

<b>Question ID</b>	2016_2720
<b>Status</b>	Final Q&A
<b>Legal act</b>	Directive 2014/59/EU (BRRD)
<b>Topic</b>	Resolution tools and powers
<b>Article</b>	37
<b>Paragraph</b>	2
<b>Subparagraph</b>	-
<b>COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations</b>	Not applicable
<b>Article/Paragraph</b>	n.a.
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<b>Disclose name of institution / entity</b>	No
<b>Type of submitter</b>	Competent authority
<b>Subject matter</b>	Interaction between Articles 37(2) and 59(3)
<b>Question</b>	<p>Articles 37(2) and 59(3) of Directive 2014/59/EU (BRRD) appear to be incompatible. Article 37(2) suggests that creditors bearing losses is an additional condition for the write-down in Article 59. Without this condition being met (for instance when resolution involves the sale of the whole bank to a third party), should the capital instruments be written down? However, Article 59(3) requires the write-down of relevant capital instruments in all cases where a resolution tool is used. Does the Commission consider that the mandatory requirement in Article 59 should be subject to the condition in 37(2) or not? Should the mandatory requirement in Article 59 BRRD be subject to the condition in 37(2) BRRD?</p>
<b>Background on the question</b>	<p>Article 37(2) requires the resolution authority to exercise its power to write down or convert capital instruments in accordance with Article 59 immediately before or together with the application of the resolution tool to the extent that the resolution action results in losses being borne by creditors of the institution under resolution.</p>
<b>Final answer</b>	<p>Article 37 BRRD lists the general principles that should inform the use of resolution tools. In this context, Article 37(2) BRRD provides that capital</p>

instruments and eligible liabilities in accordance with Article 59(1) BRRD must be written down or converted before the remaining creditors may be called to bear losses as a result of the application of a resolution tool. This reflects the general principles referred to in points (a) and (b) of Article 34(1) BRRD, whereby shareholders bear first losses and creditors bear losses in accordance with the order of priority of their claims under normal insolvency proceedings (given that the claims arising from capital instruments are the most subordinated claims). Thus, the timeline prescribed under Article 37(2) BRRD foresees that, once the conditions for resolution are met, the resolution authority, first, exercises its write-down or conversion powers and, only afterwards, applies the envisaged resolution tool, as a result of which the institution's creditors other than the holders of capital instruments and eligible liabilities pursuant to Article 59(1) BRRD would suffer losses.

Since a resolution tool may be applied only when the conditions for resolution are met, only the scenario under letter (a) of Article 59(3) BRRD is relevant for the purpose of this question. In this respect, and consistently with the prescription and timeline under Article 37(2) BRRD, Article 59(3) BRRD requires that, when conditions for resolution are met, resolution authorities may exercise write-down or conversion powers only if the resolution action would result in losses (as identified by the valuation carried out under Article 36 BRRD, which is required by Article 59(10) BRRD) being borne by the shareholders and creditors captured by Article 59 or their claims being converted. This must take place before or together with the application of the resolution actions, not afterwards, as further specified in Article 37(2) BRRD.

In light of the above, no inconsistency may be identified between the two provisions.

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