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EBA/CP/2014/39

Consultation Paper

Draft Guidelines
on the rate of conversion of debt to equity in bail-in

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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 treatment of shareholders first 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.

These EBA guidelines provide guidance to resolution authorities on the setting of conversion rates of debt to equity in accordance with Article 50 of Directive 2014/59/EU. Under that article the EBA is required to produce guidelines which indicate, in particular, how affected creditors may be appropriately compensated by means of the conversion rate, and the relative conversion rates that might be appropriate to reflect the priority of senior liabilities under applicable insolvency law.

The guidelines set out two guiding principles to which authorities should refer when setting conversion rates:

- i. When setting conversion rates resolution authorities should seek to ensure that no shareholder or creditor is expected to receive a worse treatment than in insolvency (to reduce the risk of a breach of the 'No Creditor Worse Off' safeguard of the BRRD), both when applying the bail-in tool and, to the extent necessary to uphold fundamental property rights, the power to write down or convert relevant capital instruments. This determination should be made on the basis of the ex ante valuation required by the BRRD
- ii. Subject to achieving the above, resolution authorities should only set differential conversion rates in order to respect the other principles in Article 34 of the BRRD.

The guidelines make clear that resolution authorities should only use differential conversion rates for the purposes of respecting the resolution principles and the No Creditor Worse Off safeguard. Where they are used, resolution authorities should set them so as to be reasonably confident that junior creditors and shareholders are not made worse off than in insolvency. Resolution authorities should avoid setting conversion rates which disproportionately benefit a particular class of creditors.

3. Background and rationale

Directive 2014/59/EU gives resolution authorities the power to convert certain (liabilities to equity, namely relevant capital instruments and other liabilities eligible for bail-in. The ability to convert certain debt instruments issued by the institution being resolved to equity allows the resolution authority to ensure that the institution will have sufficient equity to absorb losses and maintain any necessary regulatory authorisations, so that it may continue operating as required following the resolution.

Directive 2014/59/EU allows resolution authorities to apply differential conversion rates to different classes of liability or capital instrument. Article 50 requires that any differential conversion rates represent appropriate compensation for any loss incurred owing to the exercise of the write down and conversion powers in Article 59. Article 50 also requires that, when differential conversion rates are applied, the rates applied to senior liabilities should be higher than those for subordinated liabilities.

The use of differential conversion rates by liability class might be necessary, in certain circumstances, to ensure that the 'no creditor worse off' safeguard of Article 75 is respected. This might be the case when, for example, equally ranking creditors have been excluded from bail-in, causing a greater level of write down or conversion to be required for the liabilities not excluded. Setting a higher conversion rate would allow the resolution authorities to provide the affected creditors with more equity in the resolved firm, ensuring that they are no worse off than in insolvency.

4. Draft EBA Guidelines on the rate of conversion of debt to equity in bail-in

Status of these Guidelines

1. This document contains 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 (thereafter 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 or resolution 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, [resolution] 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 [31.10.15]. 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).
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Title I - Subject matter, scope and definitions

1. Subject matter

1.1. These Guidelines, which have been prepared pursuant to Article 50(4) of Directive 2014/59/EU (BRRD), are on the setting of conversion rates of debt to equity in bail-in. They are also relevant to the conversion of relevant capital instruments at the point of non-viability, because Article 60(3)(d) makes compliance with Article 50, including the EBA Guidelines, a condition for converting the relevant capital instruments.

1.2. Article 50(1) provides that resolution authorities, when applying the bail-in tool, may apply a different rate of conversion to different classes of capital instruments and liabilities. If they do, this must be done in accordance with: (i) the principle that the conversion rate shall represent appropriate compensation to the affected creditor for any loss incurred through write down or conversion (Article 50(2)); and (ii) the principle that conversion rates applicable to liabilities that are considered senior under applicable insolvency law shall be higher than the conversion rate applicable to subordinated liabilities (Article 50(3)).

1.3. Article 50(4) requires that these Guidelines indicate in particular, how affected creditors may be appropriately compensated by means of the conversion rate, and the relative conversion rates that might be appropriate to reflect the priority of senior liabilities under applicable insolvency law.

1.4. Resolution authorities are not obliged by the BRRD to set differential conversion rates, and may choose when applying the bail-in tool or the power to write down or convert capital instruments to convert each instrument or liability into equity at the same rate, provided that they achieve the resolution objectives and respect the sequence of write down and conversion in Article 48, the resolution principles in Article 34, the right to property under the Charter of Fundamental Rights and, in the case of the bail-in tool, the “No Creditor Worse Off” safeguard embodied in Article 75. These Guidelines provide guidance on the setting of conversion rates taking those factors into consideration.

1.5. These Guidelines relate only to the setting of differential conversion rates for classes of instruments which differ in their ranking in the relevant national insolvency creditor hierarchy. They do not relate to any setting of differential conversion rates for classes of

instruments which differ in, for example, their regulatory or accounting treatment, but not in their ranking in the relevant national insolvency creditor hierarchy.

2. Scope and level of application

1.6. These Guidelines are addressed to resolution authorities if they are compensating creditors with differential conversion rates while applying the bail-in tool to an institution, an entity referred to in BRRD Article 1(b), (c), or (d), or to claims or debt instruments that are transferred to a bridge institution or under the sale of business tool or the asset separation tool and making use of the possibility to establish differential conversion rates. They are also relevant to resolution authorities when applying the power to write down or convert relevant capital instruments at the point of non-viability. This is based on Article 60(3)(d), which requires that such instruments may only be converted when the conversion rate that determines the number of Common Equity Tier 1 instruments that are provided in respect of each relevant capital instrument complies with the principles set out in Article 50 and these guidelines.

Title II – Guidelines on the rate of conversion of debt to equity

Guiding principles

1.7. The guiding principles set out below relate directly to the requirements of the BRRD, and do not extend the resolution principles or safeguards set out in that directive. They aim to clarify how resolution authorities, having regard to those principles and safeguards, may ensure that creditors may be appropriately compensated by means of a differential conversion rate.

1.8. **Guiding principle 1: No creditor worse off.** Resolution authorities should seek to ensure when setting conversion rates that no creditor or shareholder is expected to receive treatment which is worse than the treatment they would have received if the firm had entered national insolvency proceedings at the point at which the decision to trigger resolution is made. They should base their assessment of expected actual treatment on an ex ante valuation¹ carried out pursuant to Article 36 of the BRRD. They should base their assessment of expected treatment in insolvency on 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, which must also be included alongside the ex ante valuation as required by Article 36(8) of the BRRD (the ex ante insolvency valuation).

1.9. When setting conversion rates when the bail-in tool or the power to write down convert relevant capital instruments is used, resolution authorities should also assess whether appropriate regard has been given to the right to property under the Charter of Fundamental Rights.

¹ 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

1.10. **Guiding principle 2: Creditor hierarchy.** Subject to achieving the aims of Guiding Principle 1, resolution authorities should only set differential conversion rates in order to achieve the resolution objectives or respect the other principles set out in Article 34 of the BRRD. In particular, when setting conversion rates resolution authorities should seek to ensure that:

- a. shareholders of the institution under resolution bear first loss;
- b. except where expressly otherwise provided in the BRRD, creditors of the institution under resolution are expected to bear losses after the shareholders and in accordance with the order of priority of their claims under normal insolvency proceedings;
- c. and that creditors of the same class are treated in an equitable manner.

1.11. When setting conversion rates when applying the power to write down or convert relevant capital instruments provided in Article 59 of the BRRD, authorities should also ensure that shareholders bear first loss, creditors bear losses in accordance with the order of priority of their claims under normal insolvency proceedings, and that creditors of the same class are treated in an equitable manner, unless this would be inconsistent with the need to have regard to the right to property under the Charter of Fundamental Rights.

1.12. Guidance on how resolution authorities should apply these guiding principles is set out below.

Valuation

1.13. Before applying the bail-in tool or the power to write down or convert capital instruments at the point of non-viability, a valuation of the assets and liabilities of the institution shall be made according to Article 36 of the BRRD. This must involve a fair, prudent and realistic valuation of the assets and liabilities of the firm.

1.14. This valuation (the ex ante valuation²) is to inform a number of decisions to be taken by the resolution authority, including 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. The valuation should include an estimate of the post-conversion equity value of new shares transferred or issued as consideration to holders of converted instruments.

1.15. Article 36(8) of the BRRD also requires that the valuation include 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 (the ex ante insolvency valuation). An ex-post independent valuation must also be made according to Article 74(2) to determine whether the actual treatment that shareholders and creditors had received as a

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

result of the application bail-in tool is worse than that which they would have received had the firm entered normal insolvency proceedings (the ex post valuation³).

Applying guiding principle 1: Ensuring that no creditor or shareholder is worse off than in insolvency

- 1.16. **When applying the bail-in tool, authorities should set conversion rates so that for each shareholder or creditor the expected value of their combined equity and debt claims after application of resolution powers, according to the ex ante valuation, is equal to or greater than the expected value that they would have realized had the institution entered normal insolvency proceedings, according to the ex ante insolvency valuation.**
- 1.17. **The write down or conversion powers referred to in Article 59 may be applied on their own, not in conjunction with the exercise of the bail-in or any other resolution tool. In this case, if authorities choose to employ differential conversion rates they should set conversion rates so that for each shareholder or creditor the expected actual treatment they receive (as determined by the value of their combined equity and debt claims after application of resolution powers according to the ex ante valuation) is expected to be equal to or greater than the expected value that they would have realized had the institution entered normal insolvency proceedings, according to the ex ante insolvency valuation, to the extent that is necessary to uphold fundamental property rights.**
- 1.18. Where creditor claims are fully written down, their claims no longer have any value. When a liability or other instrument is converted to equity, the equity claim may have more, less, or the same value as the original converted debt claim. The value of this equity claim must form part of the assessment of the actual treatment received by a creditor.
- 1.19. Where the total estimated value of equity received by the affected creditors following write-down and conversion is expected to be greater than the aggregate amount of debt claims written down or converted to equity, Guiding Principle 1 can be satisfied with no application of differential conversion rates.
- 1.20. Where the total expected value of the equity received by the affected creditors following write-down and conversion is lower than the aggregate amount of debt claims written down or converted to equity, differential conversion rates may be necessary.
- 1.21. Where there is a need to set differential conversion rates to prevent creditors from being made worse off than in insolvency or protect fundamental property rights or other resolution objectives, the conversion rates should be set so that senior creditors are not expected to be made worse off than in insolvency and/or that fundamental property rights have been protected. Resolution authorities should not set differential conversion rates which transfer more value to senior creditors than is necessary to respect Guiding Principle 2, to prevent

³ Criteria for the methodology to be applied for this valuation are described in EBA RTS XXX

senior creditors being made worse off than in insolvency, or to protect fundamental property rights or other resolution objectives.

1.22. For any creditor whose claim has been wholly converted to equity, the expected value of equity they receive should therefore be *at least* as large as their expected recovery in insolvency.

1.23. For any creditor whose claim has been only partially converted to equity, the expected value of equity they receive should therefore be *at least* as large as their expected recovery in insolvency, less the value of their remaining debt claim.

Applying guiding principle 2: Respecting the other Article 34 principles for resolution

1.24. **Authorities should set conversion rates to ensure, as far as reasonably possible and subject to respecting creditor safeguards and fundamental property rights, that the creditor hierarchy is fully respected. This means that if for a given creditor class the total value of remaining debt and equity claims after the application of resolution powers, according to the ex ante valuation, is less than the value of the claims of that class before resolution, the resolution authority should set a conversion rate equal to or close to zero for all more junior classes of liabilities and instruments.**

1.25. This means that shareholders will take the first loss. Any value preserved by resolution will be allocated first to senior and subordinated creditors' claims. As such, differential conversion rates aim to ensure that the creditors bear losses after the shareholders in accordance with the order of priority of the claims under insolvency. However, conversion rates may be set that allow the original shareholders (and shareholders whose claims resulted from the conversion of relevant capital instruments at the point of non-viability) to retain some claims with positive value, or for equity to be shared in some proportion by two or more classes of creditors. Shareholders could retain some positive value when there is no need to write down any creditors, i.e. where the bail-in only requires conversion.

1.26. Equity could be shared in some proportion by two or more classes of creditors where one creditor class had been fully converted to equity but more conversion were still required, and the partial or full conversion of the more senior creditor class did not leave the creditors in that class with a total debt and equity claim value of less than their original debt claim.

<p>Question 1: Do you agree that the Guiding Principles are sufficiently comprehensive? Would you add to or amend the description of how they should be applied?</p>

Final provisions

1.27. **Resolution authorities should only apply differential conversion rates where necessary to meet the guiding principles above.** Where there are no significant concerns about protecting creditor safeguards or fundamental property rights, and resolution authorities are satisfied that applying the same conversion rates would comply with the Article 34 principles

and achieve the resolution objectives, there should not be any need for differential conversion rates.

- 1.28. **Where differential conversion rates are applied, authorities should set the conversion rates so that they are reasonably confident that junior creditors or shareholders are not made worse off than in insolvency (in the case of bail-in) and that their fundamental property rights are protected.** This means that conversion rates for senior creditors should not be disproportionately high. Disproportionate benefit would arise if such creditors would be expected to have claims of a significantly higher value under the ex ante insolvency treatment than they had prior to resolution.

1.29. **Title III - Final Provisions and Implementation**

These Guidelines should be implemented into national resolution practices by relevant resolution authorities by [1.1.16].

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 conversion rate 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 that the Guiding Principles are sufficiently comprehensive? Would you add to or amend the description of how they should be applied?