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EBA/CP/2014/40

Consultation Paper

Draft Guidelines

On the treatment of shareholders in bail-in or the write-down and conversion of capital instruments

Contents

1. Responding to this Consultation	3
2. Executive Summary	4
3. Background and rationale	5
4. Draft EBA Guidelines on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments	6
5. Accompanying documents	13
5.1 Draft Cost- Benefit Analysis / Impact Assessment	13
5.2 Overview of questions	15

1. Responding to this Consultation

The EBA invites comments on all proposals put forward in this paper.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed / rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 06.02.2015. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

These Guidelines are part of a series of EBA regulatory mandates under the BRRD which aim to ensure that the bail-in power is an effective way of absorbing losses and recapitalising banks in resolution, and that resolution authorities and other stakeholders have a clear understanding of the terms on which it should be applied. Together with the draft Guidelines on treatment of liabilities in bail-in, the draft Guidelines on conversion rates in bail-in and the draft Technical Standards on valuation in resolution, they aim to clarify how valuation information should inform the determination of the terms of bail-in.

This set of Guidelines provide clarification of the circumstances which should guide the choice, when applying the bail-in tool or the write down or conversion of capital instruments power in Directive 2014/59/EU (the BRRD), between the following possible actions:

- (a) cancellation of existing shares or other instruments of ownership or transfer them to bailed-in creditors; and/or
- (b) dilution of existing shareholders and holders of other instruments of ownership as a result of the conversion of relevant capital instruments or eligible liabilities to equity

The BRRD requires that dilution may only be used when, according to the valuation, the institution under resolution has a positive net asset value, and that the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares and other instruments of ownership.

If the net asset value of the institution being resolved is negative or zero shares should instead be cancelled or transferred. Resolution authorities should not seek to impose losses on other creditors of the institution until shareholders have absorbed losses to the maximum possible extent.

A dilution of existing shareholders could be combined with a partial cancellation or partial transfer of shares, if appropriate to meet the resolution objectives.

In some circumstances, the power to writedown or convert capital instruments (in Article 59 of the BRRD) may be triggered without also triggering resolution. The extent of writedown or conversion must be the amount required to achieve resolution objectives. This amount may be zero, , for example, if Article 59 is triggered because extraordinary public financial support (including when a central bank provides emergency liquidity assistance on an indemnified basis, or guarantees newly issued liabilities) is provided to a well-capitalised institution which is not deemed failing or likely to fail according to Article 32 of the BRRD.

Where it is possible for resolution authorities to take more than one approach regarding cancellation or dilution of shares they should choose the option, or combination of options, which best achieves the resolution objectives in the BRRD. These guidelines provide a non-exhaustive list of examples of issues where the resolution authority might consider cancelling or transferring shares.

3. Background and rationale

Article 47 of Directive 2014/59/EU sets out how shareholders are to be treated when the resolution authority uses the bail-in tool, or writes down or converts capital instruments in accordance with Article 59. Article 47 requires the EBA to produce guidelines on the circumstances in which it would be appropriate to cancel, transfer or severely dilute existing shares, having regard to the valuation carried out in accordance with Article 36, the amount of any writedown or conversion of capital instruments, and the aggregate amount of bail-in required.

Shareholders sit at the bottom of the insolvency creditor hierarchy, and are therefore the first creditors to absorb losses on both a going-concern basis and in an insolvency. This position should be reflected in resolution, where shareholders should also be the first to absorb losses, and do so before more senior creditors.

There may be some circumstances where it would be appropriate for existing shares not to be cancelled or transferred in their entirety, but to instead be diluted through the conversion of other liabilities into shares. This would only be the case where shareholders would have retained some value in insolvency, meaning that to fully cancel their shares would be to breach the 'no creditor worse off' safeguard in Article 75.

Article 59 of Directive 2014/59/EU implements the requirement that all regulatory capital instruments (as defined in Directive 2013/36/EU and Regulation EU 575/2013) absorb losses when an institution reaches the point of non-viability. This is effected through the writedown and/or conversion of such instruments to equity.

4. Draft EBA Guidelines on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments

Status of these Guidelines

1. This document contains draft guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC as subsequently amended by Regulation (EU) No 1022/2013 (hereafter referred to as the 'EBA Regulation'). In accordance with Article 16(3) of the EBA Regulation, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set out the EBA's view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. The EBA therefore expects all competent authorities and financial institutions to whom guidelines are addressed to comply with guidelines. Competent authorities to whom guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting Requirements

3. According to Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by dd.mm.yyyy. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided at Section 5 to compliance@eba.europa.eu with the reference 'EBA/GL/2014/xx'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.
4. Notifications will be published on the EBA website, in line with Article 16(3).

Table of contents

Title I – Subject matter, scope and definitions	10
Title II – Guidelines on the Circumstances in which it is appropriate to cancel, transfer, or severely dilute shares or other instruments of ownership	13
Title III – Final Provisions and Implementation.....	19

Title I - Subject matter, scope and definitions

1. Subject matter

1.1. Pursuant to Article 47(6) of the BRRD, these Guidelines set out the circumstances in which it would be appropriate, when applying the bail-in tool in Article 43 or the write down or conversion of capital instruments in Article 59, to take one or both of the following actions:

(a) cancel existing shares or other instruments of ownership or transfer them to bailed-in creditors;

(b) dilute existing shareholders and holders of other instruments of ownership as a result of the conversion of:

(i) relevant capital instruments issued by the institution pursuant to the power referred to in Article 59(2); or

(ii) eligible liabilities into shares or other instruments of ownership issued by the institution under resolution pursuant to the power referred to in point (f) of Article 63(1).

Article 47(1) requires that action (b) may only be taken when, according to the valuation carried out according to Article 36, the institution under resolution has a positive net asset value, and that the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares and other instruments of ownership.

2. Definitions

In the context of this Guideline, the following definitions apply:

a) “cancellation” of shares means that shares are cancelled and the shareholders’ economic claims and other rights of ownership are completely erased on those shares.

b) “transfer” of shares means that shares or other instruments of ownership are transferred to creditors and the original shareholders’ future economic claims and other rights of ownership on those shares are erased.

c) “dilution” means that new shares or other instruments of ownership are issued and, as such, the existing shareholders’ future economic claims and other rights are proportionately reduced but are not necessarily erased. They may retain some economic and administrative (voting) ownership rights¹.

3. Scope and level of application

These Guidelines are addressed to resolution authorities when they are applying the bail-in tool or the power to write down or convert relevant capital instruments at the point of non-viability to an institution or to an entity referred to in BRRD Article 1(b),(c), or (d).

Title II – Circumstances in which it is appropriate to cancel, transfer, or severely dilute shares or other instruments of ownership

1. Circumstances related to the valuation of the firm’s assets and liabilities

1.1. Before applying the bail-in tool or the power to write down or convert capital instruments at the point of non-viability, a fair, prudent and realistic valuation of the assets and liabilities of the institution shall be made according to Article 36 of Directive 2014/59/EU.

1.2. This valuation (the ex ante valuation²) is intended to inform decisions to be taken by the resolution authority on the extent of cancellation or dilution of shares or other instruments of ownership and the extent of losses which should be recognised at the point of resolution.

1.3. An ex-post independent valuation must also be made according to Article 74(2) of Directive 2014/59/EU to determine whether the actual treatment that shareholders and creditors had received as a result of resolution is worse than that which they would have received had the firm entered normal insolvency proceedings (the ex post valuation³). An estimate of the treatment that each class of shareholders and creditors would have been expected to receive if the firm were wound up under normal insolvency proceedings must also be included alongside the ex ante valuation, as required by Article 36(8) of the BRRD (the ex ante insolvency valuation).

1.4. The appropriate treatment of shareholders and other instruments of ownership should be informed by the estimated net asset value of the institution according to the ex ante valuation and the ex ante insolvency valuation.

¹ Dilution may be combined with “cancellation” or “transfer” with the effect that some but not all shares are cancelled or transferred.

² See EBA CP/2014/38, where criteria for the methodology to be applied for this valuation are described in part III of the EBA draft RTS on valuation for the purposes of resolution

³ See EBA CP/2014/38, where criteria for the methodology to be applied for this valuation are described in the EBA draft RTS on valuation to determine difference in treatment following resolution

a. Cancellation or transfer

- 1.5. Resolution authorities should cancel or transfer in full all shares or other instruments of ownership when the net asset value of the institution is zero or negative according to both the ex ante and ex ante insolvency valuations.
- 1.6. Conversely, where the net asset value of the institution is positive according to both the ex ante and ex ante insolvency valuations, the extent of cancellation or transfer should be partial and ensure that shareholders retain at least the net asset value in the ex ante insolvency valuation.
- 1.7. If net asset value according to the ex ante valuation is zero or negative, it will be necessary to write down, at least partially, creditors more senior in insolvency to shares or other instruments of ownership. Writing down other creditors whilst shareholders retained some value would be inconsistent with both the sequence of write-down in Article 48 of Directive 2014/59/EU and the respect for the creditor hierarchy in insolvency required by the resolution principles of Article 34 of Directive 2014/59/EU.
- 1.8. If shares or other instruments of ownership have a positive value according to the ex ante valuation, but a zero value according to the ex ante insolvency valuation, resolution authorities may choose from a wider set of options consisting of: a) full cancellation or transfer; b) partial cancellation or transfer⁴; or, c) dilution. In this case, to ensure consistency with the creditor hierarchy, with the sequence of write-down in Article 48 and with the principles for resolution in Article 34, resolution authorities should carefully evaluate which option will best comply with the BRRD principles and safeguards and achieve the objectives of the resolution.
- 1.9. In taking resolution actions, resolution authorities should avoid taking a resolution action which they expect would result in shareholders incurring greater loss than they would have done in a winding up under normal insolvency proceedings⁵.

b. Severe dilution

- 1.10. If shares or other instruments of ownership are not cancelled or transferred in full, they must be severely diluted by the conversion of liabilities into equity.
- 1.11. For the purpose of these guidelines, severe dilution is taken to mean that both shareholders' percentage of ownership of the institution and the value of the instruments of ownership must be reduced, unless this would breach the safeguard provided by Article 73 of

⁴ "Partial cancellation/transfer" means that dilution (art. 47(1) letter. b)) is combined with "cancellation" or "transfer" (art. 47(1). (a)) without cancelling or transferring in full the instruments (i.e. the shareholders and the owner of other instrument retain some value). A partial transfer could also be effected by conducting a stock split to create additional shares which are transferred to holders of capital instruments or creditors.

⁵ If this is the case, they would almost certainly also have a positive going concern value, because resolution is usually expected to be value-preserving compared with insolvency.

the BRRD. This situation will only occur if resolution is expected to preserve less value for claimants on the bank than normal insolvency proceedings.

- 1.12. When dilution occurs the extent of dilution should be determined consistently with the provisions of Article 50 of Directive 2014/59/EU and the EBA Guidelines on conversion rates. Conversion rates set consistently with Guiding Principle 2 of the EBA guidelines on the rate of conversion of debt to equity in bail-in should ensure that dilution is severe. That principle requires that conversion rates are set to ensure shareholders bear first loss and to respect the creditor hierarchy. If a particular creditor class is expected to be worse off after resolution than before resolution according to the ex ante valuation, the resolution authority should set a conversion rate equal to or close to zero for all classes of classes of liabilities and instruments which have a more junior rank in insolvency.
- 1.13. In exceptional circumstances it may be the case that no liability holder is expected to contribute to loss absorption or recapitalisation in resolution. In that case conversion rates for capital instruments should be set to ensure the resolution objectives are achieved and that the value of pre-resolution shares or other instruments of ownership is reduced.
- 1.14. Resolution authorities may only opt to severely dilute existing holders of shares or other instruments of ownership when the ex ante valuation suggests that the shares or other instruments of ownership have a net positive value. In these circumstances, severe dilution could be also applied in combination with a partial cancellation or partial transfer of shares or other instrument of ownership.
- 1.15. Resolution authorities should not use severe dilution if the net asset value of the institution is zero or negative according to the ex ante valuation, to ensure consistency with the principles of Article 34 of Directive 2014/59/EU that shareholders bear first loss and the insolvency creditor hierarchy should be respected.
- 1.16. When the resolution authority considers that the institution has positive net asset value on an ex ante valuation basis but a zero value in the ex ante insolvency valuation, the resolution authority should take whichever of the options listed in Article 47(1)(a) or (b) of Directive 2014/59/EU that it considers best achieves the resolution objectives.
- 1.17. In some circumstances, the power to writedown or convert capital instruments in Article 59 of Directive 2014/59 EU may be triggered without also triggering resolution. The extent of writedown or conversion must be the amount required to achieve resolution objectives, as assessed according to Article 60(1)(b) and Article 60(1)(c). This amount may be zero, for example, if Article 59 is triggered because extraordinary public financial support (including when a central bank provides emergency liquidity assistance on an indemnified basis, or guarantees newly issued liabilities) is provided to a well-capitalised institution which is not deemed failing or likely to fail according to Article 32 of Directive 2014/59/EU.

1.18. In such cases, resolution authorities should not reduce CET1 or write down or convert relevant capital instruments, because the bank is not failing or likely to fail and to do so is not necessary to meet resolution objectives.

The table below summarises the points made in this section:

<u>Circumstance relating to value of shareholder claims</u>	<u>Appropriate actions</u>	<u>Inappropriate actions</u>
Positive net asset value under both ex ante and ex ante insolvency valuations.	1. Partial cancellation 2. Partial transfer 3. Dilution	1. Full cancellation 2. Full transfer
Positive net asset value under ex ante valuation but zero or negative net asset value under ex ante insolvency valuation	1. Full or partial cancellation 2. Full or partial transfer 3. Dilution	None (but conversion rates must be appropriate)
Zero or negative net asset value under both ex ante and ex ante insolvency valuations.	1. Full cancellation 2. Full transfer	1. Partial cancellation 2. Partial transfer 3. Dilution

Question 1: Do you agree with the classification of appropriate actions summarized in the table?

2. Circumstances other than those related to the valuation of the firm's assets and liabilities

1.19. Where more than one option may be appropriate based on the valuation, or when choosing between tools to achieve dilution, resolution authorities should choose the option or options which best meet the resolution objectives in Article 31 of the BRRD.

1.20. In particular, provisions of national or EU company law may affect the appropriate choice between achieving dilution solely by issuing new shares; through the combination of cancelling some shares and issuance of new shares; or through the transfer of some shares.

1.21. The following examples provide a non-exhaustive illustration of the factors which resolution authorities should consider. The examples are not definitive and complying with the Guidance does not require that authorities decide to choose the options suggested when the circumstances described apply.

1.22. When considering whether to cancel and / or to transfer shares or other instruments of ownership (singly or in combination with dilution), authorities may have regard to the particular features of the shares or other instruments. For example, where certain shares

confer particular special voting rights, authorities may consider that it would be more appropriate to cancel those shares than to transfer them in order to simplify the structure of the reorganised firm.

1.23. In some cases, there may be shares or other instruments of ownership which do not qualify as Common Equity Tier 1 (CET1) capital, for example preference shares which qualify as Additional Tier 1 instruments. Authorities may choose to transfer only the CET1 instruments and to cancel any shares or other instruments of ownership (respecting the relevant safeguards and legal protections).

1.24. Where resolution authorities have used the option under Article 43(4) of Directive 2014/59/EU to change the legal form of previously mutualised institution following a bail-in, a cancellation of the instruments of ownership should be carried out if necessary to effect that change.

1.25. Where shares of a public company are listed on official stock exchanges, transferring shares rather than cancelling them may be necessary to avoid an interruption of listings and discontinuity in valuation of the shares.

Title III - Final Provisions and Implementation

These Guidelines should be implemented into national resolution practices by relevant resolution authorities by [date].

5. Accompanying documents

5.1 Draft Cost- Benefit Analysis / Impact Assessment

Introduction

The EBA is mandated under Article 47(6) of the BRRD to issue guidelines on the circumstances in which cancellation, transfer, or severe dilution of shares and other instruments of ownership would be appropriate.

As per Article 16(2) of the EBA regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any Guidelines developed by the EBA shall be accompanied by an Impact Assessment (IA) annex which analyses 'the potential related costs and benefits'. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

This annex presents the impact assessment with cost-benefit analysis of the provisions included in the Guidelines described in this Consultation Paper. Given the nature of the Guidelines, the impact assessment is high-level and qualitative in nature.

Problem definition

The mandate of Article 47(6) requires the EBA to issue guidelines on the circumstances in which cancellation, transfer, or severe dilution of shares and other instruments of ownership as part of a bail-in or the exercise of the power to write down or convert capital instruments would be appropriate.

Since Article 36 of the BRRD mandates the preparation of an independent valuation to inform decisions including the extent of cancellation or dilution of shares, the main question which needs to be addressed is how the choice of action should be informed by this valuation. The choice is also constrained by the need to achieve the resolution objectives of Article 31 BRRD and the resolution principles of Article 34 BRRD.

Regulatory and specific objectives

The specification of the treatment of capital instruments in the writedown sequence in the BRRD serves two main regulatory objectives:

- a) First, to ensure that capital instruments are able to meet their primary purpose of absorbing losses in the sequence envisaged in the CRR/CRD when a resolution power, or the PONV writedown and conversion power, is applied.
- b) Second, to allow institutions and investors to form clear expectations about the treatment of capital instruments and eligible liabilities in resolution, enabling efficient pricing and market discipline. These objectives must be met while ensuring appropriate protection for the property rights of shareholders and creditors of the institutions, as provided for in the resolution principles and safeguards of the BRRD.

The specific objective of these guidelines is to enable resolution authorities, and other stakeholders, to make effective use of valuation information and to form clear expectations about the likely treatment of shareholders and creditors.

Options considered

Three options for the general approach to developing these guidelines were considered.

- a. Option 1: Provide only general criteria and guiding rules
- b. Option 2: Provide only clarification on specifically identified operational issues
- c. Option 3: Provide both

The EBA has considered whether it would be more appropriate to provide general criteria for resolution authorities to apply in the circumstances of individual resolution cases, or to provide a more specific discussion of how particular types of instrument would be affected by the writedown sequence.

Option 1 could be expected to deliver objective b) less well, giving only a relatively small benefit to investors and institutions, as the additional clarity would be limited. Investors may need considerable understanding of the resolution framework in order to understand clearly how these criteria would be applied. This may result in a higher risk premium being applied to institutions' funding costs than if investors had full information, and/or to unexpected adjustments in risk premia if resolution actions were unexpected.

Option 2 could be expected to deliver objective a) less well. Limiting the scope of the guidelines to particular situations could increase the likelihood that resolution authorities encounter situations not covered by the guidelines where the appropriate treatment of shareholders is not clear from the level 1 text. They may then be more cautious about exercising their powers to writedown or convert those instruments. This risk could be mitigated by including a more comprehensive categorisation of resolution situations in the guidelines, at the cost of increasing the complexity of the guidelines, and failing to be future-proof.

The EBA's view is that the best way of balancing these concerns is to combine the two approaches, providing general criteria which resolution authorities may apply in any circumstances, and specific discussion of how these criteria apply to the some common specific issues. Resolution authorities are also expected to benefit from symmetric information, and more

effective and efficient cooperation across jurisdictions. Option 3 is therefore selected as the preferred option.

5.2 Overview of questions

Question 1: Do you agree with the classification of appropriate actions summarized in the table on p11?