

Possible exception to bail-in for *precautionary recapitalisations* under BRRD

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BRRD: Bail-in; Resolution; “Precautionary recapitalisation”.

Bail-in in Resolution

Resolution

“Precautionary recapitalisation”

Conditions for “precautionary recapitalisation” not being subject to resolution and therefore to bail-in.

Article 43 BRRD

Pro memoria.

The Bail-in tool under Article 43 BRRD

2. Member States shall ensure that resolution authorities may apply the bail-in tool to meet the resolution objectives, in accordance with the resolution principles for any of the following purposes:

(a) to recapitalise an institution or an entity **that meets the conditions for resolution** to the extent sufficient to restore its ability to comply with the conditions for authorisation (to the extent that those conditions apply to the entity) and to carry on the activities for which it is authorised

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

Article 32 BRRD

Resolution under Article 32 BRRD

1. Member States shall ensure that resolution authorities shall take a resolution action /.../ only if the resolution authority 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 competent authority, after consulting the resolution authority or; subject to the conditions laid down in paragraph 2, by the resolution authority after consulting the competent authority;
- (b) /.../ there is no reasonable prospect that any alternative private sector measures / ... / or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments / ... / would prevent the failure of the institution within a reasonable timeframe;
- (c) a resolution action is necessary in the public interest / ... /.

2. Member States may provide that, in addition to the competent authority, the determination that the institution is failing or likely to fail under point (a) of paragraph 1 can be made by the resolution authority, after consulting the competent authority /.../

3. The previous adoption of an early intervention measure / ... / is not a condition for taking a resolution action.

Article 32 BRRD (II)

“Precautionary recapitalisation”

Resolution under Article 32 BRRD (continued)

4. For the purposes of point (a) of paragraph 1, 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 authorisation by the competent 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 objective elements support that they will be in the near future] less than its liabilities;

(c) the institution is [or objective elements support that it will be in the near future] 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 economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms:

Article 32 BRRD (III)

- (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 point (a), (b) or (c) of this paragraph nor the circumstances referred to in Article 59(3) are present at the time the public support is granted.

These circumstances referred to in Article 59(3) (one or more of them) are:

- (a) /.../ conditions for resolution specified in Articles 32 /... / have been met, before any resolution action is taken;
- (b) the appropriate authority determines that unless the power of write down of capital instruments or conversion of capital instruments into shares or other instruments of ownership is exercised, the institution / ... / will no longer be **viable** (concept defined in Article 59(4) as institution failing or likely to fail; 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).

[(c) and (d) cover lack of viability in relation to capital instruments issued by a subsidiary or the parent undertaking]

- (e) extraordinary public financial support is required by the institution / ... / except in any of the circumstances set out in point (d)(iii) of Article 32(4) [*id est: precautionary recapitalisation*].

Article 32 BRRD (IV)

Conditions for “Precautionary recapitalisation” not being subject to resolution

Article 32 (4) BRRD (continued)

In each of the cases mentioned in points (d)(i), (ii) and (iii) of the first subparagraph, 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.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, EBA or national authorities, where applicable, confirmed by the competent authority. EBA shall, by 3 January 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on the type of tests, reviews or exercises referred to above which may lead to such support.

Article 32 BRRD (V)

Conditions for “Precautionary recapitalisation” not being subject to resolution

Article 32 (4) BRRD (end)

By 31 December 2015, the Commission shall review whether there is a continuing need for allowing [“precautionary recapitalisation”] and the conditions that need to be met in the case of continuation and report thereon to the European Parliament and to the Council. If appropriate, that report shall be accompanied by a legislative proposal.

5. / ... / [public interest definition]

6. EBA shall, by 3 July 2015, issue guidelines / ... / to promote the convergence of supervisory and resolution practices regarding the interpretation of the different circumstances when an institution shall be considered to be failing or likely to fail.
