



# Public hearing: Draft RTS under Article 55(3) of the BRRD (contractual recognition)

09 January 2015

Registration, Recovery and Resolution Unit

# Overview

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  - Contents of the contractual term
- Specific questions for consultation
- Next steps

# Background: Article 55(3) BRRD

## Article 55(3) BRRD

- Pursuant to Article 55(1) BRRD institutions and entities referred to in points (b), (c) and (d) of Article 1(1) BRRD must include in *liabilities governed by the law of a third country* a contractual term by which the creditor or party to the relevant agreement:
  - recognises that the liability may be subject to the write-down and conversion powers;
  - 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 the resolution authority.
- The requirement does not apply in relation to excluded liabilities (i.e. liabilities of a kind referred to in the first and second subparagraphs of Article 55(1) BRRD).
- Article 55(3) BRRD requires the EBA to develop draft regulatory technical standards (RTS) in order:
  - to further determine the list of liabilities to which the exclusion applies, and
  - to specify the contents of the contractual term.

# Overview of the draft RTS

# Excluded liabilities

- Article 55(1) BRRD specifies the cases in which the requirement to include the contractual term does not apply.
- The requirement does not apply:
  - where the liability is:
    - excluded under Article 44(2) BRRD;
    - a deposit referred to in point (a) of Article 108 BRRD;
    - issued or entered into before the date on which a Member State applies the provisions adopted in order to transpose the bail-in section of the BRRD (Section 5, Chapter IV, Title IV BRRD);
  - where the resolution authority of the Member State has determined that liabilities or instruments governed by the law of a third country can be subject to the write-down and conversion powers by a Member State resolution authority pursuant to: (a) the law of the third country, or (b) a binding international agreement concluded with that third country.

## Excluded liabilities (cont.)

- Article 3 of the draft RTS further determines the grounds of exclusion specified in the first and second subparagraphs of Article 55(1) BRRD.
- In particular, the EBA proposes 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 may become unsecured (this is consistent with the third subparagraph of Article 44(3) BRRD which makes clear that a security interest shall not prevent a Member State resolution authority from applying the write-down and conversion powers to any unsecured portion of the liability);
  - the reference to liabilities issued or entered into after the relevant transposition date is to include: (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 but amended after that date; (d) liabilities under debt instruments issued after the transposition date, including under programmes existing prior to the transposition date.

## Excluded liabilities (cont.)

- The EBA also proposes to set out the key elements of the third country law or binding international agreement which Member State resolution authorities should assess are present before determining that liabilities or instruments can be subject to write-down and conversion by a Member State resolution authority pursuant to the law of a third country or to the binding agreement with that third country.
- Together these elements ensure that the exclusions are interpreted homogenously across the Union.
- For completeness it is noted that it is not possible for the EBA to specify new grounds of exclusion as this would involve changing an essential element of the Level 1 text and making policy choices which the EBA is not entitled to make pursuant to Article 290(1) TFEU.



# Contents of the contractual term

- Article 4 of the draft RTS specifies a list of mandatory components which must be present in the contractual term required pursuant to Article 55(1) BRRD.
- This approach is intended to strike a balance between the need:
  - to achieve an appropriate level of convergence, and
  - to ensure that differences in legal systems and other differences can be taken into account 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.

## Contents of the contractual term (cont.)

- The EBA proposes that the mandatory components should include the following elements (among others):
  - acknowledgment, agreement and consent by each counterparty that the liability of an entity under the relevant agreement may be subject to the exercise by a relevant resolution authority of its write-down and conversion powers;
  - acknowledgement, agreement and consent by each counterparty that:
    - (a) it is bound by:
      - (i) 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;
      - (ii) the conversion of that liability into ordinary shares or other instruments of ownership, that may result from an exercise by a relevant resolution authority of its write-down and conversion powers;
    - (b) the terms of the relevant agreement will be varied as may be necessary to give effect to the exercise by a relevant resolution authority of its write-down and conversion powers and the counterparty will be bound by such variations; and
    - (c) it will accept in lieu of rights under the relevant agreement any ordinary shares or other instruments of ownership into which the liability of an entity under the relevant agreement may be converted by a relevant resolution authority.

# Specific questions for consultation and next steps

## Specific questions for consultation

- 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 BRRD (which form part of the list of liabilities to which the exclusion in Article 55(1) of the BRRD 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.
- 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 BRRD (which forms part of the list of liabilities to which the exclusion in Article 55(1) of the BRRD applies)?
- 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 BRRD?
- Do you agree with the draft Impact Assessment? Can you provide any numerical data to further inform the Impact Assessment?

## Next steps

- Consultation closes on 5 February 2015.
- Draft RTS to be finalised in Q1 2015.
- Draft RTS must be submitted to the Commission by 3 July 2015.



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