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

of 13.12.2023

amending Delegated Regulation (EU) 2015/63 as regards the calculation of eligible liabilities and the transitional regime

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Pursuant to Article 100 of Directive 2014/59/EU¹, Member States are required to establish one or more financing arrangements (“resolution funds”) for the purpose of ensuring the effective application by the resolution authorities of the resolution tools and powers. According to Article 102 of Directive 2014/59/EU, Member States must ensure that by end 2024 the available financial means of the national resolution funds reach a target level of at least 1% of the amount of covered deposits of all the institutions authorised in their territory.

Article 103, paragraphs 1 and 2, of Directive 2014/59/EU provide that, in order to reach the target level, annual contributions are raised from the institutions in scope, which are based on the amount of liabilities (excluding own funds) less covered deposits of each of the institutions.

By virtue of Article 67 of Regulation (No) 806/2014² a Single Resolution Fund (SRF) has been established in the Banking Union. The SRF should reach its target level of at least 1% of the amount of covered deposits of all credit institutions authorised in all of the participating Member States by the end of 2023, pursuant to Article 69 of Regulation (No) 806/2014.

On the basis of Article 103, paragraph 7, of Directive 2014/59/EU in conjunction with Article 115 of that same Directive, the Commission adopted Delegated Regulation (EU) 2015/63 of 21 October 2014 with regard to ex ante contributions to resolution financing arrangements³.

Delegated Regulation (EU) 2015/63 governs the calculation and raising of contributions to be paid by institutions to resolution financing arrangements, including, in the Banking Union, to the SRF. Council Implementing Regulation (EU) 2015/81⁴ also applies to the contributions to the SRF.

Technical amendments

By virtue of Article 4 of Delegated Regulation (EU) 2015/63, resolution authorities determine the annual contributions to be paid by each institution in proportion to its risk profile. In order to adjust each institution’s contribution to its risk profile, resolution authorities are to take into account four risk pillars and several indicators referred to in Article 6 of Delegated Regulation (EU) 2015/63, and in particular the indicator “Eligible liabilities and own funds held by the institution in excess of MREL” pursuant to paragraph 2 point (a) of that Article.

¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348.

² 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.

³ Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements, OJ L 11, 17.1.2015, p. 44–64.

⁴ Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund, OJ L 15, 22.1.2015, p. 1.

Changes in Directive 2014/59/EU introduced by Directive (EU) 2019/879⁵ have created the need to amend Delegated Regulation (No) 2015/63 on the following matters.

First, the definition of “eligible liabilities” in Article 3, point (17) of Delegated Regulation (EU) 2015/63 refers to the definition of “eligible liabilities” in Article 2(1) point (71) of Directive 2014/59/EU. According to the latter provision, *“eligible 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) that are not excluded from the scope of the bail-in tool by virtue of Article 44(2)”*. However, this definition was amended by Directive (EU) 2019/879 and “eligible liabilities” are now defined in Article 2(1) point (71a) of Directive 2014/59/EU as *“bail-inable liabilities that fulfil, as applicable, the conditions of Article 45b or point (a) of Article 45f(2) of this Directive, and Tier 2 instruments that meet the conditions of point (b) of Article 72a(1) of Regulation (EU) No 575/2013”*. As a consequence of this amendment, only liabilities which are eligible for the minimum requirement for own funds and eligible liabilities (MREL) - and not all liabilities which are bail-inable, as it was the case under the previous definition— now fulfil the definition of “eligible liabilities”. Therefore, both the definition of “eligible liabilities” in Article (3) (17) and the formula to calculate the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” referred to in Annex I, STEP I, of Delegated Regulation (EU) 2015/63 need to be adjusted accordingly to exclude liabilities not eligible for MREL.

Second, Delegated Regulation (EU) 2015/63 refers in its Article 3 point (15) to the definition of MREL in Article 45(1) of Directive 2014/59/EU. The MREL requirement in Directive 2014/59/EU was also amended by Directive (EU) 2019/879. In particular, Article 45(2) of Directive 2014/59/EU as amended provides that MREL should be expressed both as a percentage of: (a) the total risk exposure amount (TREA) of the relevant entity, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013⁶; and (b) the total exposure measure (TEM) of the relevant entity, calculated in accordance with Articles 429 and 429a of Regulation (EU) No 575/2013. As a result of this amendment, the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” should be calculated on the basis of the higher value choosing between MREL TREA and MREL TEM.

Finally, pursuant to Article 8(2) of Delegated Regulation (EU) 2015/63, individual entities which form part of a group may use the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” calculated at consolidated level when the competent authority has fully waived the application of capital requirements to them at individual level and the resolution authority has also fully waived the application at individual level of the MREL requirement in accordance with Article 45(12) of Directive 2014/59/EU. However, Directive 2014/59/EU, as amended by Directive (EU) 2019/879, provides for further possibilities for resolution authorities to waive the MREL requirement, referred to in paragraphs 3 and 4 of Article 45f and in Article 45g instead of in Article 45(12). Therefore, the reference to Article 45(12) in Article 8(2) of Delegated Regulation (EU) 2015/63 should be replaced by paragraphs 3 and 4 of Article 45f and by Article 45g of Directive 2014/59/EU.

⁵ 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.

⁶ 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, 26.6.2013, p.1.

Transitory regime

Delegated Regulation (EU) 2015/63 sets out in Article 20(5) a transitory period during which Member States have the possibility to allow smaller institutions⁷ to contribute to national resolution funds under a lump-sum regime⁸, until the end of the initial period to reach the target level for the SRF referred to in Article 69(1) of Regulation (No) 806/2014/EU, i.e. 31 December 2023.

Article 8 (5) of Council Implementing Regulation (EU) 2015/81 sets out an identical transitory regime - until the end of the above-mentioned initial period for the SRF ending on 31 December 2023- during which smaller institutions are to contribute to the SRF under the lump-sum regime, with the difference that Article 8(5) of Council Implementing Regulation (EU) 2015/81 sets an obligation for the entities concerned to contribute with a lump-sum, while Article 20(5) of Delegated Regulation (EU) 2015/63 establishes an option for the Member States to allow the entities concerned to contribute under that lump-sum regime.

The target level of national financing arrangements is to be reached by 31 December 2024 pursuant to Article 102(1) of Directive 2014/59/EU, one year later than the target level of the SRF.

It is necessary to provide an equal treatment to smaller institutions contributing to national resolution funds and to those contributing to the SRF as to the period to apply the lump sum regime - allowing the application of the lump sum regime until the end of the initial period to reach the target level both for the national financing arrangements (31 December 2024) and the SRF (31 December 2023) respectively. Therefore, for that purpose, the transitory period to apply the lump-sum regime for smaller institutions which contribute to national resolution funds would need to be extended for one year, i.e. until 31 December 2024. The transitory period to contribute to the SRF under the lump-sum regime will still end by the end of 2023.

Amendments to the current provisions

The indicator “Own funds and eligible liabilities held by the institution in excess of MREL ” needs to be calculated on the basis of the current definition of eligible liabilities in Directive 2014/59/EU. Therefore, Article 3, point (17), and Annex I, STEP I of Delegated Regulation (EU) 2015/63 are amended to refer to the definition of eligible liabilities in Article 2(1), point (71a), of Directive 2014/59/EU. The formula for the calculation of this indicator in Annex I, STEP I of Delegated Regulation (No) 2015/63 is amended to reflect this change.

The indicator “Own funds and eligible liabilities held by the institution in excess of MREL” needs to be calculated on the basis of the MREL requirement as currently laid down in Article 45(1) of Directive 2014/59/EU, which includes MREL expressed as a percentage of both MREL TREA and MREL TEM. In order to do so, Annex I, STEP I of Delegated Regulation (EU) 2015/63 is amended to refer to the calculation of the indicator “Own funds and eligible liabilities held by the institution in excess of MREL ” using the higher value choosing between MREL TREA or MREL TEM.

⁷ Institutions whose total assets are equal to or less than EUR 3 000 000 000.

⁸ To pay a lump-sum of EUR 50 000 for the first EUR 300 000 000 of total liabilities, less own funds and covered deposits. For the total liabilities less own funds and covered deposits above EUR 300 000 000, those institutions shall contribute in accordance with Articles 4 to 9 of Delegated Regulation 2015/63.

Article 8(2) of Delegated Regulation (EU) 2015/63 needs to include the specific cases in which resolution authorities may waive the calculation of the MREL requirement at individual level under Directive 2014/59/EU, so that, provided that the other conditions listed in that Article are met, those individual entities which are part of a group can use the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” calculated at consolidated level. The reference in Article 8(2) of Delegated Regulation (EU) 2015/63 to Article 45(12) of Directive 2014/59/EU is replaced by paragraphs 3 and 4 of Article 45f and by Article 45g of Directive 2014/59/EU.

The possibility to calculate the contributions of smaller institutions to national resolution funds in accordance with the lump-sum regime provided for by Article 20(5) should be extended until the end of the initial period to reach the target level for national resolution funds, 31 December 2024. This extension will not apply to smaller institutions contributing to the SRF for which the lump-sum transitory regime will continue to apply, as provided for by Article 8(5) of Council Implementing Regulation (EU) 2015/81, only until the end of the initial period to reach the target level for the SRF, i.e. 31 December 2023. In Article 20(5) of Delegated Regulation (EU) 2015/63 the reference to the initial period of Article 69(1) of Regulation No 806/2014 is replaced by the reference to the initial period referred to in Article 102(1) of Directive 2014/59/EU.

Considering the time required for the legislative amendments to take effect, it is appropriate that the amendments to Delegated Regulation (EU) 2015/63 allow the resolution authorities to derogate in 2024 from the obligation, set out in Article 13, paragraph 1, of the Delegated Regulation, to notify institutions of the decisions on contributions by 1 May, allowing them instead to notify institutions of the decisions by 31 May 2024. Accordingly, a derogation should be provided from the obligation, set out in Article 14, paragraph 4, of the Delegated Regulation, for institutions to provide information to resolution authorities by 31 January, allowing them instead to provide information by 29 February 2024.

Pursuant to Article 14(4) of Delegated Regulation (EU) 2015/63, institutions are bound to provide resolution authorities with the data relevant for the calculation of contributions by 31 January each year (by 29 February in 2024). This collection of data must be instructed by the resolution authorities well in advance. As for the contribution period of 2024, it would be appropriate to make the effects of the relevant provisions of this Regulation retroactive to 1 December 2023, so that the instructions sent by resolution authorities to institutions on the data points to be provided by 29 February 2024 would be covered by the proposed amendments.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

For the preparation of this Delegated Regulation, the Commission consulted experts at the meeting of its Expert Group on Banking, Payments and Insurance on 19 October 2023. Among others, the role of this Expert Group is to provide the Commission with advice and expertise as regards the preparation of delegated acts. The Expert Group includes member and observer experts designated by the European Parliament, the Member States, the ECB and the Single Resolution Board (Board). The Commission gathered the opinions of members and observers of the Expert Group ahead of, during and shortly after the meeting and took them into account for the drafting of this Regulation.

No impact assessment is foreseen, because the proposed amendments do not have any significant economic impact. In particular, the proposed amendments just adjust certain provisions of the Delegated Regulation to the amendments introduced in Directive

2014/59/EU. In addition, they would extend for a year the possibility - currently in force - for smaller institutions contributing to national resolution financing arrangements to pay a lump-sum.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 of this Regulation provides the amendments necessary to adjust Delegated Regulation (No) 2015/63 to the definition of “eligible liabilities” and to the calculation of MREL as provided for in Directive 2014/59/EU as amended by Directive (EU) 2019/879, as well as to extend by one year the possibility by smaller institutions which contribute to national resolution funds to contribute with a lump-sum until 31 December 2024 – end of the period to reach the target level of national financing arrangements.

Paragraph 1 of Article 1 incorporates the definition of “eligible liabilities” in Article 2(1), point (71a), of Directive 2014/59/EU.

Paragraph 2 of Article 1 updates the reference to the specific cases in which resolution authorities can waive the calculation of the MREL requirement at individual level under Directive 2014/59/EU.

Paragraph 3 of Article 1 extends by one year the period during which smaller institutions can contribute with a lump-sum to national resolution funds, until the end of the initial period to reach the target level for national resolution funds – 31 December 2024.

Paragraph 4 of Article 1 adds two paragraphs to Article 20 of Delegated Regulation (EU) 2015/63, establishing transitional provisions for 2024 allowing resolution authorities to notify the institutions of their decisions determining the annual contribution by 31 May 2024, and institutions to provide information to resolution authorities by 29 February 2024.

Paragraph 5 of Article 1 adjusts the calculation of the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” in Annex I, STEP I, as necessary to take account of the above-mentioned amendments and the calculation of MREL pursuant to Article 45(1) of Directive 2014/59/EU as amended.

Article 2 provides that the Regulation shall apply the day following that of its publication, except for paragraphs 3 and 4 of its Article 1, which shall apply retroactively as of 1 December 2023.

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

of 13.12.2023

amending Delegated Regulation (EU) 2015/63 as regards the calculation of eligible liabilities and the transitional regime

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 Council, and in particular Article 103(7) thereof,

Whereas:

- (1) Directive (EU) 2019/879 of the European Parliament and of the Council⁹ amended the definition of ‘eligible liabilities’, as then laid down in Article 2(1), point (71), of Directive 2014/59/EU. Pursuant to that new definition, ‘eligible liabilities’ are only those liabilities that are eligible for the minimum requirement for own funds and eligible liabilities (MREL). That amendment should be reflected in Commission Delegated Regulation (EU) 2015/63¹⁰, which deals with ex ante contributions to resolution financing arrangements. More in particular, the references in that Delegated Act to the previous definition of ‘eligible liabilities’, which was laid down in Article 2(1), point (71) of Directive 2014/59/EU, should be adjusted to Article 2(1), point (71a), of that Directive, in which the new definition is laid down. Furthermore, the formula for the calculation of the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” in Annex I, STEP I of Delegated Regulation (EU) 2015/63 should also be adjusted to include only liabilities eligible for MREL.
- (2) Directive (EU) 2019/879 also amended Article 45(1) and (2) of Directive 2014/59/EU to provide for a new calculation of MREL, according to which the MREL is now calculated as a percentage of both the total risk exposure amount (TREA) and as a percentage of the total exposure measure (TEM) of the entity concerned. It should therefore be specified on the basis of which parameter the indicator “Own funds and eligible liabilities held by the institution in excess of MREL” referred to in Delegated Regulation (EU) 2015/63 should be calculated. Furthermore, to ensure a sufficiently prudent value of that indicator, it should be laid down that for the calculation of that indicator the higher value of MREL between, on the one hand, MREL calculated according to TREA and, on the other hand, MREL calculated according to TEM, should be used.

⁹ 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).

¹⁰ Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ L 11, 17.1.2015, p. 44).

- (3) Directive (EU) 2019/879 also extended the possibility of resolution authorities to waive individual entities from the MREL at solo level and to instead require MREL at consolidated level, and in particular to the circumstances referred to in Article 45f(3) and (4) and Article 45g of Directive 2014/59/EU. That amendment of Directive 2014/59/EU should be reflected in Article 8(2) of Delegated Regulation (EU) 2015/63.
- (4) Article 20(5) of Delegated Regulation (EU) 2015/63 currently provides for a transitional regime allowing smaller institutions to contribute to national resolution financing arrangements or to the Single Resolution Fund with a lump sum, rather than with a fully-fledged risk adjusted contribution. That transitional regime runs until the end of the initial period provided for reaching the target level of the Single Resolution Fund, which pursuant to Article 69 of Regulation (EU) No 806/2014 ends on 31 December 2023. However, pursuant to Article 102(1) of Directive 2014/59/EU, the initial period for reaching the target level of the national resolution financing arrangements ends a year later, on 31 December 2024. That situation creates an unequal treatment between institutions contributing to national resolution financing arrangements and institutions contributing to the Single Resolution Fund. To enable also institutions contributing to national resolution financing arrangements to contribute with a lump-sum until the end of the initial period of their respective national resolution financing arrangement, the transitional regime should be extended for one year until 31 December 2024 by replacing the reference in Article 20(5) of Delegated Regulation (EU) 2015/63 to Article 69(1) of Regulation (EU) No 806/2014 with a reference to Article 102(1) of Directive 2014/59/EU.
- (5) Delegated Regulation (EU) 2015/63 should therefore be amended accordingly.
- (6) It is necessary to provide resolution authorities with sufficient time to adopt and notify their decisions on contributions to resolution financing arrangements in line with the amended requirements. It is therefore necessary to provide for a transitional arrangement for the year 2024 extending the deadlines for such notifications.
- (7) Since the resolution authorities need to apply the amended requirements to calculate and raise the contributions for 2024 as soon as possible, it is necessary to provide for the entry into force of this Regulation the day following its publication.
- (8) Under Article 14(4) of Delegated Regulation (EU) 2015/63, institutions are to provide resolution authorities with the information that is relevant for the calculation of the contributions by 31 January each year. It is necessary to give institutions one more month to provide that information in 2024.
- (9) It is necessary to avoid legal uncertainty about the method to be applied for the information reporting and the calculation of contributions to national resolution financing arrangements. For that reason, resolution authorities should be able to instruct institutions on the information to be provided for the calculation of their annual contributions, taking into account the extension of the transitional lump-sum regime in 2024, well in advance of the established deadline for the collection of the contributions in 2024. To ensure continuity of information reporting and of the calculation method throughout contribution periods, and to enable resolution authorities to issue the necessary instructions from 1 December 2023, the extension of the transitional regime to be laid down in Article 20(5), (8) and (9) should apply retroactively from that date.

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2015/63

Delegated Regulation (EU) 2015/63 is amended as follows:

- (1) in Article 3, point (17) is replaced by the following:
‘(17) ‘eligible liabilities’ means eligible liabilities as defined in Article 2(1), point (71a), of Directive 2014/59/EU;’;
- (2) in Article 8, paragraph 2 is replaced by the following:
‘2. Where the competent authority has fully waived the application of capital requirements to an institution at individual level pursuant to Article 7(1) of Regulation (EU) No 575/2013 and the resolution authority has also fully waived the application at individual level to the same institution of the MREL in accordance with Article 45f(3) or (4), or with Article 45g of Directive 2014/59/EU, the indicator referred to in Article 6(2), point (a), of this Regulation may be calculated at consolidated level. The score obtained by that indicator at consolidated level shall be attributed to each institution which is part of the group for calculating that institution’s risk indicator.’;
- (3) in Article 20, paragraph 5 is replaced by the following:
‘5. Without prejudice to Article 10 of this Regulation, during the initial period referred to in Article 102(1) of Directive 2014/59/EU, Member States may allow institutions whose total assets are equal to or less than EUR 3 000 000 000 to pay a lump-sum of EUR 50 000 for the first EUR 300 000 000 of total liabilities, less own funds and covered deposits. For the total liabilities less own funds and covered deposits above EUR 300 000 000, those institutions shall contribute in accordance with Articles 4 to 9 of this Regulation.’;
- (4) in Article 20, the following paragraphs 8 and 9 are added:
‘8. By way of derogation from Article 13(1), in the 2024 contribution period the resolution authorities shall notify each institution referred to in Article 2 of their decisions determining the annual contribution due by each institution by 31 May 2024.
9. By way of derogation from Article 14(4), and with regard to the information to be provided to the resolution authority in 2023, the information referred to in that paragraph shall be provided at the latest by 29 February 2024.’;
- (5) Annex I is amended in accordance with the Annex to this Regulation.

Article 2

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*. It shall apply from the day following that of its publication, with the exception of Article 1(3) and (4), which shall apply from 1 December 2023.

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

Done at Brussels, 13.12.2023

For the Commission
The President
Ursula VON DER LEYEN