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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010**

(Text with EEA relevance)

{SWD(2012) 166}

{SWD(2012) 167}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

The financial crisis severely tested the ability of national and Union-level authorities to manage problems in banking institutions. Meanwhile, financial markets in the Union have become integrated to such an extent that domestic shocks in one Member State may be rapidly transmitted to other Member States.

Against this background, the Commission issued a Communication<sup>1</sup> in October 2010 setting out plans for a Union framework for crisis management in the financial sector. The framework would equip authorities with common and effective tools and powers to tackle bank crises pre-emptively, safeguarding financial stability and minimising taxpayer exposure to losses in insolvency.

At international level, G20-Leaders have called for a “review of resolution regimes and bankruptcy laws in light of recent experience to ensure that they permit an orderly wind-down of large complex cross-border institutions.”<sup>2</sup> In Cannes in November 2011, they endorsed the Financial Stability Board (FSB) "Key Attributes of Effective Resolution Regimes for Financial Institutions" ("Key Attributes")<sup>3</sup>. These set out the core elements that the FSB considers to be necessary for an effective resolution regime. Their implementation should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions. In June 2012, the G20 is set to start work on evaluating progress in implementing these provisions in the different jurisdictions.

In June 2010, the European Parliament adopted an own-initiative report on recommendations on cross-border crisis management in the banking sector<sup>4</sup>. It stressed the need for a Union-wide framework to manage banks in financial distress and recommended moving toward greater integration and coherence in the resolution requirements and arrangements applicable to cross-border institutions. In December 2010, the Council (ECOFIN) adopted conclusions<sup>5</sup> calling for a Union framework for crisis prevention, management and resolution. The conclusions stress that the framework should apply in relation to banks of all sizes, improve cross-border cooperation and consist of three pillars (preparatory and preventative measures, early intervention, and resolution tools and powers). These should "aim at preserving financial stability by protecting public and market confidence; putting prevention and preparation first; providing credible resolution tools; enabling fast and decisive action; reducing moral hazard and minimising to the fullest possible extent the overall costs to public funds, by ensuring fair burden sharing among the financial institutions' stakeholders; contributing to a smooth resolution of cross border groups; ensuring legal certainty; and, limiting distortions of competition."

In addition, a high-level group is due to report to the Commission in the second half of 2012 on whether, on top of on-going regulatory reforms, structural reforms of Union banks would

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<sup>1</sup> COM (2010) 579 final

<sup>2</sup> G20 Leaders' declaration of the Summit on financial markets and the world economy, April 2009.

<sup>3</sup> [http://www.financialstabilityboard.org/publications/r\\_111104cc.pdf](http://www.financialstabilityboard.org/publications/r_111104cc.pdf)

<sup>4</sup> (2010/2006(INI))

<sup>5</sup> 17006/1/10

strengthen financial stability and improve efficiency and consumer protection<sup>6</sup>. The group's proposals will be assessed separately upon completion of the work.

Finally, on 30 May 2012 the Commission indicated that it will initiate a process to "map out the main steps towards full economic and monetary union (including), among other things, moving towards a banking union including an integrated financial supervision and a single deposit guarantee scheme"<sup>7</sup>.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

In the period between 2008 and 2012 the Commission services organised a number of consultations and discussions with experts and key stakeholders concerning bank recovery and resolution. As the last public consultation before the adoption of the proposal, a Commission Staff Working Paper describing in detail the potential policy options under consideration by the Commission services was published for consultation in January 2011. The consultation ended on the 3<sup>rd</sup> of March 2011. On one of the resolution tools, the so called bail-in or debt write down tool, targeted discussions were organised with experts from Member States, banking industry, academic world and legal firms in April 2012. The discussions concerned the key parameters of the debt write-down tool, including in particular the resolution triggers, the scope of bail-in, its potential minimum level, resolution of groups as well as grandfathering. Documents related to public consultations can be found on the website of the European Commission.<sup>8</sup>

On this basis, the Commission has prepared the attached legislative proposal. The Commission services have also prepared an Impact Assessment (IA) for the proposal, which can be found on the website of the European Commission.<sup>9</sup>

The comments by the Impact Assessment Board (IAB) expressed in their first and second opinion in May and June 2011 have been taken into account. In addition, the text of the IA has been updated reflecting latest developments in international fora as well as incorporation of results of the discussions on the bail-in tool that took place in April 2012. Concretely, the revised IA improves the presentation of the legal and institutional context by describing the responsibilities of national supervisors and resolution authorities and the relationships between the proposal for bail-in and the planned CRD IV requirements. The text of the IA better explains the content of options, in particular the one related to the bail-in/debt-write down tool. Also the impacts of the bail-in tool on the costs of funding for banks and non-financial firms (SMEs) have been added. A section related to the coherence of the proposal with other regulatory proposals has been completed. Finally, monitoring and evaluation arrangements were further clarified by singling out the most relevant indicators to be monitored.

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<sup>6</sup> [http://ec.europa.eu/internal\\_market/bank/group\\_of\\_experts/index\\_en.htm#High-level\\_Expert\\_Group](http://ec.europa.eu/internal_market/bank/group_of_experts/index_en.htm#High-level_Expert_Group)

<sup>7</sup> [http://ec.europa.eu/europe2020/pdf/nd/eccomm2012\\_en.pdf](http://ec.europa.eu/europe2020/pdf/nd/eccomm2012_en.pdf)

<sup>8</sup> [http://ec.europa.eu/internal\\_market/bank/index\\_en.htm](http://ec.europa.eu/internal_market/bank/index_en.htm)

<sup>9</sup> [http://ec.europa.eu/internal\\_market/bank/index\\_en.htm](http://ec.europa.eu/internal_market/bank/index_en.htm)

The IA concludes the following:

- The proposed Union bank resolution framework will achieve the objectives of enhancing financial stability, reducing moral hazard, protecting depositors and critical banking services, saving public money and protecting the internal market for financial institutions.
- The framework is expected to have a positive social impact: first, by reducing the probability of a systemic banking crisis and avoiding losses in economic welfare that follow a banking crisis; and, second, by minimising taxpayer exposure to losses from insolvency support to institutions.
- The costs of the framework derive from a possible increase in funding costs for institutions due to the removal of the implicit certainty of state support, and from the costs related to resolution funds. Institutions might transmit those increased cost to customers or shareholders by pushing rates on deposits lower, increasing lending rates and banking fees or reducing returns on equity. However, competition might reduce ability of institutions to pass on the costs in full. The potential benefits of the framework in terms of economic welfare over the long term in terms of a reduced likelihood of a systemic crisis are substantially higher than the potential cost.

### **3. GENERAL EXPLANATION: A RECOVERY AND RESOLUTION FRAMEWORK**

#### **The need for an effective recovery and resolution framework**

Banks and investment firms (hereinafter institutions) provide vital services to citizens, businesses, and the economy at large (such as deposit-taking, lending, and the operation of payment systems). They operate largely based on trust, and can quickly become unviable if their customers and counterparties lose confidence in their ability to meet their obligations. In case of failures, banks should be wound down in accordance to the normal insolvency procedures. However, the extent of interdependencies between institutions creates the risk of a systemic crisis when problems in one bank can cascade across the system as a whole. Because of this systemic risk and the important economic function played by institutions, the normal insolvency procedure may not be appropriate in some cases and the absence of effective tools to manage institutions in crisis has too often required the use of public funds to restore trust in even relatively small institutions so as to prevent a domino effect of failing institutions from seriously damaging the real economy.

Accordingly, an effective policy framework is needed to manage bank failures in an orderly way and to avoid contagion to other institutions. The aim of such a policy framework would be to equip the relevant authorities with common and effective tools and powers to address banking crises pre-emptively, safeguarding financial stability and minimising taxpayers' exposure to losses.

#### **Preparation and prevention, early intervention and resolution**

To this end, the range of powers available to the relevant authorities should consist of three elements: (i) preparatory steps and plans to minimise the risks of potential problems

(preparation and prevention<sup>10</sup>); (ii) in the event of incipient problems, powers to arrest a bank's deteriorating situation at an early stage so as to avoid insolvency (early intervention); and (iii) if insolvency of an institution presents a concern as regards the general public interest (defined in Articles 27 and 28), a clear means to reorganise or wind down the bank in an orderly fashion while preserving its critical functions and limiting to the maximum extent any exposure of taxpayers to losses in insolvency (resolution). Together, these powers constitute an effective framework for the recovery and, where appropriate, the resolution of institutions. Since the risk posed by any individual bank to financial stability cannot be fully ascertained in advance, these powers should be available to the relevant authorities in relation to any bank, regardless of its size or the scope of its activities.

### **Resolution - a special insolvency regime for institutions**

In most countries, bank and non-bank companies in financial difficulties are subject to normal insolvency proceedings. These proceedings allow either for the reorganization of the company (which implies a reduction, agreed with the creditors, of its debt burden) or its liquidation and allocation of the losses to the creditors, or both. In all the cases creditors and shareholders do not get paid in full. However, the experience from different banking crises indicates that insolvency laws are not always apt to deal efficiently with the failure of financial institutions insofar as they do not appropriately consider the need to avoid disruptions to financial stability, maintain essential services or protect depositors. In addition, insolvency proceedings are lengthy and in the case of reorganization, they require complex negotiations and agreements with creditors, with some potential detriment for the debtors and the creditors in terms of delay, costs and outcome.

Resolution constitutes an alternative to normal insolvency procedures and provides a means to restructure or wind down a bank that is failing and whose failure would create concerns as regards the general public interest (threaten financial stability, the continuity of a bank's critical functions and/or the safety of deposits, client assets and public funds)<sup>11</sup>. Accordingly, resolution should achieve, for institutions, similar results to those of normal insolvency proceedings taking into account the Union State aid rules, in terms of allocation of losses to shareholders and creditors, while safeguarding financial stability and limiting taxpayer exposure to loss from solvency support. In the process, it should also ensure legal certainty, transparency and predictability regarding the treatment of shareholders and bank creditors and preserve value which might otherwise be destroyed in bankruptcy. In addition, by removing the implicit certainty of a publicly-funded bail out for institutions, the option of resolution should encourage uninsured creditors to better assess the risk associated with their investments. Moreover, a design of the national financing arrangements for resolution in line with State aid rules will ensure that the overall objectives of the resolution framework can be met.

### **A balance between predictability for investors and discretion for authorities**

In order to safeguard existing property rights, a bank should enter into resolution at a point very close to insolvency, i.e. when it is on the verge of failure. However, the judgement on the point of entry into resolution may depend on several variables and factors linked to prevailing market conditions or idiosyncratic liquidity or solvency issues, implying the need for a degree of discretion for the resolution authority. Likewise, the concrete actions to be taken in

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<sup>10</sup> "Prevention" in this context means the avoidance of disorderly failure capable of causing financial instability, not the preclusion of failure altogether.

<sup>11</sup> If authorities assess that financial stability and taxpayers are not threatened, a bank (or parts of it) may be allowed to fail in the ordinary way.

resolution should not be pre-determined in relation to any bank but should rather be taken on the basis of the concrete circumstances.

A Union framework with similar tools, principles and procedures is needed to provide sufficient convergence in how national authorities implement resolution. In designing this framework, a balance must be found between the necessary discretion for supervisors to reflect the specificities of each particular case and to ensure a level playing-field and to preserve the integrity of the single market. The European Banking Authority (EBA) should be vested with a clear role to issue guidelines and technical standards to ensure consistent application of the resolution powers, to participate in resolution planning in relation all cross-border institutions, and to carry out binding mediation between national authorities in the event of disagreement on the application of the framework.

Finally, successful resolution requires sufficient funds, for example to issue guarantees or provide short-term loans to help the critical parts of a resolved entity regain viability. These funds should, as a matter of principle, be provided for by the banking sector in a fair and proportionate manner and as far as possible (taking account of the economic cost) contributed in advance. Taken together, these steps ensure that regardless of the appropriate resolution action undertaken, its costs are primarily borne by the institutions themselves and their owners and investors.

### **The internal market - Treatment of cross border groups**

Cross border groups are composed of institutions established in different Member States. The resolution framework recognises the existence of cross border groups in Europe as one of the key drivers for the integration of the Union financial markets. The framework establishes special rules for cross border groups covering preparation and prevention (Articles 7, 8, 11, 12 and 15), early intervention (Article 25) and the resolution phase (Articles 80 to 83). It also establishes rules concerning the transfer of assets between entities affiliated to a group in times of financial distress (Articles 16 to 22).

The rules on groups aim at balancing the interest of achieving, where necessary, an efficient resolution for the group as a whole with the protection of financial stability in both the Member States where the group operates and the Union. Efficient methods for the resolution of cross border groups are the only way to achieve financial stability in the Union and consequently improve the functioning of the Single market also in times of crisis. In particular, and without disregarding the necessary safeguards for the host member States, an efficient speedy resolution of a group that minimises the loss of value for the group should be ensured by giving a prominent role to the group level resolution authority.

Notwithstanding the prominent role given to the group resolution authority, the interests of the host resolution authorities will be sufficiently considered through: a) the establishment of arrangements for cooperation between resolution authorities through the creation of the colleges of resolution authorities; b) the recognition that the financial stability in all Member States where the group operates has to be considered when taking decisions relative to groups; c) the design of clear decision making process that allow for all authorities to convey their views whilst ensuring that a single decision is taken with regards to the resolution of a group; and d) the establishment of mechanisms for the resolution of conflicts between resolution authorities (EBA mediation).

The EBA<sup>12</sup> will perform a binding mediation role as foreseen in Regulation N° 1093/2010 EBA regulation, in particular Article 19. In this context, all the relevant rules of that regulation apply, including articles 38 and 44 (1).

All those mechanisms should ensure that the resolution of a group, or the provision of financial support between affiliated institutions, is not detrimental to any parts of the groups and the financial stability of the Member State where a subsidiary is located is not disregarded.

## **4. LEGAL ELEMENTS OF THE PROPOSAL**

### **4.1. Legal basis**

The legal base for this proposal is Article 114 of the TFEU, which allows the adoption of measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.

The proposal harmonises national laws on recovery and resolution of credit institutions and investment firms to the extent necessary to ensure that Member States have the same tools and procedures to address systemic failures. In this way, the harmonised framework should foster financial stability within the Internal Market by ensuring a minimum capacity for resolution of institutions in all Member States and by facilitating cooperation between national authorities when dealing with the failure of cross-border groups.

Article 114 of the TFEU is, therefore, the appropriate legal base.

### **4.2. Subsidiarity**

Under the principle of subsidiarity set out in Article 5.3 of the TEU, in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Only action at Union level can ensure that Member States use sufficiently compatible measures to deal with failing institutions. Although the Union banking sector is highly integrated, systems to deal with bank crises are nationally-based and differ significantly. Many national legal systems do not currently confer the powers necessary for authorities to wind down financial institutions in an orderly manner while preserving those services essential for financial stability while minimising taxpayers' exposure to losses from solvency support. Such divergent national legislation is ill-suited to dealing adequately with the cross-border dimension of crises, complicating any arrangements for home-host cooperation..

Moreover, substantial differences in national procedures for resolution could result in unacceptable risks to financial stability and jeopardise the effective resolution of cross border groups. As establishing adequate resolution arrangements at the Union-level require a significant harmonisation of national practices and procedures, it is appropriate that the Union

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<sup>12</sup> In order to ensure that resolution authorities are represented in EBA and to mitigate conflicts of interest, Regulation 1093/2010 is amended in order to include national resolution authorities in the concept of competent authorities established by the Regulation.

should propose the necessary legislative action. However, resolution is closely linked to non-harmonised areas of national law, such as insolvency and property law. Therefore, a directive is the appropriate legal instrument since transposition is necessary to ensure that the framework is implemented in a way that achieves the intended effect, within the specificities of relevant national law.

### **4.3. Proportionality**

Under the principle of proportionality, the content and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties.

In principle, a failed bank should be subject to normal insolvency procedures like any other business. However, the banking sector is different to most other business sectors insofar as it performs critical functions in the economy and is particularly vulnerable to systemic crises. Because of these features, the liquidation of a bank can have more serious consequences than the exit of other businesses from the market. This may justify recourse to special rules and procedures in the event of a banking crisis.

As the systemic importance of a bank failure cannot be determined with full certainty in advance, the proposed crisis management framework should apply in principle to all banking institutions, irrespective of their size and complexity. If it is certain that the failure of an institution of global size, market importance, and global interconnectedness would cause significant disruption in the global financial system and adverse economic consequences across a range of countries, it is also clear that the simultaneous failure, in a widespread crisis, of many small institutions making up a significant part of the banking sector in a country may have equally devastating effects on the economy. The framework therefore ensures that supervisors and resolution authorities have special rules and procedures at their disposal for dealing efficiently with the failure or near-failure of any bank in circumstances of systemic risk. However, the risk, size and interconnectedness of a bank will be taken into account by national authorities in the context of recovery and resolution plans and when using the different tools at their disposal, making sure that the regime is applied in an appropriate way.

The provisions are therefore proportionate to what is necessary to achieve the objectives. Furthermore, limitations to the right to property that the exercise of the powers proposed may entail must be consistent with the Charter of Fundamental Rights as interpreted by the European Court of Justice. It is for this reason that the point of entry into resolution should be as close as possible to insolvency, and the use of the resolution powers should be limited to the extent necessary in order to meet an objective of general interest, namely preserving financial stability in the Union.

### **4.4. Detailed explanation of the proposal**

#### *4.4.1. Subject matter and scope of application (Article 1)*

The proposal addresses crisis management (preparation, recovery and resolution) in relation to all credit institutions and certain investment firms. The scope of the proposal is identical with that of the Capital Requirements Directive<sup>13</sup> (CRD), which harmonises prudential requirements for institutions including financial institutions included in a banking group, and

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<sup>13</sup> Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions.

investment firms. Investment firms need to be part of the framework since, as shown by the failure of Lehman Brothers, their failure can have serious systemic consequences. . In addition, the powers of resolution authorities should also apply to holding companies where one or more subsidiary credit institution or investment firm meet the conditions for resolution and the application of the resolution tools and powers in relation to the parent entity is necessary for the resolution of one or more of its subsidiaries or for the resolution of the group as a whole.

#### *4.4.2. Resolution authorities (Article 3)*

The proposal requires Member States to confer resolution powers on public administrative authorities to ensure that the objectives of the framework can be delivered in a timely manner. The proposal does not specify the particular authority that should be appointed as resolution authority, since this is not necessary to ensure effective resolution and would interfere with the constitutional and administrative orders of Member States. It is therefore open to Member States to designate as their resolution authorities, for example, national central banks, financial supervisors, deposit guarantee schemes, ministries of finance, or special authorities.

Resolution authorities will need to have adequate expertise and resources to manage bank resolutions at national and cross border level. Given the likelihood of conflicts of interest, functional separation of resolution activities from the other activities of any designated authority is mandated.

#### *4.4.3. Recovery and resolution plans (Articles 5 to 13)*

Early action based on recovery plans can prevent the escalation of problems and reduce the risk of a bank failure. Institutions will be required to draw up recovery plans setting out arrangements and measures to enable it to take early action to restore its long term viability in the event of a material deterioration of its financial situation. Groups will be required to develop plans at both group level and for the individual institutions within the group. Supervisors will assess and approve recovery plans.

Resolution plans will allow an institution to be resolved minimising taxpayer exposure to loss from solvency support while protecting vital economic functions. A resolution plan, prepared by the resolution authorities in cooperation with supervisors in normal times, will set out options for resolving the institution in a range of scenarios, including systemic crisis. Such plans should include details on the application of resolution tools and ways to ensure the continuity of critical functions. Group resolution plans will include a plan for the group as well as plans for each institution within the group.

#### *4.4.4. Powers to address or remove impediments to resolvability (Articles 14 to 16)*

Based on the resolution plan, the resolution authorities shall assess whether an institution or group is resolvable. If resolution authorities identify significant impediments to the resolvability of an institution or group, they may require the institution or groups to take measures in order to facilitate its resolvability.

Such measures might include inter alia: reducing complexity through changes to legal or operational structures in order to ensure that critical functions can be legally and economically separated from other functions; drawing up service agreements to cover the provision of critical functions; limiting maximum individual and aggregate exposures; imposing reporting requirements; limiting or ceasing existing or proposed activities; restricting or preventing the

development of new business lines or products; and issuing additional convertible capital instruments.

Assessment of resolvability for groups rests upon coordination, consultation and joint assessment of group resolution authorities with the resolution authorities of the subsidiaries, other relevant competent authorities and the EBA.

To ensure that the assessment of resolvability and the use of preventative powers by relevant authorities are uniformly applied across the Member States, the EBA will play an important role. Concretely, it will need to draft technical standards defining parameters needed for the assessment of resolution plans' systemic impact and it will need to draft technical standards specifying issues to be examined in order to assess the resolvability of an institution or group.

#### *4.4.5. Intra-group financial support (Articles 17-23)*

The proposal aims to overcome current legal restrictions to the provision of financial support from one entity within a group to another. Institutions that operate in a group structure will be able to enter into agreements to provide financial support (in the form of a loan, the provision of guarantees, or the provision of assets for use as collateral in transaction) to other entities within the group that experience financial difficulties. Such early financial help can address developing financial problems within individual group members. The agreement may be submitted for approval in advance by the shareholders' meetings of all participating entities in accordance with national law and will authorise the management bodies to provide financial support if needed within the terms of the agreement. On this basis, legal certainty will increase as it will be clear when and how such financial support can be provided. The agreements are voluntary, allowing banking groups to assess whether such arrangements would be in the group interest (a group might be more or less integrated and pursue more or less strongly a common strategy) and to identify the companies that should be party to the agreement (it may be appropriate to exclude companies that pursue riskier activities).

As a safeguard, the supervisor of the transferor will have the power to prohibit or restrict financial support pursuant to the agreement when that transfer threatens the liquidity or solvency of the transferor or financial stability.

#### *4.4.6. Early intervention – Special management (Articles 23-26)*

The proposal expands the powers of supervisors to intervene at an early stage in cases where the financial situation or solvency of an institution is deteriorating. The powers contemplated in the proposal supplement those conferred on supervisors under Article 136 of the CRD. These powers do not derogate any rights or procedural obligations established in accordance with Company Law.

Powers of early intervention include the power to request the institution to implement arrangements and measures set out in the recovery plan; draw up an action program and a timetable for its implementation; request the management to convene, or convene directly, a shareholders' meeting, propose the agenda and the adoption of certain decisions; and request the institution to draw up a plan for restructuring of debt with its creditors.

In addition, the supervisor would have the power to appoint a special manager for a limited period, when the solvency of an institution is deemed to be sufficiently at risk. The primary duty of a special manager is to restore the financial situation of the institution and the sound and prudent management of its business. A special manager will replace the management of

the institution and have all its powers without prejudice to ordinary shareholder rights. The power to appoint a special manager will serve as an element of discipline for the management and shareholders and as a means to foster private sector solutions to problems which, if not addressed, could lead to the failure of an institution.

#### *4.4.7. Resolution conditions (Article 27)*

The proposal establishes common parameter for triggering the application of resolution tools. The authorities shall be able to take an action when an institution is insolvent or very close to insolvency to the extent that if no action is taken the institution will be insolvent in the near future.

At the same time, it is necessary to ensure that intrusive measures are triggered only when interference with the rights of stakeholders is justified. Therefore resolution measures should be implemented only if the institution is failing or likely to fail, and there is no other solution that would restore the institution within an appropriate timeframe. In addition, the intervention by means of resolution measures must be justified by reasons of public interest as defined under Article 28.

#### *4.4.8. General principles – In particular the no creditor worse off (article 29)*

The framework sets up a number of general principles that will have to be respected by the resolution authorities. These principles refer, inter alia, to the allocation of losses and the treatment of shareholders and creditors and to the consequences that the use of the tools could have on the management of the institution.

The framework establishes that the losses, once identified through a valuation process (article 30) are to be allocated between the shareholders and the creditors of the Institution in accordance with the hierarchy of claims established by each national insolvency regime. However, and as it has been pointed out above (see heading 3) normal insolvency regimes do not sufficiently take into account financial stability or other public interest concerns. Therefore, the resolution framework establishes certain principles for the allocation of losses that would have to be respected irrespective of what each national insolvency regime establishes. These principles are: a) that the losses should first be allocated in full to the shareholders and then to the creditors and b) that creditors of the same class might be treated differently if it is justified by reasons of public interest and in particular in order to underpin financial stability. These principles apply to all the resolution tools. In addition, and with regards to the bail-in tool, the framework establishes a more detailed hierarchy of claims (article 43). This more detailed hierarchy will complement and where necessary supersede the one established in each national insolvency law.

In those cases where the creditors receive less in economic terms, than if the institution had been liquidated under normal insolvency proceedings, the authorities have to ensure that they receive the difference. This compensation, if any, shall be paid by the resolution fund. The principle that losses have to be allocated to first to shareholders and then to creditors together with the fact that resolution action has to be taken prior to availing any extraordinary public financial support is, in principle instrumental to ensuring the effectiveness of the objective of minimising taxpayers' exposure to losses (article 29).

#### 4.4.9. Valuation (Article 30)

The implementation of the resolution tools and powers is based on an assessment of the real value of the assets and liabilities of the institution that is about to fail. To this end, the framework incorporates a valuation based on the principle of 'market value'. This will ensure that the losses are recognised at the moment when the institution enters into resolution.

The valuation should be done by an independent expert, unless there are reasons of urgency, in which case the resolution authorities would proceed with a provisional valuation that will, afterwards, be complemented by a definitive valuation with the involvement of an independent expert. The resolution authorities have been granted the necessary powers to modify their resolution actions<sup>14</sup> in accordance with possible discrepancies, if any, between the provisional and the definitive valuation.

#### 4.4.10. Resolution tools and powers (Articles 31-64)

When the trigger conditions for resolution are satisfied, resolution authorities will have the power to apply the following resolution tools:

- (a) sale of business;
- (b) bridge institution;
- (c) asset separation;
- (d) bail-in.

In order to apply those tools, resolution authorities will have powers to take control of an institution that has failed or is about to fail, take over the role of shareholders and managers, transfer assets and liabilities and enforce contracts.

The resolution tools can be applied singly or in conjunction. All entail a degree of restructuring of the bank. Such restructuring is not a feature accompanying the bail-in only. The asset separation tool has to be applied in all circumstances in conjunction with the other tools (Article 32). When applicable, the use of any of the resolution tools will need to be consistent with the Union State aid framework. In this respect, any recourse to public support and/or the use of the resolution funds to assist in the resolution of failing institutions will have to be notified to the Commission and will be assessed in accordance with the relevant State aid provisions in order to establish its compatibility with the internal market.

The proposal set out a minimum set of resolution tools that all Member States should adopt. However, national authorities will be able to retain, in addition, specific national tools and powers to deal with failing institutions if they are compatible with the principles and objectives of the Union resolution framework and the Treaty on the functioning of the European Union and if they do not pose obstacles to effective group resolution<sup>15</sup>. National resolution authorities would only be able to use those national tools and powers if they justify

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<sup>14</sup> For example the resolution authorities can transfer back or forth assets or liabilities transferred to a bridge institution.

<sup>15</sup> In this respect a tool consisting in the ring fencing of an institution would not be compatible with the framework.

that none of the tools (singly or in conjunction) included in the Union framework allows them to take effective resolution action.

The sale of business tool enables resolution authorities to effect a sale of the institution or the whole or part of its business on commercial terms, without requiring the consent of the shareholders or complying with procedural requirements that would otherwise apply. As far as possible in the circumstances, the resolution authorities should market the institution or the parts of its business that are to be sold.

The bridge institution tool enables resolution authorities to transfer all or part of the business of an institution to a publicly controlled entity. The bridge institution must be licensed in accordance with the Capital Requirements Directive and will be operated as a commercial concern within any limits prescribed by the State aids framework. The operations of a bridge institution are temporary, the aim being to sell the business to the private sector when market conditions are appropriate.

The purpose of the asset separation tool is to enable resolution authorities to transfer impaired or problem assets to an asset management vehicle to allow them to be managed and worked out over time. Assets should be transferred at market or long term economic value (in accordance with Article 30) so that any losses are recognised at the moment when the transfer takes place. In order to minimise competitive distortions and risks of moral hazard, this tool should only be used in conjunction with another resolution tool.

#### **The bail-in tool (articles 37 to 51)**

The bail-in tool will give resolution authorities the power to write down the claims of unsecured creditors of a failing institution and to convert debt claims to equity. The tool can be used to recapitalise an institution that is failing or about to fail, allowing authorities to restructure it through the resolution process and restore its viability after reorganisation and restructuring. This would allow authorities greater flexibility in their response to the failure of large, complex financial institutions. It would be accompanied by removal of management responsible for the problems of the institution, and the implementation of a business restoration plan.

The resolution authorities should have the power to bail-in all the liabilities of the institution. There are, however some liabilities that would be excluded ex-ante (such as secured liabilities, covered deposits and liabilities with a residual maturity of less than one month). Exceptionally and where there is a justified necessity to ensure the critical operations of the institution and its core business lines or financial stability (Article 38) the resolution authority could exclude derivatives' liabilities. Harmonised application of the possible exclusion at Union level would be ensured by Commission delegated acts.

In order to apply the bail in tool it is necessary that the resolution authorities can ensure that institutions would have a sufficient amount of liabilities in their balance sheet that could be subject to the bail in powers. The minimum amount will be proportionate and adapted for each category of institutions on the basis of their risk or the composition of its sources of funding (Article 39). Harmonised application of the minimum requirement at Union level would be ensured by Commission delegated acts. As an example, and on the basis of evidence from the recent financial crisis and of performed model simulations, an appropriate percentage of total liabilities which could be subject to bail in could be equal to 10% of total liabilities (excluding regulatory capital).

As explained in 4.4.8, Articles 43 and 44 establish a detailed hierarchy that complements and where necessary supersedes the one established in each national insolvency law. In principle, Shareholders claims should be exhausted before those of subordinated creditors. It is only when those claims are exhausted that the resolution authorities can impose losses on senior claims (Articles 43 and 44). However, there might be circumstances when the resolution authorities could interfere on creditors' rights without having exhausted shareholders' claims. These circumstances are specific to the bail in tool and could occur when an institution under resolution might have some residual capital (according to the conditions for resolution an institution would be failing or likely to fail if it has depleted all or substantially all of its capital). In this case, the resolution authorities could, after having allocated the losses to the shareholders and reduced or cancelled most of the shareholders' claims, convert into capital subordinated and, if necessary, senior liabilities. This conversion will have to take place in a manner that seriously dilutes the remaining shareholders' claims.

#### *4.4.11. Restrictions on termination and safeguards for counterparties (Articles 68-73 and 77)*

For the effective application of resolution tools, it is necessary to allow resolution authorities to impose a temporary stay on the exercise by creditors and counterparties of rights to enforce claims and close out, accelerate or otherwise terminate contracts against a failing institution. Such a temporary suspension, which would last no longer than until 5pm on the next business day, gives authorities a period of time to identify and value those contracts that need to be transferred to a solvent third party, without the risk that financial contracts would be changing in value and scope as counterparties exercised termination rights. Termination rights for those counterparties remaining with the failed institution would resume at the end of the stay. However, transfer to a performing third party should not qualify as an event of default that triggers termination rights.

These necessary restrictions on contractual rights are balanced by safeguards for counterparties to prevent authorities from splitting linked liabilities, rights and contracts: under a partial property transfer, linked arrangements must either all be transferred, or not at all. Arrangements include close out netting agreements, set-off arrangements, title transfer financial collateral arrangements, security arrangements and structured finance arrangements.

#### *4.4.12. Restriction on judicial proceedings (Articles 78 and 77)*

In accordance with Article 47 of the Charter of Fundamental Rights, the concerned parties have a right to due process and to having an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to judicial review. However, in order to protect third parties who have bought assets, rights and liabilities of the institution under resolution by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, the judicial review should not affect any administrative act and/or transaction concluded on the basis of the annulled decision. Remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.

Furthermore, it is necessary to prevent the opening or pursuit of other legal actions in relation to a bank that is under resolution. To this effect, the framework provides that, before the national judge opens the insolvency proceedings in relation to an institution, it notifies the resolution authority of any application; the resolution authority has then the right, within a

period of 14 days from the notification, to decide to take a resolution action with regard to the institution concerned.

#### *4.4.13. Cross border resolution (Articles 80-83)*

The recovery and resolution framework takes into account the cross border nature of some banking groups, with an objective to create a comprehensive and integrated framework for bank recovery and resolution in the Union.

Accordingly, recovery and resolution plans need to be prepared agreed and implemented for the group as a whole while taking into account the particularities of each group's structure and the division between the responsibilities of host and home national authorities. This will be done through measures that will require enhanced cooperation between national authorities and creation of incentives for applying a group approach in all phases of preparation, recovery and resolution.

Resolution colleges will be established with clearly designated leadership and with the participation of the European Banking Authority (EBA). The EBA will facilitate cooperation of authorities and mediate if necessary. The objective of the colleges is to coordinate preparatory and resolution measures among national authorities to ensure optimal solutions at Union level.

#### *4.4.14. Relations with third countries (Articles 84-89)*

Because many Union institutions and banking groups are active in third countries, an effective framework for resolution needs to provide for cooperation with third country authorities. The proposal provides Union authorities with the necessary powers to support foreign resolution actions of a failed foreign bank by giving effect to transfers of its assets and liabilities that are located in or governed by the law of their jurisdiction. However, such support would only be provided if the foreign action ensured fair and equal treatment for local depositors and creditors and did not jeopardise financial stability in the Member State. Union resolution authorities should also have the power to apply resolution tools to national branches of third country institutions where separate resolution is necessary for reasons of financial stability or the protection of local depositors. The proposal provides that support for foreign resolution actions will be given where resolution authorities have a cooperation agreement with the foreign resolution authority. Such agreements should be a means to ensure effective planning, decision-making and coordination in respect of international groups.

EBA should develop and enter into framework administrative arrangements with authorities of third countries in accordance with Article 33 of Regulation No 1093/2010 and national authorities should conclude bilateral arrangements that are as far as possible in line with the EBA framework arrangements.

#### *4.4.15. Resolution funding (Articles 90-99)*

Resolution allows a better burden sharing of the resolution costs by the shareholders and creditors in the process of resolution when insolvency procedures are deemed inappropriate in light of possible risks to financial stability. However, this might not always be sufficient and might have to be supplemented by additional funding in order, for example, to provide liquidity to a bridge bank. Based on past experience, it is necessary to establish funding arrangements financed by institutions themselves in order to minimize taxpayer's exposure to

losses from solvency support. Articles 90 to 99 lay down the necessary provisions to that purpose.

Article 89 provides for the setting up of financing arrangements in each Member State. The purposes for which they may be used are listed under article 89, paragraph 2 and range from guarantees to loans or contributions. Losses are primarily borne by shareholders and creditors, but other financing arrangements cannot be excluded in principle.

Article 90 lays down the rules on the contributions to the financing arrangements, and involves a mix of ex ante contributions, supplemented by ex post contributions and, where indispensable, borrowing facilities from financial institutions or the central bank. In order to ensure that some funds are available at all times, and given the pro-cyclicality associated with ex post funding, a minimum target fund level is set, to be reached through ex ante contributions in a time span of 10 years. Based on model-calculation, an optimal minimum target fund level is set at 1% of covered deposits.

In order to enhance the resilience of national financing arrangements, Article 97 provides for a right for national arrangements to borrow from their counterparts in other Member States. In order to reflect the distribution of competences among the various national authorities in the resolution of groups, Article 98 lays down rules on the respective contributions of national financing arrangements to the resolution of groups. This contribution will be based on the one previously agreed in the context of the group resolution plans. National financing arrangements, together with borrowing mechanisms and the mutualisation of national arrangements in the case of the resolution of cross border groups (Article 98) make up a European system of financing arrangements.

Article 99 deals with the role of Deposit Guarantee Schemes (DGS) in the resolution framework. DGS may be called to contribute to resolution in two manners.

First, deposit guarantee schemes must contribute for the purpose of ensuring continuous access to covered deposits. Deposit Guarantee Schemes are currently established in all Member States in accordance with Directive 94/19/EC. They compensate retail depositors up to EUR100,000 in respect of unavailable deposits, before being subrogated to them in liquidation proceedings. By contrast, resolution avoids the unavailability of covered deposits, which is preferable from the depositor's point of view. It is therefore desirable that the DGS contributes for an amount equivalent to the losses that it would have had to bear in normal insolvency proceedings, as reflected in paragraph 1 of Article 99. In order to provide for sufficient funding, the ranking of deposit guarantee schemes in the hierarchy of claims is introduced, with DGS ranking *pari passu* with unsecured non-preferred claims. The DGS contribution must be made in cash in order to absorb the losses pertaining to covered deposits.

Secondly, while Member States must at least use DGS for the purpose of providing cash to ensure continuous access to covered deposits, they retain discretion as to how to fund resolution: they may decide to create financing arrangements separate from the DGS, or use their DGS also as financing arrangements under Article 91. Indeed, there are synergies between deposit guarantee schemes and resolution. When a resolution framework that limits contagion is in place, it reduces the number of bank failures, and therefore the likelihood of DGS pay-outs. The proposal therefore allows Member States to use DGS for resolution funding in order to reap economies of scale. Where the two arrangements are separate, the DGS is liable for the protection of covered depositors to the extent and in the conditions laid down in Article 99, paragraphs 1 to 4, while supplementary funding is provided by separate

financing arrangements established under Article 91. By contrast, where they opt for a single financing arrangement, it will cover both the losses affecting covered deposits, and other purposes under Article 92. In that case, the DGS has to comply with all the conditions on contributions, borrowing and mutualisation laid down under Articles 93 to 98.

In any case, if following a contribution by the DGS, the institution under resolution fails at a later stage and the DGS does not have sufficient funds to repay depositors, the DGS must have arrangements in place in order to raise the corresponding amounts immediately from its members.

State aid is likely to be present in the intervention of the resolution funds irrespective of the type of national financial arrangements (i.e. a resolution fund separate from the Deposit Guarantee Scheme or using the Deposit Guarantee Scheme as a resolution fund).

#### *4.4.16. Compliance with Articles 290 and 291 TFEU*

On 23 September 2009, the Commission adopted proposals for Regulations establishing EBA, EIOPA, and ESMA<sup>16</sup>. In this respect the Commission wishes to recall the Statements in relation to Articles 290 and 291 TFEU it made at the adoption of the Regulations establishing the European Supervisory Authorities according to which: "As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with Articles 290 and 291 TFEU."

#### *4.4.17. Changes to the Winding Up Directive, Company Law Directives and EBA Regulation (Articles 104 - 111)*

Directive 2001/24/EC provides for the mutual recognition and enforcement of reorganization or winding up measures in relation to credit institutions that have branches in other Member States. The Directive seeks to ensure that a credit institution and its branches in other Member States are reorganised or wound up according to the principles of unity and universality ensuring that there is only one set of insolvency proceedings in which the credit institution is treated as one entity. Unity and universality of proceedings ensure the equal treatment of creditors irrespective of their nationality, place of residence or domicile. In order to ensure the equal treatment of creditors also in resolution processes, Directive 2001/24/EC is amended to extend its scope to investment firms and to the use of the resolution tools to any entity covered by the resolution regime.

The Union Company Law Directives contain rules for the protection of shareholders and creditors. Some of these rules may hinder rapid action by resolution authorities.

The Second Company Law Directive requires that any increase in capital in a public limited liability company be agreed by the general meeting, while Directive 2007/36 (the Shareholders' Rights Directive) requires a 21 day convocation period for that meeting. Restoring the financial situation of a credit institution rapidly by means of capital increase is therefore not possible. The proposal therefore amends the Shareholders' Rights Directive to allow the general meeting to decide in advance that a shortened convocation period will apply

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<sup>16</sup> COM(2009) 501, COM(2009) 502, COM(2009) 503.

for a general meeting to decide on an increase of capital in emergency situations. Such authorisation will be part of the recovery plan. This will allow rapid action while retaining shareholders' decision-making powers.

Moreover, Company Law Directives require that increase and decrease of capital, mergers and divisions are subject to shareholders' agreement, and pre-emption rights apply whenever the capital is increased by consideration in cash. In addition, the Takeover Bids Directive requires mandatory bids when any person – including the State - acquires shares in a listed company above the control threshold (usually 30-50%). To address these obstacles, the proposal allows Member States to derogate from those provisions that require consent from creditors or shareholders or otherwise hinder the effective and rapid resolution.

In order to ensure that the authorities responsible for resolution are represented in the European System of Financial Supervision established by Regulation (EU), No 1093/2010 and to ensure that EBA has the expertise necessary to carry out the tasks provided for in this directive, Regulation (EU) No 1093/2010 should be amended in order to include national resolution authorities as defined in this Directive in the concept of competent authorities established by that Regulation.

#### *4.4.18. Entry into force*

The Directive will enter into force on the twentieth day following its publication in the OJ.

In line with common practice, the transposition deadline of the Directive is set at 18 months, i.e. 31 December 2014.

The provisions on the bail-in tool are subject to a longer transposition period and should be applied as from 1 January 2018. That date takes into account the observed maturity cycles of existing debt, the need to avoid deleveraging and the need for institutions to implement new capital requirements by 2018.

In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents, Member States should accompany the notification of the implementing measures with correlation tables. This is justified in view of the complexity of the Directive, which covers different subjects and is likely to require a plurality of implementing measures and in view of the fact some Member States have already adopted legislations partially implementing this Directive.

## **5. BUDGETARY IMPLICATION**

The above policy options will have implications for the budget of the Union.

The present proposal would require EBA to (i) develop around 23 technical standards and 5 guidelines (ii) take part in resolution colleges, make decisions in case of disagreement and exercise binding mediation and (iii) provide for recognition of third country resolution proceedings according to Article 85 and conclude non-binding framework cooperation arrangements with third countries according to Article 88. The delivery of technical standards is due 12 months after the entry into force of the Directive which is estimated to be between June and December 2013. The proposal of the Commission includes long-term tasks for EBA that will require the establishment of 5 additional posts (temporary agents) as from 2014. In

addition, 11 seconded national experts "SNE" are foreseen to carry out temporary tasks limited to 2014 and 2015 years.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010**

(Text with EEA relevance)

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,<sup>17</sup>

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

Having regard to the opinion of the European Economic and Social Committee,<sup>18</sup>

Having regard to the opinion of the European Central Bank,<sup>19</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The financial crisis that started in 2008 has shown that there is a significant lack of adequate tools at Union level to effectively deal with unsound or failing credit institutions. Such tools are, in particular, needed to prevent insolvency or, when insolvency occurs, to minimize negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save credit institutions using public funds.
- (2) Union financial markets are highly integrated and interconnected with many credit institutions operating extensively beyond national borders. The failure of a cross-border credit institution is likely to affect the stability of financial markets in the different Member States in which it operates. The inability of Member States to seize control of a failing credit institution and resolve it in a way that effectively prevents broader systemic damage can undermine Member States' mutual trust and the

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<sup>17</sup> OJ C , , p. .

<sup>18</sup> OJ C , , p. .

<sup>19</sup> OJ C , , p. .

credibility of the internal market in the field of financial services. The stability of financial markets is, therefore, an essential condition for the establishment and functioning of the internal market.

- (3) There is currently no harmonisation of the procedures for resolving credit institutions at Union level. Some Member States apply to credit institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for credit institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern credit institutions' insolvency in the Member States. In addition, the financial crisis has exposed that general corporate insolvency procedures may not always be appropriate for credit institutions as they may not always ensure sufficient speed of intervention, the continuation of the essential functions of credit institutions and the preservation of financial stability.
- (4) A regime is, therefore, needed to provide authorities with the tools to intervene sufficiently early and quickly in an unsound or failing credit institution so as to ensure the continuity of the credit institution's essential financial and economic functions, while minimizing the impact of an institution's failure on the financial system and ensuring that shareholders and creditors bear appropriate losses. New powers should enable authorities to maintain uninterrupted access to deposits and payment transactions, sell viable portions of the firm where appropriate, and apportion losses in a manner that is fair and predictable. Those objectives should help avoid destabilizing financial markets and minimize the costs for taxpayers.
- (5) Some Member States have already enacted legislative changes that introduce mechanisms to resolve failing credit institutions; others have indicated their intention to introduce such mechanisms if they are not adopted at Union level. National differences in the conditions, powers and processes for the resolution of credit institutions are likely to constitute barriers to the smooth operation of the internal market and hinder cooperation between national authorities when dealing with failing cross-border banking groups. This is particularly true where different approaches mean that national authorities do not have the same level of control or the same ability to resolve credit institutions. Those differences in resolution regimes may also affect bank funding costs differently across Member States and potentially create competitive distortions between banks. Effective resolution regimes in all Member States are also necessary to ensure that institutions cannot be restricted in the exercise of the single market rights of establishment by the financial capacity of their home Member State to manage their failure.
- (6) Those obstacles should be eliminated and rules should be adopted in order to ensure that the internal market provisions are not undermined. To that end, rules governing the resolution of institutions should be made subject to common minimum harmonisation rules.
- (7) Since the objectives of the action to be taken, namely the harmonisation of the rules and processes for the resolution of credit institutions, cannot be sufficiently achieved by the Member States, and can therefore by reason of the effects of a failure of any institution in the whole Union, 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.

- (8) In order to ensure consistency with existing Union legislation in the area of financial services as well as the greatest possible level of financial stability across the spectrum of institutions, the resolution regime should not only apply to credit institutions but also to investment firms subject to the prudential requirements laid down by Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions<sup>20</sup>. The regime should also apply to financial holding companies, mixed financial holding companies provided for in Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council<sup>21</sup>, mixed-activity holding companies and financial institutions, when the latter are subsidiaries of a credit institution or an investment firm. The crisis has demonstrated that the insolvency of an entity affiliated to a group can rapidly impact the solvency of the whole group and, thus, even have its own systemic implications. Authorities should, therefore, also possess effective means of action with respect to these entities in order to prevent contagion and produce a consistent resolution scheme for the group as a whole, as the insolvency of an entity affiliated to a group could rapidly impact the solvency of the whole group.
- (9) The use of resolution tools and powers provided for in this Directive may disrupt the rights of shareholders and creditors. In particular, the power of the authorities to transfer the shares or all or part of the assets of an institution to a private purchaser without the consent of shareholders affects the property rights of shareholders. In addition, the power to decide which liabilities to transfer out of a failing credit institution based upon the objectives of ensuring the continuity of services and avoid adverse effect on financial stability may affect the equal treatment of creditors.
- (10) National Authorities should take into account the risk, size and interconnectedness of an institution in the context of recovery and resolution plans and when using the different tools at their disposal, making sure that the regime is applied in an appropriate way.
- (11) In order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities to perform the functions and tasks in relation to resolution pursuant to this Directive. Member States should ensure that appropriate resources are allocated to those resolution authorities. The designation of public authorities should not exclude delegation under the responsibility of the resolution authority. However, it is not necessary to prescribe the exact authority that Member States should appoint as the resolution authority. While harmonisation of that aspect may facilitate coordination, it would also considerably interfere with the constitutional and administrative systems of Member States. A sufficient degree of coordination can still be achieved with a less intrusive requirement: all the national authorities involved

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<sup>20</sup> OJ L 177, 30.6.2006, p. 2011.

<sup>21</sup> OJ L35, 11.2.2003, p.1.

in the resolution of institutions should be represented in resolution colleges, where coordination at cross-border or Union level should take place. Member States should, therefore, be free to choose which authorities should be responsible for applying the resolution tools and exercising the powers provided for in this Directive.

- (12) In light of the consequences that the failure of a credit institution or an investment firm may have on the financial system and the economy of a Member State as well as the possible need to use public funds to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of crisis management and resolution.
- (13) Effective resolution of institutions or groups operating across the Union requires cooperation among competent authorities and resolution authorities within supervisory and resolution colleges in all the stages covered by this Directive, from the preparation of recovery and resolution plans to the actual resolution of an institution. In the event of disagreement between national authorities on decisions to be taken in accordance with this Directive with regard to institutions, the European Banking Authority (EBA) should, as a last resort, play a role of binding mediation. For that purpose, EBA should be empowered to take decisions requiring national authorities to take or to refrain from specific actions in accordance with the provisions of Regulation 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<sup>22</sup>.
- (14) In order to ensure uniform and consistent approach in the area covered by this Directive, EBA should also be empowered to adopt guidelines, and elaborate regulatory and technical standards to be endorsed by the Commission by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union.
- (15) In order to deal in an efficient manner with failing institutions, authorities should have the power to impose preparatory and preventative measures.
- (16) It is essential that all institutions prepare and regularly update recovery plans that set out measures to be taken by those institutions under different circumstances or scenarios. Such plans should be detailed and based on realistic assumptions applicable in a range of robust and severe scenarios. The requirement to prepare a recovery plan should, however, be applied proportionately, reflecting the systemic importance of the institution or group. In that vein, the required content should also take into account the nature of the institution's sources of funding and the degree to which group support would be credibly available. Institutions should be required to submit their plans to supervisors for a complete assessment, including whether the plans are comprehensive and could feasibly restore an institution's viability, in a timely manner, even in periods of financial stress.
- (17) Where an institution does not present an adequate recovery plan, supervisors should be empowered to require that institution to take any measure necessary to redress the deficiencies of the plan, including making changes to its business model or to its funding strategy. That requirement may affect the freedom to conduct a business as

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<sup>22</sup> OJ L..., p..

guaranteed by Article 16 of the Charter of Fundamental Rights. The limitation of that fundamental right is however necessary to meet the objectives of financial stability and for protecting depositors and creditors. More specifically, such a limitation is necessary in order to strengthen the business of institutions and avoid that institutions grow excessively or take excessive risks without being able to tackle setbacks and losses and to restore their capital base. The limitation is also proportionate as only preventative action can ensure that adequate precautions are taken and therefore complies with Article 52 of the Charter of Fundamental Rights of the European Union.

- (18) Resolution planning is an essential component of effective resolution. Authorities should have all the information necessary in order to plan how the essential functions of an institution or of a cross-border group may be isolated from the rest of the business and transferred in order to ensure the preservation and continuance of essential functions. The requirement to prepare a resolution plan should, however, be simplified, reflecting the systemic importance of the institution or group.
- (19) Resolution authorities should have the power to require changes to the structure and organization of institutions or groups in order to remove practical impediments to the application of resolution tools and ensure the resolvability of the entities concerned. Due to the potentially systemic nature of all institutions, it is crucial in order to maintain financial stability that authorities have the possibility to resolve any institution. In order to respect the right to conduct business laid down by Article 16 of the Charter of Fundamental Rights, the authorities' discretion should be limited to what is necessary in order to simplify the structure and operations of the institution solely to improve its resolvability. In addition, any measure imposed for such purposes should be consistent with Union law. Measures should be neither directly nor indirectly discriminatory on ground of nationality, and be justified by the overriding reason of being conducted in the public interest in financial stability. To determine whether an action was taken in the general public interest, resolution authorities, acting in the general public interest, should be able to achieve their resolution objectives without encountering impediments to the application of resolution tools or their ability to exercise the powers conferred to them. Furthermore, an action should not go beyond the minimum necessary to attain the objectives. When determining the measures to be taken, resolution authorities should take into account the warnings and recommendations of the European Systemic Risk Board established under Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.<sup>23</sup>
- (20) Measures proposed to address or remove impediments to the resolvability of an institution or a group should not prevent institutions from exercising the right of establishment conferred by the Treaty on the Functioning of the European Union.
- (21) Recovery and resolution plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss. Access to liquidity facilities provided by central banks, including emergency liquidity facilities, should not be considered as extraordinary public financial support provided that the institution is solvent at the moment of the liquidity provision, and such liquidity provision is not

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<sup>23</sup> OJ L 331, 15.12.2010, p. 1.

part of a larger aid package; that the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, that the central bank charges a penal interest rate to the beneficiary; and that the measure is taken at the central bank's own initiative and, in particular, is not backed by any counter-guarantee of the State.

- (22) The provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted by a number of provisions laid down by national laws. Those provisions are designed to protect the creditors and shareholders of each entity. Those provisions, however, do not take into account the interdependency of the entities of the same group or the group interest. At the international level, only in certain legal systems has the concept of group interest been developed through jurisprudence or legal rules. That concept takes into account, beside the interest of each individual group entity, the indirect interest that each entity in a group has in the prosperity of the group as a whole. However, it differs from Member State to Member State and does not provide the necessary legal certainty. It is, therefore, appropriate to set out under which conditions financial support may be transferred among entities of a cross-border banking group with a view to ensuring the financial stability of the group as a whole. Financial support between group entities should be voluntary. It is appropriate that the exercise of the right of establishment is not directly or indirectly made conditional by Member States to the existence of an agreement to provide financial support.
- (23) In order to preserve financial stability, it is important that competent authorities be able to remedy the deterioration of an institution's financial and economic situation before that institution reaches a point at which authorities have no other alternative than to resolve it. To this end, competent authorities should be granted early intervention powers, including the power to replace the management body of an institution with a special manager; this would serve as a means of exerting pressure on the institution in question to take measures to restore its financial soundness and/or to reorganise its business so as to ensure its viability at an early stage. The task of the special manager should be to take all measures necessary and promote solutions in order to redress the financial situation of the institution. The appointment of the special manager should not however derogate from any rights of the shareholders or owners or procedural obligations established under Union or national company law and should respect international obligations of the Union or Member States, relating to investment protection. The early intervention powers should include those already specified under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions<sup>24</sup> for circumstances other than those considered as early intervention as well as other situations considered necessary to restore the financial soundness of an institution.
- (24) The resolution framework should provide for timely entry into resolution before a financial institution is balance-sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated when a firm is no longer viable or likely to be no longer viable and other measures have proved insufficient to prevent failure. The fact that an institution does not meet the requirements for authorization should not

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<sup>24</sup> OJ L 177, 30.6.2006, p. 1.

justify per-se the entry into resolution, especially if the institution is still or likely to be still viable. An institution should be considered as failing or likely to fail when it is or is to be in breach of the capital requirements for continuing authorisation because it has incurred or is likely to incur in losses that are to deplete all or substantially all of its own funds, when the assets of the institution are or are to be less than its liabilities, when the institution is or is to be unable to pay its obligations as they fall due, or when the institution requires extraordinary public financial support. The need for emergency liquidity assistance from a central bank should not in itself be a condition that sufficiently demonstrates that an institution is or will be, in the near-term, unable to pay its liabilities as they fall due. In order to preserve financial stability, in particular in case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees on newly issued liabilities should not trigger the resolution framework provided that a number of conditions are met. In particular the State guarantee measures should to be approved under the State aid framework and should not be part of a larger aid package, and the use of the guarantee measures should be strictly limited in time. In both instances, the bank needs to be solvent.

- (25) The powers of resolution authorities should also apply to holding companies where both the holding company is failing or likely to fail and a subsidiary institution is failing or likely to fail. In addition, notwithstanding the fact that a holding company might not be failing or likely to fail, the powers of resolution authorities should apply to the holding company where one or more subsidiary credit institution or investment firm meet the conditions for resolution and the application of the resolution tools and powers in relation to the holding company is necessary for the resolution of one or more of its subsidiaries or for the resolution of the group as a whole.
- (26) Where an institution is failing or likely to fail, national authorities should have at their disposal a minimum harmonised set of resolution tools and powers. Their exercise should be subject to common conditions, objectives, and general principles. Once the resolution authority has taken the decision to put the institution under resolution, normal insolvency proceedings should be excluded. Member States should be able to confer onto the resolution authorities powers and tools in addition to those conferred onto them under this Directive. The use of these additional tools and powers, however, should comply with the resolution principles and objectives as set out in this Directive. In particular, the use of such tools or powers should not impinge on the effective resolution of cross-border groups and should ensure that shareholders bear losses.
- (27) In order to avoid moral hazard, any insolvent institution should be able to exit the market, irrespective of its size and interconnectedness, without causing systemic disruption. A failing institution is in principle liquidated under normal insolvency proceedings. However, liquidation under normal insolvency proceedings might jeopardise financial stability, interrupt the provision of essential services, and affect the protection of depositors. In such case there is a public interest in applying resolution tools. The objectives of resolution should therefore be to ensure the continuity of essential financial services, to maintain the stability of the financial system, to reduce moral hazard by minimising reliance on public financial support to failing institutions, and to protect depositors.
- (28) The winding up of an insolvent institution through normal insolvency proceedings should always be considered before a decision could be taken to maintain the

institution as a going concern. An insolvent institution should be maintained as a going concern with the use, to the extent possible, of private funds. That may be achieved either through sale to or merger with a private sector purchaser, or after having written down the liabilities of the institution, or after having converted its debt to equity, in order to effect a recapitalisation.

- (29) When applying resolutions tools and exercising resolution powers, resolution authorities should make sure that shareholders and creditors bear an appropriate share of the losses, that the managers are replaced, that the costs of the resolution of the institution are minimised, and that all creditors of an insolvent institution that are of the same class are treated in a similar manner. When the use of the resolution tools involves the granting of State aid, interventions should have to be assessed in accordance with the relevant State aid provisions. State aid may be involved, *inter alia*, where resolution funds or deposit guarantee funds intervene to assist in the resolution of failing institutions.
- (30) The limitations on the rights of shareholders and creditors should be in accordance with Article 52 of the Charter of Fundamental Rights. The resolution tools should therefore be applied only to those institutions that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest. In particular, resolution tools should be applied where the institution cannot be wound up under normal insolvency proceedings without destabilizing the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions and where there is no reasonable prospect for any alternative private solution, including any increase of capital by the existing shareholders or by any third party sufficient to restore the full viability of the institution.
- (31) Interference with property rights should not be disproportionate. In consequence, affected shareholders and creditors should not incur greater losses than those which they would have incurred if the institution had been wound up at the time that the resolution decision is taken. In the event of partial transfer of assets of an institution under resolution to a private purchaser or to a bridge bank, the residual part of the institution under resolution should be wound up under normal insolvency proceedings. In order to protect shareholders and creditors who are left in the winding up proceedings of the institution, they should be entitled to receive in payment of their claims in the winding up proceedings not less than what it is estimated they would have recovered if the whole institution had been wound up under normal insolvency proceedings.
- (32) For the purpose of protecting the right of shareholders and creditors to receive not less than what they would receive in normal insolvency proceedings, clear obligations should be laid down concerning the valuation of the assets and liabilities of the institution and sufficient time should be allowed to properly estimate the treatment that they would have received if the institution had been wound up under normal insolvency proceedings. There should be the possibility to start such a valuation already in the early intervention phase. Before any resolution action is taken, an estimate should be carried out of the value of the assets and liabilities of the institution and of the treatment that shareholders and creditors would receive under normal insolvency proceedings. Such valuation should be subject to judicial review only together with the resolution decision. In addition, there should be an obligation to

carry out, after the resolution tools have been applied, an *ex post* comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received under normal insolvency proceedings. If it is determined that shareholders and creditors have received, in payment of their claims, less than the amount that they would have received under normal insolvency proceedings, they should be entitled to the payment of the difference. As opposed to the valuation prior to the resolution action, it should be possible to challenge this comparison separately from the resolution decision. Member States should be free to decide on the procedure as to how to pay any difference of treatment that has been determined, to shareholders and creditors. That difference, if any, should be paid by the financial arrangements established in accordance with this directive.

- (33) It is important that losses be recognised upon failure of the institution. The guiding principle for the valuation of assets and liabilities of failing institutions should be their market value at the moment when the resolution tools are applied and to the extent that markets are functioning properly. When markets are truly dysfunctional, valuation may be performed at the duly justified long term economic value of assets and liabilities. It should be possible, for reasons of urgency, that the resolution authorities make a rapid valuation of the assets or the liabilities of a failing institution. That valuation should be provisional and should apply until an independent valuation is carried out.
- (34) Rapid action is necessary to sustain market confidence and minimise contagion. Once an institution is deemed to be failing or likely to fail, resolution authorities should not delay in taking appropriate action. The circumstances under which the failure of an institution may occur, and in particular taking account of the possible urgency of the situation, should allow resolution authorities to take resolution action without imposing an obligation to first use the early intervention powers.
- (35) The resolution tools should be applied before any public sector injection of capital or equivalent extraordinary public financial support to an institution. This, however, should not impede the use, for the purpose of financing resolution, of funds from the deposit guarantee schemes or the resolution funds. In this respect, the use of extraordinary public financial support or resolution funds, including deposit guarantee funds, to assist in the resolution of failing institutions should be assessed in accordance with relevant State aid provisions.
- (36) The resolution tools should include the sale of the business to a private purchaser, the setting up of a bridge institution, the separation of the good from the bad assets of the failing institution, and the bail in of the failing institution.
- (37) Where the resolution tools have been used to transfer the systemically important services or viable business of an institution to a sound entity such as a private sector purchaser or bridge institution, the residual part of the institution should be liquidated within an appropriate time frame having regard to any need for the failed institution to provide services or support to enable the purchaser or bridge institution to carry on the activities or services acquired by virtue of that transfer.
- (38) The sale of business tool should enable authorities to effect a sale of the institution or parts of its business to one or more purchasers without the consent of shareholders. When applying the sale of business tool, authorities should make arrangements for the

marketing of that institution or part of its business in an open, transparent and non-discriminatory process, while aiming at maximising as far as possible the sale price.

- (39) For the purpose of protecting the right of shareholders and creditors to receive not less than they would receive in normal insolvency proceedings, any proceeds from a partial transfer of assets should benefit the institution under resolution. In the event of transfer of all of the shares or of all of the assets, rights and liabilities of the institution, any proceeds from the transfer should benefit the shareholders of the failed institution. The proceeds should be calculated net of the costs arisen from the failure of the institution and from the resolution process.
- (40) In order to perform the sale of business in a timely manner and protect financial stability, the assessment of the buyer of a qualifying holding should be carried out without delay by way of derogation from the time limits set out by Directive 2006/48/EC.
- (41) Information concerning the marketing of a failed institution and the negotiations with potential acquirers prior to the application of the sale-of-business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>25</sup> may be delayed for the time necessary to plan and structure the resolution of the institution in accordance with delays permitted under the market abuse regime.
- (42) As an institution controlled by the resolution authority a bridge institution would have as its main purpose ensuring that essential financial services continue to be provided to the clients of the insolvent institution and that essential financial activities continue to be performed. The bridge institution should be operated as a viable going concern and be put back on the market as soon as possible or wound down if not viable.
- (43) The asset separation tool should enable authorities to transfer under-performing or impaired assets to a separate vehicle. That tool should be used only in conjunction with other tools to prevent an undue competitive advantage for the failing institution.
- (44) An effective resolution regime should minimise the costs of the resolution of a failing institution borne by the taxpayers. It should also ensure that also large and systemic institutions can be resolved without jeopardising financial stability. The bail-in tool achieves that objective by ensuring that shareholders and creditors of the institution suffer appropriate losses and bear an appropriate part of those costs. To this end, the Financial Stability Board recommended that statutory debt-write down powers should be included in a framework for resolution, as an additional option in conjunction with other resolution tools.
- (45) In order to ensure that resolution authorities have the necessary flexibility to allocate losses to creditors in a range of circumstances, it is appropriate that those authorities be able to apply the bail-in tool both where the objective is to resolve the failing institution as a going concern if there is a realistic prospect that the institution viability

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<sup>25</sup> OJ L 96, 12.4.2003, p. 16.

may be restored, and where systemically important services are transferred to a bridge institution and the residual part of the institution ceases to operate and is wound down.

- (46) Where the bail-in tool is applied with the objective of restoring the capital of the failing institution to enable it to continue to operate as a going concern, the resolution through bail-in should always be accompanied by replacement of management and a subsequent restructuring of the institution and its activities in a way that addresses the reasons for its failure. That restructuring should be achieved through the implementation of a business reorganisation plan. Where applicable, such plans should be compatible with the restructuring plan that the institutions is required to submit to the Commission under the Union State aid framework. In particular, in addition to measures aiming at restoring the long term viability of the institution, the plan should include measures limiting the aid to the minimum and burden sharing, and measures limiting distortions of competition.
- (47) It is not appropriate to apply the bail-in tool to claims in so far as they are secured, collateralised or otherwise guaranteed. However, in order to ensure that the bail-in tool is effective and achieves its objectives, it is desirable that it can be applied to as wide a range of the unsecured liabilities of a failing institution as possible. Nevertheless, it is appropriate to exclude certain kinds of unsecured liability from the scope of application of the bail-in tool. For reasons of public policy and effective resolution, the bail-in tool should not apply to those deposits that are protected under Directive 94/19/EC<sup>26</sup> of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, to liabilities to employees of the failing institution or to commercial claims that relate to goods and services necessary for the daily functioning of the institution.
- (48) Depositors that hold deposits guaranteed by the deposit guarantee scheme should not be subject to the exercise of the bail-in tool. The deposit guarantee scheme, however, contributes to funding the resolution process to the extent that it would have had to indemnify the depositors. The exercise of the bail-in powers would ensure that depositors continue having access to their deposits which is the main reason why the deposit guarantee schemes have been established. Not foreseeing the involvement of those schemes in such cases would constitute an unfair advantage with respect to the rest of creditors which would be subject to the exercise of the powers by the resolution authority.
- (49) In general, resolution authorities should apply the bail-in tool in a way that respects the pari passu treatment of creditors and the statutory ranking of claims under the applicable insolvency law. Losses should first be absorbed by regulatory capital instruments and should be allocated to shareholders either through the cancellation of shares or through severe dilution. Where those instruments are not sufficient, subordinated debt should be converted or written down. Finally, senior liabilities should be converted or written down if the subordinate classes have been converted or written down entirely.
- (50) To avoid institutions structuring their liabilities in a manner that impedes the effectiveness of the bail in tool it is appropriate to establish that the institutions should

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<sup>26</sup> OJ L 135, 31.5.1994, p. 5–14.

have at all times an aggregate amount of own funds, subordinated debt and senior liabilities subject to the bail in tool expressed as a percentage of the total liabilities of the institution, that do not qualify as own funds for the purposes of Directive 2006/48/EC or Directive 2006/49/EC. Resolution authorities should also be able to require that this percentage is totally or partially composed of own funds and subordinated debt.

- (51) Member States should ensure that Additional Tier 1 and Tier 2 capital instruments fully absorb losses at the point of non-viability of the issuing institution. Accordingly, resolution authorities should be required at that point to write down those instruments in full, or to convert them to Common Equity Tier 1 instruments, at the point of non-viability and before any other resolution action is taken. For this purpose, the point of non-viability should be understood as the point at which the relevant national authority determines that the institution meets the conditions for resolution or the point at which the authority decides that the institution ceases to be viable if those capital instruments are not written down. The fact that the instruments are to be written down or converted by authorities in the circumstances required by this Directive should be recognised in the terms governing the instrument, and in any prospectus or offering documents published or provided in connection with the instruments.
- (52) The bail-in tool, maintaining the institution as a going concern, should maximise the value of the creditors' claims, improve market certainty and reassure counterparties. In order to reassure investors and market counterparties and to minimise its impact it is necessary to allow not to apply the bail-in tool until 1 January 2018.
- (53) Resolution authorities should have all the legal powers that, in different combinations, may be exercised when applying the resolution tools. Those should include the powers to transfer shares in, or assets, rights or liabilities of, a failing institution to another entity such as another institution or a bridge institution, powers to write off or cancel shares, or write down or convert debt of a failing institution, the power to replace the management and power to impose a temporary moratorium on the payment of claims. Supplementary powers may also be needed, including a power to require continuity of essential services from other parts of a group.
- (54) It is not necessary to prescribe the exact means through which the resolution authorities should intervene in the insolvent institution. The resolution authorities should have the choice between taking control through a direct intervention in the institution or through executive order. They should decide according to the circumstances of the case. It does not appear necessary for efficient cooperation between Member States to impose a single model at this stage.
- (55) The resolution framework should include procedural requirements to ensure that resolution measures are properly notified and made public. However, as information obtained by resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, that information should be subject to an effective confidentiality regime.
- (56) National authorities should have ancillary powers to ensure the effectiveness of the transfer of shares or debt instruments and assets, rights and liabilities. Those powers should include the power to remove third parties rights from the transferred instruments or assets, the power to enforce contracts and to provide for the continuity

of arrangements vis-à-vis the recipient of the transferred assets and shares. However the rights of employees to terminate a contract of employment should not be affected. The right of a party to terminate a contract for reasons other than the mere substitution of the failing institution with the new institution should not be affected either. Resolution authorities should also have the ancillary power to require the residual institution that is being wound up under normal insolvency proceeding, to provide services that are necessary to enable the institution to which assets or shares have been transferred by virtue of the application of the sale of business tool or the bridge institution tool, to operate its business.

- (57) In accordance with Article 47 of the Charter of Fundamental Rights, the concerned parties have a right to due process and to having an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to judicial review. However, since this Directive aims to cover situations of extreme urgency, and since the suspension of any decision of the resolution authorities might impede the continuity of essential functions, it is necessary to provide that the lodging of any application for review and any interim court order cannot suspend the enforcement of the resolution decisions. In addition, in order to protect third parties who have bought assets, rights and liabilities of the institution under resolution by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, the judicial review should not affect any administrative act or transaction concluded on the basis of an annulled decision. Remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.
- (58) It is in the interest of an efficient resolution, and in order to avoid conflicts of jurisdiction, that no normal insolvency proceedings for the failing institution be opened or continued whilst the resolution authority is exercising its resolution powers or applying the resolution tools. It is also useful and necessary to suspend for a limited period of time certain contractual obligations so that the resolution authority has time to put into practice the resolution tools.
- (59) In order to ensure that resolution authorities, when transferring assets and liabilities to a private sector purchaser or bridge institution, have an adequate period to identify contracts that need to be transferred, it is appropriate to impose proportionate restrictions on counterparties' rights to close out, accelerate or otherwise terminate financial contracts before the transfer is made. Such a restriction is necessary to allow authorities to obtain a true picture of the balance sheet of the failing institution, without the changes in value and scope that extensive exercise of termination rights would entail. In order to interfere with the contractual rights of counterparties to the minimum extent necessary, the restriction on termination rights should apply only in relation to the resolution action, and rights to terminate arising from any other default, including failure to pay or deliver margin, should remain.
- (60) In order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, rights and liabilities of a failing institution, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts. Such a restriction on selected practices in relation to linked contracts should extend to contracts with the same counterparty covered by security arrangements, title transfer financial collateral arrangements, set-off arrangements, close out netting agreements, and structured finance arrangements. Where the

safeguard applies, resolution authorities should be bound to transfer all linked contracts within a protected arrangement, or leave them all with the residual failed bank. Those safeguards should ensure that the regulatory capital treatment of exposures covered by a netting agreement for the purposes of Directive 2006/48/EC is not affected.

- (61) When resolution authorities intend to transfer a set of linked contracts, and that transfer cannot be effective in relation to all the contracts comprised in the set because some rights or liabilities covered by the contracts are governed by the law of a territory outside the Union, the transfer should not be made. Any transfer in breach of this rule, should be void.
- (62) While ensuring that resolution authorities have the same tools and powers at their disposal will facilitate coordinated action in the event of a failure of a cross-border group, further action appears necessary to promote cooperation and prevent fragmented national responses. Resolution authorities should be required to consult each other and cooperate when resolving affiliated entities in resolution colleges with a view to agreeing a group resolution scheme. Resolution colleges should be established around the core of the existing supervisory colleges through the inclusion of resolution authorities, and the involvement, where appropriate, of Ministries of Finance, for group entities. In the event of a crisis, the resolution college should provide a forum for the exchange of information and the coordination of resolution measures.
- (63) Resolution of cross border groups should strike the balance between the need, on the one hand, for procedures that take into account the urgency of the situation and allow for efficient, fair and timely solutions for the group as a whole and, on the other hand, the necessity to protect financial stability in all the Member States where the group operates. The different resolution authorities should share their views in the resolution college. Resolution actions proposed by the group level resolution authority should be prepared and discussed amongst different national resolution authorities in the context of the group resolution plans. Resolution colleges should incorporate the views of the resolution authorities of all the Member States in which the group is active, in order to facilitate swift and joint decisions wherever possible. Resolution actions by the group level resolution authority should always take into account their impact on the financial stability in the Member States where the group operates. This should be ensured by the possibility for the resolution authorities of the Member State in which a subsidiary is established to object to the decisions of the group resolution authority, not only on appropriateness of resolution actions and measures but also on ground of the need to protect financial stability in that Member State. Any dispute regarding, among others, whether the financial stability in all the different Member States where the group operates is sufficiently safeguarded should be resolved by EBA. EBA should ensure in particular that the final decision on the resolution action to be taken considers adequately the interests of all the resolution authorities in protecting financial stability in the Union as well as in all the Member States where the group operates.
- (64) The production of a group resolution scheme should facilitate coordinated resolution that is more likely to deliver the best result for all institutions of a group. The group resolution scheme should be proposed by the group resolution authority and should be binding for the members of the resolution college. National resolution authorities that disagreed with the scheme should have the possibility to refer the matter to EBA. EBA

should be enabled to settle the disagreement on the basis of an assessment as to whether independent action by the Member State concerned is necessary for reasons of national financial stability, having regard to the impact of that action on financial stability in other Member States and the maximisation of the value of the group as a whole.

- (65) As part of a group resolution scheme, national authorities should be invited to apply the same tool to legal entities meeting the conditions for resolution. National authorities should not have the power to object to resolution tools applied at group level which falls within the responsibility of the group resolution authority, such as application of bridge bank tool at parent level, sell of assets of the parent credit institution, debt conversion at parent level. The group level resolution authorities should also have the power to apply the bridge bank institution at group level (which may involve, where appropriate, burden sharing arrangements) to stabilise a group as a whole. Ownership of subsidiaries could be transferred to the bridge bank with a view to onward sale, either as a package or singly, when market conditions are right. In addition, the group level resolution authority should have the power to apply the bail-in tool at parent level.
- (66) Effective resolution of internationally active institutions and groups requires cooperation agreements between the Union and third country resolution authorities. Cooperation will be facilitated if the resolution regimes of third countries are based on common principles and approaches that are being developed by the Financial Stability Board and the G20. For this purpose EBA should develop and enter into framework administrative arrangements with authorities of third countries in accordance with Article 33 of Regulation No 1093/2010 and national authorities should conclude bilateral arrangements in line, as far as possible, with EBA framework arrangements. The development of these arrangements between national authorities responsible for managing the failure of global firms should be a means to ensure effective planning, decision-making and coordination in respect of international groups. EBA should also be entrusted with recognition of measures taken by resolution authorities in third countries. Member States should be responsible for implementing EBA's recognition decisions.
- (67) Cooperation should take place both with regard to subsidiaries of Union or third country groups and with regard to branches of Union or third country institutions. Subsidiaries of third country groups are enterprises established in the Union and therefore are fully subject to Union law, including the resolution tools provided for in this Directive. It is however necessary that Member States maintain the right to apply the resolution tools also to branches of institutions having their head office in third countries, when the recognition and application of third country proceedings related to a branch would endanger the financial stability in the Union or when Union depositors would not receive equal treatment with third country depositors. For this reasons, EBA should have the right, after consulting the national resolution authorities, to refuse recognition of third country proceedings with regard to Union branches of third countries institutions.
- (68) There are circumstances when the effectiveness of the resolution tools applied may depend on the availability of short-term funding for the institution or a bridge institution, the provision of guarantees to potential purchasers, or the provision of capital to the bridge institution. Notwithstanding the role of central banks in providing

liquidity to the financial system even in times of stress, it is important that Member States set up financing arrangements to avoid that the funds needed for such purposes come from the national budgets. It should be the financial industry, as a whole, that finances the stabilisation of the financial system.

- (69) As a principle, contributions should be collected from the industry prior to and independently of any operation of resolution. When prior funding is insufficient to cover the losses or costs incurred by the use of the financing arrangements, additional contributions should be collected to bear the additional cost or loss.
- (70) In order to reach a critical mass and to avoid pro-cyclical effects which would arise if financing arrangements had to rely solely on *ex post* contributions in a systemic crisis, it is indispensable that the *ex-ante* available financial means of the national financing arrangements amount to a certain target level.
- (71) In order to ensure a fair calculation of contributions and provide incentives to operate under a less risky model, contributions to national financing arrangements should take account of the degree of risk incurred by credit institutions.
- (72) Ensuring effective resolution of failing financial institutions within the Union is an essential element in the completion of the internal market. The failure of such institutions has an effect not only on the financial stability of the markets where it directly operates but also on the whole Union financial market. With the completion of the internal market in financial services the interplay between the different national financial systems is reinforced. Institutions operate outside their Member State of establishment and are interrelated to each other through the interbank and other markets which, in essence are pan-European. Ensuring effective financing of the resolution of those institutions at equal conditions across Member States is in the best interest of the Member States in which they operate but also of all the Member States in general as a means to ensure equal conditions of competition and improve the functioning of the single Union financial market. Setting up a European System of Financing Arrangements should ensure that all institutions that operate in the Union are subject to equally effective resolution funding arrangements and contribute to the stability of the single market.
- (73) In order to build up the resilience of the European System of Financing Arrangements, and in line with the objective requiring that financing should come primarily from the industry rather than from public budgets, national arrangements should be able to borrow from each other in case of need.
- (74) While financing arrangements are set up at national level, they should be mutualised in the context of group resolution. When a resolution action ensures that depositors continue having access to their deposits, Deposit Guarantee Schemes to which an institution under resolution is affiliated should be liable, up to the amount of covered deposits, for the amount of losses that they would have had to bear if the institution had been wound up under normal insolvency proceedings.
- (75) In addition to ensuring payout of depositors or the continuous access to covered deposits, Member States should retain the discretion to decide whether deposit guarantee schemes could also be used as arrangements for the financing of other resolution actions. Such flexibility should not be used in a way that would endanger

the financing of deposit guarantee schemes or the function of guaranteeing the payout of covered deposits.

- (76) Where deposits are transferred to another institution in the context of the resolution of a credit institution, depositors should not be insured beyond the level of coverage provided in Directive 94/19/EC. Therefore claims with regard to deposits remaining in the credit institution under resolution should be limited to the difference between the funds transferred and the coverage level provided for by Directive 94/19/EC. Where transferred deposits are superior to the coverage level, the depositor should have no claim against the deposit guarantee scheme with regard to deposits remaining in the credit institution under resolution.
- (77) The setting up of financing arrangements establishing the European System of Financing Arrangements laid down in this Directive should ensure coordination of the use of funds available at national level for resolution..
- (78) Technical standards in financial services should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust EBA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.
- (79) The Commission should adopt the draft regulatory technical standards developed by EBA by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (80) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union in order to: specify the definitions of "critical functions" and "core business lines", specify the circumstances when an institution is failing or likely to fail, specify the circumstances when the asset separation tool should be applied, specify the liabilities excluded from the scope of application of the bail-in tool, specify the circumstances when exclusion from the bail-in tool is necessary to ensure the continuation of critical operations and core business lines, specify the criteria for the determination of the minimum amount of eligible liabilities required from institutions for the purposes of the bail in tool, specify the circumstances when, in application of the bail-in tool, existing shares should be cancelled and liabilities should be converted into shares, specify the circumstances when third country resolution proceedings should not be recognised, further specify the conditions under which it should be considered that the target level of the financing arrangements has significantly deviated from the initial level, adopt criteria aimed at adjusting the contributions to the financing arrangements to the risk profile of institutions, define obligations aimed at ensuring the effective payment of the contributions to the financing arrangements and specify the conditions for the mutual borrowing between national financing arrangements. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.
- (81) It is appropriate that in certain cases EBA first promote convergence of the practice of national authorities through guidelines and at a later stage, on the basis of the

convergence developed in the application of EBA guidelines, the Commission be empowered to adopt delegated acts.

- (82) When preparing and drawing up delegated acts, the Commission should ensure the early and on-going transmission of information on relevant documents to the n Parliament and the Council.
- (83) The European Parliament and the Council should have two months from the date of notification to object to a delegated act. It should be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections.
- (84) In the Declaration on Article 290 of the Treaty on the Functioning of the Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.
- (85) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 of the Treaty on the Functioning of the European Union and in accordance with Article 15 of Regulation (EU) No 1093/2010. EBA should be entrusted with drafting implementing technical standards for submission to the Commission.
- (86) Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions<sup>27</sup> provides for the mutual recognition and enforcement in all Member States of decisions concerning the reorganization or winding up of credit institutions having branches in Member States other than those in which they have their head offices. That directive ensures that all assets and liabilities of the credit institution, regardless of in which country they are situated, are dealt with in a single process in the home Member State and that creditors in the host States are treated in the same way as creditors in the home Member State; in order to achieve an effective resolution, Directive 2001/24/EC should apply also in the event of use of the resolution tools both when these instruments are applied to credit institutions and when they are applied to other entities covered by the resolution regime. Directive 2001/24/EC should therefore be amended accordingly.
- (87) Union company law directives contain mandatory rules for the protection of shareholders and creditors of credit institutions falls within the scope of those directives. In a situation where resolution authorities need to act rapidly, those rules may hinder their effective action and use of resolution tools and powers and derogations should be provided. In order to guarantee the maximum degree of legal certainty for the stakeholders, the derogations should be clearly and narrowly defined, and they should only be used in the public interest and when resolution triggers are met. The use of resolution tools presupposes that the resolution objectives and the conditions for resolution laid down in this Directive are respected.

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<sup>27</sup> OJ L 125, 5.5.2001, p. 15.

- (88) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent<sup>28</sup>, contains rules on the shareholders' right to decide on the capital increase and decrease, on their right to participate in any new share issue for cash consideration, on creditor protection in the event of capital reduction and the convening of shareholders' meeting in the event of serious loss of capital. Those rules may hinder the rapid action of resolution authorities and derogations from them should be provided for.
- (89) Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies<sup>29</sup>, lays down rules inter alia on the approval of mergers by the general meeting of each of the merging companies, on the requirements concerning the draft terms of merger, management report and expert report, and on the creditor protection. Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies<sup>30</sup> contains similar rules on the division of public limited liability companies. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies<sup>31</sup> provides for corresponding rules concerning cross-border mergers of limited liability companies. Derogation from those directives should be provided in order to allow a rapid action of resolution authorities.
- (90) Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>32</sup>, sets out an obligation to launch a mandatory takeover bid on all shares of the company for the equitable price, as defined in the directive, if someone acquires, directly or indirectly and alone or in concert with others, a certain percentage of shares of that company, which gives him control of that company and is defined by national law. The purpose of the mandatory bid rule is to protect minority shareholders in case of change of control. However, the prospect of such a costly obligation might deter possible investors in the affected institution, thereby making it difficult for resolution authorities to make use of all their resolution powers. Derogation should be provided from the mandatory bid rule, to the extent necessary for the use of the resolution powers, while after the resolution period the mandatory bid rule should be applied to anyone acquiring control in the affected institution.
- (91) Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies<sup>33</sup>, provides for on the procedural shareholders' rights related to the general meeting. Directive 2007/36/EC provides inter alia on the minimum convocation period to the general meeting and the content of the convocation. Those rules may hinder the rapid action of resolution authorities and derogation from the directive should be provided for. Prior

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<sup>28</sup> OJ L 26, 31.1.1977, p. 1.

<sup>29</sup> OJ L 110, 29.4.2011, p. 1.

<sup>30</sup> OJ L 378, 31.12.1982, p. 47.

<sup>31</sup> OJ L 310, 25.11.2005, p. 1.

<sup>32</sup> OJ L 142, 30.4.2004, p. 12.

<sup>33</sup> OJ L 184, 14.7.2007, p. 17.

to resolution there may be a need for a rapid increase of capital when the institution does not meet or is likely not to meet the requirements of Directives 2006/48/EC and 2006/49/EC and an increase of capital is likely to restore the financial situation and avoid a situation where the threshold condition for the resolution are met. In such situations a possibility for convening a general meeting in a shortened convocation period should be provided. However, the shareholders should retain the decision making power on the increase and on the shortening of the convocation period of the general meeting. Derogation from Directive 2007/36/EC should be provided for the establishment of that mechanism.

- (92) In order to ensure that the authorities responsible for resolution are represented in the European System of Financial Supervision established by Regulation (EU), No 1093/2010 and to ensure that EBA has the expertise necessary to carry out the tasks provided for in this directive, Regulation (EU) No 1093/2010 should be amended in order to include national resolution authorities as defined in this Directive in the concept of competent authorities established by that Regulation. Such assimilation between resolution authorities and competent authorities pursuant to Regulation N° 1093/2010 is consistent with the functions attributed to EBA pursuant to Article 25 of Regulation N° 1093/2010 to contribute and participate actively in the development and coordination of recovery and resolution plans and to aim at the facilitation of the resolution of failing institutions and in particular cross border groups.
- (93) In order to ensure compliance by institutions, those who effectively control their business and the members of the institutions' management body with the obligations deriving from this Directive and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for administrative sanctions and measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and measures set out by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication of sanctions or measures, key sanctioning powers and levels of administrative pecuniary sanctions.
- (94) This Directive refers to both administrative sanctions and measures in order to cover all actions applied after a violation is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or a measure under national law.
- (95) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.
- (96) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents<sup>34</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

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<sup>34</sup> OJ C 369, 17.12.2011, p. 14.

- (97) This Directive respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter of Fundamental Rights of the European Union, and notably the right to property, the right to an effective remedy and to a fair trial and the right of defence.

HAVE ADOPTED THIS DIRECTIVE:

## **TITLE I**

### **SCOPE, DEFINITIONS AND AUTHORITIES**

#### *Article 1*

##### *Subject matter and scope*

This Directive lays down rules and procedures relating to the recovery and resolution of the following:

- (a) credit institutions and investment firms;
- (b) financial institutions when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in points (c) and (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Subsection I of Section 2 of Chapter 2 of Title V of Directive 2006/48/EC;
- (c) financial holding companies, mixed financial holding companies, mixed-activity holding companies;
- (d) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies;
- (e) branches of institutions having their head office outside the Union in accordance with the specific conditions laid down in this Directive.

#### *Article 2*

##### *Definitions*

For the purposes of this Directive the following definitions apply:

- (1) 'resolution' means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution;

- (2) 'credit institution' means a credit institution as defined in Article 4(1) of Directive 2006/48/EC;
- (3) 'investment firm' means an investment firm as defined in Article 3(1)(b) of Directive 2006/49/EC that are subject to the initial capital requirement specified in Article 9 of that Directive;
- (4) 'financial institution' means a financial institution as defined in Article 4(5) of Directive 2006/48/EC;
- (5) 'subsidiary' means subsidiary as defined in Article 4(13) of Directive 2006/48/EC;
- (6) 'parent undertaking' means a parent undertaking as defined in Article 4(12) of Directive 2006/48/EC;
- (7) 'consolidated basis' means on the basis of the consolidated financial situation of a group subject to supervision on a consolidated basis in accordance with Subsection I of Section 2 of Chapter 2 of Title V of Directive 2006/48/EC or sub-consolidation in accordance with Article 73(2) of that Directive;
- (8) 'financial holding company' means a financial institution, the subsidiary undertakings of which are either exclusively or mainly institutions or financial institutions, at least one of such subsidiaries being an institution, and which is not a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC;
- (9) 'mixed financial holding company' means a mixed financial holding company as defined in Article 2(15) of Directive 2002/87/EC;
- (10) 'mixed-activity holding company' means a mixed-activity holding company as defined in Article 4(20) of Directive 2006/48/EC, or a mixed-activity holding company as defined in Article 3(3)(b) of Directive 2006/49/EC;
- (11) 'parent financial holding company in a Member State' means a financial holding company which is not itself a subsidiary of an institution authorised in the same Member State, or of a financial holding company or mixed financial holding company set up in the same Member State;
- (12) 'Union parent financial holding company' means a parent financial holding company which is not a subsidiary of an institution authorised in any Member State or of another financial holding company or mixed financial holding company set up in any Member State;
- (13) 'parent mixed financial holding company in a Member State' means a mixed financial holding company which is not itself a subsidiary of an institution authorised in the same Member State, or of a financial holding company or mixed financial holding company set up in the same Member State;
- (14) 'Union parent mixed financial holding company' means a parent mixed financial holding company which is not a subsidiary of a credit institution authorised in any Member State or of another financial holding company or mixed financial holding company set up in any Member State;

- (15) 'resolution objectives' means the objectives specified in Article 26(2);
- (16) 'branch' means a branch as defined in Article 4 (3) of Directive 2006/48/EC;
- (17) 'resolution authority' means an authority designated by a Member States in accordance with Article 3;
- (18) 'resolution tool' means the sale of business tool, the bridge institution tool, the asset separation tool or the bail-in tool;
- (19) 'resolution power' means a power as referred to in Article 56(1);
- (20) 'competent authority' means competent authority as defined in Article 4(4) of Directive 2006/48/EC or as defined in Article 3(3)( c) of Directive 2006/49/EC;
- (21) 'competent ministries' means the finance ministries or other ministries responsible for economic, financial and budgetary decisions according to national competencies;
- (22) 'control' means the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking;
- (23) 'institution' means a credit institution or an investment firm;
- (24) 'management' means the persons who effectively direct the business of the credit institution in accordance with Article 11 of Directive 2006/48/EC;
- (25) 'group' means a parent undertaking and its subsidiaries;
- (26) 'extraordinary public financial support' means State Aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union, that is provided in order to preserve or restore the viability, liquidity or solvency of an institution;
- (27) 'group entity' means a legal entity that is part of a group;
- (28) 'recovery plan' means a plan drawn up and maintained by an institution in accordance with Article 5;
- (29) 'critical functions' means those activities, services and operations the discontinuance of which would be likely to result in a disruption of the economy of, or the financial markets in, one or more Member States;
- (30) 'core business lines' means business lines and associated services which represent material source of revenue, profit or franchise value for an institution;
- (31) 'consolidating supervisor' means the competent authority responsible for supervision on a consolidated basis as defined in Article 4(48) of Directive 2006/48/EC;
- (32) 'own funds' means own funds within the meaning of Chapter 2 of Title V of Directive 2006/48/EC;
- (33) 'conditions for resolution' means the conditions specified in Article 27(1);

- (34) 'resolution action' means the decision to place an institution under resolution pursuant to Article 27, the application of a resolution tool to, or the exercise of one or more resolution power in relation to an institution;
- (35) 'resolution plan' means a plan drawn up for an institution by the relevant resolution authority in accordance with Article 9;
- (36) 'group resolution' means one of the following:
- (a) the taking of a resolution action at the level of the parent undertaking or institution subject to consolidated supervision, or
  - (b) the coordination of the application of resolution tools and the exercise of resolution powers by resolution authorities in relation to group entities that meet the conditions for resolution;
- (37) 'group resolution plan' means a plan for group resolution drawn up in accordance with Articles 11 and 12;
- (38) 'group level resolution authority' means the resolution authority in the Member State in which the consolidating supervisor is situated;
- (39) 'resolution college' means a college established in accordance with Article 80 to carry out the tasks required by Articles 12, 13 and 83;
- (40) 'normal insolvency proceedings' mean the collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator, normally applicable to institutions under national law and either specific for those institutions or generally applicable to any natural or legal person;
- (41) 'debt instruments' referred to in points (d), (i), (l) and (m) of Article 56 means bonds and other forms of transferable debt, any instrument creating or acknowledging a debt, and instruments giving rights to acquire debt instruments;
- (42) 'parent institution in a Member State' means a parent credit institution in a Member State as defined in Article 4(14) of Directive 2006/48/EC, or a parent investment firm in a Member State as defined in Article 3(f) of Directive 2006/49/EC;
- (43) 'Union parent institution' means a Union parent credit institution as defined in Article 4(16) of Directive 2006/48/EC, or an Union parent investment firm as defined in Article 3(g) of Directive 2006/49/EC;
- (44) 'own funds requirements' means the requirements of Article 75 of Directive 2006/48/EC;
- (45) 'supervisory colleges' means a college of supervisors established in accordance with Article 131a of Directive 2006/48/EC;
- (46) 'Union State aid framework' means the framework established by Articles 107 and 108 of the Treaty on the Functioning of the European Union and regulations made or adopted pursuant to Article 107 or Article 106(4) of the Treaty on the Functioning of the European Union;

- (47) 'winding up' means the realisation of assets of an institution;
- (48) 'asset separation tool' means the transfer by a resolution authority exercising the transfer powers of assets and rights of an institution that meets the conditions for resolution to an asset management vehicle in accordance with Article 36;
- (49) 'bail-in tool' means the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of an institution that meets the conditions for resolution in accordance with Article 37;
- (50) 'sale of business tool' means the transfer by a resolution authority of instruments of ownership, or assets, rights or liabilities, of an institution that meets the conditions for resolution to a purchaser that is not a bridge institution, in accordance with Article 32;
- (51) 'bridge institution tool' means the power to transfer the assets, rights or liabilities of an institution that meets the conditions for resolution to a bridge institution, in accordance with Article 34;
- (52) 'bridge institution' means a legal entity that is wholly owned by one or more public authorities (which may include the resolution authority) and that is created for the purpose of receiving some or all of the assets, rights and liabilities of an institution under resolution with a view to carrying out some or all of its services and activities;
- (53) 'instruments of ownership' means shares, instruments that confer ownership in mutual associations, instruments that are convertible into or give the right to acquire shares or instruments of ownership, and instruments representing interests in shares or instrument of ownership;
- (54) 'transfer powers' means the powers specified in points (c), (d) or (e) of Article 56(1) to transfer shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items from an institution under resolution to a recipient;
- (55) 'central counterparty' means a legal entity that interposes itself between the counterparties to a trade within one or more financial markets, becoming the buyer to every seller and the seller to every buyer;
- (56) 'derivatives', means a financial instrument listed in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council<sup>35</sup>;
- (57) 'write-down and conversion powers' means the powers specified in points (f) to (l) of Article 56(1);
- (58) 'secured liability' means a liability where the right of the creditor to payment is secured by a charge over assets, a pledge or lien, or collateral arrangements including liabilities arising from repurchase transactions and other title transfer collateral arrangements;

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<sup>35</sup> Directive 2004/49/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EC – OJ L 145, 30.4.2004, p.1

- (59) 'Additional Tier 1 instruments' means capital instruments that qualify as own funds under Article 57(ca) of Directive 2006/48/EC;
- (60) 'aggregate amount' means the aggregate amount by which the resolution authority has assessed that eligible liabilities must be written down or converted, in accordance with Article 41(1);
- (61) 'Common Equity Tier 1 instruments' means capital instruments that qualify as own funds in accordance with Article 57(a) of Directive 2006/48/EC;
- (62) 'eligible liabilities' means the liabilities of an institution that are not excluded from the scope of the write-down tool by virtue of Article 38(2);
- (63) 'deposit guarantee scheme' means a deposit guarantee scheme introduced and officially recognised by a Member State pursuant to Article 3 of Directive 94/19/EC;
- (64) 'Tier 2 instruments' means capital instruments that qualify as own funds under Article 56(f) and (h) of Directive 2006/48/EC;
- (65) 'relevant capital instruments' for the purposes of Sections 5 and 6 of Chapter III of Title IV, means Additional Tier 1 instruments and Tier 2 instruments;
- (66) 'conversion rate' means the factor that determines the number of ordinary shares into which a liability of a specific class will be converted, by reference either to a single instrument of the class in question or to a specified unit of value of a debt claim;
- (67) 'affected creditor' means a creditor whose claim relates to a liability that is reduced or converted to shares by exercise of a write down or conversion power;
- (68) 'affected shareholder' means a shareholder whose shares are cancelled by means of the power referred to in point (j) of Article 56(1);
- (69) 'appropriate authority', means authority of the Member State identified in accordance with Article 54 that is responsible under the national law of that State for making the determinations referred to in Article 51(1);
- (70) 'relevant parent institution' means a parent institution in a Member State, a Union parent institution, a financial holding company, a mixed financial holding company, a mixed-activity holding, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in relation to which the bail-in tool is applied;
- (71) 'recipient' means the entity to which the shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items from an institution under resolution are transferred;
- (72) 'business day' means any day other than Saturday, Sunday and any day which is a public holiday in the home Member State of the institution;
- (73) 'termination right' means a right to terminate a contract on an event of default as defined in or for the purposes of the contract, and includes any related right to

accelerate, close out, set-off or net obligations or any related provision that suspends, modifies or extinguishes an obligation of a party to the contract to make a payment;

- (74) 'institution under resolution' means an institution, a financial institution, a financial holding company, a mixed financial holding company, a mixed-activity holding company, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in respect of which a resolution action is taken;
- (75) 'domestic subsidiary institution' means an institution which is established in a Member State that is a subsidiary of a third country institution or financial holding company;
- (76) 'Union parent undertaking' means a Union parent institution, an Union parent financial holding company or a Union parent mixed financial holding company;
- (77) 'third country institution' means an entity, the head office of which is established in a third country, that is authorised or licensed under the law of that third country to carry on any of the activities listed in Annex I to Directive 2006/48/EC or Section A of Annex I to Directive 2004/39/EC;
- (78) 'third country resolution proceeding' means an action under the law of a third country to manage the failure of a third country institution that is comparable, in terms of results, to resolution actions under this Directive;
- (79) 'domestic branch' means a branch of a third country institution that is established in a Member State;
- (80) 'relevant third country authority' means a third country authority responsible for carrying out functions comparable to those of resolution authorities or competent authorities pursuant to this Directive;
- (81) 'group financing arrangement' means the financing arrangement or arrangements of the Member State of the group level resolution authority;
- (82) 'back to back transaction' means a transaction entered into between two group entities for the purpose of transferring, in whole or in part, the risk generated by another transaction entered into between one of those group entities and a third party;
- (83) 'intra-group guarantee' means a contract by which one group entity guarantees the obligations of another group entity to a third party.

Where this Directive refers to Regulation (EU) No 1093/2010, resolution authorities, shall, for the purpose of that Regulation, be considered competent authorities within the meaning of Article 4(2) of that Regulation.

The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order to specify the definitions of "critical functions" and "core business lines" provided for in points (29) and (30) in order to ensure uniform application of this Directive.

### *Article 3*

#### *Designation of authorities responsible for resolution*

1. Each Member States shall designate one or more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.
2. Resolution authorities shall be public administrative authorities.
3. Resolution authorities may be the competent authorities for supervision for the purposes of Directives 2006/48/EC and 2006/49/EC, central banks, competent ministries or other public administrative authorities, provided that Member States adopt rules and arrangements necessary to avoid conflicts of interest between the functions of supervision pursuant to Directives 2006/48/EC and 2006/49/EC or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive. In particular, Member States shall ensure that, within the competent authorities, central banks, competent ministries or other public administrative authorities there is a separation between the resolution function and the supervisory or other functions of the relevant authority.
4. Where the resolution authority and the competent authority pursuant to Directive 2006/48/EC are separate entities, Member States shall require that they cooperate closely in the preparation, planning and application of resolution decisions.
5. Where the designated authority in accordance with paragraph 1 is not the competent ministry in a Member State, any decision of the designated authority pursuant to this Directive shall be taken in consultation with the competent ministry.
6. Member States shall ensure that the authorities designated in accordance paragraph 1 have the expertise, resources and operational capacity to apply resolution measures, and are able to exercise their powers with the speed and flexibility that are necessary to achieve the resolution objectives.
7. Where a Member State designates more than one authority to apply the resolution tools and exercise the resolution powers, it shall allocate functions and responsibilities clearly between these authorities, ensure adequate coordination between them and designate a single authority as a contact authority for the purposes of cooperation and coordination with the relevant authorities of other Member States.
8. Member States shall inform European Banking Authority (EBA) of the national authority or authorities appointed as resolution authorities and contact authority and, where relevant, their specific functions and responsibilities. EBA shall publish the list of those resolution authorities.

## TITLE II

### PREPARATION

#### CHAPTER I

#### RECOVERY AND RESOLUTION PLANNING

##### SECTION 1

##### GENERAL PROVISIONS

###### *Article 4*

###### *Simplified obligations for certain institutions*

1. Having regard to the impact that the failure of the institution could have, due to the nature of its business, its size or its interconnectedness to other institutions or to the financial system in general, on financial markets, on other institutions, on funding conditions, Member States shall ensure that competent and resolution authorities determine the extent to which the following apply to institutions:
  - (a) the contents and details of recovery and resolution plans provided for in Articles 5, 7, 9 and 11;
  - (b) the contents and details of the information required from institutions as provided for in Articles 5 (5) and Articles 10 and 11.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order to specify the criteria referred to in paragraph 1, for assessing, in accordance with paragraph 1, the impact of an institution failure on financial markets, on other institutions and on funding conditions.
3. Competent and resolution authorities shall inform EBA of the way they have applied the requirement referred to in paragraph 1 to institutions in their jurisdiction. EBA shall report to the Commission by 1<sup>st</sup> January 2018 at the latest on the implementation of the requirement referred to in paragraph 1. In particular EBA shall report to the Commission whether there are divergences regarding the implementation at national level of that requirement.

## SECTION 2

### RECOVERY PLANNING

#### *Article 5*

##### *Recovery plans*

1. Member States shall ensure that each institution draws up and maintains a recovery plan providing, through measures taken by the management of the institution or by a group entity, for the restoration of its financial situation following significant deterioration. Recovery plans shall be considered as a governance arrangement within the meaning of Article 22 of Directive 2006/48/EC.
2. Member States shall ensure that the institutions update their recovery plans at least annually or after change to the legal or organisational structure of the institution, its business or its financial situation, which could have a material effect on, or necessitates a change to the recovery plan. Competent authorities may require institutions to update their recovery plans more frequently.
3. Recovery plans shall not assume any access to or receipt of extraordinary public financial support but shall include, where applicable, an analysis of how and when an institution may apply for the use of central bank facilities in stressed conditions and available collateral.
4. Member States shall ensure that the recovery plans include the information listed in Section A of the Annex.
5. The competent authorities shall ensure that institutions include in recovery plans appropriate conditions and procedures to ensure the timely implementation of recovery actions as well as a wide range of recovery options. Competent authorities shall ensure that firms test their recovery plans against a range of scenarios of financial distress, varying in their severity including system wide events, legal-entity specific stress and group-wide stress.
6. EBA, in consultation with the European Systemic Risk Board (ESRB), shall develop draft technical standards specifying the range of scenarios to be used for the purposes of paragraph 5 of this Article in accordance with Article 25(3) of Regulation (EU) No 1093/2010.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

7. EBA shall develop draft regulatory technical standards specifying the information to be contained in the recovery plan referred to in paragraph 4.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## *Article 6*

### *Assessment of recovery plans*

1. Member States shall require institutions to submit recovery plans to the competent authorities for review.
2. The competent authorities shall review those plans and assess the extent to which each plan satisfies the requirements set out in Article 5 and the following criteria:
  - (a) the implementation of the arrangements proposed in the plan would be likely to restore the viability and financial soundness of the institution, taking into account the preparatory measures that the institution has taken or has planned to take;
  - (b) the plan or specific options could be implemented effectively in situations of financial stress and without causing any significant adverse effect on the financial system, including in the event that other institutions implemented recovery plans within the same time period.
3. Where competent authorities assess that there are deficiencies in the recovery plan, or potential impediments to its implementation, they shall notify the institution of their assessment and require the institution to submit, within three months, a revised plan demonstrating how those deficiencies or impediments have been addressed.
4. If the institution fails to submit a revised recovery plan, or if the competent authority determines that the revised recovery plan does not adequately remedy the deficiencies or potential impediments identified in its original assessment, the competent authorities shall require the institution to take any measure it considers necessary to ensure that the deficiencies or impediments are removed. In addition to the measures that may be required in accordance with Article 136 of Directive 2006/48/EC, the competent authorities may, in particular, require the institution to take actions to:
  - (a) facilitate the reduction of the risk profile of the institution;
  - (b) enable timely recapitalisation measures;
  - (c) make changes to the firm strategy;

- (d) make changes to the funding strategy so as to improve the resilience of the core business lines and critical operations;
  - (e) make changes to the governance structure of the institution.
5. EBA shall develop draft regulatory technical standards specifying the matters that the competent authority must assess for the purposes of the assessment of paragraph 2 of this Article.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## *Article 7*

### *Group recovery plans*

1. Member States shall ensure that parent undertakings or institutions that are subject to consolidated supervision pursuant to Articles 125 and 126 of Directive 2006/48/EC draw up and submit to the consolidating supervisor a group recovery plan that includes a recovery plan for the whole group, including for the companies referred to in points (c) and (d) of Article 1, as well as a recovery plan for each institution that is part of the group.
2. The consolidating supervisor shall transmit the group recovery plans to the relevant competent authorities referred to in Article 131a of Directive 2006/48/EC and to EBA.
3. The group recovery plan shall aim to achieve the stabilisation of the group as a whole, or any institution of the group, when it is in a situation of stress so as to address or remove the causes of the distress and restore the financial situation of the group or the institution in question.

The group recovery plan shall include arrangements to ensure the coordination and consistency of measures to be taken at the level of the parent undertaking or relevant institution subject to consolidated supervision, and at the level of the companies referred to in points (c) and (d) of Article 1 as well as measures to be taken at the level of individual institutions.

4. The group recovery plan shall include for the whole group and for each of its entities the elements and arrangements provided in Article 5. It shall also include, where applicable, arrangements for possible intra-group financial support adopted in accordance with any agreement for group financial support that has been concluded in accordance with Article 16.
5. The consolidating supervisor shall ensure that the parent undertaking or the institution subject to consolidated supervision referred to in paragraph 1 provide a

range of recovery options setting out actions to address those scenarios provided for in Article 5(5).

For each of the scenarios, the group recovery plan shall identify whether there are obstacles to the implementation of recovery measures within the group, and whether there are substantial practical or legal impediments to the prompt transfer of own funds or the repayment of liabilities or assets within the group.

6. The management body of the parent undertaking or institution subject to consolidated supervision referred to in paragraph 1 and the management body of institutions that are part of the group shall approve the group recovery plan before submitting it to the consolidating supervisor.

## *Article 8*

### *Assessment of group recovery plans*

1. The consolidating supervisor shall review the group recovery plan, including the recovery plans for individual institutions that are part of the group, and assess the extent to which it satisfies the requirements and criteria set out in Articles 6 and 7. That assessment shall be made in accordance with the procedure established in Article 6 and the provisions of this Article.

The consolidating supervisor shall carry out the review and assessment of the group recovery plan, including the recovery plans for individual institutions that are part of the group, in consultation and cooperation with the competent authorities referred to in Article 131a of Directive 2006/48/EC. The review and assessment in accordance with Article 6(2) of this Directive of the group recovery plan and, if necessary, the request to take measures in accordance with Article 6(4) of this Directive shall take the form of joint decisions by the authorities referred to in Article 131a of Directive 2006/48/EC.

2. The competent authorities shall endeavour to reach the joint decision within a period of four months.

In the absence of a joint decision between the competent authorities within four months, the consolidating supervisor shall make its own decision on the review and assessment of the group recovery plan or on the measures required in accordance with Article 6(4). The decision shall be set out in a document containing the fully reasoned decision and should take into account the views and reservations of the other competent authorities expressed during the four-month period. The consolidating supervisor shall notify the decision to the parent undertaking of the institution subject to consolidated supervision and to the other competent authorities.

EBA may on its own initiative assist the competent authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1093/2010.

3. Any competent authority that disagrees with the assessment of the group recovery plan or any action that the parent undertaking or institution would be required to take as a result of that assessment in accordance with Article 6(2) and (4) of this

Directive, may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The matter may not be referred to EBA after the end of the four-month period or after a joint decision has been reached.

4. EBA shall take its decision within one month, and the four-month period referred to in paragraph 3 will be treated as the conciliation period within the meaning of Regulation (EU) No 1093/2010.
5. If any competent authority has referred the matter to EBA in accordance with paragraph 3, the consolidating supervisor shall defer its decision and await any decision that EBA may take. The subsequent decision of the consolidating supervisor shall comply with the decision of EBA.

### **SECTION 3**

## **RESOLUTION PLANNING**

### *Article 9*

#### *Resolution plans*

1. Resolution authorities, in consultation with competent authorities, shall draw up a resolution plan for each institution that is not part of a group subject to consolidated supervision pursuant to Articles 125 and 126 of Directive 2006/48/EC. The resolution plan shall provide for the resolution actions which the resolution and competent authorities may take where the institution meets the conditions for resolution.
2. The resolution plan shall take into consideration a range of scenarios including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide events. The resolution plan shall not assume any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 91.
3. Resolution plans shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure of the institution or to its business or its financial situation that could have a material effect on the effectiveness of the plan.
4. The resolution plan shall set out options for applying the resolution tools and resolution powers referred to in Title IV to the institution. It shall include:
  - (a) a summary of the key elements of the plan;
  - (b) a summary of the material changes to the institution that have occurred after the latest resolution information was filed;

- (c) a demonstration of how critical functions and core business lines could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity on the failure of the institution;
  - (d) an estimation of the timeframe for executing each material aspect of the plan;
  - (e) a detailed description of the assessment of resolvability carried out in accordance with Article 13;
  - (f) a description of any measures required pursuant to Article 14 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with Article 13;
  - (g) a description of the processes for determining the value and marketability of the critical functions , core business lines and assets of the institution;
  - (h) a detailed description of the arrangements for ensuring that the information required pursuant to Article 11 is up to date and at the disposal of the resolution authorities at all times;
  - (i) an explanation by the resolution authority as to how the resolution options could be financed without the assumption of any extraordinary public financial support;
  - (j) a detailed description of the different resolution strategies that could be applied according to the different possible scenarios;
  - (k) a description of critical interdependencies;
  - (l) an analysis of the impact of the plan on other institutions within the group;
  - (m) a description on options for preserving access to payments and clearing services and other infrastructures;
  - (n) a plan for communicating with the media and the public.
5. EBA, in consultation with the ESRB, shall develop draft regulatory technical standards specifying a range of scenarios for the event of failure for the purposes of paragraph 2.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## *Article 10*

### *Information for the purpose of resolution plans*

1. Member States shall ensure that resolution authorities have the power to require institutions to provide them with all of the information necessary to draw up and implement resolution plans. In particular the resolution authorities shall have the power to require, among other information, the information and analysis specified in Section B of the Annex.
2. Competent authorities in the relevant Member States shall cooperate with resolution authorities in order to verify whether some or all of the information referred to in paragraph 1 is already available. Where such information is available, competent authorities shall provide that information to the resolution authorities.
3. EBA shall develop draft implementing technical standards on standard forms, templates and procedures for such provision of information.

EBA shall submit those draft implementing technical standards to the Commission within twelve months from the date of entry into force of this Directive.

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 11*

### *Group resolution plans*

1. Member States shall ensure that resolution authorities draw up group resolution plans. Group resolution plans shall include both a plan for resolution at the level of the parent undertaking or institution subject to consolidated supervision pursuant to Article 125 and 126 of Directive 2006/48/EC and the resolution plans for the individual subsidiary institutions drawn up in accordance with Article 9 of this Directive. The group resolution plans shall also include plans for the resolution of the companies referred to in points (c) and (d) of Article 1 and plans for the resolution of institutions with branches in other Member States in compliance with the provisions of Directive 2001/24/EC.
2. The group resolution plan shall be drawn up on the basis of the information provided pursuant to Article 10.
3. The group resolution plan shall:
  - (a) set out the resolution actions to be taken with regards to the group as a whole or part of the group, including individual subsidiaries, both through resolution actions in respect to the companies referred to in Article 1(d), the parent undertaking and subsidiary institutions and through coordinated resolution

actions in respect of subsidiary institutions, in those scenarios provided for in Article 9(2);

- (b) examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to group entities located 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, and identify any potential impediments to a coordinated resolution;
- (c) where a group includes entities incorporated in third countries, identify arrangements for cooperation and coordination with the relevant authorities of those third countries;
- (d) identify measures, including the legal and economic separation of particular functions or business lines, that are necessary to facilitate group resolution when the conditions for resolution are met;
- (e) identify how the group resolution actions could be financed and, where appropriate, set out principles for sharing responsibility for that financing between sources of funding in different Member States. The plan shall not assume extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 91. Those principles shall be set out on the basis of equitable and balanced criteria and shall take into account, in particular, the economic impact of the resolution in the Member States affected and the distribution of the supervisory powers between the different competent authorities.

## *Article 12*

### *Requirement and procedure for group resolution plans*

1. Parent undertakings and institutions that are subject to consolidated supervision pursuant to Articles 125 and 126 of Directive 2006/48/EC shall submit the information required in accordance with Article 11 of this Directive to the group level resolution authority. That information shall concern the parent undertaking or institution subject to consolidated supervision and all the legal entities that are part of the group. Institutions subject to consolidated supervisions pursuant to Articles 125 and 126 of Directive 2006/48/EC shall also provide the information required pursuant to Article 11 of this Directive concerning the companies referred to in points (c) and (d) of Article 1.

The group level resolution authority shall transmit the information provided in accordance with this paragraph to EBA, to the resolution authorities of the subsidiaries institutions, to the relevant competent authorities referred to in Articles 130 and 131a of Directive 2006/48/EC and to the resolution authorities of the Member States where the companies referred to in points (c) and (d) of Article 1 are established.

2. Member States shall ensure that group level resolution authorities, acting jointly with the resolution authorities referred to in the second subparagraph of paragraph 1, in resolution colleges and in consultation with the relevant competent authorities, draw up and maintain group resolution plans. Group level resolution authorities may, at their discretion, involve in the drawing up and maintenance of group resolution plans third country resolution authorities of jurisdictions in which the group has established subsidiaries or financial holding companies or significant branches as referred to in Article 42a of Directive 2006/48/EC.
3. Member States shall ensure that group resolution plans are updated at least annually, and after any change to the legal or organisational structure of the institution or of the group, to its business or to its financial situation that could have a material effect on or require a change to the plans.
4. The group resolution plan shall take the form of a joint decision of the group level resolution authority and the other relevant resolution authorities. The resolution authorities shall make a joint decision within a period of four months from the date of the transmission by the group level resolution authority of the information referred to in the second subparagraph of paragraph 1.

In the absence of such a joint decision between the resolution authorities within four months, the group level resolution authority shall make its own decision. The decision shall be set out in a document containing the fully reasoned decisions and shall take into account the views and reservations of the other competent authorities expressed during the four-month period. The group level resolution authority shall provide the decision to the parent undertakings or institution which is subject to consolidated supervision and to other resolution authorities.

EBA may on its own initiative assist the competent authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1093/2010.

5. A resolution authority that disagrees with any element of the group resolution plan may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The matter may not be referred to EBA after the end of the four-month period or after a joint decision has been reached.
6. EBA shall take a decision within one month, and the four-month period shall be treated as the conciliation period within the meaning of that Regulation. The subsequent decision of the group level resolution authority shall comply with the decision of EBA.
7. Where any of the resolution authorities concerned has referred the matter to EBA in accordance with paragraph 5, the group level resolution authority shall defer its decision and await any decision that EBA may take.

## CHAPTER II

### ASSESSMENT OF RESOLVABILITY AND PREVENTATIVE POWERS

#### *Article 13*

##### *Assessment of resolvability*

1. Member States shall ensure that resolution authorities, in consultation with competent authorities, assess the extent to which institutions and groups are resolvable without the assumption of extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 91. An institution or group shall be deemed resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution and group without giving rise to significant adverse consequences for the financial systems, including in circumstances of broader financial instability or system wide events, of the Member State in which the institution is situated, having regard to the economy or financial stability in that same or other Member State or the Union and with a view to ensure the continuity of critical functions carried out by the institution or group either because they can be easily separated in a timely manner or by other means.
2. For the purposes of the assessment of resolvability referred to in paragraph 1, resolution authorities shall, as a minimum, examine the matters specified in Section C of the Annex.
3. EBA, in consultation with ESRB, shall develop draft regulatory technical standards to specify the matters to be examined for the assessment of the resolvability of institutions or groups provided for in paragraph 2. EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of entry into force of this Directive.
4. Power is conferred on the Commission to adopt the draft regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### *Article 14*

##### *Powers to address or remove impediments to resolvability*

1. Member States shall ensure that when, pursuant to an assessment of resolvability carried out in accordance with Article 13, a resolution authority determines that there are potential substantive impediments to the resolvability of an institution, the resolution authority shall notify in writing that determination to the institution.

2. Within four months of the date of receipt of a notification made in accordance with paragraph 1, the institution shall propose to the resolution authority measures to address or remove the impediments identified in the notification. The resolution authority, in consultation with the competent authorities, shall assess whether those measures effectively address or remove the impediments in question.
3. Where the resolution authority assesses that the measures proposed by an institution in accordance with paragraph 2 do not effectively reduce or remove the impediments in question, it shall, in consultation with the competent authorities, identify alternative measures that may achieve that objective, and notify in writing those measures to the institution.
4. For the purposes of paragraph 3, measures identified by a resolution authority may, where necessary and proportionate to reduce or remove the impediments to resolvability in question, include the following:
  - (a) requiring the institution to draw up service agreements (whether intra-group or with third parties) to cover the provision of critical economic functions or services;
  - (b) requiring the institution to limit its maximum individual and aggregate exposures;
  - (c) imposing specific or regular information requirements relevant for resolution purposes;
  - (d) requiring the institution to divest specific assets;
  - (e) requiring the institution to limit or cease specific existing or proposed activities;
  - (f) restricting or preventing the development or sale of new business lines or products;
  - (g) requiring changes to legal or operational structures of the institution so as to reduce complexity in order to ensure that critical functions may be legally and economically separated from other functions through the application of the resolution tools;
  - (h) requiring a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company;
  - (i) requiring a parent undertaking, or a company referred to in points (c) and (d) of Article 1 to issue the debt instruments or loans referred to in Article 39 (2);
  - (j) where an institution 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 institution, if this is necessary in order to facilitate the resolution of the institution and to avoid the application of the resolution tools and powers specified in Title IV having an adverse effect on the non-financial part of the group.

5. Resolution authorities shall not base a determination in accordance with paragraph 1 on impediments resulting from factors beyond the control of the institution, including the operational and financial capacity of the resolution authority.
6. A notification made pursuant to paragraph 1 or 3 shall meet the following requirements:
  - (a) it shall be supported by reasons for the assessment or determination in question;
  - (b) it shall indicate how that assessment or determination complies with the requirement for proportionate application set out in Article 9.
7. Before indentifying any measure referred to in paragraph 3, resolution authorities shall duly consider the potential effect of those measures on the stability of the financial system in other Member States.
8. EBA shall develop draft regulatory technical standards for specifying the measures provided for in paragraph 4 and the circumstances in which each measure may be applied.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

### *Article 15*

#### *Powers to address or remove impediments to resolvability: group treatment*

1. The group level resolution authorities and the resolution authorities of the subsidiaries, in consultation with the relevant competent authorities, shall consult each other within the resolution college and shall take all reasonable steps to reach a joint decision in regards to the application of measures identified in accordance with Article 14(3).
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 parent undertakings or institution subject to consolidated supervision and to the resolution authorities of the subsidiaries. The report shall be prepared in consultation with the competent authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group. The report shall also recommend any measures that, in the authorities' view, are necessary or appropriate to remove those impediments.
3. Within four months after the date of receipt of the notification, the parent undertaking or institution subject to consolidated supervision may submit

observations and propose to the group level resolution authority alternative measures to remedy the impediments identified in the report.

4. The group level resolution authority shall communicate any measure proposed by the parent undertakings or institution subject to consolidated supervision to the consolidating supervisor, EBA and the resolution authorities of the subsidiaries. The group level resolution authorities and the resolution authorities of the subsidiaries, in consultation with the competent authorities, 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 parent undertakings or institution subject to consolidated supervision and the measures required by the authorities in order to address or remove the impediments.
5. The joint decision shall be reached within four months from the submission of the report. It shall be reasoned and set out in a document which shall be provided to the parent undertakings or institution which is subject to consolidated supervision by the group level resolution authority.

EBA may on its own initiative assist the resolution authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1093/2010.

6. In the absence of a joint decision within four months from the date of submission of the report referred to in paragraphs 1 or 2, the group level resolution authority shall make its own decision on the appropriate measures to be taken in accordance with Article 14(3) in relation to the group as a whole.

The decision shall be set out in a document containing a full reasoning and shall take into account the views and reservations of the other resolution authorities expressed during the four months period. The decision shall be provided to the parent undertaking or institution which is subject to consolidated supervision by the group level resolution authority.

The decision referred to in the first subparagraph shall be recognised as conclusive and applied by the competent authorities in the Member States concerned.

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 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. EBA shall take its decision within one month and the four-month period shall be deemed the conciliation period within the meaning of that Regulation. The subsequent decision of the group level resolution authority shall be in conformity with the decision of EBA. The matter shall not be referred to EBA after the end of the four month period or after a joint decision has been reached.

## CHAPTER III

### INTRA GROUP FINANCIAL SUPPORT

#### *Article 16*

##### *Group financial support agreement*

1. Member States shall ensure that a parent institution in a Member State, or a Union parent institution, or a company referred to in points (c) and (d) of Article 1 and its subsidiaries that are institutions or financial institutions covered by the supervision of the parent undertaking, may enter into an agreement to provide financial support to any other party to the agreement that experiences financial difficulties, provided that the conditions laid down in this chapter are satisfied.
2. The agreement may:
  - (a) cover one or more subsidiaries of the group, and may provide for financial support from the parent undertaking to subsidiaries, from subsidiaries to the parent undertaking, between subsidiaries of the group that are party to the agreement, or any combination of those entities ;
  - (b) provide for financial support in the form of a loan, the provision of guarantees, or the provision of assets for use as collateral in transaction between the beneficiary of the support and a third party, or any combination of those entities.
3. Where in accordance with the terms of the agreement, a subsidiary agrees to provide financial support to the parent undertaking, the agreement shall include a reciprocal agreement by the parent undertaking to provide financial support to that subsidiary.
4. The agreement shall specify the consideration payable, or set out principles for the calculation of the consideration, for any transaction made under it.
5. The agreement may only be concluded if, at the time the proposed agreement is made, in the opinion of the supervisory authority, none of the parties is in breach of, or likely to be in breach of, any requirement of Directive 2006/48/EC relating to capital or liquidity or is at risk of insolvency.
6. Member States shall ensure that any right, claim or action arising from the agreement may be exercised only by the parties to the agreement, with the exclusion of third parties.

## *Article 17*

### *Review of proposed agreement by supervisors and mediation*

1. The parent undertakings and institutions which are subject to consolidated supervision pursuant to Articles 125 and 126 of Directive 2006/48/EC shall submit to the consolidating supervisor an application for authorisation of any proposed group financial support agreement. The application shall contain the text of the proposed agreement and identify the group entities that propose to be parties.
2. The consolidating supervisor shall grant the authorisation if the terms of the proposed agreement are consistent with the conditions for financial support set out in Article 19.
3. The consolidating supervisor shall forward without delay the application to the competent authorities of each subsidiary that proposes to be a party to the agreement.
4. The competent authorities shall do everything within their power to reach a joint decision on whether the terms of the proposed agreement are consistent with the conditions for financial support set out in Article 19 within four months from the date of receipt of the application by the consolidating supervisor. The joint decision shall be set out in a document containing the fully reasoned decision, which shall be provided to the applicant by the consolidating supervisor.
5. In the absence of a joint decision between the competent authorities within four months, the consolidating supervisor shall make its own decision on the application. The decision shall be set out in a document containing the full reasoning and shall take into account the views and reservations of the other competent authorities expressed during the four-month period. The consolidating supervisor shall notify the decision to the applicant and the other competent authorities.
6. If, at the end of the four-month period, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the consolidating supervisor 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 conformity with the decision of EBA. The four-month period shall be deemed 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.

## *Article 18*

### *Approval of proposed agreement by shareholders*

1. Member States may require that any proposed agreement that has been authorised by the competent authorities be submitted for approval to the shareholders meeting of every group entity that proposes to enter into the agreement. In this case, the

agreement shall be valid only in respect of those parties whose shareholders' meeting has approved the agreement.

2. Where Member States avail themselves of the option provided for in paragraph 1, they shall require that in accordance with the group financial support agreement, the shareholders of every group entity that will be a party to the agreement authorise the respective management body referred to in Article 11 of Directive 2006/48/EC to make a decision that the entity shall provide financial support in accordance with the terms of the agreement and in accordance with the conditions set out in this Chapter. No further approval by the shareholders nor any additional meeting for any specific transaction undertaken in accordance with the agreement shall be required.
3. The management body of each entity that is party to an agreement shall report each year to the shareholders on the performance of the agreement, and on the implementation of any decision taken pursuant to the agreement.

### *Article 19*

#### *Conditions for group financial support*

1. Financial support may only be provided in accordance with a group financial support agreement if the following conditions are met:
  - (a) there is a reasonable prospect that the support provided redresses the financial difficulties of the entity receiving the support;
  - (b) the provision of financial support has the objective of preserving or restoring the financial stability of the group as a whole;
  - (c) the financial support is provided for consideration;
  - (d) it is reasonably certain, on the basis of the information available to the management body at the time when the decision to grant financial support is taken, that the loan is reimbursed or the consideration for the support is paid at an appropriate price by the entity receiving the support;
  - (e) the financial support does not jeopardize the liquidity or solvency of the entity providing the support nor, as a result, does it create a threat to financial stability;
  - (f) the entity providing the support complies at the time the support is provided, and shall continue to comply after the support is provided, with the own funds requirements and any requirements imposed pursuant to Article 136(2) of Directive 2006/48/EC.
2. EBA shall develop draft implementing technical standards to specify the conditions set out in paragraph 1.

EBA shall submit those draft implementing technical standards to the Commission within twelve months from the date of entry into force of this Directive.

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

## *Article 20*

### *Decision to provide financial support*

The decision to provide group financial support in accordance with the agreement is taken by the management body as referred to in Article 11 of Directive 2006/48/EC of the entity providing financial support. That decision shall be reasoned and shall indicate the objective of the proposed financial support. In particular, the decision shall indicate:

- (a) how the financial support preserves or restores the financial stability of the group as a whole;
- (b) that the financial support does not exceed the financial capacities of the legal entity providing the financial support;
- (c) that the entity providing financial support shall continue to meet the own funds requirements and any requirements imposed pursuant to Article 136(2) of Directive 2006/48/EC.

## *Article 21*

### *Right of opposition of competent authorities*

1. Before providing support in accordance with a group financial support agreement, the management body of an entity that intends to provide financial support shall notify its competent authority and EBA. The notification shall include details of the proposed support.
2. Within two days from the date of receipt of a notification, the competent authority may prohibit or restrict the provision of financial support set out in Article 19 if the conditions for group financial support are not met. A decision of the competent authority to prohibit or restrict the financial support shall be reasoned.
3. The competent authority shall immediately inform EBA, the consolidating supervisor and the competent authorities identified in Article 131a of Directive 2006/48/EC, of its decision to prohibit or restrict the financial support.
4. Where the consolidating supervisor or the competent authority responsible for the entity receiving support has objections regarding the decision to prohibit or restrict the financial support, they may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation 1093/2010. In that case, EBA may act in accordance with the powers conferred on it by that Article. By way of derogation from the time limit provided for by Article 39, paragraph 1 of Regulation 1093/2010, EBA shall take any decision in accordance with Article 19(3) of Regulation 1093/2010 within 48 hours.

5. If the competent authority does not prohibit or restrict the financial support within the period indicated in paragraph 2, financial support may be provided in accordance with the terms submitted to the competent authority.

## *Article 22*

### *Disclosure*

3. Member States shall ensure that institutions that have entered into a group financial support agreement pursuant to Article 16 to make public a description of the agreement and the names of the entities that are party to it and update that information at least annually.

Articles 145 to 149 of Directive 2006/48/EC shall apply.

4. EBA shall develop draft regulatory technical standards to specify the form and content of the description provided for in paragraph 1. EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of entry into force of this Directive.
5. Power is conferred on the Commission to adopt the draft regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## **TITLE III**

### **EARLY INTERVENTION**

## *Article 23*

### *Early intervention measures*

1. Where an institution does not meet or is likely to breach the requirements of Directive 2006/48/EC, Member States shall ensure that competent authorities, , have at their disposal, in addition to the measures referred to in Article 136 of Directive 2006/48/EC where applicable, in particular, the following measures:
  - (a) require the management of the institution to implement one or more of the arrangements and measures set out in the recovery plan;
  - (b) require the management of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action program to overcome those problems and a timetable for its implementation;
  - (c) require the management of the institution to convene, or if the management fails to comply with this requirement convene directly, the shareholders

meeting of the institution, propose the agenda and the adoption of certain decisions;

- (d) require the management of the institution to remove and replace one or more board members or managing directors if these persons are found unfit to perform their duties pursuant to Article 11 of Directive 2006/48/EC;
  - (e) require the management of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors;
  - (f) acquire, including through on-site inspections, all the information necessary in order to prepare for the resolution of the institution, including carrying out an evaluation of the assets and liabilities of the institution;
  - (g) contact potential purchasers in order to prepare for the resolution of the institution, subject to the conditions laid down in article 33(2) and the confidentiality provisions laid down in Article 77.
2. EBA shall develop draft implementing technical standards in order to ensure consistent application of the measures provided for in paragraph 1 of this Article.

EBA shall submit those draft implementing technical standards to the Commission within twelve months from the date of entry into force of this Directive.

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 24*

### *Special management*

1. Where there is a significant deterioration in the financial situation of an institution or where there are serious violations of law, regulations or bylaws or serious administrative irregularities, and other measures taken in accordance with Article 23 are not sufficient to reverse that deterioration, Member States shall ensure that competent authorities may appoint a special manager to replace the management of the institution. Competent authorities shall make public the appointment of a special manager. Member States shall further ensure that the special manager has the qualifications, ability and knowledge required to carry out his or her functions.
2. The special manager shall have all the powers of the management of the institution under the statutes of the institution and under national law, including the power to exercise all the administrative functions of the management of the institution. However, the special manager may only exercise the power to convene the general meeting of the shareholders of the institution and to set the agenda with the prior consent of the competent authority.
3. The special manager shall have the statutory duty to take all the measures necessary and to promote solutions in order to redress the financial situation of the institution

and restore the sound and prudent management of its business and organization. Where necessary, that duty shall override any other duty of management in accordance with the statutes of the institution or national law, insofar as they are inconsistent. Those solutions may include an increase of capital, reorganisation of the ownership structure of the institution or takeovers by institutions that are financially and organisationally sound.

4. Competent authorities may set limits to the action of a special manager or require that certain acts of the special manager be subject to the competent authority's prior consent. The competent authorities may remove the special manager at any time.
5. Member States shall require that a special manager draw up reports for the appointing competent authority on the economic and financial situation of the institution and on the acts performed in the conduct of his duties, at regular intervals set by the competent authority and at the beginning and the end of its mandate.
6. Special management shall not last more than one year. This period can be exceptionally renewed if the conditions for appointing a special manager continue to be met. The competent authority shall be responsible for determining whether conditions are appropriate to maintain a special manager and justifying any such decision to shareholders.
7. Subject to the provisions in paragraphs 1 to 6 the appointment of the special manager shall not prejudice the rights of the shareholders or owners provided for in accordance Union or national company law.
8. The appointment of a special manager shall not be recognised as an enforcement event within the meaning of Directive 2002/47/EC of the European Parliament and of the Council<sup>36</sup> or as insolvency proceedings within the meaning of Directive 98/26/EC of the European Parliament and of the Council<sup>37</sup>.

#### *Article 25*

##### *Coordination of early intervention measures and appointment of special manager in relation to groups*

1. Where the conditions for the imposition of requirements under Article 23 of this Directive or the appointment of a special manager in accordance with Article 24 of this Directive are met in relation to a parent undertaking or an institution subject to consolidated supervision pursuant to Articles 125 and 126 of Directive 2006/48/EC or any of its subsidiaries, the competent authority that intends to take a measure in accordance with those Articles shall notify other relevant competent authorities within the supervisory college and EBA of its intention.
2. The consolidating supervisor and the other relevant competent authorities shall consider whether it is necessary to take measures in accordance with Article 23 or

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<sup>36</sup> OJ L 168, 27.6.2002., p. 43.

<sup>37</sup> OJ L 166, 11.6.1998, p. 45.

appoint a special manager in accordance with Article 24 in relation to other group entities and whether the coordination of the measures to be taken is desirable. The consolidating supervisor and other relevant authorities shall consider whether any alternative measure would be more likely to restore the viability of the individual entities and preserve the financial soundness of the group as a whole. Where more than one competent authority intends to appoint a special manager in relation to an entity affiliated to a group, authorities shall consider whether it is more appropriate to appoint the same special manager for all the entities concerned or for the whole group in order to facilitate solutions redressing the financial soundness of the group as a whole.

The assessment shall take the form of a joint decision of the consolidating supervisor and the other relevant competent authorities. The joint decision shall be reached within five days from the date of the notification referred to in paragraph 1. The joint decision shall be reasoned and set out in a document, which shall be provided by the consolidating supervisor to the parent undertaking or institution that is subject to consolidated supervision.

3. EBA may on its own initiative assist the competent authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1093/2010.
4. In the absence of a joint decision within five days the consolidating supervisor and the competent authorities responsible for supervising the subsidiaries may take individual decisions.
5. The decision of each competent authority shall be reasoned. The decision shall take into account the views and reservations of the other competent authorities expressed during the five day period and the potential impact of the decision on the financial stability in other Member States. The decisions shall be provided by the consolidating supervisor to the parent undertaking or institution which is subject to consolidated supervision and to the subsidiaries by the respective competent authorities.

Where, at the end of the five-day period, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the consolidating supervisor and the other competent authorities 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 decision in conformity with the decision of EBA. The five-day period shall be deemed the conciliation period within the meaning of that Regulation. EBA shall take its decision within five days. The matter shall not be referred to EBA after the end of the five-day period or after a joint decision has been reached.

6. Before taking their own decisions in accordance with paragraph 4, the competent authorities shall consult EBA. The decision shall consider the advice of EBA and explain any significant deviation from that advice.

## TITLE IV

### RESOLUTION

#### CHAPTER I

#### OBJECTIVES, CONDITIONS AND GENERAL PRINCIPLES

##### *Article 26*

##### *Resolution objectives*

1. When applying the resolution tools and exercising the resolution powers, resolution authorities shall have regard to the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.
2. The resolution objectives referred to in paragraph 1 are:
  - (a) to ensure the continuity of critical functions;
  - (b) to avoid significant adverse effects on financial stability, including by preventing contagion, and maintaining market discipline;
  - (c) to protect public funds by minimising reliance on extraordinary public financial support;
  - (d) to avoid unnecessary destruction of value and to seek to minimise the cost of resolution;
  - (e) to protect depositors covered by Directive 94/19/EC and investors covered by Directive 97/9/EC;
  - (f) to protect client funds and client assets.
3. Subject to different provisions of this Directive, the resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.

## Article 27

### *Conditions for resolution*

1. Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in Article 1(a) only if all of the following conditions are met:
  - (a) the competent authority or resolution authority determines that the institution is failing or likely to fail;
  - (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector or supervisory action, other than a resolution action taken in respect of the institution, would prevent the failure of the institution within reasonable timeframe;
  - (c) a resolution action is necessary in the public interest pursuant to paragraph 3.
2. For the purposes of point (a) of paragraph 1, an institution is deemed failing or likely to fail in one or more of the following circumstances:
  - (a) the institution is in breach or there are objective elements to support a determination that the institution will be in breach, in the near future, of the capital requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority because the institution has incurred or is likely to incur in losses that will deplete all or substantially all of its own funds;
  - (b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will be, in the near future, less than its liabilities;
  - (c) the institution is or there are objective elements to support a determination that the institution will be, in the near future, unable to pay its obligations as they fall due;
  - (d) the institution requires extraordinary public financial support except when, in order to preserve financial stability, it requires any of the following:
    - (i) a State guarantee to back liquidity facilities provided by central banks according to the banks' standard conditions (the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, and the central bank charges a penal interest rate to the beneficiary); or
    - (ii) a State guarantee on newly issued liabilities in order to remedy a serious disturbance in the economy of a Member State.

In both cases mentioned in points (i) and (ii), the guarantee measures shall be confined to solvent financial institutions, shall not be part of a larger aid

package, shall be conditional to approval under State aid rules, and shall be used for a maximum duration of three months.

3. For the purposes of point (c) of paragraph 1, a resolution action shall be treated as in the public interest if it achieves and is proportionate to one or more of the resolution objectives as specified in Article 26 and winding up of the institution or parent undertaking under normal insolvency proceedings would not meet those resolution objectives to the same extent.
4. EBA shall issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the convergence of supervisory and resolution practices regarding the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail. EBA shall develop these guidelines at the latest by the date provided for in the first subparagraph of Article 115(1) of this Directive.
5. The Commission, taking into account, where appropriate, the experience acquired in the application of EBA guidelines, shall adopt delegated acts in accordance with Article 103 aimed at specifying the circumstances when an institution shall be considered as failing or likely to fail.

#### *Article 28*

##### *Conditions for resolution with regard to financial institutions and holding companies*

1. Member States shall ensure that resolution authorities may take a resolution action in relation to a financial institution or firm referred to in point (b) of Article 1, when the conditions specified in Article 27(1), are met with regard to both the financial institution or firm and with regard to the parent institution subject to consolidated supervision.
2. Member States shall ensure that resolution authorities shall take a resolution action in relation to a company referred to in points (c) or (d) of Article 1, when the conditions specified in Article 27(1) are met with regard to both the company referred to in points (c) or (d) of Article 1 and with regard to one or more subsidiaries which are institutions.
3. Where the subsidiary institutions of a mixed-activity holding company are held directly or indirectly by an intermediate financial holding company, Member States shall ensure that resolution actions for the purposes of group resolution are taken in relation to the intermediate financial holding company, and shall not take resolution actions for the purposes of group resolution in relation to the mixed-activity holding company.
4. Subject to paragraph 3 and by way of derogation from the provisions of paragraph 1, notwithstanding the fact that a company referred to in point(c) or (d) of Article 1 may not meet the conditions established in Article 27 (1) resolution authorities may take resolution action with regards to a company referred to in point (c) or (d) of Article 1 when one or more of the subsidiaries which are institutions comply with the conditions established in Article 27 (1), (2) and (3) and action with regard to the

company referred to in points (c) or (d) of Article 1 is necessary for the resolution of one or more subsidiaries which are institutions or for the resolution of the group as a whole.

## *Article 29*

### *General principles governing resolution*

1. Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:
  - (a) the shareholders of the institution under resolution bear first losses;
  - (b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims pursuant to this Directive;
  - (c) senior management of the institution under resolution is replaced;
  - (d) senior managers of the institution under resolution bear losses that are commensurate under civil or criminal law with their individual responsibility for the failure of the institution;
  - (e) except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;
  - (f) no creditor incurs greater losses that would be incurred if the institution would have been wound down under normal insolvency proceedings.
2. Where an institution is a group entity, resolution authorities shall apply resolution tools and exercise resolution powers in a way that minimises the impact on affiliated institutions and on the group as a whole and minimises the adverse effect on financial stability in the Union and, in particular, in the countries where the group operates.
3. When applying the resolution tools and exercising the resolution powers, Member States shall ensure that they comply with the Union State aid framework, where applicable.

## CHAPTER II

### VALUATION

#### *Article 30*

##### *Preliminary valuation*

1. Before taking resolution action and in particular, for the purposes of Articles 31, 34, 36, 41, 42 and 65, resolution authorities shall ensure that a fair and realistic valuation of the assets and liabilities of the institution is carried out by a person independent from any public authority, including the resolution authority, and the institution. The resolution authority shall endorse that valuation. Where independent valuation is not possible due to the urgency in the circumstances of the case, resolution authorities may carry out the valuation of the assets and liabilities of the institution.
2. Without prejudice to the Union State aid framework, where applicable, the valuation required by paragraph 1 shall be based on prudent and realistic assumptions, including as to rates of default and severity of losses, and its objective shall be to assess the market value of the assets and liabilities of the institution that is failing or is likely to fail so that any losses that could be derived are recognised at the moment the resolution tools are exercised. However, where the market for a specific asset or liability is not functioning properly the valuation may reflect the long term economic value of those assets or liabilities. Valuation shall not assume the provision of extraordinary public support to the institution, regardless of whether it is actually provided.
3. The valuation shall be supplemented by the following information as appearing in the accounting books and records of the institution:
  - (a) an updated balance sheet and a report on the economic and financial situation of the institution;
  - (b) a note providing an analysis and an estimate of the value of the assets;
  - (c) the list of outstanding liabilities shown in the books and records of the institution, with an indication of the respective credits and priority level under the applicable insolvency law;
  - (d) the list of assets held by the institution for account of third parties who have ownership rights on those assets.
4. The valuation shall indicate the subdivision of the creditors in classes in accordance with their priority level under the applicable insolvency law and an estimate of the treatment that each class could be expected to receive in winding up proceedings.
5. Where due to the urgency in the circumstances of the case, it is not possible to comply with the requirements laid down in paragraphs 3 and 4, the valuation either

by an independent person or by a resolution authority shall be carried out in compliance with the requirements laid down in paragraph 2. That valuation shall be considered as provisional until the resolution authority has carried out a valuation that complies with all the requirements under this article. That definitive valuation may be carried out separately or together with the valuation referred to in Article 66.

6. The valuation shall be integrant part of the decision to apply a resolution tool or exercise a resolution power. The valuation shall not be subject to separate judicial review and shall be subject to judicial review only together with the decision in accordance with the provisions of Article 78.
7. EBA shall develop draft regulatory technical standards to specify the following criteria for the purposes of paragraphs 1 and 2 of this Article, and for the purposes of Article 66:
  - (a) under which circumstances a person is independent from both the resolution authority and the institutions, and
  - (b) under which circumstances a valuation by an independent person may be considered as not possible;
  - (c) the methodology for assessing the market value of the assets and liabilities of the institution that is failing or likely fail;
  - (d) the circumstances where the market for a specific asset or liability can be considered as not functioning properly;
  - (e) the methodology for assessing the long term economic value of the assets and liabilities of the institution that is failing or likely fail

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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.

## CHAPTER III

### RESOLUTION TOOLS

#### SECTION I

#### GENERAL PRINCIPLES

##### *Article 31*

##### *General principles of resolution tools*

1. Member States shall ensure that resolution authorities have the necessary powers to apply the resolution tools to an institution, a financial institution or a company referred to in points (c) and (d) of Article 1 that meets the applicable conditions for resolution.
2. The resolution tools referred to in paragraph 1 are the following:
  - (a) the sale of business tool;
  - (b) the bridge institution tool;
  - (c) the asset separation tool;
  - (d) the bail-in tool.
3. Subject to paragraph 4, resolution authorities may apply the resolution tools either singly or in conjunction.
4. Resolution authorities may apply the asset separation tool only in conjunction with another resolution tool.
5. When the resolution tools referred to in points (a), (b) or (c) of paragraph 2 are applied, and they are used to partially transfer assets, rights or liabilities of the institution under resolution, the residual part of the institution from which the assets, rights or liabilities have been transferred, shall be wound up under normal insolvency proceedings within a time frame that is appropriate having regard to any need for that institution to provide services or support pursuant to Article 58 in order to enable the transferee to carry on the activities or services acquired by virtue of that transfer.
6. Member States shall ensure that rules under national insolvency law relating to the voidability or unenforceability of legal acts detrimental to creditors do not apply to transfers of assets, rights or liabilities from an institution under resolution to another entity by virtue of the application of a resolution tool or exercise of a resolution power.

7. Member States shall not be prevented from conferring upon resolution authorities additional powers exercisable where an institution meets the conditions for resolution, provided that those additional powers do not pose obstacles to effective group resolution and that they are consistent with the resolution objectives and the general principles governing resolution set out in Articles 26 and 29.

## **SECTION 2**

### **THE SALE OF BUSINESS TOOL**

#### *Article 32*

##### *The sale of business tool*

1. Member States shall ensure that resolution authorities have the power to transfer to a purchaser that is not a bridge institution the following:
  - (a) shares or other instruments of ownership of an institution under resolution;
  - (b) all or specified assets, rights or liabilities of an institution under resolution;
  - (c) any combination of some or all of the assets, rights and liabilities of an institution under resolution,

The transfer referred to in the first subparagraph shall take place without obtaining the consent of the shareholders of the institution under resolution or any third party other than the purchaser, and without complying with any procedural requirements under company or securities law that would otherwise apply.

2. A transfer made pursuant to paragraph 1 shall be made on commercial terms, having regard to the circumstances, and in accordance with Union State aid rules.
3. In the case of a partial transfer of assets of the institution, any proceeds received from the transfer shall benefit the institution under resolution.

Where that all of the shares or other instruments of ownership are transferred or where all the assets, rights and liabilities of the institution are transferred, any proceeds received from the transfer shall benefit the shareholders of the institution under resolution, who have been divested of their rights.

Member States shall calculate the proceeds referred to in paragraph 2 of this Article, net of the amount of expenses, administrative or of other nature, occurred in the context of the resolution process, including costs and expenses incurred by the financing arrangements pursuant to Article 92.

4. Resolution authorities shall take all reasonable steps to obtain commercial terms for the transfer in accordance with paragraph 2 of this Article that are in conformity with the fair and realistic valuation conducted under Article 30, having regard to the circumstances of the case.

5. When applying the sale of business tool the resolution authorities may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership or, as the case may be, assets, rights or liabilities of the institution under resolution.
6. Following an application of the sale of business tool, resolution authorities may, with the consent of the purchaser, exercise the transfer powers in respect of shares or other instruments of ownership or, as the case may be, assets, rights or liabilities transferred to the purchaser in order to transfer the property back to the institution under resolution.
7. A purchaser must have the appropriate authorisation to carry on the activities or services that it acquires by virtue of a transfer made pursuant to paragraph 1.
8. By way of derogation from Article 19(1) of Directive 2006/48, where a transfer of shares or other instruments of ownership by virtue of an application of the sale of business tool would result in the acquisition or increase of a qualifying holding of a kind referred to in Article 19(1) of Directive 2006/48, competent authorities shall carry out the assessment required under that Article in a timely manner that does not delay the application of the sale of business tool and prevent the resolution action from achieving the relevant resolution objectives.
9. Transfers made by virtue of the sale of business tool which involves the transfer of some, but not all, of the assets, rights or liabilities of an institution shall be subject to the safeguards for partial property transfers specified in Chapter V.
10. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred, including the rights of membership and access to payment, clearing and settlement systems.
11. Shareholders or creditors of the institution under resolution and other third parties whose property, rights or liabilities are not transferred shall not have any rights over or in relation to the assets, rights or liabilities transferred.

### *Article 33*

#### *Sale of business tool: procedural requirements*

1. Subject to paragraph 3, when applying the sale of business tool to an institution a resolution authority shall market, or make arrangements for the marketing of that institution or those of its assets, rights or liabilities that the authority intends to transfer. Pools of rights, assets, and liabilities may be marketed separately.
2. Without prejudice to the Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:

- (a) it shall be as transparent as possible, having regard to the circumstances and in particular the need to maintain financial stability;
- (b) it shall not favour or discriminate between potential purchasers;
- (c) it shall be free from any conflict of interest;
- (d) it shall not confer any unfair advantage on a potential purchaser;
- (e) it shall take account of the need to effect a rapid resolution action;
- (f) it shall aim at maximising, as far as possible, the sale price for the assets and liabilities involved.

The principles set out in this paragraph shall not prevent the resolution authority from soliciting particular potential purchasers.

Any public disclosure of the marketing of the institution that would otherwise be required in accordance with Article 6(1) of Directive 2003/6/EC may be delayed in accordance with Article 6(2) of this Directive 2003/6/EC.

3. Resolution authorities may apply the sale of business tool without complying with the marketing requirements set out in paragraph 1 when they determine that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular if the following conditions are met:
  - (a) the resolution authority considers that there is a material threat to financial stability arising from or aggravated by the failure of the institution under resolution; and
  - (b) compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective specified in point (b) of Article 26(2).
4. EBA shall develop draft regulatory technical standards to specify the factual circumstances amounting to a material threat and the elements related to the effectiveness of the sale of business tool provided for in points (a) and (b) of paragraph 3.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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.

## SECTION 3

### THE BRIDGE INSTITUTION TOOL

#### *Article 34*

##### *Bridge institution tool*

1. In order to give effect to the bridge institution tool, Member States shall ensure that resolution authorities have the power to transfer all or specified assets, rights or liabilities of an institution under resolution, and any combination of those assets, rights and liabilities, to a bridge institution without obtaining the consent of the shareholders of the institution under resolution or any third party, and without complying with any procedural requirements under company or securities law that would otherwise apply.
2. Except where the bail-in tool is applied for the purpose specified in point (b) of Article 37(2), for the purposes of the bridge institution tool a bridge institution shall be a legal entity that is wholly or partially owned by one or more public authorities (which may include the resolution authority) and that is created for the purpose of carrying out some or all of the functions of an institution under resolution and for holding some or all of the assets and liabilities of an institution under resolution.

The application of the bail-in tool for the purpose specified in point (b) of Article 37(2) shall not interfere with the ability of the resolution authority to control the bridge institution to the extent necessary to effect the resolution and accomplish the resolution objectives.

3. When applying the bridge institution tool, a resolution authority shall ensure that the total value of liabilities transferred to the bridge institution does not exceed the total value of the rights and assets transferred from the institution under resolution or provided by other sources.
4. When applying the bridge institution tool, a resolution authority may transfer any assets, rights or liabilities of the institution as it considers appropriate in pursuance of one or more of the resolution objectives.
5. When applying the bridge institution tool, the resolution authorities may:
  - (a) transfer rights, assets or liabilities from the institution under resolution to the bridge institution on more than one occasion; and
  - (b) transfer rights, assets or liabilities back from the bridge institution to the institution under resolution provided that the conditions specified in paragraph 6 are met;
  - (c) transfer rights, assets or liabilities from the bridge institution to a third party.

6. Resolution authorities shall only transfer rights, assets or liabilities back from the bridge institution to the institution under resolution in one of the following circumstances:
  - (a) the possibility that the specific rights, assets or liabilities might be transferred back is stated expressly in the instrument by which the transfer referred to in point (a) of paragraph 5 was made;
  - (b) the specific rights, assets or liabilities do not in fact fall within the classes of, or meet the conditions for, rights, assets or liabilities specified in the instrument by which the transfer referred to in point (a) of paragraph 5 was made.

In either of the cases referred to in points (a) and (b), the transfer back is made within any time period, and complies with any other conditions, stated in that instrument for the relevant purpose.

7. Transfers made by virtue of the bridge institution tool which involves the transfer of some, but not all, of the assets, rights or liabilities of an institution shall be subject to the safeguards for partial property transfers specified in Chapter IV.
8. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, a bridge institution shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred, including the rights of membership and access to payment, clearing and settlement systems.
9. Shareholders or creditors of the institution under resolution and other third parties whose property, rights or liabilities are not transferred to the bridge institution shall not have any rights over or in relation to the bridge institution or its property.

### *Article 35*

#### *Operation of a bridge institution*

1. Member States shall ensure that the operation of a bridge institution respects the following provisions:
  - (a) the contents of the bridge institution's its constitutional documents are specified by the resolution authority;
  - (b) the resolution authority appoints the bridge institution's board of directors, approves the relevant salaries and determines the appropriate responsibilities;
  - (c) the bridge institution is authorised in accordance with Directive 2006/48/EC or Directive 2004/39/EC, as applicable, and has the necessary authorisation under the applicable national law to carry on the activities or services that it acquires by virtue of a transfer made pursuant to Article 56 of this Directive;

- (d) the bridge institution complies with the requirements of, and be subject to supervision in accordance with, Directives 2006/48/EC, 2006/49/EC and 2004/39/EC, as applicable.
2. Subject to any restrictions imposed in accordance with Union or national competition rules, the directors shall operate the bridge institution with a view to selling the institution, its assets, rights or liabilities, to one or more private sector purchasers when conditions are appropriate and within the period specified in paragraph 5.
  3. The resolution authority shall terminate the operation of a bridge institution in any of the following cases, whichever occurs first:
    - (a) the bridge institution merges with another institution;
    - (b) the acquisition of the majority of the bridge institution's capital by a third party;
    - (c) the assumption of all or substantially all of its assets, rights or liabilities by another person;
    - (d) the expiry of the period specified in paragraph 5 or, where applicable, paragraph 6.
  4. When seeking to sell the bridge institution or its assets or liabilities, Member States shall ensure that the institution or the relevant assets or liabilities are marketed openly and transparently, and that the sale does not favour or discriminate between particular potential purchasers.

Any such sale, shall be made on commercial terms, having regard to the circumstances and in accordance with the Union State Aid framework.
  5. If none of the outcomes referred to in points (a), (b) or (c) of paragraph 3 applies, the resolution authority shall terminate the operation of a bridge institution at the end of a two- year period following the date on which the last transfer from an institution under resolution pursuant to the bridge institution tool was made.
  6. The resolution authority may extend the period referred to in paragraph 5 for up to three additional one-year periods where:
    - (a) such extension is likely to achieve one of the outcomes referred to in points (a), (b) or (c) of paragraph 3; or
    - (b) such extension is necessary to ensure the continuity of essential banking or financial services.
  7. Where the operations of a bridge institution are terminated in the circumstances referred to in points (c), and (d) of paragraph 3, the institution shall be wound up and liquidated.

Any proceeds generated as a result of the termination of the operation of the bridge institutions as specified in paragraph 3 shall benefit the institution under resolution.

Member States may calculate the proceeds net of the amount of expenses administrative or of other nature occurred in the context of the resolution process.

8. Where a bridge institution is used for the purpose of transferring assets and liabilities of more than one institution the obligation referred to in paragraph 7 shall refer to the liquidation of the assets and liabilities transferred from each of the institutions and not to the bridge institution itself.

## **SECTION 4**

### **THE ASSET SEPARATION TOOL**

#### *Article 36*

##### *Asset separation tool*

1. In order to give effect to the asset separation tool, Member States shall ensure that the resolution authorities have the power to transfer assets, rights or liabilities of an institution under resolution to an asset management vehicle.
2. For the purposes of the asset separation tool, an asset management vehicle shall be a legal entity that is wholly owned by one or more public authorities, which may include the resolution authority.
3. The resolution authority shall appoint asset managers to manage the assets transferred to the asset management vehicle with a view to maximising their value through eventual sale or otherwise ensuring that the business is wound down in an orderly manner.
4. Resolution authorities may exercise the power specified in paragraph 1 to transfer assets only if the situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on the financial market.
5. When applying the asset separation tool, resolution authorities shall determine the consideration for which assets are transferred to the asset management vehicle in accordance with the principles established in Article 30 and in accordance with the Union State aid framework.
6. Resolution authorities may:
  - (c) transfer assets, rights or liabilities from the institution under resolution to the asset management vehicle on more than one occasion; transfer assets, rights or liabilities back from the asset management vehicle to the institution under resolution provided that the conditions specified in paragraph 7 are met.

7. Resolution authorities shall only transfer rights, assets or liabilities back from the asset management vehicle to the institution under resolution in one of the following circumstances:
  - (a) the possibility that the specific rights, assets or liabilities might be transferred back is stated expressly in the instrument by which the transfer referred to in point (a) of paragraph 6 was made;
  - (b) the specific rights, assets or liabilities do not in fact fall within the classes of, or meet the conditions for, rights, assets or liabilities specified in the instrument by which the transfer referred to in point (a) of paragraph 6 was made.

In either of the cases referred in points (a) and (b), the transfer back is made within any time period, and complies with any other conditions, stated in that instrument for the relevant purpose.

8. Transfers between the institution under resolution and the asset management vehicle shall be subject to the safeguards for partial property transfers specified in this Directive.
9. Shareholders and creditors of the institution under resolution and other third parties whose property, rights or liabilities are not transferred to the asset management vehicle shall not have any rights over or in relation to the asset management vehicle, its property or its managers.
10. The objectives of the managers appointed in accordance with paragraph 3 shall not imply any duty or responsibility to the shareholders of the institution under resolution, and the managers shall have no liability to those shareholders arising from action taken or not taken in discharge or purported discharge of their functions unless the act or omission implies gross negligence or serious misconduct in accordance with national law.
11. EBA shall develop guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the convergence of supervisory and resolution practices regarding the determination when, in accordance to paragraph 4 of this Article the liquidation of the assets or liabilities under normal insolvency proceeding could have an adverse effect on the financial market. EBA shall develop these guidelines at the latest by the date established in the first subparagraph of Article 115(1) of this Directive.
12. The Commission, taking into account, where appropriate, the experience acquired in the application of EBA guidelines, shall adopt delegated acts in accordance with Article 103 aimed at specifying the circumstances when the liquidation of the assets or liabilities under normal insolvency proceeding could have an adverse effect on the financial market.

## SECTION 5

### THE BAIL-IN TOOL

#### SUBSECTION 1

#### OBJECTIVE AND SCOPE OF THE BAIL-IN TOOL

##### *Article 37*

##### *The bail-in tool*

1. In order to give effect to the bail-in tool, Member States shall ensure that resolution authorities have the resolution powers specified in points (f) to (l) of Article 56(1).
2. Member States shall ensure that resolution authorities may apply the bail-in tool for either of the following purposes:
  - (a) to recapitalise an institution that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorisation and to carry on the activities for which is authorised under Directive 2006/48/EC or Directive 2004/39/EC;
  - (b) to convert to equity or reduce the principal amount of claims or debt instruments that are transferred to a bridge institution with a view to providing capital for that bridge institution.
3. Member States shall ensure that resolution authorities may apply the bail-in tool for the purpose referred to in point (a) of paragraph 2 only if there is a realistic prospect that the application of that tool, in conjunction with measures implemented in accordance with the business reorganisation plan required by Article 47 will, in addition to achieving relevant resolution objectives, restore the institution in question to financial soundness and long-term viability.

If the condition set out in the first subparagraph is not fulfilled, Member States shall apply any of the resolution tools referred to in points (a), (b) and (c) of Article 31 (2), and the bail-in tool referred to in point (b) of paragraph 2 of this Article, as appropriate.

##### *Article 38*

##### *Scope of bail-in tool*

1. Member States shall ensure that the bail-in tool may be applied to all liabilities of an institution that are not excluded from the scope of that tool pursuant to paragraph 2.

2. Resolution authorities shall not exercise the write down and conversion powers in relation to the following liabilities:
- (a) deposits that are guaranteed in accordance with Directive 94/19/EC;
  - (b) secured liabilities,
  - (c) any liability that arises by virtue of the holding by the institution of client assets or client money, or a fiduciary relationship between the institution (as fiduciary) and another person (as beneficiary);
  - (d) liabilities with an original maturity of less than one month;
  - (e) a liability to any one of the following:
    - (i) an employee, in relation to accrued salary, pension benefits or other fixed remuneration, except for variable remuneration of any form;
    - (ii) a commercial or trade creditor arising from the provision to the institution of goods or services that are essential to the daily functioning of its operations, including IT services, utilities and the rental, servicing and upkeep of premises;
    - (iii) tax and social security authorities, provided that those liabilities are preferred under the applicable insolvency law.

Points (a) and (b) of paragraph 2 shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured. Member States may exempt from this provision covered bonds as defined in Article 22(4) of Council Directive 86/611/EEC<sup>38</sup>.

Point (c) of paragraph 2 shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any amount of a deposit that exceeds the coverage under that Directive.

3. Where resolution authorities apply the bail-in tool, they may exclude from the application of the write-down and conversion powers liabilities arising from derivatives that do not fall within the scope of point (d) of paragraph 2, if that exclusion is necessary or appropriate to achieve the objectives specified in points (a) and (b) of Article 26(2).
4. The Commission shall be empowered to adopt delegated acts adopted in accordance with Article 103 in order to specify further:
- (a) specific classes of liabilities covered by point (d) of paragraph 2, and.

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<sup>38</sup> Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3). Directive as last amended by Directive 2008/18/EC.

- (b) the circumstances when exclusion is necessary or appropriate to achieve the objectives specified in points (a) and (b) of Article 26(2), having regard to the following factors:
- (i) the systemic impact of closing out derivative positions in order to apply the debt write-down tool;
  - (ii) the effect on the operation of a Central Counterparty of applying the debt write-down tool to liabilities arising from derivatives that are cleared by the Central Counterparty; and
  - (iii) the effect of applying the debt write-down tool to liabilities arising from derivatives on the risk management of counterparties to those derivatives.

## **SUBSECTION 2**

### **MINIMUM REQUIREMENT FOR ELIGIBLE LIABILITIES**

#### *Article 39*

##### *Minimum requirement for liabilities subject to the write-down and conversion powers*

1. Member States shall ensure that the institutions maintain, at all times, a sufficient aggregate amount of own funds and eligible liabilities expressed as a percentage of the total liabilities of the institution that do not qualify as own funds under Section 1 of Chapter 2 of Title V of Directive 2006/48/EC or under Chapter IV of Directive 2006/49/EC.
2. Subordinated debt instruments and subordinated loans that do not qualify as Additional Tier 1 or Tier 2 capital may be included in the aggregate amount of eligible liabilities referred to in paragraph 1 only if they satisfy the following conditions:
  - (a) the instruments are issued and fully paid up;
  - (b) the instruments are not purchased by any of the following:
    - (i) the institution or its subsidiaries;
    - (ii) an undertaking in which the institution has participation in the form of ownership, direct or by way of control, of 20% or more of the voting rights or capital of the undertaking;
  - (c) the purchase of the instrument is not funded or directly or indirectly by the institution;
  - (d) the instruments are not secured or guaranteed by any entity which is part of the same group as the institution;

- (e) the instruments have an original maturity of at least one year.
3. The minimum aggregate amount pursuant to paragraph 1 shall be determined on the basis of the following criteria:
- (a) the need to ensure that the institution can be resolved by the application of the resolution tools 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 institution has sufficient eligible liabilities to ensure that, if the bail in tool were to be applied the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to sustain sufficient market confidence in the institution and enable it to continue to comply with the conditions for authorisation and to carry on the activities for which is authorised under Directive 2006/48/EC or Directive 2006/49/EC;
  - (c) the size, the business model and the risk profile of the institution;
  - (d) the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with Article 99;
  - (e) the extent to which the failure of the institution would have an adverse effect on financial stability, including, due to its interconnectedness with other institutions or with the rest of the financial system through contagion to other institutions.
4. Subject to the provisions of Article 40, institutions shall comply with the requirements laid down in paragraph 2 of this Article on an individual basis.
- Subject to the provisions of Article 40, liabilities held by other entities that are part of the group shall be excluded from the aggregate amount specified in paragraph 1 of this Article.
5. Resolution authorities shall require and verify that institutions maintain the aggregate amount provided for in paragraph 1, and take any decision pursuant to paragraph 4 in the course of developing and maintaining resolution plans.
6. Resolution authorities shall inform EBA of the minimum amount they have determined for each institution under their jurisdiction. EBA shall report to the Commission by 1 January 2018 at the latest on the implementation of the requirement under paragraph 1. In particular EBA shall report to the Commission whether there are divergences regarding the implementation at national level of that requirement.
7. The Commission shall, by means of delegated acts in accordance with Article 103, adopt measures to specify the criteria provided for in points (a) to (e) of paragraph 3 with possible references to different categories of institutions and related ranges of percentages.

## Article 40

### *Application of minimum requirement to groups*

1. Resolution authorities may choose to apply the minimum requirement established in Article 39(1) and (3) on a consolidated basis to groups which are subject to consolidated supervision, provided that the following conditions are satisfied:
  - (a) the percentage referred to in Article 39(1) is calculated on the basis of the consolidated level of the liabilities and of the own funds held by the group;
  - (b) the debt instruments or loans referred to in Article 39, (2), are issued by the parent undertaking, or by a company referred to in points (c) or (d) of Article 1;
  - (c) the parent undertaking or the company referred to in points (c) or (d) of Article 1 distributes adequately and proportionately, in the form of credit, the funds collected through the issuance of the debt instruments or loans referred to in Article 39 (2), among the institutions which are subsidiaries;
  - (d) each institution, which is a subsidiary, shall comply with the minimum requirement set out in Article 39, paragraph 1. However, by way of exemption from the second subparagraph of Article 39(4), liabilities which are held by the parent undertaking or the company referred to in points (c) or (d) of Article 1 shall be included in the aggregate amount of own funds and eligible liabilities that the subsidiary is required to maintain pursuant to Article 39(1);
  - (e) where the group level resolution authority or other competent resolution authority, as appropriate, applies the bail-in tool to the parent undertaking or the company referred to in points (c) or (d) of Article 1, the resolution authorities of the subsidiaries shall apply the bail-in tool, in the first place, to the liabilities of the subsidiaries with regards to the parent undertaking or the company referred to in points (c) or (d) of Article 1, as appropriate, before applying it, if needed, to any other eligible liability of the subsidiary.
2. When making a decision in accordance with paragraph 1, resolution authorities shall take into account the way in which the group structures its operations and in particular the extent to which funding, liquidity and risk are centrally managed.
3. Resolution authorities shall take the decision to apply the minimum requirement on a consolidated basis pursuant to paragraph 1 of this Article in the course of developing and maintaining resolution plans pursuant to Article 9 of this Directive. For groups subject to consolidated supervision in accordance with Articles 125 and 126 of Directive 2006/48/EC, resolution authorities shall take the decision to apply the minimum requirement on a consolidated basis in accordance with the procedure laid down in Article 12 of this Directive.

## SUBSECTION 3

### IMPLEMENTATION OF THE BAIL-IN TOOL

#### *Article 41*

##### *Assessment of amount of bail-in*

1. Member States shall ensure that, when applying the bail-in tool, resolution authorities assess the aggregate amount by which eligible liabilities must be reduced or converted on the basis of a valuation that complies with the requirements of Article 30.
2. Where resolution authorities apply the bail-in tool for the purpose referred to in point (a) of Article 37(2), the assessment referred to in paragraph 1 of this Article shall establish the amount by which eligible liabilities need to be reduced in order to restore the Common Equity Tier 1 capital ratio of the institution under resolution and the amount that the resolution authority considers necessary to sustain sufficient market confidence in the institution and enable it to continue to comply with the conditions for authorisation and to carry on the activities for which is authorised under Directive 2006/48/EC or Directive 2004/39/EC.
3. Resolution authorities shall establish and maintain arrangements to ensure that the assessment and valuation is based on information about the assets and liabilities of the institution under resolution that is as updated and comprehensive as is reasonably possible.

#### *Article 42*

##### *Treatment of shareholders*

1. Member States shall ensure that, when applying the bail-in tool, resolution authorities take in respect of shareholders one or both of the following actions:
  - (a) cancel existing shares;
  - (b) exercise the power referred to in point (h) of Article 56(1) to convert eligible liabilities into shares of the institution under resolution at a rate of conversion that severely dilutes existing shareholdings.
2. The actions provided for in paragraph 1 shall apply in respect of shareholders where the shares in question were issued or conferred in the following circumstances:
  - (a) pursuant to conversion of debt instruments to shares in accordance with contractual terms of the original debt instruments on the occurrence of an event that preceded or occurred at the same time as the assessment by the resolution authority that the institution met the conditions for resolution;

- (b) pursuant to the conversion of relevant capital instruments to Common Equity Tier 1 instruments pursuant to Article 52.
- 3. When considering which action to take in accordance with paragraph 1, resolution authorities shall have regard to the likely amount of losses relative to assets before the exercise of the bail-in tool, with a view to ensuring that the action taken in respect of shareholders is consistent with that reduction in equity value; the valuation carried out in accordance with Articles 30 and 31 and in particular to the likelihood that shareholders would have recovered any value if the institution had been wound up on the basis of that valuation.
- 4. When resolution authorities apply the bail-in tool, the provisions of Article 30 and 31 shall apply.
- 5. EBA shall develop guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on the circumstances in which each of the actions referred to in paragraph 1 would be appropriate, having regard to the factors specified in paragraph 2 of this article. EBA shall develop these guidelines at the latest by the date provided for in the first subparagraph of Article 115(1) of this Directive.
- 6. The Commission, taking into account, where appropriate, the experience acquired in the application of EBA guidelines, may adopt delegated acts in accordance with Article 103 aimed at specifying the circumstances in which each of the actions mentioned in paragraph 1 would be appropriate, having regard to the factors specified in paragraph 2 of this Article.

### *Article 43*

#### *Hierarchy of claims*

- 1. Member States shall ensure that, when applying the bail-in tool, resolution authorities exercise the write down and conversion powers respecting the following requirements:
  - (a) Common Equity Tier 1 instruments are written down first in proportion to the losses and up to their capacity and the relevant shares are cancelled in accordance with Article 42;
  - (b) if, and only if, the writing down pursuant to point (a) is less than the aggregate amount, authorities reduce to zero the principal amount of Additional Tier 1 instruments that are liabilities and Tier 2 instruments in accordance with subsection 2;
  - (c) if, and only if, the total reduction of liabilities pursuant to points (a) and (b) is less than the aggregate amount, authorities reduce the principal amount of subordinated debt that is not Additional Tier 1 or Tier 2 capital to the extent required, in conjunction with the write down pursuant to points (a) and (b) to produce the aggregate amount;

- (d) if, and only if, the total reduction of liabilities pursuant to points (a), (b) or (c) of this paragraph is less than the aggregate amount, authorities reduce the principal amount of, or outstanding amount payable in respect of, the rest of eligible liabilities, pursuant to Article 38, that are senior debt to the extent required, in conjunction with the write down pursuant to points (a), (b) or (c) of this paragraph to produce the aggregate amount.
2. When applying the write down and conversion powers in compliance with points (c) and (d) of paragraph 1, resolution authorities shall allocate the losses represented by the aggregate amount equally between liabilities of the same rank by reducing the principal amount of, or outstanding amount payable in respect of, those liabilities to the same extent pro rata to their value.
3. Resolution authorities shall reduce the principal amount of the instrument or convert it in accordance with those terms referred to in points (b) or (c) of paragraph 1 before exercising the write-down and conversion powers to the liabilities referred to in points (d) of paragraph 1 and when those terms have not taken effect where an institution has issued instruments, other than those referred to in point (b) of paragraph 1, that contain either of the following terms:
- (a) terms that provide for the principal amount of the instrument to be reduced on the occurrence of any event that refers to the financial situation, solvency or levels of own funds of the institution;
- (b) terms that provide for the conversion of the instruments to shares or other instruments of ownership on the occurrence of any such event.
4. Where the principal amount of an instrument has been reduced, but not to zero, in accordance with terms of the kind referred to in point (a) of paragraph 3 before the application of the bail-in or pursuant to paragraph 3, resolution authorities shall apply the write-down and conversion powers to the residual amount of that principal in accordance with paragraph 1.

#### *Article 44*

#### *Derivatives*

1. Member States shall ensure that the provisions of this Article are respected when resolution authorities apply the write-down and conversion powers to liabilities arising from derivatives.
2. Where transactions are subject to a netting agreement, resolution authorities shall determine the liability arising from those transactions on a net basis in accordance with the terms of the agreement.
3. Resolution authorities shall determine the value of liabilities arising from derivatives in accordance with the following:
- (a) appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;

- (b) principles for establishing the relevant point in time at which the value of a derivative position should be established.
4. EBA shall develop draft regulatory technical standards specifying methodologies and the principles referred to in points (a) and (b) of paragraph 3 on the valuation of liabilities arising from derivatives.:

EBA shall submit those draft regulatory technical standards to the Commission by within twelve months from 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 of this Directive in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### *Article 45*

##### *Rate of conversion of debt to equity*

1. Member States shall ensure that, when applying the debt restructuring by exercising the power referred to in point (h) of Article 56(1) to convert eligible liabilities into ordinary shares or other instruments of ownership, resolution authorities may apply a different conversion rate to different classes of liability in accordance with one or both of the principles set out in paragraphs 2 and 3 of this Article.
2. The conversion rate shall represent appropriate compensation to the affected creditor for the loss incurred by virtue of the exercise of the write down and conversion power.
3. The conversion rate applicable to senior liabilities shall be higher than the conversion rate applicable to subordinated liabilities, where that is appropriate to reflect the priority of senior liabilities in winding up under applicable insolvency law.
4. EBA shall develop guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on the setting of conversion rates. EBA shall develop these guidelines at the latest by the date provided for in the first subparagraph of Article 115(1) of this Directive.

The guidelines shall indicate, in particular, how affected creditors may be appropriately compensated by means of the conversion rate, and the relative conversion rates that might be appropriate to reflect the priority of senior liabilities under applicable insolvency law.

#### *Article 46*

##### *Recovery and reorganisation measures to accompany bail-in*

1. Member States shall ensure that, where resolution authorities apply the bail-in tool arrangements are adopted to ensure that a business reorganisation plan for that institution is drawn up and implemented in accordance with Article 47.

2. The arrangements referred to in paragraph 1 of this Article shall include the appointment of an administrator with the objective of drawing up and implementing the business reorganisation plan required by Article 47.

#### *Article 47*

##### *Business reorganisation plan*

1. Member States shall require that, within [one month] after the application of the bail-in tool to an institution in accordance with point (a) of Article 37(2), the administrator appointed under Article 46 shall draw up and submit to the resolution authority, the Commission and EBA a business reorganisation plan that satisfies the requirements of paragraphs 2 and 3 of this Article. Where the Union State aid framework is applicable, Member States shall ensure that such plan is compatible with the restructuring plan that the institution is required to submit to the Commission under that framework.
2. A business reorganisation plan shall set out measures aimed at restoring the long term viability of the institution or parts of its business within a reasonable timescale no longer than two years. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the institution will operate.

The business reorganisation plan shall take account, inter alia, of the current state and future prospects of the financial markets, reflecting best-case and worst-case assumptions. Stress-testing shall consider a range of scenarios, including a combination of events of stress and a protracted global recession. Assumptions shall be compared with appropriate sector-wide benchmarks.
3. A business reorganisation plan shall include the following elements:
  - (a) a detailed diagnosis of the factors and problems that caused the institution to fail or to be likely to fail, and the circumstances that led to its difficulties;
  - (b) a description of the measures aimed at restoring the long-term viability of the institution that are to be adopted;
  - (c) a timetable for the implementation of those measures.
4. Measures aimed at restoring the long-term viability of an institution may include:
  - (a) the reorganisation of the activities of the institution;
  - (b) the withdrawal from loss-making activities;
  - (c) the restructuring of existing activities that can be made competitive;
  - (d) the sale of assets or of business lines.

5. Within one month from the date of submission of the business reorganisation plan, the resolution authority shall assess the likelihood that the plan, if implemented, restores the long term viability of the institution.

If the resolution authority is satisfied that the plan would achieve that objective, it shall approve the plan.

6. If the resolution authority is not satisfied that the plan would achieve that objective the resolution authority shall notify the administrator of its concerns and require the administrator to amend the plan in way that addresses those concerns.
7. Within two weeks from the date of receipt of such a notification, the administrator shall submit an amended plan to the resolution authority for approval. The resolution authority shall assess the amended plan, and shall notify the administrator within one week whether it is satisfied that the plan, as amended, addresses the concerns notified or whether further amendment is required.
8. The administrator shall implement the reorganisation plan as agreed by the resolution authority, and shall report every six months to the resolution authority on the progress in the implementation of the plan.
9. The administrator shall revise the plan if that is necessary to achieve the aim set out in paragraph 2, and shall submit any such revision to the resolution authority for approval.
10. EBA shall develop draft regulatory technical standards to specify further:
  - (a) the elements that should be included in a business reorganisation plan pursuant to paragraph 3; and
  - (b) the contents of the reports pursuant to paragraph 8.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## **SUBSECTION 4**

### **BAIL-IN TOOL: ANCILLARY PROVISIONS**

#### *Article 48*

#### *Effect of bail-in*

1. Member States shall ensure that where a resolution authority exercises a power referred to in points (f) to (l) of Article 56(1), the reduction of principal or

outstanding amount due, conversion or cancellation takes effect and is immediately binding on the institution under resolution and affected creditors and shareholders.

2. Member States shall ensure that all the administrative and procedural tasks necessary to give effect to the exercise of a power referred to in points (f) to (l) of Article 56(1) are completed, including:
  - (a) the amendment of all relevant registers;
  - (b) the delisting or removal from trading of shares or debt instruments;
  - (c) the listing or admission to trading of new shares.
3. Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (g) of Article 56(1), that liability and any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised shall be treated as discharged for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor institution in any subsequent winding up.
4. Where a resolution authority reduces in part, but not in full, the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (g) of Article 56(1):
  - (a) the liability shall be discharged to the extent of the amount reduced;
  - (b) the relevant instrument or agreement that created the original liability shall continue to apply in relation to the residual principal amount of, or outstanding amount payable in respect of the liability, subject to any modification of the amount of interest payable to reflect the reduction of the principal amount, and any further modification of the terms that the resolution authority might make by means of the power referred to in point (m) of Article 56(1).

#### *Article 49*

##### *Removal of procedural obstacles to bail in*

1. Member States shall, in appropriate cases, require institutions to maintain at all times sufficient authorised share capital so that, in the event that the resolution authority exercised the powers referred to in points (f), (g) and (h) of Article 56(1) in relation to an institution or its subsidiaries, the institution is not prevented from issuing sufficient new shares or instruments of ownership to ensure that the conversion of liabilities into ordinary shares or other instruments of ownership could be carried out effectively.
2. Resolution authorities shall assess whether it is appropriate to impose the requirement set out in paragraph 1 in the case of a particular institution in the context of the development and maintenance of the resolution plan for that institution, having regard, in particular, to the resolution actions contemplated in that plan. If the

resolution plan provides for the possible application of the bail-in tool, authorities shall verify that the authorised share capital is sufficient to cover the aggregate amount referred to in Article 41.

3. Member States shall require institutions to ensure that there are no procedural impediments to the conversion of liabilities to ordinary shares or other instruments of ownership existing by virtue of their instruments of incorporation or statutes, including pre-emption rights for shareholders or requirements for the consent of shareholders to an increase in capital.
4. The provisions of this article are without prejudice to the amendments to Directives 77/91/EEC, 82/891/EEC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EU set out in Title VIII of this Directive.

#### *Article 50*

##### *Contractual recognition of bail-in*

1. Member States shall require institutions to include in the contractual provisions governing any eligible liability, Additional Tier 1 instrument or Tier 2 instrument that is governed by the law of a jurisdiction that is not a Member State a term by which the creditor or party to the agreement creating the liability recognises that the liability may be subject to the write down and conversion powers and agrees to be bound by any reduction of principal or outstanding amount due, conversion or cancellation that is effected by the exercise of the those powers by a resolution authority.
2. If an institution fails to include in the contractual provisions governing a relevant liability a term required in accordance paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.
3. The Commission may, by means of delegated acts adopted in accordance with Article 103, adopt measures to specify further the contents of the term required by paragraph 1 of this Article.

## **Chapter IV**

### **Write Down of Capital Instruments**

#### *Article 51*

##### *Requirement to write down capital instruments*

1. Member States shall require that before any resolution action is taken, resolution authorities exercise the write down power, in accordance with the provisions of

Article 52 and without delay, in relation to relevant capital instruments issued by an institution when one or more of the following circumstances apply:

- (a) the appropriate authority determines that the institution meets the conditions for resolution;
  - (b) the appropriate authority determines that unless that power is exercised in relation to the relevant capital instruments, the institution will no longer be viable;
  - (c) a decision has been made in a Member State to provide extraordinary public support to the institution or parent undertaking and the appropriate authority makes a determination that without the provision of such support the institution would no longer be viable;
  - (d) the relevant capital instruments are recognised for the purposes of meeting the own fund requirements on an individual and a consolidated basis, or on a consolidated basis, and the appropriate authority of the Member State of the consolidating supervisor makes a determination that unless the write down power is exercised in relation to those instruments, the consolidated group will no longer be viable.
2. Where an appropriate authority makes a determination referred to in paragraph 1, it shall immediately notify the resolution authority responsible for the institution in question, if different.
  3. Before making a determination referred to in point (d) of paragraph 1 of this article in relation to an institution that issues relevant capital instruments that are recognised for the purposes of meeting the own fund requirements on an individual and a consolidated basis, the appropriate authority shall comply with the notification and consultation requirements set out in Article 52.
  4. Resolution authorities shall comply with the requirement set out in paragraph 1 irrespective of whether they also apply a resolution tool or exercise any other resolution power in relation to that institution.

## *Article 52*

### *Provisions governing the write down of capital instruments*

1. When complying with the requirement set out in Article 51, resolution authorities shall exercise the write down power in a way that produces the following results:
  - (a) Common Equity Tier 1 instruments are written down first in proportion to the losses and up to their capacity;
  - (b) the principal amount of relevant capital instruments is reduced to zero;
  - (c) the reduction to zero of that principal amount is permanent;

- (d) no liability to the holder of the relevant capital instrument remains under or in connection with that instrument, except for any liability already accrued, and any liability for damages that may arise as a result of judicial review of the legality of the exercise of the write-down power;
- (e) no compensation is paid to any holder of the relevant capital instruments other than in accordance with paragraph 4.

Point (d) shall not prevent the provision of Common Equity Tier 1 instruments to a holder of relevant capital instruments in accordance with paragraph 2.

2. Resolution authorities may accompany the exercise of power referred to in Article 51(1) with the requirement for institutions to issue Common Equity Tier 1 instruments to the holders of the relevant capital instruments that are written down in accordance with paragraph 1 of this Article, provided that the following conditions are met:
  - (a) those Common Equity Tier 1 instruments are issued by the institution referred to in paragraph 1 or by a parent undertaking of the institution;
  - (b) those Common Equity Tier 1 instruments are issued prior to any issuance of shares or instruments of ownership by that institution for the purposes of provision of own funds by the State or a government entity;
  - (c) those Common Equity Tier 1 instruments are awarded and transferred without delay following the exercise of the write down power;
  - (d) the conversion rate that determines the number of Common Equity Tier 1 instruments that are provided in respect of each relevant capital instrument complies with the principles set out in Article 45 and any guidelines developed by EBA pursuant to Article 45(5).
3. For the purposes of the provision of Common Equity Tier 1 instruments in accordance with paragraph 2, resolution authorities may require institutions to maintain at all times the necessary prior authorisation to issue the relevant number of Common Equity Tier 1 instruments.
4. Where an institution meets the conditions for resolution and the resolution authority decides to apply a resolution tool to that institution, the resolution authority shall comply with the requirement set out in Article 51(1) before applying the resolution tool.
5. Member States shall require institutions to ensure that the exercise by resolution authorities of the write down power in compliance with Article 51(1) does not constitute an event of default or credit event under the relevant capital instruments.
6. In order to ensure consistent application of paragraph 5, EBA and ESMA shall jointly develop draft regulatory technical standards to specify the meaning of 'credit event' for the purposes of that paragraph.

EBA and ESMA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of entry into force of this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 and Articles 10 to 14 of Regulation (EU) No 1095/2010.

### *Article 53*

#### *Contractual write down or conversion of capital instruments*

Provided that those contractual terms take effect when the authority makes a determination referred to in Article 51(1), the requirement set out in Article 51(1) does not apply in relation to relevant capital instruments where the terms of those instruments satisfy the following conditions:

- (a) the contractual terms of the relevant capital instrument provide that the principal amount of the instrument will be reduced to zero, or that the instrument will convert into one or more Common Equity Tier 1 instruments, automatically when any appropriate authority makes a determination in accordance with Article 51(1);
- (b) the reduction of the principal amount of the relevant capital instrument or the conversion of the relevant capital instrument into one or more Common Equity Tier 1 instruments complies with the conditions set out in Article 52(1);
- (c) where the terms of the relevant capital instrument provides that the instrument will convert into one or more Common Equity Tier 1 instruments, the conversion rate is set out in those terms and complies with the principles set out in Article 45 and any guidelines developed by EBA pursuant to Article 45(5).

### *Article 54*

#### *Authorities responsible for determination*

1. Member States shall ensure that the authorities responsible for making the determinations referred to in Article 51(1) are those set out in this Article.
2. Where the relevant capital instruments are recognised for the purposes of meeting the own funds requirements on an individual basis in accordance with Article 52 of Directive 2006/48/EC, the authority responsible for making the determination referred to in Article 51(1) of this Directive shall be the competent authority or resolution authority of the Member State where the institution has been authorised in accordance with Title II of Directive 2006/48/EC.
3. Where relevant capital instruments are issued by an institution that is a subsidiary and are recognised for the purposes of meeting the own funds requirements on an individual and a consolidated basis, the authorities responsible for making the determinations referred to in Articles 53(1) shall be the following:
  - (a) the competent authority or resolution authority of the Member State where the institution that issued those instruments has been established in accordance

with Title II of Directive 2006/48/EC shall be responsible for making the determinations referred to in points (a), (b) or (c) of Article 51(1) of this Directive;

- (b) the competent authority or resolution authority of the Member State of the consolidating supervisor or the competent authority that performs the sub-consolidation shall be responsible for making the determination referred to in point (d) of Article 51(1).

## *Article 55*

### *Consolidated application: procedure for determination*

1. Member States shall ensure that, before making a determination referred to in point (a), (b), (c) or (d) of Article 51(1) in relation to an institution that issues relevant capital instruments that are recognised for the purposes of meeting the own fund requirements on an individual and a consolidated basis, appropriate authorities comply with the following requirements:
  - (a) an appropriate authority that is considering whether to make a determination referred to in points (a), (b) or (c) of Article 51(1) shall notify the consolidating supervisor without delay;
  - (b) an appropriate authority that is considering whether to make a determination referred to in points (a), (b), (c) or (d) of Article 51(1) shall without delay notify the competent authority responsible for each institution that has issued the relevant capital instruments in relation to which the write down power must be exercised if that determination were made.
2. An appropriate authority shall accompany a notification made pursuant to paragraph 1 with an explanation of the reasons why it is considering making the determination in question.
3. Where a notification has been made pursuant to paragraph 1, the appropriate authority, in consultation with the competent authorities notified, shall assess the following matters:
  - (a) whether an alternative measure to the exercise of the write down power in accordance with Article 51(1) is available;
  - (b) if such an alternative measure is available, whether it can feasibly be applied;
  - (c) if such an alternative measure could feasibly be applied, whether there is a realistic prospect that it would address, in an adequate timeframe, the circumstances that would otherwise require a determination referred to in Article 51(1) to be made.
4. For the purposes of paragraph 3 of this Article, alternative measures mean early intervention measures referred to in Article 23 of this Directive, measures referred to

in Article 136(1) of Directive 2006/48/EC or a transfer of funds or capital from the parent undertaking.

5. Where, pursuant to paragraph 3, the appropriate authority and the competent authorities assess that one or more alternative measures are available, can feasibly be applied and would deliver the outcome referred to in point (c) of that paragraph, they shall ensure that those measures are applied.
6. Where, pursuant to paragraph 3 of this article, the appropriate authority and the competent authorities assess that no alternative measures are available that would deliver the outcome referred to in point (c) of that paragraph, the appropriate authority shall decide whether the determination referred to in Article 51(1) under consideration is appropriate.
7. Resolution authorities shall comply promptly with the requirements of paragraphs 1 to 6, having proper regard to the urgency of the circumstances.

## **Chapter V**

### **Resolution Powers**

#### *Article 56*

##### *General powers*

1. Member States shall ensure that the resolution authorities have all the powers necessary to apply the resolution tools. In particular, the resolution authorities shall have the following resolution powers, which they shall be able to exercise singly or in conjunction:
  - (a) the power to require any person to provide any information necessary for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans;
  - (b) the power to take control of an institution under resolution and exercise all the rights conferred upon the shareholders or owners of the institution;
  - (c) the power to transfer shares and other instruments of ownership issued by an institution under resolution;
  - (d) the power to transfer debt instruments issued by an institution under resolution;
  - (e) the power to transfer to another person specified rights, assets or liabilities of an institution under resolution;
  - (f) the power to write down or convert the instruments referred to in Article 51 into shares or other instruments of ownership of the institution under resolution or of a relevant parent institution under resolution;

- (g) the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of eligible liabilities, of an institution under resolution;
- (h) the power to convert eligible liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution, a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution are transferred;
- (i) the power to cancel debt instruments issued by an institution under resolution;
- (j) the power to cancel shares or other instruments of ownership of an institution under resolution;
- (k) the power to require an institution under resolution to issue new shares, or other instruments of ownership, or other capital instruments, including preference shares and contingent convertible instruments;
- (l) the power to require the conversion of debt instruments which contain a contractual term for conversion in the circumstances provided for in Article 51;
- (m) the power to amend or alter the maturity of debt instruments issued by an institution under resolution or amend the amount of interest payable under such instruments, including by suspending payment for a temporary period;
- (n) the power to remove or replace the senior management of an institution under resolution.

2. Member States shall take all necessary measures to ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities are not subject to any of the following requirements that would otherwise apply by virtue of national law or contract or otherwise:

- (a) requirements to obtain approval or consent from any person either public or private, including the shareholders or creditors of the institution under resolution;
- (b) procedural requirements to notify any person.

In particular, Member States shall ensure that resolution authorities can exercise the powers under this Article irrespective of any restriction on, or requirement for consent for, transfer of the financial instruments, rights, assets or liabilities in question that might otherwise apply.

Point (b) of this paragraph is without prejudice to the requirements set out in Article 75 and any notification requirements under the Union State aid framework.

## Article 57

### *Powers ancillary to the transfer power*

1. Member States shall ensure that, when exercising a transfer power, resolution authorities have the power to do the following:
  - (a) provide for the relevant transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred;
  - (b) remove rights to acquire further shares or other instruments of ownership;
  - (c) discontinue the admission to trading on a regulated market as defined in Article 4(14) of Directive 2004/39/EC or the official listing of financial instruments pursuant to Directive 2001/34/EC;
  - (d) provide for the recipient to be treated as if it were the institution under resolution for the purposes of any obligations, contracts or arrangements made by, or actions taken by, the institution under resolution;
  - (e) require the institution under resolution or the recipient to provide the other with information and assistance;
  - (f) cancel or modify the terms of a contract to which the credit institution under resolution is a party or to substitute a transferee as a party;
  - (g) enforce contracts entered into by a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent undertaking, notwithstanding any contractual right to cause the termination, liquidation or acceleration of such contracts based solely on the insolvency or financial condition of the parent undertaking, if such guarantee or other support and all the related assets and liabilities have been transferred to and assumed by the recipient, or the resolution authority provides in any other way adequate protection for such obligations.
2. Resolution authorities shall exercise the powers specified in points (a) to (g) of paragraph 1 where it is considered by the authority to be appropriate to help to ensure that a resolution action is effective or to achieve one or more resolution objectives.
3. Member States shall ensure that, when exercising a transfer power or the power to write down debt, resolution authorities have the power to provide for continuity arrangements necessary to ensure that the resolution action is effective and the business transferred may be operated by the recipient. Such continuity arrangements shall include, in particular:
  - (a) the continuity of contracts entered into by the institution under resolution, so that the recipient assumes the rights and liabilities of the institution under resolution relating to any financial instrument, right, asset or liability that has been transferred and is substituted for the institution under resolution (whether expressly or impliedly) in all relevant contractual documents;

- (b) the substitution of the recipient for the institution under resolution in any legal proceedings relating to any financial instrument, right, asset or liability that has been transferred.
4. The powers in point (d) of paragraph 1 and point (b) of paragraph 3 shall not affect the following:
- (a) the right of an employee of the institution under resolution to terminate a contract of employment;
  - (b) any right of a party to a contract to exercise rights under the contract, including the right to terminate, where entitled to do so in accordance with the terms of the contract by virtue of an act or omission by the institution under resolution prior to the relevant transfer, or by recipient after the relevant transfer.
5. Where a resolution authority determines that the conditions for resolution are met, applies a resolution tool or exercises a resolution power, the resolution action shall in itself not make it possible for anyone to:
- (a) exercise any right or power to terminate, accelerate or declare a default or credit event under any contract or agreement to which the institution under resolution is a party;
  - (b) obtain possession or exercise control over any property of the institution under resolution;
  - (c) affect any contractual rights of the institution under resolution.

The first subparagraph does not affect the right of a person to take an action referred to in points (a), (b) and (c) of the first subparagraph where that right arises by virtue of an event of default or state of affairs that is not the resolution action or the result of the exercise of a resolution power under this Article.

## *Article 58*

### *Power to require the provision of services and facilities*

1. Member States shall ensure that resolution authorities have the power to require an institution under resolution, including where it is subject to normal insolvency proceedings, and any entity which is part of the same group as the institution to provide any services or facilities that are necessary to enable a recipient to operate effectively the business transferred to it.
2. Member States shall ensure that their resolution authorities have powers to enforce obligations imposed, pursuant to paragraph 1, on affiliated entities established in their territory by resolution authorities in other Member States.
3. The services and facilities referred to in paragraphs 1 and 2 are restricted to operational services and facilities and do not include any form of financial support.

4. The services and facilities provided in accordance with paragraphs 1 and 2 shall be on the following terms:
  - (a) where the services and facilities were provided to the institution under resolution immediately before the resolution action was taken, on the same terms;
  - (b) where point (a) does not apply, on commercial terms.
5. EBA shall develop draft regulatory technical standards to specify the services or facilities that are necessary to enable a recipient to operate effectively a business transferred to it.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of entry into force of this Directive.

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

#### *Article 59*

##### *Power to enforce resolution actions by other Member States*

1. Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State.
2. Member States shall provide the resolution authority that has made or intends to make the transfer with all reasonable assistance to ensure that the shares or other instruments of ownership or assets, rights or liabilities are transferred to the recipient in accordance with any applicable requirements of national law.
3. Member States shall ensure that creditors and third parties that are affected by the transfer of assets, rights or liabilities referred to in paragraph 1 are not entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the rights or liabilities.
4. Where a resolution authority of a Member State (Member State A) exercises the write-down or conversion powers, including in relation to capital instruments in accordance with Article 51, and the eligible liabilities or relevant capital instruments of the institution under resolution include the following:
  - (a) instruments or liabilities that are governed by the law of a Member State other than the State of the resolution authority that exercised the write down or conversion powers (Member State B);

- (b) liabilities owed to creditors located in Member State B.

Member State B shall ensure that the principal amount of those liabilities or instruments is reduced, or liabilities or instruments are converted, in accordance with the exercise of the write-down or conversion power by the resolution authority of Member State A.

- 5. Member States shall ensure that creditors that are affected by the exercise of write-down or conversion powers referred to in paragraph 4 are not entitled to challenge the reduction of the principal amount of the instrument or liability or its conversion, as the case may be, under any provision of law of Member State B.
- 6. Each Member State shall ensure that the following are determined in accordance with the law of the Member State of the resolution authority:
  - (a) the right for creditors and third parties to challenge by judicial review, pursuant to Article 78, a transfer of assets, rights or liabilities referred to in paragraph 1 of this article that are located in its territory or governed by the law of its territory;
  - (b) the right for creditors to challenge by judicial review, pursuant to Article 78, the reduction of the principal amount, or the conversion, of an instrument or liability covered by points (a) or (b) of paragraph 4 of this Article;
  - (c) the safeguards for partial transfers, as referred to in Chapter V, in relation to assets, rights or liabilities referred to in paragraph 1 that are located in its territory or governed by the law of its territory.

#### *Article 60*

##### *Power to request transfer of property located in third countries*

Member States shall provide that, in cases in which resolution action involves action taken in respect of property located in a third country or rights and liabilities under the law of a third country, resolution authorities may require that:

- (a) the administrator, receiver or other person exercising control of the institution under resolution and the recipient are required to take all necessary steps to ensure that the transfer becomes effective;
- (b) the administrator, receiver or other person exercising control of the institution under resolution is required to hold the assets or rights or discharge the liability on behalf of the recipient until the transfer becomes effective;
- (c) the expenses of recipient in carrying out any action required under points (a) and (b) are met from the assets of the institution under resolution.

## Article 61

### *Power to suspend certain obligations*

1. Member States shall ensure that resolution authorities have the power to suspend any payment or delivery obligations pursuant to any contract to which an institution is a party from the publication of a notice of the suspension in accordance with Article 75(7) until 5 pm on the business day following that publication.
2. Any suspension under paragraph 1 shall not apply to eligible deposits within the meaning of Directive 94/19/EC.

## Article 62

### *Power to restrict the enforcement of security interests*

1. Member States shall ensure that resolution authorities have the power to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution for a limited period that the authority determines necessary to achieve the resolution objectives.
2. Resolution authorities shall not exercise the power set out in paragraph 1 in relation to any security interest of a central counterparty over assets pledged by way of margin or collateral by the institution under resolution.
3. Where Article 72 applies, resolution authorities shall ensure that any restrictions imposed pursuant to the power set out in paragraph 1 are consistent for all affiliated entities in relation to which a resolution action is taken.
4. The Commission shall, by means of delegated acts adopted in accordance with Article 103, adopt measures specifying the time period for which a restriction on the enforcement of specified classes of security interest should apply.

## Article 63

### *Power to temporarily suspend termination rights*

1. Subject to Article 77, Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party under a financial contract with a failing institution that arise solely by reason of an action by the resolution authority, from the notification of the notice pursuant to Article 74 (5) and (6) until no later than 5 pm on the business day following that notification.  
  
For the purposes this paragraph, the relevant time is that in the home Member State of the institution under resolution.
2. Where a resolution authority exercises the power set out in paragraph 1 to suspend termination rights, it shall make all reasonable efforts to ensure that all margin,

collateral and settlement obligations of the failing institution that arise under financial contracts during the period of suspension are met.

3. A person may exercise a termination right under a financial contract before the end of the period referred to in paragraph 1 if that person receives notice from the resolution authority that the rights and liabilities covered by the netting arrangement shall not be transferred to another entity.
4. Where a resolution authority exercises the power specified in paragraph 1 to suspend termination rights, those rights may be exercised on the expiry of the period of suspension as follows:
  - (a) if the rights and liabilities covered by the financial contract have been transferred to another entity, or the bail-in tool has been applied to the institution under resolution for the purpose referred to in point (b) of Article 37(2):
    - (i) A person may not exercise termination rights as a result of the resolution action in any case covered by Article 77(1);
    - (ii) A person may exercise termination rights in accordance with the terms of that contract on the occurrence of any subsequent default by the recipient where the contract has been transferred to another entity, or by the institution where the bail-in tool has been applied;
  - (b) if the rights and liabilities covered by the financial contract remain with the institution under resolution, and the resolution authority is not applying the bail in tool in accordance with Article 37(2) (a) with regards to that institution, a person may immediately exercise termination rights in accordance with the terms of that contract.
5. Competent authorities or resolution authorities may require an institution to maintain detailed records of financial contracts when they consider that there is a material possibility that the institution meets the conditions for resolution.
6. For the purposes of paragraph 1, financial contracts shall include the following contracts and agreements:
  - (a) securities contracts, including:
    - (i) contracts for the purchase, sale or loan of a security, a group or index of securities,
    - (ii) an option on a security or group or index of securities,
    - (iii) a repurchase or reverse repurchase transaction on any such security, group or index;
  - (b) commodities contracts, including:
    - (i) contracts for the purchase or sale of a commodity for future delivery,

- (ii) an option on a commodity;
  - (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date,
  - (d) repurchase agreements relating to securities;
  - (e) swap agreements, including:
    - (i) swaps, options, futures or forward agreements relating to interest rates; spot or other foreign exchange, precious metals or commodity agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation,
    - (ii) total return, credit spread or credit swaps,
    - (iii) any agreement or transaction that is similar to an agreement referred to in points (i) or (ii) of this point which is the subject of recurrent dealing in the swaps or derivatives markets;
  - (f) master agreements for any of the contracts or agreements referred to in points (a) to (e).
7. EBA shall develop draft regulatory technical standards specifying the following elements for the purposes of paragraph 6:
- (a) the information on financial contracts that should be contained in the detailed records;
  - (b) the circumstances in which the requirement should be imposed.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### *Article 64*

##### *Exercise of the resolution powers*

1. Member States shall ensure that, in order to take a resolution action, resolution authorities are able to exercise control over the institution under resolution, so as to:
  - (a) operate the institution under resolution with all the powers of the members or shareholders, directors and officers of institution and conduct its activities and services;

- (b) manage and dispose of the assets and property of the institution under resolution.

The control provided for in the first subparagraph may be exercised directly by the resolution authority or indirectly by a person appointed by the authority, including an administrator or a special administrator.

2. Member States shall also ensure that resolution authorities are able to take a resolution action through executive order in accordance with national administrative competences and procedures, without exercising control over the institution.
3. Resolution authorities shall decide in each particular case whether it is appropriate to carry out the resolution action through the means specified in paragraph 1 or in paragraph 2, having regard to the resolution objectives and the general principles governing resolution, the specific circumstances of the institution in question and the need to facilitate the effective resolution of cross border groups.

## **Chapter VI**

### **Safeguards**

#### *Article 65*

#### *Treatment of shareholders and creditors in case of partial transfers and application of the bail-in tool*

1. After the resolution tools have been applied and, in particular for the purposes of Article 67, Member States shall ensure that:
  - (a) where resolution authorities transfer only parts of the rights, assets and liabilities of the institution, the shareholders and the creditors whose claims have not been transferred, receive in payment of their claims at least as much as what they would have received if the institution had been wound up under normal insolvency proceedings immediately before the transfer,
  - (b) where resolution authorities apply the bail-in tool, the shareholders and creditors whose claims have been written down or converted to equity receive in payment of their claims at least as much as what they would have received if the institution had been wound up under normal insolvency proceedings immediately before the writing down or conversion.

## *Article 66*

### *Valuation*

For the purposes of Article 65, Member States shall ensure that a valuation is carried out by an independent person after the partial transfers or write down or conversion has been effected. That valuation shall be distinct from the valuation carried out under Article 30 unless it replaces a provisional valuation carried out under Article 30(5). The valuation may be carried out by the authority responsible for the normal insolvency proceedings under which the institution is wound up, within those proceedings or through separate proceedings in accordance with national law.

2. The valuation shall determine:
  - (a) the treatment that shareholders and creditors would have received if the institution in connection to which the partial transfer, write down or conversion has been made, had entered normal insolvency proceedings immediately before the transfer, write down or conversion was effected;
  - (b) the actual treatment that shareholders and creditors have received, are receiving or are likely to receive in the winding up of the institution;
  - (c) if there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).
3. The valuation shall be in accordance with the provisions and the methodology laid down in Article 30(1) to (5), and shall:
  - (a) assume that the institution in connection to which the partial transfer, write down or conversion has been made would have entered normal insolvency proceedings immediately after the transfer, write down or conversion has been effected;
  - (b) assume that the partial transfer, or transfers, of rights, assets or liabilities, or the write down or the conversion had not been made;
  - (c) disregard any provision of extraordinary public support to the institution.

## *Article 67*

### *Safeguard for shareholders and creditors*

1. Member States shall ensure that if the evaluation carried out under Article 66 determines that the shareholders and creditors referred to in Article 65(2) have received less, in payment of their credits, than what they would have received in a winding up under normal insolvency proceedings, they are entitled to the payment of the difference from the resolution authority.
2. Member States may choose the mechanisms and arrangements through which the payment is to be made.

## Article 68

### *Safeguard for counterparties in partial transfers*

1. Member States shall ensure that the protections specified in this Chapter apply in the following circumstances:
  - (a) a resolution authority transfers some but not all of the property, rights or liabilities of an institution to another entity or from a bridge institution or asset management vehicle to another person;
  - (b) a resolution authority exercises the powers specified in point (f) of Article 57(1).
  
2. Member States shall ensure appropriate protection of the following arrangements and of the counterparties to the following arrangements:
  - (a) security arrangements, under which a person has by way of security an actual or contingent interest in the property or rights that are subject to transfer, irrespective of whether that interest is secured by specific property or rights or by way of a floating charge or similar arrangement;
  - (b) title transfer financial collateral arrangements under which collateral to secure or cover the performance of specified obligations is provided by a transfer of full ownership of assets from the collateral provider to the collateral taker, on terms providing for the collateral taker to transfer assets if those specified obligations are performed;
  - (c) set-off arrangements under which two or more claims or obligations owed between the bank and a counterparty can be set off against each other;
  - (d) netting arrangements under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim;
  - (e) structured finance arrangements, including securitisations and covered bonds, which involve the granting and holding of security by a party to the arrangement or a trustee, agent or nominee.

The form of protection that is appropriate, for the classes of arrangements specified in points (a) to (e) of this paragraph is further specified in Articles 70 to 73, and shall be subject to the restrictions specified in Articles 61, 62 and 77.
  
3. The requirement under paragraph 2 applies irrespective of the number of parties involved in the arrangements and of whether the arrangements:
  - (a) are created by contract, trusts or other means, or arise automatically by operation of law;

- (b) arise under or are governed in whole or in part by the law of another jurisdiction.
4. The Commission shall, by means of delegated acts adopted in accordance with Article 103, adopt measures further specifying the classes of arrangement that fall within the scope of points (a) to (e) of paragraph 2 of this Article.

#### *Article 69*

##### *Protection for financial collateral, set off and netting agreements*

Member States shall ensure that there is appropriate protection for title transfer financial collateral arrangements and set-off and netting arrangements so as to prevent the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution and another person and the modification or termination of rights and liabilities that are protected under such a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement through the use of ancillary powers.

For the purposes of the first subparagraph, rights and liabilities are to be treated as protected under such an arrangement if the parties to the arrangement are entitled to set-off or net those rights and liabilities.

#### *Article 70*

##### *Protection for security arrangements*

Member States shall ensure that there is appropriate protection for liabilities secured under a security arrangement so as to prevent one of the following:

- (a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;
- (b) the transfer of a secured liability unless the benefit of the security are also transferred;
- (c) the transfer of the benefit unless the secured liability is also transferred;
- (d) the modification or termination a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

## Article 71

### *Protection for structured finance arrangements*

1. Member States shall ensure that there is appropriate protection for structured finance arrangements so as to prevent either of the following:
  - (a) the transfer of some, but not all, of the property, rights and liabilities which constitute or form part of a structured finance arrangement to which the credit institution under resolution is a party;
  - (b) the termination or modification through the use of ancillary powers of the property, rights and liabilities which constitute or form part of a structured finance arrangement to which the institution under resolution is a party.
2. The protections specified in paragraph 1 shall not apply where only property, rights and liabilities that relate to deposits are transferred or not transferred, terminated or modified.

## Article 72

### *Partial transfers: protection of trading, clearing and settlement systems*

1. Member States shall ensure that transfer, cancellation or modification shall not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where resolution authority:
  - (a) transfers some but not all of the property, rights or liabilities of an institution to another entity;
  - (b) uses powers under Article 57 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party.
2. In particular, such a transfer, cancellation or amendment may not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and may not modify or negate the enforceability of transfer orders and netting as required by Articles 3 and 5 of Directive 98/26/EC, the use of funds, securities or credit facilities as required by Article 4 of Directive 98/26/EC or protection of collateral security as required by Article 9 of Directive 98/26/EC.

## Article 73

### *Property, rights and liabilities governed by the law of a territory outside the Union*

Where a resolution authority purports to transfer or transfers all of the property, rights and liabilities of an institution to another entity, but the transfer is or may not be effective in relation to certain property because it is outside the Union, or to certain rights or liabilities

because they are under the law of a territory outside the Union, the resolution authority shall not proceed to the transfer or, if it has already ordered the transfer, that transfer shall be void, and all property, rights and liabilities covered by the relevant arrangement specified in Article 69(2) are not transferred from, or revert to, the institution under resolution.

## Chapter VII

### Procedural Obligations

#### *Article 74*

##### *Notification requirements*

1. Member States shall require the management body of an institution to notify the competent authority where they consider that the institution is failing or likely to fail, within the meaning specified in Article 27(2).
2. Competent authorities shall inform the relevant resolution authorities of any measures they require an institution to take under Article 22 of this Directive or Article 136(1) of Directive 2006/48/EC.
3. Where a competent authority assesses that the conditions referred to in points (a) and (b) of Article 27(1) are met in relation to an institution, it shall communicate that assessment without delay to the following authorities:
  - (a) the resolution authority for that institution, if different;
  - (b) the central bank, if different;
  - (c) where applicable, the group level resolution authority;
  - (d) competent ministries;
  - (e) where the institution is subject to supervision on consolidated basis under section 1 of Chapter 4, Title V of Directive 2006/48/EC, the consolidating supervisor.
4. On receiving a communication from the competent authority pursuant to paragraph 3 of this Article, the resolution authority shall assess whether the conditions established in Article 27 are met in respect of the institution in question.
5. A decision that the conditions for resolution are met in relation to an institution shall be set out in a notice, which shall contain the following information:
  - (a) the reasons for that decision;
  - (b) the action that the resolution authority intends to take.

The action referred to in point (b) may include a resolution action, or an application for winding up, the appointment of an administrator or any other measure under applicable national insolvency law.

The authority or authorities responsible for that decision shall notify the institution in question. A notification pursuant to this paragraph may take the form of the public notification referred to in paragraph 6.

6. Where the resolution authority takes a resolution action, it shall make that action public and shall take reasonable steps to notify all known shareholders and creditors, in particular retail investors, affected by the exercise of the resolution power. The measures specified in Article 75(4) shall be deemed reasonable steps for the purposes of this paragraph.
7. A resolution authority shall publish a notice specifying the terms and period of that suspension in accordance with the procedure specified in Article 75(4) where it exercises resolution powers, and in particular:
  - (a) the power under Article 61 to suspend payment or delivery obligations;
  - (b) the power under Articles 63 to suspend termination rights.
8. EBA shall develop draft regulatory technical standards in order to specify the procedures, contents and conditions related to the following requirements:
  - (a) the notifications referred to in paragraphs 1 to 5,
  - (b) the notice of a suspension referred to in paragraph 7.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of 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 the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.

## *Article 75*

### *Procedural obligations of resolution authorities*

1. Member States shall ensure that, as soon as reasonably practicable after taking a resolution action, resolution authorities comply with the requirements set out in paragraphs 2, 3 and 4.
2. The resolution authority shall notify the institution under resolution and EBA of the resolution action.

A notification according to this paragraph shall include a copy of any order or instrument by which the relevant powers are exercised and shall indicate the date from which the resolution actions are effective.

3. The notification referred to in paragraph 2 shall include a copy of any order or instrument by which the relevant powers are exercised and indicate the date from which the tool is or powers are effective.
4. The resolution authority shall publish or ensure the publication of either a copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action, and in particular the effects on retail investors, by the following means:
  - (a) on its official website;
  - (b) on the website of the competent authority, if different from the resolution authority, or on the website of EBA;
  - (c) on the website of the institution under resolution;
  - (d) where the shares or other instruments of ownership of the institution under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning that institution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council.<sup>39</sup>
5. The resolution authority shall ensure that the documents providing proof of the instruments referred to in paragraph 4 are sent to the known shareholders and creditors of the institution under resolution.

#### *Article 76*

#### *Confidentiality*

1. The requirements of professional secrecy shall be binding in respect of the following persons:
  - (a) resolution authorities;
  - (b) competent authorities and EBA;
  - (c) competent ministries;
  - (d) employees or former employees of the authorities referred to in points (a) and (b);
  - (e) special managers appointed under Article 24;
  - (f) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;

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<sup>39</sup> OJ L 390, 31.12.2004, p. 38.

- (g) auditors, accountants, legal and professional advisors, valuers and other experts engaged by the resolution authorities or by the potential acquirers referred to in point (f);
  - (h) bodies which administer the deposit guarantee schemes;
  - (i) central banks and other authorities involved in the resolution process;
  - (j) any other persons who provide or have provided services to the resolution authorities.
2. Without prejudice to the generality of the requirements under paragraph 1, the persons referred to in that paragraph shall be prohibited from divulging confidential information received during the course of their professional activities, or from a resolution authority in connection with its functions, to any person or authority unless it is in summary or collective form such that individual institutions cannot be identified or with the express and prior consent of the resolution authority.
  3. The confidentiality requirements set out in paragraphs 1 and 2 of this Article shall not prevent resolution authorities, including their employees, from sharing information with other Union resolution authorities, competent authorities, central banks, EBA, or, subject to Article 90, third country authorities that carry out equivalent functions to resolution authorities for the purposes of planning or carrying out a resolution action.
  4. The provisions of this Article are without prejudice to cases covered by criminal law.
  5. EBA shall develop draft implementing technical standards to specify how information should be provided in summary or collective form for the purposes of paragraph 2.

EBA shall submit those draft implementing technical standards to the Commission within twelve months from the date of entry into force of this Directive.

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first sub-paragraph of this paragraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

## **Chapter VIII**

### **Right of Appeal and Exclusion of Other Actions**

#### *Article 77*

##### *Exclusion of termination and set-off rights in resolution*

1. Member States shall ensure that counterparties under a financial contract as defined in Article 63 entered into originally with the institution under resolution cannot

exercise termination rights under that contract or rights under a walk-away clause unless the resolution action is the sale of business tool or the bridge institution tool and the rights and liabilities covered by the financial contract are not transferred to a third party or bridge institution, as the case may be.

For the purposes of this paragraph, a walk-away clause includes a provision in a financial contract that suspends, modifies or extinguishes an obligation of the non-defaulting party to make a payment, or prevents such an obligation from arising that would otherwise arise.

2. Member States shall ensure that creditors of the institution under resolution are not entitled to exercise statutory rights to set-off unless the resolution action is the sale of business tool or the bridge institution tool and the rights and liabilities covered by the financial contract are not transferred to a third party or bridge institution, as the case may be.

## *Article 78*

### *Rights to challenge resolution*

1. Member States shall ensure that all persons affected by the decision to open resolution proceedings provided in Article 74(5) or by a decision of the resolution authorities to take a resolution action, have the right to apply for a judicial review of that decision.
2. The right to judicial review required by paragraph 1 shall be subject to the following restrictions:
  - (a) the lodging of the application for judicial review or for any interim measure shall not entail any automatic suspension of the effects of the challenged decision;
  - (b) the decision of the resolution authority shall be immediately enforceable and shall not be subject to a suspension order issued by a court;
  - (c) the review shall be restricted to one or more of the following matters:
    - to the legality of the decision referred to in paragraph 1, including a review of whether the conditions for resolution were met,
    - the legality of the way in which that decision was implemented, and
    - the adequacy of any compensation granted;
  - (d) The annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision of the resolution authority where this is necessary to protect the interest of third parties acting in good faith having bought assets, rights and liabilities of the

institution under resolution by virtue of the exercise of the resolution powers by the resolution authorities. Remedies for a wrongful decision or action by the resolution authorities shall be limited to compensation for the loss suffered by the applicant as a result of the decision or act.

#### *Article 79*

##### *Restrictions on other judicial proceedings*

1. Member States shall ensure that normal insolvency proceedings under national law may not be commenced with respect to an institution under resolution or an institution in relation to which the conditions for resolution have been determined to be met.
2. For the purposes of paragraph 1, Member States shall ensure that:
  - (a) competent authorities and resolution authorities are notified of any application for the opening of normal insolvency proceedings in relation to an institution, irrespective of whether the institution is under resolution or a decision has been made public in accordance with Article 74(6);
  - (b) the application may not be determined unless the court has received confirmation that the notifications referred to in point (a) have been made and either of the following occur:
    - (i) the resolution authority has notified the court that it does not intend to take any resolution action in relation to the institution;
    - (ii) a period of 14 days beginning with the date on which the notifications referred to in point (a) were made has expired.
3. Without prejudice to any restriction on the enforcement of security interests imposed pursuant to Article 63 or to paragraph 1 of this Article, Member States shall ensure that, if necessary for the effective application of the resolution tools and powers, resolution authorities can request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party.

## TITLE V

### GROUP RESOLUTION

#### *Article 80*

##### *Resolution colleges*

1. Group level resolution authorities shall establish resolution colleges to carry out the tasks referred to in Articles 11, 15 and 83, and, where appropriate, to ensure cooperation and coordination with third countries resolution authorities.

In particular, resolution colleges shall provide a framework for the group level resolution authority, the other resolution authorities and, where appropriate, competent authorities and consolidating supervisors concerned to perform the following tasks:

- (a) exchanging information relevant for the development of group resolution plans, for the application to groups of preparatory and preventative powers and for group resolution;
  - (b) developing group resolution plans pursuant to Article 11;
  - (c) assessing the resolvability of groups pursuant to Article 13;
  - (d) exercising powers to address or remove impediments to the resolvability of groups pursuant to Article 15;
  - (e) deciding on the need to establish a group resolution scheme as provided for in Article 83;
  - (f) securing the agreement on group resolution schemes proposed in accordance with Article 83;
  - (g) coordinating public communication of group resolution strategies and schemes;
  - (h) coordinating the use of financing arrangements established under Title VII.
2. The group level resolution authority, the resolution authorities of each Member State in which a subsidiary covered by consolidated supervision is established and EBA shall be members of the resolution college.

Where the parent undertaking of one or more institutions is a company referred to in Article 1(d), the resolution authority of the Member State where that company is established shall be member of the resolution college.

Where the resolution authorities which are members of the resolution college are not the competent ministries, the competent ministries shall be members, in addition to the resolution authorities, of the resolution colleges and may attend meetings of the

resolution colleges, in particular, where the issues to be discussed concern matters which may have implications for public funds.

Where a parent undertaking or an institution established in the Union has subsidiary institutions situated in third countries, the resolution authorities of those third countries may also be invited to participate, as observers, in the resolution college, on request of the group level resolution authority, provided that they are subject to confidentiality requirements equivalent to those established by Article 76.

3. The public bodies participating in the colleges shall cooperate closely. The group level resolution authority shall coordinate all activities of resolution colleges and convene and chair all its meetings. The group level resolution authority shall keep all members of the college and EBA fully informed in advance of the organisation of such meetings, of the main issues to be discussed and of the activities to be considered. The group level resolution authority shall decide which authorities and ministries should participate in particular meetings or activities of the college, on the basis of the specific needs. The group level resolution authority shall also keep all the members of the college informed in a timely manner, of the actions and decisions taken in those meetings or the measures carried out.

The decision of the group level resolution authority shall take account of the relevance of the issue to be discussed, the activity to be planned or coordinated and the decisions to be taken for those resolution authorities, in particular the potential impact on the stability of the financial system in the Member States concerned.

4. EBA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of resolution colleges. To that end, EBA may participate in particular meetings or particular activities as it deems appropriate, but it shall not have voting rights.
5. The group level resolution authority, after consulting the other resolution authorities, shall establish written arrangements and procedures for the functioning of the resolution college.
6. Notwithstanding paragraph 2, for the purposes of performing the tasks referred to in point (e) of the second subparagraph of paragraph 1 the resolution authority or authorities of each Member State in which a subsidiary is established shall participate at the meetings or activities of the resolution college.
7. Notwithstanding paragraph 2, for the purposes of performing the tasks referred to in points (f) and (h) of the second subparagraph of paragraph 1 the resolution authority or authorities of each Member State in which a subsidiary that meets the conditions for resolution shall participate at the meetings or activities of the resolution colleges.
8. Group level resolution authorities may not establish resolution colleges if other groups or colleges perform the same functions and carry out the same tasks specified in this Article and comply with all the conditions and procedures established in this Section. In this case all references to resolution colleges in this Directive shall also be understood as reference to those other groups or colleges.

9. EBA shall develop draft regulatory standards in order to specify the operational functioning of the resolution colleges for the performance of the tasks provided for in paragraphs 1, 3, 5, 6 and 7.

EBA shall submit those draft regulatory technical standards to the Commission within twelve months from the date of entry into force of this Directive.

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

## *Article 81*

### *European resolution colleges*

1. Where a third country institution or third country parent undertaking has two or more subsidiary institutions established in the Union, the resolution authorities of Member States where those domestic subsidiary institutions in the Union are established shall establish a European resolution college if no arrangements as the ones foreseen in Article 89 have been established.
2. The European resolution college shall perform the functions and carry out the tasks specified in Article 80 with respect to the domestic subsidiary institutions.
3. Where the domestic subsidiaries are held by a financial holding company established within the Union in accordance with the third subparagraph of Article 143(3) of Directive 2006/48/EC, the European resolution college shall be chaired by the resolution authority of the Member State where the consolidating supervisor is located for the purposes of consolidated supervision under that Directive.

Where the first sub-paragraph does not apply, the members of the European resolution college shall nominate and agree the chair.

4. Subject to paragraph 3 of this Article, the European resolution college shall otherwise function in accordance with Article 81.

## *Article 82*

### *Information exchange*

The resolution authorities shall provide one another with all the information relevant for the exercise of the other authorities' tasks under this Directive.

The resolution authorities shall communicate on request all relevant information. In particular, the group level resolution authority shall provide the resolution authorities in other Member States with all the relevant information in a timely manner in view of facilitating the exercise of the tasks referred to in points (b) to (h) of the second subparagraph of Article 80(1).

Information shared pursuant to this Article may also be shared with competent ministries.

## Article 83

### *Group resolution*

1. Where a resolution authority decides, or is notified pursuant to Article 74(3), that an institution that is a subsidiary in a group is failing or likely to fail, that authority shall notify the following information without delay to the group level resolution authority, if different, and to the resolution authorities that are members of the resolution college for the group in question:
  - (a) the decision that the institution is failing or likely to fail;
  - (b) the resolution actions or other insolvency measures that the resolution authority considers appropriate for that institution.
2. On receiving a notification under paragraph 1, the group level resolution authority, in consultation with the other members of the relevant resolution college, shall assess the likely impact of the failure of the institution in question, or the resolution action or other measures notified in accordance with point (b) of paragraph 1, on the group or on affiliated institutions in other Member States.
3. If the group level resolution authority, after consultation with the other resolution authorities in accordance with paragraph 2, assesses that the failure of the institution in question, or the resolution action or other measures notified in accordance with point (b) of paragraph 1, would not have a detrimental impact on the group or on affiliated institutions in other Member States, the resolution authority responsible for that institution may take the resolution action or other measures that it notified in accordance in accordance with point (b) of paragraph 1.
4. If the group level resolution authority, after consultation with the other resolution authorities in accordance with paragraph 2, assesses that the failure of the institution in question, or the resolution action or other measures notified in accordance with point (b) of paragraph 1, would have a detrimental impact on the group or on affiliated institutions in other Member States, the group level resolution authority shall, no later than 24 hours after receiving the notification under paragraph 1, propose a group resolution scheme and submit it to the resolution college.
5. A group resolution scheme required under paragraph 4 shall:
  - (a) outline the resolution actions that should be taken by the relevant resolution authorities in relation to the Union parent undertaking or particular group entities with the objective of preserving the value of the group as a whole, minimising the impact on financial stability in the Member States in which the group operates and minimising the use of extraordinary public financial support;
  - (b) specify how those resolution actions should be coordinated;
  - (c) establish a financing plan. The financing plan shall take into account the principles for sharing responsibility as established in accordance with point (e) of Article 11(3).

6. If any member of the resolution college disagrees with the group resolution scheme proposed by the group level resolution authority and considers that it needs to take independent resolution actions or measures other than those proposed in the scheme in relation to an institution or group entity for reasons of financial stability, it may refer within 24 hours the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010.
7. By way of derogation from Article 19 (2) of Regulation (EU) No 1093/2010, EBA shall take a decision within 24 hours. The subsequent action or measure of the resolution authority shall be in conformity with the decision of EBA.
8. Where a group level resolution authority decides, or is notified pursuant to Article 74(3), that a Union parent undertaking for which it is responsible is failing or likely to fail, it shall notify the information referred to in points (a) and (b) of paragraph 1 of this article to resolution authorities that are members of the resolution college of the group in question. The resolution actions for the purposes of point (b) of paragraph 1 of this Article may include a group resolution scheme drawn up in accordance with paragraph 5 of this Article.
9. Authorities shall perform all actions under paragraphs 2 to 8 without delay, and with due regard to the urgency of the situation.
10. In any case where a group resolution scheme is not implemented and resolution authorities take resolution actions in relation to affiliated institutions, those authorities shall cooperate closely within the resolution colleges with a view to achieving a coordinated resolution strategy for all the institutions that are failing or likely to fail.
11. Resolution authorities that take any resolution action in relation to group entities shall inform the resolution college regularly and fully about those actions or measures and their on-going progress.

## **TITLE VI**

### **RELATIONS WITH THIRD COUNTRIES**

#### *Article 84*

##### *Agreements with third countries*

1. The Commission may submit proposals to the Council, either at the request of a Member State or on its own initiative, for the negotiation of agreements with one or more third countries regarding the means of cooperation between resolution authorities in the resolution planning and process of institutions and parent undertakings, in particular with regard to the following situations:
  - (a) in cases where a domestic subsidiary institution is established in the Member States;

- (b) in cases where a third country institution operates a significant branch in the Member States;
  - (c) in cases where a parent institution and, or a company referred to in points (c) and (d) of Article 1 established in the Member States has one or more third country subsidiary institutions;
  - (d) in cases where an institution established in the Member States has one or more significant branches in one or more third countries.
2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure the establishment of processes and arrangements between resolution authorities for cooperation in carrying out some or all of the tasks and exercising some or all of the powers indicated in Article 89.

## *Article 85*

### *Recognition of third country resolution proceedings*

1. Until an international agreement provided for under Article 84 with a third country is concluded and to the extent that the subject matter is not governed by that agreement the following provisions shall apply.
2. EBA shall recognise, except as provided for in Article 86, third country resolution proceedings relating to a third country institution that:
  - (a) has a domestic branch;
  - (b) otherwise has assets, rights or liabilities located in or governed by the law of a Member State.
3. The recognition by EBA of third country resolution proceedings as referred in paragraph 2 shall imply the obligation for national resolution authorities to give effect to such resolution proceedings in their territory.
4. The implementation of EBA's decision to recognise third country resolution proceedings shall be effected by the resolution authorities. For this purpose, Member States shall ensure that resolution authorities are, as a minimum, empowered to do the following, without the appointment of an administrator or of any official under national insolvency law, an order, approval or consent from the court, or any other form of judicial procedure:
  - (a) exercise the transfer powers in relation to the following:
    - assets of a third country institution that are located in their Member State or governed by the law of their Member State;
    - rights or liabilities of a third country institution that are booked by the domestic branch in their Member State or governed by the law of their Member State, or where claims in relation to such rights and liabilities are enforceable in their Member State.

- (b) perfect, including to require another person to take action to perfect, a transfer of shares or instruments of ownership in a domestic subsidiary institution established in the designating Member State.

## *Article 86*

### *Right to refuse recognition of third country resolution proceedings*

1. EBA shall refuse, after consulting the national resolution authorities concerned, to recognise pursuant to Article 85(2) third country resolution proceedings if it considers :
  - (a) that the third country resolution proceeding would have an adverse effect on financial stability in the Member State in which the resolution authority is based or considers that the proceeding may have an adverse effect on the financial stability of another Member State;
  - (b) that independent resolution action under Article 87 in relation to a domestic branch is necessary to achieve one or more of the resolution objectives;
  - (c) that creditors, including in particular depositors located or payable in a Member State, would not receive equal treatment with third country creditors under the third country resolution proceedings.
2. The Commission shall, by means of delegated acts adopted in accordance to Article 103, shall specify the circumstances referred to in points (a) and (b) of paragraph 1 of this Article.

## *Article 87*

### *Resolution of Union branches of third country institutions*

1. Member States shall ensure that resolution authorities have the powers necessary to take a resolution action in relation to a domestic branch that is independent of any third country resolution procedure in relation to the third country institution in question.
2. Member States shall ensure that the powers required in paragraph 1 may be exercised by resolution authorities where the resolution authority considers that resolution action is necessary in the public interest and one or more of the following conditions is met:
  - (a) the branch no longer meets, or is likely not to meet, the conditions imposed by national law for its authorisation and operation within that Member State and there is no prospect that any private sector, supervisory or relevant third country action would restore the branch to compliance or prevent failure in reasonable timeframe;

- (b) the third country institution is unable, or is unlikely to be unable, to pay its obligations to domestic creditors, or obligations that have been created or booked through the branch, as they fall due and the resolution authority is satisfied that no third country resolution proceeding or insolvency proceeding has been or will be initiated in relation to that institution;
  - (c) the relevant third country authority has initiated a resolution proceeding in relation to the third country institution, or has notified to the resolution authority its intention to initiate such a proceeding, and one of the circumstances specified in Article 86 applies.
3. Where a resolution authority takes an independent resolution action in relation to a domestic branch, it shall have regard to the resolution objectives and take the resolution action in accordance with the following principles and requirements, insofar as they are relevant:
- (a) the principles set out in Article 29;
  - (b) the requirements relating to the application of the resolution tools in Chapter II of Title IV.

## *Article 88*

### *Cooperation with third country authorities*

1. Until an international agreement provided for under Article 84 with third countries is concluded and to the extent that the subject matter is not governed by that agreement the following provisions shall apply.
2. EBA shall conclude non-binding framework cooperation arrangements with the following relevant third country authorities:
  - (a) in cases where a domestic subsidiary institution is established in the Union, the relevant authorities of the third country where the parent undertaking or a company referred to in points (c) and (d) of Article 1 are established;
  - (b) in cases where a third country institution operates a significant branch in the Union, the relevant authority of the third country where that institution is established;
  - (c) in cases where a parent institution and, or a company referred to in points (c) and (d) of Article 1 established in the Union has one or more third country subsidiary institutions, the relevant authorities of the third countries where those subsidiary institutions are established;
  - (d) in cases where an institution established in the Union has one or more significant branches in one or more third countries, the relevant authorities of the third countries where those branches are established.

Cooperation arrangements under this paragraph may relate to single institutions or to groups that include institutions.

3. The framework cooperation agreements referred to in paragraph 1 shall establish processes and arrangements between the participating authorities for cooperation in carrying out some or all of the following tasks and exercising some or all of the following powers in relation to institutions referred to in points (a) to (d) of paragraph 1 or groups including such institutions:
  - (a) the development of resolution plans in accordance with Articles 9 and 12 and similar requirements under the law of the relevant third countries;
  - (b) the assessment of the resolvability of such institutions and groups, in accordance with Article 13 and similar requirements under the law of the relevant third countries;
  - (c) the application of powers to address or remove impediments to resolvability pursuant to Articles 14 and 15 and any similar powers under the law of the relevant third countries;
  - (d) the application of early intervention measures pursuant to Article 23 and similar powers under the law of the relevant third countries;
  - (e) the application of resolution tools and exercise of resolution powers and similar powers exercisable by the relevant third country authorities.
4. Competent authorities or resolution authorities, where appropriate, shall conclude non-binding cooperation arrangements in line with EBA framework arrangement with the relevant third country authorities indicated in paragraph 2.
5. Cooperation arrangements concluded between resolution authorities of Member States and third countries in accordance with this paragraph shall include provisions on the following matters:
  - (a) the exchange of information necessary for the preparation and maintenance of resolution plans;
  - (b) consultation and cooperation in the development of resolution plans, including principles for the exercise of powers under Articles 87 and 88 and similar powers under the law of the relevant third countries;
  - (c) the exchange of information necessary for the application of resolution tools and exercise of resolution powers and similar powers under the law of the relevant third countries;
  - (d) early warning to or consultation of parties to the cooperation arrangement before taking any significant action under this Directive or relevant third country law affecting the institution or group to which the arrangement relates;
  - (e) the coordination of public communication in case of joint resolution actions;

- (f) procedures and arrangements for the exchange of information and cooperation under points (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.
6. Member States shall notify to EBA any cooperation arrangements that resolution authorities and competent authorities have concluded in accordance with this article.

#### *Article 89*

#### *Confidentiality*

1. Member States shall ensure that resolution authorities, competent authorities and competent ministries exchange confidential information with relevant third country authorities only if the following conditions are met:
- (a) those third country authorities are subject to requirements and standards of professional secrecy at least equivalent to those imposed by Article 76;
  - (b) the information is necessary for the performance by the relevant third country authorities of their functions under national law that are comparable to those under this Directive.
2. Where confidential information originates in another Member State, resolution authorities or competent authorities may not disclose that information to relevant third country authorities unless the following conditions are met:
- (a) the relevant authority of the Member State where the information originated (the originating authority) agrees to that disclosure;
  - (b) the information is disclosed only for the purposes permitted by the originating authority.
3. For the purposes of this Article, information is deemed confidential if it is subject to confidentiality requirements under Union law.

### **TITLE VII**

## **EUROPEAN SYSTEM OF FINANCING ARRANGEMENTS**

#### *Article 90*

#### *European System of Financing Arrangements*

The European System of Financing Arrangements shall consist of:

- (a) national financing arrangements established in accordance with Article 91;

- (b) the borrowing between national financing arrangements as specified in Article 97,
- (c) the mutualisation of national financing arrangements in the case of a group resolution as referred to in Article 98.

### *Article 91*

#### *Requirement to establish resolution financing arrangements*

1. Member States shall establish financing arrangements for the purpose of ensuring the effective application by the resolution authority of the resolution tools and powers. The financing arrangements shall be used only in accordance with the resolution objectives and the principles set out in Articles 26 and 29.
2. Member States shall ensure that the financing arrangements have adequate financial resources.
3. For the purpose provided for in paragraph 2, financing arrangements shall in particular have:
  - (a) the power to raise ex ante contributions as specified in Article 94 with a view to reaching the target level specified in Article 93;
  - (b) the power to raise ex post extraordinary contributions as specified in Article 95, and
  - (c) the power to contract borrowings and other forms of support as specified in Article 96.

### *Article 92*

#### *Use of the resolution financing arrangements*

1. The financing arrangements established in accordance with Article 91 may be used by the resolution authority when applying the resolution tools, for the following purposes:
  - (a) to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;
  - (b) to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;
  - (c) to purchase assets of the institution under resolution;
  - (d) to make contributions to a bridge institution;
  - (e) to take any combination of the actions referred to in points (a) to (e).

The financing arrangements may be used to take the actions referred to in points (a) to (e) also with respect to the purchaser in the context of the sale of business tool.

2. Member States shall ensure that any losses, costs or other expenses incurred in connection with the use of the resolution tools shall be first borne by the shareholders and the creditors of the institution under resolution. Only if the resources from shareholders and creditors are exhausted, the losses, costs or other expenses incurred in connection with the use of the resolution tools shall be borne by the financing arrangements.

### *Article 93*

#### *Target funding level*

1. Member States shall ensure that, in a period no longer than 10 years after the entry into force of this directive, the available financial means of their financing arrangements reach at least 1% of the amount of deposits of all the credit institutions authorised in their territory which are guaranteed under Directive 94/19/EC.
2. During the initial period of time referred to in paragraph 1, contributions to the financing arrangements raised in accordance with Article 94 shall be spread out in time as evenly as possible until the target level is reached.

Member States may extend the initial period of time for a maximum of four years in case the financing arrangements make cumulated disbursements superior to 0.5% of covered deposits.

3. If, after the initial period of time referred to in paragraph 1, the available financial means diminish below the target level specified in paragraph 2, contributions raised in accordance with Article 94 shall resume until the target level is reached. Where the available financial means amount to less than half of the target level, the annual contributions shall not be less than 0.25% of covered deposits.

### *Article 94*

#### *Ex ante contributions*

1. In order to reach the target level specified in Article 93, Member States shall ensure that contributions are raised at least annually from the institutions authorised in their territory.
2. Contributions shall be calculated in accordance with the following rules:
  - (a) if a Member State has availed itself of the option provided for in Article 99(5) of this Directive to use the funds of Deposit Guarantee Scheme for the purposes of Article 92 of this Directive, the contribution from each institution shall be pro-rata to the amount of its liabilities excluding own funds and deposits guaranteed under Directive 94/19/EC with respect to the total

liabilities, excluding own funds and deposits guaranteed under Directive 94/19/EC, of all the institutions authorised in the territory of the Member State.

- (b) if a Member State has not availed itself of the option provided for in Article 99(5) to use the funds of the Deposit Guarantee Scheme for the purposes of Article 92, the contribution from each institution shall be pro-rata to the total amount of its liabilities, excluding own funds, with respect to the total liabilities, excluding own funds, of all the institutions authorised in the territory of the Member State.
  - (c) the contributions calculated under (a) and (b) shall be adjusted in proportion to the risk profile of institutions, in accordance with the criteria adopted under paragraph 7 of this Article.
3. The available financial means to be taken into account in order to reach the target level specified in Article 93 may include payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in the first paragraph of Article 92. The share of irrevocable payment commitments shall not exceed 30% of the total amount of contributions raised in accordance with this Article.
4. Member States shall ensure that the obligation to pay the contributions specified in this Article is enforceable under national law, and that due contributions are fully paid.
- Member States shall set up appropriate regulatory, accounting; reporting and other obligations to ensure that due contribution are fully paid. Member States shall also ensure measures for the proper verification of whether the contribution has been paid correctly. Member States shall ensure measures to prevent evasion, avoidance and abuse.
5. The amounts raised in accordance with this Article shall only be used for the purposes specified in Article 92 of this Directive, and, where Member States have availed themselves of the option provided for under Article 99(5) of this Directive, for the purposes specified in Article 92 of this Directive or for the repayment of deposits guaranteed under Directive 94/19/EC.
6. The amounts received from the institution under resolution or the bridge institution, the interest and other earnings on investments and any other earnings shall benefit the financing arrangements.
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order specify the notion of adjusting contributions in proportion to the risk profile of institutions as referred to in paragraph 2 (c) of this Article, taking into account the following:
- (a) the risk exposure of the institution, including the importance of its trading activities, its off-balance sheet exposures and its degree of leverage;
  - (b) the stability and variety of the company's sources of funding;

- (c) the financial condition of the institution;
  - (d) the probability that the institution enters into resolution;
  - (e) the extent to which the institution has previously benefited from State support;
  - (f) the complexity of the structure of the institution and the resolvability of the institution, and
  - (g) its systemic importance for the market in question.
8. The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order to:
- (a) specify the registration, accounting, reporting obligations and other obligations referred to in paragraph 4 intended to ensure that the contributions are effectively paid;
  - (b) specify the measures referred to in paragraph 4 to ensure proper verification of whether the contribution has been paid correctly;
  - (c) specify the measures referred to in paragraph 4 to prevent evasion, avoidance and abuse.

#### *Article 95*

##### *Extraordinary ex post contributions*

1. Where the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, Member States shall ensure that extraordinary ex post contributions are raised from the institutions authorised in their territory, in order to cover the additional amounts. These extraordinary contributions shall be allocated between institutions in accordance with the rules set out in Article 94(2).
2. The provisions of Article 94(4) to (8) shall be applicable to the contributions raised under this article.

#### *Article 96*

##### *Alternative funding means*

Member States shall ensure that financing arrangements under their jurisdiction are enabled to contract borrowings or other forms of support from financial institutions, the central bank, or other third parties, in the event that the amounts raised in accordance with Article 94 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, and the extraordinary contributions provided for in Article 95 are not immediately accessible.

## Article 97

### *Borrowing between financing arrangements*

1. Member States shall ensure that financing arrangements under their jurisdiction shall have the right to borrow from all other financing arrangements within the Union, in the event that the amounts raised under Article 94 are not sufficient to cover the losses, costs or other expense incurred by the use of the financing arrangements, and the extraordinary contributions foreseen in Article 95 are not immediately accessible.
2. Member States shall ensure that financing arrangements under their jurisdiction are obliged to lend to other financing arrangements within the Union in the circumstances specified under paragraph 1.

Subject to the first subparagraph, national financing arrangements shall not be obliged to lend to another national financing arrangement in those circumstances when the resolution authority of the Member State of the financing arrangement considers that it would not have sufficient funds to finance any foreseeable resolution in the near future. In any case they should not be obliged to lend more than half of the funds that the national financing arrangement has available at the moment when the borrowing request is formalised.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order to specify the conditions that have to be met in order for a financing arrangement to be able to borrow from other financing arrangements as well as the conditions applicable to the borrowing and in particular the criteria for the assessment of whether there will be sufficient funds for financing a foreseeable resolution in the near future, the repayment period and the interest rate applicable.

## Article 98

### *Mutualisation of national financing arrangements in the case of a group resolution*

1. Member States shall ensure that, in the case of a group resolution as established in Article 83, each national financial arrangement of each of the institutions that are part of a group contributes to the financing of the group resolution in accordance with this Article.
2. For the purposes of paragraph 1, the group level resolution authority, in consultation to the resolution authorities of the institutions that are part of the group, shall establish, if necessary before taking any resolution action, a financing plan determining the total financial needs for the financing of the group resolution as well as the modalities for that financing.
3. The modalities referred to in paragraph 2 may include:
  - (a) contributions from the national financing arrangements of the institutions that are part of the group,

- (b) borrowings or other forms of support from financial institutions or the Central Bank.

The financing plan shall be part of the group resolution scheme as specified in Article 83. The financing plan shall establish the contribution from each national financing arrangement.

4. Provided that the requirements under paragraph 2 of this article and Article 83 are fulfilled, Member States shall establish rules and procedures to ensure that each national financing arrangement under their jurisdiction effects its contribution to the financing plan immediately after their resolution authorities receive a request from the group level resolution authority.
5. For the purpose of this Article, Member States shall ensure that the group financing arrangements are allowed, under the conditions laid down in article 96, to contract borrowings or other forms of support, from financial institutions, the Central Bank or other third parties, for the total amount needed to finance the resolution of the group in accordance with the financing plan referred to in paragraph 2 of this Article.
6. Member States shall ensure that each national financing arrangement under its jurisdiction guarantees any borrowing contracted by the group financing arrangement in accordance with paragraph 4. The guarantee by each national financing arrangement shall not exceed the part of its participation to the financing plan established in accordance to paragraph 2.
7. Member States shall ensure that any proceeds or benefits that arise from the use of the financing arrangements shall benefit all national financing arrangements in accordance to their contribution to the financing of the resolution as established in paragraph 2.
8. The Commission shall be empowered to adopt delegated acts in accordance with Article 103 in order to specify further:
  - (a) the form and content of the financing plan specified in paragraph 2;
  - (b) the modalities for the disbursement of the contributions to the financing plan referred to in paragraph 3;
  - (c) the modalities of the guarantees referred to in paragraph 5;
  - (d) the criteria for determining when all resolution actions have finalised;

#### *Article 99*

##### *Use of deposit guarantee schemes in the context of resolution*

1. Member States shall ensure that, where the resolution authorities take resolution action, and provided that this action ensures that depositors continue having access to their deposits, the deposit guarantee scheme to which the institution is affiliated is liable, up to the amount of covered deposits, for the amount of losses that it would

have had to bear if the institution had been wound up under normal insolvency proceedings.

2. Member States shall ensure that, under the national law governing normal insolvency proceedings, the deposit guarantee schemes rank *pari passu* with unsecured non-preferred claims.
3. Member States shall ensure that the determination of the amount by which the deposit guarantee scheme is liable in accordance with paragraph 1 of this Article complies with the conditions established in Article 30 (2).
4. The contribution from the deposit guarantee scheme for the purpose of paragraph 1 shall be made in cash.
5. Member States may also provide that the available financial means of deposit guarantee schemes established in their territory may be used for the purposes of Article 92(1), provided that the deposit guarantee schemes comply, where applicable, with the provisions laid down in Articles 93 to 98.
6. Member States shall ensure that the deposit guarantee scheme has arrangements in place to ensure that, following a contribution made by the deposit guarantee scheme under paragraphs 1 or 5 and where the depositors of the institution under resolution need to be reimbursed, the members of the scheme can immediately provide the scheme with the amounts that have to be paid.
7. Where Member States avail themselves of the option provided for under paragraph 5 of this Article, the deposit guarantee schemes shall be considered as financing arrangements for the purpose of Article 91. In that case Member States may abstain from establishing separate funding arrangements.
8. Where a Member State avails itself of the option provided for in paragraph 5, the following priority rule shall apply to the use of available financial means of the deposit guarantee scheme.

If the deposit guarantee scheme is, at the same time, requested to use its available financial means for the purposes specified in Article 92 or for the purpose of the first paragraph of this Article, and for the repayment of depositors under Directive 94/19/EC, and the available financial means are insufficient to satisfy all these requests, priority shall be given to the repayment of depositors under Directive 94/19/EC and to the actions specified under paragraph 1 of this Article, over the payments for the purposes provided for in Article 92 of this Directive.

9. Where eligible deposits with an institution under resolution are transferred to another entity through the sale of business tool or the bridge institution tool, the depositors have no claim under Directive 94/19/EC against the deposit guarantee scheme in relation to any part of their deposits with the institution under resolution that are not transferred, provided that the amount of funds transferred is equal to or more than the aggregate coverage level laid down in Article 7 of Directive 94/19/EC.

## TITLE VIII

### SANCTIONS

#### *Article 100*

##### *Administrative sanctions and measures*

1. Member States shall ensure that appropriate administrative sanctions and measures are taken where the national provisions adopted in the implementation of this Directive have not been complied with, and shall ensure that they are applied. The sanctions and measures shall be effective, proportionate and dissuasive.
2. Member States shall ensure that where obligations apply to financial institutions and Union parent undertakings, in case of a breach sanctions can be applied to the members of the management, and to any other individuals who under national law are responsible for the breach.
3. Resolution authorities and competent authorities shall be given all investigatory powers that are necessary for the exercise of their functions. In the exercise of their sanctioning powers, resolution authorities and competent authorities shall cooperate closely to ensure that sanctions or measures produce the desired results and coordinate their action when dealing with cross border cases.

#### *Article 101*

##### *Specific provisions*

1. This Article shall apply in all the following circumstances:
  - (a) an institution or parent undertaking fails to draw up, maintain and update recovery plans and group recovery plans, in breach of Articles 5 or 7;
  - (b) an entity fails to notify an intention to provide group financial support to its competent authorities in breach of Article 22;
  - (c) an institution or parent undertaking fails to provide all the information necessary for the development of resolution plans in breach of Article 10;
  - (d) the management of an institution fails to notify the competent authority when the institution is failing or likely to fail in breach of Article 73(1).
2. Without prejudice to the powers of competent authorities or resolution authorities in accordance with other provisions of this Directive, Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include at least the following:

- (a) a public statement, which indicates the natural or legal person responsible and the nature of the breach;
- (b) a temporary ban against any member of the institution's or parent undertaking's management or any other natural person, who is held responsible, to exercise functions in institutions;
- (c) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of that legal person in the preceding business year; where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;
- (d) in case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of entry into force of this Directive;
- (e) administrative pecuniary sanctions of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined.

#### *Article 102*

#### *Effective application of sanctions and exercise of sanctioning powers by competent authorities*

Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, including:

- (e) the gravity and the duration of the breach;
- (f) the degree of responsibility of the responsible natural or legal person;
- (g) the financial strength of the responsible natural or legal person, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;
- (h) the importance of profits gained or losses avoided by the responsible natural or legal person, insofar as they can be determined;
- (i) the losses for third parties caused by the breach, insofar as they can be determined;
- (j) the level of cooperation of the responsible natural or legal person with the competent authority;
- (k) previous breaches by the responsible natural or legal person.

## TITLE IX

### POWERS OF EXECUTION

#### *Article 103*

##### *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of powers shall be conferred for an indeterminate period of time from the date referred to in Article 116.
3. The delegation of powers referred to in Articles 2, 4, 28, 37, 39, 43, 86, 94, 97 and 98 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Articles 2, 4, 28, 37, 39, 43, 86, 94, 97 and 98 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.

## TITLE X

### **AMENDMENTS TO DIRECTIVES 77/91/EEC, 82/891/EEC, 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU AND TO REGULATION (EU) NO 1093/2010**

#### *Article 104*

##### *Amendment to Directive 77/91/EEC*

In Article 41 of Directive 77/91/EEC, the following paragraph 3 is added:

"3. Member States shall ensure that Articles 17(1), 25(1), 25(3), 27(2) first paragraph, 29, 30, 31 and 32 of this Directive do not apply in case of use of the resolution tools, powers and mechanisms provided in Title IV of Directive XX/XX/EU of the European Parliament and of the Council(\*)[Directive on Recovery and Resolution] provided that the resolution objectives laid down in Article 27 of Directive XX/XX/EU and the conditions for resolution laid down in Article 28 of that Directive are met.

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(\*) O L..... .... p.."

#### *Article 105*

##### *Amendment to Directive 82/891/EEC*

Article 1(4) of Directive of 82/891/EEC is replaced by the following:

"4. Article 1(2), (3) and (4) of Directive 2011/35/EU of the European Parliament and of the Council (\*) shall apply.

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(\*) OJ L 110, 29.4.2011, p. 1."

#### *Article 106*

##### *Amendments to Directive 2001/24/EC*

Directive 2001/24/EC is amended as follows:

1. In Article 1 the following paragraphs 3 and 4 are added:

"3. This Directive shall also apply to investment firms as defined in point (b) of Article 3(1) of Directive 2006/49/EC of the European Parliament and of the Council (\*) and their branches set up in Member States other than those in which they have their head offices.

4. In the event of application of the resolution tools and exercise of the resolution powers provided for by Directive XX/XX/EU of the European Parliament and of the Council(\*\*), the provisions of this Directive shall also apply to the financial institutions, firms and parent undertakings falling within the scope of Directive XX/XX/EU.

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(\*) OJ L 177, 30.6.2006, p.201

(\*\*) OJ L.....,....p."

2. In Article 2, the seventh indent is replaced by the following:

"- 'reorganisation measures' shall mean measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; these measures include the application of the resolution tools and the exercise of resolution powers provided for by Directive XX/XX/EU;"

#### *Article 107*

##### *Amendment to Directive 2002/47/EC*

In Article 7 of Directive 2002/47/EC, the following paragraph 1a is added:

"1a. Paragraph 1 does not apply to any restriction on the effect of a close out netting provision that is imposed by virtue of Article 77 of Directive XX/XX/EU or by the exercise by the resolution authority of the power to impose a temporary stay in accordance with Article 63 of that Directive.

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(\*) OJ L ..... p. ..."

#### *Article 108*

##### *Amendment to Directive 2004/25/EC*

In Article 4(5) of Directive 2004/25/EC, the following third subparagraph is added:

"Member States shall ensure that Article 5(1) of this Directive does not apply in case of use of resolution tools, powers and mechanisms provided in Title IV of Directive XX/XX/EU of the European Parliament and of the Council (\*)[Directive on Recovery and Resolution.

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(\*) OJ L .... p. ... "

#### *Article 109*

##### *Amendment to Directive 2005/56/EC*

In Article 3 of Directive 2005/56/EEC, the following paragraph 4 is added:

"(4) Member States shall ensure that this Directive does not apply to the company or companies that are the subject of the use of resolution tools, powers and mechanisms provided in Title IV of Directive XX/XX/EU [Directive on Recovery and Resolution], of the European Parliament and of the Council (\*).

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(\*) OJ L ..... p. ...."

### *Article 110*

#### *Amendments to Directive 2007/36/EC*

Directive 2007/36/EC is amended as follows:

1. In Article 1, the following paragraph 4 is added:

"4. Member States shall ensure that this Directive does not apply in case of the use of resolution tools, powers and mechanisms provided in Title IV of Directive XX/XX/EU [Directive on Recovery and Resolution], of the European Parliament and of the Council (\*).

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(\*) OJ L ..... p. ...."

2. In Article 5, the following paragraphs 5 and 6 are added:

"5. Member States shall ensure that for the purposes of Directive XX/XX/EU [Directive on Recovery and Resolution] the general meeting may decide by a majority of two-thirds of the votes validly cast that a convocation to a general meeting to decide on a capital increase may be called at shorter notice than provided in paragraph 1 of this Article, provided that this meeting does not take place within ten calendar days of the convocation and that the conditions of Article 23 or 24 of Directive XX/XX/EU (*early intervention triggers*) are met and that the capital increase is necessary to avoid the conditions for resolution laid down in Article 27 of that Directive.

6. For the purposes of paragraph 5, Article 6 (3) and (4) and Article 7(3) shall not apply."

### *Article 111*

#### *Amendment to Directive 2011/35/EU*

In Article 1 of Directive 2011/35/EU, the following paragraph 4 is added:

"4. Member States shall ensure that this Directive does not apply to the company or companies which are the subject of the use of resolution tools, powers and mechanisms provided in Title IV of Directive XX/XX/EU of the European Parliament and of the Council (\*) [Directive on Recovery and Resolution]."

(\*) OJ L ..... p. ...."

## Article 112

### *Amendment to Regulation (EU) No 1093/2010*

Regulation (EU) No 1093/2010 is amended as follows:

6. In Article 4 point (2) is replaced by the following:

"(2) 'competent authorities' means:

- (i) competent authorities as defined in Directives 2006/48/EC, 2006/49/EC and 2007/64/EC and as referred to in Directive 2009/110/EC;
- (ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by credit and financial institutions;
- (iii) with regard to deposit guarantee schemes, bodies which administer deposit-guarantee schemes pursuant to Directive 94/19/EC, or, where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive; and
- (iv) with regard to Directive .../... [Directive on Recovery and Resolution] resolution authorities as defined in that Directive.

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(\*) OJ L ..... p. ...."

7. In Article 40(6), the following second subparagraph is added:

"For the purpose of acting within the scope of Directive XX/XX/EU of the European Parliament and the council(\*)[Directive on Recovery and Resolution], the member of the Board of Supervisors referred to in point (b) of paragraph 1 may, where appropriate, be accompanied by a representative from the resolution authority in each Member State, who shall be non-voting."

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(\*) OJ L ..... p. ...."

## TITLE XI

### FINAL PROVISIONS

#### *Article 113*

##### *EBA Resolution Committee*

EBA shall create a permanent internal committee pursuant to Article 41 of Regulation (EU) No 1093/2010 for the purpose of preparing the EBA decisions provided for in this Directive. That internal committee shall be at least composed of the resolution authorities referred to in Article 3 of this Directive.

For the purposes of this Directive, EBA shall cooperate with ESMA and EIOPA within the framework of the Joint Committee of the European Supervisory Authorities established in Article 54 of Regulation (EU) No 1093/2010.

#### *Article 114*

##### *Review*

By 1 June 2018, the Commission shall review the general application of this Directive and assess the need for amendments in particular:

- (a) on the basis of the report from EBA provided for in Article 39(6), the need for amendments with regard to minimising divergences at national level. This report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council;
- (b) on the basis of the report from EBA provided for in Article 4(3), the need for amendments with regard to minimising divergences at national level. That report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council.

#### *Article 115*

##### *Transposition*

1. Member States shall adopt and publish by 31 December 2014 at the latest the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

Member States shall apply those provisions from 1 January 2015.

However, Member States shall apply provisions adopted in order to comply with Section 5 of Chapter III of Title IV from 1 January 2018 at the latest.

2. When Member States adopt those provisions, 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 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 116*

##### 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 117*

##### Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## ANNEX

### SECTION A

#### INFORMATION TO BE INCLUDED IN RECOVERY PLANS

The recovery plan shall include the following information:

- (1) A summary of the key elements of the plan, strategic analysis, and summary of overall recovery capacity;
- (2) a summary of the material changes to the institution since the most recently filed recovery plan;
- (3) a communication and disclosure plan outlining how the firm intends to manage any potentially negative market reactions;
- (4) a range of capital and liquidity actions required to maintain operations of, and funding for, the institution's critical functions and business lines;
- (5) an estimation of the timeframe for executing each material aspect of the plan;
- (6) a detailed description of any material impediment to the effective and timely execution of the plan, including consideration of impact on the rest of the group, customers and counterparties;
- (7) identification of critical functions;
- (8) a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the institution;
- (9) a detailed description of how recovery planning is integrated into the corporate governance structure of the institution as well as the policies and procedures governing the approval of the recovery plan and identification of the persons in the organisation responsible for preparing and implementing the plan;
- (10) arrangements and measures to conserve or restore the institution's own funds;
- (11) arrangements and measures to ensure that the institution has adequate access to contingency funding sources, including potential liquidity sources, an assessment of available collateral and an assessment of the possibility to transfer liquidity across group entities and business lines, to ensure that it can carry on its operations and meet its obligations as they fall due;
- (12) arrangements and measures to reduce risk and leverage;
- (13) arrangements and measures to restructure liabilities;
- (14) arrangements and measures to restructure business lines;

- (15) arrangements and measures necessary to maintain continuous access to financial markets infrastructures;
- (16) arrangements and measures necessary to maintain the continuous functioning of the institution's operational processes, including infrastructure and IT services;
- (17) preparatory arrangements to facilitate the sale of assets or business lines in a timeframe appropriate for the restoration of financial soundness;
- (18) other management actions or strategies to restore financial soundness and the anticipated financial effect of those actions or strategies;
- (19) preparatory measures that the institution has taken or plans to take in order to facilitate the implementation of the recovery plan, including those necessary to enable the timely recapitalisation of the institution.

## **SECTION B**

### **INFORMATION THAT RESOLUTION AUTHORITIES MAY REQUEST INSTITUTIONS TO PROVIDE FOR THE PURPOSES OF DRAWING UP AND MAINTAINING RESOLUTION PLANS**

Resolution authorities may request institutions to provide for the purposes of drawing up and maintaining resolution plans the following information:

- (1) A detailed description of the institution's organisational structure including a list of all legal entities;
- (2) identification of the direct holder and the percentage of voting and non-voting rights of each legal entity;
- (3) the location, jurisdiction of incorporation, licensing and key management associated with each legal entity;
- (4) a mapping of the institution's critical operations and core business lines including material asset holdings and liabilities related to such operations and business lines, by reference to legal entities;
- (5) a detailed description of the components of the institution's and all its legal entities' liabilities, separating, at a minimum by types and amounts of short term and long term debt, secured, unsecured and subordinated liabilities;
- (6) a detail of those liabilities of the institution that are eligible liabilities;
- (7) an identification of the processes needed to determine to whom the institution has pledged collateral, the person that holds the collateral and the jurisdiction in which the collateral is located;
- (8) a description of the off balance sheet exposures of the institution and its legal entities, including a mapping to its critical operations and core business lines;

- (9) the material hedges of the institution including a mapping to legal entity;
- (10) identification of the major or most critical counterparties of the institution as well as an analysis of the impact of the failure of major counterparties in the institution's financial situation;
- (11) each system on which the institution conducts a material number or value amount of trades, including a mapping to the institution's legal entities, critical operations and core business lines;
- (12) each payment, clearing or settlement system of which the institution is directly or indirectly a member, including a mapping to the institution's legal entities, critical operations and core business lines;
- (13) a detailed inventory and description of the key management information systems, including those for risk management, accounting and financial and regulatory reporting used by the institution including a mapping to the institution's legal entities, critical operations and core business lines;
- (14) an identification of the owners of the systems identified in (m), service level agreements related thereto, and any software and systems or licenses, including a mapping to its legal entities, critical operations and core business lines;
- (15) an identification and mapping of the legal entities and the interconnections and interdependencies among the different legal entities such as:
  - common or shared personnel, facilities and systems;
  - capital, funding or liquidity arrangements;
  - existing or contingent credit exposures;
  - cross guarantee agreements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting arrangements;
  - risks transfers and back to back trading arrangements; service level agreements;
- (16) the supervisory and resolution authority for each legal entity;
- (17) the senior management official responsible for the resolution plan of the institution as well as those responsible, if different, for the different legal entities, critical operations and core business lines;
- (18) a description of the arrangements that the institution has in place to ensure that, in the event of resolution, the resolution authority will have all the necessary information, as determined by the resolution authority, for applying the resolution tools and powers;
- (19) all the agreements entered into by the institutions and its legal entities with third parties whose termination may be triggered by a decision of the authorities to apply a

resolution tool and whether the consequences of termination may affect the application of the resolution tool;

- (20) A description of possible liquidity sources for supporting resolution;
- (21) Information on asset encumbrance, liquid assets, off-balance sheet activities, hedging strategies and booking practices.

## **SECTION C**

### **MATTERS THAT THE RESOLUTION AUTHORITY MUST ASSESS WHEN ASSESSING THE RESOLVABILITY OF AN INSTITUTION**

When assessing the resolvability of an institution, the resolution authority shall consider the following:

- (1) The extent to which the institution or the group are able to map core business lines and critical operations to legal entities.
- (2) The extent to which legal and corporate structures with respect to the core business lines and critical operations are aligned.
- (3) The extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations.
- (4) The extent to which the service agreements that the institution or the group maintains are fully enforceable in the event of resolution of the institution or the group.
- (5) The extent to which the governance structure of the institution or the group is adequate for managing and ensuring compliance with the institution or group's internal policies with respect to its service level agreements.
- (6) The extent to which the institution or the group has a process for transitioning the services provided under service level agreements to third parties in the event of the separation of critical functions or of core business lines.
- (7) The extent to which there are contingency plans in place to ensure continuity in access to payment and settlement systems.
- (8) The adequacy of the management information systems in ensuring that the resolution authorities are able to gather accurate and complete information regarding the core business lines and critical operations so as to facilitate rapid decision making.
- (9) The capacity of the management information systems to provide the information essential for the effective resolution of the institution or the group at all times even under rapidly changing conditions.
- (10) The extent to which the institution or the group has tested its management information systems under stress scenarios defined by the resolution authority.

- (11) The extent to which the institution or the group can ensure the continuity of its management information systems both for the affected institution and the new institution in the case that the critical operations and core business lines are separated from the rest of the operations and business lines.
- (12) The extent to which the institution or group has established adequate processes to ensure that it provides the resolution authorities the information necessary to identify depositors and the amounts covered by the deposit guarantee schemes;
- (13) Where the group uses intra-group guarantees, the extent to which those guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust.
- (14) Where the group engages in back to back transactions, the extent to which those transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust.
- (15) The extent to which the use of intra-group guarantees or back to back booking transactions increases contagion across the group.
- (16) The extent to which the legal structure of the group inhibits the application of the resolution tools as a result of the number of legal entities, the complexity of the group structure or the difficulty in aligning business lines to group entities.
- (17) The amount or proportion of eligible liabilities of the institution.
- (18) Where the assessment involves a mixed activity holding company, the extent to which the resolution of group entities that are institutions or financial institutions could have a negative impact on the non-financial part of the group.
- (19) The existence and robustness of service level agreements.
- (20) Whether third country authorities have the resolution tools necessary to support resolution actions by Union resolution authorities, and the scope for co-ordinated action between Union and third country authorities.
- (21) The feasibility of using resolution tools in such a way which meets the resolution objectives, given the tools available and the institution's structure.
- (22) The extent to which the group structure allows the resolution authority to resolve the whole group or any or more of its entities without causing a significant direct or indirect adverse impact on the financial system, market confidence or the economy and with a view to maximising the value of the group as a whole;
- (23) The arrangements and means through which resolution could be facilitated in the cases of groups that have subsidiaries established in different jurisdictions.
- (24) The credibility of using resolution tools in such a way which meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees and possible actions that third country authorities may take.

- (25) The impact of the institution's resolution on the financial system and on financial market's confidence can be adequately evaluated.
- (26) The resolution of the institution could have a significant direct or indirect adverse impact on the financial system, market confidence or the economy.
- (27) Contagion to other financial institutions or to the financial markets can be contained through the application of the resolution tools and powers.
- (28) The resolution of the institution could have a significant effect in the operation of payment and settlement systems.

## **LEGISLATIVE FINANCIAL STATEMENT**

### **1. FRAMEWORK OF THE PROPOSAL**

- 1.1. Title of the proposal
- 1.2. Policy area(s) concerned in the ABM/ABB structure
- 1.3. Nature of the proposal
- 1.4. Objective(s)
- 1.5. Grounds for the proposal
- 1.6. Duration and financial impact
- 1.7. Management method(s) envisaged

### **2. MANAGEMENT MEASURES**

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

### **3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL**

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
  - 3.2.1. *Summary of estimated impact on expenditure*
  - 3.2.2. *Estimated impact on operational appropriations*
  - 3.2.3. *Estimated impact on appropriations of an administrative nature*
  - 3.2.4. *Compatibility with the current multiannual financial framework*
  - 3.2.5. *Third-party participation in financing*
- 3.3. Estimated impact on revenue

## LEGISLATIVE FINANCIAL STATEMENT

### 1. FRAMEWORK OF THE PROPOSAL

#### 1.1. Title of the proposal

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC, 82/891/EC, 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2011

#### 1.2. Policy area(s) concerned in the ABM/ABB structure<sup>40</sup>

Internal Market – Financial markets

#### 1.3. Nature of the proposal

- The proposal relates to **a new action**
- The proposal/initiative relates to **a new action following a pilot project/preparatory action**<sup>41</sup>
- The proposal/initiative relates to **the extension of an existing action**
- The proposal/initiative relates to **an action redirected towards a new action**

#### 1.4. Objectives

##### 1.4.1. *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

- Maintain financial stability and confidence in banks, ensure the continuity of essential financial services, avoid contagion of problems;
- Minimise losses for society as a whole and in particular for taxpayers, protect depositors, and reduce moral hazard;
- Strengthen the internal market for banking services while maintaining a level playing field (i.e. same conditions for all players to compete in the financial markets of the EU).

##### 1.4.2. *Specific objective(s) and ABM/ABB activity(ies) concerned*

###### Specific objectives:

In the light of the general objectives above, the following specific objectives are sought:

###### **Preparation and prevention:**

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<sup>40</sup> ABM: Activity-Based Management – ABB: Activity-Based Budgeting.  
<sup>41</sup> As referred to in Article 49(6)(a) or (b) of the Financial Regulation.

- increase preparedness of supervisors and banks for crisis situations and
- enable resolvability of all banks

**Early intervention:**

- improve early intervention arrangements for supervisors

**Bank resolution:**

- ensure resolution of banks in a timely and robust manner
- ensure legal certainty for bank resolution

**Cross border crisis management:**

- foster efficient cooperation of authorities in cross border resolution

**Financing**

- ensure that funds from private source are available to finance resolution of failing banks

*1.4.3. Expected result(s) and impact*

*Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.*

The proposed crisis management framework at Union level intends to further enable financial stability, reduce moral hazard, and protect depositors, crucial banking services and taxpayers' money. In addition it aims to protect and further develop the internal market for financial institutions.

Benefits of the framework arise firstly from the expected reduction in the probability of a systemic banking crisis and the avoidance of the fall in GDP that follows a banking crisis. Secondly, the bank resolution framework aims to reduce the possibility that taxpayers' money being used again in a potential future crisis to bail out banks. The cost of banking crises, if they happen, should be borne by banks' equity and debt holders in the first instance. As a result funding cost of Member States' debt should also decrease reflecting the removal of the implicit state guarantee of banks' debt.

*1.4.4. Indicators of results and impact*

*Specify the indicators for monitoring implementation of the proposal/initiative.*

Since bank failures are unpredictable and hopefully avoided, the functioning of bank resolution cannot be regularly monitored on the basis of how real bank failures are handled. However, some of the measures could be monitored using the following possible indicators:

- Number of resolution colleges set up.

- Number of recovery and resolution plans submitted and approved by resolution authorities and resolution colleges.
- Number of cases where adjustments in the operation of banks (and banking groups) has been demanded by resolution authorities.
- Number of intra-group financing agreements concluded.
- Number of banks where minimum loss absorbing capacity (capital + bail-inable debt) is required.
- Overall level of loss absorbing capacities of banks in Member states and the UNION.
- Number of banks undergoing resolution.
- Number of application of different resolution tools and powers (e.g.sale of business, bridge bank, bail-in).
- Cost of bank resolution on an individual MS and EU aggregated level (EUR million) (cost includes bail-in cost, recapitalisation, contribution of DGS/RF, other costs).

The involvement of EBA in all phases of the bank recovery and resolution framework is proposed and supported by the stakeholders, even if EBA regulation presently does not give competence to EBA in a resolution process. Based on its involvement, EBA could carry out related monitoring tasks. The transposition of any new Union legislation will be monitored under the Treaty on the functioning of the Union

## 1.5. Grounds for the proposal

### 1.5.1. Requirement(s) to be met in the short or long term

The financial crisis severely tested the ability of authorities to manage problems in banking institutions. Union Financial markets have become integrated to such an extent that domestic shocks may be rapidly transmitted to firms and markets in other Member States.

At international level, G20-Leaders have called for a “review of resolution regimes and bankruptcy laws in light of recent experience to ensure that they permit an orderly wind-down of large complex cross-border institutions.”<sup>42</sup> At the Pittsburgh summit on 25 September 2009, they committed to act together to “...create more powerful tools to hold large global firms to account for the risks they take” and, more specifically, to “develop resolution tools and frameworks for the effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in the future.”

In Seoul in November 2010, the G20 endorsed the FSB SIFI Report<sup>43</sup> which recommended that “all jurisdictions should undertake the necessary legal reforms to ensure that they have in

<sup>42</sup> G20 Leaders' declaration of the Summit on financial markets and the world economy, April 2009.

<sup>43</sup> 'Reducing the moral hazard posed by systemically important financial institutions'  
[http://www.financialstabilityboard.org/press/pr\\_101111a.pdf](http://www.financialstabilityboard.org/press/pr_101111a.pdf)

place a resolution regime which would make feasible the resolution of any financial institution without taxpayer exposure to loss from solvency support while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in their order of seniority”.

In October 2011, the Financial Stability Board adopted Key Attributes of Effective Resolution Regimes for Financial Institutions ('Key Attributes')<sup>44</sup> that set out the core elements that the FSB considers to be necessary for an effective resolution regime. Their implementation should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions.

#### 1.5.2. *Added value of Union involvement*

Under the principle of subsidiarity set out in Article 5.3 of the TFEU, in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Only action at Union level can ensure that Member States use compatible measures to deal with failing banks. Although the Union banking sector is highly integrated, systems to deal with bank crises are nationally based. Many national legal systems do not currently confer the powers necessary for authorities to wind down financial institutions in an orderly manner while preserving those services essential for financial stability without relying on taxpayers' money. Divergent national legislation is ill-suited to dealing adequately with the cross-border dimension of crises and arrangements for home-host cooperation are insufficient.

Limited resolution options increase the risk of moral hazard and generate an expectation that large, complex and interconnected banks would again need public financial assistance in the event of problems. It is therefore clear that an effective framework for recovery and resolution in an integrated market cannot be achieved by Member States and needs to be set out at Union level.

Under the principle of proportionality, the content and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties.

The present proposal aims at maintaining financial stability and confidence in banks, minimising losses for taxpayers and strengthening the internal market for banking services while maintaining a level playing field. This requires the convergence of national laws to provide authorities with a consistent set of crisis management and resolution tools. Only Union action can deliver this objective.

The provisions are proportionate to what is necessary to achieve the objectives. The limitations to the right to property that the exercise of the powers proposed may entail are consistent with the Charter of Fundamental Rights as interpreted by the European Court of Human Rights.

<sup>44</sup>

[http://www.financialstabilityboard.org/publications/r\\_111104cc.pdf](http://www.financialstabilityboard.org/publications/r_111104cc.pdf)

These restrictions are limited to the extent necessary in order to meet an objective of general interest, namely preserving financial stability in the Union.

Resolution is closely linked to non-harmonised areas of national law, such as insolvency and property law. A directive is, therefore, the appropriate legal instrument since transposition is necessary to ensure that the framework is implemented in a way that achieves the intended effect, within the specificities of relevant national law.

#### 1.5.3. *Lessons learned from similar experiences in the past*

N.A.

#### 1.5.4. *Coherence and possible synergy with other relevant instruments*

The crisis management framework is in strong relation with the **deposit guarantee scheme system** in the Union. The modification of the relevant Directive 94/19/EC is currently discussed in the Council and the Parliament. Synergies between DGS funds and bank resolution measures are significant, especially when it relates to financing issues. When a resolution framework that stops contagion is in place, the DGS fund will only finance a few banks that default initially. In contrast, when no resolution measures are available and contagion spreads through the financial system, the amount of money that the DGS needs to pay out in a MS is considerably higher.

The proposal also relates to the **Capital Requirements Directive (CRD)**, which sets prudential requirements for banks and investment firms. Recent amendments to the CRD aim to increase the quantity and quality of capital that banks hold, so that they could actually absorb potential losses. New liquidity requirements intend to make sure that banks remain liquid even in a stressed market period and develop a liability structure that provides further stability. All these measure will make the banking sector safer and decrease the chances of bank failure and the need for public interventions. Despite all these measures, the failure of banks in the future cannot be excluded. Hence there is a need to develop a complementary legal framework (bank recovery and resolution) that ensures that financial stability is maintained even in the negative scenarios.

### 1.6. **Duration and financial impact**

Proposal/initiative of **limited duration**

–  Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

–  Financial impact from YYYY to YYYY

Proposal of **unlimited duration**

– Implementation with a start-up period from 2013 to 2015,

– followed by full-scale operation.

**1.7. Management mode(s) envisaged<sup>45</sup>**

- Centralised direct management** by the Commission
- Centralised indirect management** with the delegation of implementation tasks to:
  - executive agencies
  - bodies set up by the Communities<sup>46</sup>
  - national public-sector bodies/bodies with public-service mission
  - persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on European Union and identified in the relevant basic act within the meaning of Article 49 of the Financial Regulation
- Shared management** with the Member States
- Decentralised management** with third countries
- Joint management** with international organisations (*to be specified*)

*If more than one management mode is indicated, please provide details in the "Comments" section.*

Comments

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<sup>45</sup> Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: [http://www.cc.cec/budg/man/budgmanag/budgmanag\\_en.html](http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html)

<sup>46</sup> As referred to in Article 185 of the Financial Regulation.

## **2. MANAGEMENT MEASURES**

### **2.1. Monitoring and reporting rules**

*Specify frequency and conditions.*

Article 81 of the Regulation establishing the European Banking Authority (EBA) requires the Commission by 2 January 2014, and every 3 years thereafter, to publish a general report on the experience acquired as a result of the operation of EBA. To this end, the Commission will publish a general report that will be forwarded to the European Parliament and to the Council.

### **2.2. Management and control system**

#### *2.2.1. Risk(s) identified*

In relation to the legal, economical, efficient and effective use of appropriations resulting from the proposal it is expected that the proposal would not bring about new risks that would not be currently covered by an EBA existing internal control framework.

#### *2.2.2. Control method(s) envisaged*

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### **2.3. Measures to prevent fraud and irregularities**

*Specify existing or envisaged prevention and protection measures.*

For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) shall apply to EBA without any restriction.

EBA shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) and shall immediately adopt appropriate provisions for all EBA staff.

The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by EBA as well as on the staff responsible for allocating these monies.

Articles 64 and 65 of the Regulation establishing the European Banking Authority (EBA) set out the provisions on implementation and control of EBA budget and applicable financial rules.

### 3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL

#### 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing expenditure budget lines

*In order of multiannual financial framework headings and budget lines.*

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Description.....]	Diff./non-diff. (47)	from EFTA <sup>48</sup> countries	from candidate countries <sup>49</sup>	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
	12.0402.01 EBA – Subsidy under Titles 1, 2 and 3	Diff	Yes	NO	NO	NO

- New budget lines requested

*In order of multiannual financial framework headings and budget lines.*

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Heading.....]	Diff./non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
	[XX.YY.YY.YY]		YES/N O	YES/N O	YES/N O	YES/NO

<sup>47</sup> Diff. = Differentiated appropriations / Non-diff. = Non-Differentiated Appropriations

<sup>48</sup> EFTA: European Free Trade Association.

<sup>49</sup> Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

### 3.2. Estimated impact on expenditure

#### 3.2.1. Summary of estimated impact on expenditure

EUR million (to 3 decimal places)

<b>Heading of multiannual financial framework:</b>	1A	Competitiveness for Growth and Employment
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DG: MARKT			Year 2013 <sup>50</sup>	Year 2014	Year 2015					TOTAL
• Operational appropriations										
12.0402.01	Commitments	(1)	0	1,080	999					2,079
	Payments	(2)	0	1,080	999					2,079
Appropriations of an administrative nature financed from the revenues from fees										
Number of budget line		(3)								
<b>TOTAL appropriations for DG MARKT</b>		Commitments	=1+1a +3	0	1,080	999				2,079
		Payments	=2+2a +3	0	1,080	999				2,079
• TOTAL operational appropriations		Commitments	(4)	0	1,080	999				2,079
		Payments	(5)	0	1,080	999				2,079
• TOTAL appropriations of an administrative nature financed from revenues from fees		(6)								
<b>TOTAL appropriations</b>			=4+ 6	0	1,080	999				2,079

<sup>50</sup> Year N is the year in which implementation of the proposal/initiative starts.

<b>under HEADING 1A</b> of the multiannual financial framework	Payments	=5+ 6		1,080	999					2,079
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**Comments:**

EUR million (to 3 decimal places)

		Year 2013 <sup>51</sup>	Year 2014	Year 2015					TOTAL
<b>TOTAL appropriations</b> <b>under HEADINGS 1 to 5</b> of the multiannual financial framework	Commitments	0	1,080	999					2,079
	Payments	0	1,080	999					2,079

<sup>51</sup> Year N is the year in which implementation of the proposal/initiative starts.

### 3.2.2. Estimated impact on operational appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

Indicate objectives and outputs ↓			Year 2012		Year 2013		Year 2014		Year 2015		<b>TOTAL</b>	
	Type <sup>52</sup>	Average cost	Output	Total Cost								
	1. Objectives for preparation and prevention:											
– increase preparedness of supervisors and banks for crisis situations and												
– enable resolvability of all banks												
Number of Technical Standards and Guidelines	numerical		0	0	0	0	11	517	1	200	12	<b>717</b>
Sub-total for specific objective No 1			0	0	0	<b>0</b>	11	<b>517</b>	1	<b>200</b>	12	<b>717</b>
2. Objective for Early intervention:												
– improve early intervention arrangements for supervisors												

<sup>52</sup> Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

Indicate objectives and outputs ↓			Year 2012		Year 2013		Year 2014		Year 2015		TOTAL	
	Type <sup>52</sup>	Average cost	Output	Total Cost	Output	Total Cost						
	Number of Technical Standards and Guidelines	numerical		0	0	0	0	1	47	0	0	1
Sub-total for specific objective No 2				0		0	1	47	0	0	1	47
3. Objectives for Bank resolution: – ensure resolution of banks in a timely and robust manner – ensure legal certainty for bank resolution												
Number of Technical Standards and Guidelines	numerical		0	0	0	0	10	470	4	799	14	1,269
Sub-total for specific objective No 3				0	0	0	10	470	4	799	14	1,269
4. Objective for cross border crisis management: - foster efficient cooperation of authorities in cross border resolution												
Number of Technical Standards and Guidelines			0	0	0	0	1	47	0	0	1	47
Sub-total for specific objective No 4				0	0	0	1	47	0	0	1	47
<b>TOTAL COST<sup>53</sup></b>				0		0	23	1,081	5	999	28	2,080

<sup>53</sup>

Appropriations allocated to different objectives also include overhead costs, which are proportionate to direct HR costs.

### 3.3. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing expenditure budget lines

NA

- New budget lines requested

NA

Estimated impact on appropriations of an administrative nature

#### 3.3.1.1. Summary

- The proposal/initiative does not require the use of administrative appropriations
- The proposal/initiative requires the use of administrative appropriations, as explained below:

#### 3.3.1.2. Estimated requirements of human resources

- The proposal does not require the use of human resources
- The proposal/initiative requires the use of human resources, as explained below:

Comment:

No additional human and administrative resources will be needed in DG MARKT as a result of the proposal.

#### 3.3.2. *Compatibility with the current multiannual financial framework*

- Proposal is compatible the current multiannual financial framework.

- Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.
- Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework<sup>54</sup>.

### 3.3.3. *Third-party contributions*

- The proposal/initiative does not provide for co-financing by third parties
- The proposal provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year 2013	Year 2014	Year 2015				Total
<i>Member State' Contribution (60% of overall costs)</i>	0	1,620	1,498				3,119

### 3.4. **Estimated impact on revenue**

- Proposal has no financial impact on revenue.
- Proposal/initiative has the following financial impact:
  - on own resources
  - on miscellaneous revenue

<sup>54</sup> See points 19 and 24 of the Interinstitutional Agreement.

**Annex to the Legislative Financial Statement for a proposal for Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC, 82/891/EC, 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010.**

The costs related to tasks to be carried out by EBA have been estimated for staff expenditure (Title 1), but also Title 2.

Regarding the timing of the proposal, it is assumed that the Directive will enter into force between June and December 2013. EBA shall draft technical standards 12 months from the date of entry into force, therefore it is expected that the work would start as early as January 2014. Additional staff has been estimated for the **23 technical standards and 5 guidelines**, including related actions reserved for the recognition of third country resolution proceedings, for the completion of non-binding framework cooperation arrangements with third countries as well as for on-going monitoring work, participation in colleges and the exercise of binding mediation of EBA. The proposal of the Commission includes long-term tasks for EBA that will require the establishment of 5 additional posts (temporary agents) as from 2014. In addition, 11 seconded national experts "SNE" are foreseen to carry out temporary tasks limited to 2014 and 2015 years.

Other assumptions:

- Salary weighting coefficient for London of 1.28;
- Due to complexity of the technical standards, guidelines and the workload for related tasks as explained above, it is assumed that on average one technical standard/ guideline will require 1.15 man years. Thus, 23 technical standards and 5 guidelines will require 32 man years for 2014 and 2015.
- Training costs assumed at €1,000 per FTE per year;
- Mission costs of €10,000, estimated based on 2012 draft budget for missions per headcount;
- Recruiting-related costs (travel, hotel, medical examinations, installation and other allowances, removal costs, etc.) of €12,700, estimated based on 2012 draft budget for recruiting per new headcount.

The method of calculating the increase in the required budget for the next three years is presented in more detail in table below.

Cost type	Calculation	Amount (in EUR millions)			
		2013	2014	2015	Total
Title 1: Staff expenditure					
<i>11 Salaries and allowances</i>					
- of which temporary agents	=5*127*1,28	0	813	813	1,626
- of which SNEs	=11*73*1,28	0	1,028	1,028	2,056
- of which contract agents		0	0	0	0
<i>12 Expenditure related to recruitment</i>	=16*12,7	0	203	0	203
<i>13 Mission expenses</i>	=16*10	0	160	160	320
<i>15 Training</i>	=16*1	0	16	16	32
Total Title 1: Staff expenditure		0	2,220	2,017	4,237
Title 2: Infrastructure and operating expenditure	=16*30	0	480	480	960

Title 3: Operational expenditure		0	0	0	0
Total		0	2,700	2,497	5,197
Of which Community contribution (40%)		0	1,080	999	2,078
Of which Member State contribution (60%)		0	1,620	1,498	3,119

The following table presents the proposed establishment plan for the five temporary agent positions.

Function group and grade	Temporary posts
AD 8	1
AD 7	1
AD 6	1
AD 5	2
<b>AD total</b>	<b>5</b>