

- THE VICE-CHAIRMAN -

11 March 2020

Single Resolution Board  
Attention: Mr Sebastiano Laviola  
Director of Strategy and Policy Coordination  
Attention: Mr Guillaume Adamczyk  
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Dear Sirs,

**Re: Minimum Requirement for Own Funds and Eligible Liabilities (MREL) – SRB MREL Policy under the Banking Package – 2020 Consultation**

On 17 February 2020, the Single Resolution Board (SRB) published its revised policy on the Minimum Requirement for Own Funds and Eligible Liabilities (SRB MREL Policy) for a three-week public consultation<sup>1</sup>. The main reason for the revision of the SRB MREL Policy is the so-called Risk Reduction Package<sup>2</sup>, which will modify the framework for the recovery and resolution of credit institutions and investment firms<sup>3</sup>. One of the changes addressed by the revised SRB MREL Policy is the introduction of a new regime for the eligibility of liabilities governed by the laws of a third country (new Articles 55 BRRD). On page 36 of the revised SRB MREL Policy (under paragraph 121), the SRB announces a change to its regulatory practice: "*As a consequence of the change to Art. 55 [...] the SRB will exclude AT1 and T2 instruments*

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<sup>1</sup> <https://srb.europa.eu/en/content/public-consultation-srbs-mrel-policy-under-banking-package>. Because the deadline has expired we submit this letter bilaterally to the SRB. Thank you very much in advance.

<sup>2</sup> The Risk Reduction Package was published on 7 June 2019 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:150:FULL>); it amends the Directive 2013/36/EU (CRD), the Regulation (EU) No 575/2013 (CRR), the Directive 2014/59/EU (BRRD) and the Regulation (EU) No 806/2014 (SRMR).

<sup>3</sup> Member States shall implement the amendments to the BRRD by 28 December 2020 (Article 3(1) Directive (EU) 2019/879), the same day as of which the revised SRMR applies (Article 2(2) Regulation (EU) 2019/877).

*governed by third country law from MREL supply, unless the bank has concluded an effective and enforceable contractual recognition clause."*

The members of the European Financial Market Lawyers Group (EFMLG)<sup>4</sup> would like to take the opportunity to express their concern about the proposed change in regulatory practice.

We share the SRB's view that the substitution of Article 45(5) BRRD with the new Article 55(2) sub-paragraph 7 BRRD may have reduced the resolution authority's discretion to recognise eligible liabilities governed by third country law. We would, however, also like to point out that resolution authorities have used its discretion very cautiously and often insisted in using contractual recognition clauses at least in own funds instruments and eligible liabilities. For the reasons discussed in the Financial Stability Board's (FSB) report on Principles for Cross-border Effectiveness of Resolution Actions of 3 November 2015<sup>5</sup>, they also requested legal opinions on the enforceability of the contractual recognition clauses.

The revised SRB MREL Policy should clarify the scope of application of the new regulatory practice, especially that it does not apply to eligible liabilities that have been issued on or before the day specified in Article 55(1) subparagraph 1 point (d) BRRD<sup>6</sup>. The said 'grandfathering' provision refers to Section 5 BRRD, which was introduced with the entry into force of the BRRD on 4 June 2014. Member States were required to apply Section 5 from 1 January 2015 (Article 130(1) BRRD). As reflected in the Commission's report on national implementing measures for the BRRD<sup>7</sup>, most but not all Member States implemented and applied Section 5 BRRD by the transposition deadline. Resolution authorities should not force banks to change the terms and conditions of AT1 and T2 instruments that have been issued before 1 January 2015 (or any later implementation day relevant to the bank).

As indicated in the revised SRB MREL Policy, depending on the outcome of the negotiations between the Union and the United Kingdom on their future relationship, the need for contractual recognition clauses will increase substantially once the transition period agreed in the withdrawal agreement<sup>8</sup> expires. The withdrawal of the United Kingdom from the Union (Brexit) was initiated by the referendum on 23 June 2016, in which 51,89 % of the participants voted to leave. The formal withdrawal process started on 29 March 2017 when the United Kingdom's government invoked Article 50 of the Treaty on European Union. It was not earlier than 29

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<sup>4</sup> The European Financial Markets Lawyers Group is a group of senior legal experts from the EU banking sector dedicated to undertaking analyses and initiatives intended to foster the harmonization of laws and market practices and facilitate the integration of financial markets in Europe. The Group is hosted by the European Central Bank. More information about the EFMLG and its activities is available on its website at [www.efmlg.org](http://www.efmlg.org).

<sup>5</sup> <https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>, page 8: *"First, a contractual approach in isolation may not achieve the level of legal certainty that would be conferred by widespread adoption of statutory frameworks consistent with"* the FSB's Key Attributes.

<sup>6</sup> The revised SRB MREL Policy mentions the 'grandfathering' in footnote 82.

<sup>7</sup> <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32014L0059>

<sup>8</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7.

March 2017 that some banks started using contractual recognition clauses in new eligible liabilities governed by the laws of England and Wales. Many banks did not change their documentation until after 15 November 2018, when the SRB published its Brexit Position Paper<sup>9</sup>.

We noted the SRB's position pursuant to which *'[t]here has been a significant lead-in time for Brexit, so bonds issued since 2016 onwards should have relevant clauses included already'*<sup>10</sup>. However, we are concerned that this retrospective view may not align to the not entirely unfounded expectations and hopes prevailing in the financial industry in 2016 and later.

We would appreciate if the SRB would apply the grandfathering provision in Article 55(1) subparagraph 1 point (d) BRRD by way of analogy to the effect that the relevant transposition deadline for liabilities governed by the laws of England and Wales was 15 November 2018.

Yours sincerely,



Fernando Conlledo Lantero  
Vice-Chairman

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<sup>9</sup> SRB, Single Resolution Board expectations to ensure resolvability of banks in the context of Brexit - SRB Position Paper, published on 15 November 2018, page 3, [https://srb.europa.eu/sites/srbsite/files/brexit\\_position\\_paper.pdf](https://srb.europa.eu/sites/srbsite/files/brexit_position_paper.pdf)

<sup>10</sup> <https://srb.europa.eu/en/node/917>.