and internally recapitalise an institution that is failing or likely to fail, so that its viability is restored. Therefore, shareholders and other creditors will have to bear the burden of an institution's failure instead of taxpayers. In contrast to other jurisdictions, the Union bank recovery and resolution framework has already mandated resolution authorities to set for each credit institution or investment firm ('institution') a minimum requirement for own funds and eligible liabilities ('MREL'), which consist of highly bail-inable liabilities to be used to absorb losses and recapitalise institutions in case of failures. The delegated legislation

[1] 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, OJ L 173, 12.6.2014, p. 190

[2] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1

concerning the practical implementation of this requirement has been adopted recently by the Commission[3].

At the global level, the Financial Stability Board (FSB) has published on 9 November 2015 the Total Loss-absorbing Capacity (TLAC) Term Sheet ('the TLAC standard') that was adopted a week later at the G20 summit in Turkey[4]. The TLAC standard requires global systemically important banks ('G-SIBs'), referred to as global systemically important institutions ('G-SIIs') in the Union legislation, to hold a sufficient amount of highly loss absorbing (bail-inable) liabilities to ensure smooth and fast absorption of losses and recapitalisation in resolution. In its Communication of 24 November 2015[5], the Commission committed to bring forward a legislative proposal by the end of this year so that the TLAC standard can be implemented by the agreed deadline of 2019. In addition, the Commission committed to review the existing MREL rules with the view to provide full consistency with the internationally agreed TLAC standard by considering the findings of a report that the European Banking Authority (EBA) is required to provide to the Commission under Article 45(19) of the BRRD. An interim version of that report has already been published by the EBA on 19 July 2016[6] and the final report is expected to be submitted in the course of December 2016.

While the general BRRD framework remains valid and sound, the main objective of this proposal is to implement the TLAC standard and to integrate the TLAC requirement into the general MREL rules by avoiding duplication by applying two parallel requirements. Although TLAC and MREL pursue the same regulatory objective, there are, nevertheless, some differences between them in the way they are constructed. The scope of application of MREL covers not only G-SIIs, but the entire Union banking industry. Differently from the TLAC standard, which contains a harmonised minimum level, the level of MREL is determined by resolution authorities on the basis of a case-by-case institution specific assessment. Finally, the minimum TLAC requirement should be met in principle with subordinated debt instruments, while for the purposes of MREL, subordination of debt instruments could be required by resolution authorities on a case-by-case basis to the extent it is needed to ensure that in a given case bailed in creditors are not treated worse than in a hypothetical insolvency scenario (which is a scenario that is counterfactual to resolution). In order to achieve a simple and transparent framework providing legal certainty and consistency, the Commission is proposing to integrate the TLAC standard into the existing MREL rules and ensure that both requirements are met with largely similar instruments. This

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3 Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities, OJ L 237, 3.9.2016, p. 1

4 FSB, *Principles on Loss-absorbing and Recapitalisation Capacity of Globally Systemically Important Banks (G-SIBs) in Resolution, Total Loss-absorbing Capacity (TLAC) Term sheet*, 9.11.2015

5 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *"Towards the completion of the Banking Union"*, 24.11.2015, COM(2015) 587 final.

6 https://www.eba.europa.eu/documents/10180/1360107/EBA+Interim+report+on+MREL

approach requires introducing limited adjustments to the existing MREL rules ensuring technical consistency with the structure of any requirements for G-SIIs.

In particular, further appropriate technical amendments to the existing rules on MREL are needed to align them with the TLAC standard as regards *inter alia* the denominators used for measuring loss-absorbing capacity, the interaction with capital buffer requirements, disclosure of risks to investors and their application in relation to different resolution strategies. While implementing the TLAC standard for G-SIIs, the Commission's approach will not materially affect the burden of institutions which are not G-SIIs to comply with the provisions on MREL.

Operationally, the harmonised minimum level of the TLAC standard will be introduced in the Union through amendments to the Capital Requirements Regulation and Directive (CRR and CRD)[7] while the institution specific add-on for G-SIIs and the institution specific MREL for non-G-SIIs will be dealt with through targeted amendments to the BRRD and SRMR. This proposal covers specifically the targeted amendments to the BRRD related to the implementation of the TLAC standard in the Union. As such, this proposal is part of a wider review package of the Union financial legislation aiming at reducing risks in the financial sector (CRR/CRD review) and rendering it more resilient.

In addition, based on views expressed by many respondents to the call for evidence to stakeholders published in September 2015[8], this proposal amends the BRRD with the view to ease compliance costs of banks where their liabilities are governed by the laws of third countries. The current requirement has proven difficult to comply with in practice thus bringing limited added value to the resolvability of banks. It is thus necessary to introduce more flexibility in the contractual relationships of Union banks with third country entities by allowing resolution authorities to waive, subject to certain strict safeguards, the obligation to insert contractual clauses with the aim of recognising in third countries the effects of the bail-in of liabilities governed by the law of these third countries. In practice, the current rules are very difficult to enforce.

Furthermore, at the invitation of the ECOFIN in its conclusions of 17 June 2016, this proposal amends the BRRD as regards the application by resolution authorities of moratorium tools in the course of resolution, i.e. powers to suspend the executions of bank commitments towards third parties. Harmonisation of such powers should contribute to the stabilisation by the relevant authorities of an institution in the period before, and possibly after, resolution.

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7 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p.1; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338

8 http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses_en.pdf , Summary of contributions to the 'Call for Evidence'

- **Consistency with existing policy provisions in the policy area**

The existing Union bank resolution framework already requires all European banks to hold a sufficient amount of highly loss absorbing (bail-inable) liabilities. By aligning the existing requirement for G-SIIs with the global TLAC standard, the proposal will improve and facilitate the application of the existing rules. The proposal is, therefore, consistent with the overall objective of the Union bank resolution framework to reduce taxpayers' support in bank resolution.

- **Consistency with other Union policies**

The proposal is part of a wider review of the Union financial legislation (CRR/CRD review) aiming at reducing risks in the financial sector while promoting sustainable financing of the economic activity. It is fully consistent with the EU's fundamental goals of promoting financial stability, reducing taxpayers' support in bank resolution as well as contributing to a sustainable financing of the economy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposed Directive amends an existing directive, the BRRD. The legal basis for the proposal is the same as the legal basis of the BRRD, which is Article 114 of the TFEU. That provision allows the adoption of measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.

The proposal harmonises national laws on recovery and resolution of credit institutions and investment firms, in particular as regards their loss-absorbing and recapitalisation capacity in resolution, to the extent necessary to ensure that Member States and Union banks have the same tools and capacity to address bank failures in line with the agreed international standards (TLAC standard).

By establishing harmonised requirements for banks in the Internal Market, the proposal reduces considerably the risk of divergent national rules in the Member States on loss-absorbing and recapitalisation capacity in resolution, which could distort competition in the internal market. The proposal has, therefore, as its object the establishment and functioning of the internal market.

Article 114 of the TFEU is, therefore, the appropriate legal base.

- **Subsidiarity (for non-exclusive competence)**

Under the principle of subsidiarity set out in Article 5.3 of the TEU, in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union and its Member States are committed to implement international standards. In the absence of any Union action, Member States would have needed to implement themselves the global TLAC standard in their own jurisdictions without the possibility of amending the existing framework that stem from the BRRD and SRMR. As a result, in view of important

differences between the TLAC standard and existing framework as well as possibly diverging interpretations of the TLAC term sheet by the national regulators, banks, in particular G-SIIs, would have been subject to two parallel requirements (with the TLAC minimum requirement itself being applied differently from one Member State to another), which would imply additional costs for both banks and public authorities (supervision and resolution authorities). Union action is, therefore, desirable to implement in a harmonised way the global TLAC standard in the Union and to align the existing framework with that standard in order to alleviate as much as possible the compliance costs of banks and public authorities while ensuring an effective resolution in case of bank failures.

- **Proportionality**

Under the principle of proportionality, the content and form of Union action should not exceed what is necessary to achieve its objectives, consistent with the overall objectives of the Treaties.

While implementing TLAC for global G-SIIs, the proposal would not materially affect the burden of banks to comply with the existing rules on loss absorbing and recapitalisation capacity since the proposal does not extend the application of the TLAC minimum level beyond G-SIIs. In addition, the proposal limits to a large extent the costs of banks, in particular G-SIIs, for compliance with the TLAC standard by aligning the existing rules to the extent possible with that standard. Finally, the proposal does not extend the application of the TLAC minimum level beyond G-SIIs. On the contrary, for non-GSIIs, the proposal maintains the existing overall principle that the quality and level of the requirement on loss absorbing and recapitalisation should be tailored by resolution authorities for each specific bank based on its risk, size, interconnectedness and the chosen resolution strategy. As regards G-SIIs that are subject to the TLAC minimum level, before requiring any institution specific add-on, the proposal demands resolution authorities to assess whether any such add-on is necessary, proportionate and justified. The provisions of the proposal are, therefore, proportionate to what is necessary to achieve its objectives.

3. RESULTS OF IMPACT ASSESSMENTS

Impact assessment

Being part of a wider review package of the Union financial legislation aiming at reducing risks in the financial sector (CRR/CRD review), the proposal has been subject to an extensive impact assessment. The draft impact assessment report was submitted on 7 September 2016 to the Commission's Regulatory Scrutiny Board[9].The Board issued a negative opinion on [date]. After strengthening the evidence base for certain elements of the review package, the Board issued a positive opinion on 27 September 2016.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of several policy alternatives. Policy options were assessed against the key objectives of enhancing loss absorbing and recapitalisation capacity of banks in resolution and legal certainty and coherence of the resolution framework. The assessment was done by considering the effectiveness of achieving the objectives above and the cost efficiency of implementing different policy options.

As regards the implementation of the TLAC standard in the Union, three policy options have been considered in the impact assessment. Under the first option, the BRRD would continue

[9] [Link to Impact Assessment and to its summary]

to apply in its current form. Under the second option, the TLAC standard for G-SIIs would be integrated in the existing resolution framework, while that framework would be amended as appropriate to ensure full compatibility with the TLAC standard. The third policy option proposed to extend, additionally, the scope of the TLAC minimum level to other systemically important institutions in the Union (O-SIIs) than G-SIIs. The impact assessment concluded that the second policy option achieves the relevant policy objectives the best. In particular, contrary to the first option, it provides a harmonized implementation of the TLAC standard for all Union G-SIIs by reducing their costs of complying with potentially two different requirements (the TLAC standard and the existing BRRD) while providing for a consistent interpretation of the TLAC term sheet in the EU. This option will increase the resolvability of G-SIIs in the Union and prevent contagion effects stemming from G-SIIs cross-holdings through specific rules of the TLAC standard that are not currently provided in the BRRD (i.e. minimum TLAC level in the form of subordinated debt instruments, deduction of cross-holdings of TLAC eligible instruments held by G-SIIs). This option will ensure that the TLAC standard is implemented in the Union, which would reinforce the expectation on other jurisdictions to do the same with the view of strengthening the resolvability of G-SIBs worldwide. On the other hand, this policy option is preferable to the third option because it will not have the disadvantage of extending the minimum TLAC level to banks other than G-SIIs (O-SIIs), for which that level of minimum TLAC requirement may not appear to be well calibrated in view of their high diversity in terms of size, business model, interconnectedness and systemic importance.

The Impact Assessment showed that compliance with Article 55 of BRRD, which requires contractual recognition of bail-in in contracts subject to the law of a third country raises two types of difficulties. First, certain third country counterparties refuse to include a contractual clause recognising a Union bail-in power in financial contracts concluded with Union banks. This in some cases forces Union banks to not enter into a contract at all in order to comply with Article 55 BRRD. In extreme cases this could entail that a certain portion of their business would need to be discontinued (e.g. trade finance). Second, even where third country counterparties are prepared to accept bail-in related clauses in their contracts with Union banks, local supervisors may, in some cases, prevent it. In this case the only way for banks to comply with Article 55 BRRD would be to either contravene the rules imposed by the local supervisor or exit the relevant part of their business. To address this issue it was deemed necessary to amend this rule. The chosen policy option provides for the possibility for resolution authorities to waive the requirement as long as this does not materially affect the loss absorption and recapitalisation capacity of the banks in question.

As for the power to suspend payment obligations (moratorium) the importance of such a tool especially in the phase leading to resolution was underlined in the impact assessment. A moratorium allows freezing the flow of payments for a short period of time, which facilitates the quantification of available assets and liabilities. Such a tool is very useful both in a pre-resolution context (and more specifically in the context of early intervention) and during resolution. The Impact Assessment also analysed the potential advantages of a further harmonisation of the available tools. In this context it outlines that, while the BRRD already contains provisions allowing the suspension of payment obligations, these have been implemented in very different ways at national level and may not provide a sufficiently consistent application with respect to important elements such as the scope, phase of application, trigger conditions and duration of the suspension. On this basis, it is proposed to introduce two additional moratorium tools for activation in the early intervention and resolution phase, respectively. The conditions for triggering the moratorium, as well as the duration and the scope of application are precisely determined to ensure consistent implementation at national level.

Fundamental rights

This proposal complies with the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the rights to property and the freedom to conduct a business, and has to be applied in accordance with those rights and principles. In particular, this Directive ensures that interference with property rights of bank creditors should not be disproportionate. Affected creditors should not incur greater losses than those which they would have incurred if the institution had been wound up under normal insolvency proceedings at the time that the resolution decision is taken.

4. BUDGETARY IMPLICATIONS

The proposal does not have implications for the Union budget.

5. OTHER ELEMENTS

Implementation plans and monitoring, evaluation and reporting arrangements

The proposal requires Member States to transpose the amendments to the BRRD in their national laws within twelve months from the entry into force of the amended Directive and requires banks to comply with the amended rules within six months from the date of transposition of the proposal. Banks will be required to report the levels of their eligible instruments to the relevant authorities on a regular basis. The EBA is required to report to the Commission twice a year from the transposition date on the way the rules on loss absorbing and recapitalisation capacity for banks are implemented and applied across the Union.

Detailed explanation of the specific provisions of the proposal

As explained above, the amendments to the CRR, that are part of the same legislative package will include the rules on the TLAC minimum requirement for G-SIIs while this proposal deals with the institution specific add-on for G-SIIs and the general requirements applicable to all Union banks. This proposal introduces a number of targeted amendments to the existing BRRD.

Amendments to Articles 2, 12 and 13 of the BRRD

The TLAC standard and the BRRD recognise both Single Point of Entry ('SPE') and Multiple Point of Entry ('MPE') resolution strategies. Under the SPE strategy, only one group entity (usually the parent) is resolved whereas other group entities (usually operating subsidiaries) are not put in resolution, but upstream their losses to the entity to be resolved. Under the MPE strategy, more than one entity may be resolved. A clear identification of entities to be resolved ('resolution entities') and subsidiaries that belong to them ('resolution groups') is important to apply effectively the desired resolution strategy. Moreover, this identification is also relevant for determining the level of application of the rules on loss absorbing capacity that financial firms should comply with. For this reason, amendments to Article 2 of the BRRD introduce the concepts of 'resolution entity' and 'resolution group'. Amendments to Articles 12 and 13 concerning group resolution planning explicitly require resolution authorities to identify the resolution entities and resolution groups within a financial group and consider appropriately the implications of any planned resolution action within the group to ensure an effective group resolution.

Amendments to Article 45 of the BRRD

Article 45 is repealed and replaced with the following new provisions: Articles 45, 45a, 45b, 45c, 45d, 45e, 45f, 45g, 45h, 45i and 45k.

Currently, the institution specific MREL is measured as a percentage of the total liabilities of the institution. The amended Article 45 aligns the measurement metrics of the MREL with those of the minimum requirement for G-SIIs as provided in the TLAC standard ('the TLAC minimum requirement'). The institution specific MREL should, therefore, be expressed as a percentage of the total risk exposure amount and of the leverage ratio exposure measure of the relevant institution.

Article 45a keeps the existing exemption from the MREL for mortgage credit institutions under the condition that national insolvency or similar procedures allow for an effective loss absorption by creditors that meets the resolution objectives. It also clarifies that institutions that are exempted from the MREL should not be part of the overall consolidated requirement at the level of the resolution group.

Article 45b specifies the eligibility criteria for the instruments and items that could count for meeting the MREL by aligning them closely with the eligibility criteria provided in the TLAC standard for the TLAC minimum requirement. These criteria are, therefore, identical with the exception of the following.

As regards the scope of the instruments covered, certain debt instruments with derivative-linked features, such as structured notes are eligible for meeting the MREL because they could be sufficiently loss absorbing in resolution. Structured notes are debt obligations with an embedded derivative component. Their return is adjusted to the performance of reference assets such as single equity, equity indices, funds, interest rates, commodities or currencies. Article 45b clarifies that structured notes are eligible for the MREL to the extent that they have a fixed principal amount repayable at maturity while only an additional return is linked to a derivative and depends on the performance of a reference asset. The rationale for this is that the fixed principal amount is known in advance at the time of the issuance, its value is stable throughout the lifecycle of the structured note and could be easily bailed-in in resolution.

Under the TLAC standard, the TLAC minimum requirement should be met using largely subordinated debt instruments that rank in insolvency below senior liabilities explicitly excluded from the minimum TLAC requirement, such as covered deposits, derivatives, tax or other public law related liabilities. To meet the institution specific MREL, subordination of eligible debt instruments could currently be required by resolution authorities on a case-by-case basis. The new provisions of Article 45b further specify that subordination could be required to the extent it is needed to facilitate the application of the bail-in tool, in particular when there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed their potential losses in insolvency and only to the extent necessary to cover the portion of the losses above likely insolvency losses. Any subordination requested by resolution authorities for the institution-specific MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation (EU) No 575/2013 and in line with the TLAC standard.

Article 45c specifies the conditions for determining the MREL for all entities. The MREL should allow banks to absorb losses expected in resolution and recapitalise the bank post-resolution. The resolution authorities shall duly justify the level of the MREL imposed based on the chosen resolution strategy. As such, that level should not exceed the sum of the amount of losses expected in resolution that correspond to the institutions' own funds requirements and the recapitalisation amount that allows the entity post-resolution to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The MREL should be expressed as a percentage of the total risk exposure and leverage ratio measures, and institutions should meet simultaneously the levels resulting from the two measurements.

As regards G-SIIs, Article 45d specify that an institution-specific add-on to the TLAC minimum level as provided in the TLAC standard could be imposed only where that minimum is not sufficient to absorb losses and recapitalise a G-SII under the chosen resolution strategy.

As in the proposal amending the CRD, this proposal introduces in Article 45e the concept of 'guidance' in the BRRD. This allows resolution authorities to require institutions to meet higher levels of MREL while addressing in a more flexible manner any breaches of those levels, in particular by alleviating the automatic effects of such breaches in the form of limitations to the Maximum Distributable Amounts (MDAs). In particular, Article 45e allows resolution authorities to require institutions to meet additional amounts to cover losses in resolution that are higher than those expected under a standard resolution scenario (i.e. above the level of the existing own funds requirements) and ensure a sufficient market confidence in the entity post-resolution (i.e. on top of the required recapitalisation amount). Article 45e specifies, nevertheless, that for the loss absorption part of the requirement, the level of the guidance should not exceed the level of the 'capital guidance' when such guidance is requested by supervisory authorities under supervisory stress testing to cater for losses above normal requirements. For the recapitalisation part, the level of the guidance to ensure market confidence should allow institutions post resolution to meet their authorisation requirements for an appropriate period of time. This market confidence buffer should not exceed the combined buffer requirement under Directive 2013/36/EU unless a higher level is necessary to ensure that that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period.

Articles 45f and 45g deal with the level of application of the MREL. As regards institutions that qualify as resolution entities, the MREL applies to them at the consolidated resolution group level only. This means that resolution entities will be obliged to issue eligible (debt) instruments to external third party creditors that would be bailed-in should the resolution entity (i.e. resolution group) enter resolution. As regards other entities of the group, the proposal introduces the concept of an 'internal' MREL in line with a similar concept brought forward by the TLAC standard. This means that other resolution group entities which themselves are not resolution entities should issue eligible (debt) instruments internally within the resolution group, i.e. such instruments should be bought by resolution entities. Where a resolution group entity which itself is not a resolution entity reaches the point of non-viability, such instruments are written down or converted into equity and losses of that entity are then up-streamed to the resolution entity. The main advantage of the internal MREL is that it allows recapitalising a resolution group entity (with critical functions) without placing it into formal resolution, which could potentially have disruptive effects on the market. The application of this requirement should nevertheless comply with the chosen resolution

strategy, in particular it should not change the ownership relationship between the entity and its resolution group after its recapitalisation. The proposal also specifies that, under certain safeguards, the internal MREL could be replaced with collateralised guarantees between the resolution entity and other resolution group entities that could be triggered under the equivalent timing conditions that the instruments eligible for the internal MREL. The proposed safeguards include, in particular, the agreement of the relevant resolution authorities to replace the internal MREL and collateralisation of the guarantee given by resolution entity to its subsidiary with highly liquid collateral with minimal credit and market risk. The proposal keeps as well the existing possibility offered to resolution authorities of resolution entity's subsidiaries to fully waive the MREL applicable to those subsidiaries if both the resolution entity and its subsidiaries are established in the same Member State.

Article 45h provides for a procedure to determine the MREL for a resolution group. The authorities responsible for setting the level of the requirement are the resolution authority of the resolution entity, the group level resolution authority (resolution authority of the ultimate parent) and resolution authorities of other resolution group entities. Any disputes between authorities are subject to the powers of the EBA under the EBA Regulation.

Amendments to Articles 17, 18 and Article 45k

These amendments deal with the breaches of the MREL. Article 45k lists the powers available to resolution authorities in the event of breaches of the MREL. Since a breach of the MREL could constitute an impediment to institution or group resolvability, Articles 17 and 18 shortens the existing procedure to remove impediments to resolvability to address expediently any breaches of the MREL. It also introduces new powers for resolution authorities to require modifications in the maturity profiles of eligible instruments and plans from institutions to restore the level of the MREL.

Amendments to Article 55

Amendments to Article 55 BRRD would entail an application of the requirement provided in that Article by the resolution authority in a proportionate manner. The resolution authority can exclude the obligation of institutions to include bail-in recognition clauses in agreements or instruments governed by third country laws by means of a waiver if it determines that this would not impede the resolvability of the bank, and that it is legally, contractually or economically impracticable for banks to include the bail-in recognition clauses for certain liabilities. In these cases, those liabilities should not count for the MREL and should rank senior to liabilities eligible for the MREL to minimise the risk of breaking the No-Creditor-Worse-Off (NCWO) principle. In this regard, the proposal will not weaken the bail-in.

Amendments to Article 59 and 60

Amendments to Article 59 and 60 ensure that instruments eligible for the internal MREL other than capital instruments (debt instruments) could also be written down or converted into equity where the resolution group entity which itself is not a resolution entity that issues them reaches the point of non-viability.

Amendments to Article 27, new Article 29a and amendments to Article 63 on moratorium

The amendment to Article 27 provides for a new moratorium tool to be employed in the pre-resolution phase, and specifically as an early intervention power.

The newly added Article 29a outlines the conditions for application of the early intervention moratorium. The provision indicates that such power can be activated when it is necessary to determine whether early intervention measures are necessary or whether the institution is failing or likely to fail. It specifies the scope of the suspension power and its duration – which cannot exceed five working days.

The amendment to Article 63 introduces among the general resolution powers the power to suspend payments when this is needed for the effective application of one or more resolution tools or for the purposes of the valuation pursuant to Article 36. It specifies the scope of the suspension power and its duration,which cannot exceed five working days.

Other provisions

Several amendments are proposed to ensure appropriate supervisory reporting and public disclosure of the requirement.

Several amendments concern the regulatory architecture and decision making in the application of the requirement to third country institutions established in the Union. Other amendments bring certain clarifications as regards the treatment under BRRD and other Union legislation of central counterparties ('CCPs') following the adoption of a proposal for a specific recovery and resolution framework for CCPs, such as the treatment of CCPs with a banking licence. Targeted amendments to the relevant Company Laws Directives have been proposed to ensure an effective resolution of CCPs.

Member States are required to transpose this proposal in their national laws within twelve months from the date of its entry into force. The institutions concerned are required to comply with the new provisions within six months from the date of transposition. The EBA is required to report to the Commission twice a year on the way the requirements are implemented and applied across the Union.

2016/0362 (COD)

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amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[10]

Having regard to the opinion of the European Economic and Social Committee[11],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The Financial Stability Board (FSB) published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('TLAC standard') on 9 November 2015, which was endorsed by the G-20 in November 2015. The TLAC standard requires global systemically important banks ('G-SIBs'), referred to as global systemically important institutions ('G-SIIs') in the Union framework, to hold a sufficient minimum amount of highly loss absorbing (bailin-able) liabilities to ensure smooth and fast absorption of losses and recapitalisation in resolution. In its Communication of 24 November 2015[12], the Commission committed to bring forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented by the internationally agreed deadline of 2019.

(2) The implementation of the TLAC standard in the Union needs to take account of the existing institution-specific minimum requirement for own funds and eligible liabilities ('MREL') applicable to all Union credit institutions and investment firms as laid down in Directive 2014/59/EU of the European Parliament and of the Council[13]. As TLAC and MREL pursue the same objective of ensuring that Union institutions

[10] OJ C , , p. .

[11] OJ C , , p. .

[12] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, "Towards the completion of the Banking Union", 24.11.2015, COM(2015) 587 final

[13] 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, OJ L 173, 12.6.2014, p. 190

have sufficient loss absorbing capacity, the two requirements should be complementary elements of a common framework. Operationally, the harmonised minimum level of the TLAC standard for G-SIIs ('TLAC minimum requirement') should be introduced in Union legislation through amendments to Regulation (EU) No 575/2013[14], while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs, referred to as minimum requirement for own funds and eligible liabilities, should be addressed through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014[15]. The relevant provisions of this Directive as regards loss absorbing and recapitalisation capacity of institutions should be applied together with those in the aforementioned pieces of legislation and in Directive 2013/36/EU[16] in a consistent way.

(3) The absence of harmonised Union rules in respect of the implementation of the TLAC standard in the Union would create additional costs and legal uncertainty for institutions and make the application of the bail-in tool for cross-border institutions more difficult. That absence of harmonised Union rules also results in competitive distortions on the internal market given that the costs for institutions to comply with the existing requirements and the TLAC standard may differ considerably across the Union. It is therefore necessary to remove those obstacles to the functioning of the internal market and to avoid distortions of competition resulting from the absence of harmonised Union rules in respect of the implementation of the TLAC standard. Consequently, the appropriate legal basis for this Directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the case law of the Court of Justice of the European Union.

(4) In line with the TLAC standard, Directive 2014/59/EU should continue to recognise the Single Point of Entry (SPE) as well as the Multiple Point of Entry (MPE) resolution strategy. Under the SPE strategy, only one group entity, usually the parent undertaking, is resolved whereas other group entities, usually operating subsidiaries, are not put in resolution, but upstream their losses and recapitalisation needs to the entity to be resolved. Under the MPE strategy, more than one group entity may be resolved. A clear identification of entities to be resolved ('resolution entities') and subsidiaries that belong to them ('resolution groups') is important to apply the desired resolution strategy effectively. That identification is also relevant for determining the level of application of the rules on loss absorbing and recapitalisation capacity that financial firms should apply. It is therefore necessary to introduce the concepts of 'resolution entity' and 'resolution group' and to amend Directive 2014/59/EU concerning group resolution planning in order to explicitly require resolution authorities to identify the resolution entities and resolution groups within a group and to consider the implications of any planned resolution action within the group appropriately to ensure an effective group resolution.

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[14] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p.1

[15] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1

[16] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338

(5) Member States should ensure that institutions have sufficient loss absorbing and recapitalisation capacity to ensure smooth and fast absorption of losses and recapitalisation in resolution with a minimum impact on financial stability and taxpayers. That should be achieved through compliance by institutions with an institution-specific minimum requirement for own funds and eligible liabilities ('MREL') as provided in Directive 2014/59/EU.

(6) In order to align denominators that measure the loss absorbing and recapitalisation capacity of institutions with those provided in the TLAC standard, the MREL should be expressed as a percentage of the total risk exposure amount and of the leverage ratio exposure measure of the relevant institution.

(7) Eligibility criteria for bail-inable liabilities for the MREL should be closely aligned with those laid down in Regulation (EU) No 575/2013 for the TLAC minimum requirement, in line with the complementary adjustments and requirements introduced in this Directive. In particular, certain debt instruments with an embedded derivative component, such as certain structured notes, should be eligible to meet the MREL to the extent that they have a fixed principal amount repayable at maturity while only an additional return is linked to a derivative and depends on the performance of a reference asset. In view of their fixed principal amount, those instruments should be highly loss-absorbing and easily bail-inable in resolution.

(8) The scope of liabilities to meet the MREL includes, in principle, all liabilities resulting from claims arising from unsecured non-preferred creditors (non-subordinated liabilities) unless they do not meet specific eligibility criteria provided in this Directive. To enhance the resolvability of institutions through an effective use of the bail-in tool, resolution authorities should be able to require that the MREL is met with subordinated liabilities, in particular when there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed their potential losses in insolvency. The requirement to meet MREL with subordinated liabilities should be requested only for a level necessary to prevent that losses of creditors in resolution are above losses that they would otherwise incur under insolvency. Any subordination of debt instruments requested by resolution authorities for the MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation (EU) No 575/2013 as permitted by the TLAC standard.

(9) The MREL should allow institutions to absorb losses expected in resolution and recapitalise the institution post-resolution. The resolution authorities should, on the basis of the resolution strategy chosen by them, duly justify the imposed level of the MREL in particular as regards the need and the level of the requirement referred to in Article 104a of Directive 2013/36/EU in the recapitalisation amount. As such, that level should be composed of the sum of the amount of losses expected in resolution that correspond to the institution's own funds requirements and the recapitalisation amount that allows the institution post-resolution to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The MREL should be expressed as a percentage of the total risk exposure and leverage ratio measures, and institutions should meet simultaneously the levels resulting from the two measurements. The resolution authority should be able to adjust the recapitalisation amounts in cases duly justified to adequately reflect also increased risks that affect resolvability arising from the resolution group’s business model, funding profile and overall risk profile and therefore in such limited circumstances

require that the recapitalisation amounts referred to in the first subparagraph of Article 45c(3) and (4) are exceeded.

(10) To enhance their resolvability, resolution authorities should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement laid down in Regulation (EU) No 575/2013. That institution-specific MREL may only be imposed where the TLAC minimum requirement is not sufficient to absorb losses and recapitalise a G-SII under the chosen resolution strategy.

(11) When setting the level of MREL, resolution authorities should consider the degree of systemic relevance of an institution and the potential adverse impact of its failure on the financial stability. They should take into account the need for a level playing field between G-SIIs and other comparable institutions with systemic relevance within the Union. Thus MREL of institutions that are not identified as G-SIIs but the systemic relevance within the Union of which is comparable to the systemic relevance of G-SIIs should not diverge disproportionately from the level and composition of MREL generally set for G-SIIs..

(12) Similarly to powers conferred to competent authorities by Directive 2013/36/EU, this Directive should allow resolution authorities to require institutions to meet higher levels of MREL while addressing in a more flexible manner any breaches of those levels, in particular by alleviating the automatic effects of those breaches in the form of limitations to the Maximum Distributable Amounts (MDAs). Resolution authorities should be able to give guidance to institutions to meet additional amounts to cover losses in resolution that are above the level of the own funds requirements as laid down in Regulation (EU) No 575/2013 and Directive 2013/36/EU, and/or to ensure sufficient market confidence in the institution post-resolution. To ensure consistency with Directive 2013/36/EU, guidance to cover additional losses may only be given where the 'capital guidance' has been requested by the competent supervisory authorities in accordance with Directive 2013/36/EU and should not exceed the level requested in that guidance. For the recapitalisation amount, the level requested in the guidance to ensure market confidence should enable the institution to continue to meet the conditions for authorisation for an appropriate period of time, including by allowing the institution to cover the costs related to the restructuring of its activities following resolution. The market confidence buffer should not exceed the combined capital buffer requirement under Directive 2013/36/EU unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance, the resolution authority should be able to require that the amount of the MREL be increased to cover the amount of the guidance. For the purposes of considering whether there is a consistent failure, the resolution authority should take into account the entity's reporting on the MREL as required by this Directive.

(13) In line with Regulation No 575/2013, institutions that qualify as resolution entities should only be subject to the MREL at the consolidated resolution group level. That means that resolution entities should be obliged to issue eligible instruments and items to meet the MREL to external third party creditors that would be bailed-in should the resolution entity enter resolution.

(14) Institutions that are not resolution entities should comply with the MREL at individual level. Loss absorption and recapitalisation needs of those institutions should be generally provided by their respective resolution entities through the acquisition by

resolution entities of eligible liabilities issued by those institutions and their write-down or conversion into instruments of ownership at the point where those institutions are no longer viable. As such, the MREL applicable to institutions that are not resolution entities should be applied together and consistently with the requirements applicable to resolution entities. That should allow resolution authorities to resolve a resolution group without placing certain of its subsidiary entities in resolution, thus avoiding potentially disruptive effects on the market. Subject to the agreement of the resolution authorities of the resolution entity and of its subsidiary, it should be possible to replace the issuance of eligible liabilities to resolution entities with collateralised guarantees between the resolution entity and its subsidiaries, that can be triggered when the timing conditions equivalent to those allowing the write down or conversion of eligible liabilities are met. The resolution authorities of subsidiaries of a resolution entity should also be able to fully waive the application of the MREL applicable to institutions that are not resolution entities if both the resolution entity and its subsidiaries are established in the same Member State. The application of the MREL to institutions that are not resolution entities should comply with the chosen resolution strategy, in particular it should not change the ownership relationship between institutions and their resolution group after those institutions have been recapitalised.

(15) To ensure appropriate levels of the MREL for resolution purposes, the authorities responsible for setting the level of the MREL should be the resolution authority of the resolution entity, the group-level resolution authority, that is the resolution authority of the ultimate parent undertaking, and resolution authorities of other entities of the resolution group. Any disputes between authorities should be subject to the powers of the European Banking Authority (EBA) under Regulation (EU) No 1093/2010 of the European Parliament and of the Council[17] subject to the conditions and limitations provided in this Directive.

(16) Any breaches of the TLAC minimum requirement and of the MREL should be appropriately addressed and remedied by competent and resolution authorities. Given that a breach of those requirements could constitute an impediment to institution or group resolvability, the existing procedures to remove impediments to resolvability should be shortened to address any breaches of the requirements expediently. Resolution authorities should also be able to require institutions to modify the maturity profiles of eligible instruments and items and to prepare and implement plans to restore the level of those requirements.

(17) To ensure a transparent application of the MREL, institutions should report to their competent and resolution authorities and disclose regularly to the public the levels of eligible liabilities and the composition of those liabilities, including their maturity profile and ranking in normal insolvency proceedings. There should be consistency in the frequency of supervisory reporting on compliance with own funds requirements and with MREL.

(18) The requirement to include a contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should ensure that those liabilities can be bailed in in the event of resolution. Unless and until statutory recognition frameworks to enable effective cross-border resolution are adopted in all third country jurisdictions, contractual arrangements, when properly

[17] 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

drafted and widely adopted, should offer a workable solution. Even with statutory recognition frameworks in place, contractual recognition arrangements should help to reinforce the legal certainty and predictability of cross-border recognition of resolution actions. There might be instances, however, where it is impracticable for institutions to include those contractual terms in agreements or instruments creating certain liabilities, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments. It is in particular impracticable for institutions to include in agreements or instruments creating liabilities contractual terms on the recognition of the effects of the bail-in tool, where those contractual terms are unlawful in the third countries concerned or where institutions do not have the bargaining power to impose those contractual terms. Resolution authorities should therefore be able to waive the application of the requirement to include those contractual terms where those contractual terms would entail disproportionate costs for institutions and the resulting liabilities would not provide significant loss absorbing and recapitalisation capacity in resolution. This waiver should however not be relied upon where a number of agreements or liabilities together collectively provide significant loss absorbing and recapitalisation capacity in resolution. In addition, to ensure that the resolvability of institutions is not affected, liabilities benefitting from waivers should not be eligible for MREL.

(19) In order to preserve financial stability, it is important that competent authorities are able to remedy the deterioration of an institution's financial and economic situation before that institution reaches a point at which authorities have no other alternative than to resolve it. To that end, competent authorities should be granted appropriate early intervention powers. Early intervention powers should include the power to suspend, for the minimum time necessary, certain contractual obligations. That power to suspend should be framed accurately and should be exercised only where that is necessary to establish whether early intervention measures are needed or to determine whether the institution is failing or likely to fail. That power to suspend should however not apply to obligations in relation to the participation in systems designated under Directive 98/26/EC of the European Parliament and of the Council[18], central counterparties (CCPs) and central banks including third country CCPs recognised by the European Capital Markets Authority ('ESMA'). It should also not apply to covered deposits. Early intervention powers should comprise the powers already provided for in Directive 2013/36/EU for circumstances other than those considered to be early intervention as well as for situations in which it is considered to be necessary to restore the financial soundness of an institution.

(20) It is in the interest of an efficient resolution, and in particular in the interest of avoiding conflicts of jurisdiction, that no normal insolvency proceedings for the failing institution be opened or continued while the resolution authority is exercising its resolution powers or applying the resolution tools, except at the initiative of, or with the consent of, the resolution authority. It is useful and necessary to suspend, for a limited period, certain contractual obligations so that the resolution authority has sufficient time to carry out the valuation and put into practice the resolution tools. That power should be accurately framed and should be exercised only for the minimum time necessary for the valuation or to put resolution tools into practice. That power should however not apply to covered deposits or to obligations in relation to the participation in systems designated under Directive 98/26/EC, CCPs and central

[18] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

banks, including third country CCPs recognised by ESMA. Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, Directive 2014/59/EU should be amended to provide that a crisis prevention measure or a crisis management measure should not as such be deemed to be insolvency proceedings within the meaning of Directive 98/26/EC, provided that the substantive obligations under the contract continue to be performed. However, nothing in Directive 2014/59/EU should prejudice the operation of a system designated under Directive 98/26/EC or the right to collateral security guaranteed by that same Directive.

(21) In order to avoid a duplication of requirements and to apply the appropriate rules for the effective recovery and resolution of CCPs in accordance with Regulation (EU) No [CCP recovery and resolution], Directive 2014/59/EU should be amended to exclude from its scope those CCPs in respect of which, pursuant to Regulation (EU) No 648/2012[19], Member States apply certain requirements for authorisation under Directive 2013/36/EU and are therefore also authorised as credit institutions.

(22) The exclusion of specific liabilities of credit institutions or investment firms from the application of the bail-in tool or from powers to suspend certain obligations, restrict the enforcement of security interests or temporarily suspend termination rights in Directive 2014/59/EU, should equally cover liabilities in relation to CCPs established in the Union and to third country CCPs recognised by ESMA.

(23) In order to ensure a common understanding of terms used in various legal instruments, it is appropriate to incorporate in Directive 98/26/EC the definitions and concepts introduced by Regulation (EU) No 648/2012 regarding a "central counterparty" or "CCP" and "participant".

(24) To implement resolution of CCPs effectively, the safeguards provided for in Directive 2002/47/EC[20] should not apply to any restriction of the enforcement of a financial collateral arrangement or on the effect of a security financial collateral arrangement, any close-out netting or set-off provision imposed by virtue of Regulation (EU) No [CCP recovery and resolution].

(25) Directive 2012/30/EU[21], Directive 2011/35/EU[22], Directive 2005/56/EC[23], Directive 2004/25/EC[24] and Directive 2007/36/EC[25], contains rules for the protection of

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19 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p.1

20 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p.1

21 Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

22 Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1).

23 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1).

24 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

shareholders and creditors of CCPs that fall within the scope of those Directives. In a situation where resolution authorities need to act rapidly under Regulation (EU) No [CCP recovery and resolution], those rules may hinder effective resolution action and use of resolution tools and powers by resolution authorities. Derogations under Directive 2014/59/EU should therefore be extended to acts taken in accordance with Regulation (EU) No [CCP recovery and resolution]. In order to guarantee the maximum degree of legal certainty for stakeholders, the derogations should be clearly and narrowly defined, and they should only be used in the public interest and when resolution triggers are met. The use of resolution tools presupposes that the resolution objectives and the conditions for resolution laid down in Regulation (EU) No [CCP recovery and resolution] are met. In order to ensure that authorities can impose sanctions when the provisions of Regulation (EU) No [CCP recovery and resolution] have not been complied with and that those sanctions powers are consistent with the recovery and resolution legal framework of other financial institutions, the scope of application of Title VIII of Directive 2014/59/EU should also cover infringements of provisions of Regulation (EU) No [CCP recovery and resolution].

(26) Since the objectives of this Directive, namely to lay down uniform rules on recovery and resolution framework, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(27) To allow an appropriate time for the transposition and application of this Directive, Member States should be given twelve months to transpose this Directive in their national laws from the date of its entry into force and the institutions concerned should be required to comply with the new provisions within six months from the date of transposition.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 2014/59/EU1

1. In Article 1, the following paragraph (3) is added:

‘3. This Directive shall not apply to those central counterparties in respect of which, pursuant to Article 14(5) of Regulation (EU) No 648/2012, Member States apply certain requirements for authorisation under Directive 2013/36/EU.

However, the provisions laid down in Title VIII of this Directive shall also apply as regards penalties applicable where Regulation [on the recovery and resolution of CCPs] has not been complied with.’

2. In Article 2(1) point (71), 'eligible liabilities' is replaced by 'bail-inable liabilities'.

3. In Article 2(1), the following point is added:

'(71a) 'eligible liabilities' means bail-inable liabilities that fulfil, as applicable, the conditions of Article 45b or point (a) of Article 45g(3).'

4. In Article 2(1), the following points (83a) and (83b), (109) and (110) are added :

[25] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17).

"(83a)'resolution entity' means an entity established in the Union, which is identified by the resolution authority in accordance with Article 12 as an entity in respect of the resolution plan provides for resolution action;

(83b) 'resolution group' means a resolution entity and its subsidiaries that are not resolution entities themselves and that are not subsidiaries of another resolution entity;

"(109) ‘clearing member’ means a clearing member as defined in Article 2(14) of Regulation (EU) No 648/2012;

(110) ‘ board’ means the administrative or supervisory board, or both, set up pursuant to national company law in accordance with Article 27(2) of Regulation (EU) No 648/2012".

5. In Article 12, paragraph (1) is replaced by the following:

"1. Member States shall ensure that group-level resolution authorities, together with the resolution authorities of subsidiaries and after consulting the resolution authorities of significant branches insofar as is relevant to the significant branch, draw up group resolution plans. The group resolution plan shall identify measures to be taken in respect of:

(a) the Union parent undertaking;

(b) the subsidiaries that are part of the group and that are located in the Union;

(c) the entities referred to in points (c) and (d) of Article 1(1); and

(d) subject to Title VI, the subsidiaries that are part of the group and that are located outside the Union.

In accordance with the measures referred to in the first subparagraph, the resolution plan shall identify for each group:

(a) the resolution entities;

(b) the resolution groups.".

6. In Article 12(3), points (a) and (b) are replaced by the following:

"(a) set out the resolution actions planned to be taken for resolution entities in the scenarios referred to in Article 10(3), and the implications of those resolution actions for the other group entities referred to in points (b), (c) and (d) of Article 1(1), for the parent undertaking and for subsidiary institutions;

(b) examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to resolution entities located in the Union, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of group entities, or particular group entities or resolution groups, and identify any potential impediments to a coordinated resolution;".

7. In Article 12(3), point (e) is replaced by the following:

"(e) set out any additional actions, not referred to in this Directive, which the relevant resolution authorities intend to take in relation to the resolution entities;".

8. In Article 12(3), the following point (a1) is added:

"(a1) where a group comprises more than one resolution group, set out resolution actions planned in relation to the resolution entities of each resolution group and the implications of those actions on:

(i) other group entities that belong to the same resolution group;

(ii) other resolution groups.".

9. In Article 13(4), the following subparagraph is inserted after the first subparagraph:

"Where a group is composed of more than one resolution group, the planning of the resolution actions referred to in point (a1) of Article 12(3) shall take the form of a joint decision as referred to in the first subparagraph.".

10. In Article 13(6), the first subparagraph is replaced by the following:

"In the absence of a joint decision between the resolution authorities within four months, each resolution authority that is responsible for a subsidiary and that disagrees with the group resolution plan shall make its own decision and, where appropriate, identify the resolution entity and draw up and maintain a resolution plan for the resolution group composed of entities under its jurisdiction. Each of the individual decisions of disagreeing resolution authorities shall be fully substantiated amongst others by setting out the reasons for the disagreement with the proposed group resolution plan and by taking into account the views and reservations of the other resolution authorities and competent authorities. Each resolution authority shall notify its decision to the other members of the resolution college.".

11. In Article 16(1), the second subparagraph replaced by the following:

"A group shall be deemed to be resolvable if it is feasible and credible for the resolution authorities to either wind up group entities under normal insolvency proceedings or to resolve that group by applying resolution tools and powers to resolution entities of that group while avoiding to the maximum extent possible any significant adverse consequences for the financial systems, including in circumstances of broader financial instability or system wide events, of the Member States in which group entities are situated, or of other Member States or of the Union and with a view to ensuring the continuity of critical functions carried out by those group entities, where they can be easily separated in a timely manner or by other means. Group-level resolution authorities shall notify EBA in a timely manner whenever a group is deemed not to be resolvable.".

12. In Article 16, the following paragraph (4) is added:

"4. Member States shall ensure that, where a group is composed of more than one resolution group, the authorities referred to in paragraph 1 assess the resolvability of each resolution group in accordance with this Article.

The assessment referred to in the first subparagraph shall be performed in addition to the assessment of the resolvability of the entire group.".

13. In Article 17(3), the following subparagraph is added:

"Where a substantive impediment to resolvability is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU the institution shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 1, propose to the resolution authority possible measures to ensure that the institution complies with Articles 45f or 45g and the requirement referred to in Article 128(6) of Directive 2013/36/EU.".

14. In Article 17(5), the following point (h1) is inserted:

"(h1) require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to submit a plan to restore compliance with Articles 45f and 45g, and the requirement referred to in Article 128(6) of Directive 2013/36/EU;".

15. In Article 17(5), the following point (j1) is inserted:

'(j1) require an institution or entity referred to in point(b), (c) or (d) of Article 1(1), to change the maturity profile of items referred to in Article 45b or points (a) and (b) of Article 45g(3) to ensure continuous compliance with Article 45f or Article 45g.'.

16. In points (i) and (j) of Article 17(5), "Article 45" is replaced with "Article 45f and Article 45g".

17. In Article 18, paragraphs 1 to 7 are replaced by the following:

"1. The group-level resolution authority together with the resolution authorities of subsidiaries, after consulting the supervisory college and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, shall consider the assessment required by Article 16 within the resolution college and shall take all reasonable steps to reach a joint decision on the application of measures identified in accordance with Article 17(4) in relation to all resolution entities and their subsidiaries that are entities part of the group referred to in Article 1(1).

2. The group-level resolution authority, in cooperation with the consolidating supervisor and EBA in accordance with Article 25(1) of Regulation (EU) No 1093/2010, shall prepare and submit a report to the Union parent undertaking, to the resolution authorities of subsidiaries, which will provide it to the subsidiaries under their supervision, and to the resolution authorities of jurisdictions in which significant branches are located. The report shall be prepared after consulting the competent authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group and to resolution groups where a group is composed of more than one resolution group. The report shall consider the impact on the institution's business model and recommend any proportionate and targeted measures that, in the authority's view, are necessary or appropriate to remove those impediments.

Where the impediment to resolvability of the group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the group-level resolution authority shall notify its assessment of that impediment to the Union parent undertaking after having consulted the resolution authority of the resolution entity and resolution authorities of its subsidiary institutions.

3. Within four months of the date of receipt of the report, the Union parent undertaking may submit observations and propose to the group-level resolution authority alternative measures to remedy the impediments identified in the report.

Where those impediments are due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 2, propose to the group-level resolution authority possible measures to address or remove those impediments.

4. The group-level resolution authority shall communicate any measure proposed by the Union parent undertaking to the consolidating supervisor, EBA, the resolution authorities of the subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch. The group-level resolution authorities and the resolution authorities of the subsidiaries, after consulting the competent authorities and the resolution authorities of jurisdictions in which significant branches are located, shall do everything within their power to reach a joint decision within the resolution college regarding the identification of the material impediments, and if necessary, the assessment of the measures proposed by the Union parent undertaking and the measures required by the authorities in order to address or remove the impediments, which shall take into account the potential impact of the measures in all the Member States where the group operates.

5. The joint decision shall be reached within four months of submission of any observations by the Union parent undertaking at the expiry of the four-month period referred to in paragraph 3, whichever the earlier.

The joint decision concerning the impediment to resolvability due to a situation referred to in Article 141a(2) of Directive 2013/36/EU shall be reached within two weeks of submission of any observations by the Union parent undertaking in accordance with paragraph 3.

The joint decision shall be reasoned and set out in a document which shall be provided by the group-level resolution authority to the Union parent undertaking.

EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

6. In the absence of a joint decision within the period referred to in paragraph 5, the group-level resolution authority shall make its own decision on the appropriate measures to be taken in accordance with Article 17(4) at the group or resolution group level.

The decision shall be fully reasoned and shall take into account the views and reservations of other resolution authorities. The decision shall be provided to the Union parent undertaking by the group-level resolution authority.

If, at the end of the relevant period referred to in paragraph 5, any resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the group-level resolution authority, shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The relevant period referred to in paragraph 5 shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month or within one week when the referral to the EBA is related to an impediment to resolvability due to a situation referred to in Article 141a(2) of Directive 2013/36/EU. The matter shall not be referred to EBA after the end of the relevant period referred to in paragraph 5 or after a joint decision has been reached. In the absence of an EBA decision, the decision of the group-level resolution authority shall apply.

7. In the absence of a joint decision, the resolution authorities of subsidiaries shall make their own decisions on the appropriate measures to be taken by subsidiaries at

individual level in accordance with Article 17(4). The decision shall be fully reasoned and shall take into account the views and reservations of the other resolution authorities. The decision shall be provided to the subsidiary concerned and to the group-level resolution authority.

If, at the end of the relevant period referred to in paragraph 5, any resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority of the subsidiary shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The relevant period referred to in paragraph 5 shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month or within one week when the referral to the EBA is related to an impediment to resolvability due to a breach of Articles 45 to 45i. The matter shall not be referred to EBA after the end of the relevant period referred to in paragraph 5 or after a joint decision has been reached. In the absence of an EBA decision, the decision of the resolution authority of the subsidiary shall apply.".

18. In Article 27(1), the following point (i) is added:

"(h) where the conditions laid down in Article 29a are complied with, suspend any payment or delivery obligation to which an institution or entity referred to in point (b), (c) or (d) of Article 1(1) is a party.".

19. The following Article 29a is inserted:

"Article 29a
Power to suspend certain obligations.

1. Member States shall establish that their respective competent authority, after having consulted the resolution authority, can exercise the power referred to in point (i) of Article 27 (1) only where the exercise of the suspension power is necessary to carry out the assessment provided for in the first sentence of Article 27(1) or to make the determination provided for in point (a) of Article 32(1).

2. The suspension referred to in paragraph 1 shall not exceed the minimum period of time that the competent authority considers necessary to carry out the assessment referred to in point (a) of Article 27(1) or to make the determination referred to in point (a) of Article 32(1) and shall in any event not exceed 5 working days.

3. Any suspension pursuant to paragraph 1 shall not apply to:

   (a) payment and delivery obligations owed to systems or operators of systems that have been designated in accordance with Directive 98/26/EC, CCPs and third country CCPs recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012 and to central banks;

   (b) eligible claims for the purpose of Directive 97/9/EC;

   (c) covered deposits.

4. When exercising a power under this Article, competent authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.

5. A payment or delivery obligation that would have been due during the suspension period shall be due immediately upon expiry of that period.

6. When payment or delivery obligations under a contract are suspended pursuant to paragraph 1, the payment or delivery obligations of the entity's counterparties under that contract shall be suspended for the same period of time.

7. Member States shall ensure that competent authorities notify the resolution authorities about the exercise of any power referred to in paragraph 1 without delay.

8. Member States that make use of the option laid down in Article 32 (2) shall ensure that the suspension power referred to in paragraph 1 of this Article can also be exercised by the resolution authority, after having consulted the competent authority, where the exercise of that suspension power is necessary to make the determination provided for in point (a) of Article 32(1)."

20. In Article 32(1), point (b) is replaced by the following:

'(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments or eligible liabilities in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;'.

21. In Article 33, paragraphs 2, 3 and 4 are replaced with the following:

2. Member States shall ensure that resolution authorities take a resolution action in relation to an entity referred to in point (c) or (d) of Article 1(1), when that entity meets the conditions laid down in Article 32(1).

3. Where the subsidiary institutions of a mixed-activity holding company are held directly or indirectly by an intermediate financial holding company, the resolution plan shall provide that the intermediate financial holding company is identified as a resolution entity and Member States shall ensure that resolution actions for the purposes of group resolution are taken in relation to the intermediate financial holding company. Member States shall ensure that resolution authorities do not take resolution actions for the purposes of group resolution in relation to the mixed-activity holding company.

4. Subject to paragraph 3 of this Article and notwithstanding the fact that an entity referred to in point (c) or (d) of Article 1(1) does not meet the conditions laid down in Article 32(1), resolution authorities may take resolution action with regard to an entity referred to in point (c) or (d) of Article 1(1) where all of the following conditions are fulfilled:

(a) the entity is a resolution entity;

(b) one or more of the subsidiaries of that entity that are institutions, but not resolution entities comply with the conditions laid down in Article 32(1);

(c) assets and liabilities of those subsidiaries are such that their failure threatens the resolution group as a whole and resolution action with regard to the entity referred to in point (c) or (d) of Article 1(1) is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the relevant resolution group as a whole.".

22. In Article 44(2), point (f) is replaced by the following:

‘(f) liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated in accordance with Directive 98/26/EC or to their

participants and arising from the participation in such a system, or to third country central CCPs recognised by ESMA;'.

23. Article 45 is replaced by the following Articles:

"*Article 45*

Application and calculation of the minimum requirement for own funds and eligible liabilities

1. Member States shall ensure that institutions and entities referred to in points (b),(c) and (d) of Article 1(1) meet, at all times, a requirement for own funds and eligible liabilities in accordance with Articles 45 to 45i.

2. The requirement referred to in paragraph 1 shall be calculated in accordance with Article 45c(3) or (4) , as applicable, as the amount of own funds and eligible liabilities and expressed as percentages of:

(a) the total risk exposure amount of the relevant entity referred to in paragraph 1 calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013,

(b) the leverage ratio exposure measure of the relevant entity referred to in paragraph 1 calculated in accordance with Article 429(3) of Regulation (EU) No 575/2013.

Article 45a Exemption from the minimum requirement for own funds and eligible liabilities

1. Notwithstanding Article 45, resolution authorities shall exempt from the requirement laid down in Article 45(1) mortgage credit institutions financed by covered bonds which, according to national law are not allowed to receive deposits where all of the following conditions are met:

(a) those institutions will be wound-up through national insolvency procedures, or other types of procedure implemented in accordance with Article 38, 40 or 42, laid down for those institutions;

(b) such national insolvency procedures, or other types of procedure, will ensure that creditors of those institutions, including holders of covered bonds where relevant, will bear losses in a way that meets the resolution objectives.

2. Institutions exempted from the requirement laid down in Article 45(1) shall not be part of the consolidation referred to in Article 45f(1).

Article 45b Eligible liabilities for resolution entities

1. Eligible liabilities shall be included in the amount of own funds and eligible liabilities of resolution entities only where they satisfy the conditions referred to in Article 72a, except for point (d) of Article 72b(2) of Regulation (EU) No 575/2013.

2. By way of derogation from point (l) of Article 72a(2) of Regulation (EU) No 575/2013, liabilities that arise from debt instruments with derivative features, such as structured notes, shall be included in the amount of own funds and eligible liabilities only where all of the following conditions are met:

(a) a given amount of the liability arising from the debt instrument is known in advance at the time of issuance, is fixed and not affected by a derivative feature;

(b) the debt instrument, including its derivative feature, is not subject to any netting agreement and its valuation is not subject to Article 49(3);

The liabilities referred to in the first subparagraph shall only be included in the amount of own funds and eligible liabilities for the part that corresponds with the amount referred to in point (a) of the first subparagraph.

3. Resolution authorities may decide that the requirement referred to in Article 45f is met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives.

The resolution authority's decision under this paragraph shall contain the reasons for that decision on the basis of the following elements:

(a) non-subordinated liabilities referred to in the first and second paragraphs have the same priority ranking in the national insolvency hierarchy as certain liabilities that are excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3);

(b) the risk that as a result of a planned application of write-down and conversion powers to non-subordinated liabilities that are not excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3), creditors of claims arising from those liabilities incur greater losses than they would incur in a winding up under normal insolvency proceedings;

(c) the amount of subordinated liabilities shall not exceed the amount necessary to ensure that creditors referred to in point (b) shall not incur losses above the level of losses that they would otherwise have incurred in a winding up under normal insolvency proceedings.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 concerning measures to further specify the conditions referred to in point (a) of the first subparagraph of paragraph 2.

Article 45c Determination of the minimum requirement for own funds and eligible liabilities

1. The requirement referred to in Article 45(1)of each entity shall be determined by the resolution authority, after having consulted the competent authority, on the basis of the following criteria:

(a) the need to ensure that the resolution entity can be resolved by the application of the resolution tools including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;

(b) the need to ensure, in appropriate cases, that the resolution entity and its subsidiaries that are institutions, but not resolution entities have sufficient eligible liabilities to ensure that, if the bail-in tool or write down and conversion powers were to be applied to them, respectively, losses could be absorbed and the total capital ratio and the leverage ratio in the form of Common Equity Tier 1, of the relevant entities can be restored to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry on the activities for which they are authorised under Directive 2013/36/EU or Directive 2014/65/EU;

(c) the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in pursuant to Article 44(3) or might be transferred to a recipient in full under a partial transfer, the resolution entity has sufficient other eligible liabilities to ensure that losses could be absorbed and the capital requirements, or as applicable, the leverage ratio in the form of Common Equity Tier 1 of the resolution entity can be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to carry on the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;

(d) the size, the business model, the funding model and the risk profile of the entity;

(e) the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with Article 109;

(f) the extent to which the failure of the entity would have an adverse effect on financial stability, including, due to the interconnectedness of the entity with other institutions or entities or with the rest of the financial system through contagion to other institutions or entities.

2. Where the resolution plan provides that resolution action is to be taken in accordance with the relevant resolution scenario referred to in Article 10(3), the requirement referred to in Article 45(1) shall equal an amount sufficient to ensure that:

(a) the losses that might expected to be incurred by the entity are fully absorbed ('loss absorption');

(b) the entity or its subsidiaries that are institutions, but not resolution entities are recapitalised to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry out the activities for which they are authorised under Directive 2013/36/EU, Directive 2014/65/EU or equivalent legislation ('recapitalisation');

Where the resolution plan provides that the entity shall be wound up under normal insolvency proceedings, the requirement referred to in Article 45(1) for that entity shall not exceed an amount sufficient to absorb losses in accordance with point (a) of the first subparagraph.

3. Without prejudice to the last subparagraph, for resolution entities, the amount referred to in paragraph 2 shall not exceed the greater of the following:

(a) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the requirements referred to in Article 92(1)(a),(b) and (c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the resolution entity at sub-consolidated resolution group level,

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore its total capital ratio referred in Article 92(1)(c) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU at resolution group sub-consolidated level;

(b) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the resolution entity's leverage ratio requirement referred to in the Regulation (EU) No 575/2013 at resolution group sub-consolidated level; and

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level.

For the purposes of point (a) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) of this paragraph divided by the total risk exposure amount.

For the purposes of point (b) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) of this paragraph divided by the leverage ratio exposure measure.

The resolution authority shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile.

4. Without prejudice to the last subparagraph, for entities that are not themselves resolution entities, the amount referred to in paragraph 2 shall not exceed the greater of any of the following:

(a) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the requirements referred to in Article 92(1)(a),(b) and (c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the entity, and

(ii) a recapitalisation amount that allows the entity to restore its total capital ratio referred in Article 92(1)(c) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU;

(b) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the entity's leverage ratio requirement referred to in the Article 92(1)(d) of Regulation (EU) No 575/2013, and

(ii) a recapitalisation amount that allows the entity to restore its leverage ratio referred to in the Article 92(1)(d) of Regulation (EU) No 575/2013 ;

For the purposes of point (a) of Article 45(2)(a), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) divided by the total risk exposure amount.

For the purposes of point (b) of Article 45(2)(b), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) divided by the leverage ratio exposure measure.

The resolution authority shall set the recapitalisation amounts referred to the previous subparagraphs in accordance with the resolution actions foreseen in

the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect the recapitalisation needs arising from the entity's business model, funding profile and overall risk profile.

5. Where the resolution authority expects that certain classes of eligible liabilities might be excluded from bail-in pursuant to Article 44(3) or might be transferred to a recipient in full under a partial transfer, the requirement referred to in Article 45(1) shall not exceed an amount sufficient to:

   (a) cover the amount of excluded liabilities identified in accordance with Article 44(3);

   (b) ensure that the conditions referred to in paragraph 2 are fulfilled.

6. The resolution authority's decision to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 5.

7. For the purposes of paragraphs 3 and 4, capital requirements shall be interpreted in accordance with the competent authority's application of transitional provisions laid down in Chapters 1, 2 and 4 of Title I of Part Ten of Regulation (EU) No 575/2013 and in the provisions of national legislation exercising the options granted to the competent authorities by that Regulation.

   The resolution authority may reduce the requirement referred to in Article 45(1) to take account of the amount which a deposit guarantee scheme is expected to contribute to the financing of the preferred resolution strategy in accordance with Article 109 of Directive 2014/59/EU.

   The size of any such reduction shall be based on a credible assessment of the potential contribution from the deposit guarantee scheme, and shall at least:

   (a) be less than a prudent estimate of the potential losses which the deposit guarantee scheme would have had to bear, had the institution been wound up under normal insolvency proceedings, taking into account the priority ranking of the deposit guarantee scheme pursuant to Article 108 of Directive 2014/59/EU;

   (b) be less than the limit on deposit guarantee scheme contributions set out in the second subparagraph of Article 109(5) of Directive 2014/59/EU;

   (c) take account of the overall risk of exhausting the available financial means of the deposit guarantee scheme due to contributing to multiple bank failures or resolutions; and

   (d) be consistent with any other relevant provisions in national law and the duties and responsibilities of the authority responsible for the deposit guarantee scheme.

   (e) The resolution authority shall, after consulting the authority responsible for the deposit guarantee scheme, document its approach as regards the assessment of the overall risk of exhausting the available financial means of the deposit guarantee scheme and apply reductions in accordance with subparagraph 1, provided that that risk is not excessive.

8. EBA shall draft regulatory technical standards which shall further specify the criteria referred to in paragraph 1 on the basis of which the requirement for own funds and permissible liabilities is to be determined in accordance with this Article.

EBA shall submit those draft regulatory standards to the Commission by [1 month after the entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1090/2010.

Article 45d Determination of the minimum requirement for own funds and eligible liabilities for entities of G-SIIs

1. The requirement referred to in Article 45(1) of a resolution entity that is a G-SII or part of a G-SII shall consist of the following:

   (a) the requirement referred to in Article 92a of Regulation (EU) No 575/2013*;* and

   (b) any additional requirement for own funds and eligible liabilities determined by the resolution authority specific to the entity in accordance with paragraph 2, which shall be met with liabilities that meet the conditions of Article 45b.

2. The resolution authority may impose an additional requirement for own funds and eligible liabilities referred to in point (b) of paragraph 1 only:

   (a) where the requirement referred to in point (a) of paragraph 1 is not sufficient to fulfil the conditions set out in Article 45c; and

   (b) to an extent that the amount of required own funds and eligible liabilities does not exceed a level that is necessary to fulfil the conditions of Article 45c.

3. Where more than one G-SII entity belonging to the same EU G-SII are resolution entities, the relevant resolution authorities shall calculate the amount referred in paragraph 2,

   (a) for each resolution entity,

   (b) for the Union parent entity as if it was the only resolution entity of the EU G-SII.

4. The resolution authority's decision to impose an additional requirement of own funds and eligible liabilities under point (b) of paragraph 1, shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 2.

Article 45e Guidance for the minimum requirement of own funds and eligible liabilities

1. The resolution authority may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 45b or 45g(3) in excess of the levels set out in Article 45c and Article 45d that provides for additional amounts for the following purposes:

   (a) to cover potential additional losses of the entity to those covered in Article 45c, and/or

   (b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is sustained through capital instruments in addition to the requirement in point (b) of Article 45c(2) ('market confidence buffer').

The guidance shall be only provided and calculated with respect to the requirement referred to in Article 45(1) calculated in accordance with point (a) of Article 45(2).

2. The amount of the guidance given in accordance with of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.

The amount of the guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision, unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.

The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.

3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the resolution authority may require that the amount of the requirement referred to in Article 45c(2) be increased to cover the amount of the guidance given pursuant to this Article.

4. An entity that fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.

Article 45f Application of the minimum requirement for own funds and eligible liabilities to resolution entities

1. Resolution entities shall comply with the requirements laid down in Articles 45c to Article 45e on a consolidated basis at the level of the resolution group.

2. The requirement referred to in Article 45(1) of a resolution entity at the consolidated resolution group level shall be determined in accordance with Article 45h, on the basis of the requirements laid down in Articles 45c to 45e and of whether the third-country subsidiaries of the group are to be resolved separately according to the resolution plan.

Article 45g Application of the minimum requirement for own funds and eligible liabilities to entities that are not themselves resolution entities

1. Institutions that are subsidiaries of a resolution entity and are not resolution entities themselves shall comply with the requirements laid down in Articles 45c to 45e on an individual basis. A resolution authority may, after having consulted the competent authority, decide to apply the requirement laid down in this Article to an entity referred to in points (b), (c) or (d) of Article 1(1) that is a subsidiary of a resolution entity and is not a resolution entity itself.

The requirement referred to in Article 45(1)of an entity referred to in the first subparagraph shall be determined in accordance with Article 45h and on the basis of the requirements laid down in Articles 45c to 45e.

2. The requirement referred to in Article 45(1)of entities referred to in the first paragraph shall be subject to the following conditions:

(a) the resolution entity complies with the consolidated requirement referred to in Article 45f;

(b) the sum of all requirements to be applied to the resolution group's subsidiaries shall be covered by and not exceed the consolidated requirement referred to in Article 45f unless this is only due to the effects of the consolidation at the level of the resolution group in accordance with Article 45f(1).

(c) the requirement shall not exceed the contribution of the subsidiary to the consolidated requirement referred to in Article 45f(1).

(d) it shall fulfil the eligibility criteria provided in paragraph 3.

3. The requirement shall be met with one or more of the following:

(a) liabilities that:

(i) are issued to and bought by the resolution entity;

(ii) fulfil the eligibility criteria referred to in Article 72a, except for point (b) of Article 72b(2) of Regulation (EU) No 575/2013;

(iii) are ranking in normal insolvency proceedings below liabilities other than those eligible for own funds requirements that are issued to and bought by other entities than the resolution entity;

(iv) are subject to the power of write down or conversion in accordance with Articles 59 to 62 that is consistent with the resolution strategy of the resolution group, notably by not affecting the control of the subsidiary by the resolution entity.

(b) own funds instruments issued to and bought by other entities than the resolution entity when the exercise of the power of write down or conversion in accordance with Articles 59 to 62 does not affect the control of the subsidiary by the resolution entity.

4. Subject to the agreement of the resolution authorities of the subsidiary and the resolution entity, the requirement may be met with a guarantee of the resolution entity granted to its subsidiary, which fulfils the following conditions:

(a) the guarantee is provided for at least the equivalent amount as the amount of the requirement for which it substitutes;

(b) the guarantee is triggered when the subsidiary is unable to pay its debts or other liabilities as they fall due or a determination has been made in accordance with Article 59(3) in respect of the subsidiary, whichever is the earliest;

(c) the guarantee is collateralised through a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC for at least 50 per cent of its amount;

(d) the guarantee and financial collateral arrangement are governed by the laws of the Member State where the subsidiary is established unless specified otherwise by the resolution authority of the subsidiary;

(e) the collateral backing the guarantee fulfils the requirements of Article 197 of Regulation (EU) No 575/2013, which, following appropriately conservative haircuts, is sufficient to fully cover the amount guaranteed;

(f) the collateral backing the guarantee is unencumbered and in particular is not used as collateral to back any other guarantee;

(g) the collateral has an effective maturity that fulfils the same maturity condition as that for referred to in Article 72c(1) of Regulation (EU) No 575/2013 , and

(h) there are no legal, regulatory or operational barriers to the transfer of the collateral from the resolution entity to the relevant subsidiary, including when resolution action is taken in respect of the resolution entity.

5. The resolution authority of a subsidiary that is not a resolution entity may fully waive the application of this Article to that subsidiary where:

(a) both the subsidiary and the resolution entity are subject to authorisation and supervision by the same Member State;

(b) the resolution entity, complies on a sub-consolidated basis with the requirement referred to in Article 45f;

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 59(3), in particular when resolution action is taken in respect of the resolution entity;

(d) the resolution entity satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(e) the risk evaluation, measurement and control procedures of the resolution entity cover the subsidiary;

(f) the resolution entity holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary;

(g) the competent authority of the subsidiary has fully waived the application of individual capital requirements to the subsidiary under Article 7(1) of Regulation (EU) No 575/2013.

Article 45h Procedure for determining the requirement

1. The resolution authority of the resolution entity, the group-level resolution authority, where different from the former, and the resolution authorities responsible for the subsidiaries of the resolution group on an individual basis shall do everything within their power to reach a joint decision on:

(a) the amount of the requirement applied at the consolidated level for each resolution entity;

(b) the amount of the requirement applied to each subsidiary of the resolution entity on an individual level.

The joint decision shall ensure compliance with Article 45f and Article 45g, be fully reasoned and provided to:

(a) the resolution entity by its resolution authority;.

(b) the subsidiaries of the resolution entity by their respective resolution authorities;

(c) the Union parent undertaking of the group by the resolution authority of the resolution entity, when that Union parent undertaking is not itself a resolution entity from the same resolution group.

2. Where more than one G-SII entity belonging to the same EU G-SII are resolution entities, the resolution authorities referred to in the first subparagraph shall discuss and, where appropriate and consistent with the G-II's resolution strategy, agree on the application of Article 72e of Regulation (EU) Regulation (EU) No 575/2013 and any adjustment to minimise or eliminate the difference between the sum of the amounts referred to in point (a) of Article 45d(3) and Article 12 of Regulation (EU) No 575/2013 for individual resolution entities and the sum of the amounts referred to in point (b) of Article 45d(3) and Article 12 of Regulation (EU) No 575/2013.

Such an adjustment may be applied under the following conditions:

(a) the adjustment may be applied in respect of differences in the calculation of the total risk exposure amounts between the relevant Member States by adjusting the level of the requirement;

(b) the adjustment shall not be applied to eliminate differences resulting from exposures between resolution groups.

The sum of the amounts referred to in point (a) of Article 45d(3) and Article 12 of Regulation (EU) No 575/2013 for individual resolution entities shall not be lower than the sum of the amounts referred to in point (b) of Article 45d(3) and Article 12 of Regulation (EU) No 575/2013.

3. In the absence of such a joint decision within four months, a decision shall be taken in accordance with paragraphs 4 to 6.

4. Where a joint decision is not taken within four months because of a disagreement concerning the consolidated requirement, a decision shall be taken on the consolidated requirement by the resolution authority of the resolution entity after having duly taken into consideration:

(a) the assessment of subsidiaries performed by the relevant resolution authorities,

the opinion of the group-level resolution authority, where different from the resolution authority of the resolution entity.

Where, at the end of the four-month period, any of the resolution authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority of the resolution entity shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA.

The decision of the EBA shall take into account points (a) and (b) of the first subparagraph.

The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month.

The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached.

In the absence of an EBA decision within one month, the decision of the resolution authority of the resolution entity shall apply.

5. Where a joint decision is not taken within four months because of a disagreement concerning the level of the requirement to be applied to the resolution group's subsidiaries on an individual basis, the decision shall be taken by the respective resolution authorities of the subsidiaries where all of the following conditions are fulfilled:

(a) the views and reservations expressed by the resolution authority of the resolution entity have been duly taken into account, and

(b) the opinion of the group-level resolution authority has been duly taken into account where that authority is different from the resolution authority of the resolution entity;

(c) compliance with Article 45g(2) has been assessed.

Where, at the end of the four-month period, the resolution authority of the resolution entity or the group-level resolution authority has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authorities responsible for the subsidiaries on an individual basis shall defer their decisions and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take their decisions in accordance with the decision of EBA. The decision of the EBA shall take into account points (a), (b) and (c) of the first subparagraph.

The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month.

The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached.

In the absence of an EBA decision within one month, the decisions of the resolution authorities of the subsidiaries shall apply.

The joint decision and any decisions taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

6. Where a joint decision is not taken within four months because of a disagreement concerning the level of the consolidated requirement and the level of the requirement to be applied to the resolution group's subsidiaries on an individual basis, the following shall apply:

(a) a decision shall be taken on the consolidated requirement in accordance with paragraph 4;

(b) a decision shall be taken on the level of the requirement to be applied to the resolution group's subsidiaries on an individual basis in accordance with paragraph 4 after:

(i) having duly considered the decision referred to in point (a);

(ii) having assessed the compliance with Article 45g(2).

7. The joint decision referred to in paragraph 1 and any decisions taken by the resolution authorities referred to in paragraphs 4, 5 and 6 in the absence of a joint decision shall be binding on the resolution authorities concerned.

The joint decision and any decisions taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

8. Resolution authorities, in coordination with competent authorities, shall require and verify that entities meet the requirement referred to in article 45(1) , and shall take any decision pursuant to this Article in parallel with the development and the maintenance of resolution plans.

9. The resolution authority of the resolution entity shall inform EBA of the minimum requirement for own funds and eligible liabilities that have been set:

(a) at the consolidated resolution group level;

(b) at the level of the resolution group's subsidiaries on an individual basis.

Article 45i Supervisory reporting and public disclosure of the requirement

1. Entities referred to in Article 1(1) shall report to their competent and resolution authorities on the following on at least a yearly basis:

(a) the levels of available items that meet the conditions of Article 45b or Article 45g(3) and the amounts of own funds and eligible liabilities expressed in accordance with Article 45(2) following the application of deductions in accordance with Articles 72e to 72j of Regulation (EU) No 575/2013;

(b) the composition of the items referred to in point (a), including their maturity profile and ranking in normal insolvency proceedings.

2. Entities referred to in Article 1(1) shall make the following information publicly available on at least a yearly basis:

(a) the levels of available items that meet the conditions of Article 45b or 45g(3);

(b) the composition of the items referred to in point (a), including their maturity profile and ranking in normal insolvency proceedings.

3. EBA shall develop draft implementing technical standards to specify uniform formats, templates and frequency and templates for the supervisory reporting and public disclosure referred to in paragraphs (1) and (2) of this Article.

EBA shall submit those implementing technical standards to the Commission by [12 months from the entry into force].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

4. Public disclosure requirements shall apply at the date where the requirement referred to in Article 45(1) is fully complied with for the first time.

Article 45j Reporting to the EBA

1. Resolution authorities, in coordination with competent authorities, shall inform EBA of the minimum requirement for own funds and eligible liabilities that have been set for each institution under its jurisdiction.

2. EBA shall develop draft implementing technical standards to specify uniform formats, templates and definitions for the identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 1.

EBA shall submit those draft implementing technical standards to the Commission by [12 months after entry into force] ...*.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

Article 45k Breaches of the minimum requirement for own funds and eligible liabilities

1. Any breach of the minimum requirement for own funds and eligible liabilities by an entity shall be addressed by the relevant authorities on the basis of at least one of the following:

   (a) powers to address or remove impediments to resolvability in accordance with Article 17 and Article 18;

   (b) measures referred to in Article 104 of Directive 2013/36/EC;

   (c) early intervention measures in accordance with Article 27;

   (d) administrative penalties and other administrative measures in accordance with Article 110 and Article 111;

2. Resolution and competent authorities shall consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1.

Article 45l Reports

1. EBA shall, in cooperation with the competent authorities and resolution authorities, submit a report to the Commission providing assessments on at least of the following:

   (a) how the requirement for own funds and permissible liabilities has been implemented at national level, and in particular whether there have been divergences in the levels set for comparable entities across Member States;

   (b) how the power to require institutions to meet the requirement with instruments referred to in Article 45b(2) has been exercised by resolution authorities and whether there have been divergences in the exercise of that power across Member States.

2. The report referred to in paragraph 1 shall take account of the following:

   (a) the impact of the minimum requirement, and any proposed harmonised levels of the minimum requirement on the following:

   (i) financial markets in general and markets for unsecured debt and derivatives in particular;

* OJ please insert date: 12 months after the date of entry into force of this Directive.

(ii) business models and balance sheet structures of institutions, in particular the funding profile and funding strategy of institutions, and the legal and operational structure of groups;

(iii) the profitability of institutions, in particular their cost of funding;

(iv) the migration of exposures to entities which are not subject to prudential supervision;

(v) financial innovation;

(vi) the prevalence of contractual bail-in instruments, and the nature and marketability of such instruments;

(vii) the risk-taking behaviour of institutions;

(viii) the level of asset encumbrance of institutions;

(ix) the actions taken by institutions to comply with minimum requirements, and in particular the extent to which minimum requirements have been met by asset deleveraging, long-term debt issuance and capital raising; and

(x) the level of lending by credit institutions, with a particular focus on lending to micro, small and medium-sized enterprises, local authorities, regional governments and public sector entities and on trade financing, including lending under official export credit insurance schemes;

(b) the interaction of the minimum requirements with the own funds requirements, leverage ratio and the liquidity requirements laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU;

(c) the capacity of institutions to independently raise capital or funding from markets in order to meet any proposed harmonised minimum requirements;

3. The report referred to in paragraph 1 shall cover two calendar years and shall be communicated to the Commission by 30 September of the calendar following the last calendar year covered by the report. "

24. Article 55 is replaced by the following:

"Article 55
Contractual recognition of bail-in

1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement or instrument creating the liability recognises 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, provided that that liability complies with all of the following conditions:

(a) the liability is not excluded under Article 44(2);

(b) the liability is not a deposit as referred to in point (a) of Article 108;

(c) the liability is governed by the law of a third country;

(d) the liability is issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.

2. The requirement referred to in paragraph 1 may not apply where the resolution authority of a Member State determines all of the following conditions are met:

(a) that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country;

(b) that it is legally, contractually or economically impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities;

(c) that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1).

The liabilities referred to in points (b) and (c) shall not include debt instruments which are unsecured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible liabilities.

The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities.

3. Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of the contractual term referred to in paragraph 1.

4. Where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions governing a relevant liability a contractual term as required in accordance with paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.

5. EBA shall develop draft regulatory technical standards in order to further determine the list of liabilities to which the exclusion in paragraph 1 applies, and the contents of the contractual term required in that paragraph, taking into account institutions' different business models.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

6. EBA shall develop draft regulatory technical standards in order to specify the conditions under which it would be legally, contractually or economically 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 paragraph 1 in certain liabilities, and under which a waiver from the requirement referred to in paragraph 1 would not impede the resolvability of that institution or entity.

EBA shall submit those draft regulatory technical standards to the Commission.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010. "

25. In Article 63(1), the following point (n) is added:

"(n) the power to suspend payment or delivery obligations to which the institution or entity referred to in paragraph 1 is party when the resolution authority, after having consulted the competent authority, decides that the exercise of the suspension power is necessary for the effective application of one or more resolution tools or for the purposes of the valuation pursuant to Article 36.

26. In Article 63(1), the following paragraphs 1a and 1b are inserted:

"1a. The period of the suspension pursuant to paragraph 1(n) shall not exceed the minimum period of time that the resolution authority considers necessary for the effective application of one or more resolution tools or for the purposes of the valuation pursuant to Article 36 and in any event shall not exceed 5 working days.

1b. Any suspension under paragraph 1(n) shall not apply to:

(a) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties and third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012, and central banks;

(b) eligible claims for the purpose of Directive 97/9/EC

(c) covered deposits as defined in Article 2(1)(94)."

27. In the titles of Article 59 and Article 60 "and eligible liabilities" is inserted .

28. In Article 59, paragraph 1 is replaced by the following:

"1. The power to write down or convert relevant capital instruments and eligible liabilities may be exercised either:

(a) independently of resolution action; or

(b) in combination with a resolution action, where the conditions for resolution specified in Articles 32 and 33 are met.

The power to write down or convert eligible liabilities independently of resolution action may be exercised only in relation to eligible liabilities that meet the conditions referred to in Article 45g(3)(a), except the condition related to the remaining maturity of liabilities.".

29. "Capital instruments" in Article 59(2) and (3) is replaced with "capital instruments and liabilities referred to in paragraph 1".

30. "Capital instruments" in Article 59(4) and (10) is replaced with "capital instruments or liabilities referred to in paragraph 1".

31. In Article 60(1), the following point (d) is added:

"(d) the principal amount of eligible liabilities referred to in Article 59(1) is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or

to the extent of the capacity of the relevant eligible liabilities, whichever is lower.".

32. In Article 60, paragraph 2 is replaced by the following:

"2. Where the principal amount of a relevant capital instrument or a eligible liability is written down:

(a) the reduction of that principal amount shall be permanent, subject to any write up in accordance with the reimbursement mechanism in Article 46(3);

(b) no liability to the holder of the relevant capital instrument and liability referred to in Article 59(1) shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power;

(c) no compensation is paid to any holder of the relevant capital instruments and liabilities referred to in Article 59(1) other than in accordance with paragraph 3.".

33. In Article 60(3), "the relevant capital instruments" is replaced by "the relevant capital instruments and liabilities referred to in Article 59(1)".

34. In Article 69(4), point (b) is replaced by the following:

'(b) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012, and central banks;'.

35. In Article 70, paragraph 2 is replaced by the following:

"2. Resolution authorities shall not exercise the power referred to in paragraph 1 in relation to any security interest of systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties and third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012, and central banks over assets pledged or provided by way of margin or collateral by the institution under resolution;".

36. In Article 71, paragraph 3 is replaced by the following:

"3. Any suspension under paragraph 1 or 2 shall not apply to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties and third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012, or central banks.".

37. In Article 88, "Article 45" is replaced with the "Articles 45 to 45i".

38. In Article 88(1), the first subparagraph is replaced with the following:

"Subject to Article 89, group-level resolution authorities shall establish resolution colleges to carry out the tasks referred to in Articles 12, 13, 16, 18, 45 to 45i, 91 and 92, and, where appropriate, to ensure cooperation and coordination with third-country resolution authorities.".

39. Article 89 is replaced by the following:

"Article 89
European resolution colleges

1. Where a third country institution or third country parent undertaking has Union subsidiaries or Union parent undertakings, established in two or more Member States, or two or more Union branches that are regarded as significant by two or more Member States, the resolution authorities of Member States where those entities are established or where those significant branches are located shall establish one single European resolution college.

2. The European resolution college referred to in paragraph 1 shall perform the functions and carry out the tasks specified in Article 88 with respect to the entities referred in paragraph 1and, in so far as those tasks are relevant, to branches.

   The tasks to be performed by the European resolution college as referred to in paragraph 2 shall include the setting of the requirement referred to in Articles 45 to 45i.

   When setting the requirement referred to in Articles 45 to 45i, members of the European resolution college shall take into consideration the global resolution strategy, if any, adopted by third-country authorities.

   Where in accordance with the global resolution strategy Union subsidiaries or a Union parent undertaking and its subsidiary institutions are not resolution entities and the members of the European resolution college agree with that strategy, Union subsidiaries or the Union parent undertaking shall comply with the requirement of Article 45g(1) on a consolidated basis by issuing eligible instruments referred to in Article 45g(3)(a) and (b) to the third-country resolution entity.

3. Where only one Union parent undertaking holds all Union subsidiaries of a third country institution or third country parent undertaking, the European resolution college shall be chaired by the resolution authority of the Member State where the Union parent undertaking is established.

   Where the first subparagraph does not apply, the resolution authority of a Union parent undertaking or a Union subsidiary with the highest value of total on-balance sheet assets held shall chair the European resolution college.

4. Member States may, by mutual agreement of all the relevant parties, waive the requirement to establish a European resolution college if other group or college, performs the same functions and carries out the same tasks specified in this Article and complies with all the conditions and procedures, including those covering membership and participation in European resolution colleges, established in this Article and in Article 90. In such a case, all references to European resolution colleges in this Directive shall also be understood as references to those other groups or colleges.

5. Subject to paragraphs 3 and 4 of this Article, the European resolution college shall otherwise function in accordance with Article 88.

40. Article 110 is amended as follows:

   (a) in paragraph 1, the first sentence is replaced by the following:

   ‘Without prejudice to the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures applicable where the national

provisions transposing this Directive or the provisions of Regulation [*on the recovery and resolution of CCPs*] have not been complied with, and shall take all measures necessary to ensure that they are implemented;

(b) paragraph 2 is replaced by the following:

'2. Member States shall ensure that, where obligations referred to in the first paragraph apply to institutions, financial institutions or Union parent undertakings within the meaning of this Directive or to CCPs, clearing members of CCPs or parent undertakings within the meaning of Regulation [*on the recovery and resolution of CCPs*] or, in the event of an infringement, administrative penalties can be applied, subject to the conditions laid down in national law, to the members of the management body within the meaning of this Directive or to the members of the board within the meaning of Regulation [*on the recovery and resolution of CCPs*], and to other natural persons who under national law are responsible for the infringement.';

(c) in paragraph 3, the first sentence is replaced by the following:

'The powers to impose administrative penalties provided for in this Directive Regulation shall be attributed to resolution authorities or, where different, to competent authorities, depending on the type of infringement. ';

41. Article 111 is amended as follows:

(a) in paragraph 1, points (a), (b) and (c) are replaced by the following:

'(a) failure to draw up, maintain and update recovery plans and group recovery plans, infringing Article 5 or 7 of this Directive or Article 9 of Regulation [*on the recovery and resolution of CCPs*];

(b) failure to notify an intention to provide group financial support to the competent authority infringing Article 25 of this Directive;

(c) failure to provide all the information necessary for the development of resolution plans infringing Article 11 of this Directive or Article 14 of Regulation [*on the recovery and resolution of CCPs*];

(d) failure of the management body of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive or of the board of a CCP within the meaning of Regulation [*on the recovery and resolution of CCPs*] to notify the competent authority when the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive or the CCP is failing or likely to fail, infringing Article 81 of this Directive or Article 68(1) of Regulation [*on the recovery and resolution of CCPs*].';

(b) paragraph 2 is amended as follows:

(i) point (a) is replaced by the following:

'(a) a public statement which indicates the natural person, institution, financial institution, Union parent undertaking, CCP or other legal person responsible and the nature of the infringement;';

(ii) point (c) is replaced by the following:

'(c) a temporary ban against any member of the management body or senior management of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive or against the board of the CCP or any other

natural person, who is held responsible, to exercise functions in institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of this Directive or in CCPs; ’

42. Article 112 is amended as follows:

(a) in paragraph 1, the first sentence is replaced by the following:

‘Member States shall ensure that resolution authorities and competent authorities shall publish on their official website at least any administrative penalties imposed by them for infringing the national provisions transposing this Directive or the provisions laid down in Regulation [*on the recovery and resolution of CCPs*] where such penalties have not been the subject of an appeal or where the right of appeal has been exhausted.’;

(b) in paragraph 2, point (c) is replaced by the following:

‘(c) where publication would cause, insofar as it can be determined, disproportionate damage to the institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of this Directive or to the CCP or natural persons involved.’;

(c) paragraph 4 is amended as follows:

(i) the first sentence is replaced by the following:

‘By 3 July 2016, EBA shall submit a report to the Commission on the publication by Member States, on an anonymous basis as provided for under paragraph 2, of penalties for non-compliance with the national provisions transposing this Directive and in particular whether there have been significant divergences between Member States in that respect.’;

(ii) the following subparagraph is added:

‘By […], ESMA shall submit a similar report to the Commission as regards the publication of penalties for non-compliance with the provisions laid down in Regulation [*on the recovery and resolution of CCPs*]’;

43. Article 113 is replaced by the following:

"Article 113

Maintenance of central databases by EBA and ESMA

1. Subject to the professional secrecy requirements referred to in Article 84, resolution authorities and competent authorities shall inform EBA of all administrative penalties imposed by them under Article 111 for infringements of the national provisions transposing this Directive and of the status of that appeal and outcome thereof.

Subject to the professional secrecy requirements referred to in Article 71 of Regulation [on the recovery and resolution of CCPs], resolution authorities and competent authorities shall inform ESMA accordingly as regards administrative penalties imposed for infringements of that Regulation.

2. EBA and ESMA shall maintain central databases of penalties reported to them solely for the purpose of exchange of information between resolution authorities which shall be accessible to resolution authorities only and shall be updated on the basis of the information provided by resolution authorities.

3. EBA and ESMA shall maintain central databases of penalties reported to them solely for the purpose of exchange of information between competent authorities which shall be accessible to competent authorities only and shall be updated on the basis of the information provided by competent authorities.

4. EBA and ESMA shall maintain webpages with links to each resolution authority's publication of penalties and each competent authority's publication of penalties under Article 112 and indicate the period for which each Member State publishes penalties.".

Article 2

Amendment to Directive 98/26/EC

In Article 2, point (c) is replaced by the following:

"(c) 'central counterparty' or 'CCP' shall mean a CCP as defined in point (1) of Article 2 of Regulation (EC) No 648/2012;".

In Article 2, point (f) is replaced by the following:

(f) 'participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house, a system operator or a clearing member of a CCP authorised pursuant to Article 17 of Regulation (EU) No 648/2012;".

Article 3

Amendments to Directive 2002/47/EC

Directive 2002/47/EC is amended as follows:

In Article 1, paragraph 6 is replaced by the following:

'6. Articles 4 to 7 of this Directive shall not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of Title IV, Chapter V or VI of Directive 2014/59/EU of the European Parliament and of the Council, or of Title V, Chapter IV of Regulation (EU) No [*CCP recovery and resolution*] or to any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in point (c)(iv) of paragraph 2 which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of Directive 2014/59/EU and in Title V, Chapter V of Regulation (EU) No [*CCP recovery and resolution*].'

Article 9a is replaced by the following:

'*Article 9a*

*Directives 2008/48/EC, Directive 2014/59/EU and Regulation (EU) No [CCP recovery and resolution**]***

This Directive shall be without prejudice to Directives 2008/48/EC, Directive 2014/59/EU and Regulation (EU) No [on CCP recovery and resolution].'

Article 4

Amendment to Directive 2004/25/EC

In Article 4, paragraph 5 is replaced by the following:

"5. Member States shall ensure that Article 5(1) of this Directive does not apply in the case of use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council or in Title V of Regulation (EU) No [*CCP recovery and resolution*]".

Article 5

Amendment to Directive 2005/56/EC

In Article 3, paragraph 4 is replaced by the following:

"4. Member States shall ensure that this Directive does not apply to the company or companies that are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council or in Title V of Regulation (EU) No [*CCP recovery and resolution*]".

Article 6

Amendments to Directive 2007/36/EC

Directive 2007/36/EU is amended as follows:

(a) In Article 1, paragraph 4 is replaced by the following:

"4. Member States shall ensure that this Directive does not apply in the case of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council or in Title V of Regulation (EU) No [*CCP recovery and resolution*]".

(b) In Article 5, paragraph 5 is replaced by the following:

‘5. Member States shall ensure that for the purposes of Directive 2014/59/EU and Regulation (EU) No [*CCP recovery and resolution*] the general meeting may, by a majority of two-thirds of the votes validly cast, issue a convocation to a general meeting, or modify the statutes to prescribe that a convocation to a general meeting is issued, at shorter notice than as laid down in paragraph 1 of this Article, to decide on a capital increase, provided that that meeting does not take place within ten calendar days of the convocation, that the conditions of Article 27 or 29 of Directive 2014/59/EU or of Article 19 of Regulation (EU) No [*CCP recovery and resolution*] are met, and that the capital increase is necessary to avoid the conditions for resolution laid down in Articles 32 and 33 of Directive 2014/59/EU or in Article 22 of Regulation (EU) No [*CCP recovery and resolution*].’

Article 7

Amendment to Directive 2011/35/EU

In Article 1, paragraph 4 is replaced by the following:

"4. Member States shall ensure that this Directive does not apply to the company or companies which are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council or in Title V of Regulation (EU) No [*CCP recovery and resolution*]".

Article 8

Amendment to Directive 2012/30/EU

In Article 45, paragraph 4 is replaced by the following:

"4. Member States shall ensure that Article 10, Article 19(1), Article 29(1), (2) and (3), the first subparagraph of Article 31(2), Articles 33 to 36 and Articles 40, 41 and 42 of this Directive do not apply in the case of use of the resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council or in Title V of Regulation (EU) No [*CCP recovery and resolution*].".

Article 9
Transposition

1. Member States shall adopt and publish by [date 12 months from the date of entry into force] the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

   Member States shall apply those measures from [date – 6 months from transposition date].

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

3. Member States shall communicate to the Commission and to EBA the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Articles 1(1), 1(40), 1(41), 1(42), 1(43), 2, 3, 4, 5, 6, 7 and 8 shall enter into force on [date - when the Regulation [CCP Recovery and Resolution enters into force].

Article 11
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*