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

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank[(1)],

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

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

Whereas:

(1) On 9 November 2015, the Financial Stability Board published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('TLAC standard'), which was endorsed by the G-20 in November 2015. The objective of the TLAC standard is to ensure that global systemically important banks, referred to as global systemically important institutions ('G-SIIs') in the Union framework, have the loss-absorbing and recapitalisation capacity necessary to help ensure that, in, and immediately following, a resolution, those institutions can continue to perform critical functions without putting taxpayers' funds, that is public funds, or financial stability at risk. In its Communication of 24 November 2015, 'Towards the completion of the Banking Union', the Commission committed itself to bringing forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented in Union law by the internationally agreed deadline of 2019.

(2) The implementation of the TLAC standard in Union law needs to take into account the existing institution-specific minimum requirement for own funds and eligible liabilities (MREL) that applies to all credit institutions and investment firms (institutions) established in the Union, as well as to any other entity as laid down in Directive 2014/59/EU of the European Parliament and of the Council[(4)] (entities). As the TLAC standard and the MREL pursue the same objective of ensuring that institutions and entities

established in the Union have sufficient loss-absorbing and recapitalisation capacity, the two requirements should be complementary elements of a common framework. Operationally, the harmonised minimum level of the TLAC standard for G-SIIs ('TLAC minimum requirement') should be introduced in Union legislation through amendments to Regulation (EU) No 575/2013[(5)], while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs, referred to as the MREL, should be addressed through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council[(6)]. The provisions of Directive 2014/59/EU, as amended by this Directive, on the loss-absorbing and recapitalisation capacity of institutions and entities should be applied in a manner consistent with those in Regulations (EU) No 575/2013 and (EU) No 806/2014 and in Directive 2013/36/EU of the European Parliament and of the Council[(7)].

(3) The absence of harmonised Union rules in respect of the implementation of the TLAC standard in the Union creates additional costs and legal uncertainty and makes the application of the bail-in tool for cross-border institutions and entities more difficult. The absence of harmonised Union rules also results in distortions of competition in the internal market given that the costs for institutions and entities to comply with the existing requirements and the TLAC standard might differ considerably across the Union. It is therefore necessary to remove those obstacles to the functioning of the internal market and to avoid distortions of competition resulting from the absence of harmonised Union rules in respect of the implementation of the TLAC standard. Consequently, the appropriate legal basis for this Directive is Article 114 of the Treaty on the Functioning of the European Union.

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

(5) Member States should ensure that institutions and entities have sufficient loss-absorbing and recapitalisation capacity to ensure a smooth and fast absorption of losses and recapitalisation with a minimum impact on taxpayers and financial stability. That should

be achieved through compliance by institutions with an institution-specific MREL as set out in Directive 2014/59/EU.

(6) In order to align denominators that measure the loss-absorbing and recapitalisation capacity of institutions and entities with those provided for in the TLAC standard, the MREL should be expressed as a percentage of the total risk exposure amount and of the total exposure measure of the relevant institution or entity, and institutions or entities should meet simultaneously the levels resulting from the two measurements.

(7) In order to facilitate long-term planning for the issue of instruments and to establish certainty with regard to the necessary buffers, markets need timely clarity about the eligibility criteria required for instruments to be recognised as TLAC or MREL eligible liabilities.

(8) In order to ensure a level playing field for institutions and entities established in the Union, including on a global level, eligibility criteria for bail-inable liabilities for the MREL should be closely aligned with those laid down in Regulation (EU) No 575/2013 for the TLAC minimum requirement, but subject to the complementary adjustments and requirements introduced in this Directive. In particular, certain debt instruments with an embedded derivative component, such as certain structured notes, should be eligible, subject to certain conditions, to meet the MREL to the extent that they have a fixed or increasing principal amount repayable at maturity that is known in advance while only an additional return is linked to that derivative component and depends on the performance of a reference asset. In view of those conditions, those debt instruments are expected to be highly loss-absorbing and easy to bail-in in resolution. Where institutions or entities hold own funds in excess of own funds requirements, that fact should not in itself affect decisions concerning the determination of the MREL. Moreover, it should be possible for institutions and entities to meet any part of their MREL with own funds.

(9) The scope of liabilities used to meet the MREL includes, in principle, all liabilities resulting from claims arising from ordinary unsecured creditors (non-subordinated liabilities) unless they do not meet specific eligibility criteria set out in this Directive. To enhance the resolvability of institutions and entities through an effective use of the bail-in tool, resolution authorities should be able to require that the MREL is met with own funds and other subordinated liabilities, in particular where there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed the losses that they would incur under normal insolvency proceedings. The resolution authorities should assess the need to require institutions and entities to meet the MREL with own funds and other subordinated liabilities where the amount of liabilities excluded from the application of the bail-in tool reaches a certain threshold within a class of liabilities that includes MREL eligible liabilities. Institutions and entities should meet the MREL with own funds and other subordinated liabilities to the extent that is necessary to prevent their creditors from incurring losses that are greater than those that creditors would otherwise incur under normal insolvency proceedings.

(10) Any subordination of debt instruments requested by resolution authorities for the MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation

(EU) No 575/2013 as permitted by the TLAC standard. For resolution entities of G-SIIs, resolution entities of resolution groups with assets above EUR 100 billion (top-tier banks), and for resolution entities of certain smaller resolution groups that are considered likely to pose a systemic risk in the event of failure, taking into account the prevalence of deposits and the absence of debt instruments in the funding model, limited access to capital markets for eligible liabilities and reliance on Common Equity Tier 1 capital to meet the MREL, resolution authorities should be able to require that a part of the MREL equal to the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU as amended by this Directive is met with own funds and other subordinated liabilities, including own funds used to comply with the combined buffer requirement set out in Directive 2013/36/EU.

(11) At the request of a resolution entity, resolution authorities should be able to reduce the part of the MREL required to be met with own funds and other subordinated liabilities up to a limit that represents the proportion of the reduction possible under Article 72b(3) of Regulation (EU) No 575/2013 in relation to the TLAC minimum requirement laid down in that Regulation., Resolution authorities should be able to require, in accordance with the principle of proportionality, that the MREL is met with own funds and other subordinated liabilities to the extent that the overall level of the required subordination in the form of own funds and eligible liabilities items due to the obligation of institutions and entities to comply with the TLAC minimum requirement, the MREL and, where applicable, the combined buffer requirement under Directive 2013/36/EU, does not exceed the greater of the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU as amended by this Directive or the formula set out in this Directive based on the prudential requirements under Pillar 1 and Pillar 2 and the combined buffer requirement.

(12) For specific top-tier banks, resolution authorities should, subject to conditions to be assessed by the resolution authority, limit the level of the minimum subordination requirement to a certain threshold, taking also into account the possible risk of disproportionately impacting the business model of those institutions. That limitation should be without prejudice to the possibility of setting a subordination requirement above this limit through the requirement of subordination under Pillar 2, subject also to the conditions applying to Pillar 2, on the basis of alternative criteria, namely impediments to resolvability, or the feasibility and credibility of the resolution strategy, or the riskiness of the institution.

(13) The MREL should allow institutions and entities to absorb losses expected in resolution or at the point of non-viability, as appropriate, and to be recapitalised after the implementation of actions provided for in the resolution plan or after the resolution of the resolution group. The resolution authorities should, on the basis of the resolution strategy they have chosen, duly justify the imposed level of the MREL and should, without undue delay, review that level to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU. As such, the imposed level of the MREL should be the sum of the amount of the losses expected in resolution that correspond to the institution's or entity's own funds requirements and the recapitalisation amount that allows the institution or entity post-resolution,

or after the exercise of write down or conversion powers, to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The resolution authority should adjust downwards or upwards the recapitalisation amounts for any changes resulting from the actions set out in the resolution plan.

(14) The resolution authority should be able to increase the recapitalisation amount to ensure sufficient market confidence in the institution or entity after the implementation of the actions set out in the resolution plan. The requested level of the market confidence buffer should enable the institution or entity to continue to meet the conditions for authorisation for an appropriate period, including by allowing the institution or entity to cover the costs related to the restructuring of its activities following resolution, and to sustain sufficient market confidence. The market confidence buffer should be set by reference to part of the combined buffer requirement under Directive 2013/36/EU. The resolution authorities should adjust downwards the level of the market confidence buffer if a lower level is sufficient to ensure sufficient market confidence or should adjust upwards that level where a higher level is necessary to ensure that, following the actions set out in the resolution plan, the entity continues to meet the conditions for its authorisation for an appropriate period, and to sustain sufficient market confidence.

(15) In line with Commission Delegated Regulation (EU) 2016/1075[8], resolution authorities should examine the investor base of an individual institution's or entity's MREL instruments. If a significant part of an institution's or entity's MREL instruments is held by retail investors that might not have received an appropriate indication of relevant risks, that could in itself constitute an impediment to resolvability. In addition, if a large part of an institution's or entity's MREL instruments is held by other institutions or entities, the systemic implications of a write down or conversion could also constitute an impediment to resolvability. Where a resolution authority finds an impediment to resolvability resulting from the size and nature of a certain investor base, it should be able to recommend to an institution or entity that it address that impediment.

(16) To ensure that retail investors do not invest excessively in certain debt instruments that are eligible for the MREL, Member States should ensure that the minimum denomination amount of such instruments is relatively high or that the investment in such instruments does not represent an excessive share of the investor's portfolio. This requirement should only apply to instruments issued after the date of transposition of this Directive. This requirement is not sufficiently covered in Directive 2014/65/EU, and should therefore be enforceable under Directive 2014/59/EU and should be without prejudice to investor protection rules provided for in Directive 2014/65/EU. Where, in the course of performing their duties, resolution authorities find evidence regarding potential infringements of Directive 2014/65/EU, they should be able to exchange confidential information with market conduct authorities for the purpose of enforcing that Directive. In addition, it should also be possible for Member States to further restrict the marketing and sale of certain other instruments to certain investors.

(17) To enhance their resolvability, resolution authorities should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement

set out in Regulation (EU) No 575/2013. That institution-specific MREL should be imposed if the TLAC minimum requirement is not sufficient to absorb losses and to recapitalise a G-SII under the chosen resolution strategy.

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

(19) In line with Regulation (EU) No 575/2013, institutions or entities that are identified as resolution entities should be subject to the MREL only at the consolidated resolution group level. That means that resolution entities should, in order to meet their MREL, be obliged to issue eligible instruments and items to external third-party creditors that would be bailed-in in the event that the resolution entity enters resolution.

(20) Institutions or entities that are not resolution entities should comply with the MREL at individual level. The loss-absorption and recapitalisation needs of those institutions or entities should be generally provided by their respective resolution entities through direct or indirect acquisition by those resolution entities of own funds instruments and eligible liabilities instruments issued by those institutions or entities and through their write down or conversion into instruments of ownership at the point where those institutions or entities are no longer viable. As such, the MREL that applies to institutions or entities that are not resolution entities should be applied together and consistently with the requirements that apply to resolution entities. That should allow resolution authorities to resolve a resolution group without placing certain of its subsidiaries under resolution, thus avoiding potentially disruptive effects on the market. The application of the MREL to institutions or entities that are not resolution entities should comply with the chosen resolution strategy, and in particular should not change the ownership relationship between institutions or entities and their resolution group after those institutions or entities have been recapitalised.

(21) If both the resolution entity or the parent and its subsidiaries are established in the same Member State and are part of the same resolution group, the resolution authority should be able to waive the application of the MREL that applies to those subsidiaries that are not resolution entities or to permit them to meet the MREL with collateralised guarantees between the parent and its subsidiaries, that can be triggered when the timing conditions equivalent to those allowing the write down or conversion of eligible liabilities are met. The collateral backing the guarantee should be highly liquid and have minimal market and credit risk.

(22) Regulation (EU) No 575/2013 provides that competent authorities are able to waive the application of certain solvency and liquidity requirements for credit institutions permanently affiliated to a central body (‘cooperative networks’) where certain specific conditions are met. To take account of the specificities of such cooperative networks,

resolution authorities should also be able to waive the application of the MREL that applies to such credit institutions and the central body under similar conditions to those set out in Regulation (EU) No 575/2013 where credit institutions and the central body are established in the same Member State. Resolution authorities should also be able to treat credit institutions and the central body as a whole when assessing the conditions for resolution depending on the features of the solidarity mechanism. Resolution authorities should be able to ensure compliance with the external MREL requirement of the resolution group as a whole in different ways, depending on the features of the solidarity mechanism of each group, by counting eligible liabilities of entities that, in accordance with the resolution plan, are required by the resolution authorities to issue instruments eligible for the MREL outside the resolution group.

(23) To ensure appropriate levels of the MREL for resolution purposes, the authorities responsible for setting the level of the MREL should be the resolution authority of the resolution entity, the group-level resolution authority, that is the resolution authority of the ultimate parent undertaking, and resolution authorities of other entities of the resolution group. Any disputes between authorities should be subject to the powers of the European Banking Authority (EBA) under Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(9)] subject to the conditions and limitations set out in this Directive.

(24) Competent authorities and resolution authorities should appropriately address and remedy any breaches of the TLAC minimum requirement and of the MREL. Given that a breach of those requirements could constitute an impediment to institution or group resolvability, the existing procedures to remove impediments to resolvability should be shortened, in order to address any breaches of the requirements expediently. Resolution authorities should also be able to require institutions or entities to modify the maturity profiles of eligible instruments and items and to prepare and implement plans to restore the level of those requirements. Resolution authorities should also be able to prohibit certain distributions where they consider that an institution or entity is failing to meet the combined buffer requirement under Directive 2013/36/EU when considered in addition to the MREL.

(25) To ensure the transparent application of the MREL, institutions and entities should report to their competent and resolution authorities and should disclose regularly to the public their MREL, the levels of eligible and bail-inable liabilities and the composition of those liabilities, including their maturity profile and ranking in normal insolvency proceedings. For institutions or entities that are subject to the TLAC minimum requirement, there should be consistency in the frequency of supervisory reporting and disclosure of the institution-specific MREL as provided in this Directive with those provided in Regulation (EU) No 575/2013 for the TLAC minimum requirement. While total or partial exemptions from reporting and disclosure obligations for specified institutions or entities should be allowed in certain cases specified in this Directive, such exemptions should not limit the powers of resolution authorities to request information for the purpose of performing their duties under Directive 2014/59/EU as amended by this Directive.

(26) The requirement to include contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should facilitate and improve the process for bailing in those liabilities in the event of resolution. Contractual arrangements, when properly drafted and widely adopted, can offer a workable solution in cases of cross-border resolution until a statutory approach under Union law is developed or incentives to choose the law of a Member State for contracts are developed or statutory recognition frameworks to enable effective cross-border resolution are adopted in all third-country jurisdictions. Even with statutory recognition frameworks in place, contractual recognition arrangements should help to reinforce the awareness of creditors under contractual arrangements that are not governed by the law of a Member State of possible resolution action with regard to institutions or entities that are governed by Union law. There might be instances, however, where it is impracticable for institutions or entities to include those contractual terms in agreements or instruments creating certain liabilities, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments.

For example, under certain circumstances, it could be considered impracticable to include contractual recognition clauses in liability contracts in cases where it is illegal under the law of the third country for an institution or entity to include such clauses in agreements or instruments creating liabilities that are governed by the laws of that third country, where an institution or entity has no power at the individual level to amend the contractual terms as they are imposed by international protocols or are based on internationally agreed standard terms, or where the liability which would be subject to the contractual recognition requirement is contingent on a breach of contract or arises from guarantees, counter-guarantees or other instruments used in the context of trade finance operations. However, a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should not as such be considered as a cause of impracticability. EBA should develop draft regulatory technical standards to be adopted by the Commission in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 to more precisely identify cases of impracticability. When applying those regulatory technical standards and taking into account the specificities of the market concerned, the resolution authority should specify, where it deems it necessary, categories of liabilities where there might be grounds for impracticability. In that framework, it should be for an institution or an entity to determine whether the insertion of a bail-in recognition clause in a contract or class of contracts is impracticable. Institutions and entities should provide regular updates to resolution authorities, to keep them informed of progress towards implementing contractual recognition terms.

In this context, institutions and entities should indicate the contracts or classes of contracts for which the insertion of a bail-in recognition clause is impracticable and indicate a reason for this assessment. Resolution authorities should, within a reasonable timeframe, assess an institution's or an entity's determination that it is impracticable to include contractual recognition clauses in liability contracts and act to address any erroneous assessments and impediments to resolvability as a result of contractual recognition clauses not being included. Institutions and entities should be prepared to justify their determination if requested by the resolution authority to do so. In addition, in order to ensure that the resolvability of institutions and entities is not affected, liabilities for which the relevant contractual provisions are not included should not be eligible for the MREL.

(27) It is useful and necessary to adjust the power of resolution authorities to suspend, for a limited period, certain contractual obligations of institutions and entities. In particular, it should be possible for a resolution authority to exercise that power before an institution or an entity is put under resolution, from the moment when the determination is made that the institution or the entity is failing or likely to fail, if a private sector measure which, in the view of the resolution authority, would, within a reasonable timeframe, prevent the failure of the institution or the entity, is not immediately available, and if exercising that power is deemed necessary to avoid the further deterioration of the financial conditions of the institution or the entity. In that context, resolution authorities should be able to exercise that power if they are not satisfied with a proposed private sector measure that is immediately available. The power to suspend certain contractual obligations would also allow resolution authorities to establish whether a resolution action is in the public interest, to choose the most appropriate resolution tools, or to ensure the effective application of one or more resolution tools. The duration of the suspension should be limited to a maximum of two business days. Up to that maximum, the suspension could continue to apply after the resolution decision is taken.

(28) In order for the power to suspend certain contractual obligations to be used in a proportionate way, the resolution authorities should have the possibility to take into account the circumstances of each individual case and to determine the scope of the suspension accordingly. Furthermore, they should be able to authorise certain payments – in particular, but not limited to, administrative expenses of the institution or entity concerned - on a case-by-case basis. It should also be possible to apply the power to suspend to eligible deposits. However, the resolution authorities should carefully assess the appropriateness of applying that power to certain eligible deposits, in particular covered deposits held by natural persons and micro, small and medium-sized enterprises, and should assess the risk that the application of a suspension in respect of such deposits would severely disrupt the functioning of financial markets. Where the power to suspend certain contractual obligations is exercised in respect of covered deposits, those deposits should not be considered to be unavailable for the purposes of Directive 2014/49/EU of the European Parliament and of the Council[10]. In order to ensure that, during the suspension period, depositors do not encounter financial difficulties, Member States should be able to provide that they are allowed a certain daily amount of withdrawals.

(29) During the period of the suspension, resolution authorities should also consider, based, inter alia, on the resolution plan for the institution or the entity, the possibility that the institution or the entity is ultimately not put under resolution but is instead wound up under national law. In such cases, resolution authorities should establish the arrangements they deem appropriate to achieve adequate coordination with the relevant national authorities and to ensure that the suspension does not impair the effectiveness of the winding up process.

(30) The power to suspend payment or delivery obligations should not apply to obligations owed to systems or operators of systems designated in accordance with Directive 98/26/EC, to central banks, to authorised central counterparties (CCPs), or to third-country CCPs recognised by European Supervisory Authority (European Securities and Markets Authority) (ESMA). Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, Directive 2014/59/EU should be amended to provide that a crisis prevention measure, a suspension of obligation under Article 33a or a crisis management measure should not as such be deemed to constitute insolvency proceedings within the meaning of Directive 98/26/EC, provided that the substantive obligations under the contract continue to be performed. However, nothing in Directive 2014/59/EU should prejudice the operation of a system designated under Directive 98/26/EC or the right to collateral security guaranteed by that Directive.

(31) A key aspect of effective resolution is ensuring that, once institutions or entities referred to in points (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU enter resolution, their counterparties in financial contracts cannot terminate their positions solely as a result of the entry into resolution of those institutions or entities. In addition, resolution authorities should be empowered to suspend payment or delivery obligations due under a contract with an institution under resolution and should have the power to restrict, for a limited period of time, the rights of counterparties to close out, accelerate or otherwise terminate financial contracts. Those requirements do not apply directly to contracts under third-country law. In the absence of a statutory cross-border recognition framework, Member States should require the institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of Directive 2014/59/EU to include a contractual term in relevant financial contracts recognising that the contract may be subject to the exercise of powers by resolution authorities to suspend certain payment and delivery obligations, to restrict the enforcement of security interests or to temporarily suspend termination rights and to be bound by the requirements of Article 68 as if the financial contract was governed by the law of the relevant Member State. Such an obligation should be provided to the extent that the contract falls within the scope of those provisions. Therefore, the obligation to insert the contractual clause does not arise with respect to Articles 33a, 69, 70 and 71 of Directive 2014/59/EU as amended by this Directive in, for example, contracts with central counterparties or operators of systems designated for the purposes of Directive 98/26/EC, since with respect to these contracts, even when they are governed by the law of the relevant Member State, resolution authorities do not have the powers in those Articles.

(32) The exclusion of specific liabilities of institutions or entities from the application of the bail-in tool or from the power to suspend certain payment and delivery obligations, restrict the enforcement of security interests or temporarily suspend termination rights as provided for in Directive 2014/59/EU, should also cover liabilities in relation to CCPs established in the Union and to third-country CCPs recognised by ESMA.

(33) In order to ensure a common understanding of terms used in various legal instruments, it is appropriate to incorporate in Directive 98/26/EC the definitions and concepts introduced by Regulation (EU) No 648/2012 of the European Parliament and of the Council[11] regarding a 'central counterparty' or 'CCP' and 'participant'.

(34) Directive 98/26/EC reduces the risk associated with participation of institutions and other entities in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. Recital (7) of that Directive clarifies that Member States have the option to apply the provisions of that Directive to their domestic institutions which participate directly in systems governed by the law of a third country and to collateral security provided in connection with the participation in such systems. In view of the global size of, and activities within, some systems governed by the laws of a third country and the increased participation of entities established in the Union in such systems, the Commission should review how the Member States apply the option envisaged in recital (7) of that Directive and assess the need for any further amendments to that Directive with regard to such systems.

(35) In order to enable the effective application of the powers to reduce, write down or convert own funds items without breaching creditors' safeguards under this Directive, Member States should ensure that claims resulting from own funds items rank in normal insolvency proceedings below any other subordinated claims. Instruments which are only partly recognised as own funds should still be treated as claims resulting from own funds for their whole amount. Partial recognition could be a result, for example, of the application of grandfathering provisions which partly derecognise an instrument or a result of the application of the amortisation calendar laid down for Tier 2 instruments in Regulation (EU) No 575/2013.

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

(37) In order to allow Member States an appropriate period for the transposition and application of this Directive in their national laws, they should have eighteen months from the date of its entry into force to do so. However, the provisions of this Directive concerning public disclosure should be applied from 1 January 2024, in order to ensure that institutions and entities across the Union are allowed an appropriate period to reach the required level of the MREL in an orderly fashion,

HAVE ADOPTED THIS DIRECTIVE:

(**1**) OJ C 34, 31.1.2018, p. 17.

(**2**) OJ C 209, 30.6.2017, p. 36.

(**3**) Position of the European Parliament of 16 April 2019 (not yet published in the Official Journal) and decision of the Council of 14 May 2019.

(**4**) 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 (OJ L 173, 12.6.2014, p. 190).

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

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

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

(**8**) Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ L 184, 8.7.2016, p. 1).

(**9**) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

(**10**) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

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