Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC

DIRECTIVE (EU) 2019/879 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) On 9 November 2015, the Financial Stability Board published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('TLAC standard'), which was endorsed by the G-20 in November 2015. The objective of the TLAC standard is to ensure that global systemically important banks, referred to as global systemically important institutions ('G-SIIs') in the Union framework, have the loss-absorbing and recapitalisation capacity necessary to help ensure that, in, and immediately following, a resolution, those institutions can continue to perform critical functions without putting taxpayers' funds, that is public funds, or financial stability at risk. In its Communication of 24 November 2015, 'Towards the completion of the Banking Union', the Commission committed itself to bringing forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented in Union law by the internationally agreed deadline of 2019.

(2) The implementation of the TLAC standard in Union law needs to take into account the existing institution-specific minimum requirement for own funds and eligible liabilities (MREL) that applies to all credit institutions and investment firms (institutions) established in the Union, as well as to any other entity as laid down in Directive 2014/59/EU of the European Parliament and of the Council[(4)] (entities). As the TLAC standard and the MREL pursue the same objective of ensuring that institutions and entities

established in the Union have sufficient loss-absorbing and recapitalisation capacity, the two requirements should be complementary elements of a common framework. Operationally, the harmonised minimum level of the TLAC standard for G-SIIs ('TLAC minimum requirement') should be introduced in Union legislation through amendments to Regulation (EU) No 575/2013[5], while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs, referred to as the MREL, should be addressed through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council[6]. The provisions of Directive 2014/59/EU, as amended by this Directive, on the loss-absorbing and recapitalisation capacity of institutions and entities should be applied in a manner consistent with those in Regulations (EU) No 575/2013 and (EU) No 806/2014 and in Directive 2013/36/EU of the European Parliament and of the Council[7].

(3) The absence of harmonised Union rules in respect of the implementation of the TLAC standard in the Union creates additional costs and legal uncertainty and makes the application of the bail-in tool for cross-border institutions and entities more difficult. The absence of harmonised Union rules also results in distortions of competition in the internal market given that the costs for institutions and entities to comply with the existing requirements and the TLAC standard might differ considerably across the Union. It is therefore necessary to remove those obstacles to the functioning of the internal market and to avoid distortions of competition resulting from the absence of harmonised Union rules in respect of the implementation of the TLAC standard. Consequently, the appropriate legal basis for this Directive is Article 114 of the Treaty on the Functioning of the European Union.

(4) In line with the TLAC standard, Directive 2014/59/EU should continue to recognise both the Single Point of Entry (SPE) resolution strategy and the Multiple Point of Entry (MPE) resolution strategy. Under the SPE resolution strategy, only one group entity, usually the parent undertaking, is resolved, whereas other group entities, usually operating subsidiaries, are not put under resolution, but transfer their losses and recapitalisation needs to the entity to be resolved. Under the MPE resolution strategy, more than one group entity might be resolved. A clear identification of entities to be resolved ('resolution entities'), that is, the entities to which resolution actions could be applied, together with subsidiaries that belong to them ('resolution groups'), is important in order to apply the desired resolution strategy effectively. That identification is also relevant for determining the level of application of the rules on loss-absorbing and recapitalisation capacity that institutions and entities should apply. It is therefore necessary to introduce the concepts of 'resolution entity' and 'resolution group' and to amend Directive 2014/59/EU as regards group resolution planning, in order to explicitly require resolution authorities to identify the resolution entities and resolution groups within a group and to appropriately consider the implications of any planned action within the group to ensure effective group resolution.

(5) Member States should ensure that institutions and entities have sufficient loss-absorbing and recapitalisation capacity to ensure a smooth and fast absorption of losses and recapitalisation with a minimum impact on taxpayers and financial stability. That should

be achieved through compliance by institutions with an institution-specific MREL as set out in Directive 2014/59/EU.

(6) In order to align denominators that measure the loss-absorbing and recapitalisation capacity of institutions and entities with those provided for in the TLAC standard, the MREL should be expressed as a percentage of the total risk exposure amount and of the total exposure measure of the relevant institution or entity, and institutions or entities should meet simultaneously the levels resulting from the two measurements.

(7) In order to facilitate long-term planning for the issue of instruments and to establish certainty with regard to the necessary buffers, markets need timely clarity about the eligibility criteria required for instruments to be recognised as TLAC or MREL eligible liabilities.

(8) In order to ensure a level playing field for institutions and entities established in the Union, including on a global level, eligibility criteria for bail-inable liabilities for the MREL should be closely aligned with those laid down in Regulation (EU) No 575/2013 for the TLAC minimum requirement, but subject to the complementary adjustments and requirements introduced in this Directive. In particular, certain debt instruments with an embedded derivative component, such as certain structured notes, should be eligible, subject to certain conditions, to meet the MREL to the extent that they have a fixed or increasing principal amount repayable at maturity that is known in advance while only an additional return is linked to that derivative component and depends on the performance of a reference asset. In view of those conditions, those debt instruments are expected to be highly loss-absorbing and easy to bail-in in resolution. Where institutions or entities hold own funds in excess of own funds requirements, that fact should not in itself affect decisions concerning the determination of the MREL. Moreover, it should be possible for institutions and entities to meet any part of their MREL with own funds.

(9) The scope of liabilities used to meet the MREL includes, in principle, all liabilities resulting from claims arising from ordinary unsecured creditors (non-subordinated liabilities) unless they do not meet specific eligibility criteria set out in this Directive. To enhance the resolvability of institutions and entities through an effective use of the bail-in tool, resolution authorities should be able to require that the MREL is met with own funds and other subordinated liabilities, in particular where there are clear indications that bailed-in creditors are likely to bear losses in resolution that would exceed the losses that they would incur under normal insolvency proceedings. The resolution authorities should assess the need to require institutions and entities to meet the MREL with own funds and other subordinated liabilities where the amount of liabilities excluded from the application of the bail-in tool reaches a certain threshold within a class of liabilities that includes MREL eligible liabilities. Institutions and entities should meet the MREL with own funds and other subordinated liabilities to the extent that is necessary to prevent their creditors from incurring losses that are greater than those that creditors would otherwise incur under normal insolvency proceedings.

(10) Any subordination of debt instruments requested by resolution authorities for the MREL should be without prejudice to the possibility to partly meet the TLAC minimum requirement with non-subordinated debt instruments in accordance with Regulation

(EU) No 575/2013 as permitted by the TLAC standard. For resolution entities of G-SIIs, resolution entities of resolution groups with assets above EUR 100 billion (top-tier banks), and for resolution entities of certain smaller resolution groups that are considered likely to pose a systemic risk in the event of failure, taking into account the prevalence of deposits and the absence of debt instruments in the funding model, limited access to capital markets for eligible liabilities and reliance on Common Equity Tier 1 capital to meet the MREL, resolution authorities should be able to require that a part of the MREL equal to the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU as amended by this Directive is met with own funds and other subordinated liabilities, including own funds used to comply with the combined buffer requirement set out in Directive 2013/36/EU.

(11) At the request of a resolution entity, resolution authorities should be able to reduce the part of the MREL required to be met with own funds and other subordinated liabilities up to a limit that represents the proportion of the reduction possible under Article 72b(3) of Regulation (EU) No 575/2013 in relation to the TLAC minimum requirement laid down in that Regulation., Resolution authorities should be able to require, in accordance with the principle of proportionality, that the MREL is met with own funds and other subordinated liabilities to the extent that the overall level of the required subordination in the form of own funds and eligible liabilities items due to the obligation of institutions and entities to comply with the TLAC minimum requirement, the MREL and, where applicable, the combined buffer requirement under Directive 2013/36/EU, does not exceed the greater of the level of loss absorption and recapitalisation referred to in Articles 37(10) and 44(5) of Directive 2014/59/EU as amended by this Directive or the formula set out in this Directive based on the prudential requirements under Pillar 1 and Pillar 2 and the combined buffer requirement.

(12) For specific top-tier banks, resolution authorities should, subject to conditions to be assessed by the resolution authority, limit the level of the minimum subordination requirement to a certain threshold, taking also into account the possible risk of disproportionately impacting the business model of those institutions. That limitation should be without prejudice to the possibility of setting a subordination requirement above this limit through the requirement of subordination under Pillar 2, subject also to the conditions applying to Pillar 2, on the basis of alternative criteria, namely impediments to resolvability, or the feasibility and credibility of the resolution strategy, or the riskiness of the institution.

(13) The MREL should allow institutions and entities to absorb losses expected in resolution or at the point of non-viability, as appropriate, and to be recapitalised after the implementation of actions provided for in the resolution plan or after the resolution of the resolution group. The resolution authorities should, on the basis of the resolution strategy they have chosen, duly justify the imposed level of the MREL and should, without undue delay, review that level to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU. As such, the imposed level of the MREL should be the sum of the amount of the losses expected in resolution that correspond to the institution's or entity's own funds requirements and the recapitalisation amount that allows the institution or entity post-resolution,

or after the exercise of write down or conversion powers, to meet its own funds requirements necessary for being authorised to pursue its activities under the chosen resolution strategy. The resolution authority should adjust downwards or upwards the recapitalisation amounts for any changes resulting from the actions set out in the resolution plan.

(14) The resolution authority should be able to increase the recapitalisation amount to ensure sufficient market confidence in the institution or entity after the implementation of the actions set out in the resolution plan. The requested level of the market confidence buffer should enable the institution or entity to continue to meet the conditions for authorisation for an appropriate period, including by allowing the institution or entity to cover the costs related to the restructuring of its activities following resolution, and to sustain sufficient market confidence. The market confidence buffer should be set by reference to part of the combined buffer requirement under Directive 2013/36/EU. The resolution authorities should adjust downwards the level of the market confidence buffer if a lower level is sufficient to ensure sufficient market confidence or should adjust upwards that level where a higher level is necessary to ensure that, following the actions set out in the resolution plan, the entity continues to meet the conditions for its authorisation for an appropriate period, and to sustain sufficient market confidence.

(15) In line with Commission Delegated Regulation (EU) 2016/1075[8], resolution authorities should examine the investor base of an individual institution's or entity's MREL instruments. If a significant part of an institution's or entity's MREL instruments is held by retail investors that might not have received an appropriate indication of relevant risks, that could in itself constitute an impediment to resolvability. In addition, if a large part of an institution's or entity's MREL instruments is held by other institutions or entities, the systemic implications of a write down or conversion could also constitute an impediment to resolvability. Where a resolution authority finds an impediment to resolvability resulting from the size and nature of a certain investor base, it should be able to recommend to an institution or entity that it address that impediment.

(16) To ensure that retail investors do not invest excessively in certain debt instruments that are eligible for the MREL, Member States should ensure that the minimum denomination amount of such instruments is relatively high or that the investment in such instruments does not represent an excessive share of the investor's portfolio. This requirement should only apply to instruments issued after the date of transposition of this Directive. This requirement is not sufficiently covered in Directive 2014/65/EU, and should therefore be enforceable under Directive 2014/59/EU and should be without prejudice to investor protection rules provided for in Directive 2014/65/EU. Where, in the course of performing their duties, resolution authorities find evidence regarding potential infringements of Directive 2014/65/EU, they should be able to exchange confidential information with market conduct authorities for the purpose of enforcing that Directive. In addition, it should also be possible for Member States to further restrict the marketing and sale of certain other instruments to certain investors.

(17) To enhance their resolvability, resolution authorities should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement