



Brussels, 31.5.2021
C(2021) 3697 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 31.5.2021

**supplementing Directive 2014/59/EU of the European Parliament and of the Council
with regard to regulatory technical standards for the contractual recognition of write
down and conversion powers**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 55(6) of Directive 2014/59/EU ('the Directive', 'BRRD') empowers the Commission to adopt, following submission of draft regulatory technical standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010, delegated acts specifying (a) the conditions under which it would be legally or otherwise impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to in paragraph 1 of Article 55 BRRD in certain categories of liabilities; (b) the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD; (c) the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 BRRD.

In accordance with Article 10(1) of Regulation (EU) No 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 55(6) of the Directive. A consultation paper was published on the EBA internet site on 24 July 2020, and the consultation closed on 24 October 2020. Moreover, the EBA invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1093/2010, the EBA has submitted its Impact Assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at this [link¹](#).

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The provisions of this delegated act 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) of BRRD to include the contractual term referred to in paragraph 1 of Article 55 BRRD in certain categories of liabilities; (b) the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of article 55 BRRD; (c) the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of article 55 BRRD.

¹ <https://www.eba.europa.eu/technical-standards-impracticability-contractual-recognition-bail>

Article 1 of the regulatory technical standards provides the conditions under which it would be impracticable to include the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities.

Article 2 of the regulatory technical standards provides the conditions for the resolution authority to require the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities.

Article 3 of the regulatory technical standards provides the reasonable timeframe for the resolution authority to require the inclusion of a contractual term.

Article 4 of the regulatory technical standards provides the entry into force and application related provisions.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council², and in particular Article 55(6), third subparagraph, thereof,

Whereas:

- (1) Article 55(2), first subparagraph, of Directive 2014/59/EU requires Member States to ensure that where an institution or entity referred to in Article 1(1), points (b), (c) and (d) of that Directive reaches the determination that it is legally or otherwise impracticable to include in the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of Directive 2014/59/EU ('the contractual term'), that institution or entity is to notify its determination to the resolution authority.
- (2) The conditions under which it would be legally or otherwise impracticable for an institution or entity to include the contractual term in certain categories of liabilities should be defined in a way that allows for an appropriate level of convergence, while at the same time enabling resolution authorities to take into account differences in relevant markets.
- (3) Institutions or entities should not be required to include, in the contractual provisions governing a relevant liability, the contractual term, where such inclusion would be illegal in the relevant third country. This could be the case where, for example, the laws, or instructions from the authorities of the third country do not allow for such terms. It should also be considered as impracticable for an institution or entity to include the contractual term in an agreement or instrument where that institution or entity is unable to amend those contractual provisions. This is often the case where agreements or instruments are concluded in accordance with international standardised terms or protocols setting uniform terms and conditions for such kinds of agreements or instruments. Trade finance products, such as guarantees, counter-guarantees, letters

² OJ L 173, 12.6.2014, p. 190.

of credit or other instruments used in the context of supporting or funding trade transactions are typically issued subject to internationally recognised standard terms or rules set by an internationally recognised industry organisation or developed based on standard bilateral customs. Impracticability might also arise where the institution or entity concludes financial services provision contracts with non-Union bodies, including financial service providers, trading venues, financial market infrastructures or custodians that use standard terms that cannot be negotiated by the institution or entity.

- (4) In any event, the unwillingness alone of the counterparty to include the contractual terms or an increase in the price of the instrument or agreement alone should not be considered as a condition of impracticability of including the contractual term.
- (5) In accordance with Article 55(2), third subparagraph, of Directive 2014/59/EU, even in the absence of impracticability conditions, a resolution authority may decide not to require the relevant institution or entity to include the contractual term where it considers that such inclusion is not necessary to ensure the resolvability of the institution or entity. The conclusions of the analysis of the impact on resolvability for the purposes of Article 55 of Directive 2014/59/EU, should be consistent with those under the resolvability assessment as laid down in Title II, Chapter II, of that Directive. However, for the purposes of the assessment of the impact on resolvability in accordance with Article 55(2), third subparagraph, of Directive 2014/59/EU, agreements or instruments creating liabilities with long maturities or high nominal values should be considered necessary to ensure resolvability. The inclusion of such contractual terms should, therefore, not be waived when such inclusion does not meet the conditions of impracticability. Regarding other agreements or instruments creating liabilities, when assessing their impact on resolvability, resolution authorities should have due regard to a number of relevant elements but should be allowed, as appropriate depending on the specific circumstances, to assess any additional element they may consider necessary.
- (6) After receiving a complete notification of impracticability, a resolution authority should have a reasonable timeframe to evaluate it. Notifications can vary in complexity. It is therefore appropriate that a resolution authority is allowed to extend the timeframe for requiring the inclusion of the contractual term for a predetermined period of time as regards complex notifications. Such an extension should be duly notified to the relevant institution or entity. Considering the novel nature of the notification and its assessment, resolution authorities should be allowed to extend the timeframe to assess complex notifications for six additional months during the first year after the entry into force of this Regulation. After this period, resolution authorities should be allowed to extend the timeframe for the assessment of complex notifications for three months.
- (7) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority.
- (8) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking

Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council³,

HAS ADOPTED THIS REGULATION:

Article 1

Conditions under which it would be impracticable to include the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities

1. The conditions under which it would be legally or otherwise impracticable for an institution or entity referred to in Article 1(1), point (b), (c) or (d), of Directive 2014/59/EU to include, in the contractual provisions governing a relevant liability, the contractual term referred to in Article 55(1) of that Directive, shall be the following:
 - (a) the inclusion of the contractual term would constitute a breach of the laws, regulations or administrative provisions of the third country governing the liability;
 - (b) the inclusion of the contractual term would be contrary to an explicit and binding instruction from a third country authority;
 - (c) the liability arises from instruments or agreements concluded in accordance with international standardised terms or protocols that the institution or entity is unable to amend;
 - (d) the liability is governed by contractual terms that the institution or entity has to accept in order to be able to participate in or to utilise the services of a non-Union body, and which the institution or entity is unable to amend;
 - (e) the liability is owed to a commercial or trade creditor and relates to provision of goods or services that, while not critical, are used for daily operational functioning of the institution or entity and the institution or entity is unable to amend the terms of the agreement.
2. For the purposes of paragraph 1, points (c), (d) and (e), an institution or entity shall be deemed to be unable to amend the instruments or agreements or contractual terms where the instrument, agreement or contractual terms can be concluded only under the terms set by the counterparty or counterparties or by the applicable standard terms or protocols.

Article 2

Conditions for the resolution authority to require the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities

1. The resolution authority shall require the inclusion in the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where it has concluded, on the basis of the institution's or entity's notification, that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation is fulfilled and provided that any of the following conditions is fulfilled:

³ 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).

- (a) the nominal amount of the liability created by the relevant agreement or instrument is equal to or more than EUR 20 million;
 - (b) the remaining maturity of the agreement or instrument is equal to or longer than six months.
2. Where necessary to ensure resolvability, the resolution authority may require the inclusion in the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where it has concluded, on the basis of the institution's or entity's notification, that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation is fulfilled and provided that none of the conditions listed in paragraph (1), points (a) and (b) of this Article is fulfilled.
- When assessing whether the inclusion of the contractual term is necessary to ensure resolvability, in accordance with the first subparagraph, the resolution authority shall in particular have regard to at least one of the following elements:
- (a) the amount and type of the agreement or instrument;
 - (b) the feasibility of using resolution tools;
 - (c) the credibility of using resolution tools in a way that meets the resolution objectives, taking into account possible impacts on creditors, counterparties, customers and employees, and possible actions of third-country authorities;
 - (d) the ranking of the liability in normal insolvency proceedings under national law;
 - (e) the maturity of the liability and the revolving nature of the contract.

Article 3

The reasonable timeframe for the resolution authority to require the inclusion of a contractual term

- 1. The reasonable timeframe referred to in Article 55(2), third subparagraph, of Directive 2014/59/EU shall be three months from the day the resolution authority receives the notification referred to in Article 55(2), first subparagraph, of that Directive.
- 2. Where the notification referred to in Article 55(2), first subparagraph, of Directive 2014/59/EU is incomplete, the resolution authority shall indicate to the notifying institution or entity which information is missing. The timeframe referred to in paragraph 1 of this Article shall start when all missing information has been submitted.
- 3. Until ... [*OJ, please insert the date: the day before one year after the date of entry into force of this Regulation*], where the notification is complex, the resolution authority may extend the timeframe referred to in paragraph 1 by six months.

As from ... [*OJ, please insert the date: one year after the date of entry into force of this Regulation*], where the notification is complex, the resolution authority may extend the timeframe referred to in paragraph 1 by three months.
- 4. The resolution authority shall inform the notifying institution or entity of the extension and of the reasons for it.

Article 4

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 31.5.2021

For the Commission

The President

Ursula VON DER LEYEN