



Council of the
European Union

Brussels, 23 November 2016
(OR. en)

14779/16

Interinstitutional File:
2016/0361 (COD)

EF 355
ECOFIN 1100

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	23 November 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 851 final
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms

Delegations will find attached document COM(2016) 851 final.

Encl.: COM(2016) 851 final



EUROPEAN
COMMISSION

Brussels, 23.11.2016
COM(2016) 851 final

2016/0361 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation
Capacity for credit institutions and investment firms**

(Text with EEA relevance)

{SWD(2016) 377}

{SWD(2016) 378}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The proposed amendments to Regulation (EU) 806/2014 (the Single Resolution Mechanism Regulation or SRMR) are part of a legislative package that includes also amendments to Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR), to Directive 2013/36/EU (the Capital Requirements Directive or CRD) and to Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD).

Over the past years the EU implemented a substantial reform of the financial services regulatory framework to enhance the resilience of financial institutions in the EU, largely based on global standards agreed with the EU's international partners. In particular, the reform package included Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR) and Directive 2013/36/EU (the Capital Requirements Directive or CRD), on prudential requirements for and supervision of institutions, Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD), on recovery and resolution of institutions and Regulation (EU) No 806/2014 on the Single Resolution Mechanism (SRM).

These measures were taken in response to the financial crisis that unfolded in 2007-2008. The absence of adequate crisis management and resolution frameworks forced governments around the world to rescue banks following the financial crisis. The subsequent impact on public finances as well as the undesirable incentive of socialising the costs of bank failure have underscored that a different approach is needed to manage bank crises and protect financial stability.

Within the Union and in line with the significant steps that have been agreed and taken at international level, Directive 2014/59/EU (Bank Recovery and Resolution Directive (BRRD))¹ and Regulation (EU) No 806/2014 (Single Resolution Mechanism Regulation (SRMR))² have established a robust bank resolution framework to effectively manage bank crises and reduce their negative impact on financial stability and public finances. A cornerstone of the new resolution framework is the “bail-in” which consists of writing down debt or converting debt claims or other liabilities into equity according to a pre-defined hierarchy. The tool can be used to absorb losses of and internally recapitalise an institution that is failing or likely to fail, so that its viability is restored. Therefore, shareholders and other creditors will have to bear the burden of an institution's failure instead of taxpayers. In contrast to other jurisdictions, the Union bank recovery and resolution framework has already mandated resolution authorities to set for each credit institution or investment firm ('institution') a minimum requirement for own funds and eligible liabilities (MREL), which consist of highly bail-inable liabilities to be used to absorb losses and recapitalise institutions in case of failures. The delegated legislation

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, 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

concerning the practical implementation of this requirement has been adopted recently by the Commission³.

At the global level, the Financial Stability Board (FSB) has published on 9 November 2015 the Total Loss-absorbing Capacity (TLAC) Term Sheet ('the TLAC standard') that was adopted a week later at the G20 summit in Turkey⁴. The TLAC standard requires global systemically important banks (G-SIBs), referred to as global systemically important institutions (G-SIIs) in the Union legislation, to hold a sufficient amount of highly loss absorbing (bail-inable) liabilities to ensure smooth and fast absorption of losses and recapitalisation in resolution. In its Communication of 24 November 2015⁵, the Commission committed to bring forward a legislative proposal by the end of this year so that the TLAC standard can be implemented by the agreed deadline of 2019. In addition, the Commission committed to review the existing MREL rules with the view to provide full consistency with the internationally agreed TLAC standard by considering the findings of a report that the European Banking Authority (EBA) is required to provide to the Commission under Article 45(19) of the BRRD. An interim version of that report has already been published by the EBA on 19 July 2016⁶ and the final report is expected to be submitted in the course of December 2016.

While the general BRRD and SRMR frameworks remain valid and sound, the main objective of this proposal is to implement the TLAC standard and to integrate the TLAC requirement into the general MREL rules by avoiding duplication by applying two parallel requirements. Although TLAC and MREL pursue the same regulatory objective, there are, nevertheless, some differences between them in the way they are constructed. The scope of application of MREL covers not only G-SIIs, but the entire Union banking industry. Differently from the TLAC standard, which contains a harmonised minimum level, the level of MREL is determined by resolution authorities on the basis of a case-by-case institution specific assessment. Finally, the minimum TLAC requirement should be met in principle with subordinated debt instruments, while for the purposes of MREL, subordination of debt instruments could be required by resolution authorities on a case-by-case basis to the extent it is needed to ensure that in a given case bailed in creditors are not treated worse than in a hypothetical insolvency scenario (which is a scenario that is counterfactual to resolution). In order to achieve a simple and transparent framework providing legal certainty and consistency, the Commission is proposing to integrate the TLAC standard into the existing MREL rules and ensure that both requirements are met with largely similar instruments. This approach requires introducing limited adjustments to the existing MREL rules ensuring technical consistency with the structure of any future requirements for G-SIIs.

In particular, further appropriate technical amendments to the existing rules on MREL are needed to align them with the TLAC standard as regards *inter alia* the denominators used for measuring loss-absorbing capacity, the interaction with capital buffer requirements, disclosure of risks to investors and their application in relation to different resolution strategies. While

³ Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities, OJ L 237, 3.9.2016, p. 1

⁴ FSB, *Principles on Loss-absorbing and Recapitalisation Capacity of Globally Systemically Important Banks (G-SIBs) in Resolution, Total Loss-absorbing Capacity (TLAC) Term sheet*, 9.11.2015

⁵ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *"Towards the completion of the Banking Union"*, 24.11.2015, COM(2015) 587 final.

⁶ <https://www.eba.europa.eu/documents/10180/1360107/EBA+Interim+report+on+MREL>

implementing the TLAC standard for G-SIIs, the Commission's approach will not materially affect the burden of institutions which are not G-SIIs to comply with the provisions on MREL.

Operationally, the harmonised minimum level of the TLAC standard will be introduced in the Union through amendments to the Capital Requirements Regulation and Directive (CRR and CRD)⁷ while the institution-specific add-on for G-SIIs and the institution specific MREL for non-G-SIIs will be dealt with through targeted amendments to the BRRD and SRMR. As such, this proposal is part of a wider review package of the Union financial legislation aiming at reducing risks in the financial sector (CRR/CRD review) and making it more resilient.

This proposal covers specifically the targeted amendments to the SRMR related to the implementation of the TLAC standard in the Union. This proposal will apply to the Single Resolution Board (SRB) and national authorities of the Member States participating in the Single Resolution Mechanism (SRM) when they set and implement the requirements on loss absorbing and recapitalisation capacity of financial firms established in the Banking Union.

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

The existing Union bank resolution framework already requires all European banks to hold a sufficient amount of highly loss absorbing (bail-inable) liabilities. By aligning the existing requirement for G-SIIs with the global TLAC standard, the proposal will improve and facilitate the application of the existing rules. The proposal is, therefore, consistent with the overall objective of the Union bank resolution framework to reduce taxpayers' support in bank resolution. This proposal is fully consistent with the proposal of the Commission to amend the BRRD as regards the rules on loss absorbing and recapitalisation of banks applicable in the entire Union.

- **Consistency with other Union policies**

The proposal is part of a wider review of the Union financial legislation aiming at reducing risks in the financial sector while promoting sustainable financing of the economic activity. It is fully consistent with the EU's fundamental goals of promoting financial stability, reducing taxpayers' support in bank resolution as well as contributing to a sustainable financing of the economy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposed Regulation amends an existing Regulation, the SRMR. The legal basis for the proposal is the same as the legal basis of the SRMR, which is Article 114 of the TFEU. That provision allows the adoption of measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.

The proposal harmonises national laws of Member States participating in the SRM on recovery and resolution of credit institutions and investment firms, in particular as regards

⁷ 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; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338

their loss-absorbing and recapitalisation capacity in resolution, to the extent necessary to ensure that the SRB and national resolution authorities of participating Member States and banks established in the Banking Union have the same tools and capacity to address bank failures in line with the agreed international standards (TLAC standard).

By establishing harmonised requirements for banks in the Member States participating in the SRM, the proposal reduces considerably the risk of divergent national rules in those Member States on loss-absorbing and recapitalisation capacity in resolution, which could distort competition in the internal market. The proposal has, therefore, as its object the establishment and functioning of the internal market.

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

- **Subsidiarity**

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

The Union and its Member States, in particular the Member States participating in the SRM, are committed to implement international standards. In the absence of any Union action, Member States would have needed to implement themselves the global TLAC standard in their own jurisdictions without the possibility of amending the existing framework that stem from the BRRD and SRMR. As a result, in view of important differences between the TLAC standard and existing framework as well as possibly diverging interpretations of the TLAC term sheet by the national regulators, banks, in particular G-SIIs, would have been subject to two parallel requirements (with the TLAC requirement itself being applied differently from one Member State to another), which would imply additional costs for both banks and public authorities (supervision and resolution authorities). Union action is, therefore, desirable to implement in a harmonised way the global TLAC standard in the Member States participating in the SRM and to align the existing framework with that standard in order to alleviate as much as possible the compliance costs of banks and public authorities while ensuring an effective resolution in case of bank failures.

- **Proportionality**

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

While implementing TLAC for global G-SIIs, the proposal would not materially affect the burden of banks to comply with the existing rules on loss absorbing and recapitalisation capacity since the proposal does not extend the application of the TLAC minimum level beyond G-SIIs. In addition, the proposal limits to a large extent the costs of banks, in particular G-SIIs, for compliance with the TLAC standard by aligning the existing rules to the extent possible with that standard. Finally, the proposal does not extend the application of the TLAC minimum level beyond G-SIIs. On the contrary, for non-G-SIIs, the proposal maintains the existing overall principle that the quality and level of the requirement on loss-absorbing and recapitalisation should be tailored by resolution authorities for each specific bank based on its risk, size, interconnectedness and the chosen resolution strategy. As regards G-SIIs that are subject to the TLAC minimum level, before requiring any institution specific add-on, the

proposal demands the SRB and national resolution authorities to assess whether any such add-on is necessary, proportionate and justified. The provisions of the proposal are, therefore, proportionate to what is necessary to achieve its objectives.

3. RESULTS OF IMPACT ASSESSMENTS

- **Impact assessment**

Being part of a wider review package of the Union financial legislation aiming at reducing risks in the financial sector (CRR/CRD review), the proposal has been subject to an extensive impact assessment. The draft impact assessment report was submitted on 7 September 2016 to the Commission's Regulatory Scrutiny Board⁸. The Board issued a negative opinion on [date]. After strengthening the evidence base for certain elements of the review package, the Board issued a positive opinion on 27 September 2016.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of several policy alternatives. Policy options were assessed against the key objectives of enhancing loss absorbing and recapitalisation capacity of banks in resolution and legal certainty and coherence of the resolution framework. The assessment was done by considering the effectiveness of achieving the objectives above and the cost efficiency of implementing different policy options.

As regards the implementation of the TLAC standard in the Union, three policy options have been considered in the impact assessment. Under the first option, the BRRD and SRMR would continue to apply in its current form. Under the second option, the TLAC standard for G-SIIs would be integrated in the existing resolution framework, while that framework would be amended as appropriate to ensure full compatibility with the TLAC standard. The third policy option proposed to extend, additionally, the scope of the TLAC minimum level to other systemically important institutions in the Union (O-SIIs) than G-SIIs. The impact assessment concluded that the second policy option achieves the relevant policy objectives the best. In particular, contrary to the first option, it provides a harmonized implementation of the TLAC standard for all Union G-SIIs by reducing their costs of complying with potentially two different requirements (the TLAC standard and the existing BRRD and SRMR) while providing for a consistent interpretation of the TLAC term sheet in the EU. This option will increase the resolvability of G-SIIs in the Union and prevent contagion effects stemming from G-SIIs cross-holdings through specific rules of the TLAC standard that are not currently provided in the BRRD and the SRMR (i.e. TLAC minimum level in the form of subordinated debt instruments, deduction of cross-holdings of TLAC eligible instruments held by G-SIIs). This option will ensure that the TLAC standard is implemented in the Union, which would reinforce the expectation on other jurisdictions to do the same with the view of strengthening the resolvability of G-SIBs worldwide. On the other hand, this policy option is preferable to the third option because it will not have the disadvantage of extending the minimum TLAC level to banks other than G-SIIs (O-SIIs), for which that level of minimum TLAC requirement may not appear to be well calibrated in view of their high diversity in terms of size, business model, interconnectedness and systemic importance.

- **Fundamental rights**

This proposal complies with the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the rights to

⁸ [\[Link to Impact Assessment and to its summary\]](#)

property and the freedom to conduct a business, and has to be applied in accordance with those rights and principles. In particular, this Regulation ensures that interference with property rights of bank creditors should not be disproportionate. Affected creditors should not incur greater losses than those which they would have incurred if the institution had been wound up under normal insolvency proceedings at the time that the resolution decision is taken.

4. BUDGETARY IMPLICATIONS

The proposal does not have implications for the Union budget.

5. OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

As explained above, the amendments to the CRR, which is part of the same legislative package will include the rules on the TLAC minimum requirement for G-SIIs while this proposal deals with the institution specific add-on for G-SIIs and the general requirements applicable to banks established in the Banking Union. This proposal introduces a number of targeted amendments to the existing SRMR.

Amendments to Articles 3, 8 and 9 of the SRMR

The TLAC standard and the BRRD with SRMR recognise both Single Point of Entry (SPE) and Multiple Point of Entry (MPE) resolution strategies. Under the SPE strategy, only one group entity (usually the parent) is resolved whereas other group entities (usually operating subsidiaries) are not put in resolution, but upstream their losses to the entity to be resolved. Under the MPE strategy, more than one entity may be resolved. A clear identification of entities to be resolved ('resolution entities') and subsidiaries that belong to them ('resolution groups') is important to apply effectively the desired resolution strategy. Moreover, this identification is also relevant for determining the level of application of the rules on loss absorbing and recapitalisation capacity that financial firms should comply with. For this reason, amendments to Article 3 of the SRMR introduce the concepts of 'resolution entity' and 'resolution group'. Amendments to Articles 8 and 9 concerning group resolution planning explicitly require the Board to identify the resolution entities and resolution groups within a financial group and consider appropriately the implications of any planned resolution action within the group to ensure an effective group resolution.

Amendments to Article 12 of the SRMR

Article 12 is repealed and replaced with the following new provisions: Articles 12, 12a, 12b, 12c, 12d, 12e, 12f, 12g, 12h, 12i and 12j.

Article 12 determines the institutional framework as regards the application of the minimum requirement for own funds and eligible liabilities by underlining the respective roles of the SRB, national resolution and competent authorities of the participating Member States.

Currently, the institution specific minimum requirement for own funds and eligible liabilities ('the MREL') is measured as a percentage of the total liabilities of the institution. The amended Article 12a aligns the measurement metrics of the MREL with those of the minimum harmonised requirement for G-SIIs as provided in the TLAC standard ('the TLAC minimum requirement'). The institution specific requirement should, therefore, be expressed

as a percentage of the total risk exposure amount and of the leverage ratio exposure measure of the relevant institution.

Article 12b keeps the existing exemption from the MREL for mortgage credit institutions under the condition that national insolvency or similar procedures allow for an effective loss absorption by creditors that meets the resolution objectives. It also clarifies that institutions that are exempted from the MREL should not be part of the overall consolidated requirement at the level of the resolution group.

Article 12c specifies the eligibility criteria for the instruments and items that could count for meeting the MREL by aligning them closely with the eligibility criteria provided in the TLAC standard for the TLAC minimum requirement. These criteria are, therefore, identical with the exception of the following.

As regards the scope of the instruments covered, certain instruments with derivative features, such as structured notes, are eligible for meeting the MREL because they could be sufficiently loss absorbing in resolution. Structured notes are debt obligations with an embedded derivative component. Their return is adjusted to the performance of reference assets such as single equity, equity indices, funds, interest rates, commodities or currencies. Article 12c clarifies that structured notes are eligible for the MREL to the extent that they have a fixed principal amount repayable at maturity while only an additional return is linked to a derivative and depends on the performance of a reference asset. The *rationale* for this is that the fixed principal amount is known in advance at the time of the issuance, its value is stable throughout the lifecycle of the structured note and could be easily bailed-in in resolution.

Under the TLAC standard, the TLAC minimum requirement should be met using largely subordinated debt instruments that rank in insolvency below senior liabilities explicitly excluded from the minimum TLAC requirement, such as covered deposits, derivatives, tax or other public law related liabilities. To meet the institution specific MREL, subordination of eligible debt instruments could currently be required by resolution authorities on a case-by-case basis. The new provisions of Article 12c further specify that subordination could be required to the extent that it is needed to facilitate the application of the bail-in tool, in particular when there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed their potential losses in insolvency and only to the extent necessary to cover the portion of the losses above likely insolvency losses. Any subordination requested by Board for the institution specific MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation (EU) No 575/2013 and in line with the TLAC standard.

Article 12d specifies the conditions for determining the MREL for all entities by the Board. The requirement should allow banks to absorb losses expected in resolution and recapitalise the bank post-resolution. The Board shall duly justify the level of the MREL imposed based on the chosen resolution strategy. As such, that level should not exceed the sum of the amount of losses expected in resolution that correspond to the institutions' own funds requirements and the recapitalisation amount that allows the entity post-resolution to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The MREL should be expressed as a percentage of the total risk exposure and leverage ratio measures, and institutions should meet the level resulting from the two measurements.

As regards G-SIIs, Article 12e specifies that an institution specific add-on to the TLAC minimum level as provided in the TLAC standard could be imposed only where that minimum is not sufficient to absorb losses and recapitalise a G-SII under the chosen resolution strategy. The Board's decision to impose such an add-on should be duly justified.

As in the proposal amending the CRD, this proposal introduces in Article 12f the concept of 'guidance'. This allows the Board to require institutions to meet higher levels of MREL while addressing in a more flexible manner any breaches of those levels, in particular by alleviating the automatic effects of such breaches in the form of limitations to the Maximum Distributable Amounts (MDAs). In particular, Article 12f allows the Board to require institutions to meet additional amounts to cover losses in resolution that are higher than those expected under a standard resolution scenario (i.e. above the level of the existing own funds requirements) and ensure a sufficient market confidence in the entity post-resolution (i.e. on top of the required recapitalisation amount). Article 12f specifies, nevertheless, that for the loss absorption part of the MREL, the level of the guidance should not exceed the level of the 'capital guidance' when such guidance is requested by supervisory authorities under supervisory stress testing to cater for losses above normal requirements. For the recapitalisation part, the level of the guidance to ensure market confidence should allow institutions post-resolution to meet their authorisation requirement for an appropriate period of time. This market confidence buffer should not exceed the combined capital buffer requirement under Directive 2013/36/EU unless a higher level is necessary to ensure that that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period

Articles 12g and 12h deal with the level of application of the MREL. As regards institutions that qualify as resolution entities, the MREL applies to them at the consolidated resolution group level only. This means that resolution entities will be obliged to issue eligible (debt) instruments to external third party creditors that would be bailed-in should the resolution entity (i.e. resolution group) enter resolution. As regards other entities of the group, the proposal introduces the concept of an 'internal' MREL in line with a similar concept brought forward by the TLAC standard. This means that other resolution group entities which themselves are not resolution entities should issue eligible (debt) instruments internally within the resolution group, i.e. such instruments should be bought by resolution entities. Where a resolution group entity which itself is not a resolution entity reaches the point of non-viability, such instruments are written down or converted into equity and losses of that entity are then up-streamed to the resolution entity. The main advantage of the internal MREL is that it allows recapitalising a resolution group entity (with critical functions) without placing it into formal resolution, which could potentially have disruptive effects on the market. The application of this requirement should nevertheless comply with the chosen resolution strategy, in particular, it should not change the ownership relationship between the entity and its resolution group after its recapitalisation. The proposal also specifies that, under certain safeguards, the internal MREL could be replaced with collateralised guarantees between the resolution entity and other resolution group entities that could be triggered under the equivalent timing conditions that the instruments eligible for the internal MREL. The proposed safeguards include, in particular, the agreement of the relevant resolution authorities to replace the internal MREL and collateralisation of the guarantee given by resolution entity to its subsidiary with highly liquid collateral with minimal credit and market risk.

Article 12i specifies that, under certain safeguards, the internal MREL of a subsidiary could be waived by the Board if both the subsidiary and its parent resolution entity are established in the same participating Member State.

Amendments in Article 12g deal with the breaches of the MREL. Article 12g lists the powers available to resolution authorities in the event of breaches of the MREL. Since a breach of the requirement could constitute an impediment to institution or group resolvability, amendments to Article 10 shorten the existing procedure to remove impediments to resolvability to address expediently any breaches of the requirement. They also introduce new powers for Board to require modifications in the maturity profiles of eligible instruments and plans from institutions to restore the level of the MREL.

Amendments to Articles 16, 18, 20 and 21

Amendments to Article 16, 18, 20 and 21 ensure that instruments eligible for the internal MREL other than capital instruments (e.g. debt instruments) could also be written down or converted into equity by the Board where the resolution group entity which itself is not a resolution entity that issues them reaches the point of non-viability.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms

(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 Bank⁹,

Having regard to the opinion of the European Economic and Social Committee¹⁰,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Financial Stability Board (FSB) published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('the TLAC standard') on 9 November 2015, which was endorsed by the G-20 in November 2015. The TLAC standard requires global systemically important banks ('G-SIBs'), referred to as global systemically important institutions ('G-SIIs') in the Union framework, to hold a sufficient minimum amount of highly loss absorbing (bailin-able) liabilities to ensure smooth and fast absorption of losses and recapitalisation in resolution. In its Communication of 24 November 2015¹¹, the Commission committed to bring forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented by the internationally agreed deadline of 2019.
- (2) The implementation of the TLAC standard in the Union needs to take account of the existing institution-specific minimum requirement for own funds and eligible liabilities ('MREL') applicable to all Union credit institutions and investment firms as

⁹ OJ C [...], [...], p. [...].

¹⁰ OJ C [...], [...], p. [...].

¹¹ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, "Towards the completion of the Banking Union", 24.11.2015, COM(2015) 587 final

laid down in Directive 2014/59/EU of the European Union and of the Council¹². As TLAC and MREL pursue the same objective of ensuring that Union institutions have sufficient loss absorbing and recapitalisation capacity, the two requirements should be complementary elements of a common framework. Operationally, the harmonised minimum level of the TLAC standard for G-SIIs ('TLAC minimum requirement') should be introduced in Union legislation through amendments to Regulation (EU) No 575/2013¹³, while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs, referred to as minimum requirement for own funds and eligible liabilities, should be addressed through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014¹⁴. The relevant provisions of this Regulation as regards loss absorbing and recapitalisation capacity of institutions should be applied together with those in the aforementioned pieces of legislation and in Directive 2013/36/EU¹⁵ in a consistent way.

- (3) The absence of harmonised rules in the Member States participating in the Single Resolution Mechanism (SRM) in respect of the implementation of the TLAC standard would create additional costs and legal uncertainty for institutions and make the application of the bail-in tool for cross-border institutions more difficult. The absence of harmonised Union rules also results in competitive distortions on the internal market given that the costs for institutions to comply with the existing requirements and the TLAC standard may differ considerably across the participating Member States. It is therefore necessary to remove those obstacles to the functioning of the internal market and to avoid distortions of competition resulting from the absence of harmonised rules in respect of the implementation of the TLAC standard. Consequently, the appropriate legal basis for this Regulation is Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the case law of the Court of Justice of the European Union.
- (4) In line with the TLAC standard, Regulation (EU) No 806/2014 should continue to recognise the Single Point of Entry (SPE), as well as the Multiple Point of Entry (MPE) resolution strategy. Under the SPE strategy, only one group entity, usually the parent undertaking, is resolved whereas other group entities, usually operating subsidiaries, are not put in resolution, but upstream their losses and recapitalisation needs to the entity to be resolved. Under the MPE strategy, more than one group entity may be resolved. A clear identification of entities to be resolved ('resolution entities') and subsidiaries that belong to them ('resolution groups') is important to apply the desired resolution strategy effectively. That identification is also relevant for determining the level of application of the rules on loss absorbing and recapitalisation

¹² 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, OJ L 173, 12.6.2014, p. 190

¹³ 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

¹⁴ 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

¹⁵ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338

capacity that financial firms should apply. It is therefore necessary to introduce the concepts of 'resolution entity' and 'resolution group' and to amend Regulation (EU) No 806/2014 concerning group resolution planning in order to explicitly require the Single Resolution Board ('the Board') to identify the resolution entities and resolution groups within a group and to consider the implications of any planned resolution action within the group appropriately to ensure an effective group resolution.

- (5) The Board should ensure that institutions have sufficient loss absorbing and recapitalisation capacity to ensure smooth and fast absorption of losses and recapitalisation in resolution with a minimum impact on financial stability and taxpayers. That should be achieved through compliance by institutions with an institution-specific minimum requirement for own funds and eligible liabilities as provided in Regulation (EU) No 806/2014.
- (6) In order to align denominators that measure the loss absorbing and recapitalisation capacity of institutions with those provided in the TLAC standard, the MREL should be expressed as a percentage of the total risk exposure amount and of the leverage ratio exposure measure of the relevant institution.
- (7) Eligibility criteria for liabilities for the MREL should be closely aligned with those laid down in Regulation (EU) No 575/2013 for the TLAC minimum requirement, in line with the complementary adjustments and requirements introduced in this Regulation. In particular, certain debt instruments with an embedded derivative component, such as certain structured notes, should be eligible to meet the MREL to the extent that they have a fixed principal amount repayable at maturity while only an additional return is linked to a derivative and depends on the performance of a reference asset. In view of their fixed principal amount, those instruments should be highly loss-absorbing and easily bail-inable in resolution.
- (8) The scope of liabilities to meet the MREL includes, in principle, all liabilities resulting from claims arising from unsecured non-preferred creditors (non-subordinated liabilities) unless they do not meet specific eligibility criteria provided in this Regulation. To enhance the resolvability of institutions through an effective use of the bail-in tool, the Board should be able to require that the firm-specific requirement is met with subordinated liabilities, in particular when there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed their potential losses in insolvency. The requirement to meet MREL with subordinated liabilities should be requested only for a level necessary to prevent that losses of creditors in resolution are above losses that they would otherwise incur under insolvency. Any subordination of debt instruments requested by the Board for the MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation (EU) No 575/2013 as permitted by the TLAC standard.
- (9) The MREL should allow institutions to absorb losses expected in resolution and recapitalise the institution post-resolution. The Board should, on the basis of the resolution strategy chosen by them, duly justify the imposed level of the MREL, in particular as regards the need and the level of the requirement referred to in Article 104a of Directive 2013/36/EU in the recapitalisation amount. As such, that level should be composed of the sum of the amount of losses expected in resolution that correspond to the institution's own funds requirements and the recapitalisation amount

that allows the institution post-resolution to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The MREL should be expressed as a percentage of the total risk exposure and leverage ratio measures, and institutions should meet the levels resulting from the two measurements simultaneously. The Board should be able to adjust the recapitalisation amounts in cases duly justified to adequately reflect also increased risks that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile and therefore in such limited circumstances require that the recapitalisation amounts referred to in the first subparagraph of Article 12d(3) and (4) are exceeded.

- (10) To enhance their resolvability, the Board should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement provided in Regulation (EU) No 575/2013. That institution-specific MREL may only be imposed where the TLAC minimum requirement is not sufficient to absorb losses and recapitalise a G-SII under the chosen resolution strategy.
- (11) When setting the level of MREL, the Board should consider the degree of systemic relevance of an institution and the potential adverse impact of its failure on the financial stability. The Board should take into account the need for a level playing field between G-SIIs and other comparable institutions with systemic relevance within the participating Member States. Thus MREL of institutions that are not identified as G-SIIs but the systemic relevance within participating Member States of which is comparable to the systemic relevance of G-SIIs should not diverge disproportionately from the level and composition of MREL generally set for G-SIIs..
- (12) Similarly to powers conferred to competent authorities by Directive 2013/36/EU, the Board should be allowed to impose higher levels of MREL while addressing in a more flexible manner any breaches of those levels, in particular by alleviating the automatic effects of those breaches in the form of limitations to the Maximum Distributable Amounts ('MDAs'). The Board should be able to give guidance to institutions to meet additional amounts to cover losses in resolution that are above the level of the own funds requirements laid down in Regulation (EU) No 575/2013 and Directive 2013/36/EU, and/or to ensure sufficient market confidence in the institution post-resolution. To ensure consistency Directive 2013/36/EU, guidance to cover additional losses may only be given where the 'capital guidance' has been requested by the competent supervisory authorities in accordance with Directive 2013/36/EU and should not exceed the level requested in that guidance. For the recapitalisation amount, the level requested in the guidance to ensure market confidence should enable the institution to continue to meet the conditions for authorisation for an appropriate period of time including by allowing the institution to cover the costs related to the restructuring of its activities following resolution. The market confidence buffer should not exceed the combined capital buffer requirement under Directive 2013/36/EU unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance, the Board should be able to require that the amount of the MREL be increased to cover the amount of the guidance. For the purposes of considering whether there is a consistent failure, the Board should take into account the entity's reporting on the MREL as required by Directive 2014/59/EU.

- (13) In line with Regulation No 575/2013, institutions that qualify as resolution entities should only be subject to the MREL at the consolidated resolution group level. That means that resolution entities should be obliged to issue eligible instruments and items to meet the MREL to external third party creditors that would be bailed-in should the resolution entity enter resolution.
- (14) Institutions that are not resolution entities should comply with the firm-specific requirement at individual level. Loss absorption and recapitalisation needs of those institutions should be generally provided by their respective resolution entities through the acquisition by resolution entities of eligible liabilities issued by those institutions and their write-down or conversion into instruments of ownership when those institutions are no longer viable. As such, the MREL applicable to institutions that are not resolution entities should be applied together and consistently with the requirements applicable to resolution entities. That should allow the Board to resolve a resolution group without placing certain of its subsidiary entities in resolution, thus avoiding potentially disruptive effects on the market. Subject to the agreement of the Board, it should be possible to replace the issuance of eligible liabilities to resolution entities with collateralised guarantees between the resolution entity and its subsidiaries, that can be triggered when the timing conditions equivalent to those allowing the write down or conversion of eligible liabilities are met. The collateral backing the guarantee should be highly liquid and have minimal market and credit risk. The Board should also be able to fully waive the application of the MREL applicable to institutions that are not resolution entities if both the resolution entity and its subsidiaries are established in the same participating Member State.
- (15) The application of the MREL to institutions that are not resolution entities should comply with the chosen resolution strategy. In particular, it should not change the ownership relationship between the institutions and its resolution group after those institutions have been recapitalised.
- (16) Any breaches of the TLAC minimum requirement and of the MREL should be appropriately addressed and remedied by competent authorities, resolution authorities and the Board. Given that a breach of those requirements could constitute an impediment to institution or group resolvability, the existing procedures to remove impediments to resolvability should be shortened to address any breaches of those requirements expediently. The Board should also be able to require institutions to modify the maturity profiles of eligible instruments and items and to prepare and implement plans to restore the level of those requirements.
- (17) This Regulation complies with the fundamental rights and observes the principles recognised in particular by the Charter, notably the rights to property and the freedom to conduct a business, and has to be applied in accordance with those rights and principles.
- (18) Since the objectives of this Regulation, namely to lay down uniform rules for the purposes of Union recovery and resolution framework, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt this Regulation, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

- (19) To allow for an appropriate time for the application of this Regulation, this Regulation should be applied [18 months from its entry into force].

HAVE ADOPTED THIS REGULATION:

Article 1

1. Amendments to Regulation (EU) No 806/2014 Article 3(1) is amended as follows:

(a) the following points are inserted:

"(24a) 'resolution entity' means an entity established in the Union identified by the Board in accordance with Article 8 as an entity in respect of which the resolution plan provides for resolution action;

(24b) 'resolution group' means a group of entities identified by the Board in accordance with Article 8, which consists of resolution entity and its subsidiaries that are not themselves resolution entities and are not subsidiaries of another resolution entity;

(b) in point (49), 'eligible liabilities' are replaced with 'bail-inable liabilities'.

the following point (49a) is inserted:

'(49a) 'eligible liabilities' means bail-inable liabilities that fulfil the conditions of Article 12c or point (a) of Article 12h(3).".

2. In Article 7, point (d) of paragraph (3) is replaced by the following:

'(d) setting the level of minimum requirement for own funds and eligible liabilities, in accordance with Articles 12 to 12k'.

3. Article 8 is amended as follows:

(a) paragraph 5 is replaced by the following:

'5. The resolution plan shall set out options for applying the resolution tools and exercising resolution powers referred to in this Regulation to the entities referred to in paragraph 1.'

(b) The first and second subparagraphs of paragraph (6) are replaced by the following:

'The resolution plan shall provide for the resolution actions which the Board may take where an entity referred to in paragraph 1 meets the conditions for resolution.

The information referred to in point (a) of paragraph 9 shall be disclosed to the entity concerned.'

(c) point (p) of paragraph(9) is replaced by the following:

'(p) the minimum requirement for own funds and subordinated instruments pursuant to Article 12c, and a deadline to reach that level, where applicable;';

(d) paragraph (10) is replaced by the following:

'10 Group resolution plans shall include a plan for the resolution of the group referred to in paragraph 1, headed by the Union parent undertaking established in a participating Member State and shall identify measures for the resolution of:

- (a) the Union parent undertaking;
- (b) the subsidiaries that are part of the group and that are established in the Union;
- (c) the entities referred to in Article 2(b); and
- (d) subject to Article 33, the subsidiaries that are part of the group and that are established outside the Union.

In accordance with the measures referred to in the first subparagraph, the resolution plan shall identify the following for each group:

- (a) the resolution entities;
- (b) the resolution groups.';
- (e) points (a) and (b) of paragraph (11) are replaced by the following:

"(a) set out the resolution actions foreseen to be taken in relation to a resolution entity in the scenarios provided for in paragraph 6 and the implications of such actions in respect of other group entities, the parent undertaking and subsidiary institutions referred to in paragraph 1;

(a1) where a group referred to in paragraph 1 comprises more than one resolution group, set out resolution actions foreseen in relation to the resolution entities of each resolution group and the implications of such actions on both of the following:

 - (i) other group entities that belong to the same resolution group;
 - (ii) other resolution groups;

(b) examine the extent to which the resolution tools and powers could be applied to resolution entities established in the Union and exercised in a coordinated manner, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of group entities, or particular group entities or resolution groups, and identify any potential impediments to a coordinated resolution;"

4. Article 10 is amended as follows:

(a) paragraph (4) is replaced by the following:

'4. A group shall be deemed to be resolvable if it is feasible and credible for the Board to either liquidate group entities under normal insolvency proceedings or to resolve them by applying resolution tools and exercising resolution powers in relation to resolution entities while avoiding, to the maximum extent possible, any significant adverse consequences for financial systems, including circumstances of broader financial instability or system wide events, of the Member States in which group entities are established, or other Member States or the Union and with a view to ensuring the continuity of critical functions carried out by those group entities, where they can be easily separated in a timely manner or by other means.

The Board shall notify EBA in a timely manner where a group is deemed not to be resolvable.

Where a group is composed of more than one resolution group, the Board shall assess the resolvability of each resolution group in accordance with this Article.

The assessment referred to in the first subparagraph shall be performed in addition to the assessment of the resolvability of the entire group'.

(b) The following subparagraph is added to paragraph (7):

'Where the impediment to resolvability of the entity or group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Board shall notify its assessment of that impediment to the Union parent undertaking.'

(c) The following subparagraph is added to paragraph (9):

'Where an impediment to resolvability is due to a a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall propose to the Board possible measures to address or remove the impediment identified in accordance with the first subparagraph within two weeks of the date of receipt of a notification made in accordance with paragraph 7. '

(d) In points (i) and (j) of paragraph (11), 'Article 12' is replaced by 'Articles 12g and Article 12h'.

(e) in paragraph (11) the following points are added:

'(k) require an entity to submit a plan to restore compliance with Articles 12g and 12h, and the requirement referred to in Article 128(6) of Directive 2013/36/EU;

(l) require an entity to change the maturity profile of items referred to in Article 12c and points (a) and (b) of Article 12h(3) to ensure continuous compliance with Article 12g and Article 12h.'

5. Article 12 of Regulation (EU) No 806/2014 is replaced by the following Articles:

"Article 12

Determination of the minimum requirement for own funds and eligible liabilities

1. The Board shall, after consulting competent authorities, including the ECB, determine the minimum requirement for own funds and eligible liabilities as referred to in Articles 12a to 12i, subject to write-down and conversion powers, which the entities and groups referred to in Article 7(2), and the entities and groups referred to in Article 7(4)(b) and (5) when the conditions for the application of these paragraphs are met, are required to meet at all times.
2. When drafting resolution plans in accordance with Article 9, national resolution authorities shall, after consulting competent authorities, determine the minimum requirement for own funds and eligible liabilities, as referred to in Articles 12a to 12i, subject to write-down and conversion powers, which the entities referred to in Article 7(3) are required to meet at all times. In that regard the procedure established in Article 31 shall apply.
3. The Board shall take any determination referred to in paragraph 1, in parallel with the development and maintenance of the resolution plans pursuant to Article 8.
4. The Board shall address its determination to the national resolution authorities. The national resolution authorities shall implement the instructions of the Board in accordance with Article 29. The Board shall require that the national resolution authorities verify and ensure that institutions and parent undertakings maintain the minimum requirement for own funds and eligible liabilities laid down in paragraph 1 of this Article.
5. The Board shall inform the ECB and EBA of the minimum requirement for own funds and eligible liabilities that it has determined for each institution and parent undertaking under paragraph 1.
6. In order to ensure effective and consistent application of this Article, the Board shall issue guidelines and address instructions to national resolution authorities relating to specific entities or groups.

Article 12a

Application and calculation of the minimum requirement for own funds and eligible liabilities

1. The Board and national resolution authorities shall ensure that entities referred to in Article 12(1) and 12(2) meet, at all times, a minimum requirement for own funds and eligible liabilities in accordance with Article 12a to 12i.
2. This requirement referred to in paragraph 1 shall be calculated in accordance with, Article 12d(3) or (4) as applicable, as the amount of own funds and eligible liabilities and expressed as a percentage of:
 - (a) the total risk exposure amount of the relevant entity referred to in paragraph 1 calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013; and

- (b) the leverage ratio exposure measure of the relevant entity referred to in paragraph 1 calculated in accordance with Article 429(3) of Regulation (EU) No 575/2013.

Article 12b

Exemption from the minimum requirement for own funds and eligible liabilities

1. Notwithstanding Article 12a, the Board shall exempt from the requirement referred to in article 12a(1) mortgage credit institutions financed by covered bonds which, according to national law are not allowed to receive deposits where all of the following conditions are met:
 - (a) those institutions will be wound-up through national insolvency procedures, or other types of procedure implemented in accordance with Article 38, 40 or 42 of Directive 2014/59/EU laid down, provided for those institutions; and
 - (b) such national insolvency procedures, or other types of procedure, will ensure that creditors of those institutions, including holders of covered bonds where relevant, will bear losses in a way that meets the resolution objectives.
2. Institutions exempted from the requirement laid down in Article 12(1) shall not be part of the consolidation referred to in Article 12g(1).

Article 12c

Eligible liabilities for resolution entities

1. Eligible liabilities shall be included in the amount of own funds and eligible liabilities of resolution entities only where they satisfy the conditions referred to in 72a(2), except for point (d) of Article 72b(2) of Regulation (EU) No 575/2013.
2. By way of derogation from point (l) of Article 72a(2) of Regulation (EU) No 575/2013, liabilities that arise from debt instruments with derivative features, such as structured notes, shall be included in the amount of own funds and eligible liabilities only where all of the following conditions are met:
 - (a) a given amount of the liability arising from the debt instrument is known in advance at the time of issuance, is fixed and not affected by a derivative feature;
 - (b) the debt instrument, including its derivative feature, is not subject to any netting agreement and its valuation is not subject to Article 49(3);
 - (c) The liability referred to in the first subparagraph shall only be included in the amount of own funds and eligible liabilities for the part that corresponds with the amount referred to in point (a) of the first subparagraph.

3. The Board, on its own initiative after consulting the national resolution authority or upon proposal by a national resolution authority, may decide that the requirement referred to in Article 12g is met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives.

The Board's decision under this paragraph shall contain the reasons for that decision on the basis of the following elements:

- (a) non-subordinated liabilities referred to in the paragraph (1) and (2) have the same priority ranking in the national insolvency hierarchy as certain liabilities excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3) of Directive 2014/59/EU ;
- (b) as a result of a planned application of write-down and conversion powers to non-subordinated liabilities that are not excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3) of Directive 2014/59/EU, creditors of claims arising from those liabilities incur greater losses than they would incur in a winding up under normal insolvency proceedings;
- (c) the amount of subordinated liabilities shall not exceed the amount necessary to ensure that creditors referred to in point (b) shall not incur losses above the level of losses that they would otherwise have incurred in a winding up under normal insolvency proceedings.

Article 12d

Determination of the minimum requirement for own funds and eligible liabilities

1. The requirement referred to in Article 12a(1) of each entity shall be determined by the Board resolution authority, after having consulted the competent authorities, including the ECB, on the basis of the following criteria:
- (a) the need to ensure that the resolution entity can be resolved by the application of the resolution tools including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;
 - (b) the need to ensure, in appropriate cases, that the resolution entity and their subsidiaries that institutions, but not resolution entities have sufficient eligible liabilities to ensure that, if the bail-in tool or write down and conversion powers were to be applied to them, respectively, losses could be absorbed and the capital requirements or, as applicable, the leverage ratio in the form of Common Equity Tier 1 of the relevant entities can be restored to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry on the activities for which they are authorised under Directive 2013/36/EU or Directive 2014/65/EU;

- (c) the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in pursuant to Article 27(5) or might be transferred to a recipient in full under a partial transfer, the resolution entity has sufficient other eligible liabilities to ensure that losses could be absorbed and the capital requirements or, as applicable, the leverage ratio in the form of Common Equity Tier 1 of the resolution entity can be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to carry on the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;
 - (d) the size, the business model, the funding model and the risk profile of the entity;
 - (e) the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with Article 79;
 - (f) the extent to which the failure of the relevant entity would have an adverse effect on financial stability, including, due to the interconnectedness of the entity with other institutions or entities or with the rest of the financial system through contagion to other institutions or entities.
2. Where the resolution plan provides that resolution action is to be taken or write-down and conversion powers are to be applied, the requirement referred to in Article 12a(1) shall equal an amount sufficient to ensure that:
- (a) the losses that might be expected to be incurred by the entity are fully absorbed ('loss absorption');
 - (b) the entity or its subsidiaries that are institutions, but not resolution entities are recapitalised to a level necessary to enable them to continue to comply with the conditions for authorisation and carry out the activities for which they are authorised under Directive 2013/36/EU, Directive 2014/65/EU or equivalent legislation ('recapitalisation');
- Where the resolution plan provides that the entity shall be wound up under normal insolvency proceedings, the requirement referred to in Article 12a(1) for that entity shall not exceed an amount sufficient to absorb losses in accordance with point (a) of the first subparagraph.
3. Without prejudice to the last subparagraph, for resolution entities, the amount referred to in paragraph 2 shall not exceed the greater of the following:
- (a) the sum of:
 - (i) the amount of losses that may need to be absorbed in resolution that corresponds to the requirements referred to in Article 92(1)(a),(b) and (c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the resolution entity at sub-consolidated resolution group level,

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore its total capital ratio referred in Article 92(1)(c) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU at resolution group sub-consolidated level in accordance with the resolution actions foreseen in the resolution plan;

(b) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the resolution entity's leverage ratio requirement referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level; and

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level in accordance with the resolution actions foreseen in the resolution plan;

For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').

For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (b) divided by the leverage ratio exposure measure.

The Board shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile.

4. Without prejudice to the last subparagraph, for entities that are not themselves resolution entities, the amount referred to in paragraph 2 shall not exceed any of the following:

(a) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the requirements referred to in Article 92(1)(a), (b) and (c) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the entity, and

(ii) a recapitalisation amount that allows the entity to restore its total capital ratio referred in Article 92(1)(c) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU in accordance with the resolution plan; or

(b) the sum of:

(i) the amount of losses to be absorbed in resolution that corresponds to the entity's leverage ratio requirement referred to in Article 92(1)(d) of Regulation (EU) No 575/2013; and

(ii) a recapitalisation amount that allows the entity to restore its leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 in accordance with the resolution plan;

For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').

For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) divided by the leverage ratio exposure measure.

The Board shall set the recapitalisation amounts referred to in this paragraph in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect the recapitalisation needs arising from the entity's business model, funding profile and overall risk profile.

5. Where the Board expects that certain classes of eligible liabilities might be excluded from bail-in under Article 27(5) or might be transferred to a recipient in full under a partial transfer, the requirement referred to in Article 12a(1) shall not exceed an amount sufficient to:

(a) cover the amount of excluded liabilities identified in accordance with Article 27(5);

(b) ensure that the conditions referred to paragraph 2 are fulfilled.

6. The Board's decision to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 5, in particular as regards the need and the level of the requirement referred to in Article 104a of Directive 2013/36/EU in the recapitalisation amount.

7. For the purposes of paragraphs 3 and 4, capital requirements shall be interpreted in accordance with the competent authority's application of transitional provisions laid down in Chapters 1, 2 and 4 of Title I of Part Ten of Regulation (EU) No 575/2013 and in the provisions of national legislation exercising the options granted to the competent authorities by that Regulation.

8. The Board may reduce the requirement referred to in Article 12a(1) to take account of the amount which a deposit guarantee scheme is expected to contribute to the financing of the preferred resolution strategy in accordance with Article 109 of Directive 2014/59/EU.

The size of any such reduction shall be based on a credible assessment of the potential contribution from the deposit guarantee scheme, and shall at least:

(a) be less than a prudent estimate of the potential losses which the deposit guarantee scheme would have had to bear, had the institution been wound up under normal

insolvency proceedings, taking into account the priority ranking of the deposit guarantee scheme pursuant to Article 108 of Directive 2014/59/EU;

(b) be less than the limit on deposit guarantee scheme contributions set out in the second subparagraph of Article 109(5) of Directive 2014/59/EU;

(c) take account of the overall risk of exhausting the available financial means of the deposit guarantee scheme due to contributing to multiple bank failures or resolutions; and

(d) be consistent with any other relevant provisions in national law and the duties and responsibilities of the authority responsible for the deposit guarantee scheme.

The Board shall, after consulting the authority responsible for the deposit guarantee scheme, document its approach as regards the assessment of the overall risk of exhausting the available financial means of the deposit guarantee scheme and apply reductions in accordance with subparagraph 1, provided that that risk is not excessive.

Article 12e

Determination of the requirement for entities that are G-SIIs

1. The minimum requirement for own funds and eligible liabilities of a resolution entity that is a G-SII or part of a G-SII shall consist of:
 - (a) the requirement referred to in Article 92a of Regulation (EU) No 575/2013, and
 - (b) any additional requirement for own funds and eligible liabilities determined by the resolution authority specific to the entity in accordance with paragraph 2, which shall be met with liabilities that meet the conditions of Article 12c.
2. The Board may impose an additional requirement for own funds and eligible liabilities referred to in point (b) of paragraph 1 only :
 - (a) where the requirement referred to in point (a) of paragraph 1 is not sufficient to fulfil the conditions set out in Article 12d; and
 - (b) to an extent that the amount of required own funds and eligible liabilities does not exceed a level that is necessary to fulfil the conditions of Article 12d.
3. The decision of the Board to impose an additional requirement of own funds and eligible liabilities under point (b) of paragraph 1 shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 2.

Article 12f

Guidance for the minimum requirement for own funds and eligible liabilities

1. The Board may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 12c and Article 12h(3) in excess of the levels set out in Article 12d and Article 12e for amounts for the following purposes:

- (a) to cover potential additional losses of the entity to those covered in Article 12d, and/or
- (b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is sustained through capital instruments in addition to the requirement in point (b) of Article 12d(2) ('market confidence buffer').

The guidance shall be only provided and calculated with respect to the requirement referred to in Article 12a(1) calculated in accordance with point (a) of Article 12a(2).

2. The amount of the guidance given in accordance with point (a) of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.

The amount of guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.

The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.

3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the Board may require that the amount of the requirement referred to in Article 12d(2) be increased to cover the guidance given pursuant to this Article.
4. An entity that fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.

Article 12g

Application of the minimum requirement for own funds and eligible liabilities to resolution entities

1. Resolution entities shall comply with the requirements laid down in 12d to Article 12f on a consolidated basis at the level of the resolution group.
2. The requirement referred to in Article 12a(1) of a resolution entity established in a participating Member State at the consolidated resolution group level shall be determined by the Board, after consulting the group-level resolution authority and

the consolidating supervisor, on the basis of the requirements laid down in Articles 12d to 12f and of whether the third-country subsidiaries of the group are to be resolved separately according to the resolution plan.

Article 12h

Application of the requirement to entities that are not themselves resolution entities

1. Institutions that are subsidiaries of a resolution entity and are not themselves resolution entities shall comply with the requirements laid down in Articles 12d to 12f on an individual basis.

The Board may, after consulting a competent authorities and the ECB, decide to apply the requirement laid down in this Article to an entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU that is a subsidiary of a resolution entity and is not itself a resolution entity.

2. The requirement referred to in Article 12a(1) of entities referred to in the first paragraph shall be subject to the following conditions:

- (a) the resolution entity complies with the consolidated requirement referred to in Article 12g;
- (b) the sum of all requirements to be applied to the resolution group's subsidiaries shall be covered by and not exceed the consolidated requirement referred to in Article 12g unless this is only due to the effects of the consolidation at the level of the resolution group in accordance with Article 12g(1);
- (c) it shall fulfil the eligibility criteria provided in paragraph 3;
- (d) it shall not exceed the contribution of the subsidiary to the consolidated requirement referred to in 12g(1).

3. The requirement referred to in Article 12a(1) shall be met with one or more of the following:

- (a) liabilities that:
 - (i) are issued to and bought by the resolution entity;
 - (ii) fulfil the eligibility criteria referred to in Article 72a, except for point (b) of Article 72b(2) of Regulation (EU) No 575/2013;
 - (iii) are ranking in normal insolvency proceedings below liabilities other than those eligible for own funds requirements that are issued to and bought by other entities than the resolution entity;
 - (iv) are subject to the power of write down or conversion in accordance with Articles 21 that is consistent with the resolution strategy of the resolution group, notably by not affecting the control of the subsidiary by the resolution entity.

- (b) eligible own funds instruments issued to and bought by other entities than the resolution entity when the exercise of the power of write down or conversion in accordance with Article 21 does not affect the control of the subsidiary by the resolution entity.
4. Subject to the agreement of the Board, the requirement referred to in Article 12a(1) may be met with a guarantee of the resolution entity granted to its subsidiary, which fulfils the following conditions:
- (a) the guarantee is provided for at least the equivalent amount as the amount of the requirement for which it substitutes;
 - (b) the guarantee is triggered when the subsidiary is unable to pay its debts or other liabilities as they fall due or a determination has been made in accordance with Article 21(3) in respect of the subsidiary, whichever is the earliest;
 - (c) the guarantee is collateralised through a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC for at least 50 per cent of its amount;
 - (d) the guarantee and financial collateral arrangement are governed by the laws of the Member State where the subsidiary is established unless otherwise specified by the Board;
 - (e) the collateral backing the guarantee fulfils the requirements of Article 197 of Regulation (EU) No 575/2013, which, following appropriately conservative haircuts, is sufficient to fully cover the amount guaranteed;
 - (f) the collateral backing the guarantee is unencumbered and in particular is not used as collateral to back any other guarantee;
 - (g) the collateral has an effective maturity that fulfils the same maturity condition as that referred to in Article 72c(1) of Regulation (EU) No 575/2013; and
 - (h) there are no legal, regulatory or operational barriers to the transfer of the collateral from the resolution entity to the relevant subsidiary, including when resolution action is taken in respect of the resolution entity.

Article 12i

Waiver of the minimum requirement for own funds and eligible liabilities applied to entities that are not themselves resolution entities

The Board may fully waive the application of Article 12h for a subsidiary of a resolution entity established in a participating Member State where:

- (a) both the subsidiary and the resolution entity are established the same participating Member State;

- (b) the resolution entity complies with the requirement referred to in Article 12g;
- (c) there is no current or foreseen material, practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular when resolution action is taken in respect of the resolution entity.

Article 12g
Breaches of the requirement

1. Any breach of the minimum requirement for own funds and eligible liabilities by an entity shall be addressed by the Board and other relevant authorities through at least one of the following means:
 - (a) powers to address or remove impediments to resolvability in accordance with Article 10;
 - (b) measures referred to in Article 104 of Directive 2013/36/EC;
 - (c) early intervention measures in accordance with Article 13;
 - (d) administrative penalties and other administrative measures in accordance with Article 110 and Article 111 of Directive 2014/59/EU".
2. The Board, resolution authorities and competent authorities of participating Member States shall consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1."
6. Article 16 is amended as follows:
 - (a) paragraph (2) is replaced by the following:

'2.The Board shall take a resolution action in relation to a parent undertaking referred to in point (b) of Article 2 where the conditions laid down in Article 18(1) are met.';
 - (b) paragraph (3) is replaced with the following:

'3. Notwithstanding the fact that a parent undertaking does not meet the conditions established in Article 18(1), the Board may decide on resolution action with regard to that parent undertaking when it is a resolution entity and when one or more of its subsidiaries which are institutions and not resolution entities meet the conditions established in Article 18(1) and their assets and liabilities are such that their failure threatens an institution or the group as a whole and resolution action with regard to that parent undertaking is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the group as a whole.'.
7. 'Relevant capital instruments' in point (b) of Article 18(1) is replaced by 'relevant capital instruments and eligible liabilities'.

8. Point (c) of Article 20(5) is replaced by the following:

'(c) when the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21(7) is applied, to inform the decision on the extent of the cancellation or dilution of instruments of ownership, and the extent of the write-down or conversion of relevant capital instruments and eligible liabilities;'

9. Article 21 is amended as follows:

(a) the title is replaced by the following:

'Write-down and conversion of capital instruments and eligible liabilities'

(b) 'capital instruments' in the first sentence of paragraph (1) is replaced by 'capital instruments and eligible liabilities'

(c) 'capital instruments' in point (b) of paragraph (1) is replaced by 'capital instruments and eligible liabilities';

(d) 'capital instruments' in point (b) of paragraph (3) is replaced by 'capital instruments and eligible liabilities';

(e) 'capital instruments' in the second subparagraph of paragraph (8) is replaced by 'capital instruments and eligible liabilities';

(f) paragraph (7) is replaced by the following:

'7. If one or more of the conditions referred to in paragraph 1 are met, the Board, acting under the procedure laid down in Article 18, shall determine whether the powers to write down or convert relevant capital instruments and eligible liabilities are to be exercised independently or, in accordance with the procedure under Article 18, in combination with a resolution action.

The power to write down or convert eligible liabilities independently of resolution action may be exercised only in relation to eligible liabilities that meet the conditions referred to in point (a) of Article 12(3), except the condition related to the remaining maturity of liabilities.'

(g) the following point is added in paragraph (10):

'(d) the principal amount of eligible liabilities referred to in paragraph 7 is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 14 or to the extent of the capacity of the relevant eligible liabilities, whichever is lower.'

Article 6 *Entry into force*

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

2. This Regulation shall apply within 18 months from the date of its entry into force.

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

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*