European Financial Markets Lawyers Group

- THE VICE-CHAIRMAN -

19 June 2020

Mr. John Berrigan
Director-General of Financial Stability,
Financial Services and Capital Markets Union
European Commission
1049 Bruxelles
Belgium

Mrs. Isabelle Vaillant
Director of Prudential Regulation and Supervisory Policy
European Banking Authority
DEFENSE 4 – EUROPLAZA
20 Avenue André Prothin
CS 30154
92927 Paris La Défense CEDEX
France

Mrs. Delphine Reymondon
Liquidity, Leverage, Loss Absorbency and Capital
European Banking Authority

Mr. Francesco Mauro
Supervisory Review, Recovery and Resolution
European Banking Authority

Dear Sir or Madam,

Re: Risk Reduction Package – New Regulatory and Implementing Technical Standards in the Area of Recovery and Resolution

On 20 May 2019, the Council and the European Parliament adopted the so-called Risk Reduction Package[1], which, in accordance with its gradual applicability[2], will modify the framework for the recovery and resolution of credit institutions and investment firms.

[1] 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).

The Risk Reduction Package implements the Financial Stability Board's (FSB) Total Loss-Absorbing Capacity (TLAC) Term Sheet[3], which was endorsed by the G-20 in November 2015[4]. The new TLAC framework requires European global systemically important institution (G-SIIs) to maintain a minimum level of eligible liabilities that are subject to bail-in and that ensure that a G-SII in resolution can continue to perform its critical functions without taxpayers' money (Articles 72a – 72l, 78a, 92a, 92b CRR). The Risk Reduction Package also introduces a new regime for the recognition of resolution stays and bail-in for financial contracts and liabilities that are governed by the laws of a third country (Articles 55, 71a BRRD).

The Risk Reduction Package includes more than 100 new mandates for the European Banking Authority (EBA) to prepare draft regulatory or implementing technical standards (RTS/ITS) or new guidelines and reports. On 21 November 2019, the EBA issued its roadmaps[5] for the delivery of the various EBA mandates (Roadmaps), including its mandates for the new RTS/ITS in the area of recovery and resolution (p. 45-51 of the Roadmaps). The members of the European Financial Market Lawyers Group (EFMLG)[6] would like to take the opportunity to address some critical issues that should be considered when preparing the RTS for that area.

Article 78a(3) CRR: RTS on the permission to reduce eligible instruments

The new Article 77(2) CRR requires institutions to obtain the prior permission of the resolution authority whenever they want to reduce (i.e., call, redeem, repay or repurchase) eligible liabilities instruments prior to their contractual maturity. The conditions for the resolution authority's prior approval are set out in the new Article 78a CRR. The procedures applied by the resolution authority and the cooperation between the resolution authority and the competent authority will be governed by new RTS.

---

[2] 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). The amendments to the CRR apply from 28 June 2021 (Article 3(2) Regulation (EU) 2019/876), with the exception of the provisions on TLAC, which applied already from 27 June 2019 (Article 3(3) point (c) Regulation (EU) 2019/876).

[3] FSB, 'Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution - Total Loss-absorbing Capacity (TLAC) Term Sheet' of 9 November 2015, https://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf.

[4] See No. 13 of the G20 Leaders' Communiqué agreed on the Antalya Summit, 15-16 November 2015, http://g20.org.tr/g20-leaders-commenced-the-antalya-summit.

[5] EBA, 'Risk Reduction Package Roadmaps - EBA Tasks Arising from CRD 5 – CRR 2 – BRRD 2' of 21 November 2019, https://eba.europa.eu/eba-publishes-its-roadmap-risk-reduction-measures-package.

[6] 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.

EBA indicated in its Roadmaps (p. 46/47, par. 117) that it will align the new RTS on the permission to reduce eligible instruments with the Regulation (EU) No 241/2014[7], which governs the same topic for the institutions' own-funds instruments[8]. The alignment of the 'permission regimes' is also the expectation of the Single Resolution Board (SRB), which in its interim regime[9] follows the principles outlined in Article 30 Regulation (EU) No 241/2014. On 29 May 2020, EBA published its draft RTS on own funds and eligible liabilities[10] (draft Own Funds RTS) which will amend the Regulation (EU) No 241/2014 by introducing a new subsection 2 (Article 32a to 32g Regulation (EU) No 241/2014), and which implements the "copy-paste approach" announced in the Roadmaps.

We believe that a substantial alignment of the two regimes is appropriate, especially since the eligible liabilities maintained by institutions serve substantially the same purpose. On the other hand, the alignment should not disregard existing differences, especially in the practical handling of calls, redemptions, reductions or repurchases of eligible liabilities.

- Article 28(2) Regulation (EU) No 241/2014 and Article 32b(3) draft Own Funds RTS. The granting of the prior permission by the resolution authority should not require the institution to deduct the approved amount immediately. The day-one deduction may be appropriate for the approval provided with respect to an individual instrument (cf. Article 32b(2) draft Own Funds RTS), but not for the general permission under Article 78a(1) subparagraph 2 CRR, as currently provided under Article 32b(3) draft Own Funds RTS. In contrast to own funds, the institution must be able to respond quickly to changing market conditions, e.g. falling interest rates, and to ensure that the outstanding portfolio of instruments is always at terms that are sustainable for the income capacity of the institution. The decision to repurchase eligible liabilities will be part of a medium to long-term capital planning of the institution, however the exact timing and the final amount of repurchases will be driven by the conditions prevailing in the capital markets. The general provision should provide the institution with the required flexibility but should also account for the fact that the repurchase of eligible instruments may not be as 'certain' as a similar general approval for own funds instrument might be. We therefore would propose that the institution deducts only those eligible liabilities that the institution

---

[7] Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions (OJ L 74, 14.3.2014, p. 8–26), as last amended by Commission Delegated Regulation (EU) 2015/923 of 11 March 2015.

[8] The relevant provisions are Article 27 to 32 Regulation (EU) No 241/2014.

[9] See Annex 1 to the SRB's 'Minimum Requirement for Own Funds and Eligible Liabilities (MREL) - Addendum to the SRB 2018 MREL policy on new CRR requirements' of 25 June 2019, https://srb.europa.eu/sites/srbsite/files/crr_addendum_to_the_2018_srb_mrel_policy.pdf, as amended on 18 December 2019 (SRB Addendum).

[10] EBA Consultation Paper on 'Draft Regulatory Technical Standards on own funds and eligible liabilities - amending Delegated Regulation (EU) 241/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the council with regard to regulatory technical standards for Own Funds requirements for institutions' of 29 May 2020 (EBA/CP/2020/05); available at: https://eba.europa.eu.

actually repurchases or, referring to the phrase used in Article 29(4) Regulation (EU) No 241/2014, that are 'held by the institution'.

- Provided the institution is under the obligation to deduct only those eligible instruments that it actually holds and to the extent the institution obtained a general permission for market making, allocation of repurchases towards the permitted maximum amount specified in the resolution authority's general permission should be based on the net open positions in the institution's own eligible liabilities, not on a gross basis.
- Clarification of the term 'amount' used in Articles 28(2) and 29(3) Regulation (EU) No 241/2014 and Article 32c(2) draft Own Funds RTS. The term should be replaced with 'notional amount'.
- Clarification of the term 'market making' used in Article 29(3) Regulation (EU) No 241/2014[11] and Article 32e(2) draft Own Funds RTS. The term 'market making' should be construed broader than the term 'market maker' defined in Article 4(1) point (7) Directive 2014/65/EU[12] (MiFID II). It should also cover other trading activities in the capital market[13], like 'dealing on own account' as defined in Article 4(1) point (6) MiFID II.
- Article 20(4) Regulation (EU) No 241/2014 should be mirrored as well. At this stage we cannot exclude that institutions issue eligible liabilities that may comply with the requirements set in Article 4 Regulation (EU) No 527/2014[14], e.g., provide for a write-down trigger event of 7 per cent.
- Article 31(1) Regulation (EU) No 241/2014 requires the institution to transmit a complete application at least three months[15] in advance; Article 32f(1) draft Own Funds RTS extends the period to four months. The four-months period is too long; one month should suffice. The SRB should also consider an internal delegation of the decisions on prior permission similar to the ECB's Decision (EU) 2018/546 of 15 March 2018[16].
- Article 78a(1) subparagraph 1 point (a) CRR: The phrase 'before or at the same time' should be clarified in light of the prevailing issuing practices. Institutions usually issue new debt instruments shortly after the publication of its quarterly financial statements,

---

[11] Article 29(3) Regulation (EU) No 241/2014 will be replaced with Article 30a(3) draft Own Funds RTS, which uses the same term "market making".

[12] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496); as last amended by Regulation (EU) 2019/2115.

[13] See Annex 1 to the SRB Addendum, p. 7: 'market making and other secondary market activities'.

[14] Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration (OJ L 148, 20.5.2014, p. 21–28).

[15] The interim regime applied by the SRB provides for a four months period, see Annex 1 to the SRB Addendum, p. 6.

[16] Decision (EU) 2018/546 of the European Central Bank of 15 March 2018 on delegation of the power to adopt own funds decisions (ECB/2018/10) (OJ L 90, 6.4.2018, p. 105–109).

whereas they repurchase outstanding debt instruments whenever an opportunity is given. We would therefore appreciate an interpretation of the words 'at the same time' that would include a situation where the issue of new eligible liabilities at a certain point in time in the future (e.g., next quarter end) is sufficiently certain and where the repurchase of outstanding eligible liabilities anticipate the expected new issue, provided both measures-the repurchase and the new issue-occur within reasonable time, e.g. 90 calendar days.

Article 55(6)(8) BRRD: RTS on the clarification regarding the exclusion from contractual recognition of bail-in and new ITS for notification templates

Article 55(1) BRRD requires institutions when entering into an agreement governed by the law of a third country to include a contractual term by which the counterparty of the agreement recognises that the liabilities of the institution created under such agreement may be subject to the resolution authority's write-down and conversion powers (Bail-in Clause). The new Article 55(2) BRRD[17] addresses a situation where the institution determines that it is legally or otherwise impracticable to make use of Bail-in Clauses: The institution may notify its determination, including the relevant class of liability and the justification for the determination, to the resolution authority. We understand that the notification will refer to the relevant class of liabilities and the effect of such notification is the automatic suspension of the otherwise applicable obligation to include Bail-in Clauses in the notified class of liabilities. A separate notification of each contract falling within a relevant liability class would amount to thousands for a cross-border bank. This would be impractical for the resolution authority to administer and the burden placed on institutions to deliver on this would be disproportionate. We nevertheless would propose a clarification of this in the new RTS, which will outline the conditions under which it would be illegal or otherwise impracticable for an institution to include Bail-in Clauses in certain categories of liabilities and the conditions under which the resolution authority may require the inclusion within a certain timeframe (Article 55(6) BRRD).

Further, EBA shall also develop new ITS specifying uniform templates for the notification of the resolution authority (Article 55(8) BRRD).

- Although used in various provisions of the BRRD (Articles 44(9). 45b(5), 48(5), 55 BRRD), the term 'class of liabilities' is still an undefined term[18]. One can take from Article 45b(5) BRRD that it is not the ranking in the insolvency hierarchy that defines a 'class': The group of preferred ordinary unsecured claims in the meaning of Article 108(3) BRRD can, e.g., comprise of one or more 'classes of liabilities'; e.g. derivatives, money market instruments or short-term debt instruments. The term 'class of liabilities'

---

[17] Article 55(2) BRRD was modified by 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 PE/48/2019/REV/1 (OJ L 150, 7.6.2019, p. 296–344) (BRRD II).

[18] The same applies to the term 'class of bail-inable liabilities'' used in Article 44(3) and (4) BRRD.

is relevant for the notification under Article 55(2) 1st subparagraph BRRD and the calculation of the 10 per cent 'coverage ratio' set out in Article 55(2) 5th subparagraph BRRD and should therefore be defined in a harmonised manner.

- When specifying the conditions under which it would be illegal or otherwise impracticable for an institution to include Bail-in Clauses, EBA should consider the following factors:
  - The reliance of the real economy on the unconditional nature of certain payment obligations used in trade finance, like letters of credit (L/Cs) or guarantees.
  - The likelihood that certain off-balance sheet exposures are utilised or drawn and, hence, create a bail-inable liability. The decision about the probability of a utilisation or drawing should be based on Article 166(1) and Annex I of the Regulation (EU) No 575/2013 (CRR)[19]. Off-balance sheet exposures with a conversion factor of 50% and lower should not be subject to the Bail-in Clause requirement.
  - The impossibility to include additional terms in SWIFT confirmations, due to the technical restrictions of the SWIFT format
  - As acknowledged by recital (26) BRRD II[20], the fact that the liabilities are governed by standardised terms that cannot be negotiated bilaterally. Examples include
    - The rules and regulations of central counterparties (CCPs), securities or payment settlement systems or central securities depositories (CSDs).
    - The rules and contractual terms for the adherence to regulated markets, multilateral trading facilities and organised trading facilities.
    - The terms and business conditions used by central banks, multilateral development banks or supranational organisations, and
    - Liabilities contingent on the breach of agreement[21], namely confidentiality agreements, mandate or engagement letters, auditor arrangement letters, outsourcing agreements, licensing agreements.
  - Trade finance products, including guarantees, counter-guarantees or other similar instruments (as per recital (26) BRRD II), whose terms and conditions the institution has in practice no power to amend.

---

[19] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1–337).

[20] Recital (26) BRRD II reads: "*For example, under certain circumstances, it could be considered impracticable to include contractual recognition clauses […] where an institution or entity has no power at the individual level to amend the contractual terms as they are imposed by international protocols or are based on internationally agreed standard terms...*"

[21] Cf. Recital (26) BRRD II: "…*or where the liability which would be subject to the contractual recognition requirement is contingent on a breach of contract…*"

- We believe that the persistent refusal of a counterparty to accept Bail-in Clauses may constitute a case of impracticability, especially if counterparties are located in countries in which local banks and investment firms are not subject to comparable Bail-in Clause requirements and where the termination of contractual relationships, which may be required as *ultima ratio*, would force European institutions in an uncomfortable competitive position. We consider a waiver of the Bail-in Clause requirement justifiable if institutions establish internal policies and procedures that ensure that all disputes on Bail-in Clause are identified, escalated and, if possible, resolved and which also ensure that all unresolved disputes and their potential impact on the resolvability of the institution are well documented.
- According to last subparagraph of art 55(1) BRRD, the inclusion of a Bail-in Clauses is not required if the resolution authority of the relevant Member State determines that according to the relevant third country law or pursuant to a binding agreement with such third country, the relevant liabilities would be subject to bail in. Very little progress has been reached in this respect. We therefore encourage the SRB and the national resolution authorities to either analyse the relevant third country laws and recognise them as being equivalent, or to assist the Union in reaching a binding agreement with the third countries on the recognition of bail-in. These efforts should be taken at least with respect to those third countries the laws of which are most relevant in terms of volume of financial contracts subject to their laws, in particular with respect to the United Kingdom (UK) which laws are broadly used in the financial markets and where, due to the implementation of the BRRD, an equivalency decision or a binding agreement is more likely than for other jurisdictions.
- The reference in Article 55(2) 5th subparagraph BRRD to Article 44(3) BRRD and the likelihood that the resolution authority may exclude certain liabilities from bail-in due to the exceptional circumstances specified in point (a) to (d) of Article 44(3) BRRD, may justify a review of the Commission Delegated Regulation (EU) 2016/860[22]. The purpose of the review should consider that the probability assessment made by the resolution authority when determining the 10 per cent 'coverage ratio' and the potential decision on the resolution authority's measures taken in accordance with Article 17 BRRD should be transparent for institutions. Currently, resolution authorities have a considerable degree of flexibility in assessing on a case-by-case basis whether exclusions are strictly necessary and proportionate. This flexibility should not result in a 'black box' or create an unlevel playing field.

[22] Commission Delegated Regulation (EU) 2016/860 of 4 February 2016 specifying further the circumstances where exclusion from the application of write-down or conversion powers is necessary under Article 44(3) of Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms C/2016/0379 (OJ L 144, 1.6.2016, p. 11–20).

- We would also propose a review of Article 43(1)(b) of the Commission Delegated Regulation (EU) 2016/1075[23], which for purposes of Articles 55(1)(a) and 44(2)((b) BRRD defines the term 'secured liability', albeit without changing the characterization of repurchase transactions as ‘secured liability’ in Article 2(1)No.(67) BRRD. Securities financing transactions (SFT) that are subject to contractual margin requirements that are substantial similar to those imposed by Commission Delegated Regulation (EU) 2016/2251[24] (i.e., daily valuation and margining, zero threshold and minimum transfer amount of not more than 500,000 Euro) should be considered 'fully secured'.

Article 71a(5) BRRD: RTS on determining the contractual terms required in financial contracts

The new Article 71a(1) BRRD requires institutions, when entering into a financial contract governed by the law of a third country, to include a contractual term by which the counterparty of the financial contract recognises that the resolution authority may suspend or restrict the counterparty's termination or enforcement rights (Stay Clause). EBA shall develop new RTS specifying the content of the Stay Clauses (Article 71a(5) BRRD).

In November 2014, following various initiatives of national competent authorities and coordinated by the Financial Stability Board (FSB), the International Swaps and Derivatives Association, Inc. (ISDA) published its 2014 Resolution Stay Protocol[25], which aims to suspend the non-defaulting party's termination rights under the ISDA Master Agreements in the event of a reorganization and winding up of one of the counterparties. The 2014 Resolution Stay Protocol was adhered to by 18 of the world’s largest derivatives dealers covering a substantial portion of globally outstanding OTC-derivatives. In November 2015, ISDA published the ISDA 2015 Universal Protocol[26] which also covers certain master agreements (e.g., the GMRA and the GMSLA) that govern securities financing transactions. In May 2016, with the view to address the specific needs of the so-called buy-side institutions, ISDA published its ISDA Resolution

---

[23] Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges C/2016/1691 (OJ L 184, 8.7.2016, p. 1–71).

[24] Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty C/2016/6329 (OJ L 340, 15.12.2016, p. 9–46).

[25] The 2014 Resolution Stay Protocol is available through http://assets.isda.org/media/f253b540-25/958e4aed-pdf.

[26] The text of the ISDA 2015 Universal Protocol is available at: http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf.

Stay Jurisdictional Modular Protocol[27]. The ISDA Resolution Stay Jurisdictional Modular Protocol is supplemented by jurisdictional modules with respect to certain national recovery and resolution regimes[28]. The international standard of Stay Clauses established under the sponsorship of the FSB was the basis for various initiatives of national banking and trading organisations which developed Stay Clauses for their domestic documentation, often with the support of relevant resolution authorities.

On 15 May 2020, EBA published its draft RTS on the contractual recognition of stay powers under Article 71a BRRD[29] (draft Bail-in Clause RTS) specifying the content of the contractual term that institutions should include in its relevant financial contracts. It is important that the new RTS developed by EBA recognise the existing Stay Clauses developed by the industry as sufficient for purposes of Article 71a(1) BRRD ("Grandfathering"). Without such a Grandfathering, all the outreaches to clients in the last years would be invalidated and institutions would have to start re-papering the whole of their legacy documentation.

The content proposed in Article 1 draft Bail-in Clause RTS goes well beyond the standards developed and broadly used by the industry and does not provide for a Grandfathering rule or a phase-in. We therefore fear that the new RTS, once adopted by the Commission, will force the industry into a substantial re-papering exercise on both international and national level. Also, after the past outreaches to obtain Stay Clauses, re-negotiation of such agreements, especially in market turmoil, risks alienating clients and endangering the future of the relationship. Finally, the governing law requirement of the draft Article 1(5) would lose institutions regulatory netting under amended agreements.

Regarding Article 1 draft Bail-in Clause RTS, there is a number of changes as compared to current Stay Clauses: The description of stay powers (Article 1(2) draft Bail-in Clause RTS) provided in the ISDA 2015 Universal Protocol and the European jurisdictional modules (e.g., he ISDA German Jurisdictional Module to the 2016 ISDA Resolution Stay Jurisdictional Modular Protocol) has to be modified to account for the additional suspension powers introduced by the new Article 33a BRRD. The recognition of being bound by the Stay Clause (Article 1(3) draft Bail-in Clause RTS), the acknowledgement and acceptance that the parties have not agreed on terms and conditions that may impair the Stay Clause (Article 1(4) draft Bail-in Clause RTS) and the requirement to submit the Stay Clause to the governing law of a Member State (Article 1(5) draft Bail-in Clause RTS) are new features, which are not covered yet by any of the standard Stay Clauses used in the financial markets.

---

[27] The text of the ISDA Resolution Stay Jurisdictional Modular Protocol is available at: http://assets.isda.org/media/f253b540-95/83d17e3d-pdf.

[28] Currently, 'jurisdictional modules' are available for the following European countries: France, Italy, Germany and the United Kingdom.

[29] EBA Consultation Paper on 'Draft Regulatory Technical Standards on the contractual recognition of stay powers under Article 71a(5) of Directive 2014/59/EU' of 15 May 2020 (EBA/CP/2020/04); available at: https://eba.europa.eu

We believe that the description of the stay powers required under Article 1(2) draft Bail-in Clause RTS is redundant, because under Article 1(3) draft Bail-in Clause RTS the parties already expressly recognize to be subject to measures imposed under Articles 33a, 69, 70, and 71 BRRD, as transposed into national law. Therefore, in order to simplify and shorten the Stay Clause, we consider it appropriate to remove Article 1(2) draft Bail-in Clause RTS. Notwithstanding the foregoing, the Stay Clause should clarify that the powers given to the resolution authority under Articles 33a, 69, 70, and 71 BRRD can be exercised only once and that any suspension or restriction imposed through the exercise of the power ends on midnight of the business day following the publication of the exercise, as it may increase the acceptance of counterparties, especially those that are not familiar with this new Stay Clause requirement.

We do not believe that the proposed additional content, namely the 'split governing law' required under Article 1(5) draft Bail-in Clause RTS, would enhance the legal validity and enforceability of the Stay Clauses. Either, we consider the financial contracts that are in scope of Article 71a BRRD as financial instruments traded amongst professional clients (like those meeting the requirements set out in Annex II to MiFID II); if that is the assumption, the current industry standards should suffice. Or we consider the Commission's right under Article 71a(5) BRRD to determine the content of Stay Clauses as an instrument to provide transparency also to less sophisticated clients like retail clients or consumers; if that is the basis for the broad scope of the proposed Stay Clause, we doubt that the proposed additional content would enhance the enforceability vis-à-vis that group of clients.

As a matter of fact, pursuant to conflicts of law principles, irrespective of the governing law chosen by the parties of the financial instrument, mandatory provisions of local law should always apply if there are “relevant” elements which are connected with the country of that local law (e.g. the Stay Clause). The “characteristic performance” principle should also help to secure legal certainty as regards the law applicable to certain provisions.

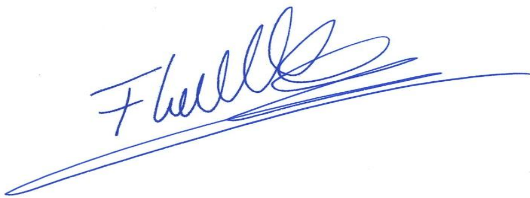
On the other hand, the split governing law could lead to problems for master agreements used for regulatory netting purposes under the CRR (regulatory capital, large exposure, leverage ratio). The governing law of a netting agreement used for regulatory purposes is seen by the European Central Bank as so essential a contractual term that not only would additional legal opinion coverage be needed to satisfy the requirements of Article 296 CRR but also the notification as “new type of netting agreement” to the relevant Joint Supervisory Team[30].

Regarding Grandfathering and phase-in, there should be a new Article 2 draft Bail-in Clause RTS which would reduce the scope of application only to those master agreements for financial contracts that have been entered into after the RTS's day of application, in order to avoid a retroactive effect of the legal change. The Grandfathering could be subject to the condition that the Stay Clauses used by the parties to the master agreement conforms to the wording of the above-mentioned ISDA protocols and any national industry standard that uses substantially

[30] See FAQs on the notification process for the recognition of netting agreements, available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/html/netting_agreement_FAQs.en.html.

similar wording. Further, considering the fact that it will take some time for the industry to amend the existing Stay Clause standards as required by the EBA, and also to organize concerted outreaches to clients, there should be a phase-in period of not less than two years.

Yours sincerely,



Fernando Conlledo

Vice-Chairman