



Brussels, 22.4.2021
C(2021) 2656 final

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

of 22.4.2021

**supplementing Directive 2014/59/EU of the European Parliament and of the Council
with regard to regulatory technical standards determining the content of the contractual
terms on recognition of resolution stay powers**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 71a(5) of Directive (EU) 2014/59 ('the Directive') 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 the content of the term required in paragraph 1 of Article 71a of the Directive, taking into account institutions' and entities' different business models.

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 71a(5) of the Directive. A consultation paper was published on the EBA internet site on 15 May 2020, and the consultation closed on 15 August 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 the following [link](https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/regulatory-technical-standards-contractual-recognition-stay-powers-under-brrd)¹.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The provisions of this delegated act specify the content of the term required in paragraph 1 of Article 71a of the Directive, taking into account institutions' and entities' different business models.

Article 1 of the technical standards provides the content of the contractual terms.

¹ <https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/regulatory-technical-standards-contractual-recognition-stay-powers-under-brrd>

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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 71a(5), third subparagraph thereof,

Whereas:

- (1) Directive 2014/59/EU as amended by Directive (EU) 2019/879 of the European Parliament and of the Council³ introduced certain safeguards to enhance effective resolution execution in relation to financial contracts governed by third-country law.
- (2) In accordance with Article 71a(1) of Directive 2014/59/EU, institutions and entities are required to include terms that recognise the stay powers of resolution authorities in their financial contracts that they enter into and which are governed by third-country law.
- (3) In order to improve the efficiency of resolution, Article 68 of Directive 2014/59/EU lays down that certain crisis prevention measures or crisis management measures should not be deemed to be enforcement events or as insolvency proceedings. Furthermore, that article lays down that such measures should not entitle contracting counterparties in relevant contracts to exercise certain contractual rights solely as a result of the application of such measures. It is therefore necessary to include the parties' acceptance to be bound by these requirements in the content of the contractual terms. In addition, under Articles 33a, 69, 70 and 71 of Directive 2014/59/EU, resolution authorities may, for a limited period of time, suspend contractual payment or delivery obligations due under a contract with an institution or an entity under resolution or in certain circumstances before resolution, restrict the enforcement of security interests and suspend certain rights of counterparties to, for instance, close

² OJ L 173, 12.6.2014, p. 190.

³ Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ L 150, 7.6.2019, p. 296).

out, net gross obligations, accelerate future payments or otherwise terminate financial contracts. As these powers of the resolution authorities might not be effective when applied to financial contracts under third-country law, they should be explicitly recognised in the terms of financial contracts.

- (4) In order to ensure the effectiveness of resolution and promote consistency in the approaches adopted by Member States, and in order to ensure that differences in their legal systems or differences arising from a particular contractual form or structure can be taken into account by resolution authorities, institutions and entities, it is appropriate to lay down the mandatory content for the contractual terms. The content of these contractual terms should take into account institutions' and entities' different business models. However, as financial contracts in international transactions generally do not vary in accordance with the institutions' or the entities' business model, it is not necessary to create different content for contractual recognition clauses.
- (5) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority (EBA).
- (6) The EBA 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 1093/2010⁴,

HAS ADOPTED THIS REGULATION:

Article 1
Content of the contractual terms

The contractual recognition terms of a relevant financial contract governed by third-country law which an institution or entity, as referred to in Article 1(1), point (b), (c) or (d), of Directive 2014/59/EU enters into, shall include the following:

- (1) the acknowledgement and acceptance by the parties that the contract may be subject to the exercise of powers by a resolution authority to suspend or restrict rights and obligations arising from such a contract under Articles 33a, 69, 70 and 71 of Directive 2014/59/EU as transposed by the applicable national law and that the conditions set out in Article 68 of that Directive as transposed by the applicable national law will apply.
- (2) a description of or a reference to the powers of the resolution authority as set out in Articles 33a, 69, 70 and 71 of Directive 2014/59/EU, as transposed by the applicable national law, and a description of or a reference to the conditions of Article 68 of Directive 2014/59/EU as transposed by the applicable national law.
- (3) the acknowledgement and acceptance by the parties:
 - (a) that they are bound by the effect of an application of the following powers:

⁴ 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).

- the suspension of any payment or delivery obligation in accordance with Article 33a of Directive 2014/59/EU as transposed by the applicable national law;
 - the suspension of any payment or delivery obligation in accordance with Article 69 of Directive 2014/59/EU as transposed by the applicable national law;
 - the restriction of enforcement of any security interest in accordance with Article 70 of Directive 2014/59/EU as transposed by the applicable national law;
 - the suspension of any termination right under the contract in accordance with Article 71 of Directive 2014/59/EU as transposed by the applicable national law;
- (b) that they are bound by the provisions of Article 68 of Directive 2014/59/EU as transposed by the applicable national law;
- (4) the acknowledgement and acceptance by the parties that the contractual recognition terms are exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreement.

Article 2

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, 22.4.2021

For the Commission

The President

Ursula VON DER LEYEN