



15.2.2019

# **PROVISIONAL AGREEMENT RESULTING FROM INTERINSTITUTIONAL NEGOTIATIONS**

**Subject:** Proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC (COM(2016)0852 – C8-0481/2016 – 2016/0362(COD))

The interinstitutional negotiations on the aforementioned proposal for a directive have led to a compromise. In accordance with Rule 69f(4) of the Rules of Procedure, the provisional agreement, reproduced below, is submitted as a whole to the Committee on Economic and Monetary Affairs for decision by way of a single vote.

**Proposal for a**  
**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC**

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<sup>1</sup>

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Financial Stability Board (FSB) published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('TLAC standard') on 9 November 2015, which was endorsed by the G-20 in November 2015. The objective of the TLAC standard is to ensure that global systemically important banks ('G-SIBs'), 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, critical functions can be continued without taxpayers' funds (public funds) or financial stability being put at risk. In its Communication of 24 November 2015<sup>3</sup>, the Commission committed itself to bring forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented by the internationally agreed deadline of 2019.

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, "Towards the completion of the Banking Union", 24.11.2015, COM(2015) 587 final

- (1a) In order to facilitate long-term planning and establish certainty with regards to the necessary buffers, markets need timely clarity about the eligibility criteria required in order for instruments to be recognised as TLAC/MREL liabilities.
- (2) The implementation of the TLAC standard in the Union needs to take into account the existing institution-specific minimum requirement for own funds and eligible liabilities ('MREL') applicable to all Union institutions as laid down in Directive 2014/59/EU of the European Parliament and of the Council

4. As TLAC and MREL pursue the same objective of ensuring that Union institutions have sufficient lo

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.  
6. The relevant provisions of this Directive as regards loss absorbing and recapitalisation capacity of in  
7 in a consistent way.

- (3) The absence of harmonised Union rules in respect of the implementation of the TLAC standard in the Union would create additional costs and legal uncertainty and make the application of the bail-in tool for cross-border institutions more difficult. That absence of harmonised Union rules also results in competitive distortions on the internal market given that the costs for institutions to comply with the existing requirements and the TLAC standard may differ considerably across the Union. It is therefore necessary to remove those obstacles to the functioning of the internal market and to avoid distortions of competition resulting from the absence of harmonised Union rules in respect of the implementation of the TLAC standard. Consequently, the appropriate legal basis for this Directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the case law of the Court of Justice of the European Union.
- (4) In line with the TLAC standard, Directive 2014/59/EU should continue to recognise the Single Point of Entry (SPE) as well as the Multiple Point of Entry (MPE) resolution strategy. Under the SPE strategy, only one group entity, usually the parent undertaking,

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<sup>4</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014, p. 190

<sup>5</sup> 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

<sup>6</sup> 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

<sup>7</sup> 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

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

- (5) Member States should ensure that institutions have sufficient loss absorbing and recapitalisation capacity to ensure smooth and fast absorption of losses and recapitalisation with a minimum impact on financial stability and taxpayers. That should be achieved through compliance by institutions with an institution-specific minimum requirement for own funds and eligible liabilities ('MREL') as provided in Directive 2014/59/EU.
- (6) In order to align denominators that measure the loss absorbing and recapitalisation capacity of institutions with those provided in the TLAC standard, the MREL should be expressed as a percentage of the total risk exposure amount and of the leverage ratio exposure measure of the relevant institution.
- (7) In order to ensure a level playing field for Union institutions, 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 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 a derivative and depends on the performance of a reference asset, subject to specific conditions. In view of those conditions, those instruments are expected to be highly loss-absorbing and easily bail-inable in resolution. Where institutions hold own funds in excess of own funds requirements, that fact should not in itself affect decisions concerning the determination of MREL. Moreover, institutions should be able to meet any part of their MREL with own funds.
- (8) 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 provided in this Directive. To enhance the resolvability of institutions through an effective use of the bail-in tool, resolution authorities should be able to require that the MREL is met with own funds and subordinated liabilities, in particular when there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed their potential losses in insolvency. The resolution authorities should assess the need for requiring institutions

to meet MREL with own funds and 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. The requirement to meet MREL with own funds and subordinated liabilities should be requested for a level necessary to prevent that losses of creditors in resolution are above losses that they would otherwise incur under insolvency.

Any subordination of debt instruments requested by resolution authorities for the MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation (EU) No 575/2013 as permitted by the TLAC standard. For resolution entities of G-SIIs, or resolution entities of resolution groups with assets above 100 billion Euro (top-tier banks), and for certain smaller resolution groups that are considered likely to pose a systemic risk in case of failure, taking into account 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 to meet MREL, resolution authorities should be able to require that part of MREL equal to the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU is met with subordinated liabilities and own funds, including own funds used to comply with the combined capital buffer requirement referred to in Directive 2013/36/EU.

- 8(-a) Upon request of a resolution entity, resolution authorities should be able to reduce that requirement up to the limit that represents the proportion of a reduction possible under Article 72b(3) of Regulation (EU) No 575/2013 in relation to the TLAC minimum requirement laid down in that Regulation. In accordance with the principle of proportionality, resolution authorities should be able to exercise the power to require that MREL is met with subordinated liabilities and own funds 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 to comply with TLAC, MREL and, where applicable, the combined capital buffer requirement under Directive 2013/36/EU does not exceed the higher of the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU or the formula based on the Pillar 1 and Pillar 2 prudential requirements and the combined capital buffer requirement.
- (8a) For specific top-tier banks, resolution authorities should, subject to conditions to be assessed by the authority, limit the level of the minimum subordination requirement to a certain threshold, taking also into account a possible risk of disproportionately impacting the business model of those institutions. This limitation should be without prejudice to the possibility to require a subordination requirement above this limit through 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.
- (9) The MREL should allow institutions to absorb losses expected in resolution or at the point of non-viability as appropriate and recapitalise the institution after the implementation of actions foreseen in the resolution plan or resolution of the resolution group. The resolution authorities should, on the basis of the resolution strategy chosen by them, duly justify the imposed level of the MREL and should review without undue

delay that level to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU. As such, that level should be the sum of the amount of losses expected in resolution that correspond to the institution's own funds requirements and the recapitalisation amount that allows the institution post-resolution 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 MREL should be expressed as a percentage of the total risk exposure and leverage ratio measures, and institutions should meet simultaneously the levels resulting from the two measurements. The resolution authority should adjust downwards or upwards the recapitalisation amounts for any changes resulting from the actions foreseen in the resolution plan. The resolution authority should also be able to increase the recapitalisation amount to ensure sufficient market confidence in the institution after the implementation of actions foreseen in the resolution plan. The requested level of the market confidence buffer should enable the institution to continue to meet the conditions for authorisation for an appropriate period of time, including by allowing the institution to cover the costs related to the restructuring of its activities following resolution, and to sustain sufficient market confidence.

The market confidence buffer should be set by reference to part of the combined capital 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 provided in the resolution plan, the entity continues to meet the conditions for its authorisation for an appropriate period of time and to sustain sufficient market confidence.

- 9a) In line with Commission Delegated Regulation (EU) 2016/1075 resolution authorities should examine the investor base of individual institution's MREL instruments. If a significant part of an institution's MREL instruments is held by retail investors that might not have received an appropriate indication of relevant risks, this can in itself constitute a potential impediment to resolvability. At the same time, if a large part of an institution's MREL instruments is held by other institutions, the systematic nature of a write down or conversion could also pose a potential impediment to resolvability. Where a resolution authority finds an impediment to resolvability as a result of the size and nature of a certain investor base, it should be able to recommend to an institution to address such impediment.
- (9b) To ensure that retail investors do not invest excessively in debt instruments in certain eligible liabilities, 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 an 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 purposes of the enforcement of Directive 2014/65/EU. At the same time, it should also be possible for Member States

to further restrict the sale and marketing of certain other instruments to certain investors.

- (10) To enhance their resolvability, resolution authorities should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement laid down in Regulation (EU) No 575/2013. That institution-specific MREL should be imposed where the TLAC minimum requirement is not sufficient to absorb losses and recapitalise a G-SII under the chosen resolution strategy.
- (11) When setting the level of MREL, resolution authorities should consider the degree of systemic relevance of an institution and the potential adverse impact of its failure on the financial stability. They should take into account the need for a level playing field between G-SIIs and other comparable institutions with systemic relevance within the Union. Thus MREL of institutions that are not identified as G-SIIs but the systemic relevance within the Union of which is comparable to the systemic relevance of G-SIIs should not diverge disproportionately from the level and composition of MREL generally set for G-SIIs.
- (13) In line with Regulation No 575/2013, institutions 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 be obliged to issue eligible instruments and items to meet the MREL to external third party creditors that would be bailed-in should the resolution entity enter resolution.
- (14) Institutions that are not resolution entities should comply with the MREL at individual level. Loss absorption and recapitalisation needs of those institutions should be generally provided by their respective resolution entities through direct or indirect acquisition by resolution entities of own funds instruments and eligible liabilities issued by those institutions and their write-down or conversion into instruments of ownership at the point where those institutions are no longer viable. As such, the MREL applicable to institutions that are not resolution entities should be applied together and consistently with the requirements applicable to resolution entities. That should allow resolution authorities to resolve a resolution group without placing certain of its subsidiary entities in resolution, thus avoiding potentially disruptive effects on the market.

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 fully waive the application of the MREL applicable to institutions that are not resolution entities or 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. The application of the MREL to institutions that are not resolution entities should comply with the chosen resolution strategy, in particular it should not change the ownership relationship between institutions and their resolution group after those institutions have been recapitalised.

- (14a) Regulation 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 MREL for such credit institutions and the central body under similar conditions to those set out in Regulation No 575/2013 where credit institutions and the central body are established in the same Member State. Resolution authorities should also be able, at their discretion, 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. Compliance with the external MREL requirement of the resolution group as a whole should be able to be ensured by the resolution authority in different ways depending on the features of the solidarity mechanism of each group, by counting eligible liabilities of entities that are required by the resolution authority to issue instruments eligible for MREL outside the resolution group in conformity with the resolution plan.

- (15) To ensure appropriate levels of the MREL for resolution purposes, the authorities responsible for setting the level of the MREL should be the resolution authority of the resolution entity, the group-level resolution authority, that is the resolution authority of the ultimate parent undertaking, and resolution authorities of other entities of the resolution group. Any disputes between authorities should be subject to the powers of the European Banking Authority (EBA) under Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>3</sup> subject to the conditions and limitations provided in this Directive.
- (16) Any breaches of the TLAC minimum requirement and of MREL, should be appropriately addressed and remedied by competent and resolution authorities. Given that a breach of those requirements could constitute an impediment to institution or group resolvability, the existing procedures to remove impediments to resolvability should be shortened to address any breaches of the requirements expediently. Resolution authorities should also be able to require institutions to modify the maturity profiles of eligible instruments and items and to prepare and implement plans to restore the level of those requirements. Resolution authorities should also be able to prohibit certain distributions where they regard an institution as failing to meet the combined capital buffer requirements when considered in addition to the MREL.
- (17) To ensure a transparent application of the MREL, institutions should report to their competent and resolution authorities and disclose regularly to the public their MREL requirement, 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 subject to the minimum TLAC 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 No 575/2013 for the minimum TLAC requirement. While total or partial exemptions from reporting and disclosure obligations for specified entities should be allowed in certain cases specified in this Directive, such exemptions should not limit the

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<sup>3</sup> 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

powers of resolution authorities to request information for the purposes of performing their duties under Directive 2014/59/EU.

- (18) The requirement to include a contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should facilitate and improve the process for bailing in those liabilities in the event of resolution. Unless and until statutory recognition frameworks to enable effective cross-border resolution are adopted in all third country jurisdictions, contractual arrangements, when properly drafted and widely adopted, can offer a workable solution until a statutory approach under the Union law or incentives to contract in an Union law are developed. Even with statutory recognition frameworks in place, contractual recognition arrangements should help to reinforce the awareness of the non-Union law creditors of possible resolution action on EU institutions under Union law. There might be instances, however, where it is impracticable for institutions to include those contractual terms in agreements or instruments creating certain liabilities, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments. For example, under certain circumstances, it may be considered impracticable to include the contractual recognition language in liability contracts where it is illegal in the third country for the institution to include contractual recognition clauses in agreements or instruments creating liabilities governed by the laws of that third country, when the institution 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 from the counterparty to agree to be bound by the contractual bail-in recognition clause should not per se be considered as a cause of impracticability.

The EBA should develop draft technical standard to be adopted by the Commission in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 to identify more precisely cases of impracticability. Building upon this technical standard and substantiating it to the specificities of the market concerned, the resolution authority shall specify, where it deems it necessary, categories of liabilities where there may be grounds for impracticability. In this framework, it should be for an institution to determine that the insertion of the bail-in recognition cause in a contract or class of contracts is impracticable. Institutions should provide regular updates to resolution authorities, to keep them informed of progress towards implementing contractual recognition terms. In this context, institutions should indicate the contracts or classes of contracts for which the insertion of the bail-in recognition clause is impracticable and indicate a reason for this assessment. Resolution authorities should assess an institution's decision that it is impracticable to include contractual recognition language in a liability in a reasonable timeframe and act to address any wrong assessments and impediments to resolvability as a result of contractual recognition language not being included. Institutions should be prepared to justify their view if asked by the resolution authority. In addition, to ensure that the resolvability of institutions is not affected, liabilities for which the relevant contractual provisions are not included should not be eligible for MREL.”

- (19a) It is useful and necessary to adjust the power of resolution authorities to suspend, for a limited period, certain contractual obligations. In particular, it should be possible to exercise that power before an institution is put under resolution, from the moment when the determination is made that the bank is failing or likely to fail, if there is no private sector measure immediately available which, in the view of the resolution authority, would prevent the failure of the institution within a reasonable timeframe and it is deemed necessary to avoid the further deterioration of the financial conditions of the bank. In this 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 the 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 can continue to apply after the resolution decision is taken.
- (19b) In order for the suspension power to be used in a proportionate way, the resolution authorities should have the flexibility to tailor the scope of the moratorium to the needs of each case. Furthermore, they should be able to authorise certain payments – especially, but not limited to, administrative expenses of the institution concerned - on a case-by-case basis. The suspension power should also be able to apply to eligible deposits. However, the resolution authorities should carefully assess the appropriateness of applying the suspension to certain eligible deposits, especially 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.
- (19c) During the period of the suspension, resolution authorities should also consider, based inter alia on the resolution plan for the institution, the possibility that the institution is ultimately not put into resolution but is instead wound up under national law. In such cases, resolution authorities should make 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. 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.
- (20) 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, or to central banks, authorised CCPs, or third country CCPs recognised by ESMA. Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, Directive 2014/59/EU should be amended to provide that a crisis prevention measure or a crisis management measure should not as such be deemed to 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.

- (20a) A key aspect of effective resolution is ensuring that, once an institution or entity referred to in points (b), (c) or (d) of Article 1(1) enters resolution, its counterparties in the case of financial contracts cannot terminate their positions solely as a result of the institution's entry into resolution. In addition, resolution authorities should be empowered to suspend payment or delivery obligations due under a contract with an institution under resolution and have the power to restrict, for a limited period of time, counterparties' rights to close out, accelerate or otherwise terminate financial contracts. These requirements do not directly apply to contracts under third country law. In the absence of a statutory cross-border recognition framework, Member States should require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) 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 or restrict rights and obligations as per Articles 33a, 69, 70 and 71 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 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.
- (22) The exclusion of specific liabilities of credit institutions or investment firms from the application of the bail-in tool or from powers to suspend certain obligations, restrict the enforcement of security interests or temporarily suspend termination rights in Directive 2014/59/EU, should equally cover liabilities in relation to CCPs established in the Union and to third country CCPs recognised by ESMA.
- (23) In order to ensure a common understanding of terms used in various legal instruments, it is appropriate to incorporate in Directive 98/26/EC the definitions and concepts introduced by Regulation (EU) No 648/2012 regarding a "central counterparty" or "CCP" and "participant".
- (23a) 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 participation in such systems. In view of the global size and activities of some systems governed by the laws of a third country and 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 systems governed by the laws of a third country.

- (25a) 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 in own funds should still be treated as claims resulting from own funds for their whole amount. Partial recognition could be a result, for instance, of the application of grandfathering provisions which partly derecognise an instrument or because of the application of the amortisation calendar laid down for Tier 2 instruments in Regulation (EU) N°575/2013.
- (26) Since the objectives of this Directive, namely to lay down uniform rules on recovery and resolution framework, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (27) To allow an appropriate time for the transposition and application of this Directive, Member States should be given eighteen months to transpose and apply this Directive in their national laws from the date of its entry into force. However, the provisions concerning the public disclosure should be applied from 1 January 2024 in order to ensure that institutions across the Union are allowed an appropriate period of time to reach the required level of MREL in an orderly fashion.

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*  
*Amendments to Directive 2014/59/EU*

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

‘3. For the purposes of applying Articles 7, 12, 17, 18 and 45 to 45m, 59 to 62, 91 and 92 to resolution groups referred to in point (b) of point (83b) of Article 2(1), the reference to subsidiaries shall, where and as appropriate, include credit institutions permanently affiliated to a central body, the central body itself, and their respective subsidiaries, taking into account the way in which such resolution groups comply with the requirement under Article 45f 2a).

2. Article 2(1) point (71) is replaced by the following:

(71) ‘bail-inable liabilities’ means the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) and that are not excluded from the scope of the bail-in tool by virtue of Article 44(2);

- 2 a. In Article 2(1) , point (70), Article 36(4)(d), Article 37(10)(a), Article 44(3), 44(4), 44(5)(a), Article 46, Article 47(1)(b)(ii), Article 48, Article 63(1)(e), (f), (j), Article 66(4) and Section B (6) and (17) of the Annex, 'eligible liabilities' is replaced by 'bail-inable liabilities'.
3. In Article 2(1), the following point is added:
- '(71a) 'eligible liabilities' means bail-inable liabilities that fulfil, as applicable, the conditions of Article 45b or point (a) of Article 45g(3), and Tier 2 instruments that meet the conditions of point (b) of Article 72a(1) of Regulation (EU) 575/2013'
- (4) In Article 2(1), the following points (68a), (83a), (83b), and (83c) are inserted:
- (68a) 'CET1 capital' means CET1 capital as calculated in accordance with Article 50 of Regulation (EU) 575/2013;
- (83a) 'resolution entity' means:
- (a) an entity established in the Union, which is identified by the resolution authority in accordance with Article 12 as an entity in respect of which the resolution plan provides for resolution action; or
- (b) an institution that is not part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, in respect of which the resolution plan drawn pursuant to Article 10 provides for resolution action.
- (83b) 'resolution group' means:
- (a) a resolution entity and its subsidiaries that are not:
- (i) resolution entities themselves;
- (ii) subsidiaries of other resolution entities; or
- (iii) entities established in a third country that are not included in the resolution group in accordance with the resolution plan and their subsidiaries;
- (b) credit institutions permanently affiliated to a central body and the central body itself when at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries.
- (83c) 'global systemically important institution' (G-SII) means a G-SII as defined in point (132) of Article 4(1) of Regulation (EU) No 575/2013;
- (4a) In Article 10(6), the following subparagraphs are added:
- “The review referred to in the first subparagraph of this paragraph shall be carried out after the implementation of resolution actions or the exercise of powers referred to in Article 59.

When setting the deadlines referred to in points (o) and (p) of Article 10(7) in the circumstances referred to in the third subparagraph, the resolution authority shall take into account the deadline to comply with the requirement referred to in Article 104b of Directive 2013/36/EU.”

(4b) In Article 10(7), point (o) is replaced by the following:

“(o) the requirements referred to in Article 45g and 45f and a deadline to reach that level in accordance with Article 45m”

4c. In Article 10(7), point (p) is replaced by the following:

“(p) where a resolution authority applies Article 45b(3), (4) or (6), a timeline for compliance by the resolution entity in accordance with Article 45m.”

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

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

- (a) the Union parent undertaking;
- (b) the subsidiaries that are part of the group and that are located in the Union;
- (c) the entities referred to in points (c) and (d) of Article 1(1); and
- (d) subject to Title VI, the subsidiaries that are part of the group and that are located outside the Union.

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

- (a) the resolution entities;
- (b) the resolution groups."

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

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

(b) examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to resolution entities established in the Union, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of

group entities, or particular group entities or resolution groups, and identify any potential impediments to a coordinated resolution;".

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

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

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

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

- (i) other group entities that belong to the same resolution group;
- (ii) other resolution groups."

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

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

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

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

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

"A group shall be deemed to be resolvable if it is feasible and credible for the resolution authorities to either wind up group entities under normal insolvency proceedings or to resolve that group by applying resolution tools and powers to resolution entities of that group while avoiding to the maximum extent possible any significant adverse consequences for the financial systems, including in circumstances of broader financial instability or system wide events, of the Member States in which group entities or branches are situated, or of other Member States or of the Union and with a view to ensuring the continuity of critical functions carried out by those group entities, where they can be easily separated in a timely manner or

by other means. Group-level resolution authorities shall notify EBA in a timely manner whenever a group is deemed not to be resolvable."

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

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

The assessment referred to in the first subparagraph shall be performed in addition to the assessment of the resolvability of the entire group and shall be made within the decision-making procedure laid down in Article 13."

(12a) After Article 16 a new Article 16a is inserted:

*"Article 16a  
Power to prohibit certain distributions*

(1) Where an entity is in a situation where it meets the combined buffer requirement defined in paragraph (6) of Article 128 of Directive 2013/36/EU when considered in addition to each of the requirements referred to points (a), (b) and (c) of Article 141a(1) of that Directive, but it fails to meet that combined buffer requirement when considered in addition to the requirements referred to in Articles 45c and 45d of this Directive, when calculated in accordance with point (a) of Article 45(2), the resolution authority of that entity shall have the power to prohibit an entity from distributing, in accordance with paragraphs 2 and 3 of this Article, more than the maximum distributable amount related to the minimum requirement for own funds and eligible liabilities ('M-MDA'), calculated in accordance with paragraph 4, through any of the following actions:

- (a) make a distribution in connection with Common Equity Tier 1 capital;
- (b) create an obligation to pay variable remuneration or discretionary pension benefits, or to pay variable remuneration if the obligation to pay was created at a time when the entity failed to meet the combined buffer requirement;
- (c) make payments on Additional Tier 1 instruments.

Where an entity is in the situation referred to in the first subparagraph, it shall immediately notify the resolution authority of that failure.

(2) In the situation referred to in paragraph 1, the resolution authority of the entity, after consulting the competent authority, shall without unnecessary delay assess whether to exercise the power referred to in paragraph 1 taking into account all of the following elements:

- (a) the reason, duration and magnitude of the failure and its impact on resolvability;

- (b) the development of the entity's financial situation and the likelihood of it fulfilling, in the foreseeable future, the condition referred to in point (a) of Article 32(1);
- (c) the prospect that the entity will be able to ensure compliance with the requirements referred to in paragraph 1 within a reasonable timeframe;
- (d) where the entity is unable 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, or in Article 45b or Article 45g(3) of this Directive, if that inability is idiosyncratic or due to market-wide disturbance;
- (e) whether the exercise of the power is the most adequate and proportionate means to address the situation of the entity, based on its potential impact on both the financing conditions and the resolvability of the entity concerned.

The resolution authority shall repeat its assessment of whether to exercise the power referred to in paragraph 1 at least every month during the duration of the failure as long as the entity continues to be in the situation referred to in paragraph 1.

(3) If the resolution authority assesses that the entity is still in the situation referred to in paragraph 1 nine months after such situation has been notified by the entity, the resolution authority, after consultation of the competent authority, shall exercise the power referred to in paragraph 1 except where the resolution authority assesses that at least two of the following conditions are fulfilled:

- (i) the failure is due to a serious disturbance to the functioning of financial markets, which leads to broad-based financial market stress across several segments of financial markets;
- (ii) the disturbance referred to in point (i) not only results in increased price volatility of the own funds and eligible liabilities instruments of the entity or increased costs for the entity, but also leads to a full or partial closure of markets which prevents the entity from issuing own funds and eligible liabilities instruments on the markets;
- (iii) the market closure referred to in point (ii) is observed not only for the concerned entity but also for several other entities;
- (iv) the disturbance referred to in point (i) prevents the concerned entity from issuing own funds and eligible liabilities instruments in a volume sufficient to remedy the failure;
- (v) an exercise of the power referred to in paragraph 1 leads to negative spill-over effects for part of the banking sector which could undermine financial stability.

Where the exception referred to in the first subparagraph applies, the resolution authority shall notify the competent authority of its decision and explain its assessment in writing.

The resolution authority shall repeat its assessment of the conditions of the first subparagraph every month to assess whether the exception may be applied.

(4) The 'M-MDA' shall be calculated by multiplying the sum calculated in accordance with paragraph 5 by the factor determined in accordance with paragraph 6. The 'M-MDA' shall be reduced by any of the actions referred to in points (a), (b) or (c) of paragraph 1.

(5) The sum to be multiplied in accordance with paragraph 4 shall consist of:

(a) interim profits not included in Common Equity Tier 1 capital pursuant to Article 26(2) of Regulation (EU) No 575/2013 net of any distribution of profits or any payment related to the actions referred to in points (a), (b) or (c) of paragraph 1 of this Article;

plus

(b) year-end profits not included in Common Equity Tier 1 capital pursuant to Article 26(2) of Regulation (EU) No 575/2013 net of any distribution of profits or any payment related to the actions referred to in points (a), (b) or (c) of paragraph 1 of this Article;

minus

(c) amounts which would be payable by tax if the items specified in points (a) and (b) of this paragraph were to be retained.

(6) The factor referred to in paragraph 4 shall be determined as follows:

(a) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet any of the own funds requirements under Article 92a of Regulation (EU) No 575/2013 and under Articles 45c and 45d of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the first (that is, the lowest) quartile of the combined buffer requirement, the factor shall be 0;

(b) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet any of the own funds requirements under Article 92a of Regulation (EU) No 575/2013 and under Articles 45c and 45d of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the second quartile of the combined buffer requirement, the factor shall be 0,2;

(c) where the Common Equity Tier 1 capital maintained by the entity

which is not used to meet the own funds requirements under Article 92a of Regulation (EU) No 575/2013 and under Articles 45c and 45d of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the third quartile of the combined buffer requirement, the factor shall be 0,4;

(d) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet the own funds requirements under Article 92a of Regulation (EU) No 575/2013 and under Articles 45c and 45d of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the fourth (that is, the highest) quartile of the combined buffer requirement, the factor shall be 0,6;

The lower and upper bounds of each quartile of the combined buffer requirement shall be calculated as follows:

$$\text{Lower bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times (Q_n - 1)$$

$$\text{Upper bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times Q_n$$

"Qn" indicates the ordinal number of the quartile concerned.

Paragraph 1 of Article 17 is replaced by the following:

1. Member States shall ensure that when, pursuant to an assessment of resolvability for an entity carried out in accordance with Articles 15 and 16, a resolution authority after consulting the competent authority determines that there are substantive impediments to the resolvability of that entity, the resolution authority shall notify in writing that determination to the entity concerned, to the competent authority and to the resolution authorities of the jurisdictions in which significant branches are located.

Paragraph 3 of Article 17 is replaced by the following:

3. Within four months of the date of receipt of a notification made in accordance with paragraph 1, the entity shall propose to the resolution authority possible measures to address or remove the substantive impediments identified in the notification. The resolution authority, after consulting the competent authority, shall assess whether those measures effectively address or remove the substantive impediments in question.

The entity shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 1 of this Article, propose to the resolution authority possible measures and the timeline for their implementation to ensure that the entity complies with Articles 45f or 45g

and the requirement referred to in point 6 of Article 128 of Directive 2013/36/EU, where a substantive impediment to resolvability is due to either of the following situations:

- (a) the entity meets the combined buffer requirement defined in point (6) of Article 128 of Directive 2013/36/EU when considered in addition to each of the requirements referred to points (a), (b) and (c) of Article 141a(1) of that Directive, but it does not meet that combined buffer requirement when considered in addition to the requirements referred to in Articles 45c and 45d of this Directive when calculated in accordance with point (a) of Article 45(2); or
- (b) the entity does not meet the requirements referred to in Articles 92a and 494 of Regulation (EU) No 575/2013 or the requirements referred to in Articles 45c and 45d of this Directive.

The timeline for the implementation of measures proposed under the second subparagraph shall take into account the reasons for the substantive impediment. The resolution authority, after consulting the competent authority, shall assess whether those measures effectively address or remove the substantive impediment in question.

Paragraph 4 of Article 17 is replaced by the following:

- 4. Where the resolution authority assesses that the measures proposed by an entity in accordance with paragraph 3 do not effectively reduce or remove the impediments in question, it shall, either directly or indirectly through the competent authority, require the entity to take alternative measures that may achieve that objective, and notify in writing those measures to the entity, which shall propose within one month a plan to comply with them.

In identifying alternative measures, the resolution authority shall demonstrate how the measures proposed by the entity would not be able to remove the impediments to resolvability and how the alternative measures proposed are proportionate in removing them. The resolution authority shall take into account the threat to financial stability of those impediments to resolvability and the effect of the measures on the business of the entity, its stability and its ability to contribute to the economy.

In paragraph 5 of Article 17, points (a) to (e) are replaced by the following:

- (a) require the entity to revise any intragroup financing agreements or review the absence thereof, or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;
- (b) require the entity to limit its maximum individual and aggregate exposures;
- (c) impose specific or regular additional information requirements relevant for resolution purposes;

- (d) require the entity to divest specific assets;
- (e) require the entity to limit or cease specific existing or proposed activities;

In paragraph 5 of Article 17, points (g) and (h) are replaced by the following:

- (g) require changes to legal or operational structures of the entity or any group entity, either directly or indirectly under its control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;
- (h) require an entity or a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company;

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

"(h1) require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to submit a plan to restore compliance with Articles 45f or 45g expressed as a total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 and, where applicable, with the requirement referred to in Article 128(6) of Directive 2013/36/EU and with the requirements referred to in Articles 45f or 45g expressed as a percentage of the total exposure measure referred to in Articles 429 and 429a of Regulation (EU) No 575/2013;"

In Article 17(5), points (i) and (j) are replaced by the following:

- (i) require an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to issue eligible liabilities to meet the requirements of Article 45f and Article 45g;
- (j) require an institution or entity referred to in point (b), (c) or (d) of Article 1(1), to take other steps to meet the minimum requirements for own funds and eligible liabilities under Article 45f and Article 45g, including in particular to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument; and

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

- (j1) for the purpose of ensuring ongoing compliance with Article 45f or Article 45g, require an institution or entity referred to in point (b), (c) or (d) of Article 1(1), to change the maturity profile of:
  - (i) own funds instruments, after having obtained the agreement of the competent authority, and
  - (ii) eligible liabilities referred to in Article 45b and in point (a) of Article 45g(3)

In Article 17(5), point (k) is replaced by the following:

(k) where an entity is the subsidiary of a mixed-activity holding company, requiring that the mixed-activity holding company set up a separate financial holding company to control the entity, if necessary in order to facilitate the resolution of the entity and to avoid the application of the resolution tools and powers referred to in Title IV having an adverse effect on the non-financial part of the group.

In Article 17, paragraph 7 is replaced by the following:

7. Before identifying any measure referred to in paragraph 4, the resolution authority, after consulting the competent authority and, if appropriate, the designated national macroprudential authority, shall duly consider the potential effect of those measures on the particular entity, on the internal market for financial services, on the financial stability in other Member States and Union as a whole.

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

- "1. The group-level resolution authority together with the resolution authorities of subsidiaries, after consulting the supervisory college and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, shall consider the assessment required by Article 16 within the resolution college and shall take all reasonable steps to reach a joint decision on the application of measures identified in accordance with Article 17(4) in relation to all resolution entities and their subsidiaries that are entities referred to in Article 1(1) and are part of the group.
2. The group-level resolution authority, in cooperation with the consolidating supervisor and EBA in accordance with Article 25(1) of Regulation (EU) No 1093/2010, shall prepare and submit a report to the Union parent undertaking, to the resolution authorities of subsidiaries, which shall provide it to the subsidiaries under their supervision, and to the resolution authorities of jurisdictions in which significant branches are located. The report shall be prepared after consulting the competent authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercise of the resolution powers in relation to the group, and also in relation to resolution groups where a group is composed of more than one resolution group. The report shall consider the impact on the group's business model and recommend any proportionate and targeted measures that, in the view of the group-level resolution authority, are necessary or appropriate to remove those impediments.

Where an impediment to the resolvability of the group is due to a situation of a group entity referred to in the second subparagraph of Article 17(3), the group-level resolution authority shall notify its assessment of that impediment to the Union parent undertaking after having consulted the resolution authority of the resolution entity and the resolution authorities of

its subsidiary institutions.

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

Where the impediments identified in the report are due to a situation of a group entity referred to in the second subparagraph of Article 17(3), the Union parent undertaking shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 2 of this Article, propose to the group-level resolution authority possible measures and the timeline for their implementation to ensure that the group entity complies with the requirements referred to in Articles 45f or 45g expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 and, where applicable, with the requirement referred to in Article 128(6) of Directive 2013/36/EU, and with the requirements referred to in Article 45f and 45g expressed as a percentage of the total exposure measure referred to in Articles 429 and 429a of Regulation (EU) No 575/2013.

The timeline for the implementation of measures proposed under the second subparagraph shall take into account the reasons for the substantive impediment. The resolution authority, after consulting the competent authority, shall assess whether those measures effectively address or remove the substantive impediment.

4. The group-level resolution authority shall communicate any measure proposed by the Union parent undertaking to the consolidating supervisor, EBA, the resolution authorities of the subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch. The group-level resolution authorities and the resolution authorities of the subsidiaries, after consulting the competent authorities and the resolution authorities of jurisdictions in which significant branches are located, shall do everything within their power to reach a joint decision within the resolution college regarding the identification of the material impediments, and if necessary, the assessment of the measures proposed by the Union parent undertaking and the measures required by the authorities in order to address or remove the impediments, which shall take into account the potential impact of the measures in all Member States where the group operates.
5. The joint decision shall be reached within four months of submission of any observations by the Union parent undertaking. Where the Union parent undertaking has not submitted any observations, the joint decision shall be reached within one month from the expiry of the four-month period referred to in paragraph 3.

The joint decision concerning the impediment to resolvability due to a situation referred to in the second subparagraph of Article 17(3) shall be

reached within two weeks of submission of any observations by the Union parent undertaking in accordance with paragraph 3 of this Article.

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

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

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

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

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

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

The decision referred to in the first subparagraph shall be fully reasoned and shall take into account the views and reservations of resolution authorities of other entities of the same resolution group and the group-level resolution authority. The decision shall be provided to the resolution entity by the relevant resolution authorities.

If, at the end of the relevant period referred to in paragraph 5 of this Article, a resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority of the 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 relevant period referred to in paragraph 5 of this Article shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the relevant period referred to in paragraph 5 of this Article or after a joint decision has been reached. In the absence of an EBA decision, the decision of the resolution authority of the resolution entity shall apply

7. In the absence of a joint decision, the resolution authorities of subsidiaries that are not resolution entities shall make their own decisions on the appropriate measures to be taken by subsidiaries at individual level in accordance with Article 17(4). The decision shall be fully reasoned and shall take into account the views and reservations of the other resolution authorities. The decision shall be provided to the subsidiary concerned and to the resolution entity of the same resolution group, to the resolution authority of that resolution entity and, where different, to the group-level resolution authority.

If, at the end of the relevant period referred to in paragraph 5 of this Article, a resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority of the subsidiary shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The relevant period referred to in paragraph 5 of this Article 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 relevant period referred to in paragraph 5 of this Article or after a joint decision has been reached. In the absence of an EBA decision, the decision of the resolution authority of the subsidiary shall apply."

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

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

20a. The following Articles 32a and 32b are inserted:

*Article 32a*

*Conditions for resolution for 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 permanently affiliated credit institutions that are part of the same resolution group when that resolution group complies as a whole with the conditions established in Article 32(1).”

#### *Article 32b*

##### *Insolvency proceedings in respect of institutions and entities 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 Article 32(1)(a) and 32(1)(b) are met, but a resolution action is not 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.

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

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

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

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

(a) the entity is a resolution entity;

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

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

#### *Article 33a*

##### *Power to suspend certain obligations*

"1. Member States shall ensure that resolution authorities, after consulting the competent authority, 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 has been made that the institution or entity is failing or likely to fail under point (a) of Article 32(1);
- (b) there is no immediately available private sector measure within the meaning of point (b) of Article 32(1) that would prevent the failure of the institution or entity;
- (c) the exercise of the suspension power is deemed necessary to avoid the further deterioration of the financial conditions of the institution or entity; and
- (d) the exercise of the suspension power 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."

The decision to exercise the power of suspension pursuant to the first subparagraph shall be made by the resolution authority, after consulting the competent authority which shall respond to the consultation in a timely manner.

2. Any suspension pursuant to paragraph 1 of this Article 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.

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 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.

2a. 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.

3. 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 paragraph 1 of this article and in any event shall not last longer than the period of time from the publication of a notice of suspension pursuant to paragraph 7 to the midnight in the Member State of the resolution authority of the institution or entity at the

end of the business day following that publication.

At the expiry of the period of suspension referred to in the first subparagraph, the suspension shall be lifted.

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 and shall consider the existing national rules, as well as supervisory and judicial powers, to safeguard creditors' rights and equal treatment of creditors in insolvency proceedings. Each resolution authority shall in particular have regard to the potential application to the institution or entity of national insolvency proceedings as a result of the determination in Article 32(1)(c) and shall make the arrangements it deems appropriate to ensure adequate coordination with the national administrative or judicial authorities.

5. 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.

6. 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.

7. 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 to suspend certain obligations after the determination that the institution is failing or likely to fail pursuant to Article 32(1)(a) has been made and before the resolution decision is taken.

The resolution authority shall publish or ensure the publication of a copy 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).

8. This article is without prejudice to the provisions contained in the national law of Member States granting powers to suspend payment or delivery obligations before a determination that the institution is failing or likely to fail pursuant to Article 32(1)(a) or applicable to institutions which are to be wound down under normal insolvency proceedings and that exceed the scope and duration foreseen in this article. Such powers shall be exercised in accordance with the scope, duration and conditions foreseen 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.

9. Member States shall establish 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, the resolution authority can also exercise the power to restrict secured creditors of the institution in relation to any of the assets of that institution or entity for the same duration. The provisions in Article 70 paragraphs 2 to 4 apply.

10. Member States shall establish 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, the resolution authority can also

exercise the power to suspend termination rights of any party to a contract with that institution for the same duration. The provisions in Article 71 paragraphs 2 to 8 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 9 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."

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

‘(f) liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated in accordance with Directive 98/26/EC or to their participants and arising from the participation in such a system, or to 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;

(22a) In Article 44(2), point (h) is inserted:

(h) liabilities to institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of this Directive that are part of the same resolution group without being themselves resolution entities, regardless of their maturities, except where these liabilities rank below ordinary unsecured liabilities under the relevant national law governing normal insolvency proceedings applicable on the date of transposition of this Directive.

Where there are liabilities to which the exception in the previous subparagraph for liabilities ranking below ordinary unsecured liabilities would apply, the resolution authority of the relevant subsidiary that is not a resolution entity shall assess whether the amount of items complying with Article 45g(3) is sufficient to support the implementation of the preferred resolution strategy.

(22b) In Article 44(3), the following subparagraph is inserted before the last subparagraph:

“Resolution authorities shall carefully assess whether liabilities to institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of this Directive 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 paragraph (2)(h) of this Article should be excluded or partially excluded under points (a) to (d) of the first subparagraph to ensure the effective implementation of the resolution strategy.”

#### *Article 44a*

#### *Selling of subordinated eligible liabilities to retail clients*

1. Member States shall ensure that the 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 may only sell such liabilities to a retail client, as defined in point 11 of Article 4(1) of Directive 2014/65/EU, 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 the eligible liability is 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 instead 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 45f does not exceed EUR 50 billion, that Member State may by way of derogation from the requirements set out in paragraphs 1 to 5 apply only the requirement set out in paragraph 2(b).

7. Member States shall not be required to apply this Article to liabilities referred to in paragraph 1 issued before [ 18 months from entry into force of this amending Directive].

23. Article 45 is replaced by the following Articles:

*"Article 45*

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

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

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

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

#### *Article 45a*

##### *Exemption from the minimum requirement for own funds and eligible liabilities*

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

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

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

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

#### *Article 45b*

##### *Eligible liabilities for resolution entities*

1. Eligible liabilities shall be included in the amount of own funds and eligible liabilities of resolution entities only where they satisfy the conditions referred to in 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, where this Directive refers to the requirements in Article 92a or Article 92b of Regulation (EU) No 575/2013, eligible liabilities for the purpose of those Articles shall consist of eligible liabilities as defined in Article 72k of Regulation (EU) No 575/2013 and determined in accordance with Chapter 5a of Part Two,

Title I 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 in advance at the time of issuance, is fixed or increasing and is not affected by an embedded derivative feature and the amount of the liability arising from the debt instrument and from the embedded derivative can be valued daily by reference to an active, liquid two-way market for an equivalent instrument without credit risk in line 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 the events of insolvency and of resolution of the issuer is fixed or increasing, and is no more than 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 their valuation 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 for the part that corresponds to the principal amount referred to in point (a) or the fixed or increasing amount referred to in point (b) of that subparagraph.

2a. Where liabilities are issued by a subsidiary established in the Union that is part of the same resolution group as the resolution entity to an existing shareholder that is not part of the same resolution group, 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 Article 45g(3)(a);

(b) the exercise of the power of write-down or convert in relation to such liabilities in accordance with Articles 59 or 62 does not affect the control of the subsidiary by the resolution entity;

(c) they do not exceed an amount determined by subtracting the amount referred to in point (i) from the amount referred to in point (ii):

(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 Article 45g(3)(b);

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

3. Without prejudice to the minimum requirement in Article 45c(3a) and Article 45d(1)(a), resolution authorities shall ensure that a part of the requirement referred to in Article 45f equal to 8% of the total liabilities, including own funds, shall be met by resolution entities that are GSIs or resolution entities subject to Article 45c(3a) and (3b) with own funds and instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation, or liabilities as referred in paragraph 2a of this Article. The resolution authority may permit that a level lower than 8% of the total liabilities, including own funds, but higher than the amount resulting from the application of the formula  $(1-X1/X2) \times 8\%$  of the total liabilities, including own funds, shall be met by resolution entities that are GSIs or resolution entities subject to Article 45c(3a) and (3b) with own funds and instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation, or liabilities as referred in paragraph 2a of this Article, provided that conditions (a), (b) and (c) of Article 72b(3) of Regulation (EU) No 575/2013 are met, where, respecting the limit of the proportion of the reduction possible under Article 72b (3) of Regulation No 575/2013:

$X1 = 3.5\%$  of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013.

$X2 =$  amount resulting from the sum of (i) and (ii) where:

(i) is 18% of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013; and

(ii) is the requirement referred to in Article 128(6) of Directive 2013/36/EU.

Where, for resolution entities subject to Article 45c(3a), the application of the previous subparagraph leads to a requirement above 27% of the total risk exposure amount, the resolution authority shall limit, for the entity concerned, the part of the requirement referred to in Article 45f which shall be met with own funds, instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation and liabilities as referred to in paragraph 2a of this Article to an amount equal to 27% of the total risk exposure amount if the resolution authority has assessed, taking also into account the risk of disproportionate impact on the business model of the entity concerned, that:

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

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

For resolution entities subject to Article 45c (3b), the previous subparagraph does not apply.

4. For resolution entities that are neither G-SIIs nor resolution entities subject to Article 45c(3a) and (3b), the resolution authority may decide that a part of the requirement referred to in Article 45f up to the higher of 8% of the total liabilities, including own funds, of the entity and the formula referred to in paragraph 6 shall be met with own funds and instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation, or liabilities as referred in paragraph 2a of this Article, provided that the following conditions are met:

- (a) non-subordinated liabilities referred to in the first and second paragraphs have the same priority ranking in the national insolvency hierarchy as certain liabilities that are excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3);
- (b) 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 the write-down or conversion powers in accordance with Article 44(2) or Article 44(3), creditors of claims arising from those liabilities incur greater losses than they would incur in a winding up under normal insolvency proceedings.
- (c) the amount of own funds and subordinated liabilities does not exceed the amount necessary to ensure that creditors referred to in point (b) shall not incur losses above the level of losses that they would otherwise have incurred in a winding up under normal insolvency proceedings.

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

5. For the purposes of paragraphs 3, 4 and 6 derivative liabilities shall be included in total liabilities on the basis that full recognition is given to counterparty netting rights.

Own funds of an entity used to comply with the requirement referred to in Article 128(6) of Directive 2013/36/EU shall be eligible to comply with requirement referred to in paragraphs 3, 4 and 6.

6. By derogation from paragraph 3, the resolution authority may decide that the requirement referred to in Article 45f shall be met by resolution entities that are GSIIIs or resolution entities subject to Article 45c(3a) or (3b) with own funds, instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation, or liabilities as referred in paragraph 2a of this Article, to the extent that the sum of those own funds, instruments and liabilities, due to the obligation of the resolution entity to comply with the requirements referred to in Article 128(6) of Directive 2013/36/EU, Article 92a of Regulation (EU) No 575/2013, Article 45c(3a), and Article 45f, does not exceed the higher of :

- a) 8% of total liabilities, including own funds, of the entity, or,
- b) the amount resulting from the application of the formula  $Ax^2+Bx^2+C$ , where A, B and C are the following amounts:

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

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

C= amount resulting from the requirement referred to in Article 128(6) of Directive 2013/36/EU

7. Resolution authorities may exercise the power referred to in paragraph 6 with respect to resolution entities that are G-SIIs or are subject to Article 45c(3a) or (3b), and that meet one of the conditions below, provided that the number of identified resolution entities does not exceed 30% of all resolution entities that are G-SIIs or subject to Article 45c(3a) or (3b) for which the resolution authority determines the requirement referred to in Article 45f.

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 powers referred to in Article 17 (5) in the timeline required by the resolution authority, or

(ii) the identified substantive impediment cannot be addressed by any of the powers referred to in Article 17 (5), and the exercise of the power referred to in paragraph 6 of this Article would partially or fully compensate for the negative impact of the impediment on resolvability, or

(b) the resolution authority considers that the feasibility and credibility of the entity's preferred resolution strategy is limited, taking into account the entity's size, interconnectedness, the nature, scope, risk and complexity of its activities, its legal status and 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(3a) or (3b) of this Directive is among the 20% riskiest institutions for which the resolution authority determines the requirement referred to in Article 45(1).

For the purposes of the percentages referred to in the first and second subparagraphs, the resolution authority shall round up the number resulting from the calculation 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 subject to Article 45c(3a) or (3b) for which the national resolution authority determines the requirement referred to in Article 45f, set the percentage referred to in the first subparagraph at a level higher than 30%.

8. After consulting the competent authority, the resolution authority shall take the decision referred to in paragraphs 4 and 6. When taking that decision resolution authorities shall also take into account:

(a) the depth of the market for the entity's own funds instruments and instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation

the pricing of such instruments where they exist, and the time needed to execute any transactions necessary for the purpose of compliance 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 with a residual maturity below one year as of the date of the decision with a view to make quantitative adjustments to the requirements referred to in paragraphs 4 and 6 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, except for point (d) of Article 72b(2) of that Regulation;

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

(e) the 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 entity's recapitalisation.

#### *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 with respect to the resolution entity including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;
- (b) the need to ensure, in appropriate cases, that the resolution entity and its subsidiaries that are institutions, but not resolution entities have sufficient eligible liabilities to ensure that, if the bail-in tool or write down and conversion powers were to be applied to them, respectively, losses could be absorbed and the total capital ratio and, as applicable, the leverage ratio of the relevant entities can be restored to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry on the activities for which they are authorised under Directive 2013/36/EU or Directive 2014/65/EU;
- (c) the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in pursuant to Article 44(3) or might be transferred to a recipient in full under a partial transfer, the resolution entity has sufficient own funds and other eligible liabilities to ensure that losses could be absorbed and the total capital ratio, and, as applicable, the leverage ratio of the resolution entity can be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to carry on the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;
- (d) the size, the business model, the funding model and the risk profile of the entity;
- (f) 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 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 in accordance with the relevant resolution scenario referred to in Article 10(3), the requirement referred to in Article 45(1) shall equal an amount sufficient to ensure that:

- (a) the losses that are expected to be incurred by the entity are fully absorbed ('loss absorption');
- (b) the resolution entity and its subsidiaries that are institutions, but not resolution entities are recapitalised to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry out the activities for which they are authorised under Directive 2013/36/EU, Directive 2014/65/EU or equivalent legislation for an appropriate period of time 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 previous 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 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 losses to be absorbed in resolution that corresponds to the requirements referred to in Article 92(1)(c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the resolution entity at consolidated resolution group level;

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

(a) 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 losses to be absorbed in resolution that corresponds to the resolution entity's leverage ratio requirement referred to in Article 92(1)(d) of the Regulation (EU) No 575/2013 at 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 Article 92(1)(d) of Regulation (EU) No 575/2013 at consolidated resolution group level after the implementation of the preferred resolution action.

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 leverage ratio exposure measure.

When setting the individual requirement provided in point (b) of the first sub-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 recent reported values for the relevant total risk exposure amount or leverage ratio exposure amount as adjusted for any changes resulting from resolution actions foreseen in the resolution plan ; and

(b) after having consulted the competent authority, adjust downwards or upwards the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU to determine the requirement applicable 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 sub-paragraph with an appropriate amount necessary to ensure that, following resolution, the entity sustains sufficient market confidence for an appropriate period which shall not exceed one year ('market confidence buffer').

Where the previous sub-paragraph applies, the market confidence buffer shall be set equal to the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision, which would apply after the application of the resolution tools.

Such amount shall be adjusted downwards if, after consulting the competent authority, the resolution authority determines that it would be feasible and credible that a lower amount is sufficient to sustain market confidence and ensure both the continued provision of critical economic functions by the institution and the access to funding without recourse to extraordinary financial support other than contributions from resolution financing arrangements, consistently with Article 101(2) and Article 44(5) and (8), after implementation of the resolution strategy. Such amount shall be adjusted upwards if, after consulting the competent authority, the resolution authority determines that a higher level is necessary to sustain sufficient market confidence and ensure both the continued provision of critical economic functions by the institution and the access to funding without recourse to extraordinary financial support other than contributions from resolution financing arrangements, consistently with Article 101(2) and Article 44(5) and (8), for an appropriate period which shall not exceed one year.

EBA shall develop draft regulatory technical standards specifying the methodology used by resolution authorities to estimate the requirements referred to in Articles 104a and 128(6) of Directive 2013/36/EU for resolution entities at the resolution group consolidated level where the resolution group is not subject as such to those requirements under that Directive.

EBA shall submit those draft regulatory technical standards to the Commission by [6 months after entry into force of this Directive].

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

3a. For resolution entities that are not subject to Article 92a of Regulation (EU) No 575/2013 and that are part of a resolution group whose total assets exceed 100 billion, the level of the requirement referred to in paragraph 3 shall be at least equal to ("Pillar 1 requirement for top tier banks"):

- (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, resolution entities referred to in the previous sub-

paragraph shall meet the level of the requirement referred to in 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) with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013, except for paragraphs (3) to (5) of Article 72b of that Regulation, liabilities as referred to in Article 45b(2a) of this Directive or own funds.

3b. A resolution authority may, after consulting the competent authority, decide to apply the requirements laid down in paragraph 3a to a resolution entity that is not subject to Article 92a of Regulation (EU) No 575/2013 and is part of a resolution group whose total assets are lower than EUR 100 billion, and is assessed by the resolution authority to be reasonably likely to pose a systemic risk in the event of its failure .

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

- (i) the prevalence of deposits and the absence of debt instruments in the funding model;
- (ii) the limited access to the capital markets for eligible liabilities;
- (iii) the reliance on Common Equity Tier 1 to meet the requirement referred to in Article 45f

The absence of a decision pursuant to the first subparagraph is without prejudice to any decision under Article 45b(4).

4. For entities that are not themselves resolution entities, the amount referred to in 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 losses to be absorbed that corresponds to the requirements referred to in Article 92(1)(c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the entity; and
  - (ii) a recapitalisation amount that allows the entity to restore compliance with its total capital ratio requirement referred in Article 92(1)(c) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU 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 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 losses to be absorbed that corresponds to the entity's leverage ratio requirement referred to in the Article 92(1)(d) of Regulation (EU) No 575/2013; and
  - (ii) a recapitalisation amount that allows the entity to restore compliance with its leverage ratio requirement referred to in the Article 92(1)(d) 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 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 leverage ratio exposure measure.

When setting the individual requirement provided in point (b) of the first sub-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 recent reported values for the relevant total risk exposure amount or leverage ratio exposure amount as adjusted for any changes resulting from actions foreseen in the resolution plan; and

(b) after having consulted the competent authority, adjust downwards or upwards the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU to determine the requirement applicable 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 or the resolution of the resolution group.

The resolution authority shall be able to increase the requirement provided in point (a) (ii) of the first sub-paragraph with 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 continues to meet the conditions for authorisation and sustains sufficient market confidence for an appropriate period which shall not exceed one year ('market confidence buffer').

Where the previous subparagraph applies, the amount of market confidence buffer shall be set equal to the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision, which would apply after the exercise of the power referred to in Article 59 or the resolution of the resolution group. Such amount shall be adjusted downwards if, after consulting the competent authority, the resolution authority determines that it would be feasible and credible that a lower amount is sufficient to ensure market confidence and ensure both the continued provision of critical economic functions by the institution and the access to funding without recourse to extraordinary financial support other than contributions from resolution financing arrangements, consistently with Article 101(2) and paragraphs 5 and 8 of Article 44 of Directive 2014/59/EU, after the exercise of the power referred to in Article 59 or the resolution of the resolution group. Such amount shall be adjusted upwards if, after consulting the competent authority, the resolution authority determines that a higher level is necessary to sustain sufficient market confidence and ensure both the continued provision of critical economic functions by the institution and the access to funding without recourse to

extraordinary financial support other than contributions from resolution financing arrangements, consistently with Article 101(2) and paragraphs 5 and 8 of Article 44 for an appropriate period which shall not exceed one year.

5. 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 to a recipient in full under a partial transfer, the requirement referred to in Article 45(1) shall be met with own funds or other eligible liabilities sufficient to:

- (a) cover the amount of excluded liabilities identified in accordance with Article 44(3);
- (b) ensure that the conditions referred to in paragraph 2 are fulfilled.

6. The resolution authority's decision to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 5 and shall be reviewed without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU.

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

#### *Article 45d*

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

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

- (a) the 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 determined by the resolution authority specific to the entity in accordance with paragraph 2 .

1a. The requirement referred to in Article 45(1) of an entity subject to the requirement referred to in Articles 92b and 494 of Regulation (EU) No 575/2013 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 determined by the resolution authority in accordance with paragraph 2, which shall be met with own funds and liabilities that meet the conditions of Articles 45g and 89 (2).

2. 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 (1a) only:

(a) where the requirement referred to in point (a) of paragraph 1 or point (a) of paragraph (1a) 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.

3. 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 2:

(a) for each resolution entity;

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

4. The resolution authority's decision to impose an additional requirement of own funds and eligible liabilities under point (b) of paragraph 1 or point (b) of paragraph 1a shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 2 and shall be reviewed without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU applicable to the resolution group.

#### *Article 45f*

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

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

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

2a. For resolution groups as defined in 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 required to comply with Article 45c(3), 45c(3a) and 45d (1)(a), to ensure that the resolution group as a whole complies with paragraphs (1) and (2) of this Article and how they are to do so in conformity with the resolution plan.

#### *Article 45g*

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

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

By derogation from the first subparagraph, Union parent undertakings that are not resolution entities themselves and 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 pursuant to point (b) of Article 2(1)(83b), those credit institutions permanently affiliated to a central body and a central body, which are not resolution entities, and any resolution entities that are not subject to a requirement under Article 45f(2a), shall comply with Article 45c(4) on an individual basis.

The requirement referred to in Article 45(1) of 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 Articles 45c

3. The requirement referred to in Article 45(1) on entities referred to in paragraph 1 of this Article shall be met with one or more of the following

- (a) liabilities that:
  - (i) 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 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 the power of write down or convert in accordance with Articles 59 to 62 does not affect the control of the subsidiary by the resolution entity;
  - (ii) fulfil the eligibility criteria referred to in Article 72a, except for points (b), (c), (k), (l) and (m) of Article 72b(2) and Article 72b(3) to (5) of Regulation (EU) No 575/2013;
  - (iii) in normal insolvency proceedings rank below liabilities that do not meet the condition referred to in point (i) and that are not eligible for own funds requirements;
  - (iv) are subject to the power of write down or conversion in accordance with Articles 59 to 62 that is consistent with the resolution strategy of the resolution group, in particular by not affecting the control of the subsidiary by the resolution entity;
  - (v) the purchase of the liabilities is not funded directly or indirectly by the entity subject to this Article;
  - (vi) the provisions governing the liabilities do not indicate explicitly or implicitly that the liabilities would be called, redeemed, repurchased or repaid early, as applicable by the entity subject to this Article other than in the case of the insolvency or liquidation of the entity and the entity does not otherwise provide such an indication;
  - (vii) the provisions governing the liabilities do not give the holder the right to accelerate the future scheduled payment of interest or principal, other than in case of the insolvency or liquidation of the entity subject to this Article;
  - (viii) the level of interest or dividend payments, as applicable, due on the liabilities is not amended on the basis of the credit standing of the entity subject to this Article or its parent undertaking.
- b)

- (i) CET1 capital, and
- (ii) other own funds instruments with a remaining maturity of at least one year that:
  - (1) are issued to and bought by entities that are included in the same resolution group, or
  - (2) are issued to and bought by entities that are not included in the same resolution group as long as the exercise of the power of write down or convert in accordance with Articles 59 to 62 does not affect the control of the subsidiary by the resolution entity.

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

- (a) 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 45f;
- (c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 59(3), in particular when resolution action is taken in respect of the resolution entity;
- (d) the resolution entity satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;
- (e) the risk evaluation, measurement and control procedures of the resolution entity cover the subsidiary;
- (f) the resolution entity holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary;

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

- (a) 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, in the Member State of the subsidiary, with the requirement referred to in Article 45(1);
- (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 when 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. .

6. Where the conditions laid down in points (a) and (b) of paragraph 5 are met, the resolution authority of a subsidiary may permit the requirement 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 the equivalent amount as the amount of the requirement for which it substitutes;
- (b) the guarantee is triggered when the subsidiary is unable to pay its debts or other liabilities as they fall due or a determination has been made in accordance with Article 59(3) in respect of the subsidiary, whichever is the earliest;
- (c) the guarantee is collateralised through a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC for at least 50% 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 when resolution action is taken in respect of the resolution entity. Upon request of the resolution authority the resolution entity shall provide an independent written and reasoned legal opinion or otherwise satisfactorily demonstrate that there are no legal, regulatory or operational barriers to the transfer of collateral to the relevant subsidiary.

8. EBA shall develop draft regulatory technical standards further specifying methods to avoid that instruments recognised for the purposes of Article 45g indirectly subscribed, in part or in full, by the resolution entity hamper the smooth implementation of the resolution strategy. Such methods should notably ensure a proper upstream of losses to the resolution entity and down-streaming of capital 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 Article 45g. 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 Article 45g.

EBA shall submit those draft regulatory technical standards to the Commission by [6 months after entry into force of this Directive].

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

#### *Article 45ga*

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

1. The resolution authority may waive the application of Article 45g to the central body or to a credit institution permanently affiliated to a central body, where all of the following conditions are met:

- (a) the credit institutions and the central body are subject to supervision by the same competent authority and are established in the same Member State and are part of the same resolution group;
- (b) the commitments of the central body and permanently affiliated institutions are joint and several liabilities or the commitments of its permanently affiliated institutions are entirely guaranteed by the central body;
- (c) the minimum requirement for own funds and eligible liabilities, solvency and liquidity of the central body and of all the permanently affiliated institutions are monitored as a whole on the basis of consolidated accounts of those institutions;
- (d) in the case of a waiver for a credit institution 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 45f(2a); 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 case of resolution.

#### *Article 45h*

##### *Procedure for determining the requirement*

1. The resolution authority of the resolution entity, the group-level resolution authority, where different from the former, and the resolution authorities responsible for the subsidiaries of a resolution group subject to the requirement 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 Article 45f and Article 45g, 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 45g(3) have not been bought directly or indirectly by the resolution entity, the requirements referred to in Article 45c(4) are partially met by the subsidiary in compliance with Article 45g(3) with instruments issued to and bought by entities not belonging to the resolution group.

2. Where more than one G-SII entity belonging to the same G-SII are resolution entities, the resolution authorities referred to in the first subparagraph 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(3) and Article 12 of Regulation (EU) No 575/2013 for individual resolution entities and the sum of the amounts referred to in point (b) of Article 45d(3) and Article 12 of Regulation (EU) No 575/2013.

Such an adjustment may be applied under the following conditions:

- (a) the adjustment may be applied in respect of differences in the calculation of the total risk exposure amounts between the relevant Member States by adjusting the level of the requirement;
- (b) the adjustment shall not be applied to eliminate differences resulting from exposures between resolution groups.

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

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

4. Where a joint decision is not taken within four months because of a disagreement concerning a consolidated resolution group requirement referred to in Article 45f, 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 the EBA shall take into account points (a) and (b) of the first subparagraph.

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

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

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

5. Where a joint decision is not taken within four months because of a disagreement concerning the level of the requirement referred to in Article 45g to be applied to any entity of a resolution group on an individual basis, the decision shall be taken by the respective resolution authorities 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) the views and reservations expressed in writing of the group-level resolution authority have been duly taken into account where that authority is different from the resolution authority of the resolution entity;

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

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

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

The resolution authority of the resolution entity or the group-level resolution authority shall not refer the matter to the EBA for binding mediation where the level set by the resolution authority of the subsidiary:

- (a) is within 2% of RWAs of the requirement referred to in Article 45f; and
- (b) complies with Article 45c(4).

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

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

6. Where a joint decision is not taken within four months because of a disagreement concerning the level of the consolidated requirement and the level of the requirement to be applied to the resolution group's 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 consolidated 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.

#### *Article 45i*

##### *Supervisory reporting and public disclosure of the requirement*

1. Entities referred to in Article 1(1) 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 Article 45g(3)(b) and eligible liabilities and the expression of those amounts in accordance with Article 45(2) following, where applicable, the deductions in accordance with Articles 72e to 72j of Regulation (EU) No 575/2013;

- (a a) the amounts of other bail-inable liabilities;
- (b) for the items referred to in points (a) and (a a):
  - (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), points (p) and (q) of Article 52(1) and points (n) and (o) of Article 63 of Regulation (EU) No 575/2013.

1a. 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 a yearly basis the information referred to in points (aa) and (b) of paragraph 1.

The entities referred to in paragraph (1) shall report the information referred to in paragraph (1) more frequently at the request of the competent authority or resolution authority.

1b. Point (aa) of paragraph 1 shall not apply to entities that hold amounts of own funds and eligible liabilities as calculated in accordance with point (a) of that paragraph of at least 150 per cent of the requirement referred to in Article 45(1) at the date of the reporting of information referred to in point (aa) of paragraph 1.

2. Entities referred to in Article 1(1) subject to the requirement referred to in Article 45(1) shall make the following information publicly available on at least a yearly basis:

- (a) the amounts of own funds that, where applicable, meet the conditions of Article 45g(3)(b) and eligible liabilities ;
  - (b) the composition of the items referred to in point (a), including their maturity profile and ranking in normal insolvency proceedings.
- (b a) the applicable requirement referred to in Article 45c or Article 45d expressed in accordance with Article 45(2).

2a. Paragraphs 1 and 2 of this Article shall not apply to entities whose resolution plan provides that the entity is to be wound up under normal insolvency proceedings.

3. 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 1a.

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

For institutions 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 99 of Regulation (EU) 575/2013.

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

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

3a. EBA shall develop draft implementing technical standards to specify uniform disclosure formats, frequency and associated instructions in accordance with which disclosures required under paragraph 2 shall be made.

Such uniform disclosure formats shall convey sufficiently comprehensive and comparable information for users of that 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 45c or Article 45d. Disclosure formats shall be in tabular format where appropriate.

For institutions 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 Regulation (EU) 575/2013.

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

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

4. Where resolution actions have been implemented or powers referred to in Article 59 have been exercised, public disclosure requirements referred to in paragraph 2 shall apply from the date of the deadline to comply with the requirements of Article 45f or Article 45g referred to in Article 45m.

#### *Article 45j* *Reporting to the EBA*

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

2. 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 identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 1.

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

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

#### *Article 45k*

##### *Breaches of the minimum requirement for own funds and eligible liabilities*

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

- (a) powers to address or remove impediments to resolvability in accordance with Article 17 and Article 18;
- (ba) powers referred to in Article 16a;
- (b) measures referred to in Article 104 of Directive 2013/36/EC;
- (c) early intervention measures in accordance with Article 27;
- (d) administrative penalties and other administrative measures in accordance with Article 110 and Article 111.

The relevant authorities may also carry out an assessment of whether the institution is failing or is likely to fail, in accordance with Article 32.

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

#### *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 45f or Article 45g 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(3), (4) and (6) has been exercised by resolution authorities and whether there have been divergences in the exercise of

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

that power across Member States.

- c) the aggregate level and composition of eligible liabilities and own funds 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, and any proposed harmonised levels of the minimum requirement on the following:
  - (i) financial markets in general and markets for unsecured debt and derivatives in particular;
  - (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 instruments that meet all of the conditions referred to in Article 72a of Regulation (EU) No 575/2013, except for paragraphs (3) to 5) of Article 72b of that Regulation, and own funds, and the nature and marketability of such instruments referred above.
  - (vii) the risk-taking behaviour of institutions;
  - (viii) the level of asset encumbrance of institutions;
  - (ix) the actions taken by institutions to comply with minimum requirements, and in particular the extent to which minimum requirements have been met by asset deleveraging, long-term debt issuance and capital raising; and
  - (x) the level of lending by credit institutions, with a particular focus on lending to micro, small and medium-sized enterprises, local authorities, regional governments and public sector entities and on trade financing, including lending under official export credit insurance schemes;
- (b) the interaction of the minimum requirements with the own funds requirements, leverage ratio and the liquidity requirements laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU;

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

3. The report referred to in paragraph 1 shall be communicated 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 no later than [ 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 communicated 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 no later than 31 December 2022.

*Article 45m*  
*Transitional and post-resolution arrangements*

1. By way of derogation from Article 45(1), resolution authorities shall determine an appropriate transitional period for an institution or entity referred to in points (b), (c) and (d) of Article 1(1) to comply with the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3), Article 45b(4) or Article 45b(6), as appropriate. the deadline to comply with the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3)), Article 45b(4) or Article 45b(6), shall be 1 January 2024.

The resolution authority shall determine an intermediate target level for the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3), Article 45b(4) or Article 45b(6), as appropriate, that an institution or entity referred to in points (b), (c) and (d) of Article 1(1) shall comply with at 1 January 2022. The intermediate target shall, as a rule, ensure a linear build-up of eligible liabilities and own funds towards the requirement.

The resolution authority may set a transitional period that is longer than 1 January 2024 where duly justified and appropriate on the basis of the criteria referred to in paragraph (4) and by taking into consideration:

- (a) the development of the entity's financial situation;
- (b) the prospect that the entity will be able to ensure compliance with the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3), Article 45b(4) or Article 45b(6) in a reasonable timeframe; 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 45g(3) of this Directive, and if not, whether this inability is of idiosyncratic nature or due to market-wide disturbance.

1a. The deadline to comply with the minimum level of the requirements referred to in Article 45c(3a) and (3b) shall be 1 January 2022.

1b. The minimum level of the requirement referred to in Article 45c(3a) and (3b) shall not apply in the following cases:

- (b) within the two years following the date on which the resolution authority has applied the bail-in tool;
- (c) within the two years following the date on which the resolution entity has put in place an alternative private sector measure 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 in order to recapitalize the resolution entity without the application of resolution tools.

1c The requirements referred to in Article 45b(3) and (6) as well as Article 45c(3a) and (3b), as applicable, shall not apply within the three years following the date on which the resolution entity or the group of which the resolution entity is part has been identified as GSII, or the resolution entity starts to be in the situation referred to in Article 45c(3a) or (3b).

2. By way of derogation from Article 45(1), resolution authorities shall determine an appropriate transitional period to comply with the requirements of Articles 45f or 45g or a requirement due to application of Article 45b(3), Article 45b(4) or Article 45b(6), as appropriate, for an institution or entity referred to in points (b), (c) and (d) of Article 1(1) to which resolution tools or the power to write down and or convert relevant capital instruments and eligible liabilities have been applied.

3. For the purposes of paragraphs 1, 1a, 1b, 1c and 2, resolution authorities shall communicate to the institution or entity referred to in points (b), (c) and (d) of Article 1(1) a planned MREL for each 12 months period during the transitional period with a view to facilitating a gradual build-up of its loss absorption and recapitalization capacity. At the end of the transitional period, the MREL shall be equal to the amount determined under Articles 45c (3a), 45c(3b), 45f, 45g, 45b (3), 45b(4) or 45b(6), as applicable.

4. When setting the transitional periods, resolution authorities shall take into account:

- (i) the prevalence of deposits and the absence of debt instruments in the funding model;
- (ii) the access to the capital markets for eligible liabilities;
- (iii) the reliance on CET1 capital to meet the requirement referred to in Article 45f.

5. Subject to paragraph 1, resolution authorities shall not be prevented from subsequently revising either the transitional period or any planned MREL communicated under paragraph 3."

(23a) In Article 48(1) point (e) is replaced by the following:

“(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), (b), (c) and (d) of this paragraph to

produce the sum of the amounts referred to in points (b) and (c) of Article 47(3).”

23a. In Article 48, the following paragraph 6a is added:

6a. 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 rank lower than any claim that does not result from an own funds item.

24. Article 55 is replaced by the following:

*"Article 55  
Contractual recognition of bail-in*

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

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

Resolution authorities may decide that paragraph 1 of this Article 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 those liabilities 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

designation of the class of the liability and justification of that determination, to the resolution authority. The institution or entity shall provide the resolution authority with all information that the resolution authority may request within a reasonable timeframe following the receipt of the notification referred to in this subparagraph, in order 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 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 are unsecured liabilities. Moreover, the liabilities referred to in the first subparagraph shall be senior to the liabilities with the ranking 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, 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 powers 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 this 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 the power to write down or convert eligible liabilities.

Where the resolution authority concludes on the basis of the assessment referred to in the fifth subparagraph 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 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.

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 in certain categories of liabilities

(b) the conditions for the resolution authority to require the inclusion of the clause pursuant to paragraph 2, third subparagraph.

(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 ..... [....one year after the date of entry into force of this amending Directive].

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.

6a. The resolution authority shall specify, where it deems it necessary, the categories of liabilities among 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, based on the conditions further specified as a result of the application of paragraph 6.

6b. 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 [ 12 months after the date of entry into force]

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

The title of Chapter V of Title IV is replaced by the following:

“Write down of capital instruments and eligible liabilities”

The title of Article 59 is replaced by the following:

“Requirement to write down or convert capital instruments and eligible liabilities”

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

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

(a) independently of resolution action; or

(b) in combination with a resolution action, where the conditions for resolution specified in Articles 32, 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 shall be exercised together with the exercise of the same power at the level of the parent undertaking of the entity concerned or subsequent parents 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 eligible liabilities or relevant capital instruments independently of resolution action, the valuation provided for in Article 74 shall be carried out and Article 75 shall apply.

28a. In Article 59, the following paragraphs 1a and 1b are inserted:

“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 Article 45g(3)(a), except the condition related to the remaining maturity of liabilities as regulated by 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 taken 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) applicable to the entity concerned.”

29. In Article 59(2) and (3), except for points (c) and (d) of Article 59(3), "capital

instruments" is replaced with "capital instruments, and liabilities referred to in paragraph 1a".

(29a) Point (a) of Article 59(3) is replaced with the following:

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

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

30a. The title of Article 60 is replaced by the following:

“Provisions concerning the write down or conversion of capital instruments and eligible liabilities”

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

"(d) 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."

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

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

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

(b) no liability to the holder of the relevant capital instrument, or of the liability 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 referred to in Article 59(1a), other than in accordance with paragraph 3."

In Article 60(3), the introductory sentence is replaced with the following:

“In order to effect a conversion of relevant capital instruments, and liabilities 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 liabilities. Relevant capital instruments and such

liabilities may only be converted where the following conditions are met.”

In point (d) of Article 60(3), " each relevant capital instrument" is replaced by "each relevant capital instrument, or each liability referred to in Article 59(1a)".

(33a) In Article 61(3) a new subparagraph is added:

”Where the relevant capital instruments, or liabilities referred to in Article 59(1a), are recognised for the purposes of meeting the requirement referred to in Article 45g(1) , 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.”

(33b) In Article 62, paragraph 1 is replaced with the following:

"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 liabilities referred to in Article 59(1a), for the purposes of meeting the requirement referred to in Article 45g 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, appropriate authorities comply with the following requirements:

- (a) an appropriate authority that is considering whether to make a determination referred to in point (b), (c), (d) or (e) of Article 59(3), after having consulted the resolution authority of the relevant resolution entity, notifies, within 24 hours of that consultation:
  - (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 45g(3) from the entity subject to Article 45g(1);
- (b) an appropriate authority that is considering whether to make a determination referred to in point (c) of Article 59(3) 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 power is 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."

(33c) In Article 62(4), the introductory part is replaced with the following:

"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:"

(33d) In Article 68, paragraph 3 the introductory part is replaced by the following:

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:

(33e) In Article 68, paragraph 5 is replaced by the following:

"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).

(33f) In Article 69, paragraph 4 is replaced by the following:

"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.

(33g) In Article 69, paragraph 5, the following subparagraphs are added:

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.

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

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."

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

"3. Any suspension under paragraph 1 or 2 shall not apply to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties 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 central banks."

(36a) The following Article 71a is inserted:

*“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 governed by a third country law, a term 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 to be bound by the requirements of Article 68.

2. Member States may also require that parent undertakings referred to in paragraph 1 ensure that their third country subsidiaries include, in financial contracts concluded with their counterparties, a contractual term 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 valid grounds 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.

2. 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 68, 33a, 69, 70 or 71 would apply if the financial contract were governed by the laws of a Member State.

3. Where an institution or entity does not include the contractual term required in accordance with paragraph 1, this shall not prevent the resolution authority from applying Article 68, 33a,

69, 70 or 71 in relation to that financial contract.”

4. EBA shall develop draft regulatory technical standards in order to further determine the contents of the term required in paragraph (1), taking into account banks’ different business models.

EBA shall submit those draft regulatory technical standards to the Commission by [12 months after the entry into force of this Directive].

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

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

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

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

39. Article 89 is replaced by the following:

*"Article 89  
European resolution colleges*

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

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

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

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

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

resolution entity or to other entities under the conditions provided in point (i) Article 45g(3)(a) and in point (ii) of Article 45g(3)(b).

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

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

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

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

*Article 2*  
*Amendment to Directive 98/26/EC*

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

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

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

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

The following Article is inserted:

*"Article 12a*

By [24 months after the entry into force of this Amending Directive] the Commission shall review how Member States apply this 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 participation in such systems. The Commission shall assess in particular the need for any further amendments to this Directive with regard to systems governed by the law of a third country. The Commission shall submit a report thereon to the European Parliament and the Council, accompanied where appropriate by proposals for revision of this Directive."

*Article 9*

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [date 18 months from the date of entry into force of this Directive]. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures as from the date of their entry into force in national law, which shall be no later than [18 months from the date of entry into force of this Directive].

Member States shall apply Article 45i(2) from 1 January 2024. Where, in accordance with Article 45m(1), the resolution authority has set a compliance deadline that is longer than 1 January 2024, the application date of Article 45i(2) shall be the same as the compliance deadline.

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

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

### *Article 10*

#### *Entry into force*

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

### *Article 11*

#### *Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*