Commission Delegated Regulation (EU) 2017/867 of 7 February 2017 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 (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2017/867

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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

(Text with EEA relevance)

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[(1)], 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,

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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 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 further specified. This Delegated Regulation should not prevent the resolution authorities to further specify in partial transfers those types of set- off and netting arrangements to be protected in individual partial transfers, where those 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. The resolution authorities should be allowed to decide on such extended protection in individual resolution cases.

(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[(2)]. 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[(3)].

(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.

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(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 Council[(4)]. 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[(5)].

(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 interests;

(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.

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Article 3

Conditions relating to set-off arrangements

1 Set-off arrangements entered into between an institution and a single counterparty shall qualify as set-off arrangements referred to in Article 76(2)(c) of Directive 2014/59/EU where they relate to rights and liabilities arising under financial contracts or derivatives.

2 Set-off arrangements entered into between an institution and one or more counterparties shall qualify as set-off arrangements referred to in 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 as referred to 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.

3 Resolution authorities may decide, in individual cases, that set-off arrangements entered into between an institution and one or more counterparties so far as they relate to other types of rights and liabilities than those referred to in paragraphs 1 and 2 may 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 a single counterparty shall qualify as netting arrangements pursuant to Article 76(2)(d) of Directive 2014/59/EU where they relate to rights and liabilities arising under financial contracts or derivatives.

2 Contractual netting agreements entered into between the institution and one or more 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 as referred to 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.

3 Resolution authorities may decide, in individual cases, that netting arrangements entered into between an institution and one or more counterparties may 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.