

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)

## TITLE IV

### RESOLUTION

#### CHAPTER IV

##### *Resolution tools*

##### *Section 1*

##### **General principles**

##### *Article 37*

##### **General principles of resolution tools**

1 Member States shall ensure that resolution authorities have the necessary powers to apply the resolution tools to institutions and to entities referred to in point (b), (c) or (d) of Article 1(1) that meet the applicable conditions for resolution.

2 Where a resolution authority decides to apply a resolution tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), and that resolution action would result in losses being borne by creditors or their claims being converted, the resolution authority shall exercise the power to write down and convert capital instruments in accordance with Article 59 immediately before or together with the application of the resolution tool.

3 The resolution tools referred to in paragraph 1 are the following:

- a the sale of business tool;
- b the bridge institution tool;
- c the asset separation tool;
- d the bail-in tool.

4 Subject to paragraph 5, resolution authorities may apply the resolution tools individually or in any combination.

5 Resolution authorities may apply the asset separation tool only together with another resolution tool.

6 Where only the resolution tools referred to in point (a) or (b) of paragraph 3 of this Article are used, and they are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the residual institution or entity referred to in point (b), (c) or (d)

of Article 1(1) from which the assets, rights or liabilities have been transferred, shall be wound up under normal insolvency proceedings. Such winding up shall be done within a reasonable timeframe, having regard to any need for that institution or entity referred to in point (b), (c) or (d) of Article 1(1) to provide services or support pursuant to Article 65 in order to enable the recipient to carry out the activities or services acquired by virtue of that transfer, and any other reason that the continuation of the residual institution or entity referred to in point (b), (c) or (d) of Article 1(1) is necessary to achieve the resolution objectives or comply with the principles referred to in Article 34.

7 The resolution authority and any financing arrangement acting pursuant to Article 101 may recover any reasonable expenses properly incurred in connection with the use of the resolution tools or powers or government financial stabilisation tools in one or more of the following ways:

- a as a deduction from any consideration paid by a recipient to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;
- b from the institution under resolution, as a preferred creditor; or
- c from any proceeds generated as a result of the termination of the operation of the bridge institution or the asset management vehicle, as a preferred creditor.

8 Member States shall ensure that rules under national insolvency law relating to the voidability or unenforceability of legal acts detrimental to creditors do not apply to transfers of assets, rights or liabilities from an institution under resolution to another entity by virtue of the application of a resolution tool or exercise of a resolution power, or use of a government financial stabilisation tool.

9 Member States may confer upon resolution authorities additional tools and powers exercisable where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) meets the conditions for resolution, provided that:

- a when applied to a cross-border group, those additional powers do not pose obstacles to effective group resolution; and
- b they are consistent with the resolution objectives and the general principles governing resolution referred to in Articles 31 and 34.

10 In the very extraordinary situation of a systemic crisis, the resolution authority may seek funding from alternative financing sources through the use of government stabilisation tools provided for in Articles 56 to 58 when the following conditions are met:

- a a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise;
- b it shall be conditional on prior and final approval under the Union State aid framework.

## Section 2

### **The sale of business tool**

#### Article 38

### **The sale of business tool**

1 Member States shall ensure that resolution authorities have the power to transfer to a purchaser that is not a bridge institution:

- a shares or other instruments of ownership issued by an institution under resolution;
- b all or any assets, rights or liabilities of an institution under resolution;

Subject to paragraphs 8 and 9 of this Article and to Article 85, the transfer referred to in the first subparagraph shall take place without obtaining the consent of the shareholders of the institution under resolution or any third party other than the purchaser, and without complying with any procedural requirements under company or securities law other than those included in Article 39.

2 A transfer made pursuant to paragraph 1 shall be made on commercial terms, having regard to the circumstances, and in accordance with the Union State aid framework.

3 In accordance with paragraph 2 of this Article, resolution authorities shall take all reasonable steps to obtain commercial terms for the transfer that conform with the valuation conducted under Article 36, having regard to the circumstances of the case.

4 Subject to Article 37(7), any consideration paid by the purchaser shall benefit:

- a the owners of the shares or other instruments of ownership, where the sale of business has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the purchaser;
- b the institution under resolution, where the sale of business has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the purchaser.

5 When applying the sale of business tool the resolution authority may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

6 Following an application of the sale of business tool, resolution authorities may, with the consent of the purchaser, exercise the transfer powers in respect of assets, rights or liabilities transferred to the purchaser in order to transfer the assets, rights or liabilities back to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership.

7 A purchaser shall have the appropriate authorisation to carry out the business it acquires when the transfer is made pursuant to paragraph 1. Competent authorities shall ensure that an application for authorisation shall be considered, in conjunction with the transfer, in a timely manner.

8 By way of derogation from Articles 22 to 25 of Directive 2013/36/EU, from the requirement to inform the competent authorities in Article 26 of Directive 2013/36/EU, from

Article 10(3), Article 11(1) and (2) and Articles 12 and 13 of Directive 2014/65/EU and from the requirement to give a notice in Article 11(3) of that Directive, where a transfer of shares or other instruments of ownership by virtue of an application of the sale of business tool would result in the acquisition of or increase in a qualifying holding in an institution of a kind referred to in Article 22(1) of Directive 2013/36/EU or Article 11(1) of Directive 2014/65/EU, the competent authority of that institution shall carry out the assessment required under those Articles in a timely manner that does not delay the application of the sale of business tool and prevent the resolution action from achieving the relevant resolution objectives.

9 Member States shall ensure that if the competent authority of that institution has not completed the assessment referred to in paragraph 8 from the date of transfer of shares or other instruments of ownership in the application of the sale of business tool by the resolution authority, the following provisions shall apply:

- a such a transfer of shares or other instruments of ownership to the acquirer shall have immediate legal effect;
- b during the assessment period and during any divestment period provided by point (f), the acquirer's voting rights attached to such shares or other instruments of ownership shall be suspended and vested solely in the resolution authority, which shall have no obligation to exercise any such voting rights and which shall have no liability whatsoever for exercising or refraining from exercising any such voting rights;
- c during the assessment period and during any divestment period provided by point (f), the penalties and other measures for infringing the requirements for acquisitions or disposals of qualifying holdings contemplated by Articles 66, 67 and 68 of Directive 2013/36/EU shall not apply to such a transfer of shares or other instruments of ownership;
- d promptly upon completion of the assessment by the competent authority, the competent authority shall notify the resolution authority and the acquirer in writing of whether the competent authority approves or, in accordance with Article 22(5) of Directive 2013/36/EU, opposes such a transfer of shares or other instruments of ownership to the acquirer;
- e if the competent authority approves such a transfer of shares or other instruments of ownership to the acquirer, then the voting rights attached to such shares or other instruments of ownership shall be deemed to be fully vested in the acquirer immediately upon receipt by the resolution authority and the acquirer of such an approval notice from the competent authority;
- f if the competent authority opposes such a transfer of shares or other instruments of ownership to the acquirer, then:
  - (i) the voting rights attached to such shares or other instruments of ownership as provided by point (b) shall remain in full force and effect;
  - (ii) the resolution authority may require the acquirer to divest such shares or other instruments of ownership within a divestment period determined by the resolution authority having taken into account prevailing market conditions; and
  - (iii) if the acquirer does not complete such a divestment within the divestment period established by the resolution authority, then the competent authority, with the consent of the resolution authority, may impose on the acquirer penalties and other measures for infringing the requirements for acquisitions or disposals of qualifying holdings contemplated by Articles 66, 67, and 68 of Directive 2013/36/EU.

10 Transfers made by virtue of the sale of business tool shall be subject to the safeguards referred to in Chapter VII of Title IV.

11 For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2013/36/EU or Directive 2014/65/EU, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

12 Member States shall ensure that the purchaser referred to in paragraph 1 may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the institution under resolution, provided that it meets the membership and participation criteria for participation in such systems.

Notwithstanding the first subparagraph, Member States shall ensure that:

- a access is not denied on the ground that the purchaser does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in the first subparagraph;
- b where the purchaser does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in the first subparagraph are exercised for such a period of time as may be specified by the resolution authority, not exceeding 24 months, renewable on application by the purchaser to the resolution authority.

13 Without prejudice to Chapter VII of Title IV, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred shall not have any rights over or in relation to the assets, rights or liabilities transferred.

### *Article 39*

#### **Sale of business tool: procedural requirements**

1 Subject to paragraph 3 of this Article, when applying the sale of business tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), a resolution authority shall market, or make arrangements for the marketing of the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer. Pools of rights, assets, and liabilities may be marketed separately.

2 Without prejudice to the Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:

- a it shall be as transparent as possible and shall not materially misrepresent the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer, having regard to the circumstances and in particular the need to maintain financial stability;
- b it shall not unduly favour or discriminate between potential purchasers;
- c it shall be free from any conflict of interest;
- d it shall not confer any unfair advantage on a potential purchaser;
- e it shall take account of the need to effect a rapid resolution action;
- f it shall aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved.

Subject to point (b) of the first subparagraph, the principles referred to in this paragraph shall not prevent the resolution authority from soliciting particular potential purchasers.

Any public disclosure of the marketing of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that would otherwise be required in accordance with Article 17(1) of Regulation (EU) No 596/2014 may be delayed in accordance with Article 17(4) or (5) of that Regulation.

3 The resolution authority may apply the sale of business tool without complying with the requirement to market as laid down in paragraph 1 when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular if the following conditions are met:

- a it considers that there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution; and
- b it considers that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective referred to in point (b) of Article 31(2).

4 EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 specifying the factual circumstances amounting to a material threat and the elements relating to the effectiveness of the sale of business tool provided for in points (a) and (b) of paragraph 3.

### *Section 3*

#### ***The bridge institution tool***

##### *Article 40*

#### **Bridge institution tool**

1 In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution:

- a shares or other instruments of ownership issued by one or more institutions under resolution;
- b all or any assets, rights or liabilities of one or more institutions under resolution.

Subject to Article 85, the transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

2 The bridge institution shall be a legal person that meets all of the following requirements:

- a it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority;
- b it is created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to

maintaining access to critical functions and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1).

The application of the bail-in tool for the purpose referred to in point (b) of Article 43(2) shall not interfere with the ability of the resolution authority to control the bridge institution.

3 When applying the bridge institution tool, the resolution authority shall ensure that the total value of liabilities transferred to the bridge institution does not exceed the total value of the rights and assets transferred from the institution under resolution or provided by other sources.

4 Subject to Article 37(7), any consideration paid by the bridge institution shall benefit:

- a the owners of the shares or instruments of ownership, where the transfer to the bridge institution has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the bridge institution;
- b the institution under resolution, where the transfer to the bridge institution has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the bridge institution.

5 When applying the bridge institution tool, the resolution authority may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

6 Following an application of the bridge institution tool, the resolution authority may:

- a transfer rights, assets or liabilities back from the bridge institution to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership, provided that the conditions laid down in paragraph 7 are met;
- b transfer, shares or other instruments of ownership, or assets, rights or liabilities from the bridge institution to a third party.

7 Resolution authorities may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:

- a the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
- b the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership, assets, rights or liabilities specified in the instrument by which the transfer was made.

Such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

8 Transfers between the institution under resolution, or the original owners of shares or other instruments of ownership, on the one hand, and the bridge institution on the other, shall be subject to the safeguards referred to in Chapter VII of Title IV.

9 For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2013/36/EU or Directive 2014/65/EU, a bridge institution shall be considered to be a continuation of the institution under resolution, and

may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

For other purposes, resolution authorities may require that a bridge institution be considered to be a continuation of the institution under resolution, and be able to continue to exercise any right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

10 Member States shall ensure that the bridge institution may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the institution under resolution, provided that it meets the membership and participation criteria for participation in such systems.

Notwithstanding the first subparagraph, Member States shall ensure that:

- a access is not denied on the ground that the bridge institution does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in the first subparagraph;
- b where the bridge institution does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in the first subparagraph are exercised for such a period of time as may be specified by the resolution authority, not exceeding 24 months, renewable on application by the bridge institution to the resolution authority.

11 Without prejudice to Chapter VII of Title IV, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to the bridge institution shall not have any rights over or in relation to the assets, rights or liabilities transferred to the bridge institution, its management body or senior management.

12 The objectives of the bridge institution shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the management body or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct in accordance with national law which directly affects rights of such shareholders or creditors.

Member States may further limit the liability of a bridge institution and its management body or senior management in accordance with national law for acts and omissions in the discharge of their duties.

#### *Article 41*

### **Operation of a bridge institution**

1 Member States shall ensure that the operation of a bridge institution respects the following requirements:

- a the contents of the bridge institution's constitutional documents are approved by the resolution authority;
- b subject to the bridge institution's ownership structure, the resolution authority either appoints or approves the bridge institution's management body;
- c the resolution authority approves the remuneration of the members of the management body and determines their appropriate responsibilities;



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- d the resolution authority approves the strategy and risk profile of the bridge institution;
- e the bridge institution is authorised in accordance with Directive 2013/36/EU or Directive 2014/65/EU, as applicable, and has the necessary authorisation under the applicable national law to carry out the activities or services that it acquires by virtue of a transfer made pursuant to Article 63 of this Directive;
- f the bridge institution complies with the requirements of, and is subject to supervision in accordance with Regulation (EU) No 575/2013 and with Directives 2013/36/EU and Directive 2014/65/EU, as applicable;
- g the operation of the bridge institution shall be in accordance with the Union State aid framework and the resolution authority may specify restrictions on its operations accordingly.

Notwithstanding the provisions referred to in points (e) and (f) of the first subparagraph and where necessary to meet the resolution objectives, the bridge institution may be established and authorised without complying with Directive 2013/36/EU or Directive 2014/65/EU for a short period of time at the beginning of its operation. To that end, the resolution authority shall submit a request in that sense to the competent authority. If the competent authority decides to grant such an authorisation, it shall indicate the period for which the bridge institution is waived from complying with the requirements of those Directives.

2 Subject to any restrictions imposed in accordance with Union or national competition rules, the management of the bridge institution shall operate the bridge institution with a view to maintaining access to critical functions and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1), its assets, rights or liabilities, to one or more private sector purchasers when conditions are appropriate and within the period specified in paragraph 4 of this Article or, where applicable, paragraph 6 of this Article.

3 The resolution authority shall take a decision that the bridge institution is no longer a bridge institution within the meaning of Article 40(2) in any of the following cases, whichever occurs first:

- a the bridge institution merges with another entity;
- b the bridge institution ceases to meet the requirements of Article 40(2);
- c the sale of all or substantially all of the bridge institution's assets, rights or liabilities to a third party;
- d the expiry of the period specified in paragraph 5 or, where applicable, paragraph 6;
- e the bridge institution's assets are completely wound down and its liabilities are completely discharged.

4 Member States shall ensure, in cases when the resolution authority seeks to sell the bridge institution or its assets, rights or liabilities, that the bridge institution or the relevant assets or liabilities are marketed openly and transparently, and that the sale does not materially misrepresent them or unduly favour or discriminate between potential purchasers.

Any such sale shall be made on commercial terms, having regard to the circumstances and in accordance with the Union State aid framework.

5 If none of the outcomes referred to in points (a), (b), (c) and (e) of paragraph 3 applies, the resolution authority shall terminate the operation of a bridge institution as soon as possible and in any event two years after the date on which the last transfer from an institution under resolution pursuant to the bridge institution tool was made.

6 The resolution authority may extend the period referred to in paragraph 5 for one or more additional one-year periods where such an extension:

- a supports the outcomes referred to in point (a), (b), (c) or (e) of paragraph 3; or
- b is necessary to ensure the continuity of essential banking or financial services.

7 Any decision of the resolution authority to extend the period referred to in paragraph 5 shall be reasoned and shall contain a detailed assessment of the situation, including of the market conditions and outlook, that justifies the extension.

8 Where the operations of a bridge institution are terminated in the circumstances referred to in point (c) or (d) of paragraph 3, the bridge institution shall be wound up under normal insolvency proceedings.

Subject to Article 37(7), any proceeds generated as a result of the termination of the operation of the bridge institution shall benefit the shareholders of the bridge institution.

9 Where a bridge institution is used for the purpose of transferring assets and liabilities of more than one institution under resolution the obligation referred to in paragraph 8 shall refer to the assets and liabilities transferred from each of the institutions under resolution and not to the bridge institution itself.

#### *Section 4*

### ***The asset separation tool***

#### *Article 42*

### **Asset separation tool**

1 In order to give effect to the asset separation tool, Member States shall ensure that resolution authorities have the power to transfer assets, rights or liabilities of an institution under resolution or a bridge institution to one or more asset management vehicles.

Subject to Article 85, the transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

2 For the purposes of the asset separation tool, an asset management vehicle shall be a legal person that meets all of the following requirements:

- a it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority;
- b it has been created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution.

3 The asset management vehicle shall manage the assets transferred to it with a view to maximising their value through eventual sale or orderly wind down.

4 Member States shall ensure that the operation of an asset management vehicle respects the following provisions:

- a the contents of the asset management vehicle's constitutional documents are approved by the resolution authority;
- b subject to the asset management vehicle's ownership structure, the resolution authority either appoints or approves the vehicle's management body;

- c the resolution authority approves the remuneration of the members of the management body and determines their appropriate responsibilities;
- d the resolution authority approves the strategy and risk profile of the asset management vehicle.

5 Resolution authorities may exercise the power specified in paragraph 1 to transfer assets, rights or liabilities only if:

- a the situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on one or more financial markets.
- b such a transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution; or
- c such a transfer is necessary to maximise liquidation proceeds.

6 When applying the asset separation tool, resolution authorities shall determine the consideration for which assets, rights and liabilities are transferred to the asset management vehicle in accordance with the principles established in Article 36 and in accordance with the Union State aid framework. This paragraph does not prevent the consideration having nominal or negative value.

7 Subject to Article 37(7), any consideration paid by the asset management vehicle in respect of the assets, rights or liabilities acquired directly from the institution under resolution shall benefit the institution under resolution. Consideration may be paid in the form of debt issued by the asset management vehicle.

8 Where the bridge institution tool has been applied, an asset management vehicle may, subsequent to the application of the bridge institution tool, acquire assets, rights or liabilities from the bridge institution.

9 Resolution authorities may transfer assets, rights or liabilities from the institution under resolution to one or more asset management vehicles on more than one occasion and transfer assets, rights or liabilities back from one or more asset management vehicles to the institution under resolution provided that the conditions specified in paragraph 10 are met.

The institution under resolution shall be obliged to take back any such assets, rights or liabilities.

10 Resolution authorities may transfer rights, assets or liabilities back from the asset management vehicle to the institution under resolution in one of the following circumstances:

- a the possibility that the specific rights, assets or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
- b the specific rights, assets or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of, rights, assets or liabilities specified in the instrument by which the transfer was made.

In either of the cases referred in points (a) and (b), the transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

11 Transfers between the institution under resolution and the asset management vehicle shall be subject to the safeguards for partial property transfers specified in Chapter VII of Title IV.

12 Without prejudice to Chapter VII of Title IV shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to

the asset management vehicle shall not have any rights over or in relation to the assets, rights or liabilities transferred to the asset management vehicle or its management body or senior management.

13 The objectives of an asset management vehicle shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the management body or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct in accordance with national law which directly affects rights of such shareholders or creditors.

Member States may further limit the liability of an asset management vehicle and its management body or senior management in accordance with national law for acts and omissions in the discharge of their duties.

14 EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the convergence of supervisory and resolution practices regarding the determination when, in accordance to paragraph 5 of this Article the liquidation of the assets or liabilities under normal insolvency proceeding could have an adverse effect on one or more financial markets.

#### *Section 5*

#### ***The bail-in tool***

#### *Subsection 1*

#### ***Objective and scope of the bail-in tool***

#### *Article 43*

#### **The bail-in tool**

1 In order to give effect to the bail-in tool, Member States shall ensure that resolution authorities have the resolution powers specified in Article 63(1).

2 Member States shall ensure that resolution authorities may apply the bail-in tool to meet the resolution objectives specified in Article 31, in accordance with the resolution principles specified in Article 34 for any of the following purposes:

- a to recapitalise an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorisation (to the extent that those conditions apply to the entity) and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU, where the entity is authorised under those Directives, and to sustain sufficient market confidence in the institution or entity;
- b to convert to equity or reduce the principal amount of claims or debt instruments that are transferred:
  - (i) to a bridge institution with a view to providing capital for that bridge institution; or

- (ii) under the sale of business tool or the asset separation tool.

3 Member States shall ensure that resolution authorities may apply the bail-in tool for the purpose referred to in point (a) of paragraph 2 of this Article only if there is a reasonable prospect that the application of that tool together with other relevant measures including measures implemented in accordance with the business reorganisation plan required by Article 52 will, in addition to achieving relevant resolution objectives, restore the institution or entity referred to in point (b), (c) or (d) of Article 1(1) in question to financial soundness and long-term viability.

Member States shall ensure that resolution authorities may apply any of the resolution tools referred to in points (a), (b) and (c) of Article 37(3), and the bail-in tool referred to in point (b) of paragraph 2 of this Article, where the conditions laid down in the first subparagraph are not met.

4 Member States shall ensure that resolution authorities may apply the bail-in tool to all institutions or entities referred to in point (b), (c) or (d) of Article 1(1) while respecting in each case the legal form of the institution or entity concerned or may change the legal form.

#### *Article 44*

#### **Scope of bail-in tool**

1 Member States shall ensure that the bail-in tool may be applied to all liabilities of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are not excluded from the scope of that tool pursuant to paragraphs 2 or 3 of this Article.

2 Resolution authorities shall not exercise the write down or conversion powers in relation to the following liabilities whether they are governed by the law of a Member State or of a third country:

- a covered deposits;
- b secured liabilities including covered bonds and liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which according to national law are secured in a way similar to covered bonds;
- c any liability that arises by virtue of the holding by the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive of client assets or client money including client assets or client money held on behalf of UCITS as defined in Article 1(2) of Directive 2009/65/EC or of AIFs as defined in point (a) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council<sup>(1)</sup>, provided that such a client is protected under the applicable insolvency law;
- d any liability that arises by virtue of a fiduciary relationship between the institution or entity referred to in point (b), (c) or (d) of Article 1(1) (as fiduciary) and another person (as beneficiary) provided that such a beneficiary is protected under the applicable insolvency or civil law;
- e liabilities to institutions, excluding entities that are part of the same group, with an original maturity of less than seven days;
- f liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated according to Directive 98/26/EC or their participants and arising from the participation in such a system;
- g a liability to any one of the following:

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- (i) an employee, in relation to accrued salary, pension benefits or other fixed remuneration, except for the variable component of remuneration that is not regulated by a collective bargaining agreement;
- (ii) a commercial or trade creditor arising from the provision to the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of goods or services that are critical to the daily functioning of its operations, including IT services, utilities and the rental, servicing and upkeep of premises;
- (iii) tax and social security authorities, provided that those liabilities are preferred under the applicable law;
- (iv) deposit guarantee schemes arising from contributions due in accordance with Directive 2014/49/EU.

Point (g)(i) of the first subparagraph shall not apply to the variable component of the remuneration of material risk takers as identified in Article 92(2) of Directive 2013/36/EU.

Member States shall ensure that all secured assets relating to a covered bond cover pool remain unaffected, segregated and with enough funding. Neither that requirement nor point (b) of the first subparagraph shall prevent resolution authorities, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured.

Point (a) of the first subparagraph shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any amount of a deposit that exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU.

Without prejudice to the large exposure rules in Regulation (EU) No 575/2013 and Directive 2013/36/EU, Member States shall ensure that in order to provide for the resolvability of institutions and groups, resolution authorities limit, in accordance with point (b) of Article 17(5) of this Directive, the extent to which other institutions hold liabilities eligible for a bail-in tool, save for liabilities that are held at entities that are part of the same group.

3 In exceptional circumstances, where the bail-in tool is applied, the resolution authority may exclude or partially exclude certain liabilities from the application of the write-down or conversion powers where:

- a it is not possible to bail-in that liability within a reasonable time notwithstanding the good faith efforts of the resolution authority;
- b the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;
- c the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium sized enterprises, which would severely disrupt the functioning of financial markets, including of financial market infrastructures, in a manner that could cause a serious disturbance to the economy of a Member State or of the Union; or
- d the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in.

Where a resolution authority decides to exclude or partially exclude an eligible liability or class of eligible liabilities under this paragraph, the level of write down or conversion applied to other eligible liabilities may be increased to take account of such exclusions, provided that the level of write down and conversion applied to other eligible liabilities complies with the principle in point (g) of Article 34(1).

4 Where a resolution authority decides to exclude or partially exclude an eligible liability or class of eligible liabilities pursuant to this Article, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution to do one or both of the following:

- a cover any losses which have not been absorbed by eligible liabilities and restore the net asset value of the institution under resolution to zero in accordance with point (a) of Article 46(1);
- b purchase shares or other instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with point (b) of Article 46(1).

5 The resolution financing arrangement may make a contribution referred to in paragraph 4 only where:

- a a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise; and
- b the contribution of the resolution financing arrangement does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36.

6 The contribution of the resolution financing arrangement referred to in paragraph 4 may be financed by:

- a the amount available to the resolution financing arrangement which has been raised through contributions by institutions and Union branches in accordance with Article 100(6) and Article 103;
- b the amount that can be raised through *ex-post* contributions in accordance with Article 104 within three years; and
- c where the amounts referred to (a) and (b) of this paragraph are insufficient, amounts raised from alternative financing sources in accordance with Article 105.

7 In extraordinary circumstances, the resolution authority may seek further funding from alternative financing sources after:

- a the 5 % limit specified in paragraph 5(b) has been reached; and
- b all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full.

As an alternative or in addition, where the conditions laid down in the first subparagraph are met, the resolution financing arrangement may make a contribution from resources which have been raised through *ex-ante* contributions in accordance with Article 100(6) and Article 103 and which have not yet been used.

8 By way of derogation from paragraph 5 (a), the resolution financing arrangement may also make a contribution as referred to in paragraph 4 provided that:

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- a the contribution to loss absorption and recapitalisation referred to in point (a) of paragraph 5 is equal to an amount not less than 20 % of the risk weighted assets of the institution concerned;
- b the resolution financing arrangement of the Member State concerned has at its disposal, by way of *ex-ante* contributions (not including contributions to a deposit guarantee scheme) raised in accordance with Article 100(6) and Article 103, an amount which is at least equal to 3 % of covered deposits of all the credit institutions authorised in the territory of that Member State; and
- c the institution concerned has assets below EUR 900 billion on a consolidated basis.

9 When exercising the discretions under paragraph 3, resolution authorities shall give due consideration to:

- a the principle that losses should be borne first by shareholders and next, in general, by creditors of the institution under resolution in order of preference;
- b the level of loss absorbing capacity that would remain in the institution under resolution if the liability or class of liabilities were excluded; and
- c the need to maintain adequate resources for resolution financing.

10 Exclusions under paragraph 3 may be applied either to completely exclude a liability from write down or to limit the extent of the write down applied to that liability.

11 The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify further the circumstances when exclusion is necessary to achieve the objectives specified in paragraph 3 of this Article.

12 Before exercising the discretion to exclude a liability under paragraph 3, the resolution authority shall notify the Commission. Where the exclusion would require a contribution by the resolution financing arrangement or an alternative financing source under paragraphs 4 to 8, the Commission may, within 24 hours of receipt of such a notification, or a longer period with the agreement of the resolution authority, prohibit or require amendments to the proposed exclusion if the requirements of this Article and delegated acts are not met in order to protect the integrity of the internal market. This is without prejudice to the application by the Commission of the Union State aid framework.

### *Subsection 2*

#### ***Minimum requirement for own funds and eligible liabilities***

##### *Article 45*

#### **Application of the minimum requirement**

1 Member States shall ensure that institutions meet, at all times, a minimum requirement for own funds and eligible liabilities. The minimum requirement shall be calculated as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution.

For the purpose of the first subparagraph derivative liabilities shall be included in the total liabilities on the basis that full recognition is given to counterparty netting rights.

2 EBA shall draft technical regulatory standards which specify further the assessment criteria mentioned in points (a) to (f) of paragraph 6 on the basis of which, for each institution,



a minimum requirement for own funds and eligible liabilities, including subordinated debt and senior unsecured debt with at least 12 months remaining on their terms that are subject to the bail-in power and those that qualify as own funds, is to be determined.

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

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

Member States may provide for additional criteria on the basis of which the minimum requirement for own funds and eligible liabilities shall be determined.

3 Notwithstanding paragraph 1, resolution authorities shall exempt mortgage credit institutions financed by covered bonds which, according to national law are not allowed to receive deposits from the obligation to meet, at all times, a minimum requirement for own funds and eligible liabilities, as:

- a those institutions will be wound-up through national insolvency procedures, or other types of procedure implemented in accordance with Article 38, 40 or 42 of this Directive, provided for those institutions; and
- b such national insolvency procedures, or other types of procedure, will ensure that creditors of those institutions, including holders of covered bonds where relevant, will bear losses in a way that meets the resolution objectives.

4 Eligible liabilities shall be included in the amount of own funds and eligible liabilities referred to in paragraph 1 only if they satisfy the following conditions:

- a the instrument is issued and fully paid up;
- b the liability is not owed to, secured by or guaranteed by the institution itself;
- c the purchase of the instrument was not funded directly or indirectly by the institution;
- d the liability has a remaining maturity of at least one year;
- e the liability does not arise from a derivative;
- f the liability does not arise from a deposit which benefits from preference in the national insolvency hierarchy in accordance with Article 108.

For the purpose of point (d) where a liability confers upon its owner a right to early reimbursement, the maturity of that liability shall be the first date where such a right arises.

5 Where a liability is governed by the law of a third-country, resolution authorities may require the institution to demonstrate that any decision of a resolution authority to write down or convert that liability would be effective under the law of that third country, having regard to the terms of the contract governing the liability, international agreements on the recognition of resolution proceedings and other relevant matters. If the resolution authority is not satisfied that any decision would be effective under the law of that third country, the liability shall not be counted towards the minimum requirement for own funds and eligible liabilities.

6 The minimum requirement for own funds and eligible liabilities of each institution pursuant to paragraph 1 shall be determined by the resolution authority, after consulting the competent authority, at least on the basis of the following criteria:

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

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- b the need to ensure, in appropriate cases, that the institution has sufficient eligible liabilities to ensure that, if the bail-in tool were to be applied, losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU and to sustain sufficient market confidence in the institution or entity;
- c the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in under Article 44(3) or that certain classes of eligible liabilities might be transferred to a recipient in full under a partial transfer, that the institution has sufficient other eligible liabilities to ensure that losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;
- d the size, the business model, the funding model and the risk profile of the institution;
- e the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with Article 109;
- f the extent to which the failure of the institution would have adverse effects on financial stability, including, due to its interconnectedness with other institutions or with the rest of the financial system through contagion to other institutions.

7 Institutions shall comply with the minimum requirements laid down in this Article on an individual basis.

A resolution authority may, after consulting a competent authority, decide to apply the minimum requirement laid down in this Article to an entity referred to in point (b), (c) or (d) of Article 1(1).

8 In addition to paragraph 7, Union parent undertakings shall comply with the minimum requirements laid down in this Article on a consolidated basis.

The minimum requirement for own funds and eligible liabilities at consolidated level of an Union parent undertaking shall be determined by the group-level resolution authority, after consulting the consolidating supervisor, in accordance with paragraph 9, at least on the basis of the criteria laid down in paragraph 6 and of whether the third-country subsidiaries of the group are to be resolved separately according to the resolution plan.

9 The group-level resolution authority and the resolution authorities responsible for the subsidiaries on an individual basis shall do everything within their power to reach a joint decision on the level of the minimum requirement applied at the consolidated level.

The joint decision shall be fully reasoned and shall be provided to the Union parent undertaking by the group-level resolution authority.

In the absence of such a joint decision within four months, a decision shall be taken on the consolidated minimum requirement by the group-level resolution authority after duly taking into consideration the assessment of subsidiaries performed by the relevant resolution authorities. If, at the end of the four-month period, any of the resolution authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the group-level resolution authority shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning

of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the group-level resolution authority shall apply.

The joint decision and the decision taken by the group-level resolution authority in the absence of a joint decision shall be binding on the resolution authorities in the Member States concerned.

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

10 Resolution authorities shall set the minimum requirement to be applied to the group's subsidiaries on an individual basis. Those minimum requirements shall be set at a level appropriate for the subsidiary having regard to:

- a the criteria listed in paragraph 6, in particular the size, business model and risk profile of the subsidiary, including its own funds; and
- b the consolidated requirement that has been set for the group under paragraph 9.

The group-level resolution authority and the resolution authorities responsible for subsidiaries on an individual basis shall do everything within their power to reach a joint decision on the level of the minimum requirement to be applied to each respective subsidiary at an individual level.

The joint decision shall be fully reasoned and shall be provided to the subsidiaries and to the Union parent institution by the resolution authority of the subsidiaries and by the group-level resolution authority, respectively.

In the absence of such a joint decision between the resolution authorities within a period of four months the decision shall be taken by the respective resolution authorities of the subsidiaries duly considering the views and reservations expressed by the group-level resolution authority.

If, at the end of the four-month period, the group-level resolution authority has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authorities responsible for the subsidiaries on an individual basis shall defer their decisions and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take their decisions in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. The group-level resolution authority shall not refer the matter to EBA for binding mediation where the level set by the resolution authority of the subsidiary is within one percentage point of the consolidated level set under paragraph 9 of this Article.

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

The joint decision and any decisions taken by the resolution authorities of the subsidiaries in the absence of a joint decision shall be binding on the resolution authorities concerned.

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

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11 The group-level resolution authority may fully waive the application of the individual minimum requirement to an Union parent institution where:

- a the Union parent institution complies on a consolidated basis with the minimum requirement set under paragraph 8; and
- b the competent authority of the Union parent institution has fully waived the application of individual capital requirements to the institution in accordance with Article 7(3) of Regulation (EU) No 575/2013.

12 The resolution authority of a subsidiary may fully waive the application of paragraph 7 to that subsidiary where:

- a both the subsidiary and its parent undertaking are subject to authorisation and supervision by the same Member State;
- b the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking;
- c the highest level group institution in the Member State of the subsidiary, where different to the Union parent institution, complies on a sub-consolidated basis with the minimum requirement set under paragraph 7;
- d there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the subsidiary by its parent undertaking;
- e either the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;
- f the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;
- g the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary; and
- h the competent authority of the subsidiary has fully waived the application of individual capital requirements to the subsidiary under Article 7(1) of Regulation (EU) No 575/2013.

13 The decisions taken in accordance with this Article may provide that the minimum requirement for own funds and eligible liabilities is partially met at consolidated or individual level through contractual bail-in instruments.

14 To qualify as a contractual bail-in instrument under paragraph 13, the resolution authority shall be satisfied that the instrument:

- a contains a contractual term providing that, where a resolution authority decides to apply the bail-in tool to that institution, the instrument shall be written down or converted to the extent required before other eligible liabilities are written down or converted; and
- b is subject to a binding subordination agreement, undertaking or provision under which in the event of normal insolvency proceedings, it ranks below other eligible liabilities and cannot be repaid until other eligible liabilities outstanding at the time have been settled.

15 Resolution authorities, in coordination with competent authorities, shall require and verify that institutions meet the minimum requirement for own funds and eligible liabilities laid down in paragraph 1 and where relevant the requirement laid down in paragraph 13, and shall take any decision pursuant to this Article in parallel with the development and the maintenance of resolution plans.

16 Resolution authorities, in coordination with competent authorities, shall inform EBA of the minimum requirement for own funds and eligible liabilities, and where relevant the requirement laid down in paragraph 13, that have been set for each institution under their jurisdiction.

17 EBA shall develop draft implementing technical standards to specify uniform formats, templates and definitions for the identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 16.

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

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

18 Based on the results of the report referred to in paragraph 19, the Commission shall, if appropriate, submit by 31 December 2016 to the European Parliament and the Council a legislative proposal on the harmonised application of the minimum requirement for own funds and eligible liabilities. That proposal shall include, where appropriate, proposals for the introduction of an appropriate number of minimum levels of the minimum requirement, taking account of the different business models of institutions and groups. The proposal shall include any appropriate adjustments to the parameters of the minimum requirement, and if necessary, appropriate amendments to the application of the minimum requirement to groups.

19 EBA shall submit a report to the Commission by 31 October 2016 on at least the following:

- a how the minimum requirement for own funds and eligible liabilities has been implemented at national level, and in particular whether there have been divergences in the levels set for comparable institutions across Member States;
- b how the power to require institutions to meet the minimum requirement through contractual bail-in instruments has been applied across Member States and whether there have been divergences in those approaches;
- c the identification of business models that reflect the overall risk profiles of the institution;
- d the appropriate level of the minimum requirement for each of the business models identified under point (c);
- e whether a range for the level of the minimum requirement of each business model should be established;
- f the appropriate transitional period for institutions to achieve compliance with any harmonised minimum levels prescribed;
- g whether the requirements laid down in Article 45 are sufficient to ensure that each institution has adequate loss-absorbing capacity and, if not, which further enhancements are needed in order to ensure that objective;
- h whether changes to the calculation methodology provided for in this Article are necessary to ensure that the minimum requirement can be used as an appropriate indicator of an institution's loss-absorbing capacity;
- i whether it is appropriate to base the requirement on total liabilities and own funds and in particular whether it is more appropriate to use the institution's risk-weighted assets as a denominator for the requirement;
- j whether the approach of this Article on the application of the minimum requirement to groups is appropriate, and in particular whether the approach adequately ensures that

- loss absorbing capacity in the group is located in, or accessible to, the entities where losses might arise;
- k whether the conditions for waivers from the minimum requirement are appropriate, and in particular whether such waivers should be available for subsidiaries on a cross-border basis;
  - l whether it is appropriate that resolution authorities may require that the minimum requirement be met through contractual bail-in instruments, and whether further harmonisation of the approach to contractual bail-in instruments is appropriate;
  - m whether the requirements for contractual bail-in instruments laid down in paragraph 14 are appropriate; and
  - n whether it is appropriate for institutions and groups to be required to disclose their minimum requirement for own funds and eligible liabilities, or their level of own funds and eligible liabilities, and if so the frequency and format of such disclosure.
- 20 The report in paragraph 19 shall cover at least the period from 2 July 2014 until 30 June 2016 and shall take account of at least the following:
- a the impact of the minimum requirement, and any proposed harmonised levels of the minimum requirement on:
    - (i) financial markets in general and markets for unsecured debt and derivatives in particular;
    - (ii) business models and balance sheet structures of institutions, in particular the funding profile and funding strategy of institutions, and the legal and operational structure of groups;
    - (iii) the profitability of institutions, in particular their cost of funding;
    - (iv) the migration of exposures to entities which are not subject to prudential supervision;
    - (v) financial innovation;
    - (vi) the prevalence of contractual bail-in instruments, and the nature and marketability of such instruments;
    - (vii) the risk-taking behaviour of institutions;
    - (viii) the level of asset encumbrance of institutions;
    - (ix) the actions taken by institutions to comply with minimum requirements, and in particular the extent to which minimum requirements have been met by asset deleveraging, long-term debt issuance and capital raising; and
    - (x) the level of lending by credit institutions, with a particular focus on lending to micro, small and medium-sized enterprises, local authorities, regional governments and public sector entities and on trade financing, including lending under official export credit insurance schemes;
  - b the interaction of the minimum requirements with the own funds requirements, leverage ratio and the liquidity requirements laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU;
  - c the capacity of institutions to independently raise capital or funding from markets in order to meet any proposed harmonised minimum requirements;
  - d consistency with the minimum requirements relating to any international standards developed by international fora.

### *Subsection 3*

#### **Implementation of the bail-in tool**

##### *Article 46*

#### **Assessment of amount of bail-in**

1 Member States shall ensure that, when applying the bail-in tool, resolution authorities assess on the basis of a valuation that complies with Article 36 the aggregate of:

- a where relevant, the amount by which eligible liabilities must be written down in order to ensure that the net asset value of the institution under resolution is equal to zero; and
- b where relevant, the amount by which eligible liabilities must be converted into shares or other types of capital instruments in order to restore the Common Equity Tier 1 capital ratio of either:
  - (i) the institution under resolution; or
  - (ii) the bridge institution.

2 The assessment referred to in paragraph 1 of this Article shall establish the amount by which eligible liabilities need to be written down or converted in order to restore the Common Equity Tier 1 capital ratio of the institution under resolution or where applicable establish the ratio of the bridge institution taking into account any contribution of capital by the resolution financing arrangement pursuant to point (d) of Article 101(1) of this Directive, and to sustain sufficient market confidence in the institution under resolution or the bridge institution and enable it to continue to meet, for at least one year, the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU.

Where resolution authorities intend to use the asset separation tool referred to in Article 42, the amount by which eligible liabilities need to be reduced shall take into account a prudent estimate of the capital needs of the asset management vehicle as appropriate.

3 Where capital has been written down in accordance with Articles 59 to 62 and bail-in has been applied pursuant to Article 43(2) and the level of write-down based on the preliminary valuation according to Article 36 is found to exceed requirements when assessed against the definitive valuation according to Article 36(10), a write-up mechanism may be applied to reimburse creditors and then shareholders to the extent necessary.

4 Resolution authorities shall establish and maintain arrangements to ensure that the assessment and valuation is based on information about the assets and liabilities of the institution under resolution that is as up to date and comprehensive as is reasonably possible.

##### *Article 47*

#### **Treatment of shareholders in bail-in or write down or conversion of capital instruments**

1 Member States shall ensure that, when applying the bail-in tool in Article 43(2) or the write down or conversion of capital instruments in Article 59, resolution authorities take in respect of shareholders and holders of other instruments of ownership one or both of the following actions:

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- a cancel existing shares or other instruments of ownership or transfer them to bailed-in creditors;
- b provided that, in accordance to the valuation carried out under Article 36, the institution under resolution has a positive net value, dilute existing shareholders and holders of other instruments of ownership as a result of the conversion into shares or other instruments of ownership of:
  - (i) relevant capital instruments issued by the institution pursuant to the power referred to in Article 59(2); or
  - (ii) eligible liabilities issued by the institution under resolution pursuant to the power referred to in point (f) of Article 63(1).

With regard to point (b) of the first subparagraph, the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares or other instruments of ownership.

2 The actions referred to in paragraph 1 shall also be taken in respect of shareholders and holders of other instruments of ownership where the shares or other instruments of ownership in question were issued or conferred in the following circumstances:

- a pursuant to conversion of debt instruments to shares or other instruments of ownership in accordance with contractual terms of the original debt instruments on the occurrence of an event that preceded or occurred at the same time as the assessment by the resolution authority that the institution or entity referred to in point (b), (c) or (d) of Article 1(1) met the conditions for resolution;
- b pursuant to the conversion of relevant capital instruments to Common Equity Tier 1 instruments pursuant to Article 60.

3 When considering which action to take in accordance with paragraph 1, resolution authorities shall have regard to:

- a the valuation carried out in accordance with Article 36;
- b the amount by which the resolution authority has assessed that Common Equity Tier 1 items must be reduced and relevant capital instruments must be written down or converted pursuant to Article 60(1); and
- c the aggregate amount assessed by the resolution authority pursuant to Article 46.

4 By way of derogation from Articles 22 to 25 of Directive 2013/36/EU, the requirement to give a notice in Article 26 of Directive 2013/36/EU, Article 10(3), Article 11(1) and(2) and Articles 12 and 13 of Directive 2014/65/EU and the requirement to give a notice in Article 11(3) of Directive 2014/65/EU, where the application of the bail-in tool or the conversion of capital instruments would result in the acquisition of or increase in a qualifying holding in an institution as referred to in Article 22(1) of Directive 2013/36/EU or Article 11(1) of Directive 2014/65/EU, competent authorities shall carry out the assessment required under those Articles in a timely manner that does not delay the application of the bail-in tool or the conversion of capital instruments, or prevent resolution action from achieving the relevant resolution objectives.

5 If the competent authority of that institution has not completed the assessment required under paragraph 4 on the date of application of the bail-in tool or the conversion of capital instruments, Article 38(9) shall apply to any acquisition of or increase in a qualifying holding by an acquirer resulting from the application of the bail-in tool or the conversion of capital instruments.

6 EBA shall, by 3 July 2016, issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on the circumstances in which each of the actions referred to



in paragraph 1 of this Article would be appropriate, having regard to the factors specified in paragraph 3 of this Article.

## Article 48

### Sequence of write down and conversion

1 Member States shall ensure that, when applying the bail-in tool, resolution authorities exercise the write down and conversion powers, subject to any exclusions under Article 44(2) and (3), meeting the following requirements:

- a Common Equity Tier 1 items are reduced in accordance with point (a) of Article 60(1);
- b if, and only if, the total reduction pursuant to point (a) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce the principal amount of Additional Tier 1 instruments to the extent required and to the extent of their capacity;
- c if, and only if, the total reduction pursuant to points (a) and (b) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce the principal amount of Tier 2 instruments to the extent required and to the extent of their capacity;
- d if, and only if, the total reduction of shares or other instruments of ownership and relevant capital instruments pursuant to points (a), (b) and (c) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce to the extent required the principal amount of subordinated debt that is not Additional Tier 1 or Tier 2 capital in accordance with the hierarchy of claims in normal insolvency proceedings, in conjunction with the write down pursuant to points (a), (b) and (c) to produce the sum of the amounts referred to in points (b) and (c) of Article 47(3);
- e if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and eligible liabilities pursuant to points (a) to (d) of this paragraph is less than the sum of the amounts referred to in points (b) and (d) of Article 47(3), authorities reduce to the extent required the principal amount of, or outstanding amount payable in respect of, the rest of eligible liabilities in accordance with the hierarchy of claims in normal insolvency proceedings, including the ranking of deposits provided for in Article 108, pursuant to Article 44, in conjunction with the write down pursuant to points (a), (b), (c) and (d) of this paragraph to produce the sum of the amounts referred to in points (b) and (c) of Article 47(3).

2 When applying the write down or conversion powers, resolution authorities shall allocate the losses represented by the sum of the amounts referred to in points (b) and (c) of Article 47(3) equally between shares or other instruments of ownership and eligible liabilities of the same rank by reducing the principal amount of, or outstanding amount payable in respect of, those shares or other instruments of ownership and eligible liabilities to the same extent pro rata to their value except where a different allocation of losses amongst liabilities of the same rank is allowed in the circumstances specified in Article 44(3).

This paragraph shall not prevent liabilities which have been excluded from bail-in in accordance with Article 44(2) and (3) from receiving more favourable treatment than eligible liabilities which are of the same rank in normal insolvency proceedings.

3 Before applying the write down or conversion referred to in point (e) of paragraph 1, resolution authorities shall convert or reduce the principal amount on instruments referred to in points (b), (c) and (d) of paragraph 1 when those instruments contain the following terms and have not already been converted:

- a terms that provide for the principal amount of the instrument to be reduced on the occurrence of any event that refers to the financial situation, solvency or levels of own funds of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- b terms that provide for the conversion of the instruments to shares or other instruments of ownership on the occurrence of any such event.

4 Where the principal amount of an instrument has been reduced, but not to zero, in accordance with terms of the kind referred to in point (a) of paragraph 3 before the application of the bail-in pursuant to paragraph 1, resolution authorities shall apply the write-down and conversion powers to the residual amount of that principal in accordance with paragraph 1.

5 When deciding on whether liabilities are to be written down or converted into equity, resolution authorities shall not convert one class of liabilities, while a class of liabilities that is subordinated to that class remains substantially unconverted into equity or not written down, unless otherwise permitted under Article 44(2) and (3).

6 For the purposes of this Article, EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 for any interpretation relating to the interrelationship between the provisions of this Directive and those of Regulation (EU) No 575/2013 and Directive 2013/36/EU.

#### *Article 49*

### **Derivatives**

1 Member States shall ensure that this Article is complied with when resolution authorities apply the write-down and conversion powers to liabilities arising from derivatives.

2 Resolution authorities shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the derivatives. Upon entry into resolution, resolution authorities shall be empowered to terminate and close out any derivative contract for that purpose.

Where a derivative liability has been excluded from the application of the bail-in tool under Article 44(3), resolution authorities shall not be obliged to terminate or close out the derivative contract.

3 Where derivative transactions are subject to a netting agreement, the resolution authority or an independent valuer shall determine as part of the valuation under Article 36 the liability arising from those transactions on a net basis in accordance with the terms of the agreement.

4 Resolution authorities shall determine the value of liabilities arising from derivatives in accordance with the following:

- a appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;
- b principles for establishing the relevant point in time at which the value of a derivative position should be established; and
- c appropriate methodologies for comparing the destruction in value that would arise from the close out and bail-in of derivatives with the amount of losses that would be borne by derivatives in a bail-in.

5 EBA, after consulting the European Supervisory Authority (European Securities and Markets Authority) ('ESMA'), established by Regulation (EU) No 1095/2010, shall develop

draft regulatory technical standards specifying methodologies and the principles referred to in points (a), (b) and (c) of paragraph 4 on the valuation of liabilities arising from derivatives.

In relation to derivative transactions that are subject to a netting agreement, EBA shall take into account the methodology for close-out set out in the netting agreement.

EBA shall submit those draft regulatory technical standards to the Commission by 3 January 2016.

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

#### *Article 50*

##### **Rate of conversion of debt to equity**

1 Member States shall ensure that, when resolution authorities exercise the powers specified in Article 59(3) and point (f) of Article 63(1), they may apply a different conversion rate to different classes of capital instruments and liabilities in accordance with one or both of the principles referred to in paragraphs 2 and 3 of this Article.

2 The conversion rate shall represent appropriate compensation to the affected creditor for any loss incurred by virtue of the exercise of the write down and conversion powers.

3 When different conversion rates are applied according to paragraph 1, the conversion rate applicable to liabilities that are considered to be senior under applicable insolvency law shall be higher than the conversion rate applicable to subordinated liabilities.

4 EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on the setting of conversion rates.

Those guidelines shall indicate, in particular, how affected creditors may be appropriately compensated by means of the conversion rate, and the relative conversion rates that might be appropriate to reflect the priority of senior liabilities under applicable insolvency law.

#### *Article 51*

##### **Recovery and reorganisation measures to accompany bail-in**

1 Member States shall ensure that, where resolution authorities apply the bail-in tool to recapitalise an institution or entity referred to in point (b), (c) or (d) of Article 1(1) in accordance with point (a) of Article 43(2), arrangements are adopted to ensure that a business reorganisation plan for that institution or entity is drawn up and implemented in accordance with Article 52.

2 The arrangements referred to in paragraph 1 of this Article may include the appointment by the resolution authority of a person or persons appointed in accordance with Article 72(1) with the objective of drawing up and implementing the business reorganisation plan required by Article 52.

## Article 52

### **Business reorganisation plan**

1 Member States shall require that, within one month after the application of the bail-in tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1) in accordance with point (a) of Article 43(2), the management body or the person or persons appointed in accordance with Article 72(1) shall draw up and submit to the resolution authority, a business reorganisation plan that satisfies the requirements of paragraphs 4 and 5 of this Article. Where the Union State aid framework is applicable, Member States shall ensure that such a plan is compatible with the restructuring plan that the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is required to submit to the Commission under that framework.

2 When the bail-in tool in point (a) of Article 43(2) is applied to two or more group entities, the business reorganisation plan shall be prepared by the Union parent institution and cover all of the institutions in the group in accordance with the procedure specified in Articles 7 and 8 and shall be submitted to the group-level resolution authority. The group-level resolution authority shall communicate the plan to other resolution authorities concerned and to EBA.

3 In exceptional circumstances, and if it is necessary for achieving the resolution objectives, the resolution authority may extend the period in paragraph 1 up to a maximum of two months since the application of the bail-in tool.

Where the business reorganisation plan is required to be notified within the Union State aid framework, the resolution authority may extend the period in paragraph 1 up to a maximum of two months since the application of the bail-in tool or until the deadline laid down by the Union State aid framework, whichever occurs earlier.

4 A business reorganisation plan shall set out measures aiming to restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) or parts of its business within a reasonable timescale. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the institution or entity referred to in point (b), (c) or (d) of Article 1(1) will operate.

The business reorganisation plan shall take account, *inter alia*, of the current state and future prospects of the financial markets, reflecting best-case and worst-case assumptions, including a combination of events allowing the identification of the institution's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.

5 A business reorganisation plan shall include at least the following elements:

- a a detailed diagnosis of the factors and problems that caused the institution or entity referred to in point (b), (c) or (d) of Article 1(1) to fail or to be likely to fail, and the circumstances that led to its difficulties;
- b a description of the measures aiming to restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are to be adopted;
- c a timetable for the implementation of those measures.

6 Measures aiming to restore the long-term viability of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) may include:

- a the reorganisation of the activities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- b changes to the operational systems and infrastructure within the institution;

- c the withdrawal from loss-making activities;
- d the restructuring of existing activities that can be made competitive;
- e the sale of assets or of business lines.

7 Within one month of the date of submission of the business reorganisation plan, the relevant resolution authority shall assess the likelihood that the plan, if implemented, will restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1). The assessment shall be completed in agreement with the relevant competent authority.

If the resolution authority and the competent authority are satisfied that the plan would achieve that objective, the resolution authority shall approve the plan.

8 If the resolution authority is not satisfied that the plan would achieve the objective referred to in paragraph 7, the resolution authority, in agreement with the competent authority, shall notify the management body or the person or persons appointed in accordance with Article 72(1) of its concerns and require the amendment of the plan in a way that addresses those concerns.

9 Within two weeks from the date of receipt of the notification referred to in paragraph 8, the management body or the person or persons appointed in accordance with Article 72(1) shall submit an amended plan to the resolution authority for approval. The resolution authority shall assess the amended plan, and shall notify the management body or the person or persons appointed in accordance with Article 72(1) within one week whether it is satisfied that the plan, as amended, addresses the concerns notified or whether further amendment is required.

10 The management body or the person or persons appointed in accordance with Article 72(1) shall implement the reorganisation plan as agreed by the resolution authority and competent authority, and shall submit a report to the resolution authority at least every six months on progress in the implementation of the plan.

11 The management body or the person or persons appointed in accordance with Article 72(1) shall revise the plan if, in the opinion of the resolution authority with the agreement of the competent authority, it is necessary to achieve the aim referred to in paragraph 4, and shall submit any such revision to the resolution authority for approval.

- 12 EBA shall develop draft regulatory technical standards to specify further:
- a the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 5; and
  - b the minimum contents of the reports pursuant to paragraph 10.

EBA shall submit those draft regulatory technical standards to the Commission by 3 January 2016.

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

13 EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 7.

14 Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 13, EBA may develop draft regulatory technical standards in order to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 7.

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

#### *Subsection 4*

#### ***Bail-in tool: ancillary provisions***

#### *Article 53*

#### **Effect of bail-in**

1 Member States shall ensure that where a resolution authority exercises a power referred to in Article 59(2) and in points (e) to (i) of Article 63(1), the reduction of principal or outstanding amount due, conversion or cancellation takes effect and is immediately binding on the institution under resolution and affected creditors and shareholders.

2 Member States shall ensure that the resolution authority shall have the power to complete or require the completion of all the administrative and procedural tasks necessary to give effect to the exercise of a power referred to in Article 59(2) and in points (e) to (i) of Article 63(1), including:

- a the amendment of all relevant registers;
- b the delisting or removal from trading of shares or other instruments of ownership or debt instruments;
- c the listing or admission to trading of new shares or other instruments of ownership;
- d the relisting or readmission of any debt instruments which have been written down, without the requirement for the issuing of a prospectus pursuant to Directive 2003/71/EC of the European Parliament and of the Council<sup>(2)</sup>.

3 Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1), that liability and any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised shall be treated as discharged for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor entity in any subsequent winding up.

4 Where a resolution authority reduces in part, but not in full, the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1):

- a the liability shall be discharged to the extent of the amount reduced;
- b the relevant instrument or agreement that created the original liability shall continue to apply in relation to the residual principal amount of, or outstanding amount payable in respect of the liability, subject to any modification of the amount of interest payable to reflect the reduction of the principal amount, and any further modification of the terms that the resolution authority might make by means of the power referred to in point (j) of Article 63(1).

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## Article 54

### Removal of procedural impediments to bail-in

1 Without prejudice to point (i) of Article 63(1), Member States shall, where applicable, require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to maintain at all times a sufficient amount of authorised share capital or of other Common Equity Tier 1 instruments, so that, in the event that the resolution authority exercises the powers referred to in points (e) and (f) of Article 63(1) in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or any of its subsidiaries, the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is not prevented from issuing sufficient new shares or other instruments of ownership to ensure that the conversion of liabilities into shares or other instruments of ownership could be carried out effectively.

2 Resolution authorities shall assess whether it is appropriate to impose the requirement laid down in paragraph 1 in the case of a particular institution or entity referred to in point (b), (c) or (d) of Article 1(1) in the context of the development and maintenance of the resolution plan for that institution or group, having regard, in particular, to the resolution actions contemplated in that plan. If the resolution plan provides for the possible application of the bail-in tool, authorities shall verify that the authorised share capital or other Common Equity Tier 1 instruments is sufficient to cover the sum of the amounts referred to in points (b) and (c) of Article 47(3).

3 Member States shall ensure that there are no procedural impediments to the conversion of liabilities to shares or other instruments of ownership existing by virtue of their instruments of incorporation or statutes, including pre-emption rights for shareholders or requirements for the consent of shareholders to an increase in capital.

4 This Article is without prejudice to the amendments to Directives 82/891/EEC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU and Directive 2012/30/EU set out in Title X of this Directive.

## Article 55

### Contractual recognition of bail-in

1 Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that such liability is:

- a not excluded under Article 44(2);
- b not a deposit referred to in point (a) of Article 108;
- c governed by the law of a third country; and
- d issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.

The first subparagraph shall not apply where the resolution authority of a Member State determines that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member

State pursuant to the law of the third country or to a binding agreement concluded with that third country.

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

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

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

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

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

#### *Article 56*

#### **Government financial stabilisation tools**

1 Member States may provide extraordinary public financial support through additional financial stabilisation tools in accordance with paragraph 3 of this Article, Article 37(10) and with Union State aid framework, for the purpose of participating in the resolution of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), including by intervening directly in order to avoid its winding up, with a view to meeting the objectives for resolution referred to in Article 31(2) in relation to the Member State or the Union as a whole. Such an action shall be carried out under the leadership of the competent ministry or the government in close cooperation with the resolution authority.

2 In order to give effect to the government financial stabilisation tools, Member States shall ensure that their competent ministries or governments have the relevant resolution powers specified in Articles 63 to 72, and shall ensure that Articles 66, 68, 83 and 117 apply.

3 The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability, as determined by the competent ministry or the government after consulting the resolution authority.

4 When applying the government financial stabilisation tools, Member States shall ensure that their competent ministries or governments and the resolution authority apply the tools only if all the conditions laid down in Article 32(1) as well as one of the following conditions are met:

- a the competent ministry or government and the resolution authority, after consulting the central bank and the competent authority, determine that the application of the resolution tools would not suffice to avoid a significant adverse effect on the financial system;
- b the competent ministry or government and the resolution authority determine that the application of the resolution tools would not suffice to protect the public interest, where



- extraordinary liquidity assistance from the central bank has previously been given to the institution;
- c in respect of the temporary public ownership tool, the competent ministry or government, after consulting the competent authority and the resolution authority, determines that the application of the resolution tools would not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the institution.
- 5 The financial stabilisation tools shall consist of the following:
- a public equity support tool as referred to in Article 57;
  - b temporary public ownership tool as referred to in Article 58.

#### *Article 57*

### **Public equity support tool**

1 Member States may, while complying with national company law, participate in the recapitalisation of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive by providing capital to the latter in exchange for the following instruments, subject to the requirements of Regulation (EU) No 575/2013:

- a Common Equity Tier 1 instruments;
- b Additional Tier 1 instruments or Tier 2 instruments.

2 Member States shall ensure, to the extent that their shareholding in an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) permits, that such institutions or entities subject to public equity support tool in accordance with this Article are managed on a commercial and professional basis.

3 Where a Member State provides public equity support tool in accordance with this Article, it shall ensure that its holding in the institution or an entity referred to in point (b), (c) or (d) of Article 1(1) is transferred to the private sector as soon as commercial and financial circumstances allow.

#### *Article 58*

### **Temporary public ownership tool**

1 Member States may take an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) into temporary public ownership.

2 For that purpose a Member State may make one or more share transfer orders in which the transferee is:

- a a nominee of the Member State; or
- b a company wholly owned by the Member State.

3 Member States shall ensure that institutions or entities referred to in point (b), (c) or (d) of Article 1(1) subject to the temporary public ownership tool in accordance with this Article are managed on a commercial and professional basis and that they are transferred to the private sector as soon as commercial and financial circumstances allow.

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- (1) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 ([OJ L 174, 1.7.2011, p. 1](#)).
- (2) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC ([OJ L 345, 31.12.2003, p. 64](#)).