

EBA/GL/2014/11

---

19 December 2014

---

# Guidelines

---

on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU

# Contents

---

<b>1. Executive summary</b>	<b>3</b>
<b>2. Background and rationale</b>	<b>4</b>
<b>3. EBA Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied</b>	<b>8</b>
<b>4. Accompanying documents</b>	<b>20</b>
4.1 Cost-benefit analysis/impact assessment	20
4.2 Views of the Banking Stakeholder Group (BSG)	26
4.3 Feedback on the public consultation	27

# 1. Executive summary

---

These guidelines complete the set of EBA regulatory deliverables on resolution planning and resolvability assessment. Where resolution authorities identify in their assessment of the resolvability of an institution or group substantive impediments to liquidation in normal insolvency proceedings or to the feasible and credible implementation of resolution powers, Article 17 of Directive 2014/59/EU sets out procedural and substantial rules for the reduction or removal of these impediments. As a first step the institution or group is required to propose possible measures to address the impediments identified by the resolution authorities. If the proposed measures do not effectively reduce or remove the impediments, the resolution authorities will require alternative measures in the second step. In selecting appropriate measures, resolution authorities have wide discretion. These guidelines do not limit this discretion, but specify further details on the list of measures specified in Article 17(5) of Directive 2014/59/EU and on the circumstances in which each measure may be applied. Therefore, these guidelines do not prescribe or prefer certain business models or organisational structures and allow for a case-by-case analysis of the impediments caused by an institution or group and of the best way to address them.

When applying measures to address impediments to resolvability, the resolution authorities must document that the measures are proportionate, taking into account the costs and benefits caused by the threat to financial stability and at the same time the effect on the institution.

The measures under Article 17(5) of Directive 2014/59/EU can be grouped under three headings: structural measures concerning the organisational, legal and business structure of an institution, financial measures relating to its assets and liabilities, and products and additional information requirements. The appropriate measure depends on the specific circumstances, the business model of the institution and on external factors, as analysed by the resolution authority in the resolvability assessment with a view to the preferred resolution strategy. Variant strategies should be considered if the measures based on these variant strategies are compatible with the preferred resolution strategy. Where relevant, the guidelines make reference to the distinction between a 'single point of entry' (SPE) strategy and a 'multiple point of entry' (MPE) strategy, making clear that both may imply a separation of legal entities or certain functions during resolution.

## 2. Background and rationale

---

The measures to address impediments to resolvability form part of the European Union framework intended to create adequate resolution tools to effectively deal with unsound or failing credit institutions. Directive 2014/59/EU creates resolution tools to permit resolution authorities to effectively deal with failing credit institutions while minimising any negative repercussions on the financial system by ensuring the continuity of that institution's systemically important functions to the real economy and without exposing public funds to loss. The directive requires that the resolution plans be credible and feasible. To fulfil these requirements, it may be necessary for financial institutions to remove impediments to an orderly resolution identified by a resolvability assessment conducted by the authorities. This may involve changes to the legal, operational and financial structure of credit institutions or their business activities. Article 17(5) provides the authorities with a range of powers to remove firm impediments to resolvability in advance of failure that can be used if measures proposed by firms are insufficient. The process established under Article 17(2) to (4) ensures a dialogue between the institution and the resolution authorities on how to address the impediments, and Article 17(7) requires the consultation of the competent authority and, if appropriate, the macro-prudential authority.

The guidelines organise the measures outlined in Article 17(5) under three broad headings (structural, financial and information-related) based on the nature of the impediment the measure may be used to remove:

<b>Category</b>	<b>Powers in Article 17(5)</b>
Structural Article 17(5)(a)	Requiring the institution to revise any intra-group financing arrangements or review the absence thereof, or draw up service agreements (whether intra-group or with third parties) to cover the provision of critical functions or services
Structural Article 17(5)(g)	Requiring changes to the legal or operational structures of the institution so as to reduce complexity to ensure that critical functions may be legally and economically separated from other functions through the application of the resolution tools
Structural Article 17(5)(h)	Requiring a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company
Structural Article 17(5)(k)	Where an institution is the subsidiary of a mixed activity holding company, requiring that the mixed-activity holding company set up a separate financial holding company to control the institution, if this is necessary to facilitate the resolution of the institution and to avoid the application of the resolution tools and powers specified in Title IV having an adverse effect on the non-financial part of the group
Financial Article 17(5)(b)	Requiring the institution to limit its maximum individual and aggregate exposures
Financial Article 17(5)(d)	Requiring the institution to divest specific assets
Financial	Requiring the institution to limit or cease specific existing or proposed

Article 17(5)(e)	activities
Financial	Restricting or preventing the development or sale of new business lines or products
Article 17(5)(f)	
Financial	Requiring a parent undertaking or a company referred to in points (c) and (d) of Article 1 to issue eligible liabilities
Article 17(5)(i)	
Financial	Requiring an institution, or an entity referred to in points (b), (c) or (d) of Article 1, to take other steps to meet the minimum requirement for own funds and eligible liabilities under Article 45, including to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument
Article 17(5)(j)	
Information	Imposing specific or regular additional information requirements relevant for resolution purposes
Article 17(5)(c)	

To support the consistent use of Article 17(5) measures across Member States, the EBA is mandated in Article 17(9) to develop guidelines specifying further details on the measures and the circumstances in which each measure may be applied. In developing these guidelines, the EBA has considered the experience of national authorities in developing credible and feasible resolution plans and the difficulties they encountered.

## Structural and operational measures

The legal, operational and financial structure of a credit institution may impede the implementation of resolution powers. The powers in Article 17(5) relating to the structure of a group, include requiring an institution ex-ante to change its legal structure to improve the feasibility and credibility of the preferred resolution strategy. Where the preferred resolution strategy includes a separation of entities within a group, it can be necessary to reduce ex-ante the financial and operational interconnectedness of a group (Article 17(5)(a)) to be able to maintain access to critical economic functions in resolution. This may require structural changes ex-ante so that these functions can be easily separated from the group in crisis (Article 17(5)(g)). Resolution plans may provide for the resolution tools to be applied to a parental holding company (or a financial holding company if within a mixed activity group) to minimise the impact on the daily operations of a complex financial institution (Article 17(5)(h) and (k)).

## Financial measures

The financial measures outlined in Article 17(5) are diverse in range. Where resolution authorities consider that certain financial products or activities carried out by an institution may impair the preferred resolution strategy, the firm can be required to cease or restrict the development of these products and/or cease the existing or proposed activity (Article 17(5)(e) and (f)). To enable a resolution strategy for a globally or domestically systemic firm it may be necessary for that firm to maintain sufficient liabilities expected to contribute to loss absorption and recapitalisation as specified by the authorities to improve the credibility and feasibility of the preferred resolution strategy (Article 17(5)(i) and (j)).

## Information requirement

This specific power enables resolution authorities to request specific information for resolution purposes from financial institutions on a regular or ad hoc basis.

## Specifications applying to all measures

It is worth noting that a number of specifications apply to all Article 17 (5) measures, as follows:

### (a) Authorities' discretion

Authorities can use discretion in their assessment of resolvability and when to apply the measures of Article 17 of Directive 2014/59/EU to remove any impediments identified. For this reason, the guidelines state that authorities should consider certain measures under specific circumstances. However, pursuant to Article 17 of Directive 2014/59/EU, if resolution authorities identify substantive impediments to resolvability and assess that the measures proposed by an institutions do not effectively reduce or remove them, they are obliged to require the institution to take alternative measures, which means that authorities are required to ensure that impediments are reduced or removed. Resolution authorities are not restricted to Article 17(5) measures if they judge that other measures are necessary to remove impediments to resolvability. The circumstances described in the guidelines are not meant to be exhaustive, and authorities are not limited to only applying measures in these cases.

It should also be noted that the application of the measures does not require a breach of prudential requirements as an ex-ante condition. In particular there does not have to be any threat to the going concern status of an institution, e.g. the institution failing or likely to fail (Article 32 of Directive 2014/59/EU) or the breach or likely breach of the requirements in Directive 2013/36/EU or Regulation (EU) No 575/2013 (as it is necessary for early intervention measures in accordance with Article 27 of Directive 2014/59/EU).

### (b) Proportionality

Depending on the individual case, certain measures may be less intrusive than others. Following the procedure provided for in Article 17(1) to (4) of Directive 2014/59/EU, resolution authorities should assess which measure is the least intrusive for removing the firm-specific impediment identified as part of the resolvability assessment.

### (c) Variant resolution strategies

The measures outlined in Article 17(5) of Directive 2014/59/EU should be used by resolution authorities to remove impediments to resolvability under the preferred resolution strategy to ensure it can be feasibly and credibly implemented in the event of firm failure. Resolution authorities may also identify variant strategies to be applied in circumstances should the preferred resolution strategy be likely to fail in its stated objectives or not be able to be implemented successfully. This particularly applies to cross-border groups. If authorities consider variant strategies necessary, impediments to the implementation of any variants could be taken into account and removed where authorities judge necessary. However, these measures should

be compatible with and not impair feasible and credible implementation of the preferred resolution strategy.

Where relevant, the guidelines make reference to the distinction between a 'single point of entry' (SPE) strategy and a 'multiple point of entry' (MPE) strategy. However, it should be noted that the distinction is not clear cut and matters considered with respect to one type of strategy may also be relevant for the other. For example, as any strategy can imply a separation of legal entities and certain functions, considerations which are typical for an MPE strategy may also be relevant to an SPE strategy.

The guidelines should be read in parallel with the EBA regulatory technical standards on the assessment of resolvability (Article 15(4)), as both processes complement each other to achieve a credible and feasible resolution plan, and with the regulatory technical standards on the assessment criteria of minimum requirement of eligible liabilities (MREL, Article 45(2)).

# 3. EBA Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied

---

## Status of these guidelines

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 (*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.

The guidelines specify the EBA's view of appropriate supervisory 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 the guidelines are addressed to comply with the 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

In accordance with Article 16(3) of the EBA Regulation, competent 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 19.02.2015. In the absence of any notification by this deadline, the EBA will consider competent authorities to be non-compliant. Notifications should be sent by submitting the form provided at Section 5 to [compliance@eba.europa.eu](mailto:compliance@eba.europa.eu) with the reference 'EBA/GL/2014/11'. Notifications should be submitted by persons with the appropriate authority to report compliance on behalf of their competent authorities.

Notifications will be published on the EBA website, in line with Article 16(3).

## Title I - Subject matter, scope and definitions

### 1. Subject matter

These guidelines specify further details on the measures provided for in Article 17(5) of Directive 2014/59/EU and the circumstances in which each measure may be applied.

### 2. Definitions

The following definitions apply for these guidelines:

- (a) 'Resolution strategy' means a set of resolution actions to resolve an institution or group.
- (b) 'Recipient' means the acquirer, the bridge institution or the asset management vehicle following the use of the sale of business, the bridge institution or the asset separation tool.
- (c) 'Multiple point of entry (MPE)' means a resolution strategy or one of the options under a resolution strategy involving the application of resolution powers by two or more resolution authorities to regional sub-groups or entities of a group.
- (d) 'Single point of entry (SPE)' means a resolution strategy or one of the options under a resolution strategy involving the application of resolution powers by a single resolution authority at the level of a single parent undertaking or of a single institution subject to consolidated supervision.

### 3. Level of application

These guidelines apply to resolution authorities.

## Title II – Specifications applying to all measures

### 4. Impediments and relation to prudential requirements and structural separation requirements

- (a) Resolution authorities should consider applying measures to remove or reduce substantive impediments to resolvability resulting from the characteristics of the institution or from the interaction of these characteristics with external circumstances, including impediments arising in third countries. Impediments should be assessed regarding their impact on feasibility and credibility as specified in the regulatory technical standard on the content of resolution plans and the assessment of resolvability of a certain (preferred or variant) resolution strategy, including foreseeable impediments to the restoration of the long-term viability of an entity continuing critical functions of the institution under resolution.
- (b) Resolution authorities may apply the measures solely to address impediments to resolvability without any existing breach or likely breach of prudential regulation requirements by the institution being required.

- (c) Where existing prudential standards or requirements, in particular under Directive 2013/36/EU and Regulation (EU) No 575/2013, are not sufficient to ensure the feasibility and credibility of the resolution strategy for the individual institution or group, resolution authorities should consider taking appropriate measures to impose additional standards and requirements on the institution, following consultation with the competent authority. Where a structural separation of certain operations is required under applicable law or may be required by competent authorities, and the resolution authorities assess that this separation is not sufficient to ensure the feasibility and credibility of the resolution strategy, the resolution authorities should consider taking appropriate additional measures.

## 5. Proportionality

Each of the measures listed in Article 17(5) of Directive 2014/59/EU may be applied if they are suitable, necessary and proportionate to reduce or remove the impediments to the implementation of a certain resolution strategy, including impediments to liquidation, where an institution is likely to be liquidated in normal insolvency proceedings in the event of its failure.

- (a) A measure is suitable to reach the intended goal if it is able to materially reduce or remove the relevant impediment in a timely manner.
- (b) A measure is necessary to reach the intended goal if it is required to remove or materially reduce a substantive impediment to the feasible or credible implementation of the relevant resolution strategy, and if there are no less intrusive measures which are able to achieve the same objective to the same extent. The intrusiveness of the measure should be assessed by costs and negative effects on the institution and its owners and their right to conduct business, and on the soundness and stability of the ongoing business of the institution. In accordance with Article 10(3) of Directive 2014/59/EU, extraordinary public support must not be assumed to be a less intrusive measure.
- (c) A measure is proportionate to the threat that those impediments pose to financial stability in the event of a failure of the institution, if the overall benefits for making a liquidation in normal insolvency proceedings or resolution of the institution feasible and credible and for meeting the resolution objectives outweigh the overall costs and negative effects of removing the impediments to resolvability. Resolution authorities should also consider less intrusive measures when assessing proportionality.

## 6. Variant resolution strategies

The measures outlined in Article 17(5) of Directive 2014/59/EU by resolution authorities should aim to remove impediments to resolution with respect to the preferred resolution strategy in the first place. Where the resolution authority considers alternative or fall-back strategies in specific situations in the event that the preferred option does not achieve the objective to protect financial stability by maintaining critical functions or cannot be expected to be successfully implemented, in particular with respect to cross-border groups, impediments to the implementation of alternative options should be taken into account and

removed where necessary. However, measures required to remove impediments to alternative variants should only be implemented if they do not impair the feasible and credible implementation of the preferred option.

### Title III- Details and circumstances with respect to specific measures

7. In relation to the requirement to revise any intragroup financing agreements or review the absence thereof, and to draw up service agreements (whether intra-group or with third parties) to cover the provision of critical functions or services pursuant to point (a) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:
- (a) Resolution authorities should consider requiring the institution to revise existing group financing agreements or to review the absence thereof if they conclude in their assessment of the existing group financing agreements that the provision of support or its form (or the absence of this type of agreement) make it substantively more difficult for resolution authorities to achieve the resolution objectives by applying resolution tools. In particular they should be consistent with the resolution strategy considered and take into account the allocation of liabilities expected to contribute to loss absorption and recapitalisation in the group and the distribution of losses within the group considered in the relevant resolution strategy.
  - (b) Resolution authorities should consider requiring the institution to draw up written service level agreements or transitional support arrangements and other appropriate measures to secure the continuity of the functions or services provided by legal entities within the group, including non-regulated affiliates, and by third parties. This measure may be applied in cases where
    - no written service agreements exist,
    - the level of documentation of service agreements is insufficient or
    - it is not ensured that they cannot be terminated by the counterparty due to resolution action being taken by the resolution authority.
  - (c) Resolution authorities should consider applying this measure to allow material legal entities to be operationally independent where necessary to support a resolution strategy envisaging a break up or restructuring of the group or institution, including the use of a (partial) transfer tool.
  - (d) If applying this measure, resolution authorities should ensure that these intragroup financing agreements and service agreements are accessible and enforceable within a short timeframe. If the relevant resolution strategy envisages the use of a (partial) transfer tool, resolution authorities should consider requiring agreements to be transferable to entities resulting from resolution action or to recognise the legal effects of statutory transfers.

8. In relation to the requirement to limit maximum individual and aggregate exposures pursuant to point (b) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:
- (a) Where necessary to support a resolution strategy involving a separation of legal entities within the group, resolution authorities should consider requiring the institution to tighten intra-group exposure limits to contain internal financial interconnectedness between group entities (or subgroups) that are to be resolved separately under the resolution strategy, if this intra-group exposure impairs the institution's resolvability. The same may apply in relation to a ring-fenced entity, if pursuant to legislative requirements or supervisory decisions a separation of certain activities into this type of entity is required, if this is necessary to ensure the credibility and feasibility of the use of resolution tools to the ring-fenced entity or the remaining parts within the group.
  - (b) Resolution authorities should consider requiring institutions to limit exposures to special purpose entities connected to the institution by significant undrawn commitments, material guarantees or letters of comfort that are not consolidated in the balance sheet of the institution and are not within the scope of resolution powers.
9. In relation to the measure of imposing specific or regular information requirements relevant for resolution purposes pursuant to point (c) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:
- (a) Resolution authorities should consider imposing information requirements if they assess that these requirements enable them to apply the resolution tools envisaged under the resolution strategy more effectively, or to draw up an effective resolution plan.
  - (b) Resolution authorities should consider requiring institutions to produce information used to inform the management about the situation of the institution (management information), including financial statements and information on capital and subordinated debt, available for each legal entity relevant for the implementation of the resolution strategy, in particular if it is envisaged as a point of entry under an MPE approach, and to be able to produce legal entity specific information for all entities the failure of which is likely to negatively affect financial stability in any jurisdiction upon request.
  - (c) If an institution has complicated intra-group operational services arrangements, resolution authorities should consider requiring the information necessary to fully clarify the structure of these arrangements.
  - (d) If applying this measure, resolution authorities should ensure that institutions are in the position to produce up-to-date information required within the timeframe necessary under the resolution strategy, and the institution's information systems should provide all data needed to develop and implement the resolution strategy, and to support a credible valuation before and during resolution including those required by Articles 36 and 74. Institutions should in particular ensure the availability of information required by the resolution authorities to identify:
-

- the critical functions,
- the creditors or types of creditors most likely to absorb losses during resolution,
- the creditors of liabilities of particular relevance for critical functions or the implementation of the resolution strategy such as covered and non-covered deposits by SMEs and natural persons (i.e. single customer view), and
- positions, services and functions essential for the risk management of the group which have to be maintained to ensure the continuation of critical functions.

10. In relation to the requirement to divest specific assets pursuant to point (d) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

- (a) Resolution authorities should consider requiring institutions to divest assets prior to resolution if the resolution strategy requires the sale of these assets and if this sale in resolution would have significant adverse effects on the use or implementation of resolution tools or make it significantly more difficult. If this measure is applied, assets to be divested should be those, the sale of which in the timeframe provided for under the resolution strategy is likely to result in pressure on prices for assets, destruction of value and additional uncertainty and vulnerability of financial markets and other institutions, if these effects can cause significant adverse consequences for the financial systems.
- (b) In addition, resolution authorities should consider applying this measure if the existing asset structure of the institution is likely to have adverse effects on the feasibility or credibility of the resolution strategy. Where the resolution strategy relies on a liquidation of assets to generate liquidity for the continuance of critical functions, resolution authorities should consider requiring institutions to divest assets, which are likely to be illiquid under stressed conditions or at the point of resolution, to increase the proportion of assets which are expected to be more liquid instead. This measure should also be considered in relation to assets which significantly impair the feasibility of the valuation required under Article 36 of Directive 2014/59/EU. Resolution authorities should also consider the risk that assets or funding may be trapped in third countries.
- (c) When applying this measure, resolution authorities should consider the impact of the divestment on the market for the assets concerned, also as a result of divestments required from further institutions.

11. In relation to the requirement to limit or cease specific existing or proposed activities pursuant to point (e) of Article 17(5) of Directive 2014/59/EU the following specifications apply:

- (a) Resolution authorities should consider requiring the institution to limit complex practices related to how trading or hedging operations are marketed, booked, funded and risk-managed, and to their location within the group, if these practices undermine the feasibility or credibility of the resolution strategy.

- (b) Resolution authorities should consider requiring institutions to limit activities in third countries that have an insufficient resolution regime if it is judged that the inability of these jurisdictions to maintain continuity of the firm's activities in their jurisdiction during a resolution may subsequently undermine the ability of a resolution authority to maintain the continuity of critical functions in a Member State.
- (c) Resolution authorities should consider whether to require institutions to limit services provided to other institutions or other participants in financial markets if, based on an overall evaluation of the institution's functions, the authority assesses that the services could not be continued in resolution and their discontinuance could threaten the stability of the recipients of these services.
- (d) Where pursuant to legislative requirements or supervisory decisions a separation of specific activities into a special entity is required, which would be prevented from performing certain other activities, resolution authorities should consider preventing this entity from performing certain additional activities if this is necessary to ensure the credibility and feasibility of the use of resolution tools to each part of the group following the separation.

12. In relation to measures that restrict or prevent the development or sale of new business lines or products pursuant to point (f) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

- (a) Resolution authorities should consider applying restrictions to products that are structured in a way that impairs the use of resolution tools, or with the purpose of circumventing their application.
- (b) Authorities should consider restricting or preventing the development or sale of products governed by third country law or instruments issued from entities in a foreign jurisdiction, for example a third country branch or special purpose entity, if the third country law does not give effect to the use of resolution powers envisaged by the resolution strategy or does not make them effectively enforceable, or if the sale of these products is likely to have significant adverse effects on the use or implementation of resolution powers. Under these conditions, authorities should also consider restricting sales to investors in foreign jurisdictions, where the holding of products by these investors potentially results in legal action against the resolution authority.
- (c) Authorities should consider requiring institutions to restrict the development or sale of products if, as a result of the complexity of these products, the assessment of obligations of the institution by the resolution authority is impaired or the valuation pursuant to Article 36 of Directive 2014/59/EU is significantly impeded.

13. In relation to the requirement to change the legal or operational structure of an institution so as to reduce complexity in order to ensure that critical functions may be legally and economically separated from other functions through the application of the resolution tools

pursuant to point (g) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

- (a) Application of this measure should be considered if the resolution authority assesses the legal and operational structure of the institution or group as being too complex or too interconnected to be able to maintain continuity of access to critical functions in a resolution, or to be broken up under a resolution strategy implying a break-up of the group or a wind-down or transfer of certain assets and liabilities.
- (b) If necessary for the effective implementation of an MPE strategy and to ensure that certain sub-groups or entities are separable, resolution authorities should consider requiring groups to organise legal entities following regional blocks or core business lines, in particular if critical functions are attributable to certain business lines while other business lines do not encompass critical functions. This should in particular apply to centralised hedging and risk management, trading and liquidity management, and collateral management, liquidity management or other key treasury and finance functions, unless these functions can be replaced by market transactions with outside parties. In accordance with the resolution strategy, resolution authorities should prevent extensive cross-entity booking and hedging practices, and ensure that entities that are to be resolved separately have sufficient stand-alone booking and risk management. Resolution authorities should consider requiring institutions to put in place effective standalone governance, control and management arrangements in each subgroup or entity.
- (c) Where pursuant to legislative requirements or supervisory decisions a structural separation of certain activities is required, resolution authorities should consider requiring a separation of additional activities if necessary to ensure the credibility and feasibility of the use of resolution tools in each part of the group following the separation.
- (d) Resolution authorities should ensure that subsidiaries which are material to the continuity of critical functions are located in EU or third country jurisdictions that do not pose impediments to resolution.
- (e) If the resolution strategy provides for a break-up of the institution or group or a change of ownership by sale or transfer, resolution authorities should consider requiring the institution to organise critical functions and access to infrastructure or shared services that are necessary for the continuation of critical functions in a way that facilitates their continuity. If necessary to make a resolution strategy credible and feasible, resolution authorities should consider requiring institutions to change their operational structure to reduce or prevent the dependency of material entities or core business lines in each subgroup on key infrastructure, IT, personnel or other critical shared services from different subgroups. This should include management information systems. It should be ensured that adequate governance and control arrangements are in place and the necessary financial resources are available so that internal and external service providers can continue to provide their services.

- (f) Where required to ensure the provision of critical shared services following resolution, resolution authorities should consider requiring institutions to move these services into separate operational subsidiaries. If applying this measure, resolution authorities should consider requiring these operational subsidiaries
- to limit their activities to the provision of these services and to apply appropriate restrictions regarding risks and activities,
  - to be adequately capitalised to meet their operational costs for an appropriate timeframe,
  - to meet the requirements applicable to an outsourcing of the functions concerned and
  - to provide their services under intra-group contract service level agreements that are robust under resolution.

The terms of these agreements, the governance arrangements of these subsidiaries and their ownership structure should be appropriate to ensure the continuance of the services following resolution.

- (g) Resolution authorities should consider requiring institutions to take precautions to meet, in a resolution situation, the specific requirements of any financial markets infrastructure (FMI) in which they participate, including access to clearing, payment and settlement services for all subgroups and material entities of the subgroup during resolution and, if applicable, for a recipient to whom critical functions have been transferred. Where necessary, resolution authorities should consider requiring institutions to make reasonable efforts to re-negotiate contracts with FMIs accordingly, subject to safeguards to protect the sound risk management and safe and orderly operations of the FMI.
- (h) Resolution authorities should consider requiring institutions to prevent critical dependencies of the institution, group or any subgroup on the provision of services under contracts not under the jurisdiction of EU Member States that permit termination upon the resolution of group entities. A dependency should be deemed critical when it affects critical functions of the institution.
- (i) If an SPE strategy includes a winding down of business lines with non-critical functions, resolution authorities should consider requiring institutions to ensure the separability of these business lines, within or outside the existing structure, including the saleability of certain operations in case the resolution strategy requires their sale. If necessary to ensure separability, resolution authorities should consider requiring institutions to change their structure in third countries from branches to subsidiaries, or to internally segregate all or certain functions and business lines in these branches to prepare a carve-out of these functions and facilitate the transfer to a separate entity.

- (j) If necessary for the effective implementation of an SPE strategy, the funding of subsidiaries by the top company of the group should be adequately subordinated, not be subject to set-off and/or provide for appropriate arrangements for losses to be transferred to the legal entity to which resolution tools would be applied from other group companies, in a way that allows the relevant operating group entities to remain viable. The funding should be structured so that the group or the part of the groups that perform critical functions is not broken up following a write-down and conversion of a considerable portion of the instruments that are subject to write-down and conversion powers. Where the resolution strategy depends on a re-allocation of capital and liquidity within the group, capital and liquidity should be located in jurisdictions where this re-allocation is allowed under local regulatory limits.
- (k) Where necessary to ensure the separability of critical functions from other functions resolution authorities should consider requiring the establishment of a holding company not performing any critical functions under the circumstances set out in point 14(b) below. The considerations under point 14(c) apply accordingly.
- (l) Resolution authorities should consider requiring institutions to take reasonable precautions to ensure availability of, to retain or to substitute key staff where this is necessary to implement the preferred resolution strategy, also with a view to the replacement of the management body and senior management of the institution under resolution required by Article 34(1)(c) of Directive 2014/59/EU.
- (m) Resolution authorities should consider requiring institutions to ensure the continuity of management information systems. Resolution authorities should consider requiring that the institution's information systems and data availability ensure that authorities are able to obtain the data needed to implement the resolution strategy and carry out valuations before and during resolution. In particular, resolution authorities should consider requiring institutions to ensure the operability of the use of the write-down and conversion powers at the point of resolution by making the identification of liabilities, stays on payments and the technical implementation of the write-down and conversion feasible.
- (n) Resolution authorities should consider requiring institutions to reduce the complexity and size of their trading book if this is necessary to apply the resolution tools, in particular the bail-in tool with regard to large portfolios of derivatives and other financial contracts, to a lack of transparent and accessible structure or the complexity or volatility of measurement and valuation of the products and portfolios in the trading book and their internal interconnectedness.

14. In relation to the requirement to a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company pursuant to point (h) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

- (a) Resolution authorities should consider applying this measure if they assess that it is not feasible or credible to resolve the EU part of a non-EU regulated bank due to the fact that

there is no parent company subject to EU jurisdiction. In particular, resolution authorities should consider requiring setting up an EU intermediate financial holding company if the issuance of debt at this level is necessary to provide for an adequate amount and proper allocation of liabilities expected to contribute to loss absorption and recapitalisation, to facilitate the absorption of losses at the level of operating subsidiaries and to ensure the fungibility of liabilities expected to contribute to loss absorption and recapitalisation within the EU part of the group.

- (b) In addition, this measure may be applied where feasibility or credibility require the application of resolution tools at holding company level rather than to operating entities, in particular with regard to potential exclusions from the bail-in power. Resolution authorities should consider applying this measure together with restrictions on the operational activities of the financial holding company, if the operational activities at its level substantively impede the feasibility or credibility of the implementation of the resolution strategy. In particular, resolution authorities should consider setting appropriate limitations to prevent this financial holding company from performing critical functions or services to other group entities on which critical services performed by these entities depend. Where necessary, the parent holding company's balance should contain only equity and liabilities expected to contribute to loss absorption and recapitalisation.
- (c) Where there is significant branch activity in the EU performing critical functions the continuance of which is not adequately provided for in the respective third country entity's resolution plan, or from which results a significant risk of contagion, which is not adequately reflected in the third country entity's resolution plan, resolution authorities should consider requiring to set up a subsidiary or capturing this under the financial holding company required pursuant to point (a).

15. In relation to the requirement to a parent undertaking, or a company referred to in Article 1(c) and (d) to issue the debt instruments or loans referred to in Article 45 of Directive 2014/59/EU pursuant to point Article 17(5)(i) of Directive 2014/59/EU, the following specifications apply:

- (a) Dependent on the preferred resolution strategy, resolution authorities should consider requiring an institution at the appropriate level to issue a sufficient amount of liabilities expected to contribute to loss absorption and recapitalisation, taking into account potential losses in entities captured by the resolution strategy without sufficient liabilities expected to contribute to loss absorption and recapitalisation on their own, and where applicable, further entities belonging to the same group. Where the resolution strategy relies on the fungibility of liabilities expected to contribute to loss absorption and recapitalisation, resolution authorities should take into account local regulatory limits and existing group support agreements.
- (b) For an SPE strategy, liabilities contributing to loss absorption should be sufficient to absorb losses across the entire group and, in accordance with the resolution strategy, to ensure the integrity and operability of those parts of the group where critical functions are performed. In

the absence of sufficient liabilities expected to contribute to loss absorption and recapitalisation at subsidiary level and if necessary to implement an SPE resolution strategy, resolution authorities should consider requiring the parent or holding company to provide funding to subsidiaries in subordinated form to facilitate the upstreaming of losses from the subsidiary, thereby avoiding entry into resolution of the subsidiary. A set-off between a subsidiary's claims against the parent and the parent's claims against the subsidiary should not be available.

- (c) For an MPE strategy, liabilities contributing to loss absorption should be sufficient at each point of entry to absorb losses across those entities included in the MPE resolution unit.

16. In relation to the requirement to take other steps to meet the minimum requirement for own funds and eligible liabilities under Article 45 of Directive 2014/59/EU, including in particular to attempt to renegotiate any eligible liability and additional Tier 1 or Tier 2 instruments it has issued with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that instrument pursuant to point (j) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

Resolution authorities should assess the risk of exclusion of liabilities from contributing to loss absorption or recapitalisation taking into account, and with a view to the resolution strategy, inter alia, (i) maturity; (ii) subordination ranking; (iii) types of holders and transferability; (iv) the risk that the liabilities would be exempted from absorbing losses in resolution; and (v) other legal obstacles such as the absence of recognition of resolution tools under third country law or the existence of set-off rights, each under the relevant law of the jurisdiction governing that liability or instrument.

17. In relation to the requirement that, where an institution is the subsidiary of a mixed-activity holding company, the mixed-activity holding company set up a separate financial holding company to control the institution pursuant to point (k) of Article 17(5) of Directive 2014/59/EU, the following specifications apply:

Resolution authorities should consider requiring a mixed-activity holding company, if this significantly enhances the feasibility and credibility of resolving the banking or investment activities separately, taking into account the risk of contagion between different segments of the financial sector and the wider economy. Resolution authorities should consider the advantages for feasibility and credibility of the resolution strategy specified under paragraph 14.

### Title III- Final provisions and implementation

These Guidelines apply from 1 April 2015.

The Guidelines should be reviewed by 30 June 2016.

## 4. Accompanying documents

---

### 4.1 Cost-benefit analysis/impact assessment

#### Introduction

This section outlines the assessment of the impact of the draft guidelines concerning the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU. The mandate for developing guidelines is established in Article 17(9) of Directive 2014/59/EU.

Article 16 (2) of the EBA Regulation provides that the EBA should carry out an analysis of ‘the potential related costs and benefits’ of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

This section presents the impact assessment and a cost-benefit analysis of the provisions included in the guidelines described in this Consultation Paper. Given the nature of the study, the impact assessment is high level and qualitative.

#### Problem definition

The core problem that these guidelines aim to address is the lack of common rules and convergent practices in the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied by resolution authorities across the EU.

If there are substantial variations in the practice of addressing impediments, the situation may create additional uncertainty regarding which actions are expected to be taken by the resolution authority, and how intrusive the requirements on the business organisation of the institution would be. In addition, lack of common rules across EU Member States makes it difficult for the resolution authorities to coordinate efficiently and successfully when they handle cross-border cases and to come to joint decisions regarding resolvability and group resolution plans.

This impact assessment presents a qualitative assessment of the different options and identifies a set of options that can effectively address the identified problems.

#### Objectives

Directive 2014/59/EU empowers resolution authorities to change the operation, business structure and exposures and activities of institutions to ensure resolvability to minimise the

probability of the disorderly winding down of an institution with the potential for adverse effects on financial stability.

The objective of these guidelines is to avoid substantial variations in the application of the measures to remove or reduce impediments to resolvability listed in Directive 2014/59/EU across jurisdictions and to promote their consistent application and explain the circumstances under which the authorities may apply these measures. The empowerment of the authorities is expected to contribute to the effectiveness and the credibility of the resolution framework to attain its objectives in terms of:

- ensuring the continuity of critical functions,
- avoiding significant adverse effects on financial stability,
- protecting public funds,
- avoiding unnecessary destruction of value, and
- protecting depositors, client funds and client assets.

If banks are not resolvable, resolution authorities, even when equipped with adequate resolution tools and powers, will not be able to complete the resolution of an institution within an adequate timeframe.

The measures that address resolvability need to be defined and be compatible with the impediments identified in the resolvability assessment. In the case of cross-border groups, the harmonisation of practices will facilitate the adoption of measures that are consistent with a coordinated approach to group resolution and of joint decisions on the resolvability assessment of the group and the group resolution plan. A common framework is expected to facilitate cooperation among the resolution authorities in different EU Member States with regard to cross-border banking groups.

The application of a common set of measures and circumstances is also expected to reduce the possibility of competitive distortions therefore creating a level playing field in the EU banking sector.

## Baseline scenario

After the transposition of Directive 2014/59/EU, there will be a harmonised framework for bank resolution, resolvability assessment and measures to overcome impediments to resolvability in all Member States. Therefore, the baseline scenario for the impact assessment will assume that the powers specified in Article 17(5) of Directive 2014/59/EU exist and are applicable. The impact will depend on the incremental requirements implied by these guidelines. Before the introduction of the BRRD, only a few Member States (DE, DK, SE and UK)<sup>1</sup> operated special bank resolution systems. Therefore, it is reasonable to assume that these Member States have already started the implementation of measures comparable to those described in these guidelines and that the

---

<sup>1</sup> BRRD IA, SWD(2012) 166 final (06.06.2012)

impact of these guidelines will be relatively smaller for the institutions in these Member States. The focus of the impact assessment will therefore be on those jurisdictions that have not started the development of these measures and, as far as possible, the impact on both the resolution authorities and the financial institutions will be assessed.

The need to define these measures and bring them forward will be defined for the subset of institutions whose resolvability assessment has detected impediments to resolvability that need to be addressed.

This assessment does not currently cover the impact of the application of guidelines in relation to specific institutions and measures. On the one hand, whilst providing guidance to support resolution authorities in exercising their discretion, these guidelines do not prejudice the resolution authorities' use of discretion in individual cases with regard to their assessment of impediments to resolvability and to the application of the measures in Article 17 of Directive 2014/59/EU. The accurate assessment of incremental cost and benefit is therefore difficult. On the other hand, the incremental costs and benefits depend on the changes that the measures suggested in these guidelines imply in the absence of further guidance on the circumstances and details relating to the measures.

## Assessment of technical options

### Options related to specifications applying to all measures

On the specification of the measures to reduce or remove impediments to resolvability, the following technical options were considered:

#### Level of generalisation for the specifications

**Option 1:** general specifications applying to all measures.

**Option 2:** only specific conditions for each measure.

On the one hand, general principles of the application of supervisory measures are well established and may be applied in analogy for the measures under Article 17. On the other hand, a resolution specific case-by-case assessment of general principles such as necessity and proportionality seems warranted. The development of specific conditions for each measure only as proposed under Option 2 would fail to meet substantial objectives of the directive, as the directive explicitly highlights general specifications such as the proportionality of the measures. These characteristics apply to all measures under any given circumstances and therefore a generalised approach would ensure that they are always taken into account. In particular, the proposed guidelines have opted for Option 1 defining three specifications to be applied to all measures: authorities' discretion, proportionality and the treatment of variants under resolution strategies.

Authorities' discretion ensures that resolution authorities are not restricted to measures enumerated in Article 17(5) of Directive 2014/59/EU, if they consider that others may be more effective, or to using them under the circumstances described in these guidelines, or that they should completely refrain from taking measures if the costs outweigh the benefits. Secondly, proportionality ensures that the least intrusive measure with the same positive effect on resolvability must be preferred to ensure cost effectiveness. This requires that an essential criterion for the application of one measure will be the comparative analysis of costs and benefits of alternative measures. Finally, variants under the preferred resolution strategy need to be considered so as to remove any impediments that may hinder resolvability if specific situations or different circumstances require divergence from the selected strategy. By giving this guidance, the chosen option is expected to contribute to a more efficient decision process to reduce administrative costs for resolution authorities and institutions and increase the efficiency of the measures themselves.

## Options related to the measures focused on structure and operations

Some of the measures included under this heading address areas that are also subject to national and EU regulatory reforms, so some interactions may arise. In particular, there are some complementarities to the proposal of a regulation on structural measures to improve the resilience of EU credit institutions.<sup>2</sup> So, there may be overlaps between this legislative proposal and some of the measures described in these guidelines.

### Interaction with other reform proposals

**Option 1:** No guidance on the interaction with other proposals.

**Option 2:** Making clear in the guidelines that resolution authorities should consider applying additional measures.

The directive will be applied jointly with other national and EU legislation that may have a direct or indirect impact on the resolvability of institutions. The proposed measures and the circumstances when implemented will need to account for compliance with mandatory EU law coming into force after the directive. To this extent the relationship between the different sets of measures does not need clarification or guidance. However, being silent on the complementarities between the measures to address impediments to resolvability and other regulatory proposals that also have an impact on the legal, operational and financial structure of an institution, as suggested under Option 1, could create gaps and could impede the implementation of resolution powers. If the objectives of the various regulatory initiatives are different from those in the directive or do not ensure resolvability in individual cases, resolution authorities are required by Directive 2014/59/EU to address any remaining impediments to

---

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0043:FIN:EN:PDF>

resolvability. In particular, the measures in points (a), (b), (e), (f) and (g) of Article 17(5) could interact with the structural reform measures for large banks that the proposal of a regulation on structural measures improving the resilience of EU credit institutions is developing. The report of the High-level Expert Group on reforming the structure of the EU banking sector ('Liikanen report') explicitly highlights that producing an effective and credible recovery and resolution plan may require the scope of the separable activities to be wider than under the mandatory separation outlined in that report. Therefore, these guidelines have chosen Option 2 to make sure that the measures are aligned with the resolvability objectives.

The cost associated with Option 2 is expected to be lower than that of Option 1. Under Option 1 uncertainty as to whether further actions are necessary at both the Member State and EU level remains. This may require the examination of previous and future regulatory developments (e.g. various regulatory legislations, macro-prudential regulation) and an assessment of the synergy of these regulatory developments with these guidelines on impediments to resolvability, which is expected to be more costly for the resolution authorities and the institutions. The chosen option therefore reduces legal uncertainty which otherwise might have reduced the efficiency of the measures.

## Options related to the financial measures

Some of the financial measures under Article 17 address areas that are also subject to regulatory requirements under different legal acts or other parts of Directive 2014/59/EU, so some interactions may arise. In particular, some complementarities may arise in relation to the minimum requirement of liabilities.

**Option 1:** Liabilities expected to contribute to loss absorption and recapitalisation be exhaustively covered by own funds requirements in Directive 2013/36/EU and the minimum requirement of eligible liabilities (MREL) under Article 45 of Directive 2014/59/EU.

**Option 2:** Further guidance on liabilities expected to contribute to loss absorption and recapitalisation in the guidelines.

The appropriate amount and allocation of liabilities expected to contribute to loss absorption and recapitalisation is highly dependent on the resolution strategy. The appropriate allocation depends on factors such as the location of the critical functions and the entities which should continue business operations in resolution. The degree of structural changes and the amount of liabilities expected to contribute to loss absorption and recapitalisation required may be inversely proportional. Decreasing complexity and the threat to financial stability may justify a lower MREL requirement. Finally, the MREL is only a minimum requirement, and eligible liabilities are not the only means of ensuring liabilities expected to contribute to loss absorption and recapitalisation. Therefore, the specification of further details on liabilities expected to contribute to loss absorption and recapitalisation (Option 2) for the resolvability assessment and the measures considered in these guidelines seems preferable.

The expected costs and benefits associated with Option 1 are negligible. Option 2 introduces further guidance that authorities can follow. This will slightly increase the costs associated with Option 2, but the benefits from a convergent practice and a case-specific determination of appropriate liabilities expected to contribute to loss absorption and recapitalisation adjusted to the applicable resolution strategy are expected to exceed the costs. The chosen option therefore meets the objective of the regulatory framework which is designed to proactively address issues related to financial stability.

## Costs and benefits of chosen options

### **Costs**

These draft guidelines specify a list of tools that resolution authorities may use when they identify an impediment to resolvability as well as how and under which circumstances these tools may be used. As a result, the draft guidelines will generate additional compliance costs within those Member States that would have introduced less intensive measures than those proposed in the guidelines. In particular, these measures include changes to an institution's organisational structure and operations to ensure its orderly winding-down, which can cause considerable costs.

In addition to the difficulty of establishing the costs of the Level 1 text, it will be highly difficult to differentiate between the costs that are triggered by the guidelines and the costs that are triggered by the Level 1 text. Costs for the implementation of the measures by institutions other than internal administrative costs depend to a great extent on the decisions of the resolution authorities. As experience with these measures is lacking at present, the costs cannot be predicted at this stage.

### **Benefits**

These guidelines will help to create the following benefits sought by the directive: to reduce threats that would prevent an effective resolution and, in theory, prevent the need for banks to be bailed out using public money in future; and to facilitate cooperation between resolution authorities in resolution planning and actions for the same cross-border institution.

The guidelines are expected to achieve these objectives by making the options for resolving the credit institution in circumstances of systemic instability more feasible and credible. The implementation of measures that remove impediments to resolvability will ensure the preparedness of resolution authorities and the most cost-effective option for resolution, and will contribute to financial stability. Having chosen to define general principles to be met by all measures and specifying the measures in relation to the objectives of resolution should ensure a proportionate approach to resolvability. The provision of further guidance on liabilities expected to contribute to loss absorption and recapitalisation could provide more tailored measures in accordance with the preferred resolution strategy.

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

The BSG supported the EBA's view that resolution authorities need to have discretion, its emphasis on proportionality, and its careful analysis of the relationship between the preferred resolution strategies of institutions and groups and the variant resolution strategies identified by resolution authorities. The BSG accepted the fact that the EBA is not responsible for establishing a rigid hierarchy of more or less intrusive measures and that the reference to proportionality is an adequate way to address this issue. In this context, the BSG expressed its view that the approach strikes a good balance. However, it noted that measures to remove or reduce impediments should in *the first place* focus on impediments to the preferred strategy. The text of the guidelines has been adjusted to reflect this comment.

As with respondents to the consultation in general, the BSG did not support further distinctions of more or less essential critical functions.

In the context of the power to require asset divestment, the BSG suggested that resolution authorities should consider possible prior management action. Where this management action is feasible, no precautionary divestment of assets should be imposed. In addition, resolution authorities should be careful to avoid a negative impact of imposed asset divestments on the market, especially as a result of similar divestments imposed on different institutions. The suggestion that authorities should consider possible prior management action is addressed as a consequence of the principle of proportionality and the text has been adjusted to reflect the need to be aware of the negative impact of imposed asset divestments.

On the issue of whether further specification on how loss absorption in banking groups is implemented, the BSG was of the opinion that no further specification would be needed, as each group has its own characteristics.

## 4.3 Feedback on the public consultation

The EBA conducted a public consultation on the draft proposal contained in this paper.

The consultation period started on 9 July 2014 and ended on 9 October 2014. Ten responses were received, of which eight 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 industry bodies made similar comments or the same body repeated its comments in its response to different questions. In these cases, the comments, and EBA analysis are included in the section of this paper where the EBA considers them most appropriate.

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

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

The main points raised by the respondents with regard to these draft RTS are as follows:

#### **Proportionality**

1. Most respondents welcomed the specification of the principle that measures should be suitable, necessary and proportionate. Nevertheless, several respondents also specified that the guidelines should also consider, as part of the proportionality principle, a reference to the capacity of institutions to implement the measures.

#### **EBA response:**

As a general principle of public law, the (legal) incapability of a person under obligation to perform a measure would, in any event, prevent an authority from requiring this measure. In addition, this impossibility would imply that the measure is not suitable. Furthermore, the impossibility of a measure has to be distinguished from a measure being onerous, which is a question of proportionality. However, the feasibility of certain measures has been revisited, which has resulted in specific amendments to the draft.

2. Some respondents expressed the view that some impediments to resolvability are genuinely beyond the institution's control and can only be addressed by, for example, regulatory measures or cooperation. In their view, such an approach would also help mitigate the risk of imposing unnecessary measures on institutions.

#### **EBA response:**

The draft Guidelines already requires the resolution authorities to apply measures only if they “*are required and if there are no less intrusive measures able to achieve the same objective*” which includes possible regulatory or cooperation measures to be taken by the resolution authority (paragraph 5b). While such measures are highly important steps to resolvability and correspond to commitments of several Member States, they are not the subject matter of the Guidelines.

### **Variant strategies**

3. Many respondents were concerned about the potential for variant strategies to be interpreted as potentially diverging overall resolution strategies in view of removing impediments to resolvability. In their view, provided that an institution is resolvable under one resolution strategy, there is no need to require the institution to take measures to address any impediments to a “variant” or any other resolution strategy as it would impair or disproportionately increase the costs of measures to remove impediments.

#### **EBA response:**

It may be necessary to plan variant strategies for the event that the preferred resolution strategy is likely not to be effective in its stated objectives or not feasible to be implemented. For this to be achieved, the draft Guidelines explicitly clarify in paragraph (6) that measures required to remove impediments to alternative variants should only be implemented if they do not impair the feasible and credible implementation of the preferred option, which prevents resolution authorities from inconsistent and contradictory measures.

### **The establishment of a parent financial holding company**

4. Several respondents commented on the fact that in many jurisdictions any senior, but bail-inable loan from an intermediate financial holding company channelled to the operative company will become subordinate or *pari-passu* with AT1 or T2 at the level of the operative company. This will make any bonds issued by the financial holding much more expensive than a bond issued by the operative company.

#### **EBA response:**

The draft guidelines state that this measure may only be applied if the resolution authority considers the issuance of debt at this level necessary to provide an adequate amount and the proper allocation of loss-absorbing capacity (point 14). The concerns expressed are expected to be considered by the resolution authority on a case-by-case basis as opposed to being subject to a general rule established by the guidelines. In addition, the structure of a banking group, in particular, the potential structural subordination of liabilities issued by a holding company and its interplay with the no-creditor-worse-off principle, may affect the loss absorption capacity and consequently the setting of the MREL

### **Location of subsidiaries**

6. A few respondents commented that globally (regionally) active financial institutions may choose to locate operations (including those that are essential to maintain critical functions, e.g. IT services) in one of the jurisdictions they are active in. In their view, it seems unreasonable to require these companies to be located in the EU or a third country with a similar resolution regime.

#### **EBA response:**

If a legal system poses impediments to resolution (which cannot be addressed by less intrusive measures, following the principle of proportionality), in particular, if it does not have an adequate resolution regime, or the effect of resolution actions can be compromised if they are not recognised and can be legally challenged, this may seriously impede the overall resolvability of the group. In these cases, the requirement in paragraph 13(d) may be the only way to properly mitigate an impediment to resolvability and prevent the migration of unresolvable activities to third countries. Where operations that are material for the continuity of critical functions are located in jurisdictions that effectively implement the FSB's key attributes, there will normally be no need to relocate companies.

## 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>			
Alignment with the level 1 text	Most respondents pointed out that in certain parts of the draft guidelines the wording is not fully aligned with the text of the BRRD (e.g. substantive impediment, not substantial impediment)	Inconsistencies within the draft and with the final version of the directive have been eliminated.	The wording has been aligned in several instances through the document: "substantive" instead of "substantial" (4(a)); "prudential regulation requirement" instead of "legal requirements" (4(b)); "divest assets" instead of "sell assets" (10(b)); "impair" instead of "hamper" (12(a)); "impeded" rather than "made significantly more difficult" (12(c)); "impede" instead of "reduce feasibility" (14(c)).
	Two respondents mentioned that it would be helpful for the guidelines to refer to the process for identifying appropriate measures as specified in the Level 1 text,	The process for identifying measures is governed by Article 17(1) to (4) while Article 17(8) of the BRRD requires the EBA to issue guidelines to	No amendment

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	including the initial step of the institution proposing measures that would address any impediments identified by the resolution authority.	specify further details on the measures provided for in paragraph 5 (of the same article) and the circumstances in which each measure may be applied. While the guidelines presuppose the procedure, this reference is beyond the mandate of the EBA.	
Relevance of a measure to the resolution strategy and specificity of the measure	Some respondents observed that several of the proposed measures are only likely to be relevant to certain types of resolution strategy, for example only SPE-style strategies or MPE-style strategies and this should be specified in the guidelines. This applies in particular to measures designed to ensure the separability of certain functions.	The guidelines make it clear that impediments always have to be assessed against a certain resolution strategy. This has been clarified further for some of the measures. However, the background of the draft guidelines and the EBA's RTS on the resolvability assessment clarify that the differentiation between SPE and MPE strategies may not always reflect practical needs, as these are stylised types, and in many cases the resolution strategy will comprise elements of both types.	Amendments to points 7(c) and 13(e).
Impediments to liquidation	One respondent requested clarification that impediments to liquidation should be considered only where the resolution authority expects the institution to be placed into liquidation in the event of its failure.	The requested clarification is sensible.	Clarification has been made in point 5 of the guidelines.
Measures requiring the establishment of a parent financial holding company	Some respondents raised concerns about whether the requirement to establish an EU holding company would be proportionate, especially as a more proportionate	In line with the proportionality principle, this measure may be applied only if the resolution authority	No amendment.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>response could be an appropriate level of MREL for entities in the EU.</p>	<p>considers the issuance of debt at this level necessary to provide an adequate amount and the proper allocation of loss-absorbing capacity (paragraph 14(a)). The concerns expressed are expected to be considered by the resolution authority on a case-by-case basis as opposed to being subject to a general rule established by the guidelines. In addition, the structure of a banking group, in particular, the potential structural subordination of liabilities potentially resulting from the issuance by a holding company and its interplay with the no-creditor-worse-off principle, may have effects on the setting of the MREL.</p>	
Operational continuity	<p>A few respondents criticised the wording of point 13(h), as it seems to consider operational subsidiarisation as the only solution for achieving the objective of ensuring continuity of access to shared services essential for critical functions. In doing so, it also introduces a slight inconsistency with point 13(f).</p>	<p>Point 13(h) focuses on one of the possible solutions for ensuring continuity of access to shared services as raised in point 13(h). Resolution authorities will assess this on a case-by-case basis when this option is required.</p>	<p>To achieve clarity and consistency, points (h) and (g) will be permuted.</p>
Availability of staff	<p>A number of respondents voiced that the assurance of availability of key staff to substitute the top management requested in point 13(k): i) is not realistic from a practical perspective, for instance, it is not possible to prevent staff from leaving if they should choose to do so; ii) top</p>	<p>Respondents' concerns are understandable. The specification is narrowed down to precautions feasible for the institution.</p>	<p>Resolution authority should consider requiring institutions to take reasonable precautions to retain or</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>management appointment are often subject to regulatory approvals; iii) it is up to the authority or person responsible for executing the resolution decision to take the necessary steps to this end.</p>		<p>substitute key staff where this is necessary to implement the preferred resolution strategy (13(k)).</p>
FMI access	<p>A number of respondents emphasised that participants would not be able to personally ‘ensure’ continued access to FMIs, or re-negotiate their contracts. Continued participation cannot be ensured ex ante, but will depend on specific facts and circumstances, and careful determination by the FMI (in close coordination with relevant regulatory authorities). Similarly, to comply with internationally agreed standards, and for the sake of full disclosure and transparency, an FMI should have standard forms of contracts with its participants.</p>	<p>Respondents’ concerns are understandable and should be addressed. However, there may be room for practical measures to ensure continued access to FMIs.</p>	<p>The possibility that an institution could be required to ensure continued access to FMI has been redrafted in point 13 (g) to take account of the concern expressed. The sentence dealing with the renegotiation of contracts has been amended.</p>
Entities outside consolidation	<p>Respondents criticised the language in point 8(b), specifically stating that ‘entities that are not consolidated in the balance sheet’ is too broad, as this would include customers.</p>	<p>The comment is understandable; the provision should focus on entities connected to the group.</p>	<p>The scope of point 8(b) has been clarified.</p>
Complexity and size of trading book	<p>Two respondents stressed that it is important to clarify when it is anticipated that a reduction of the complexity of the trading book might be appropriate and when, for example, the measure should be applied as opposed to another measure.</p>	<p>Respondents have not made concrete suggestions to further specify the term ‘complexity’. Complexity should be assessed against the practical needs of the resolution strategy on</p>	<p>While the term of complexity could not be further specified, point 13(n) has been further detailed to</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>the one hand and the capacity of the institution to make the structure sufficiently transparent on the other. Due to the large variety of sources of complexity, it is not possible to further specify this notion. In principle, the measure provided by point 13(n) may be applied, like the others, only when it is suitable, necessary and proportionate to reduce or remove a substantive impediment to resolvability as identified by the resolution authority.</p>	<p>reflect typical assessment criteria.</p>
<p>Interrelationship with MREL requirement</p>	<p>Two respondents suggested that the interplay between the measures specified in the guidelines and the ones provided for in the RTS on MREL should be referred to within the guidelines.</p>	<p>Respondents' concerns are understandable and should be addressed. That being said, it makes more sense to include a general reference as opposed to a specific reference for each measure.</p>	<p>A reference to the RTS on the assessment criteria of MREL has been inserted in the last sentence of the background and rationale part.</p>
<p>Alignment of wording for internal consistency</p>	<p>One respondent observed that paragraph 9(c) should be amended to provide that resolution authorities 'should consider requiring...' rather than 'should require'.</p>	<p>The concern expressed is understandable and should be addressed.</p>	<p>The wording of paragraph 9 (c) has been adjusted.</p>
<p><b>Responses to questions in Consultation Paper EBA/CP/2014/15</b></p>			
<p>Question 1. Should there be further</p>	<p>The vast majority of respondents replied to express concerns about the concept of 'variant strategies', which are seen as a new concept that is not included in the</p>	<p>It may be necessary to plan variant strategies if the preferred resolution strategy is likely not to be effective in</p>	<p>No amendment</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>specification on variant strategies?</p> <p>Do you think the guidelines should differentiate between more or less important critical functions and provide for a fall-back strategy to ensure the continuation of the most essential critical functions?</p>	<p>BRRD or FSB guidance. It was also pointed out that the distinction between a ‘variant’ of a strategy and a separate strategy is unclear.</p> <p>The respondents almost unanimously replied to say that it is not possible to differentiate between more and less important critical functions because: i) the level of criticality will crucially depend on the nature of the crisis; ii) the assessment of criticality will ultimately depend on the judgement of the competent authorities (or the resolution authorities); this distinction would be inconsistent with the approach reflected in the BRRD which requires the maintenance of all critical functions during the resolution process.</p>	<p>its stated objectives or if it will not be feasible to implement it. For this to be achieved, the draft guidelines explicitly clarify in point (6) that the measures required to remove impediments to alternative variants should only be implemented if they do not impair the feasible and credible implementation of the preferred option, which prevents resolution authorities from using inconsistent and contradictory measures. The question has been thoroughly analysed in the drafting process to find a balanced approach, which should be maintained in principle.</p>	
<p>Question 2.</p> <p>Do you see further cases for applying this measure (requirement to divest specific assets)?</p>	<p>Many respondents criticised the inclusion of this measure in resolution planning given that: i) a measure like this is more likely to be a step that could be taken in the recovery phase under an institution’s recovery plan; ii) any measures requiring the divestment of assets should be considered in combination with liquidity stress testing and other stress tests carried out by banks;</p> <p>Several respondents also stressed that it is almost impossible to predict which assets will be illiquid during a future crisis as normally liquid assets (such as government bonds) could become illiquid.</p>	<p>Article 17(5)(d) of the BRRD provides for the possibility for resolution authorities to require an institution to divest specific assets. Therefore, there is no scope to rule out this power. It should also be recalled that the guidelines establish a framework to be applied in conjunction with supervisory powers. The draft guidelines aim to establishing criteria for resolution authorities to perform a case-by-case assessment when</p>	<p>Additions to point 10(c).</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
How can the asset structure of institutions be improved?	<p>One respondent felt that it is important for the guidelines to focus on addressing substantive impediments to the preferred resolution strategy and not on a general ‘improvement’ of the structure of institutions’ assets. Another argued that the information provided for the calculation of liquidity ratios is relevant enough for the asset structure assessment.</p>	<p>considering requesting this measure. The text has been adjusted to consider the impact on asset markets.</p>	
<p>Question 3.</p> <p>Do you see further cases for applying the measures considered in paragraphs 11 and 12 (limiting or ceasing certain activities and restricting or preventing the development or sale of new business lines or products)?</p>	<p>A number of the respondents clearly stated that they have not identified any further cases.</p> <p>One respondent stressed that these measures are not likely to be necessary in the vast majority of cases as numerous other areas of regulation deal with the issues referred to in the draft guidelines, for example rules on large exposures, conduct of business, clearing of derivatives, etc.</p> <p>One respondent acknowledged that activities and products may be structured with the aim of avoiding the application of resolution tools and requested that the guidelines focus on these cases.</p>	<p>Article 17(5)(e) and (f) BRRD, empowers resolution authorities to consider applying such measures. There is no scope to rule out this power. It should also be recalled that the guidelines set up a framework to be applied in conjunction with supervisory powers. The draft guidelines aim to establish criteria for resolution authorities to perform a case-by-case assessment when considering requesting this measure. This is in line with responses pointing out that there is no general industry-wide methodology for identifying activities and products impeding resolvability.</p>	No amendment
<p>Are there specific types of activities or products that can constitute impediments for resolvability? How can these activities or products be</p>			

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
identified in a targeted way?	Most respondents emphasised that there cannot be a general industry-wide methodology for identifying products or activities that can constitute impediments to resolvability and that the final guidelines should not specify types of activities or products that could constitute impediments to resolvability.		
Question 4. Do you agree with the description of the potential advantages of a financial holding company structure?	Several respondents replied to say that it is unlikely that the absence of an EU holding company would be a substantive impediment to resolvability and that a measure requiring an EU holding company to be put in place would not be a proportionate response if a resolution plan is not feasible or credible. Some corporate and tax law barriers have also been mentioned.	Pursuant to Article 17(5)(h) of the BRRD, a resolution authority may require an institution or a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company. There is no scope to rule out this power. The draft guidelines aim to establish criteria for resolution authorities to perform a case-by-case assessment when considering requesting this measure. Respondents did not make any concrete suggestions for further specifying the criteria.	No amendment
Do you see any disadvantages of this structure as regards financial stability?	Two respondents commented that while there may not be any disadvantages to the holding-company structure in terms of financial stability, this needs to be weighed up against potential disadvantages from the banking group's point of view, which could include significant tax implications and may effectively ring-fence the European operations and restrict the operating model of the group.		
Question 5. Do you agree with the description of loss absorption in groups? Should there be additional specification regarding how loss absorption is implemented?	The vast majority of respondents replied to express concerns about the concept of 'variant strategies', which are seen as a new concept that is not included in the BRRD or FSB guidance. It was also pointed out that the distinction between a 'variant' of a strategy and a separate strategy is unclear.  The respondents almost unanimously replied to say that it is not possible to differentiate between more and less	It may be necessary to plan variant strategies if the preferred resolution strategy is likely not to be effective in its stated objectives or if it will not be feasible to implement it. For this to be achieved, the draft guidelines explicitly clarify in point (6) that the measures required to remove	The definition of LAC in point 2(a) has been deleted. In addition, the deletion has been reflected in several paragraphs of the Guidelines which

**Comments**

**Summary of responses received**

**EBA analysis**

**Amendments to the proposals**

---

important critical functions because: i) the level of criticality will crucially depend on the nature of the crisis; ii) the assessment of criticality will ultimately depend on the judgement of the competent authorities (or the resolution authorities); this distinction would be inconsistent with the approach reflected in the BRRD which requires the maintenance of all critical functions during the resolution process.

impediments to alternative variants should only be implemented if they do not impair the feasible and credible implementation of the preferred option, which prevents resolution authorities from using inconsistent and contradictory measures. The question has been thoroughly analysed in the drafting process to find a balanced approach, which should be maintained in principle.

referred to LAC.

---

---

## 5. Confirmation of compliance with guidelines and recommendations

---

Date:

Member/EEA State:

Competent authority

Guidelines/recommendations:

Name:

Position:

Telephone number:

E-mail address:

I am authorised to confirm compliance with the guidelines/recommendations on behalf of my competent authority:  Yes

The competent authority complies or intends to comply with the guidelines and recommendations:  Yes  No  Partial compliance

My competent authority does not, and does not intend to, comply with the guidelines and recommendations for the following reasons<sup>3</sup>:

Details of the partial compliance and reasoning:

Please send this notification to [compliance@eba.europa.eu](mailto:compliance@eba.europa.eu)

4

---

<sup>3</sup> In cases of partial compliance, please include the extent of compliance and of non-compliance and provide the reasons for non-compliance for the respective subject matter areas.

<sup>4</sup> Please note that other methods of communication of this confirmation of compliance, such as communication to a different e-mail address from the above, or by e-mail that does not contain the required form, shall not be accepted as valid.

