



Public hearing: technical standards on impracticability of contractual recognition of bail-in (EBA/CP/2020/15)

30 September 2020

Opening 10:00 a.m. CET

Overview



Public hearing structure

EBA staff to introduce:

- Draft RTS & ITS process
- Background: Article 55 BRRD
- Overview of the draft RTS and draft ITS
- Specific questions for consultation
- Next steps

Q&A session

Suggestions for an efficient session

Should you need assistance or would like to intervene:

- write on WebEx chat to any of the hosts or publicly;
- reach us by email resolution@eba.europa.eu;
- raise your hand on WebEx.

To avoid background noise, please stay muted unless you take the floor.

To increase audio quality please turn off video streaming.

Please identify yourself (if you don't use full name on WebEx).

Article 55 BRRD – main considerations



BRRD 2 introduces new mandates for the EBA. Two of them regard impracticability of contractual recognition of bail-in.

Under Article 55 of Directive 2014/59/EU (BRRD), Member States shall require institutions and entities to **include a contractual** term by which the creditor or party to the agreement or instrument creating the liability recognises **that that liability may be subject to the write down and conversion powers** and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that that liability complies with conditions laid down in art 55(1) BRRD.

Article 55(2) BRRD provide that *where an institution or entity [...] reaches the determination that it is **legally or otherwise impracticable to include in the contractual provisions** governing a relevant liability a term required in accordance with paragraph 1 (of Art.55), such institution or entity **notifies its determination, including the designation of the class of the liability and the justification of that determination, to the resolution authority.***

Article 55 BRRD – EBA Mandates

<p>Article 55(6) of the BRRD requires the EBA to develop draft regulatory technical standards (RTS) in order to further specify:</p>	<p>Article 55(8) of the BRRD requires the EBA to develop draft implementing technical standards (ITS) in order to specify:</p>
<p>(a) the conditions under which it would be legally or otherwise impracticable [...] to include the contractual term referred to in paragraph 1 of Art. 55 in certain categories of liabilities;</p> <p>(b) the conditions for the resolution authority to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 (of art 55);</p> <p>(c) the reasonable timeframe for the resolution authority to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 (of art 55).</p>	<p>uniform formats and templates for the notification to resolution authorities for the purposes of paragraph 2 of Art.55.</p>

Conditions of impracticability

Draft RTS proposed conditions

- a) the inclusion of the contractual term would be in breach of the law of the third country governing the liability;
- b) the inclusion of the contractual term would be contrary to an explicit and binding instruction from a relevant third country authority of the third country the law of which governs the liability;
- c) the liability arises out of instruments or agreements concluded in accordance with and governed by internationally standardised terms or protocols which the institution or entity is unable to amend;
- d) the liability is governed by contractual terms to which the institution or entity is bound pursuant to its membership of, or participation in, a non-Union body, including financial market infrastructures, and which the institution or entity is in practice unable to amend;
- e) the liability is owed either to a commercial or trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning and where the institution or entity is in practice unable to amend the terms of the agreement concluded on standard terms.

- no exclusions from the scope of bail-in
- no exclusions from the scope of article 55
- underlying conditions creating the impracticability and not specific instruments

Conditions for the resolution authority to require inclusion



- i. **The condition – disagreeing with the institution’s determination**, based on the conditions of impracticability as defined in the draft RTS and notified;
- ii. **The criteria that the RA should take into account when considering the need to ensure resolvability.** This only applies if none of the conditions of impracticability notified are met.
- iii. **Thresholds – above the thresholds the inclusion is mandatory while below the thresholds the RA has flexibility, by using the criteria discussed in point ii above, to require or refrain from requiring the inclusion.**

The timeframe for the resolution authority to require inclusion



The reasonable timeframe for the resolution authority to require the inclusion of a contractual term at **3 months**, starting from the moment **the application is considered complete**.

This timeframe can **be extended**, in exceptional circumstances, by the RA of **another 3 months**.

*During a **transitional period of one year** from the RTS entering into force, the **RA can extend the timeframe with an additional 6 months** (as opposed to with an additional 3 months outside the transitional period).*

Draft ITS

Article 1 Core information for the purpose of a notification of impracticability

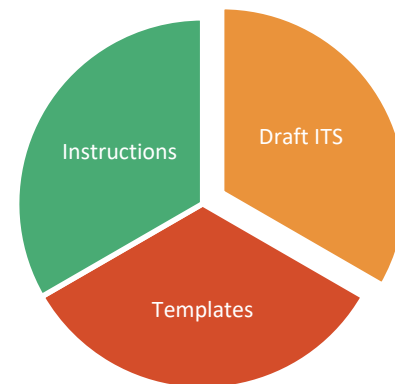
When making a notification under Article 55(2) of Directive 2014/59/EU, the institution or entity referred to in Article 1(1), points (b), (c) or (d) of that Directive shall submit to the resolution authority the information specified in the templates set out in Annex I in accordance with Article 2 and the instructions set out in Annex II.

Article 2 Format for the submission of information

Institutions or entities as referred to in Article 1(1), points (b), (c) or (d), of Directive 2014/59/EU shall submit the information referred to in Article 1 of Delegated Regulation [...] in the data exchange formats and representations **specified by resolution authorities**, respecting the data point definitions included in the single data point model referred to in Annexes III and IV, including the validation rules.

Article 3 This Regulation shall **enter into force** on the twentieth day following the day of its publication in the Official Journal of the European Union.

[N.B. entry into force for the RTS and ITS to be aligned]



Draft ITS Templates

N 01.01 - Notification Identification	
Columns	
Identification	
0010	
Notification ID	0010
Notification date	0020
Notification type	0030
Reference date for N01.01 and N01.02	0040
Reference date for N02.00	0050
Reporting currency	0060
Institution name	0070
Code	0080
Contact person	0090
Email	0100
Telephone	0110

N 01.01 - Impracticability of contractual recognition of bail-in by contract/instrument

Type of notification																			
EBA Staff: How to complete this template on intranet: Contractual recognition of liabilities Contractual recognition of liabilities																			
LIABILITY ID	MATERIAL AMENDMENT?	FINAL MATURITY DATE	RENEWABLE?	RENEW FREQUENCY	CONTRACT						IMPRACTICABILITY					COUNTERPARTY			
					DESCRIPTION	LIABILITY TYPE	INSOLVENCY RANKING	NOMINAL AMOUNT IN ORIGINAL CURRENCY	ORIGINAL CURRENCY	NOMINAL AMOUNT IN LOCAL CURRENCY	GOVERNING LAW	CONDITION	CATEGORY	LIKELY IMPACT	LEGAL OPINION?	NAME	CODE	TYPE OF CODE	NATIONAL CODE
0010	0020	0030	0040	0050	0060	0070	0080	0090	0100	0110	0120	0130	0140	0150	0160	0170	0180	0190	0200

N 01.02 - Impracticability of contractual recognition of bail-in by category

CATEGORY	TOTAL LIABILITIES IN LOCAL CURRENCY	LIKELY IMPACT	NUMBER OF UNDERLYING LIABILITIES
0010	0020	0030	0040

N 02.00 - Liability Insolvency Classes

INSOLVENCY RANKING	OUTSTANDING AMOUNT OF TOTAL LIABILITIES IN RANKING	OF WHICH: LIABILITIES GOVERNED BY THE LAW OF A THIRD COUNTRY	OF WHICH: PREVIOUSLY NOTIFIED TO THE RESOLUTION AUTHORITY	OF WHICH: CURRENTLY NOTIFIED TO THE RESOLUTION AUTHORITY	OF WHICH: EXCLUDED FROM BAIL-IN	NOMINAL AMOUNT OF TOTAL LIABILITIES CURRENTLY NOTIFIED TO THE RESOLUTION AUTHORITY
0010	0020	0030	0040	0050	0060	0070

Specific questions for the public consultation



1. Are there any third country authorities, other than resolution authorities, that might impose instructions not to include the contractual bail-in recognition term?
2. Can you provide concrete examples of instruments, such as letters of guarantee, governed by the law of a third country which are not used in the context of trade finance and which would be subject to conditions of impracticability?
3. Do you agree that the categories of liabilities in the above table do not meet the definition of impracticability for the purpose of Article 55(6)a)?
4. **Do you consider that there is any condition of impracticability that has not been captured in the analysis?**
5. Do you agree with EBA's approach for developing the draft ITS?
6. **Do you consider reasonable 3 months for entry into force of the ITS, as allowing enough time to set-up the proper and adequate capabilities to notify with this ITS?**
7. Do you agree with EBA's proposed conditions of impracticability?
8. **Can you provide examples of instruments or contracts for which it would be impracticable to include the contractual recognition which are not captured by the above proposed conditions?**
9. Are the proposed conditions of impracticability clear and meeting their purpose?
10. Is the article providing the conditions for the Resolution Authority to require inclusion clear?
11. Do you agree with EBA's proposal for the conditions for the resolution authority to require the inclusion of the contractual term?
12. What is the likely amount of the liabilities to be notified under article 55 BRRD, as average per liability and as expected maximum per liability? What is the expected average maturity of the liabilities to be notified under article 55 BRRD?
13. Do you agree with EBA's proposal for the reasonable timeframe for the resolution authority to require the inclusion of the contractual term?
14. **How much time do you need to implement the technical specifications provided in this ITS?**
15. Do you consider the draft ITS comprehensive for submitting a notification of impracticability?
16. Do you consider the templates and instructions clear?
17. Do you have any suggestions or proposals in relation to the draft ITS template and the instructions to fill it in?
18. **Do you find any specific piece of information required in the template as hard to develop or unclear how to fill in?**
19. Do you agree with the draft Impact Assessment? Can you provide any numerical data to further inform the Impact Assessment?

Next steps



Public consultation
closes on 24 October
2020

Draft RTS & ITS to be
finalised in Q4 2020
and published as Final
Draft RTS & ITS by the
EBA

Final Draft RTS & ITS
to be submitted to the
European Commission

1. Questions sent in advance
2. “Live questions”:
 - i. Via WebEx chat (private or public)
 - ii. resolution@eba.europa.eu
 - iii. Requesting the floor





30 September 2020



Public Hearing on technical standards on impracticability of contractual recognition of bail-in (EBA/CP/2020/15) / (art 55 BRRD)



Public Hearing has ended (opening was at 10:00 am CET)



Public consultation open until 24 October 2020

<https://eba.europa.eu/calendar/consultation-paper-draft-regulatory-technical-standards-contractual-recognition-stay-powers>



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