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| From: | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director |
| date of receipt: | 18 March 2016 |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
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| Subject: | COMMISSION DELEGATED REGULATION (EU) …/... of 18.3.2016 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council |

Delegations will find attached document C(2016) 1372 final.

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Brussels, 18.3.2016
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**COMMISSION DELEGATED REGULATION (EU) …/...**

**of 18.3.2016**

**on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council**

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# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE DELEGATED ACT

The Commission Delegated Regulation concerns the classes of arrangements to be protected in a partial transfer or in case of modification of contractual terms, under Article 76 of the Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery an resolution of credit institutions and investment firms (BRRD), based on the European Banking Union (EBA) technical advice.

The abovementioned article provides safeguards for certain contracts in the event of partial transfer of assets, rights and liabilities of an institution under resolution or in the event of forced contractual modifications. The aim of this protection is to prevent, when a partial transfer or a contractual modification has been effected, the splitting of assets, rights and liabilities which are linked by virtue of certain arrangements, when such linkage is justified by a lawful objective.

The BRRD further specifies that the safeguards apply irrespective of the number of parties involved in the arrangements and of whether the arrangements are created by contract, or provided by law, or are governed in whole or in part by the law of another Member State or of a third country. It also determines the form of protection[1] that is appropriate for each class of arrangements and the limits[2] to this protection.

Paragraph 4 of the abovementioned article empowers the Commission to adopt a delegated act to further specify the classes of arrangement that benefit from the safeguards. The EBA has issued its advice on the matter, which the Commission services have followed.

The Commission considers that the method of specification to be used in the Delegated Regulation should be the adoption of a more detailed set of rules and definitions than those already contained in the BRRD. The delegated regulation would not establish a list of protected arrangements. The compilation of a complete list of all types of arrangements that could be protected, which may be entered into under the different national Member State laws, would be very difficult and would need to be continuously updated. Instead, for the specific classes of arrangements, the delegated regulation should refer to the definitions in the BRRD or, in their absence, to definitions in other EU legislation, adding elements or setting out conditions for the application of the protection where required. On this basis, the delegated regulation would only further specify a class of arrangements where the BRRD does not sufficiently do so.

The delegated regulation should follow a differentiated approach to defining the scope and applying the safeguards to the classes of arrangements set out under Article 76 of the BRRD. Some classes of arrangements should be protected simply due to their nature (for example, full title transfer security), as the application of the safeguards for these classes of arrangements is clear and straight forward. However, unlimited protection for other classes of arrangements, which are defined in broader and vaguer terms in the BRRD, would likely impair the use of the partial transfer tool and might even make the tool impossible to use. For instance, the catch all term 'set-off arrangements' could cover all mutual liabilities between the parties to the arrangement; if they were afforded protection in such a broad manner, resolution

[1] Articles 77 to 80.
[2] Articles 68 to 71.



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authorities would not be able to separate assets, rights and liabilities of the parties from each other, even if they were not linked to each other or if they were to stem from different sources, such as financial contracts on the one hand and regular bonds on the other. This would significantly impair the feasibility of a partial transfer and therefore the effectiveness of a resolution.

Therefore, resolution authorities would need to apply the safeguards provided under Article 76 of the BRRD restrictively on certain classes of arrangements based on additional criteria. The delegated regulation should set out which classes of arrangements (in particular where the BRRD defines the classes, such as set-off arrangements, in a broad manner) would be subject to a determination to restrictively apply the safeguards and the criteria for such a determination.

## 2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 28 July 2014, the Commission requested the European Banking Authority (EBA) for technical advice on the empowerment under Article 76 of Directive 2014/59/EU, based on Article 1(5) of Regulation (EU) No 1093/2010, under the EBA's task to provide opinions to the Union institutions.

In drafting the delegated act, the Commission services have closely followed the EBA technical advice.

This Delegated Regulation does not involve new policy considerations beyond those of Directive 2014/59/EU.

## 3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 lays down the applicable definitions.

Article 2 defines the scope.

Articles 3 to 7 lay down the conditions relating to the different types of arrangements.

Article 8 determines the date of entry into application of this Delegated Regulation.



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

**of 18.3.2016**

**on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council**

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council[3], and in particular Article 76 thereof,

Whereas:

(1) Directive 2014/59/EU requires Member States to ensure the protection of certain classes of arrangements during the partial transfer of assets, rights and liabilities of an institution under resolution. The same protection is required when a resolution authority forcibly modifies the terms of a contract to which the institution under resolution is party. That protection aims to prevent, when a partial transfer or a contractual modification has been effected, the splitting of assets, rights and liabilities which are linked to each other by virtue of those arrangements.

(2) To ensure the proper application of this protection, it is necessary to identify precisely the types of arrangements that fall under the scope of each of the classes set out under Directive 2014/59/EU. The method most appropriate for this identification is to provide detailed rules and definitions, in addition to those set out under Directive 2014/59/EU. This is preferable to establishing a list of specific arrangements that may be entered into under the different national Member State laws, as such a list would be difficult to complete and would need to be continuously updated. As such this regulation should clarify and restrict, where necessary, the scope of application of the various forms of protection provided for by Directive 2014/59/EU for each class of arrangements.

(3) The various classes of arrangements set out in Article 76(2) of Directive 2014/59/EU are detailed to varying degrees: some classes are fully specified, while others are determined in vaguer terms. In addition, some classes refer to one type of contractual relationship and liability or to a limited set of contractual relationships and liabilities, while others cover a greater number and an open range of contractual liabilities, transactions and relationships. Those latter classes could potentially encompass all of the legal and contractual relationships between an institution and one or more of its counterparties. If those classes of arrangements were to be fully protected, resolution

[3] OJ L 173, 12.6.2014, p. 190.



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authorities could find it difficult to effect partial transfers, if at all. It is therefore appropriate to avoid an excessive protection that could potentially extend to all of the assets, rights and liabilities between an institution and its counterparties.

(4) Some classes of protected arrangements are defined in broader terms in Directive 2014/59/EU. In order to enhance certainty in terms of scope, namely in relation to security arrangements, set-off and netting arrangements and structured finance arrangements those classes should be specified more restrictively.

(5) The counterparties of the institution may agree on a so-called 'catch-all' or sweep-up 'set-off' agreement including any and all rights and liabilities between the parties. In consequence of this type of agreement any liabilities between the parties would be protected against being separated from each other. This would make the partial transfer with regard to this counterparty unmanageable, and in general would jeopardise the feasibility of the tool altogether, as the resolution authorities might even not be able to discern which liabilities are or are not covered by these arrangements. It should then further be clarified that 'catch all' or 'sweep up' netting and set-off agreements, including any and all assets, rights and liabilities between the parties, should not qualify as protected arrangements.

(6) Article 80 of Directive 2014/59/EU implies that any narrowing of the scope of the definitions of protected arrangements pursuant to Article 76(2) of Directive 2014/59/EU should not affect the operation of trading, clearing and settlement systems, insofar as these systems fall within the scope of Article 2(a) of the Directive 98/26/EC of the European Parliament and of the Council[4] . Resolution authorities should therefore be obliged to protect all types of arrangements referred to in Article 76(2) of Directive 2014/59/EU, which are linked to counterparty's activity as a Central Counterparty (CCP).This includes, but does not need to be limited to, the activity covered by a default fund under Article 42 of Regulation (EU) No 648/2012 of the European Parliament and of the Council[5].

(7) The same applies to assets, rights and liabilities relating to payment or securities settlement systems. As netting arrangements falling in the scope of Directive 98/26/EC are protected in insolvency, they should also be protected, for a reason of consistency, under Article 76 of Directive 2014/59/EU. However, it is appropriate to extend the scope of the protection under Article 76(2) of that Directive to all arrangements with payment or securities settlement systems and their related activity, where applicable.

(8) The need for specifying the scope of the arrangement benefiting from the safeguards in certain cases under Article 76(2) of Directive 2014/59/EU should not, in general, prevent resolution authorities from protecting any classes of arrangements which can be subsumed under one of the categories in that Article , and which are protected in insolvency proceedings against a separation of assets, rights and liabilities falling under these agreements under their national insolvency law including the national transposition of Directive 2001/24/EC of the European Parliament and of the

4 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 (OJ L 166, 11.6.1998, p. 45).

5 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 (OJ L 201, 27.7.2012, p. 1).



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Council[6]. This is the case, if a creditor would still benefit from the rights arising from the arrangement unless the whole transaction was made void under national insolvency law. This in particular applies to security arrangements and set-off and netting arrangements that are protected under national insolvency law,

HAS ADOPTED THIS REGULATION:

*Article 1*
*Definitions*

For the purpose of this regulation, the definitions contained in Directive 2014/59/EU shall apply. The following definitions shall also apply:

(1) "Securitisation" means securitisation as defined in Article 4(1)(61) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[7].

(2) "Contractual netting agreements" means contractual netting agreements as defined in Article 295 of Regulation (EU) No 575/2013.

*Article 2*
*Conditions relating to security arrangements, including securities financing transactions*

Security arrangements pursuant to Article 76(2)(a) of Directive 2014/59/EU shall include the following:

(1) arrangements stipulating guarantees, personal securities and warranties;

(2) liens and other real securities;

(3) securities lending transactions which do not imply a transfer of full ownership of the collateral and which involve one party (the lender) lending securities to the other party (the borrower) for a fee or interest payment and in which the borrower provides the lender with collateral for the duration of the loan.

Security arrangements shall qualify as security arrangements pursuant to Article 76(2)(a) of Directive 2014/59/EU only if the rights or assets to which the security interest is attached or would attach upon an enforcement event are sufficiently identified or identifiable in accordance with the terms of the arrangement and the applicable national law.

[6] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15).

[7] 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 (OJ L 176, 27.6.2013, p. 1).



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*Article 3*
*Conditions relating to set-off arrangements*

1. Set-off arrangements entered into between an institution and one or more particular counterparties shall qualify as set-off arrangements pursuant to Article 76(2)(c) of Directive 2014/59/EU in any of the following circumstances :

   (a) where the arrangements are linked to the counterparty's activity as a central counterparty, in particular for the activity covered by a default fund under Article 42 of Regulation (EU) No 648/2012;

   (b) where the arrangements are related to rights and obligations towards systems as defined in Article 2(a) of Directive 98/26/EC or other payment or securities settlement systems and are linked to their activity as payment or securities settlement systems.

2. Resolution authorities may specify that set-off arrangements entered into between an institution and one or more particular counterparties so far as they relate to other types of rights and liabilities shall qualify as set-off arrangements pursuant to Article 76(2)(c) of Directive 2014/59/EU where the arrangements are recognised for risk mitigation purposes under the applicable prudential rules and the protection, in particular by non-separability, is a condition for that recognition.

*Article 4*
*Conditions relating to netting arrangements*

1. Contractual netting agreements entered into between the institution and one or more particular counterparties shall qualify as netting arrangements pursuant to Article 76(2)(d) of Directive 2014/59/EU in any of the following circumstances:

   (a) where the arrangements are linked to the counterparty's activity as a central counterparty , in particular for the activity covered by a default fund under Article 42 of Regulation (EU) No 648/2012;

   (b) where the arrangements are related to rights and obligations towards systems as defined in Article 2(a) of Directive 98/26/EC or other payment or securities settlement systems and are linked to their activity as payment or securities settlement systems.

2. Resolution authorities may specify that netting arrangements entered into between an institution and a particular counterparty shall qualify as a netting arrangement pursuant to Article 76(2)(d) of Directive 2014/59/EU where they are recognised for risk mitigation purposes under the applicable prudential rules and the protection, in particular by non-separability, is a condition for that recognition.



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*Article 5*

*General conditions applying to security arrangements, set-off and netting arrangements and structured finance arrangements*

1. Articles 2, 3 and 4 are without prejudice to the following powers of the resolution authorities:

   (a) to protect any type of arrangements which can be subsumed under one of the classes in points (a), (c), (d) and (f) of Article 76(2) of Directive 2014/59/EU , and which are protected in normal insolvency proceedings against a temporary or indefinite separation, suspension or cancellation of assets, rights and liabilities falling under these arrangements under their national insolvency law including the national transposition of Directive 2001/24/EC,

   (b) to protect any type or arrangements which do not fall within the scope of Article 76(2) of Directive 2014/59/EU and which are protected in normal insolvency proceedings against a temporary or indefinite separation, suspension or cancellation of assets, rights and liabilities falling under these arrangements under their national insolvency law including the national transposition of Directive 2001/24/EC.

2. Resolution authorities may exclude from the protection afforded by Article 76(1) of Directive 2014/59/EU security arrangements, or set-off and netting arrangements which relate to contracts including any clause which, in the event of default of a counterparty, permits a non-defaulting counterparty to make limited payments only, or no payments at all, to the estate of the defaulting party, even if the defaulting party is a net creditor.

*Article 6*

*Conditions relating to structured finance arrangements, including securitisations and instruments used for hedging purposes*

1. Structured finance arrangements pursuant to Article 76(2)(f) of Directive 2014/59/EU shall include the following:

   (a) securitisations in which the underlying exposures have been placed into tranches and transferred by a full title transfer from the balance sheet of the originator, to the institution or entity under resolution (true sale securitisation);

   (b) securitisations by means of contractual instruments, where the underlying assets remain on the balance sheet of the institution or entity under resolution (synthetic securitisation).

   In true sale securitisations, any role of the originator in the structure, including servicing the loans, providing any form of risk protection or providing liquidity, shall be considered as a liability which forms part of the structured finance arrangements.

   In synthetic securitisations, the security interest shall be considered as a right which forms part of the structured finance arrangements only if it is attached to specific and sufficiently identified assets or identifiable in accordance with the terms of the arrangement and the applicable national law.



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2. Agreements constituting a securitisation structure covering mutual relationships between originators, issuers, trustees, servicers, cash managers and swap and credit protection counterparties, shall be considered as forming part of structured finance arrangements if those mutual relationships are directly linked to the underlying assets and the payments to be made from the proceeds generated by these assets to the holders of the structured instruments. Those mutual relationships include liabilities and rights related to the underlying assets, liabilities under the instruments issued, and security arrangements, including derivative transactions, required for maintaining the flow of payments under these liabilities.

3. Paragraph 2 shall be without prejudice to the power of the resolution authority to decide, on a case-by-case basis and having regard to the specific structure of the structured finance arrangement pursuant to Article 76(2)(f) of Directive 2014/59/EU, that other agreements between the parties referred to in paragraph 2, such as loan servicing agreements, which are not directly linked to the underlying assets and the payments to be made, form part of such structured finance arrangement.

*Article 8*
*Entry into force*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 18.3.2016

*For the Commission*

*The President*
*Jean-Claude JUNCKER*



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