



Brussels, 25.10.2018
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COMMISSION DELEGATED REGULATION (EU) No .../..

of 25.10.2018

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 4(6) of Directive 2014/59/EU (the ‘the Directive’) empowers the Commission to adopt, following submission of draft regulatory standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation No (EU) 1093/2010, delegated acts specifying the criteria referred to in paragraph 1 of Article 4 of the Directive, for assessing, in accordance with that paragraph, the impact of an institution’s failure on financial markets, on other institutions and on funding conditions.

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

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 4(6) of the Directive. A consultation paper was published on the EBA internet site on 8 May 2017 and the consultation closed on 8 August 2017. Moreover, the EBA invited the EBA’s Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted its Impact Assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at <https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/regulatory-technical-standards-on-simplified-obligations>, pages 25-32 of the Final Draft Regulatory Technical Standards package.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The draft Regulatory Technical Standard (‘RTS’) further specify the criteria, set out in Article 4(1) of the Directive, for granting simplified obligations.

The draft RTS have been developed taking into account, where appropriate and to the extent possible given that national practices are still evolving, experience acquired in the application of the EBA guidelines on simplified obligations issued under Article 4(5) of the Directive.

According to the draft RTS, the authorities should have regard to the criteria by following a two-stage approach: (i) they should select institutions that could potentially benefit from simplified obligations based on a number of quantitative criteria measured on the basis of a set of quantitative indicators; and (ii) they should verify whether institutions selected as potentially eligible for simplified obligations in stage 1 also meet the qualitative criteria.

The draft RTS promote convergence of practices among the authorities by creating a common framework for assessing institutions' eligibility for simplified obligations. They are also intended to facilitate cooperation among the competent and resolution authorities in conducting these assessments, including as regards cross-border groups.

Article 4(5) of Directive 2014/59/EU empowers EBA to issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify the criteria for the competent and resolution authorities assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions. Further, paragraph 6 of that Article empowers the Commission to specify the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions by adopting a Regulation on the basis of draft regulatory technical standards submitted by EBA, taking into account, where appropriate, experience acquired from the relevant guidelines. On 16 October 2015 EBA adopted EBA/GL/2015/16,¹ which should no longer be in force after the entry into force of this Regulation.

¹ EBA Guidelines on the application of simplified obligations under Article 4(5) of Directive 2014/59/EU (EBA/GL/2015/16).

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 on establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council,² and in particular Article 4(6) thereof,

Whereas:

- (1) To determine whether Member States should grant institutions in their jurisdictions simplified obligations, Article 4(1) of Directive 2014/59/EU requires those Member States to ensure that competent and resolution authorities assess the impact that the failure of an institution could have due to a number of factors specified in that article.
- (2) That assessment should be distinct from, and should not predetermine, any other assessment to be made by resolution authorities, including, in particular, any assessment of the resolvability of an institution or group, or of whether the conditions for resolution referred to in Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council³ are satisfied.
- (3) The specification of the criteria referred to in Article 4(1) of Directive 2014/59/EU should be practical, efficient and effective. The impact that the failure of an institution can have should therefore be assessed, first on the basis of quantitative criteria and subsequently on the basis of qualitative criteria. In general, the assessment based on qualitative criteria should only be conducted where the assessment on the basis of quantitative criteria does not lead to the conclusion that, in the light of the impact that the institution's failure could have, full obligations, rather than merely simplified obligations, are required.
- (4) To ensure a convergent and effective application of this Regulation, competent and resolution authorities should assess the quantitative criteria against a Union common threshold in the form of a total quantitative score. Competent and resolution

² OJ L 173, 12.6.2014, p. 190.

³ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

authorities should calculate that total quantitative score in accordance with a set of indicators, using the values from the applicable supervisory reporting framework laid down in Implementing Regulation (EU) No 680/2014⁴.

- (5) To ensure a desirable balance in terms of the expected ratio of institutions ineligible for simplified obligations within Member States and the distribution of ineligible institutions across Member States, the Union threshold for the total quantitative score for credit institutions should in principle be established at 25 basis points. However, competent and resolution authorities should be able to raise or lower the threshold of 25 basis points and set it within the range of 0 to 105 basis points, depending on the specificities of the Member State's banking sector. A highly concentrated banking sector may justify a higher threshold, whereas a large number of small institutions combined with a small number of large institutions may lead to a lower threshold. The threshold should strike the right balance between the cumulative value of total assets of credit institutions that could be eligible for simplified obligations in a given Member State and of credit institutions that would be ineligible based on the quantitative assessment.
- (6) Competent and resolution authorities should use appropriate proxies based on the national generally accepted accounting principles (GAAP) where they do not receive the indicator values from institutions as a part of supervisory reporting. Competent or resolution authorities should be able to assign a value of zero to the relevant indicators where the identification of proxies would be excessively cumbersome. That possibility should however be limited to institutions not reporting template 20 on the basis of Article 5(a)(4) of Implementing Regulation (EU) No 680/2014, due to their not exceeding the threshold referred to in that Article.
- (7) To ensure that the approach taken in this Regulation fully complies with the principle of proportionality and to eliminate any disproportionate burden, it should be possible for small credit institutions to be quantitatively assessed on the basis of their size only. Competent and resolution authorities should therefore be able to conclude that the failure of a small credit institution would not be likely to have a significant negative effect on financial markets, other institutions or funding conditions, without applying the total quantitative score, provided that their qualitative assessment supports that conclusion. For those small credit institutions, the assessment of the qualitative criteria should also be conducted in a proportionate manner.
- (8) To ensure the effectiveness and efficiency of the assessment of the impact of institutions' failure on financial markets, other institutions or funding conditions, the specification of quantitative and qualitative criteria should build upon terms and categories already laid down in Directive 2013/36/EU of the European Parliament and of the Council⁵.
- (9) In particular, pursuant to Article 131(2) of Directive 2013/36/EU, G-SIIs are identified as such on the basis of, inter alia, their size, interconnectedness with the financial system, complexity and cross-border activity. Since those criteria overlap to a large extent with the criteria of Article 4(1) of Directive 2014/59/EU, competent and

⁴ Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 191, 28.6.2014, p. 1).

⁵ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

resolution authorities should be able to decide that a G-SII's failure would be likely to have a significant negative effect on financial markets, other institutions or funding conditions, without having to conduct a quantitative assessment.

- (10) Further, pursuant to Article 131(3) of Directive 2013/36/EU, O-SIIs are identified as such on the basis of, inter alia, their size, their importance for the economy of the Union or of the relevant Member State, the significance of their cross-border activities and their interconnectedness with the financial system. Since those criteria are very similar to the criteria of Article 4(1) of Directive 2014/59/EU, competent and resolution authorities should be able to decide that an O-SII's failure would be likely to have a significant negative effect on financial markets, other institutions or funding conditions, without having to conduct a quantitative assessment.
- (11) Moreover, Article 107(3) of Directive 2013/36/EU requires the European Banking Authority (EBA) to issue guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) in accordance with Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁶. Competent authorities and financial institutions, to which those guidelines are addressed, are required to make every effort to comply with them. The categorisation under the EBA SREP guidelines by competent authorities should therefore be taken into account in the context of the assessment referred to in Article 4(1) of Directive 2014/59/EU. Competent authorities classify institutions into four categories. The first category (SREP Category 1) is comprised of G-SIIs and O-SIIs and, where appropriate, of other institutions categorised as such by a competent authority on the basis of their size, internal organisation, and the nature, scope and complexity of their activities. Accordingly, where the competent authority has determined that an institution falls within SREP Category 1, competent and resolution authorities should be able to decide that the failure of that institution would be likely to have a significant negative effect on financial markets, other institutions or funding conditions, without having to conduct a quantitative assessment.
- (12) To ensure a consistent assessment of institutions, it is necessary to specify a minimal list of considerations on the basis of which competent and resolution authorities should perform their qualitative assessments, without preventing those authorities from taking into account other relevant considerations. The minimal list of qualitative considerations should refer to circumstances indicating that the failure of an institution could have a significant negative effect on financial markets, other institutions or funding conditions.
- (13) In the light of the diverse range of investment firms covered by Directive 2014/59/EU and the need not to pre-empt the ongoing work at Union level on the review of the prudential requirements for those firms, this Regulation should only specify the indicators that competent and resolution authorities should take into account to assess the criterion of size. Those authorities should set the weights assigned to those indicators and determine the relevant thresholds.
- (14) An institution belonging to a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU (cross-border group) is highly interconnected and its activities are much more complex than those of a stand-alone institution. The impact of the failure of an institution belonging to a cross-border

⁶ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

group is thus likely to be more significant. Competent and resolution authorities should therefore conclude that the failure of an institution belonging to a cross-border group would be likely to have a significant negative effect on financial markets, other institutions or funding conditions, where any of the assessments at the level of the individual Member States where the group has a presence concludes so. To achieve this, competent and resolution authorities should coordinate their assessments and exchange all necessary information, within the structure of the Banking Union and within the framework of supervisory and resolution colleges.

- (15) Competent and resolution authorities should be able to decide that the failure of certain institutions would not be likely to have a significant negative impact as referred to in Article 4(1) of Directive 2014/59/EU, even when their total quantitative score reaches the predetermined threshold. That different treatment of those institutions should be justified by their exceptional characteristics. The first such group consists of promotional banks the purpose of which is to advance the public policy objectives of a Member State's central or regional government or local authority through the provision of promotional loans on a non-competitive, not-for-profit basis. The loans that those institutions grant are directly or indirectly guaranteed by the central or regional government or the local authority. Promotional banks may thus be regarded as institutions the failure of which would not be likely to have a significant negative effect on financial markets, other institutions or funding conditions, provided that conclusion is in line with the qualitative assessment performed for those promotional banks. The second group consists of credit institutions that have been subject to an orderly winding-up process. Since an orderly winding-up process in general prevents new business, credit institutions that have been subject to such a process may also be regarded as institutions the failure of which would not be likely to have a significant negative effect on financial markets, other institutions or funding conditions, provided that this is in line with the qualitative assessment performed for those credit institutions.
- (16) Having regard to the different purposes of recovery and resolution planning, competent and resolution authorities from the same Member State should be able to reach different conclusions to their assessments performed in accordance with this Regulation. In particular, they may make different decisions while setting thresholds for the total quantitative score, applying special treatment for promotional banks and institutions subject to an orderly winding-up process, as well as reach different conclusions on the possibility to grant simplified obligations. In those cases, competent and resolution authorities should regularly assess whether the difference remains justified.
- (17) This Regulation is based on the draft regulatory technical standards submitted by EBA to the Commission.
- (18) EBA has conducted an open public consultation on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010.

HAS ADOPTED THIS REGULATION:

Article 1

Quantitative assessment for credit institutions

1. Competent authorities and resolution authorities shall assess the impact of the failure of a credit institution on financial markets, on other institutions or on funding conditions on the basis of a total quantitative score calculated in accordance with Annex I. They shall do so on a regular basis and at least every two years.
2. A credit institution with a total quantitative score equal to or higher than 25 basis points shall be regarded as an institution the failure of which would be likely to have a significant negative effect on financial markets, other institutions or funding conditions.
3. Competent and resolution authorities may raise or lower the threshold referred to in paragraph 2 within the range of 0 to 105 basis points. Competent and resolution authorities shall keep the amended threshold under regular review.
4. Where the indicator values of Annex I are not available, the assessment referred to in paragraph 1 shall be made on the basis of proxies correlated to the greatest extent possible with the indicators as specified in Annex III.
5. Where a credit institution does not exceed the threshold specified in Article 5(a)(4) of Implementing Regulation (EU) No 680/2014 and does not submit Template 20 of that Regulation, competent and resolution authorities may assign a value of zero to the relevant indicators specified in Annex III.
6. Where the total assets of a credit institution do not exceed 0,02% of the total assets of all credit institutions authorised and, where relevant data are available, of branches established in the Member State, including Union branches, competent and resolution authorities may, without applying paragraphs 1 to 5, establish that the failure of that credit institution would not be likely to have a significant negative effect on financial markets, other institutions or funding conditions, unless that would not be justified on the basis of Article 2.
7. Where a credit institution has been identified as a G-SII or an O-SII under Article 131(1) of Directive 2013/36/EU or classified as Category 1 on the basis of the guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) issued in accordance with Article 107(3) of that Directive, competent and resolution authorities may, without applying paragraphs 1 to 5 of this Article, establish that the failure of that credit institution would be likely to have a significant negative effect on financial markets, other institutions or funding conditions. The relevant indicator values for those institutions shall, in any event, still be taken into account for determining the aggregate amount referred to in point 2 of Annex I, and for determining the total assets of all credit institutions authorised in the Member State for the purpose of paragraph 6.

Article 2

Qualitative assessment for credit institutions

1. Where, pursuant to Article 1, a credit institution is not regarded as an institution the failure of which would be likely to have a significant negative effect on financial markets, on other institutions or on funding conditions, competent and resolution

authorities shall assess the impact of that credit institution's failure on financial markets, other institutions or funding conditions on a regular basis and at least every two years and having regard to, at least, all of the following qualitative considerations:

- (a) the extent to which the credit institution performs critical functions in one or more Member States;
 - (b) whether the credit institution's covered deposits would exceed the available financial means of the relevant deposit guarantee scheme and the deposit guarantee scheme's capacity to raise extraordinary *ex post* contributions, as referred to in Article 10 of Directive 2014/49/EU of the European Parliament and of the Council⁷;
 - (c) whether the credit institution's shareholding structure is highly concentrated, highly dispersed or not sufficiently transparent in a way that could negatively impact the availability or timely implementation of the institution's recovery or resolution actions;
 - (d) whether the credit institution that is a member of an IPS, as referred to in Article 113(7) of Regulation (EU) No 575/2013, provides critical functions to other IPS members, including clearing, treasury or other services;
 - (e) whether the credit institution is affiliated to a central body, as referred to in Article 10 of Regulation (EU) No 575/2013, and the mutualisation of losses among affiliated institutions would constitute a substantive impediment to normal insolvency proceedings.
2. The assessment referred to in paragraph 1 shall be performed independently by competent and resolution authorities having regard to the objectives pursued by recovery and resolution planning.
 3. The assessment referred to in paragraph 1 may be performed for a category of credit institutions where the relevant competent or resolution authority determines that two or more credit institutions have similar characteristics in terms of all of the qualitative considerations set out in paragraph 1.

Article 3

Quantitative assessment for investment firms

1. Competent and resolution authorities shall assess the impact of the failure of an investment firm on financial markets, other institutions or funding conditions on a regular basis and at least every two years and on the basis of:
 - (a) the total quantitative score calculated based on the indicators referred to in Annex II;
 - (b) the weights assigned to those indicators by competent and resolution authorities.
2. The values of the indicators shall be determined on the basis of the indicators as specified in Annex III. Where the indicator values of Annex II are not available, the assessment referred to in paragraph 1 shall be made on the basis of proxies correlated to the greatest extent possible with the indicators as specified in Annex III. Where proxies are not available, competent and resolution authorities may replace the indicators referred to in Annex II with other relevant indicators.

⁷ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 190).

3. The threshold for the total quantitative score shall be set by competent and resolution authorities.
4. An investment firm with a total quantitative score equal to or higher than the threshold referred to in paragraph 3 shall be regarded as an institution the failure of which would be likely to have a significant negative effect on financial markets, other institutions or funding conditions.
5. Where an investment firm has been identified as a G-SII or an O-SII in accordance with Article 131(1) of Directive 2013/36/EU or has been classified as Category 1 on the basis of the guidelines on common procedures and methodologies for SREP issued in accordance with Article 107(3) of that Directive, competent and resolution authorities may, without applying paragraphs 1 to 4 of this Article, establish that the failure of that institution would be likely to have a significant negative effect on financial markets, other institutions or funding conditions.

Article 4

Qualitative assessment for investment firms

1. Where an investment firm is not regarded as an institution the failure of which would be likely to have a significant negative effect on financial markets, other institutions and funding conditions pursuant to Article 3, competent and resolution authorities shall assess the impact of that investment firm's failure on financial markets, other institutions or funding conditions on a regular basis and at least every two years and having regard to, at least, all of the following qualitative considerations:
 - (a) the extent to which the investment firm performs critical functions in one or more Member States;
 - (b) whether the investment firm's shareholding structure is highly concentrated, highly dispersed, or not sufficiently transparent in a way that could negatively impact the availability or timely implementation of the institution's recovery or resolution actions;
 - (c) whether an investment firm that is a member of an IPS, as referred to in Article 113(7) of Regulation (EU) No 575/2013, provides critical functions to other IPS members, including clearing, treasury or other services;
 - (d) whether the majority of the investment firm's clients are retail or professional;
 - (e) the extent to which money and financial instruments held by the investment firm on its clients' behalf would not be fully protected by an investor-compensation scheme as referred to in Directive 97/9/EC of the European Parliament and of the Council⁸;
 - (f) whether the investment firm's business model is complex, including the scale of its investment activities.
2. The assessment referred to in paragraph 1 shall be performed independently by competent and resolution authorities having regard to the objectives pursued by recovery and resolution planning.

⁸ Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ L 84, 26.3.1997 p. 22).

Article 5

Institutions belonging to groups

1. For an institution that is part of a group, the assessments referred to in Articles 1 to 4 shall be made at the level of the parent undertaking in the Member State where the institution has been authorised.
2. By way of derogation from paragraph 1, for an institution that is part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, the assessments referred to in Articles 1 to 4 of this Regulation shall be made at the following levels:
 - (a) the level of the Union parent undertaking;
 - (b) the level of each parent undertaking in a Member State or, where there is no parent undertaking in a Member State, the level of each stand-alone subsidiary of the group in a Member State.
3. Institutions that are part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU shall be regarded as institutions the failure of which would be likely to have a significant negative effect on financial markets, other institutions or funding conditions, where any of the following apply at any of the levels referred to in points (a) and (b) of paragraph 2 of this Article:
 - (a) the institution has a total quantitative score that is equal to or exceeds the threshold set by competent and resolution authorities pursuant to Article 1(3) or Article 3(3);
 - (b) the criteria in Article 2(1) or Article 4(1) are satisfied.
4. Paragraphs 2 and 3 shall not apply to institutions that are subject to a recovery plan as referred to in Article 8(2)(b) of Directive 2014/59/EU.
5. Competent and resolution authorities shall coordinate the assessments referred to in this Article and exchange all necessary information within the framework of supervisory and resolution colleges.

Article 6

Assessment of promotional banks

Competent and resolution authorities may regard promotional banks, as defined in Article 3(27) of Commission Delegated Regulation (EU) No 2015/63⁹, as institutions the failure of which would not be likely to have a significant negative effect on financial markets, other institutions or funding conditions, without applying paragraphs 2 and 7 of Article 1 and Article 5(3), where the qualitative considerations of Article 2(1) are not satisfied at any of the following levels:

- (a) the level of the Union parent undertaking;
- (b) the level of each parent undertaking in a Member State or, where there is no parent undertaking in a Member State, the level of each stand-alone subsidiary of the group in a Member State.

⁹ Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ L 11, 17.1.2015, p. 44).

Article 7

Assessment of credit institutions subject to an orderly winding-up process

Competent and resolution authorities may regard credit institutions that are subject to an orderly winding-up process as institutions the failure of which is not likely to have a significant negative effect on financial markets, other institutions or funding conditions, without the application of paragraphs 2 and 7 of Article 1 and Article 5(3), where the qualitative considerations of Article 2(1) are not satisfied at any of the following levels:

- (a) the level of the Union parent undertaking;
- (b) the level of each parent undertaking in a Member State or, where there is no parent undertaking in a Member State, the level of each stand-alone subsidiary of the group in a Member State.

Article 8

Assessment by competent and resolution authorities from the same Member State

Taking into account different purposes of recovery and resolution planning, competent and resolution authorities from the same Member State may reach different conclusions with regard to the application of Articles 1 to 4, 6 and 7, in which case they shall regularly assess whether those different conclusions remain justified.

Article 9

Entry into force

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

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

Done at Brussels, 25.10.2018

For the Commission
The President
Jean-Claude JUNCKER