

EBA/RTS/2015/06

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## Final Report

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Draft Regulatory Technical Standards on the contractual recognition of write-down and conversion powers under Article 55(3) of Directive 2014/59/EU

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# 1. Executive Summary

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Pursuant to Article 55(1) of Directive 2014/59/EU (the Directive) Member States shall require institutions<sup>1</sup> and entities referred to in points (b), (c) and (d) of Article 1(1) of the Directive to include a contractual term by which the creditor or the party to the agreement creating a relevant liability recognises that liability may be subject to the write-down and conversion powers<sup>2</sup> 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.

Article 55(1) of the Directive specifies the list of liabilities which are excluded from the requirement to include the contractual term. The requirement does not apply in relation to a liability that is:

- excluded under Article 44(2) of the Directive;
- a deposit referred to in point (a) of Article 108 of the Directive;
- governed by the law of a Member State;
- issued or entered into before the date on which a Member State applies the provisions adopted in order to transpose Section 5 (The bail-in tool) of Chapter IV (Resolution tools) of Title IV (Resolution) of the Directive.

In addition, the requirement does not apply where the resolution authority of a Member State determines that liabilities or instruments governed by the law of a third country can be subject to the write-down and conversion powers by a Union resolution authority pursuant to:

- the law of the third country, or
- a binding agreement concluded with that third country. (See the second subparagraph of Article 55(1) of the Directive.)

Article 55(3) of the Directive requires the EBA to develop draft regulatory technical standards (RTS) in order to further determine the list of liabilities to which the exclusion in Article 55(1) of the Directive applies and the contents of the term required in that paragraph, taking into account banks' different business models.

This report includes the EBA's draft RTS and explains the approach the EBA has taken in relation to the proposal.

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<sup>1</sup> 'Institution' is defined in point (23) of Article 2(1) of the Directive.

<sup>2</sup> The 'write-down and conversion powers' are defined in point (66) of Article 2(1) of the Directive as the powers referred to in Article 59(2) and in points (e) to (i) of Article 63(1) of the Directive.

In accordance with its mandate under Article 55(3) of the Directive, the EBA has not proposed any new grounds for exclusion (for example new forms of liabilities to which the requirement to include the contractual term does not apply or a *de minimis* threshold as regards the value of the liabilities subject to the requirement specified in the first subparagraph of Article 55(1) of the Directive). This is because the creation of new exclusions would involve changing an essential element of the Level 1 text (the Directive) and making policy choices, which the EBA is not empowered to do, as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of European Union.

Instead, the draft RTS further determine the list of liabilities to which the exclusion from the requirement to include the contractual term applies. For example, the draft RTS specify key elements which Union resolution authorities should assess as present before determining that the liabilities or instruments referred to in the first subparagraph of Article 55(1) of the Directive can be subject to write-down and conversion by a resolution authority pursuant to the law of a third country or to a binding agreement with that third country. This will ensure that the exclusion is interpreted homogeneously across the Union (and therefore that contractual terms are required to be included in the same cases across the Union).

The draft RTS also specify a list of mandatory components which must be present in the contractual term required pursuant to Article 55(1) of the Directive. These include provisions specifying the express acknowledgement, agreement and consent of the counterparty to the application of write-down and conversion powers by the Union resolution authority and their potential effects in terms of the liability under the agreement.

This approach is intended to strike a balance between achieving an appropriate level of convergence and ensuring that differences in legal systems and cultures of third countries as well as other differences arising from different forms of liability (in particular, debt instruments and capital instruments) can be taken into account by Union resolution authorities, institutions and relevant entities through the addition of further elements if necessary to achieve the policy goal of ensuring that the write-down and conversion powers can be applied effectively in relation to liabilities governed by the law of a third country.

## Next steps

The draft RTS will be submitted to the Commission for endorsement before being published in the Official Journal of the European Union. The technical standards will apply from on the twentieth day following that of its publication in the *Official Journal of the European Union*.

## 2. Background and rationale

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1. The Directive requires Member States to confer on their resolution authorities a number of powers including the powers to write-down and convert<sup>3</sup> relevant capital instruments<sup>4</sup> in accordance with Article 59 of the Directive, including in the context of an application of the bail-in tool (Chapter IV (Resolution tools) of Title IV (Resolution) of the Directive). The bail-in tool shall enable the resolution authority:
  - to recapitalise an institution<sup>5</sup> or entity referred to in point (b), (c) or (d) of Article 1(1) of the Directive;
  - to convert to equity or reduce the principal amount of claims or debt instruments that are transferred to a bridge institution or under the sale of business tool or the asset separation tool. (See Article 43 of the Directive.)<sup>6</sup>
2. Member States must ensure that the powers may be applied to all relevant liabilities of an institution or relevant entity.
3. Liabilities of an institution or relevant entity may be governed by the law of the Member State of establishment or another Member State, in which case the application of the write-down and conversion powers would be effective as a matter of law.
4. However, some liabilities (for example debt securities) may be governed by the law of a third country. In the absence of a regime to secure the effectiveness of an application of the write-down and conversion powers by a Union resolution authority (whether under the local law of a third country or pursuant to an international agreement), it is possible that a third country court may not recognise the effect of the application of the powers by that resolution authority.
5. For this reason Article 55(1) of the Directive requires Member States to require institutions and relevant entities to include in relevant agreements a contractual term by which the creditor or party to the agreement creating the liability recognises that liabilities 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 Union resolution authority.

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<sup>3</sup> The 'write-down and conversion powers' are defined in point (66) of Article 2(1) of the Directive as the powers referred to in Article 59(2) and in points (e) to (i) of Article 63(1) of the Directive.

<sup>4</sup> 'Relevant capital instruments' are defined in point (74) of Article 2(1) of the Directive.

<sup>5</sup> 'Institution' is defined in point (23) of Article 2(1) of the Directive.

<sup>6</sup> See also recitals 67, 68, 70–73, 77 and 78 of the Directive.

6. A 'relevant agreement' means an agreement creating relevant liabilities (i.e. all liabilities other than those which are excluded liabilities under Article 44(2) of the Directive or are deposits referred to in point (a) of Article 108 of the Directive) which is:
- governed by the law of a third country; and
  - issued or entered into after the date on which provisions to transpose Section 5 (The bail-in tool) of Chapter IV of Title IV of the Directive are applied. (See the first subparagraph of Article 55(1) of the Directive.)
7. The requirement to include the contractual term does not apply where the Union resolution authority determines that the liabilities or instruments can be subject to the write-down and conversion powers as a result of national law in the third country or a binding agreement with that third country. (See the second subparagraph of Article 55(1) of the Directive.)

## 2.1 Content

8. Article 55(3) of the Directive requires the EBA to develop draft RTS in order:
- to further determine the list of liabilities to which the exclusion in Article 55(1) of the Directive applies; and
  - to determine the contents of the contractual term to be required to be included in relevant agreements.
9. The EBA's draft RTS are set out in the next chapter of the report. An overview of each part of the draft RTS is set out below.

### 2.1.1 Article 1: Definitions

10. The definitions set out in the Directive are applied for the purposes of the draft RTS. In particular, they refer to the write-down and conversion powers defined in point (66) of Article 2(1) of the Directive (i.e. the exercise of the powers independently of, or in conjunction with, resolution action). A number of definitions are also introduced for the purposes of the draft RTS, where these terms are not defined in the Directive.

### 2.1.2 Article 2: Further determining the liabilities to which the exclusion in Article 55(1) of the Directive applies

11. The EBA is required to 'further determine the list of liabilities to which the exclusion in Article 55(1) applies' (Article 55(3) of the Directive).
12. Pursuant to this mandate the EBA further determines the grounds for exclusion specified in the first and second subparagraphs of Article 55(1) of the Directive.

13. In accordance with this mandate, the EBA has not proposed any new grounds for exclusion (for example new forms of liabilities to which the requirement to include the contractual term does not apply or a de minimis threshold as regards the value of the liabilities subject to the requirement). This is because the creation of new exclusions would involve changing an essential element of the Level 1 text (the Directive) and making policy choices, which the EBA is not empowered to do, as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of European Union. It is also to be observed that all liabilities of an institution or relevant entity, unless expressly excluded as a result of Article 44(2) of the Directive, are within the scope of the bail-in tool. Therefore, in order to ensure that the write-down and conversion powers can be applied effectively with regard to any liability governed by the law of a third country and not otherwise excluded pursuant to the Directive, it is appropriate that the contractual term should be required to be included unless a third country law or binding international agreement provides an alternative mechanism to secure the effectiveness of an application of such powers (see below).

14. In light of the mandate, the EBA presents in the draft RTS proposals to:

- clarify that the contractual term is required to apply to any unsecured portion of a liability even if the liability is otherwise secured; the term is also required where a liability is fully secured but is not governed by contractual terms that oblige the debtor to maintain the liability fully collateralised on a continuous basis in accordance with regulatory requirements specified in Union law or equivalent third country law;
- clarify that in point (d) of the first subparagraph of Article 55(1) of the Directive the reference to liabilities issued or entered into after the relevant transposition date includes: (a) liabilities under agreements entered into after the transposition date, (b) liabilities created after the transposition date under agreements entered into before that date, (c) liabilities under agreements entered into before the transposition date, and liabilities under debt instruments issued before that date, which are subject to a material amendment after that date; (d) liabilities under debt instruments issued after the transposition date;
- set out the key elements of the third country law or binding international agreement which Union resolution authorities should assess as present before determining that the liabilities or instruments referred to in the first subparagraph of Article 55(1) of the Directive can be subject to write-down and conversion by a Union resolution authority pursuant to the law of a third country or to a binding agreement with that third country.

15. The EBA's proposal with regard to liabilities issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose Section 5 (The bail-in tool) of Chapter IV (Resolution tools) of Title IV (Resolution) of the Directive is intended to prevent regulatory arbitrage and ensures that the write-down and conversion powers can be applied effectively in relation to any liabilities created after the transposition date. Where netting arrangements are in place and cover liabilities pre-dating the transposition date and any new liabilities created after that date, it is to be expected that parties to the contract would prefer that

the contractual term apply to the full netting set rather than split the netting set into pre-transposition set and post-transposition sets.

16. The EBA's proposal with regard to third countries is intended to strike a balance between the objective of harmonising the approach the Union resolution authorities adopt to the assessment process and the objective of preserving the role of the resolution authorities in making the determination. Accordingly, the draft RTS specify a minimum list of elements which must be present under the third country law or binding international agreement in order for the Union resolution authority to determine that a third country law or binding agreement is sufficient to secure the effective application of the write-down and conversion powers.

17. The third country law or binding international agreement may make provision for a process to recognise and give effect to or to support (for example by suspending or preventing local actions) the application of the write-down and conversion powers by the Union resolution authority. This process may involve an administrative or judicial procedure. It may also involve the use by the third country authority of its own powers in support of the actions of the Union resolution authority. The third country law or binding international agreement may also include provisions which, once a trigger event has been satisfied (e.g. the triggering of resolution by a Union resolution authority and the application of resolution powers by that authority), enable recognition without any further action on the part of relevant authority.

### **2.1.3 Article 3: The contents of the contractual recognition term required by Article 55(1) of the Directive**

18. The EBA is tasked with determining the contents of the contractual term required to be included pursuant to Article 55(1) of the Directive.

19. The EBA has considered whether to propose in the draft RTS a specific clause or a list of mandatory components to be included in the term.

20. The EBA does not consider it appropriate to specify a clause as this may not be effective in all jurisdictions or suitable for all forms of liability falling within the scope of Article 55(1) of the Directive. Rather, the EBA considers that listing the key mandatory contents of the term strikes the right balance between securing an appropriate level of convergence and ensuring that differences in legal systems and cultures of third countries as well as other differences arising from different forms of liability (in particular, debt instruments and capital instruments) can be taken into account by Union resolution authorities, institutions and relevant entities.

21. Accordingly, it is proposed that the draft RTS include a list of mandatory components which must be present in the contractual term required pursuant to Article 55(1) of the Directive. These include provisions specifying the express acknowledgement and consent of the counterparty to the application of write-down and conversion powers by the Union resolution authority and their potential effects in terms of the liability under the agreement, including:

- the reduction of the amount outstanding, including to zero;

- the conversion of the liability into ordinary shares or other instruments of ownership, for example of the entity under resolution, the parent undertaking or a bridge institution, and that these shares or other instruments of ownership will be accepted in lieu of rights under the relevant agreement;
- the variation of terms in connection with the exercise of the write-down and conversion powers, for example the variation of the maturity of a debt instrument.

## 2.2 Other matters

### 2.2.1 Legal opinions and interaction with Article 45(5) of the Directive (MREL)

22. The EBA notes that the third subparagraph of Article 55(1) of the Directive specifies that Member States shall ensure that resolution authorities may require institutions and relevant entities to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of contractual recognition terms included in liabilities governed by the law of a third country.

23. It is also to be noted that Article 45(5) of the Directive (application of the minimum requirement for own funds and eligible liabilities (MREL) specifies that where a liability is governed by the law of a third country Union resolution authorities may require institutions to provide an opinion demonstrating that any decision of the resolution authority to write-down or convert that liability would be effective under the law of that third country, having regard to the contract governing the liability, international agreements on the recognition of resolution proceedings and other relevant matters.

24. It is to be expected that where a relevant agreement which is otherwise eligible to count towards MREL includes components of a contractual term as specified in the draft RTS, the agreement can count towards MREL. However, in accordance with Article 45(5) of the Directive, it should remain possible for Union resolution authorities to require institutions to demonstrate that the exercise of powers would have effect with regard to that liability in the third country concerned (for example to take account of any relevant judicial proceedings or changes to third country law which may have an impact on the likelihood of the recognition of the application of powers).

### 2.2.2 Ongoing international work in this area

25. The EBA is aware of ongoing international work in relation to statutory and contractual approaches to the recognition of the exercise of write-down and conversion powers and other resolution powers. In particular, the EBA notes the Financial Stability Board's (FSB's) *Consultative Document: Cross-border recognition of resolution action*, published on 29 September 2014, and has sought to align its proposals with the FSB's proposals insofar as they are compatible with the Directive and otherwise appropriate.<sup>7</sup>

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<sup>7</sup> The consultative document is available here: [http://www.financialstabilityboard.org/publications/c\\_140929.htm](http://www.financialstabilityboard.org/publications/c_140929.htm). Consultation responses are available here: <http://www.financialstabilityboard.org/2014/12/public-responses-to-the-september-2014-consultative-document-cross-border-recognition-of-resolution-actions/>.

### 3. Draft regulatory technical standards on the contractual recognition of write-down and conversion powers under Article 55(3) of Directive 2014/59/EU

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**COMMISSION DELEGATED REGULATION (EU) .../..****of XXX****supplementing Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms with regard to regulatory technical standards for the contractual recognition of write-down and conversion powers**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,  
Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council<sup>8</sup>, and in particular Article 55(3) thereof,

Whereas:

- (1) Directive 2014/59/EU requires Member States to confer on their resolution authorities a range of powers, including the write-down and conversion powers as defined in point (66) of Article 2(1) of that Directive which can be applied independently of, or in conjunction with, resolution action.
- (2) It is important to ensure that the write-down and conversion powers can be applied in relation to all liabilities that are not excluded by Article 44(2) of Directive 2014/59/EU. For liabilities governed by the law of a third country, other than those falling within the list of liabilities to which the exclusion in Article 55(1) of Directive 2014/59/EU applies, a contractual term should be included to support the application of the write-down and conversion powers to such liabilities.
- (3) The contractual term referred to in Article 55(1) of Directive 2014/59/EU should be included in agreements creating a liability to which that Article applies, entered into after the date of application of the provisions adopted to transpose Section 5 of Chapter IV of Title IV of Directive 2014/59/EU in a Member State.
- (4) In particular, the contractual term referred to in Article 55(1) of Directive 2014/59/EU should be included in relevant agreements concerning a liability which, on creation, is not fully secured or is fully secured but the contractual terms governing the liability do not oblige the debtor to maintain collateral that would fully secure the liability on a continuous basis in compliance with regulatory requirements specified in Union law or the equivalent law in third countries.



- (5) For relevant agreements entered into before the date of application of the provisions adopted to transpose Section 5 of Chapter IV of Title IV of Directive 2014/59/EU in a Member State the contractual term should be included where liabilities are created under that agreement after the transposition date.
- (6) In addition, for relevant agreements entered into before the date of application of the provisions adopted to transpose Section 5 of Chapter IV of Title IV of Directive 2014/59/EU in a Member State, material amendments which affect the substantive rights and obligations of a party to the agreement should entail the obligation to insert the contractual term referred to in Article 55(1) of Directive 2014/59/EU. Non-material amendments which do not affect the substantive rights and obligations of a party to a relevant agreement should not be sufficient to trigger the requirement to include the contractual term; in all other cases the contractual term should be introduced.
- (7) In order to allow for an appropriate level of convergence whilst ensuring that differences in legal systems or those arising from the nature or form of liability can be taken into account by resolution authorities, institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of Directive 2014/59/EU it is appropriate to lay down the mandatory contents for the contractual term.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the EBA to the Commission.
- (9) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>9</sup>,

HAS ADOPTED THIS REGULATION:

#### *Article 1- Definitions*

For the purposes of this Regulation the following definitions shall apply:

- (1) ‘entity’ means an institution or entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU;
- (2) ‘material amendment’ means, in relation to a relevant agreement as defined in point 4 of this Article, entered into before the date of application of the provisions to comply with Section 5 of Chapter IV of Title IV of Directive 2014/59/EU in a Member State, an amendment after that date which is not a non-material amendment;
- (3) ‘non-material amendment’ means an amendment, including an automatic amendment, which does not affect the substantive rights and obligations of a party to a relevant agreement such as a change to the contact details of a signatory or

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<sup>9</sup> 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 (OJL 331, 15.12.2010, p. 12).

the addressee for the service of documents, typographical changes to correct drafting errors or automatic adjustments of interest rates;

- (4) ‘relevant agreement’ means an agreement, including the terms of a capital instrument, creating a liability to which Article 55(1) of Directive 2014/59/EU applies.

*Article 2- Liabilities to which the exclusion from the obligation to include the contractual term referred to in Article 55(1) of Directive 2014/59/EU applies*

1. For the purposes of point (a) of the first subparagraph of Article 55(1) of Directive 2014/59/EU, a liability shall not be considered as an excluded liability where, at the time at which it is created, it is:
  - (a) not fully secured;
  - (b) fully secured but governed by contractual terms that do not oblige the debtor to maintain the liability fully collateralised on a continuous basis in compliance with regulatory requirements of Union law or of a third country law achieving effects that can be deemed equivalent to Union law.
  
2. For purposes of point (d) of the first subparagraph of Article 55(1) of Directive 2014/59/EU, liabilities issued or entered into after the date of application of the provisions to transpose Section 5 of Chapter IV of Title IV of Directive 2014/59/EU in a Member State shall comprise:
  - (a) liabilities created after that date, regardless of whether they are created under relevant agreements entered into before that date (including under master or framework agreements between the contracting parties governing multiple liabilities);
  - (b) liabilities created before or after that date under relevant agreements entered into before that date which are subject to a material amendment;
  - (c) liabilities under debt instruments issued after that date;
  - (d) liabilities under debt instruments issued before or after that date under relevant agreements entered into before that date which are subject to a material amendment.
  
3. For the purposes of the second subparagraph of Article 55(1) of Directive 2014/59/EU, a resolution authority shall determine that the requirement to include a contractual term in a relevant agreement shall not apply where it is satisfied that the law of the third country concerned or a binding agreement concluded with that third country provides for an administrative or judicial procedure which:
  - (e) at the request of the resolution authority, or at the initiative of the third country whose law governs the liability or instrument, enables such duly empowered third country administrative or judicial authority, within a period which the resolution authority determines will not compromise the effective application of the write-down and conversion powers by that authority:
    - (1) to recognise and give effect to the exercise of the write-down and conversion powers by the resolution authority, or



- (2) to support through the application of relevant powers the exercise of the write-down and conversion powers by the resolution authority;
- (f) provides that the grounds on which a third country administrative or judicial authority may refuse to recognise or support the exercise of the write-down and conversion powers pursuant to point (a) are clearly stated and are limited to one or more of the following exceptional cases:
  - (1) the recognition or support of the exercise of the write-down and conversion powers by the resolution authority would have adverse effects on financial stability in the third country concerned;
  - (2) the recognition or support of the exercise of the write-down and conversion powers by the resolution authority would result in third country creditors, in particular depositors located and payable in that third country, being treated less favourably than creditors, and depositors located or payable in the Union, with similar rights under applicable Union law;
  - (3) recognition or support would have material financial implications for the third country concerned;
  - (4) the effects of recognition or support of the exercise of write-down and conversion powers by the resolution authority would have effects contrary to the public order of the third country concerned.
- 4. For the purposes of the application of the second subparagraph of Article 55(1) of Directive 2014/59/EU, the resolution authority must have assessed that the grounds referred to in paragraph 3(b) would not prevent the recognition or support of the exercise of the write-down and conversion powers in all circumstances where such powers are applied.

*Article 3- Contents of the contractual term required by Article 55(1) of Directive 2014/59/EU*

A contractual term in a relevant agreement shall include the following:

- (a) the acknowledgement and acceptance by the entity's counterparty that the liability may be subject to the exercise of write-down and conversion powers by a resolution authority;
- (b) a description of the write-down and conversion powers of each resolution authority in accordance with the national law transposing Section 5 of Chapter IV of Title IV of Directive 2014/59/EU or, where applicable, under Regulation (EU) No 806/2014, in particular the powers set out in points (e), (f), (g) and (j) of Article 63(1) thereof or, where applicable, under Regulation (EU) No 806/2014;
- (c) the acknowledgement and acceptance by the entity's counterparty:
  - (1) that it is bound by the effect of an application of the powers referred to in point (b), including:



- (a) any reduction in the principal amount or outstanding amount due, including any accrued but unpaid interest, in respect of the liability of an entity under the relevant agreement;
- (b) the conversion of that liability into ordinary shares or other instruments of ownership;
- (2) that the terms of the relevant agreement may be varied as necessary to give effect to the exercise by a resolution authority of its write-down and conversion powers and such variations will be binding on the entity's counterparty;
- (3) that ordinary shares or other instruments of ownership may be issued to or conferred on the entity's counterparty as a result of the exercise of the write-down and conversion powers;
- (d) the acknowledgement and acceptance by the entity's counterparty that the contractual term is exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreement.

*Article 4- Entry into force*

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

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

Done at Brussels,

*For the Commission  
The President*

*On behalf of the President*

*[Position]*

## 4. Accompanying documents

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### 4.1 Impact assessment

Article 55(3) of the Directive requires the EBA to develop draft RTS:

- to further determine the list of liabilities to which the exclusion in Article 55(1) of the Directive (the exclusion from the requirement to include a contractual term) applies; and
- to specify the contents of the term required in Article 55(1) of the Directive, taking into account banks' different business models.

In accordance with Article 10(1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council (the EBA Regulation), any draft RTS developed by the EBA shall be accompanied by a cost and benefit analysis. 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 therefore presents an impact assessment (IA) with a cost–benefit analysis of the policy options considered in the draft RTS. Given the nature of the draft RTS, the IA is mostly high level and qualitative in nature.

#### A. Problem identification

Liabilities of an institution or of a relevant entity referred to in points (b), (c) and (d) of Article 1(1) of the Directive may be governed by the law of the Member State of establishment or of another Member State, in which case the application of the write-down and conversion powers defined in point (66) of Article 2(1) of the Directive would be effective as a matter of law.

However, some liabilities (for example debt securities) of an institution or relevant entity may be governed by the law of a third country. In the absence of a regime to secure the effectiveness of an application of the write-down and conversion powers by a Union resolution authority (whether under the local law of a third country or pursuant to an international agreement), it is possible that a third country court may not recognise the effect of the application of the powers by that resolution authority. A refusal to recognise the application of the powers could undermine the effectiveness of actions on the part of a Union resolution authority to restore the financial condition of an institution or relevant entity for the purposes of addressing a threat to financial stability and/or the interests of depositors and clients.

For this reason, Article 55(1) of the Directive requires Member States to require institutions and relevant entities to include in relevant cases (specifically, liabilities governed by a third country law) a contractual term by which the creditor or party to the agreement creating the liability



recognises that liabilities 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 Union resolution authority.

The requirement to include the contractual term does not apply in relation to the liabilities listed in points (a) to (d) of the first subparagraph of Article 55(1) of the Directive or where a Union resolution authority determines that the liabilities or instruments can be subject to the write-down and conversion powers as a result of national law in the third country or a binding agreement with that third country (see the second subparagraph of Article 55(1) of the Directive).

## B. Policy objectives

### Drivers

There is a risk of divergences in the approach of the Union resolution authorities to the interpretation of the exclusion from the requirement to include the contractual term as set out in Article 55(1) of the Directive and, where the requirement to include the contractual term applies, to the contents of the contractual term.

For example, having regard to the second subparagraph of Article 55(1) of the Directive, some Union resolution authorities may determine that a third country law or binding international agreement is sufficient to secure the effective application of the write-down and conversion powers (thereby displacing the requirement to include the contractual term) even if, pursuant to that law or agreement, a third country authority has a right to refuse recognition on *any* grounds, whereas other resolution authorities may regard a third country law or international agreement as sufficient only if the grounds on which a third country authority may refuse recognition are strictly limited to exceptional cases.

To give another example, the resolution authorities may take a different view as to the necessary contents of the contractual term intended to implement the requirement in Article 55(1) of the Directive; some Union resolution authorities may require extensive provision, while others may require more limited provision.

### Problems

#### *Uneven playing field between institutions*

Such heterogeneity in the application of the requirement to include the contractual term could lead to an uneven playing field for institutions and relevant entities. It is reasonable to expect that this could have an impact on the availability and cost of funding for institutions and relevant entities (e.g. those institutions in Member States where resolution authorities adopt a more relaxed approach to the application of the requirement to include the contractual term could benefit from a potential funding advantage).

#### *Ineffectiveness of the resolution power in the third countries*

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In addition, divergences in approach could reduce the effectiveness of the write-down and conversion powers as regards liabilities governed by the law of a third country, for example where a Union resolution authority has determined that a contractual term is sufficient but it does not, in fact, secure the effective application of the write-down and conversion powers, or where a third country law or binding international agreement enables a third country authority to refuse recognition or support on any grounds at the point of resolution. This could lead to financial stability implications in the Member State concerned and in the Union as a whole.

The objective of the draft RTS is to promote convergence of approach to the application of the list of liabilities to which the exclusion in Article 55(1) of the Directive (the exclusion from the requirement to include a contractual term) applies and to the contents of the contractual term required by that paragraph.

A central element of promoting convergence of practice is specifying a common set of principles to guide the interpretation of the exclusion in Article 55(1) of the Directive and setting out a common list of the components of the contractual term required under that paragraph.

### C. Baseline scenario

As noted above, in the absence of Union action there is a risk of divergences between the Member States as to the interpretation of the circumstances in which the contractual term is required to be included and the contents of the contractual term.

### D. Options considered

It is important to make clear that for the first part of the EBA's mandate under Article 55(3) of the Directive it is possible only for the EBA to 'further determine' the list of exclusions set out in Article 55(1) of the Directive. It is not possible for the EBA to specify further grounds for exclusion from the requirement to include the contractual term. This is because the creation of new exclusions would involve changing an essential element of the Directive and would involve making policy choices, which the EBA is not empowered to do, as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of European Union. Therefore, the EBA had only one 'technical option' for this part of the mandate, i.e. to 'further determine' the existing list of excluded liabilities.

The EBA has identified only three points on which further determinations can be usefully made. These are with regard to:

- point (a) of the first subparagraph of Article 55(1) of the Directive – the treatment of secured liabilities referred to in Article 44(2)(b) of the Directive;
- point (d) of the first subparagraph of Article 55(1) of the Directive – the interpretation of the reference to liabilities issued or entered into after the relevant transposition date;

- the second subparagraph of Article 55(1) of the Directive – the key elements of the third country law or binding international agreement which Union resolution authorities should assess as present before determining that the liabilities or instruments referred to in the first subparagraph of Article 55(1) of the Directive can be subject to write-down and conversion by a Union resolution authority pursuant to the law of a third country or to a binding agreement with that third country.

### Technical options

Following the EBA's mandate, three options have been considered regarding the contents of the contractual term:

Option A: the specification of the mandatory contents *with no flexibility* for institutions and relevant entities to supplement these components.

Option B: the specification of mandatory contents *with flexibility* for institutions and relevant entities to supplement the clause with additional components from a *closed list* set out in the draft RTS.

Option C: the specification of mandatory contents *with flexibility* for institutions and relevant entities to supplement these components with additional components (i.e. no closed list).

### Assessment of the technical options

Under Option A, the contents of the contractual term would be developed with no flexibility for institutions and relevant entities to supplement these components.

This option would secure a very high degree of consistency as regards the approach of the Member States, institutions and entities to the contents of the contractual term. However, this option would not enable institutions and relevant entities to supplement these contents as necessary to take account of any specificities arising in relation to a particular type of liability or a specific third country law.

Option B would offer a greater degree of flexibility in that, in addition to the mandatory components, it would enable institutions and relevant entities to supplement the mandatory components with optional components drawn from a closed list presented in the draft RTS.

This option would also promote a high degree of convergence, but, in addition, it would enable some specificities arising in relation to a particular type of liability or a specific third country law to be taken into account. However, it does not appear possible to anticipate in advance all potential issues that may be identified with regard to a particular type of liability or a specific third country law and, therefore, this option would be too rigid.

Option C aims to find a balance between the need for harmonisation and the need for flexibility. Under this option the mandatory contents are set out in the draft RTS, but there are no limits on



the ability of institutions and relevant entities to supplement the contents if necessary to take account of issues arising in relation to a particular type of liability or a specific third country law (although, of course, Member States must ensure that resolution authorities may require institutions and entities to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of such a term (third subparagraph of Article 55(1) of the Directive)).

#### E. Preferred option

Given the potential costs and benefits of the technical options, Option C is the preferred option to address the problems identified.



## 4.2 Views of the Banking Stakeholder Group (BSG)

The BSG did not submit a response to the draft RTS set out in EBA/CP/2014/33.

### 4.3 Feedback on the public consultation

The EBA publicly consulted on the draft RTS.

The consultation period lasted for 3 months and ended on 5 February 2015. Thirteen responses were received, of which two are confidential. The non-confidential responses were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases several respondents made similar comments or the same body repeated its comments in response to different questions. In such cases, the comments, and the EBA's analysis, are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

#### Summary of key issues and the EBA's response

1. Respondents asked for additional clarity regarding the scope of the exclusion from the requirement to include the contractual term.

##### **EBA response**

The EBA notes the concerns raised and observes that the EBA has not proposed any new grounds for exclusion (for example new forms of liabilities to which the requirement to include the contractual term does not apply or a de minimis threshold as regards the value of the liabilities subject to the requirement). This is because the creation of new exclusions would involve changing an essential element of the Level 1 text (the Directive) and making policy choices, which the EBA is not empowered to do, as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of European Union. It is also to be observed that all liabilities of an institution or relevant entity, unless expressly excluded as a result of Article 44(2) of the Directive, are within the scope of the bail-in tool.

2. Respondents raised concerns about the practicability of securing the inclusion of the contractual term in certain types of agreements, in particular standardised agreements.

##### **EBA response**



The EBA notes the concerns that have been raised about the practical difficulties that may arise in the course of negotiating the inclusion of the contractual term in certain types of agreements. However, the EBA also notes the scope of the requirement to include the contractual term as set out in Article 55(1) of the Directive. As is true of the other obligations under the Directive, it is incumbent on Member States and institutions to comply with this requirement.

3. Respondents raised concerns about the treatment of secured liabilities and the proposal to require the inclusion of the contractual term in relation to liabilities under agreements entered into prior to the date of application of provisions to transpose Section 5 of Chapter IV of Title IV of Directive 2014/59/EU which are subject to amendment after that date.

#### **EBA response**

The EBA agrees with a number of the comments that have been raised about its proposed approach in Article 3(2) and (3) of the draft RTS (Article 2(1) and (2) of the draft RTS published in this report) and proposes to make amendments to these provisions to accommodate the comments received

4. Respondents supported the EBA's proposed approach to the specification of elements which Union resolution authorities should identify as present before determining that a third country law or international agreement is sufficient to displace the obligation to include the contractual term. Respondents also supported the EBA's proposal to specify the mandatory contents of the contractual term, rather than prescribing a specific term



## Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>General comments</b>			
Scope (general)	<p>All respondents commented on the scope of the requirement to include the contractual term (Article 55(1) of the Directive):</p> <ul style="list-style-type: none"> <li>• Most respondents expressed concerns about applying the requirement to liabilities which are unlikely in practice to be subject to the write-down and conversion powers (e.g. having regard to the requirements for MREL (Article 45 of the Directive) and the grounds for excluding liabilities from the application of the bail-in tool on a case-by-case basis (Article 44(3) of the Directive)).</li> <li>• Five respondents noted that the FSB's <i>Consultative Document: Cross-border recognition of resolution action</i> (September 2014)<sup>10</sup> focuses on the inclusion of contractual recognition provisions in debt instruments, whereas Article 55 of the Directive encompasses all categories of liabilities other than those expressly excluded under Article 55(1) of the Directive. Therefore, the wide scope of the requirement under Article 55 of the Directive could have a negative impact on</li> </ul>	<p>As the EBA noted in its Consultation Paper, in accordance with its mandate under Article 55(3) of the Directive, the EBA has not proposed any new grounds for exclusion (for example new forms of liabilities to which the requirement to include the contractual term does not apply or a <i>de minimis</i> threshold as regards the value of the liabilities subject to the requirement specified in the first subparagraph of Article 55(1) of the Directive).</p> <p>This is because the creation of new exclusions would involve changing an essential element of the Level 1 text (the Directive) and making policy choices, which the EBA is not empowered to, as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of European Union.</p> <p>In addition, all liabilities of an institution or relevant entity, unless expressly excluded as a result of Article 44(2) of the Directive, are within the scope of the bail-in tool. Therefore, in order to ensure that the write-down and conversion powers can be applied effectively with regard to any liability governed by the law of a third country and not otherwise excluded pursuant to the Directive, it is</p>	No amendments proposed.

<sup>10</sup> The Consultative Document is available here: [http://www.financialstabilityboard.org/2014/09/c\\_140929/](http://www.financialstabilityboard.org/2014/09/c_140929/).



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>the competitiveness of EU institutions.</p> <ul style="list-style-type: none"> <li>The majority of respondents suggested that the EBA use the draft RTS to clarify the meaning of 'liability' and exclude certain forms of liability from the requirement to include the contractual term, including contingent liabilities, trade finance liabilities and credit arrangements. One respondent suggested that it would be appropriate to introduce a <i>de minimis</i> threshold to exclude certain liabilities from the requirement to include the contractual term. One respondent sought clarification that deposits in cash accounts under custody agreements fall within the scope of Article 44(2)(c) of the Directive and are therefore outside the scope of the requirement (see Article 55(1) of the Directive).</li> <li>Three respondents noted expressly that they considered that the EBA had correctly interpreted its mandate as requiring it to clarify the scope of excluded liabilities rather than conferring the power to create new grounds for exclusion.</li> <li>Several respondents encouraged the EBA to monitor international developments and to engage with the European Commission to assess whether it would be appropriate to pursue amendments to the requirements of Article 55 of the Directive to ensure that third country operations of European institutions</li> </ul>	<p>appropriate that the contractual term should be required to be included unless a third country law or binding international agreement provides an alternative mechanism to secure the effectiveness of an application of such powers.</p> <p>It is also noted that any 'clarification' of the scope of the term 'liabilities' is a Level 1 matter and would have cross-cutting implications as the term is used frequently throughout the Directive.</p> <p>For these reasons it is not possible for the EBA to vary the scope of the requirement to include the contractual term as established in the Level 1 text (i.e. in relation to liabilities governed by the law of a third country which are not otherwise excluded from the requirement).</p> <p>Instead, the draft RTS further determine the list of liabilities to which the exclusion from the requirement to include the contractual term applies (and specify the content of the contractual term).</p> <p>The EBA agrees that work should be taken forward on statutory approaches to the recognition of resolution proceedings such that third country authorities are empowered to recognise foreign resolution proceedings in a similar way to EU resolution authorities (see Articles 94 and 95 of the Directive). In this regard the EBA welcomes the FSB's work on a set of principles to enhance legal certainty in resolution, including by way of contractual and statutory approaches to recognition, and is following this work closely.</p>	



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>and third party creditors of those institutions are not unduly disadvantaged, and to ensure that the EU resolution regime is consistent with international developments.</p> <ul style="list-style-type: none"> <li>• One respondent thought that the EBA should promote and encourage the development of third country frameworks for recognition on a statutory basis.</li> <li>• One respondent considered that it would be helpful to make clear in the draft RTS that the requirement does not apply to liabilities with non-EU counterparties which are governed by the laws of an EU jurisdiction.</li> </ul>	<p>More generally, the EBA supports dialogue with any third countries to encourage the timely adoption of statutory recognition regimes and harmonise European rules with international initiatives.</p> <p>In 2015 the EBA will work on the development of framework cooperation arrangements with the supervisory and resolution authorities in key third country jurisdictions (see Article 97(2) of the Directive). This is intended to facilitate cooperation and the exchange of information in relation to recovery, resolvability and resolution actions.</p> <p>As for possible changes to the Directive, the EBA notes that it would be for the European Commission to put forward any legislative proposals necessary to amend the Directive in light of international developments.</p>	
Other points	<p>The following detailed issues were also raised:</p> <ul style="list-style-type: none"> <li>• Several respondents reiterated that it will be impracticable or impossible for firms to comply with the requirement to include the contractual term in liabilities arising under arrangements with non-EU market infrastructure (central counterparties and payment and settlement systems), which are generally and appropriately on standard terms for all members or participants.</li> <li>• A number of respondents also felt that it would</li> </ul>	<p>The EBA notes the concerns that have been raised about the practical difficulties that may arise in the course of negotiating the inclusion of the contractual term in certain types of agreements. However, the EBA also notes the scope of the requirement to include the contractual term as set out in Article 55(1) of the Directive. As is true of the other obligations under the Directive, it is incumbent on Member States and institutions to comply with this requirement.</p> <p>The EBA also notes that it is for the resolution authorities to determine on a case-by-case basis</p>	No amendments proposed.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>be very difficult in practice to secure the inclusion of the contractual term in trade finance agreements, which are generally highly standardised.</p> <ul style="list-style-type: none"> <li>• One respondent considered that the EBA should seek to agree with the relevant EU regulators that the ISDA Protocol (with its wholesale opt-in into the relevant resolution regimes) is sufficient to comply with Article 55 of the Directive.</li> <li>• One respondent suggested that the EBA could encourage Member States to take a harmonised and proportionate approach to enforcement, by requiring authorities to focus initially on enforcing the inclusion of the contractual term in instruments counting towards MREL and only at a later date to other liabilities within the scope of Article 55(1) of the Directive.</li> </ul>	<p>whether a particular recognition arrangement is sufficient to satisfy the requirement under Article 55(1) of the Directive; it is not for the EBA to comment on the adequacy of specific arrangements or terms.</p>	
<b>Responses to questions in Consultation Paper EBA/CP/2014/33</b>			
<p>Question 1. Do you agree with the approach the EBA has proposed for the purposes of further determining points (a) and (d) of the first subparagraph of Article 55(1) of the Directive (which form part</p>	<p>In general, respondents did not support the EBA's proposed approach for the purposes of further determining points (a) and (d) of the first subparagraph of Article 55(1) of the Directive, noting that the effect could be to inadvertently broaden the scope of the requirement under Article 55(1) of the Directive.</p> <p><u>Treatment of secured liabilities (Article 3(2) of the draft RTS)</u></p>	<p>The EBA agrees with a number of the comments that have been raised about its proposed approach in Article 3(2) and (3) of the draft RTS (Article 2(1) and (2) of the draft RTS published in this report) and proposes to make amendments to these provisions to accommodate the comments received, specifically by way of:</p>	<p>Article 2(1) and (2) of the draft RTS published in this report have been amended in light of the comments received.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>of the list of liabilities to which the exclusion in Article 55(1) of the Directive applies)? In particular, it is to be noted that Article 3(2) of the draft RTS refers to liabilities that ‘may’ become unsecured. Respondents are invited to comment on this approach and, should they disagree with this proposal, suggest possible alternative approaches.</p>	<ul style="list-style-type: none"> <li>• Ten respondents raised concerns about the EBA’s proposed approach to liabilities that <i>may</i> become unsecured (Article 3(2) of the draft RTS), as it is not inconceivable that almost any secured liability has the potential to become unsecured because of a shortfall in the value of the security. Therefore, the EBA’s proposed approach could be regarded as inconsistent with the Level 1 text, which foresees the exclusion from the requirement to include the contractual term of those liabilities referred to in Article 55(1) of the Directive, including those referred to in Article 44(2)(b) of the Directive (secured liabilities).</li> <li>• Respondents suggested possible alternative approaches, including clarifying that the exclusion applies to liabilities that: <ul style="list-style-type: none"> <li>○ were intended at their creation to be fully secured notwithstanding that the value of the security could fluctuate over the life of the liability;</li> <li>○ are subject to collateral arrangements conforming to the upcoming regulatory requirements.</li> </ul> </li> </ul> <p><u>Relevant transposition date (Article 3(3) of the draft RTS)</u></p> <ul style="list-style-type: none"> <li>• Respondents raised various concerns about the EBA’s interpretation of the transposition date,</li> </ul>	<ul style="list-style-type: none"> <li>• Article 2(1) of the draft RTS published in this report specifying that the contractual term must be included in relevant agreements where the liability is not fully secured or is fully secured but the liability is not required to be fully collateralised on a continuous basis in compliance with regulatory requirements under Union law or equivalent third country law;</li> <li>• Article 2(2) of the draft RTS published in this report including a materiality threshold such that non-material amendments to a relevant agreement created before the relevant transposition date but amended after that date would not trigger the obligation to include the contractual term. The EBA also agrees with the amendment proposed by one respondent to omit the words ‘is to include’ from the chapeau to Article 3(3) of the draft RTS.</li> </ul>	



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>i.e. with regard to liabilities under agreements amended after the implementation of the bail-in section of the Directive (see point (d) of the first subparagraph of Article 55(1) of the Directive).</p> <ul style="list-style-type: none"> <li>Several respondents noted that it would be helpful to clarify further the meaning of 'created', 'amended' and 'agreement'. In particular, respondents noted that agreements can be changed in a variety of ways which do not alter the fundamental state of the contract and queried whether changes to the contract details or authorised signatories constitute an 'amendment' triggering the requirement to include the contractual term. A broad interpretation could lead to critical disruption of client servicing by amending a large number of contracts to include Directive-compliant language when the fundamental terms remain the same as those agreed pre-implementation of the Directive. One respondent considered that the obligation could give rise to a significant monitoring exercise by institutions to keep under review existing contracts entered into prior to transposition and liabilities under agreements amended after the transposition date.</li> </ul> <p><u>Other points</u></p> <ul style="list-style-type: none"> <li><u>Amendments</u>: Several respondents proposed specifying that only material amendments</li> </ul>		



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>should trigger the requirement to include the contractual term (for certain types of liability this could include fundamental changes to the commercial terms of the principal liability, such as amount, pricing and tenor, but not amendments to other terms of the contract; however, this would need to be carefully considered for all types of liability within the scope of Article 55 of the Directive).</p> <ul style="list-style-type: none"> <li>• <u>Master agreements:</u> <ul style="list-style-type: none"> <li>○ One respondent noted that some liabilities arising after the transposition date would arise automatically by operation of, for example, provisions of a master agreement, and are beyond the control of the institutions concerned. Such cases should not include the requirement to introduce the contractual term.</li> <li>○ Confirmation should also be provided that new transactions under a master agreement should not constitute an ‘amendment’ to that master agreement for the purposes of Article 55 of the Directive, nor should any amendment to the terms of an individual transaction. Only new master agreements and a renegotiation of a term of the master</li> </ul> </li> </ul>		



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>agreement itself (and not a confirmation or new transaction under a master agreement) should constitute an 'amendment' for this purpose.</p> <ul style="list-style-type: none"> <li>• <u>Deposits</u>: BNY Mellon asked for further clarity regarding the treatment of deposits that are not excluded as a result of Article 55(1) of the Directive (see the reference to point (a) of Article 108 of the Directive). For instance, that the increase (or decrease) in the balance of an existing account under a deposit-taking agreement does not constitute the creation of a liability, but a change in the amount of an existing liability.</li> <li>• One respondent noted that subparagraphs (a), (b) and (c) of Article 3(3) of the draft RTS do not refer to <u>debt instruments</u> whereas subparagraph (d) refers only to debt instruments, and sought clarification on this point. In contrast, one respondent commented that Article 3(3) of the draft RTS should be restricted to debt instruments and should not be extended to other types of liabilities.</li> <li>• One respondent noted that the draft RTS could <u>subject a draw-down that is made after the relevant transposition date but is under a facility entered into before that date to the requirement to contractually accommodate bail-in</u>. It is widely expected that no lender</li> </ul>		



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>would wish to entertain the proposed amendment absent an opportunity to negotiate a risk premium.</p> <ul style="list-style-type: none"> <li>One respondent considered that the words '<u>is to include</u>' should be omitted from the chapeau to Article 3(3) as the list set out at subparagraphs (a) to (d) of that paragraph is exhaustive.</li> </ul>		
<p>Question 2. Do you agree with the approach the EBA has proposed for the purposes of further determining the second subparagraph of Article 55(1) of the Directive (which forms part of the list of liabilities to which the exclusion in Article 55(1) of the Directive applies)?</p>	<p>Of those respondents who responded to this question, all supported the EBA's general approach (see Article 3(4) of the draft RTS), but some respondents raised concerns about the level of prescription of the administrative or judicial procedure to recognise and give effect to, or to support, the application of resolution powers by EU resolution authorities. Several also noted the need for alignment with the FSB's final principles on cross-border recognition (see the consultative document referred to above).</p> <p>A number of respondents raised concerns about subparagraph (3) of Article 3(4) of the draft RTS (the grounds on which a third country authority may refuse to recognise the application of resolution powers by an EU resolution authority) as this could unintentionally frustrate the negotiation of cross-border recognition arrangements and appears premature bearing in mind the very few cross-border statutory recognition arrangements currently in existence.</p>	<p>The EBA welcomes the support for the approach the EBA has proposed in Article 3(4) of the draft RTS (Article 2(3) of the draft RTS published in this report) which is aligned with the FSB's <i>Consultative Document: Cross-border recognition of resolution action</i>, the contents of which we understand are unlikely to change in the FSB's final set of principles, which it is anticipated will be published later this year.</p> <p>The EBA's proposal with regard to third countries is intended to strike a balance between the objective of harmonising the approach the Union resolution authorities adopt to the assessment process and the objective of preserving the role of the resolution authorities in making the determination as to whether a third country law or international agreement is sufficient to secure recognition and therefore displace the need to include the contractual term.</p> <p>The EBA does not propose to amend the grounds on which a third country authority may refuse to</p>	<p>Article 2(3) of the draft RTS published in this report has been refined in drafting terms.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		recognise or support resolution actions by an EU resolution authority as the EBA considers that the permissible grounds should be limited and clearly defined.	
<p>Question 3. Do you agree with the approach the EBA has proposed with regard to the components of the contractual term required pursuant to Article 55(1) of the Directive?</p>	<p>Of the respondents who responded to this question:</p> <ul style="list-style-type: none"> <li>All respondents welcomed the EBA's proposal to avoid specifying a mandatory clause. However, several noted that the level of detail in the list of mandatory components (Article 4 of the draft RTS) arguably results in a de facto mandatory clause. The respondents suggested that Article 4 of the draft RTS be reworded to identify general concepts which can be applied universally to different types of agreements across different jurisdictions and taking account of market practice for different types of liability.</li> <li>Several respondents considered that the requirement for there to be an entire agreement clause (Article 4(5) of the draft RTS) should be omitted. One respondent noted it would be 'highly unusual' to include entire agreement clauses in bonds or other debt securities because the issuer's contacts with bondholders prior to issuance are very limited. The respondent went on to note that if Article 4(5) of the draft RTS is to be retained, it should be limited to bilateral agreements and should not apply to bonds, notes or similar instruments that are (or are capable of being)</li> </ul>	<p>The EBA welcomes the support for the approach that the EBA has proposed to the specification of components of the contractual term (rather than the prescription of a mandatory term), which now appear at Article 3 of the draft RTS published in this report. These components aim to strike a balance between the need to ensure that a harmonised approach is adopted by institutions when including contractual terms and the need to ensure that the term can be adapted appropriately to take account of issues arising in relation to a particular liability or governing law. In addition, the core components are aligned with those identified in the FSB's <i>Consultative Document: Cross-border recognition of resolution action</i>, (the contents of which we understand are unlikely to change in the FSB's final set of principles).</p> <p>The EBA notes the feedback received and has made a number of changes to Article 3 of the draft RTS published in this report to accommodate this feedback. In particular,</p> <ul style="list-style-type: none"> <li>the drafting has been slightly amended in places to become more principles-based;</li> <li>references to 'acknowledgment, agreement and consent' (e.g. Article 4(1) of the draft</li> </ul>	<p>Article 3 of the draft RTS published in this report includes amendments to take account of consultation feedback.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>listed on a regulated market or alternative trading platform, or any equivalent market or trading platform in a non-EU jurisdiction.</p> <ul style="list-style-type: none"> <li>• Several respondents had a number of detailed comments; for example, it was noted that:                             <ul style="list-style-type: none"> <li>○ references to ‘acknowledgment, agreement and consent’ (e.g. Article 4(1) of the draft RTS) should be changed to ‘acknowledgement, agreement <i>or</i> consent’ as this is more flexible;</li> <li>○ the specific identification of the resolution authority (Article 4(2) of the draft RTS) is not necessary and may change from time to time therefore this requirement should be deleted;</li> <li>○ the references to ‘consent by each counterparty’ are unclear; the respondent queried whether they relate to the signatories of the original agreements or if the general terms and conditions of the instruments will be imposed on the holder by means of purchasing the instrument.</li> </ul> </li> <li>• Several respondents noted the need for alignment with the final principles adopted by the FSB further to its <i>Consultative Document: Cross-border recognition of resolution action</i>.</li> </ul>	<p>RTS included in the Consultation Paper) have been changed;</p> <ul style="list-style-type: none"> <li>• Article 4(2) and (5) of the draft RTS included in the Consultation Paper have been omitted.</li> </ul>	



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Question 4. Do you agree with the draft Impact Assessment? Can you provide any numerical data to further inform the Impact Assessment?</p>	<p>Most respondents did not comment expressly on the IA.</p> <p>Of those who did comment:</p> <ul style="list-style-type: none"> <li>• One respondent noted that they largely agree with the IA but have some concerns along the lines set out below. Two respondents noted that they do not agree with the IA.</li> <li>• A number of respondents noted that the requirement to include the contractual term would have a significant negative impact, particularly taking account of the broad scope of the requirement (see ‘General comments’ above) and the practical issues with attempting to secure the inclusion of the contractual recognition language in certain types of agreements, for example agreements concerning liabilities to non-critical trade suppliers.</li> <li>• Several respondents noted that the requirement would result in amendments being made to tens of thousands of contracts.</li> <li>• A number of respondents noted that the IA does not provide detailed analysis in relation to detailed aspects of the draft RTS, such as the implications of the EBA’s proposed treatment of secured liabilities. Similarly, one respondent expressed disappointment that the IA does not distinguish between different liability types in assessing the impact of the requirement.</li> </ul>	<p>In the Consultation Paper the EBA invited respondents to comment on the IA and provide numerical data to further inform the IA.</p> <p>Unfortunately, no sufficient detailed numerical data has been provided to inform the EBA’s assessment of the impact of detailed aspects of its proposals.</p> <p>In light of the feedback received some changes have been made to the draft RTS with a view to securing a more proportionate approach. The draft IA has been updated in line with these amendments.</p> <p>However, for the reasons given in the original draft of the IA and the EBA’s analysis above (see ‘General comments’ above), the EBA is not empowered to create new exclusions from the requirement to include the contractual term as set out in Article 55(1) of the Directive. It is the Level 1 text, and not the RTS, that establishes the general scope of the requirement.</p>	<p>The IA has been updated in line with the amendments made to the draft RTS. However, more detailed cost–benefit analysis has not been included as a result of the absence of sufficient numerical data.</p>

