Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (Text with EEA relevance)

DIRECTIVE 2014/59/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 15 May 2014

establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

(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[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms ('institutions'). Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.

(2) The financial crisis was of systemic dimension in the sense that it affected the access to funding of a large proportion of credit institutions. To avoid failure, with consequences for the overall economy, such a crisis necessitates measures aiming to secure access to funding under equivalent conditions for all credit institutions that are otherwise

solvent. Such measures involve liquidity support from central banks and guarantees from Member States for securities issued by solvent credit institutions.

(3) Union financial markets are highly integrated and interconnected with many institutions operating extensively beyond national borders. The failure of a cross-border institution is likely to affect the stability of financial markets in the different Member States in which it operates. The inability of Member States to seize control of a failing institution and resolve it in a way that effectively prevents broader systemic damage can undermine Member States' mutual trust and the credibility of the internal market in the field of financial services. The stability of financial markets is, therefore, an essential condition for the establishment and functioning of the internal market.

(4) There is currently no harmonisation of the procedures for resolving institutions at Union level. Some Member States apply to institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern the insolvency of institutions in the Member States. In addition, the financial crisis has exposed the fact that general corporate insolvency procedures may not always be appropriate for institutions as they may not always ensure sufficient speed of intervention, the continuation of the critical functions of institutions and the preservation of financial stability.

(5) A regime is therefore needed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system. The regime should ensure that shareholders bear losses first and that creditors bear losses after shareholders, provided that no creditor incurs greater losses than it would have incurred if the institution had been wound up under normal insolvency proceedings in accordance with the no creditor worse off principle as specified in this Directive. New powers should enable authorities, for example, to maintain uninterrupted access to deposits and payment transactions, sell viable portions of the institution where appropriate, and apportion losses in a manner that is fair and predictable. Those objectives should help avoid destabilising financial markets and minimise the costs for taxpayers.

(6) The ongoing review of the regulatory framework, in particular the strengthening of capital and liquidity buffers and better tools for macro-prudential policies, should reduce the likelihood of future crises and enhance the resilience of institutions to economic stress, whether caused by systemic disturbances or by events specific to the individual institution. It is not possible, however, to devise a regulatory and supervisory framework that can prevent those institutions from ever getting into difficulties. Member States should therefore be prepared and have adequate recovery and resolution tools to handle situations involving both systemic crises and failures of individual institutions. Such tools should include mechanisms that allow authorities to deal effectively with institutions that are failing or likely to fail.

(7) The exercise of such powers and the measures taken should take into account the circumstances in which the failure occurs. If the problem arises in an individual institution and the rest of the financial system is not affected, authorities should be able to exercise their resolution powers without much concern for contagion effects. In a fragile environment, on the other hand, greater care should be exercised to avoid destabilising financial markets.

(8) Resolution of an institution which maintains it as a going concern may, as a last resort, involve government financial stabilisation tools, including temporary public ownership. It is therefore essential to structure the resolution powers and the financing arrangements for resolution in such a way that taxpayers are the beneficiaries of any surplus that may result from the restructuring of an institution that is put back on a safe footing by the authorities. Responsibility and assumption of risk should be accompanied by reward.

(9) Some Member States have already enacted legislative changes that introduce mechanisms to resolve failing institutions; others have indicated their intention to introduce such mechanisms if they are not adopted at Union level. The absence of common conditions, powers and processes for the resolution of institutions is likely to constitute a barrier to the smooth operation of the internal market and hinder cooperation between national authorities when dealing with failing cross-border groups of institutions. This is particularly true where different approaches mean that national authorities do not have the same level of control or the same ability to resolve institutions. Those differences in resolution regimes may affect the funding costs of institutions differently across Member States and potentially create competitive distortions between institutions. Effective resolution regimes in all Member States are necessary to ensure that institutions cannot be restricted in the exercise of the internal market rights of establishment by the financial capacity of their home Member State to manage their failure.

(10) Those obstacles should be eliminated and rules should be adopted in order to ensure that the internal market provisions are not undermined. To that end, rules governing the resolution of institutions should be made subject to common minimum harmonisation rules.

(11) In order to ensure consistency with existing Union legislation in the area of financial services as well as the greatest possible level of financial stability across the spectrum of institutions, the resolution regime should apply to institutions subject to the prudential requirements laid down in Regulation (EU) No 575/2013 of the European Parliament and of the Council[(4)] and Directive 2013/36/EU of the European Parliament and of the Council[(5)]. The regime should also apply to financial holding companies, mixed financial holding companies provided for in Directive 2002/87/EC of the European Parliament and of the Council[(6)], mixed-activity holding companies and financial institutions, when the latter are subsidiaries of an institution or of a financial holding company, a mixed financial holding company or a mixed-activity holding company and are covered by the supervision of the parent undertaking on a consolidated basis. The crisis has demonstrated that the insolvency of an entity affiliated to a group

can rapidly impact the solvency of the whole group and, thus, even have its own systemic implications. Authorities should therefore possess effective means of action with respect to those entities in order to prevent contagion and produce a consistent resolution scheme for the group as a whole, as the insolvency of an entity affiliated to a group could rapidly impact the solvency of the whole group.

(12) To ensure consistency in the regulatory framework, central counterparties, as defined in Regulation (EU) No 648/2012 of the European Parliament and of the Council[(7)] and central securities depositories as defined in Regulation of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories (CSDs) and amending Directive 98/26/EC could be covered by a separate legislative initiative establishing a recovery and resolution framework for those entities.

(13) The use of resolution tools and powers provided for in this Directive may disrupt the rights of shareholders and creditors. In particular, the power of the authorities to transfer the shares or all or part of the assets of an institution to a private purchaser without the consent of shareholders affects the property rights of shareholders. In addition, the power to decide which liabilities to transfer out of a failing institution based upon the objectives of ensuring the continuity of services and avoiding adverse effects on financial stability may affect the equal treatment of creditors. Accordingly, resolution action should be taken only where necessary in the public interest and any interference with rights of shareholders and creditors which results from resolution action should be compatible with the Charter of Fundamental Rights of the European Union (the Charter). In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.

(14) Authorities should take into account the nature of an institution's business, shareholding structure, legal form, risk profile, size, legal status and interconnectedness to other institutions or to the financial system in general, the scope and complexity of its activities, whether it is a member of an institutional protection scheme or other cooperative mutual solidarity systems, whether it exercises any investment services or activities and whether its failure and subsequent winding up under normal insolvency proceedings would be likely to have a significant negative effect on financial markets, on other institutions, on funding conditions, or on the wider economy in the context of recovery and resolution plans and when using the different powers and tools at their disposal, making sure that the regime is applied in an appropriate and proportionate way and that the administrative burden relating to the recovery and resolution plan preparation obligations is minimised. Whereas the contents and information specified in this Directive and in Annexes A, B and C establish a minimum standard for institutions with evident systemic relevance, authorities are permitted to apply different or significantly reduced recovery and resolution planning and information requirements on an institution-specific basis, and at a lower frequency for updates than one year. For a small institution of little interconnectedness and complexity, a recovery plan could be reduced to some basic information on its structure, triggers for recovery actions and

recovery options. If an institution could be permitted to go insolvent, then the resolution plan could be reduced. Further, the regime should be applied so that the stability of financial markets is not jeopardised. In particular, in situations characterised by broader problems or even doubts about the resilience of many institutions, it is essential that authorities consider the risk of contagion from the actions taken in relation to any individual institution.

(15) In order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform the functions and tasks in relation to resolution pursuant to this Directive. Member States should ensure that appropriate resources are allocated to those resolution authorities. The designation of public authorities should not exclude delegation under the responsibility of a resolution authority. However, it is not necessary to prescribe the type of authority or authorities that Member States should appoint as a resolution authority. While harmonisation of that aspect may facilitate coordination, it would considerably interfere with the constitutional and administrative systems of Member States. A sufficient degree of coordination can still be achieved with a less intrusive requirement: all the national authorities involved in the resolution of institutions should be represented in resolution colleges, where coordination at cross-border or Union level should take place. Member States should therefore be free to choose which authorities should be responsible for applying the resolution tools and exercising the powers laid down in this Directive. Where a Member State designates the authority responsible for the prudential supervision of institutions (competent authority) as a resolution authority, adequate structural arrangements should be put in place to separate the supervisory and resolution functions. That separation should not prevent the resolution function from having access to any information available to the supervisory function.

(16) In light of the consequences that the failure of an institution may have on the financial system and the economy of a Member State as well as the possible need to use public funds to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of crisis management and resolution.

(17) Effective resolution of institutions or group entities operating across the Union requires cooperation among competent authorities and resolution authorities within supervisory and resolution colleges at all the stages covered by this Directive, from the preparation of recovery and resolution plans to the actual resolution of an institution. In the event of disagreement between national authorities on decisions to be taken in accordance with this Directive with regard to institutions, the European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[8] should, where specified in this Directive, as a last resort, play a mediation role. In certain cases, this Directive provides for binding mediation by EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. Such binding mediation does not prevent non-binding mediation in accordance with Article 31 of Regulation (EU) No 1093/2010 in other cases.

(18) In the resolution of institutions or groups operating across the Union, the decisions taken should also aim to preserve financial stability and minimise economic and social effects in the Member States where the institution or group operates.

(19) In order to deal in an efficient manner with failing institutions, authorities should have the power to impose preparatory and preventative measures.

(20) Given the extension of EBA's responsibilities and tasks as laid down in this Directive, the European Parliament, the Council and the Commission should ensure that adequate human and financial resources are made available without delay. For that purpose, the procedure for the establishment, implementation and control of its budget as referred to in Articles 63 and 64 of Regulation (EU) No 1093/2010 should take due account of those tasks. The European Parliament and the Council should ensure that the best standards of efficiency are met.

(21) It is essential that institutions prepare and regularly update recovery plans that set out measures to be taken by those institutions for the restoration of their financial position following a significant deterioration. Such plans should be detailed and based on realistic assumptions applicable in a range of robust and severe scenarios. The requirement to prepare a recovery plan should, however, be applied proportionately, reflecting the systemic importance of the institution or the group and its interconnectedness, including through mutual guarantee schemes. Accordingly, the required content should take into account the nature of the institution's sources of funding, including mutually guaranteed funding or liabilities, and the degree to which group support would be credibly available. Institutions should be required to submit their plans to competent authorities for a complete assessment, including whether the plans are comprehensive and could feasibly restore an institution's viability, in a timely manner, even in periods of severe financial stress.

(22) Recovery plans should include possible measures which could be taken by the management of the institution where the conditions for early intervention are met.

(23) In determining whether a private sector action could prevent the failure of an institution within a reasonable timeframe, the relevant authority should take into account the effectiveness of early intervention measures undertaken within the timeframe predetermined by the competent authority. In the case of group recovery plans, the potential impact of the recovery measures on all the Member States where the group operates should be taken into account while drawing up the plans.

(24) Where an institution does not present an adequate recovery plan, competent authorities should be empowered to require that institution to take measures necessary to redress the material deficiencies of the plan. That requirement may affect the freedom to conduct a business as guaranteed by Article 16 of the Charter. The limitation of that fundamental right is however necessary to meet the objectives of financial stability. More specifically, such a limitation is necessary in order to strengthen the business of institutions and avoid institutions growing excessively or taking excessive risks without being able to tackle setbacks and losses and to restore their capital base. The limitation

is proportionate because it permits preventative action to the extent that it is necessary to address the deficiencies and therefore complies with Article 52 of the Charter.

(25) Resolution planning is an essential component of effective resolution. Authorities should have all the information necessary in order to identify and ensure the continuance of critical functions. The content of a resolution plan should, however, be proportionate to the systemic importance of the institution or group.

(26) Because of the institution's privileged knowledge of its own functioning and any problems arising from it, resolution plans should be drawn up by resolution authorities on the basis of, inter alia, the information provided by the institutions concerned.

(27) In order to comply with the principle of proportionality and to avoid excessive administrative burden, the possibility for competent authorities and, where relevant, resolution authorities, to waive the requirements relating to the preparation of the recovery and resolution plans on a case-by-case basis should be allowed in the limited cases specified in this Directive. Such cases comprise institutions affiliated to a central body and wholly or partially exempt from prudential requirements in national law in accordance with Article 21 of Directive 2013/36/EU and institutions which belong to an institutional protection scheme in accordance with Article 113(7) of Regulation (EU) No 575/2013. In each case the granting of a waiver should be subject to the conditions specified in this Directive.

(28) Having regard to the capital structure of institutions affiliated to a central body, for the purposes of this Directive, those institutions should not be obliged to each draw up separate recovery or resolution plans solely on the grounds that the central body to which they are affiliated is under the direct supervision of the European Central Bank.

(29) Resolution authorities, on the basis of the assessment of resolvability by the relevant resolution authorities, should have the power to require changes to the structure and organisation of institutions directly or indirectly through the competent authority, to take measures which are necessary and proportionate to reduce or remove material impediments to the application of resolution tools and ensure the resolvability of the entities concerned. Due to the potentially systemic nature of all institutions, it is crucial, in order to maintain financial stability, that authorities have the possibility to resolve any institution. In order to respect the right to conduct business laid down in Article 16 of the Charter, the authorities' discretion should be limited to what is necessary in order to simplify the structure and operations of the institution solely to improve its resolvability. In addition, any measure imposed for such purposes should be consistent with Union law. Measures should be neither directly nor indirectly discriminatory on the grounds of nationality, and should be justified by the overriding reason of being conducted in the public interest in financial stability. Furthermore, action should not go beyond the minimum necessary to attain the objectives sought. When determining the measures to be taken, resolution authorities should take into account the warnings and recommendations of the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council[9].

(30) Measures proposed to address or remove impediments to the resolvability of an institution or a group should not prevent institutions from exercising the right of

establishment conferred on them by the Treaty on the Functioning of the European Union ('TFEU).

(31) Recovery and resolution plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss.

(32) The group treatment for recovery and resolution planning provided for in this Directive should apply to all groups of institutions supervised on a consolidated basis, including groups whose undertakings are linked by a relationship within the meaning of Article 22(7) of Directive 2013/34/EU of the European Parliament and of the Council[(10)]. The recovery and resolution plans should take into account the financial, technical and business structure of the relevant group. If individual recovery and resolution plans for institutions that are a part of a group are prepared, the relevant authorities should aim to achieve, to the extent possible, consistency with recovery and resolution plans for the rest of the group.

(33) It should be the general rule that the group recovery and resolution plans are prepared for the group as a whole and identify measures in relation to a parent institution as well as all individual subsidiaries that are part of a group. The relevant authorities, acting within the resolution college, should make every effort to reach a joint decision on the assessment and adoption of those plans. However, in specific cases where an individual recovery or resolution plan has been drawn up, the scope of the group recovery plan assessed by the consolidating supervisor or the group resolution plan decided by the group-level resolution authority should not cover those group entities for which the individual plans have been assessed or prepared by the relevant authorities.

(34) In the case of group resolution plans, the potential impact of the resolution measures in all the Member States where the group operates should be specifically taken into account in the drawing up of group resolution plans. The resolution authorities of the Member States where the group has subsidiaries should be involved in the drawing up of the plan.

(35) Recovery and resolution plans should include procedures for informing and consulting employee representatives throughout the recovery and resolution processes where appropriate. Where applicable, collective agreements, or other arrangements provided for by social partners, as well as national and Union law on the involvement of trade unions and workers' representatives in company restructuring processes, should be complied with in that regard.

(36) Given the sensitivity of the information contained in them, confidential information in the recovery and resolution plans should be subject to the confidentiality provisions as laid down in this Directive.

(37) The competent authorities should transmit the recovery plans and any changes thereto to the relevant resolution authorities, and the latter should transmit the resolution plans and any changes thereto to the former, in order to permanently keep every relevant resolution authority fully informed.

(38) The provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted by a number of provisions laid down

in national law in some Member States. Those provisions are designed to protect the creditors and shareholders of each entity. Those provisions, however, do not take into account the interdependency of the entities of the same group. It is, therefore, appropriate to set out under which conditions financial support may be transferred among entities of a cross-border group of institutions with a view to ensuring the financial stability of the group as a whole without jeopardising the liquidity or solvency of the group entity providing the support. Financial support between group entities should be voluntary and should be subject to appropriate safeguards. It is appropriate that the exercise of the right of establishment is not directly or indirectly made conditional by Member States to the existence of an agreement to provide financial support. The provisions regarding intra-group financial support in this Directive do not affect contractual or statutory liability arrangements between institutions which protect the participating institutions through cross-guarantees and equivalent arrangements. Where a competent authority restricts or prohibits intragroup financial support and where the group recovery plan makes reference to intragroup financial support, such a prohibition or restriction should be considered to be a material change for the purpose of reviewing the recovery plan.

(39) During the recovery and early intervention phases laid down in this Directive, shareholders should retain full responsibility and control of the institution except when a temporary administrator has been appointed by the competent authority. They should no longer retain such a responsibility once the institution has been put under resolution.

(40) 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 early intervention powers, including the power to appoint a temporary administrator, either to replace or to temporarily work with the management body and senior management of an institution. The task of the temporary administrator should be to exercise any powers conferred on it with a view to promoting solutions to redress the financial situation of the institution. The appointment of the temporary administrator should not unduly interfere with rights of the shareholders or owners or procedural obligations established under Union or national company law and should respect international obligations of the Union or Member States, relating to investment protection. The early intervention powers should include those already provided for in Directive 2013/36/EU for circumstances other than those considered to be early intervention as well as other situations considered to be necessary to restore the financial soundness of an institution.

(41) The resolution framework should provide for timely entry into resolution before a financial institution is balance-sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated when a competent authority, after consulting a resolution authority, determines that an institution is failing or likely to fail and alternative measures as specified in this Directive would prevent such a failure within a reasonable timeframe. Exceptionally, Member States may provide that, in addition to the competent authority, the determination that the institution is failing or likely to fail can be made also by the resolution authority, after consulting the competent authority.

The fact that an institution does not meet the requirements for authorisation should not justify per-se the entry into resolution, especially if the institution is still or likely to still be viable. An institution should be considered to be failing or likely to fail when it infringes or is likely in the near future to infringe the requirements for continuing authorisation, when the assets of the institution are or are likely in the near future to be less than its liabilities, when the institution is or is likely in the near future to be unable to pay its debts as they fall due, or when the institution requires extraordinary public financial support except in the particular circumstances laid down in this Directive. The need for emergency liquidity assistance from a central bank should not, per se, be a condition that sufficiently demonstrates that an institution is or will be, in the near future, unable to pay its liabilities as they fall due.

If that facility were guaranteed by a State, an institution accessing such a facility would be subject to the State aid framework. In order to preserve financial stability, in particular in the case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees of newly issued liabilities to remedy a serious disturbance in the economy of a Member State should not trigger the resolution framework provided that a number of conditions are met. In particular, the State guarantee measures should be approved under the State aid framework and should not be part of a larger aid package, and the use of the guarantee measures should be strictly limited in time. Member States guarantees for equity claims should be prohibited. When providing a guarantee for newly issued liabilities other than equity, a Member State should ensure that the guarantee is sufficiently remunerated by the institution. Furthermore, the provision of extraordinary public financial support should not trigger resolution where, as a precautionary measure, a Member State takes an equity stake in an institution, including an institution which is publicly owned, which complies with its capital requirements. This may be the case, for example, where an institution is required to raise new capital due to the outcome of a scenario-based stress test or of the equivalent exercise conducted by macroprudential authorities which includes a requirement that is set to maintain financial stability in the context of a systemic crisis, but the institution is unable to raise capital privately in markets. An institution should not be considered to be failing or likely to fail solely on the basis that extraordinary public financial support was provided before the entry into force of this Directive. Finally, access to liquidity facilities including emergency liquidity assistance by central banks may constitute State aid pursuant to the State aid framework.

(42) In the event of resolution of a group with cross-border activity, any resolution action should take into account the potential impact of the resolution in all the Member States where the institution or the group operates.

(43) The powers of resolution authorities should also apply to holding companies where both the holding company is failing or likely to fail and a subsidiary institution, whether in the Union or in a third country, is failing or likely to fail. In addition, notwithstanding the fact that a holding company might not be failing or likely to fail, the powers of resolution authorities should apply to the holding company where one or more subsidiary institutions meet the conditions for resolution, or a third-country institution meets the conditions for resolution in that third country and the application of the

resolution tools and powers in relation to the holding company is necessary for the resolution of one or more of its subsidiaries or for the resolution of the group as a whole.

(44) Where an institution is failing or likely to fail, national resolution authorities should have at their disposal a minimum harmonised set of resolution tools and powers. Their exercise should be subject to common conditions, objectives, and general principles. Once the resolution authority has taken the decision to put the institution under resolution, normal insolvency proceedings should be excluded except if they need to be combined with the use of the resolution tools and at the initiative of the resolution authority. Member States should be able to confer on the resolution authorities powers and tools in addition to those conferred on them under this Directive. The use of those additional tools and powers, however, should be consistent with the resolution principles and objectives as laid down in this Directive. In particular, the use of such tools or powers should not impinge on the effective resolution of cross-border groups.

(45) In order to avoid moral hazard, any failing institution should be able to exit the market, irrespective of its size and interconnectedness, without causing systemic disruption. A failing institution should in principle be liquidated under normal insolvency proceedings. However, liquidation under normal insolvency proceedings might jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors. In such a case it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings. The objectives of resolution should therefore be to ensure the continuity of critical functions, to avoid adverse effects on financial stability, to protect public funds by minimising reliance on extraordinary public financial support to failing institutions and to protect covered depositors, investors, client funds and client assets.

(46) The winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied. A failing institution should be maintained through the use of resolution tools as a going concern with the use, to the extent possible, of private funds. That may be achieved either through sale to or merger with a private sector purchaser, or after having written down the liabilities of the institution, or after having converted its debt to equity, in order to effect a recapitalisation.

(47) When applying resolutions tools and exercising resolution powers, resolution authorities should take all appropriate measures to ensure that resolution action is taken in accordance with principles including that shareholders and creditors bear an appropriate share of the losses, that the management should in principle be replaced, that the costs of the resolution of the institution are minimised and that creditors of the same class are treated in an equitable manner. In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and should be neither directly nor indirectly discriminatory on the grounds of nationality. When the use of the resolution tools involves the granting of State aid, interventions should have to be assessed in accordance with the relevant State aid provisions. State aid may be involved, inter alia,

where resolution funds or deposit guarantee funds intervene to assist in the resolution of failing institutions.

(48) When applying resolution tools and exercising resolution powers, resolution authorities should inform and consult employee representatives where appropriate. Where applicable, collective agreements, or other arrangements provided for by social partners, should be fully taken into account in that regard.

(49) The limitations on the rights of shareholders and creditors should be in accordance with Article 52 of the Charter. The resolution tools should therefore be applied only to those institutions that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest. In particular, resolution tools should be applied where the institution cannot be wound up under normal insolvency proceedings without destabilising the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions and where there is no reasonable prospect for any alternative private solution, including any increase of capital by the existing shareholders or by any third party sufficient to restore the full viability of the institution. In addition, when applying resolutions tools and exercising resolution powers, the principle of proportionality and the particularities of the legal form of an institution should be taken into account.

(50) Interference with property rights should not be disproportionate. Affected shareholders and creditors should not incur greater losses than those which they would have incurred if the institution had been wound up at the time that the resolution decision is taken. In the event of a partial transfer of assets of an institution under resolution to a private purchaser or to a bridge bank, the residual part of the institution under resolution should be wound up under normal insolvency proceedings. In order to protect shareholders and creditors who are left in the winding up proceedings of the institution, they should be entitled to receive in payment of, or compensation for, their claims in the winding up proceedings not less than what it is estimated they would have recovered if the whole institution had been wound up under normal insolvency proceedings.

(51) For the purpose of protecting the right of shareholders and creditors, clear obligations should be laid down concerning the valuation of the assets and liabilities of the institution under resolution and, where required under this Directive, valuation of the treatment that shareholders and creditors would have received if the institution had been wound up under normal insolvency proceedings. It should be possible to commence a valuation already in the early intervention phase. Before any resolution action is taken, a fair and realistic valuation of the assets and liabilities of the institution should be carried out. Such a valuation should be subject to a right of appeal only together with the resolution decision. In addition, where required under this Directive, an *ex-post* comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received under normal insolvency proceedings should be carried out after resolution tools have been applied. If it is determined that shareholders and creditors have received, in payment of, or compensation for, their claims, the equivalent of less than the amount that they would have received under normal insolvency proceedings, they should be entitled

to the payment of the difference where required under this Directive. As opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision. Member States should be free to decide on the procedure as to how to pay any difference of treatment that has been determined to shareholders and creditors. That difference, if any, should be paid by the financial arrangements established in accordance with this Directive.

(52) It is important that losses be recognised upon failure of the institution. The valuation of assets and liabilities of failing institutions should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are applied. The value of liabilities should not, however, be affected in the valuation by the institution's financial state. It should be possible, for reasons of urgency, that the resolution authorities make a rapid valuation of the assets or the liabilities of a failing institution. That valuation should be provisional and should apply until an independent valuation is carried out. EBA's binding technical standards relating to valuation methodology should establish a framework of principles to be used in conducting such valuations and should allow different specific methodologies to be applied by resolution authorities and independent valuers, as appropriate.

(53) Rapid and coordinated action is necessary to sustain market confidence and minimise contagion. Once an institution is deemed to be failing or likely to fail and there is no reasonable prospect that any alternative private sector or supervisory action would prevent the failure of the institution within a reasonable timeframe, resolution authorities should not delay in taking appropriate and coordinated resolution action in the public interest. The circumstances under which the failure of an institution may occur, and in particular taking account of the possible urgency of the situation, should allow resolution authorities to take resolution action without imposing an obligation to first use the early intervention powers.

(54) When taking resolution actions, resolution authorities should take into account and follow the measures provided for in the resolution plans unless resolution authorities assess, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans.

(55) Save as expressly specified in this Directive, the resolution tools should be applied before any public sector injection of capital or equivalent extraordinary public financial support to an institution. This, however, should not impede the use of funds from the deposit guarantee schemes or resolution funds in order to absorb losses that would have otherwise been suffered by covered depositors or discretionarily excluded creditors. In that respect, the use of extraordinary public financial support, resolution funds or deposit guarantee schemes to assist in the resolution of failing institutions should comply with the relevant State aid provisions.

(56) Problems in financial markets in the Union arising from system-wide events could have adverse effects on the Union economy and citizens of the Union. Therefore, resolution tools should be designed and suitable to counter a broad set of largely

unpredictable scenarios, taking into account that there could be a difference between a single institution in a crisis and a broader systemic banking crisis.

(57) When the Commission undertakes State aid assessment under Article 107 TFEU of the government stabilisation tools referred to in this Directive, it should separately assess whether the notified government stabilisation tools do not infringe any intrinsically linked provisions of Union law, including those relating to the minimum loss absorption requirement of 8 % contained in this Directive, as well as whether there is a very extraordinary situation of a systemic crisis justifying resorting to those tools under this Directive while ensuring the level playing field in the internal market. In accordance with Articles 107 and 108 TFEU, that assessment should be made before any government stabilisation tools may be used.

(58) The application of government stabilisation tools should be fiscally neutral in the medium term.

(59) The resolution tools should include the sale of the business or shares of the institution under resolution, the setting up of a bridge institution, the separation of the performing assets from the impaired or under-performing assets of the failing institution, and the bail-in of the shareholders and creditors of the failing institution.

(60) Where the resolution tools have been used to transfer the systemically important services or viable business of an institution to a sound entity such as a private sector purchaser or bridge institution, the residual part of the institution should be liquidated within an appropriate time frame having regard to any need for the failing institution to provide services or support to enable the purchaser or bridge institution to carry out the activities or services acquired by virtue of that transfer.

(61) The sale of business tool should enable authorities to effect a sale of the institution or parts of its business to one or more purchasers without the consent of shareholders. When applying the sale of business tool, authorities should make arrangements for the marketing of that institution or part of its business in an open, transparent and non-discriminatory process, while aiming to maximise, as far as possible, the sale price. Where, for reasons of urgency, such a process is impossible, authorities should take steps to redress detrimental effects on competition and on the internal market.

(62) Any net proceeds from the transfer of assets or liabilities of the institution under resolution when applying the sale of business tool should benefit the institution left in the winding up proceedings. Any net proceeds from the transfer of shares or other instruments of ownership issued by the institution under resolution when applying the sale of business tool should benefit the owners of those shares or other instruments of ownership. Proceeds should be calculated net of the costs arisen from the failure of the institution and from the resolution process.

(63) In order to perform the sale of business in a timely manner and protect financial stability, the assessment of the buyer of a qualifying holding should be carried out in a timely manner that does not delay the application of the sale of business tool in accordance with this Directive by way of derogation from the time-limits and procedures laid down

in Directive 2013/36/EU and Directive 2014/65/EU of the European Parliament and of the Council[(11)].

(64) Information concerning the marketing of a failing institution and the negotiations with potential acquirers prior to the application of the sale-of-business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Regulation (EU) No 596/2014 of the European Parliament and of the Council[(12)] may be delayed for the time necessary to plan and structure the resolution of the institution in accordance with delays permitted under the market abuse regime.

(65) As an institution which is wholly or partially owned by one or more public authorities or controlled by the resolution authority, a bridge institution would have as its main purpose ensuring that essential financial services continue to be provided to the clients of the failing institution and that essential financial activities continue to be performed. The bridge institution should be operated as a viable going concern and be put back on the market when conditions are appropriate and within the period laid down in this Directive or wound up if not viable.

(66) The asset separation tool should enable authorities to transfer assets, rights or liabilities of an institution under resolution to a separate vehicle. That tool should be used only in conjunction with other tools to prevent an undue competitive advantage for the failing institution.

(67) An effective resolution regime should minimise the costs of the resolution of a failing institution borne by the taxpayers. It should ensure that systemic institutions can be resolved without jeopardising financial stability. The bail-in tool achieves that objective by ensuring that shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the institution. The bail-in tool will therefore give shareholders and creditors of institutions a stronger incentive to monitor the health of an institution during normal circumstances and meets the Financial Stability Board recommendation that statutory debt-write down and conversion powers be included in a framework for resolution, as an additional option in conjunction with other resolution tools.

(68) In order to ensure that resolution authorities have the necessary flexibility to allocate losses to creditors in a range of circumstances, it is appropriate that those authorities be able to apply the bail-in tool both where the objective is to resolve the failing institution as a going concern if there is a realistic prospect that the institution's viability may be restored, and where systemically important services are transferred to a bridge institution and the residual part of the institution ceases to operate and is wound up.

(69) Where the bail-in tool is applied with the objective of restoring the capital of the failing institution to enable it to continue to operate as a going concern, the resolution through bail-in should be accompanied by replacement of management, except where retention of management is appropriate and necessary for the achievement of the resolution objectives, and a subsequent restructuring of the institution and its activities in a way that addresses the reasons for its failure. That restructuring should be achieved through the implementation of a business reorganisation plan. Where applicable, such plans

should be compatible with the restructuring plan that the institution is required to submit to the Commission under the State aid framework. In particular, in addition to measures aiming to restore the long-term viability of the institution, the plan should include measures limiting the aid to the minimum burden sharing, and measures limiting distortions of competition.

(70) It is not appropriate to apply the bail-in tool to claims in so far as they are secured, collateralised or otherwise guaranteed. However, in order to ensure that the bail-in tool is effective and achieves its objectives, it is desirable that it can be applied to as wide a range of the unsecured liabilities of a failing institution as possible. Nevertheless, it is appropriate to exclude certain kinds of unsecured liability from the scope of application of the bail-in tool. In order to protect holders of covered deposits, the bail-in tool should not apply to those deposits that are protected under Directive 2014/49/EU of the European Parliament and of the Council[13]. In order to ensure continuity of critical functions, the bail-in tool should not apply to certain liabilities to employees of the failing institution or to commercial claims that relate to goods and services critical to the daily functioning of the institution. In order to honour pension entitlements and pension amounts owed or owing to pension trusts and pension trustees, the bail-in tool should not apply to the failing institution's liabilities to a pension scheme. However, the bail-in tool would apply to liabilities for pension benefits attributable to variable remuneration which do not arise from collective bargaining agreements, as well as to the variable component of the remuneration of material risk takers. To reduce risk of systemic contagion, the bail-in tool should not apply to liabilities arising from a participation in payment systems which have a remaining maturity of less than seven days, or liabilities to institutions, excluding entities that are part of the same group, with an original maturity of less than seven days.

(71) As the protection of covered depositors is one of the most important objectives of resolution, covered deposits should not be subject to the exercise of the bail-in tool. The deposit guarantee scheme should, however, contribute to funding the resolution process by absorbing losses to the extent of the net losses that it would have had to suffer after compensating depositors in normal insolvency proceedings. The exercise of the bail-in powers would ensure that depositors continue to have access to their deposits up to at least the coverage level which is the main reason why the deposit guarantee schemes have been established. Not providing for the involvement of those schemes in such cases would constitute an unfair advantage with respect to the rest of creditors which would be subject to the exercise of the powers by the resolution authority.

(72) Resolution authorities should be able to exclude or partially exclude liabilities in a number of circumstances including where it is not possible to bail-in such liabilities within a reasonable timeframe, the exclusion is strictly necessary and is proportionate to achieving the continuity of critical functions and core business lines or the application of the bail-in tool to liabilities would cause a destruction in value such that losses borne by other creditors would be higher than if those liabilities were not excluded from bail-in. Resolution authorities should be able to exclude or partially exclude liabilities where necessary to avoid the spreading of contagion and financial instability which may cause serious disturbance to the economy of a Member State. When carrying out those

assessments, resolution authorities should give consideration to the consequences of a potential bail-in of liabilities stemming from eligible deposits held by natural persons and micro, small and medium-sized enterprises above the coverage level provided for in Directive 2014/49/EU.

(73) Where those exclusions are applied, the level of write down or conversion of other eligible liabilities may be increased to take account of such exclusions subject to the 'no creditor worse off than under normal insolvency proceedings' principle being respected. Where the losses cannot be passed to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution subject to a number of strict conditions including the requirement that losses totalling not less than 8 % of total liabilities including own funds have already been absorbed, and the funding provided by the resolution fund is limited to the lower of 5 % of total liabilities including own funds or the means available to the resolution fund and the amount that can be raised through *ex-post* contributions within three years.

(74) In extraordinary circumstances, where liabilities have been excluded and the resolution fund has been used to contribute to bail-in in lieu of those liabilities to the extent of the permissible cap, the resolution authority should be able to seek funding from alternative financing sources.

(75) The minimum amount of contribution to loss absorption and recapitalisation of 8 % of total liabilities including own funds or, where applicable, of 20 % of risk-weighted assets should be calculated based on the valuation for the purposes of resolution in accordance with this Directive. Historical losses which have already been absorbed by shareholders through a reduction in own funds prior to such a valuation should not be included in those percentages.

(76) Nothing in this Directive should require Member States to finance resolution financing arrangements by means from their general budget.

(77) Except where otherwise specified in this Directive, resolution authorities should apply the bail-in tool in a way that respects the *pari passu* treatment of creditors and the statutory ranking of claims under the applicable insolvency law. Losses should first be absorbed by regulatory capital instruments and should be allocated to shareholders either through the cancellation or transfer of shares or through severe dilution. Where those instruments are not sufficient, subordinated debt should be converted or written down. Senior liabilities should be converted or written down if the subordinate classes have been converted or written down entirely.

(78) Where there are exemptions of liabilities such as for payment and settlement systems, employee or trade creditors, or preferential ranking such as for deposits of natural persons and micro, small and medium-sized enterprises, they should apply in third countries as well as in the Union. To ensure the ability to write down or convert liabilities when appropriate in third countries, recognition of that possibility should be included in the contractual provisions governed by the law of the third countries, especially for those liabilities ranking at a lower level within the hierarchy of creditors. Such contractual terms should not be required for liabilities exempted from bail-in for deposits of natural persons and micro, small and medium-sized enterprises or where the

law of the third country or a binding agreement concluded with that third country allow the resolution authority of the Member State to exercise its write down or conversion powers.

(79) To avoid institutions structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool it is appropriate to establish that the institutions meet at all times a minimum requirement for own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution. Resolution authorities should be able to require, on a case-by-case basis, that that percentage is wholly or partially composed of own funds or of a specific type of liabilities.

(80) This Directive adopts a 'top down' approach to the determination of the minimum requirement for own funds and eligible liabilities (MREL) within a group. The approach further recognises that resolution action is applied at the level of the individual legal person, and that it is imperative that loss-absorbing capacity is located in, or accessible to, the legal person within the group in which losses occur. To that end, resolution authorities should ensure that loss-absorbing capacity within a group is distributed across the group in accordance with the level of risk in its constituent legal persons. The minimum requirement necessary for each individual subsidiary should be separately assessed. Furthermore, resolution authorities should ensure that all capital and liabilities which are counted towards the consolidated minimum requirement are located in entities where losses are liable to occur, or are otherwise available to absorb losses. This Directive should allow for a multiple-point-of-entry or a single-point-of-entry resolution. The MREL should reflect the resolution strategy which is appropriate to a group in accordance with the resolution plan. In particular, the MREL should be required at the appropriate level in the group in order to reflect a multiple-point-of-entry approach or single-point-of-entry-approach contained in the resolution plan while keeping in mind that there could be circumstances where an approach different from that contained in the plan is used as it would allow, for instance, reaching the resolution objectives more efficiently. Against that background, regardless of whether a group has chosen the single-point- of-entry or the multiple-point-of entry approach, all institutions and other legal persons in the group where required by the resolution authorities should, at all times, have a robust MREL so as to avoid the risk of contagion or a bank run.

(81) Member States should ensure that Additional Tier 1 and Tier 2 capital instruments fully absorb losses at the point of non-viability of the issuing institution. Accordingly, resolution authorities should be required to write down those instruments in full, or to convert them to Common Equity Tier 1 instruments, at the point of non-viability and before any resolution action is taken. For that purpose, the point of non-viability should be understood as the point at which the relevant authority determines that the institution meets the conditions for resolution or the point at which the authority decides that the institution would cease to be viable if those capital instruments were not written down or converted. The fact that the instruments are to be written down or converted by authorities in the circumstances required by this Directive should be recognised in the terms governing the instrument, and in any prospectus or offering documents published or provided in connection with the instruments.

(82) In order to allow for effective resolution outcomes, it should be possible to apply the bail-in tool before 1 January 2016.

(83) Resolution authorities should be able to apply the bail-in tool only partially where an assessment of the potential impact on the stability of the financial system in the Member States concerned and in the rest of the Union demonstrates that its full application would be contrary to the overall public interests of the Member State or the Union as a whole.

(84) Resolution authorities should have all the necessary legal powers that, in different combinations, may be exercised when applying the resolution tools. They should include the power to transfer shares in, or assets, rights or liabilities of, a failing institution to another entity such as another institution or a bridge institution, the power to write down or cancel shares, or write down or convert liabilities of a failing institution, the power to replace the management and the power to impose a temporary moratorium on the payment of claims. Supplementary powers are needed, including the power to require continuity of essential services from other parts of a group.

(85) It is not necessary to prescribe the exact means through which the resolution authorities should intervene in the failing institution. Resolution authorities should have the choice between taking control through a direct intervention in the institution or through executive order. They should decide according to the circumstances of the case. It does not appear necessary for efficient cooperation between Member States to impose a single model at this stage.

(86) The resolution framework should include procedural requirements to ensure that resolution actions are properly notified and, subject to the limited exceptions laid down in this Directive, made public. However, as information obtained by resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, that information should be subject to an effective confidentiality regime. The fact that information on the contents and details of recovery and resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action. However, information that the resolution authority is examining a specific institution could be enough for there to be negative effects on that institution. It is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of recovery and resolution plans and the result of any assessment carried out in that context.

(87) Resolution authorities should have ancillary powers to ensure the effectiveness of the transfer of shares or debt instruments and assets, rights and liabilities. Subject to the safeguards specified in this Directive, those powers should include the power to remove third parties rights from the transferred instruments or assets and the power to enforce contracts and to provide for the continuity of arrangements vis-à-vis the recipient of the transferred assets and shares. However, the rights of employees to terminate a contract

of employment should not be affected. The right of a party to terminate a contract with an institution under resolution, or a group entity thereof, for reasons other than the resolution of the failing institution should not be affected either. Resolution authorities should have the ancillary power to require the residual institution that is being wound up under normal insolvency proceedings to provide services that are necessary to enable the institution to which assets or shares have been transferred by virtue of the application of the sale of business tool or the bridge institution tool to operate its business.

(88) In accordance with Article 47 of the Charter, the parties concerned have a right to due process and to an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to a right of appeal.

(89) Crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important to ensure that the complex economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom.

(90) Since this Directive aims to cover situations of extreme urgency, and since the suspension of any decision of the resolution authorities might impede the continuity of critical functions, it is necessary to provide that the lodging of any appeal should not result in automatic suspension of the effects of the challenged decision and that the decision of the resolution authority should be immediately enforceable with a presumption that its suspension would be against the public interest.

(91) In addition, where necessary in order to protect third parties who have acquired assets, rights and liabilities of the institution under resolution in good faith by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, a right of appeal should not affect any subsequent administrative act or transaction concluded on the basis of an annulled decision. In such cases, remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.

(92) Given that crisis management measures may be required to be taken urgently due to serious financial stability risks in the Member State and the Union, any procedure under national law relating to the application for *ex-ante* judicial approval of a crisis management measure and the court's consideration of such an application should be swift. Given the requirement for a crisis management measure to be taken urgently, the court should give its decision within 24 hours and Member States should ensure that the relevant authority can take its decision immediately after the court has given its approval. This is without prejudice to the right that interested parties might have in

making an application to the court to set aside the decision for a limited period after the resolution authority has taken the crisis management measure.

(93) It is in the interest of an efficient resolution, and in order to avoid conflicts of jurisdiction, that no normal insolvency proceedings for the failing institution be opened or continued whilst 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 time to put into practice the resolution tools. This should not, however, apply to obligations in relation to systems designated under Directive 98/26/EC of the European Parliament and of the Council[(14)], central counterparties and central banks. 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, this Directive provides that a crisis prevention measure or a crisis management measure should not, per se, 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 this Directive prejudices the operation of a system designated under Directive 98/26/EC or the right to collateral security guaranteed by Article 9 of Directive 98/26/EC.

(94) In order to ensure that resolution authorities, when transferring assets and liabilities to a private sector purchaser or bridge institution, have an adequate period to identify contracts that need to be transferred, it might be appropriate to impose proportionate restrictions on counterparties' rights to close out, accelerate or otherwise terminate financial contracts before the transfer is made. Such a restriction would be necessary to allow authorities to obtain a true picture of the balance sheet of the failing institution, without the changes in value and scope that extensive exercise of termination rights would entail. In order to interfere with the contractual rights of counterparties to the minimum extent necessary, the restriction on termination rights should apply only in relation to the crisis prevention measure or crisis management measure, including the occurrence of any event directly linked to the application of such a measure, and rights to terminate arising from any other default, including failure to pay or deliver margin, should remain.

(95) In order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, rights and liabilities of a failing institution, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts, as appropriate. Such a restriction on selected practices in relation to linked contracts should extend to contracts with the same counterparty covered by security arrangements, title transfer financial collateral arrangements, set-off arrangements, close out netting agreements, and structured finance arrangements. Where the safeguard applies, resolution authorities should be bound to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing institution. Those

safeguards should ensure that the regulatory capital treatment of exposures covered by a netting agreement for the purposes of Directive 2013/36/EU is not affected.

(96) While ensuring that resolution authorities have the same tools and powers at their disposal will facilitate coordinated action in the event of a failure of a cross-border group, further action appears necessary to promote cooperation and prevent fragmented national responses. Resolution authorities should be required to consult each other and cooperate in resolution colleges when resolving group entities with a view to agreeing a group resolution scheme. Resolution colleges should be established around the core of the existing supervisory colleges through the inclusion of resolution authorities and the involvement of competent ministries, central banks, EBA and, where appropriate, authorities responsible for the deposit guarantee schemes. In the event of a crisis, the resolution college should provide a forum for the exchange of information and the coordination of resolution actions.

(97) Resolution of cross-border groups should strike the balance between the need, on the one hand, for procedures that take into account the urgency of the situation and allow for efficient, fair and timely solutions for the group as a whole and, on the other, the necessity to protect financial stability in all the Member States where the group operates. The different resolution authorities should share their views in the resolution college. Resolution actions proposed by the group-level resolution authority should be prepared and discussed amongst different resolution authorities in the context of the group resolution plans. Resolution colleges should incorporate the views of the resolution authorities of all the Member States in which the group is active, in order to facilitate swift and joint decisions wherever possible. Resolution actions by the group-level resolution authority should always take into account their impact on the financial stability in the Member States where the group operates. This should be ensured by the possibility for the resolution authorities of the Member State in which a subsidiary is established to object to the decisions of the group-level resolution authority, not only on appropriateness of resolution actions and measures but also on ground of the need to protect financial stability in that Member State.

(98) The resolution college should not be a decision-making body, but a platform facilitating decision-making by national authorities. The joint decisions should be taken by the national authorities concerned.

(99) The production of a group resolution scheme should facilitate coordinated resolution that is more likely to deliver the best result for all institutions of a group. The group-level resolution authority should propose the group resolution scheme and submit it to the resolution college. National resolution authorities that disagree with the scheme or decide to take independent resolution action should explain the reasons for their disagreement and notify those reasons, together with details of any independent resolution action they intend to take, to the group-level resolution authority and other resolution authorities covered by the group resolution scheme. Any national authority that decides to depart from the group resolution scheme should duly consider the potential impact on financial stability in the Member States where the other resolution authorities are located and the potential effects on other parts of the group.

(100) As part of a group resolution scheme, authorities should be invited to apply the same tool to legal persons meeting the conditions for resolution. The group-level resolution authorities should have the power to apply the bridge institution tool at group level (which may involve, where appropriate, burden sharing arrangements) to stabilise a group as a whole. Ownership of subsidiaries could be transferred to the bridge bank with a view to onward sale, either as a package or individually, when market conditions are appropriate. In addition, the group-level resolution authority should have the power to apply the bail-in tool at parent level.

(101) Effective resolution of internationally active institutions and groups requires cooperation between the Union, Member States and third-country resolution authorities. Cooperation will be facilitated if the resolution regimes of third countries are based on common principles and approaches that are being developed by the Financial Stability Board and the G20. For that purpose EBA should be empowered to develop and enter into non-binding framework cooperation arrangements with authorities of third countries in accordance with Article 33 of Regulation (EU) No 1093/2010 and national authorities should be permitted to conclude bilateral arrangements in line with EBA framework arrangements. The development of those arrangements between national authorities responsible for managing the failure of global firms should be a means to ensure effective planning, decision-making and coordination in respect of international groups. In general, there should be reciprocity in those arrangements. National resolution authorities, as part of the European resolution college, where applicable, should recognise and enforce third-country resolution proceedings in the circumstances laid down in this Directive.

(102) Cooperation should take place both with regard to subsidiaries of Union or third-country groups and with regard to branches of Union or third-country institutions. Subsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to Union law, including the resolution tools laid down in this Directive. It is necessary, however, that Member States retain the right to act in relation to branches of institutions having their head office in third countries, when the recognition and application of third-country resolution proceedings relating to a branch would endanger financial stability in the Union or when Union depositors would not receive equal treatment with third-country depositors. In those circumstances, and in the other circumstances as laid down in this Directive, Member States should have the right, after consulting the national resolution authorities, to refuse recognition of third-country resolution proceedings with regard to Union branches of third-country institutions.

(103) There are circumstances when the effectiveness of the resolution tools applied may depend on the availability of short-term funding for an institution or a bridge institution, the provision of guarantees to potential purchasers, or the provision of capital to the bridge institution. Notwithstanding the role of central banks in providing liquidity to the financial system even in times of stress, it is important that Member States set up financing arrangements to avoid that the funds needed for such purposes come from the national budgets. It should be the financial industry, as a whole, that finances the stabilisation of the financial system.

(104) As a general rule, Member States should establish their national financing arrangements through funds controlled by resolution authorities to be used for the purposes as laid down in this Directive. However, a strictly framed exception should be provided to allow Member States to establish their national financing arrangements through mandatory contributions from institutions which are authorised in their territories and which are not held through funds controlled by their resolution authorities provided that certain conditions are met.

(105) As a principle, contributions should be collected from the industry prior to and independently of any operation of resolution. When prior funding is insufficient to cover the losses or costs incurred by the use of the financing arrangements, additional contributions should be collected to bear the additional cost or loss.

(106) In order to reach a critical mass and to avoid pro-cyclical effects which would arise if financing arrangements had to rely solely on *ex-post* contributions in a systemic crisis, it is indispensable that the *ex-ante* available financial means of the national financing arrangements amount at least to a certain minimum target level.

(107) In order to ensure a fair calculation of contributions and provide incentives to operate under a less risky model, contributions to national financing arrangements should take account of the degree of credit, liquidity and market risk incurred by the institutions.

(108) Ensuring effective resolution of failing institutions within the Union is an essential element in the completion of the internal market. The failure of such institutions has an effect not only on the financial stability of the markets where it directly operates but also on the whole Union financial market. With the completion of the internal market in financial services, the interplay between the different national financial systems is reinforced. Institutions operate outside their Member State of establishment and are interrelated through the interbank and other markets which, in essence, are pan-European. Ensuring effective financing of the resolution of those institutions across Member States is not only in the best interests of the Member States in which they operate but also of all the Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal financial market. Setting up a European system of financing arrangements should ensure that all institutions that operate in the Union are subject to equally effective resolution financing arrangements and contribute to the stability of the internal market.

(109) In order to build up the resilience of that European system of financing arrangements, and in accordance with the objective requiring that financing should come primarily from the shareholders and creditors of the institution under resolution and then from industry rather than from public budgets, financing arrangements may make a request to borrow from other financing arrangements in the case of need. Likewise they should have the power to grant loans to other arrangements that are in need. Such lending should be strictly voluntary. The decision to lend to other arrangements should be made by the lending financing arrangement, but due to potential fiscal implications, Member States should be able to require consultation or the consent of the competent ministry.

(110) While financing arrangements are set up at national level, they should be mutualised in the context of group resolution, provided that an agreement is found between national authorities on the resolution of the institution. Deposits covered by deposit guarantee schemes should not bear any losses in the resolution process. When a resolution action ensures that depositors continue to have access to their deposits, deposit guarantee schemes to which an institution under resolution is affiliated should be required to make a contribution not greater than the amount of losses that they would have had to bear if the institution had been wound up under normal insolvency proceedings.

(111) While covered deposits are protected from losses in resolution, other eligible deposits are potentially available for loss absorbency purposes. In order to provide a certain level of protection for natural persons and micro, small and medium-sized enterprises holding eligible deposits above the level of covered deposits, such deposits should have a higher priority ranking over the claims of ordinary unsecured, non-preferred creditors under the national law governing normal insolvency proceedings. The claim of the deposit guarantee scheme should have an even higher ranking under such national law than the aforementioned categories of eligible deposits. Harmonisation of national insolvency law in that area is necessary in order to minimise exposure of the resolution funds of Member States under the no creditor worse off principle as specified in this Directive.

(112) Where deposits are transferred to another institution in the context of the resolution of a institution, depositors should not be insured beyond the coverage level provided for in Directive 2014/49/EU. Therefore, claims with regard to deposits remaining in the institution under resolution should be limited to the difference between the funds transferred and the coverage level provided for in Directive 2014/49/EU. Where transferred deposits are superior to the coverage level, the depositor should have no claim against the deposit guarantee scheme with regard to deposits remaining in the institution under resolution.

(113) The setting up of financing arrangements establishing the European system of financing arrangements laid down in this Directive should ensure coordination of the use of funds available at national level for resolution.

(114) The power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in order to specify the criteria for defining ‘critical functions’ and ‘core business lines’ for the purposes of this Directive; the circumstances when exclusion of liabilities from the write down or conversion requirements under this Directive is necessary; the classes of arrangement for which Member States should ensure appropriate protection in partial transfers; the manner in which institutions’ contributions to resolution financing arrangements should be adjusted in proportion to their risk profile; the registration, accounting, reporting obligations and other obligations intended to ensure that the *ex-ante* contributions are effectively paid; and the circumstances in which and conditions subject to which an institution may be temporarily exempted from paying *ex-post* contributions. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated

acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(115) Where provided for in this Directive, it is appropriate that EBA promote convergence of the practices of national authorities through guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010. In areas not covered by regulatory or implementing technical standards, EBA is able to issue guidelines and recommendations on the application of Union law under its own initiative.

(116) The European Parliament and the Council should have three months from the date of notification to object to a delegated act. It should be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections.

(117) Technical standards in financial services should facilitate consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate, where provided for in this Directive, to entrust EBA with the development of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.

(118) The Commission should, where provided for in this Directive, adopt draft regulatory technical standards developed by EBA by means of delegated acts pursuant to Article 290 TFEU, in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010. The Commission should, where provided for in this Directive, adopt draft implementing technical standards developed by EBA by means of implementing acts pursuant to Article 291 TFEU, in accordance with Article 15 of Regulation (EU) No 1093/2010.

(119) Directive 2001/24/EC of the European Parliament and of the Council[(15)] provides for the mutual recognition and enforcement in all Member States of decisions concerning the reorganisation or winding up of institutions having branches in Member States other than those in which they have their head offices. That directive ensures that all assets and liabilities of the institution, regardless of the country in which they are situated, are dealt with in a single process in the home Member State and that creditors in the host Member States are treated in the same way as creditors in the home Member State. In order to achieve an effective resolution, Directive 2001/24/EC should apply in the event of use of the resolution tools both when those instruments are applied to institutions and when they are applied to other entities covered by the resolution regime. Directive 2001/24/EC should therefore be amended accordingly.

(120) Union company law directives contain mandatory rules for the protection of shareholders and creditors of institutions which fall within the scope of those directives. In a situation where resolution authorities need to act rapidly, those rules may hinder effective action and use of resolution tools and powers by resolution authorities and appropriate derogations should be included in this Directive. 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 this Directive are met.

(121) Directive 2012/30/EU of the European Parliament and of the Council[16] contains rules on shareholders' rights to decide on capital increases and reductions, on their right to participate in any new share issue for cash consideration, on creditor protection in the event of capital reduction and the convening of shareholders' meeting in the event of serious loss of capital. Those rules may hinder the rapid action by resolution authorities and appropriate derogations from them should be provided for.

(122) Directive 2011/35/EU of the European Parliament and of the Council[17] lays down rules, inter alia, on the approval of mergers by the general meeting of each of the merging companies, on the requirements concerning the draft terms of merger, management report and expert report, and on creditor protection. Council Directive 82/891/EEC[18] contains similar rules on the division of public limited liability companies. Directive 2005/56/EC of the European Parliament and of the Council[19] provides for corresponding rules concerning cross-border mergers of limited liability companies. Appropriate derogations from those directives should be provided in order to allow a rapid action by resolution authorities.

(123) Directive 2004/25/EC of the European Parliament and of the Council[20] sets out an obligation to launch a mandatory takeover bid on all shares of the company for the equitable price, as defined in that directive, if a shareholder acquires, directly or indirectly and alone or in concert with others, a certain percentage of shares of that company, which gives it control of that company and is defined by national law. The purpose of the mandatory bid rule is to protect minority shareholders in the case of change of control. However, the prospect of such a costly obligation might deter possible investors in the affected institution, thereby making it difficult for resolution authorities to make use of all their resolution powers. Appropriate derogations should be provided from the mandatory bid rule, to the extent necessary for the use of the resolution powers, while after the resolution period the mandatory bid rule should be applied to any shareholder acquiring control in the affected institution.

(124) Directive 2007/36/EC of the European Parliament and of the Council[21], provides for procedural shareholders' rights relating to general meetings. Directive 2007/36/EC provides, inter alia, for a minimum notice period for general meetings and the contents of the notice of general meeting. Those rules may hinder rapid action by resolution authorities and appropriate derogations from the directive should be provided for. Prior to resolution there may be a need for a rapid increase of capital when the institution does not meet or is likely not to fulfil the requirements of Regulation (EU) No 575/2013 and Directive 2013/36/EU and an increase of capital is likely to restore the financial situation and avoid a situation where the threshold conditions for resolution are met. In such situations a possibility for convening a general meeting at short notice should be permitted. However, the shareholders should retain the decision making power on the increase and on the shortening of the notice period for the general meetings. Appropriate derogations from Directive 2007/36/EC should be provided for the establishment of that mechanism.

(125) In order to ensure that resolution authorities are represented in the European System of Financial Supervision established by Regulation (EU) No 1092/2010, Regulation

(EU) No 1093/2010, Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(22)] and Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(23)], and to ensure that EBA has the expertise necessary to carry out the tasks laid down in this Directive, Regulation (EU) No 1093/2010 should be amended in order to include national resolution authorities as defined in this Directive in the concept of competent authorities established by that Regulation. Such assimilation between resolution authorities and competent authorities pursuant to Regulation (EU) No 1093/2010 is consistent with the functions attributed to EBA pursuant to Article 25 of Regulation (EC) No 1093/2010 to contribute and participate actively in the development and coordination of recovery and resolution plans and to aim at the facilitation of the resolution of failing institutions and in particular cross-border groups.

(126) In order to ensure compliance by institutions, those who effectively control their business and their management body with the obligations deriving from this Directive and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for administrative sanctions and other administrative measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and other administrative measures laid down by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or other administrative measure, publication of sanctions or other administrative measures, key penalising powers and levels of administrative fines. Subject to strict professional secrecy, EBA should maintain a central database of all administrative sanctions and information on the appeals reported to it by competent authorities and resolution authorities.

(127) This Directive refers to both administrative sanctions and other administrative measures in order to cover all actions applied after an infringement is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or another administrative measure under national law.

(128) Even though nothing prevents Member States from laying down rules for administrative sanctions as well as criminal sanctions for the same infringements, Member States should not be required to lay down rules for administrative sanctions for infringements of this Directive which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they can do so if their national law so permits. However, the maintenance of criminal sanctions rather than administrative sanctions or other administrative measures for infringements of this Directive should not reduce or otherwise affect the ability of resolution authorities and competent authorities to cooperate, access and exchange information in a timely way with resolution authorities and competent authorities in other Member States for the purposes of this Directive, including after any referral of the relevant infringements to the competent judicial authorities for prosecution.

(129) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents[(24)], Member States have undertaken to accompany, in justified cases, the notification of their transposition

measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(130) This Directive respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the right to an effective remedy and to a fair trial and the right of defence.

(131) Since the objective of this Directive, namely the harmonisation of the rules and processes for the resolution of institutions, cannot be sufficiently achieved by the Member States, but can rather, by reason of the effects of a failure of any institution in the whole Union, 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 that objective.

(132) When taking decisions or actions under this Directive, competent authorities and resolution authorities should always have due regard to the impact of their decisions and actions on financial stability in other Member States and on the economic situation in other Member States and should give consideration to the significance of any subsidiary or branch for the financial sector and the economy of the Member State where such a subsidiary or branch is established or located, even in cases where the subsidiary or branch concerned is of lesser importance for the consolidated group.

(133) The Commission will review the general application of this Directive and, in particular, consider, in light of the arrangements taken under any act of Union law establishing a resolution mechanism covering more than one Member State, the exercise of EBA's powers under this Directive to mediate between a resolution authority in a Member State participating in the mechanism and a resolution authority in a Member State not participating therein,

HAVE ADOPTED THIS DIRECTIVE:

(**1**) OJ C 39, 12.2.2013, p. 1.

(**2**) OJ C 44, 15.2.2013, p. 68.

(**3**) Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal) and the decision of the Council of 6 May 2014.

(**4**) 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).

(**5**) 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).

(**6**) Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(**7**) 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, 7.2.2012, p. 1).

(**8**) 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).

(**9**) Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

(**10**) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

(**11**) Directive 2014/65/EU of 15 May 2014 of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (see page 349 of this Official Journal).

(**12**) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (See page 1 of this Official Journal).

(**13**) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes (see page 149 of this Official Journal).

(**14**) 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).

(**15**) Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ L 125, 5.5.2001, p. 15).

(**16**) 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).

(**17**) 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).

(**18**) Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47).

(**19**) 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).

(**20**) 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).

(**21**) 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).

(**22**) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Investment and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

(**23**) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(**24**) OJ C 369, 17.12.2011, p. 14.