



EUROPEAN
COMMISSION

Brussels, **XXX**
[...](2023) **XXX** draft

2023/**[...]** (**[...]**)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Directive 2014/59/EU as regards early intervention measures, conditions for
resolution and financing of resolution action**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The proposed amendments to Directive 2014/59/EU¹ (the Bank Recovery and Resolution Directive or BRRD) are part of a legislative package that includes also amendments to Regulation (EU) No 806/2014² (the Single Resolution Mechanism Regulation or SRMR) and to Directive 2014/49/EU³ (the Deposit Guarantee Schemes Directive or DGSD).

Context of the proposal

In the aftermath of the global financial and sovereign crises, the EU took multiple decisive actions, in line with international calls for reform, to create a safer financial sector for the EU single market and provide the tools and powers to handle the failure of any bank in an orderly manner, while preserving financial stability, public finances and depositor protection. The Banking Union was created in 2014 and is currently made up of two pillars: a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) equipped with a Single Resolution Fund (SRF). The Banking Union is supported by a Single Rulebook which, in what concerns the EU bank crisis management and deposit insurance (CMDI), is made up of three EU legislative texts adopted in 2014: the BRRD, the SRMR and the DGSD. The 2019 Banking package (so-called ‘risk reduction package’) revised the BRRD and SRMR as well as the Capital Requirements Regulation (CRR⁴) and the Capital Requirements Directive (CRD⁵) by including measures delivering on Europe’s commitments made in international fora⁶ to take further steps towards completing the Banking Union by providing credible risk reduction measures to mitigate threats to financial stability.

In November 2020, the Eurogroup agreed on the creation and early introduction of a common backstop to the SRF by the European Stability Mechanism (ESM)⁷. However, the Banking

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

² Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

³ 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. 149–178).

⁴ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1–337).

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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338–436).

⁶ The Basel Committee on Banking Supervision and the Financial Stability Board (FSB). Financial Stability Board (2014 updated version), [*Key Attributes of effective resolution regimes for financial institutions*](#) and (2015), [*Principles on Loss-absorbing and Recapitalisation Capacity of Globally Systemically Important Banks \(G-SIBs\) in Resolution, Total Loss-absorbing Capacity \(TLAC\) Term Sheet*](#).

⁷ Eurogroup (30 November 2020), [*Statement of the Eurogroup in inclusive format on the ESM reform and the early introduction of the backstop to the Single Resolution Fund*](#). The implementation will take

Union is still incomplete and misses its third pillar: a European Deposit Insurance Scheme (EDIS)⁸. The Commission proposal adopted on 24 November 2015 to establish EDIS⁹ is still pending.

The objectives of the CMDI framework

The CMDI framework was designed to mitigate the risks and manage the failure of institutions of any size, while achieving four overarching objectives: (i) protect financial stability while avoiding contagion, thereby ensuring market discipline and continuity of critical functions for the society, (ii) safeguard the functioning of the single market and provide a level playing field across the EU; (iii) minimise recourse to taxpayer money and weaken the bank-sovereign loop and (iv) protect depositors and ensure consumer confidence.

The CMDI framework provides for a set of instruments that can be applied in the different stages of the lifecycle of banks in distress: recovery action supported by the recovery plans drafted by the banks, early intervention measures, measures to prevent the failure of a bank, resolution plans prepared by the resolution authorities, a resolution toolbox when the bank is declared failing or likely to fail (FOLF) and it is deemed that the resolution of the bank (rather than its liquidation) is in the public interest. Conversely, national insolvency procedures, which are outside of the CMDI framework¹⁰, continue to apply for those failing banks that can be dealt with under these national procedures, where they are more suitable (rather than resolution) and do not harm public interest or endanger financial stability.

The CMDI framework is intended to provide a combination of funding sources to manage failures in an economically efficient manner, protecting financial stability and depositors, maintaining market discipline, while reducing recourse to the public budget and ultimately the cost to taxpayers. The cost of resolving the bank is first covered through bank's own resources, i.e. allocated to the shareholders and creditors of the bank itself (constituting the bank's internal loss absorbing capacity), which also reduces moral hazard and enhances market discipline. If needed, it can be complemented by funds from deposit guarantee schemes (DGS) and resolution financing arrangements (national resolution funds (RF) or the SRF in the Banking Union). These funds are built through contributions by all banks irrespective of their size and business model. In the Banking Union, these rules were further integrated by entrusting the Single Resolution Board (SRB) with the management and oversight of the SRF, which is funded by contributions from the industry in the participating Member States of the Banking Union. Depending on the tool applied to a bank in distress (e.g. preventive, precautionary, resolution or alternative measures under national insolvency proceedings) and the specificities of the case, State aid¹¹ control may be necessary for interventions by a RF/SRF, a DGS or public funding from the State budget.

place over 2022-2024. However, the [Agreement Amending the Treaty Establishing the European Stability Mechanism](#) is still pending ratification.

⁸ Furthermore, there is still no agreement on a credible and robust mechanism for providing liquidity in resolution in the Banking Union, in line with the standard set by international peers.

⁹ COM/2015/0586 final.

¹⁰ National insolvency proceedings are unharmonized. However, the decision by the resolution authority whether to place a failing bank in resolution or in national insolvency proceedings is part of the CMDI framework (public interest assessment). If a decision is taken by the resolution authority to place a failing bank in insolvency, the case is treated at national level, where the assessment of initiation of insolvency proceedings takes place, according to the specificities of national insolvency regimes.

¹¹ State aid rules are intrinsically interconnected with and complementary to the CMDI framework. These rules are not subject to this review and this impact assessment. In order to ensure consistency between the two frameworks, the Eurogroup invited the Commission in November 2020 to conduct a review of

Reasons for the proposal

Notwithstanding the progress achieved since 2014, the application of resolution has been scarce, especially in the Banking Union, and areas for further strengthening and adjustment were identified with regard to the CMDI framework in terms of design, implementation and most importantly, incentives for its application.

To date, many failing banks of a smaller or medium size have been dealt with under national regimes often involving the use of taxpayer money (bail-outs) instead of the industry-funded safety nets, such as the SRF in the Banking Union that so far has been unused in resolution. This goes against the intention of the framework as it was set-up after the global financial crisis, which involved a major paradigm shift from bail-out to bail-in. In this context, the opportunity cost of the resolution financing arrangements financed by all banks is considerable.

The resolution framework did not fully deliver with respect to key overarching objectives, notably facilitating the functioning of the EU single market in banking by ensuring a level playing field, handling cross-border and domestic crises and minimising recourse to taxpayer money.

The reasons are mainly due to misaligned incentives in choosing the right tool to manage failing banks, leading to the non-application of the harmonised resolution framework, in favour of other avenues. This is overall due to the broad discretion in the public interest assessment, difficulties in accessing funding in resolution without imposing losses on depositors and easier access to funding outside of resolution, raising risks of fragmentation and suboptimal outcomes in managing banks' failures, in particular of smaller and medium-sized banks.

The review of the CMDI framework and the interaction with national insolvency proceedings should provide solutions to address these issues and enable the framework to fully achieve its objectives and be fit for its purpose for all banks in the EU irrespective of their size, business model and liability structure, even smaller and medium-sized banks, if required by prevailing circumstances. The revision should aim at ensuring a coherent application of the rules across Member States, delivering a better level playing field, while protecting financial stability and depositors, preventing contagion and reducing recourse to taxpayer money. In particular, the framework could be improved to facilitate the resolution of smaller and medium-sized banks as initially expected, by mitigating the impacts on financial stability and the real economy without recourse to public funding, but also fostering confidence of their depositors that consist primarily of households and SMEs. In terms of magnitude of the changes envisaged, the CMDI review does not seek to overhaul the current framework but rather to bring much needed improvements in a number of key areas in order to make the framework function as intended for all banks.

The CMDI reform and the broader implications for the Banking Union

Together with the CMDI reform, a complete Banking Union, including its third pillar, EDIS, would offer a higher level of financial protection to Europe's households and businesses, foster trust and strengthen financial stability as necessary conditions for growth, prosperity and resilience in the Economic and Monetary Union and in the EU more generally. The Capital Markets Union complements the Banking Union as both initiatives would help finance the twin transition (digital and green), enhance the international role of the euro and

the State aid framework for banks, and to complete it in parallel with the CMDI framework review, ensuring its entry into force at the same time with the updated CMDI framework.

strengthen Europe's open strategic autonomy in a changing world, particularly considering the current challenging economic and geopolitical environment.

In June 2022, the Eurogroup did not agree to a more comprehensive work plan to complete the Banking Union including EDIS. Instead, the Eurogroup invited the Commission to table more targeted legislative proposals for reforming the EU framework for bank crisis management and national deposit insurance¹².

In parallel, the European Parliament also stressed in its 2021 annual report on Banking Union¹³ the importance of completing it with the establishment of EDIS and supported the Commission in putting forward a legislative proposal on the CMDI review. While EDIS was not explicitly endorsed by the Eurogroup, it would make the CMDI reform more robust and delivered synergies and efficiency gains for the industry. Such a legislative package would be part of the agenda for the completion of the Banking Union, as emphasised in President von der Leyen's Political Guidelines, which also recalled the importance of EDIS.

Summary of the CMDI reform elements

The CMDI proposals cover a range of policy aspects and constitute a coherent response to the identified problems:

- Expanding the scope of resolution through a revision of the public interest assessment, when this achieves the objectives of the framework, e.g. protecting financial stability, taxpayer money and depositor confidence better than national insolvency proceedings;
- Strengthening the funding in resolution by complementing the internal loss-absorbing capacity of institutions, which remains the first line of defence, with the use of DGS funds in resolution to help access resolution funds without imposing losses on depositors where appropriate, subject to conditions and safeguards;
- Amending the hierarchy of claims in insolvency and ensuring a general depositor preference with a single-tier depositor preference, with the aim of enabling the use of DGS funds in measures other than payout of covered deposits;
- Harmonising the least cost test for all types of DGS interventions outside payout of covered deposits in insolvency to improve the level playing field and ensure consistency of outcomes;
- Clarifying the early intervention framework by removing overlaps between early intervention and supervisory measures, providing legal certainty on the applicable conditions and facilitating cooperation between competent and resolution authorities;
- Ensuring a timely triggering of resolution;
- Improving depositor protection (targeted improvements of DGSD provisions on scope of protection and cross-border cooperation, harmonisation of national options, improvement of transparency on financial robustness of DGSs).

¹² Eurogroup (16 June 2022), [Eurogroup statement on the future of the Banking Union](#).

¹³ European Parliament (2022), [Banking Union – annual report 2021](#).

- **Consistency with existing policy provisions in the policy area**

The proposal introduces amendments to the existing legislation and renders it fully consistent with the existing policy provisions in the area of bank crisis management and deposit insurance. The review of the BRRD/SRMR and of the DGSD aims at improving the functioning of the framework in a way that provides the tools to resolution authorities to handle the failure of any bank, irrespective of size and business model, in order to preserve financial stability, protect depositors and avoid recourse to taxpayer money.

- **Consistency with other Union policies**

The proposal contributes to the strengthening of the Union financial legislation adopted in the last decade to reduce risks in the financial sector and to ensure an orderly management of bank failures that aim to make the banking system more robust and ultimately promote the sustainable financing of the economic activity in the Union. It is fully consistent with the EU's fundamental goals of promoting financial stability, reducing taxpayers' support in bank resolution as well as protecting depositor confidence. These objectives are conducive to a high level of competitiveness and consumer protection.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal amends an existing directive, BRRD, in particular as regards the enhanced application of the tools that are already available in the bank recovery and resolution framework, clarifying the conditions for resolution, facilitating access to safety nets in case of bank failure and improving the clarity and consistency of funding rules. By establishing harmonised requirements for the application of the CMDI framework to banks in the internal market, the proposal reduces considerably the risk of divergent national rules in the Member States, which could distort competition in the internal market.

Consequently, the legal basis for the proposal is the same as the legal basis of the original legislative act, namely Article 114 TFEU. That provision allows the adoption of measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.

- **Subsidiarity (for non-exclusive competence)**

The legal basis falls within the internal market area, which is considered a shared competence, as defined by Article 4 TFEU. Most of the actions considered represent updates and amendments to existing Union law, and as such, they concern areas where the Union has already exercised its competence and does not intend to cease exercising such competence.

Given that the objectives pursued by the proposed measures aim at supplementing already existing EU legislation, they can be best achieved at EU level rather than by different national initiatives. In particular, the rationale for a specific and harmonised EU resolution regime for all banks in the EU was laid out at the inception of the framework in 2014 and its main features reflect international guidance and the 'Key Attributes of Effective Resolution Regimes for Financial Institutions' adopted by the Financial Stability Board in the aftermath of the 2008 global financial crisis.

The principle of subsidiarity is embedded in the existing resolution framework, as its objectives, namely the harmonisation of the rules and processes for resolution, cannot be sufficiently achieved by the Member States, but can rather, by reason of the effects of a failure of any institution in the whole Union, be better achieved on a Union level through EU action.

The intention of the existing resolution framework has always been to provide a common toolbox to deal effectively with any bank failure, irrespective of its size, business model or location, in an orderly way, where this is necessary to preserve financial stability of the EU, the Member State or the region in which it operates, and to protect depositors without relying on public funds.

The proposal amends certain provisions of the BRRD to enhance the existing framework, in particular when it comes to its application to smaller and medium-sized banks, as otherwise it may not reach its objectives.

Risks to financial stability, depositor confidence or the use of public finances in one Member State may have far-reaching impacts on a cross border basis and may ultimately contribute to a fragmentation of the single market. The lack of action at EU level for less significant banks and their perceived exclusion from a mutualised safety net would also potentially affect their ability to access markets and attract depositors when compared to significant banks. Furthermore, national solutions to tackle bank failures would worsen the sovereign-bank link and undermine the idea behind the Banking Union of introducing a paradigm shift from bail-out to bail-in.

Acting at EU level to reform the resolution framework will not prescribe the strategy that should be taken when banks fail. The determination of choosing an EU harmonised resolution strategy/tool or the national liquidation strategy will remain at the discretion of the resolution authority on the basis of the public interest assessment, which is tailored to each specific failure case and not automatically driven by considerations such as the bank size, the geographical outreach of its activities and structure of the banking sector. This makes, de facto, the public interest assessment the subsidiarity test in the EU.

Thus, while a case-by-case basis needs to be used for assessing whether a bank undergoes resolution or not, it is critical that the possibility for all banks to undergo resolution is preserved and the resolution authorities have the right incentives to opt for resolution, due to the potentially systemic nature of all institutions, as already provided for in BRRD.

Member States may still consider liquidation for the smaller or medium-sized banks under the reformed framework. In this respect, (unharmonised) national insolvency regimes remain in place when an insolvency procedure is deemed superior to resolution. The continuum of tools is preserved in this way, including tools outside resolution, such as: preventive and precautionary measures, resolution tools, alternative measures within national insolvency proceedings and payout of covered deposits in case of piecemeal liquidation.

The amendment of the BRRD is therefore considered to be the best option. It strikes the right balance between harmonising rules and maintaining national flexibility, where relevant. The amendments would further promote a uniform application of the resolution framework, the convergence of practices of supervisory and resolution authorities, and ensure a level playing field throughout the internal market for banking services. This is particularly important in the banking sector where many institutions operate across the EU internal market. National rules would not achieve these objectives.

- **Proportionality**

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

Proportionality has been an integral part of the impact assessment accompanying the proposal. The proposed amendments have been individually assessed against the proportionality objective. In addition, the lack of proportionality of the existing rules has been assessed in

several domains and specific options have been analysed aiming at reducing administrative burden and compliance costs for smaller institutions, in particular by removing the obligation to determine the minimum requirement for own funds and eligible liabilities (MREL) for certain types of entities.

The conditions to access the resolution financing arrangements under the current framework do not sufficiently account for distinctions on grounds of proportionality based on the resolution strategy, size and/or business model. The ability of banks to fulfil the access conditions to the resolution financing arrangement depends on the stock of bail-inable instruments available in their balance sheets at the time of the intervention. However, evidence suggests that some (smaller and medium-sized) banks in certain markets face structural difficulties to build up MREL. For those banks, considering their specific liability structure (particularly those relying significantly on deposit funding), certain deposits would need to be bailed-in in order to access the resolution financing arrangement, which may raise concerns of financial stability and operational feasibility considering the economic and social impact in a number of Member States. The proposed amendments (e.g. clear rules on tailoring MREL for transfer resolution strategies, introducing a single-tier depositor preference, allowing DGS funds to bridge the gap to access the resolution financing arrangement) would improve the access to funding in resolution and introduce more proportionality for banks that would be resolved under transfer strategies, by allowing the protection of deposits from bail-in where appropriate, and addressing in an effective manner the problem of funding of resolution without weakening the minimum bail-in conditions to access the resolution financing arrangement.

- **Choice of the instrument**

The measures are proposed to be implemented by amending the BRRD through a Directive. The proposed measures refer to or further develop already existing provisions inbuilt in this legal instrument.

Some of the proposed amendments, for instance those affecting market exit following a negative public interest assessment, would leave Member States with a sufficient degree of flexibility to maintain different national winding up rules at the stage of their transposition into national law.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The CMDI framework was designed to avert and manage the failure of institutions of any size or business model. It was built upon the objectives of maintaining financial stability, protecting depositors, minimising the use of public support, limiting moral hazard and improving the internal market for financial services. The evaluation concluded that, overall, the CMDI framework should be improved in certain respects, such as better protection of taxpayer money.

In particular, the evaluation shows that legal certainty and predictability in the management of bank failures remains insufficient. The decision of public authorities whether to resort to resolution or insolvency may differ considerably across Member States. In addition, safety nets financed by the industry remain not always effective and divergent access conditions to funding in resolution and outside resolution persist, impacting incentives and creating arbitrage opportunities when deciding on the crisis management tool to use. Finally, depositor protection remains uneven and inconsistent across Member States.

- **Stakeholder consultations**

The Commission undertook extensive exchanges through different consultation tools to reach out to all stakeholders involved, in order to understand better the performance of the framework as well as the possible scope for improvements.

The Commission launched a consultation in 2020 on a combined inception impact assessment and a roadmap aiming at providing a detailed analysis on the actions to be taken at the EU level and the potential impact of different policy options on the economy, the society and the environment.

The Commission then launched a targeted and a public consultation in 2021 to seek stakeholder feedback on the application of the CMDI framework and views on possible modifications. The targeted consultation, covering 39 general and specific technical questions, was available in English only and open from 26 January to 20 April 2021. The public consultation consisted of 10 general questions, available in all EU languages and ran over the feedback period from 25 February 2021 to 20 May 2021.

In addition, the Commission organised a high-level conference on 18 March 2021 gathering representatives from all relevant stakeholders, which confirmed the importance of an effective framework but also highlighted the current weaknesses.

Commission staff have also repeatedly consulted Member States on the EU implementation of the CMDI framework and possible revisions of the BRRD/SRM and DGSD in the context of the Commission Expert Group for Banking, Payment and Insurance. In parallel to the discussions in the Commission's Expert Group, the issues addressed in this proposal were also covered in meetings of the Council's preparatory bodies, namely the Council Working Party on Financial Services and Banking Union and the High-Level Working Group on EDIS.

Finally, during the preparatory phase of the legislation, the Commission staff have also held numerous meetings (physical and virtual) with representatives of the banking industry as well as other stakeholders.

The results of all the above-mentioned initiatives have fed into the preparation of this proposal and the accompanying impact assessment. They have provided clear evidence of the need to update and complete the current rules in order to best achieve the objectives of the framework. Annex 2 of the impact assessment provides the summaries of these consultations and the public conference.

- **Collection and use of expertise**

The Commission issued a call for advice to the European Banking Authority (EBA) on funding in insolvency and resolution, seeking to receive target technical advice to assess the reported difficulty for some smaller and medium-sized banks to issue sufficient loss absorbing financial instruments, to examine the current requirements to access available sources of funding in the current framework and to assess the quantitative impacts of various possible policy options in the area of funding in resolution and insolvency and their effectiveness in achieving the policy objectives. EBA responded to the call for advice in October 2021¹⁴.

The Commission also benefited from the opinion of the Fit for Future Platform issued in December 2021 and highlighting the need to make the CMDI framework fit for purpose for all banks, in a proportionate manner, taking into consideration potential impact on depositors' confidence and on financial stability.

¹⁴ EBA (22 October 2021), [Call for advice regarding funding in resolution and insolvency](#).

- **Impact assessment¹⁵**

The proposal has been subject to an extensive impact assessment taking into account the feedback received from stakeholders and the need to address various interconnected issues spanning over three different legal texts.

The impact assessment considered a range of policy options to address the problems identified in the design and the implementation of the crisis management and deposit insurance framework. Given the strong interlinkages between the crisis management toolbox and its funding, the impact assessment considered packages of policy options that bundle together relevant design features of the CMDI framework to ensure a holistic and consistent approach. Some changes proposed pertaining to early intervention measures, the triggers to determine a bank failing or likely to fail and the harmonisation of certain features of the DGSD are common across the option packages considered.

The different packages of options are mainly focused on analysing the spectrum of possibilities to broaden credibly and effectively the scope of resolution in function of the level of ambition in making the funding more accessible. In particular, the policy options consider facilitating the use of DGS funds in resolution, including to serve as bridge, under the least cost test safeguard, to improve the proportionality in accessing the resolution financing arrangements for banks, in particular medium-sized/smaller banks, being subject to transfer strategies with market exit. In addition, they explore the possibility of using DGS funds more effectively and efficiently under a harmonised least cost test for measures other than the payout of covered deposits, seeking to improve the compatibility of incentives for resolution authorities when selecting the most appropriate tool to manage a crisis. Unlocking DGS funds for measures other than the payout of covered deposits depends on the DGS ranking in the hierarchy of claims, therefore, the policy options also explore different scenarios of harmonisation of depositor preference.

In light of these elements, the impact assessment explores three possible packages of policy options that deliver outcomes with varying range of ambition. Each of the three packages of policy options strives to create an incentive-based framework, by encouraging the application of resolution tools in a more consistent manner, increasing legal certainty and predictability, levelling the playing field, facilitating access to common safety nets, while maintaining some alternatives outside resolution under national insolvency procedures. However, by design, the packages of options achieve these objectives to a different extent and their political feasibility differs.

The preferred option envisages ambitious improvements in the funding equation, opening the possibility for a substantial broadening of the resolution scope to include more medium-sized/smaller banks and a better alignment of incentives for deciding on the best crisis tool for these institutions. It was considered more effective, efficient and coherent in achieving the objectives of the framework relative to other options, including the baseline where no action is taken. In particular, the removal of super-preference of the DGS was identified as the most effective means of ensuring that DGS funds can be used in resolution. The existence of a super-preference for DGS claims is the main reason why the DGS funds can currently almost never be used outside a payout of covered deposits in insolvency because of the impact it has on the outcome of the least cost test (LCT) that privileges a payout. However, it was found that the super-preference ends up protecting the financial means of the DGS and the banking sector from possible replenishment by hindering any DGS intervention in resolution, without bringing a better protection for covered deposits. The removal of DGS super-preference is

¹⁵

Add reference to summary sheet of IA and positive opinion of the RSB

therefore necessary to address the existing outcome of the LCT assessment that is skewed towards payout and provide adequate funding in resolution to make the resolution of smaller and medium-sized banks through a transfer of business and market exit of the failed bank feasible. The impact assessment also included another option consisting of an ambitious reform of the CMDI framework including EDIS, under the form of an intermediate, hybrid model, different from the 2015 Commission proposal. This option acknowledges the importance of establishing a common deposit insurance system for the robustness of the framework and the completion of the Banking Union but has been assessed as politically unfeasible at this stage.

The proposal would bring costs for authorities and certain banks depending on the extent to which resolution would be expanded on the basis of case-by-case public interest assessments. Using the DGS funds and the RF/SRF may also trigger replenishment needs through contributions from the industry. Overall, costs for resolution authorities and banks would be compensated, however, by the benefits of enhanced preparedness for a larger spectrum of banks, clarified incentives when deciding which crisis tools to use, reduced recourse to taxpayer funds, increased financial stability and depositor confidence, thanks to clearer rules and access to industry-funded safety nets. For citizens and consumers, the costs should be limited and clearly outweighed by the benefits, in particular through increased depositor protection, financial stability and reduced use of taxpayer money.

The impact assessment was endorsed by the Regulatory Scrutiny Board following a first negative opinion. To address the comments raised by the Regulatory Scrutiny Board, the impact assessment has been extended to include additional explanations on (i) the nature of the problems the review aims to address and the general merits of resolution compared to insolvency proceedings to protect financial stability, depositor confidence and minimise the recourse to taxpayers money, (ii) clarifications on how the reform complies with the principle of subsidiarity and (iii) additional details on other aspects such as the consistency with the review of State aid rules, the interaction with the 2015 Commission proposal on EDIS, how EBA advice has been taken into account or the conditions in which DGS could intervene in resolution.

- **Regulatory fitness and simplification**

The main focus of the review is on the overall set-up and functioning of the crisis management and deposit insurance framework, with particular attention paid to smaller and medium sized banks and a more equal treatment for depositors. The proposed reform is expected to bring about benefits with respect to the effectiveness of the framework and legal clarity.

The reform is technology-neutral and does not impact digital readiness.

- **Fundamental rights**

The European Union is committed to high standards of protection of fundamental rights and is signatory to a broad set of conventions on human rights. In this context, the proposal complies with these rights, as listed in the main UN conventions on human rights, the Charter of Fundamental Rights of the European Union, which is an integral part of the EU Treaties and the European Convention on Human Rights (ECHR).

4. BUDGETARY IMPLICATIONS

The proposal does not have implications for the Union budget.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

The proposal requires Member States to transpose the amendments to the BRRD in their national laws within 18 months from the entry into force of the amending Directive.

The proposal includes requirements for EBA to issue standards in relation to certain provisions of the framework and report to the Commission on its effective implementation, for instance in relation to resolvability assessments conducted by resolution authorities or the preparation for resolution execution.

The legislation will be subject to an evaluation five years after its implementation deadline in order to assess how effective and efficient it has been in terms of achieving its objectives and to decide whether new measures or amendments are needed.

6. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL

Early intervention measures and preparation for resolution

The conditions for applying early intervention measures, including the removal of management and appointment of temporary managers, are amended to remove ambiguity and provide competent authorities with the necessary legal certainty. Articles 27(1), 28 and 29(1) are amended to provide that early intervention measures may be used when the conditions for supervisory measures under CRD or Directive (EU) 2019/2034¹⁶ (IFD) have been met, but those measures have not been taken by the institution or are deemed insufficient to address the identified issues. The existing triggers not covered by CRD or IFD are preserved. At the same time, the internal sequencing between early intervention measures, removal of managers and appointment of temporary managers is removed – they are now all subject to the same triggers, but competent authorities are required to follow the proportionality principle when choosing the most appropriate measure for each circumstance. The EBA mandate for guidelines promoting the consistent application of the triggers is maintained.

The early intervention measures listed in Article 27 BRRD that overlapped with the available supervisory powers under Article 104 CRD or Article 49 IFD (concerning examination of the financial situation by the management body, removal of managers that no longer meet the suitability criteria, changes to the business strategy and to the operational structure of the institution) are removed from BRRD and kept only in CRD/IFD. This should address the practical and administrative challenges observed by competent authorities in applying those overlapping measures.

To expand the limited provisions in BRRD requiring cooperation between competent and resolution authorities when the financial situation of a bank starts deteriorating, the new Article 30a is introduced, detailing the interactions and responsibilities of competent and resolution authorities in the run up to resolution. The competent authority is required to notify the resolution authority when it adopts certain supervisory measures under CRD or IFD (particularly those that previously overlapped with early intervention measures), when it considers that the conditions for early intervention are met and when it actually applies early

¹⁶ Directive of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU, OJ L 314, 5.12.2019, p. 64–114.

intervention measures. The financial situation of the institution and its compliance with any imposed measure is to be monitored by the competent authority in cooperation with the resolution authority. At the same time, the competent authority must provide the resolution authority with all the information necessary for preparing for resolution, or requires the institution itself to provide it, and it is clarified that the resolution authority has the power to market or make arrangements for the marketing of the institution and to request the creation of a virtual data room without being dependent on the prior application of early intervention measures. Competent and resolution authorities are required to cooperate closely when considering taking any early intervention or resolution preparation actions to ensure consistency and effectiveness.

Early warning of failing or likely to fail

Article 30a includes an obligation for the competent authority to notify sufficiently early the resolution authority as soon as it considers that there is a material risk that an institution or entity meets the conditions for being assessed as failing or likely to fail, laid down in Article 32(4). This notification should include the reasons for the competent authority's assessment as well as an overview of the alternative solutions that may be able to prevent the failure of the institution or entity concerned within a reasonable timeframe.

In recognition of the critical role that the timing of resolution action plays with respect to preserving as much as possible the levels of capital, MREL and liquidity of the institution or entity, and more generally in ensuring that the necessary conditions are in place for the resolution authority to successfully execute the resolution strategy prepared for each institution or entity, the resolution authority is empowered to assess, in close cooperation with the competent authority, what it considers to be a reasonable timeframe for the purposes of looking for solutions, of private or administrative nature, able to prevent the failure. During this early warning period, the competent authority should continue exercising its competences, while liaising with the resolution authority in line with Article 30a. The competent authority and the resolution authority should monitor, in close cooperation, the evolution of the situation of the institution or entity and the implementation of the alternative measures. In this context, the resolution authority and the competent authority should meet regularly, at a frequency set by the resolution authority.

If no appropriate alternative measure which would avert the failure is found or implemented within this timeframe, the competent authority should assess whether the institution or entity is failing or likely to fail. Where the competent authority concludes that the institution or entity is failing or likely to fail, it should formally communicate this to the resolution authority, pursuant to the procedure laid down in Article 32(1) and (2). The resolution authority may also make this assessment by itself, where the Member State has exercised the national option provided in Article 32(2). The resolution authority should then determine whether the conditions for resolution are met. Where the public interest assessment results in the need to resolve the institution or entity, the resolution authority should subsequently adopt a decision taking resolution action. This is in line with the recent case law of the Court of Justice of the European Union related to a case taking place in the Banking Union, according to which the ECB's assessment is a preparatory measure designed to allow the SRB to take a decision regarding the resolution of a bank. The Court further stated that the SRB has the exclusive power to assess the conditions required for the application of resolution action,

subject to the endorsement of the resolution scheme by the Commission and, where applicable, non-objection by the Council¹⁷.

Public interest assessment

The CMDI framework was designed to avert and manage the failure of institutions of any size while protecting depositors and taxpayers. When a bank is considered FOLF and there is a public interest in resolving it, the resolution authorities will intervene in the bank by using the tools and powers granted by the BRRD in absence of a private solution. In the absence of a public interest for resolution, the bank failure should be handled through national orderly winding up proceedings, sometimes with the financing from the DGS or other sources where appropriate, carried out by national authorities.

In essence, the public interest assessment (PIA) compares resolution with insolvency, in particular assessing how each scenario achieves the resolution objectives. The set of resolution objectives against which the assessment is made includes (i) the impact on financial stability (a wide-spread crisis may yield a different PIA than an idiosyncratic failure), (ii) the assessment of the impact on the bank's critical functions and (iii) limiting the use of extraordinary public financial support. Under the current framework, resolution can only be chosen where insolvency would not allow achieving the resolution objectives to the same extent.

The BRRD and SRMR leave a margin of discretion to resolution authorities when carrying out the PIA, which leads to divergent applications and interpretations that does not always fully reflect the logic and intention of the legislation. In some cases, and in particular within the Banking Union, the PIA has been applied rather restrictively.

To minimise divergences and widen the interpretation of the PIA, and respectively broaden the scope of resolution, the following legislative amendments are included in the proposal.

Amendments to the resolution objectives

The current definition of 'critical functions' does not include an explicit reference to the impact of their disruption on the real economy and financial stability at a regional level, leading to possible interpretation that functions may only be deemed critical when their discontinuation has impacts at a national level. To avoid divergent interpretation, in the definition of 'critical functions' reference is added to the 'national or regional level' of the impact of the disturbance of their discontinuation to the real economy or to financial stability (Article 2(1), point (35)).

The resolution objective requiring the minimisation of reliance on extraordinary public financial support does not allow for a distinction between the use of budget money and the use of industry-funded safety nets (national resolution funds, SRF or DGSs). Therefore, this resolution objective is amended to include a specific reference to support provided by the budget of a Member State, so as to indicate that funding through the industry-funded safety nets should be considered preferable to funding through taxpayers' money (Article 31(1), point (c)). This is complemented with a change in the procedural rules on PIA, requiring the resolution authority to consider and compare all extraordinary public financial support that can reasonably be expected to be provided to the institution in resolution and in the insolvency counterfactual. If liquidation aid is expected in the insolvency counterfactual, this should lead to a positive PIA outcome (Article 32(5), 2nd subparagraph).

¹⁷ Order of 6 May 2019, ABLV Bank / ECB, T-281/18, EU:T:2019:296, paragraphs 34 to 36, and Judgment of 6 May 2021, ABLV Bank / ECB, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraphs 62 to 71.

The resolution objective related to depositor protection is amended to clarify that resolution should aim at protecting depositors, while minimising losses for deposit guarantee schemes. This will mean that resolution should be preferred if choosing insolvency would be more costly to the DGS.

Procedural changes to the comparison between resolution and national insolvency proceedings

Under the current BRRD resolution authorities are expected to choose insolvency unless opting for resolution would better achieve the resolution objectives. The current text of Article 32(5) provides that resolution shall only be chosen when winding up of the institution under normal insolvency proceedings would not meet the resolution objectives to the same extent. To allow broadening of resolution application, Article 32(5), first subparagraph, is amended to clarify that national insolvency proceedings should be selected as the preferred strategy only when they achieve the framework's objectives better than resolution (and not only to the same extent). While keeping insolvency as the default option, the amendment leads to an increase in the burden of proof for resolution authorities in demonstrating that resolution is not in the public interest. Nevertheless, the PIA decision will remain at the discretion of the resolution authority on a case-by-case basis.

Use of DGS in resolution

A fundamental principle of the current resolution framework is that funding in resolution should be first and foremost provided by the bank's internal resources (its capital and other liabilities, including certain categories of deposits), which are used to cover its losses. These can be complemented by external sources of funding, namely (1) the resolution financing arrangement – but only after 8% of the capital and liabilities of the bank have been used to cover its losses – and (2) the DGS – in lieu of covered depositors up to the amount of losses that they would have suffered (were it possible for them to be subject to losses in resolution). For certain smaller and mid-sized banks, especially those primarily financed with deposits, it can be very difficult to meet these requirements to access industry-financed external funding without bailing-in deposits above the coverage level and those excluded from coverage. However, in certain cases incurring losses on deposits can lead to widespread contagion and financial instability, exacerbating the risks of broader banks runs, and thereby also have serious adverse impact on the real economy.

Therefore, to ensure a higher degree of proportionality of the resolution framework, enhance the application of transfer tools in resolution for smaller or medium-sized banks that will exit the market, and facilitate DGS interventions in support of such tools where needed to prevent depositors from bearing losses, Article 109 is amended to clarify certain aspects of the use of DGS in resolution. The fundamental principle that the first line of defence in case of bank distress should always be the banks' internal loss absorption capacity, as well as the conditions for access to the resolution financing arrangement, are preserved. In particular, Article 109 clarifies that the DGS can be used to support transfer transactions that include covered deposits, and, under certain conditions, also eligible deposits beyond the coverage level and deposits excluded from the DGS guarantee. The DGS contribution should cover part of or the entire difference between the value of the deposits transferred to a buyer or to a bridge institution and the value of the transferred assets. Where a contribution is required by the buyer as part of the transaction to ensure its capital neutrality and preserve compliance with the buyer's capital requirements, the DGS is also allowed to contribute to this effect.

To avoid depletion and ensure that the DGS has sufficient resources to maintain its functions, the contribution of the DGS in resolution remains subject to certain limits.

On the one hand, the provision of Article 109(1) requires that any loss which the DGS may bear as a result of an intervention in resolution does not exceed the loss that the DGS would bear in insolvency if it paid out covered depositors and subrogated to their claims. This amount is determined by the DGS on the basis of the least cost test, in accordance with the criteria and methodology set out in DGSD for any possible use of DGS. These same criteria and methodology are also to be used when determining the treatment that the DGS would have received had the institution entered normal insolvency proceedings when carrying out the ex-post valuation under Article 74 for the purposes of assessing compliance with the ‘no creditor worse off’ principle and determining whether any compensation is owed to the DGS.

On the other hand, in order to ensure that the contribution of the DGS is only used for the purposes of depositor protection, where appropriate, and not for the protection of creditors that rank below deposits in insolvency, the amount of the DGS contribution may not exceed any shortfall in the value of the assets of the institution under resolution transferred to the buyer or the bridge institution in comparison to the value of the transferred deposits and liabilities with the same or a higher priority ranking in insolvency than those deposits.

Furthermore, it is clarified in Article 109(1) that the DGS can only contribute to a transaction including all deposits if it is concluded by the resolution authority that the eligible deposits exceeding the coverage level provided by the DGS, as well as the deposits excluded from coverage, should be protected from losses and cannot be bailed-in nor left in the residual institution under resolution, which will be wound up. In particular, this would be the case where the exclusion is strictly necessary and proportionate in order to preserve the continuity of critical functions and core business lines or where necessary to avoid widespread contagion and financial instability which could cause a serious disturbance to the economy of the Union or of a Member State. To ensure access to resolution financing arrangements where necessary for the implementation of a transfer strategy, paragraph 2b of Article 109 provides that the DGS contributions in resolution should count towards the 8% total liabilities and own funds (TLOF) requirement for accessing the resolution financing arrangement. If the contribution made by shareholders and creditors of the institution under resolution through reductions, write-down or conversion of their liabilities, summed with the contribution made by the DGS amounts to at least 8% of the institution’s total liabilities including own funds, it will be possible for the resolution authority to use the resolution financing arrangement to finance the resolution action, which must lead to the failing institution’s exit from the market. To ensure that MREL remains the first line of defense and to preserve level playing field, this should only be possible for institutions for which the resolution plan or group resolution plan does not provide for its winding up in an orderly manner in case of failure, given that the MREL of these institutions has been set at a level that includes both the loss absorption as well as the recapitalisation amounts.

The use of DGS funds enabling access to the resolution financing arrangements is not expected to impact institutions’ incentives to comply with MREL. This is because the incentives to comply with MREL are built into the governance of the framework. Resolution authorities calibrate MREL requirements for all institutions with resolution strategies, including smaller and mid-sized institutions where appropriate, according to the existing legal provisions and address any failure to comply through several measures. Additionally, institutions’ obligation to disclose publicly their MREL requirement and capacity, that will start to apply in 2024 (as provided under the existing rules), will reinforce market discipline and compliance. Moreover, the DGS use to facilitate access to the resolution financing arrangement will be possible only for transfer strategies with market exit and on a case-by-case basis where justified by resolution authorities. Therefore, since the failed institution will exit the market after resolution should DGS funds be used, this mechanism de facto prevents

any advantage with regard to MREL calibration or the use of DGS funds compared to other institutions that would continue operating after being restructured. Importantly, moral hazard exists due to the possibility of subsidies outside resolution in the form of public funds in insolvency. By allowing a more credible application of resolution through DGS use in specific cases, the reform aims to disincentivise the recourse to taxpayer money, which may affect market expectations *ex ante*, leading to more market discipline and decreasing the risk of moral hazard. Finally, the use of the DGS contribution towards compliance with the 8% TLOF threshold to access the resolution financing arrangements is restricted to those institutions for which MREL has been set and includes both the loss absorption as well as the recapitalisation components, in light of the fact that the respective resolution plan or group resolution plan does not provide for their winding up in case of failure.

Depositor preference

Under the current wording of Article 108(1), BRRD creates a three-tier depositor preference in the hierarchy of claims. It provides that covered deposits and DGS claims must have a so-called ‘super-preference’ in the creditor ranking in the insolvency laws in each Member State relative to non-covered preferred deposits (the part of eligible deposits from natural persons and SMEs exceeding the coverage level of EUR 100 000). The latter must rank above the claims of ordinary unsecured creditors.

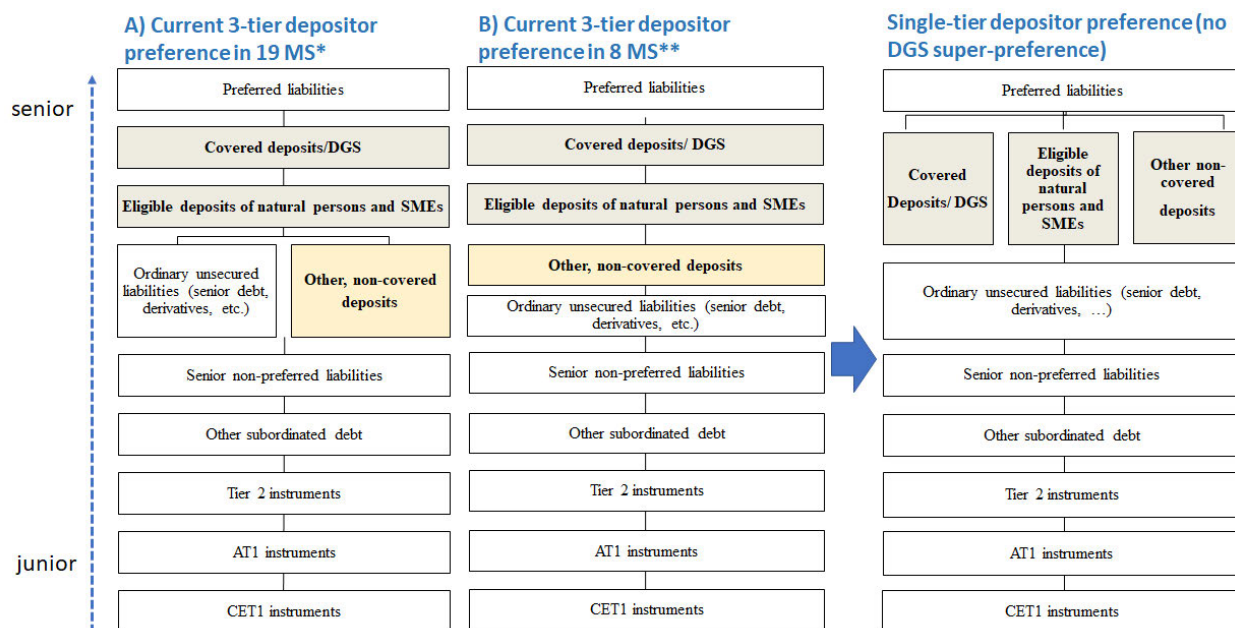
BRRD is silent on the ranking of the remaining deposits, that is, non-covered non-preferred (i.e., corporate non-SME deposits exceeding the coverage level of EUR 100 000) and excluded deposits (which currently include deposits of public authorities, financial sector entities and pension funds). In most Member States, the non-covered non-preferred deposits rank in insolvency alongside ordinary unsecured claims, including senior debt instruments eligible for MREL (section A of figure below), while in a minority of Member States, they already rank above ordinary unsecured claims (section B of figure below).

The super-preference of the DGS in the current framework (i.e., its rank above claims of depositors that are not covered) impacts the results of the least cost test in a way that the DGS funds can almost never be used outside the payout of covered deposits in insolvency, because the DGS would expect a full or very high recovery of the resources used to reimburse covered deposits.

On the other hand, the lack of general depositor preference (i.e., the ranking of all deposits above ordinary unsecured claims) in some Member States creates an unlevel playing field and potential impediments to resolution in cross-border contexts and might lead to breaches of the ‘no creditor worse off’ principle, where, for financial stability reasons, it is necessary to exclude non-covered deposits from bearing losses.

To facilitate the use of the DGS in resolution under the least cost test safeguard where this is necessary to maintain financial stability and protect depositors, as well as to remove impediments to resolution, Article 108(1) is amended to introduce a general depositor preference with a single-tiered ranking, which would be achieved thanks to two modifications. First, the legal preference in the insolvency laws of Member States required by BRRD relative to ordinary unsecured claims is extended to include all deposits. This entails that all deposits, including eligible deposits of large corporates and excluded deposits, rank above ordinary unsecured claims. Second, the relative ranking between the different categories of deposits is replaced by a single-tier depositor preference, where the super-preference of the DGS/covered deposits is removed, and where all deposits rank *pari passu* (i.e., at the same level amongst themselves) and above ordinary unsecured claims.

Stylised view of creditor hierarchy in insolvency under the current framework (three-tier depositor preference) and under the proposed reform (single-tier general depositor preference)



* AT, BE, CZ, DE, DK, EE, ES, FI, FR, IE, LV, LT, LU, MT, NL, PL, RO, SE and SK.

** Other 8 MS have preferred non-covered deposits relative to ordinary unsecured claims (BG, CY, EL, HR, HU, IT, PT and SI).

Note: this illustration is stylized and simplified. In reality, the hierarchies of claims across Member States are unharmonized, in particular with regard to the senior layers and may include additional sub-categories of liabilities.

Source: Commission staff.

As shown by the impact assessment, a single-tier depositor preference would not impinge on the protection currently enjoyed by covered depositors, who are always insured under the DGSD in case their accounts become unavailable and are mandatorily excluded from bearing losses in resolution (Article 44(2) BRRD). The higher preferred ranking of the DGS claims protects instead the banking industry, which pays contributions to the DGS. Nevertheless, from the perspective of the banking industry itself, the higher priority of the DGS does not necessarily lead to less frequent need for replenishment of the DGS given that the result of this higher priority would be more frequent use of DGS resources for payout than for transfer strategies in resolution. This is so because a payout requires using the DGS available financial means to cover the gross amount of covered deposits, and there is a time lag between the payout and recovery in sometimes lengthy insolvency procedures, as well as a loss on the franchise value of assets.

Additionally, regarding the argument of cost-efficiency associated with the use of DGS funds in resolution compared to the cost of payout of covered deposits in insolvency, empirical evidence referenced in the impact assessment¹⁸ shows that paying out covered deposits can quickly deplete the financial means of the DGS (even when fully-filled) or that, in some cases, the DGS financial means cannot sustain a payout event when the amount of covered deposits is significant. In this regard, the CMDI review aims to enable cheaper, more cost-efficient alternative uses of the DGS in resolution, when compared to the cost of DGS payout in insolvency, to support a transfer of assets and liabilities (including deposits) followed by

¹⁸ ECB (October 2022), [Protecting depositors and saving money - why DGS in the EU should be able to support transfers of assets and liabilities when a bank fails](#).

market exit. See the impact assessment for a comprehensive analysis (including by the EBA in its reply to the Commission's call for advice from October 2021).

Conditions for providing extraordinary public financial support

In order to ensure that public funds in the form of extraordinary public financial support are not used to support institutions or entities that are not financially viable, it is necessary to provide for strict conditions on when such support can be provided and what form it can take. The existing rules provide for certain limitations but are not sufficiently precise. Extraordinary public financial support outside of resolution should be limited to cases of precautionary recapitalisation, preventive measures of DGS aimed at preserving the financial soundness and long-term viability of credit institutions, measures taken by DGS to preserve the access of depositors and other forms of support granted in the context of winding up proceedings. Providing extraordinary public financial support in any other situations outside of resolution should not be permitted and should result in the receiving institution or entity being considered as failing or likely fail.

Precautionary recapitalisation

Particular attention must be paid to the extraordinary public financial support granted in the form of precautionary recapitalisation. It is necessary to lay down more clearly what are the permissible forms of precautionary measures provided outside of resolution and aimed at recapitalising the entity concerned. The measures granted should be temporary in nature because they are supposed to address adverse consequences of external shocks and not used to compensate for intrinsic weaknesses linked, for example, to an outdated business model. Use of perpetual instruments, such as Common Equity Tier 1, should become exceptional and possible only if other forms of capital instruments would not be adequate. Such change is necessary to ensure that the support remains temporary in nature. Stronger and more explicit requirements on determining in advance the duration and exit strategy for the precautionary measures are also needed. The entity receiving support should be solvent at the time the measures are applied, i.e. assessed by the competent authority as not being in breach and not likely to breach the applicable capital requirements in the next 12 months. If the conditions under which the support is granted are not adhered to, the entity receiving the support should be considered as failing or likely to fail.

Article 32b and market exit

Regardless of a potential expansion of the application of resolution, the resolution of many banks will not be in the public interest. In such cases banks should be wound up in accordance with national law. The applicable national rules are very heterogeneous across EU Member States, both in terms of the conditions which trigger the initiation of a procedure, and the structure of the procedure itself. In some Member States, the bank would go into normal insolvency, in others a special insolvency or liquidation regime for banks exists or there are several procedures available, not necessarily leading in all cases to the exit of the bank from the market. Furthermore, the triggers for commencing national insolvency proceedings are not always aligned with the FOLF determination under the BRRD. This can create uncertainty as to whether insolvency proceedings can start (so called "limbo situations") or whether the procedure leads to a clear outcome in terms of ensuring exit from the market.

To address such situations, the 2019 Banking Package introduced Article 32b, requiring Member States to ensure the orderly winding up in accordance with the applicable national law of failing banks, which are not resolved due to a negative PIA. However, the implementation of this provisions in national legal frameworks is not sufficient to address all residual risks of failing institutions not exiting the market. In particular, there is still

uncertainty as to which procedure should apply in these cases, and particularly whether only normal insolvency proceedings should apply or whether any other national procedures could also apply.

Therefore, to resolve the existing inconsistency and uncertainty across Member States, Article 32b is amended to provide further framing and clarity, and to ensure that applicable national procedures lead to the market exit of the bank within a reasonable timeframe. The amendments neither aim at, nor lead to harmonisation of national insolvency rules, and a margin at national level is preserved as to how this market exit should occur (i.e., whether through a sale or otherwise).

In this context, it is also proposed to further enhance the role of the withdrawal of the bank's license when FOLF is declared, and no resolution ensues. The new provision of Article 32b(3) empowers the supervisor to withdraw the license solely based on the FOLF determination, which on its turn shall be a sufficient condition for relevant national administrative or judicial authorities to initiate without delay the applicable national winding-up procedure.

Amendments related to the minimum requirement for own funds and eligible liabilities (MREL)

MREL for transfer strategies

As part of resolution planning, resolution authorities are defining the preferred and variant resolution strategies and preparing the application of the relevant tools to ensure their effective execution. For large and complex institutions, open-bank bail-in is, in general, expected to be the preferred resolution tool, implying the write-down and conversion of own funds and eligible liabilities to absorb losses and recapitalise the bank emerging from resolution.

In parallel, certain smaller and medium-sized institutions with business models based predominantly on funding through equity and deposits may be candidates for transfer tool strategies which involve selling parts or all of the business to a purchaser or a bridge institution, transferring non-performing assets to an asset management vehicle, and market exit.

As already provided under the current framework, the level of the MREL requirement should reflect the preferred resolution strategy. The existing provision of Article 45c focuses on MREL calibration for bail-in strategies (requirement for loss absorption and recapitalisation amount, with detailed rules on how each should be adjusted, and on subordination requirements mostly geared towards ensuring compliance with the 8% TLOF requirement). While acknowledging the possibility to use resolution tools other than bail-in, the current BRRD does not regulate in detail MREL calibration for transfer strategies. In practice, this leads to legal uncertainty and divergent methodologies applied by resolution authorities when setting MREL for such strategies.

It is therefore necessary to provide a clearer legal basis for distinguishing MREL calibration for transfer strategies from the one for bail-in and ensure proportionality and consistent application. In this respect, and taking into account also current practices of resolution authorities, a new Article 45ca is added which sets out the principles which should be considered when calibrating MREL for transfer strategies - size, business model, risk profile, transferability analysis, marketability, whether the strategy is asset transfer or share deal and complementary use of asset management vehicle for assets which cannot be transferred.

The amendments reinforce the principle that MREL should remain the first and main line of defence for all banks, including for those that will be subject to a transfer strategy and market

exit, to ensure that losses are absorbed to the maximum extent possible by shareholders and creditors.

Estimating the combined buffer requirement in case of prohibition of certain distributions

To address an existing gap and provide legal clarity in the current framework with respect to the power of the resolution authorities to prohibit certain distributions in case of failure of an entity to meet the combined buffer requirement in addition to its MREL, and in particular where the entity is not subject to the combined buffer requirement (under Article 104a of Directive 2013/36/EU) on the same basis as its MREL, a new paragraph 7 is added to Article 16a to clarify that the power to prohibit certain distributions should be applied on the basis of the estimation of the combined buffer requirement resulting from the delegated act under Article 45c(4) that specifies the methodology to be used by resolution authorities to estimate the combined buffer requirement in such circumstances.

De minimis exemption from certain MREL requirements

Under the MREL rules in BRRD, structurally subordinated liabilities referred to in Article 72b(2)(d)(iii) CRR are captured by the definition of ‘subordinated eligible instruments’ used throughout Article 45b BRRD. However, liabilities that are permitted to be eligible in CRR under the *de minimis* exemption in Article 72b(4) CRR do not qualify as ‘subordinated eligible instruments’ under BRRD because paragraph 4 of Article 72b CRR is explicitly excluded from the definition in Article 2(1), point (71b), of BRRD.

To correct this inconsistency, a new paragraph is added to Article 45b BRRD, allowing resolution authorities to permit resolution entities to comply with the MREL subordination requirements using senior liabilities when the conditions in Article 72b(4) CRR are met.

To ensure alignment with the TLAC framework, resolution entities benefitting from the *de minimis* exemption may not have their MREL subordination requirement adjusted downwards by an amount equivalent to the 3.5% TREA allowance for TLAC pursuant to the second sentence of the first subparagraph of Article 45b(4) BRRD.

Contingent liabilities

The proposal also introduces clarifications regarding the status of contingent liabilities and provisions for the purposes of resolution planning and execution. The amendments take in to account the International Accounting Standards Board’s (IASB) International Accounting Standard (IFRS) 37 ‘Provisions, Contingent Liabilities and Contingent Assets’ and introduce references to (i) provisions (liabilities of uncertain timing or amount) and (ii) contingent liabilities (possible obligations depending on whether some uncertain future event occurs, or present obligations for which payment is not probable or the amount cannot be measured reliably). The two categories differ from the perspective of the degree of likelihood of a payment having to be made and provisions should be treated as liabilities whereas contingent liabilities would not be treated as such. From a resolution perspective this means that provisions which have been recognised should, in principle, be bail-inable while contingent liabilities are unlikely to be bailed in given their uncertain nature.

Contributions and irrevocable payment commitments

To take into account the end of the initial period for the build-up of the resolution financing arrangements and the ensuing reduction in the amount of regular ex ante contributions, technical amendments are made to Articles 102 and 104 to disconnect the maximum amount of ex post contributions that may be raised from the amount of the regular ex ante contributions, thus avoiding a disproportionately low cap on ex post contributions, as well as to allow for a deferral of the collection of the regular ex ante contributions in case the cost of

an annual collection would not be proportionate to the amount to be raised. The treatment of irrevocable payment commitments is also clarified in Article 103, both as regards their use in resolution and as regards the procedure to follow in case an institution or entity ceases to be subject to the obligation to pay contributions.

Mandates for the EBA

Resolution authorities have in the past years developed and implemented a wide set of policies to improve banks' resolvability and ensure an adequate level of preparation in the implementation of resolution tools and powers in the event of resolution. The EBA has developed common standards to supplement the provisions set out in BRRD and harmonise authorities' practices across the Union.

To ensure that the applicable standards remain fit for purpose, and that new ones are adopted where appropriate, new roles and responsibilities are given to the EBA to report on the existing practices, foster convergence and promote a high level of preparedness among the competent and resolution authorities. New mandates are introduced for the EBA to monitor the actions taken by resolution authorities to ensure an effective implementation of the framework and assess possible divergences among Member States in the areas of resolvability assessments and the operationalisation of resolution tools and powers. In addition, a new role for EBA is introduced to foster convergence and exchanges between competent and resolution authorities through the coordination of Union-wide exercises to test the application of the framework, in recovery and resolution.

Moreover, in light of the multiple national options available to Member States under Article 44a, EBA is asked to report on the application of that article, comparing the way it has been implemented in the Member States and analysing the impact of any divergences on cross-border operations.

Finally, as institutions and entities may be required to comply with internal MREL either on an individual or consolidated basis, practice has shown that, in some situations, the additional own funds requirements and the combined buffer requirement provided in CRD are not set on the same basis as the internal MREL. For this reason, the existing regulatory technical standards on the estimation of the additional own funds requirements and the combined buffer requirement, which have been adopted through Commission Delegated Regulation (EU) 2021/1118¹⁹, should be expanded to capture not just resolution entities but also entities that have not been identified as resolution entities. The EBA mandate in Article 45c(4) is amended accordingly.

Other provisions

To reduce the administrative burden on institutions as regards obligations to update recovery plans on an annual basis, a third subparagraph is added to Article 5, paragraph 2, which provides that supervisors shall have the discretion to waive the requirement to update certain parts of the plan for a given cycle in the absence of any changes to the legal or organisational structure of the institution, its business or its financial situation.

¹⁹ Commission Delegated Regulation (EU) 2021/1118 of 26 March 2021 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU of the European Parliament and of the Council and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive (OJ L 241, 8.7.2021, p. 1).

Under the current text of the BRRD, recovery plans shall not assume any access to or receipt of extraordinary public financial support. The rule in Article 5, paragraph 3 is supplemented to provide that, in addition to public financial support, recovery plans shall not assume access to or receipt of central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

Resolution authorities are required to identify measures to be taken with respect to group entities when drafting group resolution plans. The intensity and level of detail of this work with respect to subsidiaries that are not resolution entities may vary depending on the size and risk profile of the institutions and entities concerned, the presence of critical functions and the group resolution strategy. BRRD is thus amended with the introduction of a new subparagraph in Article 12(1), which will allow resolution authorities to follow a simplified approach, where appropriate, when carrying out this task.

Clarifications to Article 44(7)

The current provision of Article 44(7) is unclear as to what are the condition and the sequence of use of the resolution financing arrangement and alternative financing sources after the provision of initial financing of up to the 5 % TLOF limit and after all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full. Therefore, paragraph 7 of Article 44 is amended to provide legal clarity and additional flexibility to use the RF beyond the 5% TLOF.

Resolution colleges

To ensure alignment with Article 51(3) of Directive (EU) 2013/36 which provides for the establishment of colleges of supervisors by the competent authorities supervising an institution with significant branches in other Member States to facilitate the cooperation and exchange of information between the home and host supervisors, a new paragraph 6a is added to Article 88 BRRD which provides for the setting up of resolution colleges in these cases to facilitate the cooperation and exchange of information between the home and host resolution authorities.

Ranking of resolution financing arrangements' claims

Article 37(7) provides that the resolution financing arrangement should be able to recover any reasonable expenses properly incurred in connection with the use of resolution tools and powers from the institution under resolution as a preferred creditor. However, BRRD did not specify the relative ranking of the resolution financing arrangement to other preferred creditors. The new paragraph 9 added to Article 108 clarifies that those claims of the resolution financing arrangement should rank above the claims of depositors and of DGSs.

Additionally, the resolution financing arrangement can be further used in resolution for the purposes identified in Article 101. So far, BRRD has not specified whether such use creates a claim in favour of the resolution financing arrangement and, if so, on the insolvency ranking of such claim. A new paragraph 8 is added in Article 108 specifying that, where the activity of the institution under resolution is partially transferred to a bridge institution or a private purchaser with the support of the resolution financing arrangement, it should have a claim against the residual entity. The existence of such claim should be assessed on a case-by-case basis, depending on the resolution strategy and the way in which the resolution financing arrangement was concretely used, but it should be connected to the use of the resolution financing arrangement to bear losses in lieu of creditors, such as when the arrangement is used to guarantee assets and liabilities transferred to a recipient or to cover the difference between the transferred assets and liabilities.

Where the resolution financing arrangement is used to support the application of the bail-in tool as the primary resolution strategy (Article 43(2), point (a)), in lieu of the write down and conversion of the liabilities of certain creditors, this should not generate a claim against the institution under resolution, as it would eliminate the purpose of the resolution financing arrangement's contribution. Compensations paid due to the breach of the 'no creditor worse off' principle should likewise not generate a claim in favour of the resolution financing arrangement.

Information exchange

Article 128 is amended to allow the Single Resolution Board, the ECB and other members of the European System of Central Banks, the EBA, the resolution authorities and competent authorities to provide the Commission with all information necessary for the performance of its tasks related to policy development.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action

(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,

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

Having regard to the opinion of the European Central Bank²⁰,

Having regard to the opinion of the European Economic and Social Committee²¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) [*Scene setter 1:*] The Union resolution framework for credit institutions and investment firms (institutions) was established in the aftermath of the 2008-2009 global financial crisis and following the internationally endorsed Key Attributes of Effective Resolution Regimes for Financial Institutions²² of the Financial Stability Board. It consists of Directive 2014/59/EU of the European Parliament and of the Council²³ and Regulation (EU) No 806/2014 of the European Parliament and of the Council²⁴, which applies to institutions established in the Union as well as to any other entity as laid down in that Directive or in that Regulation (entities). The Union resolution framework and aims at dealing in an orderly manner with the failure of institutions and entities by preserving institutions and entities' critical functions and avoiding threats to financial stability, and at the same time protecting depositors and public funds. In addition, the framework intended to foster the development of the

²⁰ OJ C , , p. .

²¹ OJ C , , p. .

²² Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014.

²³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

²⁴ 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).

internal market in banking by creating a harmonised regime to address cross-border crises in a coordinated way and avoiding issues of distortions of competition and risks of unequal treatment.

- (2) *[Scene setter 2:]* Several years into its implementation, the framework as it stands did not deliver as intended with respect of some of those objectives. In particular, while significant progress towards resolvability has been made by institutions and entities and significant resources have been dedicated to that end, in particular through the build-up of the loss absorption and recapitalisation capacity and the filling-up of resolution financing arrangements, the resolution framework has seldom been resorted to so far. Failures of certain smaller and medium-sized institutions and entities have instead been mostly addressed through unharmonised national measures. Taxpayer money has been used rather than resolution financing arrangements. That situation appears to arise from inadequate incentives. Those inadequate incentives result from the interplay of the Union resolution framework with national rules, whereby the broad discretion in the public interest assessment was not always exercised in a way that reflected how the framework was intended to apply. At the same time, the resolution framework saw little use due to the risks for losses of deposit-funded institutions to be imposed on depositors to ensure access to funding in resolution, given the institutions' liability structure and in particular in the absence of other bail-inable liabilities. Finally, less stringent rules on access to funding outside resolution than in resolution have discouraged the application of the Union resolution framework in favour of other solutions which often entail the use of taxpayers' money instead of the own resources of the institution and entity and industry-funded safety nets. That situation, in turn, generates risks of fragmentation, risks of suboptimal outcomes in managing institutions and entities' failures, in particular in the case of smaller and medium-sized institutions and entities, and opportunity costs from unused financial resources.
- (3) *[Scene setter 3:]* To ensure a more effective and coherent application of the Union resolution framework and to make resolution credible for all institutions and entities for which it is in the public interest, including certain smaller and medium-sized institutions primarily funded through deposits and without sufficient other bail-inable liabilities, It is therefore necessary to amend Directive 2014/59/EU. That more effective and coherent application of the resolution framework should create a level-playing field within the Union while protecting financial stability, enhancing depositors' confidence and reducing recourse to taxpayer money.
- (4) *[Article 12, resolution planning 1:]* The intensity and level of detail of the resolution planning work needed with respect to subsidiaries that have not been identified as resolution entities varies depending on the size and risk profile of the institutions and entities concerned, the presence of critical functions and the group resolution strategy. It is therefore appropriate to allow resolution authorities to reflect that situation by considering those factors when identifying the measures to be taken in respect of such subsidiaries and following a simplified approach where appropriate.
- (5) *[Article 12, resolution planning 2:]* An institution or entity that is being wound up under applicable national law, following a determination that the institution or entity is failing or likely to fail and a conclusion by the resolution authority that its resolution is not in the public interest, is by construction heading towards market exit. It also implies that there is no longer a need to plan for actions to be taken in case of failure, even before the competent authority has withdrawn the authorisation of the institution or entity concerned. The same applies to the residual institution under resolution after

the transfer of assets, rights and liabilities in the context of a transfer strategy. It is therefore appropriate to specify that the adoption of resolution plans is not required in those situations.

- (6) *[M-MDA, Article 16a:]* Resolution authorities may prohibit certain distributions where an institution or entity fails to meet the combined buffer requirement when considered in addition to the minimum requirement for own funds and eligible liabilities ('MREL'). However, in certain situations, it is possible for an institution or entity to be required to comply with the MREL on a different basis than the basis on which it is required to comply with the combined buffer requirement. This creates uncertainties as to the conditions for the exercise of the powers to prohibit distributions and the calculation of the Maximum Distributable Amount related to MREL. It should therefore be laid down that, in those cases, resolution authorities should exercise the power to prohibit certain distributions using the estimate of the combined buffer requirement resulting from Commission Delegated Regulation (EU) 2021/1118²⁵. To ensure transparency and legal certainty, the estimated combined buffer requirement should be formally communicated to the entity and be publicly disclosed.
- (7) *[Articles 27-30a, early intervention 1:]* Early intervention measures were created to empower competent authorities to remedy the deterioration of the financial and economic situation of an institution or entity and to reduce, to the extent possible, the risk and impact of a possible resolution. However, due to a lack of certainty regarding the triggers for their application of those early intervention measures and partial overlaps with supervisory measures, early intervention measures have seldom been used. It is therefore necessary to simplify and clarify the conditions for their application. Those conditions should nevertheless continue to be stricter than those applicable to supervisory measures, as early intervention measures should only be available at a more advanced stage of the difficulties of the institution or entity, due to their more intrusive nature. The removal of the management body and the appointment of temporary administrators should be explicitly identified as early intervention measures and their application should be subject to the same triggers. At the same time, competent authorities should still be required to select the appropriate measures to address a specific situation in compliance with the principle of proportionality. Competent authorities should assess the conditions for application of early intervention measures not only on the basis of quantitative indicators, such as capital or liquidity requirements, level of leverage, non-performing loans or concentration of exposures, but also on the basis of qualitative triggers, enabling competent authorities to take into account reputational risks or risks related to money laundering or information and communication technology, among others.
- (8) *[Articles 27-30a, early intervention 2:]* To improve legal certainty, the early intervention measures laid down in Directive 2014/59/EU that overlap with already existing powers under the prudential framework laid down in Directive 2013/36/EU of

²⁵ Commission Delegated Regulation (EU) 2021/1118 of 26 March 2021 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU of the European Parliament and of the Council and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive (OJ L 241, 8.7.2021, p. 1).

the European Parliament and of the Council²⁶ and in Directive (EU) 2019/2034 of the European Parliament and of the Council²⁷ should be removed. In addition, to ensure that resolution authorities are given sufficient time to prepare for the possible resolution of an institution or entity, the competent authority should inform the resolution authorities of the deterioration of the financial condition of an institution or entity sufficiently early, and resolution authorities should have the necessary powers to start implementing preparatory measures. Importantly, the prior application of early intervention measures should not be a condition for the resolution authority to make arrangements for the marketing of the institution or entity or to request information for the purposes of updating the resolution plan and preparing the valuation. To ensure a consistent, coordinated, effective and timely reaction to the deterioration of the financial situation of an institution or entity and to appropriately prepare for a possible resolution, the interaction and coordination between competent authorities and resolution authorities should be enhanced. As soon as an institution or entity meets the conditions for application of early intervention measures, those authorities should increase exchanges of information, including provisional information, and jointly monitor the financial situation of the institution or entity.

- (9) *[Article 30a, early FOLF warning]*: It is necessary to ensure timely action and early coordination between the competent authority and the resolution authority, at the moment when an institution or entity is still a going concern, but the deterioration of the situation of the institution or entity is such that its failure risks occurring. Therefore, the competent authority should notify the resolution authority, as early as possible, when it considers that there is a material risk that one or more of the conditions for an institution or entity to be considered failing or likely to fail would be met. This notification should include the reasons for the competent authority's assessment, as well as an overview of the alternative private sector measures, supervisory action or early intervention measures available to prevent the failure of the institution within a reasonable timeframe. Moreover, if at a later stage the institution or entity is assessed to be failing or likely to fail and there are no alternative solutions able to prevent the failure within a reasonable timeframe, the resolution authority will determine whether the conditions for the resolution of the institution or entity are met. In such a case, the timeliness of the decision to apply resolution action to an institution or entity can be fundamental to the successful implementation of the resolution strategy, in particular because an earlier intervention in the institution or entity can contribute to ensuring sufficient levels of loss absorption capacity and liquidity to execute that strategy. Therefore, when closely monitoring the evolution of the situation of the institution or entity concerned, it is appropriate to empower the resolution authority to assess, in close cooperation with the competent authority, what constitutes a reasonable timeframe for the purpose of the implementation of alternative measures in order to avoid the failure of the institution or entity. To ensure a timely outcome and the sufficient preparation of the resolution authority for the potential resolution of the institution or entity, the resolution authority and the competent authority should meet regularly, and the frequency of those meetings should be

²⁶ 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

²⁷ Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ L 314, 5.12.2019, p. 64).

decided by the resolution authority in light of the circumstances of the case. This early notification should not prejudice the applicable procedures for the determination of whether the conditions for resolution are met. The prior notification by the competent authority to the resolution authority of a material risk that an institution or entity is failing or likely to fail should not be a condition for a subsequent determination that an institution or entity is actually failing or likely to fail.

- (10) *[Article 32(5) and (2)(1)(35), PIA 1:]* The resolution framework is meant to be applied to potentially any institution or entity, irrespective of its size and business model, if the tools available under national law are not adequate to manage its failure. To ensure this outcome, the criteria to apply the public interest assessment to a failing institution or entity should be specified. In particular, it is necessary to clarify that, depending on the specific circumstances, certain functions of the institution or entity can be considered critical even if their discontinuance would impact financial stability or critical services only at regional level.
- (11) *[Article 32(5) and 31, PIA 2:]* The assessment of whether the resolution of an institution or entity is in the public interest should reflect the consideration that depositors are better protected when DGS funds are used more efficiently and the losses for the DGS are minimised. Therefore, in the public interest assessment, the resolution objective of protecting depositors should be considered better achieved in resolution if opting for insolvency would be more costly for the DGS.
- (12) *[Article 32(5) and 31, PIA 3:]* The assessment of whether the resolution of an institution or entity is in the public interest should also reflect, to the extent possible, the difference between, on the one hand, funding provided through industry-funded safety nets (resolution financing arrangements or DGSs) and, on the other hand, funding provided by Member States from taxpayers' money. Funding provided by Member States bears a higher risk of moral hazard and a lower incentive for market discipline. Therefore, when assessing the objective of minimising reliance on extraordinary public financial support, resolution authorities should find funding through the resolution financing arrangements or the DGS preferable to funding through an equal amount of resources from the budget of Member States.
- (13) *[Article 32(5), PIA 4:]* *[Article 32(5), PIA 4:]* To ensure that the resolution objectives are attained in the most effective way, the public interest assessment should be negative only where the winding up of the failing institution or entity under normal insolvency proceedings would achieve the resolution objectives more effectively and not only to the same extent as resolution.
- (14) *[Article 32b, procedure for entities that are not resolved, 1:]* When a failing institution or entity is not put in resolution, it should be wound down according to the procedures available under national law. Such procedures may vary substantially from one Member State to the other. While it is appropriate to allow sufficient flexibility to use the existing national procedures, certain aspects should be clarified to ensure that the institutions or entities concerned exit the market.
- (15) *[Article 32b, procedure for entities that are not resolved, 2:]* It should be ensured that the relevant national administrative or judicial authority swiftly initiates a procedure under national law when an institution or entity is considered failing or likely to fail and is not put in resolution. Where voluntary liquidation of the institution or entity upon a decision of shareholders is available under national law, such option should remain available. However, it should be ensured that, in absence of swift action from the shareholders, the relevant national administrative or judicial authority takes action.

- (16) *[Article 32b, procedure for entities that are not resolved, 3:]* It should also be laid down that the final outcome of such procedures is the exit of the failing institution or entity from the market or the termination of its banking activities. Depending on the national law, that objective can be achieved in different ways, which may include the sale of the institution or entity or parts of it, sale of specific assets or liabilities, a gradual wind down or the termination of its banking activities, including payments and deposit-taking, with a view to selling its assets gradually to repay the affected creditors. However, in order to enhance the predictability of the procedures, it should be required that this outcome is reached within a reasonable timeframe.
- (17) *[Article 32b, procedure for entities that are not resolved, 4:]* Competent authorities should be empowered to withdraw the authorisation of an institution or entity solely on the basis of the fact that the institution or entity is failing or likely to fail and is not put in resolution. Competent authorities should be able to withdraw the authorisation to support the objective of winding up the institution or entity in accordance with national law, particularly in cases where the available procedures under national law cannot be initiated at the moment the institution or entity is determined to be failing or likely to fail, including the cases where the institution or entity is not yet balance sheet insolvent. To further ensure that the objective of winding up the institution or entity can be achieved, Member States should ensure that the withdrawal of the authorisation by the competent authority is also included among the possible conditions to initiate at least one of the procedures available under national law and applicable to institutions or entities that are failing or likely to fail but are not put in resolution.
- (18) *[Article 32c, precautionary recap and DGS preventive measures 1:]* In light of the experience acquired in the implementation of Directive 2014/59/EU, Regulation (EU) No 806/2014 and Directive 2014/49/EU, it is necessary to specify further certain aspects with respect to the conditions under which measures of a preventive precautionary nature that qualify as extraordinary public financial support may exceptionally be granted. To minimise distortions of competition arising from the differences in nature of DGSs in the Union, interventions of DGSs in the context of preventive measures complying with the requirements laid down in Directive 2014/49/EU that qualify as extraordinary public financial support may exceptionally be allowed where the beneficiary institution or entity does not meet any of the conditions for being deemed as failing or likely to fail.
- (19) *[Article 32c, precautionary recap 1.5:]* It should be ensured that precautionary measures are granted sufficiently early. The current practice of the European Central Bank, which considers an institution or entity as solvent, for the purpose of precautionary recapitalisation, based on a forward looking assessment of compliance with the own funds requirements set out in Regulation (EU) No 575/2013 or in Regulation (EU) 2019/2033, and the additional own funds requirement under Directive 2013/36/EU or Directive (EU) 2019/2034, within the following 12 months from carrying out its assessment, should be used as a basis for the definition. Moreover, measures to provide relief for impaired assets such as asset management vehicles or asset guarantee schemes can prove effective and efficient in addressing issues faced by institutions and entities and preventing their failure and could as such constitute relevant precautionary measures. In view of this, it should be specified that precautionary measures can be taken in the form of impaired asset measures.
- (20) *[Article 32c, precautionary recap 2:]* To preserve market discipline, protect public funds and avoid distortions of competition, precautionary measures should remain the exception and only applied to address situations of serious disturbance in the market

and to preserve financial stability. Moreover, precautionary measures should not be used to address incurred or likely losses. The most reliable instrument to identify incurred losses is an asset quality review conducted by the ECB, the EBA or national competent authorities. When such a review can be carried out within a reasonable timeframe, it should be used to identify incurred losses. However, when it is not possible to carry out an asset quality review in time, the competent authority should identify incurred losses in the most reliable way possible under the prevailing circumstances.

- (21) *[Article 32c, precautionary recap 3:]* Precautionary recapitalisation is by definition aimed to support viable institutions and entities identified as likely to encounter temporary difficulties in the near future and to prevent their situation from deteriorating further. To comply with this principle and to avoid public subsidies being granted to businesses that are already unprofitable at the time the support is granted, precautionary measures granted in the form of acquisition of own funds instruments or other capital instruments or through impaired asset measures should not exceed the amount necessary to cover capital shortfalls as identified in the adverse scenario of a stress test or equivalent exercise. To ensure that public financing ends up being recouped by the State, those precautionary measures should also be limited in time and contain a clear timeline for their termination (exit strategy). Perpetual instruments, including Common Equity Tier 1 capital, should only be used in exceptional circumstances because by their nature they are not well suited for compliance with the condition of temporariness.
- (22) *[Article 32c, precautionary recap 4:]* Precautionary measures should be limited to the amount that the institution or entity would need to maintain its solvency in the presence of an adverse scenario event as determined in a stress test or equivalent exercise. In the case of precautionary measures in the form of impaired asset measures, it should be possible to use that amount to cover losses on the transferred assets or in combination with an acquisition of capital instruments, provided that the overall amount of the shortfall identified is not exceeded. Moreover, in order to ensure that those measures comply with existing State aid rules as well as best practices and that they achieve their aims of restoring the institution or entity's long-term viability, limiting State aid to the minimum necessary and limiting distortions of competition, the specific conditions required under the available guidance, including the AMC Blueprint²⁸, should be complied with in case of impaired asset measures. Those measures should always be subject to the overriding condition of temporariness. Public guarantees granted for a specified period in relation to the impaired assets of the institution or entity concerned are expected to ensure better compliance with the temporariness condition than transfers of such assets to a publicly supported entity. To ensure the market exit of institutions and entities that prove, despite the support received, not to be viable, the absence of termination of the support measures received on the terms specified at the time of granting such measure should result in the institution or entity concerned being considered failing or likely to fail.
- (23) *[Article 33, FOLF for HoldCos:]* The conditions for determining that holding companies are failing or likely to fail should be clarified to cover material infringements of prudential requirements. An infringement committed by a holding company should be material, if the type and extent of such infringement is comparable

²⁸

COM(2018) 133 final.

with an infringement that, if committed by a credit institution, would have justified the withdrawal of the authorisation by the competent authority in accordance with Article 18 of Directive 2013/36/EU.

- (24) *[Article 33a(9), ensuring availability of a daily allowance:]* Member States may have, under their national laws, powers to suspend payment or delivery obligations that may include eligible deposits. Where the suspension of payment or delivery obligations is not directly related to the financial circumstances of the credit institution, deposits may not be unavailable for the purposes of Directive 2014/49/EU. As a consequence, depositors may not be able to access their deposits for an extended period. To maintain depositor trust and confidence in the banking sector and maintain financial stability, Member States should ensure that depositors have access to an appropriate daily amount from their deposits, in order to cover, in particular, the cost of living, should their deposits be made inaccessible due to a suspension of payments for reasons other than leading to depositor payout. Such a procedure should remain exceptional and Member States should ensure that depositors have access to appropriate daily amounts.
- (25) *[Contingent liabilities 1:]* To increase legal certainty, and in view of the potential relevance of liabilities which may arise from future uncertain events, such as the outcome of litigations pending at the time of resolution, it is appropriate to lay down which treatment of those liabilities should receive for the purposes of the application of the bail-in tool. The guiding principles in that respect should be those provided in the accounting rules, and particularly the accounting rules laid down in the International Accounting Standard 37 as adopted by Commission Regulation (EC) No 1126/2008²⁹. On that basis, resolution authorities should draw a distinction should be drawn between provisions and contingent liabilities. Provisions are liabilities that relate to a probable outflow of funds and which can be reliably estimated. Contingent liabilities are not recognised as accounting liabilities as they relate to an obligation which cannot be considered probable at the time of the estimate or cannot be reliably estimated.
- (26) *[Contingent liabilities 2, Articles 44 and 53:]* Since provisions are accounting liabilities, it should be specified that such provisions are to be treated the same way as other liabilities. As such, such provisions should be bail-inable, unless they meet one of the specific criteria for being excluded from the scope of the bail-in tool. Given the potential relevance of those liabilities and to ensure certainty in the application of the bail-in tool, it should be specified that provisions are part of the bail-inable liabilities and that, as a result, the bail-in tool applies to them. It should also be ensured that, after the application of the bail-in tool, those liabilities and any obligations or claims arising in relation to them are treated as discharged for all purposes. That is particularly relevant for liabilities and obligations arising from judicial claims against the institution under resolution.
- (27) *[Contingent liabilities 3, Articles 36 and 46:]* According to accounting principles, contingent liabilities cannot be recognised as liabilities and should therefore not be bail-inable. It is however necessary to ensure that a contingent liability that would arise from an event which is improbable or cannot be reliably estimated at the time of resolution does not impair the effectiveness of the resolution strategy and in particular

²⁹ Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ L 320, 29.11.2008, p. 1).

of the bail-in tool. To achieve that objective, where the balance sheet of the institution under resolution includes contingent liabilities, the valuer should assess those liabilities and quantify their potential value to the valuer's best abilities, as part of the valuation for the purposes of resolution. To ensure that, after the resolution process, the institution or entity can sustain sufficient market confidence for an appropriate amount of time, the valuer should take into account that potential value when establishing the amount by which bail-inable liabilities need to be written down or converted to restore the capital ratios of the institution under resolution. In particular, the resolution authority should apply its conversion powers to bail-inable liabilities to the extent necessary to ensure that the recapitalisation of the institution under resolution is sufficient to cover potential losses which may be generated by a liability that may arise as a result of an improbable event. In making that assessment, the resolution authority should carefully consider the impact of the potential loss on the institution under resolution based on factors including the likelihood of the event materialising, the time frame for its materialisation and the amount of the contingent liability.

- (28) *[Clarification of RF use above 5%, Article 44(7):]* In certain circumstances, after the resolution financing arrangement has provided a contribution up to the maximum of 5 % of the institution or entity's total liabilities including own funds, resolution authorities may have recourse to additional sources of funding to further support their resolution action. It should be specified that the resolution financing arrangement may provide further support where all liabilities with a priority ranking lower than deposits that are not mandatorily or discretionarily excluded from bail-in have been written down or converted in full.
- (29) *[MREL 1:]* Regulation (EU) 2019/876 of the European Parliament and of the Council³⁰, Regulation (EU) 2019/877 of the European Parliament and of the Council³¹ and Directive (EU) 2019/879 of the European Parliament and of the Council³² implemented in the Union the international 'Total Loss-absorbing Capacity (TLAC) Term Sheet', published by the Financial Stability Board on 9 November 2015 (the 'TLAC standard'), for global systemically important banks, referred to in Union law as global systemically important institutions (G-SIIs), and amended the MREL set out in Directive 2014/59/EU and in Regulation (EU) No 806/2014 of the European Parliament and of the Council³³. It is necessary to align the provisions of Directive 2014/59/EU on the MREL with the implementation of the TLAC standard for G-SIIs with respect to certain liabilities that could be used to meet the part of the MREL that

³⁰ Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

³¹ Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (OJ L 150, 7.6.2019, p. 226).

³² Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ L 150, 7.6.2019, p. 296).

³³ 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).

should be met with own funds and other subordinated liabilities. In particular, liabilities that rank *pari passu* with certain excluded liabilities should be included in the own funds and subordinated eligible instruments of resolution entities where the amount of those excluded liabilities on the balance sheet of the resolution entity does not exceed 5 % of the amount of the own funds and eligible liabilities of the resolution entity and no risks related to the ‘no creditor worse off’ principle arise from that inclusion.

- (30) *[MREL 3, Article 45ca:]* The rules for determining the MREL are mostly focused on setting the appropriate level of the MREL with the assumption of the bail-in tool as the preferred resolution strategy. However, Directive 2014/59/EU allows resolution authorities to use other resolution tools, namely those relying on the transfer of the business of the institution under resolution to a private purchaser or to a bridge institution. It should therefore be specified that resolution authorities should determine the level of the MREL for resolution entities for which the resolution plan envisages the use of the sale of business tool or the bridge institution tool and the resolution entity’s exit from the market on the basis of the specificities of those resolution tools and of the different loss-absorbing and recapitalisation needs those tools entail.
- (31) *[MREL 4, Article 45ca:]* The level of the MREL for resolution entities is the sum of the amount of the losses expected in resolution and the recapitalisation amount that allows the resolution entity to continue to comply with its conditions for authorisation and allowing it to pursue its activities for the appropriate period of time. For certain preferred resolution strategies entailing the transfer of assets, rights and liabilities to a recipient and market exit, in particular the sale of business tool, the objectives pursued by the recapitalisation component might not apply to the same extent, as the resolution authority will not be required to ensure that the resolution entity restores compliance with its own funds requirements after resolution action. Nevertheless, the losses in such scenarios are expected to exceed the resolution entity’s own funds requirements. It is therefore appropriate to lay down that the level of the MREL of those resolution entities continues to include a recapitalisation amount that is adjusted in a way that is proportionate to the resolution strategy.
- (32) *[MREL 5, Article 45ca:]* When adjusting the level of the MREL for resolution entities the resolution plan of which envisages the sale of business tool or the bridge institution tool and its exit from the market, resolution authorities should take into account the features of those tools, such as the expected perimeter of the transfer to the private purchaser or to the bridge institution, the types of instruments to be transferred, the expected value and marketability of those instruments and the design of the preferred resolution strategy, including the complementary use of the asset separation tool. The potential contribution of the DGS in resolution should not be considered by resolution authorities when calibrating the level of the MREL.
- (33) *[MREL 6, Article 45ca:]* To ensure equal incentives for institutions and entities that would be subject to transfer strategies in or outside resolution to build sufficient amounts of MREL, the setting of level of the MREL for those institutions or entities that may be subject to measures in the context of national insolvency proceedings pursuant to Article 11(5) of Directive 2014/49/EU should follow the same rules as those applicable to the setting of the MREL for resolution entities whose preferred resolution strategy provides for the sale of business or transfer to a bridge institution leading to its exit from the market.

- (34) *[Interaction with market disclosure rules, Article 63:]* There are interactions between the resolution framework and the market abuse framework. In particular, while actions taken in preparation for resolution are susceptible of qualifying as inside information under Regulation (EU) No 596/2014 of the European Parliament and of the Council³⁴, their premature disclosure risks jeopardising the resolution process. Institutions under resolution are able to take steps to address this issue by requesting a delay in the disclosure of inside information under Article 17(5) of Regulation (EU) No 596/2014. However, the right incentives might not always be present at the time of preparing for resolution in order for the institution under resolution to take the initiative to make such a request. To avoid such situations, resolution authorities should have the power to directly request a delay in the disclosure of inside information pursuant to Article 17(5) of Regulation (EU) No 596/2014 on behalf of an institution under resolution.
- (35) *[Resolution colleges for groups with significant branches only, Article 88]* To facilitate resolution planning, the assessment of resolvability and the exercise of the power to address or remove impediments to resolvability as well as to foster information exchange, the resolution authority of an institution with significant branches in other Member States should establish and chair a resolution college.
- (36) *[Ex ante contributions, Article 103:]* After the initial build-up period of the resolution financing arrangements referred to in Article 102(1) of Directive 2014/59/EU, their respective available financial means may face slight decreases below their target level, in particular resulting from an increase in covered deposits. The amount of the *ex-ante* contributions likely to be called in those circumstances is thus likely to be small. It may therefore be possible that, in some years, the amount of such *ex ante* contributions will not be commensurate to the cost of their collection. Resolution authorities should therefore be able to defer the collection of the *ex-ante* contributions for 1 or more years until the amount to be collected reaches an amount that is proportionate to the cost of the collection process, provided that such deferral does not materially affect the capacity of resolution authorities to use resolution financing arrangements.
- (37) *[IPCs, Article 103:]* Irrevocable payment commitments are one of the components of the available financial means of resolution financing arrangements. It is therefore necessary to specify the circumstances in which those payment commitments may be called and the applicable procedure when terminating the commitments in case an institution or entity ceases to be subject to the obligation to pay contributions to a resolution financing arrangement.
- (38) *[Ex post contributions, Article 104:]* The maximum annual amount of extraordinary *ex-post* contributions to resolution financing arrangements that are allowed to be called is currently limited to three times the amount of the *ex-ante* contributions. After the initial build-up period referred to in Article 102(1) of Directive 2014/59/EU, such *ex-ante* contributions will depend only, in circumstances other than the use of the resolution financing arrangements, on variations in the level of covered deposits and as such are likely to become small. Basing the maximum amount of extraordinary *ex-post* contributions on *ex-ante* contributions could then have the effect of drastically limiting the possibility for resolution financing arrangements to raise *ex-post*

³⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

contributions, thereby reducing their capacity for action. To avoid such an outcome, a less binding limit should be chosen and the maximum amount of extraordinary *ex-post* contributions allowed to be called should be set at three times one-eighth of the target level of the resolution financing arrangement concerned.

- (39) *[Depositor preference 1, Article 108:]* Directive 2014/59/EU partially harmonised the ranking of deposits under national laws governing normal insolvency proceedings. Those rules provided for a three-tier ranking of deposits, whereby covered deposits had the highest priority ranking, followed by eligible deposits of natural persons and micro, smaller and medium-sized enterprises above the coverage level. The remaining deposits, i.e. deposits of large corporates exceeding the coverage level and deposits that are not eligible for repayment by the DGS, were required to have a lower priority ranking, but their position was not otherwise harmonised. Finally, the claims of DGSs benefitted from the same higher priority ranking as covered deposits. Nevertheless, this has not proved to be the optimal solution for depositor protection. Partial harmonisation created differences in the treatment of those remaining depositors across Member States, in particular as an increasing number of Member States have decided to also grant a legal preference to the remaining deposits. Those differences also created difficulties when determining the insolvency counterfactual for cross-border groups during the resolution valuations. Furthermore, the lack of general depositor preference along with the three-tiered ranking of depositors' claims had the potential to create problems regarding compliance with the 'no creditor worse off' principle, particularly when the deposits the priority of which had not been harmonised by Directive 2014/59/EU ranked at the same level as senior claims. Lastly, the high priority ranking given to the claims of DGSs had not made it possible for the available financing means of those schemes to be used in a more efficient and effective way in interventions other than the payout of covered deposits in insolvency, namely in the context of resolution, alternative measures in insolvency or preventive measures. The protection of covered deposits does not rely on the priority ranking of the claims of the DGS but is instead ensured through the mandatory exclusions from bail-in in resolution and the prompt repayment from the DGS in case of unavailability of deposits. Therefore, the ranking of deposits in the current hierarchy of claims should be amended.
- (40) *[Depositor preference 2, Article 108:]* The ranking of all deposits should be fully harmonised through the implementation of a general depositor preference with a single-tiered approach, whereby all deposits benefit from a higher priority ranking over ordinary unsecured claims, without any differentiation between different types of deposits. At the same time, the use of the deposit guarantee schemes in resolution, insolvency and in preventive measures should always remain subject to compliance with the relevant conditionality, in particular the so-called 'least cost test'.
- (41) *[Depositor preference 3, Article 108:]* A general depositor preference will contribute to reinforcing depositors' confidence and to further prevent the risk of bank runs. Enhanced depositor protection is also aligned with the central role deposits play in the real economy, being the primary tool for savings and for payments, as well as in the banking activity, where the deposits represent an important source of funding and are a key driver of confidence in the banking system, which becomes of particular relevance in times of market stress. Moreover, a general depositor preference improves the resolvability of institutions and entities by increasing their ability to comply with the requirements to access the resolution financing arrangements and decreasing the amount of funding required from those arrangements, due to the lower risk of

breaching the ‘no creditor worse off’ principle where bailing-in ordinary unsecured debt. Specifically, the removal of deposits from the insolvency class of ordinary unsecured claims would increase the bail-inability of remaining ordinary unsecured claims by minimising the risk of breaches of the ‘no creditor worse off’ principle. By reducing the likelihood of deposits being written down or converted to ensure access to the resolution financing arrangements, the general depositor preference would contribute to making the bail-in tool more effective and credible and would lead to an increase of the transparency and legal certainty of the resolution framework. The general depositor preference would also contribute to the credibility of transfer strategies in resolution, as it would facilitate the inclusion of the entire deposit contract in the perimeter of liabilities to be transferred to a private purchaser or to a bridge institution, to the benefit of the customer relationship and the franchise value of the institution under resolution. Lastly, a full harmonisation of the insolvency ranking of depositors would be beneficial from the cross-border and level playing field perspective.

- (42) *[Depositor preference 4, Article 108:]* A single-tiered approach for the priority ranking of deposits under national laws governing normal insolvency proceedings contributes to a more efficient and less costly protection of all deposits. For covered deposits, that approach facilitates the financing by the DGS of measures other than the payout of covered deposits, which can be more effective and less disruptive in protecting access to the deposited funds as they do not lead to an interruption of access to bank accounts and payment services. For the deposits that are not covered, that approach facilitates their protection where this is necessary for the protection of financial stability and depositor confidence. Finally, by introducing flexibility in the use of those potentially less costly mechanisms for depositor protection, that approach minimises the immediate disbursement needs of the DGSs, thereby ensuring a better preservation of their available financing means in case other crises occur and decreasing the burden on the banking sector, who are called to replenish those funds.
- (43) *[Depositor preference 5, Article 108:]* The changes to the priority ranking of deposits, in particular the elimination of the higher ranking of covered deposits and the claims of the DGSs relative to all other deposits, would not negatively affect the protection afforded to covered deposits in the event of failure, as that protection would continue to be guaranteed through the mandatory exclusion of covered deposits from loss absorption in case of resolution and, ultimately, by the payout provided by the DGS in event of unavailability of deposits.
- (44) *[Ranking of resolution financing arrangements’ claims, Article 108:]* Where resolution financing arrangements are used to support the application of the sale of business tool or of the bridge institution tool, whereby a set of assets, rights and liabilities of the institution under resolution are transferred to a recipient, the resolution financing arrangement may have a claim against the residual institution or entity in its subsequent winding up under normal insolvency proceedings. That may occur where the resolution financing arrangement is used in connection to losses that creditors would have otherwise borne, including under the form of guarantees to assets and liabilities or coverage of the difference between the transferred assets and liabilities. Compensations paid to shareholders and creditors by resolution financing arrangements due to breaches of the ‘no creditor worse off’ principle should not give rise to a claim in favour of those arrangements. To ensure that the shareholders and creditors left behind in the residual institution or entity effectively absorb the losses of the institution under resolution and improve the possibility of repayments in

insolvency to the resolution-specific safety net, those claims of the resolution financing arrangement against the residual institution or entity, and claims that arise from reasonable expenses properly incurred, should rank in insolvency above the claims of deposits and of the DGS.

- (45) *[Use of DGS in resolution, Article 109 1:]* To ensure sufficient flexibility and to facilitate DGS interventions in support of the use of the resolution tools, where they lead to the exit from the market of the institution under resolution and where necessary to prevent losses being borne by depositors, certain aspects of the use of DGS in resolution should be specified. It is necessary to specify that the DGS can be used to support transfer transactions that include deposits, including eligible deposits beyond the coverage level provided by the DGS, and also deposits excluded from repayment by a DGS, in certain cases and under clear conditions. The contribution of the DGS should be aimed at covering the shortfall in the value of the assets transferred to a buyer or bridge institution in comparison to the value of the transferred deposits. Where a contribution is required by the buyer as part of the transaction to ensure its capital neutrality and preserve compliance with the buyer's capital requirements, the DGS should also be allowed to contribute to that effect. The support of the DGS to resolution action should take the form of cash or other forms, such as guarantees or loss sharing agreements that can minimise the impact of the support on the available financial means of the DGS while simultaneously allowing the contribution of the DGS to meet its purposes.
- (46) *[Use of DGS in resolution, Article 109 2:]* The contribution of the DGS in resolution should be subject to certain limits. First, it should be ensured that any loss which the DGS may bear as a result of an intervention in resolution does not exceed the loss that the DGS would bear in insolvency if it paid out covered depositors and subrogated to their claims over the institution's assets. That amount should be determined on the basis of the least cost test, in accordance with the criteria and methodology set out in Directive 2014/49/EU. Those criteria and methodology should also be used when determining the treatment that the DGS would have received had the institution entered normal insolvency proceedings when carrying out the *ex-post* valuation for the purposes of assessing compliance with the 'no creditor worse off' principle and determining any compensation owed to the DGS. Second, the amount of the DGS's contribution aimed at covering the difference between the assets and liabilities to be transferred to a purchaser or to a bridge institution should not exceed the difference between the transferred assets and the transferred deposits and liabilities with the same or a higher priority ranking in insolvency than those deposits. That would ensure that the contribution of the DGS is only used for the purposes of avoiding the imposition of losses on depositors, where appropriate, and not for the protection of creditors that rank below deposits in insolvency. Nevertheless, the sum of the contribution of the DGS to cover the difference between assets and liabilities with the contribution of the DGS towards the own funds of the recipient entity should not exceed the cost of repaying covered depositors as calculated under the least cost test.
- (47) *[Use of DGS in resolution, Article 109 3:]* It should be specified that the DGS may only contribute to a transfer of liabilities other than covered deposits in the context of a resolution if the resolution authority concludes that deposits other than covered deposits cannot be bailed-in, nor left in the residual institution under resolution which will be wound up. In particular, the resolution authority should be allowed to avoid allocating losses to those deposits where the exclusion is strictly necessary and proportionate in order to preserve the continuity of critical functions and core business

lines or where necessary to avoid widespread contagion and financial instability, which could cause a serious disturbance to the economy of the Union or of a Member State. The same reasons should apply to the inclusion in the transfer to a buyer or to a bridge institution of bail-inable liabilities with a priority ranking lower than that of deposits. In that case, the transfer of those bail-inable liabilities should not be supported by the contribution of the DGS. If any financial support to the transfer of those bail-inable liabilities is required, that support should be provided by the resolution financing arrangement.

- (48) *[Use of DGS in resolution, Article 109 4:]* DGS contributions in resolution, under the conditions described above, should count towards the calculation of the requirements to access resolution financing arrangements. If the contribution made by shareholders and creditors of the institution under resolution through reductions, write-down or conversion of their liabilities, summed with the contribution made by the DGS, amounts to at least 8 % of the institution's total liabilities including own funds, the institution should be able to access the resolution financing arrangement to receive further funding, where necessary to ensure effective resolution in line with the resolution objectives. If those conditions are met, the contribution of the DGS should be limited to the amount necessary to enable access to the resolution financing arrangement. To ensure that resolution continues to be primarily financed by the institution's internal resources and to minimise distortions of competition, the possibility to use the DGS contribution to ensure access to resolution financing arrangements should only be possible for institutions for which the resolution plan or the group resolution plan does not provide for their winding up in an orderly manner in case of failure, given that the MREL determined by resolution authorities for those institutions has been set at a level that includes both the loss absorption and the recapitalisation amounts.
- (49) *[EBA mandates, Articles 15, 37, 44a, 45c, 45l and 128:]* In view of the role of the European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council³⁵, in furthering the convergence of authorities' practices, EBA should monitor and report on the design and implementation of the resolvability assessments of institutions and groups and on the actions and preparations of resolution authorities to ensure an effective implementation of the resolution tools and powers. In those reports, EBA should also assess the level of transparency of the measures taken by resolution authorities towards relevant external stakeholders and the extent of their contribution to resolution preparedness and institutions' resolvability. The EBA should furthermore report on the measures adopted by Member States for the protection of retail investors in what concern debt instruments that are eligible for the MREL pursuant to Directive (EU) 2019/879, comparing and assessing any potential impact on cross-border operations. The scope of existing regulatory technical standards on the estimation of the additional own funds requirements and the combined buffer requirement for resolution entities should be expanded to include entities that have not been identified as resolution entities, where those requirements have not been set on the same basis as the MREL. In the annual report on MREL, EBA should also assess the policy implementation by resolution authorities of the new rules for the calibration of the

³⁵ 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).

MREL for transfer strategies. In the context of EBA's tasks of contributing to ensure a coherent and coordinated crisis management and resolution regime in the Union, EBA should coordinate and oversee crisis simulation exercises. Those simulations should cover the coordination and cooperation between competent authorities, resolution authorities and DGSs during the deterioration of the financial situation of institutions and entities, testing the application of the toolbox in recovery and resolution planning, early intervention and resolution in a holistic manner. Those exercises should consider in particular the cross-border dimension in the interaction between the relevant authorities and the application of the available tools and powers. Where relevant, the crisis simulation exercises should also capture the adoption and implementation of resolution schemes within the Banking Union, pursuant to Regulation (EU) No 806/2014.

- (50) *[Article 128: Provision of information to the Commission:]* High-quality impact assessment is crucial for the development of sound and evidence-based legislative proposals, while facts and evidence are key to inform the decisions taken during the legislative procedure. To ensure that the Commission has access to the necessary information when it is involved in those processes, the Single Resolution Board, the ECB and other members of the European System of Central Banks, the EBA, resolution authorities and competent authorities should provide the Commission with all information necessary for the performance of its tasks related to policy development, including the preparation of impact assessments and the preparation and negotiation of legislative proposals.
- (51) Directive 2014/59/EU should therefore be amended accordingly.
- (52) *[Standard final recital on subsidiarity/proportionality:]* Since the objectives of this Directive, namely to improve the effectiveness and efficiency of the recovery and resolution framework for institutions and entities, cannot be sufficiently achieved by the Member States due to the risks that diverging national approaches might entail for the integrity of the single market but can rather, by amending rules that are already set at Union level, 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 the 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,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2014/59/EU

Directive 2014/59/EU is amended as follows:

- (1) Article 2(1) is amended as follows:
 - (a) the following point (29a) is inserted:

‘(29a) ‘alternative private sector measure’ means any support not qualifying as extraordinary public financial support;’;
 - (b) point (35) is replaced by the following:

‘(35) ‘critical functions’ means activities, services or operations the discontinuance of which is likely in one or more Member States to lead to the

disruption of services that are essential to the real economy or to disrupt financial stability at national or regional level, due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations;’;

(c) point (71) is replaced by the following:

‘(71) ‘bail-inable liabilities’ means the liabilities, including those giving rise to accounting provisions, and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to Article 1(1), points (b), (c) or (d), and that are not excluded from the scope of the bail-in tool pursuant to Article 44(2);’;

(d) the following points (83d) and (83e) are inserted:

‘(83d) ‘non-EU G-SII’ means a non-EU G-SII as defined in Article 4(1), point (134), of Regulation (EU) No 575/2013;

(83e) ‘G-SII entity’ means a G-SII entity as defined in Article 4(1), point (136), of Regulation (EU) No 575/2013;’;

(e) the following point (93a) is inserted:

‘(93a) ‘deposit’ means, for the purposes of Articles 108 and 109, deposit as defined in Article 2(1), point (3), of Directive 2014/49/EU;’;

(2) in Article 5, paragraphs 2, 3 and 4 are replaced by the following:

‘2. Competent authorities shall ensure that the institutions update their recovery plans at least annually or after a 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 material change to, the recovery plan. Competent authorities may require institutions to update their recovery plans more frequently.

In the absence of changes referred to in the first subparagraph in 12 months following the latest annual update of the recovery plan, the competent authorities may exceptionally waive, until the subsequent 12-month period, the obligation to update the recovery plan.

3. Recovery plans shall not assume any access to or receipt of any of the following:

- (a) extraordinary public financial support;
- (b) central bank emergency liquidity assistance;
- (c) central bank liquidity assistance provided under non-standard collateralisation, tenor or interest rate terms.

4. Recovery plans shall include, where applicable, an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities not excluded from the scope of the recovery plan pursuant to paragraph 3 and identify those assets which would be expected to qualify as collateral.’;

(3) in Article 6, paragraph 5 is replaced by the following:

‘5. Where the competent authority assesses that there are material deficiencies in the recovery plan, or material impediments to its implementation, it shall notify the institution or the parent undertaking of the group of its assessment and require the

institution to submit, within 3 months, extendable with the authorities' approval by 1 month, a revised plan demonstrating how those deficiencies or impediments are addressed.';

- (4) in Article 8(2), the third subparagraph is replaced by the following:

'EBA may, at the request of a competent authority, assist the competent authorities in reaching a joint decision in accordance with Article 31(2), point (c), of Regulation (EU) No 1093/2010.';

- (5) in Article 10, the following paragraph 8a is inserted:

'8a. Resolution authorities shall not adopt resolution plans where an institution is being wound up in accordance with the applicable national law pursuant to Article 32b or where Article 37(6) applies.';

- (6) Article 12 is amended as follows:

- (a) in paragraph 1, the following third subparagraph is added:

'The identification of the measures to be taken in respect of the subsidiaries referred to in the first subparagraph, point (b), that are not resolution entities may be subject to a simplified approach by resolution authorities if such approach does not negatively affect the resolvability of the group, taking into account the size of the subsidiary, its risk profile, the absence of critical functions and the group resolution strategy.';

- (b) the following paragraph 5a is inserted:

'5a. Resolution authorities shall not adopt resolution plans where an entity is being wound up in accordance with the applicable national law pursuant to Article 32b or where Article 37(6) applies.';

- (7) in Article 13(4), the fourth subparagraph is replaced by the following:

'EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(2), point (c), of Regulation (EU) No 1093/2010.';

- (8) in Article 15, the following paragraph 5 is added:

'5. EBA shall monitor the design and implementation of the resolvability assessments of institutions or groups provided for in this Article and in Article 16 by resolution authorities. EBA shall report to the Commission on the existing practices on resolvability assessments and possible divergences across Member States by ... [PO please insert the date = 2 years after the date of entry into force of this Directive] and monitor the implementation of any recommendation set out in that report, where appropriate.

The report referred to in the first subparagraph shall cover at least the following:

- (a) an assessment of the methodologies developed by resolution authorities to carry out resolvability assessments, including the identification of areas of possible divergence across Member States;
- (b) an assessment of the testing capabilities required by resolution authorities to ensure an effective implementation of the resolution strategy;

- (c) the level of transparency towards relevant stakeholders of the methodologies developed by resolution authorities to perform resolvability assessments and their outcome.’;

(9) in Article 16a, the following paragraph 7 is added:

‘7. Where an entity is not subject to the combined buffer requirement on the same basis as the requirements referred to in Articles 45c and 45d, resolution authorities shall apply paragraphs 1 to 6 of this Article on the basis of the estimation of the combined buffer requirement calculated in accordance with Commission Delegated Regulation (EU) 2021/1118*. Article 128, fourth paragraph, of Directive 2013/36/EU shall apply.

The resolution authority shall include the estimated combined buffer requirement referred to in the first subparagraph in the decision determining the requirements referred to in Articles 45c and 45d. The entity shall make the estimated combined buffer requirement publicly available together with the information referred to in Article 45i(3).

* Commission Delegated Regulation (EU) 2021/1118 of 26 March 2021 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU of the European Parliament and of the Council and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive (OJ L 241, 8.7.2021, p. 1).;’

(10) in Article 17(4), the following third subparagraph is added:

‘If the measures proposed by the entity concerned effectively reduce or remove the impediments to resolvability, the resolution authority shall take a decision, after consulting the competent authority. That decision shall indicate that the measures proposed effectively reduce or remove the impediments to resolvability and require the entity to implement the measures proposed.’;

(11) Article 18 is amended as follows:

(a) paragraph 4 is replaced by the following:

‘4. The group-level resolution authority shall communicate any measure proposed by the Union parent undertaking to the consolidating supervisor, EBA, the resolution authorities of the subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch. The group-level resolution authority and the resolution authorities of the subsidiaries, after consulting the competent authorities and the resolution authorities of jurisdictions in which significant branches are located, shall do everything within their power to reach a joint decision within the resolution college regarding the identification of substantive impediments, and if necessary, the assessment of the measures proposed by the Union parent undertaking and the measures required by the authorities in order to address or remove the impediments, which shall take into account the potential impact of the measures in all Member States where the group operates.’;

- (b) paragraph 9 is replaced by the following:

‘9. In the absence of a joint decision on the taking of any measures referred to in Article 17(5), point (g), (h) or (k), EBA may, upon the request of a resolution authority in accordance with paragraphs 6, 6a or 7 of this Article, assist the resolution authorities in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010.’;

- (12) Articles 27 and 28 are replaced by the following:

‘Article 27

Early intervention measures

1. Member States shall ensure that competent authorities may apply early intervention measures where an institution or entity referred to in Article 1(1), points (b), (c) or (d) meets any of the following conditions:

- (a) the institution or entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 38 of Directive (EU) 2019/2034, or the competent authority has determined that the arrangements, strategies, processes and mechanisms implemented by the institution or entity and the own funds and liquidity held by that institution or entity do not ensure a sound management and coverage of its risks, and either of the following applies:
 - (i) the institution or entity has not taken the remedial actions required by the competent authority, including the measures referred to in Article 104 of Directive 2013/36/EU or in Article 49 of Directive (EU) 2019/2034;
 - (ii) the competent authority deems that remedial actions other than early intervention measures are insufficient to address the problems due inter alia to a rapid and significant deterioration of the financial condition of the institution or entity;
- (b) the institution or entity infringes or is likely to infringe in the 12 months following the assessment of the competent authority the requirements of Title II of Directive 2014/65/EU, of Articles 3 to 7, Articles 14 to 17, or Articles 24, 25 and 26 of Regulation (EU) No 600/2014 or Articles 45e or 45f of this Directive.

The competent authority may determine that the condition referred to in the first subparagraph, point (a)(ii), is met without having previously taken other remedial actions, including the exercise of the powers referred to in Article 104 of Directive 2013/36/EU or in Article 39 of Directive (EU) 2019/2034.

1a. For the purposes of paragraph 1, early intervention measures shall include all of the following measures:

- (a) the requirement for the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d), to do either of the following:
 - (i) to implement one or more of the arrangements or measures set out in the recovery plan;
 - (ii) to update the recovery plan in accordance with Article 5(2) when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or

more of the arrangements or measures set out in the updated recovery plan within a specific timeframe;

- (b) the requirement for the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d) to convene or, if the management body fails to comply with that requirement, convene directly, a meeting of shareholders of the institution or entity, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;
- (c) the requirement for the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d), to draw up a plan, in accordance with the recovery plan where applicable, for negotiation on restructuring of debt with some or all of its creditors;
- (d) the requirement to change the legal structure of the institution;
- (e) the requirement to remove or replace the senior management or management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d), in its entirety or with regard to individuals, in accordance with Article 28;
- (f) appointment of one or more temporary administrators to the institution or entity referred to in Article 1(1), points (b), (c) or (d), in accordance with Article 29.

2. Competent authorities shall choose the appropriate early intervention measures based on what is proportionate to the objectives pursued, having regard to the seriousness of the infringement or likely infringement and the speed of the deterioration in the financial situation of the institution or entity referred to in Article 1(1), points (b), (c) or (d), among other relevant information.

3. For each of the measures referred to in paragraph 1a, competent authorities shall set a deadline that is appropriate for completion and that enables the competent authority to evaluate the effectiveness of the measure.

4. EBA shall, by ... [PO please insert the date = 12 months from the date of entry into force of this amending Directive], issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the consistent application of the triggers referred to in paragraph 1 of this Article.

Article 28

Removal of senior management and management body

For the purposes of Article 27(1a), point (e), Member States shall ensure that the new senior management or management body is appointed in accordance with Union and national law and is subject to the approval or consent of the competent authority.’;

(13) Article 29 is amended as follows:

- (a) paragraphs 1, 2 and 3 are replaced by the following:

‘1. For the purposes of Article 27(1a), point (f), Member States shall ensure that competent authorities may, based on what is proportionate in the circumstances, appoint any temporary administrator to do either of the following:

- (a) to replace temporarily the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d);

- (b) to work temporarily with the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d).

The competent authority shall specify its decision at the time of appointment.

For the purposes of the first subparagraph, point (b), the competent authority shall further specify at the time of the appointment the role, duties and powers of the temporary administrator and any requirements for the management body of the institution or entity to consult or to obtain the consent of the temporary administrator prior to taking specific decisions or actions.

Member States shall require the competent authority to make public the appointment of any temporary administrator, except where the temporary administrator does not have the power to represent the institution or entity referred to in Article 1(1), points (b), (c) or (d).

Member States shall further ensure that any temporary administrator fulfils the requirements set out in Article 91(1), (2) and (8) of Directive 2013/36/EU. The assessment by competent authorities of whether the temporary administrator complies with those requirements shall be an integral part of the decision to appoint that temporary administrator.

2. The competent authority shall specify the powers of the temporary administrator at the time of his or her appointment, based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the management body of the institution or entity referred to in Article 1(1), points (b), (c) or (d), under the statutes of the institution or entity and under national law, including the power to exercise some or all of the administrative functions of the management body of the institution or entity. The powers of the temporary administrator in relation to the institution or entity shall comply with the applicable company law.

3. The competent authority shall specify the role and functions of the temporary administrator at the time of appointment. Such roles and functions may include all of the following:

- (a) ascertaining the financial position of the institution or entity referred to in Article 1(1), points (b), (c) or (d);
- (b) managing the business or part of the business of the institution or entity to preserve or restore the financial position of the institution or entity;
- (c) taking measures to restore the sound and prudent management of the business of the institution or entity.

The competent authority shall specify any limits on the role and functions of the temporary administrator at the time of appointment.’;

- (b) paragraphs 5 and 6 are replaced by the following:

‘5. The competent authority may require that certain acts of a temporary administrator be subject to the prior consent of the competent authority. The competent authority shall specify any such requirements at the time of appointment of a temporary administrator or at the time of any variation of the terms of appointment of a temporary administrator.

In any case, the temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution or entity referred to in

Article 1(1), points (b), (c) or (d) and to set the agenda of such a meeting only with the prior consent of the competent authority.

6. The competent authority may require that a temporary administrator draws up reports on the financial position of the institution or entity referred to in Article 1(1), points (b), (c) or (d) and on the acts performed in the course of his or her appointment, at intervals set by the competent authority and at the end of his or her mandate.’;

(14) Article 30 is amended as follows:

(a) the title is replaced by the following:

‘Coordination of early intervention measures in relation to groups’;

(b) paragraphs 1 to 4 are replaced by the following:

‘1. Where the conditions for the imposition of early intervention measures under Article 27 are met in relation to a Union parent undertaking, the consolidating supervisor shall notify EBA and consult the other competent authorities within the supervisory college before deciding to apply an early intervention measure.

2. Following the notification and consultation referred to in paragraph 1 the consolidating supervisor shall decide whether to apply early intervention measures under Article 27 in respect of the relevant Union parent undertaking, taking into account the impact of those measures on the group entities in other Member States. The consolidating supervisor shall notify the decision to EBA and to the other competent authorities within the supervisory college.

3. Where the conditions for the imposition of early intervention measures under Article 27 are met in relation to a subsidiary of a Union parent undertaking, the competent authority responsible for the supervision on an individual basis that intends to take a measure in accordance with those Articles shall notify EBA and consult the consolidating supervisor.

On receiving the notification, the consolidating supervisor may assess the likely impact of the imposition of early intervention measures under Article 27 to the institution or entity referred to in Article 1(1), points (b), (c) or (d), in question, on the group or on group entities in other Member States. The consolidating supervisor shall communicate that assessment to the competent authority within 3 days.

Following that notification and consultation the competent authority shall decide whether to apply an early intervention measure. The decision shall give due consideration to any assessment of the consolidating supervisor. The competent authority shall notify the decision to EBA, the consolidating supervisor and other competent authorities within the supervisory college.

4. Where more than one competent authority intends to apply an early intervention measure under Article 27 to more than one institution or entity referred to in Article 1(1), points (b), (c) or (d), in the same group, the consolidating supervisor and the other relevant competent authorities shall assess whether it is more appropriate to appoint the same temporary administrator for all the entities concerned or to coordinate the application of the other early intervention measures to more than one institution or entity in order to facilitate solutions restoring the financial position of the institution or

entity concerned. 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 5 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 Union parent undertaking.

EBA may, at the request of a competent authority, assist the competent authorities in reaching an agreement in accordance with Article 31 of Regulation (EU) No 1093/2010.

In the absence of a joint decision within 5 days the consolidating supervisor and the competent authorities of subsidiaries may take individual decisions on the appointment of a temporary administrator to the institutions or entities referred to in Article 1(1), points (b), (c) or (d), for which they have responsibility and on the application of the other early intervention measures.’;

- (c) paragraph 6 is replaced by the following:

‘6. EBA may at the request of any competent authority assist the competent authorities that intend to apply one or more of the measures in Article 27(1a), point (a), of this Directive with respect to the points (4), (10), (11) and (19) of Section A of the Annex to this Directive, in Article 27(1a), point (c), of this Directive or in Article 27(1a), point (d), of this Directive in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010.’;

- (15) the following Article 30a is inserted:

‘Article 30a

Preparation for resolution

1. Member States shall ensure that competent authorities notify the resolution authorities without delay of any of the following:

- (a) any of the actions referred to in Article 104(1) of Directive 2013/36/EU they require an institution or entity referred to in Article 1(1), points (b), (c) or (d), of this Directive to take;
- (b) where supervisory activity shows that the conditions laid down in Article 27(1) of this Directive are met in relation to an institution or entity referred to in Article 1(1), points (b), (c) or (d), of this Directive, the assessment of whether such conditions are met, independently of the adoption of an early intervention measure;
- (c) the application of any early intervention measures under Article 27.

Competent authorities shall closely monitor, in cooperation with the resolution authorities, the situation of the institution or entity and their compliance with the measures referred to in the first subparagraph, point (a), that aim to address a deterioration in the situation of the institution or entity and with the measures referred to in the first subparagraph, point (c).

2. Competent authorities shall notify resolution authorities as early as possible when they consider that there is a material risk that one or more of the circumstances in Article 32(4) would be met in relation to an institution or an entity referred to Article 1(1), points (b), (c) and (d). That notification shall include:

- (a) the reasons for the notification;
- (b) an overview of the measures which would prevent the failure of the institution or entity within a reasonable timeframe, their expected impact on the situation of the institution or entity in relation to the circumstances referred to in Article 32(4) and the expected timeframe for the implementation of such measures.

After receiving the notification referred to in the first subparagraph, the resolution authority shall assess, in close cooperation with the competent authority, what constitutes a reasonable timeframe for the purposes of the assessment of the condition referred to in Article 32(1), point (b), taking into account the speed of the deterioration of the conditions of the institution or entity referred to in Article 1(1), points (b), (c) and (d), the need to implement effectively the resolution strategy and any other relevant considerations. The resolution authority shall communicate this assessment to the competent authority as early as possible.

Following the notification referred to in the first subparagraph, the competent authority and the resolution authority shall, in close cooperation, monitor the situation of the institution or entity referred to in Article 1(1), points (b), (c) and (d), the implementation of the relevant measures within the expected timeframe as well as any other relevant developments. For this purpose, the resolution authority and the competent authority shall meet regularly, with a frequency set by the resolution authority in light of the circumstances of the case. The competent authority and the resolution authority shall, without delay, provide each other with any relevant information.

3. Competent authorities shall provide resolution authorities with all of the information requested by the resolution authority necessary for all of the following:

- (a) updating the resolution plan and preparing for the possible resolution of the institution or entity referred to in Article 1(1), points (b), (c) or (d);
- (b) carrying out the valuation referred to in Article 36.

Where such information is not already available to the competent authorities, the resolution authorities and the competent authorities shall cooperate and coordinate to obtain this information. For this purpose, the competent authorities shall have the power to require the institution or entity referred to in Article 1(1), points (b), (c) or (d), to provide such information, including through on-site inspections, and to provide that information to the resolution authority.

4. The powers of the resolution authorities shall include the power to market or make arrangements for the marketing of the institution or entity referred to in Article 1(1), points (b), (c) or (d), to potential purchasers, or require the institution or entity to do so, for the following purposes:

- (a) to prepare for the resolution of the institution or entity referred to in Article 1(1), points (b), (c) or (d), subject to the conditions laid down in Article 39(2) and the confidentiality provisions laid down in Article 84;
- (b) to inform the assessment by the resolution authority of the condition referred to in Article 32(1), point (b).

5. For the purposes of the paragraph 4, the resolution authority shall have the power to request the institution or entity referred to in Article 1(1), points (b), (c) or (d), to put in place a digital platform for sharing the information necessary for the marketing

of the institution or entity with potential purchasers or with advisors and valuers engaged by the resolution authority.

6. The determination that the conditions laid down in Article 27(1) are met and the prior adoption of early intervention measures shall not be necessary conditions for resolution authorities to prepare for the resolution of the institution or entity referred to in Article 1(1), points (b), (c) or (d), or to exercise the power referred to in the paragraphs 4 and 5 of this Article.

7. Resolution authorities shall inform without delay the competent authorities of any action taken pursuant to paragraphs 4 and 5.

8. Member States shall ensure that competent authorities and resolution authorities closely cooperate:

- (a) when considering taking the actions referred to in paragraph 1, first subparagraph, point (a), that aim to address a deterioration in the situation of an institution or entity referred to in Article 1(1), points (b), (c) or (d), as well as the actions referred to in paragraph 1, first subparagraph, point (c);
- (b) when considering taking any actions aimed at preparing for resolution referred to in paragraphs 4 and 5;
- (c) during the implementation of the actions referred to in points (a) and (b) of this subparagraph.

Competent authorities and resolution authorities shall ensure that those actions are consistent, coordinated and effective.’;

- (16) in Article 31(2), points (c) and (d) are replaced by the following:

‘(c) to protect public funds by minimising reliance on extraordinary public financial support, in particular when provided from the budget of a Member State;

(d) to protect depositors, while minimising losses for deposit guarantee schemes, and to protect investors covered by Directive 97/9/EC;’;

- (17) Article 32 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. Member States shall ensure that the resolution authority takes a resolution action in relation to an institution if it determines, on receiving a communication or on its own initiative pursuant to the procedure laid down in paragraph 2, that all of the following conditions are met:

- (a) the institution is failing or is likely to fail;
- (b) having regard to the timing, the need to implement effectively the resolution strategy and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures including measures by an IPS, supervisory action, early intervention measures, or write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59(2) taken in respect of the institution would prevent the failure of the institution within a reasonable timeframe;
- (c) a resolution action is in the public interest pursuant to paragraph 5.’;

- (b) paragraph 2 is replaced by the following:

‘2. The competent authority shall make an assessment of the condition referred to in paragraph 1, point (a), after consulting the resolution authority.

Member States may provide that, in addition to the competent authority, the assessment of the condition referred to in paragraph 1, point (a), can be made by the resolution authority, after consulting the competent authority, where resolution authorities under national law have the necessary tools for making such a determination including, in particular, adequate access to the relevant information. The competent authority shall provide the resolution authority with any relevant information that the latter requests in order to perform its assessment without delay.’;

(c) paragraph 4 is amended as follows:

(i) point (d) is replaced by the following:

‘(d) extraordinary public financial support is required except when it is granted in one of the forms and in compliance with Article 32c;

(ii) the second, the third and the fifth subparagraphs are deleted;

(d) paragraph 5 is replaced by the following:

‘5. For the purposes of paragraph 1, point (c), a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives more effectively.

When carrying out the assessment referred to in the first subparagraph, the resolution authority, based on the information available to the resolution authority at the time of the assessment, shall consider and compare all extraordinary public financial support that can reasonably be expected to be granted to the institution, both in the event of resolution and in the event of winding up in accordance with the applicable national law.’;

(18) Articles 32a and 32b are replaced by the following:

‘Article 32a

Conditions for resolution with regard to a central body and credit institutions permanently affiliated to a central body

Member States shall ensure that resolution authorities may take a resolution action in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group when the central body and all credit institutions permanently affiliated to it, or the resolution group to which they belong, comply as a whole with the conditions established in Article 32(1).

Article 32b

Proceedings in respect of institutions and entities that are not subject to resolution action

1. Member States shall ensure that, when a resolution authority determines that an institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions laid down in Article 32(1), points (a) and (b), but not the condition laid down in Article 32(1), point (c), the relevant national administrative or judicial authority has the power to initiate without delay the procedure to wind up the

institution or entity in an orderly manner in accordance with the applicable national law.

2. Member States shall ensure that an institution or entity referred to in Article 1(1), points (b), (c) or (d), which is wound up in an orderly manner in accordance with the applicable national law exits the market or terminates its banking activities within a reasonable timeframe.

3. Member States shall ensure that when a resolution authority determines that an institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions in Article 32(1), points (a) and (b), but not the condition in Article 32(1), point (c), the determination that the institution or entity is failing or likely to fail pursuant to Article 32(1), point (a) is a condition for the withdrawal of the authorisation by the competent authority pursuant to Article 18 of Directive 2013/36/EU.

4. Member States shall ensure that the withdrawal of the authorisation of the institution or entity referred to in Article 1(1), points (b), (c) or (d) is a sufficient condition for a relevant national administrative or judicial authority to initiate without delay the procedure to wind up the institution or entity in an orderly manner in accordance with the applicable national law.’:

(19) the following Article 32c is inserted:

‘Article 32c

Extraordinary public financial support

1. Member States shall ensure that extraordinary public financial support outside of resolution action may be granted to an institution or entity referred to in Article 1(1), points (b), (c) or (d), on an exceptional basis only in one of the following cases and provided that the extraordinary public financial support complies with the conditions and requirements established in the Union State aid framework:

- (a) when, to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes the form of any of the following support measures:
 - (i) a State guarantee to back liquidity facilities provided by central banks according to the central banks’ conditions;
 - (ii) a State guarantee of newly issued liabilities;
 - (iii) an acquisition of own funds instruments other than Common Equity Tier 1 instruments, or of other capital instruments or a use of impaired assets measures, at prices, duration and other terms that do not confer an undue advantage upon the institution or entity concerned, where neither the circumstances referred to in Article 32(4), points (a), (b) or (c), nor the circumstances referred to in Article 59(3) occur at the time the public support is granted.
- (b) when the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme to preserve the financial soundness and long-term viability of the credit institution in compliance with the conditions set out in Articles 11a and 11b of Directive 2014/49/EU, provided that none of the circumstances referred to in Article 32(4) occur;

- (c) when the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme in the context of the winding up of an institution pursuant to Article 32b and according to the conditions set out in Article 11(5) of Directive 2014/49/EU;
- (d) when the extraordinary public financial support takes the form of State aid within the meaning of Article 107(1) TFEU granted in the context of the winding up of the institution or entity pursuant to Article 32b of this Directive, other than the support granted by a deposit guarantee scheme pursuant to Article 11(5) of Directive 2014/49/EU.

2. The support measures referred to in paragraph 1, point (a), shall fulfil all of the following conditions:

- (a) the measures shall be confined to solvent institutions or entities, as confirmed by the competent authority;
- (b) the measures shall be of a precautionary and temporary nature based on a pre-defined exit strategy approved by the competent authority, including a clearly specified termination date, sale date or repayment schedule for any of the measures provided;
- (c) the measures shall be proportionate to remedy the consequences of the serious disturbance or to preserve financial stability;
- (d) the measures shall not be used to offset losses that the institution has incurred or is likely to incur in the near future.

For the purposes of the first subparagraph, point (a), an institution or entity shall be deemed to be solvent where the competent authority has concluded that no breach of any of the requirements referred to in Article 92(1) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU, or Article 11(1) of Regulation (EU) 2019/2033 and Article 40 of Directive (EU) 2019/2034, as applicable, or the relevant applicable requirements under Union or national law, has occurred or is likely to occur in the 12 months following that assessment.

For the purposes of the first subparagraph, point (d), the relevant competent authority shall quantify the losses that are incurred or likely to be incurred. That quantification shall be based, as a minimum, on the institution's balance sheet, provided that the balance sheet complies with the applicable accounting rules and standards, as confirmed by an independent external auditor, and, where available, on asset quality reviews conducted by the European Central Bank, EBA or national authorities.

The support measures referred to in paragraph 1, point (a)(iii), shall be limited to measures assessed by the relevant competent authority as necessary to maintain the solvency of the institution by addressing its capital shortfall established in the adverse scenario of national, Union or SSM-wide stress tests or equivalent exercises conducted by the European Central Bank, EBA or national authorities, where applicable, confirmed by the competent authority.

Acquisition of Common Equity Tier 1 instruments referred to in paragraph 1, point (a)(iii), shall be exceptionally permitted only where the nature of the shortfall identified is such that the acquisition of any other own funds instruments or other capital instruments would not make it possible for the institution or entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise.

In case any of the support measures referred to in paragraph 1, point (a), is not redeemed, repaid or otherwise terminated in accordance with the terms of the exit strategy specified at the time of granting such measure, the competent authority shall conclude that the condition laid down in Article 32(1), point (a), is met in relation to the institution or entity which has received those support measures, and shall communicate this conclusion to the resolution authority concerned.’;

- (20) in Article 33, paragraph 2 is replaced by the following:

‘2. Member States shall ensure that resolution authorities take a resolution action in relation to an entity referred to in Article 1(1), points (c) or (d), when that entity meets the conditions laid down in Article 32(1). For the purpose of this provision, an entity referred to in Article 1(1), points (c) or (d), shall be deemed to be failing or likely to fail in one or more of the following circumstances:

- (a) the entity meets one or more of the conditions laid down in Article 32(4), points (b), (c) and (d);
- (b) the entity infringes materially or there are objective elements to support a determination that the entity will, in the near future, infringe materially its requirements under Regulation (EU) No 575/2013 or Directive 2013/36/EU.’;

- (21) Article 33a is amended as follows:

- (a) in paragraph 8, the first subparagraph is replaced by the following:

‘Member States shall ensure that resolution authorities notify the institution or the entity referred to in Article 1(1), points (b), (c) or (d), and the authorities referred to in Article 83(2), points (a) to (h), without delay when exercising the power referred to in paragraph 1 of this Article after a determination has been made that the institution or entity is failing or likely to fail pursuant to Article 32(1), point (a), and before the resolution decision is taken.’;

- (b) in paragraph 9, the second subparagraph is added:

‘By way of derogation from the first subparagraph, Member States shall ensure that where such powers are exercised in respect of eligible deposits and those deposits are not considered unavailable for the purposes of Directive 2014/49/EU, depositors have access to an appropriate daily amount from those deposits.’;

- (22) Article 35 is amended as follows:

- (a) paragraphs 1 and 2 are replaced by the following:

‘1. Member States shall ensure that resolution authorities may appoint a special manager to replace or to work with the management body of the institution under resolution or the bridge institution. Resolution authorities shall make public the appointment of a special manager. Resolution authorities shall ensure that the special manager has the qualifications, ability and knowledge required to carry out his or her functions.

Article 91 of Directive 2013/36/EU shall not apply to the appointment of special managers.

2. The special manager shall have all the powers of the shareholders and the management body of the institution under resolution or the bridge institution.

However, the special manager may only exercise such powers under the control of the resolution authority.’;

- (b) paragraph 5 is replaced by the following:

‘5. Member States shall require that a special manager draw up reports for the appointing resolution authority on the economic and financial situation of the institution under resolution or the bridge institution and on the acts performed in the conduct of his or her duties, at regular intervals set by the resolution authority and at the beginning and the end of his or her mandate.’;

- (23) Article 36 is amended as follows:

- (a) in paragraph 1, the first sentence is replaced by the following:

‘1. Before determining whether the conditions for resolution or the conditions for the write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59 are met, resolution authorities shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity referred to in Article 1(1), points (b), (c) or (d), is carried out by a person independent from any public authority, including the resolution authority, and the institution or entity referred to in Article 1(1), points (b), (c) or (d).’;

- (b) the following paragraph 7a is inserted:

‘7a. Where necessary to inform the decisions referred to in paragraph 4, points (c) and (d), the valuer shall complement the information in paragraph 6, point (c), with an estimate of the value of the off-balance sheet assets and liabilities, including contingent liabilities and assets.’;

- (24) in Article 37, the following paragraph 11 is added:

‘11. EBA shall monitor the actions and preparation of resolution authorities to ensure an effective implementation of the resolution tools and powers in the event of resolution. EBA shall report to the Commission on the state of play of existing practices and possible divergences across Member States by ... [PO please insert the date = 2 years after the date of entry into force of this Directive] and monitor the implementation of any recommendation set out in that report, where appropriate.

The report referred to in the first subparagraph shall cover at least the following:

- (a) the arrangements in place to implement the bail-in tool and the level of engagement with financial market infrastructures and third-country authorities, where relevant;
- (b) the arrangements in place to operationalise the use of other resolution tools;
- (c) the level of transparency towards relevant stakeholders regarding the arrangements referred to in points (a) and (b).’;

- (25) Article 40 is amended as follows:

- (a) in paragraph 1, the introductory sentence is replaced by the following:

‘In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution or to pursue any of the resolution objectives, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution all of the following:’;

- (b) in paragraph 2, the second subparagraph is replaced by the following:
 ‘The application of the bail-in tool for the purpose referred to in Article 43(2), point (b), shall not interfere with the ability of the resolution authority to control the bridge institution. Where the application of the bail-in tool allows for the capital of the bridge institution to be fully provided through the conversion of bail-inable liabilities into shares or other types of capital instruments, the requirement that the bridge institution is wholly or partially owned by one or more public authorities may be waived.’;
- (26) in Article 42(5), point (b) is replaced by the following:
 ‘(b) such a transfer is necessary to ensure the proper functioning of the institution under resolution, the bridge institution or the asset management vehicle itself; or’;
- (27) Article 44 is amended as follows:
 - (a) paragraph 1 is replaced by the following:
 ‘1. Member States shall ensure that the bail-in tool may be applied to all liabilities, including those giving rise to an accounting provision, of an institution or entity referred to in Article 1(1), points (b), (c) or (d), that are not excluded from the scope of that tool pursuant to paragraphs 2 or 3 of this Article.’;
 - (b) paragraph 5 is replaced by the following:
 ‘5. The resolution financing arrangement may make a contribution referred to in paragraph 4 where all of the following conditions are met:
 - (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other bail-inable liabilities through reduction, write down or conversion pursuant to Article 48(1) and Article 60(1), and by the deposit guarantee scheme pursuant to Article 109 if relevant;
 - (b) the contribution of the resolution financing arrangement does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured in accordance with the valuation provided for in Article 36.’;
 - (c) paragraph 7 is replaced by the following:
 ‘7. The resolution financing arrangement may make a contribution from resources which have been raised through *ex-ante* contributions in accordance with Article 100(6) and Article 103 and which have not yet been used after all of the following conditions are met:
 - (a) the resolution financing arrangement has made a contribution pursuant to paragraph 4 and the 5 % limit referred to in paragraph 5, point (b), has been reached; and
 - (b) all liabilities ranking lower than eligible deposits, and not excluded from bail-in pursuant to Article 44(2) and 44(3), have been written down or converted in full.

In extraordinary circumstances, as an alternative or in addition to the contribution from the resolution financing arrangement referred to in the first subparagraph, where the conditions laid down in the first subparagraph are met, the resolution authority may seek further funding from alternative financing sources.’;

(28) in Article 44a, the following paragraph 8 is added:

‘8. By ... [PO please insert the date = 24 months after the date of entry into force of this Directive], EBA shall report to the Commission on the application of this Article. That report shall compare the measures adopted by the Member States to comply with this Article, analyse their effectiveness in protecting retail investors and assess their impact on cross-border operations.

On the basis of that report, the Commission may submit a legislative proposal to amend this Directive.’;

(29) in Article 45, paragraph 1 is replaced by the following:

‘1. Member States shall ensure that institutions and entities referred to in Article 1(1), points (b), (c) and (d), meet, at all times, the requirements for own funds and eligible liabilities where required by and as determined by the resolution authority in accordance with this Article and Articles 45a to 45i.’;

(30) Article 45b is amended as follows:

(a) in paragraphs 4, 5 and 7, the word ‘G-SIIs’ is replaced by the words ‘G-SII entities’;

(b) paragraph 8 is amended as follows:

(i) in the first subparagraph, the word ‘G-SIIs’ is replaced by the words ‘G-SII entities’;

(ii) in the second subparagraph, point (c), the word ‘G-SII’ is replaced by the words ‘G-SII entity’;

(iii) in the fourth subparagraph, the word ‘G-SIIs’ is replaced by the words ‘G-SII entities’;

(c) the following paragraph 10 is added:

‘10. Resolution authorities may permit resolution entities to comply with the requirements referred to in paragraphs 4, 5 and 7 using own funds or liabilities as referred to in paragraphs 1 and 3 when all of the following conditions are met:

(a) for entities that are G-SII entities or resolution entities that are subject to Article 45c(5) or (6), the resolution authority has not reduced the requirement referred to in paragraph 4 of this Article, pursuant to the first subparagraph of that paragraph;

(b) the liabilities referred to in paragraph 1 of this Article that do not meet the condition referred to in Article 72b(2), point (d), of Regulation (EU) No 575/2013 comply with the conditions set out in Article 72b(4), points (b) to (e), of that Regulation.’;

(31) Article 45c is amended as follows:

- (a) in paragraph 3, eighth subparagraph, the words ‘critical economic functions’ are replaced by the words ‘critical functions’;
- (b) paragraph 4 is replaced by the following:
‘EBA shall develop draft regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU and the combined buffer requirement for:
 - (a) resolution entities at the resolution group consolidated level, where the resolution group is not subject to those requirements under Directive 2013/36/EU;
 - (b) entities that are not themselves resolution entities, where the entity is not subject to those requirements under Directive 2013/36/EU on the same basis as the requirements referred to in Article 45f.

EBA shall submit those draft regulatory technical standards to the Commission by [OP please insert the date = 12 months from the date of entry into force of this amending 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.’;

- (c) in paragraph 7, eighth subparagraph, the words ‘critical economic functions’ are replaced by the words ‘critical functions’;
- (32) the following Article 45ca is inserted:

‘Article 45ca

Determination of the minimum requirement for own funds and eligible liabilities for transfer strategies leading to market exit

1. When applying Article 45c to a resolution entity whose preferred resolution strategy envisages primarily the use of the sale of business tool or the bridge institution tool and its exit from the market, the resolution authority shall set the recapitalisation amount provided in Article 45c(3) in a proportionate way on the basis of the following criteria, as relevant:

- (a) the resolution entity’s size, business model, funding model and risk profile;
- (b) the shares, other instruments of ownership, assets, rights or liabilities to be transferred to a recipient as identified in the resolution plan, taking into consideration:
 - (i) the core business lines and critical functions of the resolution entity;
 - (ii) the liabilities excluded from bail-in pursuant to Article 44(2);
 - (iii) the safeguards referred to in Articles 73 to 80;
- (c) the expected value and marketability of the shares, other instruments of ownership, assets, rights or liabilities of the resolution entity referred to in point (b), taking into account:
 - (i) any material impediments to resolvability identified by the resolution authority directly related to the application of the sale of business tool or the bridge institution tool;

- (ii) the losses resulting from the assets, rights or liabilities left in the residual institution;
 - (d) whether the preferred resolution strategy envisages the transfer of shares or other instruments of ownership issued by the resolution entity, or of all or part of the assets, rights and liabilities of the resolution entity;
 - (e) whether the preferred resolution strategy envisages the application of the asset separation tool.
2. Where the resolution plan provides that the entity is to be wound up under normal insolvency proceedings or other equivalent national procedures and envisages the use of the deposit guarantee scheme pursuant to Article 11(5) of Directive 2014/49/EU, the resolution authority shall also take into account paragraph 1 of this Article when carrying out the assessment referred to in Article 45c(2a), second subparagraph, of this Directive.
3. The application of paragraph 1 shall not result in an amount higher than the amount resulting from application of Article 45c(3).’;
- (33) in Article 45d(1), the introductory wording is replaced by the following:
 ‘The requirement referred to in Article 45(1) for a resolution entity that is a G-SII entity shall consist of the following:’;
- (34) in Article 45f(1), the third subparagraph is replaced by the following:
 ‘By way of derogation from the first and second subparagraphs of this paragraph, Union parent undertakings that are not themselves resolution entities, but are subsidiaries of third-country entities, shall comply with the requirements laid down in Articles 45c and 45d on a consolidated basis.’;
- (35) Article 45l is amended as follows:
- (a) in paragraph 1, point (a) is replaced by the following:
 ‘(a) how the requirement for own funds and eligible liabilities set in accordance with Article 45e or Article 45f has been implemented at national level, including Article 45ca, and in particular whether there have been divergences in the levels set for comparable entities across Member States;’
 - (b) in paragraph 3, second subparagraph, the following sentence is added:
 ‘The obligation referred to in paragraph 2 shall cease to apply after the second report is submitted.’;
- (36) in Article 45m, paragraph 4 is replaced by the following:
 ‘4. The requirements referred to in Article 45b(4) and (7) and in Article 45c(5) and (6), as applicable, shall not apply within the three-year period following the date on which the resolution entity or the group of which the resolution entity is part has been identified as a G-SII or a non-EU G-SII, or the resolution entity starts to be in the situation referred to in Article 45c(5) or (6).’;
- (37) in Article 46(2), the first subparagraph is replaced by the following:
 ‘The assessment referred to in paragraph 1 of this Article shall establish the amount by which bail-inable liabilities need to be written down or converted in order to restore the Common Equity Tier 1 capital ratio of the institution under resolution or where applicable establish the ratio of the bridge institution taking into account any

contribution of capital by the resolution financing arrangement pursuant to Article 101(1), point (d), of this Directive, and to sustain sufficient market confidence in the institution under resolution or the bridge institution, taking into account any contingent liabilities, and enable the institution under resolution to continue to meet, for at least 1 year, the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU.’;

(38) in Article 47(1), point (b)(i) is replaced by the following:

‘(i) relevant capital instruments and eligible liabilities in accordance with Article 59 issued by the institution pursuant to the power referred to in Article 59(2); or’;

(39) Article 52 is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

‘In exceptional circumstances, the resolution authority may extend the 1 month deadline for submission of the business reorganisation plan by another month.’;

(b) in paragraph 5, the following subparagraph is added:

‘The resolution authority may require the institution or entity referred to in Article 1(1), points (b), (c) or (d), to include additional elements in the business reorganisation plan.’;

(40) in Article 53, paragraph 3 is replaced by the following:

‘3. Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability, including a liability giving rise to an accounting provision, by means of the power referred to in Article 63(1), point (e), 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 entity in any subsequent winding up.’;

(41) Article 55 is amended as follows:

(a) in paragraph 1, point (b) is replaced by the following:

‘(b) the liability is not a deposit referred to in Article 108(1), points (a) or (b)’;

(b) in paragraph 2, the fifth and sixth subparagraphs are replaced by the following:

‘Where the resolution authority, in the context of the assessment of the resolvability of an institution or entity referred to in Article 1(1), points (b), (c) or (d), in accordance with Articles 15 and 16, or at any other time, determines that, within a class of liabilities which includes eligible liabilities, the amount of liabilities that do not include the contractual term referred to in paragraph 1 of this Article, together with the liabilities which are excluded from the application of the bail-in tool in accordance with Article 44(2) or which are likely to be excluded in accordance with Article 44(3), amounts to more than 10 % of that class, it shall immediately assess the impact of that particular fact on the resolvability of that institution or entity, including the impact on the resolvability resulting from the risk of breaching the creditor safeguards provided in Article 73 when applying write-down and conversion powers to eligible liabilities.

Where the resolution authority concludes, on the basis of the assessment referred to in the fifth subparagraph of this paragraph, that the liabilities which do not include the contractual term referred to in paragraph 1 of this Article create a substantive impediment to resolvability, it shall apply the powers provided in Article 17 as appropriate to remove that impediment to resolvability.’;

(42) Article 59 is amended as follows:

(a) in paragraph 3, point (e) is replaced by the following:

‘(e) extraordinary public financial support is required by the institution or the entity referred to in Article 1(1), points (b), (c) or (d), except when it is granted in one of the forms and in compliance with the requirements laid down in Article 32c.’;

(b) in paragraph 4, point (b) is replaced by the following:

‘(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, including alternative private sector measures, supervisory action or early intervention measures, other than the write down or conversion of capital instruments and eligible liabilities as referred to in paragraph 1a, would prevent the failure of the institution or the entity referred to in Article 1(1), points (b), (c) or (d), or the group within a reasonable timeframe.’;

(43) Article 63 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) point (m) is replaced by the following:

‘(m) the power to require the competent authority to assess the acquirer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of Directive 2013/36/EU and Article 12 of Directive 2014/65/EU;’;

(ii) the following point (n) is added:

‘(n) the power to make requests pursuant to Article 17(5) of Regulation (EU) No 596/2014 on behalf of the institution under resolution.’;

(b) in paragraph 2, point (a) is replaced by the following:

‘(a) subject to Article 3(6) and Article 85(1), requirements to obtain approval or consent from any person either public or private, including the shareholders or creditors of the institution under resolution and the competent authorities for the purposes of Articles 22 to 27 of Directive 2013/36/EU;’;

(44) Article 71a(3) is replaced by the following:

‘3. Paragraph 1 shall apply to any financial contract which complies with all of the following:

(a) the contract creates a new obligation, or materially amends an existing obligation after the entry into force of the provisions adopted at national level to transpose this Article;’

- (b) the contract provides for the exercise of one or more termination rights or rights to enforce security interests to which Article 33a, 68, 69, 70 or 71 would apply if the financial contract were governed by the laws of a Member State.’;
- (45) in Article 74(3), the following point (d) is added:
- ‘(d) when determining the losses that the deposit guarantee scheme would have incurred had the institution been wound up under normal insolvency proceedings, apply the criteria and methodology referred to in Article 11e of Directive 2014/49/EU and in any delegated act adopted pursuant to that Article.’;
- (46) in Article 88, the following paragraph 6a is inserted:
- ‘6a. To facilitate the tasks referred to in Articles 10(1), 15(1) and 17(1) and to exchange any relevant information, the resolution authority of an institution with significant branches in other Member States shall establish and chair a resolution college.
- The resolution authority of the institution referred to in the first subparagraph shall decide which authorities participate in a meeting or in an activity of the resolution college, taking into account the relevance of the activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned and the tasks referred to in the first subparagraph.
- The resolution authority of the institution referred to in the first subparagraph shall keep all members of the resolution college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The resolution authority of the institution referred to in the first subparagraph shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.’;
- (47) Article 91 is amended as follows:
- (a) paragraph 1 is replaced by the following:
- ‘1. Where a resolution authority decides that an institution or any entity referred to in Article 1(1), points (b), (c) or (d), that is a subsidiary in a group meets the conditions referred to in Article 32 or 33, that authority shall notify the following information without delay to the group-level resolution authority, if different, to the consolidating supervisor, and to the members of the resolution college for the group in question:
- (a) the decision that the institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions set out in Article 32(1), points (a) and (b), or in Article 33(1) or (2) as applicable, or the conditions set out in Article 33(4);
- (b) the outcome of the assessment of the condition referred to in Article 32(1), point (c);
- (c) the resolution actions or insolvency measures that the resolution authority considers to be appropriate for that institution or that entity referred to in Article 1(1), points (b), (c) or (d).
- The information mentioned above may be included in the notifications communicated pursuant to Article 81(3) to the addressees referred to in the first subparagraph of this paragraph.’;

(b) in paragraph 7, the second subparagraph is replaced by the following:

‘EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(2), point (c), of Regulation (EU) No 1093/2010.’;

(48) in Article 92(3), the second subparagraph is replaced by the following:

‘EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(2), point (c), of Regulation No 1093/2010.’;

(49) in Article 97, paragraph 4 is replaced by the following:

‘4. Resolution authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement.

Competent authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement and shall ensure that the information disclosed to the third-country authorities is subject to a guarantee that professional secrecy requirements at least equivalent to those referred to in Article 53(1) of Directive 2013/36/EU are complied with.’

(50) in Article 98, paragraph 1 is replaced by the following:

‘1. Member States shall ensure that resolution authorities and competent ministries exchange confidential information, including recovery plans, with relevant third-country authorities only if all of the following conditions are met:

- (a) those third-country authorities are subject to requirements and standards of professional secrecy at least considered to be equivalent, in the opinion of all the authorities concerned, to those imposed by Article 84;
- (b) the information is necessary for the performance by the relevant third-country authorities of their resolution functions under national law that are comparable to those under this Directive and, subject to point (a) of this paragraph, is not used for any other purposes.

For the purposes of point (a), in so far as the exchange of information relates to personal data, the handling and transmission of such personal data to third-country authorities shall be governed by the applicable Union and national data protection law.

Member States shall ensure that competent authorities exchange confidential information with relevant third country authorities only if the following conditions are met:

- (a) in relation to recovery and resolution-related information, the conditions set out in the first subparagraph;
- (b) in relation to other information available to the competent authorities, the conditions set out in Article 55 of Directive 2013/36/EU.

For the purposes of the second subparagraph, recovery and resolution-related information shall include all information directly related to the tasks of competent authorities under this Directive, in particular recovery planning and recovery plans,

early intervention measures and exchanges with resolution authorities regarding resolution planning, resolution plans and resolution action.’;

- (51) in Article 101, paragraph 2 is replaced by the following:

‘2. Where the resolution authority determines that the use of the resolution financing arrangement for the purposes referred to in paragraph 1 of this Article is likely to result in part of the losses of an institution or an entity referred to in Article 1(1), points (b), (c) or (d), being passed on to the resolution financing arrangement, the principles governing the use of the resolution financing arrangement set out in Article 44 shall apply.’;

- (52) in Article 102(3), the first subparagraph is replaced by the following:

‘If, after the initial period of time referred to in paragraph 1 of this Article, the available financial means diminish below the target level specified in that paragraph, the regular contributions raised in accordance with Article 103 shall resume until the target level is reached. Resolution authorities may defer the collection of the regular contributions raised in accordance with Article 103 for 1 or more years where the amount to be collected reaches an amount that is proportionate to the costs of the collection process, provided that such deferral does not materially affect the capacity of the resolution authority to use the resolution financing arrangements pursuant to Article 101. After the target level has been reached for the first time and where the available financial means have subsequently been reduced to less than two thirds of the target level, those contributions shall be set at a level allowing for reaching the target level within 6 years.’;

- (53) in Article 103, the following paragraph 3a is inserted:

‘3a. The resolution authority shall call the irrevocable payment commitments made pursuant to paragraph 3 of this Article when the use of the resolution financing arrangements is needed pursuant to Article 101.

When an entity stops being within the scope of Article 1 and is no longer subject to the obligation to pay contributions in accordance with paragraph 1 of this Article, the resolution authority shall call the irrevocable payment commitments made pursuant to paragraph 3 and still due. If the contribution linked to the irrevocable payment commitment is duly paid at first call, the resolution authority shall cancel the commitment and return the collateral. If the contribution is not duly paid at first call, the resolution authority shall seize the collateral and cancel the commitment.’;

- (54) In Article 104(1), the second subparagraph is replaced by the following:

‘Extraordinary *ex-post* contributions shall not exceed three times 12,5 % of the target level specified in Article 102.’;

- (55) Article 108 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. Member States shall ensure that in their national laws governing normal insolvency proceedings the following have the same priority ranking, which is higher than the ranking provided for the claims of ordinary unsecured creditors:

- (a) deposits;

- (b) deposits made through branches located outside the Union of institutions established within the Union;
- (c) deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency.’;
- (b) the following paragraphs 8 and 9 are added:

‘8. Where the resolution tools referred to in Article 37(3), point (a) or (b), are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the resolution financing arrangement shall have a claim against the residual institution or entity referred to in Article 1(1), points (b), (c) or (d), for any expense and loss incurred by the resolution financing arrangement as a result of any contributions made to resolution pursuant to Article 101(1) in connection to losses which creditors would have otherwise borne.

9. Member States shall ensure that the claims of the resolution financing arrangement referred to in paragraph 8 of this Article and in Article 37(7) have, in their national laws governing normal insolvency proceedings, a preferred priority ranking, which shall be higher than the ranking provided for the claims of deposits and of deposit guarantee schemes pursuant to paragraph 1 of this Article.’;

(56) Article 109 is amended as follows:

- (a) paragraphs 1 and 2 are replaced by the following:

‘1. Member States shall ensure that, where the resolution authorities take resolution action with respect to a credit institution, and provided that such action ensures that depositors continue to have access to their deposits, to prevent depositors from bearing losses the deposit guarantee scheme to which that credit institution is affiliated shall contribute:

- (a) when the bail-in tool is applied, independently or in combination with the asset separation tool, the amount by which covered deposits would have been written down or converted in order to absorb the losses and recapitalise the institution under resolution pursuant to Article 46(1), had covered deposits been included within the scope of bail-in;
- (b) when the sale of business or the bridge institution tools are applied, independently or in combination with other resolution tools:
 - (i) the amount necessary to cover the difference between the value of the covered deposits and of the liabilities with the same or a higher priority ranking than deposits and the value of the assets of the institution under resolution which are to be transferred to a recipient; and
 - (ii) where relevant, an amount necessary to ensure the capital neutrality of the recipient following the transfer.

In the cases referred to in the first subparagraph, point (b), where the transfer to the recipient includes deposits that are not covered deposits or other bail-inable liabilities and the resolution authority assesses that the circumstances referred to in Article 44(3) apply to those deposits or liabilities, the deposit guarantee scheme shall contribute:

- (a) the amount necessary to cover the difference between the value of deposits, including deposits that are not covered, and of the liabilities with the same or higher priority ranking than deposits and the value of the assets of the institution under resolution which are to be transferred to a recipient; and
- (b) where relevant, an amount necessary to ensure the capital neutrality of the transfer for the recipient.

In all cases, the cost of the contribution of the deposit guarantee scheme shall not be greater than the cost of repaying depositors as calculated by the deposit guarantee scheme under Article 11e of Directive 2014/49/EU.

Where it is determined by a valuation under Article 74 that the cost of the deposit guarantee scheme's contribution to resolution was greater than the losses it would have incurred had the institution been wound up under normal insolvency proceedings, the deposit guarantee scheme shall be entitled to the payment of the difference from the resolution financing arrangement in accordance with Article 75.

2. Member States shall ensure that the resolution authority determines the amount of the contribution of the deposit guarantee scheme in accordance with paragraph 1 after having consulted the deposit guarantee scheme on the estimated cost of repaying depositors pursuant to Article 11e of Directive 2014/49/EU and in compliance with the conditions referred to in Article 36 of this Directive.

The resolution authority shall notify its decision referred to in the first subparagraph to the deposit guarantee scheme to which the institution is affiliated. The deposit guarantee scheme shall implement that decision without delay.';

- (b) the following paragraphs 2a and 2b are inserted:

'2a. Where the funds of the deposit guarantee scheme are used in accordance with paragraph 1, first subparagraph, point (a), to contribute to the recapitalisation of the institution under resolution, Member States shall ensure that the deposit guarantee scheme transfers its holdings of shares or other capital instruments in the institution under resolution to the private sector as soon as commercial and financial circumstances allow.

Member States shall ensure that the deposit guarantee scheme markets the shares and other capital instruments referred to in the first subparagraph openly and transparently, and that the sale does not misrepresent them or discriminate between potential purchasers. Any such sale shall be made on commercial terms.

2b. The contribution of the deposit guarantee scheme pursuant to paragraph 1, second subparagraph, shall count towards the thresholds laid down in Article 44(5), point (a), and in Article 44(8), point (a).

Where the use of the deposit guarantee scheme pursuant to paragraph 1, second subparagraph, together with the contribution to loss absorption and recapitalisation made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other bail-inable liabilities, allows for the use of the resolution financing arrangement, the

contribution of the deposit guarantee scheme shall be limited to the amount necessary to meet the thresholds laid down in Article 44(5), point (a), and in Article 44(8), point (a).

For institutions that have been identified as liquidation entities in the group resolution plan or in the resolution plan, the first and the second subparagraphs shall not apply.’;

- (c) paragraph 3 is deleted;
 - (d) in paragraph 5, the second and third subparagraphs are deleted;
- (57) Article 128 is amended as follows:
- (a) the title is replaced by the following:
‘Cooperation and information exchange among institutions and authorities’;
 - (b) the following subparagraph is added:
‘The Single Resolution Board, the ECB and other members of the European System of Central Banks, the EBA, the resolution authorities and the competent authorities shall provide the Commission with all information necessary for the performance of its tasks related to policy development, including the preparation of impact assessments and the preparation and negotiation of legislative proposals.’;
- (58) in Article 111(1), the following point (e) is added:
‘(e) failure to comply with the minimum requirement for own funds and eligible liabilities referred to in Article 45e or 45f.’;
- (59) the following Article 128a is inserted:

‘Article 128a

Crisis management simulations

1. EBA shall coordinate regular Union-wide exercises to test the application of this Directive, Regulation (EU) No 806/2014 and Directive 2014/49/EU in cross-border situations on all of the following aspects:
 - (a) cooperation of the competent authorities during recovery planning;
 - (b) cooperation among resolution authorities and competent authorities before the failure and during the resolution of financial institutions, including in the implementation of resolution schemes adopted pursuant to Article 18 of Regulation (EU) No 806/2014.
2. EBA shall produce a report setting out the key findings and conclusions of the exercises. The report shall be made public.’.

Article 2

Transposition

1. Member States shall adopt and publish, by ... [OP please insert the date = 18 months from the date of entry into force of this amending Directive] 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.

They shall apply those provisions from ... [OP please insert the date = 1 day after the transposition date of this amending Directive].

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.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

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 4

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President