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WORKING PAPER

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From:	Presidency
To:	Delegations
Subject:	Article 55 BRRD 'Contractual recognition of bail-in'

Delegations will find attached Presidency non-paper for the 6/7 February 2017.

Article 55 BRRD
'Contractual recognition of bail-in'

At the WPFS (RRM) held on 12 & 13 January 2017, Commission's proposed amendments to Article 55 BRRD (Annex II) where discussed.

The main issues highlighted which were also in line with the comments to Questionnaire 2 were the following:

i) Conditions (a) to (c) in sub-article (2) cannot be cumulative.

ii) Word 'impracticable' needs to be clarified since ambiguous.

iii) Determination of what is 'impracticable'. Should resolution authority grant waivers on a case by case basis or should responsibility lie with the institution?

Following receipt of comments by Member States on the articles in the BRRD being amended by the Commission proposal, **a number of amendments to Recital 18 and Article 55 BRRD have been proposed[1] which include the following**:

1) Cumulativeness of conditions (a) to (c) in Article 55(2) BRRD

a) A number of Member States agreed that conditions (a) to (c) in Article 55(2) BRRD cannot be cumulative since conditions (a) and (b) cannot be met simultaneously.

2) Ambiguity of term 'impracticable'

a) A couple of Member States proposed amendments to Recital 18 where one of them included examples of impracticability.

b) A Member State proposed removing the concepts of 'legally, contractually or economically' impracticable.

c) A Member State propose replacing the word 'impracticable' with 'impossible'.

3) Burden of proof

a) A Member State proposed the removal of the waiver in Article 55(2) BRRD since it deems that an institution and not the resolution entity should be responsible to determine whether it is impracticable to include the contractual recognition language.

[1] Vide Annex III which reflects Member States' comments as at 31 January 2017.

b) Another Member State noted that the burden of proof in Article 55(2) BRRD should lay more on the institution who should provide the necessary input for justification purposes.

4) Resolution Stay

A Member State proposed an extension of contractual recognition of bail-in in Article 55 BRRD to resolution stay[2][3].

5) Framing of the waiver

a) A Member State proposed limiting the waiver to non-GSIIs.

b) A Member State proposed that the resolvability criterion should be further operationalized, for example by limiting waivers to a certain small percentage of balance sheet.

6) Clarifications

a) A Member State proposed clarifying 'unsecured liabilities'.

b) A Member State proposed replacing 'permissible liabilities' with 'eligible liabilities'.

7) Relation with MREL liabilities

a) A Member State proposed the deletion of the last sentence in the second paragraph to Article 55(2) BRRD, that the liabilities referred to in Article 55(2)(b) and (c) shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible liabilities.

b) A Member State proposed deleting the provision that *"The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities"*

Question:

Do any other Member States share any of the views indicated in points 2 to 7 above? Please advise which in order of preference.

[2] "Stay" is the power to temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers.

[3] Whilst the contractual recognition of the bail-in powers is already addressed in the BRRD, the Financial Stability Board (FSB) has led a separate initiative to require contractual recognition of stays imposed by resolution authorities.

ANNEX I

Article 55 'Contractual recognition of bail-in' BRRD

"1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that such liability is:

(a) not excluded under Article 44(2);

(b) not a deposit referred to in point (a) of Article 108;

(c) governed by the law of a third country; and

(d) issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.

The first subparagraph shall not apply where the resolution authority of a Member State determines that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country.

Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of such a term.

2. If an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions governing a relevant liability a term required in accordance paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.

3. EBA shall develop draft regulatory technical standards in order to further determine the list of liabilities to which the exclusion in paragraph 1 applies, and the contents of the term required in that paragraph, taking into account banks' different business models.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

ANNEX II

Commission's proposed text replacing current Article 55 BRRD

"1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement or instrument creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that that liability complies with all of the following conditions:

(a) the liability is not excluded under Article 44(2);

(b) the liability is not a deposit as referred to in point (a) of Article 108;

(c) the liability is governed by the law of a third country;

(d) the liability is issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.

2. The requirement referred to in paragraph 1 may not apply where the resolution authority of a Member State determines all of the following conditions are met:

(a) that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country;

(b) that it is legally, contractually or economically impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities;

(c) that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1).

The liabilities referred to in points (b) and (c) shall not include debt instruments which are unsecured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible liabilities.

The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities.

3. Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a

legal opinion relating to the legal enforceability and effectiveness of the contractual term referred to in paragraph 1.

4. Where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions governing a relevant liability a contractual term as required in accordance with paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.

5. EBA shall develop draft regulatory technical standards in order to further determine the list of liabilities to which the exclusion in paragraph 1 applies, and the contents of the contractual term required in that paragraph, taking into account institutions' different business models.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

6. EBA shall develop draft regulatory technical standards in order to specify the conditions under which it would be legally, contractually or economically impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to paragraph 1 in certain liabilities, and under which a waiver from the requirement referred to in paragraph 1 would not impede the resolvability of that institution or entity.

EBA shall submit those draft regulatory technical standards to the Commission.

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

ANNEX III

Comments to specific articles of the Commission Proposal for a Directive amending BRRD

(18) The requirement to include a contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should ensure that those liabilities can be bailed in in the event of resolution. Unless and until statutory recognition frameworks to enable effective cross-border resolution are adopted in all third country jurisdictions, contractual arrangements, when properly drafted and widely adopted, should offer a workable solution. Even with statutory recognition frameworks in place, contractual recognition arrangements should help to reinforce the legal certainty and predictability of cross-border recognition of resolution actions. There might be instances, however, where it is impracticable for institutions to include those contractual terms in agreements or instruments creating certain liabilities, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments. It is in particular impracticable for institutions to include in agreements or instruments creating liabilities contractual terms on the recognition of the effects of the bail-in tool, where those contractual terms are unlawful in the third countries concerned or where institutions do not have the bargaining power to impose those contractual terms. Resolution authorities should therefore be able to waive the application of the requirement to include those contractual terms where those contractual terms would entail disproportionate costs for institutions and the resulting liabilities would not provide significant loss absorbing and recapitalisation capacity in resolution. This waiver should however not be relied upon where a number of agreements or liabilities together collectively provide significant loss absorbing and recapitalisation capacity in resolution. In addition, to ensure that the resolvability of institutions is not affected, liabilities benefitting from waivers should not	**Drafting Suggestion 1:** **Recital 18 - either delete or change:** 18) The requirement to include a contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should ensure that those liabilities can be bailed in in the event of resolution. Unless and until statutory recognition frameworks to enable effective cross-border resolution are adopted in all third country jurisdictions, contractual arrangements, when properly drafted and widely adopted, should offer a workable solution. Even with statutory recognition frameworks in place, contractual recognition arrangements should help to reinforce the legal certainty and predictability of cross-border recognition of resolution actions. There might be instances, however, where it is impracticable for institutions to include those contractual terms in agreements or instruments creating certain liabilities~~, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments. It is in particular impracticable for institutions to include in agreements or instruments creating liabilities contractual terms on the recognition of the effects of the bail-in tool, where those contractual terms are unlawful in the third countries concerned or where institutions do not have the bargaining power to impose those contractual terms.~~ For example, under certain circumstances, it may be considered impracticable to include the contractual recognition language in liability contracts where: i) relevant third country authorities have informed and explained to the institution in writing the reasons why they will not allow it to include contractual recognition language in agreements or instruments creating liabilities governed by the law of that third country; ii) it is illegal in the third country for the institution to include contractual recognition language in agreements or instruments creating liabilities

be eligible for MREL.	**governed by the laws of that third country; iii) the creation of liabilities is governed by international protocols which the institution has in practice no power to amend; iv) contractual terms are imposed on the institution by virtue of its membership and participation terms in non-EU bodies, whose use is necessarily on standard terms for all members and impractical to amend bilaterally; or v) the liability which would be subject to the contractual recognition requirement is contingent on a breach of the contract. Institutions should provide regular updates to resolution and, where appropriate, competent authorities to keep them informed of progress towards implementing contractual recognition terms. Resolution and, where appropriate, competent authorities should retain the ability to challenge an institution's decision that it is impractical to include contractual recognition language in a liability and act to address any impediments to resolvability as a result of contractual recognition language not being included.** ~~**Resolution authorities should therefore be able to waive the application of the requirement to include those contractual terms where those contractual terms would entail disproportionate costs for institutions and the resulting liabilities would not provide significant loss absorbing and recapitalisation capacity in resolution. This waiver should however not be relied upon where a number of agreements or liabilities together collectively provide significant loss absorbing and recapitalisation capacity in resolution. In addition, to ensure that the resolvability of institutions is not affected, liabilities benefitting from waivers should not be eligible for MREL.**~~ **Explanation** Proposed giving examples of impracticability in Recital 18. This is a consequential amendment to the changes proposed to Article 55 below. **Drafting suggestion 2:** (18) The requirement to include a contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries should ensure that those liabilities can be bailed in in the event of resolution. Unless and until statutory recognition frameworks to enable effective cross-border resolution are adopted in all third country jurisdictions, contractual

	arrangements, when properly drafted and widely adopted, should offer a workable solution. Even with statutory recognition frameworks in place, contractual recognition arrangements can ~~should~~ help to reinforce the legal certainty and predictability of cross-border recognition of resolution actions. There might be instances, however, where it is impracticable for institutions to include those contractual recognition terms in agreements or instruments creating certain liabilities, in particular liabilities that are not excluded from the bail-in tool under Directive 2014/59/EU, covered deposits or own funds instruments. It is in particular impracticable for institutions to include in agreements or instruments creating liabilities contractual terms on the recognition of the effects of the bail-in tool, where those contractual terms are unlawful in the third countries concerned or where institutions do not have the bargaining power to impose those contractual terms. Resolution authorities should therefore be able to waive the application of the requirement to include those contractual recognition terms where those contractual terms would entail disproportionate costs for institutions and the resulting liabilities would not provide significant loss absorbing and recapitalisation capacity in resolution. This waiver should however not be relied upon where a number of agreements or liabilities together collectively provide significant loss absorbing and recapitalisation capacity in resolution. ~~In addition, to ensure that the resolvability of institutions is not affected, liabilities benefitting from waivers should not be eligible for MREL.~~ However, in line with an appropriate and proportionate approach to supervision and enforcement, this ground for not including the contractual recognition language may not be relied upon for a number of agreements or instruments where together they would collectively provide significant loss absorption value in a resolution.
24. Article 55 is replaced by the following:	
"Article 55 *Contractual recognition of bail-in*	**<u>Drafting Suggestion 1:</u>** *"Article55* *Contractual recognition of bail-in* ***<u>and resolution stay</u>*** **Explanation:**

	Bail-in clauses have an important role in ensuring cross-border effectiveness of resolution measures. This has high priority with FSB. Because of this, waivers, if at all, should only be possible under clear restricted conditions and if resolvability is not jeopardized. It is essential that, as proposed in the KOM draft, liabilities that are subject to waivers are excluded from MREL and that they have to fall into a different insolvency class than MREL in order to avoid "no creditor worse off" problems. If Art. 55 BRRD is reformed, it should at the occasion be extended to resolution stay. The subject of resolution stay clauses is adressed in the CCP resolution proposal (Art. 53 para 2); we strongly think it should be addressed in BRRD also.
1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement or instrument creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that that liability complies with all of the following conditions:	**Drafting Suggestion 1:** 1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual **recognition** term by which the creditor or party to the agreement or instrument creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that that liability complies with all of the following conditions:
(a) the liability is not excluded under Article 44(2);	
(b) the liability is not a deposit as referred to in point (a) of Article 108;	
(c) the liability is governed by the law of a third country;	

(d) the liability is issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.	**Drafting Suggestion 1:** (d) the liability is issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section. **Subparagraph 1 [, with the exception of letter (d),] is applicable, mutatis mutandis, to a provision by which the creditor or party to the agreement agrees to be bound by any action in respect of their assets, contracts, rights, obligations and liabilities taken by the resolution authority (resolution stay powers).** **The first and second subparagraph shall not apply where the resolution authority of a Member State determines that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers or resolution stay powers taken by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country.** **The first and second subparagraph shall further not apply to institutions or entities whose MREL requirement equals the loss absorbption amount.** **Explanation:** The regime concerning bail-in clauses should be extended to resolution stay clauses. Whether application should only be to new liabilities should be further discussed. Propose to separate the existing exception concerning third country law/binding agreement from the new waiver provision. For reasons of proportionality, banks that will go into insolvency proceedings should be totally exempt from Art. 55.
	Drafting Suggestion 1: **The requirements referred to in first subparagraph shall be proportionate to the risks being addressed in order to ensure the resolvability of the entities concerned.** **Explanation:** To pose the principles that the obligations to insert the clauses should be proportionnate to insure the resolvability of the institutions.

2. The requirement referred to in paragraph 1 may not apply where the resolution authority of a Member State determines all of the following conditions are met:	**Drafting Suggestion 1:** 2. The requirement referred to in paragraph 1 may not apply where **(a)** the resolution authority of a Member State determines ~~**all of the following conditions are met**~~: ~~**(a)**~~ that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country; **or** (b) it is ~~**legally, contractually or economically**~~ impracticable for **that** ~~**an**~~ institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities; ~~**(c) that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1).**~~ The liabilities referred to in points (b) ~~**and (c)**~~ shall not include debt instruments which are **not** ~~**un**~~secured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. **For the purposes of this sub-paragraph, a debt instrument shall not be considered a secured liability where, at the time it is created, it meets the requirements set out in either sub-paragraph (a) or (b) of Article 43(1) of Commission Delegated Regulation 2016/1075.** Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and ~~**permissible**~~ **eligible** liabilities. The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities. **Drafting Suggestion 2:** The Article should be amended to provide that firms must include the language unless impracticable **or** (not 'and') if the resolution authority has determined that bail-in is possible pursuant to the law of a third country or a binding agreement with it. The conditions should not be cumulative as this is disproportionate. The responsibility to determine whether it is impracticable to include the contractual recognition language should lie with the firm and

	not with the resolution authority. We do not believe that the resolution authority should be granting waivers. The waivers would create a disproportionate volume of work for the resolution authority. Nevertheless, the institution should provide regular updates to the relevant authority regarding progress towards implementing Article 55 and the authority should retain the ability to challenge decisions taken by the firm and, if appropriate, act to address any impediments to resolvability that arise as a result of contractual language not being included. We have proposed drafting in Recital 18 to this effect. The concepts of economically and contractually impracticable are ambiguous as currently presented and should be deleted. The Article should be amended to say that firms must include the language unless impracticable. We have proposed giving examples of impracticability in Recital 18. Further clarification on impracticability should be included in the new RTS referenced in paragraph 2(6). The proposal should clarify that the EBA technical standards referred to in paragraph 2 (5) are the standards already produced by the EBA. The proposal should also tighten the definitions used, in particular that of unsecured liabilities. The BRRD should refer to liabilities that are 'not secured' and define 'secured' as in the EBA Article 55 RTS. **Drafting Suggestion 3:** **2. Other than for global systemically important institutions (G-SIIs),** ~~T~~the requirement referred to in paragraph 1 may ~~not apply~~ **be waived** where the resolution authority of a Member State determines all of the following conditions are met: **Explanation:** Waivers should only be possible for non-G-SIIs. Waivers do seem an acceptable way of lessening the burden on banks that manifestly lack the market power to impose such conditions. G-SIIs, however, are themselves standard setters and should be required to include contractual recognition clauses. Otherwise, there will never be enough pressure to make bail-in-clauses an international standard. **Drafting Suggestion 4:** 2. The requirement referred to in paragraph 1 may not apply where the resolution authority of a Member State determines any~~all~~ of the following conditions are met:

	Explanation: Condition a and condition b can't be meet at a same time. **Suggestion 5:** The burden of proof lies with the resolution entity. It should lay more on the institution who should provide the necessary input to justify this.
(a) that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country;	**Vide drafting suggestion 1 next to sub-article 2** **Drafting Suggestion 2:** ~~(a) that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country;~~ **Explanation:** relocated
(b) that it is legally, contractually or economically impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities;	**Vide drafting suggestion 1 next to sub-article 2** **Drafting Suggestion 2:** (**~~a~~b**) that it is legally, contractually or economically ~~impracticable~~ **impossible** for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities **and liabilities have been demonstrated necessary for continuation of business concerned;** **Explanation:** Concept of "impracticability" is too wide; there should be a more specific definition in level 1 text.
(c) that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1).	**Vide drafting suggestion 1 next to sub-article 2** **Drafting Suggestion 2:** (**~~b~~c**) that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1) **the sum of liabilities subject to waivers shall not exceed ## % of balance sheet".** **Explanation:**

	Resolvability criterion should be further operationalized, for example of limiting waivers to certain small percentage of balance sheet. **Drafting Suggestion 3:** ~~(c) that a~~ The resolution authority shall ensure that a waiver from the requirement referred to in paragraph 1 for certain liabilities does not impede the resolvability of the institutions and entities referred to in points (b), (c) and (d) of Article 1(1). **Explanation:** Condition a and condition b can't be meet at a same time. Condition c is parallell to them.
The liabilities referred to in points (b) and (c) shall not include debt instruments which are unsecured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible liabilities.	**Vide drafting suggestion 1 next to sub-article 2** Drafting Suggestion 2: The liabilities referred to in subparagraph 1 in points (b) and (c) shall not include debt instruments which are unsecured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible eligible liabilities Explanation: Unclear what "permissible liabilities" refers to. We assume this should read "eligible liabilities", and as such that this is a drafting error. **Drafting Suggestion 3:** The liabilities referred to in points (b) and (c) shall not include debt instruments which are unsecured liabilities, Additional Tier 1 instruments, and Tier 2 instruments. ~~Moreover, they shall be senior to the liabilities which count towards the minimum requirement for own funds and permissible liabilities.~~ Explanation: Surely this sentence should be deleted : - Liabilities that count towards MREL can be standard senior unsecured liabilities, and in most jurisdictions the next most senior class to these will be the deposits from natural persons and SME's in excess of the DGS coverage limit. Then liabilities such as trade finance and others that lie behind the problems that the new Article 55 is seeking to address do not rank, indeed cannot rank, at this level.

	- Such a clause would lead to an unlevel playing field between institutions of Member States for which the national law in insolvency ranking allows senior liabilities to be pari pasu with operationnal liabilities (they would not be able to use this exemption) and institutions with a HoldCo/OpCo scheme.
The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities.	**Vide drafting suggestion 1 next to sub-article 2** **Drafting Suggestion 2:** ~~The liabilities which, in accordance with points (b) and (c), do not include the contractual term referred to in paragraph 1 shall not be counted towards the minimum requirement for own funds and eligible liabilities.~~
3. Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of the contractual term referred to in paragraph 1.	
4. Where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions governing a relevant liability a contractual term as required in accordance with paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.	**Drafting Suggestion 1:** 4. ~~Where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to~~ **If a contract does not** include in the ~~contractual~~ provisions governing a relevant liability a contractual **recognition** term as required in accordance with paragraph 1, that ~~failure~~ shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability. **Explanation:** Technical remark
5. EBA shall develop draft regulatory technical standards in order to further determine the list of liabilities to which the exclusion in paragraph 1 applies, and the contents of the contractual term required in that paragraph, taking into account	

institutions' different business models.	
EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.	**Drafting Suggestion 1:** EBA shall submit those draft regulatory technical standards to the Commission ~~by 3 July 2015~~ **by [xx months after entry into force].** **Explanation:** Technical remark
Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.	
6. EBA shall develop draft regulatory technical standards in order to specify the conditions under which it would be legally, contractually or economically impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to paragraph 1 in certain liabilities, and under which a waiver from the requirement referred to in paragraph 1 would not impede the resolvability of that institution or entity.	**Drafting Suggestion 1:** EBA shall develop draft regulatory technical standards in order to specify the conditions under which it would be ~~**contractually or economically**~~ impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred to paragraph 1 in certain liabilities~~**, and under which a waiver from the requirement referred to in paragraph 1 would not impede the resolvability of that institution or entity**~~.
EBA shall submit those draft regulatory technical standards to the Commission.	
Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010. "	