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 I

Objectives, conditions and general principles

Article 31

Resolution objectives

1 When applying the resolution tools and exercising the resolution powers, resolution authorities shall have regard to the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.

2 The resolution objectives referred to in paragraph 1 are:

a to ensure the continuity of critical functions;

b to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

c to protect public funds by minimising reliance on extraordinary public financial support;

d to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC;

e to protect client funds and client assets.

When pursuing the above objectives, the resolution authority shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

3 Subject to different provisions of this Directive, the resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.

Article 32

Conditions for resolution

1 Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in point (a) of Article 1(1) only if the resolution authority considers that all of the following conditions are met:

a the determination that the institution is failing or is likely to fail has been made by the competent authority, after consulting the resolution authority or,; subject to the conditions laid down in paragraph 2, by the resolution authority after consulting the competent authority;

[F1b having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;**]**

c a resolution action is necessary in the public interest pursuant to paragraph 5.

2 Member States may provide that, in addition to the competent authority, the determination that the institution is failing or likely to fail under point (a) of paragraph 1 can be made by the resolution authority, after consulting the competent authority, where resolution authorities under national law have the necessary tools for making such a determination including, in particular, adequate access to the relevant information. The competent authority shall provide the resolution authority with any relevant information that the latter requests in order to perform its assessment without delay.

3 The previous adoption of an early intervention measure according to Article 27 is not a condition for taking a resolution action.

4 For the purposes of point (a) of paragraph 1, an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

a the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

b the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;

c the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;

d extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms:

(i) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions;

(ii) a State guarantee of newly issued liabilities; or

(iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution, where neither the circumstances referred to in point (a), (b) or (c) of this paragraph nor the circumstances referred to in Article 59(3) are present at the time the public support is granted.

In each of the cases mentioned in points (d)(i), (ii) and (iii) of the first subparagraph, the guarantee or equivalent measures referred to therein shall be confined to solvent institutions and shall be conditional on final approval under the Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall

be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the institution has incurred or is likely to incur in the near future.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, EBA or national authorities, where applicable, confirmed by the competent authority.

EBA shall, by 3 January 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on the type of tests, reviews or exercises referred to above which may lead to such support.

By 31 December 2015, the Commission shall review whether there is a continuing need for allowing the support measures under point (d)(iii) of the first subparagraph and the conditions that need to be met in the case of continuation and report thereon to the European Parliament and to the Council. If appropriate, that report shall be accompanied by a legislative proposal.

5 For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

6 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 interpretation of the different circumstances when an institution shall be considered to be failing or likely to fail.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

I[F2] Article 32a

Conditions for resolution with regard to a central body and credit institutions permanently affiliated to a central body

Member States shall ensure that resolution authorities may take a resolution action in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group when that resolution group complies as a whole with the conditions established in Article 32(1).

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 32b

Insolvency proceedings in respect of institutions and entities that are not subject to resolution action

Member States shall ensure that an institution or entity referred to in points (b), (c) or (d) of Article 1(1) in relation to which the resolution authority considers that the conditions in points (a) and (b) of Article 32(1) are met, but that a resolution action would not be in the public interest in accordance with point (c) of Article 32(1), shall be wound up in an orderly manner in accordance with the applicable national law.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 33

Conditions for resolution with regard to financial institutions and holding companies

1 Member States shall ensure that resolution authorities may take a resolution action in relation to a financial institution referred to in point (b) of Article 1(1), when the conditions laid down in Article 32(1), are met with regard to both the financial institution and with regard to the parent undertaking subject to consolidated supervision.

[F1 2 Member States shall ensure that resolution authorities take a resolution action in relation to an entity referred to in point (c) or (d) of Article 1(1), when that entity meets the conditions laid down in Article 32(1).

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

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

a the entity is a resolution entity;

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

c assets and liabilities of the subsidiaries referred to in point (b) are such that the failure of those subsidiaries threatens the resolution group as a whole, and resolution action with regard to the entity is necessary either for the resolution of such subsidiaries which are institutions or for the resolution of the relevant resolution group as a whole.**]**

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

[F2 Article 33a

Power to suspend certain obligations

1 Member States shall ensure that resolution authorities, after consulting the competent authorities, which shall reply in a timely manner, have the power to suspend any payment or delivery obligations pursuant to any contract to which an institution or an entity referred to in points (b), (c) or (d) of Article 1(1) is a party, where all of the following conditions are met:

a a determination that the institution or entity is failing or likely to fail has been made under point (a) of Article 32(1);

b there is no immediately available private sector measure referred to in point (b) of Article 32(1) that would prevent the failure of the institution or entity;

c the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the institution or entity; and

d the exercise of the power to suspend is either:

(i) necessary to reach the determination provided for in point (c) of Article 32(1); or

(ii) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools.

2 The power referred to in paragraph 1 of this Article shall not apply to payment or delivery obligations to the following:

a systems and operators of systems designated in accordance with Directive 98/26/EC;

b CCPs authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation;

c central banks.

The resolution authorities shall set the scope of the power referred to in paragraph 1 of this Article having regard to the circumstances of each case. In particular, resolution authorities shall carefully assess the appropriateness of extending the suspension to eligible deposits according to the definition in point (4) of Article 2(1) of Directive 2014/49/EU, especially to covered deposits held by natural persons and micro, small and medium-sized enterprises.

3 Member States may provide that where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits.

4 The period of the suspension pursuant to paragraph 1 shall be as short as possible and shall not exceed the minimum period of time that the resolution authority considers necessary for the purposes indicated in points (c) and (d) of paragraph 1 and in any event shall not last longer than the period from the publication of a notice of suspension pursuant to paragraph 8 to midnight in the Member State of the resolution authority of the institution or entity at the end of the business day following the day of the publication.

At the expiry of the period of suspension referred to in the first subparagraph, the suspension shall cease to have effect.

5 When exercising the power referred to in paragraph 1 of this Article, resolution authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets and shall consider the existing national rules, as well as supervisory and judicial powers, to safeguard creditors' rights and equal treatment of creditors in normal insolvency proceedings. Resolution authorities shall in particular have regard to the potential application of national insolvency proceedings to the institution or entity as a result of the determination in point (c) of Article 32(1) and shall make the arrangements they deem appropriate to ensure adequate coordination with the national administrative or judicial authorities.

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

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

8 Member States shall ensure that resolution authorities notify the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) and the authorities referred to in points (a) to (h) of Article 83(2) without delay when exercising the power referred to in paragraph 1 of this Article after a determination has been made that the institution is failing or likely to fail pursuant to point (a) of Article 32(1) and before the resolution decision is taken.

The resolution authority shall publish or ensure the publication of the order or instrument by which obligations are suspended under this Article and the terms and period of suspension, by the means referred to in Article 83(4).

9 This Article is without prejudice to the provisions contained in the national law of Member States granting powers to suspend payment or delivery obligations of the institutions and entities referred to in paragraph 1 of this Article before a determination is made that those institutions or entities are failing or likely to fail under point (a) of Article 32(1) or to suspend payment or delivery obligations of institutions or entities which are to be wound up under normal insolvency proceedings, and that exceed the scope and duration provided for in this Article. Such powers shall be exercised in accordance with the scope, duration and conditions provided for in the relevant national laws. The conditions provided for in this Article shall be without prejudice to the conditions related to such power of suspension payment or delivery obligations.

10 Member States shall ensure that when a resolution authority exercises the power to suspend payment or delivery obligations with respect to an institution or an entity referred to in points (b), (c) or (d) of Article 1(1) pursuant to paragraph 1 of this Article, the resolution authority is also able, for the duration of that suspension, to exercise the power to:

a restrict secured creditors of that institution or entity from enforcing security interests in relation to any of the assets of that institution or entity for the same duration, in which case Article 70(2), (3) and (4) shall apply; and

b suspend the termination rights of any party to a contract with that institution or entity for the same duration, in which case Article 71(2) to (8) shall apply.

11 In the event that, after making a determination that an institution or entity is failing or likely to fail pursuant to point (a) of Article 32(1), a resolution authority has exercised the power to suspend payment or delivery obligations in the circumstances set out in paragraph 1 or 10 of this Article, and if resolution action is subsequently taken with respect to that institution or

entity, the resolution authority shall not exercise its powers under Article 69(1), 70(1) or 71(1) with respect to that institution or entity.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 34

General principles governing resolution

1 Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

a the shareholders of the institution under resolution bear first losses;

b creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Directive;

c management body and senior management of the institution under resolution are replaced, except in those cases when the retention of the management body and senior management, in whole or in part, as appropriate to the circumstances, is considered to be necessary for the achievement of the resolution objectives;

d management body and senior management of the institution under resolution shall provide all necessary assistance for the achievement of the resolution objectives;

e natural and legal persons are made liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the institution;

f except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;

g no creditor shall incur greater losses than would have been incurred if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) had been wound up under normal insolvency proceedings in accordance with the safeguards in Articles 73 to 75;

h covered deposits are fully protected; and

i resolution action is taken in accordance with the safeguards in this Directive.

2 Where an institution is a group entity resolution authorities shall, without prejudice to Article 31, apply resolution tools and exercise resolution powers in a way that minimises the impact on other group entities and on the group as a whole and minimises the adverse effects on financial stability in the Union and its Member States, in particular, in the countries where the group operates.

3 When applying the resolution tools and exercising the resolution powers, Member States shall ensure that they comply with the Union State aid framework, where applicable.

4 Where the sale of business tool, the bridge institution tool or the asset separation tool is applied to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), that institution or entity shall be considered to be the subject of bankruptcy proceedings or analogous insolvency proceedings for the purposes of Article 5(1) of Council Directive 2001/23/EC[1].

5 When applying the resolution tools and exercising the resolution powers, resolution authorities shall inform and consult employee representatives where appropriate.

6 Resolution authorities shall apply resolution tools and exercise resolution powers without prejudice to provisions on the representation of employees in management bodies as provided for in national law or practice.

CHAPTER II

Special management

Article 35

Special management

1 Member States shall ensure that resolution authorities may appoint a special manager to replace the management body of the institution under resolution. Resolution authorities shall make public the appointment of a special manager. Member States shall further ensure that the special manager has the qualifications, ability and knowledge required to carry out his or her functions.

2 The special manager shall have all the powers of the shareholders and the management body of the institution. However, the special manager may only exercise such powers under the control of the resolution authority.

3 The special manager shall have the statutory duty to take all the measures necessary to promote the resolution objectives referred to in Article 31 and implement resolution actions according to the decision of the resolution authority. Where necessary, that duty shall override any other duty of management in accordance with the statutes of the institution or national law, insofar as they are inconsistent. Those measures may include an increase of capital, reorganisation of the ownership structure of the institution or takeovers by institutions that are financially and organisationally sound in accordance with the resolution tools referred to in Chapter IV.

4 Resolution authorities may set limits to the action of a special manager or require that certain acts of the special manager be subject to the resolution authority's prior consent. The resolution authorities may remove the special manager at any time.

5 Member States shall require that a special manager draw up reports for the appointing resolution authority on the economic and financial situation of the institution and on the acts performed in the conduct of his or her duties, at regular intervals set by the resolution authority and at the beginning and the end of his or her mandate.

6 A special manager shall not be appointed for more than one year. That period may be renewed, on an exceptional basis, if the resolution authority determines that the conditions for appointment of a special manager continue to be met.

7 Where more than one resolution authority intends to appoint a special manager in relation to an entity affiliated to a group, they shall consider whether it is more appropriate to appoint the same special manager for all the entities concerned in order to facilitate solutions redressing the financial soundness of the entities concerned.

8 In the event of insolvency, where national law provides for the appointment of insolvency management, such management may constitute special management as referred to in this Article.

CHAPTER III

Valuation

Article 36

Valuation for the purposes of resolution

1 Before taking resolution action or exercising the power to write down or convert relevant **[**F1capital instruments and eligible liabilities in accordance with Article 59**]** resolution authorities shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is carried out by a person independent from any public authority, including the resolution authority, and the institution or entity referred to in point (b), (c) or (d) of Article 1(1). Subject to paragraph 13 of this Article and to Article 85, where all the requirements laid down in this Article are met, the valuation shall be considered to be definitive.

2 Where an independent valuation according to paragraph 1 is not possible, resolution authorities may carry out a provisional valuation of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), in accordance with paragraph 9 of this Article.

3 The objective of the valuation shall be to assess the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) that meets the conditions for resolution of Articles 32 and 33.

4 The purposes of the valuation shall be:

a to inform the determination of whether the conditions for resolution or the conditions for the write down or conversion of **[**F1capital instruments and eligible liabilities in accordance with Article 59**]** are met;

b if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);

c when the power to write down or convert relevant **[**F1capital instruments and eligible liabilities in accordance with Article 59 is applied, to inform the decision on the extent of the cancellation or dilution of shares or other instruments of ownership, and the extent of the write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59**]**;

d when the bail-in tool is applied, to inform the decision on the extent of the write down or conversion of **[**F1bail-inable liabilities**]**;

e when the bridge institution tool or asset separation tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;

f when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and to inform

the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 38;

g in all cases, to ensure that any losses on the assets of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant **[**F1capital instruments and eligible liabilities in accordance with Article 59**]** is exercised.

5 Without prejudice to the Union State aid framework, where applicable, the valuation shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of extraordinary public financial support or central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to the institution or entity referred to in point (b), (c) or (d) of Article 1(1) from the point at which resolution action is taken or the power to write down or convert relevant **[**F1capital instruments and eligible liabilities in accordance with Article 59**]** is exercised. Furthermore, the valuation shall take account of the fact that, if any resolution tool is applied:

a the resolution authority and any financing arrangement acting pursuant to Article 101 may recover any reasonable expenses properly incurred from the institution under resolution, in accordance with Article 37(7);

b the resolution financing arrangement may charge interest or fees in respect of any loans or guarantees provided to the institution under resolution, in accordance with Article 101.

6 The valuation shall be supplemented by the following information as appearing in the accounting books and records of the institution or entity referred to in point (b), (c) or (d) of Article 1(1):

a an updated balance sheet and a report on the financial position of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);

b an analysis and an estimate of the accounting value of the assets;

c the list of outstanding on balance sheet and off balance sheet liabilities shown in the books and records of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), with an indication of the respective credits and priority levels under the applicable insolvency law.

7 Where appropriate, to inform the decisions referred to in points (e) and (f) of paragraph 4, the information in point (b) of paragraph 6 may be complemented by an analysis and estimate of the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) on a market value basis.

8 The valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) were wound up under normal insolvency proceedings.

That estimate shall not affect the application of the 'no creditor worse off' principle to be carried out under Article 74.

9 Where due to the urgency in the circumstances of the case it is not possible to comply with the requirements in paragraphs 6 and 8 or paragraph 2 applies, a provisional valuation shall be carried out. The provisional valuation shall comply with the requirements in paragraph 3 and in so far as reasonably practicable in the circumstances with the requirements of paragraphs 1, 6 and 8.

The provisional valuation referred to in this paragraph shall include a buffer for additional losses, with appropriate justification.

10 A valuation that does not comply with all the requirements laid down in this Article shall be considered to be provisional until an independent person has carried out a valuation that is fully compliant with all the requirements laid down in this Article. That *ex-post* definitive valuation shall be carried out as soon as practicable. It may be carried out either separately from the valuation referred to in Article 74, or simultaneously with and by the same independent person as that valuation, but shall be distinct from it.

The purposes of the *ex-post* definitive valuation shall be:

a to ensure that any losses on the assets of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) are fully recognised in the books of accounts of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);

b to inform a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 11.

11 In the event that the *ex-post* definitive valuation's estimate of the net asset value of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is higher than the provisional valuation's estimate of the net asset value of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), the resolution authority may:

a exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool;

b instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights, liabilities to the institution under resolution, or as the case may be, in respect of the shares or instruments of ownership to the owners of the shares or other instruments of ownership.

12 Notwithstanding paragraph 1, a provisional valuation conducted in accordance with paragraphs 9 and 10 shall be a valid basis for resolution authorities take resolution actions, including taking control of a failing institution or entity referred to in point (b), (c) or (d) of Article 1(1), or to exercise the write down or conversion power of **[**[F1]capital instruments and eligible liabilities in accordance with Article 59**]**.

13 The valuation shall be an integral part of the decision to apply a resolution tool or exercise a resolution power, or the decision to exercise the write down or conversion power of **[**[F1]capital instruments and eligible liabilities in accordance with Article 59**]**. The valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision in accordance with Article 85.

14 EBA shall develop draft regulatory technical standards to specify the circumstances in which a person is independent from both the resolution authority and the institution or entity referred to in point (b), (c) or (d) of Article 1(1) for the purposes of paragraph 1of this Article, and for the purposes of Article 74.

15 EBA may develop draft regulatory technical standards to specify the following criteria for the purposes of paragraphs 1, 3 and 9 of this Article, and for the purposes of Article 74:

a the methodology for assessing the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);

b the separation of the valuations under Articles 36 and 74;

c the methodology for calculating and including a buffer for additional losses in the provisional valuation.

16 EBA shall submit the draft regulatory technical standards referred to in paragraph 14 to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraphs 14 and 15 in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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 **[**F1capital instruments and eligible liabilities**]** 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 **[**[F1]bail-inable liabilities**]** through write down, conversion or otherwise;

b it shall be conditional on prior and final approval under the Union State aid framework.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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;

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[(2)], 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;

[[F1]f liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated in accordance with Directive 98/26/EC or to their participants and arising from the participation in such a system, or to CCPs authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation;**]**

g a liability to any one of the following:

(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**[**F1;**]**

[F2h liabilities to institutions or entities referred to in point (b), (c) or (d) of Article 1(1) that are part of the same resolution group without being themselves resolution entities, regardless of their maturities, except where those liabilities rank below ordinary unsecured liabilities under the relevant national law governing normal insolvency proceedings applicable on the date of transposition of this Directive; in cases where that exception applies, the resolution authority of the relevant subsidiary that is not a resolution entity shall assess whether the amount of items complying with Article 45f(2) is sufficient to support the implementation of the preferred resolution strategy.**]**

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 **[**F1bail-inable liabilities**]**, 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.

[[F1]Resolution authorities shall carefully assess whether liabilities to institutions or entities referred to in point (b), (c) or (d) of Article 1(1) that are part of the same resolution group without being themselves resolution entities and that are not excluded from the application of the write down and conversion powers under point (h) of paragraph (2) of this Article should be excluded or partially excluded under points (a) to (d) of the first subparagraph of this paragraph to ensure the effective implementation of the resolution strategy.

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

[[F1]4 Where a resolution authority decides to exclude or partially exclude a bail-inable liability or class of bail-inable 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 bail-inable 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 **[**[F1]bail-inable 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:

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.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

[F2 Article 44a

Selling of subordinated eligible liabilities to retail clients

1 Member States shall ensure that a seller of eligible liabilities which meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for point (b) of Article 72a(1) and paragraphs 3 to 5 of Article 72b of that Regulation sells such liabilities to a retail client, as defined in point 11 of Article 4(1) of Directive 2014/65/EU, only where all of the following conditions are fulfilled:

a the seller has performed a suitability test in accordance with Article 25(2) of Directive 2014/65/EU;

b the seller is satisfied, on the basis of the test referred to in point (a), that such eligible liabilities are suitable for that retail client;

c the seller documents the suitability in accordance with Article 25(6) of Directive 2014/65/EU.

Notwithstanding the first subparagraph, Member States may provide that the conditions laid down in points (a) to (c) of that subparagraph shall apply to sellers of other instruments qualifying as own funds or bail-inable liabilities.

2 Where the conditions set out in paragraph 1 are fulfilled and the financial instrument portfolio of that retail client does not, at the time of the purchase, exceed EUR 500 000 the seller shall ensure, on the basis of the information provided by the retail client in accordance with paragraph 3, that both of the following conditions are met at the time of the purchase:

a the retail client does not invest an aggregate amount exceeding 10 % of that client's financial instrument portfolio in liabilities referred to in paragraph 1;

b that initial investment amount invested in one or more liabilities instruments referred to in paragraph 1 is at least EUR 10 000.

3 The retail client shall provide the seller with accurate information on the retail client's financial instrument portfolio, including any investments in liabilities referred to in paragraph 1.

4 For the purposes of paragraphs 2 and 3, the retail client's financial instrument portfolio shall include cash deposits and financial instruments, but shall exclude any financial instruments that have been given as collateral.

5 Without prejudice to Article 25 of Directive 2014/65/EU, and by way of derogation from the requirements set out in paragraphs 1 to 4 of this Article, Member States may set a minimum denomination amount of at least EUR 50 000 for liabilities referred to in paragraph 1, taking into account the market conditions and practices of that Member State as well as existing consumer protection measures within the jurisdiction of that Member State.

6 Where the value of total assets of entities referred to in Article 1(1) that are established in a Member State and are subject to the requirement referred to in Article 45e does not exceed EUR 50 billion, that Member State may, by way of derogation from the requirements set out in paragraphs 1 to 5 of this Article, apply only the requirement set out in paragraph 2(b) of this Article.

7 Member States shall not be required to apply this Article to liabilities referred to in paragraph 1 issued before 28 December 2020.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Subsection 2

Minimum requirement for own funds and eligible liabilities

[F1 Article 45

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

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

2 The requirement referred to in paragraph 1 of this Article shall be calculated in accordance with Article 45c(3), (5) or (7), as applicable, as the amount of own funds and eligible liabilities and expressed as percentages of:

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

b the total exposure measure of the relevant entity referred to in paragraph 1 of this Article, calculated in accordance with Articles 429 and 429a of Regulation (EU) No 575/2013.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45a

Exemption from the minimum requirement for own funds and eligible liabilities

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

a those institutions will be wound up in national insolvency proceedings, or in other types of proceedings laid down for those institutions and implemented in accordance with Article 38, 40 or 42; and

b the proceedings referred to in point (a), ensure that creditors of those institutions, including holders of covered bonds, where relevant, bear losses in a way that meets the resolution objectives.

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

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45b

Eligible liabilities for resolution entities

1 Liabilities shall be included in the amount of own funds and eligible liabilities of resolution entities only where they satisfy the conditions referred to in the following Articles of Regulation (EU) No 575/2013:

a Article 72a;

b Article 72b, with the exception of point (d) of paragraph 2; and

c Article 72c.

By way of derogation from the first subparagraph of this paragraph, where this Directive refers to the requirements in Article 92a or Article 92b of Regulation (EU) No 575/2013, for the purpose of those Articles, eligible liabilities shall consist of eligible liabilities as defined in Article 72k of that Regulation and determined in accordance with Chapter 5a of Title I of Part Two of that Regulation.

2 Liabilities that arise from debt instruments with embedded derivatives, such as structured notes, that meet the conditions of the first subparagraph of paragraph 1, except for point (l) of Article 72a(2) of Regulation (EU) No 575/2013, shall be included in the amount of own funds and eligible liabilities only where one of the following conditions is met:

a the principal amount of the liability arising from the debt instrument is known at the time of issue, is fixed or increasing, and is not affected by an embedded derivative feature, and the total amount of the liability arising from the debt instrument, including the embedded derivative, can be valued on a daily basis by reference to an active and

liquid two-way market for an equivalent instrument without credit risk, in accordance with Articles 104 and 105 of Regulation (EU) No 575/2013; or

b the debt instrument includes a contractual term that specifies that the value of the claim in cases of the insolvency of the issuer and of the resolution of the issuer is fixed or increasing, and does not exceed the initially paid-up amount of the liability.

Debt instruments referred to in the first subparagraph, including their embedded derivatives, shall not be subject to any netting agreement and the valuation of such instruments shall not be subject to Article 49(3).

The liabilities referred to in the first subparagraph shall only be included in the amount of own funds and eligible liabilities with respect to the part of the liability that corresponds to the principal amount referred to in point (a) of that subparagraph or to the fixed or increasing amount referred to in point (b) of that subparagraph.

3 Where liabilities are issued by a subsidiary established in the Union to an existing shareholder that is not part of the same resolution group, and that subsidiary is part of the same resolution group as the resolution entity, those liabilities shall be included in the amount of own funds and eligible liabilities of that resolution entity, provided that all of the following conditions are met:

a they are issued in accordance with point (a) of Article 45f(2);

b the exercise of the write down or conversion power in relation to those liabilities in accordance with Articles 59 or 62 does not affect the control of the subsidiary by the resolution entity;

c those liabilities do not exceed an amount determined by subtracting:

(i) the sum of the liabilities issued to and bought by the resolution entity either directly or indirectly through other entities in the same resolution group and the amount of own funds issued in accordance with point (b) of Article 45f(2) from

(ii) the amount required in accordance with Article 45f(1).

4 Without prejudice to the minimum requirement in Article 45c(5) or point (a) of Article 45d(1), resolution authorities shall ensure that a part of the requirement referred to in Article 45e equal to 8 % of the total liabilities, including own funds, shall be met by resolution entities that are G-SIIs or resolution entities that are subject to Article 45c(5) or (6) using own funds, subordinated eligible instruments, or liabilities as referred to in paragraph 3 of this Article. The resolution authority may permit that a level lower than 8 % of the total liabilities, including own funds, but greater than the amount resulting from the application of the formula (1-(X1/X2)) × 8 % of the total liabilities, including own funds, shall be met by resolution entities that are G-SIIs or resolution entities that are subject to Article 45c(5) or (6) using own funds, subordinated eligible instruments, or liabilities as referred in paragraph 3 of this Article, provided that all the conditions set out in Article 72b(3) of Regulation (EU) No 575/2013 are met, where, in light of the reduction that is possible under Article 72b(3) of that Regulation:

X1 = 3,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013; and

X2 = the sum of 18 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 and the amount of the combined buffer requirement.

For resolution entities that are subject to Article 45c(5), where the application of the first subparagraph of this paragraph leads to a requirement greater than 27 % of the total risk exposure amount, for the resolution entity concerned, the resolution authority

shall limit the part of the requirement referred to in Article 45e which is to be met using own funds, subordinated eligible instruments, or liabilities as referred to in paragraph 3 of this Article, to an amount equal to 27 % of the total risk exposure amount, if the resolution authority has assessed that:

a access to the resolution financing arrangement is not considered to be an option for resolving that resolution entity in the resolution plan; and

b where point (a) does not apply, the requirement referred to in Article 45e allows that resolution entity to meet the requirements referred to in Article 44(5) or 44(8) as applicable.

In carrying out the assessment referred to in the second subparagraph, the resolution authority shall also take into account the risk of disproportionate impact on the business model of the resolution entity concerned.

For resolution entities that are subject to Article 45c(6), the second subparagraph of this paragraph does not apply.

5 For resolution entities that are neither G-SIIs nor resolution entities that are subject to Article 45c(5) or (6), the resolution authority may decide that a part of the requirement referred to in Article 45e up to the greater of 8 % of the total liabilities, including own funds, of the entity and the formula referred to in paragraph 7, shall be met using own funds, subordinated eligible instruments, or liabilities as referred to in paragraph 3 of this Article, provided that the following conditions are met:

a non-subordinated liabilities referred to in paragraphs 1 and 2 of this Article have the same priority ranking in the national insolvency hierarchy as certain liabilities that are excluded from the application of write down and conversion powers in accordance with Article 44(2) or Article 44(3);

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

c the amount of own funds and other subordinated liabilities does not exceed the amount necessary to ensure that the creditors referred to in point (b) do not incur losses above the level of losses that they would otherwise have incurred in the winding-up under normal insolvency proceedings.

Where the resolution authority determines that, within a class of liabilities which includes eligible liabilities, the amount of the liabilities that are excluded or reasonably likely to be excluded from the application of write down and conversion powers in accordance with Article 44(2) or Article 44(3) totals more than 10 % of that class, the resolution authority shall assess the risk referred to in point (b) of the first subparagraph of this paragraph.

6 For the purposes of paragraphs 4, 5 and 7, derivative liabilities shall be included in total liabilities on the basis that full recognition is given to counterparty netting rights.

The own funds of a resolution entity that are used to comply with the combined buffer requirement shall be eligible to comply with the requirements referred to in paragraphs 4, 5 and 7.

7 By derogation from paragraph 4 of this Article, the resolution authority may decide that the requirement referred to in Article 45e of this Directive shall be met by resolution entities that are G-SIIs or resolution entities that are subject to Article 45c(5) or (6) of this Directive

using own funds, subordinated eligible instruments, or liabilities as referred to in paragraph 3 of this Article, to the extent that, due to the obligation of the resolution entity to comply with the combined buffer requirement and the requirements referred to in Article 92a of Regulation (EU) No 575/2013, Article 45c(5) and Article 45 e of this Directive, the sum of those own funds, instruments and liabilities does not exceed the greater of:

a 8 % of total liabilities, including own funds, of the entity; or

b the amount resulting from the application of the formula Ax2+Bx2+C, where A, B and C are the following amounts:

A = the amount resulting from the requirement referred to in point (c) of Article 92(1) of Regulation (EU) No 575/2013;

B = the amount resulting from the requirement referred to in Article 104a of Directive 2013/36/EU;

C = the amount resulting from the combined buffer requirement.

8 Resolution authorities may exercise the power referred to in paragraph 7 of this Article with respect to resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6), and that meet one of the conditions set out in the second subparagraph of this paragraph, up to a limit of 30 % of the total number of all resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6) for which the resolution authority determines the requirement referred to in Article 45e.

The conditions shall be considered by resolution authorities as follows:

a substantive impediments to resolvability have been identified in the preceding resolvability assessment and either:

(i) no remedial action has been taken following the application of the measures referred to in Article 17(5) in the timeline required by the resolution authority, or

(ii) the identified substantive impediments cannot be addressed using any of the measures referred to in Article 17(5), and the exercise of the power referred to in paragraph 7 of this Article would partially or fully compensate for the negative impact of the substantive impediments on resolvability;

b the resolution authority considers that the feasibility and credibility of the resolution entity's preferred resolution strategy is limited, taking into account the entity's size, its interconnectedness, the nature, scope, risk and complexity of its activities, its legal status and its shareholding structure; or

c the requirement referred to in Article 104a of Directive 2013/36/EU reflects the fact that the resolution entity that is a G-SII or that is subject to Article 45c(5) or (6) of this Directive is, in terms of riskiness, among the top 20 % of institutions for which the resolution authority determines the requirement referred to in Article 45(1) of this Directive.

For the purposes of the percentages referred to in the first and second subparagraphs, the resolution authority shall round the number resulting from the calculation up to the closest whole number.

Member States may, by taking into account the specificities of their national banking sector, including in particular the number of resolution entities that are G-SIIs or that are subject to Article 45c(5) or (6) for which the national resolution authority determines the requirement referred to in Article 45e, set the percentage referred to in the first subparagraph at a level higher than 30 %.

9 The resolution authority shall only take the decisions referred to in paragraph 5 or 7 after consulting the competent authority.

When taking those decisions, the resolution authority shall also take into account:

a the depth of the market for the resolution entity's own funds instruments and subordinated eligible instruments, the pricing of such instruments, where they exist, and the time needed to execute any transactions necessary for the purpose of complying with the decision;

b the amount of eligible liabilities instruments that meet all of the conditions referred to in Article 72a of Regulation (EU) No 575/2013 that have a residual maturity below one year as of the date of the decision, with a view to making quantitative adjustments to the requirements referred to in paragraphs 5 and 7 of this Article;

c the availability and the amount of instruments that meet all of the conditions referred to in Article 72a of Regulation (EU) No 575/2013 other than point (d) of Article 72b(2) of that Regulation;

d whether the amount of liabilities that are excluded from the application of write down and conversion powers in accordance with Article 44(2) or (3) and that, in normal insolvency proceedings, rank equally with or below the highest ranking eligible liabilities is significant in comparison to the own funds and eligible liabilities of the resolution entity. Where the amount of excluded liabilities does not exceed 5 % of the amount of the own funds and eligible liabilities of the resolution entity, the excluded amount shall be considered as not being significant. Above that threshold, the significance of the excluded liabilities shall be assessed by resolution authorities;

e the resolution entity's business model, funding model, and risk profile, as well as its stability and ability to contribute to the economy; and

f the impact of possible restructuring costs on the resolution entity's recapitalisation.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45c

Determination of the minimum requirement for own funds and eligible liabilities

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

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

b the need to ensure, where appropriate, that the resolution entity and its subsidiaries that are institutions or entities referred to in points (b), (c) and (d) of Article 1(1) but are not resolution entities have sufficient own funds and eligible liabilities to ensure that, if the bail-in tool or write down and conversion powers, respectively, were to be applied to them, losses could be absorbed and that it is possible to restore the total capital ratio and, as applicable, the leverage ratio, of the relevant entities to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry

on the activities for which they are authorised under Directive 2013/36/EU or Directive 2014/65/EU;

c the need to ensure, if the resolution plan anticipates the possibility for certain classes of eligible liabilities to be excluded from bail-in pursuant to Article 44(3) of this Directive or to be transferred in full to a recipient under a partial transfer, that the resolution entity has sufficient own funds and other eligible liabilities to absorb losses and to restore its total capital ratio and, as applicable, its leverage ratio, to the level necessary to enable it to continue to comply with the conditions for authorisation and to carry on the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;

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

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

2 Where the resolution plan provides that resolution action is to be taken or that the power to write down and convert relevant capital instruments and eligible liabilities in accordance with Article 59 is to be exercised in accordance with the relevant scenario referred to in Article 10(3), the requirement referred to in Article 45(1) shall equal an amount sufficient to ensure that:

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

b the resolution entity and its subsidiaries that are institutions or entities referred to points (b), (c) and (d) of Article 1(1) but are not resolution entities are recapitalised to a level necessary to enable them to continue to comply with the conditions for authorisation, and to carry on the activities for which they are authorised under Directive 2013/36/EU, Directive 2014/65/EU or an equivalent legislative act for an appropriate period not longer than one year (‘recapitalisation’).

Where the resolution plan provides that the entity is to be wound up under normal insolvency proceedings or other equivalent national procedures, the resolution authority shall assess whether it is justified to limit the requirement referred to in Article 45(1) for that entity, so that it does not exceed an amount sufficient to absorb losses in accordance with point (a) of the first subparagraph.

The assessment by the resolution authority shall, in particular, evaluate the limit referred to in the second subparagraph as regards any possible impact on financial stability and on the risk of contagion to the financial system.

3 For resolution entities, the amount referred to in the first subparagraph of paragraph 2 shall be the following:

a for the purpose of calculating the requirement referred to in Article 45(1), in accordance with point (a) of Article 45(2), the sum of:

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

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

consolidated resolution group level after the implementation of the preferred resolution strategy; and

b for the purpose of calculating the requirement referred to in Article 45(1), in accordance with point (b) of Article 45(2), the sum of:

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

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore compliance with the leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013 at the consolidated resolution group level after the implementation of the preferred resolution strategy.

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

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

When setting the individual requirement provided in point (b) of the first subparagraph of this paragraph, the resolution authority shall take into account the requirements referred to in Articles 37(10), 44(5) and 44(8).

When setting the recapitalisation amounts referred to in the previous subparagraphs, the resolution authority shall:

a use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes resulting from resolution actions set out in the resolution plan; and

b after consulting the competent authority, adjust the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU downwards or upwards to determine the requirement that is to apply to the resolution entity after the implementation of the preferred resolution strategy.

The resolution authority shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph by an appropriate amount necessary to ensure that, following resolution, the entity is able to sustain sufficient market confidence for an appropriate period, which shall not exceed one year.

Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the application of the resolution tools, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU.

The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authority, the resolution authority determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in points (b), (c) and (d) of

Article 1(1) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with Article 44(5) and (8) and Article 101(2), after implementation of the resolution strategy. That amount shall be adjusted upwards if, after consulting the competent authority, the resolution authority determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in points (b), (c) and (d) of Article 1(1) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with Article 44(5) and (8) and Article 101(2), for an appropriate period which shall not exceed one year.

4 EBA shall develop draft regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive.

EBA shall submit those draft regulatory technical standards to the Commission by 28 December 2019.

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

5 For resolution entities that are not subject to Article 92a of Regulation (EU) No 575/2013 and that are part of a resolution group the total assets of which exceed EUR 100 billion, the level of the requirement referred to in paragraph 3 of this Article shall be at least equal to:

a 13,5 % when calculated in accordance with point (a) of Article 45(2); and

b 5 % when calculated in accordance with point (b) of Article 45(2).

By way of derogation from Article 45b, the resolution entities referred to in the first subparagraph of this paragraph shall meet a level of the requirement referred to in the first subparagraph of this paragraph that is equal to 13,5 % when calculated in accordance with point (a) of Article 45(2) and to 5 % when calculated in accordance with point (b) of Article 45(2) using own funds, subordinated eligible instruments, or liabilities as referred to in Article 45b(3) of this Directive.

6 A resolution authority may, after consulting the competent authority, decide to apply the requirements laid down in paragraph 5 of this Article to a resolution entity which is not subject to Article 92a of Regulation (EU) No 575/2013 and which is part of a resolution group the total assets of which are lower than EUR 100 billion and which the resolution authority has assessed as reasonably likely to pose a systemic risk in the event of its failure.

When taking a decision as referred to in the first subparagraph of this paragraph, a resolution authority shall take into account:

a the prevalence of deposits, and the absence of debt instruments, in the funding model;

b the extent to which access to the capital markets for eligible liabilities is limited;

c the extent to which the resolution entity relies on Common Equity Tier 1 capital to meet the requirement referred to in Article 45e.

The absence of a decision pursuant to the first subparagraph of this paragraph is without prejudice to any decision under Article 45b(5).

7 For entities that are not themselves resolution entities, the amount referred to in the first subparagraph of paragraph 2 shall be the following:

a for the purpose of calculating the requirement referred to in Article 45(1), in accordance with point (a) of Article 45(2), the sum of:

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

(ii) a recapitalisation amount that allows the entity to restore compliance with its total capital ratio requirement referred in point (c) of Article 92(1) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 59 of this Directive or after the resolution of the resolution group; and

b for the purpose of calculating the requirement referred to in Article 45(1), in accordance with point (b) of Article 45(2), the sum of:

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

(ii) a recapitalisation amount that allows the entity to restore compliance with its leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013 after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 59 of this Directive or after the resolution of the resolution group.

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

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

When setting the individual requirement provided in point (b) of the first subparagraph of this paragraph, the resolution authority shall take into account the requirements referred to in Articles 37(10), 44(5) and 44(8).

When setting the recapitalisation amounts referred to in the previous subparagraphs, the resolution authority shall:

a use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes resulting from actions set out in the resolution plan; and

b after consulting the competent authority, adjust the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU downwards or upwards to determine the requirement that is to apply to the relevant entity after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 59 of this Directive or after the resolution of the resolution group.

The resolution authority shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph of this paragraph by an appropriate amount necessary to ensure that, following the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 59, the entity is able to sustain sufficient market confidence for an appropriate period which shall not exceed one year.

Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the exercise of the power referred to in Article 59 of this Directive or after the resolution of the resolution group, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU.

The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authority, the resolution authority determines that it would be feasible and credible for a lower amount to be sufficient to ensure market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in points (b), (c) and (d) of Article 1(1) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with paragraphs 5 and 8 of Article 44 and Article 101(2), after the exercise of the power referred to in Article 59 or after the resolution of the resolution group. That amount shall be adjusted upwards if, after consulting the competent authority, the resolution authority determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in points (b), (c) and (d) of Article 1(1) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with Article 44(5) and (8) and Article 101(2) for an appropriate period which shall not exceed one year.

8 Where the resolution authority expects that certain classes of eligible liabilities are reasonably likely to be fully or partially excluded from bail-in pursuant to Article 44(3) or might be transferred in full to a recipient under a partial transfer, the requirement referred to in Article 45(1) shall be met using own funds or other eligible liabilities that are sufficient to:

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

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

9 Any decision by the resolution authority to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 8 of this Article, and shall be reviewed by the resolution authority without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU.

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

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45d

Determination of the minimum requirement for own funds and eligible liabilities for resolution entities of G-SIIs and Union material subsidiaries of non-EU G-SIIs

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

a the requirements referred to in Articles 92a and 494 of Regulation (EU) No 575/2013; and

b any additional requirement for own funds and eligible liabilities that has been determined by the resolution authority specifically in relation to that entity in accordance with paragraph 3 of this Article.

2 The requirement referred to in Article 45(1) for a Union material subsidiary of a non-EU G-SII shall consist of the following:

a the requirements referred to in Articles 92b and 494 of Regulation (EU) No 575/2013; and

b any additional requirement for own funds and eligible liabilities that has been determined by the resolution authority specifically in relation to that material subsidiary in accordance with paragraph 3 of this Article, which is to be met using own funds and liabilities that meet the conditions of Articles 45f and 89(2).

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

a where the requirement referred to in point (a) of paragraph 1 or point (a) of paragraph 2 of this Article is not sufficient to fulfil the conditions set out in Article 45c; and

b to an extent that ensures that the conditions set out in Article 45c are fulfilled.

4 For the purposes of Article 45h(2), where more than one G-SII entity belonging to the same G-SII are resolution entities, the relevant resolution authorities shall calculate the amount referred to in paragraph 3:

a for each resolution entity;

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

5 Any decision by the resolution authority to impose an additional requirement for own funds and eligible liabilities under point (b) of paragraph 1 of this Article or point (b) of paragraph 2 of this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 3 of this Article, and shall be reviewed by the resolution authority without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU that applies to the resolution group or the Union material subsidiary of a non-EU G-SII.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45e

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

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

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

3 For resolution groups identified in accordance with point (b) of point (83b) of Article 2(1), the relevant resolution authority shall decide, depending on the features of the solidarity mechanism and of the preferred resolution strategy, which entities in the resolution group are to be required to comply with Article 45c(3) and (5) and Article 45d(1), in order to ensure that the resolution group as a whole complies with paragraphs 1 and 2 of this Article, and how such entities are to do so in conformity with the resolution plan.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45f

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

1 Institutions that are subsidiaries of a resolution entity or of a third-country entity, but are not themselves resolution entities, shall comply with the requirements laid down in Article 45c on an individual basis.

A resolution authority, after consulting the competent authority, may decide to apply the requirement laid down in this Article to an entity referred to in points (b), (c) or (d) of Article 1(1) that is a subsidiary of a resolution entity but is not itself a resolution entity.

By way of derogation from the first subparagraph of this paragraph, Union parent undertakings that are not themselves resolution entities, but are subsidiaries of third-country entities, shall comply with the requirements laid down in Articles 45c and 45d on a consolidated basis.

For resolution groups identified in accordance with point (b) of point (83b) of Article 2(1), those credit institutions which are permanently affiliated to a central body, but are not themselves resolution entities, a central body which is not itself a resolution entity, and any resolution entities that are not subject to a requirement under Article 45e(3), shall comply with Article 45c(7) on an individual basis.

The requirement referred to in Article 45(1) for an entity referred to in this paragraph shall be determined in accordance with Articles 45h and 89, where applicable, and on the basis of the requirements laid down in Article 45c.

2 The requirement referred to in Article 45(1) for entities referred to in paragraph 1 of this Article shall be met using one or more of the following:

a liabilities:

(i) that are issued to and bought by the resolution entity, either directly or indirectly through other entities in the same resolution group that bought the liabilities from the entity that is subject to this Article, or are issued to and bought by an existing shareholder that is not part of the same resolution group as long as the exercise of write down or conversion powers in accordance with Articles 59 to 62 does not affect the control of the subsidiary by the resolution entity;

(ii) that fulfil the eligibility criteria referred to in Article 72a of Regulation (EU) No 575/2013, except for points (b), (c), (k), (l) and (m) of Article 72b(2) and Article 72b(3) to (5) of that Regulation;

(iii) that rank, in normal insolvency proceedings, below liabilities that do not meet the condition referred to in point (i) and that are not eligible for own funds requirements;

(iv) that are subject to write down or conversion powers in accordance with Articles 59 to 62 in a manner that is consistent with the resolution strategy of the resolution group, in particular by not affecting the control of the subsidiary by the resolution entity;

(v) the acquisition of ownership of which is not funded directly or indirectly by the entity that is subject to this Article;

(vi) the provisions governing which do not indicate explicitly or implicitly that the liabilities would be called, redeemed, repaid or repurchased early, as applicable, by the entity that is subject to this Article, other than in the case of the insolvency or liquidation of that entity, and that entity does not otherwise provide such an indication;

(vii) the provisions governing which do not give the holder the right to accelerate the future scheduled payment of interest or principal, other than in the case of the insolvency or liquidation of the entity that is subject to this Article;

(viii) the level of interest or dividend payments, as applicable, due thereon is not amended on the basis of the credit standing of the entity that is subject to this Article or its parent undertaking;

b own funds, as follows:

(i) Common Equity Tier 1 capital, and

(ii) other own funds that:

— are issued to and bought by entities that are included in the same resolution group, or

— are issued to and bought by entities that are not included in the same resolution group as long as the exercise of write down or conversion powers in accordance with Articles 59 to 62 does not affect the control of the subsidiary by the resolution entity.

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

a both the subsidiary and the resolution entity are established in the same Member State and are part of the same resolution group;

b the resolution entity complies with the requirement referred to in Article 45e;

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

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

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

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

4 The resolution authority of a subsidiary that is not a resolution entity may also waive the application of this Article to that subsidiary where:

a both the subsidiary and its parent undertaking are established in the same Member State and are part of the same resolution group;

b the parent undertaking complies on a consolidated basis with the requirement referred to in Article 45(1) in that Member State;

c there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the parent undertaking to the subsidiary in respect of which a determination has been made in accordance with Article 59(3), in particular where resolution action or powers referred to in Article 59(1) are taken in respect of the parent undertaking;

d 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;

e the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

f 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.

5 Where the conditions laid down in points (a) and (b) of paragraph 3 are met, the resolution authority of a subsidiary may permit the requirement referred to in Article 45(1) to be met in full or in part with a guarantee provided by the resolution entity, which fulfils the following conditions:

a the guarantee is provided for at least an amount that is equivalent to the amount of the requirement for which it substitutes;

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

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

d the collateral backing the guarantee fulfils the requirements of Article 197 of Regulation (EU) No 575/2013, which, following appropriately conservative haircuts, is sufficient to cover the amount collateralised as referred to in point (c);

e the collateral backing the guarantee is unencumbered and, in particular, is not used as collateral to back any other guarantee;

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

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

For the purposes of point (g) of the first subparagraph, at the request of the resolution authority, the resolution entity shall provide an independent written and reasoned legal opinion or shall otherwise satisfactorily demonstrate that there are no legal, regulatory or operational barriers to the transfer of collateral from the resolution entity to the relevant subsidiary.

6 EBA shall develop draft regulatory technical standards further specifying methods to avoid that instruments recognised for the purposes of this Article indirectly subscribed, in part or in full, by the resolution entity hamper the smooth implementation of the resolution strategy. Such methods are to ensure, in particular, the proper transfer of losses to the resolution entity and the proper transfer of capital from the resolution entity to entities that are part of the resolution group but not themselves resolution entities, and provide a mechanism to avoid double counting of eligible instruments recognised for the purpose of this Article. They shall consist of a deduction regime or an equivalently robust approach and they shall ensure to entities that are not themselves the resolution entity an outcome equivalent to that of a full direct subscription by the resolution entity of eligible instruments recognised for the purpose of this Article.

EBA shall submit those draft regulatory technical standards to the Commission by 28 December 2019.

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.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45g

Waiver for a central body and credit institutions permanently affiliated to a central body

The resolution authority may partially or fully waive the application of Article 45f in respect of a central body or of a credit institution which is permanently affiliated to a central body, where all of the following conditions are met:

(a) the credit institution and the central body are subject to supervision by the same competent authority, are established in the same Member State and are part of the same resolution group;

(b) the commitments of the central body and its permanently affiliated credit institutions are joint and several liabilities, or the commitments of its permanently affiliated credit institutions are entirely guaranteed by the central body;

(c) the minimum requirement for own funds and eligible liabilities, and the solvency and liquidity of the central body and of all of the permanently affiliated credit institutions, are monitored as a whole on the basis of the consolidated accounts of those institutions;

(d) in the case of a waiver for a credit institution which is permanently affiliated to a central body, the management of the central body is empowered to issue instructions to the management of the permanently affiliated institutions;

(e) the relevant resolution group complies with the requirement referred to in Article 45e(3); and

(f) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the central body and the permanently affiliated credit institutions in the event of resolution.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45h

Procedure for determining the minimum requirement for own funds and eligible liabilities

1 The resolution authority of the resolution entity, the group-level resolution authority, where different from the former, and the resolution authorities responsible for the subsidiaries of a resolution group that are subject to the requirement referred to in Article 45f on an individual basis shall do everything within their power to reach a joint decision on:

a the amount of the requirement applied at the consolidated resolution group level for each resolution entity; and

b the amount of the requirement applied on an individual basis to each entity of a resolution group which is not a resolution entity.

The joint decision shall ensure compliance with Articles 45e and 45f and it shall be fully reasoned and provided to:

a the resolution entity by its resolution authority;

b the entities of a resolution group which are not a resolution entity by the resolution authorities of those entities;

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

The joint decision taken in accordance with this Article may provide that, where consistent with the resolution strategy and sufficient instruments complying with Article 45f(2) have not been bought directly or indirectly by the resolution entity, the requirements referred to in Article 45c(7) are partially met by the subsidiary in compliance with Article 45f(2) with instruments issued to and bought by entities not belonging to the resolution group.

[[X1]2 Where more than one G-SII entity belonging to the same G-SII are resolution entities, the resolution authorities referred to in paragraph 1 shall discuss and, where appropriate and consistent with the G-SII's resolution strategy, agree on the application of Article 72e of Regulation (EU) No 575/2013 and any adjustment to minimise or eliminate the difference between the sum of the amounts referred to in point (a) of Article 45d(4) and Article 12a of Regulation (EU) No 575/2013 for individual resolution entities and the sum of the amounts referred to in point (b) of Article 45d(4) and Article 12a of Regulation (EU) No 575/2013.

Such an adjustment may be applied subject to the following:

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

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

The sum of the amounts referred to in point (a) of Article 45d(4) of this Directive and Article 12a of Regulation (EU) No 575/2013 for individual resolution entities shall not be lower than the sum of the amounts referred to in point (b) of Article 45d(4) of this Directive and Article 12a of Regulation (EU) No 575/2013.**]**

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

4 Where a joint decision is not taken within four months because of a disagreement concerning a consolidated resolution group requirement referred to in Article 45e, a decision shall be taken on that requirement by the resolution authority of the resolution entity after having duly taken into account:

a the assessment of entities of the resolution group that are not a resolution entity, performed by the relevant resolution authorities;

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

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

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

The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. 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 of the referral of the matter, the decision of the resolution authority of the resolution entity shall apply.

5 Where a joint decision is not taken within four months because of a disagreement concerning the level of the requirement referred to in Article 45f to be applied to any entity of a resolution group on an individual basis, the decision shall be taken by the resolution authority of that entity, where all of the following conditions are fulfilled:

a the views and reservations expressed in writing by the resolution authority of the resolution entity have been duly taken into account; and

b where the group-level resolution authority is different from the resolution authority of the resolution entity, the views and reservations expressed in writing by the group-level resolution authority have been duly taken into account.

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

The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. 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 resolution authority of the resolution entity or 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:

a is within 2 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 of the requirement referred to in Article 45e; and

b complies with Article 45c(7).

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

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

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

a a decision shall be taken on the level of the requirement to be applied to the resolution group's subsidiaries on an individual basis in accordance with paragraph 5;

b a decision shall be taken on the level of the consolidated resolution group requirement in accordance with paragraph 4.

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

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

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

Editorial Information

X1 Substituted by Corrigendum to Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (Official Journal of the European Union L 150 of 7 June 2019).

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45i

Supervisory reporting and public disclosure of the requirement

1 Entities referred to in Article 1(1) that are subject to the requirement referred to in Article 45(1) shall report to their competent and resolution authorities on the following:

a the amounts of own funds that, where applicable, meet the conditions of point (b) of Article 45f(2) of this Directive, and the amounts of eligible liabilities, and the expression of those amounts in accordance with Article 45(2) of this Directive after any applicable deductions in accordance with Articles 72e to 72j of Regulation (EU) No 575/2013;

b the amounts of other bail-inable liabilities;

c for the items referred to in points (a) and (b):

(i) their composition, including their maturity profile,

(ii) their ranking in normal insolvency proceedings, and

(iii) whether they are governed by the laws of a third country and, if so, which third country and whether they contain the contractual terms referred to in Article 55(1) of this Directive, points (p) and (q) of Article 52(1) and points (n) and (o) of Article 63 of Regulation (EU) No 575/2013.

The obligation to report on the amounts of other bail-inable liabilities referred to in point (b) of the first subparagraph of this paragraph shall not apply to entities that, at the date of the reporting of that information, hold amounts of own funds and eligible liabilities of at least 150 % of the requirement referred to in Article 45(1) as calculated in accordance with point (a) of the first subparagraph of this paragraph.

2 The entities referred to in paragraph 1 shall report:

a on at least a semi-annual basis the information referred to in point (a) of paragraph 1, and

b on at least an annual basis the information referred to in points (b) and (c) of paragraph 1.

However, at the request of the competent authority or resolution authority, the entities referred to in paragraph 1 shall report the information referred to in paragraph 1 on a more frequent basis.

4 Paragraphs 1 and 3 of this Article shall not apply to entities whose resolution plan provides that the entity is to be wound up under normal insolvency proceedings.

5 EBA shall develop draft implementing technical standards to specify uniform reporting templates, instructions and methodology on how to use the templates, frequency and dates of reporting, definitions and IT solutions for the supervisory reporting referred to in paragraphs 1 and 2.

Such draft implementing technical standards shall specify a standardised way of providing information on the ranking of items referred in point (c) of paragraph 1 applicable in national insolvency proceedings in each Member State.

For institutions or entities referred to in points (b), (c) and (d) of Article 1(1) of this Directive that are subject to Article 92a and Article 92b of Regulation (EU) No 575/2013, such draft implementing technical standards shall, where appropriate, be aligned to the implementing technical standards adopted in accordance with Article 430 of that Regulation.

EBA shall submit those implementing technical standards to the Commission by 28 June 2020.

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.

6 EBA shall develop draft implementing technical standards to specify uniform disclosure formats, frequency and associated instructions in accordance with which disclosures required under paragraph 3 shall be made.

Such uniform disclosure formats shall convey sufficiently comprehensive and comparable information to assess the risk profiles of entities referred to in Article 1(1) and their degree of compliance with the applicable requirement referred to in Article 45e or Article 45f. Where appropriate, disclosure formats shall be in tabular format.

For institutions or entities referred to in points (b), (c) and (d) of Article 1(1) of this Directive that are subject to Article 92a and Article 92b of Regulation (EU) No 575/2013, such draft implementing technical standards shall, where appropriate, be aligned to the implementing technical standards adopted in accordance with Article 434a of that Regulation.

EBA shall submit those implementing technical standards to the Commission by 28 June 2020.

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.

7 Where resolution actions have been implemented or the write-down or conversion power referred to in Article 59 have been exercised, public disclosure requirements referred to

in paragraph 3 shall apply from the date of the deadline to comply with the requirements of Article 45e or Article 45f referred to in Article 45m.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45j

Reporting to EBA

1 Resolution authorities shall inform EBA of the minimum requirement for own funds and eligible liabilities that has been set, in accordance with Article 45e or Article 45f, for each entity under its jurisdiction.

2 EBA shall develop draft implementing technical standards to specify uniform reporting templates, instructions and methodology on how to use those templates, frequency and dates of reporting, definitions and IT solutions for the identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 1.

EBA shall submit those draft implementing technical standards to the Commission by 28 June 2020.

Power is conferred on the Commission to ad0opt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45k

Breaches of the minimum requirement for own funds and eligible liabilities

1 Any breach of the minimum requirement for own funds and eligible liabilities referred to in Article 45e or Article 45f shall be addressed by the relevant authorities on the basis of at least one of the following:

a powers to address or remove impediments to resolvability in accordance with Articles 17 and 18;

b powers referred to in Article 16a;

c measures referred to in Article 104 of Directive 2013/36/EU;

d early intervention measures in accordance with Article 27;

e administrative penalties and other administrative measures in accordance with Articles 110 and 111.

The relevant authorities may also carry out an assessment of whether the institution or entity referred to in points (b), (c) and (d) of Article 1(1) is failing or is likely to fail, in accordance with Article 32, 32a or Article 33, as applicable.

2 Resolution and competent authorities shall consult each other when they exercise their respective powers referred to in paragraph 1.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45l

Reports

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

a how the requirement for own funds and eligible liabilities set in accordance with Article 45e or Article 45f has been implemented at national level, and in particular whether there have been divergences in the levels set for comparable entities across Member States;

b how the power referred to in Article 45b(4), (5) and (7) has been exercised by resolution authorities and whether there have been divergences in the exercise of that power across Member States;

c the aggregate level and composition of own funds and eligible liabilities of institutions and entities, the amounts of instruments issued in the period, and the additional amounts necessary to meet applicable requirements.

2 In addition to the annual report provided for in paragraph 1, EBA shall, every three years, submit a report to the Commission, assessing the following:

a the impact of the minimum requirement for own funds and eligible liabilities, and any proposed harmonised levels of that minimum requirement on the following:

(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 own funds instruments and subordinated eligible instruments and their nature and marketability;

(vii) the risk-taking behaviour of institutions or entities referred to in points (b), (c) and (d) of Article 1(1);

(viii) the level of asset encumbrance of institutions or entities referred to in points (b), (c) and (d) of Article 1(1);

(ix) the actions taken by institutions or entities referred to in points (b), (c) and (d) of Article 1(1) to comply with the minimum requirement, and in particular the extent to which the minimum requirement has been met by asset deleveraging, long-term debt issue 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 or entities referred to in points (b), (c) and (d) of Article 1(1) to independently raise capital or funding from markets in order to meet any proposed harmonised minimum requirements.

3 The report referred to in paragraph 1 shall be submitted to the Commission by 30 September of the calendar year following the last year covered by the report. The first report shall be submitted to the Commission by 30 September of the year following the date of application of this Directive.

The report referred to in paragraph 2 shall cover three calendar years and shall be submitted to the Commission by 31 December of the calendar year following the last year covered by the report. The first report shall be submitted to the Commission by 31 December 2022.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 45m

Transitional and post-resolution arrangements

1 By way of derogation from Article 45(1), resolution authorities shall determine appropriate transitional periods for institutions or entities referred to in points (b), (c) and (d) of Article 1(1) to comply with the requirements in Articles 45e or 45f or with requirements that result from the application of Article 45b(4), (5) or (7), as appropriate. The deadline for institutions and entities to comply with the requirements in Articles 45e or 45f or the requirements that result from the application of Article 45b(4), (5) or (7) shall be 1 January 2024.

The resolution authority shall determine intermediate target levels for the requirements in Articles 45e or 45f or for requirements that result from the application of Article 45b(4), (5) or (7), as appropriate, that institutions or entities referred to in points (b), (c) and (d) of Article 1(1) shall comply with at 1 January 2022. The intermediate target levels, as a rule, shall ensure a linear build-up of own funds and eligible liabilities towards the requirement.

The resolution authority may set a transitional period that ends after 1 January 2024 where duly justified and appropriate on the basis of the criteria referred to in paragraph 7, taking into consideration:

a the development of the entity's financial situation;

b the prospect that the entity will be able to ensure compliance in a reasonable timeframe with the requirements in Article 45e or 45f or with a requirement that results from the application of Article 45b(4), (5) or (7); and

c whether the entity is able to replace liabilities that no longer meet the eligibility or maturity criteria laid down in Articles 72b and 72c of Regulation (EU) No 575/2013, and Article 45b or Article 45f(2) of this Directive, and if not, whether that inability is of an idiosyncratic nature or is due to market-wide disturbance.

2 The deadline for resolution entities to comply with the minimum level of the requirements referred to in Article 45c(5) or (6) shall be 1 January 2022.

3 The minimum levels of the requirements referred to in Article 45c(5) and (6) shall not apply within the two-year period following the date:

a on which the resolution authority has applied the bail-in tool; or

b on which the resolution entity has put in place an alternative private sector measure as referred to in point (b) of Article 32(1) by which capital instruments and other liabilities have been written down or converted into Common Equity Tier 1 instruments, or on which write down or conversion powers, in accordance with Article 59, have been exercised in respect of that resolution entity, in order to recapitalise the resolution entity without the application of resolution tools.

4 The requirements referred to in Article 45b(4) and (7) as well as Article 45c(5) and (6), as applicable, shall not apply within the three-year period following the date on which the resolution entity or the group of which the resolution entity is part has been identified as a G-SII, or the resolution entity starts to be in the situation referred to in Article 45c(5) or (6).

5 By way of derogation from Article 45(1), resolution authorities shall determine an appropriate transitional period within which to comply with the requirements of Articles 45e or 45f, or a requirement resulting from the application of Article 45b(4), (5) or (7), as appropriate, for institutions or entities referred to in points (b), (c) and (d) of Article 1(1) to which resolution tools or the write-down or conversion power referred to in Article 59 have been applied.

6 For the purposes of paragraphs 1 to 5, resolution authorities shall communicate to the institution or entity referred to in points (b), (c) and (d) of Article 1(1) a planned minimum requirement for own funds and eligible liabilities for each 12-month period during the transitional period, with a view to facilitating a gradual build-up of its loss-absorbing and recapitalisation capacity. At the end of the transitional period, the minimum requirement for own funds and eligible liabilities shall be equal to the amount determined under Article 45b(4), (5) or (7), Article 45c(5) or (6), Article 45e or Article 45f, as applicable.

7 When determining the transitional periods, resolution authorities shall take into account:

a the prevalence of deposits and the absence of debt instruments in the funding model;

b the access to the capital markets for eligible liabilities;

c the extent to which the resolution entity relies on Common Equity Tier 1 capital to meet the requirement referred to in Article 45e.

8 Subject to paragraph 1, resolution authorities shall not be prevented from subsequently revising either the transitional period or any planned minimum requirement for own funds and eligible liabilities communicated under paragraph 6.**]**

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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 **[**F1bail-inable 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 **[**F1bail-inable 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 **[**F1bail-inable 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 **[**F1bail-inable 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.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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:

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) **[**F1bail-inable 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 13of 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.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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);

⌊[F1]e if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and bail-inable liabilities pursuant to points (a) to (d) of this

paragraph 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, or outstanding amount payable in respect of, the rest of bail-inable liabilities, including debt instruments referred to in Article 108(3), 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) to (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 **[**[F1]bail-inable 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 bail-inable 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 **[**[F1]bail-inable 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.

[[F2]7 Member States shall ensure that, for entities referred to in points (a) to (d) of the first subparagraph of Article 1(1), all claims resulting from own funds items have, in national laws governing normal insolvency proceedings, a lower priority ranking than any claim that does not result from an own funds item.

For the purposes of the first subparagraph, to the extent that an instrument is only partly recognised as an own funds item, the whole instrument shall be treated as a claim resulting from an own funds item and shall rank lower than any claim that does not result from an own funds item.**]**

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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[(3)].

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).

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.

I[F1] Article 55

Contractual recognition of bail-in

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

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

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

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

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

Resolution authorities may decide that the obligation in the first subparagraph of this paragraph shall not apply to institutions or entities in respect of which the requirement under Article 45(1) equals the loss-absorption amount as defined under point (a) of Article 45c(2), provided that liabilities that meet the conditions referred to in the first subparagraph and which do not include the contractual term referred to in that subparagraph are not counted towards that requirement.

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.

2 Member States shall ensure that where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) reaches the determination that it is legally or otherwise impracticable

to include in the contractual provisions governing a relevant liability a term required in accordance with paragraph 1, such institution or entity notifies its determination, including the designation of the class of the liability and the justification of that determination, to the resolution authority. The institution or entity shall provide the resolution authority with all information that the resolution authority requests, within a reasonable timeframe following the receipt of the notification, in order for the resolution authority to assess the effect of such notification on the resolvability of that institution or entity.

Member States shall ensure that, in the case of a notification under the first subparagraph of this paragraph, the obligation to include in the contractual provisions a term required in accordance with paragraph 1 is automatically suspended from the moment of receipt by the resolution authority of the notification.

In the event that the resolution authority concludes that it is not legally or otherwise impracticable to include in the contractual provisions a term required in accordance with paragraph 1, taking into account the need to ensure the resolvability of the institution or entity, it shall require, within a reasonable timeframe after the notification pursuant to the first subparagraph, the inclusion of such contractual term. The resolution authority may, in addition, require the institution or entity to amend its practices concerning the application of the exemption from contractual recognition of bail-in.

The liabilities referred to in the first subparagraph of this paragraph shall not include Additional Tier 1 instruments, Tier 2 instruments and debt instruments referred to in point (48)(ii) of Article 2(1), where those instruments are unsecured liabilities. Moreover, the liabilities referred to in the first subparagraph of this paragraph shall be senior to the liabilities referred to in points (a), (b) and (c) of Article 108(2) and in Article 108(3).

Where the resolution authority, in the context of the assessment of the resolvability of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) in accordance with Articles 15 and 16, or at any other time, determines that, within a class of liabilities which includes eligible liabilities, the amount of liabilities that, in accordance with the first subparagraph of this paragraph, do not include the contractual term referred to in paragraph 1, together with the liabilities which are excluded from the application of the bail-in tool in accordance with Article 44(2) or which are likely to be excluded in accordance with Article 44(3) amounts to more than 10 % of that class, it shall immediately assess the impact of that particular fact on the resolvability of that institution or entity, including the impact on the resolvability resulting from the risk of breaching the creditor safeguards provided in Article 73 when applying write-down and conversion powers to eligible liabilities.

Where the resolution authority concludes, on the basis of the assessment referred to in the fifth subparagraph of this paragraph, that the liabilities which, in accordance with the first subparagraph, do not include the contractual term referred to in paragraph 1, create a substantive impediment to resolvability, it shall apply the powers provided in Article 17 as appropriate to remove that impediment to resolvability.

Liabilities for which the institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions the term required by paragraph 1 of this Article or for which, in accordance with this paragraph, that requirement does not apply, shall not be counted towards the minimum requirement for own funds and eligible liabilities.

3 Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a legal

opinion relating to the legal enforceability and effectiveness of the contractual term referred to in paragraph 1 of this Article.

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

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

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

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

6 EBA shall develop draft regulatory technical standards in order to further specify:

a the conditions under which it would be legally or otherwise impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to in paragraph 1 of this Article in certain categories of liabilities;

b the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2;

c the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2.

EBA shall submit those draft regulatory technical standards to the Commission by 28 June 2020.

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.

7 The resolution authority shall specify, where it deems it necessary, the categories of liabilities for which an institution or entity referred to in point (b), (c) or (d) of Article 1(1) may reach the determination that it is legally or otherwise impracticable to include the contractual term referred to in paragraph 1 of this Article, based on the conditions further specified as a result of the application of paragraph 6.

8 EBA shall develop draft implementing technical standards to specify uniform formats and templates for the notification to resolution authorities for the purposes of paragraph 2.

EBA shall submit those draft implementing technical standards to the Commission by 28 June 2020.

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

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

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.

CHAPTER V

[F1Write down or conversion of capital instruments and eligible liabilities]

Article 59

[F1Requirement to write down or convert relevant capital instruments and eligible liabilities]

[F1 1 The power to write down or convert relevant capital instruments and eligible liabilities may be exercised either:

a independently of resolution action; or

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

Where relevant capital instruments and eligible liabilities have been purchased by the resolution entity indirectly through other entities in the same resolution group, the power to write down or convert those relevant capital instruments and eligible liabilities shall be exercised together with the exercise of the same power at the level of the parent undertaking of the entity concerned or at the level of other parent undertakings that are not resolution entities, so that the losses are effectively passed on to, and the entity concerned is recapitalised by, the resolution entity.

After the exercise of the power to write down or convert relevant capital instruments and eligible liabilities independently of resolution action, the valuation provided for in Article 74 shall be carried out, and Article 75 shall apply.**]**

[F2 1a The power to write down or convert eligible liabilities independently of resolution action may be exercised only in relation to eligible liabilities that meet the conditions referred to in point (a) of Article 45f(2) of this Directive, except the condition related to the remaining maturity of liabilities as set out in Article 72c(1) of Regulation (EU) No 575/2013.

When that power is exercised, Member States shall ensure that the write-down or conversion is done in accordance with the principle referred to in point (g) of Article 34(1).

1b Where a resolution action is taken in relation to a resolution entity or, in exceptional circumstances in deviation from the resolution plan, in relation to an entity that is not a resolution entity, the amount that is reduced, written down or converted in accordance with Article 60(1) at the level of such an entity shall count towards the thresholds laid down in Articles 37(10) and point (a) of Article 44(5), or point (a) of Article 44(8) that apply to the entity concerned.**]**

2 Member States shall ensure that the resolution authorities have the power to write down or convert relevant **[**F1 capital instruments, and eligible liabilities as referred to in paragraph 1a,**]** into shares or other instruments of ownership of institutions and entities referred to in points (b), (c) and (d) of Article 1(1).

[F1 3 Member States shall require that resolution authorities exercise the write down or conversion power, in accordance with Article 60 and without delay, in relation to relevant capital instruments, and eligible liabilities as referred to in paragraph 1a, issued by an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) when one or more of the following circumstances apply:

a where the determination has been made that the conditions for resolution specified in Articles 32, 32a, or 33 have been met, before any resolution action is taken;

b the appropriate authority determines that unless that power is exercised in relation to the relevant capital instruments, and eligible liabilities as referred to in paragraph 1a, the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) will no longer be viable;**]**

c in the case of relevant capital instruments issued by a subsidiary and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual and on a consolidated basis, the appropriate authority of the Member State of the consolidating supervisor and the appropriate authority of the Member State of the subsidiary make a joint determination taking the form of a joint decision in accordance with Article 92(3) and (4) that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

d in the case of relevant capital instruments issued at the level of the parent undertaking and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual basis at the level of the parent undertaking or on a consolidated basis, and the appropriate authority of the Member State of the consolidating supervisor makes a determination that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

e extraordinary public financial support is required by the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) except in any of the circumstances set out in point (d)(iii) of Article 32(4).

4 For the purposes of paragraph 3, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or a group shall be deemed to be no longer viable only if both of the following conditions are met:

a the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or the group is failing or likely to fail;

b having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, including alternative private sector measures or supervisory action (including early intervention measures), other than the write down or conversion of **[**F1capital instruments, or eligible liabilities as referred to in paragraph 1a**]**, independently or in combination with a resolution action, would prevent the failure of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or the group within a reasonable timeframe.

5 For the purposes of point (a) of paragraph 4 of this Article, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) shall be deemed to be failing or likely to fail where one or more of the circumstances set out in Article 32(4) occurs.

6 For the purposes of point (a) of paragraph 4, a group shall be deemed to be failing or likely to fail where the group infringes or there are objective elements to support a determination that the group, in the near future, will infringe its consolidated prudential requirements in a way that would justify action by the competent authority including but not limited to because the group has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds.

7 A relevant capital instrument issued by a subsidiary shall not be written down to a greater extent or converted on worse terms pursuant to point (c) of paragraph 3 than equally ranked capital instruments at the level of the parent undertaking which have been written down or converted.

8 Where an appropriate authority makes a determination referred to in paragraph 3 of this Article, it shall immediately notify the resolution authority responsible for the institution or for the entity referred to in point (b), (c) or (d) of Article 1(1) in question, if different.

9 Before making a determination referred to in point (c) of paragraph 3of this Article in relation to a subsidiary that issues relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the appropriate authority shall comply with the notification and consultation requirements laid down in Article 62.

10 Before exercising the power to write down or convert **[**F1capital instruments, or eligible liabilities as referred to in paragraph 1a, resolution authorities shall ensure that a valuation of the assets and liabilities of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is carried out in accordance with Article 36. That valuation shall form the basis of the calculation of the write down to be applied to the relevant capital instruments, or eligible

liabilities as referred to in paragraph 1a in order to absorb losses and the level of conversion to be applied to relevant capital instruments, or eligible liabilities as referred to in paragraph 1a**]** in order to recapitalise the institution or the entity referred to in point (b), (c) or (d) of Article 1(1).

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 60

[F1Provisions concerning the write down or conversion of relevant capital instruments and eligible liabilities]

1 When complying with the requirement laid down in Article 59, resolution authorities shall exercise the write down or conversion power in accordance with the priority of claims under normal insolvency proceedings, in a way that produces the following results:

a Common Equity Tier 1 items are reduced first in proportion to the losses and to the extent of their capacity and the resolution authority takes one or both of the actions specified in Article 47(1) in respect of holders of Common Equity Tier 1 instruments;

b the principal amount of Additional Tier 1 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower;

c the principal amount of Tier 2 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower**[F1**;**]**

[F2d the principal amount of eligible liabilities referred to in Article 59(1a) is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or to the extent of the capacity of the relevant eligible liabilities, whichever is lower.**]**

[F12 Where the principal amount of a relevant capital instrument, or an eligible liability as referred to in Article 59(1a) is written down:

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

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

c no compensation is paid to any holder of the relevant capital instruments, or of the liabilities as referred to in Article 59(1a), other than in accordance with paragraph 3 of this Article.**]**

3 **[F1**In order to effect a conversion of relevant capital instruments, and eligible liabilities as referred to in Article 59(1a), under points (b), (c) and (d) of paragraph 1 of this Article, resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to issue Common Equity Tier 1 instruments to the holders of the relevant capital

instruments and such eligible liabilities. Relevant capital instruments and such liabilities may only be converted where the following conditions are met:**]**

a those Common Equity Tier 1 instruments are issued by the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or by a parent undertaking of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1), with the agreement of the resolution authority of the institution or the entity referred to in points (b), (c) or (d) of Article 1(1) or, where relevant, of the resolution authority of the parent undertaking;

b those Common Equity Tier 1 instruments are issued prior to any issuance of shares or other instruments of ownership by that institution or that entity referred to in point (b), (c) or (d) of Article 1(1) for the purposes of provision of own funds by the State or a government entity;

c those Common Equity Tier 1 instruments are awarded and transferred without delay following the exercise of the conversion power;

d the conversion rate that determines the number of Common Equity Tier 1 instruments that are provided in respect of **[**F1each relevant capital instrument, or each eligible liability as referred to in Article 59(1a)**]** complies with the principles set out in Article 50 and any guidelines developed by EBA pursuant to Article 50(4).

4 For the purposes of the provision of Common Equity Tier 1 instruments in accordance with paragraph 3, resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to maintain at all times the necessary prior authorisation to issue the relevant number of Common Equity Tier 1 instruments.

5 Where an institution meets the conditions for resolution and the resolution authority decides to apply a resolution tool to that institution, the resolution authority shall comply with the requirement laid down in Article 59(3) before applying the resolution tool.

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 61

Authorities responsible for determination

1 Member States shall ensure that the authorities responsible for making the determinations referred to in Article 59(3) are those set out in this Article.

2 Each Member State shall designate in national law the appropriate authority which shall be responsible for making determinations pursuant to Article 59. The appropriate authority may be the competent authority or the resolution authority, in accordance with Article 32.

3 Where the relevant capital instruments are recognised for the purposes of meeting the own funds requirements in accordance with Article 92 of Regulation (EU) No 575/2013 on an individual basis, the authority responsible for making the determination referred to in Article 59(3) of this Directive shall be the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) has been authorised in accordance with Title III of Directive 2013/36/EU.

[[F2]Where the relevant capital instruments, or eligible liabilities as referred to in Article 59(1a) of this Directive, are recognised for the purposes of meeting the requirement referred to in Article 45f(1) of this Directive, the authority responsible for making the determination referred to in Article 59(3) of this Directive shall be the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive has been authorised in accordance with Title III of Directive 2013/36/EU.**]**

4 Where relevant capital instruments are issued by an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) that is a subsidiary and are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the authority responsible for making the determinations referred to in Articles 59(3) shall be the following:

a the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that issued those instruments has been established in accordance with Title III of Directive 2013/36/EU shall be responsible for making the determinations referred to in (b) of Article 59(3) of this Directive;

b the appropriate authority of the Member State of the consolidating supervisor and the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that issued those instruments has been established in accordance with Title III of Directive 2013/36/EU shall be responsible for making the joint determination taking the form of a joint decision referred to in point (c) of Article 59(3) of this Directive.

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 62

Consolidated application: procedure for determination

[[F1]1 Member States shall ensure that, before making a determination referred to in point (b), (c), (d) or (e) of Article 59(3) in relation to a subsidiary that issues relevant capital instruments, or eligible liabilities as referred to in Article 59(1a), for the purposes of meeting the requirement referred to in Article 45f on an individual basis or relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual or consolidated basis, an appropriate authority complies with the following requirements:

a when considering whether to make a determination referred to in point (b), (c), (d) or (e) of Article 59(3), after consulting the resolution authority of the relevant resolution entity, it notifies, within 24 hours of consulting that resolution authority

(i) the consolidating supervisor and, if different, the appropriate authority in the Member State where the consolidating supervisor is located;

(ii) resolution authorities of other entities within the same resolution group that directly or indirectly purchased liabilities referred to in Article 45f(2) from the entity that is subject to Article 45f(1);

b when considering whether to make a determination referred to in point (c) of Article 59(3), it notifies, without delay, the competent authority responsible for each

institution or entity referred to in point (b), (c) or (d) of Article 1(1) that has issued the relevant capital instruments in relation to which the write down or conversion powers are to be exercised if that determination were made, and, if different, the appropriate authorities in the Member States where those competent authorities and the consolidating supervisor are located.**]**

2 When making a determination referred to in point (c), (d) or (e) of Article 59(3) in the case of an institution or of a group with cross-border activity, the appropriate authorities shall take into account the potential impact of the resolution in all the Member States where the institution or the group operate.

3 An appropriate authority shall accompany a notification made pursuant to paragraph 1 with an explanation of the reasons why it is considering making the determination in question.

4 **[**[F1]Where a notification has been made pursuant to paragraph 1, the appropriate authority, after consulting the authorities notified in accordance with points (a)(i) or (b) of that paragraph, shall assess the following matters:**]**

a whether an alternative measure to the exercise of the write down or conversion power in accordance with Article 59(3) is available;

b if such an alternative measure is available, whether it can feasibly be applied;

c if such an alternative measure could feasibly be applied, whether there is a realistic prospect that it would address, in an adequate timeframe, the circumstances that would otherwise require a determination referred to in Article 59(3) to be made.

5 For the purposes of paragraph 4 of this Article, alternative measures mean early intervention measures referred to in Article 27 of this Directive, measures referred to in Article 104(1) of Directive 2013/36/EU or a transfer of funds or capital from the parent undertaking.

6 Where, pursuant to paragraph 4, the appropriate authority, after consulting the notified authorities, assesses that one or more alternative measures are available, can feasibly be applied and would deliver the outcome referred to in point (c) of that paragraph, it shall ensure that those measures are applied.

7 Where, in a case referred to in point (a) of paragraph 1, and pursuant to paragraph 4 of this Article, the appropriate authority, after consulting the notified authorities, assesses that no alternative measures are available that would deliver the outcome referred to in point (c) of paragraph 4, the appropriate authority shall decide whether the determination referred to in Article 59(3) under consideration is appropriate.

8 Where an appropriate authority decides to make a determination under point (c) of Article 59(3), it shall immediately notify the appropriate authorities of the Member States in which the affected subsidiaries are located and the determination shall take the form of a joint decision as set out in Article 92(3) and (4). In the absence of a joint decision no determination under point (c) of Article 59(3) shall be made.

9 The resolution authorities of the Member States where each of the affected subsidiaries are located shall promptly implement a decision to write down or convert capital instruments made in accordance with this Article having due regard to the urgency of the circumstances.

CHAPTER VI

Resolution powers

Article 63

General powers

1 Member States shall ensure that the resolution authorities have all the powers necessary to apply the resolution tools to institutions and to entities referred to in points (b), (c) and (d) of Article 1(1) that meet the applicable conditions for resolution. In particular, the resolution authorities shall have the following resolution powers, which they may exercise individually or in any combination:

a the power to require any person to provide any information required for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;

b the power to take control of an institution under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the management body of the institution under resolution;

c the power to transfer shares or other instruments of ownership issued by an institution under resolution;

d the power to transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;

e the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of **[**F1bail-inable liabilities**]**, of an institution under resolution;

f the power to convert **[**F1bail-inable liabilities**]** of an institution under resolution into ordinary shares or other instruments of ownership of that institution or entity referred to in point (b), (c) or (d) of Article 1(1), a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) are transferred;

g the power to cancel debt instruments issued by an institution under resolution except for secured liabilities subject to Article 44(2);

h the power to reduce, including to reduce to zero, the nominal amount of shares or other instruments of ownership of an institution under resolution and to cancel such shares or other instruments of ownership;

i the power to require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments;

j the power to amend or alter the maturity of debt instruments and other **[**F1bail-inable liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other bail-inable liabilities**]**, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities subject to Article 44(2);

k the power to close out and terminate financial contracts or derivatives contracts for the purposes of applying Article 49;

l the power to remove or replace the management body and senior management of an institution under resolution;

m the power to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of Directive 2013/36/EU and Article 12 of Directive 2014/65/EU.

2 Member States shall take all necessary measures to ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities are not subject to any of the following requirements that would otherwise apply by virtue of national law or contract or otherwise:

a subject to Article 3(6) and Article 85(1), requirements to obtain approval or consent from any person either public or private, including the shareholders or creditors of the institution under resolution;

b prior to the exercise of the power, procedural requirements to notify any person including any requirement to publish any notice or prospectus or to file or register any document with any other authority.

In particular, Member States shall ensure that resolution authorities can exercise the powers under this Article irrespective of any restriction on, or requirement for consent for, transfer of the financial instruments, rights, assets or liabilities in question that might otherwise apply.

Point (b) of the first subparagraph is without prejudice to the requirements laid down in Articles 81 and 83 and any notification requirements under the Union State aid framework.

3 Member States shall ensure that, to the extent that any of the powers listed in paragraph 1 of this Article is not applicable to an entity within the scope of Article 1(1) of this Directive as a result of its specific legal form, resolution authorities shall have powers which are as similar as possible including in terms of their effects.

4 Member States shall ensure that, when resolution authorities exercise the powers pursuant to paragraph 3 the safeguards provided for in this Directive, or safeguards that deliver the same effect, shall be applied to the persons affected, including shareholders, creditors and counterparties.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 64

Ancillary powers

1 Member States shall ensure that, when exercising a resolution power, resolution authorities have the power to:

a subject to Article 78, provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred; for that purpose, any right of compensation in accordance with this Directive shall not be considered to be a liability or an encumbrance;

b remove rights to acquire further shares or other instruments of ownership;

c require the relevant authority to discontinue or suspend the admission to trading on a regulated market or the official listing of financial instruments pursuant to Directive 2001/34/EC of the European Parliament and of the Council[(4)];

d provide for the recipient to be treated as if it were the institution under resolution for the purposes of any rights or obligations of, or actions taken by, the institution under resolution, including, subject to Articles 38 and 40, any rights or obligations relating to participation in a market infrastructure;

e require the institution under resolution or the recipient to provide the other with information and assistance; and

f cancel or modify the terms of a contract to which the institution under resolution is a party or substitute a recipient as a party.

2 Resolution authorities shall exercise the powers specified in paragraph 1 where it is considered by the resolution authority to be appropriate to help to ensure that a resolution action is effective or to achieve one or more resolution objectives.

3 Member States shall ensure that, when exercising a resolution power, resolution authorities have the power to provide for continuity arrangements necessary to ensure that the resolution action is effective and, where relevant, the business transferred may be operated by the recipient. Such continuity arrangements shall include, in particular:

a the continuity of contracts entered into by the institution under resolution, so that the recipient assumes the rights and liabilities of the institution under resolution relating to any financial instrument, right, asset or liability that has been transferred and is substituted for the institution under resolution, expressly or implicitly in all relevant contractual documents;

b the substitution of the recipient for the institution under resolution in any legal proceedings relating to any financial instrument, right, asset or liability that has been transferred.

4 The powers in point (d) of paragraph 1 and point (b) of paragraph 3 shall not affect the following:

a the right of an employee of the institution under resolution to terminate a contract of employment;

b subject to Articles 69, 70 and 71, any right of a party to a contract to exercise rights under the contract, including the right to terminate, where entitled to do so in accordance with the terms of the contract by virtue of an act or omission by the institution under resolution prior to the relevant transfer, or by the recipient after the relevant transfer.

Article 65

Power to require the provision of services and facilities

1 Member States shall ensure that resolution authorities have the power to require an institution under resolution, or any of its group entities, to provide any services or facilities that are necessary to enable a recipient to operate effectively the business transferred to it.

The first subparagraph shall apply including where the institution under resolution or relevant group entity has entered into normal insolvency proceedings.

2 Member States shall ensure that their resolution authorities have powers to enforce obligations imposed, pursuant to paragraph 1, on group entities established in their territory by resolution authorities in other Member States.

3 The services and facilities referred to in paragraphs 1 and 2 are restricted to operational services and facilities and do not include any form of financial support.

4 The services and facilities provided in accordance with paragraphs 1 and 2 shall be on the following terms:

a where the services and facilities were provided under an agreement to the institution under resolution immediately before the resolution action was taken and for the duration of that agreement, on the same terms;

b where there is no agreement or where the agreement has expired, on reasonable terms.

5 EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify the minimum list of services or facilities that are necessary to enable a recipient to effectively operate a business transferred to it.

Article 66

Power to enforce crisis management measures or crisis prevention measures by other Member States

1 Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State.

2 Member States shall provide the resolution authority that has made or intends to make the transfer with all reasonable assistance to ensure that the shares or other instruments of ownership or assets, rights or liabilities are transferred to the recipient in accordance with any applicable requirements of national law.

3 Member States shall ensure that shareholders, creditors and third parties that are affected by the transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 are not entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the shares, other instruments of ownership, rights or liabilities.

4 Where a resolution authority of a Member State (Member State A) exercises the write-down or conversion powers, including in relation to capital instruments in accordance with Article 59, and the **[**[F1]bail-inable liabilities**]** or relevant capital instruments of the institution under resolution include the following:

a instruments or liabilities that are governed by the law of a Member State other than the State of the resolution authority that exercised the write down or conversion powers (Member State B);

b liabilities owed to creditors located in Member State B.

Member State B shall ensure that the principal amount of those liabilities or instruments is reduced, or liabilities or instruments are converted, in accordance with the exercise of the write-down or conversion powers by the resolution authority of Member State A,

5 Member States shall ensure that creditors that are affected by the exercise of write-down or conversion powers referred to in paragraph 4 are not entitled to challenge the reduction of the principal amount of the instrument or liability or its conversion, as the case may be, under any provision of law of Member State B.

6 Each Member State shall ensure that the following are determined in accordance with the law of the Member State of the resolution authority:

a the right for shareholders, creditors and third parties to challenge, by way of appeal pursuant to Article 85, a transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 of this Article;

b the right for creditors to challenge, by way of appeal pursuant to Article 85, the reduction of the principal amount, or the conversion, of an instrument or liability covered by points (a) or (b) of paragraph 4 of this Article;

c the safeguards for partial transfers, as referred to in Chapter VII, in relation to assets, rights or liabilities referred to in paragraph 1.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 67

Power in respect of assets, rights, liabilities, shares and other instruments of ownership located in third countries

1 Member States shall provide that, in cases in which resolution action involves action taken in respect of assets located in a third country or shares, other instruments of ownership, rights or liabilities governed by the law of a third country, resolution authorities may require that:

a the administrator, receiver or other person exercising control of the institution under resolution and the recipient take all necessary steps to ensure that the transfer, write down, conversion or action becomes effective;

b the administrator, receiver or other person exercising control of the institution under resolution hold the shares, other instruments of ownership, assets or rights or discharge the liabilities on behalf of the recipient until the transfer, write down, conversion or action becomes effective;

c the reasonable expenses of the recipient properly incurred in carrying out any action required under points (a) and (b) of this paragraph are met in any of the ways referred to in Article 37(7).

2 Where the resolution authority assesses that, in spite of all the necessary steps taken by the administrator, receiver or other person in accordance with paragraph 1(a), it is highly unlikely that the transfer, conversion or action will become effective in relation to certain assets located in a third country or certain shares, other instruments of ownership, rights or liabilities under the law of a third country, the resolution authority shall not proceed with the transfer, write down, conversion or action. If it has already ordered the transfer, write down, conversion or action, that order shall be void in relation to the assets, shares, instruments of ownership, rights or liabilities concerned.

Article 68

Exclusion of certain contractual terms in early intervention and resolution

1 A crisis prevention measure or a crisis management measure taken in relation to an entity in accordance with this Directive, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, under a contract entered into by the entity, be deemed to be an enforcement event within the meaning of Directive 2002/47/EC or as insolvency proceedings within the meaning of Directive 98/26/EC provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed.

In addition, a crisis prevention measure or crisis management measure shall not, per se, be deemed to be an enforcement event or insolvency proceedings under a contract entered into by:

a a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent undertaking or by any group entity; or

b any entity of a group which includes cross-default provisions.

2 Where third country resolution proceedings are recognised pursuant to Article 94, or otherwise where a resolution authority so decides, such proceedings shall for the purposes of this Article constitute a crisis management measure.

3 **[**[F1]Provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed, a crisis prevention measure, a suspension of obligation under Article 33a or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, make it possible for anyone to:**]**

a exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by:

(i) a subsidiary, the obligations under which are guaranteed or otherwise supported by a group entity;

(ii) any group entity which includes cross-default provisions;

b obtain possession, exercise control or enforce any security over any property of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) concerned or any group entity in relation to a contract which includes cross-default provisions;

c affect any contractual rights of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) concerned or any group entity in relation to a contract which includes cross-default provisions.

4 This Article shall not affect the right of a person to take an action referred to in paragraph 3 where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the application of such a measure.

[[F1]5 A suspension or restriction under Articles 33a, 69, or 70 shall not constitute non-performance of a contractual obligation for the purposes of paragraphs 1 and 3 of this Article and of Article 71(1).**]**

6 The provisions contained in this Article shall be considered to be overriding mandatory provisions within the meaning of Article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council[5].

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 69

Power to suspend certain obligations

1 Member States shall ensure that resolution authorities have the power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication.

2 When a payment or delivery obligation would have been due during the suspension period the payment or delivery obligation shall be due immediately upon expiry of the suspension period.

3 If an institution under resolution's payment or delivery obligations under a contract are suspended under paragraph 1, the payment or delivery obligations of the institution under resolution's counterparties under that contract shall be suspended for the same period of time.

[F1 4 Any suspension under paragraph 1 shall not apply to payment and delivery obligations owed to the following:

a systems and operators of systems designated in accordance with Directive 98/26/EC;

b CCPs authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation;

c central banks.**]**

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

[F2 The resolution authorities shall set the scope of that power having regard to the circumstances of each case. In particular, resolution authorities shall carefully assess the appropriateness of extending the suspension to eligible deposits as defined in point (4) of Article 2(1) of Directive 2014/49/EU, especially to covered deposits held by natural persons and micro, small and medium-sized enterprises.

Member States may provide that, where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, resolution authorities ensure that depositors have access to an appropriate daily amount from those deposits.**]**

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 70

Power to restrict the enforcement of security interests

1 Member States shall ensure that resolution authorities have the power to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution from the publication of a notice of the restriction in accordance with Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication.

[[F1]2 Resolution authorities shall not exercise the power referred to in paragraph 1 of this Article in relation to any of the following:

a security interest of systems or operators of systems designated for the purposes of Directive 98/26/EC;

b central counterparties authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012; and

c central banks, over assets pledged or provided by way of margin or collateral by the institution under resolution.**]**

3 Where Article 80 applies, resolution authorities shall ensure that any restrictions imposed pursuant to the power referred to in paragraph 1 of this Article are consistent for all group entities in relation to which a resolution action is taken.

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

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 71

Power to temporarily suspend termination rights

1 Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party to a contract with an institution under resolution from the publication of the notice pursuant to Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

2 Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party to a contract with a subsidiary of an institution under resolution where:

a the obligations under that contract are guaranteed or are otherwise supported by the institution under resolution;

b the termination rights under that contract are based solely on the insolvency or financial condition of the institution under resolution; and

c in the case of a transfer power that has been or may be exercised in relation to the institution under resolution, either:

(i) all the assets and liabilities of the subsidiary relating to that contract have been or may be transferred to and assumed by the recipient; or

(ii) the resolution authority provides in any other way adequate protection for such obligations.

The suspension shall take effect from the publication of the notice pursuant to Article 83(4) until midnight in the Member State where the subsidiary of the institution under resolution is established on the business day following that publication.

[[F1]3 Any suspension under paragraph 1 or 2 shall not apply to:

a systems or operators of systems designated for the purposes of Directive 98/26/EC;

b central counterparties authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012; or

c central banks.**]**

4 A person may exercise a termination right under a contract before the end of the period referred to in paragraph 1 or 2 if that person receives notice from the resolution authority that the rights and liabilities covered by the contract shall not be:

a transferred to another entity; or

b subject to write down or conversion on the application of the bail-in tool in accordance with point (a) of Article 43(2).

5 Where a resolution authority exercises the power specified in paragraph 1 or 2 of this Article to suspend termination rights, and where no notice has been given pursuant to paragraph 4 of this Article, those rights may be exercised on the expiry of the period of suspension, subject to Article 68, as follows:

a if the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only on the occurrence of any continuing or subsequent enforcement event by the recipient entity;

b if the rights and liabilities covered by the contract remain with the institution under resolution and the resolution authority has not applied the bail-in tool in accordance with Article 43(2)(a)to that contract, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of a suspension under paragraph 1.

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

7 Competent authorities or resolution authorities may require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to maintain detailed records of financial contracts.

Upon the request of a competent authority or a resolution authority, a trade repository shall make the necessary information available to competent authorities or resolution authorities to enable them to fulfil their respective responsibilities and mandates in accordance with Article 81 of Regulation (EU) No 648/2012.

8 EBA shall develop draft regulatory technical standards specifying the following elements for the purposes of paragraph 7:

a a minimum set of the information on financial contracts that should be contained in the detailed records; and

b the circumstances in which the requirement should be imposed.

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.

Textual Amendments

F1 Substituted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

I[F2] Article 71a

Contractual recognition of resolution stay powers

1 Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include in any financial contract which they enter into and which is governed by third-country law, terms by which the parties recognise that the financial contract may be subject to the exercise of powers by the resolution authority to suspend or restrict rights and obligations under Articles 33a, 69, 70, and 71 and recognise that they are bound by the requirements of Article 68.

2 Member States may also require that Union parent undertakings ensure that their third-country subsidiaries include, in the financial contracts referred to in paragraph 1, terms to exclude that the exercise of the power of the resolution authority to suspend or restrict rights and obligations of the Union parent undertaking, in accordance with paragraph 1, constitutes a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts.

The requirement in the first subparagraph may apply in respect of third-country subsidiaries which are:

a credit institutions;

b investment firms (or which would be investment firms if they had a head office in the relevant Member State); or

c financial institutions.

3 Paragraph 1 shall apply to any financial contract which:

a creates a new obligation, or materially amends an existing obligation after the entry into force of the provisions adopted at national level to transpose this Article;

b provides for the exercise of one or more termination rights or rights to enforce security interests to which Article 33a, 68, 69, 70 or 71 would apply if the financial contract were governed by the laws of a Member State.

4 Where an institution or entity does not include the contractual term required in accordance with paragraph 1 of this Article, that shall not prevent the resolution authority from applying the powers referred to in Articles 33a, 68, 69, 70 or 71 in relation to that financial contract.

5 EBA shall develop draft regulatory technical standards in order to further determine the contents of the term required in paragraph 1, taking into account institutions' and entities' different business models.

EBA shall submit those draft regulatory technical standards to the Commission by 28 June 2020.

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.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

Article 72

Exercise of the resolution powers

1 Member States shall ensure that, in order to take a resolution action, resolution authorities are able to exercise control over the institution under resolution, so as to:

a operate and conduct the activities and services of the institution under resolution with all the powers of its shareholders and management body; and

b manage and dispose of the assets and property of the institution under resolution.

The control referred to in the first subparagraph may be exercised directly by the resolution authority or indirectly by a person or persons appointed by the resolution authority. Member States shall ensure that voting rights conferred by shares or other instruments of ownership of the institution under resolution cannot be exercised during the period of resolution.

2 Subject to Article 85(1), Member States shall ensure that resolution authorities are able to take a resolution action through executive order in accordance with national administrative competences and procedures, without exercising control over the institution under resolution.

3 Resolution authorities shall decide in each particular case whether it is appropriate to carry out the resolution action through the means specified in paragraph 1 or in paragraph 2, having regard to the resolution objectives and the general principles governing resolution, the specific circumstances of the institution under resolution in question and the need to facilitate the effective resolution of cross-border groups.

4 Resolution authorities shall not be deemed to be shadow directors or de facto directors under national law.

CHAPTER VII

Safeguards

Article 73

Treatment of shareholders and creditors in the case of partial transfers and application of the bail-in tool

Member States shall ensure that, where one or more resolution tools have been applied and, in particular for the purposes of Article 75:

(a) except where point (b) applies, where resolution authorities transfer only parts of the rights, assets and liabilities of the institution under resolution, the shareholders and those creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

(b) where resolution authorities apply the bail-in tool, the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings immediately at the time when the decision referred to in Article 82 was taken.

Article 74

Valuation of difference in treatment

1 For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to for the purpose of Article 73, Member States shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. That valuation shall be distinct from the valuation carried out under Article 36.

2 The valuation in paragraph 1 shall determine:

a the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if the institution under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

b the actual treatment that shareholders and creditors have received, in the resolution of the institution under resolution; and

c if there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).

3 The valuation shall:

a assume that the institution under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

b assume that the resolution action or actions had not been effected;

c disregard any provision of extraordinary public financial support to the institution under resolution.

4 EBA may develop draft regulatory technical standards specifying the methodology for carrying out the valuation in this Article, in particular the methodology for assessing the treatment that shareholders and creditors would have received if the institution under resolution had entered insolvency proceedings at the time when the decision referred to in Article 82 was taken.

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 75

Safeguard for shareholders and creditors

Member States shall ensure that if the valuation carried out under Article 74 determines that any shareholder or creditor referred to in Article 73, or the deposit guarantee scheme in accordance with Article 109(1), has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, it is entitled to the payment of the difference from the resolution financing arrangements.

Article 76

Safeguard for counterparties in partial transfers

1 Member States shall ensure that the protections specified in paragraph 2 apply in the following circumstances:

a a resolution authority transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity or, in the exercise of a resolution tool, from a bridge institution or asset management vehicle to another person;

b a resolution authority exercises the powers specified in point (f) of Article 64(1).

2 Member States shall ensure appropriate protection of the following arrangements and of the counterparties to the following arrangements:

a security arrangements, under which a person has by way of security an actual or contingent interest in the assets or rights that are subject to transfer, irrespective of whether that interest is secured by specific assets or rights or by way of a floating charge or similar arrangement;

b title transfer financial collateral arrangements under which collateral to secure or cover the performance of specified obligations is provided by a transfer of full ownership of assets from the collateral provider to the collateral taker, on terms providing for the collateral taker to transfer assets if those specified obligations are performed;

c set-off arrangements under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other;

d netting arrangements;

e covered bonds;

f structured finance arrangements, including securitisations and 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 the covered bonds, which involve the

granting and holding of security by a party to the arrangement or a trustee, agent or nominee.

The form of protection that is appropriate, for the classes of arrangements specified in points (a) to (f) of this paragraph is further specified in Articles 77 to 80, and shall be subject to the restrictions specified in Articles 68 to 71.

3 The requirement under paragraph 2 applies irrespective of the number of parties involved in the arrangements and of whether the arrangements:

a are created by contract, trusts or other means, or arise automatically by operation of law;

b arise under or are governed in whole or in part by the law of another Member State or of a third country.

4 The Commission shall adopt delegated acts in accordance with Article 115 further specifying the classes of arrangement that fall within the scope of points (a) to (f) of paragraph 2 of this Article.

Article 77

Protection for financial collateral, set off and netting agreements

1 Member States shall ensure that there is appropriate protection for title transfer financial collateral arrangements and set-off and netting arrangements so as to prevent the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution under resolution and another person and the modification or termination of rights and liabilities that are protected under such a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement through the use of ancillary powers.

For the purposes of the first subparagraph, rights and liabilities are to be treated as protected under such an arrangement if the parties to the arrangement are entitled to set-off or net those rights and liabilities.

2 Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

a transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement; and

b transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

Article 78

Protection for security arrangements

1 Member States shall ensure that there is appropriate protection for liabilities secured under a security arrangement so as to prevent one of the following:

a the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;

b the transfer of a secured liability unless the benefit of the security are also transferred;

c the transfer of the benefit of the security unless the secured liability is also transferred; or

d the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

2 Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

a transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement; and

b transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits

Article 79

Protection for structured finance arrangements and covered bonds

1 Member States shall ensure that there is appropriate protection for structured finance arrangements including arrangements referred to in points (e) and (f) of Article 76(2) so as to prevent either of the following:

a the transfer of some, but not all, of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in points (e) and (f) of Article 76(2), to which the institution under resolution is a party;

b the termination or modification through the use of ancillary powers of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in points (e) and (f) of Article 76(2), to which the institution under resolution is a party.

2 Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

a transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement, and

b transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

Article 80

Partial transfers: protection of trading, clearing and settlement systems

1 Member States shall ensure that the application of a resolution tool does not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where the resolution authority:

a transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity; or

b uses powers under Article 64 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party.

2 In particular, a transfer, cancellation or amendment as referred to in paragraph 1 of this Article shall not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and shall not modify or negate the enforceability of transfer orders and netting as required

by Articles 3 and 5 of that Directive, the use of funds, securities or credit facilities as required by Article 4 thereof or protection of collateral security as required by Article 9 thereof.

CHAPTER VIII

Procedural obligations

Article 81

Notification requirements

1 Member States shall require the management body of an institution or any entity referred to in point (b), (c) or (d) of Article 1(1) to notify the competent authority where they consider that the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is failing or likely to fail, within the meaning specified in Article 32(4).

2 Competent authorities shall inform the relevant resolution authorities of any notifications received under paragraph 1 of this Article, and of any crisis prevention measures, or any actions referred to in Article 104 of Directive 2013/36/EU they require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive to take.

3 Where a competent authority or resolution authority determines that the conditions referred to in points (a) and (b) of Article 32(1) are met in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), it shall communicate that determination without delay to the following authorities, if different:

a the resolution authority for that institution or entity referred to in point (b), (c) or (d) of Article 1(1);

b the competent authority for that institution or entity referred to in point (b), (c) or (d) of Article 1(1);

c the competent authority of any branch of that institution or entity referred to in point (b), (c) or (d) of Article 1(1);

d the resolution authority of any branch of that institution or entity referred to in point (b), (c) or (d) of Article 1, (1)

e the central bank;

f the deposit guarantee scheme to which a credit institution is affiliated where necessary to enable the functions of the deposit guarantee scheme to be discharged;

g the body in charge of the resolution financing arrangements where necessary to enable the functions of the resolution financing arrangements to be discharged;

h where applicable, the group-level resolution authority;

i the competent ministry;

j where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive is subject to supervision on consolidated basis under Chapter 3 of Title VII of Directive 2013/36/EU, the consolidating supervisor; and

k the ESRB and the designated national macro-prudential authority.

4 Where the transmission of information referred to in paragraphs 3(f) and 3(g) does not guarantee the appropriate level of confidentiality, the competent authority or resolution authority shall establish alternative communication procedures that achieve the same objectives while ensuring the appropriate level of confidentiality.

Article 82

Decision of the resolution authority

1 On receiving a communication from the competent authority pursuant to paragraph 3 of Article 81, or on its own initiative, the resolution authority shall determine, in accordance with Article 32(1) and Article 33, whether the conditions of that paragraph are met in respect of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) in question.

2 A decision whether or not to take resolution action in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) shall contain the following information:

a the reasons for that decision, including the determination that the institution meets or does not meet the conditions for resolution;

b the action that the resolution authority intends to take including, where appropriate, the determination to apply for winding up, the appointment of an administrator or any other measure under applicable normal insolvency proceedings or, subject to Article 37(9), under national law.

3 EBA shall develop draft regulatory technical standards in order to specify the procedures and contents relating to the following requirements:

a the notifications referred to in Article 81(1), (2) and (3);

b the notice of suspension referred to in Article 83.

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 83

Procedural obligations of resolution authorities

1 Member States shall ensure that, as soon as reasonably practicable after taking a resolution action, resolution authorities comply with the requirements laid down in paragraphs 2, 3 and 4.

2 The resolution authority shall notify the institution under resolution and the following authorities, if different:

a the competent authority for the institution under resolution;

b the competent authority of any branch of the institution under resolution;

c the central bank;

d the deposit guarantee scheme to which the credit institution under resolution is affiliated;

e the body in charge of the resolution financing arrangements;

f where applicable, the group-level resolution authority;

g the competent ministry;

h where the institution under resolution is subject to supervision on a consolidated basis under Chapter 3 of Title VII of Directive 2013/36/EU, the consolidating supervisor;

i the designated national macroprudential authority and the ESRB;

j the Commission, the European Central Bank, ESMA, the European Supervisory Authority (European Investment and Occupational Pensions Authority) ('EIOPA') established by Regulation (EU) No 1094/2010 and EBA;

k where the institution under resolution is an institution as defined in Article 2(b) of Directive 98/26/EC, the operators of the systems in which it participates.

3 The notification referred to in paragraph 2 shall include a copy of any order or instrument by which the relevant powers are exercised and indicate the date from which the resolution action or actions are effective.

4 The resolution authority shall publish or ensure the publication of a copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action, and in particular the effects on retail customers and, if applicable, the terms and period of suspension or restriction referred to in Articles 69, 70 and 71, by the following means:

a on its official website;

b on the website of the competent authority, if different from the resolution authority, and on the website of EBA;

c on the website of the institution under resolution;

d where the shares, other instruments of ownership or debt instruments of the institution under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning the institution under resolution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council[(6)].

5 If the shares, instruments of ownership or debt instruments are not admitted to trading on a regulated market, the resolution authority shall ensure that the documents providing proof of the instruments referred to in paragraph 4 are sent to the shareholders and creditors of the institution under resolution that are known through the registers or databases of the institution under resolution which are available to the resolution authority.

Article 84

Confidentiality

1 The requirements of professional secrecy shall be binding in respect of the following persons:

a resolution authorities;

b competent authorities and EBA;

c competent ministries;

d special managers or temporary administrators appointed under this Directive;

e potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;

f auditors, accountants, legal and professional advisors, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministries or by the potential acquirers referred to in point (e);

g bodies which administer deposit guarantee schemes;

h bodies which administer investor compensation schemes;

i the body in charge of the resolution financing arrangements;

j central banks and other authorities involved in the resolution process;

k a bridge institution or an asset management vehicle;

l any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in points (a) to (k);

m senior management, members of the management body, and employees of the bodies or entities referred to in points (a) to (k) before, during and after their appointment.

2 With a view to ensuring that the confidentiality requirements laid down in paragraphs 1 and 3 are complied with, the persons in points (a), (b), (c), (g), (h), (j) and (k) of paragraph 1 shall ensure that there are internal rules in place, including rules to secure secrecy of information between persons directly involved in the resolution process.

3 Without prejudice to the generality of the requirements under paragraph 1, the persons referred to in that paragraph shall be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with its functions under this Directive, to any person or authority unless it is in the exercise of their functions under this Directive or in summary or collective form such that individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) cannot be identified or with the express and prior consent of the authority or the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) which provided the information.

Member States shall ensure that no confidential information is disclosed by the persons referred to in paragraph 1 and that the possible effects of disclosing information on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits, are assessed.

The procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of recovery and resolution plan as referred to in Articles 5, 7, 10, 11 and 12 and the result of any assessment carried out under Articles 6, 8 and 15.

Any person or entity referred to in paragraph 1 shall be subject to civil liability in the event of an infringement of this Article, in accordance with national law.

4 This Article shall not prevent:

a employees and experts of the bodies or entities referred to in points (a) to (j) of paragraph 1 from sharing information among themselves within each body or entity; or

b resolution authorities and competent authorities, including their employees and experts, from sharing information with each other and with other Union resolution authorities, other Union competent authorities, competent ministries, central banks, deposit guarantee schemes, investor compensation schemes, authorities responsible for normal insolvency proceedings, authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, persons charged with carrying out statutory audits of accounts, EBA, or, subject to Article 98, third-country authorities that carry out equivalent functions to resolution authorities, or, subject to strict confidentiality requirements, to a potential acquirer for the purposes of planning or carrying out a resolution action.

5 Notwithstanding any other provision of this Article, Member States may authorise the exchange of information with any of the following:

a subject to strict confidentiality requirements, any other person where necessary for the purposes of planning or carrying out a resolution action;

b parliamentary enquiry committees in their Member State, courts of auditors in their Member State and other entities in charge of enquiries in their Member State, under appropriate conditions; and

c national authorities responsible for overseeing payment systems, the authorities responsible for normal insolvency proceedings, the authorities entrusted with the public duty of supervising other financial sector entities, the authorities responsible for the supervision of financial markets and insurance undertakings and inspectors acting on their behalf, the authorities of Member States responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, the authorities responsible for protecting the stability of the financial system, and persons charged carrying out statutory audits;

6 This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.

7 EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify how information should be provided in summary or collective form for the purposes of paragraph 3.

CHAPTER IX

Right of appeal and exclusion of other actions

Article 85

Ex-ante judicial approval and rights to challenge decisions

1 Member States may require that a decision to take a crisis prevention measure or a crisis management measure is subject to *ex-ante* judicial approval, provided that in respect of a decision to take a crisis management measure, according to national law, the procedure relating to the application for approval and the court's consideration are expeditious.

2 Member States shall provide in national law for a right of appeal against a decision to take a crisis prevention measure or a decision to exercise any power, other than a crisis management measure, under this Directive.

3 Member States shall ensure that all persons affected by a decision to take a crisis management measure, have the right to appeal against that decision. Member States shall ensure that the review is expeditious and that national courts use the complex economic assessments of the facts carried out by the resolution authority as a basis for their own assessment.

4 The right to appeal referred to in paragraph 3 shall be subject to the following provisions:

a the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision;

b the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be against the public interest.

Where it is necessary to protect the interests of third parties acting in good faith who have acquired shares, other instruments of ownership, assets, rights or liabilities of

an institution under resolution by virtue of the use of resolution tools or exercise of resolution powers by a resolution authority, the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision. In that case, remedies for a wrongful decision or action by the resolution authorities shall be limited to compensation for the loss suffered by the applicant as a result of the decision or act.

Article 86

Restrictions on other proceedings

1 Without prejudice to point (b) of Article 82(2), Member States shall ensure with respect to an institution under resolution or an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) in relation to which the conditions for resolution have been determined to be met, that normal insolvency proceedings shall not be commenced except at the initiative of the resolution authority and that a decision placing an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) into normal insolvency proceedings shall be taken only with the consent of the resolution authority.

2 For the purposes of paragraph 1, Member States shall ensure that:

a competent authorities and resolution authorities are notified without delay of any application for the opening of normal insolvency proceedings in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), irrespective of whether the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is under resolution or a decision has been made public in accordance with Article 83(4) and (5);

b the application is not determined unless the notifications referred to in point (a) have been made and either of the following occurs:

(i) the resolution authority has notified the authorities responsible for normal insolvency proceedings that it does not intend to take any resolution action in relation to the institution or the entity referred to in point (b), (c) or (d) of Article 1(1);

(ii) a period of seven days beginning with the date on which the notifications referred to in point (a) were made has expired.

3 Without prejudice to any restriction on the enforcement of security interests imposed pursuant to Article 70, Member States shall ensure that, if necessary for the effective application of the resolution tools and powers, resolution authorities may request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party.

(**1**) Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82 22.3.2001, p. 16).

(**2**) 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).

(**3**) 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).

(**4**) Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1).

(**5**) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

(**6**) Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).