

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,475, 18 ta' Settembru, 2015
Taqsimha B

L.N. 301 of 2015

MALTA FINANCIAL SERVICES AUTHORITY ACT
(CAP. 330)

Recovery and Resolution Regulations, 2015

IN exercise of the powers conferred by article 20A and 20D of the Malta Financial Services Authority Act, the Minister for Finance, acting on the advice of the Malta Financial Services Authority and of the Resolution Authority, respectively, has made the following regulations:-

1. (1) The title of these regulations is the Recovery and Resolution Regulations, 2015.

Citation, scope
and
commencement.

(2) The purpose of these regulations is to implement 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/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 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.

(3) These regulations lay down rules and procedures relating to the recovery and resolution of entities:

Provided that when establishing and applying the requirements of these regulations, and when using the different tools at their disposal in relation to an entity, and subject to specific provisions, the Resolution Committee and the Authority shall take account of the nature of its business, its shareholding structure, its legal form, its profile, size and legal status, its interconnectedness to other institutions or to the financial system in general, the scope and the complexity of its activities, its membership of an institutional protection scheme (IPS) that meets the requirements of Article 113(7) of the CRR or other cooperative mutual solidarity systems as referred to in Article 113(6) of that Regulation and whether it exercises any investment services or activities as defined in paragraph (2) of Article 4(1) of Directive 2014/65/EU.

(4) The provisions of regulation 32(5) shall come into force on such date as the Minister for Finance may, by notice in the Gazette, establish.

B 3116

Interpretation. **2. (1)** In these regulations, unless the context otherwise requires:

Cap. 330. "the Act" means the Malta Financial Services Authority Act;

"the BRRD" means Directive 2014/59/EU of the European Parliament and of the Council of 15th 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, as amended from time to time, and includes any implementing measures, implementing technical standards, regulatory technical standards, guidelines and similar measures that have been or may be issued thereunder;

"the CRD" means Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"the CRR" means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Additional Tier 1 instruments" means capital instruments that meet the conditions laid down in Article 52(1) of the CRR;

"affected creditor" means a creditor whose claim relates to a liability that is reduced or converted to shares or other instruments of ownership by the exercise of the write-down or conversion power pursuant to the use of the bail-in tool;

"aggregate amount" means the aggregate amount by which the Resolution Committee has assessed that eligible liabilities are to be written down or converted, in accordance with regulation 46(1);

"appropriate authority" means the Authority or the Resolution Committee, as the case may be;

"asset management vehicle" means a legal person that meets the requirements laid down in regulation 42(2);

"asset separation tool" means the mechanism for effecting a transfer by a Resolution Committee of assets, rights or liabilities of an institution under resolution to an asset management vehicle in accordance with regulation 42;

"the Authority" means the Malta Financial Services Authority established under the Act;

"back-to-back transaction" means a transaction entered into between two group entities for the purpose of transferring, in whole or in part, the risk generated by another transaction entered into between one of those group entities and a third party;

"bail-in tool" means the mechanism for effecting the exercise by the Resolution Committee of the write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with regulation 43;

"branch" has the same meaning as that assigned to it in point (17) of Article 4(1) of the CRR;

"bridge institution" means a legal person that meets the requirements laid down in regulation 40(2);

"bridge institution tool" means the mechanism for transferring shares or other instruments of ownership issued by an institution under resolution or assets, rights or liabilities of an institution under resolution to a bridge institution, in accordance with regulation 40;

"business day" means a day other than a Saturday, a Sunday or a public holiday in Malta;

"Central Bank" means the Central Bank of Malta as defined by the Central Bank of Malta Act;

Cap. 204.

"central counterparty" has the same meaning as that assigned to it in point (1) of Article 2 of Regulation (EU) No 648/2012;

"Common Equity Tier 1 instruments" means capital instruments that meet the conditions laid down in Article 28(1) to (4), Article 29(1) to (5) or Article 31(1) of the CRR;

"company" means a limited liability company constituted in Malta in accordance with the Commercial Partnerships Ordinance* or the Companies Act, or any law which may from time to time be in force, or a company registered, licensed or holding an equivalent

Cap. 386.

*Repealed by Act XXV of 1995 (Chapter 386).

B 3118

authorisation in another country outside Malta under the laws of any country provided that such company, if not constituted in Malta, would qualify to be so registered or licensed under the laws of Malta;

"conditions for resolution" means the conditions referred to in regulation 32(1);

"consolidated basis" means the basis of the consolidated situation as defined in point (47) of Article 4(1) of the CRR;

"consolidating supervisor" means consolidating supervisor as defined in point (41) of Article 4(1) of the CRR;

"conversion rate" means the factor that determines the number of shares or other instruments of ownership into which a liability of a specific class will be converted, by reference either to a single instrument of the class in question or to a specified unit of value of a debt claim;

"core business lines" means business lines and associated services which represent material sources of revenue, profit or franchise value for an institution or for a group of which an institution forms part;

"covered bond" means an instrument as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time, including any implementing measures that have been or may be issued thereunder;

"covered deposits" means covered deposits as defined in point (5) of Article 2(1) of Directive 2014/49/EU;

"credit institution" shall have the same meaning as that assigned to it in point (1) of Article 4(1) of the CRR, with the exception of those entities referred to in Article 2(5) of the CRD;

"crisis management measure" means a resolution action or the appointment of a special manager under regulation 35 or a person under regulation 51(2) or under regulation 72(1);

"crisis prevention measure" means the exercise of powers to direct removal of deficiencies or impediments to recoverability under regulation 6(6), the exercise of powers to address or remove impediments to resolvability under regulations 17 or 18, the application of an early intervention measure under regulation 27, the

appointment of a temporary administrator under regulation 29 or the exercise of the write-down or conversion powers under regulation 59;

"critical functions" means activities, services or operations the discontinuance of which is likely, in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of the institution or group, with particular regard to the substitutability of those activities, services or operations;

"cross-border group" means a group having group entities established in more than one Member State;

"debt instruments" referred to in paragraphs (g) and (j) of regulation 63(1) means bonds and other forms of transferable debt, instruments creating or acknowledging a debt, and instruments giving rights to acquire debt instruments;

"deposit" means a sum of money paid-in on terms under which it will be repaid, with or without interest or a premium and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it;

"deposit guarantee scheme" means a deposit guarantee scheme introduced and officially recognised by a Member State pursuant to Article 4 of Directive 2014/49/EU;

"depositor" has the same meaning as that assigned to it in point (6) of Article 2(1) of Directive 2014/49/EU;

"derivative" has the same meaning as that assigned to it in point (5) of Article 2 of Regulation (EU) No 648/2012;

"Directive 2002/47/EC" means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Directive 2014/49/EU" means Directive 2014/49/EU of the European Parliament and of the Council, of 16 April 2014, on deposit guarantee schemes, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Directive 2014/65/EU" means Directive 2014/65/EU of the European Parliament and of the Council, of 15 May 2014, on markets in financial instruments and amending Directive 2002/92/EC and

B 3120

Directive 2011/61/EU, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Directive 97/9/EC" means Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Directive 98/26/EC" means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"director" includes an individual occupying the position of director of a company, by whatever name he may be called, empowered to carry out substantially the same functions in relation to the direction of the company as those carried out by a director and in respect of a company registered, licensed or holding an equivalent authorisation outside Malta includes a member of a local board or agent or representative of that company;

"EBA" means the European Banking Authority established by Regulation (EU) No 1093/2010;

"EEA State" means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on the 2nd May, 1992 as amended by the Protocol signed at Brussels on the 17th March, 1993 and as amended by any subsequent acts;

"eligible deposits" has the same meaning as that assigned to it in point (4) of Article 2(1) of Directive 2014/49/EU;

"eligible liabilities" means the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in this sub-regulation and that are not excluded from the scope of the bail-in tool by virtue of regulation 44(2);

"emergency liquidity assistance" means the provision by a central bank of central bank money, or any other assistance that may lead to an increase in central bank money, to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems, without such operation being part of

monetary policy;

"entity" means:

(a) institutions that are established in the European Union;

(b) financial institutions that are established in the Union when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in paragraph (c) or (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of the CRR;

(c) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the Union;

(d) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies;

(e) branches of institutions that are established outside the European Union in accordance with the specific conditions laid down in this regulation;

"ESRB" means the European Systemic Risk Board established by Regulation (EU) No 1092/2010;

"European Central Bank" means the European Central Bank established in accordance with Article 13 of the Treaty on European Union;

"European regulatory authority" means an authority which is situated in a country or territory outside Malta that is in a Member State and is empowered by law or regulation to supervise investment firms or credit institutions;

"European resolution authority" means an authority which is situated in a country or territory outside Malta that is in a Member State and which exercises any function corresponding to the functions of the Resolution Committee under these regulations;

"extraordinary public financial support" means State Aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, or any other public financial support at supra-national level, which, if provided at national level, would constitute

B 3122

State aid, that is provided in order to preserve or restore the viability, liquidity or solvency of an institution or of an entity or of a group of which such an institution or entity forms part;

"financial contracts" includes the following contracts and agreements:

- (a) securities contracts, including:
 - (i) contracts for the purchase, sale or loan of a security, a group or index of securities;
 - (ii) options on a security or group or index of securities;
 - (iii) repurchase or reverse repurchase transactions on any such security, group or index;
- (b) commodities contracts, including:
 - (i) contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;
 - (ii) options on a commodity or group or index of commodities;
 - (iii) repurchase or reverse repurchase transactions on any such commodity, group or index;
- (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;
- (d) swap agreements, including:
 - (i) swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;
 - (ii) total return, credit spread or credit swaps;
 - (iii) any agreements or transactions that are similar to an agreement referred to in paragraph (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

(e) inter-bank borrowing agreements where the term of the borrowing is three months or less;

(f) master agreements for any of the contracts or agreements referred to in paragraphs (a) to (e);

"financial holding company" means a financial holding company as defined in point (20) of Article 4(1) of the CRR;

"financial institution" means a financial institution as defined in point (26) of Article 4(1) of the CRR;

"financial instrument" shall have the same meaning as that assigned to it in point (50) of Article 4(1) of the CRR;

"group" means a parent undertaking and its subsidiaries;

"group entity" means a legal entity that is part of a group;

"group financing arrangement" means the financing arrangement or arrangements of the Member State of the group-level resolution authority;

"group-level resolution authority" means the Resolution Committee when Malta is the consolidating supervisor or the resolution authority in the Member State in which the consolidating supervisor is situated;

"group recovery plan" means a group recovery plan drawn up and maintained in accordance with regulation 7;

"group resolution" means either of the following:

(a) the taking of resolution action at the level of a parent undertaking or of an institution subject to consolidated supervision, or

(b) the coordination of the application of resolution tools and the exercise of resolution powers by the Resolution Committee and the European resolution authorities concerned in relation to group entities that meet the conditions for resolution;

"group resolution plan" means a plan for group resolution drawn up in accordance with regulations 12 and 13;

"group resolution scheme" means a plan drawn up for the purposes of group resolution in accordance with regulation 91;

B 3124

"hybrid capital" means a form of debt that has been substituted for equity;

"impaired asset" means an asset that is worth less on the market than the value listed on an institutions balance sheet and which will result in a write-down of that same asset account to the stated market price;

"institution" means a credit institution or an investment firm;

"institution under resolution" means an institution, a financial institution, a financial holding company, a mixed financial holding company, a mixed-activity holding company, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in respect of which a resolution action is taken;

"institutional protection scheme" or "IPS" means an arrangement that meets the requirements laid down in Article 113(7) of the CRR;

"instruments of ownership" means shares, other instruments that confer ownership, instruments that are convertible into or give the right to acquire shares or other instruments of ownership, and instruments representing interests in shares or other instruments of ownership;

"insurance undertaking" shall have the same meaning as that assigned to it in point (5) of Article 4(1) of the CRR;

"intra-group guarantee" means a contract by which one group entity guarantees the obligations of another group entity to a third party;

"investment firm" has the same meaning as that assigned to it in point (2) of Article 4(1) of the CRR that is subject to the initial capital requirement of €730,000, excluding firms which are not authorised to provide the investment service falling within points (3), (7) and (9) of the First Schedule to the Investment Services Act;

Cap. 370.

"investor" means an investor within the meaning of point (4) of Article 1 of Directive 97/9/EC of the European Parliament and of the Council;

"Member State" means a Member State of the European Union and includes an EEA State;

"micro, small and medium-sized enterprises" means micro, small and medium-sized enterprises as defined with regard to the annual turnover criterion referred to in Article 2(1) of the Annex to Commission Recommendation 2003/361/EC;

"mixed-activity holding company" means a mixed-activity holding company as defined in point (22) of Article 4(1) of the CRR;

"mixed financial holding company" means a mixed financial holding company as defined in point (21) of Article 4(1) of the CRR;

"netting arrangement" means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC;

"normal insolvency proceedings" means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under Maltese law and either specific to those institutions or generally applicable to any natural or legal person;

"overseas appropriate authority" means an authority of a Member State identified in accordance with Article 61 of the BRRD that is responsible under the national law of that State for making the determinations referred to in regulation 59(3);

"own funds" means own funds as defined in point (118) of Article 4(1) of the CRR;

"own funds requirements" means the requirements laid down in regulations 92 to 98 of the CRR;

"parent financial holding company in a Member State" means a parent financial holding company in a Member State as defined in point (30) of Article 4(1) the CRR;

"parent institution in a Member State" means a parent institution in a Member State as defined in point (28) of Article 4(1) of the CRR;

"parent mixed financial holding company in a Member State"

B 3126

means a parent mixed financial holding company in a Member State as defined in point (32) of Article 4(1) of the CRR;

"parent undertaking" means a parent undertaking as defined in point (15)(a) of Article 4(1) of the CRR;

"recipient" means the entity to which shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items are transferred from an institution under resolution;

"recovery capacity" means the capability of an institution to restore its financial position following a significant deterioration;

"recovery plan" means a recovery plan drawn up and maintained by an institution in accordance with regulation 5;

"regulated market" has the same meaning as that assigned to it in point (21) of Article 4(1) of Directive 2014/65/EU;

"Regulation (EU) No 1093/2010" means Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"Regulation (EU) No 648/2012" means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"relevant capital instruments" for the purposes of Section 5 of Chapter IV of Title IV and Chapter V of Title IV of the BRRD, means Additional Tier 1 instruments and Tier 2 instruments;

"relevant parent institution" means a parent institution in a Member State, a Union parent institution, a financial holding company, a mixed financial holding company, a mixed-activity holding company, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in relation to which the bail-in tool is applied;

"relevant third-country authority" means an authority

established in a third-country which is responsible for carrying out functions comparable to those of the Resolution Committee or the Authority pursuant to these regulations;

"resolution" means the application of a resolution tool or a tool referred to in regulation 37(9) in order to achieve one or more of the resolution objectives referred to in regulation 31(2);

"resolution action" means the decision to place an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in this sub-regulation under resolution pursuant to regulations 32 or 33, the application of a resolution tool, or the exercise of one or more resolution powers;

"resolution college" means a college established in accordance with regulation 88 to carry out the tasks referred to in regulation 88(1);

"Resolution Committee" means the committee responsible for recovery and resolution, as established in the Act;

"resolution objectives" means the resolution objectives referred to in regulation 31(2);

"resolution plan" means a resolution plan for an institution drawn up in accordance with regulation 10;

"resolution power" means a power referred to in regulations 63 to 72;

"resolution tool" means a resolution tool referred to in regulation 37(3);

"sale of business tool" means the mechanism for effecting a transfer by the Resolution Committee of shares or other instruments of ownership issued by an institution under resolution, or assets, rights or liabilities, of an institution under resolution to a purchaser that is not a bridge institution, in accordance with regulation 38;

"secured liability" means a liability where the right of the creditor to payment or other form of performance is secured by a charge, pledge or lien, or collateral arrangements including liabilities arising from repurchase transactions and other title transfer collateral arrangements;

"senior management" means senior management as defined in point (9) of Article 3(1) of the CRD;

B 3128

"set-off arrangement" means an arrangement under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other;

"significant branch" means a branch that would be considered as significant in a host Member State in accordance with Article 51(1) of the CRD;

"subsidiary" has the same meaning as that assigned to it in point (16) of Article 4(1) of the CRR;

"supervisory college" means a college of supervisors established in accordance with Article 116 of the CRD;

"systemic crisis" means a disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree;

"termination right" means a right to terminate a contract, a right to accelerate, close out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise;

"third country" means a country that is not a Member State or an EEA state;

"third-country institution" means an entity, the head office of which is established in a third country, that would, if it were established within the Union, be covered by the definition of an institution;

"third-country parent undertaking" means a parent undertaking, a parent financial holding company or a parent mixed financial holding company, established in a third country;

"third-country regulatory authority" means an authority which is in a country or territory that is not a Member State and is responsible for carrying out functions comparable to those of the Authority pursuant to these regulations;

"third-country resolution authority" means an authority which is in a country or territory that is not a Member State and is responsible for carrying out functions comparable to those of the Resolution Committee pursuant to these regulations;

"third-country resolution proceedings" means an action under the law of a third country to manage the failure of a third-country institution or a third-country parent undertaking that is comparable, in terms of objectives and anticipated results, to resolution actions under these regulations;

"Tier 2 instruments" means capital instruments or subordinated loans that meet the conditions laid down in Article 63 of the CRR;

"title transfer financial collateral arrangement" means a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC;

"transfer powers" means the powers specified in paragraphs (c) or (d) of regulation 63(1) to transfer shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items from an institution under resolution to a recipient;

"Union branch" means a branch located in a Member State of a third-country institution;

"Union parent financial holding company" means an EU parent financial holding company as defined in point (31) of Article 4(1) of the CRR;

"Union parent institution" means an EU parent institution as defined in point (29) of Article 4(1) of the CRR;

"Union parent mixed financial holding company" means an EU parent mixed financial holding company as defined in point (33) of Article 4(1) of the CRR;

"Union parent undertaking" means a Union parent institution, a Union parent financial holding company or a Union parent mixed financial holding company;

"Union State aid framework" means the framework established by Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union and regulations and all Union acts, including guidelines, communications and notices, made or adopted pursuant to Article 108(4) or Article 109 of the Treaty on the Functioning of the European Union;

"Union subsidiary" means an institution which is established in a Member State and which is a subsidiary of a third-country institution or a third-country parent undertaking;

B 3130

"winding up" means the realisation of assets of an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in this sub-regulation;

"write-down and conversion powers" means the powers referred to in regulation 59(2) and in paragraphs (e) to (i) of regulation 63(1).

(2) Words and expressions used in these regulations which are also used in the Act but which are not defined herein, shall have the same meaning assigned to them as in the Act.

(3) These regulations shall apply to:

(a) institutions that are established in the European Union;

(b) financial institutions that are established in the Union when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in paragraphs (c) and (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of the CRR;

(c) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the European Union;

(d) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies;

(e) branches of institutions that are established outside the Union in accordance with the specific conditions laid down in these regulations.

Powers and
duties of the
Resolution
Committee.

3. (1 It shall be the duty of the Resolution Committee to carry out the functions and duties assigned to it by the Act and these regulations. The Resolution Committee shall be empowered to apply the resolution tools and exercise the resolution powers.

(2) The Resolution Committee shall have the power to:

(a) remove and replace the senior management and directors and recover monies from responsible persons;

(b) appoint a temporary administrator to take control of and manage the affected institution with the objective of

restoring the institution, or parts of its business, to ongoing and sustainable viability;

(c) require, where necessary, the adoption of appropriate measures such as a change to an institution's business practices, structure or organization;

(d) operate and resolve the institution, including terminating contracts, continuing or assigning contracts, purchase or sell assets, write-down debt and take any other action necessary to restructure or wind down the institution's operations;

(e) ensure continuity of critical services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity;

(f) ensure that the residual entity in resolution can temporarily provide critical services to a successor or an acquiring entity or procuring necessary services from unaffiliated third parties;

(g) override rights of shareholders of the institution in resolution, including the requirement for approval by shareholders of particular transactions in order to permit a merger, acquisition, sale of substantial business operations, recapitalization or other measures to restructure and dispose of the institution's business or its liabilities and assets;

(h) transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any requirements for consent or novation that would otherwise apply;

(i) make a rapid valuation of assets and liabilities of a failing entity;

(j) establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed institution;

(k) establish a separate asset management vehicle and transfer to the vehicle for management and run-down non-performing loans or difficult-to-value assets;

(l) carry out bail-in within resolution as a means to

B 3132

achieve or help achieve continuity of critical functions either by recapitalizing the entity that is no longer viable, or by capitalizing a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable institutions;

(m) temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of an institution into resolution or in connection with the use of resolution powers;

(n) impose a moratorium with a suspension of payments to unsecured creditors and customers, other than for payments and property transfers to central counterparties and those entered into the payment, clearing and settlement systems, and to stay on creditor actions to attach assets or otherwise collect money or property from the institution, while protecting the enforcement of eligible netting and collateral arrangements;

(o) ensure that the 'no creditor worse off principle' is respected;

(p) effect the closure and orderly wind-up of the whole or part of a failing institution with timely pay out or transfer of insured deposits and prompt access to transaction accounts and to safeguard client funds.

(3) For the purposes of this regulation, the Resolution Committee shall adopt and make public any necessary relevant internal rules, including rules regarding professional secrecy and information exchanges between the different functional areas.

(4) The Resolution Committee shall cooperate closely with the Authority in the preparation, planning and application of resolution decisions.

(5) The Resolution Committee shall seek the approval, in writing, of the Ministry responsible for Finance prior to taking any decisions that may have a direct fiscal impact or which have systemic implications. The Resolution Committee shall inform the Minister responsible for finance of any decisions taken pursuant to the Act where transposing the BRRD or to these regulations.

(6) Any decisions taken by the Authority and the Resolution Committee in accordance with the Act transposing the BRRD and these regulations, shall take into account the potential impact of such a decision in all the Member States where the institution or the group

operates and shall minimise the negative effect on the financial stability and negative economic and social effects in those Member States.

(7) The Resolution Committee shall have the expertise, resources and operational capacity to apply resolution actions, and shall be able to exercise its powers with the speed and flexibility that is necessary to achieve the resolution objectives.

(8) The Resolution Committee shall inform the EBA of its specific functions and responsibilities.

4. (1) Having regard to the impact that the failure of an institution could have, due to the nature of its business; its shareholding structure; its legal form; its risk profile, size and legal status; its interconnectedness to other institutions or to the financial system in general; the scope and the complexity of its activities; its membership of an IPS or other cooperative mutual solidarity systems as referred to in Article 113(7) of the CRR and any exercise of investment services or activities as defined in point (2) of Article 4(1) of Directive 2014/65/EU, and whether its failure and subsequent winding up under normal insolvency proceedings would be likely to have a significant negative effect on financial markets, on other institutions, on funding conditions, or on the wider economy, the Authority and the Resolution Committee shall determine:

Simplified obligations for certain institutions.

(a) the contents and details of recovery and resolution plans provided for in regulations 5 to 12;

(b) the date by which the first recovery and resolution plans are to be drawn up and the frequency for updating recovery and resolution plans which may be lower than that provided for in regulation 5(2), regulation 7(5), regulation 10(6) and regulation 13(5);

(c) the contents and details of the information required from institutions as provided for regulation 5(5) and (6), regulation 11(1) and regulation 12(2) and in Sections A and B of the Schedule to these regulations;

(d) the level of detail for the assessment of resolvability provided for in regulations 15 and 16, and Section C of the Schedule to these regulations.

(2) The Authority and the Resolution Committee shall make the assessment referred to in sub-regulation (1) following consultation with the Central Bank.

B 3134

(3) Where the Authority or the Resolution Committee apply simplified obligations on an institution, the Authority or the Resolution Committee may still, where relevant, impose full, non-simplified obligations at any time:

Provided that where simplified obligations are imposed, the application of simplified obligations shall not, in itself, affect the Authority's and, where relevant, the Resolution Committee's powers to take a crisis prevention measure or a crisis management measure.

Cap. 371.
Cap. 370.

(4) The Authority and the Resolution Committee shall inform the EBA of the way sub-regulations (1), (5), (6) and (7) have been applied to institutions licensed under the Banking Act and Investment Services Act.

(5) Subject to sub-regulations (6) and (7), the Authority, and where relevant, the Resolution Committee may waive the application of:

(a) the requirements of regulations 5 to 14 to institutions affiliated to a central body and wholly or partially exempted from prudential requirements in accordance with Article 10 of the CRR;

(b) the requirements of regulations 5 to 9 to institutions which are members of an IPS.

(6) (a) Where a waiver pursuant to sub-regulation (5) is granted, the Authority, or where relevant, the Resolution Committee shall:

(i) apply the requirements of regulations 5 to 14 on a consolidated basis to the central body and institutions affiliated to it within the meaning of Article 10 of the CRR;

(ii) require the IPS to fulfil the requirements of regulations 5 to 9 in cooperation with each of its waived members.

S.L. 371.15

(b) For the purpose of this sub-regulation, any reference in regulations 5 to 14 to a group shall include a central body and institutions affiliated to it within the meaning of Article 10 of the CRR and their subsidiaries, and any reference to parent undertakings or institutions that are subject to consolidated supervision pursuant to regulation 3 of the Supervisory Consolidation Regulations, shall include the central body.

(7) (a) Institutions subject to direct supervision by the European Central Bank pursuant to Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions or which constitutes a significant share in the financial system of Malta shall draw up their own recovery plans in accordance with regulations 5 to 9 and shall be the subject to individual resolution plans in accordance with regulations 10 to 14.

(b) For the purposes of this sub-regulation, the operations of an institution shall be considered to constitute a significant share of Malta's financial system if any of the following conditions are met:

(i) the total value of its assets exceeds EUR 30 000 000 000; or

(ii) the ratio of its total assets over the GDP of Malta exceeds 20%, unless the total value of its assets is below EUR 5 000 000 000.

5. (1) An institution, that is not part of a group subject to consolidated supervision pursuant to regulations 3 and 4 of the Supervisory Consolidation Regulations, shall draw up and maintain a recovery plan providing for measures to be taken by the institution to restore its financial position following a significant deterioration of its financial situation. Recovery plans shall be considered to be a governance arrangement within the meaning of article 17B of the Banking Act for credit institutions and the Investment Services Rules for Investment Services Providers for investment firms.

Recovery plans.

S.L. 371.15

Cap. 371.

(2) Institutions shall update their recovery plans at least annually or after a change to the legal or organisational structure of the institution, its business or its financial situation, which could have a material effect on, or necessitates a change to, the recovery plan. The Authority may require institutions to update their recovery plans more frequently.

(3) Recovery plans shall not assume any access to or receipt of extraordinary public financial support.

(4) Recovery plans shall include, where applicable, an analysis of how and when an institution may apply for the use of central bank facilities, subject to the conditions addressed by the plan, and identify those assets which would be expected to qualify as collateral.

B 3136

(5) Without prejudice to regulation 4, the Authority shall ensure that the recovery plans include the information listed in Section A of the Schedule to these regulations, and any other additional information which may be required by the Authority on a case by case basis.

(6) Recovery plans shall also include possible measures which could be taken by the institution where the conditions for early intervention under regulation 27 are met.

(7) Recovery plans shall include appropriate conditions and procedures to ensure the timely implementation of recovery actions as well as a wide range of recovery options, and shall contemplate a range of scenarios of severe macroeconomic and financial stress relevant to the institution's specific conditions, including system-wide events and stress, specific to individual legal persons and to groups.

(8) The Authority may require an institution to maintain detailed records of financial contracts to which the institution concerned is a party to.

(9) The board of directors of an institution shall assess and approve the recovery plan before submitting it to the Authority.

Assessment of
recovery plans.

6. (1) Institutions required to draw up recovery plans under regulation 5(1) and regulation 7(1) shall submit the recovery plans to the Authority for review. The institution shall demonstrate to the satisfaction of the Authority that those plans meet the criteria set out in sub-regulation (2).

(2) The Authority shall, within six months from the submission of each recovery plan, and after consulting the relevant European regulatory authorities where significant branches are located, review it and assess the extent to which it satisfies the requirements laid down in regulation 5 and the following criteria:

(a) the implementation of the arrangements proposed in the plan is reasonably likely to maintain or restore the viability and financial position of the institution or of the group, taking into account the preparatory measures that the institution has taken or has planned to take;

(b) the plan and specific options within the plan are reasonably likely to be implemented quickly and effectively in situations of financial stress and avoiding to the maximum extent possible any significant adverse effect on the financial system, including in scenarios which would lead other

institutions to implement recovery plans within the same period.

(3) When assessing the appropriateness of the recovery plans, the Authority shall take into consideration the appropriateness of the institution's capital and funding structure to the level of complexity of the organisational structure and the risk profile of the institution.

(4) The Authority shall provide the recovery plan to the Resolution Committee. The Resolution Committee shall examine the recovery plan with a view to identifying any actions in the recovery plan which may adversely impact the resolvability of the institution and make recommendations to the Authority with regard to those matters.

(5) (a) Where the Authority assesses that there are material deficiencies in the recovery plan, or material impediments to its implementation, it shall notify the institution or the parent undertaking of the group of its assessment and require the institution to submit, within two months, extendable with the Authority's approval by one month, a revised plan demonstrating how those deficiencies or impediments are addressed:

Provided that, before requiring an institution to resubmit a recovery plan, the Authority shall give the institution the opportunity to state its opinion on that requirement.

(b) Where the Authority does not consider the deficiencies and impediments to have been adequately addressed by the revised plan, it may direct the institution to make specific changes to the plan.

(6) (a) If the institution fails to submit a revised recovery plan, or if the Authority determines that the revised recovery plan does not adequately remedy the deficiencies or potential impediments identified in its original assessment, and it is not possible to adequately remedy the deficiencies or impediments through a direction to make specific changes to the plan, the Authority shall require the institution to identify within a reasonable time-frame changes it can make to its business in order to address the deficiencies in or impediments to the implementation of the recovery plan.

(b) If the institution fails to identify such changes within the time-frame set by the Authority, or if the competent authority assesses that the actions proposed by the institution would not adequately address the deficiencies or impediments, the Authority may direct the institution to take any measures it considers to be necessary and proportionate, taking into account the seriousness of

B 3138

the deficiencies and impediments and the effect of the measures on the institution's business.

S.L. 371.16 (c) The Authority may, without prejudice to regulation
S.L. 370.15 9 of the Banking Act (Supervisory Review) Regulations and regulation 16 of the Investment Services Act (Supervisory Review) Regulations, direct the institution to:

(i) reduce the risk profile of the institution, including liquidity risk;

(ii) enable timely recapitalisation measures;

(iii) review the institution's strategy and structure;

(iv) make changes to the funding strategy so as to improve the resilience of the core business lines and critical functions;

(v) make changes to the governance structure of the institution:

Provided that such measures do not preclude the Authority from taking additional measures under Maltese law.

(7) When the Authority requires an institution to take measures according to sub-regulation 6, its decision on the measures shall be reasoned and proportionate, and the decision shall be notified in writing to the institution and shall be subject to a right of appeal.

Group recovery plans.

7. (1) Union parent undertakings shall draw up and submit to the Authority, where it is the consolidating supervisor, a group recovery plan. Group recovery plans shall consist of a recovery plan for the group headed by the Union parent undertaking as a whole. The group recovery plan shall identify measures that may be required to be implemented at the level of the Union parent undertaking and each individual subsidiary.

(2) In accordance with regulation 8, the Authority may require subsidiaries to draw up and submit recovery plans on an individual basis.

(3) The Authority where it is the consolidating supervisor shall, provided that the confidentiality requirements laid down in these regulations are in place, transmit the group recovery plans to:

S.L. 371.15 (a) the relevant authorities referred to in regulations 6 and 7 of the Supervisory Consolidation Regulations;

(b) the European regulatory authorities where significant branches are located insofar as is relevant to that branch;

(c) the group-level resolution authority; and

(d) the European resolution authorities of subsidiaries.

(4) (a) The group recovery plan shall aim to achieve the stabilisation of the group as a whole, or any institution of the group, when it is in a situation of stress so as to address or remove the causes of the distress and restore the financial position of the group or the institution in question, at the same time taking into account the financial position of other group entities.

(b) The group recovery plan shall include arrangements to ensure the coordination and consistency of measures to be taken at the level of the Union parent undertaking, at the level of the entities referred to in paragraphs (c) and (d) of the definition "entity" in regulation 2(1), as well as measures to be taken at the level of subsidiaries and, where applicable, in accordance with the CRD at the level of significant branches.

(5) The group recovery plan, and any plan drawn up for an individual subsidiary, shall include the elements specified in regulation 5, and shall include, where applicable, arrangements for intra-group financial support adopted pursuant to an agreement for intra-group financial support that has been concluded in accordance with regulations 19 to 26.

(6) Group recovery plans shall include a range of recovery options setting out actions to address those scenarios provided for in regulation 5(7):

Provided that for each of the scenarios, the group recovery plan shall identify whether there are obstacles to the implementation of recovery measures within the group, including at the level of individual entities covered by the plan, and whether there are substantial practical or legal impediments to the prompt transfer of own funds or the repayment of liabilities or assets within the group.

(7) The board of directors of the entity drawing up the group recovery plan pursuant to sub-regulation (1) shall assess and approve the group recovery plan before submitting it to the Authority, where it is the consolidating supervisor.

8. (1) The Authority shall:

Assessment of
group recovery
plans.

B 3140

(a) where it is the consolidating supervisor, together with the European regulatory authorities of subsidiaries; or

(b) where it is responsible for a subsidiary, together with the European regulatory authority acting as the consolidating supervisor and the European regulatory authorities of other subsidiaries, if any,

S.L. 371.15

after consulting the authorities referred to in regulation 7 of the Supervisory Consolidation Regulations and with the European regulatory authorities of significant branches insofar as is relevant to the significant branch, review the group recovery plan and assess the extent to which it satisfies the requirements and criteria laid down in regulations 6 and 7. That assessment shall be made in accordance with the procedure established in regulation 6 and with this regulation and shall take into account the potential impact of the recovery measures on financial stability in Malta and in all the Member States where the group operates.

(2) The Authority shall endeavour to reach a joint decision:

(a) where it is the consolidating supervisor, together with the European regulatory authorities of subsidiaries; or

(b) where it is responsible for a subsidiary, together with the European regulatory authority acting as the consolidating supervisor and the European regulatory authorities of other subsidiaries, if any, on:

(i) the review and assessment of the group recovery plan;

(ii) whether a recovery plan on an individual basis shall be drawn up for institutions that are part of the group; and

(iii) the application of the measures referred to in regulation 6(5) and (6):

Provided that the parties shall reach a joint decision within four months from the date of the transmission by the consolidating supervisor of the group recovery plan in accordance with regulation 7(3):

Provided further that the Authority may also request the EBA to assist the authorities mentioned in this sub-regulation in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

(3) Where the Authority is the consolidating supervisor, in the absence of a joint decision between the authorities mentioned in sub-regulation (2) within four months of the date of transmission, on the review and assessment of the group recovery plan or on any measures the Union parent undertaking is required to take in accordance with regulation 6(5) and (6), the Authority shall make its own decision with regard to those matters. The Authority, where it is the consolidating supervisor, shall make its decision having taken into account the views and reservations of the relevant European regulatory authorities expressed during the four-month period. The Authority, where it is the consolidating supervisor shall notify the decision to the Union parent undertaking and to the other relevant European regulatory authorities:

Provided that, if at the end of the four-month period, any of the authorities referred to in sub-regulation (2) have referred a matter mentioned in sub-regulation (7) to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Authority, where it is the consolidating supervisor, shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of a decision by the EBA within one month, the decision of the Authority as the consolidating supervisor shall apply.

(4) Where the Authority is responsible for the supervision of a subsidiary, in the absence of a joint decision between the authorities mentioned in sub-regulation (2) within four months of the date of transmission on:

- (a) whether a recovery plan on an individual basis is to be drawn up for the institutions under its jurisdiction; or
- (b) the application at subsidiary level of the measures referred to in regulation 6(5) and (6),

the Authority shall make its own decision on that matter:

Provided that, if at the end of the four-month period, any of the European regulatory authorities concerned have referred a matter mentioned in sub-regulation (7) to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Authority, where it is responsible for the supervision of the subsidiary, shall defer its decision and await any decision that the EBA may take in accordance

B 3142

with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of a decision made by the EBA within one month, the decision of the Authority, where it is responsible for the supervision of the subsidiary at an individual level, shall apply.

Cap. 370.

Cap. 371.

(5) Where the Authority does not disagree with a decision taken by a relevant European regulatory authority responsible for a subsidiary in accordance with Article 8(4) of the BRRD, the Authority and the other European regulatory authorities which did not disagree with such a decision, may reach a joint decision on a group recovery plan covering entities licensed in terms of the Banking Act and the Investment Services Act, as well as those entities authorised by the European regulatory authorities mentioned in this sub-regulation.

(6) The joint decision referred to in sub-regulations (2) or (5) and any decision taken by the European regulatory authorities in the absence of a joint decision in accordance with Article 8(3) and (4) of the BRRD shall be recognised as conclusive and shall be applied by the Authority in Malta.

(7) The Authority may, within four months of the date of transmission, request the EBA to assist the authorities mentioned in sub-regulation (2) in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010, only in relation to the assessment of recovery plans and implementation of the measures of paragraphs (c)(i), (ii) and (iv) of regulation 6(6). The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decisions of the European regulatory authority acting as the consolidating supervisor taken in accordance with Article 8(3) of the BRRD and, or, of the European regulatory authorities responsible for subsidiaries taken in accordance with Article 8(4) of the BRRD shall apply.

Recovery plan indicators.

9. (1) For the purpose of regulations 5 to 8, each recovery plan shall include a framework of indicators established by the institution which identifies the points at which appropriate actions referred to in the plan may be taken.

(2) Such indicators shall be agreed upon by the Authority when making the assessment of the recovery plans in accordance with regulations 6 and 8.

(3) The indicators may be of a qualitative or quantitative nature relating to the institution's financial position and shall be capable of being monitored easily.

(4) The Authority shall ensure that institutions put in place appropriate arrangements for the regular monitoring of the indicators.

(5) Notwithstanding sub-regulations (1) to (4), an institution may:

(a) take action under its recovery plan where the relevant indicator has not been met, but where the board of directors of the institution considers it to be appropriate in the circumstances; or

(b) refrain from taking such action where the board of directors of the institution does not consider it to be appropriate in the circumstances of the situation.

(6) A decision to take an action referred to in the recovery plan or a decision to refrain from taking such an action shall be notified to the Authority without delay.

10. (1) The Resolution Committee, after consulting the Authority and after consulting the European resolution authorities of the jurisdictions in which any significant branches are located insofar as is relevant to the significant branch, shall draw up a resolution plan for each institution that is not part of a group subject to consolidated supervision pursuant to regulations 3 and 4 of the Supervisory Consolidation Regulations. The resolution plan shall provide for the resolution actions which the Resolution Committee may take where the institution meets the conditions for resolution. Information referred to in sub-regulation (7)(a) shall be disclosed to the institution concerned.

Resolution plans.

S.L. 371.15

(2) When drawing up the resolution plan, the Resolution Committee shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed, according to regulations 15 to 18.

(3) The resolution plan shall take into consideration relevant scenarios including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide

B 3144

events. The resolution plan shall not assume any of the following:

(a) extraordinary public financial support besides the use of the financing arrangements established in accordance with regulation 100;

(b) any central bank emergency liquidity assistance; or

(c) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

(4) The resolution plan shall include an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and shall identify those assets which would be expected to qualify as collateral.

(5) The Resolution Committee may require institutions to assist them in the drawing up and updating of the plans.

(6) Resolution plans shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure of the institution or to its business or its financial position that could have a material effect on the effectiveness of the plan or otherwise necessitates a revision of the resolution plan:

Provided that for the purpose of the revision or update of the resolution plans referred to in this sub-regulation, the institutions and the Authority shall promptly communicate to the Resolution Committee any change that necessitates such revision or update.

(7) Without prejudice to regulation 4, the resolution plan shall set out options for applying the resolution tools and resolution powers referred to in Title IV of the BRRD to the institution. It shall include, quantified whenever appropriate and possible:

(a) a summary of the key elements of the plan;

(b) a summary of the material changes to the institution that have occurred after the latest resolution information was filed;

(c) a demonstration of how critical functions and core business lines could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity upon the failure of the institution;

(d) an estimation of the time-frame for executing each

material aspect of the plan;

(e) a detailed description of the assessment of resolvability carried out in accordance with sub-regulation (2) and with regulation 15;

(f) a description of any measures required pursuant to regulation 17 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with regulation 15;

(g) a description of the processes for determining the value and marketability of the critical functions, core business lines and assets of the institution;

(h) a detailed description of the arrangements for ensuring that the information required pursuant to regulation 11 is up to date and at the disposal of the Resolution Committee at all times;

(i) an explanation by the Resolution Committee as to how the resolution options could be financed without the assumption of any of the following:

(i) extraordinary public financial support besides the use of the financing arrangements established in accordance with regulation 100;

(ii) any central bank emergency liquidity assistance; or

(iii) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms;

(j) a detailed description of the different resolution strategies that could be applied according to the different possible scenarios and the applicable time-scales;

(k) a description of critical interdependencies;

(l) a description of options for preserving access to payments and clearing services and other infrastructures and, an assessment of the portability of clients positions;

(m) an analysis of the impact of the plan on the employees of the institution, including an assessment of any associated costs, and a description of envisaged procedures to

B 3146

consult staff during the resolution process, taking into account national systems for dialogue with social partners where applicable;

(n) a plan for communicating with the media and the public;

(o) the minimum requirement for own funds and eligible liabilities required pursuant to regulation 45(1) and a deadline to reach that level, where applicable;

(p) where applicable, the minimum requirement for own funds and contractual bail-in instruments pursuant to regulation 45(1), and a deadline to reach that level, where applicable;

(q) a description of essential operations and systems for maintaining the continuous functioning of the institution's operational processes;

(r) where applicable, any opinion expressed by the institution in relation to the resolution plan.

(8) The Resolution Committee may require an institution and an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to maintain detailed records of financial contracts to which it is a party. The Resolution Committee may specify a time-limit within which the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is to be capable of producing those records. The same time-limit shall apply to all institutions and all entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) under its jurisdiction. The Resolution Committee may decide to set different time-limits for different types of financial contracts as referred to in the definition "financial contracts" under regulation 2(1). This sub-regulation shall not affect the information gathering powers of the Authority.

Information for the purpose of resolution plans and cooperation from the institution.

11. (1) The Resolution Committee may require institutions to:

(a) cooperate as much as necessary in the drawing up of resolution plans;

(b) provide them, either directly or through the Authority, with all of the information necessary to draw up and implement resolution plans.

In particular the Resolution Committee may require,

among other information, the information and analysis specified in Section B of the Schedule to these regulations.

(2) The Authority shall cooperate with the Resolution Committee in order to verify whether some or all of the information referred to in sub-regulation (1) is already available. Where such information is available, the Authority shall provide that information to the Resolution Committee.

12. (1) The Resolution Committee shall, in its capacity as the group-level resolution authority, together with the European resolution authorities of subsidiaries, or, in its capacity as the resolution authority of a subsidiary, together with the European resolution authority acting as the group-level resolution authority and the European resolution authorities of other subsidiaries, if any, and after consulting the European resolution authorities of significant branches, insofar as is relevant to the significant branch, draw up group resolution plans. Group resolution plans shall include a plan for the resolution of the group headed by the Union parent undertaking as a whole, either through resolution at the level of the Union parent undertaking or through break up and resolution of the subsidiaries. The group resolution plan shall identify measures for the resolution of:

- (a) the Union parent undertaking;
- (b) the subsidiaries that are part of the group and that are located in the European Union;
- (c) the entities referred to in paragraphs (c) and (d) of the definition "entity" in regulation 2(1); and
- (d) subject to Title VI of the BRRD, the subsidiaries that are part of the group and that are located outside the European Union.

(2) The group resolution plan shall be drawn up on the basis of the information provided pursuant to regulation 11.

(3) The group resolution plan shall:

- (a) set out the resolution actions to be taken in relation to group entities, both through resolution actions in respect of the entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), the parent undertaking and subsidiary institutions and through coordinated resolution actions in respect of subsidiary institutions, in the scenarios provided for in regulation 10(3);

B 3148

(b) examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to group entities established in the European Union, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of group entities, or particular group entities, and identify any potential impediments to a coordinated resolution;

(c) where a group includes entities incorporated in third countries, identify appropriate arrangements for cooperation and coordination with the relevant authorities of those third countries and the implications for resolution within the European Union;

(d) identify measures, including the legal and economic separation of particular functions or business lines, that are necessary to facilitate group resolution when the conditions for resolution are met;

(e) set out any additional actions, not referred to in these regulations, which the group-level resolution authority intends to take in relation to the resolution of the group;

(f) identify how the group resolution actions could be financed and, where the financing arrangement would be required, set out principles for sharing responsibility for that financing between sources of funding in different Member States. The plan shall not assume any of the following:

(i) extraordinary public financial support besides the use of the financing arrangements established in accordance with regulation 100;

(ii) central bank emergency liquidity assistance;
or

(iii) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms:

Provided that those principles shall be set out on the basis of equitable and balanced criteria and shall take into account, in particular, regulation 107(5) and the impact on financial stability in Malta and in all the Member States concerned.

(4) The assessment of the resolvability of the group under

Article 16 of the BRRD shall be carried out at the same time as the drawing up and updating of the group resolution plan in accordance with this regulation. A detailed description of the assessment of resolvability carried out in accordance with Article 16 of the BRRD shall be included in the group resolution plan.

(5) The group resolution plan shall not have a disproportionate impact on any Member State.

13. (1) Where the Resolution Committee acts as the group-level resolution authority, Union parent undertakings shall submit the information that may be required in accordance with regulation 11 to the Resolution Committee. That information shall concern the Union parent undertaking and to the extent required, each of the group entities including entities referred to in paragraphs (c) and (d) of the definition "entity" in regulation 2(1). Requirement and procedure for group resolution plans.

(2) The Resolution Committee in its capacity as the group-level resolution authority shall, provided that confidentiality requirements laid down in these regulations are in place, transmit the information provided in accordance with this regulation to:

- (a) the EBA;
- (b) the Authority;
- (c) the European resolution authorities of subsidiaries;
- (d) the European resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch;
- (e) the relevant authorities referred to in regulations 6 and 7 of the Supervisory Consolidation Regulations; and S.L. 371.15
- (f) the European resolution authorities of the Member States where the entities referred to in paragraphs (c) and (d) of the definition "entity" in regulation 2(1) are established.

(3) The information provided by the Resolution Committee in its capacity as the group-level resolution authority to the European resolution authorities and European regulatory authorities of subsidiaries, European resolution authorities of the jurisdiction in which any significant branches are located, and to the relevant authorities referred to in regulations 6 and 7 of the Supervisory Consolidation Regulations, shall include as a minimum all information that is relevant to the subsidiary or significant branch. The information provided to the EBA shall include all information S.L. 371.15

B 3150

that is relevant to the role of the EBA in relation to the group resolution plans. In the case of information relating to third-country subsidiaries, the Resolution Committee in its capacity as group-level resolution authority shall not be obliged to transmit that information without the consent of the relevant third-country authority.

(4) The Resolution Committee in its capacity as group-level resolution authority, shall act jointly with the European resolution authorities referred to in sub-regulation (1), in resolution colleges and after consulting the Authority, where relevant, and the relevant European regulatory authorities, including the European regulatory authorities in which any significant branches are located, draw up and maintain group resolution plans. The Resolution Committee in its capacity as group-level resolution authority may, at its discretion, and subject to it meeting the confidentiality requirements laid down in regulation 98, involve in the drawing up and maintenance of group resolution plans third-country resolution authorities of jurisdictions in which the group has established subsidiaries or financial holding companies or significant branches as referred to in Article 51 of the CRD.

(5) Where the Resolution Committee is the group-level resolution authority, it shall review and, where appropriate update, group resolution plans, at least annually, and after any change to the legal or organisational structure, to the business or to the financial position of the group including any group entity, that could have a material effect on or require a change to the plan.

(6) The adoption of the group resolution plan shall take the form of a joint decision:

(a) where the Resolution Committee is the group-level resolution authority, of the Resolution Committee and the European resolution authorities of subsidiaries; or

(b) where the resolution authority is responsible for a subsidiary, of the Resolution Committee, the European resolution authority acting as the group-level resolution authority, and the European resolution authorities of other subsidiaries, if any:

Provided that the joint decision shall be made within four months of the date of the transmission by the group-level resolution authority of the information referred to in sub-regulation (2):

Provided further that the Resolution Committee may also request the EBA to assist the authorities mentioned in this sub-

regulation in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

(7) Where the Resolution Committee is the group-level resolution authority, in the absence of a joint decision between the Resolution Committee and the European resolution authorities of subsidiaries within four months, the Resolution Committee shall make its own decision on the group resolution plan. The decision shall be fully reasoned and shall take into account the views and reservations of the relevant European resolution authorities. The decision shall be provided to the Union parent undertaking by the Resolution Committee acting as the group-level resolution authority:

Provided that, subject to Article 13(9) of the BRRD, where the Resolution Committee is the group-level resolution authority, if, at the end of the four-month period, any of the authorities mentioned in sub-regulation (6) has referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Resolution Committee in its capacity as the group-level resolution authority shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee in its capacity as the group-level resolution authority shall apply.

(8) Where the Resolution Committee is responsible for a subsidiary, in the absence of a joint decision between the authorities mentioned in sub-regulation (6) within four months, the Resolution Committee shall make its own decision and shall draw up and maintain a resolution plan for the entities under its jurisdiction. The Resolution Committee, in its capacity as the resolution authority responsible for the subsidiary, shall provide full reasons for each individual decision. It shall set out the reasons for disagreeing with the proposed group resolution plan and shall take into account the views and reservations of the Authority and the other European regulatory authorities and European resolution authorities. The Resolution Committee shall notify its decision to the other members of the resolution college:

Provided that, subject to Article 13(9) of the BRRD, where the Resolution Committee is responsible for a subsidiary, if, at the end of the four-month period, any of the authorities mentioned in sub-regulation (6) has referred the matter to EBA in accordance with

Article 19 of Regulation (EU) No 1093/2010, the Resolution Committee shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee, where it is responsible for a subsidiary, shall apply.

Cap. 371.
Cap. 370.

(9) Where the Resolution Committee does not disagree with a decision taken by a relevant European resolution authority responsible for a subsidiary in accordance with Article 13(6) of the BRRD, the Resolution Committee and the other European resolution authorities which do not disagree with such a decision may reach a joint decision on a group resolution plan covering entities licensed in terms of the Banking Act and the Investment Services Act as well as those entities authorised by the European regulatory authorities mentioned in this sub-regulation.

(10) The joint decisions referred to in sub-regulations (6) and (9) and any decisions taken by European resolution authorities in the absence of a joint decision in accordance with Article 13(5) and (6) of the BRRD, shall be recognised as conclusive and applied by the Resolution Committee.

(11) The Resolution Committee may, within four months of the date of transmission, request the EBA to assist the authorities mentioned in sub-regulation (4) in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010 unless the Resolution Committee assesses that the subject matter under disagreement may in any way impinge on Malta's fiscal responsibilities. The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decisions of the European resolution authority acting as the group-level resolution authority taken in accordance with Article 13(5) of the BRRD and, or, of the European resolution authorities responsible for subsidiaries taken in accordance with Article 13(6) of the BRRD shall apply.

(12) Where joint decisions are taken pursuant to sub-regulations (6) and (9) and where the Resolution Committee or a European resolution authority, assesses that the subject matter of a disagreement regarding group resolution plans impinges on the fiscal

responsibilities of Malta or of its Member State respectively, the Resolution Committee, in its capacity as the group-level resolution authority, shall initiate a reassessment of the group resolution plan, including the minimum requirement for own funds and eligible liabilities.

14. (1) The Resolution Committee shall transmit the resolution plans and any changes thereto to the Authority and the relevant European regulatory authorities.

Transmission of resolution plans to the competent authorities.

(2) The Resolution Committee in its capacity as the group-level resolution authority shall transmit group resolution plans and any changes thereto to the Authority and the relevant European regulatory authorities.

15. (1) After the Resolution Committee has consulted with the Authority and the European resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, it shall assess the extent to which an institution, which is not part of a group, is resolvable without the assumption of any of the following:

Assessment of resolvability for institutions.

(a) extraordinary public financial support besides the use of the financing arrangements established in accordance with regulation 100;

(b) central bank emergency liquidity assistance;

(c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms:

Provided that an institution shall be deemed to be resolvable if it is feasible and credible for the Resolution Committee to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system wide events, of Malta, or other Member States or the European Union and with a view to ensuring the continuity of critical functions carried out by the institution. The Resolution Committee shall notify the EBA in a timely manner whenever an institution is deemed not to be resolvable.

(2) For the purposes of the assessment of resolvability referred to in sub-regulation (1), the Resolution Committee shall, as a minimum, examine the matters specified in Section C of the Schedule to these regulations.

B 3154

(3) The resolvability assessment under this regulation shall be made by the Resolution Committee at the same time as and for the purposes of the drawing up and updating of the resolution plan in accordance with regulation 10.

Assessment of
resolvability for
groups.

16. (1) The Resolution Committee -

(a) where it is the group-level resolution authority, together with the European resolution authorities of subsidiaries; or

(b) where it is responsible for a subsidiary, together with the European resolution authority acting as the group-level resolution authority and the European resolution authorities of other subsidiaries, if any,

after consulting the Authority and the European regulatory authorities in their capacity as either the consolidating supervisor, or where responsible for such subsidiaries, and the European resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, shall assess the extent to which groups are resolvable without the assumption of any of the following:

(i) extraordinary public financial support besides the use of the financing arrangements established in accordance with regulation 100;

(ii) central bank emergency liquidity assistance;

(iii) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms:

Provided that a group shall be deemed to be resolvable if it is feasible and credible for the Resolution Committee and the relevant European resolution authorities to either wind up group entities under normal insolvency proceedings or to resolve group entities by applying resolution tools and powers to group entities while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system wide events, of Malta, of the Member States in which the other group entities are situated, or other Member States or the European Union and with a view to ensuring the continuity of critical functions carried out by the group entities, where they can be easily separated in a timely manner or by other means. Where the Resolution Committee acts as the group-level resolution authority, it shall notify the EBA in a timely manner whenever a group is deemed not to be resolvable. The assessment of

group resolvability shall be taken into consideration by the resolution colleges referred to in regulation 88.

(2) For the purposes of the assessment of group resolvability, the Resolution Committee shall, as a minimum, examine the matters specified in Section C of the Schedule to these regulations:

Provided that the assessment of group resolvability under this regulation shall be made at the same time as, and for the purposes of drawing up and updating of the group resolution plans in accordance with regulation 12. The assessment shall be made under the decision-making procedure laid down in regulation 13.

17. (1) Where an assessment of resolvability for an institution is carried out in accordance with regulations 15 and 16, and where the Resolution Committee, after consulting the Authority, determines that there are substantive impediments to the resolvability of that institution, the Resolution Committee shall notify in writing that determination to the institution concerned, to the Authority and to the European resolution authorities of the jurisdictions in which significant branches are located.

Powers to address or remove impediments to resolvability.

(2) The requirement for the Resolution Committee to draw up resolution plans or for the Resolution Committee and the relevant European resolution authorities to reach a joint decision on group resolution plans in accordance with regulations 10(1) and 13(6) respectively shall be suspended following the notification referred to in sub-regulation (1) until the measures to remove the substantive impediments to resolvability have been accepted by the Resolution Committee pursuant to sub-regulation (3) or decided pursuant to sub-regulation (4).

(3) Within four months of the date of receipt of a notification made in accordance with sub-regulation (1), the institution shall propose to the Resolution Committee possible measures to address or remove the substantive impediments identified in the notification. The Resolution Committee, after consulting the Authority, shall assess whether those measures effectively address or remove the substantive impediments in question.

(4) Where the Resolution Committee assesses that the measures proposed by an institution in accordance with sub-regulation (3) do not effectively reduce or remove the impediments in question, it shall, either directly or indirectly through the Authority, require the institution to take alternative measures that may achieve that objective, and notify in writing those measures to the institution, which shall propose within one month a plan to comply with them:

B 3156

Provided that in identifying alternative measures, the Resolution Committee shall demonstrate how the measures proposed by the institution were not able to remove the impediments to resolvability and how the alternative measures proposed are proportionate in removing them. The Resolution Committee shall take into account the threat to financial stability of those impediments to resolvability and the effect of the measures on the business of the institution, its stability and its ability to contribute to the economy.

(5) For the purposes of sub-regulation (4), the Resolution Committee shall have the power to take any of the following measures:

(a) require the institution to revise any intra-group financing agreements or review the absence thereof, or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;

(b) require the institution to limit its maximum individual and aggregate exposures;

(c) impose specific or regular additional information requirements relevant for resolution purposes;

(d) require the institution to divest specific assets;

(e) require the institution to limit or cease specific existing or proposed activities;

(f) restrict or prevent the development of new or existing business lines or sale of new or existing products;

(g) require changes to legal or operational structures of the institution or any group entity, either directly or indirectly under its control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;

(h) require an institution or a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company;

(i) require an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to issue eligible liabilities to meet the requirements of regulation 45;

(j) require an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), to take other steps to meet the minimum requirement for own funds and eligible liabilities under regulation 45, including in particular to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the Resolution Committee to write down or convert that liability or instrument would be effected: where Malta is the jurisdiction governing that liability or instrument, under Maltese law; or, where Malta is not the jurisdiction governing that liability or instrument, under the law of such jurisdiction; and

(k) where an institution is the subsidiary of a mixed-activity holding company, requiring that the mixed-activity holding company set up a separate financial holding company to control the institution, if necessary in order to facilitate the resolution of the institution and to avoid the application of the resolution tools and powers referred to in Title IV of the BRRD having an adverse effect on the non-financial part of the group.

(6) A decision made pursuant to sub-regulation (1) or (4) shall meet the following requirements:

(a) it shall be supported by reasons for the assessment or determination in question;

(b) it shall indicate how that assessment or determination complies with the requirement for proportionate application laid down in sub-regulation (4); and

(c) it shall be subject to a right of appeal.

(7) Before identifying any measure referred to in sub-regulation (4), the Resolution Committee, after consulting the Authority and, if appropriate, the Central Bank, shall duly consider the potential effect of those measures on the particular institution, on the internal market for financial services, on the financial stability in other Member States and the European Union as a whole.

18. (1) The Resolution Committee shall -

(a) where it is the group-level resolution authority, together with the European resolution authorities of subsidiaries; or

(b) where it is responsible for a subsidiary, together with the European resolution authority acting as the group-level

Powers to address or remove impediments to resolvability: group treatment.

B 3158

resolution authority and the European resolution authorities of other subsidiaries, if any,

after consulting the supervisory college and the European resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, consider the assessment required by regulation 16 within the resolution college and shall take all reasonable steps to reach a joint decision on the application of measures identified in accordance with regulation 17(4) in relation to all institutions that are part of the group.

(2) The Resolution Committee shall, in its capacity as the group-level resolution authority, in cooperation with the consolidating supervisor and the EBA in accordance with Article 25(1) of Regulation (EU) No 1093/2010, prepare and submit a report to the Union parent undertaking, to the European resolution authorities of subsidiaries, which will provide it to the subsidiaries under their supervision, and to the European resolution authorities of jurisdictions in which significant branches are located. The report shall be prepared after consulting the Authority and the relevant European regulatory authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group. The report shall consider the impact on the institution's business model and recommend any proportionate and targeted measures that, in the Resolution Committee's view, are necessary or appropriate to remove those impediments.

(3) Where the Resolution Committee is responsible for a subsidiary, it shall, after receiving a report from the European resolution authority acting as the group-level resolution authority in accordance with Article 18(2) of the BRRD, provide such a report to the subsidiary under its supervision.

(4) Within four months of the date of receipt of the report referred to in sub-regulation (2), the Union parent undertaking may submit observations and propose to the Resolution Committee in its capacity as the group-level resolution authority alternative measures to remedy the impediments identified in the report. The Resolution Committee in its capacity as the group-level resolution authority shall communicate any measure proposed by the Union parent undertaking to the consolidating supervisor, the EBA, the European resolution authorities of the subsidiaries and the European resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch.

(5) The Resolution Committee shall -

(a) where it is the group-level resolution authority, together with the European resolution authorities of the subsidiaries; or

(b) where it is responsible for a subsidiary, together with the European resolution authority acting as the group-level resolution authority and the European resolution authorities responsible for the other subsidiaries, if any,

after consulting the Authority and the European regulatory and resolution authorities of jurisdictions in which significant branches are located, do everything within their power to reach a joint decision within the resolution college regarding the identification of the material impediments, and if necessary, the assessment of the measures proposed by the Union parent undertaking and the measures required by the authorities in order to address or remove the impediments, which shall take into account the potential impact of the measures in Malta and in all the Member States where the group operates:

Provided that, the joint decision shall be reached within four months of submission of any observations by the Union parent undertaking or at the expiry of the four-month period referred to in sub-regulation (4), whichever the earlier. The joint decision shall be reasoned and set out in a document which, where the Resolution Committee is the group-level resolution authority, shall be provided by the Resolution Committee to the Union parent undertaking:

Provided further that the Resolution Committee may request the EBA to assist the authorities referred to in this sub-regulation in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

(6) Where the Resolution Committee is the group-level resolution authority, in the absence of a joint decision within the period referred to in the first proviso to sub-regulation (5), the Resolution Committee shall make its own decision on the appropriate measures to be taken in accordance with regulation 17(4) at the group level. The decision shall be fully reasoned, shall take into account the views and reservations of European resolution authorities and shall be provided to the Union parent undertaking by the Resolution Committee in its capacity as the group-level resolution authority:

Provided that, if, at the end of the four-month period, any of the authorities mentioned in sub-regulation (5) has referred a matter mentioned in sub-regulation (9) to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Resolution

B 3160

Committee in its capacity as the group-level resolution authority shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee in its capacity as the group-level resolution authority shall apply.

(7) Where the Resolution Committee is responsible for a subsidiary, in the absence of a joint decision, the Resolution Committee shall take a decision on the appropriate measures to be taken by subsidiaries at individual level in accordance with regulation 17(4). The decision shall be fully reasoned and shall take into account the views and reservations of the other European resolution authorities. The decision shall be provided to the subsidiary concerned and to the European resolution authority acting as the group-level resolution authority:

Provided that, if, at the end of the four-month period, any of the authorities mentioned in sub-regulation (5) has referred a matter mentioned in sub-regulation (9) to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Resolution Committee shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee shall apply.

(8) The joint decision referred to in the first proviso of sub-regulation (5) and any decision taken by European resolution authorities in the absence of a joint decision referred to in sub-regulation (6) and (7) shall be recognised as conclusive and applied by the Resolution Committee.

(9) In the absence of a joint decision on the taking of any measures referred to in paragraphs (g), (h) or (k) of regulation 17(5), the Resolution Committee may, within four months of the date of submission of any observations made by the Union parent undertaking in accordance with sub-regulation (4), and in accordance with Article 18(6) or (7) of the BRRD, request the EBA to assist the

authorities mentioned in sub-regulation (5) in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010. The four-month period shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decisions of the European resolution authority acting as the group-level resolution authority taken in accordance with Article 18(6) of the BRRD and, or, of the European resolution authorities responsible for subsidiaries taken in accordance with Article 18(7) of the BRRD shall apply.

19. (1) A parent institution, a Union parent institution, or an entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1) and its subsidiaries, whether established in another Member State or in a third country and which are institutions or financial institutions covered by the consolidated supervision of the parent undertaking, may enter into an agreement to provide financial support to any other party to the agreement that meets the conditions for early intervention pursuant to regulation 27, provided that the conditions laid down in this regulation and in regulations 20 to 26 are satisfied.

Group financial
support
agreement.

(2) This regulation and regulations 20 to 26 do not apply to intra-group financial arrangements including funding arrangements and the operation of centralised funding arrangements provided that none of the parties to such arrangements meets the conditions for early intervention.

(3) A group financial support agreement shall not constitute a prerequisite:

(a) to provide group financial support to any group entity that experiences financial difficulties if the institution decides to do so, on a case-by-case basis and according to the group policies if it does not represent a risk for the whole group; or

(b) to operate in a Member State.

(4) Notwithstanding the provision of any other law, intra-group financial support transactions that are undertaken in accordance with this regulation and regulations 20 to 26, shall not be prohibited:

Provided that, this regulation and regulations 20 to 26 shall not prevent the imposition of limitations on intra-group transactions

B 3162

in connection with Maltese law exercising the options provided for in the CRR, transposing the CRD or requiring the separation of parts of a group or activities carried on within a group for reasons of financial stability.

(5) The group financial support agreement may:

(a) cover one or more subsidiaries of the group, and may provide for financial support from the parent undertaking to subsidiaries, from subsidiaries to the parent undertaking, between subsidiaries of the group that are party to the agreement, or any combination of those entities;

(b) provide for financial support in the form of a loan, the provision of guarantees, the provision of assets for use as collateral, or any combination of those forms of financial support, in one or more transactions, including between the beneficiary of the support and a third party.

(6) Where, in accordance with the terms of the group financial support agreement, a group entity agrees to provide financial support to another group entity, the agreement may include a reciprocal agreement by the group entity receiving the support to provide financial support to the group entity providing the support.

(7) The group financial support agreement shall specify the principles for the calculation of the consideration, for any transaction made under it. Those principles shall include a requirement that the consideration shall be set at the time of the provision of financial support. The agreement, including the principles for calculation of the consideration for the provision of financial support and the other terms of the agreement, shall comply with the following principles:

(a) each party must be acting freely in entering into the agreement;

(b) in entering into the agreement and in determining the consideration for the provision of financial support, each party must be acting in its own best interests which may take account of any direct or any indirect benefit that may accrue to a party as a result of provision of the financial support;

(c) each party providing financial support must have full disclosure of relevant information from any party receiving financial support prior to determination of the consideration for the provision of financial support and prior to any decision to provide financial support;

(d) the consideration for the provision of financial support may take account of information in the possession of the party providing financial support based on it being in the same group as the party receiving financial support and which is not available to the market; and

(e) the principles for the calculation of the consideration for the provision of financial support are not obliged to take account of any anticipated temporary impact on market prices arising from events external to the group.

(8) The group financial support agreement may only be concluded if, at the time the proposed agreement is made, in the opinion of the Authority and the respective European regulatory authorities of the parties to the group financial support agreement, none of the parties meets the conditions for early intervention.

(9) Any right, claim or action arising from the group financial support agreement may be exercised only by the parties to the agreement, with the exclusion of third parties.

20. (1) Where the Authority is the consolidating supervisor, the Union parent institution shall submit to the Authority an application for authorisation of any proposed group financial support agreement proposed pursuant to regulation 19. The application shall contain the text of the proposed agreement and identify the group entities that propose to be parties.

Review of
proposed
agreement.

(2) The Authority, where it is the consolidating supervisor shall forward without delay the application to the European regulatory authorities of each subsidiary that proposes to be a party to the agreement, with a view to reaching a joint decision.

(3) The Authority, where it is the consolidating supervisor shall, in accordance with the procedure set out in sub-regulations (5) and (6) grant the authorisation if the terms of the proposed agreement are consistent with the conditions for financial support set out in regulation 23.

(4) The Authority, where it is the consolidating supervisor may, in accordance with the procedure set out in sub-regulations (5) and (6), prohibit the conclusion of the proposed agreement if it is considered to be inconsistent with the conditions for financial support set out in regulation 23.

(5) The Authority shall, do everything within its power to reach a joint decision:

B 3164

(a) where the Authority is the consolidating supervisor, with the European regulatory authorities of subsidiaries; or

(b) where the Authority is responsible for a subsidiary, with the European regulatory authority acting as the consolidating supervisor and the European regulatory authorities of other subsidiaries, if any,

taking into account the potential impact, including any fiscal consequences, of the execution of the agreement in Malta and in all the Member States where the group operates, on whether the terms of the proposed agreement are consistent with the conditions for financial support laid down in regulation 23 within four months of the date of receipt of the application by the consolidating supervisor. The joint decision shall be set out in a document containing the fully reasoned decision, which, where the Authority is the consolidating supervisor, shall be provided to the applicant by the Authority:

Provided that, the Authority may request the EBA to assist the authorities mentioned in this sub-regulation in reaching an agreement in accordance with Article 31 of Regulation (EU) No 1093/2010.

(6) Where the Authority is the consolidating supervisor, in the absence of a joint decision between the authorities mentioned in sub-regulation (5) within four months, the Authority shall make its own decision on the application. The decision shall be set out in a document containing the full reasoning and shall take into account the views and reservations of the other European regulatory authorities expressed during the four-month period. The Authority acting as the consolidating supervisor shall notify its decision to the applicant and to the other European regulatory authorities.

(7) The Authority may, within four months of the date of receipt of the application by the consolidating supervisor, refer the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached.

(8) Where the Authority is the consolidating supervisor, if, at the end of the four-month period, any of the European regulatory authorities concerned has referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Authority shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and

shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached.

21. (1) Any proposed agreement that has been authorised by the Authority and the European resolution authorities concerned shall be submitted for approval to the shareholders of every group entity that proposes to enter into the agreement. In such a case, the agreement shall be valid only in respect of those parties whose shareholders have approved the agreement in accordance with sub-regulation (2).

Approval of proposed agreement by shareholders.

(2) A group financial support agreement shall be valid in respect of a group entity only if its shareholders have authorised the board of directors of that group entity to make a decision that the group entity shall provide or receive financial support in accordance with the terms of the agreement and in accordance with the conditions laid down in regulations 19 to 26 and that shareholder authorisation has not been revoked.

(3) The board of directors of each entity that is party to an agreement shall report each year to the shareholders on the performance of the agreement, and on the implementation of any decision taken pursuant to the agreement.

22. The Authority shall transmit to the Resolution Committee and to the relevant European resolution authorities, the authorised group financial support agreements and any changes thereto.

Transmission of the group financial support agreements.

23. Financial support by a group entity in accordance with regulation 19 may only be provided if all the following conditions are met:

Conditions for group financial support.

(a) there is a reasonable prospect that the support provided significantly redresses the financial difficulties of the group entity receiving the support;

(b) the provision of financial support has the objective of preserving or restoring the financial stability of the group as a whole or any of the entities of the group and is in the interests of the group entity providing the support;

(c) the financial support is provided on terms, including consideration in accordance with regulation 19(7);

(d) there is a reasonable prospect, on the basis of the

B 3166

information available to the board of directors of the group entity providing financial support at the time when the decision to grant financial support is taken, that the consideration for the support will be paid and, if the support is given in the form of a loan, that the loan will be reimbursed, by the group entity receiving the support. If the support is given in the form of a guarantee or any form of security, the same condition shall apply to the liability arising for the recipient if the guarantee or the security is enforced;

(e) the provision of the financial support would not jeopardise the liquidity or solvency of the group entity providing the support;

(f) the provision of the financial support would not create a threat to financial stability: in particular in Malta, where the group entity providing support is in Malta; or, in particular in the Member State of such a group entity providing support, where the group entity providing support is not established in Malta;

(g) the group entity providing the support complies at the time the support is provided with the requirements of the CRD relating to capital or liquidity and any requirements imposed pursuant to Article 104(2) of the CRD and the provision of the financial support shall not cause the group entity to infringe those requirements, unless authorised:

(i) where the Authority is responsible for the supervision on an individual basis of the entity providing the support, by the Authority; or

(ii) where the Authority is not responsible for the supervision on an individual basis of the entity providing the support, by the European regulatory authority responsible for such supervision;

(h) the group entity providing the support complies, at the time when the support is provided, with the requirements relating to large exposures laid down in the CRR and in the CRD including any national legislation or any legislation in force in any other Member State exercising the options provided therein, and the provision of the financial support shall not cause the group entity to infringe those requirements, unless authorised by the Authority responsible for the supervision on an individual basis of the group entity providing the support;

(i) the provision of the financial support would not undermine the resolvability of the group entity providing the support.

24. The decision to provide group financial support in accordance with the agreement shall be taken by the board of directors of the group entity providing financial support. That decision shall be reasoned and shall indicate the objective of the proposed financial support. In particular, the decision shall indicate how the provision of the financial support complies with the conditions laid down in regulation 23. The decision to accept group financial support in accordance with the agreement shall be taken by the board of directors of the group entity receiving financial support.

Decision to provide financial support.

25. (1) Before providing support in accordance with a group financial support agreement, the board of directors of a group entity that intends to provide financial support shall, where the Authority is responsible for such a group entity, notify:

Right of opposition of the Authority.

- (a) the Authority;
- (b) where different from authorities in paragraphs (a) and (c), where applicable, the European regulatory authority acting as the consolidating supervisor;
- (c) where different from paragraphs (a) and (b), the European regulatory authority of the group entity receiving the financial support; and
- (d) the EBA.

The notification shall include the reasoned decision of the board of directors in accordance with regulation 24 and details of the proposed financial support including a copy of the group financial support agreement.

(2) Within five business days from the date of receipt of a complete notification, the Authority being the Authority of the group entity providing financial support may agree with the provision of financial support, or may prohibit or restrict it if it assesses that the conditions for group financial support laid down in regulation 23 have not been met. A decision of the Authority to prohibit or restrict the financial support shall be reasoned.

(3) The decision of the Authority to agree, prohibit or restrict the financial support shall be immediately notified to:

- (a) the consolidating supervisor being either the

B 3168

Authority or an European regulatory authority;

(b) the European regulatory authority of the group entity receiving the support; and

(c) the EBA:

Provided that where the Authority is the consolidating supervisor it shall immediately inform other members of the supervisory college and the members of the resolution college.

(4) Where the Authority is the consolidating supervisor or where the Authority is the Authority responsible for the group entity receiving support and it has objections regarding the decision to prohibit or restrict the financial support, it may within two days refer the matter to the EBA and request its assistance in accordance with Article 31 of Regulation (EU) No 1093/2010.

(5) If the Authority, as the Authority responsible for the group entity providing financial support, does not prohibit or restrict the financial support within the period indicated in sub-regulation (2), or has agreed before the end of that period to that support, financial support may be provided in accordance with the terms submitted to the Authority.

(6) The decision of the board of directors of the institution to provide financial support shall, where the Authority is responsible for such an institution, be transmitted to:

(a) the Authority;

(b) where different from authorities in paragraphs (a) and (c), and where applicable, the consolidating supervisor;

(c) where different from paragraphs (a) and (b), the European regulatory authority of the group entity receiving the financial support; and

(d) the EBA:

Provided that where the Authority is the consolidating supervisor, it shall immediately inform the other members of the supervisory college and the members of the resolution college.

(7) If the Authority, as the Authority responsible for the group entity providing financial support, restricts or prohibits group financing support pursuant to sub-regulation (2) and where the group recovery plan in accordance with regulation 7(5) makes reference to

intra-group financial support, the Authority in its capacity as the Authority of the group entity in relation to whom the support is restricted or prohibited may request the consolidating supervisor to initiate a reassessment of the group recovery plan pursuant to regulation 8 or, where a recovery plan is drawn up on an individual basis, request the group entity to submit a revised recovery plan.

26. Group entities shall make public whether or not they have entered into a group financial support agreement pursuant to regulation 19 and make public a description of the general terms of any such agreement and the names of the group entities that are party to it and update that information at least annually. Articles 431 to 434 of the CRR shall apply. Disclosure.

27. (1) Where an institution infringes or, due *inter alia* to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1.5 percentage points, is likely in the near future to infringe the requirements of the CRR, the CRD, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014 of the European parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, the Authority shall have at its disposal, without prejudice to the measures referred to in regulation 9 of the Banking Act (Supervisory Review) Regulations and regulation 16 of the Investment Services Act (Supervisory Review) Regulations where applicable, at least the following measures: Early intervention measures.

(a) require the board of directors of the institution to implement one or more of the arrangements or measures set out in the recovery plan or in accordance with regulation 5(2) to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;

(b) require the board of directors of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;

(c) require the board of directors of the institution to

S.L. 371.16
S.L. 370.15

B 3170

convene, or if the board of directors fails to comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;

(d) require one or more directors or members of the senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of the CRD or Article 9 of Directive 2014/65/EU;

(e) require the board of directors of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;

(f) require changes to the institution's business strategy;

(g) require changes to the legal or operational structures of the institution; and

(h) acquire, including through on-site inspections and provide to the Resolution Committee, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with regulation 36.

(2) The Authority shall notify the Resolution Committee without delay upon determining that the conditions laid down in sub-regulation (1) have been met in relation to an institution. The Resolution Committee shall have the power to require the institution to contact potential purchasers in order to prepare for the resolution of the institution, subject to the conditions laid down in regulation 39(2) and the confidentiality provisions laid down in regulation 84.

(3) For each of the measures referred to in sub-regulation (1), the Authority shall set an appropriate deadline for completion, so as to enable the Authority to evaluate the effectiveness of the measure.

Removal of the senior management and the board of directors.

28. Where there is a significant deterioration in the financial situation of an institution or where there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities, and other measures taken in accordance with regulation 27 are not sufficient to reverse that deterioration, the Authority may require the removal of the senior management or the board of directors of the institution, in its entirety or with regard to individuals. The appointment of the new senior management or the board of directors shall be done in accordance with Maltese and

European Union law and be subject to the approval or consent of the Authority.

29. (1) Where replacement of the senior management or board of directors as referred to in regulation 28 is deemed to be insufficient by the Authority to remedy the situation, the Authority may appoint one or more temporary administrators to the institution. The Authority may, based on what is proportionate in the circumstances, appoint any temporary administrator either to replace the board of directors of the institution temporarily or to work temporarily with the board of directors of the institution and the Authority shall specify its decision at the time of appointment. If the Authority appoints a temporary administrator to work with the board of directors of the institution, the Authority shall further specify, at the time of such appointment the role, duties and powers of the temporary administrator and any requirements for the board of directors of the institution to consult or to obtain the consent of the temporary administrator prior to taking specific decisions or actions. The Authority shall be required to make public the appointment of any temporary administrator except where the temporary administrator does not have the power to represent the institution. The Authority shall further ensure that any temporary administrator has the qualifications; ability and knowledge required to carry out his or her functions and is free of any conflict of interests.

Temporary administrator.

(2) The Authority shall specify the powers of the temporary administrator at the time of the appointment of the temporary administrator based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the board of directors of the institution under the statutes of the institution and under Maltese law, including the power to exercise some or all of the administrative functions of the board of directors of the institution. The powers of the temporary administrator in relation to the institution shall comply with the Companies Act.

Cap. 386.

(3) The role and functions of the temporary administrator shall be specified by the Authority at the time of appointment and may include ascertaining the financial position of the institution, managing the business or part of the business of the institution with a view to preserving or restoring the financial position of the institution and taking measures to restore the sound and prudent management of the business of the institution. The Authority shall specify any limits on the role and functions of the temporary administrator at the time of appointment.

(4) The Authority shall have the exclusive power to appoint and remove any temporary administrator; may remove a temporary

B 3172

administrator at any time and for any reason; and may vary the terms of appointment of a temporary administrator at any time subject to this regulation.

(5) The Authority may require that certain acts of a temporary administrator be subject to the prior consent of the Authority. The Authority shall specify any such requirements at the time of appointment of a temporary administrator or at the time of any variation of the terms of appointment of a temporary administrator. In any case, the temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the Authority.

(6) The Authority may require that a temporary administrator draws up reports on the financial position of the institution and on the acts performed in the course of its appointment, at intervals set by the Authority and at the end of his or her mandate.

(7) The appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The Authority shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders.

(8) Subject to this regulation, the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with European Union or Maltese company law.

(9) The liability of the temporary administrator may be limited for acts and omissions in the discharge of his or her duties as temporary administrator in accordance with sub-regulation (3).

(10) A temporary administrator appointed pursuant to this regulation shall not be deemed to be a shadow director or a *de facto* director under Maltese law.

Coordination of
early
intervention
measures and
appointment of
temporary
administrator in
relation to
groups.

30. (1) Where the conditions for the imposition of requirements under regulation 27 or the appointment of a temporary administrator in accordance with regulation 29 are met in relation to a Union parent undertaking, where the Authority is the consolidating supervisor, it shall notify the EBA and consult the European regulatory authorities within the supervisory college.

(2) Following the notification and consultation, where the Authority is the consolidating supervisor, it shall decide whether to apply any of the measures in regulation 27 or appoint a temporary

administrator under regulation 29 in respect of the relevant Union parent undertaking, taking into account the impact of those measures on the group entities in other Member States. The Authority, where it is the consolidating supervisor shall notify the decision to the European regulatory authorities within the supervisory college and the EBA.

(3) Where the Authority is responsible for the supervision on an individual basis of a subsidiary of a Union parent undertaking and the conditions for the imposition of requirements under regulation 27 or the appointment of a temporary administrator under regulation 29 are met in relation to such a subsidiary, the Authority, where it intends to take a measure in accordance with those regulations, shall notify the EBA and consult the European regulatory authority acting as the consolidating supervisor.

(4) Following the notification and consultation referred to in sub-regulation (3), the Authority, as the Authority responsible for the supervision on an individual basis of the subsidiary of the Union parent undertaking, shall decide whether to apply any of the measures in regulation 27 or appoint a temporary administrator under regulation 29. The decision shall give due consideration to any assessment of the European regulatory authority acting as the consolidating supervisor. The Authority, shall notify the decision to the European regulatory authority acting as the consolidating supervisor and other European regulatory authorities within the supervisory college and the EBA.

(5) Where the Authority is the consolidating supervisor, on receiving a notification from the European regulatory authority responsible for the supervision on an individual basis of a subsidiary of a Union parent undertaking in accordance with Article 30(3) of the BRRD, the Authority may assess the likely impact of the imposition of requirements under regulation 27 or the appointment of a temporary administrator in accordance with regulation 29 to the institution in question, on the group or on group entities in other Member States and shall communicate that assessment to the European regulatory authority concerned within three days.

(6) Where the Authority and one or more European regulatory authorities intend to appoint a temporary administrator or apply any of the measures in regulation 27 to more than one institution in the same group, the Authority together with the other relevant European regulatory authorities shall consider whether it is more appropriate to appoint the same temporary administrator for all the entities concerned or to coordinate the application of any measures in regulation 27 to more than one institution in order to facilitate

B 3174

solutions restoring the financial position of the institution concerned. The assessment shall take the form of a joint decision:

(a) where the Authority is the consolidating supervisor, of the Authority and the relevant European regulatory authorities; or

(b) where the Authority is responsible for supervision on an individual basis of a subsidiary of a Union parent undertaking,

of the Authority, the European regulatory authority acting as the consolidating supervisor and the other relevant European regulatory authorities responsible for supervision on an individual basis of other subsidiaries of the Union parent undertaking. The joint decision shall be reached within five days from the date of the notification referred to in Article 30(1) of the BRRD. The joint decision shall be reasoned and set out in a document, which shall be provided by the Authority, where it is the consolidating supervisor to the Union parent undertaking:

Provided that, the Authority may request the EBA to assist the authorities mentioned in this sub-regulation in reaching an agreement in accordance with Article 31 of Regulation (EU) No 1093/2010.

(7) In the absence of a joint decision within five days, where the Authority is either the consolidating supervisor or the Authority responsible for supervision on an individual basis of a subsidiary, it may take an individual decision on the appointment of a temporary administrator to the institution for which it has responsibility and on the application of any of the measures in regulation 27.

(8) Where the Authority does not agree with a decision notified by the European regulatory authority acting as the consolidating supervisor in accordance with Article 30(1) of the BRRD, a decision notified by an European regulatory authority responsible for supervision on an individual basis of a subsidiary of a Union parent undertaking in accordance with Article 30(3), or in the absence of a joint decision under sub-regulation (6) and (7), the Authority may refer the matter to the EBA in accordance with sub-regulation (9).

(9) The Authority may request the EBA to assist the authorities mentioned in this regulation that intend to apply one or more of the measures in paragraph (a) of Article 27(1) of the BRRD with respect to the paragraphs (4), (10), (11) and (19) of Section A of

the Annex to the BRRD, in paragraph (e) of Article 27(1) of the BRRD or in paragraph (g) of Article 27(1) of the BRRD in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010.

(10) The decision of the Authority shall be reasoned. The decision shall take into account the views and reservations of the European regulatory authorities concerned expressed during the consultation period referred to in Article 30(1) or (3) of the BRRD or the five-day period referred to in sub-regulations (6) and (7) as well as the potential impact of the decision on financial stability in Malta and in the Member States concerned. The Authority shall provide its decisions: where the Authority is the consolidating supervisor, to the Union parent undertaking; or, where the Authority is responsible for a subsidiary, to the subsidiary concerned.

(11) In the cases referred to in Article 30(6) of the BRRD, where, before the end of the consultation period referred to in Article 30(1) and (3) of the BRRD or at the end of the five-day period referred to in sub-regulations (6) and (7), any of the authorities mentioned in this regulation has referred the matter to the EBA in accordance with Article 19(3) of Regulation (EU) No 1093/2010, the Authority and the European regulatory authorities concerned shall defer their decisions and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take their decision in accordance with the decision of the EBA. The five-day period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the five-day period or after a joint decision has been reached.

(12) The Authority may, in the cases referred to in sub-regulation (9), before the end of the consultation period referred to in Article 30(1) and (3) of the BRRD or at the end of the five-day period referred to in sub-regulation (7), refer the matter to the EBA in accordance with Article 19(3) of Regulation (EU) No 1093/2010. The five-day period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the five-day period or after a joint decision has been reached.

(13) In the absence of a decision by the EBA within three days, individual decisions taken in accordance with Article 30(1) or (3) of the BRRD, or sub-regulation (7), shall apply.

31. (1) When applying the resolution tools and exercising the resolution powers, the Resolution Committee shall have regard to

Resolution objectives.

B 3176

the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.

(2) The resolution objectives referred to in sub-regulation (1) are:

- (a) to ensure the continuity of critical functions;
- (b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;
- (c) to protect public funds by minimising reliance on extraordinary public financial support;
- (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC;
- (e) to protect client funds and client assets:

Provided that, when pursuing the above objectives, the Resolution Committee shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

(3) Subject to different provisions of these regulations, the resolution objectives are of equal significance, and the Resolution Committee shall balance them as appropriate to the nature and circumstances of each case.

Conditions for
resolution and
early
intervention

32. (1) The Resolution Committee shall take a resolution action in relation to an institution referred to in paragraph (a) of the definition "entity" in regulation 2(1) only if the Resolution Committee considers that all of the following conditions are met:

- (a) the determination that the institution is failing or is likely to fail has been made by the Authority, after consulting the Resolution Committee; or, subject to the conditions laid down in sub-regulation (2), by the Resolution Committee after consulting the Authority;
- (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with regulation 59(2) taken in respect

of the institution, would prevent the failure of the institution within a reasonable time-frame;

(c) a resolution action is necessary in the public interest pursuant to sub-regulation (5):

Provided that, for the purposes of paragraph (c), a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in regulation 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

(2) In addition to the Authority, the determination that the institution is failing or likely to fail under sub-regulation (1)(a) can be made by the Resolution Committee, after consulting the Authority. The Authority shall provide the Resolution Committee with any relevant information that the latter requests in order to perform its assessment without delay.

(3) The previous adoption of an early intervention measure according to regulation 27 is not a condition for taking a resolution action.

(4) For the purposes of sub-regulation (1)(a), an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

(a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the licence by the Authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

(b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;

(c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;

(d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the

B 3178

economy of Malta or of another Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms:

(i) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions;

(ii) a State guarantee of newly issued liabilities;
or

(iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution, where neither the circumstances referred to in paragraphs (a), (b) or (c) of this sub-regulation nor the circumstances referred to in regulation 59(3) are present at the time the public support is granted:

Provided that in each of the cases mentioned in paragraph (d)(i), (ii) and (iii), the guarantee or equivalent measures referred to therein shall be confined to solvent institutions and shall be conditional on final approval under the Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the institution has incurred or is likely to incur in the near future:

Provided further that support measures under paragraph (d)(iii) shall be limited to injections necessary to address capital shortfall established in the Maltese, European Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, the EBA or national authorities, where applicable, confirmed by the Authority.

(5) For the purposes of sub-regulation (4), State aid rules may apply in the case of impaired asset measures and recapitalisation, where it is precautionary, and as prescribed in the Banking Act (State Aid Rules and Support Measures) Regulations, 2015. A credit institution, prior to resorting to State aid shall undertake all possible capital raising measures by private means. If these are not sufficient, shareholders, hybrid capital and subordinated debt holders shall contribute to reduce the capital shortfall to the maximum extent before State aid can be granted. Such a contribution can take the form of either a conversion into Common Equity Tier 1 or a write-down of the principal on the instrument, depending on the capital position of the credit institution. Prior to the granting of State aid, at least one of

the following scenarios should occur:

(a) where the capital ratio of the credit institution remains above the European regulatory minimum but below the threshold set by the Authority or the Resolution Committee; or

(b) where the credit institution no longer meets the minimum regulatory capital requirements:

Provided that no contribution from senior debt holders, in particular from insured deposits; uninsured deposits; bonds and all other senior debt, will be required:

Provided further that this shall not affect the application of the "no creditor worse off" principle to be carried out under regulation 74.

33. (1) The Resolution Committee may take a resolution action in relation to a financial institution as defined in paragraph (b) of the definition "entity" when the conditions laid down in regulation 32(1), are met with regard to both the financial institution and with regard to the parent undertaking subject to consolidated supervision.

Conditions for resolution with regard to financial institutions and holding companies.

(2) The Resolution Committee may take a resolution action in relation to an entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1), when the conditions laid down in regulation 32(1) are met with regard to the entity mentioned above and with regard to one or more subsidiaries which are institutions or, where the subsidiary is not established in the European Union, the relevant third-country authority has determined that it meets the conditions for resolution under the law of that third country:

Provided that when assessing whether the conditions in regulation 32(1) are met in respect of one or more subsidiaries which are institutions, the Resolution Committee may: in its capacity as the resolution authority of the institution, together with the European resolution authority of the entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1); or, where acting as the Resolution Committee of the entity mentioned above, together with the European resolution authority of the institution; by way of joint agreement disregard any intra-group capital or loss transfers between the entities, including the exercise of write-down or conversion powers.

(3) Where the subsidiary institutions of a mixed-activity holding company are held directly or indirectly by an intermediate financial holding company, resolution actions for the purposes of group resolution shall be taken in relation to the intermediate

B 3180

financial holding company, and not in relation to the mixed-activity holding company.

(4) Subject to sub-regulation (3), notwithstanding the fact that an entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1) does not meet the conditions established in regulation 32(1), the Resolution Committee may take a resolution action with regard to such an entity when one or more of the subsidiaries which are institutions comply with the conditions established in Article 32(1), (4) and (5) of the BRRD and their assets and liabilities are such that their failure threatens an institution or the group as a whole or Maltese insolvency law requires that groups be treated as a whole and resolution action, with regard to the entity referred to in paragraph (c) or (d) of the definition "entity" in regulation 2(1), is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the group as a whole:

Provided that when assessing whether the conditions in regulation 32(1) are met in respect of one or more subsidiaries which are institutions, the Resolution Committee may: in its capacity as the resolution authority of the institution, together with the European resolution authority of the entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1); or, where acting as the resolution authority of the entity mentioned above, together with the European resolution authority of the institution; by way of joint agreement, disregard any intra-group capital or loss transfers between the entities, including the exercise of write-down or conversion powers.

General
principles
governing
resolution.

34. (1) When applying the resolution tools and exercising the resolution powers, the Resolution Committee shall take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

(a) the shareholders of the institution under resolution bear first losses;

(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in these regulations;

(c) the board of directors and senior management of the institution under resolution are replaced, except in those cases when the retention of the board of directors and senior management, in whole or in part, as appropriate to the circumstances, is considered to be necessary for the

achievement of the resolution objectives;

(d) the board of directors and senior management of the institution under resolution shall provide all necessary assistance for the achievement of the resolution objectives;

(e) natural and legal persons are made liable, under civil or criminal law for their responsibility for the failure of the institution;

(f) except where otherwise provided in these regulations, creditors of the same class are treated in an equitable manner;

(g) no creditor shall incur greater losses than would have been incurred if the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) had been wound up under normal insolvency proceedings in accordance with the safeguards in regulations 73 to 75;

(h) covered deposits are fully protected; and

(i) resolution action is taken in accordance with the safeguards in these regulations.

(2) Where an institution is a group entity, the Resolution Committee shall, without prejudice to regulation 31, apply resolution tools and exercise resolution powers in a way that minimises the impact on other group entities and on the group as a whole and minimises the adverse effects on financial stability in the European Union, in Malta and in the other Member States, in particular, in the countries where the group operates.

(3) When applying the resolution tools and exercising the resolution powers, the Resolution Committee shall ensure that it complies with the Union State aid framework, where applicable.

(4) Where the sale of business tool, the bridge institution tool or the asset separation tool is applied to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), that institution or entity shall be considered to be the subject of bankruptcy proceedings or analogous insolvency proceedings for the purposes of Article 5(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

B 3182

(5) When applying the resolution tools and exercising the resolution powers, the Resolution Committee shall inform and consult employee representatives where appropriate.

(6) The Resolution Committee shall apply resolution tools and exercise resolution powers without prejudice to provisions on the representation of employees in the board of directors as provided for in Maltese law or practice.

Special
management.

35. (1) The Resolution Committee may appoint a special manager to replace the board of directors of the institution under resolution. The Resolution Committee shall make public the appointment of a special manager. The special manager shall have the qualifications, ability and knowledge required to carry out his or her functions.

(2) The special manager shall have all the powers of the shareholders and the board of directors of the institution. However, the special manager may only exercise such powers under the control of the Resolution Committee.

(3) The special manager shall have the statutory duty to take all the measures necessary to promote the resolution objectives referred to in regulation 31 and implement resolution actions according to the decision of the Resolution Committee. Where necessary, that duty shall override any other duty of management in accordance with the statutes of the institution or Maltese law, insofar as they are inconsistent. Those measures may include an increase of capital, reorganisation of the ownership structure of the institution or takeovers by institutions that are financially and organisationally sound in accordance with the resolution tools referred to in regulations 37 to 58.

(4) The Resolution Committee may set limits to the action of a special manager or require that certain acts of the special manager be subject to the Resolution Committee's prior consent. The Resolution Committee may remove the special manager at any time.

(5) The special manager shall draw up reports for the Resolution Committee on the economic and financial situation of the institution and on the acts performed in the conduct of his or her duties, at regular intervals set by the Resolution Committee and at the beginning and the end of his or her mandate.

(6) A special manager shall not be appointed for more than one year. That period may be renewed, on an exceptional basis, if the Resolution Committee determines that the conditions for appointment

of a special manager continue to be met.

(7) Where the Resolution Committee intends to appoint a special manager in relation to an entity affiliated to a group and one or more European resolution authorities intend to appoint a special manager in relation to another entity affiliated to the same group, the Resolution Committee shall, together with the European resolution authorities concerned, consider whether it is more appropriate to appoint the same special manager for all the entities concerned in order to facilitate solutions redressing the financial soundness of the entities concerned.

(8) In the event of insolvency, where Maltese law provides for the appointment of insolvency management, such management may constitute special management as referred to in this regulation.

36. (1) Before taking resolution action or exercising the power to write down or convert relevant capital instruments, the Resolution Committee shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is carried out by a person independent from any public authority, including the Resolution Committee, and the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1). Subject to sub-regulation (13) and to regulation 85, where all the requirements laid down in this regulation are met, the valuation shall be considered to be definitive.

Valuation for the purposes of resolution.

(2) Where an independent valuation according to sub-regulation (1) is not possible, the Resolution Committee may carry out a provisional valuation of the assets and liabilities of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), in accordance with sub-regulation (9).

(3) The objective of the valuation shall be to assess the value of the assets and liabilities of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that meets the conditions for resolution of regulations 32 and 33.

(4) The purposes of the valuation shall be:

(a) to inform the determination of whether the conditions for resolution or the conditions for the write-down or conversion of capital instruments are met;

(b) if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in

B 3184

respect of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(c) when the power to write down or convert relevant capital instruments is applied, to inform the decision on the extent of the cancellation or dilution of shares or other instruments of ownership, and the extent of the write-down or conversion of relevant capital instruments;

(d) when the bail-in tool is applied, to inform the decision on the extent of the write-down or conversion of eligible liabilities;

(e) when the bridge institution tool or asset separation tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;

(f) when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and to inform the Resolution Committee's understanding of what constitutes commercial terms for the purposes of regulation 38;

(g) in all cases, to ensure that any losses on the assets of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.

(5) Without prejudice to the Union State aid framework, where applicable, the valuation shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of extraordinary public financial support or central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) from the point at which resolution action is taken or the power to write down or convert relevant capital instruments is exercised. Furthermore, the valuation shall take account of the fact that, if any resolution tool is applied:

(a) the Resolution Committee and any financing arrangement acting pursuant to regulation 101 may recover any

reasonable expenses properly incurred from the institution under resolution, in accordance with regulation 37(7);

(b) the resolution financing arrangement may charge interest or fees in respect of any loans or guarantees provided to the institution under resolution, in accordance with regulation 101.

(6) The valuation shall be supplemented by the following information as appearing in the accounting books and records of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1):

(a) an updated balance sheet and a report on the financial position of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(b) an analysis and an estimate of the accounting value of the assets;

(c) the list of outstanding on balance sheet and off-balance sheet liabilities shown in the books and records of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), with an indication of the respective credits and priority levels under the applicable insolvency law.

(7) Where appropriate, to inform the decisions referred to in sub-regulation (4)(e) and (f), the information in sub-regulation (6)(b) may be complemented by an analysis and estimate of the value of the assets and liabilities of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) on a market value basis.

(8) The valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) were wound up under normal insolvency proceedings:

Provided that, that estimate shall not affect the application of the "no creditor worse off" principle to be carried out under regulation 74.

B 3186

(9) Where due to the urgency in the circumstances of the case it is not possible to comply with the requirements in sub-regulations (6) and (8) or sub-regulation (2) applies, a provisional valuation shall be carried out. The provisional valuation shall comply with the requirements in sub-regulation (3) and in so far as reasonably practicable in the circumstances with the requirements of sub-regulations (1), (6) and (8). The provisional valuation referred to in this sub-regulation shall include a buffer for additional losses, with appropriate justification.

(10) A valuation that does not comply with all the requirements laid down in this regulation shall be considered to be provisional until an independent person has carried out a valuation that is fully compliant with all the requirements laid down in this regulation. That ex-post definitive valuation shall be carried out as soon as practicable. It may be carried out either separately from the valuation referred to in regulation 74, or simultaneously with and by the same independent person as that valuation, but shall be distinct from it. The purposes of the ex-post definitive valuation shall be:

(a) to ensure that any losses on the assets of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) are fully recognised in the books of accounts of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(b) to inform a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with sub-regulation (11).

(11) In the event that the *ex-post* definitive valuation's estimate of the net asset value of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is higher than the provisional valuation's estimate of the net asset value of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), the Resolution Committee may:

(a) exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool;

(b) instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights, liabilities to the institution under resolution, or as the case may be, in respect of the shares or instruments of

ownership to the owners of the shares or other instruments of ownership.

(12) Notwithstanding sub-regulation (1), a provisional valuation conducted in accordance with sub-regulations (9) and (10) shall be a valid basis for the Resolution Committee to take resolution actions, including taking control of a failing institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), or to exercise the write-down or conversion power of capital instruments.

(13) The valuation shall be an integral part of the decision to apply a resolution tool or exercise a resolution power, or the decision to exercise the write-down or conversion power of capital instruments. The valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision in accordance with regulation 85.

37. (1) The Resolution Committee shall have the necessary powers to apply the resolution tools to institutions and to entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that meet the applicable conditions for resolution.

General
principles of
resolution tools.

(2) Where the Resolution Committee decides to apply a resolution tool to an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), and that resolution action would result in losses being borne by creditors or their claims being converted, the Resolution Committee shall exercise the power to write down and convert capital instruments in accordance with regulation 59 immediately before or together with the application of the resolution tool.

(3) The resolution tools referred to in sub-regulation (1) are the following:

- (a) the sale of business tool;
- (b) the bridge institution tool;
- (c) the asset separation tool;
- (d) the bail-in tool.

(4) Subject to sub-regulation (5), the Resolution Committee may apply the resolution tools individually or in any combination.

(5) The Resolution Committee may apply the asset separation tool only together with another resolution tool.

B 3188

(6) Where only the resolution tools referred to in sub-regulation (3)(a) or (b) are used, and they are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the residual institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) from which the assets, rights or liabilities have been transferred, shall be wound up under normal insolvency proceedings. Such winding up shall be done within a reasonable time-frame, having regard to any need for that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to provide services or support pursuant to regulation 65 in order to enable the recipient to carry out the activities or services acquired by virtue of that transfer, and any other reason that the continuation of the residual institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is necessary to achieve the resolution objectives or comply with the principles referred to in regulation 34.

(7) The Resolution Committee and any financing arrangement acting pursuant to regulation 101 may recover any reasonable expenses properly incurred in connection with the use of the resolution tools or powers or government financial stabilisation tools in one or more of the following ways:

(a) as a deduction from any consideration paid by a recipient to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;

(b) from the institution under resolution, as a preferred creditor; or

(c) from any proceeds generated as a result of the termination of the operation of the bridge institution or the asset management vehicle, as a preferred creditor.

(8) Any provisions under normal insolvency proceedings relating to the voidability or unenforceability of legal acts detrimental to creditors shall not apply to transfers of assets, rights or liabilities from an institution under resolution to another entity by virtue of the application of a resolution tool or exercise of a resolution power, or use of a government financial stabilisation tool.

(9) The Resolution Committee may make use of additional tools and powers exercisable where an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) meets the conditions for resolution, provided that:

(a) when applied to a cross-border group, those additional powers do not pose obstacles to effective group resolution; and

(b) they are consistent with the resolution objectives and the general principles governing resolution referred to in regulations 31 and 34.

(10) In the very extraordinary situation of a systemic crisis, the Resolution Committee may seek funding from alternative financing sources through the use of government stabilisation tools provided for in regulations 56 to 58 when the following conditions are met:

(a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8% of total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in regulation 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write-down, conversion or otherwise;

(b) it shall be conditional on prior and final approval under the Union State aid framework.

38. (1) The Resolution Committee shall have the power to transfer to a purchaser that is not a bridge institution: The sale of business tool.

(a) shares or other instruments of ownership issued by an institution under resolution;

(b) all or any assets, rights or liabilities of an institution under resolution:

Provided that, subject to sub-regulations (8) and (9) and to regulation 85, the transfer referred to in this sub-regulation shall take place without obtaining the consent of the shareholders of the institution under resolution or any third party other than the purchaser, and without complying with any procedural requirements under company or securities law other than those included in regulation 39, and it shall not constitute a default or termination event in relation to any obligation relating to such assets or liabilities or under any contract to which the failed institution is a party.

(2) A transfer made pursuant to sub-regulation (1) shall be made on commercial terms, having regard to the circumstances, and in accordance with the Union State aid framework.

B 3190

(3) In accordance with sub-regulation (2), the Resolution Committee shall take all reasonable steps to obtain commercial terms for the transfer that conform with the valuation conducted under regulation 36, having regard to the circumstances of the case.

(4) Subject to regulation 37(7), any consideration paid by the purchaser shall benefit:

(a) the owners of the shares or other instruments of ownership, where the sale of business has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the purchaser;

(b) the institution under resolution, where the sale of business has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the purchaser.

(5) When applying the sale of business tool the Resolution Committee may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

(6) Following an application of the sale of business tool, the Resolution Committee may, with the consent of the purchaser, exercise the transfer powers in respect of assets, rights or liabilities transferred to the purchaser in order to transfer the assets, rights or liabilities back to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership.

(7) A purchaser shall have the appropriate authorisation to carry out the business it acquires when the transfer is made pursuant to sub-regulation (1). The Authority shall ensure that an application for a licence shall be considered, in conjunction with the transfer, in a timely manner.

(8) By way of derogation from Articles 22 to 25 of the CRD, from the requirement to inform the Authority in Article 26 of the CRD, articles 10, 10A and 10B of the Investment Services Act and the Investment Services Rules for Investment Services Providers, where a transfer of shares or other instruments of ownership by virtue of an application of the sale of business tool would result in the

Cap. 370.

acquisition of or increase in a qualifying holding in an institution of a kind referred to in Article 22(1) of the CRD or article 10 of the Investment Services Act, the Authority shall carry out the assessment required under those Articles (and articles) in a timely manner that does not delay the application of the sale of business tool and prevent the resolution action from achieving the relevant resolution objectives.

(9) Where the Authority has not completed the assessment referred to in sub-regulation (8) from the date of transfer of shares or other instruments of ownership in the application of the sale of business tool by the Resolution Committee, the following provisions shall apply:

(a) such a transfer of shares or other instruments of ownership to the acquirer shall have immediate legal effect;

(b) during the assessment period and during any divestment period provided by paragraph (f), the acquirer's voting rights attached to such shares or other instruments of ownership shall be suspended and vested solely in the Resolution Committee, which shall have no obligation to exercise any such voting rights and which shall have no liability whatsoever for exercising or refraining from exercising any such voting rights;

(c) during the assessment period and during any divestment period provided by paragraph (f), the penalties and other measures in terms of article 35B of the Banking Act, regulations 6 and 7 of the Administrative Penalties, Measures and Investigatory Powers Regulations made under the Banking Act and regulations 6 and 7 of the CRD (Administrative Penalties, Measures and Investigatory Powers) Regulations made under the Investment Services Act, for infringing the requirements for acquisitions or disposals of qualifying holdings, shall not apply to such a transfer of shares or other instruments of ownership; Cap. 371.
S.L. 371.05
S.L. 370.25

(d) promptly upon completion of the assessment by the Authority, the Authority shall notify the Resolution Committee and the acquirer in writing of whether the Authority approves or, in accordance with article 13A(11) of the Banking Act, opposes such a transfer of shares or other instruments of ownership to the acquirer; Cap. 371.

(e) if the Authority approves such a transfer of shares or other instruments of ownership to the acquirer, then the voting

B 3192

rights attached to such shares or other instruments of ownership shall be deemed to be fully vested in the acquirer immediately upon receipt by the Resolution Committee and the acquirer of such an approval notice from the Authority;

(f) if the Authority opposes such a transfer of shares or other instruments of ownership to the acquirer, then:

(i) the voting rights attached to such shares or other instruments of ownership as provided by paragraph (b) shall remain in full force and effect;

(ii) the Resolution Committee may require the acquirer to divest such shares or other instruments of ownership within a divestment period determined by the Resolution Committee having taken into account prevailing market conditions; and

(iii) if the acquirer does not complete such a divestment within the divestment period established by the Resolution Committee, then the Authority, with the consent of the Resolution Committee, may impose on the acquirer penalties and other measures for infringing the requirements for acquisitions or disposals of qualifying holdings contemplated by article 35B of the Banking Act, regulations 6 and 7 of the Administrative Penalties, Measures and Investigatory Powers Regulations made under the Banking Act and regulations 6 and 7 of the CRD (Administrative Penalties, Measures and Investigatory Powers) Regulations made under the Investment Services Act.

Cap. 371.

S.L. 371.05

S.L. 370.25

(10) Transfers made by virtue of the sale of business tool shall be subject to the safeguards referred to in regulations 73 to 80.

(11) For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with the CRD or Directive 2014/65/EU, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

(12) The purchaser referred to in sub-regulation (1) may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the

institution under resolution, provided that it meets the membership and participation criteria for participation in such systems:

Provided that:

(a) access shall not be denied on the ground that the purchaser does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in this sub-regulation;

(b) where the purchaser does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in this sub-regulation shall be exercised for such a period of time as may be specified by the Resolution Committee, not exceeding twenty-four months, renewable on application by the purchaser to the Resolution Committee.

(13) Without prejudice to regulations 73 to 80, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred shall not have any rights over or in relation to the assets, rights or liabilities transferred.

39. (1) Subject to sub-regulation (3), when applying the sale of business tool to an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), the Resolution Committee shall market, or make arrangements for the marketing of the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer. Pools of rights, assets, and liabilities may be marketed separately.

Sale of business tool: procedural requirements.

(2) Without prejudice to the Union State aid framework, where applicable, the marketing referred to in sub-regulation (1) shall be carried out in accordance with the following criteria:

(a) it shall be as transparent as possible and shall not materially misrepresent the assets, rights, liabilities, shares or other instruments of ownership of that institution that the Resolution Committee intends to transfer, having regard to the circumstances and in particular the need to maintain financial stability;

(b) it shall not unduly favour or discriminate between potential purchasers;

(c) it shall be free from any conflict of interest;

B 3194

(d) it shall not confer any unfair advantage on a potential purchaser;

(e) it shall take account of the need to effect a rapid resolution action;

(f) it shall aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved:

Provided that, subject to paragraph (b), the principles referred to in this sub-regulation shall not prevent the Resolution Committee from soliciting particular potential purchasers:

Provided further, that any public disclosure of the marketing of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that would otherwise be required in accordance with Article 17(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, may be delayed in accordance with Article 17(4) or (5) of that Regulation.

(3) The Resolution Committee may apply the sale of business tool without complying with the requirement to market as laid down in sub-regulation (1) when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular if the following conditions are met:

(a) it considers that there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution; and

(b) it considers that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective referred to in paragraph (b) of regulation 31(2).

Bridge
institution tool.

40. (1) In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution, the Resolution Committee shall have the power to transfer to a bridge institution:

(a) shares or other instruments of ownership issued by

one or more institutions under resolution;

(b) all or any assets, rights or liabilities of one or more institutions under resolution:

Provided that, subject to regulation 85, the transfer referred to in this sub-regulation may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law, and it shall not constitute a default or termination event in relation to any obligation relating to such assets or liabilities or under any contract to which the failed institution is a party.

(2) The bridge institution shall be a legal person that meets all of the following requirements:

(a) it is wholly or partially owned by one or more public authorities which may include the Resolution Committee or the resolution financing arrangement and is controlled by the Resolution Committee;

(b) it is created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to maintaining access to critical functions and selling the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1):

Provided that, the application of the bail-in tool for the purpose referred to in paragraph (b) of regulation 43(2) shall not interfere with the ability of the Resolution Committee to control the bridge institution.

(3) When applying the bridge institution tool, the Resolution Committee shall ensure that the total value of liabilities transferred to the bridge institution does not exceed the total value of the rights and assets transferred from the institution under resolution or provided by other sources.

(4) Subject to regulation 37(7), any consideration paid by the bridge institution shall benefit:

(a) the owners of the shares or instruments of ownership, where the transfer to the bridge institution has been effected by transferring shares or instruments of ownership

B 3196

issued by the institution under resolution from the holders of those shares or instruments to the bridge institution;

(b) the institution under resolution, where the transfer to the bridge institution has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the bridge institution.

(5) When applying the bridge institution tool, the Resolution Committee may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

(6) Following an application of the bridge institution tool, the Resolution Committee may:

(a) transfer rights, assets or liabilities back from the bridge institution to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership, provided that the conditions laid down in sub-regulation (7) are met;

(b) transfer, shares or other instruments of ownership, or assets, rights or liabilities from the bridge institution to a third party.

(7) The Resolution Committee may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:

(a) the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;

(b) the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership, assets, rights or liabilities specified in the instrument by which the transfer was made:

Provided that such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

(8) Transfers between the institution under resolution, or the original owners of shares or other instruments of ownership, on the one hand, and the bridge institution on the other, shall be subject to the safeguards referred to in regulations 73 to 80.

(9) For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with the CRD or Directive 2014/65/EU, a bridge institution shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred:

Provided that, for other purposes, the Resolution Committee may require that a bridge institution is considered to be a continuation of the institution under resolution, and is able to continue to exercise any right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

(10) The bridge institution may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the institution under resolution, provided that it meets the membership and participation criteria for participation in such systems:

Provided that:

(a) access shall not be denied on the ground that the bridge institution does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in this sub-regulation;

(b) where the bridge institution does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in this sub-regulation shall be exercised for such a period of time as may be specified by the Resolution Committee, not exceeding 24 months, renewable on application by the bridge institution to the Resolution Committee.

(11) Without prejudice to regulations 73 to 80, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to the bridge

B 3198

institution shall not have any rights over or in relation to the assets, rights or liabilities transferred to the bridge institution, its board of directors or senior management.

(12) The objectives of the bridge institution shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the board of directors or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct which directly affects rights of such shareholders or creditors.

(13) The Resolution Committee may further limit the liability of a bridge institution and its board of directors or senior management for acts and omissions in the discharge of their duties.

Operation of a
bridge
institution.

41. (1) The operation of a bridge institution shall respect the following requirements:

(a) the contents of the bridge institution's constitutional documents are approved by the Resolution Committee;

(b) subject to the bridge institution's ownership structure, the Resolution Committee either appoints or approves the board of directors of the bridge institution;

(c) the Resolution Committee approves the remuneration of the directors and determines their appropriate responsibilities;

(d) the Resolution Committee approves the strategy and risk profile of the bridge institution;

(e) the bridge institution is licenced in accordance with the CRD or Directive 2014/65/EU, as applicable, and has the necessary licence to carry out the activities or services that it acquires by virtue of a transfer made pursuant to regulation 63;

(f) the bridge institution complies with the requirements of, and is subject to supervision in accordance with the CRD, CRR and Directive 2014/65/EU, as applicable;

(g) the operation of the bridge institution shall be in accordance with the Union State aid framework and the Resolution Committee may specify restrictions on its operations accordingly:

Provided that, notwithstanding the provisions referred to in

paragraphs (e) and (f) and where necessary to meet the resolution objectives, the bridge institution may be established and licensed without complying with the CRD or Directive 2014/65/EU for a short period of time at the beginning of its operation. To that end, the Resolution Committee shall submit a request in that sense to the Authority. If the Authority decides to grant such a licence, it shall indicate the period for which the bridge institution is waived from complying with the requirements of those Directives.

(2) Subject to any restrictions imposed in accordance with European Union or Maltese competition rules, the management of the bridge institution shall operate the bridge institution with a view to maintaining access to critical functions and selling the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), its assets, rights or liabilities, to one or more private sector purchasers when conditions are appropriate and within the period specified in sub-regulation (4) or, where applicable, sub-regulation (6).

(3) The Resolution Committee shall take a decision that the bridge institution is no longer a bridge institution within the meaning of regulation 40(2) in any of the following cases, whichever occurs first:

- (a) the bridge institution merges with another entity;
- (b) the bridge institution ceases to meet the requirements of regulation 40(2);
- (c) the sale of all or substantially all of the bridge institution's assets, rights or liabilities to a third party;
- (d) the expiry of the period specified in sub-regulation (5) or, where applicable, sub-regulation (6);
- (e) the bridge institution's assets are completely wound down and its liabilities are completely discharged.

(4) Where the Resolution Committee seeks to sell the bridge institution or its assets, rights or liabilities, the bridge institution or the relevant assets or liabilities shall be marketed openly and transparently, and the sale shall not materially misrepresent the institution or the relevant assets or liabilities or unduly favour or discriminate between potential purchasers. Any such sale shall be made on commercial terms, having regard to the circumstances and in accordance with the Union State aid framework.

B 3200

(5) If none of the outcomes referred to in paragraphs (a), (b), (c) and (e) of sub-regulation (3) applies, the Resolution Committee shall terminate the operation of a bridge institution as soon as possible and in any event two years after the date on which the last transfer from an institution under resolution pursuant to the bridge institution tool was made.

(6) The Resolution Committee may extend the period referred to in sub-regulation (5) for one or more additional one-year periods where such an extension:

(a) supports the outcomes referred to in sub-regulation (3)(a), (b), (c) or (e); or

(b) is necessary to ensure the continuity of essential banking or financial services.

(7) Any decision of the Resolution Committee to extend the period referred to in sub-regulation (5) shall be reasoned and shall contain a detailed assessment of the situation, including of the market conditions and outlook that justifies the extension.

(8) Where the operations of a bridge institution are terminated in the circumstances referred to in sub-regulation (3)(c) or (d), the bridge institution shall be wound up under normal insolvency proceedings:

Provided that, subject to regulation 37(7), any proceeds generated as a result of the termination of the operation of the bridge institution shall benefit the shareholders of the bridge institution.

(9) Where a bridge institution is used for the purpose of transferring assets and liabilities of more than one institution under resolution, the obligation referred to in sub-regulation (8) shall refer to the assets and liabilities transferred from each of the institutions under resolution and not to the bridge institution itself.

Asset separation tool.

42. (1) In order to give effect to the asset separation tool, the Resolution Committee shall have the power to transfer assets, rights or liabilities of an institution under resolution or a bridge institution to one or more asset management vehicles:

Provided that, subject to regulation 85, the transfer referred to in this sub-regulation may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

(2) For the purposes of the asset separation tool, an asset management vehicle shall be a legal person that meets all of the following requirements:

(a) it is wholly or partially owned by one or more public authorities which may include the Resolution Committee or the resolution financing arrangement and is controlled by the Resolution Committee;

(b) it has been created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution.

(3) The asset management vehicle shall manage the assets transferred to it with a view to maximising their value through eventual sale or orderly wind down.

(4) The Resolution Committee shall:

(a) approve the contents of the asset management vehicle's constitutional documents;

(b) subject to the asset management vehicle's ownership structure, either appoint or approve the vehicle's board of directors;

(c) approve the remuneration of the directors and determine their appropriate responsibilities;

(d) approve the strategy and risk profile of the asset management vehicle; and

(e) ensure that the operation of the asset management vehicle respects the provisions of paragraphs (a) to (d) of this sub-regulation.

(5) The Resolution Committee may exercise the power specified in sub-regulation (1) to transfer assets, rights or liabilities only if:

(a) the situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on one or more financial markets;

(b) such a transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution; or

B 3202

(c) such a transfer is necessary to maximise liquidation proceeds.

(6) When applying the asset separation tool, the Resolution Committee shall determine the consideration for which assets, rights and liabilities are transferred to the asset management vehicle in accordance with the principles established in regulation 36 and in accordance with the Union State aid framework. This sub-regulation does not prevent the consideration having nominal or negative value.

(7) Subject to regulation 37(7), any consideration paid by the asset management vehicle in respect of the assets, rights or liabilities acquired directly from the institution under resolution shall benefit the institution under resolution. Consideration may be paid in the form of debt issued by the asset management vehicle.

(8) Where the bridge institution tool has been applied, an asset management vehicle may, subsequent to the application of the bridge institution tool, acquire assets, rights or liabilities from the bridge institution.

(9) The Resolution Committee may transfer assets, rights or liabilities from the institution under resolution to one or more asset management vehicles on more than one occasion and transfer assets, rights or liabilities back from one or more asset management vehicles to the institution under resolution provided that the conditions specified in sub-regulation (10) are met. The institution under resolution shall be obliged to take back any such assets, rights or liabilities.

(10) The Resolution Committee may transfer rights, assets or liabilities back from the asset management vehicle to the institution under resolution in one of the following circumstances:

(a) the possibility that the specific rights, assets or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;

(b) the specific rights, assets or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of, rights, assets or liabilities specified in the instrument by which the transfer was made:

Provided that, in either of the cases referred in paragraphs (a) and (b), the transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

(11) Transfers between the institution under resolution and the asset management vehicle shall be subject to the safeguards for partial property transfers specified in regulations 73 to 80.

(12) Without prejudice to regulations 73 to 80, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to the asset management vehicle shall not have any rights over or in relation to the assets, rights or liabilities transferred to the asset management vehicle or its board of directors or senior management.

(13) The objectives of an asset management vehicle shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the board of directors or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct which directly affects rights of such shareholders or creditors.

(14) The Resolution Committee may further limit the liability of an asset management vehicle and its board of directors or senior management for acts and omissions in the discharge of their duties.

43. (1) In order to give effect to the bail-in tool, the Resolution Committee shall have the resolution powers specified in regulation 63(1). The bail-in tool.

(2) The Resolution Committee shall apply the bail-in tool to meet the resolution objectives specified in regulation 31, in accordance with the resolution principles specified in regulation 34 for any of the following purposes:

(a) to recapitalise an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for obtaining a licence (to the extent that those conditions apply to the entity) and to continue to carry out the activities for which it is licensed under the CRD or Directive 2014/65/EU, where the entity is licensed under those Directives, and to sustain sufficient market confidence in the institution or entity;

(b) to convert to equity or reduce the principal amount of claims or debt instruments that are transferred:

(i) to a bridge institution with a view to providing capital for that bridge institution; or

B 3204

(ii) under the sale of business tool or the asset separation tool.

(3) The Resolution Committee may apply the bail-in tool for the purpose referred to in sub-regulation (2)(a) only if there is a reasonable prospect that the application of that tool together with other relevant measures including measures implemented in accordance with the business reorganisation plan required by regulation 52 will, in addition to achieving relevant resolution objectives, restore the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in question to financial soundness and long-term viability:

Provided that, where the conditions laid down in this sub-regulation are not met, the Resolution Committee may apply any of the resolution tools referred to in regulation 37(3)(a), (b) and (c) and the bail-in tool referred to in paragraph of sub-regulation (2)(b).

(4) The Resolution Committee may apply the bail-in tool to all institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) while respecting in each case the legal form of the institution or entity concerned or may change the legal form.

Scope of bail-in tool.

44. (1) The bail-in tool may be applied to all liabilities of an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that are not excluded from the scope of that tool pursuant to sub-regulations (2) or (3):

Provided that contributions from senior debt holders, in particular from insured deposits, uninsured deposits, bonds and all other senior debt, will not be mandatory whether by conversion into capital or by write-down of instruments before 1st January 2016.

(2) The Resolution Committee shall not exercise the write-down or conversion powers in relation to the following liabilities whether they are governed by the law of Malta, of another Member State or of a third country:

(a) covered deposits:

Provided that this paragraph shall not prevent the Resolution Committee, where appropriate, from exercising those powers in relation to any amount of a deposit that exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU;

(b) secured liabilities including covered bonds and

liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which according to Maltese law are secured in a way similar to covered bonds;

(c) any liability that arises by virtue of the holding by the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) of client assets or client money including client assets or client money held on behalf of UCITS as defined in Article 1(2) of Directive 2009/65/EC or of AIF's as defined in point (a) of article 4(1) of Directive 2011/61/EC, provided that such a client is protected under the applicable insolvency law;

(d) any liability that arises by virtue of a fiduciary relationship between the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) (as fiduciary) and another person (as beneficiary) provided that such a beneficiary is protected under the applicable insolvency or civil law;

(e) liabilities to institutions, excluding entities that are part of the same group, with an original maturity of less than seven days;

(f) liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated according to Directive 98/26/EC or their participants and arising from the participation in such a system;

(g) a liability to any one of the following:

(i) an employee, in relation to accrued salary, pension benefits or other fixed remuneration, except for the variable component of remuneration that is not regulated by a collective bargaining agreement:

Provided that this sub-paragraph shall not apply to the variable component of the remuneration of material risk takers as identified in Article 92(2) of the CRD;

(ii) a commercial or trade creditor arising from the provision to the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) of goods or services that are critical to the daily functioning of its operations, including IT services,

B 3206

utilities and the rental, servicing and upkeep of premises;

(iii) tax and social security authorities, provided that those liabilities are preferred under the applicable law;

(iv) deposit guarantee schemes arising from contributions due in accordance with Directive 2014/49/EU;

Provided that all secured assets relating to a covered bond cover pool shall remain unaffected, segregated and with enough funding. Neither that requirement, nor paragraph (b) shall prevent the Resolution Committee, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured:

Provided further that without prejudice to the large exposure rules in the CRR and the CRD, in order to provide for the resolvability of institutions and groups, the Resolution Committee shall limit, in accordance with regulation 17(5)(b), the extent to which other institutions hold liabilities eligible for a bail-in tool, save for liabilities that are held at entities that are part of the same group.

(3) In exceptional circumstances, where the bail-in tool is applied, the Resolution Committee may exclude or partially exclude certain liabilities from the application of the write-down or conversion powers where:

(a) it is not possible to bail-in that liability within a reasonable time notwithstanding the good faith efforts of the Resolution Committee;

(b) the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;

(c) the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium sized enterprises, which would severely disrupt the functioning of financial markets, including of financial market infrastructures, in a manner that could cause a serious disturbance to the economy of Malta, of another Member State or of the European Union; or

(d) the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in:

Provided that, where a Resolution Committee decides to exclude or partially exclude an eligible liability or class of eligible liabilities under this sub-regulation, the level of write down or conversion applied to other eligible liabilities may be increased to take account of such exclusions, provided that the level of write down and conversion applied to other eligible liabilities complies with the principle in regulation 34(1)(g).

(4) Where the Resolution Committee decides to exclude or partially exclude an eligible liability or class of eligible liabilities pursuant to this regulation, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution to do one or both of the following:

(a) cover any losses which have not been absorbed by eligible liabilities and restore the net asset value of the institution under resolution to zero in accordance with regulation 46(1)(a);

(b) purchase shares or other instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with regulation 46(1)(b).

(5) The resolution financing arrangement may make a contribution referred to in sub-regulation (4) only where:

(a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8% of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in regulation 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise; and

(b) the contribution of the resolution financing arrangement does not exceed 5% of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in regulation 36.

B 3208

(6) The contribution of the resolution financing arrangement referred to in sub-regulation (4) may be financed by:

(a) the amount available to the resolution financing arrangement which has been raised through contributions by institutions and Union branches in accordance with regulation 100(6) and regulation 103;

(b) the amount that can be raised through ex-post contributions in accordance with regulation 104 within three years; and

(c) where the amounts referred to in paragraphs (a) and (b) are insufficient, amounts raised from alternative financing sources in accordance with regulation 105.

(7) In extraordinary circumstances, the Resolution Committee may seek further funding from alternative financing sources after:

(a) the 5% limit specified in sub-regulation (5)(b) has been reached; and

(b) all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full:

Provided that, where the conditions laid down in this sub-regulation are met, the resolution financing arrangement may make a contribution from resources which have been raised through ex-ante contributions in accordance with regulation 100(6) and regulation 103 and which have not yet been used.

(8) By way of derogation from sub-regulation (5)(a), the resolution financing arrangement may also make a contribution as referred to in sub-regulation (4) provided that:

(a) the contribution to loss absorption and recapitalisation referred to in sub-regulation (5)(a) is equal to an amount not less than 20% of the risk weighted assets of the institution concerned;

(b) the resolution financing arrangement has at its disposal, by way of ex-ante contributions (not including contributions to a deposit guarantee scheme) raised in accordance with regulation 100(6) and regulation 103, an amount which is at least equal to 3% of covered deposits of all the credit institutions authorised in Malta; and

(c) the institution concerned has assets below EUR 900

billion on a consolidated basis.

(9) When exercising the discretions under sub-regulation (3), the Resolution Committee shall give due consideration to:

(a) the principle that losses should be borne first by shareholders and next, in general, by creditors of the institution under resolution in order of preference;

(b) the level of loss absorbing capacity that would remain in the institution under resolution if the liability or class of liabilities were excluded; and

(c) the need to maintain adequate resources for resolution financing.

(10) Exclusions under sub-regulation (3) may be applied either to completely exclude a liability from write down or to limit the extent of the write down applied to that liability.

(11) Before exercising the discretion to exclude a liability under sub-regulation (3), the Resolution Committee shall notify the European Commission.

45. (1) Institutions shall, at all times, meet a minimum requirement for own funds and eligible liabilities. The minimum requirement shall be calculated as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution:

Application of the minimum requirement.

Provided that, for the purpose of this sub-regulation, derivative liabilities shall be included in the total liabilities on the basis that full recognition is given to counterparty netting rights.

(2) Notwithstanding sub-regulation (1), the Resolution Committee shall exempt mortgage credit institutions financed by covered bonds which, according to Maltese law are not allowed to receive deposits from the obligation to meet, at all times, a minimum requirement for own funds and eligible liabilities, as:

(a) those institutions will be wound-up through Maltese insolvency procedures, or other types of procedure implemented in accordance with regulations 38, 40 and 42, provided for those institutions; and

(b) such Maltese insolvency procedures, or other types of procedure, will ensure that creditors of those institutions, including holders of covered bonds, where relevant, will bear

B 3210

losses in a way that meets the resolution objectives.

(3) Eligible liabilities shall be included in the amount of own funds and eligible liabilities referred to in sub-regulation (1) only if they satisfy the following conditions:

- (a) the instrument is issued and fully paid up;
- (b) the liability is not owed to, secured by or guaranteed by the institution itself;
- (c) the purchase of the instrument was not funded directly or indirectly by the institution;
- (d) the liability has a remaining maturity of at least one year:

Provided that where a liability confers upon its owner a right to early reimbursement, the maturity of that liability shall be the first date where such a right arises;

- (e) the liability does not arise from a derivative;
- (f) the liability does not arise from a deposit which benefits from preference in the national insolvency hierarchy in accordance with Article 108 of the BRRD.

(4) Where a liability is governed by the law of a third-country, the Resolution Committee may require the institution to demonstrate that any decision of the Resolution Committee to write down or convert that liability would be effective under the law of that third country, having regard to the terms of the contract governing the liability, international agreements on the recognition of resolution proceedings and other relevant matters. If the Resolution Committee is not satisfied that any decision would be effective under the law of that third country, the liability shall not be counted towards the minimum requirement for own funds and eligible liabilities.

(5) The minimum requirement for own funds and eligible liabilities of each institution pursuant to sub-regulation (1) shall be determined by the Resolution Committee, after consulting the Authority, at least on the basis of the following criteria:

- (a) the need to ensure that the institution can be resolved by the application of the resolution tools including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;

(b) the need to ensure, in appropriate cases, that the institution has sufficient eligible liabilities to ensure that, if the bail-in tool were to be applied, losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for obtaining a licence and to continue to carry out the activities for which it is licensed under the Banking Act or the Investment Services Act and to sustain sufficient market confidence in the institution or entity;

Cap. 371.

Cap. 370.

(c) the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in under regulation 44(3) or that certain classes of eligible liabilities might be transferred to a recipient in full under a partial transfer, that the institution has sufficient other eligible liabilities to ensure that losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for obtaining a licence and to continue to carry out the activities for which it is licensed under the Banking Act or the Investment Services Act;

Cap. 371.

Cap. 370.

(d) the size, the business model, the funding model and the risk profile of the institution;

(e) the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with regulation 109;

(f) the extent to which the failure of the institution would have adverse effects on financial stability, including, due to its interconnectedness with other institutions or with the rest of the financial system through contagion to other institutions.

(6) The Resolution Committee may provide for additional criteria on the basis of which the minimum requirement for own funds and eligible liabilities shall be determined.

(7) Institutions shall comply with the minimum requirements laid down in this regulation on an individual basis:

Provided that the Resolution Committee may, after consulting the Authority, decide to apply the minimum requirement laid down in this regulation also to an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1).

(8) In addition to sub-regulation (7), Union parent undertakings shall comply with the minimum requirements laid down

B 3212

in this regulation on a consolidated basis:

Provided that where the Resolution Committee is the group-level resolution authority, such minimum requirements shall be determined by Resolution Committee, after consulting the consolidating supervisor, in accordance with sub-regulation (9) to (11), at least on the basis of the criteria laid down in sub-regulation (5) and of whether the third-country subsidiaries of the group are to be resolved separately according to the resolution plan.

(9) The Resolution Committee shall do everything within its power to reach a joint decision -

(a) where the Resolution Committee is the group-level resolution authority, together with the European resolution authorities responsible for the subsidiaries on an individual basis; or

(b) where the Resolution Committee is the resolution authority responsible for a subsidiary on an individual basis, together with the European resolution authority acting as the group-level resolution authority and the European resolution authorities responsible for the other subsidiaries, if any,

on the level of the minimum requirement applied at the consolidated level. The joint decision shall be binding on the Resolution Committee and on the European resolution authorities concerned:

Provided that the joint decision shall be fully reasoned and where the Resolution Committee is the group-level resolution authority, the Resolution Committee shall provide the decision to the Union parent undertaking:

Provided further that the joint decision shall be reviewed and where relevant updated on a regular basis.

(10) Where the Resolution Committee is the group-level resolution authority, in the absence of a joint decision in accordance with sub-regulation (9) within four months, a decision shall be taken on the consolidated minimum requirement by the Resolution Committee in its capacity as the group-level resolution authority after duly taking into consideration the assessment of subsidiaries performed by the relevant European resolution authorities. If, at the end of the four-month period, any of the authorities mentioned in sub-regulation (9) has referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Resolution Committee, in its capacity as the group-level resolution authority,

shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee in its capacity as the group-level resolution authority shall apply:

Provided that, the decision taken by the Resolution Committee in its capacity as the group-level resolution authority in the absence of a joint decision, shall be binding on the European resolution authorities concerned:

Provided further that any decision taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

(11) The Resolution Committee may, within the four-month period referred to in sub-regulation (10), refer the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, where the Resolution Committee is the group-level resolution authority, the decision of the Resolution Committee shall apply, and where the Resolution Committee is responsible for a subsidiary on an individual basis, the decision of the European resolution authority acting as the group-level resolution authority shall apply and shall be binding on the Resolution Committee.

(12) The Resolution Committee shall set the minimum requirement to be applied to the group's subsidiaries on an individual basis. Those minimum requirements shall be set at a level appropriate for the subsidiary having regard to:

- (a) the criteria listed in sub-regulation (5), in particular the size, business model and risk profile of the subsidiary, including its own funds; and
- (b) the consolidated requirement that has been set for the group under sub-regulation (9) to (11).

(13) The Resolution Committee shall do everything within its power to reach a joint decision -

B 3214

(a) where the Resolution Committee is the group-level resolution authority, together with the European resolution authorities responsible for the subsidiaries on an individual basis; or

(b) where the Resolution Committee is responsible for a subsidiary on an individual basis, together with the European resolution authority acting as the group-level resolution authority and the European resolution authorities responsible for the other subsidiaries on an individual level, if any,

on the level of the minimum requirement to be applied to each respective subsidiary at an individual level. The joint decision shall be binding on the Resolution Committee and the European resolution authorities concerned:

Provided that the joint decision shall be fully reasoned and shall be provided by the Resolution Committee to, where the Resolution Committee is responsible for a subsidiary, the subsidiary, or where the Resolution Committee is the group-level resolution authority, to the Union parent institution:

Provided further that the joint decision shall be reviewed and where relevant updated on a regular basis.

(14) Where the Resolution Committee is responsible for a subsidiary on an individual basis, in the absence of a joint decision in accordance with sub-regulation (13) within a period of four months, the decision on the level of the minimum requirement to be applied to the subsidiary concerned shall be taken by the Resolution Committee, duly considering the views and reservations expressed by the European resolution authority acting as the group-level resolution authority:

Provided that if, at the end of the four-month period, the European resolution authority acting as the group-level resolution authority has referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Resolution Committee shall defer its decision and await any decision that the EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of the EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision referred to in sub-regulation (13) has been reached. In the absence of an EBA decision within one month, the decision of the Resolution Committee, in its capacity as the resolution authority of

the subsidiary on an individual basis, shall apply to the subsidiary for which the Resolution Committee is responsible and shall be binding on the Resolution Committee, and the decisions of the European resolution authorities of the other subsidiaries, if any, shall apply to the subsidiaries concerned and shall be binding on the European resolution authorities concerned:

Provided further that the decision taken by the Resolution Committee shall be reviewed and where relevant updated on a regular basis.

(15) Where the Resolution Committee is the group-level resolution authority, the Resolution Committee may, within four months, refer the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. The matter shall not be referred to the EBA after the end of the four-month period or after a joint decision referred to in sub-regulation (13) has been reached. The Resolution Committee in its capacity as the group-level resolution authority shall not refer the matter to the EBA for binding mediation where the level set by European resolution authorities of subsidiaries is within one percentage point of the consolidated level set under sub-regulations (9) to (11). In the absence of an EBA decision within one month, the decision of the European resolution authorities responsible for subsidiaries shall apply and shall be binding on the Resolution Committee.

(16) Where the Resolution Committee is the group-level resolution authority, the Resolution Committee may fully waive the application of the individual minimum requirement to a Union parent institution where:

(a) the Union parent institution complies on a consolidated basis with the minimum requirement set under sub-regulation (8); and

(b) the Authority has fully waived the application of individual capital requirements to the institution in accordance with Article 7(3) of the CRR.

(17) Where the Resolution Committee is responsible for a subsidiary, the Resolution Committee may fully waive the application of sub-regulation (7) to that subsidiary where:

(a) both the subsidiary and its parent undertaking are subject to licensing conditions and supervision in Malta;

B 3216

(b) the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking;

(c) the highest level group institution in Malta, where different to the Union parent institution, complies on a sub-consolidated basis with the minimum requirement set under sub-regulation (7);

(d) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the subsidiary by its parent undertaking;

(e) either the parent undertaking satisfies the Authority regarding the prudent management of the subsidiary and has declared, with the consent of the Authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(f) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

(g) the parent undertaking holds more than 50% of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the board of directors of the subsidiary; and

(h) the Authority has fully waived the application of individual capital requirements to the subsidiary under Article 7(1) of the CRR.

(18) The decisions taken in accordance with this regulation may provide that the minimum requirement for own funds and eligible liabilities is partially met at consolidated or individual level through contractual bail-in instruments.

(19) To qualify as a contractual bail-in instrument under sub-regulation (18), the Resolution Committee shall be satisfied that the instrument:

(a) contains a contractual term providing that, where the Resolution Committee decides to apply the bail-in tool to that institution, the instrument shall be written down or converted to the extent required before other eligible liabilities are written down or converted; and

(b) is subject to a binding subordination agreement,

undertaking or provision under which in the event of normal insolvency proceedings, it ranks below other eligible liabilities and cannot be repaid until other eligible liabilities outstanding at the time have been settled.

(20) The Resolution Committee, in coordination with the Authority, shall require and verify that institutions meet the minimum requirement for own funds and eligible liabilities laid down in sub-regulation (1) and where relevant the requirement laid down in sub-regulation (18), and shall take any decision pursuant to this regulation in parallel with the development and the maintenance of resolution plans.

(21) The Resolution Committee, in coordination with the Authority, shall inform the EBA of the minimum requirement for own funds and eligible liabilities, and where relevant the requirement laid down in sub-regulation (18), that have been set for each institution under their jurisdiction.

46. (1) When applying the bail-in tool, the Resolution Committee shall assess, on the basis of a valuation that complies with regulation 36, the aggregate of:

Assessment of
amount of bail-
in.

(a) where relevant, the amount by which eligible liabilities must be written down in order to ensure that the net asset value of the institution under resolution is equal to zero; and

(b) where relevant, the amount by which eligible liabilities must be converted into shares or other types of capital instruments in order to restore the Common Equity Tier 1 capital ratio of either:

(i) the institution under resolution; or

(ii) the bridge institution.

(2) The assessment referred to in sub-regulation (1) shall establish the amount by which eligible liabilities need to be written down or converted in order to restore the Common Equity Tier 1 capital ratio of the institution under resolution or where applicable establish the ratio of the bridge institution taking into account any contribution of capital by the resolution financing arrangement pursuant to regulation 101(1)(d), and to sustain sufficient market confidence in the institution under resolution or the bridge institution and enable it to continue to meet, for at least one year, the licence conditions and to continue to carry out the activities for which it is authorised under the CRD or Directive 2014/65/EU:

B 3218

Provided that, where the Resolution Committee intends to use the asset separation tool referred to in regulation 42, the amount by which eligible liabilities need to be reduced shall take into account a prudent estimate of the capital needs of the asset management vehicle as appropriate.

(3) Where capital has been written down in accordance with regulations 59 to 62 and bail-in has been applied pursuant to regulation 43(2) and the level of write-down based on the preliminary valuation according to regulation 36 is found to exceed requirements when assessed against the definitive valuation according to regulation 36(10), a write-up mechanism may be applied to reimburse creditors and then shareholders to the extent necessary.

(4) The Resolution Committee shall establish and maintain arrangements to ensure that the assessment and valuation is based on information about the assets and liabilities of the institution under resolution that is as up to date and as comprehensive as is reasonably possible.

Treatment of shareholders in bail-in or write-down or conversion of capital instruments.

47. (1) When applying the bail-in tool in regulation 43(2) or the write-down or conversion of capital instruments in regulation 59, the Resolution Committee shall, in respect of shareholders and holders of other instruments of ownership, take one or both of the following actions:

(a) cancel existing shares or other instruments of ownership or transfer them to bailed-in creditors;

(b) provided that, in accordance to the valuation carried out under regulation 36, the institution under resolution has a positive net value, dilute existing shareholders and holders of other instruments of ownership as a result of the conversion into shares or other instruments of ownership of:

(i) relevant capital instruments issued by the institution pursuant to the power referred to in regulation 59(2); or

(ii) eligible liabilities issued by the institution under resolution pursuant to the power referred to in regulation 63(1)(f):

Provided that with regard to paragraph (b), the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares or other instruments of ownership.

(2) The actions referred to in sub-regulation (1) shall also be

taken in respect of shareholders and holders of other instruments of ownership where the shares or other instruments of ownership in question were issued or conferred in the following circumstances:

(a) pursuant to conversion of debt instruments to shares or other instruments of ownership in accordance with contractual terms of the original debt instruments on the occurrence of an event that preceded or occurred at the same time as the assessment by the Resolution Committee that the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) met the conditions for resolution;

(b) pursuant to the conversion of relevant capital instruments to Common Equity Tier 1 instruments pursuant to regulation 60.

(3) When considering which action to take in accordance with sub-regulation (1), the Resolution Committee shall have regard to:

(a) the valuation carried out in accordance with regulation 36;

(b) the amount by which the Resolution Committee has assessed that Common Equity Tier 1 items must be reduced and relevant capital instruments must be written down or converted pursuant to regulation 60(1); and

(c) the aggregate amount assessed by the Resolution Committee pursuant to regulation 46.

(4) By way of derogation from Articles 22 to 25 of the CRD, the requirement to give a notice in Article 26 of the CRD, articles 10, 10A and 10B of the Investment Services Act and the Investment Services Rules for Investment Services Providers, where the application of the bail-in tool or the conversion of capital instruments would result in the acquisition of or increase in a qualifying holding in an institution as referred to in article 13(1) of the Banking Act or article 10 of the Investment Services Act, the Authority shall carry out the assessment required under those Articles (and those articles) in a timely manner that does not delay the application of the bail-in tool or the conversion of capital instruments, or prevent resolution action from achieving the relevant resolution objectives. Cap. 370.
Cap. 371.

(5) If the Authority has not completed the assessment required under sub-regulation (4) on the date of application of the bail-in tool or the conversion of capital instruments, regulation 38(9) shall apply to any acquisition of or increase in a qualifying holding by an

B 3220

acquirer resulting from the application of the bail-in tool or the conversion of capital instruments.

Sequence of
write-down and
conversion.

48. (1) When applying the bail-in tool, the Resolution Committee shall exercise the write-down and conversion powers, subject to any exclusions under regulation 44(2) and (3), meeting the following requirements:

(a) Common Equity Tier 1 items are reduced in accordance with regulation 60(1)(a);

(b) if, and only if, the total reduction pursuant to paragraph (a) is less than the sum of the amounts referred to in regulation 47(3)(b) and (c), the Resolution Committee reduces the principal amount of Additional Tier 1 instruments to the extent required and to the extent of their capacity;

(c) if, and only if, the total reduction pursuant to paragraphs (a) and (b) is less than the sum of the amounts referred to in regulation 47(3)(b) and (c), the Resolution Committee reduces the principal amount of Tier 2 instruments to the extent required and to the extent of their capacity;

(d) if, and only if, the total reduction of shares or other instruments of ownership and relevant capital instruments pursuant to paragraphs (a), (b) and (c) is less than the sum of the amounts referred to in regulation 47(3)(b) and (c), the Resolution Committee reduces to the extent required the principal amount of subordinated debt that is not Additional Tier 1 or Tier 2 capital in accordance with the ranking of claims in normal insolvency proceedings, in conjunction with the write down pursuant to paragraphs (a), (b) and (c) to produce the sum of the amounts referred to in regulation 47(3)(b) and (c);

(e) if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and eligible liabilities pursuant to paragraphs (a) to (d) is less than the sum of the amounts referred to in regulation 47(3)(b) and (c), the Resolution Committee reduces to the extent required the principal amount of, or outstanding amount payable in respect of, the rest of eligible liabilities in accordance with the ranking of claims in normal insolvency proceedings, including the ranking of deposits provided for in regulation 108, pursuant to regulation 44, in conjunction with the write-down pursuant to paragraphs (a), (b), (c) and (d) to produce the sum of the amounts referred to in regulation 47(3)(b) and (c).

(2) When applying the write down or conversion powers, the Resolution Committee shall allocate the losses represented by the sum of the amounts referred to in regulation 47(3)(b) and (c) equally between shares or other instruments of ownership and eligible liabilities of the same rank by reducing the principal amount of, or outstanding amount payable in respect of, those shares or other instruments of ownership and eligible liabilities to the same extent pro rata to their value except where a different allocation of losses amongst liabilities of the same rank is allowed in the circumstances specified in regulation 44(3):

Provided that this shall not prevent liabilities which have been excluded from bail-in in accordance with regulation 44(2) and (3) from receiving more favourable treatment than eligible liabilities which are of the same rank in normal insolvency proceedings.

(3) Before applying the write-down or conversion referred to in sub-regulation (1)(e), the Resolution Committee shall convert or reduce the principal amount on instruments referred to in sub-regulation (1)(b), (c) and (d) when those instruments contain the following terms and have not already been converted:

(a) terms that provide for the principal amount of the instrument to be reduced on the occurrence of any event that refers to the financial situation, solvency or levels of own funds of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(b) terms that provide for the conversion of the instruments to shares or other instruments of ownership on the occurrence of any such event.

(4) Where the principal amount of an instrument has been reduced, but not to zero, in accordance with terms of the kind referred to in sub-regulation (3)(a) before the application of the bail-in pursuant to sub-regulation (1), the Resolution Committee shall apply the write-down and conversion powers to the residual amount of that principal in accordance with sub-regulation (1).

(5) When deciding on whether liabilities are to be written down or converted into equity, the Resolution Committee shall not convert one class of liabilities, while a class of liabilities that is subordinated to that class remains substantially unconverted into equity or not written down, unless otherwise permitted under regulation 44(2) and (3).

49. (1) The Resolution Committee shall comply with this Derivatives.

B 3222

regulation when applying the write-down and conversion powers to liabilities arising from derivatives.

(2) The Resolution Committee shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the derivatives. Upon entry into resolution, the Resolution Committee shall be empowered to terminate and close out any derivative contract for that purpose.

(3) Where a derivative liability has been excluded from the application of the bail-in tool under regulation 44(3), the Resolution Committee shall not be obliged to terminate or close out the derivative contract.

(4) Where derivative transactions are subject to a netting agreement, the Resolution Committee or an independent valuer shall determine as part of the valuation under regulation 36 the liability arising from those transactions on a net basis in accordance with the terms of the agreement.

(5) The Resolution Committee shall determine the value of liabilities arising from derivatives in accordance with the following:

(a) appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;

(b) principles for establishing the relevant point in time at which the value of a derivative position should be established; and

(c) appropriate methodologies for comparing the destruction in value that would arise from the close out and bail-in of derivatives with the amount of losses that would be borne by derivatives in a bail-in.

Rate of
conversion of
debt to equity.

50. (1) When the Resolution Committee exercises the powers specified in regulation 59(3) and regulation 63(1)(f), they may apply a different conversion rate to different classes of capital instruments and liabilities in accordance with one or both of the principles referred to in sub-regulations (2) and (3).

(2) The conversion rate shall represent appropriate compensation to the affected creditor for any loss incurred by virtue of the exercise of the write down and conversion powers.

(3) When different conversion rates are applied according to sub-regulation (1), the conversion rate applicable to liabilities that are

considered to be senior under applicable insolvency law shall be higher than the conversion rate applicable to subordinated liabilities.

51. (1) Where the Resolution Committee applies the bail-in tool to recapitalise an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in accordance with regulation 43(2)(a), arrangements shall be adopted to ensure that a business reorganisation plan for that institution or entity is drawn up and implemented in accordance with regulation 52.

Recovery and reorganisation measures to accompany bail-in.

(2) The arrangements referred to in sub-regulation (1) may include the appointment by the Resolution Committee of a person or persons appointed in accordance with regulation 72(1) with the objective of drawing up and implementing the business reorganisation plan required by regulation 52.

52. (1) Within one month after the application of the bail-in tool to an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in accordance with regulation 43(2)(a), the board of directors or the person or persons appointed in accordance with regulation 72(1) shall draw up and submit to the Resolution Committee, a business reorganisation plan that satisfies the requirements of sub-regulations (4) and (5). Where the Union State aid framework is applicable, the Resolution Committee shall ensure that such a plan is compatible with the restructuring plan that the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is required to submit to the European Commission under that framework.

Business reorganisation plan.

(2) Where the Resolution Committee is the group-level resolution authority, and the bail-in tool in regulation 43(2)(a) is applied to two or more group entities, the business reorganisation plan shall be prepared by the Union parent institution and cover all of the institutions in the group in accordance with the procedure specified in regulations 7 and 8 and shall be submitted to the Resolution Committee. The Resolution Committee, in its capacity as the group-level resolution authority, shall communicate the plan to the European resolution authorities concerned and to the EBA.

(3) In exceptional circumstances, and if it is necessary for achieving the resolution objectives, the Resolution Committee may extend the period in sub-regulation (1) up to a maximum of two months from the application of the bail-in tool:

Provided that, where the business reorganisation plan is required to be notified within the Union State aid framework, the

B 3224

Resolution Committee may extend the period in sub-regulation (1) up to a maximum of two months since the application of the bail-in tool or until the deadline laid down by the Union State aid framework, whichever occurs earlier.

(4) A business reorganisation plan shall set out measures aiming to restore the long-term viability of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or parts of its business within a reasonable time-scale. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) will operate:

Provided that the business reorganisation plan shall take account, *inter alia*, of the current state and future prospects of the financial markets, reflecting best-case and worst-case assumptions, including a combination of events allowing the identification of the institution's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.

(5) A business reorganisation plan shall include at least the following elements:

(a) a detailed diagnosis of the factors and problems that caused the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to fail or to be likely to fail, and the circumstances that led to its difficulties;

(b) a description of the measures aiming to restore the long-term viability of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that are to be adopted;

(c) a timetable for the implementation of those measures.

(6) Measures aiming to restore the long-term viability of an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) may include:

(a) the reorganisation of the activities of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(b) changes to the operational systems and infrastructure within the institution;

- (c) the withdrawal from loss-making activities;
- (d) the restructuring of existing activities that can be made competitive;
- (e) the sale of assets or of business lines.

(7) Within one month of the date of submission of the business reorganisation plan, the Resolution Committee shall assess the likelihood that the plan, if implemented, will restore the long-term viability of the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1). The assessment shall be completed in agreement with the Authority. If the Resolution Committee and the Authority are satisfied that the plan would achieve that objective, the Resolution Committee shall approve the plan.

(8) If the Resolution Committee is not satisfied that the plan would achieve the objective referred to in sub-regulation (7), the Resolution Committee, in agreement with the Authority, shall notify the board of directors or the person or persons appointed in accordance with regulation 72(1) of its concerns and require the amendment of the plan in a way that addresses those concerns.

(9) Within two weeks from the date of receipt of the notification referred to in sub-regulation (8), the board of directors or the person or persons appointed in accordance with regulation 72(1) shall submit an amended plan to the Resolution Committee for approval. The Resolution Committee shall assess the amended plan, and shall notify the board of directors or the person or persons appointed in accordance with regulation 72(1) within one week whether it is satisfied that the plan, as amended, addresses the concerns notified or whether further amendment is required.

(10) The board of directors or the person or persons appointed in accordance with regulation 72(1) shall implement the reorganisation plan as agreed by the Resolution Committee and Authority, and shall submit a report to the Resolution Committee at least every six months on progress in the implementation of the plan.

(11) The board of directors or the person or persons appointed in accordance with regulation 72(1) shall revise the plan if, in the opinion of the Resolution Committee with the agreement of the Authority, it is necessary to achieve the aim referred to in sub-regulation (4), and shall submit any such revision to the Resolution Committee for approval.

53. (1) Where a Resolution Committee exercises a power referred to in regulation 59(2) and in regulation 63(1)(e) to (i), the Effect of bail-in.

B 3226

reduction of principal or outstanding amount due, conversion or cancellation takes effect and is immediately binding on the institution under resolution and affected creditors and shareholders.

(2) The Resolution Committee shall have the power to complete or require the completion of all the administrative and procedural tasks necessary to give effect to the exercise of a power referred to in regulation 59(2) and in regulation 63(1)(e) to (i), including:

- (a) the amendment of all relevant registers;
- (b) the delisting or removal from trading of shares or other instruments of ownership or debt instruments;
- (c) the listing or admission to trading of new shares or other instruments of ownership;
- (d) the relisting or readmission of any debt instruments which have been written down, without the requirement for the issuing of a prospectus pursuant to Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as amended from time to time, including any implementing measures that have been or may be issued thereunder.

(3) Where the Resolution Committee reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in regulation 63(1)(e), that liability and any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised shall be treated as discharged for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor entity in any subsequent winding up.

(4) Where the Resolution Committee reduces in part, but not in full, the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in regulation 63(1)(e):

- (a) the liability shall be discharged to the extent of the amount reduced;
- (b) the relevant instrument or agreement that created the original liability shall continue to apply in relation to the residual principal amount of, or outstanding amount payable in

respect of the liability, subject to any modification of the amount of interest payable to reflect the reduction of the principal amount, and any further modification of the terms that the Resolution Committee might make by means of the power referred to in regulation 63(1)(j).

54. (1) Without prejudice to regulation 63(1)(i), institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) shall, where applicable, be required to maintain at all times a sufficient amount of authorised share capital or of other Common Equity Tier 1 instruments, so that, in the event that the Resolution Committee exercises the powers referred to in regulation 63(1)(e) and (f) in relation to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or any of its subsidiaries, the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is not prevented from issuing sufficient new shares or other instruments of ownership to ensure that the conversion of liabilities into shares or other instruments of ownership could be carried out effectively.

Removal of procedural impediments to bail-in.

(2) The Resolution Committee shall assess whether it is appropriate to impose the requirement laid down in sub-regulation (1) in the case of a particular institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in the context of the development and maintenance of the resolution plan for that institution or group, having regard, in particular, to the resolution actions contemplated in that plan. If the resolution plan provides for the possible application of the bail-in tool, the Resolution Committee shall verify that the authorised share capital or other Common Equity Tier 1 instruments is sufficient to cover the sum of the amounts referred to in regulation 47(3)(b) and (c).

(3) Notwithstanding anything contained in any other law, there shall be no procedural impediments to the conversion of liabilities to shares or other instruments of ownership existing by virtue of their instruments of incorporation or statutes, including pre-emption rights for shareholders or requirements for the consent of shareholders to an increase in capital.

(4) This regulation is without prejudice to the amendments to Directives 82/891/EEC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU and Directive 2012/30/EU set out in Title X of the BRRD.

55. (1) Institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) shall include a

Contractual recognition of bail-in.

B 3228

contractual term by which the creditor or party to the agreement creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by the Resolution Committee, provided that such liability is:

- (a) not excluded under regulation 44(2);
- (b) not a deposit referred to in regulation 108(a);
- (c) governed by the law of a third country; and
- (d) issued or entered into on or after the date on which these regulations are adopted:

Provided that this sub-regulation shall not apply where the Resolution Committee determines that the liabilities or instruments referred to in this sub-regulation can be subject to write down and conversion powers by the Resolution Committee or by an European resolution authority pursuant to the law of the third country or to a binding agreement concluded with that third country:

Provided further that the Resolution Committee may require institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to provide it with a legal opinion relating to the legal enforceability and effectiveness of such a term.

(2) If an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) fails to include, in the contractual provisions governing a relevant liability, a term required in accordance with sub-regulation (1), that failure shall not prevent the Resolution Committee from exercising the write down and conversion powers in relation to that liability.

Government
financial
stabilisation
tools.

56. (1) The Ministry responsible for Finance may provide extraordinary public financial support through additional financial stabilisation tools in accordance with sub-regulation (3), regulation 37(10) and with Union State aid framework, for the purpose of participating in the resolution of an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), including by intervening directly in order to avoid its winding up, with a view to meeting the objectives for resolution referred to in regulation 31(2) in relation to Malta or the European Union as a whole. Such an action shall be carried out under the leadership of the Ministry responsible for Finance or the government in close cooperation with the Resolution Committee.

(2) In order to give effect to the government financial stabilisation tools, the Ministry responsible for Finance shall have the relevant resolution powers specified in regulations 63 to 72, and shall ensure that regulations 66, 68, 83 and 117 apply.

(3) The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability, as determined by the Ministry responsible for Finance or the government after consulting the Resolution Committee.

(4) When applying the government financial stabilisation tools, the Ministry responsible for Finance and the Resolution Committee shall apply the tools only if all the conditions laid down in regulation 32(1) as well as one of the following conditions are met:

(a) the Ministry responsible for Finance and the Resolution Committee, after consulting the Central bank and the Authority, determine that the application of the resolution tools would not suffice to avoid a significant adverse effect on the financial system;

(b) the Ministry responsible for Finance and the Resolution Committee determine that the application of the resolution tools would not suffice to protect the public interest, where extraordinary liquidity assistance from the Central bank has previously been given to the institution;

(c) in respect of the temporary public ownership tool, the Ministry responsible for Finance, after consulting the Authority and the Resolution Committee, determines that the application of the resolution tools would not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the institution.

(5) The financial stabilisation tools shall consist of the following:

(a) public equity support tool as referred to in regulation 57;

(b) temporary public ownership tool as referred to in regulation 58.

57. (1) The Ministry responsible for Finance may, while complying with Maltese company law, participate in the recapitalisation of an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) by providing

Public equity support tool.

B 3230

capital to the latter in exchange for the following instruments, subject to the requirements of the CRR:

- (a) Common Equity Tier 1 instruments;
- (b) Additional Tier 1 instruments or Tier 2 instruments.

(2) To the extent that the Government of Malta's shareholding in an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) permits, such institutions or entities subject to public equity support tools in accordance with this regulation shall be managed on a commercial and professional basis.

(3) Where the Ministry responsible for Finance provides public equity support tools in accordance with this regulation, it shall ensure that its holding in the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is transferred to the private sector as soon as commercial and financial circumstances allow.

Temporary
public
ownership tool.

58. (1) The Ministry responsible for Finance may take an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) into temporary public ownership.

(2) For that purpose one or more share transfer orders may be made in which the transferee is:

- (a) a nominee of the Government of Malta; or
- (b) a company wholly owned by the Government of Malta.

(3) Institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) subject to the temporary public ownership tool in accordance with this regulation shall be managed on a commercial and professional basis and shall be transferred to the private sector as soon as commercial and financial circumstances allow.

Requirement to
write down or
convert capital
instruments.

59. (1) The power to write down or convert relevant capital instruments may be exercised either:

- (a) independently of resolution action; or
- (b) in combination with a resolution action, where the conditions for resolution specified in regulations 32 and 33 are met.

(2) The Resolution Committee shall have the power to write down or convert relevant capital instruments into shares or other instruments of ownership of institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1).

(3) The Resolution Committee shall exercise the write-down or conversion power, in accordance with regulation 60 and without delay, in relation to relevant capital instruments issued by an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) when one or more of the following circumstances apply:

(a) where the determination has been made that conditions for resolution specified in regulations 32 and 33 have been met, before any resolution action is taken;

(b) the appropriate authority determines that unless that power is exercised in relation to the relevant capital instruments, the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) will no longer be viable;

(c) in the case of relevant capital instruments issued by a subsidiary and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual and on a consolidated basis, a joint determination taking the form of a joint decision is made by -

(i) where the Authority is the consolidating supervisor, the appropriate authority and the overseas appropriate authority of the Member State of the subsidiary; or

(ii) where the Authority is responsible for the subsidiary, the appropriate authority, the appropriate authority of the Member State of the consolidating supervisor and the overseas appropriate authorities of the Member State of the other subsidiaries, if any;

in accordance with regulation 92(4) and (5) that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

(d) in the case of relevant capital instruments issued at the level of the parent undertaking and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual basis at the level of the

B 3232

parent undertaking or on a consolidated basis, and: where the Authority is the consolidating supervisor, the appropriate authority; or, where the Authority is responsible for a subsidiary, the overseas appropriate authority of the Member State of the consolidating supervisor; makes a determination that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

(e) extraordinary public financial support is required by the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) except in any of the circumstances set out in regulation 32(4)(d)(iii).

(4) For the purposes of sub-regulation (3), an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or a group shall be deemed to be no longer viable only if both of the following conditions are met:

(a) the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or the group is failing or likely to fail;

(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, including alternative private sector measures or supervisory action (including early intervention measures), other than the write down or conversion of capital instruments, independently or in combination with a resolution action, would prevent the failure of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or the group within a reasonable time-frame.

(5) For the purposes of sub-regulation (4)(a), an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) shall be deemed to be failing or likely to fail where one or more of the circumstances set out in regulation 32(4) occurs.

(6) For the purposes of sub-regulation (4)(a), a group shall be deemed to be failing or likely to fail where the group infringes or there are objective elements to support a determination that the group, in the near future, will infringe its consolidated prudential requirements in a way that would justify action by the Authority including but not limited to because the group has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds.

(7) A relevant capital instrument issued by a subsidiary shall not be written down to a greater extent or converted on worse terms pursuant to sub-regulation (3)(c) than equally ranked capital instruments at the level of the parent undertaking which have been written down or converted.

(8) Where the appropriate authority makes a determination referred to in sub-regulation (3), it shall, where it is responsible for a subsidiary, or where the Authority is the consolidating supervisor, immediately notify the European resolution authority responsible for the institution or for the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in question.

(9) Before making a determination referred to in sub-regulation (3)(c) in relation to a subsidiary that issues relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the appropriate authority shall comply with the notification and consultation requirements laid down in regulation 62.

(10) Before exercising the power to write down or convert capital instruments, the Resolution Committee shall ensure that a valuation of the assets and liabilities of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is carried out in accordance with regulation 36. That valuation shall form the basis of the calculation of the write down to be applied to the relevant capital instruments in order to absorb losses and the level of conversion to be applied to relevant capital instruments in order to recapitalise the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1).

60. (1) When complying with the requirement laid down in regulation 59, the Resolution Committee shall exercise the write-down or conversion power in accordance with the priority of claims under normal insolvency proceedings, in a way that produces the following results:

Provisions governing the write-down or conversion of capital instruments.

(a) Common Equity Tier 1 items are reduced first in proportion to the losses and to the extent of their capacity and the Resolution Committee takes one or both of the actions specified in regulation 47(1) in respect of holders of Common Equity Tier 1 instruments;

(b) the principal amount of Additional Tier 1 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the

B 3234

resolution objectives set out in regulation 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower;

(c) the principal amount of Tier 2 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in regulation 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower.

(2) Where the principal amount of a relevant capital instrument is written down:

(a) the reduction of that principal amount shall be permanent, subject to any write up in accordance with the reimbursement mechanism in regulation 46(3);

(b) no liability to the holder of the relevant capital instrument shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power;

(c) no compensation is paid to any holder of the relevant capital instruments other than in accordance with sub-regulation (3):

Provided that paragraph (b) shall not prevent the provision of Common Equity Tier 1 instruments to a holder of relevant capital instruments in accordance with sub-regulation (3).

(3) In order to effect a conversion of relevant capital instruments under sub-regulation (1)(b), the Resolution Committee may require institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to issue Common Equity Tier 1 instruments to the holders of the relevant capital instruments. Relevant capital instruments may only be converted where the following conditions are met:

(a) those Common Equity Tier 1 instruments are issued by the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or by a parent undertaking of the institution or the entity, referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) with the agreement:

(i) where the Resolution Committee is responsible for the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), of the Resolution Committee or, where relevant, the European resolution authority responsible for the parent undertaking; or

(ii) where the Resolution Committee is responsible for the parent undertaking, the European resolution authority of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or, where relevant, of the Resolution Committee;

(b) those Common Equity Tier 1 instruments are issued prior to any issuance of shares or other instruments of ownership by that institution or that entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) for the purposes of provision of own funds by the Government of Malta or a government entity;

(c) those Common Equity Tier 1 instruments are awarded and transferred without delay following the exercise of the conversion power;

(d) the conversion rate that determines the number of Common Equity Tier 1 instruments that are provided in respect of each relevant capital instrument complies with the principles set out in regulation 50 and any guidelines developed by the EBA pursuant to Article 50(4) of the BRRD.

(4) For the purposes of the provision of Common Equity Tier 1 instruments in accordance with sub-regulation (3), the Resolution Committee may require institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to maintain at all times the necessary prior authorisation to issue the relevant number of Common Equity Tier 1 instruments.

(5) Where an institution meets the conditions for resolution and the Resolution Committee decides to apply a resolution tool to that institution, the Resolution Committee shall comply with the requirement laid down in regulation 59(3) before applying the resolution tool.

61. (1) Where the relevant capital instruments are recognised for the purposes of meeting the own funds requirements in accordance with Article 92 of the CRR on an individual basis, the

Authorities
responsible for
determination.

B 3236

authority responsible for making the determination referred to in regulation 59(3) shall:

(a) where the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) has been licensed in Malta in accordance with Title III of the CRD, be the appropriate authority; or

(b) where the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) has been authorised in another Member State in accordance with Title III of the CRD, be the overseas appropriate authority of the Member State concerned.

(2) Where relevant capital instruments are issued by an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that is a subsidiary and are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the authority responsible for making the determinations referred to in regulation 59(3) shall be the following:

(a) the authority responsible for making the determinations referred to in regulation 59(3)(b) shall:

(i) where the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that issued those instruments has been established in Malta in accordance with Title III of the CRD, be the appropriate authority; or

(ii) where the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that issued those instruments has been established in another Member State in accordance with Title III of the CRD, be the overseas appropriate authority of the Member State concerned;

(b) the authorities responsible for making the joint determination taking the form of a joint decision referred to in regulation 59(3)(c) shall:

(i) where the Authority is the consolidating supervisor and the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that issued those instruments has been established in another Member State in accordance with

Title III of the CRD, be the appropriate authority and the overseas appropriate authority of the Member State concerned; or

(ii) where the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that issued those instruments has been established in Malta in accordance with Title III of the CRD, be the appropriate authority and the overseas appropriate authority of the Member State of the consolidating supervisor.

62. (1) Before making a determination referred to in regulation 59(3)(b), (c), (d) or (e) in relation to a subsidiary that issues relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual and a consolidated basis, the appropriate authority shall:

Consolidated application: procedure for determination.

(a) when considering whether to make a determination referred to in regulation 59(3)(b), (c), (d) or (e), notify, without delay: where the Authority is the consolidating supervisor, the Authority; or, where the Authority is not the consolidating supervisor, the European regulatory authority acting as the consolidating supervisor and the overseas appropriate authority in the Member State where the consolidating supervisor is located;

(b) when considering whether to make a determination referred to in regulation 59(3)(c), notify, without delay:

(i) where the Authority is responsible for an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that has issued the relevant capital instruments in relation to which the write down or conversion power is to be exercised if that determination were made, the Authority, the European regulatory authorities responsible for the other institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that have issued the relevant capital instruments in relation to which the write down or conversion power is to be exercised if that determination were made, if any, and, if different, the overseas appropriate authorities in the Member States where those European regulatory authorities and the consolidating supervisor are located; or

(ii) where the Authority is not responsible for

B 3238

such institutions or entities, the European regulatory authorities responsible for the institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that have issued the relevant capital instruments in relation to which the write down or conversion power is to be exercised if that determination were made; and, if different, the overseas appropriate authorities in the Member States where those European regulatory authorities and the consolidating supervisor are located.

(2) When making a determination referred to in regulation 59(3)(c), (d) or (e) in the case of an institution or of a group with cross-border activity, the appropriate authority shall take into account the potential impact of the resolution in Malta and in all the Member States where the institution or the group operate.

(3) The appropriate authority shall accompany a notification made pursuant to sub-regulation (1) with an explanation of the reasons why it is considering making the determination in question.

(4) Where a notification has been made pursuant to sub-regulation (1), the appropriate authority, after consulting the authorities notified, shall assess the following matters:

(a) whether an alternative measure to the exercise of the write down or conversion power in accordance with regulation 59(3) is available;

(b) if such an alternative measure is available, whether it can feasibly be applied;

(c) if such an alternative measure could feasibly be applied, whether there is a realistic prospect that it would address, in an adequate time-frame, the circumstances that would otherwise require a determination referred to in regulation 59(3) to be made.

S.L. 371.16

S.L. 370.15

(5) For the purposes of sub-regulation (4), alternative measures shall mean early intervention measures referred to in regulation 27, measures referred to in regulation 9(1) of the Banking Act (Supervisory Review) Regulations, measures referred to in Schedule III of the Investment Services Act (Supervisory Review) Regulations or a transfer of funds or capital from the parent undertaking.

(6) Where, pursuant to sub-regulation (4), the appropriate authority, after consulting the authorities notified in terms of sub-

regulation (1), assesses that one or more alternative measures are available, can feasibly be applied and would deliver the outcome referred to in sub-regulation (4)(c), it shall ensure that those measures are applied.

(7) Where, in a case referred to in sub-regulation (1)(a), and pursuant to sub-regulation (4), the appropriate authority, after consulting the authorities notified in terms of sub-regulation (1), assesses that no alternative measures are available that would deliver the outcome referred to in sub-regulation (4)(c), the appropriate authority shall decide whether the determination referred to in regulation 59(3) under consideration is appropriate.

(8) Where the appropriate authority decides to make a determination under regulation 59(3)(c), it shall immediately notify the overseas appropriate authorities of the Member States in which the affected subsidiaries are located and the determination shall take the form of a joint decision as set out in regulation 92(4) and (5). In the absence of a joint decision, no determination under regulation 59(3)(c) shall be made.

(9) Where an affected subsidiary is located in Malta, the Resolution Committee shall promptly implement a decision to write down or convert capital instruments made in accordance with this regulation, having due regard to the urgency of the circumstances.

63. (1) The Resolution Committee shall have all the powers necessary to apply the resolution tools to institutions and to entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that meet the applicable conditions for resolution. In particular, the Resolution Committee shall have the following resolution powers, which may be exercised individually or in any combination:

General
resolution
powers.

(a) the power to require any person to provide any information required for the Resolution Committee to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;

(b) the power to take control of an institution under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the board of directors of the institution under resolution;

(c) the power to transfer shares or other instruments of

B 3240

ownership issued by an institution under resolution;

(d) the power to transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;

(e) the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of eligible liabilities, of an institution under resolution;

(f) the power to convert eligible liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) are transferred;

(g) the power to cancel debt instruments issued by an institution under resolution except for secured liabilities subject to regulation 44(2);

(h) the power to reduce, including to reduce to zero, the nominal amount of shares or other instruments of ownership of an institution under resolution and to cancel such shares or other instruments of ownership;

(i) the power to require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments;

(j) the power to amend or alter the maturity of debt instruments and other eligible liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other eligible liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities subject to regulation 44(2);

(k) the power to close out and terminate financial contracts or derivatives contracts for the purposes of applying regulation 49;

(l) the power to remove or replace the board of directors and senior management of an institution under

resolution;

(m) the power to require the Authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of the CRD and Article 12 of Directive 2014/65/EU.

(2) When applying the resolution tools and exercising the resolution powers, the Resolution Committee shall not be subject to any of the following requirements that would otherwise apply by virtue of Maltese law or contract or otherwise:

(a) subject to regulation 3(4) and regulation 85(1), requirements to obtain approval or consent from any person either public or private, including the shareholders or creditors of the institution under resolution;

(b) prior to the exercise of the power, procedural requirements to notify any person including any requirement to publish any notice or prospectus or to file or register any document with any other authority:

Provided that the Resolution Committee can exercise the powers under this regulation irrespective of any restriction on, or requirement for consent for, transfer of the financial instruments, rights, assets or liabilities in question that might otherwise apply:

Provided further that paragraph (b) shall be without prejudice to the requirements laid down in regulations 81 and 83 and any notification requirements under the Union State aid framework.

(3) Where any of the powers listed in sub-regulation (1) are not applicable to an entity as a result of its specific legal form, the Resolution Committee shall have powers which are as similar as possible including in terms of their effects.

(4) Where the Resolution Committee exercises its powers pursuant to sub-regulation (3), the safeguards provided for in these regulations, or safeguards that deliver the same effect, shall be applied to the persons affected, including shareholders, creditors and counterparties.

64. (1) When exercising a resolution power, the Resolution Committee shall have the power to:

Ancillary
resolution
powers.

(a) subject to regulation 78, provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred; for

B 3242

that purpose, any right of compensation in accordance with these regulations shall not be considered to be a liability or an encumbrance;

(b) remove rights to acquire further shares or other instruments of ownership;

(c) require the listing authority to discontinue or suspend the admission to trading on a regulated market or the official listing of financial instruments pursuant to Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;

(d) provide for the recipient to be treated as if it were the institution under resolution for the purposes of any rights or obligations of, or actions taken by, the institution under resolution, including, subject to regulations 38 and 40, any rights or obligations relating to participation in a market infrastructure;

(e) require the institution under resolution or the recipient to provide the other with information and assistance; and

(f) cancel or modify the terms of a contract to which the institution under resolution is a party or substitute a recipient as a party.

(2) The Resolution Committee shall exercise the powers specified in sub-regulation (1) where it is considered by the Resolution Committee to be appropriate to help to ensure that a resolution action is effective or to achieve one or more resolution objectives.

(3) When exercising a resolution power, the Resolution Committee shall have the power to provide for continuity arrangements necessary to ensure that the resolution action is effective and, where relevant, the business transferred may be operated by the recipient. Such continuity arrangements shall include, in particular:

(a) the continuity of contracts entered into by the institution under resolution, so that the recipient assumes the rights and liabilities of the institution under resolution relating to any financial instrument, right, asset or liability that has been

transferred and is substituted for the institution under resolution, expressly or implicitly in all relevant contractual documents;

(b) the substitution of the recipient for the institution under resolution in any legal proceedings relating to any financial instrument, right, asset or liability that has been transferred.

(4) The powers in sub-article (1)(d) and sub-article (3)(b) shall not affect the following:

(a) the right of an employee of the institution under resolution to terminate a contract of employment;

(b) subject to regulations 69, 70 and 71, any right of a party to a contract to exercise rights under the contract, including the right to terminate, where entitled to do so in accordance with the terms of the contract by virtue of an act or omission by the institution under resolution prior to the relevant transfer, or by the recipient after the relevant transfer.

65. (1) The Resolution Committee shall have the power to require an institution under resolution, or any of its group entities, to provide any services or facilities that are necessary to enable a recipient to operate effectively the business transferred to it:

Power to require the provision of services and facilities.

Provided that this sub-regulation shall apply even where the institution under resolution or relevant group entity has entered into normal insolvency proceedings.

(2) The Resolution Committee shall have powers to enforce obligations imposed, pursuant to sub-regulation (1), on group entities established in their territory by European resolution authorities in other Member States.

(3) The services and facilities referred to in sub-regulations (1) and (2) are restricted to operational services and facilities and do not include any form of financial support.

(4) The services and facilities provided in accordance with sub-regulations (1) and (2) shall be on the following terms:

(a) where the services and facilities were provided under an agreement to the institution under resolution immediately before the resolution action was taken and for the duration of that agreement, on the same terms;

(b) where there is no agreement or where the agreement

B 3244

has expired, on reasonable terms.

Power to
enforce crisis
management
measures or
crisis prevention
measures by
other Member
States.

66. (1) Where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than in Malta or rights or liabilities under the law of a Member State other than Malta, the transfer shall have effect in or under the law of that other Member State.

(2) Where a European resolution authority has made or intends to make a transfer of shares, other instruments of ownership, or assets, rights or liabilities including assets that are located in Malta or rights or liabilities under the Maltese law, the Resolution Committee shall provide such a European resolution authority with all reasonable assistance to ensure that the shares or other instruments of ownership or assets, rights or liabilities are transferred to the recipient in accordance with any applicable requirements of Maltese law.

(3) Shareholders, creditors and third parties that are affected by the transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in sub-regulation (1) shall not be entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the shares, other instruments of ownership, rights or liabilities.

(4) Where a European resolution authority exercises the write-down or conversion powers, including in relation to capital instruments in accordance with regulation 59, and the eligible liabilities or relevant capital instruments of the institution under resolution include the following:

(a) instruments or liabilities that are governed by the law of Malta;

(b) liabilities owed to creditors located in Malta,

the Resolution Committee shall ensure that the principal amount of those liabilities or instruments is reduced, or liabilities or instruments are converted, in accordance with the exercise of the write-down or conversion powers by the European resolution authority.

(5) Creditors that are affected by the exercise of write-down or conversion powers referred to in sub-regulation (4) shall not be entitled to challenge the reduction of the principal amount of the instrument or liability or its conversion, as the case may be, under any provision of Maltese law.

(6) Where the Resolution Committee exercises the write-down

or conversion powers, the following shall be determined in accordance with Maltese law:

(a) the right for shareholders, creditors and third parties to challenge, by way of appeal pursuant to regulation 85, a transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in sub-regulation (1);

(b) the right for creditors to challenge, by way of appeal pursuant to regulation 85, the reduction of the principal amount, or the conversion, of an instrument or liability covered by sub-regulation (4)(a) or (b);

(c) the safeguards for partial transfers, as referred to in regulations 73 to 80, in relation to assets, rights or liabilities referred to in sub-regulation (1).

67. (1) Where the resolution action involves an action taken in respect of assets located in a third country or shares, other instruments of ownership, rights or liabilities governed by the law of a third country, the Resolution Committee may require that:

Power in respect of assets, rights, liabilities, shares and other instruments of ownership located in third countries.

(a) the administrator, receiver or other person exercising control of the institution under resolution and the recipient take all necessary steps to ensure that the transfer, write down, conversion or action becomes effective;

(b) the administrator, receiver or other person exercising control of the institution under resolution hold the shares, other instruments of ownership, assets or rights or discharge the liabilities on behalf of the recipient until the transfer, write down, conversion or action becomes effective;

(c) the reasonable expenses of the recipient properly incurred in carrying out any action required under paragraphs (a) and (b) are met in any of the ways referred to in regulation 37(7).

(2) Where the Resolution Committee assesses that, in spite of all the necessary steps taken by the administrator, receiver or other person in accordance with sub-regulation (1)(a), it is highly unlikely that the transfer, conversion or action will become effective in relation to certain assets located in a third country or certain shares, other instruments of ownership, rights or liabilities under the law of a third country, the Resolution Committee shall not proceed with the transfer, write down, conversion or action. If it has already ordered the transfer, write down, conversion or action, that order shall be void in relation to the assets, shares, instruments of ownership, rights or

B 3246

liabilities concerned.

Exclusion of certain contractual terms in early intervention and resolution.

68. (1) A crisis prevention measure or a crisis management measure taken in relation to an entity in accordance with these regulations, including the occurrence of any event directly linked to the application of such a measure, shall not, in itself, under a contract entered into by the entity, be deemed to be an enforcement event within the meaning of Directive 2002/47/EC or as insolvency proceedings within the meaning of Directive 98/26/EC provided that:

(a) the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed;

(b) the contract is entered into by:

(i) a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent undertaking or by any group entity; or

(ii) any entity of a group which includes cross-default provisions.

(2) Where third country resolution proceedings are recognised pursuant to regulation 94, or otherwise where the Resolution Committee so decides, such proceedings shall for the purposes of this regulation constitute a crisis management measure.

(3) Where the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed, a crisis prevention measure or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, in itself, make it possible for anyone to:

(a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by:

(i) a subsidiary, the obligations under which are guaranteed or otherwise supported by a group entity;

(ii) any group entity which includes cross-default provisions;

(b) obtain possession, exercise control or enforce any security over any property of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity"

in regulation 2(1) concerned or any group entity in relation to a contract which includes cross-default provisions;

(c) affect any contractual rights of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) concerned or any group entity in relation to a contract which includes cross-default provisions.

(4) This regulation shall not affect the right of a person to take an action referred to in sub-regulation (3) where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the application of such a measure.

(5) A suspension or restriction under regulations 69, 70 or 71 shall not constitute non-performance of a contractual obligation for the purposes of sub-regulations (1) and (2).

(6) The provisions contained in this regulation shall be considered to be overriding mandatory provisions within the meaning of Article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

69. (1) The Resolution Committee may suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with regulation 83(4) until midnight at the end of the business day following that publication.

Power to
suspend certain
obligations.

(2) When a payment or delivery obligation would have been due during the suspension period, the payment or delivery obligation shall be due immediately upon expiry of the suspension period.

(3) If the payment or delivery obligations under a contract of an institution under resolution are suspended under sub-regulation (1), the payment or delivery obligations of the counterparties of the institution under resolution under that contract shall be suspended for the same period of time.

(4) Any suspension under sub-regulation (1) shall not apply to:

(a) eligible deposits;

(b) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, and central banks;

B 3248

(c) eligible claims for the purpose of Directive 97/9/EC.

(5) When exercising a power under this regulation, the Resolution Committee shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.

Power to restrict the enforcement of security interests.

70. (1) The Resolution Committee may restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution from the publication of a notice of the restriction in accordance with regulation 83(4) until midnight at the end of the business day following that publication.

(2) The Resolution Committee shall not exercise the power referred to in sub-regulation (1) in relation to any security interest of systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, and central banks over assets pledged or provided by way of margin or collateral by the institution under resolution.

(3) Where regulation 80 applies, the Resolution Committee, together with the European resolution authorities concerned, shall ensure that any restrictions imposed pursuant to the power referred to in sub-regulation (1) are consistent for all group entities in relation to which a resolution action is taken.

(4) When exercising a power under this regulation, the Resolution Committee shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.

Power to temporarily suspend termination rights.

71. (1) The Resolution Committee may suspend the termination rights of any party to a contract with an institution under resolution from the publication of the notice pursuant to regulation 83(4) until midnight at the end of the business day following that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

(2) The Resolution Committee may suspend the termination rights of any party to a contract with a subsidiary of an institution under resolution where:

(a) the obligations under that contract are guaranteed or are otherwise supported by the institution under resolution;

(b) the termination rights under that contract are based solely on the insolvency or financial condition of the institution

under resolution; and

(c) in the case of a transfer power that has been or may be exercised in relation to the institution under resolution, either:

(i) all the assets and liabilities of the subsidiary relating to that contract have been or may be transferred to and assumed by the recipient; or

(ii) the Resolution Committee provides in any other way adequate protection for such obligations:

Provided that the suspension shall take effect from the publication of the notice pursuant to regulation 83(4) until midnight in the Member State where the subsidiary of the institution under resolution is established on the business day following that publication.

(3) Any suspension under sub-regulation (1) and (2) shall not apply to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, or central banks.

(4) A person may exercise a termination right under a contract before the end of the period referred to in sub-regulations (1) and (2) if that person receives notice from the Resolution Committee that the rights and liabilities covered by the contract shall not be:

(a) transferred to another entity; or

(b) subject to write down or conversion on the application of the bail-in tool in accordance with regulation 43(2)(a).

(5) Where the Resolution Committee exercises the power specified in sub-regulations (1) and (2) to suspend termination rights, and where no notice has been given pursuant to sub-regulation (4), those rights may be exercised on the expiry of the period of suspension, subject to regulation 68, as follows:

(a) if the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only on the occurrence of any continuing or subsequent enforcement event by the recipient entity;

(b) if the rights and liabilities covered by the contract remain with the institution under resolution and the Resolution

B 3250

Committee has not applied the bail-in tool in accordance with regulation 43(2)(a) to that contract, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of a suspension under sub-regulation (1).

(6) When exercising a power under this regulation, the Resolution Committee shall have regard to the impact the exercise of that power might have on the orderly functioning of the financial markets.

(7) The Authority or the Resolution Committee may require an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to maintain detailed records of financial contracts.

(8) Upon the request of the Authority or the Resolution Committee, a trade repository shall make the necessary information available to the Authority and the Resolution Committee to enable them to fulfil their respective responsibilities and mandates in accordance with Article 81 of Regulation (EU) No 648/2012.

Exercise of the
resolution
powers.

72. (1) In order to take a resolution action, the Resolution Committee may exercise control over the institution under resolution, so as to:

(a) operate and conduct the activities and services of the institution under resolution with all the powers of its shareholders and board of directors; and

(b) manage and dispose of the assets and property of the institution under resolution:

Provided that the control referred to in this sub-regulation may be exercised directly by the Resolution Committee or indirectly by a person or persons appointed by the Resolution Committee. Voting rights conferred by shares or other instruments of ownership of the institution under resolution cannot be exercised during the period of resolution.

(2) Subject to regulation 85(1), the Resolution Committee may take a resolution action through executive order in accordance with national administrative competences and procedures, without exercising control over the institution under resolution.

(3) The Resolution Committee shall decide in each particular case whether it is appropriate to carry out the resolution action through the means specified in sub-regulations (1) or (2), having regard to the resolution objectives and the general principles

governing resolution, the specific circumstances of the institution under resolution in question and the need to facilitate the effective resolution of cross-border groups.

(4) The Resolution Committee shall not be deemed to be a shadow director or a de facto director.

73. The Resolution Committee shall ensure that, where one or more resolution tools have been applied and, in particular for the purposes of regulation 75:

Treatment of shareholders and creditors in the case of partial transfers and application of the bail-in tool.

(a) except where paragraph (b) applies, where the Resolution Committee transfers only parts of the rights, assets and liabilities of the institution under resolution, the shareholders and those creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in regulation 82 was taken;

(b) where the Resolution Committee applies the bail-in tool, the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings immediately at the time when the decision referred to in regulation 82 was taken.

74. (1) For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to, for the purpose of regulation 73, a valuation shall be carried out by an independent person as soon as possible after the resolution action or actions have been effected. That valuation shall be distinct from the valuation carried out under regulation 36.

Valuation of difference in treatment.

(2) The valuation in sub-regulation (1) shall determine:

(a) the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if the institution under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in regulation 82 was taken;

(b) the actual treatment that shareholders and creditors

B 3252

have received, in the resolution of the institution under resolution; and

(c) if there is any difference between the treatment referred to in paragraph (a) and the treatment referred to in paragraph (b).

(3) The valuation shall:

(a) assume that the institution under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision referred to in regulation 82 was taken;

(b) assume that the resolution action or actions had not been effected;

(c) disregard any provision of extraordinary public financial support to the institution under resolution.

Safeguard for
shareholders
and creditors.

75. If the valuation carried out under regulation 74 determines that any shareholder or creditor referred to in regulation 73, or the deposit guarantee scheme in accordance with regulations 109(1) and (2), has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, the shareholder or creditor or the deposit guarantee scheme shall be entitled to the payment of the difference from the resolution financing arrangements.

Safeguard for
counterparties in
partial transfers.

76. (1) Where the Resolution Committee transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity or, in the exercise of a resolution tool, from a bridge institution or asset management vehicle to another person, and where the Resolution Committee or the European resolution authority exercises the powers specified in regulation 64(1)(f), the provisions of this regulation shall apply.

(2) The following arrangements and the counterparties to the following arrangements shall be appropriately protected in the circumstances set out in sub-regulation (1):

(a) security arrangements, under which a person has by way of security an actual or contingent interest in the assets or rights that are subject to transfer, irrespective of whether that interest is secured by specific assets or rights or by way of a general hypothec, floating charge or similar arrangement;

(b) title transfer financial collateral arrangements under which collateral to secure or cover the performance of specified obligations is provided by a transfer of full ownership of assets from the collateral provider to the collateral taker, on terms providing for the collateral taker to transfer assets if those specified obligations are performed;

(c) set-off arrangements under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other;

(d) netting arrangements;

(e) covered bonds;

(f) structured finance arrangements, including securitisations and instruments used for hedging purposes which form an integral part of the cover pool and which according to Maltese law are secured in a way similar to the covered bonds, which involve the granting and holding of security by a party to the arrangement or a trustee, agent or nominee;

Provided that the form of protection that is appropriate, for the classes of arrangements specified in paragraphs (a) to (f) is further specified in regulations 77 to 80, and shall be subject to the restrictions specified in regulations 68 to 71.

(3) The requirement under sub-regulation (2) applies irrespective of the number of parties involved in the arrangements and of whether the arrangements:

(a) are created by contract, trusts or other means, or arise automatically by operation of law;

(b) arise under or are governed in whole or in part by the law of another Member State or of a third country.

77. (1) Title transfer financial collateral arrangements and set-off and netting arrangements shall be appropriately protected so as to prevent the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution under resolution and another person and the modification or termination of rights and liabilities that are protected under such a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement through the use of ancillary powers:

Protection for financial collateral, set off and netting agreements.

B 3254

Provided that such rights and liabilities shall be treated as protected under such an arrangement if the parties to the arrangement are entitled to set-off or net those rights and liabilities.

(2) Notwithstanding sub-regulation (1), where necessary in order to ensure the availability of the covered deposits, the Resolution Committee may:

(a) transfer covered deposits which are part of any of the arrangements mentioned in sub-regulation (1) without transferring other assets, rights or liabilities that are part of the same arrangement; and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

Protection for
security
arrangements.

78. (1) Liabilities secured under a security arrangement shall be appropriately protected so as to prevent one of the following:

(a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;

(b) the transfer of a secured liability unless the benefit of the security are also transferred;

(c) the transfer of the benefit of the security unless the secured liability is also transferred; or

(d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

(2) Notwithstanding sub-regulation (1), where necessary in order to ensure availability of the covered deposits, the Resolution Committee may:

(a) transfer covered deposits which are part of any of the arrangements mentioned in sub-regulation (1) without transferring other assets, rights or liabilities that are part of the same arrangement; and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

79. (1) Structured finance arrangements including arrangements referred to in regulation 76(2)(e) and (f) shall be appropriately protected so as to prevent either of the following:

Protection for structured finance arrangements and covered bonds.

(a) the transfer of some, but not all, of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in regulation 76(2)(e) and (f), to which the institution under resolution is a party;

(b) the termination or modification through the use of ancillary powers of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in regulation 76(2)(e) and (f), to which the institution under resolution is a party.

(2) Notwithstanding sub-regulation (1), where necessary in order to ensure availability of the covered deposits, the Resolution Committee may:

(a) transfer covered deposits which are part of any of the arrangements mentioned in sub-regulation (1) without transferring other assets, rights or liabilities that are part of the same arrangement, and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

80. (1) The application of a resolution tool shall not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where the Resolution Committee:

Partial transfers: protection of trading, clearing and settlement systems.

(a) transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity; or

(b) uses powers under regulation 64 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party.

(2) In particular, a transfer, cancellation or amendment as referred to in sub-regulation (1) shall not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and shall not modify or negate the enforceability of transfer orders and netting as required by Articles 3 and 5 of that Directive, the use of funds, securities or credit facilities as required by Article 4 thereof or protection of collateral security as required by Article 9 thereof.

81. (1) The board of directors of an institution or any entity

Notification requirements.

B 3256

referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) shall be required to notify the Authority where they consider that the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is failing or likely to fail, within the meaning specified in regulation 32(4).

(2) The Authority shall inform the Resolution Committee and any relevant European resolution authorities of any notifications received under sub-regulation (1), and of any crisis prevention measures, or any actions referred to in regulation 9 of the Banking Act (Supervisory Review) Regulations and Schedule III of the Investment Services Act (Supervisory Review) Regulations, they require an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to take.

S.L. 371.16

S.L. 370.15

(3) Where the Authority or Resolution Committee determines that the conditions referred to in regulation 32(1)(a) and (b) are met in relation to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), it shall communicate that determination without delay to the following authorities:

(a) where different, the Resolution Committee for that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(b) where different, the Authority for that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(c) the European regulatory authority of any branch of that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(d) the European resolution authority of any branch of that institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(e) the Central Bank;

(f) the deposit guarantee scheme to which a credit institution is affiliated where necessary to enable the functions of the deposit guarantee scheme to be discharged;

(g) where different, the body in charge of the resolution financing arrangements where necessary to enable the functions of the resolution financing arrangements to be discharged;

(h) where applicable, the European resolution authority acting as the group-level resolution authority;

(i) the Ministry responsible for Finance;

(j) where the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is subject to supervision on consolidated basis under Chapter 3 of Title VII of the CRD, the European regulatory authority acting as the consolidating supervisor; and

(k) the ESRB and the Central Bank.

(4) Where the transmission of information referred to in sub-regulation (3)(f) and (g) does not guarantee the appropriate level of confidentiality, the Authority or the Resolution Committee shall establish alternative communication procedures that achieve the same objectives while ensuring the appropriate level of confidentiality.

82. (1) On receiving a communication from the Authority pursuant to regulation 81(3), or on its own initiative, the Resolution Committee shall determine, in accordance with regulations 32(1) and 33, whether the conditions of regulation 81(3) are met in respect of the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in question.

Decision of the resolution authority.

(2) A decision whether or not to take resolution action in relation to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) shall contain the following information:

(a) the reasons for that decision, including the determination that the institution meets or does not meet the conditions for resolution;

(b) the action that the Resolution Committee intends to take including, where appropriate, the determination to apply for winding up, the appointment of an administrator or any other measure under applicable normal insolvency proceedings or, subject to regulation 37(9), under Maltese law.

83. (1) As soon as reasonably practicable, after taking a resolution action, the Resolution Committee shall comply with the requirements laid down in sub-regulations (2), (3) and (4).

Procedural obligations of resolution authorities.

(2) The Resolution Committee shall notify the institution under resolution and the following authorities:

B 3258

- (a) the Authority;
- (b) the European regulatory authority of any branch of the institution under resolution;
- (c) the Central Bank;
- (d) the deposit guarantee scheme to which the credit institution under resolution is affiliated;
- (e) where different, the body in charge of the resolution financing arrangements;
- (f) where applicable, the European resolution authority acting as the group-level resolution authority;
- (g) the Ministry responsible for Finance;
- (h) where the institution under resolution is subject to supervision on a consolidated basis under Chapter 3 of Title VII of the CRD, the European regulatory authority acting as the consolidating supervisor;
- (i) the Central Bank and the ESRB;
- (j) the European Commission, the European Central Bank, the European Securities and Markets Authority established by Regulation (EU) No 1095/2010, the European Investment and Occupational Pensions Authority established by Regulation (EU) No 1094/2010 and the EBA;
- (k) where the institution under resolution is an institution as defined in Article 2(b) of Directive 98/26/EC, the operators of the systems in which it participates.

(3) The notification referred to in sub-regulation (2) shall include a copy of any order or instrument by which the relevant powers are exercised and indicate the date from which the resolution action or actions are effective.

(4) The Authority shall publish or ensure the publication of a copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action, and in particular the effects on retail customers and, if applicable, the terms and period of suspension or restriction referred to in regulations 69, 70 and 71, by the following means:

- (a) on the official website of the Authority, and on the

website of the EBA;

(b) on the website of the institution under resolution;

(c) where the shares, other instruments of ownership or debt instruments of the institution under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning the institution under resolution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

(5) If the shares, instruments of ownership or debt instruments are not admitted to trading on a regulated market, the Resolution Committee shall ensure that the documents providing proof of the instruments referred to in sub-regulation (4) are sent to the shareholders and creditors of the institution under resolution that are known through the registers or databases of the institution under resolution which are available to the Resolution Committee.

84. (1) The requirements of professional secrecy shall be binding in respect of the following persons: Confidentiality.

(a) the Resolution Committee;

(b) the Resolution Authority;

(c) the Authority;

(d) the Ministry responsible for Finance;

(e) special managers or temporary administrators appointed under these regulations;

(f) potential acquirers that are contacted by the Authority or solicited by the Resolution Committee, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;

(g) auditors, accountants, legal and professional advisors, valuers and other experts directly or indirectly engaged by the Resolution Committee, Authority, the Ministry responsible for Finance or by the potential acquirers referred to in paragraph (e);

B 3260

(h) the management committee administering the depositor compensation scheme;

(i) the management committee administering the investor compensation scheme;

(j) the body in charge of the resolution financing arrangements;

(k) the Central Bank and other authorities or bodies that may be involved in the resolution process;

(l) a bridge institution or an asset management vehicle;

(m) any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in paragraphs (a) to (k);

(n) senior management, directors, and employees of the bodies or entities referred to in paragraphs (a) to (k) before, during and after their appointment.

(2) With a view to ensuring that the confidentiality requirements laid down in sub-regulations (1) and (3) are complied with, the persons in sub-regulation (1)(a), (b), (c), (g), (h), (j) and (k) shall ensure that there are internal rules in place, including rules to secure secrecy of information between persons directly involved in the resolution process.

(3) Without prejudice to the generality of the requirements under sub-regulation (1), the persons referred to in sub-regulation (1) shall be prohibited from disclosing confidential information received during the course of their professional activities or from the Authority or the Resolution Committee in connection with its functions under these regulations, to any person or authority unless it is in the exercise of their functions under these regulations or in summary or collective form such that individual institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) cannot be identified or with the express and prior consent of the authority or the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) which provided the information:

Provided that no confidential information shall be disclosed by the persons referred to in sub-regulation (1) and the possible effects of disclosing information on the public interest as regards financial, monetary or economic policy, on the commercial

interests of natural and legal persons, on the purpose of inspections, on investigations and on audits, shall be assessed:

Provided further that the procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of the recovery and resolution plan as referred to in regulations 5, 7, 10, 11 and 12 and the result of any assessment carried out under regulations 6, 8 and 15.

(4) Any person or entity referred to in sub-regulation (1) shall be subject to civil liability in the event of an infringement of this regulation, in accordance with Maltese law.

(5) This regulation shall not prevent:

(a) employees and experts of the bodies or entities referred to in sub-regulation (1)(a) to (j) from sharing information among themselves within each body or entity; or

(b) the Resolution Committee and the Authority, including their employees and experts, from sharing information with each other and with European resolution authorities in the other Member States, European regulatory authorities, the Ministry responsible for Finance, competent ministries in the other Member States, the Central Bank, central banks in the other Member States, deposit guarantee schemes, investor compensation schemes, authorities responsible for normal insolvency proceedings in the other Member States, authorities responsible for maintaining the stability of the financial system in the other Member States through the use of macroprudential rules, persons charged with carrying out statutory audits of accounts, the EBA, or, subject to regulation 98, third-country authorities that carry out equivalent functions to the Resolution Committee, or, subject to strict confidentiality requirements, to a potential acquirer for the purposes of planning or carrying out a resolution action.

(6) Notwithstanding any other provision of this regulation, the exchange of information with any of the following may be authorised:

(a) subject to strict confidentiality requirements, any other person where necessary for the purposes of planning or carrying out a resolution action;

(b) parliamentary enquiry committees, courts of auditors and other entities in charge of enquiries in Malta, under

B 3262

appropriate conditions;

- (c) the Authority;
- (d) the Central Bank; and
- (e) the Ministry responsible for Finance.

(7) This regulation shall be without prejudice to Maltese law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.

Right to
challenge
decisions.

85. Any decision taken by the Resolution Committee and, or the Authority, as the case may be, shall be subject to an appeal by any person aggrieved by that decision as provided for in the Act.

Restrictions on
other
proceedings.

86. (1) Without prejudice to regulation 82(2)(b), with respect to an institution under resolution or an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in relation to which the conditions for resolution have been determined to be met, normal insolvency proceedings shall not be commenced except at the initiative of the Resolution Committee and a decision placing an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) into normal insolvency proceedings shall be taken only with the consent of the Resolution Committee.

(2) For the purposes of sub-regulation (1):

(a) the Authority and the Resolution Committee shall be notified without delay of any application for the opening of normal insolvency proceedings in relation to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), irrespective of whether the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is under resolution or a decision has been made public in accordance with regulation 83(4) and (5);

(b) the application shall not be determined unless the notifications referred to in paragraph (a) have been made and either of the following occurs:

- (i) the Resolution Committee has notified the authorities responsible for normal insolvency proceedings that it does not intend to take any resolution action in relation to the institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in

regulation 2(1);

(ii) a period of seven days beginning with the date on which the notifications referred to in paragraph (a) were made has expired.

(3) Without prejudice to any restriction on the enforcement of security interests imposed pursuant to regulation 70, if necessary for the effective application of the resolution tools and powers, the Resolution Committee may request the First Hall of the Civil Court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party:

Provided that a decision granting the stay of proceedings shall be final and shall not be subject to an appeal.

87. When making decisions or taking action pursuant to these regulations, which may have an impact in one or more other Member States, the Authority and the Resolution Committee shall have regard to the following general principles:

General principles regarding decision-making involving more than one Member State.

(a) the imperatives of efficacy of decision-making and of keeping resolution costs as low as possible when taking resolution action;

(b) that decisions are made and action is taken in a timely manner and with due urgency when required;

(c) that the Resolution Committee, the Authority and other relevant authorities cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner;

(d) that the roles and responsibilities of the relevant authorities are defined clearly;

(e) that due consideration is given to the interests of the Member States where the Union parent undertakings are established, in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of those Member States;

(f) that due consideration is given to the interests of each individual Member State where a subsidiary is established, in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, resolution fund, deposit

B 3264

guarantee scheme or investor compensation scheme of those Member States;

(g) that due consideration is given to the interests of each Member State where significant branches are located, in particular the impact of any decision or action or inaction on the financial stability of those Member States;

(h) that due consideration is given to the objectives of balancing the interests of the various Member States involved and of avoiding unfairly prejudicing or unfairly protecting the interests of particular Member States, including avoiding unfair burden allocation across Member States;

(i) that any obligation under these regulations to consult an authority before any decision or action is taken implies at least an obligation to consult that authority on those elements of the proposed decision or action which have or which are likely to have:

(i) an effect on the Union parent undertaking, the subsidiary or the branch; and

(ii) an impact on the stability of the Member State where the Union parent undertaking, the subsidiary or the branch, is established or located;

(j) that the Resolution Committee, when taking resolution actions, takes into account and follows the resolution plans referred to in regulation 13 unless the Resolution Committee considers, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans;

(k) the requirement for transparency whenever a proposed decision or action is likely to have implications on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of any relevant Member State; and

(l) recognition that coordination and cooperation are most likely to achieve a result which lowers the overall cost of resolution.

Resolution colleges.

88. (1) Where the Resolution Committee is the group-level resolution authority, the Resolution Committee shall establish resolution colleges to carry out the tasks referred to in regulations 12,

13, 16, 18, 45, 91 and 92, and, where appropriate, to ensure cooperation and coordination with third-country resolution authorities. In particular, resolution colleges shall provide a framework for the Resolution Committee in its capacity as the group-level resolution authority, the other European resolution authorities and, where appropriate, the Authority, the other European regulatory authorities concerned and the consolidating supervisor to perform the following tasks:

- (a) exchanging information relevant for the development of group resolution plans, for the application to groups of preparatory and preventative powers and for group resolution;
- (b) developing group resolution plans pursuant to regulations 12 and 13;
- (c) assessing the resolvability of groups pursuant to regulation 16;
- (d) exercising powers to address or remove impediments to the resolvability of groups pursuant to regulation 18;
- (e) deciding on the need to establish a group resolution scheme as referred to in regulation 91 or 92;
- (f) reaching the agreement on a group resolution scheme proposed in accordance with regulation 91 or 92;
- (g) coordinating public communication of group resolution strategies and schemes;
- (h) coordinating the use of financing arrangements established under Title VII of the BRRD;
- (i) setting the minimum requirements for groups at consolidated and subsidiary level under regulation 45;

Provided that resolution colleges may be used as a forum to discuss any issues relating to cross-border group resolution.

(2) The following shall be members of the resolution college:

- (a) the Resolution Committee in its capacity as the group-level resolution authority;
- (b) the European resolution authorities of each Member

B 3266

State in which a subsidiary covered by consolidated supervision is established;

(c) the European resolution authorities where a parent undertaking of one or more institutions of the group, that is an entity referred to in paragraph (d) of the definition "entity" in regulation 2(1), are established;

(d) the European resolution authorities in which significant branches are located;

(e) the consolidating supervisor, the Authority and the European regulatory authorities of the Member States where the European resolution authority is a member of the resolution college:

Provided that the Authority may decide to be accompanied by a representative from the Central Bank:

Provided further that where a European regulatory authority is not the Member State's central bank, such a European regulatory authority may decide to be accompanied by a representative from the Member State's central bank;

(f) the Ministry responsible for Finance and, where the European resolution authorities which are members of the resolution college are not the competent ministries, the competent ministries;

(g) the authority that is responsible for the deposit guarantee scheme, where the Resolution Committee is a member of a resolution college;

(h) the EBA:

Provided that the EBA shall be invited to attend the meetings of the resolution college in order to contribute to the promotion and the monitoring of the efficient, effective and consistent functioning of the resolution college:

Provided further that to the extent that any voting takes place within the framework of the resolution college, the EBA shall not have any voting rights.

(3) The third-country resolution authorities where a parent undertaking or an institution established in the European Union has a subsidiary institution or a branch that would be considered to be significant were it located in the European Union may, at their

request, be invited to participate in the resolution college as observers, provided that they are subject to confidentiality requirements equivalent, in the opinion of the Resolution Committee in its capacity as group-level resolution authority, to those established by regulation 98.

(4) The Resolution Committee in its capacity as the group-level resolution authority shall be the chair of the resolution college. In that capacity it shall:

(a) establish written arrangements and procedures for the functioning of the resolution college, after consulting the other members of the resolution college;

(b) coordinate all activities of the resolution college;

(c) convene and chair all its meetings and keep all members of the resolution college fully informed in advance of the organisation of meetings of the resolution college, of the main issues to be discussed and of the items to be considered;

(d) notify the members of the resolution college of any planned meetings so that they can request to participate;

(e) decide which members and observers shall be invited to attend particular meetings of the resolution college, on the basis of specific needs, taking into account the relevance of the issue to be discussed for those members and observers, in particular the potential impact on financial stability in the Member States concerned;

(f) keep all of the members of the college informed, in a timely manner, of the decisions and outcomes of those meetings.

(5) The members participating in the resolution college shall cooperate closely.

(6) The Resolution Committee in its capacity as the group-level resolution authority is not obliged to establish a resolution college if other groups or colleges perform the same functions and carry out the same tasks specified in this regulation and comply with all the conditions and procedures, including those covering membership and participation in resolution colleges, established in this regulation and in regulation 90. In such a case, all references to resolution colleges in these regulations shall also be understood as references to those other groups or colleges.

B 3268

(7) Where the Resolution Committee is not a group-level resolution authority and a European resolution authority acting as a group-level resolution authority establishes a resolution college in accordance with Article 88 of the BRRD, notwithstanding paragraph (e) of Article 88(5) of the BRRD, the Resolution Committee shall be entitled to participate in the meetings of such a resolution college whenever matters subject to joint decision-making or relating to a group entity located in Malta are on the agenda.

European
resolution
colleges.

89. (1) Where a third country institution or third country parent undertaking has Union subsidiaries established in Malta and at least another Member State, or two or more Union branches that are regarded as significant by Malta and at least another Member State, the Resolution Committee together with the European resolution authority of the Member States where those Union subsidiaries are established or where those significant branches are located shall establish a European resolution college.

(2) The European resolution college shall perform the functions and carry out the tasks specified in regulation 88 with respect to the subsidiary institutions and, in so far as those tasks are relevant, to branches.

S.L. 371.15

(3) Where the Union subsidiaries are held by, or the significant branches are of, a financial holding company established within the European Union in accordance with regulation 13(5) of the Supervisory Consolidation Regulations, where the Authority is the consolidating supervisor, the European resolution college shall be chaired by the Resolution Committee:

Provided that where the Union subsidiaries are held by, or the significant branches are of, a financial holding company which is not established within the European Union in accordance with the third sub-paragraph of Article 127(3) of the CRD, the members of the European resolution college shall nominate and agree the chair.

(4) Malta together with the other relevant Member States may, by mutual agreement of all the relevant parties, waive the requirement to establish a European resolution college if other groups or colleges, including a resolution college established under Article 88 of the BRRD, perform the same functions and carry out the same tasks specified in this regulation and comply with all the conditions and procedures, including those covering membership and participation in European resolution colleges, established in Article 89 and Article 90 of the BRRD. In such a case, all references to European resolution colleges in these regulations shall also be understood as references to those other groups or colleges.

(5) Subject to sub-regulations (3) and (4), the European resolution college shall otherwise function in accordance with regulation 88.

90. (1) Subject to regulation 84, the Resolution Committee and the Authority shall provide one another, on request, with all the information relevant for the exercise of the other authorities' tasks under these regulations. Information exchange.

(2) Where the Resolution Committee is the group-level resolution authority, it shall coordinate the flow of all relevant information between the Resolution Committee and the relevant European resolution authorities. In particular, the Resolution Committee shall provide the European resolution authorities with all the relevant information in a timely manner with a view to facilitating the exercise of the tasks referred to in regulation 88(1)(b) to (i).

(3) Upon a request for information which has been provided by a third-country resolution authority, the Resolution Committee shall seek the consent of the third-country resolution authority for the onward transmission of that information, save where the third-country resolution authority has already consented to the onward transmission of that information:

Provided that the Resolution Committee shall not be obliged to transmit information provided from a third-country resolution authority if the third-country resolution authority has not consented to its onward transmission.

(4) The Resolution Committee shall share information with the Ministry responsible for Finance when it relates to a decision or matter which requires notification, consultation or consent of the Ministry responsible for Finance or which may have implications for public funds.

91. (1) Where the Resolution Committee decides that an institution or any entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) that is a subsidiary in a group meets the conditions referred to in regulations 32 or 33, the Resolution Committee shall notify the following information without delay to the group-level resolution authority, if different, to the consolidating supervisor, and to the members of the resolution college for the group in question: Group resolution involving a subsidiary of the group.

(a) the decision that the institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) meets the conditions referred to in regulations 32 or 33;

B 3270

(b) the resolution actions or insolvency measures that the Resolution Committee considers to be appropriate for that institution or that entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1).

(2) Where the Resolution Committee, in its capacity as the group-level resolution authority, receives a notification in accordance with Article 91(1) of the BRRD, after consulting the other members of the relevant resolution college, it shall assess the likely impact of the resolution actions or other measures notified in accordance with paragraph (b) of Article 91(1) of the BRRD, on the group and on group entities in other Member States, and, in particular, whether the resolution actions or other measures would make it likely that the conditions for resolution would be satisfied in relation to a group entity in another Member State.

(3) If the Resolution Committee, in its capacity as the group-level resolution authority, after consulting the other members of the resolution college, assesses that the resolution actions or other measures notified in accordance with paragraph (b) of Article 91(1) of the BRRD, would not make it likely that the conditions laid down in regulations 32 or 33 would be satisfied in relation to a group entity in another Member State, the European resolution authority responsible for that institution or that entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1), may take the resolution actions or other measures that it notified in accordance with paragraph (b) of Article 91(1) of the BRRD.

(4) If the Resolution Committee, in its capacity as the group-level resolution authority, after consulting the other members of the resolution college, assesses that the resolution actions or other measures notified in accordance with paragraph (b) of Article 91(1) of the BRRD, would make it likely that the conditions laid down in regulations 32 or 33 would be satisfied in relation to a group entity in another Member State, the Resolution Committee in its capacity as the group-level resolution authority shall, no later than 24 hours after receiving the notification under Article 91(1) of the BRRD, propose a group resolution scheme and submit it to the resolution college:

Provided that the 24-hour period may be extended with the consent of the European resolution authority which made the notification referred to in Article 91(1) of the BRRD:

Provided further that in the absence of an assessment by the Resolution Committee in its capacity as the group-level resolution authority within 24 hours, or a longer period that has been agreed, after receiving the notification under Article 91(1) of the BRRD, the

European resolution authority which made the notification referred to in Article 91(1) of the BRRD may take the resolution actions or other measures that it notified in accordance with paragraph (b) of Article 91(1) of the BRRD.

(5) Where the Resolution Committee makes a notification in accordance with sub-regulation (1), if the European resolution authority acting as the group-level resolution authority, after consulting the other members of the resolution college, assesses that the resolution actions or other measures notified in accordance with sub-regulation (1)(b), would not make it likely that the conditions laid down in regulation 32 or 33 would be satisfied in relation to a group entity in another Member State, the Resolution Committee may take the resolution actions or other measures that it notified in accordance with sub-regulation (1)(b):

Provided that in the absence of an assessment by the European resolution authority acting as the group-level resolution authority within twenty-four hours, or a longer period that has been agreed in accordance with Article 91(4) of the BRRD, after receiving the notification under sub-regulation (1), the Resolution Committee may take the resolution actions or other measures that it notified in accordance with sub-regulation (1)(b).

(6) A group resolution scheme required under sub-regulation (4) shall:

(a) take into account and follow the resolution plans as referred to in regulation 13 unless the Resolution Committee and the relevant European resolution authorities assess, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans;

(b) outline the resolution actions that should be taken by the Resolution Committee and the relevant European resolution authorities in relation to the Union parent undertaking or particular group entities with the aim of meeting the resolution objectives and principles referred to in regulations 31 and 34;

(c) specify how those resolution actions should be coordinated;

(d) establish a financing plan which takes into account the group resolution plan, principles for sharing responsibility as established in accordance with regulation 12(3)(f) and the mutualisation as referred to in regulation 107.

B 3272

(7) Subject to sub-regulation (8), the group resolution scheme shall, where the Resolution Committee is the group-level resolution authority, take the form of a joint decision of the Resolution Committee and the European resolution authorities responsible for the subsidiaries that are covered by the group resolution scheme, and where the Resolution Committee is responsible for a subsidiary that is covered by the group resolution scheme, take the form of a joint decision of the Resolution Committee, the European resolution authority acting as the group-level resolution authority and the relevant European resolution authorities responsible for other subsidiaries that are covered by the group resolution scheme, if any:

Provided that the Resolution Committee may request the EBA to assist the authorities mentioned in this sub-regulation in reaching a joint decision in accordance with Article 31(c) of Regulation (EU No 1093/2010).

(8) If the Resolution Committee disagrees with or departs from the group resolution scheme proposed by the group-level resolution authority or considers that it needs to take independent resolution actions or measures other than those proposed in the scheme in relation to an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) for reasons of financial stability, it shall set out in detail the reasons for the disagreement or the reasons to depart from the group resolution scheme, notify the group-level resolution authority and the other European resolution authorities that are covered by the group resolution scheme of the reasons and inform them about the actions or measures it will take. When setting out the reasons for its disagreement, the Resolution Committee shall take into consideration the resolution plans as referred to in regulation 13, the potential impact on financial stability in the Member States concerned as well as the potential effect of the actions or measures on other parts of the group.

(9) If the Resolution Committee does not disagree in accordance with sub-regulation (8), it may, together with any relevant European resolution authorities which do not disagree in accordance with Article 91(8) of the BRRD, reach a joint decision on a group resolution scheme covering group entities in Malta and in the relevant Member States.

(10) The joint decision referred to in sub-regulations (7) or (9) and any decisions taken by the European resolution authorities in the absence of a joint decision referred to in Article 91(8) of the BRRD shall be recognised as conclusive and applied by the Resolution Committee in Malta.

(11) The Resolution Committee shall perform all actions under this regulation without delay, and with due regard to the urgency of the situation.

(12) In any case where a group resolution scheme is not implemented and the Resolution Committee takes resolution actions in relation to any group entity, the Resolution Committee shall cooperate closely with the relevant European resolution authorities within the resolution college with a view to achieving a coordinated resolution strategy for all the group entities that are failing or likely to fail.

(13) If the Resolution Committee takes any resolution action in relation to any group entity, it shall inform the members of the resolution college regularly and fully about those actions or measures and their on-going progress.

92. (1) Where the Resolution Committee in its capacity as the group-level resolution authority decides that a Union parent undertaking for which it is responsible meets the conditions referred to in regulations 32 or 33 it shall notify the information referred to in regulation 91(1)(a) and (b) without delay to the consolidating supervisor, if different, and to the other members of the resolution college of the group in question. Group resolution.

(2) The resolution actions or insolvency measures for the purposes of regulation 91(1)(b) may include the implementation of a group resolution scheme drawn up in accordance with regulation 91(6) in any of the following circumstances:

(a) resolution actions or other measures at parent level notified in accordance with regulation 91(1)(b) make it likely that the conditions laid down in regulations 32 or 33 would be fulfilled in relation to a group entity in another Member State;

(b) resolution actions or other measures at parent level only are not sufficient to stabilise the situation or are not likely to provide an optimum outcome;

(c) one or more subsidiaries meet the conditions referred to in regulations 32 or 33 according to a determination by the European resolution authorities responsible for those subsidiaries; or

(d) resolution actions or other measures at group level will benefit the subsidiaries of the group in a way which makes a group resolution scheme appropriate.

B 3274

(3) Where the actions proposed by the Resolution Committee, in its capacity as the group-level resolution authority, under sub-regulations (1) and (2) do not include a group resolution scheme, the Resolution Committee in its capacity as the group-level resolution authority shall take its decision after consulting the members of the resolution college:

Provided that the decision of the group-level resolution authority shall take into account:

(a) and follow the resolution plans as referred to in regulation 13 unless the Resolution Committee and the European resolution authorities concerned assesses, taking into account circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans;

(b) the financial stability of Malta and of the Member States concerned.

(4) Where the actions proposed by the Resolution Committee, in its capacity as the group-level resolution authority, under sub-regulation (1) include a group resolution scheme, the group resolution scheme shall take the form of a joint decision of the Resolution Committee, in its capacity as the group-level resolution authority, and the European resolution authorities responsible for the subsidiaries that are covered by the group resolution scheme:

Provided that where the Resolution Committee is responsible for a subsidiary that is covered by a group resolution scheme, and the action proposed by a European resolution authority acting as the group-level resolution authority in accordance with Article 92(1) of the BRRD includes a group resolution scheme, the group resolution scheme shall take the form of a joint decision of the Resolution Committee, the European resolution authority acting as the group-level resolution authority and the European resolution authority responsible for the other subsidiaries that are covered by the group resolution scheme, if any:

Provided further that the Resolution Committee may request the EBA to assist the authorities mentioned in this sub-regulation in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

(5) Where the Resolution Committee is responsible for a subsidiary that is covered by a group resolution scheme, if the Resolution Committee disagrees with or departs from the group

resolution scheme proposed by the European resolution authority acting as the group-level resolution authority or considers that it needs to take independent resolution actions or measures other than those proposed in the scheme in relation to an institution or entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) for reasons of financial stability, it shall set out in detail the reasons for the disagreement or the reasons to depart from the group resolution scheme, notify the European resolution authority acting as the group-level resolution authority and the relevant European resolution authorities that are covered by the group resolution scheme of the reasons and inform them about the actions or measures it intends to take:

Provided that when setting out the reasons for its disagreement, the Resolution Committee shall give consideration to the resolution plans as referred to in regulation 13, the potential impact on financial stability in Malta and in the Member States concerned as well as the potential effect of the actions or measures on other parts of the group.

(6) Where the Resolution Committee is responsible for a subsidiary that is covered by a group resolution scheme and the Resolution Committee does not disagree with the group resolution scheme under sub-regulation (5), it may, together with any European resolution authorities which do not disagree with the group resolution scheme under Article 92(4) of the BRRD, reach a joint decision on a group resolution scheme covering group entities in Malta and in the relevant Member States.

(7) The joint decision referred to in sub-regulations (4) or (6) and any decisions taken by the European resolution authorities in the absence of a joint decision referred to in Article 92(4) of the BRRD shall be recognised as conclusive and applied by the Resolution Committee in Malta.

(8) The Resolution Committee shall perform all actions under this regulation without delay, and with due regard to the urgency of the situation:

Provided that, where a group resolution scheme is not implemented and the Resolution Committee takes a resolution action in relation to any group entity, the Resolution Committee shall co-operate closely with the relevant European resolution authorities within the resolution college with a view to achieving a coordinated resolution strategy for all affected group entities:

Provided further that where the Resolution Committee

B 3276

takes a resolution action in relation to any group entity, it shall inform the members of the resolution college regularly and fully about those actions or measures and their on-going progress.

Agreements
with third
countries.

93. The Resolution Committee may enter into bilateral agreements with third countries with regard to the following situations:

(a) in cases where a third country parent undertaking has subsidiary institutions or branches authorised in Malta, where such branches are regarded as significant in two or more Member States;

(b) in cases where a parent undertaking established in Malta and which has a subsidiary or a significant branch in at least one other Member State, also has one or more third country subsidiary institutions;

(c) in cases where an institution established in Malta and which has a parent undertaking, a subsidiary or a significant branch in at least one other Member State has one or more branches in one or more third countries:

Provided that such bilateral agreements shall seek to ensure the establishment of processes and arrangements between the Resolution Committee and the relevant third country authorities for cooperation in carrying out some or all of the tasks and exercising some or all of the powers indicated in regulation 97:

Provided further that such bilateral agreements with a third country shall remain in force only until the entry into force of an agreement referred to in Article 93(1) of the BRRD with the relevant third country to the extent that such bilateral agreements are not inconsistent with Title VI of the BRRD.

Recognition and
enforcement of
third-country
resolution
proceedings.

94. (1) This regulation shall apply in respect of third-country resolution proceedings unless and until an international agreement as referred to in Article 93(1) of the BRRD enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement as referred to in the second proviso of regulation 93 with the relevant third country to the extent that recognition and enforcement of third-country resolution proceedings is not governed by that agreement.

(2) Where there is a European resolution college established in accordance with regulation 89, the Resolution Committee shall, together with the relevant European resolution authorities, take a joint decision on whether to recognise, except as provided for in regulation

95, third-country resolution proceedings relating to a third-country institution or a parent undertaking that:

(a) has Union subsidiaries established in, or Union branches located in and regarded as significant by, two or more Member States; or

(b) has assets, rights or liabilities located in two or more Member States or are governed by the law of those Member States:

Provided that, where the European resolution college reaches a joint decision on the recognition of the third-country resolution proceedings, the Resolution Committee shall seek the enforcement of the recognised third-country resolution proceedings.

(3) In the absence of a joint decision of the European resolution college, or in the absence of a European resolution college, the Resolution Committee, where relevant, shall make its own decision on whether to recognise and enforce, except as provided for in regulation 95, third-country resolution proceedings relating to a third-country institution or a parent undertaking:

Provided that the decision shall give due consideration to the interests of Malta where a third-country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States.

(4) The Resolution Committee shall be empowered, as a minimum, to do the following:

(a) exercise the resolution powers in relation to the following:

(i) assets of a third-country institution or parent undertaking that are located in Malta or governed by the laws of Malta;

(ii) rights or liabilities of a third-country institution that are booked by the Union branch in Malta or governed by the laws of Malta, or where claims in relation to such rights and liabilities are enforceable in Malta;

(b) perfect, including to require another person to take action to perfect, a transfer of shares or other instruments of ownership in a Union subsidiary established in Malta;

B 3278

(c) exercise the powers in regulations 69, 70 or 71 in relation to the rights of any party to a contract with an entity referred to in sub-regulation (2), where such powers are necessary in order to enforce third-country resolution proceedings; and

(d) render unenforceable any right to terminate, liquidate or accelerate contracts, or affect the contractual rights, of entities referred to in sub-regulation (2) and other group entities, where such a right arises from resolution action taken in respect of the third-country institution, parent undertaking of such entities or other group entities, whether by the third-country resolution authority itself or otherwise pursuant to legal or regulatory requirements as to resolution arrangements in that country, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed.

(5) The Resolution Committee may take, where necessary in the public interest, resolution action with respect to a parent undertaking where the relevant third-country authority determines that an institution that is incorporated in that third country meets the conditions for resolution under the law of that third country. To that end, the Resolution Committee may use any resolution power in respect of that parent undertaking, and regulation 68 shall apply.

(6) The recognition and enforcement of third-country resolution proceedings shall be without prejudice to any normal insolvency proceedings under Maltese law applicable, where appropriate, in accordance with these regulations.

Right to refuse recognition or enforcement of third-country resolution proceedings.

95. The Resolution Committee, after consulting European resolution authorities, where a European resolution college is established under regulation 89, may refuse to recognise or to enforce third-country resolution proceedings pursuant to regulation 94(2) if it considers:

(a) that the third-country resolution proceedings would have adverse effects on the financial stability in Malta or that the proceedings would have adverse effects on financial stability in another Member State;

(b) that independent resolution action under regulation 96 in relation to a Union branch is necessary to achieve one or more of the resolution objectives;

(c) that creditors, including in particular depositors

located or payable in Malta or in another Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;

(d) that recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for Malta; or

(e) that the effects of such recognition or enforcement would be contrary to Maltese law.

96. (1) The Resolution Committee shall have the power to act in relation to a Union branch that is not subject to any third-country resolution proceedings or that is subject to third-country proceedings and one of the circumstances referred to in regulation 95 applies:

Resolution of
Union branches.

Provided that regulation 68 shall apply in the exercise of such powers.

(2) The powers required in sub-regulation (1) may be exercised by the Resolution Committee where it considers that action is necessary in the public interest and one or more of the following conditions are met:

(a) the Union branch no longer meets, or is likely not to meet, the conditions imposed by Maltese law for obtaining its licence and operation within Malta and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable time-frame;

(b) the third-country institution is, in the opinion of the Resolution Committee, unable or unwilling, or is likely to be unable, to pay its obligations to Union creditors, or obligations that have been created or booked through the branch, as they fall due and the Resolution Committee is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable time-frame;

(c) the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country institution, or has notified to the Resolution Committee its intention to initiate such a proceeding.

(3) Where the Resolution Committee takes an independent

B 3280

action in relation to a Union branch, it shall have regard to the resolution objectives and take the action in accordance with the following principles and requirements, insofar as they are relevant:

- (a) the principles set out in regulation 34;
- (b) the requirements relating to the application of the resolution tools in regulation 36.

Cooperation
with third-
country
authorities.

97. (1) This regulation shall apply in respect of cooperation with a third country unless and until an international agreement as referred to in Article 93(1) of the BRRD enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement provided for in Article 93(1) of the BRRD with the relevant third country to the extent that the subject matter of this regulation is not governed by that agreement.

(2) The Authority or the Resolution Committee, where appropriate, shall conclude non-binding cooperation arrangements in line with the EBA framework arrangement with the relevant third-country authorities indicated in Article 97(2) of the BRRD:

Provided that this regulation shall not prevent the Authority from concluding bilateral or multilateral arrangements with third countries, in accordance with Article 33 of Regulation (EU) No 1093/2010.

(3) Cooperation arrangements concluded between the Resolution Committee and third countries in accordance with this regulation may include provisions on the following matters:

- (a) the exchange of information necessary for the preparation and maintenance of resolution plans;
- (b) consultation and cooperation in the development of resolution plans, including principles for the exercise of powers under regulations 94 and 96 and similar powers under the law of the relevant third countries;
- (c) the exchange of information necessary for the application of resolution tools and exercise of resolution powers and similar powers under the law of the relevant third countries;
- (d) early warning to or consultation of parties to the cooperation arrangement before taking any significant action under these regulations or relevant third-country law affecting the institution or group to which the arrangement relates;

(e) the coordination of public communication in the case of joint resolution actions;

(f) procedures and arrangements for the exchange of information and cooperation under paragraphs (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.

(4) The Resolution Committee and the Authority shall notify the EBA of any cooperation arrangements concluded in accordance with this regulation.

98. (1) The Resolution Committee, the Authority and the Ministry responsible for Finance shall exchange confidential information, including recovery plans, with relevant third-country authorities only if the following conditions are met:

Exchange of confidential information.

(a) those third-country authorities are subject to requirements and standards of professional secrecy at least considered to be equivalent, in the opinion of all the authorities concerned, to those imposed by regulation 84:

Provided that in so far as the exchange of information relates to personal data, the handling and transmission of such personal data to third-country authorities shall be governed by the applicable Union and Maltese data protection law;

(b) the information is necessary for the performance by the relevant third-country authorities of their resolution functions under their national law that are comparable to those under these regulations and, subject to paragraph (a), is not used for any other purposes.

(2) Where confidential information originates in another Member State, the Resolution Committee, the Authority and the Ministry responsible for Finance shall not disclose that information to relevant third-country authorities unless the following conditions are met:

(a) the relevant authority of the Member State where the information originated (the originating authority) agrees to that disclosure;

(b) the information is disclosed only for the purposes permitted by the originating authority.

(3) For the purposes of this regulation, information is deemed

B 3282

to be confidential if it is subject to confidentiality requirements under Union law.

European
system of
financing
arrangements.

99. A European system of financing arrangements shall be established and shall consist of:

- (a) national financing arrangements established in accordance with regulation 100;
- (b) the borrowing between national financing arrangements as specified in regulation 106;
- (c) the mutualisation of national financing arrangements in the case of a group resolution as referred to in regulation 107.

Requirement to
establish
resolution
financing
arrangements.

100. (1) One or more financing arrangements shall be established for the purpose of ensuring the effective application by the Resolution Committee of the resolution tools and powers:

Provided that the use of the financing arrangements may be triggered by a designated public authority or authority entrusted with public administrative powers:

Provided further that the financing arrangements shall be used only in accordance with the resolution objectives and the principles set out in regulations 31 and 34.

(2) The same administrative structure may be used as the financing arrangements for the purposes of the deposit guarantee scheme.

(3) Financing arrangements shall have adequate financial resources.

(4) For the purpose of sub-regulation (3), financing arrangements shall in particular have the power to:

- (a) raise *ex-ante* contributions as referred to in regulation 103 with a view to reaching the target level specified in regulation 102;
- (b) raise *ex-post* extraordinary contributions as referred to in regulation 104 where the contributions specified in paragraph (a) are insufficient; and
- (c) contract borrowings and other forms of support as referred to in regulation 105.

(5) Save where permitted under sub-regulation (6), the financing arrangements shall be established through a fund, the use of which may be triggered by the Resolution Committee for the purposes set out in regulation 101(1).

(6) Notwithstanding sub-regulation (5), for the purpose of fulfilling the obligations under sub-regulation (1), financing arrangements may be established through mandatory contributions from institutions which are authorised in its territory, which contributions are based on the criteria referred to in Article 103(7) of the BRRD and which are not held through a fund controlled by the Resolution Committee provided that all of the following conditions are met:

(a) the amount raised by contributions is at least equal to the amount that is required to be raised under regulation 102;

(b) the Resolution Committee is entitled to an amount that is equal to the amount of such contributions, which shall be made immediately available to the Resolution Committee upon the latter's request, for use exclusively for the purposes set out in regulation 101;

(c) the Resolution Committee notifies the European Commission of its decision to avail itself of the discretion to structure its financing arrangements in accordance with this sub-regulation;

(d) the Resolution Committee notifies the European Commission of the amount referred to in paragraph (b) at least annually; and

(e) save as laid down in this sub-regulation, the financing arrangements comply with regulations 99 to 102, regulations 103(1) to (4) and (6) and regulations 104 to 109:

Provided that for the purposes of this sub-regulation, the available financial means to be taken into account in order to reach the target level specified in regulation 102 may include mandatory contributions from any scheme of mandatory contributions established at any date between 17 June 2010 and 2 July 2014 from institutions licensed in Malta for the purposes of covering the costs relating to systemic risk, failure and resolution of institutions, provided that the Resolution Committee complies with regulations 99 to 109. Contributions to deposit guarantee schemes shall not count towards the target level for resolution financing arrangements set out in regulation 102.

B 3284

Use of the
resolution
financing
arrangements.

101. (1) The financing arrangements established in accordance with regulation 100 may be used by the Resolution Committee only to the extent necessary to ensure the effective application of the resolution tools, for the following purposes:

(a) to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;

(b) to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;

(c) to purchase assets of the institution under resolution;

(d) to make contributions to a bridge institution and an asset management vehicle;

(e) to pay compensation to shareholders or creditors in accordance with regulation 75;

(f) to make a contribution to the institution under resolution in lieu of the write down or conversion of liabilities of certain creditors, when the bail-in tool is applied and the Resolution Committee decides to exclude certain creditors from the scope of bail-in in accordance with regulation 44(3) to (8);

(g) to lend to other financing arrangements on a voluntary basis in accordance with regulation 106;

(h) to take any combination of the actions referred to in paragraphs (a) to (g):

Provided that the financing arrangements may be used to take the actions referred to in this sub-regulation also with respect to the purchaser in the context of the sale of business tool.

(2) The resolution financing arrangement shall not be used directly to absorb the losses of an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or to recapitalise such an institution or an entity. In the event that the use of the resolution financing arrangement for the purposes of sub-regulation (1) indirectly results in part of the losses of an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) being passed on to the resolution financing arrangement, the principles governing the use of the resolution financing arrangement set out in regulation 44 shall apply.

102. (1) The financial means of Malta's financing arrangements must, by 31 December 2024, reach at least 1% of the amount of covered deposits of all the institutions authorised in Malta. Target level.

(2) During the initial period of time referred to in sub-regulation (1), contributions to the financing arrangements raised in accordance with regulation 103 shall be spread out in time as evenly as possible until the target level is reached, but with due account of the phase of the business cycle and the impact pro-cyclical contributions may have on the financial position of contributing institutions:

Provided that the initial period of time may be extended for a maximum of four years if the financing arrangements have made cumulative disbursements in excess of 0.5% of covered deposits of all the institutions licensed in Malta which are guaranteed under Directive 2014/49/EU.

(3) If, after the initial period of time referred to in sub-regulation (1), the available financial means diminish below the target level specified in that sub-regulation, the regular contributions raised in accordance with regulation 103 shall resume until the target level is reached. After the target level has been reached for the first time and where the available financial means have subsequently been reduced to less than two thirds of the target level, those contributions shall be set at a level allowing for reaching the target level within six years. The regular contribution shall take due account of the phase of the business cycle, and the impact procyclical contributions may have when setting annual contributions in the context of this sub-regulation.

103. (1) In order to reach the target level specified in regulation 102, contributions shall be raised at least annually from the institutions licensed in Malta including Union branches. Ex-ante contributions.

(2) The contribution of each institution shall be *pro rata* to the amount of its liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits of all the institutions licenced in Malta:

Provided that those contributions shall be adjusted in proportion to the risk profile of institutions, in accordance with the criteria adopted under Article 103(7) of the BRRD.

(3) The available financial means to be taken into account in order to reach the target level specified in regulation 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights,

B 3286

at the free disposal and earmarked for the exclusive use by the Resolution Committee for the purposes specified in regulation 101(1). The share of irrevocable payment commitments shall not exceed 30% of the total amount of contributions raised in accordance with this regulation.

(4) The obligation to pay the contributions specified in this regulation is enforceable under Maltese law, and due contributions shall be fully paid. Appropriate regulatory, accounting, reporting and other obligations shall be set up to ensure that due contributions are fully paid. There shall be measures for the proper verification of whether the contributions have been paid correctly, which measures shall prevent evasion, avoidance and abuse.

(5) The amounts raised in accordance with this regulation shall only be used for the purposes specified in regulation 101(1).

(6) Subject to regulations 37, 38, 40, 41 and 42, the amounts received from the institution under resolution or the bridge institution, the interest and other earnings on investments and any other earnings may benefit the financing arrangements.

Extraordinary
ex-post
contributions.

104. (1) Where the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, extraordinary *ex-post* contributions shall be raised from the institutions licensed in Malta, in order to cover the additional amounts. Those extraordinary *ex-post* contributions shall be allocated between institutions in accordance with the rules laid down in regulation 103(2):

Provided that extraordinary *ex-post* contributions shall not exceed three times the annual amount of contributions determined in accordance with regulation 103.

(2) Regulations 103(4) to (6) and Article 103(7) and (8) of the BRRD shall be applicable to the contributions raised under this regulation.

(3) The Resolution Committee may defer, in whole or in part, an institution's payment of extraordinary *ex-post* contributions to the resolution financing arrangement if the payment of those contributions would jeopardise the liquidity or solvency of the institution. Such a deferral shall not be granted for a period of longer than six months but may be renewed upon the request of the institution. The contributions deferred pursuant to this sub-regulation shall be paid when such a payment no longer jeopardises the institution's liquidity or solvency.

105. Financing arrangements shall be enabled to contract borrowings or other forms of support from institutions, financial institutions or other third parties in the event that the amounts raised in accordance with regulation 103 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, and the extraordinary *ex-post* contributions provided for in regulation 104 are not immediately accessible or sufficient.

Alternative
funding means.

106. (1) Financing arrangements may make a request to borrow from all other financing arrangements within the European Union, in the event that:

Borrowing
between
financing
arrangements.

(a) the amounts raised under regulation 103 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements;

(b) the extraordinary *ex-post* contributions provided for in regulation 104 are not immediately accessible; and

(c) the alternative funding means provided for in regulation 105 are not immediately accessible on reasonable terms.

(2) Financing arrangements shall have the power to lend to other financing arrangements within the European Union in the circumstances specified in sub-regulation (1).

(3) Following a request under Article 106(1) of the BRRD, the financing arrangement in Malta shall decide whether to lend to the financing arrangement which has made the request. The decision shall be taken after consulting or with the consent of, the Ministry responsible for Finance. The decision shall be taken with due urgency.

(4) The rate of interest, repayment period and other terms and conditions of the loans shall be agreed between the borrowing financing arrangement and the other financing arrangements which have decided to participate. The loan of every participating financing arrangement shall have the same interest rate, repayment period and other terms and conditions, unless all participating financing arrangements agree otherwise.

(5) The amount lent by the resolution financing arrangement shall be *pro rata* to the amount of covered deposits in Malta, with respect to the aggregate of covered deposits in Malta. The rates of contribution may vary upon agreement of the resolution financing arrangement with the other participating financing arrangements.

B 3288

(6) An outstanding loan to the resolution financing arrangement of another Member State under this regulation shall be treated as an asset of the resolution financing arrangement in Malta and may be counted towards that financing arrangement's target level.

Mutualisation of national financing arrangements in the case of a group resolution.

107. (1) In the case of a group resolution as referred to in regulation 91 or regulation 92, the resolution financing arrangement of each institution established in Malta that is part of a group shall contribute to the financing of the group resolution in accordance with this regulation.

(2) For the purposes of sub-regulation (1), where the Resolution Committee is the group-level resolution authority, it shall, after consulting the European resolution authorities of the institutions that are part of the group, propose, if necessary before taking any resolution action, a financing plan as part of the group resolution scheme provided for in regulations 91 and 92:

Provided that the financing plan shall be agreed in accordance with the decision-making procedure referred to in regulations 91 and 92.

(3) The financing plan shall include:

(a) a valuation in accordance with regulation 36 in respect of the affected group entities;

(b) the losses to be recognised by each affected group entity at the moment the resolution tools are exercised;

(c) for each affected group entity, the losses that would be suffered by each class of shareholders and creditors;

(d) any contribution that deposit guarantee schemes would be required to make in accordance with regulation 109(1) and (2);

(e) the total contribution by resolution financing arrangements and the purpose and form of the contribution;

(f) where an affected group entity is located in Malta, the basis for calculating the amount that the financing arrangement is required to contribute to the financing of the group resolution in order to build up the total contribution referred to in paragraph (e);

(g) where an affected group entity is located in Malta,

the amount that the financing arrangement is required to contribute to the financing of the group resolution and the form of those contributions;

(h) where an affected group entity is located in Malta, the amount of borrowing that the financing arrangements will contract from institutions, financial institutions and other third parties under regulation 105;

(i) where an affected group entity is located in Malta, a timeframe for the use of the financing arrangement which should be capable of being extended where appropriate.

(4) The basis for apportioning the contribution referred to in sub-regulation (3)(e) shall be consistent with sub-regulation (5) and with the principles set out in the group resolution plan in accordance with regulation 12(3)(f), unless otherwise agreed in the financing plan.

(5) Unless agreed otherwise in the financing plan, the basis for calculating the contribution of a financing arrangement in Malta shall in particular have regard to:

(a) the proportion of the group's risk-weighted assets held at institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) established in Malta;

(b) the proportion of the group's assets held at institutions and entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) established in Malta;

(c) the proportion of the losses, which have given rise to the need for group resolution, which originated in group entities under the supervision of the Authority; and

(d) the proportion of the resources of the group financing arrangements which, under the financing plan, are expected to be used to benefit group entities established in Malta.

(6) The Resolution Committee shall establish rules and procedures in advance to ensure that each financing arrangement in Malta can affect its contribution to the financing of group resolution immediately without prejudice to sub-regulation (2).

(7) For the purposes of these regulations, group financing arrangements, under the conditions laid down in regulation 105, shall

B 3290

be allowed to contract borrowings or other forms of support, from institutions, financial institutions or other third parties.

(8) Financing arrangements may guarantee any borrowing contracted by the group financing arrangements in accordance with sub-regulation (7).

(9) Any proceeds or benefits that arise from the use of the group financing arrangements shall be allocated to Malta's financing arrangements in accordance with Malta's contributions to the financing of the resolution as established in sub-regulation (2).

Ranking of deposits in insolvency hierarchy.

108. In normal insolvency proceedings:

(a) the following have the same priority ranking which is higher than the ranking provided for the claims of ordinary unsecured, non-preferred creditors:

(i) that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU;

(ii) deposits that would be eligible deposits from natural persons, micro, small and medium-sized enterprises were they not made through branches located outside the European Union of institutions established within the European Union;

(b) the following have the same priority ranking which is higher than the ranking provided for under paragraph (a):

(i) covered deposits;

(ii) deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency.

Use of deposit guarantee schemes in the context of resolution.

109. (1) Where the Resolution Committee takes a resolution action, and provided that that action ensures that depositors continue to have access to their deposits, the deposit guarantee scheme to which the institution is affiliated is liable for:

(a) when the bail-in tool is applied, the amount by which covered deposits would have been written down in order to absorb the losses in the institution pursuant to regulation 46(1)(a), had covered deposits been included within the scope of bail-in and been written down to the same extent as creditors with the same level of priority under normal insolvency

proceedings; or

(b) when one or more resolution tools other than the bail-in tool is applied, the amount of losses that covered depositors would have suffered, had covered depositors suffered losses in proportion to the losses suffered by creditors with the same level of priority under normal insolvency proceedings.

(2) In all cases, the liability of the deposit guarantee scheme shall not be greater than the amount of losses that it would have had to bear had the institution been wound up under normal insolvency proceedings:

Provided that when the bail-in tool is applied, the deposit guarantee scheme shall not be required to make any contribution towards the costs of recapitalising the institution or bridge institution pursuant to regulation 46(1)(b):

Provided further that where it is determined by a valuation under regulation 74 that the deposit guarantee scheme's contribution to resolution was greater than the net losses it would have incurred had the institution been wound up under normal insolvency proceedings, the deposit guarantee scheme shall be entitled to the payment of the difference from the resolution financing arrangement in accordance with regulation 75.

(3) The determination of the amount by which the deposit guarantee scheme is liable in accordance with sub-regulation (1) shall comply with the conditions referred to in regulation 36.

(4) The contribution from the deposit guarantee scheme for the purpose of sub-regulation (1) shall be made in cash.

(5) Where eligible deposits at an institution under resolution are transferred to another entity through the sale of business tool or the bridge institution tool, the depositors have no claim under Directive 2014/49/EU against the deposit guarantee scheme in relation to any part of their deposits at the institution under resolution that are not transferred, provided that the amount of funds transferred is equal to or more than the aggregate coverage level provided for in Article 6 of Directive 2014/49/EU.

(6) Notwithstanding sub-regulations (1) to (5), if the available financial means of a deposit guarantee scheme are used in accordance therewith and are subsequently reduced to less than two thirds of the target level of the deposit guarantee scheme, the regular contribution to the deposit guarantee scheme shall be set at a level allowing for

B 3292

reaching the target level within six years:

Provided that in all cases, the liability of a deposit guarantee scheme shall not be greater than the amount equal to 50 % of its target level pursuant to Article 10 of Directive 2014/49/EU. The Resolution Committee, may, by taking into account the specificities of their national banking sector, set a percentage which is higher than 50%:

Provided further that in any circumstances, the deposit guarantee scheme's participation under these regulations shall not exceed the losses it would have incurred in a winding up under normal insolvency proceedings.

Offences.

110. (1) Any person who -

(a) fails to comply with any directive issued by the Authority or the Resolution Committee, as the case may be, under the Act, or any regulations and Rules issued thereunder;

(b) without reasonable excuse alters, suppresses, conceals, destroys or refuses to produce any document which he is lawfully required to produce under these regulations, under the Act and any Rules issued thereunder transposing the BRRD;

(c) on any matter relating to the BRRD, makes a statement, promise or forecast which he knows to be misleading, false or deceptive, or dishonestly conceals any material facts, or recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive,

shall be guilty of an offence:

(2) Any person who is knowingly a part to, or procures or aids and abets the commission of any offence under sub-regulation (1), shall be guilty of an offence and shall be liable to the same penalties as the principal offender.

(3) Any person found guilty of an offence shall, on conviction, be liable to a fine (*multa*) not exceeding two million Euro (€2,000,000) or to a term of imprisonment not exceeding three years or to both such fine and imprisonment.

(4) No proceedings for an offence under the Malta Financial Services Authority Act shall be commenced without the sanction of the Attorney General.

111. (1) The Authority and the Resolution Committee, as the case may be, may impose administrative penalties and other administrative measures in respect of breaches of the provisions of the Act and these regulations and, or of any Rules issued under the Act transposing the BRRD, and shall take all measures necessary to ensure that they are implemented.

Administrative penalties and other administrative measures.

(2) The administrative penalties and other administrative measures taken pursuant to sub-regulation (1) shall be effective, proportionate and dissuasive.

(3) Where the obligations arising under this regulation apply to credit institutions, financial institutions and Union parent undertakings, in the event of a breach of any such obligation or of a failure to comply with a directive issued by, as the case may be, the Authority or the Resolution Committee under the Act, or any regulations or Rules issued thereunder transposing the BRRD, the Authority and, or the Resolution Committee may, subject to the conditions laid down in Maltese law, by notice in writing and without recourse to a court hearing, impose administrative penalties on directors, and on other natural persons who under Maltese law are responsible for the breach or for the failure to comply with any such directive.

112. The Authority and the Resolution Committee shall have all the information-gathering powers and investigatory powers which are necessary for the exercise of their respective functions.

Investigatory and information gathering powers by the Authority and the Resolution Committee.

113. The Authority and the Resolution Committee shall exercise their respective administrative powers to impose penalties in such a way as to ensure full and complete adherence to the requirements and obligations arising out of the Act and any regulations and Rules issued thereunder transposing the BRRD, either directly or in collaboration with other authorities, in terms of law and as warranted by the relevant circumstances.

Powers to impose penalties by the Authority and the Resolution Committee.

114. (1) Without prejudice to the powers of the Authority to impose administrative penalties for breaches of provisions of the Act or regulations or rules issued thereunder, administrative penalties and other administrative measures may be imposed by the Authority in respect of breaches, including the following:

Instances when administrative penalties and other measures may be imposed by the Authority and the Resolution Committee.

(a) failure to draw up, maintain and update recovery plans, and maintain detailed records of financial contracts, in breach of regulation 5;

B 3294

(b) failure to draw up and submit to the Authority a group recovery plan, in breach of regulation 7;

(c) failure to submit to the Authority a revised recovery plan or group recovery plan and, or fails to take measures as directed by the Authority, in breach of regulations 6 and 8;

(d) failure to include a framework of indicators established by the institution, identifying the points at which appropriate actions may be taken, or failure to put in place appropriate arrangements for the regular monitoring of indicators, in breach of regulation 9;

(e) failure to notify an intention to provide group financial support to the Authority, in breach of regulation 25;

(f) failure of group entities to make public the information on the group financial support agreement and to update such information, in terms of regulations 26, in breach of such regulation;

(g) failure to comply with a requirement imposed by the Authority as an early intervention measure, in breach of regulation 27;

(h) failure to comply with a requirement imposed by the Authority on the removal of senior management or of the board of directors, and or failure to appoint new senior management or a new board of directors with the approval of the Authority.

(2) Without prejudice to the powers of the Resolution Committee to impose administrative penalties for breaches of provisions of the Act or regulations or rules issued thereunder, administrative penalties and other administrative measures may be imposed by the Resolution Committee in respect of breaches, including the following:

(a) failure to provide all the information necessary for the development of resolution plans infringing regulation 11;

(b) failure of the board of directors of a credit institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) to notify the Authority when the said credit institution or entity is failing or likely to fail infringing regulation 81(1).

(3) In the cases referred to in sub-regulations (1) and (2), the administrative penalties and other administrative measures that can

be applied include at least the following:

(a) a public statement which indicates the natural person, credit institution, financial institution, Union parent undertaking or other legal person responsible and the nature of the breach;

(b) an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;

(c) a temporary ban against any director or member of the senior management of the credit institution or the entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) or any other natural person, who is held responsible, to exercise functions in credit institutions or entities referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1);

(d) in the case of a legal person, administrative pecuniary penalties of up to 10% of the total annual net turnover of that legal person in the preceding business year:

Provided that where the legal person is a subsidiary of a parent undertaking, the relevant turnover shall be turnover resulting from the consolidated accounts of the ultimate parent undertaking in the preceding business year;

(e) in the case of a natural person, administrative pecuniary penalties of up to five million euro (€5,000,000);

(f) administrative pecuniary penalties of up to twice the amount of the benefits derived from the breach where that benefit can be determined.

115. In the exercise of their powers to impose penalties, the Resolution Committee shall:

Co-operation
and co-
ordination.

(a) cooperate closely to ensure that administrative penalties or other administrative measures produce the desired results; and

(b) coordinate their action when dealing with cross-border cases.

B 3296

Exchange of information on penalties and maintenance of a central database.

116. Subject to professional secrecy requirements referred to in regulation 84, the Authority and, or the Resolution Committee, as the case may be, shall inform the EBA of all administrative penalties imposed by them under regulation 114 and of the status of that appeal or outcome thereof for the purpose of publication of administrative penalties on the central databases of the EBA, which the Authority and the Resolution Committee shall consult, where appropriate, in the carrying out of their functions and duties.

Effective application of penalties and exercise of powers to impose penalties.

117. When determining the type of administrative penalties or other administrative measures and the level of administrative pecuniary penalties, the Authority and, or the Resolution Committee, as the case may be, shall take into account all relevant circumstances, including, where appropriate:

- (a) the gravity and the duration of the breach;
- (b) the degree of responsibility of the natural or legal person responsible for the breach;
- (c) the financial strength of the natural or legal person responsible for the breach, for example as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;
- (d) the amount of profits gained or losses avoided by the natural or legal person responsible, insofar as they can be determined;
- (e) the losses for third parties caused by the breach, insofar as they can be determined;
- (f) the level of cooperation of the natural or legal person responsible with the Authority and the Resolution Committee;
- (g) previous breaches by the natural or legal person responsible;
- (h) any potential systemic consequences of the breach.

Right of appeal.

118. Any person subject to a decision taken by the Resolution Committee in terms of these regulations, imposing upon such person an administrative penalty and, or administrative measure, may appeal against such a decision in terms of the First Schedule to the Act.

Cooperation with EBA.

119. (1) The Authority and the Resolution Committee shall cooperate with the EBA for the purposes of these regulations in

accordance with Regulation (EU) No 1093/2010.

(2) The Authority and the Resolution Committee shall, without delay, provide the EBA with all the information necessary to carry out its duties in accordance with Article 35 of Regulation (EU) No 1093/2010.

Schedule 1

SECTION A

Information to be included in recovery plans

The recovery plan shall include the following information:

(1) a summary of the key elements of the plan and a summary of overall recovery capacity;

(2) a summary of the material changes to the institution since the most recently filed recovery plan;

(3) a communication and disclosure plan outlining how the institution intends to manage any potentially negative market reactions;

(4) a range of capital and liquidity actions required to maintain or restore the viability and financial position of the institution;

(5) an estimation of the time-frame for executing each material aspect of the plan;

(6) a detailed description of any material impediment to the effective and timely execution of the plan, including consideration of impact on the rest of the group, customers and counterparties;

(7) identification of critical functions;

(8) a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the institution;

(9) a detailed description of how recovery planning is integrated into the corporate governance structure of the institution as well as the policies and procedures governing the approval of the recovery plan and identification of the persons in the organisation responsible for preparing and implementing the plan;

B 3298

(10) arrangements and measures to conserve or restore the institution's own funds;

(11) arrangements and measures to ensure that the institution has adequate access to contingency funding sources, including potential liquidity sources, an assessment of available collateral and an assessment of the possibility to transfer liquidity across group entities and business lines, to ensure that it can continue to carry out its operations and meet its obligations as they fall due;

(12) arrangements and measures to reduce risk and leverage;

(13) arrangements and measures to restructure liabilities;

(14) arrangements and measures to restructure business lines;

(15) arrangements and measures necessary to maintain continuous access to financial markets infrastructures;

(16) arrangements and measures necessary to maintain the continuous functioning of the institution's operational processes, including infrastructure and IT services;

(17) preparatory arrangements to facilitate the sale of assets or business lines in a time-frame appropriate for the restoration of financial soundness;

(18) other management actions or strategies to restore financial soundness and the anticipated financial effect of those actions or strategies;

(19) preparatory measures that the institution has taken or plans to take in order to facilitate the implementation of the recovery plan, including those necessary to enable the timely recapitalisation of the institution;

(20) a framework of indicators which identifies the points at which appropriate actions referred to in the plan may be taken.

SECTION B

Information that the Resolution Committee may request institutions to provide for the purposes of drawing up and maintaining resolution plans

The Resolution Committee may request institutions to provide for the purposes of drawing up and maintaining resolution plans at least the following information:

(1) a detailed description of the institution's organisational structure including a list of all legal persons;

(2) identification of the direct holders and the percentage of voting and non-voting rights of each legal person;

(3) the location, jurisdiction of incorporation, licensing and key management associated with each legal person;

(4) a mapping of the institution's critical operations and core business lines including material asset holdings and liabilities relating to such operations and business lines, by reference to legal persons;

(5) a detailed description of the components of the institution's and all its legal entities' liabilities, separating, at a minimum by types and amounts of short term and long-term debt, secured, unsecured and subordinated liabilities;

(6) details of those liabilities of the institution that are eligible liabilities;

(7) an identification of the processes needed to determine to whom the institution has pledged collateral, the person that holds the collateral and the jurisdiction in which the collateral is located;

(8) a description of the off balance sheet exposures of the institution and its legal entities, including a mapping to its critical operations and core business lines;

(9) the material hedges of the institution including a mapping to legal persons;

(10) identification of the major or most critical counterparties of the institution as well as an analysis of the impact of the failure of major counterparties in the institution's financial situation;

(11) each system on which the institution conducts a material number or value amount of trades, including a mapping to the institution's legal persons, critical operations and core business lines;

(12) each payment, clearing or settlement system of which the institution is directly or indirectly a member, including a mapping to the institution's legal persons, critical operations and core business lines;

(13) a detailed inventory and description of the key management information systems, including those for risk management, accounting and financial and regulatory reporting used

B 3300

by the institution including a mapping to the institution's legal persons, critical operations and core business lines;

(14) an identification of the owners of the systems identified in point (13), service level agreements related thereto, and any software and systems or licences, including a mapping to their legal entities, critical operations and core business lines;

(15) an identification and mapping of the legal persons and the interconnections and interdependencies among the different legal persons such as:

- (i) common or shared personnel, facilities and systems;
- (ii) capital, funding or liquidity arrangements;
- (iii) existing or contingent credit exposures;
- (iv) cross guarantee agreements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting arrangements;
- (v) risks transfers and back-to-back trading arrangements; service level agreements;

(16) the European regulatory authority and the European resolution authority for each legal person;

(17) the director responsible for providing the information necessary to prepare the resolution plan of the institution as well as those responsible, if different, for the different legal persons, critical operations and core business lines;

(18) a description of the arrangements that the institution has in place to ensure that, in the event of resolution, the Resolution Committee will have all the necessary information, as determined by the Resolution Committee, for applying the resolution tools and powers;

(19) all the agreements entered into by the institutions and their legal entities with third parties the termination of which may be triggered by a decision of the authorities to apply a resolution tool and whether the consequences of termination may affect the application of the resolution tool;

(20) a description of possible liquidity sources for supporting resolution;

(21) information on asset encumbrance, liquid assets, off-balance sheet activities, hedging strategies and booking practices.

SECTION C

Matters that the Resolution Committee is to consider when assessing the resolvability of an institution or group

When assessing the resolvability of an institution or group, the Resolution Committee shall consider the following:

When assessing the resolvability of a group, references to an institution shall be deemed to include any institution or entity referred to in paragraphs (c) or (d) of the definition "entity" in regulation 2(1) within a group:

(1) the extent to which the institution is able to map core business lines and critical operations to legal persons;

(2) the extent to which legal and corporate structures are aligned with core business lines and critical operations;

(3) the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;

(4) the extent to which the service agreements that the institution maintains are fully enforceable in the event of resolution of the institution;

(5) the extent to which the governance structure of the institution is adequate for managing and ensuring compliance with the institution's internal policies with respect to its service level agreements;

(6) the extent to which the institution has a process for transitioning the services provided under service level agreements to third parties in the event of the separation of critical functions or of core business lines;

(7) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;

(8) the adequacy of the management information systems in ensuring that the Resolution Committee and the European resolution authorities are able to gather accurate and complete information

B 3302

regarding the core business lines and critical operations so as to facilitate rapid decision making;

(9) the capacity of the management information systems to provide the information essential for the effective resolution of the institution at all times even under rapidly changing conditions;

(10) the extent to which the institution has tested its management information systems under stress scenarios as defined by the Resolution Committee;

(11) the extent to which the institution can ensure the continuity of its management information systems both for the affected institution and the new institution in the case that the critical operations and core business lines are separated from the rest of the operations and business lines;

(12) the extent to which the institution has established adequate processes to ensure that it provides the Resolution Committee and the European resolution authorities with the information necessary to identify depositors and the amounts covered by the deposit guarantee schemes;

(13) where the group uses intra-group guarantees, the extent to which those guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust;

(14) where the group engages in back-to-back transactions, the extent to which those transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust;

(15) the extent to which the use of intra-group guarantees or back-to-back booking transactions increases contagion across the group;

(16) the extent to which the legal structure of the group inhibits the application of the resolution tools as a result of the number of legal persons, the complexity of the group structure or the difficulty in aligning business lines to group entities;

(17) the amount and type of eligible liabilities of the institution;

(18) where the assessment involves a mixed activity holding company, the extent to which the resolution of group entities that are institutions or financial institutions could have a negative impact on the non-financial part of the group;

- (19) the existence and robustness of service level agreements;
- (20) whether third-country authorities have the resolution tools necessary to support resolution actions by European resolution authorities, and the scope for coordinated action between European Union and third-country authorities;
- (21) the feasibility of using resolution tools in such a way which meets the resolution objectives, given the tools available and the institution's structure;
- (22) the extent to which the group structure allows the Resolution Committee to resolve the whole group or one or more of its group entities without causing a significant direct or indirect adverse effect on the financial system, market confidence or the economy and with a view to maximising the value of the group as a whole;
- (23) the arrangements and means through which resolution could be facilitated in the cases of groups that have subsidiaries established in different jurisdictions;
- (24) the credibility of using resolution tools in such a way which meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees and possible actions that third-country authorities may take;
- (25) the extent to which the impact of the institution's resolution on the financial system and on financial market's confidence can be adequately evaluated;
- (26) the extent to which the resolution of the institution could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;
- (27) the extent to which contagion to other institutions or to the financial markets could be contained through the application of the resolution tools and powers;
- (28) the extent to which the resolution of the institution could have a significant effect on the operation of payment and settlement systems.
-

