

Operation of the bail-in tool¹

Background

On 29 June 2016, the Dutch Central Bank (**DNB**), in its capacity as the Dutch national resolution authority (**NRA**), published a consultation paper. It set out the initial parameters for possible application of the bail-in tool by the NRA and requested respondents to provide feedback on several specific

questions. A number of responses was received², discussions were held with all respondents and the consultation paper has been amended where and to the extent appropriate to reflect such responses.

1

Introduction

Bail-in is one of the resolution tools the NRA has at its disposal to (timely) intervene in a Dutch credit institution (**Bank**)³ that is failing or likely to fail (**FOLTF**) so as to ensure the continuity of critical functions, such as lending and deposit taking, while minimising the impact on the economy and financial system.

Bail-in aims to ensure that losses and recapitalisation costs of a failing Bank are, first and foremost, borne by the shareholders and creditors of the bank: the insiders. Accordingly, the burden of resolving a bank is primarily placed on the insiders of the bank instead of the outsiders, like the taxpayer in case of a bail-out. The allocation of losses and recapitalisation costs to the shareholders and creditors can also be achieved by or in combination with other resolution tools, for example by the sale of business tool, whether or not in combination with a bankruptcy of the remaining part of the bank.

Moreover, in the context of the Banking Union, the Single Resolution Board (**SRB**), the European Central Bank and the European Commission have each been assigned specific tasks in connection with resolution of banks under the SRB's remit that are deemed FOLTF. The SRB in its Executive Session along with the relevant NRA(s) (in the case a bank has its seat in the Netherlands, DNB), will decide whether and when to place a bank into resolution and sets out the resolution scheme. In that case, the NRA will transpose this resolution scheme in an implementation decision on the basis of national law and execute the bail-in process to resolve such banks through application of the bail-in tool.

Accordingly, using a simplified and hypothetical case study, this paper outlines the NRA's currently proposed approach to such implementation by applying the bail-in tool⁴ to Banks if

- ¹ Please note that the Dutch language version of this document is leading. In case there is any conflict or inconsistency between the Dutch and the English language versions of this document, the Dutch language version prevails.
- ² Please see Annex 1 to this paper for a summary of the main responses received and the NRA's related background reaction.
- ³ Both the BRRD and Wft (as defined below) apply to investment firms as well. Please note that in relation to this consultation paper, investment firms are out of scope.
- ⁴ This paper only concerns the application of the bail-in tool as set out in part 3A Wft. However, in order to implement bail-in, banks will be required to also meet operational requirements, including for example in respect of (i) the information to be provided at short notice (within 24 hours) regarding eligible liabilities subject to bail-in and (ii) the processing of a number of bail-in steps, such as the write down and conversion of capital instruments and the issue of new shares, in the banks' internal systems.

such is necessary. This paper only concerns the application of the bail-in tool as part of the Bank Recovery and Resolution Directive (**BRRD**)⁵ being transposed in part 3A of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **Wft**) and the Single Resolution Mechanism Regulation (**SRMR**).⁶

This paper thus applies to (i) Banks that fall under the responsibility of the SRB and for which the SRB has determined the resolution scheme (to apply the bail-in tool) which requires the NRA to pass and execute a related implementation decision and (ii) Banks that only fall under the responsibility of the NRA and for which the NRA has taken a resolution decision to apply and execute the bail-in tool.

In doing so, this paper elaborates on certain specific topics, such as the 'no creditor worse off' principle (**NCWO**), takeover defence measures in resolution, the NRA's (implementing) decision(s), the trade in securities issued by the Bank in resolution⁷ and legal protection.

This paper does not deal with several other issues related to the bail-in tool, such as, for example, the role of Contingent Convertible bonds, valuation methodologies⁸, the possibility of discretionary exclusion of eligible liabilities, or conditions for access to the Single Resolution Fund (**SRF**).

Finally, the provisions contained in the Wft do not prescribe a specific procedure for the application of the bail-in tool. Accordingly, if the resolution objectives or the circumstances of the case so require, DNB may choose to apply the bail-in tool differently than set out in this paper.

5 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council (OJ EU 2014, L 173).

6 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

7 The Dutch language version of this paper uses the term 'resolutie' (resolution) while the Wft uses the term 'afwikkeling' (wind-down).

8 This is currently being developed in an international context, including, amongst others, at the EBA level (see e.g. EBA-RTS-2017-05 and 06).

General aspects

Bail-in is one of the four resolution tools that the NRA can apply in respect of a Bank that meets the following conditions for resolution:

- I. the Bank is FOLTF⁹;
- II. there is no reasonable prospect that a private solution or the use of regular supervision tools will rectify the situation; and
- III. resolution of the Bank is necessary in the public interest. This involves assessing whether intervention is necessary and proportionate and whether the resolution objectives could not be achieved equally well through insolvency proceedings. The resolution objectives are:
 - a) ensuring the continuity of critical functions,
 - b) avoiding a significant adverse effect on financial stability,
 - c) protecting public funds by minimising reliance on extraordinary public financial support,
 - d) protecting covered depositors and investors as well as
 - e) client funds and client assets.

The bail-in tool is first of all applied to absorb losses and recapitalise the distressed Bank so that it once again meets its license requirements (including its minimum capital requirements). The recapitalisation must be such as to restore market confidence. Further, there should be a reasonable prospect that application of the bail-in tool will restore the Bank to financial soundness and long-term viability.

When applying the bail-in tool – once reserves¹⁰, shares and relevant capital instruments have been wholly or partly written down¹¹ – non-excluded liabilities are written down or converted into rights to newly issued shares or other instruments of ownership¹² of the Bank in resolution. Write down and conversion are applied in the reverse order of the priority of claims in Dutch law insolvency proceedings.¹³

In addition, the bail-in tool can be applied in combination with the other resolution tools, namely (i) the use of a bridge bank, (ii) asset separation and (iii) sale of business. For example, application of the bail-in tool can provide capital for a bridge bank¹⁴ or an asset management vehicle after separation of assets or, if the sale of business tool is used, be applied to the Bank in resolution before transferring shares to another party.

Certain liabilities are excluded from bail-in by law, including¹⁵: covered deposits, secured claims, claims with an original maturity of less than seven days, claims of employees, claims of commercial or trade creditors and claims arising from the provision of goods or services to the Bank that are critical to the daily functioning of its operations, including IT services, utilities and the rental, servicing and upkeep of premises.

⁹ See the EBA Guidelines on the interpretation of the different circumstances when a bank shall be considered FOLTF under article 32(6) BRRD (EBA/GL/2015/07).

¹⁰ The term "reserves" as used throughout this paper refers to Common Equity Tier 1 items as defined in article 26 (1) (b-f) of the Capital Requirements Regulation (CRR) as further described in Annex 2 below.

¹¹ See Chapter 3 below for further details.

¹² For the definitions of Common Equity Tier 1 items, Common Equity Tier 1 instruments, instruments of ownership, relevant capital instruments and debt instruments, please see Annex 2 to this paper. References throughout this paper to "shares" shall, where appropriate, also include references to depositary receipts which may be issued in respect of such shares.

¹³ Compare article 17, 21(10) and 27(15) SRMR and 48 BRRD.

¹⁴ In this scenario, the eligible liabilities transferred to the bridge bank would subsequently be (partially) written down and converted, resulting in additional capital. The capital of a bridge bank or asset management vehicle can alternatively be provided by transferring more assets than liabilities to such entity.

¹⁵ See also article 27(3) SRMR and article 44(2) BRRD.

In addition to these eligible liabilities excluded by law, the resolution authority **may** in exceptional circumstances wholly or partly exclude certain claims from bail-in, if¹⁶:

- it is impossible to bail-in a liability within a reasonable time;
- exclusion is strictly necessary and proportionate to ensure the continuity of critical functions and core business lines;

- exclusion is strictly necessary and proportionate to avoid widespread contagion; or
- application of the bail-in tool to those eligible liabilities would cause value destruction such that the losses borne by other creditors would be bigger than if the exclusion were applied.

3

Write-down and conversion of capital instruments tool and bail-in tool

A distinction must be made between the write-down and conversion of capital instruments tool (**WDCCI**)¹⁷ and the bail-in tool.¹⁸ WDCCI involves writing down the reserves, the value of shares or other instruments of ownership and relevant capital instruments of the Bank and/or, ultimately, the conversion of those relevant capital instruments into Common Equity Tier 1 instruments.

WDCCI may be applied to Banks both in and out of resolution. Application out of resolution may occur if the supervisory authority considers that the Bank is no longer viable without WDCCI¹⁹ (or, in other words, where it determines that the application of WDCCI only is sufficient to avoid insolvency). In such a case, the NRA will apply the WDCCI tool where applicable, upon notification by the supervisory authority.

If the conditions for resolution have been met and it is determined that WDCCI would not be sufficient to restore the viability of the Bank, the Bank will instead be placed in resolution. In such case, the bail-in tool can be applied to its non-excluded eligible liabilities. The bail-in tool therefore sequentially follows WDCCI. Whereas WDCCI relates to the writing down or conversion of capital instruments, bail-in continues with subordinated debt followed by senior debt and, finally, preferred debt. When WDCCI and thereafter the bail-in tool are applied, the NRA should take the write-down

and conversion steps in the following order (respecting the insolvency hierarchy of creditors):

in the context of WDCCI:

- 1 Common Equity Tier 1 items as referred to in article 26(1)(b)-(f) Capital Requirements Regulation (**CRR**) (incl. reserves); then
- 2 The principal amount of the shares or other instruments of ownership issued by or with the cooperation of the Bank; then
- 3 The principal amount of the relevant capital instruments issued by or with the cooperation of the Bank (first Additional Tier 1 and then Tier 2 capital); and

in the context of application of the bail-in tool:

- 4 The principal amount of subordinated debt that does not qualify as Additional Tier 1 and then Tier 2 capital; and finally
- 5 The principal amount of, or outstanding amount payable in respect of, the remaining non-excluded eligible liabilities

¹⁶ See article 44(3) BRRD and the EC Delegated Regulation (EU) 2016/860 of 04.02.2016 specifying further the circumstances where exclusion from the application of write-down or conversion powers is necessary under article 44(3) BRRD.

¹⁷ See article 3A:21 Wft in conjunction with article 21 SRMR. WDCCI is not, strictly speaking, a resolution tool, but it is one of the tools at the disposal of the NRA.

¹⁸ Article 3A:44 Wft and following.

¹⁹ See article 21(1) SRMR.

Valuations

The NRA has the power to intervene in the rights of Banks' shareholders and creditors. To ensure that this power is exercised with due care (such that both the resolution objectives are achieved and the rights of shareholders and

creditors are respected), independent valuations²⁰ should be carried out at various moments during the resolution process.

Box 1: types of valuation in resolution.²¹

1 Valuation to inform whether the Bank is FOLTF (article 20 section 5 (a) SRMR), FOLTF valuation

This valuation serves to inform the NRA whether the conditions for WDCCI in the recovery phase or in resolution are met. It is an accounting valuation of the Bank's assets and liabilities and results in an updated balance sheet. This valuation is initiated by the NRA and is carried out by an independent party before WDCCI or resolution is applied. When determining whether a Bank is FOLTF, the NRA must also consider other factors such as loss of confidence and outflow of liquidity.

2 Resolution valuation (article 20 section 5 (b) SRMR)

This valuation informs which resolution measures may be taken and the extent to which reserves, shares, relevant capital instruments and non-excluded liabilities are written down or converted and the conversion rate. An independent economic valuation of the Bank's assets and liabilities is initiated by the NRA. Ideally, this valuation should be completed before the resolution decision is

taken by the NRA, but in urgent cases may be finalised later. However, the valuation should be completed before the final conversion rate can be determined. A provisional NCWO valuation forms part of the (provisional) resolution valuation (article 20(2)SRMR).

3 Liquidation valuation (article 20 section 16, 17 and 18 SRMR)

The aim of this valuation is to verify the extent to which the NCWO principle has been complied with when applying the bail-in tool. This involves calculating the amount which creditors and shareholders would have received in the event of the Bank's hypothetical bankruptcy. This amount is then compared with the amount which these parties have received in resolution. This valuation is initiated by the NRA and carried out by an independent party. The liquidation valuation must take place as soon as possible after resolution, for which purpose the moment of the resolution decision is used as the reference date.

²⁰ Whether a valuation is independent is a matter to be assessed, among other things, by reference to EBA's final report on the draft Regulatory Technical Standards on independent valuers under article 36(14) of Directive 2014/59/EU.

²¹ As regards the various valuations in resolution, see EBA-RTS-2017-05 and 06. These provide, amongst others, that the provisional valuation to determine whether the bank is FOLTF can be performed by an independent expert as well as the NRA.

Operation of the bail-in tool

This chapter illustrates the operation of the bail-in tool in a stylised example.

Assumptions in the case of ABC Bank:

- ABC Bank N.V. (**ABC Bank**)²² is an independent bank, is not part of a group and has no foreign operations.
- The shares have a par value of EUR 2 (per share). 500,000,000 shares have been issued.
- ABC Bank's balance sheet is as follows:

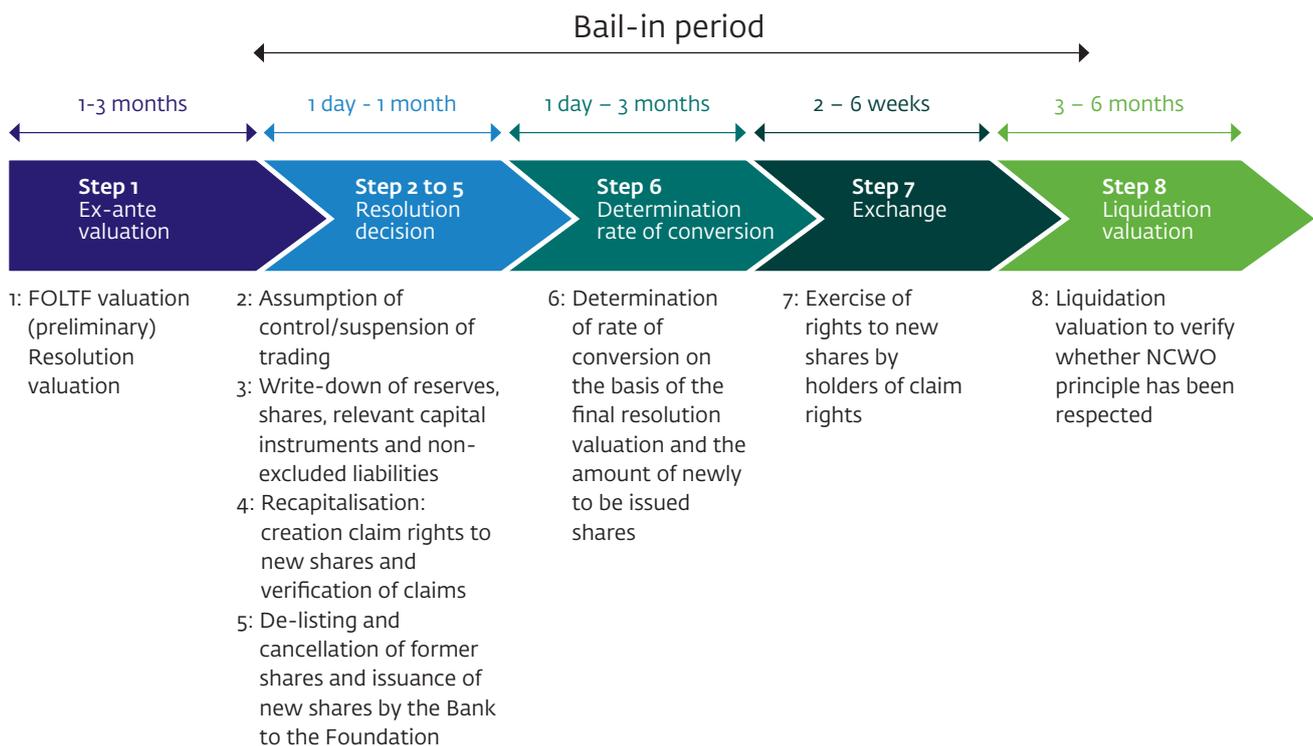
Starting position ABC Bank

Assets (x€1bn)			Liabilities (x€1bn)		
Cash		10	Capital:		10
Mortgages:		60	- Reserves	4	
SME-loans:		30	- Shares (nominal value):	1	
			- Relevant capital instruments	5	
			Subordinated debt (other):		10
			Senior creditors:		25
			Guaranteed deposits:		35
			Secured financing:		20
Total:		100	Total		100

- Due to a poor economic climate, ABC Bank's portfolio of SME loans comes under particular stress and as a result ABC Bank has to write down the assets in the portfolio by EUR 15 billion. The uncertainty about the value of the assets means that there is the risk of a bank run.
- ABC Bank falls under the exclusive competence of the NRA.²³
- The conditions for resolution have been met.
- There is no reason to exclude certain eligible liabilities from bail-in.
- Following the determination by the Supervisory Authority that ABC Bank is FOLTF, the NRA places ABC Bank in resolution and then applies in accordance with the resolution plan, WDCCI and the bail-in tool. The following steps can be taken for this purpose. It should be noted that the timelines included in this diagram are merely indicative and that there may be a certain degree of overlap between the various steps:

²² In the example, a fictional bank with the most common legal form in the Netherlands is used, namely that of a public limited liability company (naamloze vennootschap). If it were to have a different legal form, the step-by-step analysis set out in this paper could require modification.

²³ This means the example pertains to a Dutch bank in respect of which both the resolution decision and the implementation thereof are the responsibility of the NRA.



These steps are elaborated below.

Preparation

Step 1: FOLTF valuation and resolution valuation

- The NRA instructs a valuer to prepare the valuation to inform the NRA whether the Bank is FOLTF.
- The NRA obtains a resolution valuation. If an independent resolution valuation that meets all the requirements is not possible, a provisional resolution valuation (by the NRA) would initially be sufficient. However, a definitive resolution valuation should then be prepared at a later stage (see step 6).
- It is apparent from the resolution valuation that the net asset value of ABC Bank is negative:

Balance sheet ABC Bank - losses

Assets (x€1bln)			Liabilities (x€1bln)		
Cash:		10	Capital:	10 - 15 =	-5
Mortgages:		60	- Reserves		
SME loans:	30 - 15 =	15	- Shares		
			- Relevant capital instruments:		
			Subordinated debt (other):		10
			Senior creditors:		25
			Guaranteed deposits:		35
			Secured financing:		20
Total	100 - 15 =	85	Total	100 - 15 =	85

Step 2 Take-over of control/suspension of trading

- At the start of the resolution process, the NRA takes control of ABC Bank.²⁴ The NRA may do this either directly or through the appointment of a special manager. The resolution decision²⁵ provides that the special manager or, as the case may be, the NRA has the rights and powers previously exercised by the bodies of ABC Bank and its shareholders.²⁶
- At the NRA's request, the Dutch Financial Markets Authority (*Autoriteit Financiële Markten, AFM*) exercises its authority to suspend trading in financial instruments issued by ABC Bank (see also chapter 10 of this paper).²⁷

Write-down

Step 3 Loss absorption

- The reserves, par value of the shares and relevant capital instruments are written down to nil and the principal amount of other eligible liabilities is wholly or partly written down.
- A written decision of the NRA (which forms part of the resolution decision) is sufficient.

For ABC Bank this means that the loss absorption takes place as follows:

WDCCI

- As ABC Bank's net asset value is negative, the NRA's decision involves reducing to nil:
 - its reserves;
 - the par value of its shares or other instruments of ownership; and
 - the principal amount of its relevant capital instruments

Bail-in

- The next creditors in line are the holders of other subordinated debt. The resolution decision provides for:
 - reduction of the principal amount of the other subordinated debt by EUR 5 billion.

Balance sheet ABC Bank – WDCCI and bail-in (write-down)

Assets (x€1bn)			Liabilities (x€1bn)		
Cash:		10	Capital:		0
Mortgages:		60	- Reserves:	4 - 4 = 0	
SME loans:		15	- Shares:	1 - 1 = 0	
			- Relevant capital instruments:	5 - 5 = 0	
			Subordinated debt (other):	10 - 5 =	5
			Senior creditors:		25
			Guaranteed deposits:		35
			Secured financing:		20
Total		85	Total		85

Legend: the instruments to which WDCCI is applied have been highlighted in orange; the instruments that are written down through application of the bail-in tool are highlighted in yellow.

²⁴ Article 3A:49 Wft.

²⁵ The resolution decision covers more than just the resolution of the bank and includes decisions on steps 3-7 (also see chapter 8 of this paper).

²⁶ The Bank's governing bodies as such remain intact but on the basis of article 3A:49 Wft their powers may only be exercised by the special manager or the NRA and no longer by the members of the board of directors, supervisory board or shareholders, as applicable. In this connection article 15 section 1 (c) SRMR is applicable.

²⁷ See article 3A:56 Wft (which refers to article 1:77d and 1:77e Wft).

Recapitalisation

Step 4 Creation of rights to new shares

- The next step is to provide ABC Bank with fresh capital. The recapitalisation can in this case be achieved by:
 - (i) full conversion of its remaining subordinated debt and
 - (ii) partial conversion of its senior creditors.
- In order to recapitalise ABC Bank, the NRA decides that these debts are converted in rights to newly (to be) issued shares in ABC Bank (**Claim Rights**).²⁸ These Claim Rights are transferable.²⁹ The NRA can further specify the characteristics of the Claim Rights in its decision. To the extent that the conversion rate at which Claim Rights can be converted into new shares of ABC Bank cannot yet be definitively determined at the time of the NRA's resolution decision (because only a provisional resolution valuation is available, see step 6), the Claim Rights represent a potential claim to newly (to be) issued shares.³⁰
- These Claim Rights may be exercised against ABC Bank³¹ and thus bear a certain similarity to pre-emption rights for shareholders as referred to in article 2:96a Dutch Civil Code (**DCC**) in the sense that these Claim Rights similar to pre-emption rights, may be made transferable (tradeable) until the ultimate moment they can be exercised.
 - The Claim Rights may be listed for this purpose on an official market. This enhances marketability and has the advantage that trading is visible, cost efficient and traceable.
 - Although no prospectus is required by law, a concise information memorandum describing, amongst others, (i) the nature, characteristics and scope of the Claim Rights, (ii) the exchange process and (iii) certain regulatory aspects may be desirable.
- If there is a takeover defence measure in place whereby depositary receipts (*certificaten van aandelen*) are issued for ABC Bank's shares and the NRA determines that this measure should be respected in resolution (see also chapter 6 of this paper), the NRA can provide that the conversion of a Claim Right entitles the holder thereof to depositary receipts (*certificaten van aandelen*) instead of shares. The NRA may also choose to reinstate or introduce one or more takeover defence measures using the Foundation established by it in the context of the issuance of new shares (see step 5 below for background and definition).
- If the creditors entitled to Claim Rights are not known in advance, they should contact ABC Bank for verification of their claims within such period as may be specified by the NRA. The verification process establishes who is entitled to the Claim Rights as soon as possible and as such contributes to the tradeability of these rights. The NRA may cooperate with central securities depositories in identifying the persons entitled to the Claim Rights.

²⁸ Pursuant to article 3A:21(1) (c) Wft, the Claim Rights come into existence as a consequence of the public legal act (publiekrechtelijke rechtshandeling) of the NRA.

²⁹ Claim Rights may be traded prior to their exercise during a period to be designated by the NRA to allow parties who are prohibited from investing or do not wish to invest in such instruments to dispose thereof.

³⁰ In determining the final target recapitalization amount a prudent approach shall prevail. In certain circumstances this might entail taking into consideration the reduced amount of RWA's post resolution. The NRA may apply different conversion rates (see also article 3A:44 (3) and 50 BRRD).

³¹ The entity in resolution has the obligation to issue shares (Common Equity Tier 1 instruments) to the holders of the Claim Rights pursuant to the resolution decision (article 3A:45 (1) Wft).

Step 5 Issuance of new shares

- At the same time as the write-down of the shares in step 3 above, the NRA requires ABC Bank to issue³² new shares to be held on trust (*ten titel van beheer*) to a new, NRA incorporated Dutch foundation (*stichting*, **Foundation**) and immediately thereafter proceeds to cancel³³ all shares that have been written down. These new shares will be held by the Foundation.
- The use of the Foundation as the holder of the shares, ensures that there is clarity regarding the initial new shareholding structure of ABC Bank.³⁴ In addition thereto this construction may simplify the transfer of the shares to the holders of the Claim Rights.³⁵
- Various aspects of the share issue can be arranged directly in the resolution decision, including:
 - obtaining a stock exchange listing for the new shares; and
 - amending the articles of association of ABC Bank, for example if the nominal value of the shares has been changed.

Step 6 Determination of conversion rate and number of shares to be issued

- If the ex-ante resolution valuation does not meet all (legal) requirements, the NRA should arrange for a definitive resolution valuation to be prepared as quickly as possible after effecting the resolution action(s).
- Upon finalisation of the resolution valuation, the NRA can determine the conversion rate and therefore the number of new shares the former holders of converted subordinated bonds and senior creditors (which fall within the scope of the bail-in tool) will receive in exchange for their Claim Rights. If possible, this step is taken together with steps 2-5 above.
- Subject to the general principles relating to resolution and the NCWO principle, different conversion rates may be applied to take account of the difference in ranking between the subordinated bondholders and the senior creditors.³⁶ This can be done, for example, by granting the senior creditors relatively more shares.
- If the final resolution valuation finds that the level write-down/conversion should be less than actually has taken place pursuant to the preliminary valuation, the NRA can write-up the initially converted debt. Part of the debt is – in principle – then reinstated at its original terms and conditions.³⁷

³² The DCC (article 2:64 and 2:175 DCC) requires a public limited liability company (*naamloze vennootschap*) or private limited liability company (*besloten vennootschap*) to have shareholders at all times. Each share so to be issued will be fully paid up upon issue from the capital reserve created as a result of the conversion of eligible liabilities.

³³ The cancellation of the shares takes place by decision of the NRA (article 3A:21 section 1(b) Wft).

³⁴ As a result of this structure, (i) it is clear that all existing shareholders can no longer derive any rights from their written down and cancelled shares and (ii) until the exercise of the Claim Rights the Foundation shall be the sole shareholder. Until the moment of exercise of the Claim Rights or the granting of a DNO, the voting rights can be exercised by the special manager or the NRA.

³⁵ The transfer of the shares may also take place in another manner than through the Foundation.

³⁶ See article 50 BRRD and the EBA Final Guidelines on the rate of conversion of debt to equity in bail-in, EBA-GL-2017-03.

³⁷ See article 20(12) SRMR) for the write-up mechanism.

Step 7 Exercise of rights to new shares

- The exercise of Claim Rights may be made subject to a fixed exchange period. If a Claim Right is not exercised within this period, it expires. The exchange period is expected to last at least a few weeks after the day of issuance of the claim rights or from the moment when the conversion rate has been definitively determined.³⁸
- If a former creditor does not wish to exercise its Claim Right (e.g. because it does not wish to become a shareholder), it may transfer its Claim Right.
- Creditors other than the holders of the specific Claim Rights may not enforce any rights to the newly issued shares; this issue is intended, after all, to provide for the conversion of non-excluded eligible liabilities into shares.
- If a creditor, by exercising his Claim Rights, would acquire a qualifying holding (*gekwalificeerde deelneming*) in ABC Bank, it should apply to the ECB for a declaration of no-objection (*verklaring van geen bezwaar*) (i.e. permission for a qualified holding).
- The ECB has not yet taken a decision on an application for a declaration of no-objection (*verklaring van geen bezwaar*), the applicant's voting rights resulting from those shares are suspended and, from the moment when the shares are issued until the decision on the application has been made, may be exercised only by the NRA.³⁹
- Upon expiration of the exchange period, the new shares are transferred to those holders of Claim Rights who have indicated on time that they wish to exchange the Claim Rights for shares in ABC Bank.
- Unclaimed shares are sold by the Foundation (on the stock exchange) after the expiry of the exchange period and the proceeds of the sale are reserved for a reasonable period to provide for those that decide to exercise their claim after all at a later date.

Balance sheet ABC Bank - conversion

Assets (x€1bln)			Liabilities (x€1bln)		
Cash:		10	Capital:		10
Mortgages:		60	- Newly to be issued shares:	10	
SME loans:		15	Subordinated debt (other):	5-5=	0
			Senior creditors:	25-5=	20
			Guaranteed deposits:		35
			Secured financing:		20
Total		85	Total		85

³⁸ Article 2:96a (5) DCC stipulates, for example, a period of two weeks after publication within which a statutory pre-emption right may be exercised.

³⁹ See article 3A:26 Wft. The uncertainty is reduced because the normally applicable decision periods in respect of a DNO do not apply in resolution. The ECB is required to decide upon the application in a manner which neither delays nor hinders the realization of the relevant resolution objectives.

Step 8 Liquidation valuation

- In order to assess whether the NCWO principle has been met, the NRA should always arrange for an ex-post liquidation valuation to be drawn up by an independent valuator after the resolution action or actions have been effected.⁴⁰
- It is apparent from this valuation of ABC Bank that subordinated bondholders are better off in resolution than in a bankruptcy. They have, after all, received shares, whereas in normal insolvency proceedings, they

would have received no payment. However, senior creditors could be worse off. Whether this is the case depends on the final valuation of the shares the senior creditors have received and the applicable conversion rate, considering the NCWO principle and the bail-in hierarchy.⁴¹ If and to the extent there is a violation of the NCWO principle, senior creditors may possibly be entitled to compensation from the SRF.

Balance sheet ABC Bank – Liquidation valuation

Valuation assets (x€1bln)			Payment in bankruptcy(x€1ml)		
Cash:		10	Capital:		10
Mortgages: (assumption – haircut 15%)		51	- Reserves:	0	
			- Shares:	0	
SME loans: (assumption– no additional haircut)		15	- Relevant capital instruments:	0	0
			Subordinated debt (other):		0
			Senior creditors (84%):		21
			Guaranteed deposits (100%):		35
			Secured financing: (100%):		20
Total		76	Total		76

After application of WDCCI and bail-in, ABC Bank's balance sheet is as follows:

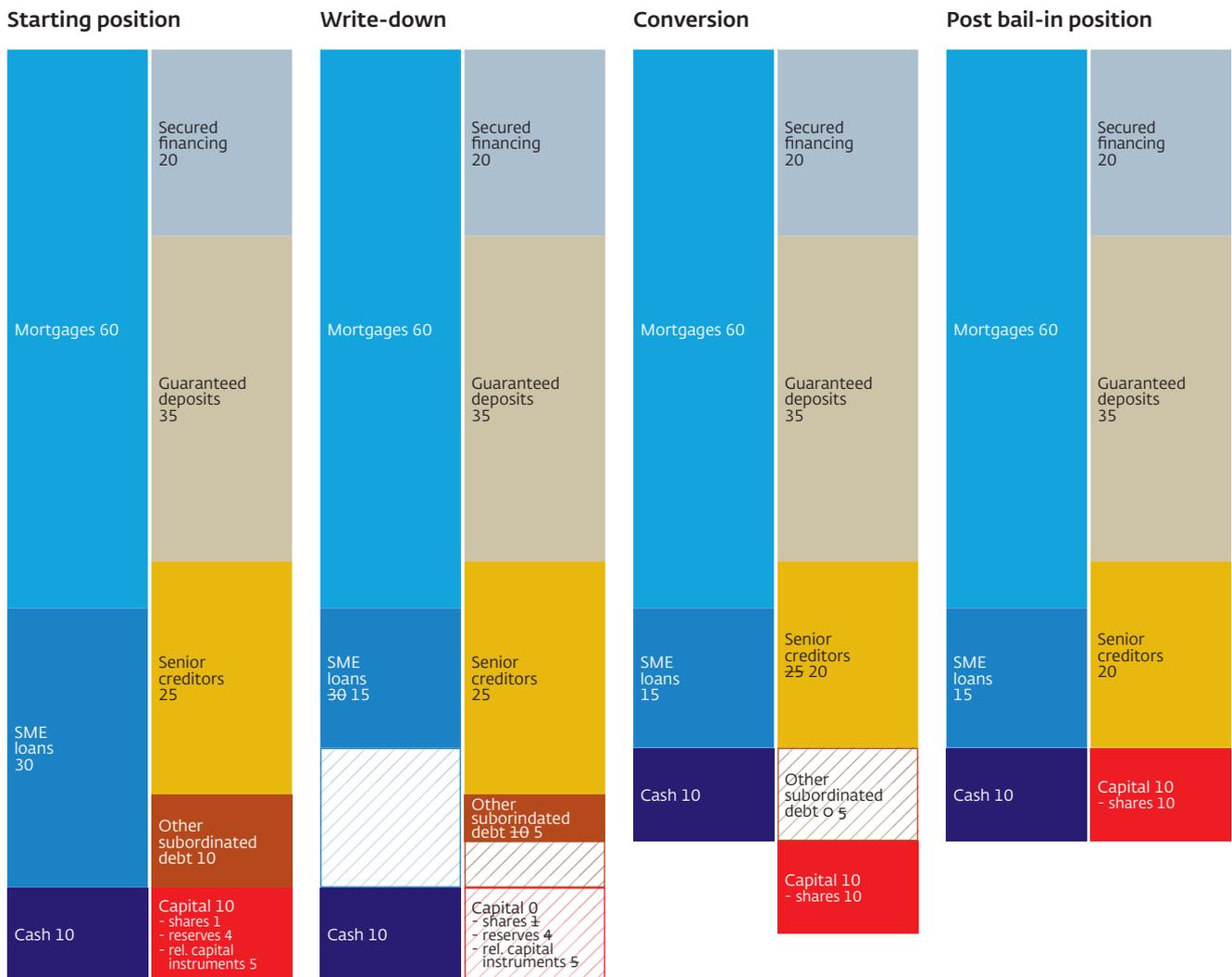
Post bail-in balance sheet ABC Bank

Assets (x€1bln)			Liabilities (x€1bln)		
Cash:		10	Capital:		10
Mortgages:		60	- Shares: 5 to subordinated debtholders 5 to senior creditors	10	
SME loans:		15			0
			Subordinated debt (other):		20
			Senior creditors:		35
			Guaranteed deposits:		20
			Secured financing:		
Total		85	Total		85

⁴⁰ See article 20 section 16 SRMR.

⁴¹ See EBA Guidelines on the rate of conversion of debt to equity in bail-in (EBA-GL-2017-03), in particular par. 1.16 and 1.24 thereof.

The application of WDCI and the bail-in tool on ABC Bank are depicted in the following diagram:



Takeover defence measures

In practice certain Banks have implemented various forms of takeover defence measures. For example, some Banks have issued depository receipts (*certificaten van aandelen*) for their shares. In such cases, the underlying shares have been issued or transferred to a foundation (*Stichting Administratiekantoor*, **STAK**), which has then issued depository receipts (*certificaten van aandelen*) for such shares.

Another takeover defence measure is the placement of preference shares with an independent 'continuity foundation' (*Stichting Continuïteit*, **SC**). In this scenario, the Bank enters into an option agreement with the SC, which can exercise the option in certain situations, for example in the event of a hostile takeover bid in respect of the Bank, as a result of which it acquires a decisive interest in the company.

The BRRD and the SRMR do not contain any rules on dealing with takeover defence measures for a Bank in resolution. The exercise of WDCCI or the bail-in tool may result in the dismantling of existing takeover defences. This is the case, for example, if the shares held by a STAK are cancelled and shares are issued directly to the creditors whose claims have been converted. In case of an SC, preference shares already issued would be cancelled.⁴² If the option has not yet been exercised, the NRA can consider whether it should remain in force or it should be amended or not.

The legislator has taken the position that any existing takeover defence measures should, in principle, be respected or re-established.⁴³

- In order to ensure that WDCCI can also be applied to holders of depository receipts (*certificaten van aandelen*) issued by a STAK, the term 'instruments of ownership' is deemed to include depository receipts (*certificaten van aandelen*). The NRA may choose to reinstate such takeover defence measure using the Foundation established by the NRA in the context of the issue of new shares (as described in chapter 5 of this paper under step 5 above).
- In so far as the takeover defence measure takes the form of an option agreement with an SC, the NRA may decide to maintain this agreements by means of not cancelling the option) or to modify it to reflect the new situation. This can be done by the special manager or by the NRA if it exercises control over the Bank in resolution.

However, the NRA is not obliged to respect a takeover defence measure. If the NRA considers, for example, that this would obstruct or hinder the achievement of one or more of the resolution objectives, it may decide not to reinstate the measure.

⁴² An option to subscribe for preference shares also qualifies as an instrument of ownership.

⁴³ See Explanatory Memorandum, House of Representatives 2014-2015, 34 208, no. 3, pp. 23 and 24.

The NCWO principle

When WDCCI and a resolution tool is applied, shareholders and creditors may not incur greater losses than they would have incurred if the Bank had been wound up immediately beforehand under normal insolvency proceedings. This NCWO principle protects both shareholders and creditors whose instruments or claims, respectively, have been affected by WDCCI, bail-in or application of the other resolution tools. The NRA should use the resolution tools in such a way that this condition is met. This principle thus to a certain extent limits the scope for writing down and converting shares and claims (notwithstanding compensation from the SRF).⁴⁴

An initial NCWO valuation is part of the (provisional) resolution valuation.⁴⁵ To determine whether the NCWO principle has been met, the NRA should arrange for a liquidation valuation to be carried out by an independent third party as soon as possible after the resolution action has been effected. 'As soon as possible' does not mean that the valuation has to be carried out immediately after application of the tools. A liquidation valuation can be carried out only once it has been established what losses shareholders (or holders of other instruments of ownership) and creditors

have incurred. For this purpose, the resolution should have been largely completed. It is therefore sufficient for the liquidation valuation to be carried out once the resolution has been completed.

The aim of the liquidation valuation is to determine:⁴⁶

- a the losses that shareholders and creditors would have incurred if the Bank in resolution had entered into normal insolvency proceedings at the time when the decision on the resolution action was taken;
- b the actual losses that shareholders and creditors have incurred in resolution; and
- c whether there is any difference between (a) and (b).

In addition, any provision of extraordinary public financial support (state aid) to a Bank in resolution, including liquidity support, is disregarded.

If it turns out that shareholders and creditors have incurred greater losses than they would have incurred in normal insolvency proceedings, they are entitled to be compensated for the difference from the SRF. The amount of any compensation is determined by decision of the SRB.

⁴⁴ This principle is recorded, for example, in article 34(1) (g) BRRD and article 3A:20(1) Wft.

⁴⁵ See article 20(9) SRMV.

⁴⁶ See article 20(16) to (18) SRMR.

The resolution decision

WDCCI and application of the bail-in tool are effected by means of a written decision by the NRA. This decision is informed by the FOLTF valuation and the (provisional) resolution valuation. There may be successive decisions or a single more comprehensive decision which covers, for example, steps 2-7 in the example.

In principle, no specific procedural requirements or consent requirements apply to decisions of the NRA that are taken in the context of resolution (or its preparation and/or implementation).⁴⁷ In addition, resolution decisions are not subject to notification requirements or procedural rules of company law or securities law.⁴⁸ This means, for example, that no approval by the general meeting of shareholders is necessary for an alteration of the articles of association of the bank in resolution, and that the requirement to circulate an AFM approved prospectus in the case of a share issue can be set aside for the duration of the resolution.

Finally, in principle, a resolution decision is not subject to any other limitation imposed by law, articles of association or contract.⁴⁹ An example of a provision in law which can be disregarded is the minimum capital requirement applicable to a public limited liability company. Temporary inability to meet this requirement is not an impediment to write-down and conversion.

Publication/taking effect

The time at which the NRA's decision is to take effect should be accurately stated in the original decision. Such decision should also be published in the Dutch Government Gazette (*Staatscourant*).

Legal protection

National law applies to decisions taken by the NRA and, where applicable, the AFM⁵⁰: of relevance here are the Wft, the General Administrative Law Act (*Algemene wet bestuursrecht*, **Awb**) and the general principles of good administration (*algemene beginselen van behoorlijk bestuur*). The legal protection regime set out in the Awb and its annexes applies to the decisions taken by the NRA (and the AFM) by virtue of the Wft and the SRMR. Interested parties may file a notice of objection with the NRA or the AFM, as the case may be. An appeal may be lodged with the Rotterdam District Court and a further appeal with the Trade and Industry Appeals Tribunal (*College van beroep voor het bedrijfsleven*, **CBb**). The same legal protection regime applies to decisions taken by a special manager appointed by DNB: lodging an administrative appeal with DNB, an appeal with the Rotterdam District Court and a further appeal with the CBb.

In resolution, however, there are a number of differences compared with the regular legal protection regime under the Wft.⁵¹ For example, WDCCI decisions and resolution decisions are not open to objection, but they are appealable directly to the CBb. Appeals must be lodged within a shortened period of ten days, and the CBb will render its decision within fourteen days.

Lodging an appeal has no suspensive effect. If needed, the CBb can be requested to issue a preliminary relief order (*voorlopige voorziening*) pending the appeal. If the NRA has taken a decision to apply a resolution measure, the CBb will assess such a request on the basis of the rebuttable

⁴⁷ This basic rule is subject to a number of exceptions. First, the consent of the purchaser is required where the sale of business tool is applied as a potential purchaser cannot be forced to complete the purchase. Secondly, there is also an exception to decisions taken pursuant to Chapter 3A.2.2 Wft in the resolution planning phase. Finally, a right of consent cannot be set aside in the case powers under EU law (e.g. a regulation). For example, application of the instrument of sale of business could result in a merger requiring submission to the European Commission for approval.

⁴⁸ However, the NRA should observe restraint in setting aside notification requirements, consent requirements and limitations imposed by law, articles of association or contract. The powers of the NRA should be applied proportionally and only insofar as necessary to achieve the resolution objectives.

⁴⁹ See article 3A:6 Wft and article 63 BRRD. And see footnote 39.

⁵⁰ For instance when the trading in financial instruments is suspended by a decision of the AFM.

⁵¹ See article 3A:64 Wft

presumption (*weerlegbaar rechtsvermoeden*) that suspension of the measure is contrary to the public interest,⁵² thereby shifting the burden of proof. The basic presumption is that suspension of the NRA's decision is in conflict with the public interest, the onus of proof to the contrary resting with the party contesting the decision.

If a court or tribunal nullifies a decision, it may rule that some or all of its legal effects continue to apply. It will do so if this is necessary to protect the interests of third parties acting in good faith that have acquired different instruments of ownership, assets, rights or liabilities from the entity under resolution as a consequence of the decision to take a resolution measure⁵³.

The European legal protection regime applies to decisions taken by the SRB, and the European courts have jurisdiction. SRB decisions are appealable to the European Court of

Justice.⁵⁴ Subject to specific conditions, an appeal can also be lodged with the European Court of Justice if the SRB fails to take a decision it is obliged to take pursuant to the SRMR. For specific SRB decisions⁵⁵ an appeal can first be lodged with the SRB Appeal Panel, after which an appeal may be lodged with the General Court of the European Union and a further appeal with the European Court of Justice.

If the SRB issues an instruction to the NRA by virtue of the SRMR or the BRRD, the national legal protection regime applies to the NRA's decisions taken to give effect to these instructions. In the event of objection or appeal, the Dutch court is competent to review the NRA's discretionary freedom in executing the SRB's instruction, but not to rule on the validity of that instruction. The European Court of Justice has exclusive jurisdiction to establish the validity of the SRB instruction.

⁵² See article 3A: 65 Wft

⁵³ See article 3A: 66 Wft

⁵⁴ Pursuant to article 263 (fourth paragraph of the Treaty on the Functioning of the European Union (EU- Werkingsverdrag), natural and legal persons can lodge an appeal against a decision by the SRB with the European Court of Justice, in the event these persons are directly and individually affected by such decision.

⁵⁵ For example decisions to remove material impediments to resolvability. The claimant has to have an individual and direct interest which is affected by the decision.

Trading in securities

Suspending trading

At the request of the NRA, the AFM makes use of its authority to suspend or discontinue the trading in financial instruments issued by the bank in resolution⁵⁶ if this is required in view of the protection of investors or the orderly trade of the financial instruments. In addition (at the request of the NRA) the AFM can request the District Court of Rotterdam to exclude the relevant instruments from trading (and ensures, if relevant, that foreign market supervisors are informed).

Resumption of trading

At the request of the NRA, a competent person or body admits the following to trading on an official market:

- (i) new shares or instruments of ownership; and
- (ii) debt instruments that have not been fully written down.

Prospectus

An AFM-approved prospectus is not required for admission to trading on an official market of Claim Rights, newly issued shares. As noted above, however, a concise information memorandum relating to the nature and scope of the Claim Rights is desirable.

⁵⁶ See article 3A:56 Wft. In relation to the suspension of trading, the legislator uses the broader definition of 'financial instrument' in article 1(1) Wft.

Annex 1 – summary of responses received

Table: Comments from respondents on the consultation document on the bail-in tool, and our responses

Category	Comments from respondents	Our responses
General comments	The scenario is limited or oversimplifies reality, it possibly fails to reflect actual practice sufficiently and it should deal in more depth with steps that must be taken during bail-in and with the associated complications.	We acknowledge the fact that the situation will be more complex in actual practice and we factor this in when we operationalise the bail-in tool. For the purposes of the consultation document, however, we see no need to make any changes to the example.
	The document could clarify the relation between the powers exercised by DNB and the Single Resolution Board.	We have amended the wording of the introduction chapter 1.
	With a view to the far-reaching powers granted to DNB under the Wft, DNB could describe in more detail how it envisages to exercise them – e.g. adhering to the principles of proportionality and effectiveness. Respondents believe DNB ought to exercise restraint in suspending regular statutory requirements and must safeguard the international level playing field.	We share respondents' view that we must exercise the resolution powers in accordance with the NCWO principle and the general principles of good administration.
	The impact which DNB's resolution measures have on its other tasks and competencies is insufficiently addressed.	Since the document focuses on resolution and specifically discusses application of the bail-in tool, we refer to our other tasks only where relevant, (such as DNB as supervisory authority determining FOLTF).
Write-down and conversion of capital instruments (WDCCI), bail-in and the relation with other resolution tools	The relation between the bail-in tool and the other resolution tools and their possible combinations requires further clarification.	See chapter 2 of the document.
	The consequences of WDCCI for the instruments involved must be clarified.	Chapters 2 and 3 of the document provide more details, and step 3 in chapter 5 also discusses this.
	The document could address the question of whether an institution must be placed under resolution if only WDCCI is applied. Respondents believe that a clearer distinction could be made between WDCCI inside and outside of resolution.	Chapter 3 describes the situation in which WDCCI is applied outside of resolution.
	DNB could address the treatment of contingent convertible bonds during WDCCI, distinguishing between the situation in which the CoCos' triggers have already been activated and the situation in which they have not yet.	The document does not address the treatment of CoCos. See chapter 1.

Category	Comments from respondents	Our responses
Step 1: Ex ante valuations	The concepts of accounting (FOLTF) valuation, economic valuation and liquidation valuation must be more precisely defined with a view to future legal proceedings.	Box 1 explains these concepts. ⁵⁷ See also below.
	With regard to the term accounting valuation, a respondent asked whether this term adequately reflects the nature of that valuation, noting that the definitive ex ante valuation must also be prepared by an independent expert.	The term accounting valuation as chosen because it best reflects the type of valuation, which is an update of the balance sheet based on accounting principles. It is prepared by an independent party (see Box 1).
	Economic valuation is forward-looking and considers the institution's performance that can reasonably be expected. Could DNB describe this process and the degree of realism in such a valuation at a time when the institution is in the middle of sweeping changes due to its resolution? If an economic valuation is preliminary and includes a conservative buffer, how will creditors be compensated if the definitive valuation shows that the buffer was set too high?	Due to the document's focus on bail-in, we have chosen to describe economic valuation only briefly. If it should turn out that an economic valuation was too low, this could be adjusted by means of compensation from the resolution fund or reinstatement of part of the converted debts (see chapter 5, under step 6).
	With respect to the liquidation valuation, the question was raised whether DNB could go into more detail with regard to legal protection offered to creditors and the degree to which the valuation's assumptions and outcomes are disclosed to creditors.	We provide information about legal protection in chapter 8. We will disclose the outcome of a valuation once it is complete.
	Valuation requires involving the institution and external valuation experts. One respondent asked how confidentiality will be safeguarded.	We acknowledge the importance of confidentiality during the resolution process and will enforce this under the relevant provisions of the law (see also articles 1:89 and 1:90 Wft) and in contractual provisions where needed.
Step 2: Assumption of control/suspension of trading	Could DNB clarify why the appointed special manager is given the powers previously exercised by the shareholders when they no longer have any control during resolution pursuant to article 3A:6 Wft?	DNB or the special manager are given the powers of the shareholders pursuant to article 3A:49, not 3A:6 Wft. See also chapter 5, under step 2.
	The document should describe the role of the failing bank's incumbent management and supervisory boards in more detail. If DNB involves incumbent directors, how does this relate to their release from responsibilities under company law when DNB takes over control.	We will study the role of the incumbent management and supervisory boards and how they might be or remain involved in operational management more closely. With the exception of the changes to chapter 5, under step 2, the document will not address this in any further detail.
	DNB could explain why it will suspend trading and how it will deal with listings on foreign stock exchanges.	More details are provided in chapter 5, under step 2. How we will deal with listings on foreign stock exchanges falls outside the scope of this document but will be further considered.

⁵⁷ DNB also refers to the Regulatory Technical Standard of European Banking Authority on valuation, see <https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/regulatory-technical-standards-on-valuation>.

Category	Comments from respondents	Our responses
	This step should also describe when the rights of the company's bodies revert to the directors and shareholders.	Among other factors, completion of step 7, in chapter 5, determines when the special manager or DNB reinstates the rights of the company's bodies. The exact timing will, however, depend on the circumstances of the case.
Step 3: Write-down	The order in which capital instruments are written down is inconsistent in the document and warrants further explanation.	We have changed the order of the write-downs in step 3 of chapter 5.
	DNB must also describe how corporate documentation will be amended and how this relates to the provisions of Book 2 of the Dutch Civil Code.	Due to the document's focus on bail-in, we will not describe any amendments to corporate documentation. DNB is, however, aware of the need to make amendments and envisages this to be part of the resolution process.
Step 4: Conversion	DNB could elaborate on the nature and substance of the claim rights in the consultation document. It could explain how the relevant institution will be bound to the claim rights, as they come into being de jure under the resolution decision, and how suitable they are for private investors.	We clarify step 4 in chapter 5 further to this comment.
	Respondents are in agreement about the fact that they need an information memorandum about the claim rights that will come into existence following conversion, for instance drawing on the EU's Prospectus Regulation and article 5:13 Wft. DNB could also specify who will prepare the memorandum, the requirements to which it will be subject, who will be liable for the accuracy of the information, and the extent to which the failed bank's future perspectives will be set out.	DNB will consider the respondents' suggestions when addressing this subject in further detail. See also step 4 of chapter 5.
	Respondents commented that they would also like to have further technical information about claim rights, including the reference date on which the claim rights are issued, custody, administration, listing and negotiability or restrictions thereon.	We acknowledge that technical information dealing with the processing of claim rights must be made available. We will survey the market parties involved and establish the information need.
	Respondents believe that listing claim rights would be an option, but not a necessity. The pros of listing that were mentioned are increased tradability, particularly if the instruments were originally listed, and a transparent market value. The cons cited are the fact that the market price will not be representative, as the impact of the institution's restructuring are uncertain, the fact that not much comparative information is available if the institution's instruments were originally listed prior to resolution, the anonymity of the holders of the claim rights, the increased complexity of claims verification, and uncertainty about value in a volatile environment.	We welcome the respondents' comments and will examine the possibilities of making claim rights tradeable. Listing claim rights will be more opportune if the written-down shares of the institution under resolution were originally listed.
	The document should clarify the extent to which claim rights will be governed by the Securities Giro Act (<i>Wet giraal effectenverkeer</i>).	We will study the need to ensure that claim rights are governed by the Securities Giro Act.

Category	Comments from respondents	Our responses
	Respondents' views differ as to whether claim rights must be linked to converted debt instruments. Proponents of such a link cite reduced complexity if DNB were to correct write-down or conversion. Its critics mention the speculative nature of the claim right – while acknowledging that this is an inherent feature – and the fact that it is difficult to link senior debts to the claim right.	We realise that linking claim rights to converted claims is complex and will study this in more detail.
Step 5: Cancelling existing shares/issuing new shares	The role played by the company's bodies when existing shares are cancelled and new shares issued could be clarified.	We clarify the role of the company's bodies in chapter 5, under step 2 and 5.
	The role played by the foundation in effecting the bail-in, how it fulfils its role as a shareholder and the paying-up of the shares within this context must be explained in more detail.	We explain the foundation's role and the way in which the shares are paid up in chapter 5, under step 5.
Step 6: Determination of conversion rate	Respondents confirmed that it may be desirable to differentiate in terms of conversion rates. One respondent, for example, suggested that it may be considered allotting higher-ranking creditors preference shares that are cancelled once they have been compensated to such an extent that the NCWO principle has been satisfied. DNB could explain in more detail how it expects to apply differentiation between conversion rates.	We consider differentiated conversion rates to be a means to do justice to the creditor hierarchy and will act in conformity with the EBA Guidelines on the rate of conversion of debt to equity in bail-in ⁵⁸ .
Step 7: Exercise of rights to new shares	The requirement to apply for a declaration of no-objection (DNO) from the supervisory authority if a creditor, by exercising its claim rights, acquires a qualifying holding may result in uncertainty and delays. The period referred to in the consultation document is too short. How will the uncertainty about obtaining a DNO on the part of future shareholders be dealt with, and what will be the implications of not obtaining a DNO in terms of applying the NCWO principle?	In chapter 5, under step 7, we explicitly mention the fact that the statutory periods for obtaining a DNO do not apply within this context, which should shorten the period of uncertainty about the supervisory authority's decision. The special trustee will continue to exercise the powers of the company's bodies during the period in which the claim rights are exercised. If the supervisory authority should not grant a DNO, the creditor must sell the claim rights within a reasonable period.
	Respondents also commented that the document should explain more clearly what will happen if not all claim rights are exercised.	We already described this in chapter 5, under step 7.
Step 8: Liquidation valuation	The question was raised in this context whether the 8% bail-in requirement also applies to compensation paid from the European resolution fund if creditors are compensated because the NCWO principle was breached.	The 8% bail-in requirement that applies before a claim can be made from the European resolution fund concerns a number of cases defined in the SRMR. It does not apply where creditors are compensated because the NCWO was breached.

⁵⁸ For these guidelines please refer to <https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/guidelines-on-the-rate-of-conversion-of-debt-to-equity-in-bail-in>.

Category	Comments from respondents	Our responses
Other relevant information	Concerning takeover defence mechanisms created by the institution in question, one respondent commented that DNB should leave these intact to the extent possible, and that the NRA's discretion should be restricted in this respect. DNB was asked to explain how it will treat existing options held by a continuity foundation while maintaining the listing of the depositary receipts for shares newly issued during bail-in.	We acknowledge the view held by respondents that takeover defence mechanisms should be left intact. Such mechanisms must, however, not hamper the application of the bail-in tool. We will assess this on a case-by-case basis. We clarify in chapter 6 that we will consider whether existing takeover defence mechanisms must be kept intact.
	With a view to the provision in article 3A:6 Wft that a resolution decision is not subject to any consent requirements, notification requirements or procedural rules under the law, one respondent asked whether DNB could clarify which requirements remain.	We already addressed this in chapter 8.
Answers to consultation question A (General)	Respondents cited a variety of subjects here, such as DNB's relationship with the SRB and the AFM, the way in which the various valuations will be performed, the importance of providing stakeholders with sufficient, accurate information, and the treatment of lapsing liabilities during bail-in.	We used the answers to the consultation questions first and foremost to enrich our thinking. To the extent possible, we ensured that any new insights we gained from the answers are reflected in the steps listed in chapter 5.
Answers to consultation question B (Conversion process)	As far as conversion is concerned, respondents are in agreement that as much information as possible must be made available to the creditors. All respondents deem it desirable for claim rights to be tradeable. Not all respondents believe it is a necessity, however, and they wish to know more about procedural requirements and point to a liability risk if investor confidence should be harmed. Their views differ as to the need to link the claim right to the underlying debt instrument. See also the comments on step 4, above.	
Answers to consultation question C (Differentiation in the rate of conversion)	The majority of respondents confirmed the desirability of differentiated conversion rates, arguing that it could contribute to respecting the creditor hierarchy, a reduction of the risk of breaching the NCWO principle and improved credibility of the resolution. Respondents raised questions about how exactly differentiation of conversion rates will be achieved, suggesting a number of factors that may be considered, including the ranking of a creditor's original claim and the nominal value, term and any interest payments made on the debt instrument.	

ANNEX 2 – Definitions

In articles 3A:1 and 3A:21 Wft the following definitions are used:

- (1) Common Equity Tier 1 items
- (2) Common Equity Tier 1 instruments
- (3) Instruments of ownership
- (4) Relevant capital instruments
- (5) Debt instruments

These definitions do not completely align.

Ad (1) – Common Equity Tier 1 items as referred to in article 26(1) (b) to (f) CRR: items of the Common Equity Tier 1 capital of an institution, namely: share premium accounts, retained earnings, accumulated other comprehensive income, other reserves and funds for general banking risk. From a civil law perspective, Common Equity Tier 1 items are not claims of or against the entity and cannot be transferred.

Ad (2) – Common Equity Tier 1 instruments: capital instruments that meet the requirements of article 26(1)(a) CRR and are therefore included in the Common Equity Tier 1 capital of the institution. article 26(1)(a) CRR refers to the conditions laid down in articles 28 and 29 CRR. Essentially it concerns shares or comparable instruments issued by mutual societies, cooperatives, savings institutions, etc.

Ad (3) – Instruments of ownership: shares, rights to shares, share certificates, other participation rights or participations in the capital or certificates of those rights and participations, membership rights or comparable rights,

claims, options, conversion rights or comparable rights which when exercised can be converted in a right to the acquisition of shares or comparable rights that provide a claim on the capital or own funds of the entity concerned.

Ad (4) – Relevant capital instruments: instruments as referred to in article 2(1)(69) and (73) of the BRRD, namely:

- additional Tier 1 instruments: capital instruments that meet the conditions of article 52(1) CRR; and
- Tier 2 instruments: capital instruments or subordinated debt instruments that meet the conditions of article 63 CRR.

Ad (5) – Debt instruments: obligations and other forms of transferable debt, instruments that create or recognise a debt and instruments that provide the right to acquire debt instruments.

The definitions used in the BRRD and SRMR are, as far as instruments that are included in the capital of an institution are concerned, based on the CRR. These definitions only partially align with the definitions that have been added to the Wft as part of the BRRD transposition. For the sake of legibility, a simplified version of the definitions has been used in this paper.

The table below compares the terminology used in CRR, Wft and the paper.

Table: terminology used in CRR, Wft

CRR (BRRD) definitions	Wft definitions	Terms used in paper
Core Tier 1 items		
Art. 26f1)(a) CRR: Capital instruments that meet the conditions of Art. 28 of 29 CRR (i.a. shares)	Art. 3A:1 Wft jo Art. 26(1)(a) CRR: Core capital Instruments i.a. shares)	'Shares'
Art. 26(1)(b)-(f) CRR: Capital items (i.a. reserves, share premium accounts, retained earnings)	Art. 3A:21(1)(a) Wft: Core capital items as defined in Art. 26(1)(b)-(f) CRR (i.a. reserves, share premium accounts, retained earnings)	'Reserves'
Not included In CRR	Art3A:1 Wft: Instruments of ownership (i.a. shares, participations, membership rights and all related rights, claims and options)	'Instruments of ownership'
Additional Tier 1		
Art. 51(a) CRR: Capital Instruments that meet the condklons of Art. 52(1) CRR	art. 3A:1 Wft jo Art. 2(1)(69) BRRD: Relevant capital instruments	Additional Tier-1 (capital),together with Tier 2 (capital) 'retevant capital instruments'
Art. 51(b) CRR: Additional Tier 1 items (share premium accounts related to Additonal - Tier 1 instruments)	Not included in Art. 2(1)(69) BRRD	
Tier 2		
Art. 62(a) CRR: Capital instruments that meet the conditions of Art. 63 CRR	art. 3A:1 Wft jo Art. 2(1)(73) BRRD: BRRD: Relevant capitat instruments	Tier 2 (capital), together with additional Tier 1 (capital) 'relevant capital instruments'
Art 62(b) CRR: Tier 2 items (share premium accounts related to Tier 2 Instruments)	Not included in Art. 2(1)(73) BRRD	