

ENGLISH VERSION. PLEASE BE INFORMED THAT THE ITALIAN TEXT ALONE IS AUTHENTIC.

REGULATORY MEASURES CONCERNING THE TEMPORARY SUSPENSION OF TERMINATION RIGHTS BY THE RESOLUTION AUTHORITY IN RELATION TO FINANCIAL CONTRACTS GOVERNED BY THE LAW OF A THIRD COUNTRY

1. In listing the powers that must be available to resolution authorities, Chapter VI, Article 71 of the Bank Recovery and Resolution Directive (Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014) provides that resolution authorities shall have the power to temporarily suspend the termination rights of any party to a contract with an institution under resolution and, under certain circumstances, its subsidiaries. This power extends to all contracts governed by the law of a Member State.

This provision was transposed into our legal framework by means of Article 68 of Legislative Decree 180/2015, which assigns to the Bank of Italy, in its capacity as resolution authority, the power to suspend – from the publication of the resolution programme until midnight at the end of the business day following that publication – the termination rights of any party to a contract with an institution under resolution (paragraph 1) and, under certain circumstances, with a subsidiary of an institution under resolution (paragraph 2). To make the exercise of this power also effective in relation to contracts governed by the law of a third country, paragraph 8 of Article 68 provides that the Bank of Italy may require, in the cases it has itself identified, that such contracts include a clause by which the parties agree to subject themselves to the suspension powers envisaged by this Article.

Financial contracts (derivatives and securities financing transactions) are of particular relevance in this regard. According to the standards set out by the Financial Stability Board (FSB), the existence of the resolution authority's power to temporarily suspend the termination rights in these contracts is in fact one of the elements to be considered when assessing the resolvability of a bank or other financial institution.¹

At the request of the FSB, global systemically important banks (G-SIBs) adhering to the 2015 Universal Resolution Stay Protocol published by ISDA have already voluntarily recognized the power of the resolution authorities of their foreign G-SIB counterparties to temporarily suspend termination rights in financial contracts.

¹ See 'Key Attributes of Effective Resolution Regimes for Financial Institutions'.

However, banking groups that are smaller than the global systemically important banks also enter into financial contracts governed by the law of a third country. Certain jurisdictions, including some EU Member States, have already adopted regulatory measures that require all institutions, or at least a wider range than just G-SIBs, to include clauses in financial contracts by which the counterparty recognizes the power of the resolution authority to temporarily suspend the termination rights in financial contracts governed by the law of a third country and entered into by an institution under resolution.

2. The present Regulatory Measures, issued by the Bank of Italy in its capacity as resolution authority, set out implementing measures for Article 68, paragraph 8 of Legislative Decree 180/2015, identifying the type of contracts, institutions and counterparties to which the suspension power may apply for two business days.

The provisions shall apply to financial contracts as defined in Article 1, paragraph 1, letter (o) of Legislative Decree 180/2015 (with the exception of interbank lending agreements with a maturity of three months or less), governed by the law of a third country and entered into, with any type of counterparty, by banks and financial institutions (including investment firms) that fall under the remit of the Single Resolution Board, with the exclusion of contracts entered into within the context of payment systems or securities settlement or with related operators, central counterparties or central banks.

The provisions shall apply only to those institutions that fall under the remit of the Single Resolution Board in response to the need primarily to improve the resolvability of institutions of larger size and greater complexity owing to the higher degree of systemic risk that they pose and to the fact that the financial contracts that are subject to these measures have almost exclusively been entered into by such institutions.

The consultation and impact analysis obligations set out in the Bank of Italy Provision of 24 March 2010 on the issuance of Bank of Italy regulatory measures shall not apply to the present provisions, having regard to their urgent nature, without prejudice to the need to ensure, in certain cases, a transitional period for its application (see *infra*). Indeed, the absence of the competent resolution authority's power to suspend the termination rights in financial contracts governed by the law of a third country is a factor that may compromise the full and effective resolvability of an institution and the implementation of the strategies envisaged to solve the crisis. Furthermore, the rapid enactment of the present provisions is consistent with the objective of aligning the Italian regulatory framework, within the context of the European integration of the banking and financial system and of the rules on banking crisis management, with the regulatory measures already adopted by other Member States.

Nevertheless, an impact analysis and an informal consultation were carried out with the ABI (Italian Banking Association) and the banks that are currently parties to this type of contract. They have confirmed that these Regulatory Measures impose a very light burden on the institutions involved since, as mentioned above, financial contracts governed by the law of a third country are entered into only by larger institutions and are of negligible value compared with the aggregate value of all financial contracts. The comments collected during the consultation were taken into consideration in drafting the text of these measures.

3. The Regulatory Measures shall enter into effect on the date they are published in the *Gazzetta Ufficiale della Repubblica Italiana*; they will be published on the Bank of Italy's website (www.bancaditalia.it). The provisions shall apply according to the following timeframe:

- a) for financial contracts entered into by G-SIBs with counterparties that are also G-SIBs, they shall apply from the date of publication in the *Gazzetta Ufficiale*, in order to ensure continuity of the obligations that the G-SIBs have already voluntarily assumed by adhering to the ISDA 2015 Universal Resolution Stay Protocol;
- b) in all other cases, they shall apply one year after their entry into force. This solution makes it possible to take into account any ISDA initiative to facilitate compliance with the present provisions by means of a dedicated Jurisdictional Modular Protocol or, in the absence of such initiative, sufficient time to adapt contracts to these provisions.

Consistently with Article 68, paragraph 8, of Legislative Decree 180/2015, the Regulatory Measures shall apply to contracts entered into or rolled over after the dates indicated in points a) and b); since these provisions further strengthen the resolvability of institutions, it is left to them to voluntarily include suspension of termination right clauses in existing contracts, including by adhering to the ISDA initiatives.

Rome, 16 January 2018

THE GOVERNOR

Ignazio Visco

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The Bank of Italy

HAVING REGARD to Legislative Decree 180/2015, that sets out rules for implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, which establishes a framework for the recovery and resolution of credit institutions and investment firms;

HAVING REGARD to Article 68 of Legislative Decree 180/2015 which governs the Bank of Italy's exercise of the power to temporarily suspend the termination rights of a counterparty in a contract entered into by an institution under resolution or by one of its subsidiaries;

HAVING REGARD to paragraph 8 of Article 68 of Legislative Decree 180/2015 which authorizes the Bank of Italy to require, in the cases it identifies, that contracts governed by the law of a third country entered into after the entry into force of the above-referenced Legislative Decree contain a clause whereby the parties agree to subject themselves to the effects of the suspension powers provided for under Article 68;

HAVING REGARD to Articles 32 and 33 of Legislative Decree 180/2015 on the resolution of banks and financial institutions that are part of a banking group;

HAVING REGARD to paragraph 4 of Article 61 of the Consolidated Law on Banking which governs the management and coordination activities of the parent undertaking of a banking group and which provides that the parent undertaking shall issue rules to the components of the group for the implementation of the instructions issued by the Bank of Italy in the interest of the group's stability;

WHEREAS the Financial Stability Board (FSB), in consultation with the Basel Committee on Banking Supervision (BCBS) and with the national competent authorities, identifies and publishes annually a list of the Global Systemically Important Banks (G-SIBs);

WHEREAS the standards issued by the FSB take into account the existence of the resolution authority's power to temporarily suspend the termination rights in financial contracts entered into by an entity under resolution as one of the factors to consider in determining the resolvability of the entity;

WHEREAS the existence of financial contracts governed by the law of a third country could render ineffective the resolution authority's power to temporarily suspend termination rights;

CONSIDERING IT necessary to introduce a regulation that makes mandatory the commitments that G-SIBs have voluntarily assumed by joining the ISDA 2015 Universal Resolution Stay Protocol according to which, in the event that a G-SIB that is the contractual counterparty enters into resolution, G-SIBs subject themselves to the effects of the exercise by the counterparty's resolution authority of the power to temporarily suspend termination rights in financial contracts governed by the law of a third country;

CONSIDERING IT necessary to generally improve the resolvability of all banking groups and of banks not part of a banking group which fall within the remit of the Single Resolution Board, pursuant to Article 7 paragraphs 2, 4(b) and 5 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014, by introducing regulatory measures that require these entities to only enter into financial contracts governed by the law of a third country if the contracts include a clause whereby the counterparty subjects itself to the competent resolution authority's power to temporarily suspend termination rights;

HEREBY STIPULATES

Article 1

(Scope of application)

1. These provisions shall apply to the following companies, with a registered office in Italy and within the remit of the Single Resolution Board, pursuant to Article 7 paragraphs 2, 4(b) and 5 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014:

- a) banks that are not part of a banking group;
- b) banks, financial companies and mixed financial holding companies that are the parent company of a banking group pursuant to Article 61 of the Consolidated Law on Banking;
- c) other banks and financial companies that are part of a banking group pursuant to Article 60 of the Consolidated Law on Banking.

Article 2

(Definitions)

1. For the purposes of these Regulatory Measures the following definitions shall apply:

- a) control: the power exercised on a company pursuant to Article 23 of the Consolidated Law on Banking;
- b) financial contracts: the contracts and agreements referred to in Article 1, paragraph 1, letter (o), numbers 1), 2), 3), 4) and 6) of Legislative Decree 180/2015 entered into by the entities referred to in Article 1 with any type of counterparty, with the exclusion of contracts entered into within the context of payment systems or securities settlement or with related operators, central counterparties or central banks;
- c) secured financial contracts: financial contracts referenced in paragraph b) that meet both of the following conditions:
 - 1) the obligations stemming from such contracts are guaranteed by a controlling entity as defined in Article 1, paragraphs b) and c), or are otherwise supported by such entity;

- 2) the prerequisite for the exercise of termination rights is the insolvency of the controlling entity referenced in point 1) or is otherwise determined with regard to the controlling entity's financial situation;
- d) termination rights: the clauses referred to in Article 1, paragraph 1, letter (ii) of Legislative Decree 180/2015;
- e) G-SIBs: the banks included in the list of Global Systemically Important Banks identified annually by the Financial Stability Board (FSB), in consultation with the Basel Committee on Banking Supervision (BCBS) and with the national competent authorities;
- f) financial companies: the companies referred to in Article 59, paragraph 1, letter (b), of the Consolidated Law on Banking.
2. For definitions not expressly indicated in the present Article, the definitions set out in Article 1 of Legislative Decree 180/2015 shall apply.

Article 3

(Contractual recognition of the power to suspend termination rights)

1. The entities referenced in Article 1 shall not enter into financial contracts that are governed by the law of a third country without said contracts containing a clause whereby, in the event such entities enter into resolution, the counterparty subjects itself to the competent resolution authority's power to temporarily suspend termination rights pursuant to Article 68, paragraph 1 of Legislative Decree 180/2015.
2. Banks and financial companies with a registered office in Italy which are controlled by one of the entities referenced in Article 1, paragraphs b) and c) shall not enter into secured financial contracts that are governed by the law of a third country without said contracts containing a clause whereby, in the event the controlling entity referenced in Article 1, paragraphs b) and c) enters into resolution, the counterparty subjects itself to the competent resolution authority's power to temporarily suspend termination rights pursuant to Article 68, paragraph 2 of Legislative Decree 180/2015.

3. Parent undertakings of a banking group referenced in Article 1, paragraph b) shall ensure that the banks and financial companies with registered offices abroad, controlled by one of the entities referenced in Article 1, paragraphs b) and c), shall not enter into secured financial contracts that are governed by the law of a third country without said contracts containing a clause whereby, in the event the controlling entity referenced in Article 1, paragraphs b) and c), enters into resolution, the counterparty subjects itself to the competent resolution authority's power to temporarily suspend termination rights pursuant to Article 68, paragraph 2, of Legislative Decree 180/2015.

Article 4

(Applicability)

1. One year after date these Regulatory Measures enter into force, the provisions of Article 3 shall apply to the contracts referred to in Article 2, paragraph 1, letters b) and c), that are entered into or rolled over, either formally or tacitly, with effect from that date, including those entered into or rolled over on the basis of master agreements entered into previously.

2. With reference to the financial contracts referred to in Article 2, paragraph 1, letter b) entered into by G-SIBs with counterparties that are also G-SIBs, the provisions of paragraph 1 shall apply from the date these Regulatory Measures enter into force.

3. Companies fitting the description of the entities referred to in Article 1 after the date these Regulatory Measures enter into force shall apply these provisions one year after the date on which they fall under the remit of the Single Resolution Board.

Article 5

(Entry into force)

1. These Regulatory Measures shall enter into force on the date of their publication in the *Gazzetta Ufficiale della Repubblica Italiana*.