

EBA/RTS/2020/13
EBA/ITS/2020/09

23 December 2020

Final Report

Draft regulatory technical standards on impracticability of contractual recognition of the bail-in clause under Article 55(6) of Directive 2014/59/EU

and

Draft implementing standards for the notification of impracticability of contractual recognition of the bail-in clause under Article 55(8) of Directive 2014/59/EU

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1. Executive summary

Pursuant to Article 55(1) of Directive 2014/59/EU (the BRRD), Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of that Directive to include a contractual term by which the creditor or the party to the agreement or instrument creating a relevant liability recognises that that liability may be subject to write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority (RA).

Article 55(2) of the BRRD provides that if an institution or entity reaches the determination that it is legally or otherwise impracticable to include in the contractual provisions governing a relevant liability a term required in accordance with paragraph 1 of Article 55 of the BRRD, that institution or entity must notify its determination to the RA.

Article 55(6) of the BRRD mandates the EBA to develop draft regulatory technical standards (RTS) in order to specify:

- (a) the conditions under which it would be legally or otherwise impracticable for an institution or entity to include the contractual term referred to in Article 55(1) of the BRRD in certain categories of liabilities;
- (b) the conditions for the RA to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 of the BRRD;
- (c) the reasonable time frame for the RA to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 of the BRRD.

Article 55(8) of the BRRD requires that the EBA develop draft implementing technical standards (ITS) to specify uniform formats and templates for the notification to RAs for the purposes of paragraph 2 of Article 55 of the BRRD.

The EBA's mandate requires the articulation of cases of impracticability as 'conditions of impracticability'. It does not allow the RTS to provide exclusions either from bail-in or from the requirement to include a contractual recognition term.

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

Next steps

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

2. Background and rationale

2.1 Objective and process

Directive 2014/59/EU (BRRD) requires Member States to confer on their RAs a number of powers, including the powers to write down or convert relevant capital instruments in accordance with Article 59 of the BRRD (bail-in).

Member States must ensure that the powers may be applied to all relevant liabilities of an institution or relevant entity. Liabilities of an institution or relevant entity may be governed by the law of the Member State of establishment or another Member State, in which case the application of the write-down and conversion powers would be effective as a matter of law. However, some liabilities may be governed by the law of a third country. In the absence of a regime to ensure the effectiveness of an application of the write-down and conversion powers by a Member State RA, it is possible that a third country court might not recognise the effect of the application of the powers by that RA. For this reason, Article 55(1) of the BRRD requires Member States to require institutions and relevant entities to include in relevant agreements a contractual term by which the creditor or party to the agreement creating the liability recognises that liabilities may be subject to write-down and conversion powers. In addition, the creditor or party to the contract must agree to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a Member State RA.

The requirement to include contractual recognition of the effects of the bail-in tool in agreements or instruments creating liabilities governed by the laws of third countries is intended to facilitate and improve the process of bailing in those liabilities in the event of resolution.

There may be instances, however, where it is impracticable for institutions or entities to include those contractual terms in agreements or instruments creating certain liabilities that are relevant for the bail-in process, for example:

- where it is illegal under the law of the third country for an institution or entity to include such clauses in agreements or instruments creating liabilities that are governed by the laws of that third country;
- where the institution or entity has no power at the individual level to amend the contractual terms, as they are imposed by international protocols or are based on internationally agreed standard terms, as might be the case, for example, for liabilities that arise from guarantees or other instruments used in the context of trade finance operations.

However, the BRRD provides that a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should not as such be considered a case of impracticability.

The EBA is mandated under Article 55(6)(a) to develop draft RTS to specify the conditions of impracticability.

It is important to note that these draft RTS deal with liabilities for which it is impracticable to include the bail-in recognition clause in a contract. They recognise a practical impediment to the contractual inclusion of the term but, importantly, they do not exclude such liabilities from the scope of bail-in. In this respect, this provision is materially different from Article 44(2) of the BRRD, which mandatorily exempts certain liabilities from the scope of bail-in.

The EBA’s mandate does not cover exclusions from the scope of bail-in or from the scope of Article 55 of the BRRD. Furthermore, the draft RTS cannot specify that certain instruments are impracticable, as the mandate is to identify the underlying conditions creating the impracticability of including in the contractual term by which the counterparty recognises the effects of a possible bail-in.

The process that would be followed in instances of impracticability would follow these steps:

1. In accordance with Article 55(2) of the BRRD, institutions and entities should **notify the relevant RA if they determine that it is legally or otherwise impracticable** to include the contractual provision in a contract. The determination should **be based on the conditions of impracticability set out in Article 1 of the draft RTS**.
2. **The notification to the RA should be made in accordance with the draft ITS** provided in this report and developed by the EBA pursuant to its mandate given in Article 55(8) of the BRRD.
3. The RA should assess the institution’s or entity’s determination that it is impracticable to include the contractual recognition clause. If the RA concludes that it is not impracticable to include the contractual term, it shall, **within a reasonable timeframe**, require the inclusion of the term. The reasonable timeframe is set by the EBA in **Article 3 of the draft RTS**.
4. The RA shall require the inclusion of the contractual term taking into account the conditions specified in Article 2 of the draft RTS. **The conditions under which the RA is to require the inclusion of the contractual term are set out in Article 2 of the draft RTS**.
5. Where liabilities not including the contractual term because of impracticability and the RA determines the existence of a substantive impediment to resolvability, it can apply the powers provided in Article 17 of the BRRD as appropriate to remove that impediment to resolvability.
6. Institutions and entities should be prepared to justify their determination. In addition, in order to ensure that the resolvability of institutions and entities is not affected, liabilities for which the relevant contractual recognition provisions are not included are not eligible for the minimum requirement for own funds and eligible liabilities (MREL). Furthermore, bail-in-able liabilities arising from contracts that do not include the contractual term are not excluded from bail-in.

2.2 Content

Article 55(6) of the BRRD requires the EBA to develop draft RTS in order to further specify the following.

- a) The conditions under which it would be legally or otherwise impracticable for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include the contractual term referred

to in paragraph 1 of Article 55 of the BRRD in certain categories of liabilities. Article 1 of the draft RTS describes the conditions of impracticability.

- b) The conditions for the RA to require the inclusion of the contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 of the BRRD. Article 2 of the draft RTS lays out the conditions for the RA to require the inclusion of the contractual term.
- c) The reasonable timeframe for the RA to require the inclusion of a contractual term pursuant to the third subparagraph of paragraph 2 of Article 55 of the BRRD. Article 3 of the draft RTS lays out the reasonable timeframe for the RA to require the inclusion of a contractual term.

Article 55(8) of the BRRD requires the EBA to develop draft ITS to specify uniform formats and templates for the notification to RAs for the purposes of paragraph 2 of Article 55 of the BRRD.

2.3 Draft RTS provisions

2.3.1 Conditions of impracticability

Article 1 sets out five conditions giving rise to the impracticability of including the term for contractual recognition of the powers to write down or convert relevant capital instruments, as follows:

- The first condition is self-explanatory. It relates to situations where inclusion of the contractual term is prohibited by third-country law.
- The second condition, again considered self-explanatory, relates to situations where the inclusion of the contractual term is prohibited by an explicit instruction from a third-country authority. This condition, originally referred specifically to ‘relevant third-country authority’ as defined by the BRRD in Article 2(1)(90). However, since it is possible that other types of public authority (e.g. market conduct or competition authorities) might issue similar instructions, the condition has been widened to allow instructions from other third country authorities as well. The focus of the draft RTS should be on RAs in third countries and not on trying to cover each and every private and public authority.
- The third condition aims to capture instruments and agreements that are based on international standards. By including this condition, the RTS aim to capture guarantees or counter-guarantees governed by uniform international industry rules (e.g. those set by the International Chamber of Commerce) or comparable industry organisations, as well as instruments used in the context of trade finance operations, the terms of which are not negotiable; consequently, the institution is, in practice, unable to amend them.
- The fourth condition aims to capture liabilities that are based on standard terms that are imposed on the institution by virtue of its membership or participation in non-EU bodies, for example financial market infrastructure entities.
- The fifth condition is designed to capture those liabilities that are not excluded from bail-in and that relate to daily operations (i.e. are not critical to the daily functioning of the institution). This condition should capture, for example, travel tickets, liabilities related to hotels and liabilities related to utilities if they are governed by third-country law.

An extensive variety of contractual arrangements may be captured by the obligation to include the contractual term. Accordingly, the EBA believes it is appropriate, when identifying the conditions under which it would be legally or otherwise impracticable to include that term, to refer to the legal or factual circumstances under which an institution or entity would face unsurmountable issues, rather than identifying specific types of contractual arrangement or types of liability.

Furthermore, when specifying the circumstances in which an institution or entity may reach the determination of impracticability pursuant to Article 55(2) of Directive 2014/59/EU, this Regulation defines those circumstances as precisely as possible as conditions of impracticability.

The burden of proof of impracticability is on the entity or institution making the notification.

A number of criteria were tested as potential conditions for impracticability but were not deemed to be within the scope of the RTS for the reasons set out in the table below.

No	Proposed condition	Reasons for non-inclusion
1	Request by the counterparty to renegotiate the contract and/or increase in pricing or refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause	There may be cases in which a refusal/request for renegotiation/repricing affects a relevant contract. In addition, it could be considered that refusal in the case of standard contracts (e.g. those based on International Swaps and Derivatives Association agreements) and not in the case of other contracts would result in an uneven playing field. However, the mandate under Article 55(6) should be interpreted in conjunction with the relevant recital 26 of Directive (EU) 2019/879 of the European Parliament and of the Council.
2	General reference to 'contingent liabilities'	Contingency is not a condition of impracticability per se; as long as the liability (contingent or not) stems from a contract, that contract should include contractual recognition. If the characteristics of the contract do not allow such a clause, the relevant condition of impracticability should be identified (from those specified in the RTS). However, the contingent nature of the liability cannot be seen as a cause of impracticability.
3	Conditions referring to the short duration of a contract (short maturity)	The argument is that by the time the RA finishes its assessment the contract may have expired. The fact that a contract is of short duration is not in itself a cause of impracticability.

		<p>The maximum time allowed for an RA to assess a notified situation of impracticability is specified, but the assessment could be performed faster, and certainly the RA does not need to wait until the end of the period specified in the draft RTS to reply to the applicant institution. Furthermore, the failure of an institution may not be predictable and can happen over any time horizon; excluding some contracts from the requirement to include the contractual term because their maturity was short would imply a confidence that the institution would not fail within that period. Finally, it should be borne in mind that contracts are generally renewable.</p>
4	Conditions relating to a low-value contract/liability	<p>The identification of such conditions would be subjective, as we do not have any statistical evidence of what is a non-important liability in the event of bail-in (in part because of the low number of bail-ins that have been executed). Furthermore, an absolute amount would not be suitable for all institutions, while a relative amount might have different effects in terms of resolvability depending on the wider context. The BRRD includes a requirement to assess the impact on the resolvability of an institution where a 10% threshold is reached within a liability class; the RTS should not propose other thresholds or amounts.</p>
5	The relevant liability arises from an existing agreement that the entity has acquired and the entity has no power to amend the terms of that agreement	<p>This condition refers to an agreement that the institution has bought and for which it was not part of the original negotiation process. This situation has not been retained in the list of conditions, as it is considered that, in this situation, there would be a contract for the acquisition of the instrument in which the contractual recognition term could be included; it is also considered that the underlying instrument would become an asset.</p>
6	The liability is contingent on a breach of contract	<p>Since the liabilities subject to Article 55 have to arise from a contract in any event, the fact that an underlying liability may be contingent at the time of formation of the contract does not in itself prevent the inclusion of Article 55 wording in the contract.</p>

2.3.2 Conditions for the RA to require inclusion

The draft RTS specify in Article 2 the conditions for the RA to require the inclusion of the contractual term: the RA shall require inclusion if it disagrees with the institution's determination of impracticability.

If any of the conditions notified by the institution are met as defined in the draft RTS, the RA cannot require inclusion. If none of the conditions notified is met as defined in the draft RTS, the RA can refrain from requiring inclusion, taking into account the need to ensure resolvability.

The article referring to the conditions for the RA to require inclusion is based on three building blocks.

- i. The primary condition: the RA disagrees with the institution's determination, based on the conditions of impracticability notified and as defined in the draft RTS.
- ii. The criteria that the RA should take into account when considering the need to ensure resolvability: this only applies if none of the conditions of impracticability notified is met. The criteria proposed are aligned with those set out in Annex C to the BRRD for the purposes of the resolvability assessment. The RTS recitals specify that the assessment with regard to the need to ensure resolvability for the purposes of Article 55 of the BRRD is not the same as the yearly resolvability assessment of the institution.
- iii. Thresholds: above certain thresholds, inclusion is mandatory, while below them the RA has flexibility, within the limits of the criteria referred to in point ii above, to require or refrain from requiring inclusion. The use of thresholds is intended to ensure a level playing field for institutions across the EU (a consistent approach) and to reduce the operational burden (an automatic process). It should be emphasised that the thresholds are to be used after and only in case the RA determines that notified liabilities do not meet the conditions of impracticability.

It is important to note that the RA can always require other actions provided for under the BRRD framework in order to remove impediments to resolvability, depending on how satisfied it is with overall resolvability of the institution.

For the purposes of the assessment with regard to the need to ensure resolvability in the context of this RTS, the RA needs not perform a full resolvability assessment (as must be performed annually in the context of resolution planning) but may consider only targeted characteristics (e.g. hierarchy of the liability and/or its maturity and/or the liability value).

Two criteria that were considered for conditions of impracticability in Article 1 of the RTS but finally discarded (criteria 3 and 4 in the table in Section 2.3.1) have been included among the criteria relating to thresholds in Article 2(2) of the RTS, to guide the RA in assessing if the inclusion of the clause is necessary to ensure the institution's resolvability. The recourse to thresholds for the value and maturity of the liability pursuant to Article 2 of the RTS is without prejudice to the decision not to include such criteria among the conditions of impracticability. The institution cannot notify contracts as impracticable based on their value or maturity. If a contract does not meet the conditions of impracticability, the RA will always require inclusion if it is above one of the thresholds, and it may require inclusion if it is below the thresholds.

2.3.3 The timeframe for the RA to require inclusion

Article 3 of the draft RTS sets the reasonable timeframe for the RA to require the inclusion of a contractual term at 3 months, starting from the moment the application is considered complete. This timeframe can be extended, in exceptional circumstances, by the RA for another 3 months.

During a transitional period of 1 year from the RTS entering into force, the RA can extend the timeframe by an additional 6 months (as opposed to an additional 3 months outside the transitional period).

2.4 Draft ITS provisions

The EBA specifies in the draft ITS the data required in a notification and gives specifications for these data points. While the EBA also provides a table (in Excel) and a data point model (taxonomy) for these information points, it is up to the RA to determine the actual system to be used at national level for submitting these notifications. This is because there may be instances where certain systems are already in place and it will be easier to use them.

Consistency at EU level will be achieved, as the data required are consistent; moreover, if the data point definitions are not altered, transformations from one system to another should be easy to perform. Considering existing approaches to managing big data, where information is not stored in a specific format, the EBA favours this approach of ensuring consistent data point definitions. For example, a template would require the information in a certain order; however, an RA might wish to process that information using various algorithms (reorder, calculations, etc.), which would be facilitated by the use of specific data systems.

The draft ITS require institutions and entities making notifications to distinguish between contracts creating new liabilities and contracts amending existing liabilities. The template to fill in is the same, but for contracts amending existing liabilities the institution needs to indicate that the contract is of this type and update only the values that have changed if the contract/instrument has been notified before. The institution also needs to state whether it considers the changes to be material or not.

Furthermore, the draft ITS allow the possibility of notifying categories of liabilities that meet the conditions of impracticability. However, this option is to be used only if the relevant RA deems it necessary to use the provisions of Article 55(7) of the BRRD. The values to be used for N01.02 (categories) are to be defined by each RA that decides to make use in practice of Article 55(7) of the BRRD.

The ITS allow a notification to include both N01.02 and N01.02 notifications (i.e. group notification of individual contracts and of categories).

Finally, the draft ITS require institutions to provide the outstanding values in template N02.00 for all insolvency rankings for which liabilities are notified. The information in this template is necessary to allow RAs to observe the provisions of subparagraph 5 of Article 55(2) of the BRRD.

In general, values in the notification will be nominal values or expected maximum values (in the case of framework agreements and notification by category). This is the case because the institution is expected to notify before actually entering into a contract and therefore there is no underlying value. However, values provided in template N02.00 have to be actual outstanding amounts, as they reflect, in part, how the previously notified contracts behave.

Being aware of the difficulty of processing huge amounts of data with a high frequency, the draft ITS propose that the values in template N02.00 should reflect the outstanding amounts as per the last concluded quarter.

Ongoing international work in this area

The EBA is aware of ongoing international work in relation to statutory and contractual approaches to the recognition of the exercise of write-down and conversion powers and other resolution powers. In particular, the EBA notes the Financial Stability Board's *Thematic review on bank resolution planning*, published in April 2019, which acknowledges that 'Challenges to cross-border enforceability of resolution actions that have been identified in resolution planning include: [...] the operation of recognition of bail-in in practice (timeliness, competing regulatory requirements, understanding of regulation on contractual recognition, impracticability of wide scope of requirement to include bail-in contractual recognition clauses).'

3. Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

[...]

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards for the contractual recognition of write-down and conversion powers

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, and in particular Article 55(6) thereof,

Whereas:

(1) The conditions referred to in Article 55(6), point (a), of Directive 2014/59/EU should allow for an appropriate level of convergence in relation to the cases that should qualify as impracticable, while at the same time enabling resolution authorities to take into account differences in relevant markets.

(2) Institutions or entities should not be required to include in the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of Directive 2014/59/EU where such inclusion would be illegal in the relevant third country (including cases where such illegality arises from laws or from instructions from local authorities). It should also be considered as impracticable for an institution or entity to include the term referred to in Article 55(1) of Directive 2014/59/EU in an agreement or instrument where the institution or entity concerned is unable to amend those contractual provisions, in particular where those agreements are concluded in accordance with internationally standardised terms or protocols setting uniform terms and conditions for such kinds of agreements or instruments. Often, institutions or entities have no power to amend the contractual terms themselves because there is a clear expectation that the contractual terms will correspond to the available standard terms. Trade finance products, such as guarantees, counter-guarantees, letters of credit or other instruments used in the context of supporting or funding trade transactions are typically among those contracts issued subject to internationally recognised standard terms or rules set by an internationally recognised industry organisation or developed based on standard bilateral customs. Another case of impracticability might arise where the institution or entity concludes financial services provision contracts with financial service providers (including trading venues or financial market infrastructures or custodians) creating a non-excluded liability under point f, of Article 44 (2) of Directive 2014/59/EU, that use standard terms that cannot be negotiated by the institution or entity.

(3) In any event, when making its determination of impracticability, the institution or entity should note that solely the unwillingness of the counterparty to include the contractual term required under Article 55(1) of Directive 2014/59/EU or solely an increase in the price of the instrument or agreement should not be considered as a condition of impracticability of including the contractual term in accordance with this Regulation.

(4) Following Article 55(2), third subparagraph, of Directive 2014/59/EU, a resolution authority may refrain from requiring the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where it considers that such inclusion is not necessary to ensure the resolvability of the institution or entity. The conclusions of the analysis of the impact on resolvability, for the purposes of Article 55 of Directive 2014/59/EU, should be consistent with those under the resolvability assessment regulated in Chapter II, Title II, of the same Directive. However, for the purposes of this Regulation only, agreements or instruments creating liabilities with long maturities or high nominal value should be considered necessary to ensure resolvability, and, therefore, the inclusion of the contractual terms should not be waived when such inclusion is practicable. Regarding other agreements or instruments creating liabilities, when assessing the impact on resolvability, resolution authorities should have due regard to a number of elements set out in this Regulation.

(5) After receiving a complete notification of impracticability, a resolution authority should have a reasonable timeframe to evaluate the notification. Notifications can vary in complexity. It is therefore appropriate that a resolution authority, in special circumstances and after a preliminary assessment, should be allowed to extend the timeframe for requiring the inclusion of the contractual term for a predetermined period of time. Such an extension should be duly notified to the relevant institution or entity. Considering the novel nature of the notification and its assessment, resolution authorities should be allowed to extend the timeframe for an additional 6 months during the first year after entry into force of this Regulation.

(6) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (EBA) to the Commission.

(7) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council¹,

HAS ADOPTED THIS REGULATION:

Article 1

Conditions under which it would be impracticable to include the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities

1. The conditions under which it would be legally or otherwise impracticable for an institution or entity as referred to in Article 1(1), point (b), (c) or (d), of Directive 2014/59/EU to include in the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of that Directive, shall be the following:

- (a) the inclusion of the contractual term would be in breach of the law or regulatory provisions of the third country governing the liability;
- (b) the inclusion of the contractual term would be contrary to an explicit and binding instruction from a third country authority;

¹ 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 (OJ L 331 15.12.2010, p. 12).

- (c) the liability arises from instruments or agreements concluded in accordance with international standardised terms or protocols that the institution or entity is in practice unable to amend;
- (d) the liability is governed by contractual terms that the institution or entity has to accept in order to be able to participate in or to utilise the services of a non-Union body, including financial market infrastructures or other similar service providers, and which the institution or entity is in practice unable to amend;
- (e) the liability is owed to a commercial or trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning and the institution or entity is in practice unable to amend the terms of the agreement.

2. For the purposes of paragraph 1, points (c) and (d) and (e), an institution or entity shall be deemed to be unable to amend the instruments or agreements or contractual terms where the instrument, agreement or contractual terms can be concluded only under the terms set by the counterparty or counterparties or by the applicable standard terms or protocols.

Article 2

Conditions for the resolution authority to require the inclusion of the contractual term referred to in Article 55(1) of Directive 2014/59/EU in certain categories of liabilities

1. The resolution authority shall require the inclusion in the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where the resolution authority has concluded, on the basis of the institution's or entity's notification, that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation is fulfilled and either where the nominal amount of the liability created by the relevant agreement or instrument is equal to or more than EUR 20 million or where the remaining maturity of that agreement or instrument is equal to or longer than 6 months.
2. The resolution authority, for the purpose of ensuring resolvability, may require the inclusion in the contractual provisions governing a relevant liability of the contractual term referred to in Article 55(1) of Directive 2014/59/EU where the resolution authority has concluded, on the basis of the institution's or entity's notification, that none of the conditions of impracticability notified and referred to in Article 1 of this Regulation is fulfilled and where the nominal amount of the liability created by the relevant agreement or instrument is less than EUR 20 million and the remaining maturity of that

agreement or instrument is shorter than 6 months. When assessing whether such inclusion is necessary to ensure resolvability, the resolution authority shall have regard to one or more of the following elements and to any other element as appropriate:

- (a) the amount and type of the agreement or instrument;
- (b) the feasibility of using resolution tools;
- (c) the credibility of using resolution tools in a way that meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees, and possible actions that third-country authorities may take;
- (d) the ranking of the liability in normal insolvency proceedings under national law;
- (e) the maturity of the liability and the revolving nature of the contract, where applicable.

Article 3

The reasonable timeframe for the resolution authority to require the inclusion of a contractual term

1. The reasonable timeframe referred to in Article 55(2), third subparagraph, of Directive 2014/59/EU shall be 3 months, counting from the day the resolution authority receives the notification referred to in Article 55(2), first subparagraph, of that Directive.

2. Where the notification referred to in Article 55(2), first subparagraph, of Directive 2014/59/EU is incomplete, the resolution authority shall specify to the institution or entity which information is missing. The timeframe referred to in paragraph 1 of this Article shall start only when all missing information has been submitted.

3. The resolution authority may, in cases of complex notifications, extend the time frame referred to in paragraph 1 by 3 months, and until [*insert the date one year after the date of entry into force of this Regulation*] by 6 months. The resolution authority shall inform the institution or entity of the extension and of the reasons for it.

Article 4

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. *[N.B. entry into force for the RTS and ITS to be aligned]*

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

Done at Brussels,

For the Commission

The President

[For the Commission

On behalf of the President

[Position]

4. Draft implementing standards

COMMISSION IMPLEMENTING REGULATION (EU) No .../... laying down implementing technical standards specifying uniform formats and templates for notifications with regard to the impracticability of the contractual recognition of write-down and conversion powers when applying bail-in

of **XXX**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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

Whereas:

(1) Commission Delegated Regulation (EU) [XXXX/XX]² lays down the conditions under which it would be legally or otherwise impracticable for an institution or entity to include in the contractual provisions governing a relevant liability the contractual term referred to in Article 55(1) of

² [to insert full reference to the Delegated Act]

Directive 2014/59/EU, as well as the conditions and the reasonable timeframe for the resolution authorities to require the inclusion of such provisions.

(2) In order to ensure an appropriate level of convergence in the process by which a resolution authority assesses a notification of impracticability, it is appropriate to specify uniform formats and templates for the notification to the resolution authority of a determination of impracticability.

(3) To enhance the data quality and ensure comparability, the data items set out in the notification templates introduced by this Implementing Regulation should comply with the single data point model, as is the practice in supervisory reporting. The single data point model should consist of a structural representation of the data items, and identify all relevant business concepts for the purpose of uniform notifications of impracticability of contractual recognition.

(4) In order to safeguard the quality, consistency and accuracy of data items notified by institutions, the data items should be subject to common validation rules.

(5) Due to their very nature, validation rules and data point definitions are updated regularly in order to ensure they comply, at all times, with applicable regulatory, analytical and information technology requirements. Stringent qualitative criteria should be established for the detailed single data point model and the detailed common validation rules which will be published electronically by the European Banking Authority (EBA) on its website.

(6) This Regulation is based on the draft regulatory implementing standards submitted by the European Banking Authority (EBA) to the Commission.

(7) The EBA has conducted open public consultations on the draft implementing standards on which this Regulation is based, analysed the potential related costs and benefits, and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council³

HAS ADOPTED THIS REGULATION:

Article 1

Core information for the purpose of a notification of impracticability

³ 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 (OJ L 331 15.12.2010, p. 12).

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

Article 2

Format for the submission of information

1. The institutions and the entities referred to in Article 1(1), points (b), (c) or (d) of Directive 2014/59/EU shall submit the information referred to in Article 1 of this Regulation in the data exchange formats and representations specified by the relevant resolution authority.
2. Where submitting information referred to in this Regulation, institutions and entities referred to in Article 1(1), points (b), (c) or (d) of Directive 2014/59/EU shall respect the data point definitions included in the single data point model referred to in Annexes III and IV, including the validation rules.

Article 3

Entry into force and application

This Regulation shall enter into force on the twentieth day following the day of its publication in the *Official Journal of the European Union*. [N.B. entry into force for the RTS and ITS to be aligned]

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

Done at Brussels,

For the Commission

The President

[For the Commission]

On behalf of the President

[Position]

ANNEX

Annex I – Templates

See separate file.

Annex II – Instructions

See separate file.

Annex III – Single data point model

All data items set out in Annexes of this Implementing Regulation shall be transformed into a single data point model.

Annex IV – Validation rules

The data items set out in Annex I shall be subject to validation rules ensuring data quality and consistency. The validation rules shall meet the following criteria:

- a) define the logical relationships between relevant data points;
 - b) include filters and preconditions that define a set of data to which a validation rule applies;
 - c) check the consistency of the transmitted data;
-

- d) check the accuracy of the transmitted data;
- e) set default values which shall be applied where the relevant information has not been transmitted.

5. Accompanying documents

5.1 Draft cost–benefit analysis/impact assessment

1. Article 55(6) of the Directive (EU) 2019/879 of the European Parliament and of the Council (from now on, the BRRD) amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC mandated the EBA to develop RTS to specify:
 - a. the conditions under which it would be legally or otherwise impracticable for an institution to include the contractual term referred to in Article 55(1) of the BRRD;
 - b. the conditions for the RA to require the inclusion of the contractual term; and
 - c. the reasonable time frame for the RA to require the inclusion of the contractual term.
2. In addition, Article 55(8) of the same Directive mandated the EBA to develop RTS to specify uniform formats and templates for the notification to RAs of the impracticability of including the contractual term referred to in Article 55(1).
3. The current draft RTS and draft ITS aim to fulfil the mandates in Articles 55(6) and 55(8) respectively.
4. As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any RTS developed by the EBA must be accompanied by an Impact Assessment (IA) that analyses ‘the potential related costs and benefits’ when it is submitted to the Commission. The same requirement applies to any ITS developed by the EBA, as per Article 15(1) of the aforementioned EBA Regulation. The IA must provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.
5. The EBA has prepared an IA with a cost–benefit analysis of the policy options considered for inclusion in the draft RTS. Given the nature of the study, the IA is mainly high-level and qualitative in nature, including quantitative analysis where possible.

A. Problem identification

1. The primary problem that these RTS aim to address is to fulfil the aforementioned mandates. Article 55(1) of the BRRD requires the inclusion of the contractual term by which write-down and conversion powers are recognised. Nevertheless, the second paragraph of the same article

recognises that there may be occasions when the inclusion of this contractual term is impracticable. In these circumstances, institutions shall notify the RAs.

2. The existing regulation states that Member States must ensure that the powers to write down or convert relevant capital instruments in accordance with Article 59 of the BRRD are to be applied to all relevant liabilities of an institution or relevant entity. However, this is not straightforward for some liabilities governed by the law of a third country. In the absence of a regime to ensure the effectiveness of an application of these powers, Member States need to require institutions and relevant entities to include in relevant agreements a contractual term by which the creditor or party to the agreement creating the liability recognises that liabilities may be subject to the aforementioned powers. There may be instances, however, where it is impracticable for institutions or entities to include those contractual terms in agreements or instruments creating certain liabilities that are relevant for the bail-in process.
3. The existing regulation does not identify under which conditions the inclusion of the contractual term would not be practicable. There is also no clarification on when the RA should require the inclusion of this contractual term or the timeframe to do it. Furthermore, no format or content is specified for notifications to RAs by institutions regarding the impracticability of including the contractual term in specific contracts.

B. Policy objectives

a. Draft RTS [XXX]

4. The main objective of the draft RTS is to fulfil the mandate established in Article 55(6) of the BRRD.
5. Therefore, the general objective of the RTS is to complete the framework around the obligation to include the contractual term referred to in Article 55(1). This framework will provide further details on when the inclusion of this contractual term is illegal or impracticable.
6. The specific objectives of the RTS are:
 - a. to define the list of conditions under which the inclusion of the term is impracticable;
 - b. to define the conditions under which the RAs should request inclusion and the time frame to do it, pursuant to a notification of impracticability.

b. Draft ITS [XXX]

7. The main objective of the draft ITS is to fulfil the mandate established in Article 55(8) of the BRRD.

8. As a result, the specific objective of the draft ITS is to specify the format and content of the notification to RAs of the impracticability of including the contractual term in certain contracts governed by the law of a third country.

C. Baseline scenario

9. Currently, the BRRD requires the inclusion of the contractual term without identifying any conditions under which this inclusion is impracticable. General conditions of impracticability linked to the inclusion of the term in contracts governed by the law of a third country have not been specified.
10. When an institution determines and notifies a case of impracticability of including the contractual term, the RA, after analysing the relevant notification, may require its inclusion. Under the current scenario, there is no clear specification of under which conditions this requirement is needed. Furthermore, there is no specification of the timeframe for completing this requirement. The draft RTS aim to address both these aspects.
11. In addition, there is no obligation to follow a specific format or content when notifying RAs that there is a condition that makes it impracticable to include the contractual term. As things stand, institutions could notify the RAs in non-standardised ways and including different content in the notifications.

D. Options considered

a. Draft RTS [XXX]

12. When drafting the present draft RTS, the EBA considered several policy options.

- 1) **Regarding the specification of conditions of impracticability of including the term for contractual recognition of the bail-in powers, the following options have been considered.**

- a. **Where the impediment is due to the law of a third country or to an explicit and binding instruction from a relevant third-country authority in the third country whose law governs the liability, the following two options have been considered.**
Option 1: To specifically consider this as a condition of impracticability.
Option 2: Not to consider this as a condition of impracticability.
- b. **Whether instruments and agreements that are based on international standards and/or standard terms that are imposed on the institution by virtue of its membership or participation in a body governed by the law of a non-EU country should be considered contracts that meet the condition of impracticability.**
Option 1: To consider only instruments and agreements that are based on international standards contracts that meet the condition of impracticability.
Option 2: To consider both instruments and agreements that are based on international standards or on standard terms that are imposed on the institution

by virtue of its membership or participation in a **body governed by the law of a non-EU country** contracts that meet the condition of impracticability.

Option 3: Not to consider instruments and agreements that are based on international standards or on standard terms that are imposed on the institution by virtue of its membership or participation in a **body governed by the law of a non-EU country** contracts that meet the condition of impracticability.

- c. **Whether liabilities that are not excluded from bail-in and that relate to daily operations but are not necessarily critical to the daily functioning of the institution should be considered contracts that meet the condition of impracticability.**

Option 1: To consider them contracts that meet the condition of impracticability.

Option 2: Not to consider them contracts that meet the condition of impracticability.

- d. **Whether a request by the counterparty to renegotiate the contract and/or an increase in pricing or a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should be considered as contracts that meets the condition of impracticability.**

Option 1: To consider it a condition of impracticability.

Option 2: Not to consider it a condition of impracticability.

- e. **Whether the contingent nature of the liability should be considered a condition of impracticability.**

Option 1: To consider it a condition of impracticability.

Option 2: Not to consider it a condition of impracticability.

- f. **Whether some specific conditions of the contract, such as a short maturity or low value of the contract, should be considered conditions of impracticability.**

Option 1: To consider a short maturity of the contract a condition of impracticability.

Option 2: To consider a low value of the contract a condition of impracticability.

Option 3: To consider both a short maturity and a low value of the contract a condition of impracticability.

Option 4: To consider neither the low value of the contract nor its short maturity a condition of impracticability.

- g. **Whether cases in which the liability arises from an existing agreement that the entity has acquired and the entity has no power to amend the terms should be considered a condition of impracticability.**

Option 1: To consider this a condition of impracticability.

Option 2: Not to consider this a condition of impracticability.

- h. **Whether cases in which the liability is contingent on a breach of contract should be considered a condition of impracticability.**

Option 1: To consider this a condition of impracticability.

Option 2: Not to consider this a condition of impracticability.

- 2) **Regarding the conditions under which the RA may require the inclusion of the contractual term and the specification of the time frame to require this inclusion, the following options have been considered.**

- a. **Whether a strict requirement to include the contractual term is necessary in all cases in which it is not considered impracticable to include it.**

Option 1: To require the inclusion of the term in all cases in which the RA does not agree with the institution's determination of impracticability.

Option 2: To require the inclusion of the term in those cases in which the RA does not agree with the institution's determination of impracticability and its inclusion may be necessary to guarantee the resolvability of the institution. The list of considerations to be taken into account in assessing the resolvability of the institution would be fixed and strict.

Option 3: To require the inclusion of the term in those cases in which the RA does not agree with the institution's determination of impracticability and its inclusion may be necessary to guarantee the resolvability of the institution. The list of considerations to be taken into account in assessing the resolvability of the institution would have a certain specificity but remain flexible.

Option 4: To use thresholds above which the RA would always require the inclusion of the term and below which the RA would have flexibility in its decision, if Option 2 or 3 is to be used.

- b. **Whether the reasonable time frame for the RA to require the inclusion of the term should be kept flexible or be a strict timeframe.**

Option 1: To specify a completely flexible timeframe.

Option 2: To specify a strict timeframe but allow some flexibility under certain circumstances.

Option 3: To specify a strict timeframe without any flexibility.

- c. **Whether the reasonable timeframe for the RA to require the inclusion of the term should be aligned with the resolvability cycle.**

Option 1: To align the timeframe with the resolvability cycle.

Option 2: Not to align the timeframe with the resolvability cycle.

- d. **Whether an explicit mention of the need for a complete notification to trigger the start of the timeframe is required.**

Option 1: Not to include an explicit provision covering the need for a complete notification.

Option 2: To include an explicit provision covering the need for a complete notification.

b. **Draft ITS [XXX]**

13. When drafting the present draft ITS, the EBA considered several policy options in four main areas:

- a. **The content of the notification to RAs about the impracticability of including the contractual terms.**

Option 1: To create a standardised template with predefined content to be filled in by all institutions when notifying RAs about the impracticability of inclusion of the term. No information would be accepted outside this standardised template.

Option 2: To create a standardised template with predefined content to be filled in by all institutions when notifying RAs about the impracticability of inclusion of the term, but to allow some flexibility for institutions to provide supporting documents and the possibility for RAs to request additional information.

Option 3: To allow institutions to use free content when notifying RAs about the impracticability of inclusion of the term.

b. **The system that should be used to notify the RAs about the impracticability of including the contractual terms.**

Option 1: To have a standardised system for notifications.

Option 2: To allow RAs to select the most appropriate system.

c. **Whether a notification is needed in cases of new contracts amending existing liabilities.**

Option 1: To require notifications for contracts amending existing liabilities.

Option 2: To require notifications for contracts amending existing liabilities only if there are material amendments.

Option 3: Not to require notifications for contracts amending existing liabilities.

d. **Whether it should be possible for notifications to cover categories of liability as defined in Article 55(7) of the BRRD.**

Option 1: Not to include categories in the ITS.

Option 2: To link each notified liability to a category, as defined by the relevant RA, if applicable.

Option 3: To create a specific sheet in the draft ITS to be used if categories are specified by the RA, and the notification could cover categories of liabilities at the same time.

E. Assessment of the options and the preferred options

a. Draft RTS [XXX]

14. Regarding the **conditions of impracticability** of including the term for contractual recognition of the bail-in powers, the EBA has followed a mixed approach. On the one hand, the EBA has identified the legal impediments and problems that institutions may face in including the contractual term in certain circumstances. On the other hand, the EBA has evaluated the number of contracts that might be affected by each of the conditions of impracticability,⁴ in order to estimate the number of notifications that the RAs might receive. This last factor is important to ensure that the RAs are not overloaded and are ready and prepared to process all the notifications.

15. To evaluate the number of contracts that could fall under each condition, the EBA launched a questionnaire for banks to identify what would be the range of contracts affected by each of the conditions. It is important to note that the conditions evaluated by this quantitative assessment

⁴ To estimate the number of contracts affected by each condition and the number of potential notifications, the EBA launched a quantitative questionnaire. Results included in this analysis are based on a sample of 67 institutions that reported their answers to the EBA. Some of the responses presented inconsistencies. In those cases, the inconsistent responses have not been considered in this analysis.

have a slightly different wording from the conditions finally included in the draft RTS, as the drafting of the RTS continued after the launch of the questionnaire. As the analysis is based on ranges and the drafting modifications are not significant, the EBA is of the view that the results obtained can be extended to the conditions included in the current draft RTS.

16. To begin with, it seems problematic to include such a term when it is against the law of the third country governing the liability, or an explicit and binding instruction from a relevant authority in the third country whose law governs the liability. In order to provide an adequate level of legal certainty, the preferred option is Option 1: to specify that, when the inclusion of the contractual term is prohibited by the law of a third country or by an instruction from an authority in that country, it is considered a condition of impracticability. Regarding how many contracts could be affected by this condition, institutions were asked to provide a range for the number of new or materially amended contracts in the last 4 months that would fall under the condition (independently). 25% of the respondents⁵ indicated that this information was not available. 73% of the respondents indicated that they had fewer than 50 new or materially amended contracts in the last 4 months for which the inclusion of the contractual term was against the law of the third country governing the liability. Only one respondent (1%) indicated that it had more than 1 000 new or materially amended contracts in the last 4 months for which the inclusion of the contractual term was against the law of the third country governing the liability. Regarding the number of new or materially amended contracts in the last 4 months for which the inclusion of the contractual term was against an explicit and binding instruction from a relevant authority in the third country whose law governs the liability, 73% of the respondents indicated that they had fewer than 50 such contracts, and only one respondent (1%) indicated that it had between 100 and 500 such contracts.

17. In addition, it does not seem feasible to modify the conditions included in standardised contracts, such as guarantees or counter-guarantees governed by international standards in order to be accepted internationally, or those included in other instruments used in the context of trade finance operations, where the terms are not negotiable or the institution is in practice unable to amend. Furthermore, by applying the same reasoning as in the paragraph before, other types of standardised contracts, such as those subject to standardised terms by virtue of the institution's membership or participation in non-EU bodies, for example financial market infrastructure entities, may not be modifiable or amendable in practice. For these reasons, the preferred option is Option 2: to consider both instruments and agreements that are based on international standards or on standard terms that are imposed on the institution by virtue of its membership or participation in non-EU bodies contracts that meet the condition of impracticability. Regarding how many contracts could be affected by these two conditions, institutions were asked to provide a range of the number of new or materially amended contracts in the last 4 months where (a) the liability arises out of instruments and agreements concluded in accordance with internationally standardised terms or protocols, and which the institution or entity is in practice unable to amend or (b) the relevant liability has been created based on standard terms to which the entity is bound pursuant to its membership in a non-EU

⁵ From a sample of 67 banks.

body, and which the entity has in practice no power to amend. Regarding (a), 19% of the respondents⁶ reported that the information was not available, and the majority of the respondents (63%) reported having fewer than 50 contracts compliant with these characteristics. In addition, institutions were asked to identify the subset of contracts that were trade finance instruments/letters of guarantee. In this case, there were fewer than 50 contracts for 64% of the banks. Regarding (b), 22% of the respondents⁷ reported that the information was not available, and the majority of the respondents (78%) reported having fewer than 50 contracts compliant with these characteristics.

18. Regarding those liabilities that are not excluded from bail-in and that relate to daily operations that are not critical to the daily functioning of the institution (e.g. travel tickets or liabilities related to hotels or to utilities if they are governed by third-country law), they are still subject to bail-in, but they cannot be amended in practice by the institution. These are standardised contracts, generally imposed by a supplier. Negotiation between the supplier and the buyer is unlikely to be possible due to the small amount per contract, the standardised approach prevailing in the relevant industries and the retail approach of no negotiation with the buyer. Therefore, the preferred option is Option 1: to consider them contracts that meet the condition of impracticability. Regarding how many contracts could be affected by this condition, institutions were asked to provide a range of the number of new or materially amended contracts in the last 4 months where the relevant liability is owed to either a commercial or a trade creditor and relates to goods or services that, while not critical, are used for daily operational functioning, and where the entity has in practice no power to amend the terms of the contract, concluded in accordance with standard terms. 21% of the respondents⁸ reported that the information was not available, and the majority of the respondents (76%) reported having fewer than 50 contracts compliant with these characteristics.
19. Regarding a specific request by the counterparty or its refusal to include the term, even in those cases where the refusal is insurmountable and affects a relevant contract, including refusal per se as an impracticability case, to consider this a condition of impracticability would go against recital 26 of the Level 1 text, which establishes that a refusal by the counterparty to agree to be bound by a contractual bail-in recognition clause should not as such be considered a cause of impracticability. For these reasons, the preferred option is Option 2: not to consider this a condition of impracticability.
20. Regarding the contingent nature of the liability, it should not be considered per se a condition of impracticability. As long as the contingent liability stems from a contract, that contract should include contractual recognition. If some specific characteristics of the contract do not allow that clause, these conditions should be analysed on specific bases, but 'contingency' is not considered a condition of impracticability (Option 1).
21. Regarding considering some specificities of contracts conditions of impracticability, the short duration of a contract could be considered a problem, as the RA might not have enough time to

⁶ From a sample of 66 banks.

⁷ From a sample of 66 banks.

⁸ From a sample of 67 banks.

assess the notification before the expiry of the contract. However, it should also be considered that the timeframe for assessing the notification is indicative, and the RA might be able to perform it more quickly. In addition, the failure of an institution may not be predictable and can happen over any time horizon, which is an argument in favour of no exclusion based on maturity. Moreover, contracts are generally renewable, which would in practice extend their original maturity. For these reasons, it does not seem appropriate to consider the short duration of a contract a condition of impracticability. Another specificity that could be considered problematic is the low value of the contract. Nevertheless, there is no statistical evidence on the value of a non-important liability in the event of bail-in. In addition, determining what should be considered a low amount is complicated, as an absolute amount would not be suitable for all institutions, while a relative amount might have different effects in terms of resolvability depending on the wider context. This is linked to the fact that the BRRD sets a requirement to assess the impact of resolvability on an institution where a 10% threshold is reached within a liability class. For these reasons, it does not seem appropriate to consider the low value of a contract a condition of impracticability. The preferred option is Option 4: to consider neither the low value of the contract nor its short maturity conditions of impracticability.

22. In cases where the liability arises from an existing agreement that the entity has acquired and the entity has no power to amend the terms, there will be a contract for the acquisition that should include the bail-in clause, and it is likely that the instruments will become an asset, so there is no reason to consider this situation a condition of impracticability (Option 2).
23. In cases where the liability is contingent on a breach of contract, the fact that it may, at the time of formation of the contract, be contingent does not in itself prevent the inclusion of the term pursuant to Article 55 of the BRRD, as the liability has to arise from a contract in any event. Therefore, the preferred option is Option 2: not to consider this a condition of impracticability.
24. Regarding the specification of the **conditions under which the RA may require the inclusion of the contractual term**, there may be cases in which the RA disagrees with the institution's determination of impracticability but considers that the institution's resolvability is not affected. In those cases, it seems necessary to allow some degree of flexibility, so that RAs can require inclusion only when necessary to ensure the resolvability of the institution or entity. This option would reduce the burden on both institutions and RAs, avoiding triggering the process in cases where the resolvability of the entity will not change as a result of the non-inclusion of the term. Therefore, the preferred option is to require the inclusion of the term in those cases in which the RA does not agree with the impracticability determination and its inclusion may be necessary to ensure the resolvability of the institution.
25. With regard to performing the assessment of resolvability in this specific context (as opposed to a fully fledged resolvability assessment under resolution planning), the EBA proposes considering a number of criteria (the value of the liability, its maturity, its position in the hierarchy in insolvency proceedings, etc.) for harmonisation and ease of application. These criteria, however, do not have specific predetermined values, to avoid their being considered impracticability conditions. In addition, each institution is different, and the relevant resolvability considerations may evolve over time even for the same institution. The preferred

option is Option 3: to require the inclusion of the term in those cases in which the RA does not agree with the institution's determination and not to require inclusion if the RA agrees with the institution's determination or if it disagrees with it but concludes that inclusion would not help to ensure the resolvability of the institution. The list of considerations to be taken into account in assessing resolvability in this specific context has a certain specificity but remains flexible.

26. Furthermore, in order to provide more clarity to RAs and to institutions, and to ensure a level playing field, the draft RTS propose the use of thresholds. In those cases where the notified liability does not meet the conditions of impracticability and is above the thresholds, RAs will always require inclusion. By contrast, in those cases where the liability is below the threshold, the RAs will have flexibility to apply the criteria set out in the RTS. The thresholds relate to the contract's maturity and value. Therefore, Option 4 is to be used in conjunction with Option 3.

27. Regarding the degree of flexibility in the specification of the timeframe for the RA to request the inclusion of the contractual term, the time that the RA will need to analyse the notification and all the relevant information to conclude if the inclusion of the term is necessary may vary on a case-by-case basis. Nevertheless, no specification of a timeframe would not provide certainty and security to institutions or enable them to understand when they could be requested to include the contractual term, making their daily operational work difficult. However, in some specific circumstances where the analysis of the information received is considered complex, additional time may be needed by the RA to analyse the relevant information. For this reason, the preferred option is Option 2: to specify a strict timeframe but allow some flexibility under certain circumstances.

28. Regarding the possibility of alignment between the timeframe for the RA to request the inclusion of the contractual term and the resolvability cycle, the resolvability cycle has a duration of 1 year. Notifications could be received at any point in the resolvability cycle, allowing the RA in some cases up to 11 months to request the inclusion of the term and in other cases only a few days. For this reason, the preferred option is Option 2: not to align the time frame with the resolvability cycle.

29. Regarding whether it is necessary to explicitly mention that the time frame is triggered from the moment a complete notification is received, it is believed that an explicit mention will help to harmonise practices in the EU. In any case, the moment at which the start of the time frame is triggered is the moment when a complete notification is received. For this reason, the preferred option is Option 2: to include an explicit provision covering the need for a complete notification.

b. Draft ITS [XXX]

30. Regarding the content of the notification, a standardised template with all the relevant fields will guarantee that all institutions are providing the necessary information to the RAs for their evaluations. This will facilitate the analysis process for the RAs, reducing the burden on them and the time taken to evaluate each notification. Institutions may benefit from a shorter evaluation period, and, more importantly, the template will facilitate the process of providing a notification to the RA. Having a standardised template will help institutions to develop

experience in produce the template, making the notification process easier. Nevertheless, in some specific cases, some additional information could be necessary for a proper evaluation of the notification in a timely manner. In those cases, allowing some flexibility to request this additional information seems the best option to ensure that notifications will be processed on time. Therefore, the preferred option is Option 2: to create a standardised template with predefined content to be filled in by all institutions when notifying RAs about the impracticability of inclusion of the term but to allow some flexibility for institutions to provide supporting documents and RAs to request additional information. Regarding the system to be used to notify RAs, there may be instances where certain systems are already in place in the different jurisdictions. Requiring the use of a specific system standardised for all jurisdictions would entail additional technical and economical efforts for jurisdictions using a system different from the selected one. In addition, institutions and RAs would need to become familiar with the designated system, which would place an additional burden on them. Regardless, consistency at EU level will be achieved, as the data provided will be consistent, as a standardised template with the same specification of all data points will be in place. For these reasons, the preferred option is Option 2: to allow RAs to select the most appropriate system.

31.Regarding the requirement to notify in cases of a new contract amending an existing liability, it could be argued that changes to an existing contract are similar to entering into a new contract (for which a notification is required). Furthermore, if there is no notification of changes to existing notified contracts, the RA risks not having the full information on the institution. For example, a substantial increase in the amount of the contract or in its maturity should be re-notified to enable a proper evaluation of the consequences of the non-inclusion of the contractual term. For these reasons, the preferred option is Option 1: to require notifications for contracts amending existing liabilities.

32.Regarding whether it should be possible for notifications to cover categories of liability, Article 55(7) of the BRRD indicates that the RA must specify, where it deems it necessary, the categories of liabilities for which it is impracticable to include the contractual term. Therefore, the template for reporting this impracticability should allow the identification of categories. In those cases where the RA decides to specify the categories of liabilities for which it is impracticable to include the contractual term, reporting the full amount of liabilities in the same template is more efficient and less burdensome for institutions. For this reason, the preferred option is Option 3: to create a specific sheet in the draft ITS to be used if categories are specified by the RA; notifications may cover a category of liabilities.

5.2 Views of the Banking Stakeholder Group

The Banking Stakeholder Group (BSG) submitted a response to the draft RTS set out in the Consultation Paper EBA/CP/2020/04. The complete response can be found on the EBA website.⁹

For some of the questions, the BSG indicated that it lacked the information or means to provide categorical answers.

In general, the BSG found the conditions of impracticability clear. In some instances, it put forward some considerations for improvement and indicated various instruments that should be seen as giving rise to a condition of impracticability of contractual recognition. The main example offered was that of guarantee instruments, where the beneficiary imposes the terms and the issuing institution does not negotiate with the beneficiary.

Furthermore, the BSG discussed the counterparty refusal situation. Its conclusion was that the EBA should consider a predetermined set of criteria or a threshold for what constitutes reasonable negotiation or attempts to include the contractual recognition clause, following which counterparty refusal should be considered to give rise to a situation of impracticability. The BSG referred to a particular situation in which a counterparty might refuse the inclusion of the contractual term, as it might consider it an erosion of its rights under a prior agreement. The BSG's discussion, however, acknowledged that the EBA would need to be given an explicit mandate in order to be able to pursue an analysis in this direction.

The BSG argued that 'acquired liabilities' should be a condition of impracticability, offering two examples: one regarding syndicated facility agreements, where a lender transfers its position to a new lender, and one regarding adherence to non-disclosure agreements.

Furthermore, the BSG discussed situations of impracticability potentially linked to Brexit. Related to this context, the BSG urged RAs to carry out an assessment of the equivalence of bail-in powers under UK law.

Regarding the conditions for RAs to require inclusion, the BSG comments focused on the thresholds. BSG members' views are mixed: the thresholds either potentially create an uneven playing field for large banks or, on the contrary, help to achieve a level playing field by applying a common rule.

Regarding the draft ITS, the BSG indicated support for the proposal put forward by the EBA and considered the templates and instructions clear. The BSG further indicated that its consultations with the financial industry pointed to a time frame of a minimum of 6 months to implement the technical specifications of the ITS. In addition, the BSG suggested some flexibility in the ITS to allow for notification of cases of impracticability outside the conditions set out by the related RTS.

⁹ <https://eba.europa.eu/technical-standards-impracticability-contractual-recognition-bail#pane-291>. The response of the BSG is available at: https://eba.europa.eu/sites/default/documents/files/document_library/934715/Response%20to%20the%20EBA%20CP%20on%20RTS%20and%20ITS%20impracticability.pdf

5.3 Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 3 months and ended on 24 October 2020. Thirteen responses were received, of which twelve, including the response of the BSG, 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 the 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 response to different questions. In such cases, the comments and the EBA's analysis are included in the section of this report where the EBA considers them most appropriate. In addition, as some answers covered several questions, the summary table has grouped questions of a similar nature for concision and readability.

Changes to the draft RTS and draft ITS, including to the related templates and instructions, have been incorporated as a result of the responses received during the public consultation, where deemed justified.

Summary of key issues and the EBA's response

This part of the final report summarises the main aspects highlighted by the public consultation and the related EBA responses. The structure focuses on each of the three components of the RTS (conditions of impracticability, conditions for the RA to require inclusion and reasonable timeframe for the RA to require inclusion) and then on the ITS and the entry into force of the two technical standards.

In general terms, an increased ability in the conditions of impracticability in capturing the relevant cases was pursued, where such changes were justified. This approach should decrease the burden on institutions and RAs alike and should reduce the need to use the thresholds specified in the conditions for the RA to require inclusion.

The requirement for bail-in contractual recognition under Article 55 of the BRRD has been in place for a number of years. The new provisions in the BRRD2 that acknowledge the existence of situations of impracticability arise from practical experiences of these impracticability situations. The present draft RTS identifying conditions of impracticability aimed to capture all the experiences and situations, where possible. The focus of the public consultation was to make sure that all situations of impracticability are clearly and unequivocally captured as conditions of impracticability.

Some of the respondents, however, made requests that could not be met, such as recognising the impracticability of the actual bail-in (as opposed to the impracticability of contractual recognition), or allowing an open list of conditions of impracticability or linking the requirement for contractual

recognition to resolvability status. Furthermore, some respondents asked for the possibility to have a tacit or automatic mechanism for the recognition of impracticability. The EBA's mandate is linked to specifying the conditions of impracticability of contractual recognition. General exclusions from the scope of bail-in or from the scope of Article 55 of the BRRD are not within the scope of the mandate. An open list would indicate that the EBA had not fulfilled its mandate and would create an uneven playing field, allowing institutions and RAs to develop their own practices. The intended purpose of the public consultation was to gather knowledge from experiences, allowing the creation of an exhaustive and comprehensive list and thus eliminating the need for an open list of conditions of impracticability.

Respondents considered it critical that a fast-track or automatic non-objection process be put in place, to avoid situations where RAs have to process thousands of notifications requiring a straightforward application of the waiver and would also ensure certainty for institutions in a timely manner. The EBA believes that the technical standards achieve this: following notification, the RA has a set timeframe to require inclusion if it disagrees with the determination made by the institution.

Some respondents indicated that it was unclear what part of the process the timeframe refers to (i.e. (i) the time necessary for the RA to notify the bank of its decision to include the clause or (ii) the time period within which the bank then has to include a bail-in clause). Furthermore, respondents indicated that in practice it would be better to have as short a period as possible to provide certainty, particularly given that the timeframe may also impact the feasibility of remedying the situation should the RA determine that the waiver does not apply. The EBA believes that the RTS provisions are clear and relate to the timeframe that the RA has at its disposal to require inclusion of the bail-in recognition term. In practice, the RA has 3 months to assess the notification and, if it determines that it does not meet the conditions of impracticability, to assess the further provisions related to requiring the institution to include the contractual term. The EBA believes that, if inclusion is required, the RA has the means, if it deems it necessary, to indicate to the institution the time frame that the institution has to remedy the situation. However, this is not regulated by the RTS, as the EBA's mandate does not cover this part of the process.

In addition to seeking a certain degree of flexibility in the conditions set out in the draft RTS, respondents indicated the need to include some other conditions of impracticability. These related in particular to the following:

- Liabilities contingent on a breach of contract (as indicated in the recitals of BRRD2): the feedback indicated that such liabilities would be impracticable for the purpose of bail-in (e.g. might not be materialised at the time of bail-in action), as opposed to being impracticable to include the contractual recognition clause. Feedback from the public consultation posed the question of whether liabilities contingent on a breach of contract are, in some cases, within the scope of Article 55. The EBA cannot provide views on or interpretations of Level 1 provisions. The EBA highlights the following considerations.
 - The liability is only a secondary obligation of the contract, and no actual financial liability arises as a primary obligation of the contract. In this respect, the EBA believes that, since the evidence from the public consultation focuses

on the limited value in the event of bail-in action, as opposed to barriers to achieving contractual recognition, the contingency of a liability on a breach of contract cannot be considered a condition of impracticability of contractual recognition. Furthermore, the EBA notes that if such a condition of impracticability were accepted, all contracts would be within its scope and notified, creating a huge operational burden for both institutions and authorities.

- The instrument acts as insurance for the underlying contract, i.e. if the contract is breached, the institution has contractually agreed to make a payment. The EBA notes that these kinds of instruments (letters of guarantee, for example) have already been captured, where relevant, by condition (c) of the draft RTS. As noted above, the impracticability of contractual recognition cannot be said to arise from the contingent nature of the liability; rather, it arises from the purpose of the instrument and the actual standardised wording imposed by such instruments or agreements.
- Liabilities for which respondents indicated there was no contract to amend: the EBA notes that Article 55 of the BRRD applies to contracts, as it refers throughout to contractual terms or provisions. Therefore, where there is no contract, the requirement for contractual recognition would seem to lack any basis. Feedback from respondents did not indicate why there might be no contract to amend. Examples given (phone deals or SWIFT messages) seem to indicate operational arrangements made in relation to existing underlying contracts, frameworks or master agreements, rather than undocumented agreements.
- Linking the condition of impracticability of contractual recognition to the value brought to the institution's resolvability: in this case, the EBA notes the difference between impracticability of contractual recognition and impracticability of bail-in. The EBA's mandate relates strictly to the first. The assessment of this request indicates, that should that condition be accepted, the same contract would be impracticable for contractual recognition for a certain small value but not impracticable for a larger value – which can only be linked to competition advantages.
- To consider counterparty refusal a condition of impracticability, despite recital 26 of the BRRD2: respondents suggested designing a certain mechanism to assess counterparty refusal by designing a benchmarking system and hence having a level-playing field basis for what would constitute counterparty refusal. However, as some respondents indicated, it is difficult to assess counterparty refusal and the extent to which the institution insisted on having contractual recognition. Furthermore, the list of conditions of impracticability is considered to capture all situations objectively occurring in practice. Considering counterparty refusal an acceptable condition of impracticability would potentially include all contracts in the scope of the conditions.

Respondents further requested more flexibility regarding the conditions for the RA to require inclusion. Specific requests were made in relation to the thresholds included in the draft RTS article regarding these conditions. The EBA notes that the degree of flexibility is limited by two factors, giving rise to the wording proposed in the draft RTS: the RA cannot require inclusion if it agrees with the institution's determination (therefore providing certainty to institutions, a level playing field and no relation to the value of a liability) and the RA must require inclusion if it disagrees with the determination of impracticability above certain thresholds. The thresholds are included to provide a level playing field, as otherwise the waiver from Article 55 of the BRRD would be at the discretion of the RA: notified liabilities that do not meet any of the conditions of impracticability could be waived from the requirement for the simple reason that they were notified, thus creating an uneven playing field for institutions.

Furthermore, some respondents requested that RAs carry out their assessments on the equivalence and recognition of write-down and conversion powers under English law as soon as possible, and urged them to conclude binding agreements in the event of a negative outcome, as foreseen in the final subparagraph of Article 55.

Still in relation to Brexit, some respondents asked for a condition of impracticability linked to this event, as institutions are relocating contracts from the UK institutions to EU-based ones. EBA notes that it is outside the scope of the mandate of the RTS to deal with Brexit related matters.

Relating to the provisions of Article 55(7) of the BRRD, allowing RAs to specify categories of liabilities impracticable for contractual recognition based on the RTS conditions of impracticability, respondents indicated that such a practice would have a huge operational advantage over notifications of individual contracts. Respondents also indicated that it would be important that RAs do not set up numerous different local rules/instructions/categories, and that they would support any such work being undertaken in a collegiate fashion through the EBA.

Some respondents indicated that the RTS did not appear to cover the possible consequences that firms would face in the event of being required to include a relevant contractual clause, despite having sought to apply the impracticability waiver. The EBA acknowledges this feedback and notes that this subject is outside the mandate: the EBA has no power to assess any potential harmonisation or possible regulation relating to such situations.

Furthermore, respondents indicated the high burden related to the implementation of the ITS and the high burden created by notifications of individual contracts. The EBA notes that the waiver from the requirements of Article 55 of the BRRD is not automatic. On the contrary, when identifying a contract that meets a condition of impracticability of contractual recognition, it must be notified to the RA in accordance with the BRRD provisions. While the ITS allow notifications of categories, decreasing the operational burden, it is for each RA to decide on its operationalisation, as foreseen under Article 55(7) of the BRRD.

Some respondents indicated the need to clarify some of the instructions and date fields, while also indicating that, depending on the contract, certain data points would not be applicable. The EBA

updated the templates and instructions to provide more clarity, indicating that where certain data points are not applicable to certain contracts they do not need to be filled in.

The EBA notes that institutions and RAs will need time to set up processes and systems to deal with notifications. However, the EBA believes that delaying too much the entry into force of this ITS, in practice, would create a void: the RTS will provide the institutions with the conditions to notify to the RAs the contracts for impracticability but there will be no uniform formats and templates for the notification. The draft ITS allow each RA to decide on the appropriate means for the transmission of data (including the freedom to change these systems at any given time) and also allow the flexibility to not report data points that are not applicable. For these reasons, the technical standards should enter into force and be applicable after publication in the *Official Journal of the European Union*.

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

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Waiver of obligation to notify impracticability	Respondents suggested using a mechanism of thresholds for waiving the obligation to notify contracts identified by the RTS conditions as impracticable (as opposed to the RTS thresholds for requiring inclusion of the contractual term).	The EBA acknowledges this feedback and its practical utility. However, the notification requirement is set in the Level 1 text, and the EBA's mandate does not allow the RTS to change the approach to this process.	No change
Waiver for Article 55 based on resolvability assessment	Respondents proposed using the resolvability assessment to waive requirements for contractual recognition under Article 55 of the BRRD.	The outcome of the resolvability assessment is not a condition related to the impracticability of contractual recognition of bail-in. The EBA's mandate is limited to specifying the conditions of impracticability of contractual recognition.	No change
Provisions for non-compliance	Some respondents highlighted that the draft RTS do not provide clarification for situations where the RA requires the inclusion of such a clause where it is operationally impossible, for example entering into contract after notification but before the RA requires inclusion. (e.g. does the bank then need to terminate the contract or accept a compliance breach?).	The EBA's mandate is limited to identifying the conditions of impracticability of contractual recognition, the conditions for the RA to require inclusion and the timeframe under which the RA must operationalise this requirement. Therefore, the EBA's mandate does not cover situations related to the process of notification of impracticability and related subsequent processes.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>Some respondents indicated that they would welcome clarity on the exclusion from the scope of the application of Article 55 of the BRRD of non-financial liabilities. For instance, such clarity would enable entities to avoid fruitless negotiations to include a bail-in clause in contracts that do not contemplate any primary financial liability on the part of the institution, as is the case for example, for non-disclosure agreements (NDAs).</p>	<p>The EBA acknowledges the issue raised. However, the EBA's mandate relates to specifying the conditions of impracticability of contractual recognition. While Article 55 of the BRRD does not expressly refer to financial contracts only, the RTS cannot clarify or provide views on Level 1 provisions.</p>	<p>No change</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2020/15			
<p>Q1. Are there any third-country authorities, other than RAs, that might impose instructions not to include the contractual bail-in recognition term?</p>	<p>Some respondents highlighted that they were not aware of any authorities expressly prohibiting contractual recognition clauses. Furthermore, these respondents believed that the conditions addressed in Article 1(1)(a) and (b) of the draft RTS could turn out to be of little practical relevance.</p> <p>In any event, respondents considered that it should not matter which authority prohibits the acceptance of contractual recognition clauses, since any prohibition would always be an obvious and insurmountable obstacle.</p> <p>Most of the respondents suggested that the final RTS should not be confined to third-country RAs but should refer more broadly to any third-country authority or applicable law that is competent to impose even implicitly or informally such a prohibition/restriction.</p> <p>Furthermore, respondents indicated that the concept of an RA might not exist in some third-country jurisdictions.</p>	<p>The EBA acknowledges the need to use a more general reference to capture restriction to contractual recognition determined by authorities other than an RA.</p>	<p>Change to Article 1(1)(b) of the RTS to allow for any third-country authority instruction to be considered a case of impracticability</p>

<p>Q2. Can you provide concrete examples of instruments, such as letters of guarantee, governed by the law of a third country that are not used in the context of trade finance and which would be subject to conditions of impracticability?</p> <p>Q8. Can you provide examples of instruments or contracts for which it would be impracticable to include the contractual recognition clause that are not captured by the proposed conditions in the draft RTS?</p>	<p>Respondents provided examples of instruments not used in the context of trade finance for which it would be impracticable to have contractual recognition: letters of credit, letters of guarantee, performance bonds or tender bonds (or similar instruments, where the counterparty requires the agreement to use very specific text that cannot be amended).</p> <p>Further examples of instruments for which it would be impracticable to include contractual recognition are: deposits/certificates of deposits, interbank guarantees, loans and lines of credit, spot transactions in securities or foreign exchange. Some other examples pointed to agreements concluded by phone or via SWIFT message or secondary liabilities.</p> <p>Most respondents indicated the need to consider those contracts generating liabilities that are contingent on a breach of contract conditions of impracticability. The reasoning for this included the argument that the inclusion of Article 55 wording in a contract is unlikely to result in the ability to bail in a liability arising from a breach of that contract.</p> <p>In the context of syndicated loan transactions, respondents indicated that obligations undertaken by financial institutions as credit providers and administrative parties would typically only give rise to liabilities where the financial institution breaches an obligation. As a consequence, the liability that could be bailed in arises under the relevant court judgment rather than under the original contract.</p>	<p>The EBA welcomes the examples provided. The conditions in points (c) and (d) have been reworded to include some of the instruments given as examples.</p> <p>However, for other examples, the EBA believes that they do not constitute conditions of impracticability.</p> <p>In particular, these are:</p> <ul style="list-style-type: none"> • Agreements concluded by phone or via SWIFT messages. The EBA notes that these agreements could still fall under condition (c) as long as they are concluded on standardised terms. Furthermore, the RTS sets out conditions and not types of contracts. • Regarding secondary liabilities, contingency is not a condition of impracticability of contractual recognition per se. As long as the liability (contingent or not) stems from a contract, that contract should be able to include a contractual recognition clause. If the characteristics of the contract do not allow such a clause, that relevant condition should be identified (from those proposed in the draft RTS). • Regarding syndicated lending or trading of loans, the EBA notes that the examples offered refer to liabilities contingent on a breach of contract (secondary liabilities). 	<p>Changes to conditions (c) and (d) to include more types of instruments in their scope</p>
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Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>Loan trading activities were identified as creating situations of impracticability, as institutions will be unable to amend the purchased loan contracts.</p> <p>Furthermore, in respect to liabilities contingent on a breach of contract, respondents indicated the different approaches taken in other jurisdictions that may put EU-based institutions at a competitive disadvantage. In this regard, several respondents pointed out that, according to the UK Prudential Regulation Authority, UK firms will not be required to include Article 55 wording in their syndicated loan documents, to the extent that these are governed by non-UK law.</p>	<ul style="list-style-type: none"> Regarding the opportunity, efficacy or contribution of contingent liabilities to a bail-in exercise, the EBA notes that these are not characteristics of impracticability of contractual recognition, and are therefore outside the mandate the EBA was given. 	

<p>Q3. Do you agree that the categories of liabilities in the above table do not meet the definition of impracticability for the purpose of Article 55(6)(a)?</p> <p>Q4. Do you consider that there is any condition of impracticability that has not been captured in the analysis?</p> <p>Q7. Do you agree with the EBA's proposed conditions of impracticability?</p> <p>Q9. Are the proposed conditions of impracticability clear and do they fulfil their purpose?</p>	<p>In general, respondents agreed with the conditions of impracticability proposed in the draft RTS; however, there were specific requests for clarification or to increase their scope.</p> <p>Some respondents commented that the list should be open and flexible to also cover unforeseen situations in which institutions are unable to include the bail-in recognition clause.</p> <p>The following additional conditions of impracticability were suggested.</p> <ol style="list-style-type: none"> 1. Contingent liabilities/liabilities contingent on a breach of an agreement. Respondents suggested that the RTS should recognise that it is impracticable to include the bail-in-clause if a payment obligation would arise only in the event of a breach of the agreement. In this context, respondents argued that the amount of the (secondary) liability would not be clear at the time of conclusion of the agreement, and that the liability would not arise from the agreement but from a court order or another means of ending litigation. Many respondents pointed out that liabilities contingent on a breach of contract are indicated as a type of agreement in which it is impracticable to include the bail-in recognition clause in recital 26 of the BRRD2. 2. Refusal of the counterparty should not be disregarded as a situation of impracticability, as such refusal is an underlying issue that could give rise to several conditions of impracticability and 	<p>The EBA acknowledges the feedback received. Where deemed relevant, the conditions of impracticability have been amended by taking into account the feedback from the public consultation. For other requests, no changes occurred, as the evidence put forward did not bring any additional elements to those considered at the time of drafting.</p> <p>The EBA understands the rationale for providing a more flexible list of conditions. However, an opened-ended list of conditions would fail to provide certainty to institutions entering into various contracts and instruments. Furthermore, a level playing field can be achieved only by an exhaustive list of conditions of impracticability.</p> <p>Specific reflections on the comments highlighted are offered below:</p> <ol style="list-style-type: none"> 1. The EBA's mandate under Article 55(6) does not allow it to provide for general exceptions to the scope of Article 55. This is true also with respect to payment obligations that arise only in the case of a breach of an agreement as a secondary obligation; therefore, it is not possible for the EBA to make a general exception to the scope of Article 55 for those liabilities. In addition, following the principles the EBA has set for describing circumstances in which an institution is not able to include the bail-in recognition clause, a contingent liability 	<p>The wording of the conditions of impracticability has been adjusted where necessary to increase the scope of their application and decrease their rigidity</p>
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	<p>result in the EU-based institution being unable to enter into certain transactions, which would have broader ramifications for the competitiveness of European institutions.</p> <ol style="list-style-type: none"> 3. One respondent suggested temporary impracticability for UK law governed contracts following the UK's withdrawal from the EU, as UK banks are novating their contracts to EU parts of their groups. 4. One respondent suggested an impracticability condition for all situations where there is no contractual documentation or where the institution has acquired an existing agreement not containing the bail-in recognition clause (e.g. loan trading). 5. Several respondents suggested making it a criterion for the RA not to request the inclusion of the bail-in language or providing a corresponding condition of impracticability where it is unlikely that the liability would ever be bailed in or would not contribute to the resolvability of the institution or entity, or where the liability would not improve loss-absorption capacity and resolvability overall. Examples given included low-value contracts, such as 'click-wrap' agreements entered into online. 6. One respondent suggested defining as impracticable the situation of smaller Member States for which international standard-makers 	<p>should not face circumstances generally different from other liabilities. Furthermore, feedback from the public consultation poses the question of whether liabilities contingent on a breach of contract, in some cases, fall within the scope of Article 55. The EBA cannot provide views on or interpretations of Level 1 provisions.</p> <ol style="list-style-type: none"> 2. The EBA is aware of the relevance of the refusal of the counterparty for the difficulties institutions would face when trying to include the bail-in clause. However, the Level 1 legislation indicates that the refusal of the counterparty alone should not as such be a condition for impracticability. Therefore, the EBA intends to capture typical situations in which a refusal of the counterparty can be expected through the conditions of impracticability set out in the draft RTS. Generally, accepting refusal of the counterparty as the sole reason for impracticability would result in great legal uncertainty for the market and potentially any contract meeting this condition. 3. The RTS cannot cover third-country-specific or transitory conditions of impracticability. 4. The EBA considers it unlikely that bank liabilities would be created without contractual documentation in a relevant number of cases. The examples offered in the public consultation seem to indicate 	
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	<p>such as the International Swaps and Derivatives Association (ISDA) do not provide standard terms or protocols reflecting appropriately the legal requirements applicable in those Member States.</p>	<p>obligations undertaken following a master agreement or operations to materialise existing contracts. The requirements of Article 55 of the BRRD apply when entering into an agreement or instrument creating a liability.</p> <p>5. The value of a liability, although it could be considered by some as having little relevance (impracticable) for resolvability or for bail-in results, is not a criterion for impracticability of contractual recognition. The argument put forward in the feedback relates to the fact that lower value instruments would have low value for resolvability. With regard to this argument, we note that a similar instrument but of higher value would paradoxically not give rise to impracticability of contractual recognition.</p> <p>6. The EBA RTS are applicable in the same way in all Member States. Creating conditions that would differentiate between Member States would go against the purpose of the technical standards. The EBA believes that if there are no standard terms or protocols for such Member States, the conditions of impracticability of the RTS would apply accordingly.</p> <p>Answers to the specific requests to adapt the existing conditions in the draft RTS are the following:</p>	
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	<p>Regarding the details of the conditions set out in the draft RTS, respondents indicated changes that would render these conditions more useful in practice:</p> <ul style="list-style-type: none"> i. Legal challenges to including the bail-in clause should also relate to local rules and market practice, e.g. consumer protection or the principles of unfair provisions. As currently drafted, the scope of conditions (a) and (b) was considered too rigid. ii. One respondent suggested providing more precise examples for condition (c) by making reference to specific instruments used in the context of trade financing, since there is no definition. In this regard, one respondent deemed that the conditions set out in Article 1(1)(c) should make clearer that off-balance-sheet trade finance instruments are captured. iii. Some respondents pointed out that an institution would never be able to modify the terms unilaterally, as this would always require mutual agreement. Furthermore, some respondents indicated that it would be too burdensome for the institution to demonstrate that it had been unable to amend the terms. Some respondents therefore requested the deletion of the respective secondary conditions to conditions (c)–(e). iv. Some respondents argued that the list of impracticability conditions should cover liabilities 	<ul style="list-style-type: none"> i. The scope of conditions (a) and (b) has been enlarged to cater for situations described by the public consultation. ii. The recitals of the draft RTS expressly refer to the case of trade finance products and recognise that these instruments are to be within the scope of condition (c) of Article 1(1) of the draft RTS. The recitals have been reworded to provide more guidance on the scope of the conditions of impracticability. iii. The EBA notes the sensible line between situations making it impracticable for the institution to negotiate and include the bail-in clause and difficulties arising from the unwillingness of the counterparty to agree on the terms. Bearing in mind, among other things, the difficulty and subjectivity linked to demonstrating counterparty refusal of contractual recognition, the EBA does not specify such a condition of impracticability. iv. Condition (d) has been amended to include financial service providers, while condition (e) already had in scope operational service providers. 	
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Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	towards service providers in third countries, in particular custodians, collateral managers, brokers, etc., as those entities generally operate on standard terms without negotiating their terms.		

<p>Q10. Is the article providing the conditions for the RA to require inclusion clear?</p> <p>Q11. Do you agree with the EBA's proposal for the conditions for the RA to require the inclusion of the contractual term?</p>	<p>Some respondents considered coordination between RAs important.</p> <p>Respondents indicated that the conditions for the RA to require inclusion were generally clear.</p> <p>Some respondents suggested modifications to the conditions:</p> <ol style="list-style-type: none"> 1. Some respondents indicated that more flexibility should be allowed either by making the list of conditions of impracticability non-exhaustive or by linking the conditions for the RA to take into account more of the effects of resolvability matters. 2. Furthermore, some respondents indicated that the requirements of Article 55 of the BRRD should be linked to resolvability assessments to a greater degree. 3. Some respondents indicated that the thresholds could create an uneven playing field and were arbitrary. Other respondents indicated that they agreed that the thresholds would help to achieve a European level playing field. Furthermore, one respondent suggested introducing various thresholds for different groups of instruments/contracts. <p>There was one suggestion to make the two conditions independent: require inclusion if the RA disagrees with the institution's notification or if the RA considers inclusion necessary for resolvability reasons.</p>	<p>The RTS provide, in line with the Level 1 provisions, only one condition for the RA to require inclusion: that it disagrees with the institution's determination of impracticability of contractual recognition. In principle, any notified contract not meeting the conditions of impracticability is subject to the requirement to include the contractual recognition term. The draft RTS provide a certain degree of flexibility by allowing the RA to refrain from requiring inclusion, even if it disagrees with the institution's determination.</p> <p>From a different perspective, if the RA agrees with the determination of impracticability made by the institution or entity, it cannot require inclusion. This is also a limitation on requiring inclusion for the purpose of resolvability (the RTS cover conditions of impracticability and not resolvability matters).</p> <p>In order to avoid different practices (e.g. some authorities always requiring inclusion while others rarely do so, on the basis that resolvability assessments are very specific), the flexibility granted to RAs is harmonised through the thresholds. This ensures that RAs' practices, when disagreeing with institutions' determinations, are harmonised across the EU, ensuring a level playing field.</p> <p>The argument that larger banks would be at a disadvantage because of the cap is not</p>	<p>No change</p>
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Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		reasonable. Large banks would benefit from a commercial advantage if there was no cap. The conditions of impracticability are the same for all institutions. The thresholds apply only to liabilities notified that do not meet any of the conditions of impracticability and therefore act as a backstop for contracts that do not meet the conditions of impracticability.	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Q12. What is the likely amount of the liabilities to be notified under Article 55 of the BRRD, as average per liability and as expected maximum per liability? What is the expected average maturity of the liabilities to be notified under Article 55 of the BRRD?</p>	<p>All respondents, except one, indicated that it was impossible to give concrete indications regarding values for contracts/instruments to be notified.</p> <p>One respondent provided some pieces of information related to the amount and maturity of the liabilities per different types of contract, proposing that the thresholds be differentiated by liability type.</p>	<p>Regarding the likely amount of notified liabilities, sound responses were not provided either in the survey conducted during the drafting of the RTS nor during the public consultation (the answers to this question).</p> <p>The EBA notes that notified contracts that are determined to meet at least one condition of impracticability will not be required to include a contractual recognition clause, regardless of their value. The thresholds linked to value apply only to notified contracts falling outside the conditions of impracticability, that is, contracts for which it is practicable to include the contractual recognition clause.</p> <p>Contracts that do not meet any of the conditions of impracticability are subject to the requirement to include a contractual recognition clause (as required by Article 55 of the BRRD) in an automatic manner if they are above the draft RTS thresholds (in order to prevent institutions taking the approach of freely notifying all contracts that they enter into) and at the discretion of the RA below the thresholds.</p>	<p>No change</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Q13. Do you agree with the EBA's proposal for the reasonable timeframe for the RA to require the inclusion of the contractual term?</p>	<p>Some respondents found the proposed language ambiguous because readers could interpret the 3 months as referring to either the time period within which banks have to include a bail-in clause once requested to do so or the time necessary for the RA to notify the bank of its decision. Respondents considered that, if the latter were correct, as short a period as possible would be important to provide certainty. A fast-track or automatic non-objection process was suggested for contracts meeting the current draft conditions for impracticability as set out in the RTS, e.g. trade finance contracts.</p> <p>Two respondents mentioned that it was not clear from the draft RTS what timeframe would be given to banks to comply with a request from the RA to include the contractual recognition clause and what would be the consequences if the request from the RA to include a recognition clause arrived after the signing off of the contract.</p>	<p>The EBA takes the view that the 'reasonable timeframe' clearly refers, in line with the BRRD mandate, to the time period within which the RA shall assess the institution's or entity's determination on impracticability and require inclusion of the contractual term in the contract, if it comes to such a conclusion. Therefore, the period specified in Article 3 of the draft RTS is the timeframe within which the RA can require inclusion of the contractual recognition term if it disagrees with the institution's determination.</p> <p>For the reasons mentioned above, the comments and proposals stemming from the interpretation that the reasonable time frame refers to the period for the institution or the entity to include the clause in the contract cannot be taken into consideration.</p> <p>The EBA notes that the scope of its mandate under Article 55(6) of the BRRD does not extend to providing fast-track or automatic non-objection processes for assessing the impracticability of including the contractual clause regarding certain types of agreements, or to determining the timeframe given to banks to comply with a request from the RA.</p>	<p>No change</p>

<p>Q5. Do you agree with the EBA’s approach in developing the draft ITS?</p> <p>Q15. Do you consider the draft ITS comprehensive for submitting a notification of impracticability?</p> <p>Q16. Do you consider the templates and instructions clear?</p> <p>Q17. Do you have any suggestions or proposals in relation to the draft ITS template and the instructions for filling it in?</p> <p>Q18. Do you consider any specific piece of information required in the template hard to obtain or unclear how to fill in?</p>	<p>The approach of reporting the notification to the authorities in a consistent fashion was broadly supported by the respondents. However, respondents expressed some concerns.</p> <ol style="list-style-type: none"> 1. Five respondents considered the level of granularity required by the template to be too high. Some of them feared that several required elements would be unavailable in institutions’ IT systems and/or inapplicable to specific liabilities (e.g. agreements with financial market infrastructure service providers) and suggested therefore introducing an option to leave fields empty or filled in with ‘N/A’. 2. One respondent asked for greater clarity regarding the implementation timeline while, in general, respondents were in favour of a longer implementation period with a staggered, risk-based approach. Concerns regarding additional delays caused by the need to install data systems were also expressed. 3. Respondents indicated that it would be preferable to take a batch notification approach, rather than notification of individual contracts, which could be too burdensome for all parties. 4. Because notifying before entering into a contractual agreement could be unsustainable business-wise for institutions, two respondents suggested either (i) notification in advance through which the institution notifies the RA about future contracts and the RA’s decision 	<p>The EBA acknowledges the feedback provided and has updated the ITS templates and instructions accordingly, where relevant.</p> <p>The ITS instructions have been updated to indicate that data points that are not available or relevant for a specific instrument or contract should not be provided in the notification. However, ‘N/A’ cannot be implemented as an option due to modelling constraints. The EBA notes that several data points should be available based on the ITS on resolution reporting (CIR 1624) and the RTS on records of financial contracts (CDR 1712/2016).</p> <p>The implementation timeline could not have been clearer at the time of the public consultation as it was dependent on several variables. Following its assessment of the public consultation, the EBA proposes that the ITS enter into force immediately in order to enable institutions to notify cases of impracticability, as this is not a reporting requirement.</p> <p>The ITS allow batch notifications: template N01.01 allows institutions to notify as many contracts/instruments as necessary in a single file, while template N01.02, which can be used in the same notification with template N01.01, allows notifications of entire categories if the RA allows it.</p> <p>Notifications for future likely contracts could be possible if the RA allows notifications per</p>	<p>The ITS instructions and templates have been updated to reflect and address some of the comments and queries, where relevant</p>
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	<p>becomes applicable to all similar contracts or (ii) yearly notification based on year-end data in order to feed into the resolvability assessment performed once a year by RAs.</p> <p>5. One respondent would have expected RAs to define <i>ex ante</i> examples for which impracticability would be granted de facto.</p> <p>One respondent regretted that the data validation rules referred to in the instructions were not made available at the time of the consultation. None of the other respondents indicated that they did not consider the draft ITS comprehensive for submitting a notification of impracticability.</p> <p>Five respondents stressed that the ITS should not limit the conditions of impracticability too narrowly and should allow more flexibility.</p>	<p>category. Any such implementation will depend on how the RA determines the applicable process. Otherwise, institutions should keep in mind the Level 1 provision that requires notification at the time of determination of impracticability.</p> <p>The EBA's mandate is strict in defining the conditions of impracticability. The ITS can allow notifications based only on the RTS provisions. Should RAs deem it useful to utilise categories as provided for under Article 55(7) of the BRRD, the ITS allow this.</p> <p>The data validation rules were not published at the time of the public consultation. They will be made available in due time, after the publication of the final report.</p> <p>The ITS cannot allow notification of conditions other than those set out in the RTS, as this would be equivalent to having a non-exhaustive list of conditions of impracticability, which in principle is not deemed acceptable by the EBA.</p>	

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<p>Q6. Do you consider reasonable 3 months for entry into force of the ITS to allow enough time to set up proper and adequate capabilities to notify using the ITS?</p> <p>Q14. How much time do you need to implement the technical specifications required by these ITS?</p>	<p>All respondents considered that the envisaged 3-month timetable was too short. The arguments provided mostly related to challenges that institutions are currently facing, challenges requiring far-reaching operational changes and adjustments to existing procedures and contractual arrangements, including the ongoing benchmark-replacement projects, the imminent coming into force of Brexit and the parallel implementation of projects in respect of Article 71a of the BRRD. In addition, the notification process would require extensive adaptations to banks' IT systems. Respondents indicated that the time necessary to implement adequate IT systems would depend on whether the banks can use a category-based <i>ex post</i> notification system, notification by batches being less burdensome than line-by-line notifications. Furthermore, implementation would depend on the how the RAs ask for templates to be submitted (if submission is required through XBRL, it would probably take even more time to implement the necessary changes).</p> <p>Two respondents proposed an implementation period of 12 months, especially for banks with an extensive business footprint across third countries (especially in trade finance), while one respondent indicated that a 6-month period would be sufficient. Respondents, in general, indicated that a 3-month period was likely to be too demanding.</p>	<p>The EBA acknowledges the responses indicating the need for a longer implementation period. The EBA believes that delaying too much the entry into force of this ITS, in practice, would create a gap: the RTS would set out for institutions the conditions for notifying to the RAs contracts affected by impracticability, but there would be no uniform formats and templates for notification.</p> <p>The EBA proposes a solution whereby the ITS enter into force immediately after publication in order to allow institutions to notify. However, RAs can determine the technical means for submitting the notifications.</p> <p>The draft ITS allow the possibility of notifying categories of liabilities that meet conditions of impracticability. However, this option is to be used only if the relevant RA deems it necessary to use the provisions of Article 55(7) of the BRRD.</p> <p>The technical means of submitting the notifications are to be determined by each RA.</p>	<p>Entry into force will be immediate in order to allow institutions and entities to notify, taking into account the flexibility that RAs have regarding the technical means for submission</p>

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<p>Q17. Do you have any suggestions or proposals in relation to the draft ITS template and the instructions for filling it in?</p>	<p>One respondent expressed concern that the amount of information and level of detail required were not proportionate to the requirements of Article 55 of the BRRD.</p> <p>One respondent queried whether firms were expected to maintain a register of all IDs notified to the RA.</p> <p>Some respondents indicated that certain data points could not be known at the date of entry into the contract, i.e. depending on the notified contract, certain data points might not be applicable at all.</p>	<p>The ITS instructions have been updated to indicate that where certain data points do not apply or are not relevant to certain notified contracts, such information does not need to be notified. In other words, not all data points in the ITS are mandatory.</p> <p>The purpose of the IDs (notification and liability) is to be able to retrace those items. This is important in case the RA requires further information or inclusion of the contractual term in some of the notified contracts. Retrieval of notifications could also be part of an audit or verification process. The EBA is not mandated to indicate if a database should be set up or not.</p>	<p>The draft ITS instructions have been updated to indicate that if data points do not apply to a certain contract, such data points are not mandatory</p>
<p>Q18. Do you consider any specific piece of information required in the template hard to obtain or unclear?</p>	<p>One respondent suggested some clarifications related to various elements, such as the estimated amount column, contracts/instruments creating new liabilities, new contracts/guarantees, final maturity date, specific chart of insolvency ranking, governing law for certain trade finance instruments, legal opinion, counterparty and banking secrecy.</p> <p>One respondent considered that notification by category would be much preferable and much more practicable. Concerning template N02.00 (Liability Insolvency Classes), it was considered very burdensome to fill in.</p>	<p>The feedback on the instructions and description of data points were taken into account and instructions and templates have been revised.</p>	<p>Updates have been made to the ITS instructions and templates for greater clarity</p>

<p>Q19. Do you agree with the draft IA? Can you provide any numerical data to further inform the IA?</p>	<p>In general, there is agreement with the proposed assessment. The main areas of disagreement are the following.</p> <ul style="list-style-type: none"> a) The IA is missing an assessment of the burden of negotiation represented by the mandatory inclusion of a bail-in clause. b) The IA is missing a comparison with existing systems in non-EU countries and an assessment of the level-playing field between EU entities and non-EU entities. <p>Furthermore, one respondent indicated that the quantitative questionnaire had been launched in March 2020, a period of instability and additional burdens on institutions. The respondent indicated that, in order to gather data from a bigger sample and gain more accurate responses, this quantitative questionnaire should be launched again.</p>	<p>The general objective of the RTS is to complete the framework around the obligation to include a contractual term. This involves specifying the list of conditions under which the inclusion of the term is impracticable, as well as the conditions under which the RAs may request inclusion and the timeframe for doing so.</p> <p>The inclusion of this contractual term is required by the Level 1 text and outside the scope of the EBA's discretion.</p> <p>The IA aims to provide an overview of the costs and benefits of the different options analysed by the EBA when specifying the conditions of impracticability and the conditions for RAs to require inclusion.</p> <p>The IA does not take into account an assessment of the burden of negotiation, as this is a cost of the inclusion of the contractual term: this is not an option as the inclusion of the term is required by the Level 1 text.</p> <p>For the same reason, the comparison with obligations to include the contractual term in the non-EU framework is outside the scope of the IA, as the inclusion of the term is required by the Level 1 text and is not under consideration in these draft RTS.</p> <p>Regarding the quantitative questionnaire, the purpose of this exercise was to evaluate the number of contracts that could fall under each</p>	<p>No change</p>
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		<p>condition in order to estimate the potential number of notifications that the RAs may receive. This last factor is important to ensure that the RAs are not overloaded and are ready and prepared to process all the notifications. In general, the results showed that a vast majority of respondents would have fewer than 50 contracts (the lower boundary of the specified ranges) falling under each of the conditions. The EBA considers that it is unlikely that relaunching the questionnaire would lead to significant changes in the answers of the respondents or a significant change in the sample of respondents that could lead to a change in the conclusions that RAs will not be overloaded and will be ready and prepared to process all the notifications.</p> <p>In addition, during the public consultation, institutions were given the opportunity to provide their feedback on the quantitative assessment if they did not do so in response to the survey March. Nevertheless, most respondents to the public consultation did not provide any additional input and highlighted that they did not have any relevant information.</p>	