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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding of resolution action

(Text with EEA relevance)

{SEC(2023) 230 final} - {SWD(2023) 225 final} - {SWD(2023) 226 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The proposed amendments to Directive 2014/59/EU[1] (the Bank Recovery and Resolution Directive or BRRD) are part of the crisis management and deposit insurance (CMDI) legislative package that also includes amendments to Regulation (EU) No 806/2014[2] (the Single Resolution Mechanism Regulation or SRMR) and to Directive 2014/49/EU[3] (the Deposit Guarantee Schemes Directive or DGSD).

The EU crisis management framework is well-established, however, previous episodes of bank failures have shown that there is need for improvements. The aim of the CMDI reform is to build on the objectives of the crisis management framework and to ensure a more consistent approach to resolution, so that any bank in crisis can exit the market in an orderly manner, while preserving financial stability, taxpayer money and ensuring depositor confidence. In particular, the existing resolution framework for smaller and medium-sized banks needs to be strengthened with respect to its design, implementation and, most importantly, incentives for its application, so that it can be more credibly applied to those banks.

Context of the proposal

In the aftermath of the global financial and sovereign debt crises, the EU took decisive actions, in line with international calls for reform, to create a safer financial sector for the EU single market. This included providing 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). However, the Banking Union is still incomplete and is missing its third pillar: a European deposit insurance scheme (EDIS)[4]. The Commission's proposal adopted on 24 November 2015 to establish EDIS[5] is still pending.

The Banking Union is supported by a Single Rulebook which, in what concerns the CMDI, is made up of three EU legal acts adopted in 2014: the BRRD, the SRMR and the DGSD. The BRRD defines the powers, rules and procedures for the recovery and resolution of banks, including cross-border cooperation arrangements to tackle cross-border banking failures. The SRMR creates the Single Resolution Board (SRB) and the Single Resolution Fund (SRF) and defines powers, rules and procedures for the resolution of the entities established in the

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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).

4 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.

5 COM/2015/0586 final.

Banking Union, in the context of the single resolution mechanism. The DGSD ensures the protection of depositors and sets-out the rules for the use of DGS funds. The BRRD and the DGSD apply in all Member States while the SRMR applies in Member States participating in the Banking Union.

The 2019 banking package, also known as the 'risk reduction package', revised the BRRD, the SRMR, the Capital Requirements Regulation (CRR)[6] and the Capital Requirements Directive (CRD)[7]. These revisions included measures delivering on the EU's commitments made in international fora[8] 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)[9].

The crisis management and deposit insurance (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 and confidence to EU's households and businesses, increase 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 are essential to finance the twin transitions (digital and green), step up the international role of the euro and strengthen the EU's open strategic autonomy and its competitiveness in a changing world, particularly considering the current challenging economic and geopolitical environment[10, 11].

In June 2022, the Eurogroup did not agree to a more comprehensive work plan to complete the Banking Union by 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 insurance[12].

In parallel, the European Parliament, in its 2021 annual report on the Banking Union[13], also stressed 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 it

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

7 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).

8 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*.

9 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 would take place over 2022-2024. However, the Agreement Amending the Treaty Establishing the European Stability Mechanism is still pending ratification.

10 European Commission (2020), *Commission Work Programme 2021*, section 2.3, p. 5.

11 European Commission (2023), *Long-term competitiveness of the EU: looking beyond 2030*.

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

13 European Parliament (2022), *Banking Union – annual report 2021;* the European Parliament has issued a report on the Banking Union every year starting 2015.

would deliver synergies and efficiency gains for the industry. Such a legislative package would be part of the agenda for completing the Banking Union, as emphasised in President von der Leyen's Political Guidelines, which also recalled the importance of EDIS, and as regularly supported by leaders[14].

The objectives of the crisis management and deposit insurance (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 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 various stages of the life cycle of banks in distress: recovery action supported by recovery plans drafted by banks; early intervention measures; measures to prevent the failure of a bank; resolution plans prepared by resolution authorities; and a resolution toolbox when the bank is declared failing or likely to fail and it is deemed that the resolution of the bank (rather than its liquidation) is in the public interest. Additionally, national insolvency procedures, which are outside of the CMDI framework[15] 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 aimed at providing a combination of funding sources to manage failures in an economically efficient manner, protecting financial stability and depositors and 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 the 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 improves 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 financed by contributions by all banks irrespective of their size and business model. In the Banking Union, these rules were further integrated by entrusting the SRB with managing and overseeing 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 specific details of the

[14] Euro Summit Meeting (24 March 2023), *Statement of the Euro Summit, meeting in inclusive format*.

[15] National insolvency proceedings are not harmonised. However, the decision by the resolution authority whether to place a failing bank in resolution, which requires a comparison between resolution and national insolvency proceedings (public interest assessment), is part of the CMDI framework. If a resolution authority decides not to place a failing bank in resolution, the case is subsequently treated at national level, where the assessment of the initiation of insolvency proceedings or of other types of winding up proceedings takes place, according to the specific details of national insolvency regimes.

case, State aid[16] control may be necessary for interventions by an RF/SRF, a DGS or public funding from the State budget.

Reasons for the proposal

Notwithstanding the progress achieved since 2014, resolution has been rarely applied, especially in the Banking Union. Areas for further strengthening and adjustment were identified as regards 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 (bailouts) 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 bailout 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 on 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 due overall 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.Following this path raises risks of fragmentation and suboptimal outcomes in managing banks' failures, in particular those 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. It should also enable the framework to fully achieve its objectives and be fit for 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 consistent 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 should 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, and by fostering the confidence of their depositors, consisting primarily of households and small and medium-sized enterprises (SMEs). In terms of the magnitude of the changes envisaged, the CMDI review does not seek to overhaul the current framework but rather to bring much needed improvements in several key areas to make the framework work as intended for all banks.

Summary of the crisis management and deposit insurance (CMDI) reform elements

The amendments included in the CMDI package cover a range of policy aspects and constitute a coherent response to the identified problems:

[16] State aid rules are intrinsically linked 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 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.

- expanding the scope of resolution by reviewing 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 ranking 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; and
- improving depositor protection (e.g. targeted improvements of DGSD provisions on scope of protection and cross-border cooperation, harmonisation of national options, and improvement of transparency on financial robustness of DGSs).

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

The proposal puts forward amendments to the existing legislation to render it fully consistent with 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 be able 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 EU policies**

The proposal builds on the reforms carried out in the aftermath of the financial crisis that led to the creation of the Banking Union and the single rulebook for all EU banks.

The proposal helps strengthen the EU financial legislation adopted in the last decade to reduce risks in the financial sector and ensure an orderly management of bank failures. The aim is to make the banking system more robust and ultimately promote the sustainable financing of economic activity in the EU. It is fully consistent with the EU's fundamental goals of promoting financial stability, reducing taxpayers' support in bank resolution and 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 regulation, the SRMR, in particular as regards the improved application of the tools that are already available in the bank resolution framework, clarifying the conditions for resolution, facilitating access to safety nets the event of bank failure and improving the clarity and consistency of funding rules. By establishing harmonised requirements for applying the CMDI framework to banks in the Member States participating in the SRM, the proposal considerably reduces the risk of divergent national rules in those 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 for measures to be adopted for the approximation of national provisions which have as their objective 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 EU law, and as such, they concern areas where the EU 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. 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. Its objectives, namely the harmonisation of the rules and processes for resolution, cannot be sufficiently achieved by Member States. Rather, by reason of the effects of a failure of any institution in the whole EU, they can be better achieved at EU 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 SRMR to improve the existing framework, particularly when it comes to applying it 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 with significant banks. Furthermore, national solutions to tackle bank failures would worsen the bank-sovereign 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 choice between an EU harmonised resolution strategy/tool and the national liquidation strategy will remain at the discretion of the resolution authority on the basis of the public interest assessment. This 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 the structure of the banking sector. In practice, this makes 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 crucial that the possibility for all banks to undergo resolution is preserved and that resolution authorities have the right incentives to opt for resolution, due to the potentially systemic nature of all institutions, as already provided for in the SRMR.

Member States may still consider liquidation for the smaller or medium-sized banks under the reformed framework. In this respect, national insolvency regimes (which are not harmonised) remain in place when an insolvency procedure is deemed a better alternative to resolution. The continuum of tools is preserved in this way, including those outside resolution, such as: preventive and precautionary measures; resolution tools; alternative measures within national insolvency proceedings and payout of covered deposits in the event of piecemeal liquidation.

Amending the SRMR is therefore considered 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 and the convergence of practices of supervisory and resolution authorities, as well as 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 EU 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 areas and specific options have been analysed aimed 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 in building up the 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 several Member States. The proposed amendments (e.g. clear rules on tailoring the MREL for transfer resolution strategies, introducing a single-tier depositor

preference and allowing DGS funds to bridge the gap to access the resolution financing arrangement) would improve access to funding in resolution. They would also 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 effectively the problem of funding of resolution without weakening the minimum bail-in conditions for accessing the resolution financing arrangement.

- **Choice of the instrument**

It is proposed that the measures be implemented by amending the SRM Regulation through a regulation. The proposed measures refer to or further develop already existing provisions inbuilt in this legal instrument.

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 developed with 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 managing bank failures remains insufficient. The decision of public authorities on whether to resort to resolution or insolvency may differ considerably across Member States. In addition, safety nets financed by the industry are not always effective and divergent access conditions to funding in resolution and outside resolution persist. These affect incentives and create opportunities for arbitrage when decisions are made on what crisis management tool to use. Finally, depositor protection remains uneven and inconsistent across Member States in a number of areas.

- **Stakeholder consultations**

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

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

In 2021, the Commission launched two consultations: a targeted and a public consultation to seek stakeholder feedback on how the CMDI framework was applied and views on possible modifications. The targeted consultation, comprising 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 to 20 May 2021.

In addition, the Commission hosted a high-level conference on 18 March 2021 gathering representatives from all relevant stakeholders. The conference 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 on possible revisions of the BRRD/SRMR and DGSD in the context of the Commission Expert Group on Banking, Payments and Insurance. In parallel to the discussions in the 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 the Banking Union and the High-Level Working Group on EDIS.

Furthermore, during the preparatory phase of the legislation, Commission staff also held numerous meetings (physical and virtual) with representatives of the banking industry and with 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 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. The Commission sought targeted technical advice to: (i) assess the reported difficulty for some smaller and medium-sized banks to issue sufficient loss-absorbing financial instruments; (ii) examine the current requirements to access available sources of funding in the current framework; and (iii) 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. The EBA responded in October 2021[17].

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

- **Impact assessment[18]**

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 three different legal texts.

The impact assessment considered a range of policy options to address the problems identified in the design and implementation of the crisis management and deposit insurance framework. Given the strong links 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 comprehensive and consistent approach. Some changes proposed – related to early intervention measures, the triggers to determine whether a bank is 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 as a 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 serving as a bridge, under

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

[18] Please see references to SWD(2023)226 (summary sheet of the IA) and SEC(2023)230 (the positive opinion of the Regulatory Scrutiny Board).

the least-cost test safeguard, to improve the proportionality in accessing the resolution financing arrangements for banks, particularly smaller and medium-sized banks, being subject to transfer strategies with market exit. In addition, the policy options 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 where the DGS ranks 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 ranges of ambition. Each package 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, and facilitating access to common safety nets, all while maintaining some alternatives outside resolution under national insolvency procedures. However, by design, the packages of options achieve these objectives to a varying extent and their political feasibility differs.

The preferred option envisages ambitious improvements in the funding equation, opening the possibility for the resolution scope to be substantially broadened to include more smaller and medium-sized 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 the super-preference for 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 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. Therefore, the removal of the DGS super-preference is necessary to address the existing outcome of the LCT assessment that is skewed towards payout and to 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, in 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; however, it has been assessed as politically unfeasible at this stage.

The proposal would entail 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 and the specific circumstances of each case. Using the DGS funds and the RF/SRF would be more cost-efficient in terms of financial means required to be used, however it may also trigger replenishment needs through contributions from the industry. Overall, costs for resolution authorities and banks would, however, be compensated 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, and increased financial stability and depositor confidence, all thanks to clearer rules and access to industry-funded safety nets. For consumers and the public, the costs should be limited and clearly outweighed by the benefits,

particularly through increased depositor protection, financial stability and reduced use of taxpayer money.

The Regulatory Scrutiny Board endorsed the impact assessment following a first negative opinion. To address the comments raised by the 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 with 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 consistency with the review of State aid rules, the interaction with the 2015 Commission proposal on EDIS, how the EBA's advice has been taken into account or the conditions in which DGS could intervene in resolution.

- **Regulatory fitness and simplification**

The review is mainly focused on the overall set-up and functioning of the crisis management and deposit insurance framework, with particular attention being paid to smaller and medium sized banks and a more equal treatment of depositors. The proposed reform is expected to bring 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 EU is committed to high standards of protection for fundamental rights and is a 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.

4. BUDGETARY IMPLICATIONS

The proposal does not have implications for the EU 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 the EBA to issue standards in relation to certain provisions of the framework and to report to the Commission on its effective implementation, e.g. in relation to resolvability assessments conducted by resolution authorities or the preparation for resolution execution.

The legislation will be subject to an evaluation 5 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

Article 13 is replaced by a new set of articles (Articles 13 to 13c) mirroring the BRRD provisions on early intervention (Articles 27 to 29 BRRD), in order to provide the ECB with a

directly applicable legal basis for the exercise of those powers. As in BRRD, the escalation mechanism between the different types of measures is clarified and it is specified that the prior adoption of early intervention measures, or the meeting of the conditions for early intervention, are not prerequisites to start the preparation for resolution or to exercise the related powers.

SRMR already included provisions concerning the cooperation and exchange of information between the Board and the ECB or national competent authorities (NCAs) when the financial situation of a bank starts deteriorating. However, those provisions needed to be strengthened to ensure better and more effective cooperation. The new Article 13c builds on the former Article 13 and provides additional details on cooperation in the run-up to resolution, concerning the type of information that should be exchanged, the situations in which the ECB or the NCA need to exchange information and the type of arrangements that the Board may put in place to prepare for resolution.

Early warning of failing or likely to fail

Article 13c includes an obligation for the ECB, or the NCA in relation to the less significant cross-border groups under the Board's direct remit, to notify sufficiently early the Board 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, as laid down in Article 18(4). This notification should include the reasons for the ECB/NCA's assessment as well as an overview of the alternative solutions that may 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 Board to successfully execute the resolution strategy prepared for each institution or entity, the Board is empowered to assess, in close cooperation with the ECB/NCA, 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 ECB/NCA should continue exercising its competences, while liaising with the Board in line with Article 13c. The ECB/NCA and the Board should monitor, in close cooperation, the evolution of the situation of the institution or entity and the implementation of alternative measures. In this context, the Board and the ECB/NCA should meet regularly, with a frequency set by the Board.

If no appropriate alternative measure which would avert the failure is found or implemented within this timeframe, the ECB/NCA should assess whether the institution or entity is failing or likely to fail. Where the ECB/NCA concludes that the institution or entity is failing or likely to fail, it should formally communicate this to the Board, following the procedure laid down in Article 18(1). The Board may also make this assessment itself, in compliance with the existing rules in Article 18(1), second subparagraph. The Board 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 Board should adopt a resolution scheme. This is in line with the recent case law of the Court of Justice of the EU 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 Board to take a decision regarding the resolution of a bank. The Court further stated that the Board 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 Council[19].

Public interest assessment (PIA)

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 failing or likely to fail and there is a public interest in resolving it, the resolution authorities will intervene by using the tools and powers granted by the BRRD/SRMR 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 carried out by national authorities, potentially with financing from the DGS or other funding sources, as appropriate.

In essence, the public interest assessment (PIA) compares resolution against insolvency, in particular assessing how each scenario achieves the resolution objectives. The resolution objectives against which the assessment is made include: (i) the impact on financial stability (a wide-spread crisis may result in a different outcome of the PIA than an idiosyncratic failure); (ii) the assessment of the impact on the bank's critical functions; and (iii) the need to limit 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 SRMR leaves margin of discretion to the Board when carrying out the PIA, which leads to divergent applications and interpretations that do not always fully reflect the logic and intention of the legislation. In some cases, the PIA has been applied rather restrictively in the Banking Union.

To minimise divergences and widen the application of the PIA, i.e. broadening the scope of resolution, the proposal includes the following legislative amendments:

Amendments to the resolution objectives

The resolution objective requiring minimising the reliance on extraordinary public financial support does not allow for a distinction between the use of national budget money and the use of industry-funded safety nets (the SRF or DGSs). Therefore, this resolution objective is amended to include a specific reference to support provided by the budget of a Member State, to indicate that funding provided by industry-funded safety nets should be considered preferable to funding supported by taxpayers' money (Article 14(2)(c)). This is complemented with a change in the procedural rules on PIA, requiring the Board to consider and compare all extraordinary public financial support that can reasonably be expected to be provided to the institution in resolution against those in the insolvency counterfactual. If liquidation aid is expected in the insolvency counterfactual, this should lead to a positive PIA outcome (Article 18(5), second subparagraph).

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 means that resolution should be preferred if insolvency would be more costly for the DGS.

[19] 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.

Procedural changes to the comparison between resolution and national insolvency proceedings

Under the current SRMR, the Board is expected to choose insolvency unless opting for resolution would better achieve the resolution objectives. The current text of Article 18(5) provides that resolution shall only be chosen when winding up the institution under normal insolvency proceedings would not meet the resolution objectives to the same extent. To make it possible to broaden the application of resolution, Article 18(5) 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 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 will remain a case-by-case decision at the discretion of the resolution authority.

Use of DGS in resolution

Under the current framework the decision on the use of DGS funds to finance resolution is taken by the Board after consulting the DGS and the amount of the DGS contribution is determined on the basis of the valuation of the losses that covered depositors would have suffered have they not been shielded from suffering losses. To ensure that the enhanced possibilities and strict conditions for the use of national DGS resources to finance transfer strategies in resolution under the amended Article 109 BRRD are also applied consistently in the Banking Union, Article 79 SRMR is amended to specify that the DGS to which the credit institution is affiliated should be used for the purposes and under the conditions laid down in Article 109 BRRD. In addition, the second and third subparagraphs of Article 79(5) SRMR, which mirror the conditions under the current Article 109(5), second and third subparagraphs BRRD, are deleted.

Given that within the Banking Union resolution decisions are taken by the Board while the financing might be provided from national DGS resources, the reference to Article 109 BRRD in the first paragraph of Article 79 SRMR also ensures that the enhanced role of the DGS under BRRD should apply in the decision-making process for banks under the Board's remit. In particular, the calculation of the cost of repaying depositors for the purpose of limiting the amount of the DGS contribution to resolution remains at national level under the responsibility of the DGS based on the least cost test (LCT). The Board should determine the amount of the contribution to be provided by the DGS only after consulting the DGS on the results of this calculation and it should be bound by these results. Therefore, the Board should not be able to determine a DGS contribution to a transaction which would be above the cost of repaying depositors as calculated by the DGS according to the DGSD rules (no breaching of the LCT), nor higher than what is needed to reach the access condition to the resolution financing arrangement (8% total liabilities and own funds requirement).

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. Provision of 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 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.

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

MREL for transfer strategies

As already provided under the current framework, the level of the MREL requirement should reflect the preferred resolution strategy. The existing provision of Article 12d 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 minimum 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, also for the sake of proportionality and consistent application. In this respect, a new Article 12da is added which sets out the principles which should be considered by the SRB when calibrating MREL for transfer strategies - size, business model, risk profile, transferability analysis, marketability, whether the strategy is asset transfer or share deal, complementary use of asset management vehicle for assets which cannot be transferred, and the amount which DGS is expected to contribute to finance the preferred strategy in resolution.

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 in legal clarity of the current framework with respect to the power to prohibit certain distributions in case of failure of an entity to meet the combined buffer requirement in addition to its MREL, 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 10a 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 existing MREL rules in SRMR, structurally subordinated liabilities referred to in Article 72b(2)(d)(iii) CRR are captured by the definition of 'subordinated eligible instruments' used throughout Article 12c SRMR. 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 the SRMR because paragraph 4 of Article 72b CRR is explicitly excluded from the definition in Article 3(1)(49b) SRMR.

To correct this inconsistency and in line with the approach followed in BRRD, a new paragraph 10 is added to Article 12c, allowing SRB 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 12c(4) BRRD.

Contributions and irrevocable payment commitments

To take into account the end of the initial period for the build-up of the Fund and the ensuing reduction in the amount of regular ex ante contributions, technical amendments are made to Articles 69 and 71 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 70, 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.

In addition, to provide more transparency and certainty with respect to the share of irrevocable payment commitments in the total amount of ex ante contributions to be raised, it is clarified that the Board should determine such share on an annual basis, subject to the applicable limits.

Other provisions

Amendments to resolution planning

The Board is 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. SRMR is thus amended with the introduction of a new subparagraph in Article 8(10), which will allow resolution authorities to follow a simplified approach, where appropriate, when carrying out this task.

Clarifications on Article 27(9)

The current provisions of Article 27(9) and (10) are unclear as to what are the condition and the sequence of use of the SRF 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, paragraphs 9 and 10 of Article 27 are amended to provide legal clarity and additional flexibility to use the SRF beyond the 5% TLOF.

Governance of the Board

To facilitate continuity and the build-up of institutional expertise, amendments are made to Article 56 in order to establish the possibility for the Chair, the Vice-Chair and the permanent Members of the Board to serve a second term in office, in the same capacity as their first term. The procedure for the renewal of the Chair, Vice-Chair and Board Members has been designed while taking into account the procedure applicable to the renewal of the Chairpersons of the ESAs.

Other amendments are made to Article 43, 53 and 55 in order to grant a voting right to the Vice-Chair and accommodate this voting right throughout SRMR. His or her appointment follows the same procedure as this of the Chair and he or she is able to substitute the Chair in its absence or reasonable impediment. A treatment different for the Vice-Chair than for other members of the Board did not therefore seem justified.

Ranking of SRF claims

Article 22(6) provides that the Board 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, SRMR did not specify the relative ranking of the Board to other preferred creditors. It was also unclear how this provision could be operationalised, given that the ranking of claims in insolvency is exclusively laid down in national laws governing normal insolvency proceedings (even if that ranking is partially harmonised across the EU). The new paragraph 6 added to Article 76 clarifies that those claims of the Board should have, in each participating Member State, the same ranking as the claims of the national resolution funds pursuant to the new Article 108(9) BRRD (which should be above the claims of depositors and of DGSs).

Additionally, the SRF can be further used in resolution for the purposes identified in Article 76(1). So far, SRMR has not specified whether such use creates a claim in favour of the Board and, if so, on the insolvency ranking of such claim. A new paragraph 5 is added in Article 76 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 SRF, the Board 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 SRF was concretely used, but it should be connected to the use of the SRF to bear losses in lieu of creditors, such as when the SRF is used to guarantee assets and liabilities transferred to a recipient or to cover the difference between the transferred assets and liabilities. Where the SRF is used to support the application of the bail-in tool as the primary resolution strategy (Article 27(1), 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 SRF'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 Board.

Allocation of responsibilities

Article 7 established a division of tasks whereby the Board has direct responsibility for entities under the direct responsibility of the ECB, for cross border less significant institutions, and for entities for which there has been a decision, either on the initiative of the Board, on this of a national competent authority, or on this of a Member State, that the Board would exercise direct responsibility. NRAs would retain primary responsibility over all other entities. However, although Article 7 was explicit on this division of tasks, the language of the articles of the Regulation that dealt with the specific responsibilities concerned, such as resolution planning, resolvability assessment, assessment of simplified obligations, MREL-setting or adoption of resolution schemes, referred only to the Board and thus did not make it fully clear that, in case of entities within their remit, the responsibility for the tasks mentioned laid with the NRAs. This point is clarified in Article 7.

Similarly, the power for the Board to prohibit certain distributions where an entity within its remit does not meet is combined buffer requirement in addition to its MREL was laid down in the SRMR, but the exact procedure governing the exercise of this power was not specified. It is now clarified in Article 10a(1) that the Board is able to instruct the relevant NRA to exercise this power.

A number of cases has also been identified in which powers were granted to NRAs in the BRRD but, in the absence of a mention in the SRMR, the modalities of their application in the case of entities under the direct remit of the Board were unclear. To address this issue, it is clarified in Article 12 that, for entities under its direct remit, the Board is responsible for granting the permission to call, redeem, repay or repurchase eligible liabilities instruments under Article 78a of Regulation (EU) No 575/2013. Article 8 is also amended to clarify that the Board is able, where it deems it necessary, to instruct NRAs to require an institution or entity to maintain detailed records of the financial contracts to which the institution is a party. It is further clarified in Article 18(11) that the Board is able to instruct NRAs to exercise their power to suspend some financial obligations following the determination that the institution or entity is failing or likely to fail, pursuant to Article 33a of Directive 2014/59/EU.

Amendments to Article 18 also clarify the division of tasks between the ECB and the national competent authorities as regards the failing or likely to fail assessment. In some situations, namely cross-border less significant groups, less significant institutions and entities receiving assistance from the SRF, and specific less significant institutions and entities for which it has been decided, on the initiative of the Board, of a national competent authority or of a Member State, that the Board will exercise direct responsibility, although the resolution scheme is adopted by the Board, the supervision of the institution or entity, and thus the assessment of whether an institution or entity is failing or likely to fail, is the responsibility of the national competent authority. It is therefore specified that the assessment of whether an institution or entity is failing or likely to fail is to be performed by the ECB for the significant institutions and by the relevant national competent authority for the less significant institutions and entities for which the Board adopts the resolution scheme.

Lastly, to reflect the establishment of the Single Resolution Mechanism, it is specified in Article 31 that NRAs should consult the Board before they act in accordance with Article 86 of the BRRD, that provides that normal insolvency proceedings in relation to institutions and entities within the scope of the BRRD shall not be commenced except at the initiative of the resolution authority and that a decision placing an institution or an entity into normal insolvency proceedings shall be taken only with the consent of the resolution authority.

Exchange of information

A number of amendments are made in order to facilitate access to information for the Board. Articles 30 and 34 are amended to clarify that the information that the Board may request from the ECB covers not only information available to it in its supervisory function but also information collected in its central bank function. Pursuant to Article 8(4a) of Council Regulation (EC) No 2533/98[20], the SRB should ensure the physical and logical protection of confidential statistical information and should require authorisation to the ECB for the further transmission that may be necessary for the execution of the tasks of the Board.

A new Article 30a is introduced allowing the SRB to obtain information held by the centralised automated mechanisms established by Article 32a of Directive (EU) 2015/849[21], which may prove to be relevant when carrying out the public interest assessment. The SRB can only request information regarding the number of customers for which an entity is the only or principal banking partner. The SRB should receive that information by way of the authorities or public entities managing the centralised automated mechanisms, filtered of personal data that is not relevant for the performance of SRB's tasks.

Amendments are also added to bring the ESRB, the ESAs and the DGS under the scope of the obligation to cooperate and share information with the SRB, including the possibility to conclude memoranda of understanding on information-sharing with the Board.

Furthermore, Article 34 is amended to allow the Board to specify the procedure and the form under which it requests information to be shared, as well as to specifically mention the ESM as one of the entities with which cooperation and information exchange may take place.

Finally, Article 74 is amended to provide for an early warning from the Board to the ECB and the Commission when it foresees a possible need to use the fiscal backstop, in order to allow for the timely activation of such backstop.

Disclosures

The SRMR rules on the protection of institution-specific confidential information are quite strict and could in the future hinder efforts towards further transparency regarding the banking sector. To address this issue, Article 88 is amended to allow the Board to disclose information that is not directly collected from institutions and entities within its remit but results from its own analyses, assessments and determinations when this would not undermine the protection of the public interest as regards financial, monetary or economic policy and that there is an overriding public interest in the disclosure.

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[20] Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p.8).

[21] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

2023/0111 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding 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 Bank[22],

Having regard to the opinion of the European Economic and Social Committee[23],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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 Institutions[24] of the Financial Stability Board. The Union resolution framework consists of Directive 2014/59/EU of the European Parliament and of the Council[25] and Regulation (EU) No 806/2014 of the European Parliament and of the Council[26]. Both acts apply to institutions established in the Union, and to any other entity that falls under the scope of that Directive or that Regulation ('entities'). The Union resolution framework 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 Union resolution

22 OJ C , , p. .

23 OJ C , , p. .

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

25 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).

26 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).

framework intends to foster the development of the internal market in banking by creating a harmonised regime to address cross-border crises in a coordinated way and by avoiding level playing field issues.

(2) Several years into its implementation, the Union resolution framework as currently applicable does not deliver as intended with respect to some of those objectives. In particular, while institutions and entities have made significant progress towards resolvability and have dedicated significant resources 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 Union resolution framework is seldom resorted to. Failures of certain smaller and medium-sized institutions and entities are instead mostly addressed through unharmonised national measures. Taxpayer money is 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 is not always exercised in a way that reflects how the Union resolution framework was intended to apply. At the same time, the Union resolution framework saw little use due to the risks for depositors of deposit-funded institutions to bear losses to ensure that those institutions can access external funding in resolution, in particular in the absence of other bail-inable liabilities. Finally, the fact that there are less stringent rules on access to funding outside resolution than in resolution has 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 or entity or 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. It is therefore necessary to ensure a more effective and coherent application of the Union resolution framework and to ensure that it can be applied whenever that is in the public interest, including for smaller and medium-sized institutions primarily funded through deposits and without sufficient other bail-inable liabilities.

(3) Pursuant to Article 4 of Regulation (EU) No 806/2014, Member States which have established a close cooperation between the European Central Bank (ECB) and the respective national competent authorities are to be considered participant Member States for the purposes of that Regulation. However, Regulation (EU) No 806/2014 does not contain any details on the process for preparing the start of the close cooperation on resolution-related tasks. It is therefore appropriate to lay down those details.

(4) 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. The Single Resolution Board (the 'Board') should therefore be able to consider those factors when identifying the measures to be taken in respect of such subsidiaries and follow a simplified approach where appropriate.

(5) An institution or entity that is being wound up under national law, following a determination that the institution or entity is failing or likely to fail and a conclusion by the Board that its resolution is not in the public interest, is ultimately heading towards market exit. That implies that a plan for actions to be taken in case of failure is not needed, irrespective of whether the competent authority has already withdrawn

the authorisation of the institution or entity concerned. The same applies for a 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 in those situations, the adoption of resolution plans is not required.

(6) The Board may currently 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, to ensure legal certainty and alignment with the existing procedures for the implementation of decisions taken by the Board, it is necessary to specify more clearly the roles of the authorities involved in the process for prohibiting distributions. It is therefore appropriate to lay down that the Board should address an instruction to prohibit such distributions to the national resolution authority, which should implement the Board's decision. In addition, in certain situations, an institution or entity might be required to comply with the MREL on a different basis than the basis on which that institution or entity is required to comply with the combined buffer requirement. That situation creates uncertainties as to the conditions for the exercise of the Board's powers to prohibit distributions and for the calculation of the Maximum Distributable Amount related to MREL. It should therefore be laid down that, in those cases, the Board should instruct national resolution authorities to prohibit certain distributions based on the estimate of the combined buffer requirement resulting from Commission Delegated Regulation (EU) 2021/1118[27]. To ensure transparency and legal certainty, the Board should communicate the estimated combined buffer requirement to the institution or entity, which should then publicly disclose that estimated combined buffer requirement.

(7) Directive 2014/59/EU and Regulation (EU) No 575/2013 lay down powers to be exercised by resolution authorities, some of which are not included in Regulation (EU) No 806/2014. In the Single Resolution Mechanism, this can create uncertainty as to who should exercise those powers and in what conditions they should be exercised. It is therefore necessary to specify how national resolution authorities should exercise certain powers set out only in Directive 2014/59/EU in relation to entities and groups that fall under the direct responsibility of the Board. In those cases, the Board should be able, where it deems necessary, to instruct national resolution authorities to exercise those powers. In particular, the Board should be able to instruct national resolution authorities to require an institution or entity to maintain detailed records of the financial contracts to which the institution or entity is a party, or to apply the power to suspend some financial obligations pursuant to Article 33a of Directive 2014/59/EU. However, given that the permissions for the reduction of eligible liabilities instruments laid down in Regulation (EU) No 575/2013 of the European Parliament and of the Council[28], which is also applicable to institutions and entities and liabilities subject to the MREL, do not require the application of national legislation, the Board should be

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[27] 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).

[28] 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).

able to grant those permissions to institutions or entities directly, without having to instruct national resolution authorities to exercise that power.

(8) Regulation (EU) 2019/876 of the European Parliament and of the Council[29], Regulation (EU) 2019/877 of the European Parliament and of the Council[30] and Directive (EU) 2019/879 of the European Parliament and of the Council[31] implemented in Union law 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). Regulation (EU) 2019/877 and Directive (EU) 2019/879 also amended the MREL set out in Directive 2014/59/EU and in Regulation (EU) No 806/2014. It is necessary to align the provisions in Regulation (EU) No 806/2014 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 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.

(9) 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, Regulation (EU) No 806/2014 allows the Board 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, in case the resolution plan envisages the use of the sale of business tool or of the bridge institution tool and the resolution entity's exit from the market, the Board should determine the level of the MREL for the resolution entity concerned on the basis of the specificities of those resolution tools and of the different loss-absorbing and recapitalisation needs those tools entail.

(10) 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 enables the resolution entity to continue to comply with its conditions for authorisation and enabling it to pursue its activities for an appropriate period. Certain preferred resolution strategies entail the transfer of assets, rights and liabilities to a recipient and market exit, in particular the sale of business tool. In those cases, the objectives pursued by the recapitalisation component might not apply to the same extent as in the case of an open-bank bail-in strategy, because the Board will not be required to ensure that the

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29 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).

30 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).

31 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).

resolution entity restores compliance with its own funds requirements after resolution action. Nevertheless, the losses in such cases 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 which is proportionate to the resolution strategy.

(11) Where the resolution strategy envisages the use of resolution tools other than bail-in, the recapitalisation needs of the entity concerned will generally be smaller after resolution than in case of open bank bail-in. The calibration of the MREL in such a case should take that aspect into account when estimating the recapitalisation requirement. Therefore, 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, the Board should take into account the features of those tools, including 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. Since the resolution authority has to decide on a case by case basis on any possible use in resolution of funds from the deposit guarantee scheme and since such decision cannot be assumed with certainty *ex ante*, the Board should not consider the potential contribution of the deposit guarantee scheme (in resolution when calibrating the level of the MREL.

(12) It is necessary to ensure equal incentives to build sufficient amounts of MREL for institutions and entities that would be subject to transfer strategies both in and outside resolution. The setting of the level of the MREL for institutions and entities that may be subject to measures in the context of national insolvency proceedings pursuant to Article 11(5) of Directive 2014/49/EU of the European Parliament and of the Council[32] should therefore 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.

(13) Pursuant to Article 4 of Council Regulation (EU) No 1024/2013[33], the ECB is competent to carry out supervisory tasks in relation to early intervention. It is necessary to reduce the risks stemming from diverging transpositions into national laws of the early intervention measures in Directive 2014/59/EU and to facilitate the effective and consistent application by the ECB of its powers to take early intervention measures. Those early intervention measures were created to enable 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 the application of those early intervention measures and partial overlaps with supervisory measures, early intervention measures have seldom been used. The provisions of Directive 2014/59/EU concerning early intervention measures should therefore be mirrored in Regulation (EU) No 806/2014, thereby ensuring a single and directly applicable legal tool for the ECB, and the conditions for the application of those early

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32 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).

33 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

intervention measures should be simplified and further specified. To dispel uncertainties concerning the conditions and timing for the removal of the management body and the appointment of temporary administrators, those measures should be explicitly identified as early intervention measures and their application should be subject to the same triggers. At the same time, the ECB should be required to select the appropriate measures to address a specific situation in compliance with the principle of proportionality. To enable the ECB to take into account reputational risks or risks related to money laundering or information and communication technology, the ECB should assess the conditions for the application of early intervention measures not only on the basis of quantitative indicators, including capital or liquidity requirements, level of leverage, non-performing loans or concentration of exposures, but also on the basis of qualitative triggers.

(14) It is necessary to ensure that the Board is able to prepare for the possible resolution of an institution or entity. The ECB or the relevant national competent authority should therefore inform the Board of the deterioration of the financial condition of an institution or entity sufficiently early, and the Board should have the necessary powers for the implementation of preparatory measures. Importantly, to enable the Board to react as swiftly as possible to a deterioration of the situation of an institution or entity, the prior application of early intervention measures should not be a condition for the Board to make arrangements for the marketing of the institution or entity or to request information to update the resolution plan and prepare 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 prepare properly for a possible resolution, it is necessary to enhance the interaction and coordination between the ECB, the national competent authorities and the Board. As soon as an institution or entity meets the conditions for application of early intervention measures, the ECB, the national competent authorities and the Board should increase their exchanges of information, including provisional information, and monitor the financial situation of the institution or entity jointly.

(15) It is necessary to ensure timely action and early coordination between the Board and the ECB, or the relevant national competent authority, with respect to less significant cross-border groups when an institution or entity is still a going concern but where there is a material risk that that institution or entity may fail. The ECB or the relevant national competent authority should therefore notify the Board as early as possible of such risk. That notification should contain the reasons for the assessment of the ECB or of the relevant national competent authority and an overview of the alternative private sector measures, supervisory action or early intervention measures that are available to prevent the failure of the institution or entity within a reasonable timeframe. Such early notification should not prejudice the procedures to determine whether the conditions for resolution are met. The prior notification by the ECB or by the relevant national competent authority to the Board 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. 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 to prevent such failure within a reasonable timeframe, the Board has to take a decision whether to take resolution action. 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. It is therefore appropriate to enable the Board to assess, in close cooperation with the ECB or the relevant national competent authority, what constitutes a reasonable timeframe to implement alternative measures to avoid the failure of the institution or entity. To ensure a timely outcome and to enable the Board to prepare properly for the potential resolution of the institution or entity, the Board and the ECB, or the relevant national competent authority, should meet regularly, and the Board should decide on the frequency of those meetings considering the circumstances of the case.

(16) To cover material infringements of prudential requirements, it is necessary to further specify the conditions for determining that parent undertakings, including holding companies, are failing or likely to fail. An infringement of those requirements by a parent undertaking should be material where the type and extent of such infringement is comparable 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.

(17) 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 such outcome, the criteria to apply the public interest assessment to a failing institution or entity should be specified.

(18) 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 deposit guarantee scheme funds are used more efficiently and the losses for those funds 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 deposit guarantee scheme.

(19) 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 deposit guarantee schemes) 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, the Board should find funding through the resolution financing arrangements or the deposit guarantee scheme, preferable to funding through an equal amount of resources from the budget of Member States.

(20) To ensure that the resolution objectives are attained in the most effective way, the outcome of 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.

(21) 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 the conditions under which measures of a precautionary nature that qualify as extraordinary public financial support may exceptionally be granted. To minimise distortions of competition arising from differences in nature of deposit guarantee schemes in the Union, interventions of such schemes in the context of preventive measures complying with the requirements laid down in Directive 2014/49/EU that

qualify as extraordinary public financial support should 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. It should be ensured that precautionary measures are taken sufficiently early. The ECB currently bases its consideration that an institution or entity is solvent, for the purposes of precautionary recapitalisation, on a forward-looking assessment for the following 12 months of whether the institution or entity can comply 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 laid down in Directive 2013/36/EU or Directive (EU) 2019/2034. That practice should be laid down in Regulation (EU) No 806/2014. Moreover, measures to provide relief for impaired assets, including asset management vehicles or asset guarantee schemes, can prove effective and efficient in addressing causes of possible financial distress faced by institutions and entities and preventing their failure and could therefore constitute relevant precautionary measures. It should therefore be specified that such precautionary measures can take the form of impaired asset measures.

(22) To preserve market discipline, protect public funds and avoid distortions of competition, precautionary measures should remain the exception and only be applied to address serious disturbances in the market or to preserve financial stability. Moreover, precautionary measures should not be used to address incurred or likely losses. The most reliable instrument to identify incurred or likely to be incurred losses is an asset quality review by the ECB, the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[34] or national competent authorities. The ECB and national competent authorities should use such a review to identify incurred or likely to be incurred losses if such review can be carried out within a reasonable timeframe. Where that is not possible, the ECB and national competent authorities should identify incurred or likely to be incurred losses in the most reliable way possible under the prevailing circumstances, based on on-site inspections where appropriate.

(23) Precautionary recapitalisation is aimed at supporting viable institutions and entities identified as likely to encounter temporary difficulties in the near future and to prevent their situation from deteriorating further. To avoid that public subsidies are granted to businesses that are already unprofitable when 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 is ultimately discontinued, 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 and be subject to certain quantitative limits because by their nature they are not well suited for compliance with the condition of temporariness.

(24) Precautionary measures should be limited to the amount that the institution or entity would need to maintain its solvency in case of an adverse scenario event as determined in a stress test or equivalent exercise. In the case of precautionary measures in the

[34] 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).

form of impaired asset measures, the receiving institution or entity should be able 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. It is also necessary to ensure that such precautionary measures in the form of impaired asset measures comply with existing State aid rules and best practices, that they restore the institution or entity's long-term viability, that State aid is limited to the minimum necessary and that distortions of competition are avoided. For those reasons, the authorities concerned should, in case of precautionary measures in the form of impaired asset measures, take into account the specific guidance, including the AMC Blueprint[35] and the Communication on Tackling Non-Performing Loans[36]. Those precautionary measures in the form of impaired asset measures should also 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 not to be viable, despite the support received, it is necessary to lay down that non-compliance by the institution or entity concerned with the terms of the support measures specified at the time such measures were granted is to result in the institution or entity concerned being considered failing or likely to fail.

(25) It is important to ensure swift and timely resolution action by the Board where such action involves the granting of State aid or Fund aid. It is therefore necessary to enable the Board to adopt the resolution scheme concerned before the Commission has assessed whether such aid is compatible with the internal market. However, to ensure the good functioning of the internal market in such a scenario, resolution schemes involving the granting of State aid or Fund aid should ultimately remain subject to the Commission approving such aid. To enable the Commission to assess as early as practicable whether the Fund aid is compatible with the single market, and to ensure a smooth flow of information, it is also necessary to lay down that the Board and the Commission should promptly share all information necessary regarding the possible use of Fund aid and to provide for specific rules on when and what information the Board should provide to the Commission in order to inform the Commission’s assessment of Fund aid compatibility.

(26) The procedure governing the entry into resolution and the procedure governing the decision to apply the write down and conversion powers are similar. It is therefore appropriate to align the respective tasks of the Board and of either the ECB or the national competent authority, as relevant, when, on the one hand, they assess whether the conditions for the application of the write down and conversion powers are present, and, on the other hand, when they assess the conditions for adopting a resolution scheme.

(27) It is possible that resolution action is to be applied to a resolution entity that is the head of a resolution group, while write down and conversion powers are to be applied to another entity of the same group. Interdependencies between such entities, including the existence of consolidated capital requirements to be restored and the need to activate loss upstream and capital downstream mechanisms, may make it challenging to assess the loss absorption and recapitalisation needs for each entity

35 COM(2018) 133 final.
36 COM(2020) 822 final.

separately, and thus to determine the necessary amounts to be written down and converted for each entity. The procedure for the application of the power to write down and convert capital instruments and eligible liabilities in those situations should therefore be specified, whereby the Board should take such interdependencies into account. For that purpose, where one entity meets the conditions for the application of the write down and conversion power and another entity within the same group meets at the same time the conditions for resolution, the Board should adopt a resolution scheme covering both entities.

(28) To increase legal certainty, and in view of the potential relevance of liabilities which may arise from future uncertain events, including the outcome of litigations pending at the time of resolution, it is necessary to lay down which treatment those liabilities should receive for 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 1126/2008[37]. On that basis, resolution authorities should draw a distinction 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.

(29) Since provisions are accounting liabilities, it should be specified that such provisions are to be treated the same way as other liabilities. 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 provisions in resolution 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.

(30) 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 that is improbable or cannot be reliably estimated at the time of resolution does not impair the effectiveness of the resolution strategy and in particular of the bail-in tool. To achieve that objective, the valuer should, as part of the valuation for the purposes of resolution, assess contingent liabilities that are included in the balance sheet of the institution or entity under resolution and quantify the potential value of those liabilities to the valuer's best abilities. 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 caused by a liability that may arise because of an improbable event. When assessing the amount to be written down or converted, the resolution authority should carefully consider the impact of the potential loss on the institution under

[37] 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).

resolution based on a number of factors, including the likelihood of the event materialising, the time frame for its materialisation and the amount of the contingent liability.

(31) In certain circumstances, after the Single Resolution Fund has provided a contribution up to the maximum of 5 % of the institution or entity's total liabilities including own funds, the Board may use additional sources of funding to further support their resolution action. It should be specified more clearly in which circumstances the Single Resolution Fund 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.

(32) The success of resolution hinges on timely access for the Board to relevant information from the institutions and entities that fall under the responsibility of the Board and from public institutions and authorities. Within that context, the Board should be able to access information of a statistical nature which the ECB collected under its central bank function, in addition to the information available to the ECB as a supervisor within the framework of Regulation (EU) No 1024/2013. Pursuant to Council Regulation (EC) No 2533/98[38], the Board should ensure the physical and logical protection of confidential statistical information and should require authorisation to the ECB for the further transmission that may be necessary for the execution of the tasks of the Board. As information related to the number of customers for which an institution or entity is the only or principal banking partner, which is held by the centralised automated mechanisms set up pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council[39], may be necessary to carry out the public interest assessment, the Board should be able to receive that information on a case-by-case basis. The exact timing of indirect access to information by the Board should also be specified. In particular, when the relevant information is available to an institution or authority which is obliged to cooperate with the Board when the Board requests information, such institution or authority should provide that information to the Board. If, at that time, the information is not available, irrespective of the reason for this unavailability, the Board should be able to obtain that information from the natural or legal person that has that information through the national resolution authorities or directly, after having informed those national resolution authorities thereof. It should also be possible for the Board to specify the procedure under, and the form in which it should receive information from financial entities to ensure that such information is the most suited to its needs, including virtual data rooms. In addition, to ensure the broadest cooperation possible with all entities susceptible of holding data relevant to the Board, and necessary for the performance of the tasks conferred on it, and to avoid duplicating requests to institutions and entities, the public institutions and authorities with which the Board should be able to cooperate, check the availability of information and exchange information, should include the members of the European System of Central Banks, the relevant DGSs, the European Systemic Risk Board, the European Supervisory Authorities and the European Stability

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38 Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p.8).

39 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

Mechanism. Finally, to ensure a timely intervention of financial arrangements contracted for the Single Resolution Fund in case of need, the Board should inform the Commission and the ECB as soon as it considers that it may be necessary to activate such financial arrangements and provide the Commission and the ECB with all information necessary for the performance of their tasks in respect of such financial arrangements.

(33) Article 86(1) of Directive 2014/59/EU provides that normal insolvency proceedings in relation to institutions and entities within the scope of that Directive are not to be commenced except at the initiative of the resolution authority and that a decision placing an institution or an entity into normal insolvency proceedings is to be taken only with the consent of the resolution authority. That provision is not reflected in Regulation (EU) No 806/2014. In line with the division of tasks specified in Regulation (EU) No 806/2014, national resolution authorities should consult the Board before they act in accordance with Article 86(1) of Directive 2014/59/EU for institutions and entities that are under the direct responsibility of the Board.

(34) The selection criteria for the position of the Vice-Chair of the Board are the same as those for the selection of the Chair and other full-time members of the Board. It is therefore appropriate to provide also the Vice-Chair of the Board with the same voting rights as those enjoyed by the Chair and the full-time members of the Board.

(35) In order to ensure institutional continuity and the build-up of institutional expertise, the Chair, the Vice-Chair and the other full-time members of the Board should be allowed to serve for two consecutive terms in their respective positions. It should therefore be possible to renew their term of office for a five-year term, based on an evaluation by the Commission of the discharge of their duties during the first term.

(36) To allow for a preliminary assessment by the Board in its plenary session of the draft preliminary budget before the Chair presents its final draft, the period for the Chair to put forward an initial proposal for the annual budget of the Board should be extended.

(37) After the initial build-up period of the Single Resolution Fund referred to in Article 69(1) of Regulation (EU) No 806/2014, its available financial means may face slight decreases below its 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 those *ex ante* contributions is no longer commensurate to the cost of the collection of those contributions. The Board should therefore be able to defer the collection of the *ex ante* contributions for one 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 the Board to use the Single Resolution Fund.

(38) Irrevocable payment commitments are one of the components of the available financial means of the Single Resolution Fund. 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 the Single Resolution Fund. In addition, to provide more transparency and certainty with respect to the share of irrevocable payment commitments in the total amount of *ex ante* contributions to be raised, the Board should determine such share on an annual basis, subject to the applicable limits.

(39) The maximum annual amount of extraordinary post contributions to the Single Resolution Fund 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 69(1) of Regulation (EU) No 806/2014, such *ex ante* contributions will depend only, in circumstances other than the use of the Single Resolution Fund, on variations in the level of covered deposits and are therefore 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 the Single Resolution Fund to raise *ex post* contributions, thereby reducing its capacity for action. To avoid such an outcome, a different limit should be laid down 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 Fund.

(40) The Single Resolution Fund can be 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. In that case, the Board may have a claim against the residual institution or entity in its subsequent winding up under normal insolvency proceedings. That may occur where the Single Resolution Fund is used in connection to losses that creditors would otherwise have borne, including under the form of guarantees to assets and liabilities, or coverage of the difference between the transferred assets and liabilities. 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 Board, those claims of the Board against the residual institution or entity, and claims that arise from reasonable expenses properly incurred by the Board, should benefit from the same priority ranking in insolvency as the ranking of the claims of the national resolution financing arrangements in each participating Member State, which should be higher than the priority ranking of deposits and of deposit guarantee schemes. Since compensations paid to shareholders and creditors from the Single Resolution Fund due to breaches of the 'no creditor worse off' principle aim to compensate for the results of resolution action, those compensations should not give rise to claims of the Board.

(41) Since some of the provisions of Regulation (EU) No 806/2014 concerning the role that deposit guarantee schemes may play in resolution are similar to those of Directive 2014/59/EU, the amendments made to those provisions in Directive 2014/59/EU by [OP please insert the number of the directive amending Directive 2014/59/EU] should be mirrored in Regulation (EU) No 806/2014.

(42) Transparency is key to ensuring market integrity, market discipline, and the protection of investors. To ensure that the Board is able to foster, and participate in, efforts towards greater transparency, the Board should be allowed to disclose information that result from its own analyses, assessments and determinations, including its resolvability assessments, where such disclosure would not undermine the protection of the public interest as regards financial, monetary or economic policy and where there is an overriding public interest in the disclosure.

(43) Regulation (EU) No 806/2014 should therefore be amended accordingly.

(44) To ensure consistency, the amendments to Regulation (EU) No 806/2014 that are similar to the amendments to Directive 2014/59/EU by … [OP, please insert the number of the directive amending Directive 2014/59/EU] should be applied from the same date as the date for the transposition of … [OP, please insert the number of the

directive amending Directive 2014/59/EU], which is … [OP please insert the date = 18 months from the date of entry into force of this amending Regulation]. However, there is no reason to delay the application of those amendments to Regulation (EU) No 806/2014 that relate exclusively to the functioning of the Single Resolution Mechanism. Those amendments should therefore apply from … [OP please insert the date = 1 month from the date of entry into force of this amending Regulation].

(45) Since the objectives of this Regulation, 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 Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) No 806/2014

Regulation (EU) No 806/2014 is amended as follows:

(1) Article 3(1) is amended as follows:

(a) point (24a) is replaced by the following:

‘(24a) ‘resolution entity’ means a legal person established in a participating Member State, which the Board or the national resolution authority, in accordance with Article 8 of this Regulation, has identified as an entity in respect of which the resolution plan provides for resolution action;’;

(b) the following points (24d) and (24e) are inserted:

‘(24d) ‘non-EU G-SII’ means a non-EU G-SII as defined in Article 4(1), point (134), of Regulation (EU) No 575/2013;

(24e) ‘G-SII entity’ means a G-SII entity as defined in Article 4(1), point (136), of Regulation (EU) No 575/2013;’;

(c) point (49) is replaced by the following:

‘(49) ‘bail-inable liabilities’ means the liabilities, including those liabilities that give 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 entity as referred to in Article 2 and that are not excluded from the scope of the bail-in tool pursuant to Article 27(3);’;

(2) in Article 4, the following paragraph 1a is inserted:

‘1a. Member States shall inform the Board as soon as possible of their request to enter into a close cooperation with the ECB pursuant to Article 7 of Regulation (EU) No 1024/2013.

Following the notification made pursuant to Article 7 of Regulation (EU) No 1024/2013 and before close cooperation is established, Member States shall provide all information about the entities and groups established in their territory that

the Board may require to prepare for the tasks conferred on it by this Regulation and the Agreement.';

(3) Article 7 is amended as follows:

(a) in paragraph 3, fourth subparagraph, the first sentence is replaced by the following:

'When performing the tasks referred to in this paragraph, the national resolution authorities shall apply the relevant provisions of this Regulation. Any references to the Board in Article 5(2), Article 6(5), Article 8(6), (8), (12) and (13), Article 10(1) to (10), Article 10a, Articles 11 to 14, Article 15(1), (2) and (3), Article 16, Article 18(1), (1a), (2) and (6), Article 20, Article 21(1) to (7), Article 21(8), second subparagraph, Article 21(9) and (10), Article 22(1), (3) and (6), Articles 23 and 24, Article 25(3), Article 27(1) to (15), Article 27(16), second subparagraph, second sentence, third subparagraph, and fourth subparagraph, first, third and fourth sentences, and Article 32, shall be read as references to the national resolution authorities with regard to groups and entities referred to in the first subparagraph of this paragraph.';

(b) paragraph 5 is amended as follows:

(i) the words 'Article 12(2)' are replaced by the words 'Article 12(3)';

(ii) the following subparagraph is added:

'After the notification referred to in the first subparagraph has taken effect, participating Member States may decide that the responsibility for performing the tasks related to entities and groups established in their territory, other than those referred to in paragraph 2, shall be returned to the national resolution authorities, in which case the first subparagraph shall no longer apply. Member States that intend to make use of that option shall notify the Board and the Commission thereof. That notification shall take effect from the day of its publication in the *Official Journal of the European Union*.';

(4) Article 8 is amended as follows:

(a) in paragraph 2, the following subparagraph is added:

'The Board may instruct the national resolution authorities to exercise the powers referred to in Article 10(8) of Directive 2014/59/EU. The national resolution authorities shall implement the instructions of the Board in accordance with Article 29 of this Regulation.';

(b) in paragraph 10, the following 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 the Board if such approach would 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.';

(c) the following paragraph 14 is added:

'14. The Board shall not adopt resolution plans for the entities and groups referred to in paragraph 1 where Article 22(5) applies or where the entity or

group is being wound up in accordance with the applicable national law pursuant to Article 32b of Directive 2014/59/EU.';

(5) Article 10 is amended as follows:

(a) in paragraph 4, fourth subparagraph, the words 'first subparagraph' are replaced by the words 'third subparagraph';

(b) in paragraph 7, the words 'addressed to the institution or the parent undertaking' are replaced by the words 'addressed to the entity or the parent undertaking' and the words 'impact on the institution's business model' are replaced by the words 'impact on the entity's or the group's business model';

(c) paragraph 10 is amended as follows:

(i) in the second subparagraph, the word 'institution' is replaced by the words 'entity concerned';

(ii) in the third subparagraph, the word 'institution' is replaced by the word 'entity';

(iii) the following subparagraph is added:

'If the measures proposed by the entity concerned effectively reduce or remove the impediments to resolvability, the Board shall take a decision, after having consulted the ECB or the relevant national competent authority and, where appropriate, the designated macro-prudential authority. That decision shall indicate that the measures proposed effectively reduce or remove the impediments to resolvability and shall instruct the national resolution authorities to require the institution, the parent undertaking, or any subsidiary of the group concerned, to implement the measures proposed.';

(6) Article 10a is amended as follows:

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

'1. Where an entity is in a situation where it meets the combined buffer requirement when considered in addition to each of the requirements referred to in Article 141a(1), points (a), (b) and (c), of Directive 2013/36/EU, but fails to meet the combined buffer requirement when considered in addition to the requirements referred to in Articles 12d and 12e of this Regulation when calculated in accordance with Article 12a(2), point (a), of this Regulation, the Board shall have the power, in accordance with paragraphs 2 and 3 of this Article, to instruct the national resolution authority to prohibit an entity from distributing more than the Maximum Distributable Amount related to the minimum requirement for own funds and eligible liabilities ("M-MDA"), calculated in accordance with paragraph 4 of this Article, through any of the following actions:';

(b) the following paragraph 7 is added:

'7. Where an entity is not subject to the combined buffer requirement on the same basis as the basis on which it is required to comply with the requirements referred to in Articles 12d and 12e, the Board shall apply paragraphs 1 to 6 of this Article on the basis of the estimation of the combined buffer requirement in accordance with Commission Delegated Regulation (EU) 2021/1118*. Article 128, fourth paragraph, of Directive 2013/36/EU shall apply.

The Board shall include the estimated combined buffer requirement referred to in the first subparagraph in the decision determining the requirements referred to in Articles 12d and 12e of this Regulation. The entity shall make the estimated combined buffer requirement publicly available together with the information referred to in Article 45i(3) of Directive 2014/59/EU.

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* 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).';

(7) in Article 12, the following paragraph 8 is added:

'8. The Board shall be responsible for granting the permissions referred to in Articles 77(2) and 78a of Regulation (EU) No 575/2013 to the entities referred to in paragraph 1 of this Article. The Board shall address its decision to the entity concerned.';

(8) in Article 12a, paragraph 1 is replaced by the following:

'1. The Board and national resolution authorities shall ensure that the entities referred to in Article 12(1) and (3) meet, at all times, the requirements for own funds and eligible liabilities where required by and as determined by the Board in accordance with this Article and Articles 12b to 12i.';

(9) Article 12c is amended as follows:

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

(b) in paragraph 7, introductory wording, the words 'paragraph 3' are replaced by the words 'paragraph 4', and the word 'G-SIIs' is replaced by the words 'G-SII entities';

(c) 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';

(d) the following paragraph 10 is added:

'10. The Board 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 12d(4) or (5), the Board 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.';

(10) in Article 12d, paragraph 3, eight subparagraph, and paragraph 6, eight subparagraph, the words 'critical economic functions' are replaced by the words 'critical functions';

(11) the following Article 12da is inserted:

'*Article 12da*

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

1. When applying Article 12d 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 Board shall set the recapitalisation amount provided in Article 12d(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, and the depth of the market in which the resolution entity operates;

(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 27(3);

(iii) the safeguards referred to in Articles 73 to 80 of Directive 2014/59/EU;

(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, that are 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 Board shall also take into account paragraph 1 of this Article when carrying out the assessment referred to in Article 12d(2a), second subparagraph, of this Regulation.

3. The application of paragraph 1 shall not result in an amount that is higher than the amount resulting from the application of Article 12d(3).';

(12) in Article 12e(1), the words 'G-SII or part of a G-SII' are replaced by the words 'G-SII entity';

(13) Article 12g is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the second subparagraph is replaced by the following:

'The Board, after having consulted the competent authorities, including the ECB, may decide to apply the requirement laid down in this Article to an entity as referred to in Article 2, point (b), and to a financial institution as referred to in Article 2, point (c), that is a subsidiary of a resolution entity but is not itself a resolution entity.';

(ii) in the third subparagraph, the words 'first subparagraph' are replaced by the words 'first and second subparagraphs';

(b) the following paragraph 4 is added:

'4. Where, in accordance with the global resolution strategy, subsidiaries established in the Union, or a Union parent undertaking and its subsidiary institutions, are not resolution entities and the members of the European resolution college, where established pursuant to Article 89 of Directive 2014/59/EU, agree with that strategy, subsidiaries established in the Union or, on a consolidated basis, the Union parent undertaking, shall comply with the requirement of Article 12a(1) by issuing the instruments referred to in paragraph 2, points (a) and (b), of this Article to any of the following:

(a) their ultimate parent undertaking established in a third country;

(b) the subsidiaries of that ultimate parent undertaking that are established in the same third country;

(c) other entities under the conditions set out in paragraph 2, points (a)(i) and (b)(ii), of this Article.';

(14) Article 12k is amended as follows:

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

'By way of derogation from Article 12a(1), the Board shall determine appropriate transitional periods for entities to comply with the requirements in Articles 12f or 12g, or with the requirements that result from the application of Article 12c(4), (5) or (7), as appropriate.';

(b) in paragraph 3, point (a), the words 'the Board or the national resolution authority' are replaced by the words 'the Board';

(c) in paragraph 4, the words 'G-SII' are replaced by the words 'G-SII or a non-EU G-SII';

(d) in paragraphs 5 and 6, the words 'the Board and the national resolution authorities' are replaced by the words 'the Board';

(15) Article 13 is replaced by the following:

‘*Article 13*

Early intervention measures

1. The ECB may apply early intervention measures where an entity as referred to in Article 7(2)(a) meets any of the following conditions:

(a) the entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 16(1) of Regulation (EU) No 1024/2013 and either of the following applies:

  (i) the entity has not taken the remedial actions required by the ECB, including the measures referred to in Article 104 of Directive 2013/36/EU, Article 16(2) of Regulation (EU) No 1024/2013 or Article 49 of Directive (EU) 2019/2034;

  (ii) the ECB 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 entity;

(b) the entity infringes or is likely to infringe in the 12 months following the assessment of the ECB the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, 14 to 17, or 24, 25 and 26 of Regulation (EU) No 600/2014, or in Articles 12f or 12g of this Regulation.

The ECB 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 16(2) of Regulation (EU) No 1024/2013.

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

(a) the requirement for the management body of the entity 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) of Directive 2014/59/EU where the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and to 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 entity to convene or, if the management body fails to comply with that requirement, convene directly, a meeting of shareholders of the 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 entity 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 entity in its entirety or with regard to individuals, in accordance with Article 13a;

(f) the appointment of one or more temporary administrators to the entity, in accordance with Article 13b.

3. The ECB 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 entity, among other relevant information.

4. For each of the measures referred to in paragraph 2, the ECB shall set a deadline that is appropriate for completion of that measure and that enables the ECB to evaluate its effectiveness.

5. Where a group includes entities established in participating Member States as well as in non-participating Member States, the ECB shall represent the national competent authorities of the participating Member States for the purposes of consultation and cooperation with non-participating Member States in accordance with Article 30 of Directive 2014/59/EU.

Where a group includes entities established in participating Member States and subsidiaries established, or significant branches located, in non-participating Member States, the ECB shall communicate any decisions or measures referred to in Articles 13 to 13c relevant to the group to the competent authorities or the resolution authorities of the non-participating Member States, as appropriate.';

(16) the following Articles 13a, 13b and 13c are inserted:

'*Article 13a*

Replacement of the senior management or management body

For the purposes of Article 13(2), point (e), the new senior management or management body, or individual members of those bodies, shall be appointed in accordance with Union and national law and be subject to the approval of the ECB.

Article 13b

Temporary administrator

1. For the purposes of Article 13(2), point (f), the ECB may, based on what is proportionate in the circumstances, appoint any temporary administrator to do either of the following:

(a) temporarily replace the management body of the entity;

(b) work temporarily with the management body of the entity.

The ECB shall specify its choice under points (a) or (b) at the time of appointment of the temporary administrator.

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

The ECB shall make public the appointment of any temporary administrator, except where the temporary administrator does not have the power to represent the entity.

Any temporary administrator shall fulfil the requirements set out in Article 91(1), (2) and (3) of Directive 2013/36/EU. The assessment by the ECB of whether the

temporary administrator complies with those requirements shall be an integral part of the decision to appoint that temporary administrator.

2. The ECB 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 entity, under the statutes of the entity and under national law, including the power to exercise some or all of the administrative functions of the management body of the entity. The powers of the temporary administrator in relation to the entity shall comply with the applicable company law.

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

(a) ascertaining the financial position of the entity;

(b) managing the business or part of the business of the entity to preserve or restore its financial position;

(c) taking measures to restore the sound and prudent management of the business of the entity.

The ECB shall specify any limits on the role and functions of the temporary administrator at the time of his or her appointment.

4. The ECB shall have the exclusive power to appoint and remove any temporary administrator. The ECB may remove a temporary administrator at any time and for any reason. The ECB may vary the terms of appointment of a temporary administrator at any time subject to this Article.

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

In any case, the temporary administrator may exercise the power to convene a general meeting of the shareholders of the entity and to set the agenda of such a meeting only with the prior consent of the ECB.

6. At the request of the ECB, the temporary administrator shall draw up reports on the financial position of the entity and on the acts performed in the course of his or her appointment, at intervals set by the ECB, and in any case at the end of his or her mandate.

7. The temporary administrator shall be appointed for maximum 1 year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The ECB shall determine those conditions and shall justify any renewal of the appointment of the temporary administrator to the shareholders.

8. Subject to this Article, the appointment of a temporary administrator shall not prejudice the rights of the shareholders laid down in Union or national company law.

9. A temporary administrator appointed pursuant to paragraphs 1 to 8 of this Article shall not be deemed to be a shadow director or a de facto director under national law.

Article 13c

Preparation for resolution

1. For the entities and groups referred to in Article 7(2), and the entities and groups referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met, the ECB or national competent authorities shall notify the Board without delay of any of the following:

(a) any of the measures referred to in Article 16(2) of Regulation (EU) No 1024/2013 or Article 104(1) of Directive 2013/36/EU they require an entity or group to take;

(b) where supervisory activity shows that the conditions laid down in Article 13(1) of this Regulation or Article 27(1) of Directive 2014/59/EU are met in relation to an entity or group, the assessment that those conditions are met, irrespective of any early intervention measure;

(c) the application of any of the early intervention measures referred to in Article 13 of this Regulation or Article 27 of Directive 2014/59/EU.

The Board shall notify the Commission of notification it has received pursuant to the first subparagraph.

The ECB or the relevant national competent authority shall closely monitor, in cooperation with the Board, the situation of the entities and groups referred to in the first subparagraph and their compliance with the measures referred to in the first subparagraph, point (a), that aim to address a deterioration in the situation of those entities and groups and with the early intervention measures referred to in the first subparagraph, point (c).

2. The ECB or the relevant national competent authority shall notify the Board as early as possible where they consider that there is a material risk that one or more of the circumstances referred to in Article 18(4) would apply in relation to an entity as referred to in Article 7(2), or an entity as referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met. That notification shall contain:

(a) the reasons for the notification;

(b) an overview of the measures which would prevent the failure of the entity within a reasonable timeframe, their expected impact on the entity as regards the circumstances referred to in Article 18(4) and the expected timeframe for the implementation of those measures.

After having received the notification referred to in the first subparagraph, the Board shall assess, in close cooperation with the ECB or the relevant national competent authority, what constitutes a reasonable timeframe for the purposes of the assessment of the condition referred to in Article 18(1), point (b), taking into account the speed of the deterioration of the conditions of the entity, the need to implement effectively the resolution strategy and any other relevant considerations. The Board shall communicate that assessment to the ECB or to the relevant national competent authority as early as possible.

Following the notification referred to in the first subparagraph, the ECB or the relevant national competent authority and the Board shall, in close cooperation, monitor the situation of the entity, the implementation of the any relevant measures

within their expected timeframe and any other relevant developments. For that purpose, the Board and the ECB or the relevant national competent authority shall meet regularly, with a frequency set by the Board considering the circumstances of the case. The ECB or the relevant national competent authority and the Board shall provide each other with any relevant information without delay.

The Board shall notify the Commission of any information it has received pursuant to the first subparagraph.

3. The ECB or the relevant national competent authority shall provide the Board with all the information requested by the Board that is necessary for all of the following:

(a) updating the resolution plan and preparing for the possible resolution of an entity as referred to in Article 7(2), or an entity as referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met;

(b) carrying out the valuation referred to in Article 20(1) to (15).

Where such information is not already available to the ECB or the national competent authorities, the Board and the ECB and such national competent authorities shall cooperate and coordinate to obtain that information. For that purpose, the ECB and the national competent authorities shall have the power to require the entity to provide such information, including through on-site inspections, and to provide that information to the Board.

4. The Board shall have the power to market to potential purchasers, or make arrangements for such marketing, the entity referred to in Article 7(2), or the entity referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met or require the entity to do so, for the following purposes:

(a) to prepare for the resolution of that entity, subject to the conditions specified in Article 39(2) of Directive 2014/59/EU and the requirements of professional secrecy laid down in Article 88 of this Regulation;

(b) to inform the assessment by the Board of the condition referred to in Article 18(1), point (b), of this Regulation.

5. For the purposes of paragraph 4, the Board shall have the power to:

(a) request the entity concerned to put in place a digital platform for sharing the information that is necessary for the marketing of that entity with potential purchasers or with advisors and valuers engaged by the Board;

(b) require the relevant national resolution authority to draft a preliminary resolution scheme for the entity concerned.

6. The determination that the conditions laid down in Article 13(1) of this Regulation or Article 27(1) of Directive 2014/59/EU are met and the prior adoption of early intervention measures are not necessary conditions for the Board to prepare for the resolution of the entity or to exercise the powers referred to in the paragraphs 4 and 5 of this Article.

7. The Board shall inform the Commission, the ECB, the relevant national competent authorities and the relevant national resolution authorities of any action taken pursuant to paragraphs 4 and 5 without delay.

8. The ECB, the national competent authorities, the Board and the relevant national resolution authorities shall closely cooperate:

(a) when considering taking the measures referred to in paragraph 1, first subparagraph, point (a) that aim to address a deterioration in the situation of an entity and group, and the measures referred to in paragraph 1, first subparagraph, point (c);

(b) when considering taking any of the actions referred to in paragraphs 4 and 5;

(c) during the implementation of the actions referred to in points (a) and (b) of this subparagraph.

The ECB, the national competent authorities, the Board and the relevant national resolution authorities shall ensure that those measures and actions are consistent, coordinated and effective.';

(17) in Article 14(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;';

(18) in Article 16, paragraph 2 is replaced by the following:

'2. The Board shall take a resolution action in relation to a parent undertaking as referred to in Article 2, point (b), where the conditions laid down in Article 18(1) are met.

For those purposes, a parent undertaking as referred to Article 2, point (b), shall be deemed to be failing or likely to fail in any of the following circumstances:

(a) the parent undertaking meets one or more of the conditions laid down in Article 18(4), points (b), (c) or (d);

(b) the parent undertaking infringes materially, or there are objective elements that show that the parent undertaking will, in the near future, infringe materially, the applicable requirements laid down in Regulation (EU) No 575/2013 or in the national provisions that transpose Directive 2013/36/EU.';

(19) Article 18 is amended as follows:

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

'1. The Board shall adopt a resolution scheme pursuant to paragraph 6 in relation to the entities referred to in Article 7(2), and to the entities referred to in Article 7(4), point (b) and Article 7(5) where the conditions for the application of those provisions are met, only when it has determined, in its executive session, upon receiving a communication pursuant to the second subparagraph or on its own initiative, that all of the following conditions are met:

(a) the entity 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 measure, including measures by an IPS, supervisory action, early intervention measures, or

the write down or conversion of relevant capital instruments and eligible liabilities as referred to in Article 21(1), taken in respect of the entity would prevent the failure of the entity within a reasonable timeframe;

(c) a resolution action is necessary in the public interest pursuant to paragraph 5.

The assessment of the condition referred to in the first subparagraph, point (a), shall be made by the ECB for the entities referred to in Article 7(2), point (a), or by the relevant national competent authority for the entities referred to in Article 7(2), point (b), Article 7(3), second subparagraph, Article 7(4), point (b) and Article 7(5), after having consulted the Board. The Board, in its executive session, may make such an assessment only after having informed the ECB or the relevant national competent authority of its intention to make such an assessment and only if the ECB or the relevant national competent authority, within three calendar days of receipt of that information, do not make such an assessment themselves. The ECB or the relevant national competent authority shall, without delay, provide the Board with any relevant information that the Board requests to inform its assessment, before or after being informed by the Board of its intention to make the assessment of the condition referred to in the first subparagraph, point (a).

Where the ECB or the relevant national competent authority has assessed that the condition referred to in the first subparagraph, point (a), is met in relation to an entity as referred to in the first subparagraph, they shall communicate that assessment to the Commission and to the Board without delay.

The assessment of the condition referred to in the first subparagraph, point (b), met shall be made by the Board, in its executive session and in close cooperation with the ECB or the relevant national competent authority. The ECB or the relevant national competent authority shall, without delay, provide the Board with any relevant information that the Board requests to inform its assessment. The ECB or the relevant national competent authority may also inform the Board that it considers the condition laid down in the first subparagraph, point (b), to be met.

1a. The Board may adopt a resolution scheme in accordance with paragraph 1 in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group where 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 laid down in paragraph 1, first subparagraph.

2. Without prejudice to cases where the ECB has decided to exercise directly supervisory tasks relating to credit institutions pursuant to Article 6(5), point (b) of Regulation (EU) No 1024/2013, in the event of receipt of a communication pursuant to paragraph 1 in relation to an entity or group as referred to in Article 7(3), the Board shall communicate its assessment as referred to paragraph 1, fourth subparagraph, to the ECB or the relevant national competent authority without delay.

3. The previous adoption of a measure pursuant to Article 16 of Regulation (EU) No 1024/2013, to Article 27 of Directive 2014/59/EU, to Article 13 of

this Regulation or to Article 104 of Directive 2013/36/EU shall not be a condition for taking a resolution action.';

(b) paragraph 4 is amended as follows:

(i) in the first subparagraph, point (d) is replaced by the following:

'(d) extraordinary public financial support is required except where such support is granted in one of the forms referred to in Article 18a(1)';

(ii) the second and third subparagraphs are deleted;

(c) 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 where that resolution action is necessary for the achievement of, and is proportionate to, one or more of the resolution objectives referred to in Article 14 and where 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 Board, based on the information available to it at the time of that assessment, shall consider and compare all extraordinary public financial support that can reasonably be expected to be granted to the entity, both in the event of resolution and in the event of winding up in accordance with the applicable national law.';

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

'Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall endorse the resolution scheme or object to it, either with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph of this paragraph or with regard to the proposed use of State aid or Fund aid that is not considered compatible with the internal market.';

(e) the following paragraph 11 is added:

'11. Where the conditions referred to in paragraph 1, points (a) and (b), are met, the Board may instruct the national resolution authorities to exercise the powers under national law transposing Article 33a of Directive 2014/59/EU, in accordance with the conditions laid down in national law. The national resolution authorities shall implement the instructions of the Board in accordance with Article 29.';

(20) the following Article 18a is inserted:

'*Article 18a*

Extraordinary public financial support

1. Extraordinary public financial support outside of resolution action may be granted to an entity as referred to in Article 2 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) where, to remedy a serious disturbance in the economy of a Member State or to preserve financial stability, the extraordinary public financial support takes any of the following forms:

(i) a State guarantee to back liquidity facilities provided by central banks in accordance with 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 terms that do not confer an undue advantage upon the institution or entity concerned, provided that none of the circumstances referred to in Article 18(4), points (a), (b) or (c), or Article 21(1) are present at the time the public support is granted.

(b) where 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 or of the circumstances referred to in Article 18(4) are present;

(c) where 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 of Directive 2014/59/EU and in accordance with the conditions set out in Article 11(5) of Directive 2014/49/EU;

(d) where 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 Directive 2014/59/EU, 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 are confined to solvent entities, as confirmed by the ECB or by the relevant national competent authority;

(b) the measures are of a precautionary and temporary nature and are based on a pre-defined exit strategy approved by the ECB or the relevant national competent authority, including a clearly specified termination date, sale date or repayment schedule for any of the measures provided;

(c) the measures are proportionate to remedy the consequences of the serious disturbance or to preserve financial stability;

(d) the measures are not used to offset losses that the entity has incurred or is likely to incur in the near future.

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

For the purposes of the first subparagraph, point (d), the relevant competent authority shall quantify the losses that the entity has incurred or is likely to incur. 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 ECB, EBA or national authorities or, where appropriate, on on-site inspections conducted by the ECB or the relevant national competent authority.

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

By way of derogation from paragraph 1, point (a)(iii), acquisition of Common Equity Tier 1 instruments shall be exceptionally permitted 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 entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise. The amount of acquired Common Equity Tier 1 instruments shall not exceed 2% of the total risk exposure amount of the institution or entity concerned calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013.

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 established at the time of granting such measure, the ECB or the relevant national competent authority shall conclude that the condition laid down in Article 18(1), point (a), is met in relation to the institution or entity which has received those support measures and shall communicate that assessment to the Commission and to the Board, in accordance with Article 18(1), third subparagraph.';

(21) Article 19 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. Where resolution action involves the granting of State aid pursuant to Article 107(1) TFEU or of Fund aid in accordance with paragraph 3 of this Article, the resolution scheme referred to in Article 18(6) of this Regulation shall not enter into force until such time when the Commission adopts a positive or conditional decision, or a decision not to raise objections, concerning the compatibility of the use of such aid with the internal market. The Commission shall take the decision concerning the compatibility of the use of State aid or of Fund aid with the internal market at the latest when it endorses or objects to the resolution scheme pursuant to Article 18(7), second subparagraph, or when the period of 24 hours referred to in Article 18(7), fifth subparagraph, expires, whichever is earlier.

In performing the tasks conferred on them by Article 18 of this Regulation, Union institutions shall have in place structural arrangements that ensure operational independence and avoid conflicts of interest that could arise between the functions entrusted with the performance of those tasks and other

functions and shall make public in an appropriate manner all relevant information on their internal organisation in this regard.';

(b) paragraph 3 is replaced by the following:

'3. As soon as the Board considers that it may be necessary to use the Fund, it shall informally, promptly, and in a confidential manner contact the Commission to discuss the possible use of the Fund, including legal and economic aspects related to its use. Once the Board is sufficiently certain that the resolution scheme envisaged will entail the use of Fund aid, the Board shall formally notify the Commission of the proposed use of the Fund. That notification shall contain all the information that the Commission needs to make its assessments pursuant to this paragraph, and that the Board has in its possession or which the Board has the power to obtain in accordance with this Regulation.

Upon receiving the notification referred to in the first subparagraph, the Commission shall assess whether the use of the Fund would distort, or threaten to distort, competition by favouring the beneficiary or any other undertaking so as, insofar as it would affect trade between Member States, to be incompatible with the internal market. The Commission shall apply to the use of the Fund the criteria established for the application of State aid rules as enshrined in Article 107 TFEU. The Board shall provide the Commission with the information in its possession, or which the Board has the power to obtain in accordance with this Regulation, and that the Commission deems to be necessary to carry out that assessment.

When making its assessment, the Commission shall be guided by all the relevant regulations adopted under Article 109 TFEU, all related and relevant communications and guidance of the Commission, and all measures adopted by the Commission in application of the rules of the Treaties relating to State aid as are in force at the time the assessment is to be made. Those measures shall be applied as if references to the Member State responsible for notifying the aid were references to the Board, and with any other necessary modifications.

The Commission shall decide on the compatibility of the use of the Fund with the internal market and address that decision to the Board and to the national resolution authorities of the Member State or Member States concerned. That decision may be contingent on conditions, commitments or undertakings in respect of the beneficiary and it shall take into account the need for timely execution of resolution action by the Board.

The decision may also lay down obligations on the Board, the national resolution authorities in the participating Member State or Member States concerned or the beneficiary to enable compliance with it to be monitored. This may include requirements for the appointment of a trustee or other independent person to assist in monitoring. A trustee or other independent person may perform such functions as may be specified in the Commission decision.

Any decision pursuant to this paragraph shall be published in the Official Journal of the European Union.

The Commission may issue a negative decision, addressed to the Board, where it decides that the proposed use of the Fund would be incompatible with the internal market and cannot be implemented in the form proposed by the Board.

On receipt of such a decision the Board shall reconsider its resolution scheme and prepare a revised resolution scheme.';

(c) paragraph 10 is replaced by the following:

'10. By way of derogation from paragraph 3, the Council may, on an application of a Member State or the Board, within 7 days of such application being made, unanimously decide that the use of the Fund is to be considered compatible with the internal market, where such a decision is justified by exceptional circumstances. The Commission shall take a decision on the case where the Council has not decided within those 7 days.';

(22) Article 20 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. Before determining whether the conditions for resolution, or the conditions for write down or conversion of capital instruments and eligible liabilities as referred to in Article 21(1) are met, the Board shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity as referred to in Article 2 is carried out by a person that is independent from any public authority, including the Board and the national resolution authority, and from the entity concerned.';

(b) the following paragraph 8a is inserted:

'8a. Where necessary to inform the decisions referred to paragraph 5, points (c) and (d), the valuer shall complement the information in paragraph 7, point (c), with an estimate of the value of the off-balance sheet assets and liabilities, including contingent liabilities and assets.';

(c) in paragraph 18, 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.';

(23) Article 21 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the first subparagraph is amended as follows:

— the introductory wording is replaced by the following:

'1. The Board, acting under the procedure laid down in Article 18, shall exercise the power to write down or convert relevant capital instruments, and eligible liabilities as referred to in paragraph 7a, in relation to the entities and groups referred to in Article 7(2), and to the entities and groups referred to in Article 7(4), point (b), and Article7(5) where the conditions for the application of those provisions are met, only where it determines, in its executive session, on receiving a communication pursuant to the second subparagraph or on its own initiative, that one or more of the following conditions are met:';

— point (e) is replaced by the following:

‘(e) extraordinary public financial support is required by the entity or group, except where that support is granted in one of the forms referred to in Article 18a(1).’;

(ii) the second subparagraph is replaced by the following:

‘The assessment of the conditions referred to in the first subparagraph, points (a) to (d), shall be made by the ECB for entities referred to in Article 7(2)(a), or by the relevant national competent authority for entities referred to in Article 7(2)(b), (4)(b) and (5), and by the Board, in its executive session, in accordance with the allocation of tasks pursuant to the procedure laid down in Article 18(1) and (2).’;

(b) paragraph 2 is deleted;

(c) in paragraph 3, point (b) is replaced by the following:

‘(b) having regard to timing, the need to implement effectively the write down and conversion powers or the resolution strategy for the resolution group 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 relevant capital instruments, and eligible liabilities as referred to in paragraph 7a, would prevent the failure of that entity or group within a reasonable timeframe.’;

(d) paragraph 9 is replaced by the following:

‘9. Where one or more of the conditions referred to in paragraph 1 are met in relation to an entity referred to in that paragraph, and the conditions referred to in Article 18(1) are also met in relation to that entity or to an entity belonging to the same group, the procedure laid down in Article 18(6), (7) and (8) shall apply.’;

(24) Article 27 is amended as follows:

(a) paragraph 7 is replaced by the following:

‘7. The Fund may make a contribution as referred to in paragraph 6 only 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 20(1) to (15), has been made by shareholders, the holders of relevant capital instruments and other bail-inable liabilities through reduction, write-down, or conversion pursuant to Article 48(1) of Directive 2014/59/EU and Article 21(10) of this Regulation, and by the deposit guarantee scheme pursuant to Article 79 of this Regulation and Article 109 of Directive 2014/59/EU where relevant;

(b) the contribution from the Fund 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 20(1) to (15).’;

(b) paragraphs 9 and 10 are replaced by the following:

‘9. The Fund may make a contribution from resources which have been raised through *ex*-ante contributions as referred to in Article 70 and which have not yet been used, provided that all of the following conditions are met:

(a) the Fund has made a contribution pursuant to paragraph 6 and the 5 % limit referred to in paragraph 7, point (b), has been reached;

(b) all liabilities ranking lower than deposits, and not excluded from bail-in pursuant to paragraphs 3 and 5, have been written down or converted in full.

10. In extraordinary circumstances, as an alternative or in addition to the contribution of the Fund referred to in paragraph 9, where the conditions laid down in paragraph 9 are met, the Board may seek further funding from alternative financing sources.’;

(c) in paragraph 13, the second subparagraph is replaced by the following:

‘The assessment referred to in the first subparagraph shall establish the amount by which bail-inable liabilities need to be written down or converted:

(a) 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 Fund made pursuant to Article 76(1), point (d);

(b) to sustain sufficient market confidence in the institution under resolution or the bridge institution, taking into account the need to cover contingent liabilities, and enable the institution under resolution to continue to meet, for at least 1 year, the conditions for authorisation andto continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU.’;

(25) Article 30 is amended as follows:

(a) the title is replaced by the following:

‘**Obligation to cooperate and information exchange**’;

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

‘2a. The Board, the ESRB, the EBA, ESMA and EIOPA shall cooperate closely and provide each other with all information necessary for the performance of their respective tasks.

2b. The ECB and other members of the European System of Central Banks (ESCB) shall cooperate closely with the Board and provide it with all information necessary for the performance of the Board’s tasks, including information collected by them in accordance with their statute. Article 88(6) shall apply to the exchanges concerned.

2c. The designated authorities referred to in Article 2(1), point (18), of Directive 2014/49/EU shall cooperate closely with the Board and provide it with all information necessary to the performance of its tasks.’;

(c) paragraph 6 is replaced by the following:

‘6. The Board shall endeavour to cooperate closely with any public financial assistance facility, including the European Financial Stability Facility (EFSF)

and the European Stability Mechanism (ESM), in particular in all of the following situations:

(a) in the extraordinary circumstances referred to in Article 27(9) and where such a facility has granted, or is likely to grant, direct or indirect financial assistance to entities established in a participating Member State;

(b) where the Board has contracted for the Fund a financial arrangement pursuant to Article 74.';

(d) paragraph 7 is replaced by the following:

'7. Where necessary, the Board shall conclude a memorandum of understanding with the ECB and other members of the ESCB, the national resolution authorities and the national competent authorities describing in general terms how they will cooperate under paragraphs 2, 2a, 2b and 4 of this Article and under Article 74, second paragraph, in the performance of their respective tasks under Union law. The memorandum shall be reviewed on a regular basis and shall be published subject to the requirements of professional secrecy.';

(26) the following Article 30a is inserted:

'*Article 30a*

Information held by centralised automated mechanism

1. The authorities operating the centralised automated mechanisms established by Article 32a of Directive (EU) 2015/849 of the European Parliament and of the Council** shall provide the Board, upon its request, with information related to the number of customers for which an entity as referred to in Article 2 is the only or principal banking partner.

2. The Board shall request the information referred to in paragraph 1 only on a case-by-case basis and where necessary for the purpose of performing its tasks under this Regulation.

3. The Board may share the information obtained pursuant to the first paragraph with national resolution authorities in the context of the performance of their respective tasks under this Regulation.

** Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).';

(27) in Article 31, the following paragraph 3 is added:

'3. For the entities and groups referred to in Article 7(2), and for the entities and groups referred to in Article 7(4), point (b) and Article 7(5) where the conditions for the application of those provisions are met, national resolution authorities shall consult the Board before acting under Article 86 of Directive 2014/59/EU.';

(28) in Article 32(1), the first subparagraph is replaced by the following:

‘Where a group includes entities established in participating Member States as well as in in non-participating Member States or third countries, without prejudice to any approval by the Council or the Commission required under this Regulation, the Board shall represent the national resolution authorities of the participating Member States for the purposes of consultation and cooperation with non-participating Member States or third countries in accordance with Articles 7, 8, 12, 13, 16, 18, 45h, 55, and 88 to 92 of Directive 2014/59/EU.’;

(29) Article 34 is amended as follows:

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

‘The Board may, making full use of all of the information which is already available to the ECB, including information collected by the members of the ESCB in accordance with their statute, or of all the information available to the national competent authorities, to the ESRB, the EBA, ESMA or EIOPA, require, through the national resolution authorities or directly, after having informed those authorities, the following legal or natural persons to provide it with all the information necessary, in accordance with the procedure requested by the Board and in the form requested by the Board, to perform its tasks:’;

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

‘5. The Board, the ECB, the members of the ESCB, the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities may draw up memoranda of understanding setting out a procedure governing the exchange of information. The exchange of information between the Board, the ECB and other members of the ESCB, the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities shall not be deemed to infringe the requirements of professional secrecy.

6. National competent authorities, the ECB, members of the ESCB, the ESRB, the EBA, ESMA, EIOPA, and the national resolution authorities shall cooperate with the Board to verify whether some or all of the information requested is already available at the time the request is made. Where such information is available, the national competent authorities, the ECB and other members of the ESCB, the ESRB, the EBA, ESMA, EIOPA, or the national resolution authorities shall provide that information to the Board.’;

(30) in Article 43(1), the following point (aa) is inserted:

‘(aa) the Vice-Chair appointed in accordance with Article 56;’;

(31) in Article 50(1), point (n) is replaced by the following:

‘(n) appoint an Accounting Officer and an Internal Auditor, subject to the Staff Regulations and the Conditions of Employment, who shall be functionally independent in the performance of their duties;’;

(32) Article 53 is amended as follows:

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

‘The Board in its executive session shall be composed of the Chair, the Vice-Chair and the four members referred to in Article 43(1), point (b).’;

(b) in paragraph 5, the words ‘Article 43(1)(a) and (b)’ are replaced by the words ‘Article 43(1), points (a), (aa) and (b)’.;

(33) in Article 55, paragraphs 1 and 2 are replaced by the following:

‘1. When deliberating on an individual entity or a group established in only one participating Member State, if all members referred to in Article 53(1) and (3) are not able to reach a joint agreement by consensus within a deadline set by the Chair, the Chair, the Vice-Chair and the members referred to in Article 43(1), point (b), shall take a decision by a simple majority.

2. When deliberating on a cross-border group, if all members referred to in Article 53(1) and (4) are not able to reach a joint agreement by consensus within a deadline set by the Chair, the Chair, the Vice-Chair and the members referred to in Article 43(1), point (b), shall take a decision by a simple majority.’;

(34) Article 56 is amended as follows:

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

‘(d) the establishment of a preliminary draft budget and a draft budget of the Board, in accordance with Article 61, and the implementation of the budget of the Board, in accordance with Article 63;’;

(b) in paragraph 5, the first subparagraph is replaced by the following:

‘The term of office of the Chair, of the Vice-Chair and of the members referred to in Article 43(1), point (b), shall be five years. That term shall be renewable once.

A person who has served two terms of office as the Chair, the Vice-Chair or a member referred to in Article 43(1), point (b), shall not be eligible for appointment to any of the other two positions.’;

(c) in paragraph 6, first subparagraph, the following sentence is added:

‘The Commission may arrange the names on the shortlist in the order reflecting the Commission’s assessment of the suitability of each candidate in light of the criteria referred to in paragraph 4 of this Article.’;

(d) the following paragraph 6a is inserted:

‘6a. In the 9 months preceding the end of the first term of office of the Chair, of the Vice-Chair and of the members referred to in Article 43(1), point (b), the Commission shall evaluate the results achieved in the first term of office and shall decide whether to put forward a proposal for renewal of the term based on the results of that evaluation.

The Council, acting on a proposal from the Commission, shall adopt an implementing decision to renew the term of office of the Chair, of the Vice-Chair and of the members referred to in Article 43(1), point (b). The Council shall act by qualified majority.’;

(e) in paragraph 7, the last sentence is replaced by the following:

‘The Chair, the Vice-Chair, and the members referred to in Article 43(1), point (b) shall remain in office until their successors are appointed and have taken up their duties in accordance with the Council decision referred to in paragraph 6 of this Article.’;

(35) Article 61 is replaced by the following:

‘*Article 61*

Establishment of the budget

1. By 31 March each year, the Chair shall draw up a preliminary draft budget of the Board, including a statement of estimates of the Board’s revenue and expenditure for the following year, together with the establishment plan, for the following year and submit it to the Board in its plenary session.

The Board in its plenary session shall, where necessary, adjust the preliminary draft budget of the Board together with the draft establishment plan.

2. On the basis of the preliminary draft budget as adopted by the Board in its plenary session, the Chair shall draw up a draft budget of the Board and submit it to the Board in its plenary session for adoption.

By 30 November each year, the Board in its plenary session shall adjust the draft budget submitted by the Chair, where necessary, and adopt the final budget of the Board together with the establishment plan.’;

(36) in Article 69, paragraph 4 is replaced by the following:

‘4. If, after the initial period referred to in paragraph 1, the available financial means fall below the target level specified in that paragraph, the regular contributions calculated in accordance with Article 70 shall be raised until the target level is reached. The Board may defer the collection of the regular contributions raised in accordance with Article 70 for 1 or more years to ensure that 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 Board to use the Fund pursuant to Section 3. 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.’;

(37) Article 70 is amended as follows:

(a) paragraph 3 is replaced by the following:

‘3. The available financial means to be taken into account in order to reach the target level specified in Article 69 may include irrevocable payment commitments which are fully backed by collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Board for the purposes specified in Article 76(1). The share of those irrevocable payment commitments shall not exceed 50 % of the total amount of contributions raised in accordance with this Article. Within that limit, the Board shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article.’;

(b) the following paragraph 3a is inserted:

‘3a. The Board shall call the irrevocable payment commitments made pursuant to paragraph 3 of this Article when the use of the Fund is needed pursuant to Article 76.

Where an institution or entity stops being within the scope of Article 2 and is no longer subject to the obligation to pay contributions in accordance with paragraph 1 of this Article, the Board 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 Board shall cancel the commitment and return the collateral. If the contribution is not duly paid at first call, the Board shall seize the collateral and cancel the commitment.';

(38) in Article 71(1), the second subparagraph is replaced by the following:

'The total amount of extraordinary *ex-post* contributions per year shall not exceed three times 12,5 % of the target level.';

(39) in Article 74, the following paragraph is inserted:

'The Board shall inform the Commission and the ECB as soon as it considers that it may be necessary to activate financial arrangements contracted for the Fund in accordance with this Article, and shall provide the Commission and the ECB with all information necessary for the performance of their tasks in respect of such financial arrangements.';

(40) Article 76 is amended as follows:

(a) paragraph 3 is replaced by the following:

'3. Where the Board determines that the use of the Fund for the purposes referred to in paragraph 1 is likely to result in part of the losses of an entity referred to in Article 2 being passed on to the Fund, the principles governing the use of the Fund set out in Article 27 shall apply.';

(b) the following paragraphs 5 and 6 are added:

'5. Where the resolution tools referred to in Article 22(2), point (a) or (b), are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the Board shall have a claim against the residual entity for any expense and loss incurred by the Fund as a result of any contributions made to resolution pursuant to paragraphs 1 and 2 of this Article in connection to losses which creditors would have otherwise borne.

6. The claims of the Board referred to paragraph 5 of this Article and in Article 22(6) shall, in each participating Member State, have the same priority ranking as the claims of the national resolution financing arrangements in the national law of that Member State governing normal insolvency proceedings pursuant to Article 108(9) of Directive 2014/59/EU.';

(41) Article 79 is amended as follows:

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

'1. Participating Member States shall ensure that when the Board takes resolution action with respect to a credit institution, 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 for the purposes and under the conditions laid down in Article 109 of Directive 2014/59/EU.

2. The Board shall determine the amount of the contribution of the deposit guarantee scheme in accordance with paragraph 1 after having consulted the deposit guarantee scheme, and where necessary the designated authority within the meaning of Article 2(1), point (18), of Directive 2014/49/EU, 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 20 of this Regulation.

3. The Board shall notify its decision as referred to in the first subparagraph to the designated authority within the meaning of Article 2(1), point (18), of Directive 2014/49/EU and to the deposit guarantee scheme to which the institution is affiliated. The deposit guarantee scheme shall implement that decision without delay.';

(b) in paragraph 5, the second and third subparagraph are deleted;

(42) in Article 85(3), the words 'referred to in' are replaced by the words 'adopted under';

(43) in Article 88, the following paragraph 7 is added:

'7. This Article shall not prevent the Board from disclosing its analyses or assessments, including when they are based on information provided by the entities referred to in Article 2 or other authorities as referred to in paragraph 6 of this Article, when the Board assesses that the disclosure would not undermine the protection of the public interest as regards financial, monetary or economic policy and that there is a public interest in disclosing which overrides any other interests referred to in paragraph 5 of this Article. Such disclosure shall be considered to be made by the Board in the exercise of its functions under this Regulation for the purposes of paragraph 1 of this Article.'.

Article 2

Entry into force and application

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

It shall apply from … [OP please insert the date = 18 months from the date of entry into force of this amending Regulation].

However, Article 1, points (1)(a), points (2) and, (3), point (4)(a), point (5)(a), (b) and (c)(i) and (ii), point (6)(a), point (7), point (13)(a)(i) and (b), point (14)(a), (b) and (d), point (19)(d) and (e), point (21), point (23)(a)(i), first indent, (b) and (d), points (25) to (35), and points (39), (42) and (43), shall apply from … [OP please insert the date = 1 month from the date of entry into force of this amending Regulation].

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

Done at Strasbourg,

For the European Parliament	*For the Council*
The President	*The President*