Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/778

of 2 February 2016

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary *ex post* contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines

(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 2(2), and Article 104(4) thereof,

Whereas:

(1) The deferral of extraordinary *ex post* contributions, referred to in Article 104 of Directive 2014/59/EU, should be granted by the resolution authority upon an institution's request in order to facilitate the assessment by the resolution authority that that institution meets the conditions for the deferral set out in Article 104(3) of Directive 2014/59/EU. The concerned institution should provide any information deemed necessary by the resolution authority to conduct such assessment. The resolution authority should take into account all information available to the national competent authorities to avoid any duplication of notification requirements.

(2) When assessing the impact of the payment of extraordinary *ex post* contributions on the solvency or liquidity of the institution, the resolution authority should analyse the impact of the payment on the institution's capital and liquidity position. The analysis should assume a loss on the institution's balance sheet equal to the amount payable at the point in time when it is due and make a projection of the institution's capital ratios following this loss for an appropriate time frame. Moreover, it should assume an

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outflow of funds equal to the amount payable at the point in time when it is due and should assess the liquidity risk.

(3) Recovery and resolution plans require institutions and resolution authorities to be able to identify and ensure the continuance of critical functions of institutions or groups.

(4) The continuity of critical functions of the institution under resolution is one of the main resolution objectives. It aims at safeguarding financial stability and the real economy and therefore plays a key role in the recovery and resolution planning process. Critical functions can include deposit taking, lending and loan services, payment, clearing, custody and settlement services, wholesale funding markets activities, and capital markets and investments activities.

(5) Critical functions of an institution or group are set out in its recovery plan. The recovery plan should be assessed by the resolution authority and form the basis of the resolution plan. The resolution authority should conduct its own assessment of critical functions when establishing the resolution plan and should demonstrate how critical functions and core business lines could be legally and economically separated from other functions so as to ensure continuity upon the failure of the institution.

(6) When assessing the resolvability of an institution, resolution authorities should take into account whether the chosen strategy ensures the continuity of critical functions, and whether the power to address or remove impediments to resolvability relates to critical functions. Similarly, in a bail-in scenario, liabilities could be exempted from the scope of the bail-in where the exclusion is strictly necessary and proportionate to achieve the continuity of critical functions. Critical functions also become relevant in the operation of a bridge bank tool since a bridge bank institution should maintain critical functions.

(7) Critical functions should be identified in a two-step procedure: first, the institutions perform a self-assessment when establishing their recovery plans. Secondly, the resolution authorities critically review the recovery plans of the individual institutions to ensure consistency and coherence in the approaches used by banks. Since the resolution authorities benefit from the overarching view as to which functions are essential to maintain financial stability as a whole, they should take the final decision as regards the designation of critical functions for the purpose of resolution planning and execution.

(8) Critical services should be the underlying operations, activities and services performed for one (dedicated services) or more business units or legal entities (shared services) within the group which are needed to provide one or more critical functions. Critical services can be performed by one or more entities (such as a separate legal entity or an internal unit) within the group (internal service) or be outsourced to an external provider (external service). A service should be considered critical where its disruption can present a serious impediment to, or completely prevent, the performance of critical functions as they are intrinsically linked to the critical functions that an institution performs for third parties. Their identification follows the identification of a critical function.

(9) Institutions and resolution authorities should also identify the critical services in the recovery and resolution plans. To the extent that critical services are outsourced to third

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parties, the resolution authority should be able to limit its assessment to that which is necessary to verify whether the institution has an appropriate business continuity plan in place.

(10) The determination of a service as critical should enable institutions to ensure the continued availability of those services by providing them through entities or units that are resilient in a failure, or establishing appropriate arrangements where they are supplied by an external provider.

(11) The main difference between a critical function and a core business line lies in the impact of the activities concerned. While critical functions should be assessed from a perspective of their importance for the functioning of the real economy and financial markets and therefore for financial stability as a whole, core business lines should be assessed on the basis of the importance for the institution itself such as the level of their contributions to revenues and profits of the institution.

(12) Insofar as the recovery plan should contain a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the institution, also the resolution plan should contain a mapping of the institution's critical operations and core business lines and a demonstration of how critical functions and core business lines could be legally and economically separated from other functions so as to ensure continuity upon the failure of the institution. In resolution, the continuity of critical functions and core business lines may justify an exemption of certain liabilities from the application of the bail-in tool and may also justify its transference to a bridge bank.

(13) While core business lines are often linked to how much they contribute to the financial results of the institution, such an approach may not completely capture all core business lines because an institution may provide a service which is not directly profitable (or may even generate losses) but creates significant franchise value and is therefore important to its business as a whole,

HAS ADOPTED THIS REGULATION:

CHAPTER I

COMMON PROVISIONS

Article 1

Subject matter

This Regulation lays down rules specifying:

(a) the circumstances and conditions under which the payment of extraordinary *ex-post* contributions may be partially or entirely deferred pursuant to Article 104(3) of Directive 2014/59/EU;

(b) the criteria for the determination of the activities, services and operations referred to in point (35) of Article 2(1) of Directive 2014/59/EU;

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(c) the criteria for the determination of the business lines and associated services referred to in point (36) of Article 2(1) of Directive 2014/59/EU.

Those rules shall be applied by a resolution authority designated by a Member State in accordance with Article 3 of Directive 2014/59/EU.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) 'deferral period' means a period of up to six months;

(2) 'function' means a structured set of activities, services or operations that are delivered by the institution or group to third parties irrespective from the internal organisation of the institution;

(3) 'business line' means as a structured set of activities, processes or operations that are developed by the institution or group for third parties to achieve the organisation's goals.

CHAPTER II

DEFERRAL OF *EX POST* CONTRIBUTIONS

Article 3

Deferral of extraordinary *ex post* contributions

1 The deferral of *ex post* contributions referred to in Article 104(3) of Directive 2014/59/EU may be granted by the resolution authority upon an institution's request. That institution shall provide any information deemed necessary by the resolution authority to conduct the assessment of the impact of the payment of extraordinary *ex post* contributions on its financial position. The resolution authority shall take into account all information available to the national competent authorities to establish whether that institution meets the conditions for deferral referred to in paragraph 3.

2 When determining whether that institution meets the conditions for deferral, the resolution authority shall assess the impact a payment of extraordinary *ex post* contributions would have on the solvency and liquidity position of that institution. Where that institution is part of a group, the assessment shall also include the impact of solvency and liquidity of the group as a whole.

3 The resolution authority may defer payment of extraordinary *ex post* contributions where it concludes that the payment results in any of the following:

a a likely breach, within the following six months, of the institution's minimum own funds requirements set out in Article 92 of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(2)];

b a likely breach, within the following six months, of the institution's minimum liquidity coverage requirement set out in Article 412(1) of Regulation (EU) No 575/2013 and specified in Article 4 of the Commission Delegated Regulation (EU) 2015/61[(3)];

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c a likely breach, within the following six months, of the institution's specific liquidity requirement set out in Article 105 of Directive 2013/36/EU of the European Parliament and of the Council[4].

4 The resolution authority shall limit the deferral period to the extent it is necessary to avoid risks to the financial position of that institution or its group. The resolution authority shall regularly monitor whether the conditions for the deferral referred to in paragraph 3 continue to apply during the deferral period.

5 Upon request of that institution, the resolution authority may renew the deferral period, where it determines that the conditions for the deferral referred to in paragraph 3 continue to apply. This renewal shall not exceed 6 months.

Article 4

Assessment of the impact of the deferral on solvency

1 The resolution authority shall assess the impact of the payment of extraordinary *ex post* contributions on the institution's regulatory capital position. That assessment shall include an analysis of the impact the payment of extraordinary *ex post* contributions would have on the institution's compliance with the minimum own funds requirements set out in Article 92 of Regulation (EU) No 575/2013.

2 For the purpose of this assessment, the amount of *ex post* contributions shall be deducted from the institution's own funds position.

3 The analysis referred to in paragraph 1 shall cover at least the period up to the next reporting remittance date for the own funds requirement set out in Article 3 of Commission Implementing Regulation (EU) No 680/2014[5].

Article 5

Assessment of the impact of deferral on liquidity

1 The resolution authority shall assess the impact of the payment of extraordinary *ex post* contributions on the institution's liquidity position. That assessment shall include an analysis of the impact a payment of extraordinary *ex post* contributions would have on the institution's ability to meet the liquidity coverage requirement provided for in Article 412(1) of Regulation (EU) No 575/2013 and specified in Article 4 of Delegated Regulation (EU) 2015/61.

2 For the purposes of the analysis described in paragraph 1, the resolution authority shall add a liquidity outflow, equal to 100 % of the amount payable at the point in time when the payment of extraordinary *ex post* contributions is due, to the calculation of net liquidity outflows as set out in Article 20(1) of Delegated Regulation (EU) 2015/61.

3 The resolution authority shall also assess the impact of such outflow established under paragraph 2 on the specific liquidity requirements set out in Article 105 of Directive 2013/36/EU.

4 The analysis referred to in paragraph 1 shall cover at least the period up to the next reporting remittance date for the liquidity coverage requirement set out in Article 3 of Implementing Regulation (EU) No 680/2014.