SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4785 GIBRALTAR Friday 27th November 2020

LEGAL NOTICE NO. 425 OF 2020

FINANCIAL SERVICES ACT 2019

INTERPRETATION AND GENERAL CLAUSES ACT

FINANCIAL SERVICES (RECOVERY AND RESOLUTION) (AMENDMENT) REGULATIONS 2020

In exercise of the powers conferred on the Minister by section 283, 620 and 627 of the Financial Services Act 2019, as read with section 23(g)(i) of the Interpretation and General Clauses Act, and on the Government by section 23(g)(ii) of that Act and of all other enabling powers, the Minister and the Government have made these Regulations–

Title.

1. These Regulations may be cited as the Financial Services (Recovery and Resolution) (Amendment) Regulations 2020.

Commencement.

2. These Regulations come into operation on 28th December 2020.

Amendment of the Financial Services (Recovery and Resolution) Regulations 2020.

3.(1) The Financial Services (Recovery and Resolution) Regulations 2020 are amended as follows.

(2) In regulation 3–

(a) in the definition of "aggregate amount", for "eligible" substitute "bail-inable";

(b) after the definition of "back-to-back transaction", insert–

""bail-inable liabilities" means the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to in regulation 2(1)(b), (c) or (d) and that are not excluded from the scope of the bail-in tool pursuant to regulation 44(2);";

(c) after the definition of "central counterparty", insert–

““combined buffer requirement” means combined buffer requirement as defined in Article 128(6) of the Capital Requirements Directive;

“Common Equity Tier 1 capital” means Common Equity Tier 1 capital as calculated in accordance with Article 50 of the Capital Requirements Regulation;”;

(d) for the definition of “debt instruments” substitute–

““debt instruments”–

(a) for the purpose of regulation 63(2)(g) and (j), means–

(i) bonds and other forms of transferrable debt;

(ii) instruments creating or acknowledging a debt; and

(iii) instruments giving rights to acquire debt instruments; and

(b) for the purpose of regulation 99, means–

(i) bonds and other forms of transferrable debt; and

(ii) instruments creating or acknowledging a debt;”;

(e) for the definition of “eligible liabilities” substitute–

““eligible liabilities” means bail-inable liabilities that fulfil, as applicable, the conditions of regulation 45B or 45F(5)(a), and Tier 2 instruments that meet the conditions of Article 72a.1(b) of the Capital Requirements Regulation;”;

(f) after the definition of “Gibraltar Resolution Authority” insert–

““global systemically important institution” or “G-SII” means a G-SII as defined in Article 4.1(133) of the Capital Requirements Regulation;”;

(g) after the definition of “management body” insert–

““material subsidiary” means a material subsidiary as defined in Article 4.1(135) of the Capital Requirements Regulation;“;

(h) after the definition of “resolution college” insert–

““resolution entity” means–

(a) a legal person established in an EEA State, which, in accordance with regulation 12, is identified by the resolution authority as an entity in respect of which the resolution plan provides for resolution action; or

(b) an institution that is not part of a group that is subject to consolidated supervision under Articles 111 and 112 of the Capital Requirements Directive, in respect of which the resolution plan drawn up under regulation 10 provides for resolution action;

"resolution group" means–

(a) a resolution entity and its subsidiaries that are not–

(i) resolution entities themselves;

(ii) subsidiaries of other resolution entities; or

(iii) entities established in a third country that are not included in the resolution group in accordance with the resolution plan and their subsidiaries; or

(b) credit institutions permanently affiliated to a central body and the central body itself when at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries;";

(i) after the definition of "the State Aid framework" insert–

""subordinated eligible instruments" means instruments that meet all of the conditions referred to in Article 72a of the Capital Requirements Regulation other than paragraphs (3) to (5) of Article 72b of that Regulation;";

(j) for the definition of "subsidiary" substitute–

""subsidiary"–

(a) means a subsidiary as defined in Article 4.1(16) of the Capital Requirements Regulation; and

(b) for the purpose of applying regulations 7, 12, 17, 18, 45 to 45M, 59 to 62, 91 and 92 to resolution groups within the meaning of paragraph (b) of that expression, includes, where and as appropriate, credit institutions that are permanently affiliated to a central body, the central body itself, and their respective subsidiaries, taking into account the way in which such resolution groups comply with regulation 45E(3);".

(3) In regulation 10–

(a) after sub-regulation (10) insert–

"(10A) The review referred to in the sub-regulation (9) must be carried out after the implementation of resolution actions or the exercise of powers referred to in regulation 59.

(10B) When setting the deadlines referred to in sub-regulation (11)(o) and (p) in the circumstances referred to in sub-regulation (10A), the Gibraltar Resolution Authority must take into account the deadline to comply with the requirement referred to in Article 104b of the Capital Requirements Directive.";

(b) in sub-regulation (11), for paragraphs (o) and (p) substitute–

"(o) the requirements referred to in regulations 45E and 45F and a deadline to reach that level in accordance with regulation 45M;

(p) where a resolution authority applies regulation 45B(7) to (11), (12) and (13) or (16), a timeline for compliance by the resolution entity in accordance with regulation 45M;';

(4) In regulation 12–

(a) for sub-regulations (2) and (3) substitute–

"(2) The group resolution plan must identify measures to be taken in respect of–

(a) the EEA parent undertaking;

(b) the subsidiaries that are part of the group and that are established in the EEA;

(c) the entities referred to in regulation 2(1)(c) and (d); and

(d) subject to Part 6, the subsidiaries that are part of the group and that are established outside the EEA.

(3) In accordance with the measures referred to in sub-regulation (2), the resolution plan must identify for each group the resolution entities and the resolution groups.";

(b) in sub-regulation (5)–

(i) for paragraphs (a) and (b) substitute–

"(a) set out the resolution actions that are to be taken for resolution entities in the scenarios referred to in regulation 10(5) and (6), and the implications of those resolution actions in respect of other group entities referred to in regulation 2(1)(b), (c) and (d), the parent undertaking and subsidiary institutions;

(aa) where a group comprises more than one resolution group, set out the resolution actions that are to be taken for the resolution entities of each resolution group and the implications of those actions on both of the following–

(i) other group entities that belong to the same resolution group;

(ii) other resolution groups;

(b) examine the extent to which the resolution tools could be applied, and the resolution powers exercised, with respect to resolution entities established in the EEA in a coordinated manner, including measures to facilitate the purchase by a third party of the group as a whole, of separate business lines or activities that are provided by a number of group entities, or of particular group entities or resolution groups, and identify any potential impediments to a coordinated resolution;"; and

(ii) for paragraph (e) substitute–

"(e) set out any additional actions, not referred to in these Regulations, which the relevant resolution authorities intend to take in relation to the entities within each resolution group;".

(5) In regulation 13–

(a) for sub-regulation (10) substitute–

"(10) The adoption of the group resolution plan must take the form of a joint decision of the Gibraltar Resolution Authority as group-level resolution authority and the resolution authorities of subsidiaries.

(10A) Where a group is composed of more than one resolution group, the planning of the resolution actions referred to regulation 12(5)(aa) must be included in any joint decision.

(10B) The resolution authorities must make a joint decision within four months of the date of the transmission by the Gibraltar Resolution Authority as group-level resolution authority of the information referred to in sub-regulation (3).";

(b) for sub-regulation (19) substitute–

"(19) In the absence of a joint decision between the resolution authorities within four months, the Gibraltar Resolution Authority, where it is responsible for a subsidiary and disagrees with the group resolution plan, must make its own decision and, where appropriate, identify the

resolution entity and draw up and maintain a resolution plan for the resolution group composed of entities under its jurisdiction.".

(6) In regulation 16–

(a) in sub-regulation (2) substitute–

"(2) A group must be considered to be resolvable if the Gibraltar Resolution Authority, together with other relevant resolution authorities of the group, determine that it is feasible and credible for the resolution authorities to–

(a) either–

(i) wind up group entities under normal insolvency proceedings; or

(ii) resolve the group by applying resolution tools and exercising resolution powers with respect to resolution entities of that group; and

(b) in doing so–

(i) avoid, to the maximum extent possible, any significant adverse consequences for the financial systems of the EEA States in which group entities or branches are located or of other EEA States or the EEA, including broader financial instability or system wide events; and

(ii) ensure the continuity of critical functions carried out by those group entities, where they can be easily separated in a timely manner or by other means."; and

(b) after sub-regulation (8), insert–

"(8A) Where a group is composed of more than one resolution group, the Gibraltar Resolution Authority, together with other relevant resolution authorities of the group, must assess the resolvability of each resolution group in accordance with this regulation.

(8B) The assessment under sub-regulation (8A) must be performed in addition to the assessment of the resolvability of the entire group and must be made within the decision-making procedure set out in regulation 13.".

(7) After regulation 16, insert–

"**Power to prohibit certain distributions.**

16A.(1) An entity which is in the situation that–

(a) it meets the combined buffer requirement when considered in addition to each of the requirements in points Article 141a.1(a) to (c) of the Capital Requirements Directive; but

(b) it fails to meet the combined buffer requirement when considered in addition to the requirements referred to in regulations 45C and 45D, when calculated in accordance with regulation 45(2)(a),

must immediately notify the Gibraltar Resolution Authority of that situation.

(2) Where an entity is in the situation in sub-regulation (1), the Gibraltar Resolution Authority may prohibit the entity from distributing more than the Maximum Distributable Amount related to the minimum requirement for own funds and eligible liabilities ("M-MDA"), calculated in accordance with sub-regulation (7), through any of the following actions–

(a) making a distribution in connection with Common Equity Tier 1 capital;

(b) creating an obligation to pay variable remuneration or discretionary pension benefits, or to pay variable remuneration if the obligation to pay was created at a time when the entity failed to meet the combined buffer requirement; or

(c) making payments on Additional Tier 1 instruments.

(3) In the situation referred to in in sub-regulation (1), the Gibraltar Resolution Authority, after consulting the GFSC, must without unnecessary delay assess whether to exercise the power in sub-regulation (2), taking account of the following elements–

(a) the reason, duration and magnitude of the failure and its impact on resolvability;

(b) the development of the entity's financial situation and the likelihood of it fulfilling, in the foreseeable future, the condition in regulation 32(1)(a);

(c) the prospect that the entity will be able to ensure compliance with the requirements in sub-regulation (1) within a reasonable timeframe;

(d) where the entity is unable to replace liabilities that no longer meet the eligibility or maturity criteria set out in Articles 72b and 72c of the Capital Requirements Regulation or in regulation 45B or 45F(5), if that inability is idiosyncratic or is due to market-wide disturbance; and

(e) whether the exercise of the power in sub-regulation (2) is the most adequate and proportionate means of addressing the situation of the

entity, taking into account its potential impact on both the financing conditions and resolvability of the entity concerned.

(4) The Gibraltar Resolution Authority must repeat its assessment of whether to exercise the power in sub-regulation (2) at least every month for as long as the entity continues to be in the situation referred to in in sub-regulation (1).

(5) If the Gibraltar Resolution Authority finds that the entity is still in the situation referred to in in sub-regulation (1) nine months after that situation arose, the Gibraltar Resolution Authority, after consulting the GFSC, must exercise the power in sub-regulation (2), except where it finds, following an assessment, that at least two of the following conditions are fulfilled–

(a) the failure is due to a serious disturbance to the functioning of financial markets which leads to broad-based financial market stress across several segments of financial markets;

(b) the disturbance referred to in paragraph (a) not only results in the increased price volatility of the own funds instruments and eligible liabilities instruments of the entity or increased costs for the entity, but also leads to a full or partial closure of markets which prevents the entity from issuing own funds instruments and eligible liabilities instruments on those markets;

(c) the market closure referred to in paragraph (b) is observed not only for the concerned entity, but also for several other entities;

(d) the disturbance referred to in paragraph (a) prevents the entity concerned from issuing own funds instruments and eligible liabilities instruments sufficient to remedy the failure; or

(e) an exercise of the power in sub-regulation (2) would lead to negative spill-over effects for part of the banking sector, thereby potentially undermining financial stability.

(6) Where the exception in sub-regulation (5) applies, the Gibraltar Resolution Authority must–

(a) notify the GFSC of its decision and explain its assessment in writing; and

(b) every month, repeat its assessment of whether the exception applies.

(7) The M-MDA must be–

(a) calculated by multiplying the sum calculated in accordance with sub-regulation (8) by the factor determined in accordance with sub-regulation (9); and

(b) reduced by any amount resulting from any of the actions referred to in paragraphs (a) to (c) of sub-regulation (2).

(8) The sum to be multiplied in accordance with sub-regulation (7)(a) comprises–

(a) any interim profits not included in Common Equity Tier 1 capital under Article 26.2 of the Capital Requirements Regulation, net of any distribution of profits or any payment resulting from the actions referred to in paragraphs (a) to (c) of sub-regulation (2);

(b) plus any year-end profits not included in Common Equity Tier 1 capital Article 26.2 of the Capital Requirements Regulation, net of any distribution of profits or any payment resulting from the actions referred to in paragraphs (a) to (c) of sub-regulation (2);

(c) minus amounts which would be payable by tax if the items specified in paragraphs (a) and (b) were to be retained.

(9) The factor referred to sub-regulation (7)(a) must be determined as follows–

(a) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet any of the requirements set out in Article 92a of the Capital Requirements Regulation and in regulations 45C and 45D, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92.3 of the Capital Requirements Regulation, is within the first (that is, the lowest) quartile of the combined buffer requirement, the factor is 0;

(b) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet any of the requirements set out in Article 92a of the Capital Requirements Regulation and in regulations 45C and 45D, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92.3 of the Capital Requirements Regulation, is within the second quartile of the combined buffer requirement, the factor is 0.2;

(c) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet the requirements set out in Article 92a of the Capital Requirements Regulation and in regulations 45C and 45D, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92.3 of the Capital Requirements Regulation, is within the third quartile of the combined buffer requirement, the factor is 0.4; and

(d) where the Common Equity Tier 1 capital maintained by the entity which is not used to meet the requirements set out in Article 92a of the Capital Requirements Regulation and in regulations 45C and 45D, expressed as a percentage of the total risk exposure amount calculated in accordance

with Article 92.3 of the Capital Requirements Regulation, is within the fourth (that is, the highest) quartile of the combined buffer requirement, the factor is 0.6.

(10) The lower and upper bounds of each quartile of the combined buffer requirement is calculated as follows–

$$\text{Lower bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times (Qn - 1)$$

$$\text{Upper bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times Qn$$

where Qn = the ordinal number of the quartile concerned.".

(8) In regulation 17–

(a) in sub-regulation (1), in the four places it occurs, for "institution" substitute "entity";

(b) in sub-regulation (2), for "institution" substitute "entity";

(c) in sub-regulation (3), for "institution" substitute "entity";

(d) for sub-regulations (4) to (7), substitute–

"(4) Within two weeks of the date of receipt of a notification under sub-regulation (1), the entity must propose to the Gibraltar Resolution Authority possible measures (including the timeline for their implementation) to ensure that the entity complies with regulation 45E or 45F and the combined buffer requirement, where a substantive impediment to resolvability is due to either of the following situations–

(a) the entity–

(i) meets the combined buffer requirement when considered in addition to each of the requirements in points Article 141a.1(a) to (c) of the Capital Requirements Directive; but

(ii) does not meet the combined buffer requirement when considered in addition to the requirements referred to in regulations 45C and 45D, when calculated in accordance with regulation 45(2)(a); or

(b) the entity does not meet the requirements in Articles 92a and 494 of the Capital Requirements Regulation or the requirements in regulations 45C and 45D,

and the timeline for the implementation of the measures proposed must take account of the reasons for the substantive impediment.

(5) The Gibraltar Resolution Authority, after consulting the GFSC, must assess whether the measures proposed effectively address or remove the substantive impediment in question.

(6) Where the Gibraltar Resolution Authority finds that the measures proposed by an entity do not effectively reduce or remove the impediments in question, it must (either directly or through the GFSC) require the entity to take alternative measures that may achieve that objective, and notify in writing those measures to the entity, which must propose within one month a plan to comply with them.

(7) In identifying alternative measures, the Gibraltar Resolution Authority must–

(a) demonstrate–

(i) how the measures proposed by the entity would not be able to remove the impediments to resolvability; and

(ii) how the alternative measures proposed are proportionate in removing them; and

(b) take account of the threat that those impediments to resolvability present for financial stability and the effect of the measures on the business of the entity, its stability and its ability to contribute to the economy.";

(e) in sub-regulation (8)–

(i) in paragraphs (a), (b), (d), (e), (g) and (h), in each place it occurs, for "institution" substitute "entity";

(ii) after paragraph (h), insert–

"(ha) require an institution or an entity referred to in regulation 2(1)(b), (c) or (d) to submit a plan to restore compliance with the requirements of regulation 45E or 45F, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92.3 of the Capital Requirements Regulation and, where applicable, with the combined buffer requirement and with the requirements referred to in regulation 45E or 45F, expressed as a percentage of the total exposure measure referred to in Articles 429 and 429a of that Regulation;";

(iii) for paragraphs (i) to (k) substitute–

"(i) require an institution or entity referred to in regulation 2(1)(b), (c) or (d) to issue eligible liabilities to meet the requirements of regulation 45E or 45F;

(j) require an institution or entity referred to in regulation 2(1)(b), (c) or (d) to take other steps to meet the minimum requirement for own funds and eligible liabilities under regulation 45E or 45F, including in particular to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument;

(k) for the purpose of ensuring ongoing compliance with regulation 45E or 45F, require an institution or entity referred to regulation 2(1)(b), (c) or (d) to change the maturity profile of–

(i) own funds instruments, after having obtained the agreement of the GFSC; and

(ii) eligible liabilities referred to in regulation 45B and regulation 45F(5)(a);

(l) where an entity is the subsidiary of a mixed-activity holding company, requiring that the mixed- activity holding company set up a separate financial holding company to control the entity, if necessary in order to facilitate the resolution of the entity and to avoid the application of the resolution tools and the exercise of the powers referred to in Part 4 having an adverse effect on the non-financial part of the group.";

(f) in sub-regulation (10)–

(i) after "GFSC and" insert ", if appropriate,"; and

(ii) for "institution" substitute "entity".

(9) In regulation 18, for sub-regulations (1) to (24) substitute–

"(1) The Gibraltar Resolution Authority as group-level resolution authority together with the resolution authorities of subsidiaries, after consulting the supervisory college and the resolution authorities of any jurisdiction in which a significant branch is located (so far as is relevant to the significant branch) must consider the assessment required by regulation 16 within the resolution college and take all reasonable steps to reach a joint decision on the application of measures identified under regulation

17(6) in relation to all resolution entities and their subsidiaries that are entities referred to in regulation 2(1) and are part of the group.

(2) The Gibraltar Resolution Authority as group-level resolution authority, in cooperation with the consolidating supervisor and EBA in accordance with Article 25.1 of the EBA Regulation, must prepare and submit a report to–

(a) the EEA parent undertaking;

(b) the resolution authorities of subsidiaries (which must provide it to the subsidiaries under their supervision);

(c) the resolution authorities of jurisdictions in which significant branches are located.

(3) The report must be prepared after consulting the competent authorities, and must analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group, and also in relation to resolution groups where a group is composed of more than one resolution group.

(4) The report must consider the impact on the group's business model and recommend any proportionate and targeted measures that, in the Gibraltar Resolution Authority's, are necessary or appropriate to remove those impediments.

(5) Where an impediment to the resolvability of the group is due to a situation of a group entity referred to in regulation 17(4), the Gibraltar Resolution Authority must notify its assessment of that impediment to the EEA parent undertaking after consulting the resolution authority of the resolution entity and the resolution authorities of its subsidiary institutions.

(6). Within four months of the date of receipt of the report, the EEA parent undertaking may submit observations and propose to the Gibraltar Resolution Authority as group-level resolution authority alternative measures to remedy the impediments identified in the report.

(7) Where the impediments identified in the report are due to a situation of a group entity referred to in regulation 17(4), the EEA parent undertaking must, within two weeks of the date of receipt of a notification made in accordance with sub-regulation (5), propose to the Gibraltar Resolution Authority possible measures and the timeline for their implementation to ensure that the group entity complies with–

(a) the requirements in regulation 45E or 45F expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92.3 of the Capital Requirements Regulation and, where applicable, with the combined buffer requirement; and

(b) the requirements in regulation 45E or 45F expressed as a percentage of the total exposure measure referred to in Articles 429 and 429a of the Capital Requirements Regulation.

(8) The timeline for the implementation of measures proposed under sub-regulation (7) must take into account the reasons for the substantive impediment and the resolution authority, after consulting the competent authority, must assess whether those measures effectively address or remove the substantive impediment.

(9) The Gibraltar Resolution Authority as group-level resolution authority must communicate any measure proposed by the EEA parent undertaking to the consolidating supervisor, the EBA, the resolution authorities of the subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located (so far as is relevant to the significant branch).

(10) The Gibraltar Resolution authority as group-level resolution authority and the resolution authorities of the subsidiaries, after consulting the competent authorities and the resolution authorities of jurisdictions in which significant branches are located, must do everything within their power to reach a joint decision within the resolution college regarding the identification of substantive impediments, and if necessary, the assessment of the measures proposed by the EEA parent undertaking and the measures required by the authorities in order to address or remove the impediments, which must take into account the potential impact of the measures in all EEA States where the group operates.

(11) The joint decision must be reached within four months of submission of any observations by the EEA parent undertaking or, where it has not submitted any observations, within one month from the expiry of the four-month period referred to in sub-regulation (6).

(12) The joint decision concerning the impediment to resolvability due to a situation referred to in regulation 17(4) must be reached within two weeks of the submission of any observations by the EEA parent undertaking in accordance with sub-regulations (6) to (8); it must be reasoned and set out in a document which is provided to the EEA parent undertaking by the Gibraltar Resolution Authority as group-level resolution authority.

(13) The Gibraltar Resolution Authority as a resolution authority may request the EBA to assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of the EBA Regulation.

(14) In the absence of a joint decision within the period referred to in sub-regulation (11) or (12), the Gibraltar Resolution Authority as group-level resolution authority must make its own decision on the appropriate measures to be taken in accordance with regulation 17(6) and (7) at the group level; it must be reasoned and take account of the views and reservations of other resolution authorities and set out in a document which is provided to the EEA parent undertaking by the Gibraltar Resolution Authority as group-level resolution authority.

(15) If, at the end of the period referred to in sub-regulation (11) or (12), any resolution authority has referred a matter mentioned in sub-regulation (24) to the EBA in accordance with Article 19 of the EBA Regulation, the Gibraltar Resolution Authority as group-level resolution authority

(a) must defer its decision and await any decision that the EBA may take in accordance with Article 19.3 of that Regulation; and

(b) must take its decision in accordance with the decision of the EBA,

and the relevant period in sub-regulation (11) or (12), is to be regarded as the conciliation period within the meaning of that Regulation.

(16) The EBA must take its decision within one month and–

(a) the matter cannot be referred to the EBA after the end of the relevant period in sub-regulation (11) or (12) or after a joint decision has been reached; and

(b) in the absence of an EBA decision within one month, the decision of the group level resolution authority applies.

(17) In the absence of a joint decision within the relevant period referred to in in sub-regulation (11) or (12), the resolution authority of the relevant resolution entity must make its own decision on the appropriate measures to be taken in accordance with regulation 17(6) and (7) at the resolution group level; it must be reasoned and take account of the views and reservations of resolution authorities of other entities of the same resolution group and be provided to the resolution entity by the relevant resolution authority.

(18) If, at the end of the period referred to in sub-regulation (11) or (12), any resolution authority has referred a matter mentioned in sub-regulation (24) to the EBA in accordance with Article 19 of the EBA Regulation, the resolution authority of the resolution entity–

(a) must defer its decision and await any decision that the EBA may take in accordance with Article 19.3 of that Regulation; and

(b) must take its decision in accordance with the decision of the EBA,

and the relevant period in sub-regulation (11) or (12), is to be regarded as the conciliation period within the meaning of that Regulation.

(19) The EBA must take its decision within one month and–

(a) the matter cannot be referred to the EBA after the end of the relevant period in sub-regulation (11) or (12) or after a joint decision has been reached; and

(b) in the absence of an EBA decision within one month, the decision of the resolution authority of the resolution entity applies.

(20) In the absence of a joint decision, the resolution authorities of subsidiaries that are not resolution entities must make their own decisions on the appropriate measures to be taken by subsidiaries at individual level in accordance with regulation 17(6) and (7); they must reasoned and take account of the views and reservations of the other resolution authorities, and must be provided to the subsidiary concerned, to the resolution entity of the same resolution group, to the resolution authority of that resolution entity and, where different, to the group-level resolution authority.

(21) If, at the end of the period referred to in sub-regulation (11) or (12), any resolution authority has referred a matter mentioned in sub-regulation (24) to the EBA in accordance with Article 19 of the EBA Regulation, the resolution authority of the subsidiary–

(a) must defer its decision and await any decision that the EBA may take in accordance with Article 19.3 of that Regulation; and

(b) must take its decision in accordance with the decision of the EBA,

and the relevant period in sub-regulation (11) or (12), is to be regarded as the conciliation period within the meaning of that Regulation.

(22) The EBA must take its decision within one month and–

(a) the matter cannot be referred to the EBA after the end of the relevant period in sub-regulation (11) or (12) or after a joint decision has been reached; and

(b) in the absence of an EBA decision within one month, the decision of the resolution authority of the subsidiary applies.

(23) The joint decision referred to in sub-regulations (11) to (13) and the decisions taken by the resolution authorities in the absence of a joint decision referred to in sub-regulations (14) to (16) must be recognised as conclusive and applied by the Gibraltar Resolution Authority as one of the other resolution authorities concerned.

(24) In the absence of a joint decision on the taking of any measures referred to in regulation 17(8)(g), (h) or (l), the Gibraltar Resolution Authority as a resolution authority may request the EBA in accordance with sub-regulations (14) to (22) to assist the resolution authorities in reaching an agreement in accordance with Article 19.3 of the EBA Regulation.".

(10) In regulation 32(1)(b), after "capital instruments" insert "and eligible liabilities".

(11) After regulation 32, insert–

"**Conditions for resolution with regard to a central body and credit institutions permanently affiliated to a central body.**

32A. The Gibraltar Resolution Authority may take a resolution action in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group when that resolution group complies as a whole with the conditions in regulation 32(1).

Insolvency proceedings in respect of institutions and entities that are not subject to resolution action.

32B. Where the Gibraltar Resolution Authority considers that, in relation to an institution or entity referred to in regulation 2(1)(b), (c) or (d), the conditions in regulation 32(1)(a) and (b) of are met but that, in accordance with regulation 32(1)(c), resolution action would not be in the public interest, the institution or entity must be wound up in an orderly manner in accordance with the applicable law of Gibraltar.".

(12) In regulation 33, for sub-regulations (2) to (5) substitute–

"(2) The Gibraltar Resolution Authority must take a resolution action in relation to an entity referred to in regulation 2(1) (c) or (d) when that entity meets the conditions in regulation 32(1).

(3) Where the subsidiary institutions of a mixed-activity holding company are held directly or indirectly by an intermediate financial holding company–

(a) the resolution plan must provide that the intermediate financial holding company is identified as a resolution entity; and

(b) any resolution actions for the purposes of group resolution must be taken in relation to the intermediate financial holding company and not in relation to the mixed-activity holding company.

(4) Subject to sub-regulation (3), and despite the fact that an entity referred to in regulation 2(1)(c) or (d) does not meet the conditions in regulation 32(1), the Gibraltar Resolution Authority may take resolution action with regard to such an entity where–

(a) the entity is a resolution entity;

(b) one or more of the subsidiaries of the entity that are institutions, but not resolution entities, meets the conditions in regulation 32(1);

(c) the assets and liabilities of those subsidiaries are such that the failure of those subsidiaries threatens the resolution group as a whole, and resolution action with regard to the entity is necessary either for the resolution of such subsidiaries which are institutions or for the resolution of the relevant resolution group as a whole.".

(13) After regulation 33, insert–

"**Power to suspend certain obligations.**

33A.(1) The Gibraltar Resolution Authority, after consulting the GFSC, may suspend any payment or delivery obligation under any contract to which an institution or an entity referred to regulation 2(1)(b), (c) or (d) is a party, where all of the following conditions are met–

(a) a determination that the institution or entity is failing or likely to fail has been made under regulation 32(1)(a);

(b) there is no immediately available private sector measure referred to regulation 32(1)(b) that would prevent the failure of the institution or entity;

(c) the exercise of the power to suspend is regarded as necessary to avoid the further deterioration of the financial conditions of the institution or entity; and

(d) the exercise of the power to suspend is either–

(i) necessary to reach the determination provided for in regulation 32(1)(c); or

(ii) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools.

(2) The power in sub-regulation (1) does not apply to payment or delivery obligations to–

(a) systems and operators of systems designated in accordance with the Settlement Finality Directive;

(b) CCPs authorised in the EEA under Article 14 of EMIR and third-country CCPs recognised by ESMA under Article 25 of that Regulation; or

(c) central banks.

(3) The Gibraltar Resolution Authority must set the scope of the power in sub-regulation (1) having regard to the circumstances of each case and, in particular, must carefully assess the appropriateness of extending the suspension to eligible deposits

within the meaning of the DGS Directive, especially to covered deposits held by individuals and micro, small and medium-sized enterprises.

(4) Where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, the Gibraltar Resolution Authority must ensure that depositors have access to an appropriate daily amount from those deposits.

(5) The period of any suspension must be as short as possible, must not exceed the minimum time that the Gibraltar Resolution Authority considers necessary for the purposes indicated in sub-regulation (1)(c) and (d) and, in any event, must not last longer than the period from the publication of a notice of suspension under sub-regulation (9) until midnight at the end of the business day following the day of publication.

(6) A suspension ceases to have effect at the expiry of the period of suspension determined under sub-regulation (5).

(7) The Gibraltar Resolution Authority, in exercising the power in sub-regulation (1), must–

(a) have regard to the impact the exercise of that power might have on the orderly functioning of financial markets;

(b) consider any other legal, supervisory or judicial powers to safeguard creditors' rights and the equal treatment of creditors in normal insolvency proceedings;

(c) have regard, in particular, to the potential application of insolvency proceedings to the institution or entity as a result of the determination in regulation 32(1)(c) and

(d) make the arrangements it considers appropriate to ensure adequate coordination with administrative or judicial authorities.

(8) When payment or delivery obligations under a contract are suspended under sub-regulation (1)–

(a) any payment or delivery obligation of a counterparty to that contract is suspended for the same period of time; and

(b) a payment or delivery obligation that would have been due during the period of the suspension is due immediately upon expiry of that period.

(9) The Gibraltar Resolution Authority must–

(a) without delay, notify–

(i) the institution or entity referred to regulation 2(1)(b), (c) or (d); and

(ii) the authorities referred to in regulation 83(2)(a) to (h),

when exercising the power in sub-regulation (1) after a determination has been made that the institution is failing or likely to fail under regulation 32(1)(a) and before the resolution decision is taken; and

(b) publish or ensure the publication of the order or instrument by which obligations are suspended under this regulation and the terms and period of suspension, by the means referred to in regulation 83(4).

(10). This regulation applies without limiting any other power under the law of Gibraltar to suspend the payment or delivery obligations of an institution or entity in sub-regulation (1)–

(a) before a determination is made that the institution or entity is failing or likely to fail under regulation 32(1)(a); or

(b) which is to be wound up under normal insolvency proceedings,

which exceed the scope and duration provided for in this regulation.

(11) Such powers must be exercised in accordance with the scope, duration and conditions provided for in the relevant law and the conditions provided for in this regulation apply without limiting the conditions related to such power of suspension payment or delivery obligations.

(12) The Gibraltar Resolution Authority's powers under this regulation to suspend payment or delivery obligations with respect to an institution or an entity in regulation 2(1)(b), (c) or (d) includes the power, for the duration of that suspension, to–

(a) restrict secured creditors of that institution or entity from enforcing security interests in relation to any of the assets of that institution or entity for the same duration (in which case regulation 70(2), (3) and (4) applies); and

(b) suspend the termination rights of any party to a contract with that institution or entity for the same duration (in which case regulation 71(2) to (9) applies).

(13) If, after determining that an institution or entity is failing or likely to fail under regulation 32(1)(a), the Gibraltar Resolution Authority has exercised the power to suspend payment or delivery obligations in the circumstances set out in sub-regulation (1) or (12) and resolution action is subsequently taken with respect to that institution or entity, the authority must not exercise its powers under regulation 69(1), 70(1) or 71(1) with respect to that institution or entity.';

(14) In regulation 36–

(a) in sub-regulation (1), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(b) in sub-regulation (5)–

(i) in paragraph (a), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(ii) in paragraph (c), in both places it occurs, for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(iii) in paragraph (d), for "eligible liabilities" substitute "bail-inable liabilities"; and

(iv) in paragraph (g), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(c) in sub-regulation (6), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(d) in sub-regulation (18), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59"; and

(e) in sub-regulation (19), for "capital instruments" substitute "capital instruments and eligible liabilities in accordance with regulation 59";

(15) In regulation 37–

(a) in sub-regulation (2), for "capital instruments" substitute "capital instruments and eligible liabilities"; and

(b) in sub-regulation (11)(a), for "eligible liabilities" substitute "bail-inable liabilities".

(16) In regulation 44–

(a) in sub-regulation (2)–

(i) for paragraph (f) substitute–

"(f) liabilities with a remaining maturity of less than seven days, owed to–

(i) systems or operators of systems designated in accordance with the Settlement Finality Directive or to their participants and arising from the participation in such a system, or

(ii) CCPs authorised in the EEA under Article 14 of EMIR and third-country CCPs recognised by ESMA under Article 25 of that Regulation;";

(ii) after paragraph (g) insert–

"(h) liabilities to institutions or entities referred to in regulation 2(1)(b), (c) or (d) that are part of the same resolution group without being themselves resolution entities, regardless of their maturities, except where those liabilities rank below ordinary unsecured liabilities under the law governing normal insolvency proceedings applicable on the date the Recovery and Resolution Directive was transposed; and in cases where that exception applies, the Gibraltar Resolution Authority, as resolution authority of the relevant subsidiary that is not a resolution entity, must assess whether the amount of items complying with regulation 45F(5) is sufficient to support the implementation of the preferred resolution strategy.";

(b) in sub-regulation (7), for "liabilities eligible for a bail-in tool" substitute "bail-inable liabilities";

(c) for sub-regulations (9) and (10) substitute–

"(9) The Gibraltar Resolution Authority must carefully assess whether liabilities to institutions or entities referred to in regulation 2(1)(b), (c) or (d) are part of the same resolution group without being themselves resolution entities and that are not excluded from the application of the write down and conversion powers under sub-regulation (2)(h) should be excluded or partially excluded under sub-regulation (8) to ensure the effective implementation of the resolution strategy.

(9A) Where the Gibraltar Resolution Authority decides to exclude or partially exclude a bail-inable liability or class of bail-inable liabilities under sub-regulation (9), the level of write down or conversion applied to other bail-inable liabilities may be increased to take account of such exclusions, if the level of write down and conversion applied to other bail-inable liabilities complies with the principle in regulation 34(1)(g).

(10) Where the Gibraltar Resolution Authority decides to exclude or partially exclude a bail-inable liability or class of bail-inable liabilities under this regulation, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution to do one or both of the following–

(a) cover any losses which have not been absorbed by bail-inable liabilities and restore the net asset value of the institution under resolution to zero in accordance with regulation 46(1)(a); or

(b) purchase shares or other instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with regulation 46(1)(b).”; and

(d) in sub-regulation (11)(a), for “eligible liabilities” substitute “bail-inable liabilities”.

(17) After regulation 44, insert–

“**Selling of subordinated eligible liabilities to retail clients.**

44A.(1) The seller of eligible liabilities which meet all of the conditions in Article 72a of the Capital Requirements Regulation other than Article 72a.1(b) and Articles 72b.3 to 72b.5 of that Regulation must only sell such liabilities to a retail client (within the meaning of the MiFID 2 Directive) where–

(a) the seller has performed a suitability test in accordance with Article 25.2 of the MiFID 2 Directive;

(b) the seller is satisfied, on the basis of the test, that the eligible liabilities are suitable for that retail client; and

(c) the seller documents the suitability in accordance with Article 25.6 of that Directive.

(2) Where the conditions in sub-regulation (1) are fulfilled and the financial instrument portfolio of the retail client does not, at the time of the purchase, exceed €500,000 the seller must ensure, on the basis of the information provided by the retail client in accordance with sub-regulation (3), that both of the following conditions are met at the time of the purchase–

(a) the retail client does not invest an aggregate amount exceeding 10% of the client's financial instrument portfolio in liabilities of the kind in sub-regulation (1); and

(b) the initial investment amount invested in one or more liabilities instruments referred to in that sub-regulation is at least €10,000.

(3) The retail client must provide the seller with accurate information on the retail client's financial instrument portfolio, including any investments in liabilities of the kind in sub-regulation (1).

(4) For the purposes of sub-regulation (2) and (3), the retail client's financial instrument portfolio includes cash deposits and financial instruments, but excluding any financial instruments that have been given as collateral.

(5) An entity in regulation 2(1) established in Gibraltar which is subject to the requirement in regulation 45E and the value of the total assets of which does not exceed €50 billion is only subject to the requirement in sub-regulation (2)(b).

(6) This regulation does not apply to liabilities referred to in sub-regulation (1) which were issued before 28 December 2020.';

(18) For regulation 45 substitute–

"**Application and calculation of the minimum requirement.**

45.(1) Institutions and entities referred to in regulation 2(1)(b), (c) and (d) must at all times meet the requirements for own funds and eligible liabilities required by, and in accordance with, this regulation and regulations 45A to 45I.

(2) The requirement must be calculated in accordance with regulation 45C(5) to (10), (12) and (13) or (17) to (22), as applicable, as the amount of own funds and eligible liabilities and expressed as percentages of–

(a) the total risk exposure amount of the relevant entity, calculated in accordance with Article 92.3 of the Capital Requirements Regulation; and

(b) the total exposure measure of the relevant entity, calculated in accordance with Articles 429 and 429a of that Regulation.

Exemption from the minimum requirement.

45A.(1) The Gibraltar Resolution Authority must exempt from the requirement in regulation 45(1) mortgage credit institutions financed by covered bonds which are not allowed to receive deposits under domestic law, where the following conditions are met–

(a) those institutions will be wound up in insolvency proceedings, or other types of proceedings specified for those institutions and implemented in accordance with regulation 38, 40 or 42; and

(b) those proceedings ensure that creditors of those institutions, including holders of covered bonds, where relevant, bear losses in a way that meets the resolution objectives.

(2) Institutions that are exempted from the requirement in regulation 45(1) must not be part of the consolidation referred to in regulation 45E(1).

Eligible liabilities for resolution entities.

45B.(1) Liabilities must be included in the amount of own funds and eligible liabilities of resolution entities only where they satisfy the conditions referred to in the following Articles of the Capital Requirements Regulation–

(a) Article 72a;

(b) Article 72b, with the exception of point (d) of paragraph 2; and

(c) Article 72c.

(2) Where these Regulations refer to the requirements in Article 92a or Article 92b of the Capital Requirements Regulation, for the purpose of those Articles, eligible liabilities consist of eligible liabilities as defined in Article 72k of that Regulation and determined in accordance with Chapter 5a of Title I of Part Two of that Regulation.

(3) Liabilities that arise from debt instruments with embedded derivatives, such as structured notes, that meet the conditions in sub-regulation (1), other than Article 72a.2 (l) of the Capital Requirements Regulation. must be included in the amount of own funds and eligible liabilities only where one of the following conditions are met–

(a) the principal amount of the liability arising from the debt instrument is known at the time of issue, is fixed or increasing, and is not affected by an embedded derivative feature, and the total amount of the liability arising from the debt instrument, including the embedded derivative, can be valued on a daily basis by reference to an active and liquid two-way market for an equivalent instrument without credit risk, in accordance with Articles 104 and 105 of the Capital Requirements Regulation; or

(b) the debt instrument includes a contractual term that specifies that the value of the claim in cases of the insolvency of the issuer and of the resolution of the issuer is fixed or increasing, and does not exceed the initially paid-up amount of the liability.

(4) Debt instruments referred to in sub-regulation (3), including their embedded derivatives, must not be subject to any netting agreement and the valuation of such instruments must not be subject to regulation 49(5).

(5) The liabilities referred to in in sub-regulation (3) must only be included in the amount of own funds and eligible liabilities with respect to the part of the liability that corresponds to the principal amount in sub-regulation (3)(a) or to the fixed or increasing amount in sub-regulation (3)(b).

(6) Where liabilities are issued by a subsidiary established in the EEA to an existing shareholder that is not part of the same resolution group, and that subsidiary is part of the same resolution group as the resolution entity, those liabilities must be included in

the amount of own funds and eligible liabilities of that resolution entity if all of the following conditions are met–

(a) they are issued in accordance with regulation 45F(5)(a);

(b) the exercise of the write down or conversion power in relation to those liabilities in accordance with regulation 59 or 62 does not affect the control of the subsidiary by the resolution entity;

(c) those liabilities do not exceed an amount determined by subtracting the sum of the liabilities issued to and bought by the resolution entity either directly or indirectly through other entities in the same resolution group and the amount of own funds issued in accordance with regulation 45F(5)(b) from the amount required in accordance with regulation 45F(1).

(7) Without affecting the minimum requirement in regulation 45C(12) and (13) or 45D(1)(a), the Gibraltar Resolution Authority must ensure that a part of the requirement referred to in regulation 45E equal to 8% of the total liabilities, including own funds, is met by resolution entities that are G-SIIs or resolution entities that are subject to regulation 45C(12) and (13) or (14) to (16) using own funds, subordinated eligible instruments, or liabilities in sub-regulation (6).

(8) The Gibraltar Resolution Authority may permit a level lower than 8% of the total liabilities, including own funds, but greater than the amount resulting from the application of the formula (1-(X1/X2)) × 8% of the total liabilities, including own funds, to be met by resolution entities that are G-SIIs or resolution entities that are subject to regulation 45C(12) and (13) or (14) to (16) using own funds, subordinated eligible instruments, or liabilities in sub-regulation (6), if all the conditions in Article 72b.3 of the Capital Requirements Regulation are met, where, in light of the reduction that is possible under that Article–

X1 = 3,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of the Capital Requirements Regulation; and

X2 = the sum of 18 % of the total risk exposure amount calculated in accordance with Article 92(3) of the Capital Requirements Regulation and the amount of the combined buffer requirement.

(9) For resolution entities that are subject to regulation 45C(12) and (13), where the application of the sub-regulation (7) or (8) leads to a requirement greater than 27% of the total risk exposure amount, for the resolution entity concerned, the Gibraltar Resolution Authority must limit the part of the requirement referred to in regulation 45E which is to be met using own funds, subordinated eligible instruments, or liabilities in sub-regulation (6), to an amount equal to 27% of the total risk exposure amount, if the resolution authority has assessed that–

(a) access to the resolution financing arrangement is not considered to be an option for resolving that resolution entity in the resolution plan; and

(b) where paragraph (a) does not apply, the requirement referred to in regulation 45E allows that resolution entity to meet the requirements in regulation 44(11) or 44(15) as applicable.

(10) In carrying out the assessment in sub-regulation (9), the Gibraltar Resolution Authority must also take account of the risk of disproportionate impact on the business model of the resolution entity concerned.

(11) Sub-regulation (9) does not apply to resolution entities that are subject to regulation 45C(14) to (16).

(12) For resolution entities that are neither G-SIIs nor subject to regulation 45C(12) and (13) or (14) to (16), the Gibraltar Resolution Authority may decide that a part of the requirement in regulation 45E up to the greater of 8% of the total liabilities, including own funds, of the entity and the formula in sub-regulation (16), is to be met using own funds, subordinated eligible instruments, or liabilities in sub-regulation (6), if the following conditions are met–

(a) non-subordinated liabilities referred to in sub-regulations (1) to (5) have the same priority ranking in the domestic insolvency hierarchy as certain liabilities that are excluded from the application of write down and conversion powers in accordance with regulation 44(2) to (7) or (8) to (9A);

(b) there is a risk that, as a result of a planned application of write-down and conversion powers to non subordinated liabilities that are not excluded from the application of write down and conversion powers in accordance with regulation 44(2) to (7) or (8) to (9A), creditors whose claims arise from those liabilities incur greater losses than they would incur in a winding up under normal insolvency proceedings;

(c) the amount of own funds and other subordinated liabilities does not exceed the amount necessary to ensure that those creditors do not incur losses above the level of losses that they would otherwise have incurred in the winding-up under normal insolvency proceedings.

(13) Where the Gibraltar Resolution Authority determines that, within a class of liabilities which includes eligible liabilities, the amount of the liabilities that are excluded or reasonably likely to be excluded from the application of write down and conversion powers in accordance with regulation 44(2) to (7) or (8) to (9A) totals more than 10% of that class, it must assess the risk in sub-regulation (12)(b).

(14) For the purposes of sub-regulations (8) to (11), (12) and (13) and (16), derivative liabilities must be included in total liabilities on the basis that full recognition is given to counterparty netting rights.

(15) The own funds of a resolution entity that are used to comply with the combined buffer requirement must be eligible to comply with the requirements in sub-regulations (8) to (11), (12) and (13) and (16).

(16) Despite sub-regulations (8) to (11), the Gibraltar Resolution Authority may decide that the requirement in regulation 45E must be met by resolution entities that are G-SIIs or are subject to regulation 45C(12) and (13) or (14) to (16) using own funds, subordinated eligible instruments, or liabilities in sub-regulation (6), to the extent that, due to the obligation of the resolution entity to comply with the combined buffer requirement and the requirements in Article 92a of the Capital Requirements Regulation, regulations 45C(12) and (13) and 45E, the sum of those own funds, instruments and liabilities does not exceed the greater of–

(a) 8% of total liabilities, including own funds, of the entity; or

(b) the amount resulting from the application of the formula Ax2+Bx2+C, where–

A = the amount resulting from the requirement in Article 92.1(c) of the Capital Requirements Regulation;

B = the amount resulting from the requirement in Article 104a of the Capital Requirements Directive; and

C = the amount resulting from the combined buffer requirement.

(17) The Gibraltar Resolution Authority may exercise the power in sub-regulation (16) with respect to resolution entities that are G-SIIs or are subject to regulation 45C(12) and (13) or (14) to (16), and that meet one of the conditions in sub-regulation (18), up to a limit of 30% of the total number of all resolution entities that are G-SIIs or are subject to regulation 45C(12) and (13) or (14) to (16) for which the authority determines the requirement in regulation 45E.

(18) The conditions to be considered are–

(a) substantive impediments to resolvability have been identified in the preceding resolvability assessment and either–

(i) no remedial action has been taken following the application of the measures in regulation 17(8) in the timeline required by the resolution authority, or

(ii) the identified substantive impediments cannot be addressed using any of the measures in regulation 17(8), and the exercise of the power in sub-regulation (16) would partially or fully compensate for the negative impact of the substantive impediments on resolvability;

(b) the resolution authority considers that the feasibility and credibility of the resolution entity's preferred resolution strategy is limited, taking into account the entity's size, its interconnectedness, the nature, scope, risk and complexity of its activities, its legal status and its shareholding structure; or

(c) the requirement in Article 104a of the Capital Requirements Directive reflects the fact that the resolution entity that is a G-SII or subject to regulation 45C(12) and (13) or (14) to (16) is, in terms of riskiness, among the top 20% of institutions for which the resolution authority determines the requirement in regulation 45(1).

(19) For the purposes of the percentages in sub-regulations (17) and (18), the Gibraltar Resolution Authority must round the number resulting from the calculation up to the closest whole number.

(20) The Gibraltar Resolution Authority must only take the decisions in sub-regulations (12) and (13) or (16) after consulting the GFSC.

(21) When taking those decisions, the Gibraltar Resolution Authority must also take account of–

(a) the depth of the market for the resolution entity's own funds instruments and subordinated eligible instruments, the pricing of such instruments, where they exist, and the time needed to execute any transactions necessary for the purpose of complying with the decision;

(b) the amount of eligible liabilities instruments that meet all of the conditions in Article 72a of the Capital Requirements Regulation that have a residual maturity below one year as of the date of the decision, with a view to making quantitative adjustments to the requirements referred to in sub-regulations (12), (13) and (16);

(c) the availability and the amount of instruments that meet all of the conditions in Article 72a of the Capital Requirements Regulation other than Article 72b.2(d) of that Regulation;

(d) whether the amount of liabilities that are excluded from the application of write down and conversion powers in accordance with regulation 44(2) to (7) or (8) and that, in normal insolvency proceedings, rank equally with or below the highest ranking eligible liabilities is significant in comparison to the own funds and eligible liabilities of the resolution entity;

(e) the resolution entity's business model, funding model and risk profile, as well as its stability and ability to contribute to the economy; and

(f) the impact of possible restructuring costs on the resolution entity's recapitalisation.

(22) For the purpose of sub-regulation (21)(d), where the amount of excluded liabilities

(a) does not exceed 5% of the amount of the own funds and eligible liabilities of the resolution entity, the excluded amount must be considered as not being significant; and

(b) exceeds that threshold, the significance of the excluded liabilities must be assessed by the resolution authority.

Determination of the minimum requirement for own funds and eligible liabilities.

45C.(1) The requirement in regulation 45(1) must be determined by the Gibraltar Resolution Authority, after consulting the GFSC, on the basis of the following criteria–

(a) the need to ensure that the resolution group can be resolved by the application of the resolution tools to the resolution entity, including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;

(b) the need to ensure, where appropriate, that the resolution entity and its subsidiaries that are institutions or entities referred to in regulation 2(1)(b), (c) and (d) but are not resolution entities have sufficient own funds and eligible liabilities to ensure that, if the bail-in tool or write down and conversion powers, respectively, were to be applied to them, losses could be absorbed and that it is possible to restore the total capital ratio and, as applicable, the leverage ratio, of the relevant entities to a level necessary to enable them to continue to comply with the conditions for authorisation and to carry on the activities for which they are authorised under the Capital Requirements Directive or the MiFID 2 Directive;

(c) the need to ensure, if the resolution plan anticipates the possibility for certain classes of eligible liabilities to be excluded from bail-in under regulation 44(8) or to be transferred in full to a recipient under a partial transfer, that the resolution entity has sufficient own funds and other eligible liabilities to absorb losses and to restore its total capital ratio and, as applicable, its leverage ratio, to the level necessary to enable it to continue to comply with the conditions for authorisation and to carry on the activities for which it is authorised under the Capital Requirements Directive or the MiFID 2 Directive;

(d) the size, the business model, the funding model and the risk profile of the entity;

(e) the extent to which the failure of the entity would have an adverse effect on financial stability, including through contagion to other institutions or entities, due to the interconnectedness of the entity with those other institutions or entities or with the rest of the financial system.

(2) Where the resolution plan provides that resolution action is to be taken or that the power to write down and convert relevant capital instruments and eligible liabilities in accordance with regulation 59 is to be exercised in accordance with the relevant scenario in regulation 10(5), the requirement referred to in regulation 45(1) must equal an amount sufficient to ensure that–

(a) the losses that are expected to be incurred by the entity are fully absorbed ("loss absorption");

(b) the resolution entity and its subsidiaries that are institutions or entities referred to regulation 2(1)(b), (c) and (d) but are not resolution entities are recapitalised to a level necessary to enable them to continue to comply with the conditions for authorisation, and to carry on the activities for which they are authorised under the Capital Requirements Directive, the MiFID 2 Directive or an equivalent legislative act for an appropriate period not longer than one year ("recapitalisation").

(3) Where the resolution plan provides that the entity is to be wound up under normal insolvency proceedings or equivalent procedures, the Gibraltar Resolution Authority must assess whether it is justified to limit the requirement in regulation 45(1) for that entity, so that it does not exceed an amount sufficient to absorb losses in accordance with sub-regulation (2)(a).

(4) The assessment by the Gibraltar Resolution Authority must, in particular, evaluate the limit referred to in sub-regulation (3) as regards any possible impact on financial stability and on the risk of contagion to the financial system.

(5) For resolution entities, the amount referred to in sub-regulation (2) is–

(a) for the purpose of calculating the requirement in regulation 45(1), in accordance with regulation 45(2)(a), the sum of–

(i) the amount of the losses to be absorbed in resolution that corresponds to the requirements in Article 92.1(c) of the Capital Requirements Regulation and Article 104a of the Capital Requirements Directive of the resolution entity at the consolidated resolution group level; and

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore compliance with its total capital ratio requirement in Article 92.1(c) of the Capital Requirements Regulation and its requirement in Article 104a of the Capital Requirements Directive at the consolidated resolution group level after the implementation of the preferred resolution strategy; and

(b) for the purpose of calculating the requirement in regulation 45(1), in accordance with regulation 45(2)(b), the sum of–

(i) the amount of the losses to be absorbed in resolution that corresponds to the resolution entity's leverage ratio requirement in Article 92.1(d) of the Capital Requirements Regulation at the consolidated resolution group level; and

(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore compliance with the leverage ratio requirement in Article 92.1(d) of the Capital Requirements Regulation at the consolidated resolution group level after the implementation of the preferred resolution strategy.

(6) For the purposes of–

(a) regulation 45(2)(a), the requirement in regulation 45(1) must be expressed in percentage terms as the amount calculated in accordance with sub-regulation (5)(a), divided by the total risk exposure amount; and

(b) regulation 45(2)(b), the requirement in regulation 45(1) must be expressed in percentage terms as the amount calculated in accordance with sub-regulation (5)(b), divided by the total exposure measure.

and when setting the individual requirement provided in sub-regulation (5)(b), the resolution authority must take account of the requirements in regulations 37(11), 44(11) and 44(15).

(7) When setting the recapitalisation amounts the Gibraltar Resolution Authority must–

(a) use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes resulting from resolution actions set out in the resolution plan; and

(b) after consulting the GFSC, adjust the amount corresponding to the current requirement in Article 104a of the Capital Requirements Directive downwards or upwards to determine the requirement that is to apply to the resolution entity after the implementation of the preferred resolution strategy.

(8) The Gibraltar Resolution Authority may increase the requirement provided in sub-regulation (5)(a)(ii) by an appropriate amount necessary to ensure that, following resolution, the entity is able to sustain sufficient market confidence for an appropriate period, which must not exceed one year.

(9) Where sub-regulation (8) applies, the amount referred to in that sub-regulation must be equal to the combined buffer requirement that is to apply after the application of the resolution tools, less the amount Article 128.6(a) of the Capital Requirements Directive.

(10) The Gibraltar Resolution Authority, after consulting the GFSC, must adjust the amount in sub-regulation (8)–

(a) downwards. if it determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in regulation 2(1)(b), (c) or (d) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with regulations 44(11) and (15) and 97(3) and (4), after implementation of the resolution strategy; or

(b) upwards, if it determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in regulation 2(1)(b), (c) or (d) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with regulations 44(11) and (15) and 97(3) and (4), for an appropriate period which must not exceed one year.

(11) In estimating the requirement in Article 104a of the Capital Requirements Directive and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive, the Gibraltar Resolution Authority must have regard to any regulatory technical standards adopted by the European Commission under Article 45c.4 of the Recovery and Resolution Directive.

(12) For resolution entities that are not subject to Article 92a of the Capital Requirements Regulation and are part of a resolution group the total assets of which exceed €100 billion, the level of the requirement in sub-regulations (5) to (10) must be at least equal to–

(a) 13.5% when calculated in accordance with regulation 45(2)(a); and

(b) 5% when calculated in accordance with regulation 45(2)(b).

(13) Despite regulation 45B, the resolution entities referred to in the first subparagraph of this paragraph must meet a level of the requirement referred to in the first subparagraph of this paragraph that is equal to 13.5% when calculated in accordance with regulation 45(2)(a) and to 5% when calculated in accordance with regulation 45(2)(b) using own funds, subordinated eligible instruments, or liabilities in regulation 45B(6).

(14) The Gibraltar Resolution Authority may, after consulting the GFSC, decide to apply the requirements in sub-regulations (12) and (13) to a resolution entity which is not subject to Article 92a of the Capital Requirements Regulation, which is part of a resolution group the total assets of which are lower than €100 billion and which the resolution authority has assessed as reasonably likely to pose a systemic risk in the event of its failure.

(15) In taking a decision under sub-regulation (14), the Gibraltar Resolution Authority must take account of–

(a) the prevalence of deposits, and the absence of debt instruments, in the funding model;

(b) the extent to which access to the capital markets for eligible liabilities is limited;

(c) the extent to which the resolution entity relies on Common Equity Tier 1 capital to meet the requirement referred to in regulation 45E.

(16) The absence of a decision under sub-regulation (14) does not affect any decision under regulation 45B(5).

(17) For entities that are not themselves resolution entities, the amount referred to in sub-regulation (2) is–

(a) for the purpose of calculating the requirement in regulation 45(1), in accordance with regulation 45(2)(a), the sum of–

(i) the amount of the losses to be absorbed that corresponds to the requirements in Article 92,1(c) of the Capital Requirements Regulation and Article 104a of the Capital Requirements Directive of the entity; and

(ii) a recapitalisation amount that allows the entity to restore compliance with its total capital ratio requirement in Article 92.1(c) of the Capital Requirements Regulation and its requirement in Article 104a of the Capital Requirements Directive after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with regulation 59 or after the resolution of the resolution group; and

(b) for the purpose of calculating the requirement in regulation 45(1), in accordance with regulation 45(2)(b), the sum of–

(i) the amount of the losses to be absorbed that corresponds to the entity's leverage ratio requirement in Article 92.1(d) of the Capital Requirements Regulation; and

(ii) a recapitalisation amount that allows the entity to restore compliance with its leverage ratio requirement in Article 92.1(d) of the Capital Requirements Regulation after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with regulation 59 or after the resolution of the resolution group.

(18) For the purposes of–

(a) regulation 45(2)(a), the requirement in regulation 45(1) must be expressed in percentage terms as the amount calculated in accordance with sub-regulation (17)(a), divided by the total risk exposure amount; and

(b) regulation 45(2)(b), the requirement in regulation 45(1) must be expressed in percentage terms as the amount calculated in accordance with sub-regulation (17)(b), divided by the total exposure measure.

and when setting the individual requirement provided in sub-regulation (17)(b), the resolution authority must take account of the requirements in regulations 37(11), 44(11) and 44(15).

(19) When setting the recapitalisation amounts in sub-regulations (17) and (18), the Gibraltar Resolution Authority must–

(a) use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes resulting from actions set out in the resolution plan; and

(b) after consulting the GFSC, adjust the amount corresponding to the current requirement in Article 104a of the Capital Requirements Directive downwards or upwards to determine the requirement that is to apply to the relevant entity after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with regulation 59 or after the resolution of the resolution group.

(20) The Gibraltar Resolution Authority may increase the requirement in sub-regulation (17)(a)(ii) by an appropriate amount necessary to ensure that, following the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with regulation 59, the entity is able to sustain sufficient market confidence for an appropriate period which must not exceed one year.

(21) Where sub-regulation (20) applies, the amount referred to in that sub-regulation must be equal to the combined buffer requirement that is to apply after the exercise of the power in regulation 59 or after the resolution of the resolution group, less the amount in Article 128.6(a) of the Capital Requirements Directive.

(22) The Gibraltar Resolution Authority, after consulting the GFSC, must adjust the amount in sub-regulation (20)–

(a) downwards. if it determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in regulation 2(1)(b), (c) or (d) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with regulations 44(11) and (15) and 97(3) and (4), after the exercise of the power in regulation 59 or after the resolution of the resolution group; or

(b) upwards, if it determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in regulation 2(1)(b), (c) or (d) and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, in accordance with regulations 44(11) and (15) and 97(3) and (4), for an appropriate period which must not exceed one year.

(23) Where the Gibraltar Resolution Authority expects that certain classes of eligible liabilities are reasonably likely to be fully or partially excluded from bail-in under regulation 44(8) to (9A) or might be transferred in full to a recipient under a partial transfer, the requirement in regulation 45(1) must be met using own funds or other eligible liabilities that are sufficient to–

(a) cover the amount of excluded liabilities identified in accordance with regulation 44(8) to (9A); and

(b) ensure that the conditions in sub-regulations (2) to (4) are fulfilled.

(24) Any decision by the Gibraltar Resolution Authority to impose a minimum requirement of own funds and eligible liabilities under this regulation–

(a) must contain the reasons for that decision, including a full assessment of the elements in sub-regulations (2) to (23); and

(b) must be reviewed by the resolution authority without undue delay to reflect any changes in the level of the requirement in Article 104a of the Capital Requirements Directive.

(25) For the purposes of sub-regulations paragraphs (5) to (10) and (17) to (22), capital requirements must be interpreted in accordance with the GFSC's application

of the transitional provisions in Chapters 1, 2 and 4 of Title I of Part Ten of the Capital Requirements Regulation.

Determination of the minimum requirement for resolution entities of G-SIIs and EU material subsidiaries of non-EU G-SIIs.

45D.(1) The requirement in regulation 45(1) for a resolution entity that is a G-SII or part of a G-SII must consist of–

(a) the requirements in Articles 92a and 494 of the Capital Requirements Regulation; and

(b) any additional requirement for own funds and eligible liabilities that has been determined by the resolution authority specifically in relation to that entity in accordance with sub-regulation (3).

(2) The requirement in regulation 45(1) for an EU material subsidiary of a non-EU G-SII must consist of –

(a) the requirements in Articles 92b and 494 of the Capital Requirements Regulation; and

(b) any additional requirement for own funds and eligible liabilities that has been determined by the resolution authority specifically in relation to that material subsidiary in accordance with sub-regulation (3), which is to be met using own funds and liabilities that meet the conditions of regulations 45F and 89(2) to (5).

(3) The Gibraltar Resolution Authority must impose an additional requirement for own funds and eligible liabilities under sub-regulation (1)(b) or (2)(b) only–

(a) where the requirement in sub-regulation (1)(a) or (2)(a) is not sufficient to fulfil the conditions set out in regulation 45C; and

(b) to an extent that ensures that the conditions set out in regulation 45C are fulfilled.

(4) For the purposes of regulation 45H(4) to (6), where more than one G-SII entity belonging to the same G-SII are resolution entities, the Gibraltar Resolution Authority and any other relevant resolution authorities must calculate the amount in sub-regulation (3)–

(a) for each resolution entity; and

(b) for the Union parent entity as if it were the G-SII's only resolution entity.

(5) Any decision by the Gibraltar Resolution Authority to impose an additional requirement for own funds and eligible liabilities under sub-regulation (1)(b) or (2)(b)–

(a) must contain the reasons for that decision, including a full assessment of the elements in sub-regulation (3); and

(b) must be reviewed by the resolution authority without undue delay to reflect any changes in the level of the requirement in Article 104a of the Capital Requirements Directive that applies to the resolution group or the Union material subsidiary of a non-EU G-SII.

Application of the minimum requirement to resolution entities.

45E.(1) Resolution entities must comply with the requirements in regulations 45B to 45D on a consolidated basis at the level of the resolution group.

(2) The Gibraltar Resolution Authority must determine the requirement in regulation 45(1) for a resolution entity at the consolidated resolution group level in accordance with regulation 45H, on the basis of the requirements in regulations 45B to 45D and whether the third-country subsidiaries of the group are to be resolved separately under the resolution plan.

(3) Where it is the resolution authority of a credit institution resolution group, the Gibraltar Resolution Authority must decide, depending on the features of the solidarity mechanism and the preferred resolution strategy–

(a) which entities in the resolution group are to be required to comply with regulation 45C(5) to (10), (12) and (13) and 45D(1), in order to ensure that the resolution group as a whole complies with sub-regulations (1) and (2); and

(b) how those entities are to do so in conformity with the resolution plan.

(4) In sub-regulation (3) a "credit institution resolution group" means a resolution group which comprises credit institutions permanently affiliated to a central body and the central body itself where at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries.

Application of the minimum requirement to entities that are not resolution entities.

45F.(1) Institutions that are subsidiaries of a resolution entity or a third-country entity, but are not themselves resolution entities, must comply with the requirements in regulation 45C on an individual basis.

(2) The Gibraltar Resolution Authority, after consulting the GFSC, may decide to apply the requirement of this regulation to an entity in regulation 2(1)(b), (c) or (d) that is a subsidiary of a resolution entity but is not itself a resolution entity.

(3) Despite sub-regulation (1), EEA parent undertakings that are not themselves resolution entities, but are subsidiaries of third-country entities, must comply with the requirements in regulations 45C and 45D on a consolidated basis.

(4) For credit institution resolution groups (within the meaning of regulation 45E(4)), those credit institutions which are permanently affiliated to a central body, but are not themselves resolution entities, a central body which is not itself a resolution entity, and any resolution entities that are not subject to a requirement under regulation 45E(3), must comply with regulation 45C(17) to (22) on an individual basis.

(5) The requirement in regulation 45(1) for an entity referred to in sub-regulations (1) to (4) must be determined in accordance with regulations 45H and 89, where applicable, and on the basis of the requirements in regulation 45C and met using one or more of the following–

(a) liabilities–

(i) that are issued to and bought by the resolution entity, either directly or indirectly through other entities in the same resolution group that bought the liabilities from the entity that is subject to this regulation, or are issued to and bought by an existing shareholder that is not part of the same resolution group as long as the exercise of write down or conversion powers in accordance with regulations 59 to 62 does not affect the control of the subsidiary by the resolution entity;

(ii) that fulfil the eligibility criteria in Article 72a of the Capital Requirements Regulation, except for Articles 72b.2(b), (c), (k), (l) and (m) and Article 72b.3 to 72b.5 of that Regulation;

(iii) that rank, in normal insolvency proceedings, below liabilities that do not meet the condition in sub-paragraph (i) and that are not eligible for own funds requirements;

(iv) that are subject to write down or conversion powers in accordance with regulations 59 to 62 in a manner that is consistent with the resolution strategy of the resolution group, in particular by not affecting the control of the subsidiary by the resolution entity;

(v) the acquisition of ownership of which is not funded directly or indirectly by the entity that is subject to this regulation;

(vi) the provisions governing which do not indicate explicitly or implicitly that the liabilities would be called, redeemed, repaid or

repurchased early, as applicable, by the entity that is subject to this regulation, other than in the case of the insolvency or liquidation of that entity, and that entity does not otherwise provide such an indication;

(vii) the provisions governing which do not give the holder the right to accelerate the future scheduled payment of interest or principal, other than in the case of the insolvency or liquidation of the entity that is subject to this regulation;

(viii) the level of interest or dividend payments, as applicable, due on them is not amended on the basis of the credit standing of the entity that is subject to this regulation or its parent undertaking;

(b) own funds, as follows–

(i) Common Equity Tier 1 capital; and

(ii) other own funds that–

(aa) are issued to and bought by entities that are included in the same resolution group; or

(bb) are issued to and bought by entities that are not included in the same resolution group as long as the exercise of write down or conversion powers in accordance with regulations 59 to 62 does not affect the control of the subsidiary by the resolution entity.

(6) The Gibraltar Resolution Authority may waive the application of this regulation to a subsidiary that is not a resolution entity where–

(a) both the subsidiary and the resolution entity are established in Gibraltar and are part of the same resolution group;

(b) the resolution entity complies with the requirement in regulation 45E;

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with regulation 59(3), in particular where resolution action is taken in respect of the resolution entity;

(d) the resolution entity satisfies the GFSC regarding the prudent management of the subsidiary and has declared, with the consent of the GFSC, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(e) the risk evaluation, measurement and control procedures of the resolution entity cover the subsidiary;

(f) the resolution entity holds more than 50% of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

(7) The Gibraltar Resolution Authority may also waive the application of this regulation to a subsidiary that is not a resolution entity where–

(a) both the subsidiary and its parent undertaking are established in Gibraltar and are part of the same resolution group;

(b) the parent undertaking complies on a consolidated basis with the requirement in regulation 45(1);

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the parent undertaking to the subsidiary in respect of which a determination has been made in accordance with regulation 59(3), in particular where resolution action or powers in regulation 59(1) are taken in respect of the parent undertaking;

(d) the parent undertaking satisfies the GFSC regarding the prudent management of the subsidiary and has declared, with the consent of the GFSC, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(e) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

(f) the parent undertaking holds more than 50% of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

(8) Where the conditions in sub-regulation (6)(a) and (b) are met, the Gibraltar Resolution Authority may permit the requirement in regulation 45(1) to be met by a subsidiary, in full or in part, with a guarantee provided by the resolution entity, which fulfils the following conditions–

(a) the guarantee is provided for at least an amount that is equivalent to the amount of the requirement for which it substitutes;

(b) the guarantee is triggered when the subsidiary is unable to pay its debts or other liabilities as they fall due, or a determination has been made in accordance with regulation 59(3) in respect of the subsidiary, whichever is the earlier;

(c) the guarantee is collateralised through a financial collateral arrangement as defined in Article 2.1(a) of Directive 2002/47/EC for at least 50% of its amount;

(d) the collateral backing the guarantee fulfils the requirements of Article 197 of the Capital Requirements Regulation, which, following appropriately conservative haircuts, is sufficient to cover the amount collateralised;

(e) the collateral backing the guarantee is unencumbered and, in particular, is not used as collateral to back any other guarantee;

(f) the collateral has an effective maturity that fulfils the same maturity condition as that referred to in Article 72c.1 of the Capital Requirements Regulation; and

(g) there are no legal, regulatory or operational barriers to the transfer of the collateral from the resolution entity to the relevant subsidiary, including where resolution action is taken in respect of the resolution entity.

(9) For the purposes of sub-regulation (8)(g), at the Gibraltar Resolution Authority's request, the resolution entity must provide an independent reasoned legal opinion or otherwise satisfactorily demonstrate that there are no legal, regulatory or operational barriers to the transfer of collateral from the resolution entity to the relevant subsidiary.

(10) This regulation applies subject to any regulatory technical standards adopted by the European Commission under Article 45f.6 of the Recovery and Resolution Directive.

Waiver for central bodies and permanently affiliated credit institutions.

45G. The Gibraltar Resolution Authority may partially or fully waive the application of regulation 45F in respect of a central body or a credit institution which is permanently affiliated to a central body, where all of the following conditions are met–

(a) the credit institution and the central body are established in Gibraltar, are subject to supervision by the GFSC and are part of the same resolution group;

(b) the commitments of the central body and its permanently affiliated credit institutions are joint and several liabilities, or the commitments of its permanently affiliated credit institutions are entirely guaranteed by the central body;

(c) the minimum requirement for own funds and eligible liabilities, and the solvency and liquidity of the central body and of all of the permanently

affiliated credit institutions, are monitored as a whole on the basis of the consolidated accounts of those institutions;

(d) in the case of a waiver for a credit institution which is permanently affiliated to a central body, the management of the central body is empowered to issue instructions to the management of the permanently affiliated institutions;

(e) the relevant resolution group complies with the requirement in regulation 45E(3); and

(f) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the central body and the permanently affiliated credit institutions in the event of resolution.

Procedure for determining the minimum requirement.

45H.(1) The Gibraltar Resolution Authority, where it is the resolution authority of the resolution entity, must co-operate with the group-level resolution authority (if different) and the resolution authorities responsible for the subsidiaries of a resolution group that are subject to the requirement in regulation 45F and do everything within its power to reach a joint decision on–

(a) the amount of the requirement applied at the consolidated resolution group level for each resolution entity; and

(b) the amount of the requirement applied on an individual basis to each entity of a resolution group which is not a resolution entity.

(2) The joint decision must ensure compliance with regulations 45E and 45F, be fully reasoned and be provided to–

(a) the resolution entity by Gibraltar Resolution Authority;

(b) the entities of a resolution group which are not a resolution entity by the resolution authorities of those entities; and

(c) the EEA parent undertaking of the group by the Gibraltar Resolution Authority, when that EEA parent undertaking is not itself a resolution entity from the same resolution group.

(3) The joint decision may provide that, where consistent with the resolution strategy and sufficient instruments complying with regulation 45F(5) have not been bought directly or indirectly by the resolution entity, the requirements in regulation 45C(17) to (22) are partially met by the subsidiary in compliance with regulation 45F(5) with instruments issued to and bought by entities not belonging to the resolution group.

(4) Where more than one G-SII entity belonging to the same G-SII are resolution entities, the Gibraltar Resolution Authority and other resolution authorities must discuss and, where appropriate and consistent with the G-SII's resolution strategy, agree on the application of Article 72e of the Capital Requirements Regulation and any adjustment to minimise or eliminate the difference between the sum of the amounts referred to in regulation 45D(4)(a) and Article 12 of the Capital Requirements Regulation for individual resolution entities and the sum of the amounts referred to regulation 45D(4)(b) and that Article.

(5) Such an adjustment may be applied subject to the following–

(a) the adjustment may be applied in respect of differences in the calculation of the total risk exposure amounts between the relevant EEA States by adjusting the level of the requirement; and

(b) the adjustment must not be applied to eliminate differences resulting from exposures between resolution groups.

(6) The sum of the amounts referred to in regulation 45D(4)(a) and Article 12 of the Capital Requirements Regulation for individual resolution entities must not be lower than the sum of the amounts referred to in regulation 45D(4)(b) and that Article.

(7) In the absence of such a joint decision within four months, a decision must be taken in accordance with sub-regulations (8) to (15).

(8) Where a joint decision is not taken within four months because of a disagreement concerning a consolidated resolution group requirement referred to in regulation 45E, a decision must be taken on that requirement by the Gibraltar Resolution Authority after taking account of–

(a) the assessment of entities of the resolution group that are not a resolution entity, performed by the relevant resolution authorities; and

(b) where the Gibraltar Resolution Authority is not the group-level resolution authority, the opinion of that resolution authority,

(9) If, at the end of the four month period, any resolution authority has referred the matter to the EBA in accordance with Article 19 of the EBA Regulation, the Gibraltar Resolution Authority as the resolution authority of the resolution entity–

(a) must defer its decision and await any decision that the EBA may take in accordance with Article 19.3 of that Regulation; and

(b) must take its decision in accordance with the decision of the EBA (which must take account of sub-regulation (8)(a) and (b)),

and the four month period is to be regarded as the conciliation period within the meaning of that Regulation.

(10) The EBA must take its decision within one month and–

(a) the matter cannot be referred to the EBA after the end of the four month period or after a joint decision has been reached; and

(b) in the absence of an EBA decision within one month, the decision of the Gibraltar Resolution Authority as the resolution authority of the resolution entity applies.

(11) Where a joint decision is not taken within four months because of a disagreement concerning the level of the requirement in regulation 45F to be applied to any entity of a resolution group on an individual basis, the decision must be taken by the resolution authority of that entity, where all of the following conditions are fulfilled–

(a) the views and reservations expressed in writing by the Gibraltar Resolution Authority, as resolution authority of the resolution entity, have been duly taken into account; and

(b) where the group-level resolution authority is different from the resolution authority of the resolution entity, the views and reservations expressed in writing by the group-level resolution authority have been duly taken into account.

(12) If, at the end of the four-month period, the Gibraltar Resolution Authority as resolution authority of the resolution entity or, if different, the group-level resolution authority has referred the matter to the EBA in accordance with Article 19 of the EBA Regulation, the resolution authorities responsible for the subsidiaries on an individual basis–

(a) must defer their decisions and await any decision that the EBA may take in accordance with Article 19.3 of that Regulation; and

(b) must take their decisions in accordance with the decision of the EBA (which must take account of sub-regulation (8)(a) and (b)),

and the four month period is to be regarded as the conciliation period within the meaning of that Regulation.

(13) The Gibraltar Resolution Authority as resolution authority of the resolution entity or, if different, the group-level resolution must not refer the matter to the EBA where the level set by the resolution authority of the subsidiary–

(a) is within 2% of the total risk exposure amount, calculated in accordance with Article 92.3 of the Capital Requirements Regulation, of the requirement in regulation 45E; and

(b) complies with regulation 45C(17) to (22).

(14) The EBA must take its decision within one month and–

(a) the matter cannot be referred to the EBA after the end of the four month period or after a joint decision has been reached; and

(b) in the absence of an EBA decision within one month, the decisions of the resolution authorities of the subsidiaries apply.

(15) Where a joint decision is not taken within four months because of a disagreement concerning the level of the consolidated resolution group requirement and the level of the requirement to be applied to the resolution group's entities on an individual basis–

(a) a decision must be taken on the level of the requirement to be applied to the resolution group's subsidiaries on an individual basis in accordance with sub-regulations (11) to (14); and

(b) a decision must be taken on the level of the consolidated resolution group requirement in accordance with sub-regulations (8) to (10).

(16) The joint decision under sub-regulation (1) and any decision taken by the resolution authorities under sub-regulations (8), (11) or (15) in the absence of a joint decision is binding on the resolution authorities concerned.

(17) Any joint decision and any decision taken in the absence of a joint decision must be reviewed and where relevant updated on a regular basis.

(18) The Gibraltar Resolution Authority, in coordination with the GFSC, must require and verify that entities meet the requirement in regulation 45(1), and take any decision under this regulation in parallel with the development and the maintenance of resolution plans.

(19) Where it is not the resolution authority of the resolution entity, the Gibraltar Resolution Authority must participate, as appropriate, in the processes set out in this regulation.

Supervisory reporting and public disclosure of the requirement.

45I.(1) An entity in regulation 2(1) that is subject to the requirement in regulation 45(1) must report to the GFSC and the Gibraltar Resolution Authority on the following–

(a) the amounts of own funds that, where applicable, meet the conditions of regulation 45F(5)(b), and the amounts of eligible liabilities, and the

expression of those amounts in accordance with regulation 45(2) after any applicable deductions in accordance with Articles 72e to 72j of the Capital Requirements Regulation;

(b) the amounts of other bail-inable liabilities;

(c) for the items referred to in paragraphs (a) and (b)–

(i) their composition, including their maturity profile;

(ii) their ranking in normal insolvency proceedings; and

(iii) whether they are governed by the laws of a third country and, if so, which third country and whether they contain the contractual terms in regulation 55(1) and Articles 52.1(p) and (q) and 63(n) and (o) of the Capital Requirements Regulation.

(2) The obligation to report on the amounts of other bail-inable liabilities in sub-regulation (1)(b) does not apply to entities that, at the date of the reporting of that information, hold amounts of own funds and eligible liabilities of at least 150% of the requirement in regulation 45(1), calculated in accordance with sub-regulation (1)(b).

(3) Entities to which sub-regulation (1) applies must report the information–

(a) in sub-regulation (1)(a) at least semi-annually; and

(b) in in sub-regulation (1)(b) and (c) at least annually,

and must report that information more frequently at the request of the GFSC or the Gibraltar Resolution Authority.

(4) Entities to which sub-regulation (1) applies must make the following information publicly available at least annually–

(a) the amounts of own funds that, where applicable, meet the conditions of regulation 45F(5)(b) and eligible liabilities;

(b) the composition of those items, including their maturity profile and ranking in normal insolvency proceedings; and

(c) the applicable requirement in regulation 45E or 45F expressed in accordance with regulation 45(2).

(5) Sub-regulations (1) to (3) do not apply to an entity whose resolution plan provides that the entity is to be wound up under normal insolvency proceedings.

(6) Where resolution actions have been implemented or the write-down or conversion power in regulation 59 has been exercised, the public disclosure requirements in sub-regulation (4) apply from the date of the deadline to comply with the requirements of regulation 45E or 45F referred to in regulation 45M.

(7) This regulation applies subject to any implementing technical standards adopted by the European Commission under Articles 45i.5 and 45i.6 of the Recovery and Resolution Directive.

Reporting to EBA.

45J.(1) The Gibraltar Resolution Authority must inform the EBA of the minimum requirement for own funds and eligible liabilities which, in accordance with regulation 45E or 45F, has been set for each entity under the Gibraltar Resolution Authority's jurisdiction.

(2) Any report prepared by the Gibraltar Resolution Authority under sub-regulation (1) must take account of any implementing technical standards for such reports adopted by the European Commission under Article 45j.2 of the Recovery and Resolution Directive.

Breaches of the minimum requirement.

45K.(1) The GFSC and the Gibraltar Resolution Authority must address any breach of the minimum requirement for own funds and eligible liabilities in regulation 45E or 45F on the basis of exercising one or more of–

(a) the powers to address or remove impediments to resolvability in accordance with regulations 17 and 18;

(b) the powers in regulation 16A;

(c) the measures in Article 104 of the Capital Requirements Directive;

(d) the early intervention measures in regulation 27; or

(e) the powers under regulations 101 and 102.

(2) The GFSC and the Gibraltar Resolution Authority must also assess whether the institution or entity referred to in regulation 2(1)(b), (c) or (d) is failing or likely to fail, in accordance with Article 32, 32A or 33, as applicable.

(3) The GFSC and the Gibraltar Resolution Authority must consult each other when exercising their respective powers under sub-regulation (1).

EBA Reports.

45L. The Gibraltar Resolution Authority and the GFSC must cooperate with the EBA for the purpose of assisting the EBA to prepare any report that it is required to submit the European Commission under Article 45l of the Recovery and Resolution Directive.

Transitional and post-resolution arrangements.

45M.(1) Despite regulation 45(1), the Gibraltar Resolution Authority must determine appropriate transitional periods for institutions or entities in regulation 2(1)(b), (c) and (d) to comply with the requirements in regulation 45E or 45F or requirements that result from the application of regulation 45B(7) to (11), (12) and (13) or (16), as appropriate.

(2) Institutions and entities must comply with those requirements by 1 January 2024.

(3) The Gibraltar Resolution Authority must determine intermediate target levels for the requirements in regulation 45E or 45F or requirements that result from the application of regulation 45B(7) to (11), (12) and (13) or (16), as appropriate, that institutions or entities in regulation 2(1)(b), (c) and (d) must comply with by 1 January 2022.

(4) Those intermediate target levels must, as a rule, ensure a linear build-up of own funds and eligible liabilities towards the requirement.

(5) The Gibraltar Resolution Authority may set a transitional period that ends after 1 January 2024 where duly justified and appropriate on the basis of the criteria in sub-regulation (12), taking into consideration–

(a) the development of the entity's financial situation;

(b) the prospect that the entity will be able to ensure compliance in a reasonable timeframe with the requirements in regulation 45E or 45F or with a requirement that results from the application of regulation 45B(7) to (11), (12) and (13) or (16); and

(c) whether the entity is able to replace liabilities that no longer meet the eligibility or maturity criteria in Articles 72b and 72c of the Capital Requirements Regulation, and regulation 45B or 45F(5), and if not, whether that inability is of an idiosyncratic nature or is due to market-wide disturbance.

(6) The deadline for resolution entities to comply with the minimum level of the requirements in regulation 45C(12) and (13) or 45C(14) to (16). is 1 January 2022.

(7) The minimum levels of the requirements in regulation 45C(12) to (16) do not apply within the two-year period following the date–

(a) on which the Gibraltar Resolution Authority has applied the bail-in tool; or

(b) on which the resolution entity has put in place an alternative private sector measure under regulation 32(1)(b) by which capital instruments and other liabilities have been written down or converted into Common Equity Tier 1 instruments, or on which write down or conversion powers, in accordance with regulation 59, have been exercised in respect of that resolution entity, in order to recapitalise the resolution entity without the application of resolution tools.

(8) The requirements in regulation 45B(7) to (11) and (16) and regulation 45C(12) to (16), as applicable, do not apply within the three-year period following the date on which–

(a) the resolution entity or the group of which it is part has been identified as a G-SII;

(b) the resolution entity starts to be in the situation in regulation 45C(12) and (13) or 45C(14) to (16).

(9) Despite regulation 45(1), the Gibraltar Resolution Authority must determine an appropriate transitional period within which to comply with the requirements in regulation 45E or 45F or requirements that result from the application of regulation 45B(7) to (11), (12) and (13) or (16), as appropriate, for institutions or entities in regulation 2(1)(b), (c) and (d) to which resolution tools or the write-down or conversion power in regulation 59 have been applied.

(10) For the purposes of sub-regulations (1) to (9), the Gibraltar Resolution Authority must communicate to the institution or entity in regulation 2(1)(b), (c) or (d) a planned minimum requirement for own funds and eligible liabilities for each 12-month period during the transitional period, with a view to facilitating a gradual build-up of its loss-absorbing and recapitalisation capacity.

(11) At the end of the transitional period, the minimum requirement for own funds and eligible liabilities must be equal to the amount determined under regulation 45B(7) to (11), (12) and (13) or (16), regulation 45C(12) and (13) or (14) to (16), regulation 45E or regulation 45F, as applicable.

(12) When determining the transitional periods, the Gibraltar Resolution Authority must take account of–

(a) the prevalence of deposits and the absence of debt instruments in the funding model;

(b) the access to the capital markets for eligible liabilities; and

(c) the extent to which the resolution entity relies on Common Equity Tier 1 capital to meet the requirement in regulation 45E.

(13) .Subject to sub-regulation (1), the Gibraltar Resolution Authority may revise either the transitional period or any planned minimum requirement for own funds and eligible liabilities communicated under sub-regulation (10).".

(19) In regulation 46–

(a) in sub-regulation (1)–

(i) in paragraph (a), for "eligible liabilities" substitute "bail-inable liabilities"; and

(ii) in paragraph (b), for "eligible liabilities" substitute "bail-inable liabilities";

(b) in sub-regulation (2), for "eligible liabilities" substitute "bail-inable liabilities"; and

(c) in sub-regulation (3), for "eligible liabilities" substitute "bail-inable liabilities".

(20) In regulation 47(1)(b)(ii), for "eligible liabilities" substitute "bail-inable liabilities".

(21) In regulation 48–

(a) for sub-regulation (1)(e) substitute–

"(e) if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and bail-inable liabilities in paragraphs (a) to (d) is less than the sum of the amounts referred to in regulation 47(4)(b) and (c), the Gibraltar Resolution Authority reduces to the extent required the principal amount of, or outstanding amount payable in respect of, the rest of bail-inable liabilities, including debt instruments referred to in in regulation 99(3), in accordance with the hierarchy of claims in normal insolvency proceedings, including the ranking of deposits provided for in in regulation 99, under regulation 44, in conjunction with the write down under paragraphs (a) to (d) to produce the sum of the amounts referred to in regulation 47(4)(b) and (c).";

(b) in sub-regulation (2), for "eligible liabilities" substitute "bail-inable liabilities"; and

(c) after sub-regulation (6), insert–

"(6A) For entities in regulation 2(1)(a) to (d), all claims resulting from own funds items have a lower priority ranking in insolvency proceedings, than any claim that does not result from an own funds item.

(6B) For the purposes of sub-regulation (6A), to the extent that an instrument is only partly recognised as an own funds item, the whole instrument must be treated as a claim resulting from an own funds item and rank lower than any claim that does not result from an own funds item.".

(22) For regulation 55 substitute–

"**Contractual recognition of bail-in.**

55.(1) Institutions and entities referred to in regulation 2(1)(b) to (d) must include a contractual term by which the creditor or party to the agreement or instrument creating the liability recognises that liability may be subject to the write down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, if that liability–

(a) is not excluded under regulation 44(2) to (7);

(b) is not a deposit referred to in regulation 99(1)(a);

(c) is governed by the law of a third country; and

(d) is issued or entered into after the date on which regulations 43 to 58 came into operation.

(2) The Gibraltar Resolution Authority may decide that the obligation in sub-regulation (1) does not apply to institutions or entities in respect of which the requirement under regulation 45(1) equals the loss-absorption amount under regulation 45C(2)(a), if liabilities that meet the conditions in sub-regulation (1) and which do not include the contractual term in that sub-regulation are not counted towards that requirement.

(3) Sub-regulation (1) does not apply where the Gibraltar Resolution Authority determines that the liabilities or instruments in that sub-regulation can be subject to write down and conversion powers by the Gibraltar Resolution Authority under the law of the third country or a binding agreement concluded with that third country.

(4) Where an institution or entity in regulation 2(1)(b), (c) or (d) reaches the determination that it is legally or otherwise impracticable to include in the contractual provisions governing a relevant liability a term required sub-regulation (1), it must–

(a) notify the Gibraltar Resolution Authority of the determination, including the designation of the class of the liability and the justification for that determination; and.

(b) provide the Gibraltar Resolution Authority with any information that it requests, within a reasonable timeframe following the receipt of the notification, in order for the Gibraltar Resolution Authority to assess the effect of the notification on the resolvability of that institution or entity.

(5) The obligation to include in the contractual provisions a term required by sub-regulation (1) is automatically suspended from the time that the Gibraltar Resolution Authority receives a notification under sub-regulation (4).

(6) If the Gibraltar Resolution Authority concludes that it is not legally or otherwise impracticable to include in the contractual provisions a term required under sub-regulation (1), taking account of the need to ensure the resolvability of the institution or entity, the Gibraltar Resolution Authority–

(a) must, within a reasonable timeframe after the notification, require the institution or entity to include such a contractual term; and

(b) may, in addition, require the institution or entity to amend its practices concerning the application of the exemption from contractual recognition of bail-in.

(7) The liabilities referred to in sub-regulation (4)–

(a) do include Additional Tier 1 instruments, Tier 2 instruments and debt instruments (to which regulation 63(2)(g) and (j) applies) where those instruments are unsecured liabilities; and

(b) must be senior to the liabilities in regulations 99(2)(a) to (c) and (3).

(8) Where the Gibraltar Resolution Authority, in the context of assessing the resolvability of an institution or entity in regulation 2(1)(b), (c) or (d) in accordance with regulations 15 and 16, or at any other time, determines that, within a class of liabilities which includes eligible liabilities–

(a) the liabilities that, in accordance with sub-regulation (4), do not include the contractual term in sub-regulation (1);

(b) the liabilities which are excluded from the application of the bail-in tool in accordance with regulation 44(2) to (7);

(c) the liabilities which are likely to be excluded in accordance with regulation 44(8) to (9A),

amounts to more than 10% of that class, it must immediately assess the impact of that particular fact on the resolvability of that institution or entity, including the impact on the resolvability resulting from the risk of breaching the creditor safeguards provided in regulation 73 when applying write-down and conversion powers to eligible liabilities.

(9) Where the Gibraltar Resolution Authority, on the basis of the assessment in sub-regulation (8), that the liabilities which, in accordance with sub-regulation (4),, do not include the contractual term referred to in sub-regulation (1), create a substantive impediment to resolvability, it must apply the powers in regulation 17 as appropriate to remove that impediment to resolvability.

(10) Liabilities for which an institution or entity in regulation 2(1)(b), (c) or (d) fails to include in the contractual provisions the term required by sub-regulation (1) or for which, in accordance with sub-regulations (4) to (9), that requirement does not apply, must not be counted towards the minimum requirement for own funds and eligible liabilities.

(11) The Gibraltar Resolution Authority may require an institution or entity in regulation 2(1)(b), (c) or (d) to provide the authority with a legal opinion relating to the legal enforceability and effectiveness of the contractual term referred to in sub-regulation (1).

(12) Failure by an institution or entity to include the contractual term required by sub-regulation (1) in the contractual provisions governing a relevant liability, does not prevent the Gibraltar Resolution Authority from exercising the write down and conversion powers in relation to that liability.

(13) The Gibraltar Resolution Authority, where it considers it necessary, must specify the categories of liabilities for which an institution or entity in regulation 2(1)(b), (c) or (d) may reach the determination that it is legally or otherwise impracticable to include the contractual term required by sub-regulation (1), based on any conditions specified in regulatory technical standards adopted by the European Commission adopts under Article 55.6 of the Recovery and Resolution Directive.

(14) This regulation applies subject to any regulatory technical standards which the European Commission adopts under Article 55.5 or 55.6 of the Recovery and Resolution Directive or any implementing technical standards which it adopts under Article 55.8 of that Directive.

(23) For the cross heading before regulation 59, substitute "*Write down or conversion of capital instruments and eligible liabilities*".

(24) In regulation 59–

(a) for the heading, substitute "**Requirement to write down or convert relevant capital instruments and eligible liabilities.**";

(b) for sub-regulation (1), substitute–

"(1) The power to write down or convert relevant capital instruments and eligible liabilities may be exercised either–

(a) independently of resolution action; or

(b) in combination with a resolution action, where the conditions for resolution in regulation 32, 32A or 33 are met.

(1A) Where relevant capital instruments and eligible liabilities have been purchased by the resolution entity indirectly through other entities in the same resolution group, the power to write down or convert those relevant capital instruments and eligible liabilities must be exercised together with the exercise of the same power at the level of –

(a) the parent undertaking of the entity concerned; or

(b) other parent undertakings that are not resolution entities,

so that the losses are effectively passed on to, and the entity concerned is recapitalised by, the resolution entity.

(1B) After the exercise of the power to write down or convert relevant capital instruments and eligible liabilities independently of resolution action, the valuation provided for in regulation 74 must be carried out, and regulation 75 applies.

(1C) The power to write down or convert eligible liabilities independently of resolution action

(a) may be exercised only in relation to eligible liabilities that meet the conditions in regulation 45F(5)(a), other than the condition related to the remaining maturity of liabilities set out in Article 72c.1 of the Capital Requirements Regulation; and

(b) when exercised, must be in accordance with the principle in regulation 34(1)(g).

(1D) Where a resolution action is taken in relation to a resolution entity or, in exceptional circumstances in deviation from the resolution plan, in relation to an entity that is not a resolution entity, the amount that is reduced, written down or converted in accordance with regulation 60(1) at the level of such an entity must count towards the thresholds in regulation 37(11) and regulation 44(11)(a) or 44(15)(a) that apply to the entity concerned.";

(c) for sub-regulation (2), for "capital instruments" substitute "capital instruments, and eligible liabilities referred to in sub-regulation (1C),";

(d) in sub-regulation (3), for the opening words and paragraphs (a) and (b), substitute–

"(3) The Gibraltar Resolution Authority must exercise the write-down or conversion power, in accordance with regulation 60 and without delay, in relation to relevant capital instruments and eligible liabilities referred to in sub-regulation (1C), issued by an institution or entity in regulation 2(1)(b), (c) or (d) when one or more of the following circumstances apply–

(a) where the determination has been made that the conditions for resolution specified in regulation 32, 32A, or 33 have been met, before any resolution action is taken;

(b) the appropriate authority determines that unless that power is exercised in relation to the relevant capital instruments, and eligible liabilities referred to in sub-regulation (1C), the institution or entity in regulation 2(1)(b), (c) or (d) will no longer be viable;";

(e) in sub-regulation (4)(b), for "capital instruments" substitute "capital instruments, or eligible liabilities referred to in sub-regulation (1C)"; and

(f) in sub-regulation (9), in the three places it occurs, for "capital instruments" substitute "capital instruments, or eligible liabilities referred to in sub-regulation (1C)"; and

(25) In regulation 60–

(a) for the heading substitute "**Provisions governing write-down or conversion of relevant capital instruments and eligible liabilities.**";

(b) after sub-regulation (1)(c), insert–

"(d) the principal amount of eligible liabilities in regulation 59(1A) is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in regulation 31 or to the extent of the capacity of the relevant eligible liabilities, whichever is lower.";

(c) for sub-regulation (2) substitute–

"(2) Where the principal amount of a relevant capital instrument, or an eligible liability in regulation 59(1A) is written down–

(a) the reduction of that principal amount must be permanent, subject to any write up in accordance with the reimbursement mechanism in regulation 46(4);

(b) no liability to the holder of the relevant capital instrument, or of the eligible liability in regulation 59(1C), must remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write down power; and

(c) no compensation is to be paid to any holder of the relevant capital instruments, or of the liabilities in regulation 59(1C), other than in accordance with sub-regulation (4).";

(d) omit sub-regulation (3);

(e) for sub-regulation (4) substitute–

"(4) In order to effect a conversion of relevant capital instruments, and eligible liabilities in regulation 59(1C), under sub-regulation (1)(b), (c) and (d), the Gibraltar Resolution Authority may require institutions and entities in regulation 2(1)(b), (c) and (d) to issue Common Equity Tier 1 instruments to the holders of the relevant capital instruments and such eligible liabilities."; and

(f) in sub-regulation (5)–

(i) for the opening words substitute "Relevant capital instruments and such liabilities may only be converted where the following conditions are met– "; and

(ii) in paragraph (d), for "each relevant capital instrument" substitute "each relevant capital instrument, or each eligible liability in regulation 59(1A)".

(26) After regulation 61(3), insert–

"(3A) Where the relevant capital instruments, or eligible liabilities in regulation 59(1C), are recognised for the purposes of meeting the requirement in regulation 45F(1), the authority responsible for making the determination in regulation 59(3) must be the appropriate authority of the EEA State where the institution or the entity in 2(1)(b), (c) or (d) has been authorised in accordance with Title III of the Capital Requirements Directive.";

(27) In regulation 62–

(a) for sub-regulation (1) substitute–

"(1) Before making a determination referred to in regulation 59(3)(b) to (e) in relation to a subsidiary that issues relevant capital instruments, or eligible liabilities as referred to in regulation 59(1C), for the purposes of meeting the requirement in regulation 45F on an individual basis or relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual or consolidated basis, the appropriate authority must comply with the following requirements–

(a) an appropriate authority that is considering whether to make a determination referred to in regulation 59(3)(b) to (e), having consulted the resolution authority of the relevant resolution entity must, within 24 hours of consulting that authority, notify–

(i) the consolidating supervisor and, if different, the appropriate authority in the EEA State where the consolidating supervisor is located; and

(ii) the resolution authorities of other entities within the same resolution group that directly or indirectly purchased liabilities in regulation 45F(5) from the entity that is subject to regulation 45F(1); and

(b) an appropriate authority that is considering whether to make a determination referred to in regulation 59(3)(c), must, without delay, notify–

(i) the competent authority responsible for each institution or entity referred to regulation 2(1)(b), (c) or (d) that has issued the relevant capital instruments in relation to which the write down or conversion powers are to be exercised if that determination were made; and

(ii) if different, the appropriate authorities in the EEA States where those competent authorities and the consolidating supervisor are located."; and

(b) in sub-regulation (4), for the opening words substitute–

"(4) Where a notification has been made under sub-regulation (1), the appropriate authority, after consulting the authorities notified in accordance with sub-regulation (1)(a)(i) or (b), must assess the following matters–",

(28) In regulation 63(2)–

(a) in paragraph (e), for "eligible liabilities" substitute "bail-inable liabilities";

(b) in paragraph (f), for "eligible liabilities" substitute "bail-inable liabilities"; and

(c) in paragraph (j), in both places it occurs, for "eligible liabilities" substitute "bail-inable liabilities".

(29) In regulation 66(4), for "eligible liabilities" substitute "bail-inable liabilities".

(30) In regulation 68–

(a) in sub-regulation (4), for the opening words substitute–

"Where the substantive obligations under a contract, including payment and delivery obligations, and provision of collateral, continue to be performed, a crisis prevention measure, a suspension of obligation under regulation 33A or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, is not, by itself, sufficient to enable anyone to–";

(b) for sub-regulation (6), substitute–

"(6) A suspension or restriction under regulation 33A, 69, or 70 does not constitute non-performance of a contractual obligation for the purposes of sub-regulations (1), (2) and (4) or regulation 71(1).".

(31) In regulation 69–

(a) for sub-regulation (4) substitute–

"(4) Any suspension under sub-regulation (1) does not apply to payment and delivery obligations owed to–

(a) systems and operators of systems designated in accordance with the Settlement Finality Directive;

(b) central counterparties authorised in the EEA under Article 14 of EMIR and third-country central counterparties recognised by ESMA under Article 25 of that Regulation; or

(c) central banks."; and

(b) after sub-regulation (5), insert–

"(6) The Gibraltar Resolution Authority must set the scope of that power having regard to the circumstances of each case and, in particular, must carefully assess the appropriateness of extending the suspension to eligible deposits within the meaning of the DGS Directive, especially to covered deposits held by individuals and micro, small and medium-sized enterprises.

(7) Where the power to suspend payment or delivery obligations is exercised in respect of eligible deposits, the Gibraltar Resolution Authority must ensure that depositors have access to an appropriate daily amount from those deposits.".

(32) For regulation 70(2) substitute–

"(2) The Gibraltar Resolution Authority must not exercise the power in sub-regulation (1) in relation to–

(a) security interest of systems or operators of systems designated for the purposes of the Settlement Finality Directive;

(b) central counterparties authorised in the EEA under Article 14 of EMIR and third-country central counterparties recognised by ESMA under Article 25 of that Regulation; or

(c) central banks, over assets pledged or provided by way of margin or collateral by the institution under resolution.".

(33) For regulation 71(4) substitute–

"(4) A suspension under sub-regulation (1) or (2) does not apply to–

(a) systems or operators of systems designated for the purposes of the Settlement Finality Directive;

(b) central counterparties authorised in the EEA under Article 14 of EMIR and third-country central counterparties recognised by ESMA under Article 25 of that Regulation; or

(c) central banks.".

(34) After regulation 71, insert–

"**Contractual recognition of resolution stay powers.**

71A.(1) Institutions and entities in regulation 2(1)(b), (c) and (d) must include in any financial contract which they enter into and which is governed by third-country law, terms by which the parties recognise that the financial contract may be subject to the exercise of powers by the Gibraltar Resolution Authority to suspend or restrict rights and obligations under regulations 33A, 69, 70, and 71 and recognise that they are bound by the requirements of regulation 68.

(2) EEA parent undertakings must ensure that their third-country subsidiaries include, in the financial contracts in sub-regulation (1), terms to exclude the exercise of the Gibraltar Resolution Authority's power to suspend or restrict rights and

obligations of the EEA parent undertaking, in accordance with that sub-regulation from constituting a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts.

(3) The requirement in sub-regulation (1) applies in respect of third-country subsidiaries which are–

(a) credit institutions;

(b) investment firms (or which would be investment firms if they had a head office in Gibraltar); or

(c) financial institutions.

(4) Sub-regulation (1) applies to any financial contract which–

(a) creates a new obligation, or materially amends an existing obligation after the entry into force of this regulation; and

(b) provides for the exercise of one or more termination rights or rights to enforce security interests to which regulation 33A, 68, 69, 70 or 71 would apply if the financial contract were governed by the laws of an EEA State.

(5) Failure by an institution or entity to include the contractual term required by sub-regulation (1), does not prevent the Gibraltar Resolution Authority from applying the powers in regulations 33A, 68, 69, 70 or 71 in relation to the financial contract in question.

(6) This regulation applies subject to any regulatory technical standards adopted by the European Commission under Article 71a.5 of the Recovery and Resolution Directive.".

(35) In regulation 88–

(a) in sub-regulation (1), after "45" insert "to 45H"; and

(b) in sub-regulation (3)(i), for "regulation 45" substitute "regulations 45 to 45H".

(36) For regulation 89 substitute–

"**European resolution colleges**

89(1). Where a third-country institution or third-country parent undertaking has–

(a) EEA subsidiaries or EEA parent undertakings, established in Gibraltar and one or more other EEA States; or

(b) two or more EEA branches that are regarded as significant by Gibraltar or one or more other EEA States,

the Gibraltar Resolution Authority must cooperate in the establishment of a single European resolution college with the resolution authorities of the EEA States where those entities are established or those significant branches are located.

(2) The European resolution college must perform the functions and carry out the tasks set out in regulation 88 with respect to the entities in sub-regulation (1) and, in so far as those tasks are relevant, to their branches.

(3) The tasks in sub-regulation (2) include the setting of the requirement in regulations 45 to 45H.

(4) When setting the requirement in regulations 45 to 45H, members of the European resolution college must take into consideration the global resolution strategy, if any, adopted by third-country authorities.

(5) Where, in accordance with the global resolution strategy, subsidiaries established in the EEA or an EEA parent undertaking and its subsidiary institutions are not resolution entities and the members of the European resolution college agree with that strategy, subsidiaries established in the EEA or, on a consolidated basis, the EEA parent undertaking must comply with the requirement of regulation 45F(1) by issuing instruments in regulation 45F(5)(a) and (b) to their ultimate parent undertaking established in a third country, or to the subsidiaries of that ultimate parent undertaking that are established in the same third country or to other entities under the conditions set out in regulation 45F(5)(a)(i) and (b)(ii).

(6) Where only one EEA parent undertaking holds all EEA subsidiaries of a third-country institution or third- country parent undertaking, the European resolution college must be chaired by the resolution authority of the EEA State where the EEA parent undertaking is established.

(7) Where sub-regulation (6) does not apply, the resolution authority of an EEA parent undertaking or an EEA subsidiary with the highest value of total on-balance sheet assets held must chair the European resolution college.

(8) The Gibraltar Resolution Authority may participate with other EEA States in, by mutual agreement of all of the relevant parties, waiving the requirement to establish a European resolution college if another group or college performs the same functions and carries out the same tasks set out in this regulation and complies with all of the conditions and procedures, including those covering membership and participation in European resolution colleges, set out in this regulation and in regulation 90.

(9) In any case where sub-regulation (8) applies, any reference in these Regulations to European resolution colleges includes a reference to those other groups or colleges.

(10) Subject to sub-regulations (6) to (9), the European resolution college must otherwise function in accordance with regulation 88.".

(37) For regulation 99 substitute–

"**Ranking in insolvency hierarchy.**

99.(1) In the law of Gibraltar governing normal insolvency proceedings–

(a) the following have the same priority ranking which is higher than the ranking provided for the claims of ordinary unsecured creditors–

(i) that part of eligible deposits from individuals and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of the DGS Directive; and

(ii) deposits that would be eligible deposits from individuals and micro, small and medium-sized enterprises were they not made through branches located outside Gibraltar of institutions established within Gibraltar;

(b) the following have the same priority ranking which is higher than the ranking provided for under paragraph (a)–

(i) covered deposits; and

(ii) deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency.

(2) In normal insolvency proceedings, for entities in regulation 2(1)(a) to (d) ordinary unsecured claims have a higher priority ranking than that of unsecured claims resulting from debt instruments that meet the following conditions–

(a) the original contractual maturity of the debt instruments is of at least one year;

(b) the debt instruments contain no embedded derivatives and are not derivatives themselves; and

(c) the relevant contractual documentation and, where applicable, the prospectus related to the issuance explicitly refer to the lower ranking under this regulation.

(3) In normal insolvency proceedings, unsecured claims resulting from debt instruments that meet the conditions in sub-regulation (2) have a higher priority ranking than the priority ranking of claims resulting from instruments referred to regulation 48(1)(a) to (d).

(4) The Insolvency Act 2011 as it applied on 31st December 2016 applies to the ranking in normal insolvency proceedings of unsecured claims resulting from debt instruments issued prior to 29th December 2018 by entities in regulation 2(1)(a) to (d).

(5) From 29th December 2018, unsecured claims resulting from debt instruments in sub-regulation (1)(b) have the same priority ranking as those in sub-regulation (2)(a) to (c) and (3).

(6) For the purposes of sub-regulation (2)(b), debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, are not to be considered to be debt instruments containing embedded derivatives solely because of those features.".

(38) In the Schedule–

(a) in Part 2, in paragraph (6), for "eligible liabilities" substitute "bail-inable liabilities"; and

(b) in Part 3, in paragraph (17), for "eligible liabilities" substitute "bail-inable liabilities".

Amendment of the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020.

4.(1) The Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020 are amended as follows.

(2) In regulation 2(1)–

(a) in the definition of "central counterparty", for "article 2(1) of Regulation (EU) No. 648/2012;" substitute "Article 2(1) of EMIR"; and

(b) for the definition of "participant" substitute–

""participant" means an institution, a central counterparty, a settlement agent, a clearing house, a system operator or a clearing member of a CCP authorised under Article 17 of EMIR;".

Dated: 27th November 2020.

A J ISOLA,
Minister with responsibility for financial services,
and for the Government.

EXPLANATORY MEMORANDUM

These Regulations amend the Financial Services (Recovery and Resolution) Regulations 2020 and make consequential amendments to the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020, in order to give effect to 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.

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