



EBA/GL/2017/04

11/07/2017

Final Guidelines

on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments

1. Compliance and reporting obligations

Status of these Guidelines

This document contains draft guidelines issued pursuant to Article 16 of 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 subsequently amended by Regulation (EU) No 1022/2013 (the EBA Regulation). In accordance with Article 16(3) of the EBA Regulation, competent authorities and financial institutions must make every effort to comply with the guidelines.

Guidelines set out the EBA's view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. The EBA therefore expects all competent authorities and financial institutions to whom guidelines are addressed to comply with guidelines. Competent authorities to whom guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting Requirements

1. In accordance with Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by 11/09/2017. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided at Section 5 to compliance@eba.europa.eu with the reference 'EBA/GL/2017/04'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.
2. Notifications will be published on the EBA website, in line with Article 16(3).

Title I – Subject matter, scope and definitions

1. Subject matter

1.1. Pursuant to Article 47(6) of Directive 2014/59/EU (the Bank Recovery and Resolution Directive, BRRD)¹, these guidelines set out the circumstances in which it would be appropriate, when applying the bail-in tool set out in Article 43 or the writedown or conversion of capital instruments set out in Article 59, to 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) dilute existing shareholders and holders of other instruments of ownership as a result of the conversion of:

(i) relevant capital instruments issued by the institution pursuant to the power referred to in Article 59(2) of the BRRD; or

(ii) eligible liabilities into shares or other instruments of ownership issued by the institution under resolution pursuant to the power referred to in Article 63(1)(f) of the BRRD.

Article 47(1) requires that action (b) may only be taken when, according to the valuation carried out in accordance with Article 36, the institution under resolution has a positive net asset value, and that the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares and other instruments of ownership.

2. Definitions

In the context of these guidelines, the following definitions apply:

(a) ‘cancellation’ of shares means that shares are cancelled and the shareholders’ economic claims and other rights of ownership are completely erased on those shares;

(b) ‘transfer’ of shares means that shares or other instruments of ownership are transferred to creditors and the original shareholders’ future economic claims and other rights of ownership on those shares are erased;

(c) ‘dilution’ means that new shares or other instruments of ownership are issued and, as such, the existing shareholders’ future economic claims and other rights are proportionately

¹ 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 (OJ L 173, 12.6.2014, p. 190)

reduced but are not necessarily erased. They may retain some economic and administrative (voting) ownership rights².

3. Scope and level of application

These guidelines are addressed to resolution authorities when they are applying the bail-in tool or the power to write down or convert relevant capital instruments at the point of non-viability to an institution or to an entity referred to in Article 1(b),(c), or (d) of Directive 2014/59/EU.

Title II – Guidelines on the circumstances in which it is appropriate to cancel, transfer, or severely dilute shares or other instruments of ownership

1. Circumstances related to the valuation of the firm's assets and liabilities

- 1.1. Before applying the bail-in tool or the power to write down or convert capital instruments at the point of non-viability, a fair, prudent and realistic valuation of the assets and liabilities of the institution shall be made in accordance with Article 36 (b) to (g) of Directive 2014/59/EU.
- 1.2. This valuation is intended to inform decisions to be taken by the resolution authority on the extent of cancellation or dilution of shares or other instruments of ownership and the extent of losses which should be recognised at the point of resolution.
- 1.3. An *ex post* independent valuation must also be made in accordance with Article 74(2) of Directive 2014/59/EU to determine whether the actual treatment that shareholders and creditors received as a result of resolution was worse than that which they would have received had the firm entered normal insolvency proceedings (the *ex post* valuation). An estimate of the treatment that each class of shareholders and creditors would have been expected to receive if the firm were wound up under normal insolvency proceedings must also be included alongside the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD, as required by Article 36(8) of the BRRD.
- 1.4. The appropriate treatment of shareholders and other instruments of ownership should be informed by the estimated net asset value of the institution according to the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD and the estimate produced pursuant to Article 36(8) of that Directive.

a. Cancellation or transfer

² Dilution may be combined with 'cancellation' or 'transfer' with the effect that some but not all shares are cancelled or transferred.

- 1.5. Resolution authorities should cancel or transfer in full all shares or other instruments of ownership when the net asset value of the institution is zero or negative according to both the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD and the estimate produced pursuant to Article 36(8) of that Directive.
- 1.6. Conversely, where the net asset value of the institution is positive according to both the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD and the estimate produced pursuant to Article 36(8) of that Directive, the extent of cancellation or transfer should be partial and ensure that shareholders retain at least the net asset value in the estimate pursuant to Article 36(8).
- 1.7. If the net asset value according to the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD is zero or negative, it will be necessary to write down, at least partially, creditors more senior in insolvency to shares or other instruments of ownership. Writing down other creditors while shareholders retained some value would be inconsistent with both the sequence of writedown in Article 48 of Directive 2014/59/EU and the respect for the creditor hierarchy in insolvency required by the resolution principles of Article 34 of Directive 2014/59/EU.
- 1.8. If shares or other instruments of ownership have a positive value according to the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD, but a zero value according to the estimate pursuant to Article 36(8), resolution authorities may choose from a wider set of options consisting of: a) full cancellation or transfer; b) partial cancellation or transfer³; or c) dilution. In this case, to ensure consistency with the creditor hierarchy, with the sequence of writedown in Article 48 and with the principles for resolution in Article 34, resolution authorities should carefully evaluate which option will best comply with the BRRD principles and safeguards and achieve the objectives of the resolution.
- 1.9. In taking resolution actions, resolution authorities should avoid taking a resolution action which they expect would result in shareholders incurring a greater loss than they would have incurred in a winding-up under normal insolvency proceedings⁴.

b. Severe dilution

- 1.10. If shares or other instruments of ownership are not cancelled or transferred in full, they must be severely diluted by the conversion of liabilities into equity.
- 1.11. For the purpose of these guidelines, severe dilution is taken to mean that both shareholders' percentage of ownership of the institution and the value of the instruments of

³ 'Partial cancellation/transfer' means that dilution (Article 47(1)(b)) is combined with 'cancellation' or 'transfer' (Article 47(1)(a)) without cancelling or transferring in full the instruments (i.e. the shareholders and the owners of other instruments retain some value). A partial transfer could also be effected by conducting a stock split to create additional shares which are transferred to holders of capital instruments or creditors.

⁴ If this is the case, they would almost certainly also have a positive going-concern value, because resolution is usually expected to be value-preserving compared with insolvency.

ownership must be reduced, unless this would breach the safeguard provided by Article 73 of the BRRD. This situation will occur only if resolution is expected to preserve less value for claimants on the bank than normal insolvency proceedings.

- 1.12. When dilution occurs, the extent of dilution should be determined consistently with the provisions of Article 50 of Directive 2014/59/EU and the EBA Guidelines on conversion rates. Conversion rates set consistently with guiding principle 2 of the EBA Guidelines on the rate of conversion of debt to equity in bail-in should ensure that dilution is severe. This principle requires that conversion rates are set to ensure that shareholders bear first loss and to respect the creditor hierarchy. If a particular creditor class is expected to be worse off after resolution than before resolution according to the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD, the resolution authority should set a conversion rate equal to or close to zero for all classes of liabilities and instruments which have a more junior rank in insolvency.
- 1.13. In exceptional circumstances it may be the case that no liability holder is expected to contribute to loss absorption or recapitalisation in resolution. In that case conversion rates for capital instruments should be set to ensure that the resolution objectives are achieved and that the value of pre-resolution shares or other instruments of ownership is reduced.
- 1.14. Resolution authorities may opt to severely dilute existing holders of shares or other instruments of ownership only when the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD suggests that the shares or other instruments of ownership have a net positive value. In these circumstances, severe dilution could also be applied in combination with a partial cancellation or partial transfer of shares or other instruments of ownership.
- 1.15. Resolution authorities should not use severe dilution if the net asset value of the institution is zero or negative according to the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD, to ensure consistency with the principles of Article 34 of Directive 2014/59/EU that shareholders bear first loss and the insolvency creditor hierarchy should be respected.
- 1.16. When the resolution authority considers that the institution has positive net asset value on the basis of the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD, but a zero value in the estimate produced pursuant to Article 36(8) of that Directive, the resolution authority should take whichever of the options listed in Article 47(1)(a) or (b) of Directive 2014/59/EU it considers best achieves the resolution objectives.
- 1.17. In some circumstances, the power to write down or convert capital instruments in Article 59 of Directive 2014/59 EU may be triggered without also triggering resolution. The extent of writedown or conversion must be the amount required to achieve resolution objectives, as assessed in accordance with Article 60(1)(b) and (c). This amount may be zero, for example, if Article 59 is triggered because extraordinary public financial support (including when a central bank provides emergency liquidity assistance on an indemnified basis, or

guarantees newly issued liabilities) is provided to a well-capitalised institution which is not deemed failing or likely to fail in accordance with Article 32 of Directive 2014/59/EU.

- 1.18. In such cases, resolution authorities should not reduce Common Equity Tier 1 (CET1) or write down or convert relevant capital instruments, because the bank is not failing or likely to fail and to do so is not necessary to meet resolution objectives.

The table below summarises the points made in this section:

<u>Circumstance relating to value of shareholder claims</u>	<u>Appropriate actions</u>	<u>Inappropriate actions</u>
Positive net asset value under both the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD and the estimate produced pursuant to Article 36(8) of that Directive	<ol style="list-style-type: none"> 1. Partial cancellation 2. Partial transfer 3. Dilution 	<ol style="list-style-type: none"> 1. Full cancellation 2. Full transfer
Positive net asset value under the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD but zero or negative net asset value under and the estimate produced pursuant to Article 36(8) of that Directive	<ol style="list-style-type: none"> 1. Full or partial cancellation 2. Full or partial transfer 3. Dilution 	None (but conversion rates must be appropriate)
Zero or negative net asset value under both the valuation carried pursuant to Article 36 (4)(b) to (g) of the BRRD and the estimate produced pursuant to Article 36(8) of that Directive	<ol style="list-style-type: none"> 1. Full cancellation 2. Full transfer 	<ol style="list-style-type: none"> 1. Partial cancellation 2. Partial transfer 3. Dilution

2. Circumstances other than those related to the valuation of the firm's assets and liabilities

- 1.19. Where more than one option may be appropriate based on the valuation, or when choosing between tools to achieve dilution, resolution authorities should choose the option or options which best meet the resolution objectives in Article 31 of the BRRD.

- 1.20. In particular, provisions of national or EU company law may affect the appropriate choice between achieving dilution solely by issuing new shares, through the combination of cancelling some shares and issuing new shares, or through the transfer of some shares.

- 1.21. The following examples provide a non-exhaustive illustration of the factors which resolution authorities should consider. The examples are not definitive and complying with the guidance does not require that authorities decide to choose the options suggested when the circumstances described apply.
- 1.22. When considering whether to cancel and/or to transfer shares or other instruments of ownership (singly or in combination with dilution), authorities may have regard to the particular features of the shares or other instruments. For example, where certain shares confer particular special voting rights, authorities may consider that it would be more appropriate to cancel those shares than to transfer them in order to simplify the structure of the reorganised firm.
- 1.23. In some cases, there may be shares or other instruments of ownership which do not qualify as CET1 capital, for example preference shares which qualify as Additional Tier 1 instruments. Authorities may choose to transfer only the CET1 instruments and to cancel any shares or other instruments of ownership (respecting the relevant safeguards and legal protections).
- 1.24. Where resolution authorities have used the option under Article 43(4) of Directive 2014/59/EU to change the legal form of a previously mutualised institution following a bail-in, a cancellation of the instruments of ownership should be carried out if necessary to effect that change.
- 1.25. Where shares of a public company are listed on official stock exchanges, transferring shares rather than cancelling them may be necessary to avoid an interruption of listings and discontinuity in valuation of the shares.

Title III – Final provisions and implementation

These guidelines should be implemented into national resolution practices by relevant resolution authorities by 6 months after publication.