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European Banking Authority
Tower 42
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London EC2N 1HQ

Submitted via the EBA website

Consultation paper on draft Regulatory Technical Standards on the content of resolution plans and the assessment of resolvability

Dear Sir / Madam

Please find enclosed AFME's response to the EBA Consultation paper on draft Regulatory Technical Standards on the content of resolution plans and the assessment of resolvability (EBA/CP/2014/16).

Please do not hesitate to contact me if you have any questions.

Yours faithfully

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Consultation response

EBA Consultation Paper on draft Regulatory Technical Standards on the content of resolution plans and the assessment of resolvability (EBA/CP/2014/16)

3 October 2014

The Association for Financial Markets in Europe ("**AFME**") welcomes the opportunity to comment on the European Banking Authority ("**EBA**") Consultation Paper (the "**CP**") on draft Regulatory Technical Standards ("**RTS**") on the content of resolution plans and the assessment of resolvability (EBA/CP/2014/16).

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. [1]

AFME has been very active on resolution issues for a number of years and has played a leading role in the industry efforts, at a European and global level, aimed at establishing credible and effective recovery and resolution frameworks and addressing the problem of "too-big-to-fail".

We set out below our comments in response to the CP. We set out some general comments on the draft RTS in the first section and answer the specific questions raised by the CP in the following section.

A. General comments

Content of resolution plans

The development of credible resolution plans and effective resolvability assessments are key elements of the resolution framework and addressing the issue of "too-big-to-fail". Considerable work on these issues has been done by the Financial Stability Board ("**FSB**") and a number of national authorities. We are supportive of the inclusion of recital 1 of the draft RTS noting that the content of resolution plans should take account of the work done within the FSB. This should be expanded to also cover FSB work relating to resolvability assessments. While the FSB guidance on resolution planning and resolvability assessments is primarily aimed at global systemically important banks, we believe that it can also be applied to a broader spectrum of institutions.

We also suggest that the principles and guidance set out in the FSB Key Attributes for Effective Resolution Regimes for Financial Institutions (the "**Key Attributes**") (such as Key Attributes 10

[1] AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

and 11, Annex II and Annex III) and the FSB Guidance on Developing Effective Resolution Strategies[2] (the "**FSB Guidance**") should be expressly incorporated by cross-reference in the RTS, perhaps by moving recital 1 to an operative article of the RTS. This would help to ensure consistency of approach and aid the development of effective cross-border resolution plans, in particular for groups operating in both the EU and third countries. If this is not possible, we suggest that reference to these particular principles and guidance is included in the first recital to the RTS as examples of the FSB work referred to.

We are broadly supportive of the draft RTS in relation to the content of resolution plans. We agree with the requirement for a description of the information required in order to effectively implement the appropriate strategy and arrangements for obtaining such information in Article 3(c) of the draft RTS. However, we suggest that some of the information referred to, for example information to support marketability, is unlikely to be necessary for all resolution strategies. Therefore we suggest adding the wording "where relevant" after "including" in the first sentence of Article 3(c). We also support a phased approach to information requirements, with an initial phase of information relevant to the choice of preferred resolution strategy and a second phase of more detailed information that is required to implement that particular strategy. This approach would benefit both resolution authorities and institutions by tailoring information requirements to information that is relevant to the resolution strategy.

We suggest expressly including reference to plans for communication with shareholders and depositors in Article 3(f) as these are important stakeholders.

The draft RTS should emphasise the need for coordination between competent authorities and resolution authorities in relation to resolution planning and resolvability assessments. It should also encourage information sharing between resolution authorities within resolution colleges and Crisis Management Groups. In particular, relevant information should be shared between the authorities to avoid duplicative requests for information.

We support the inclusion of details of arrangements for cooperation and coordination between authorities in resolution plans. However, we suggest a minor amendment to the wording of Article 3(b)(vii) to clarify that any arrangements should be described and that these might not all be exactly in accordance with the RTS on the operational functioning of resolution colleges, for example arrangements with third country authorities which are not bound by these. This could be done by amending the wording of this paragraph to read "where appropriate, in line~~s~~ with the written arrangements...."

The draft RTS should also make reference to the possibility that the group resolution plan within Europe could be to recognise and give effect to a third country led resolution of the group and does not necessitate an SPE or MPE strategy within the EU. For example where the global resolution plan adopted by the Crisis Management Group involves a single point of entry strategy and the relevant point of entry is located in a third country, the group resolution plan and the associated resolvability assessment under the BRRD should be focused on the implementation of this strategy within the relevant EU Member States. We suggest that this should be reflected in the following sentence to be added at the end of recital (5): "Consideration should be given to any such group resolution strategy agreed at a global level and the implementation of such plan in relevant Member States when developing resolution plans and assessing resolvability for entities that are part of such a group strategy".

2 FSB, Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies, 16 July 2013.

Resolvability assessments

We support the EBA's proposed approach to including the RTS on the content of resolution plans and resolvability assessments in a single regulation. There is considerable interaction between the resolvability assessment process and the development of resolution plans. The development of feasible and credible resolution strategies to be set out in the resolution plan will benefit from the resolvability assessment process and in practice we expect that these will be done together. We also support the inclusion of standards as to how the resolvability assessment process should be undertaken. This should provide greater clarity and consistency of the process, which is particularly important in light of the important implications that it may have.

The draft RTS does not currently define "feasibility" or "credibility" for the purposes of the assessment of resolvability. We suggest that it would be helpful to elaborate on what is meant by these terms and that this could be achieved by including the following wording closely adapted from paragraph 1 of Annex II to the Key Attributes:

"*For resolution to be feasible, the authorities should have the necessary legal powers – and the practical capacity to apply them to the particular group – to ensure the continuity of critical functions. For resolution to be credible, the application of those resolution tools should not itself give rise to unacceptably adverse broader consequences for the financial system and the real economy*."

While the reference to "single point of entry" ("**SPE**") and "multiple point of entry" ("**MPE**") approaches may be helpful as a broad categorisation of resolution strategies, it is important to emphasise that in practice many resolution strategies might fall somewhere in between and combine aspects of both. As stated in the FSB Guidance, "there is no binary choice between the two approaches. In practice, a combination might be necessary...."[3] This message is acknowledged in the draft RTS, but should be strengthened, for example by reflecting it in Article 6 when considering the choice between SPE and MPE strategies when selecting an appropriate resolution strategy.

As an overarching comment, it is important to emphasise that a group is resolvable provided that there are one or more feasible and credible resolution strategies.

When assessing any impediments to resolvability, the clear focus should be on substantive impediments to the stabilisation of the group over a short timeframe. This would enable the group to be placed into resolution, recapitalised and stabilised while continuing to perform its critical functions. The following business reorganisation can follow once the institution has been stabilised. This would enable further restructuring of the group and changes to be made to facilitate the reorganisation over a period of time.

Furthermore, the scope of the business reorganisation itself is likely to be impossible to predict ex ante as it will depend upon the particular cause of failure and circumstances at the time. Accordingly impediments to resolvability should be focused on the stabilisation phase and not extend to requiring changes that could be made once the institution has been placed into resolution. This principle appears to be reflected in paragraph 5(c) of the draft guidelines on the specification of measures to reduce or remove impediments to resolvability, but this should also be reflected in Article 7 of the draft RTS. We do not therefore agree with the requirement for

[3] See page 13, FSB Guidance.

resolution authorities to assess impediments to a potential business reorganisation in Article 7(2) of the draft RTS.

The draft RTS should reflect the level 1 text which limits the scope of impediments to "substantive impediments". Therefore the references to "potential impediments" in Article 7 should be amended to "potential substantive impediments" to ensure consistency with the BRRD.

We query whether the assessment of the credibility of the selected resolution strategy should be done *alongside* the assessment of its feasibility, rather than *following* the feasibility assessment as required by Article 8(1) of the draft RTS. We also question whether clause 21 of Section C of the Annex to the Bank Recovery and Resolution Directive ("**BRRD**") would be more relevant to the assessment of the feasibility of the resolution strategy rather than its credibility.

The additional matters to be considered in the assessment of the credibility of the selected resolution strategy in Article 8(2) should be clarified to ensure that it is focused on the impact of the particular selected resolution strategy. For example, Article 8(2)(b) refers to the impact on financial market infrastructures of "the sudden cessation of activities" but it is likely that this would be avoided under resolution strategies. Rather than "***the*** sudden cessation of activities" we suggest referring to "***any*** sudden cessation of activities." We also query the references to liquidation in Article 8(2)(b) and (c) and whether these should instead be references to resolution as the assessment of credibility is focused upon the impact of the resolution strategy rather than a liquidation of the institution.

Further, we suggest that the resolvability assessment process should also include the identification and assessment of the significance of any impediments identified in the conclusions referred to in Article 3(g) of the draft RTS.

Finally, the inclusion of a new definition using the terminology "loss absorbing capacity" is likely to create confusion and could be interpreted as introducing a new concept in addition to MREL and the standards on loss absorbing capacity currently being developed by the FSB. We therefore suggest that this terminology is changed to avoid such confusion. We note that Article 5(b) of the draft RTS refers to "qualifying eligible liabilities or any other liabilities that would absorb losses" and suggest that similar language is used in Article 6(3)(b) in place of "qualifying eligible liabilities or other loss absorbing capacity". The definition of loss absorbing capacity could then be deleted.

"Variant" resolution strategies

The draft RTS refers to the concept of "variants" of a preferred resolution strategy and "variant strategies". This appears to be a new concept which is not contained in the BRRD or FSB guidance. The distinction between a "variant" of a resolution strategy and a separate resolution plan is unclear. While we agree that a resolution plan can and should make provision for different circumstances that might arise, we are concerned that the use of this term could create confusion.

There is also some inconsistency in the draft RTS between references to "variants of the preferred resolution strategy" and "variant strategies". The latter in particular suggests that such variants would be separate resolution strategies rather than part of the preferred resolution strategy. We are concerned that any suggestion that institutions must be resolvable under more than one resolution strategy is not contemplated in the level 1 text. Provided that

an institution is resolvable under the preferred resolution strategy, this should be sufficient and it is not appropriate to introduce an additional requirement for it to also be resolvable under one or more "variant" strategies through the level 2 process. We suggest that this should be clarified and it should be emphasised that provided that an institution is resolvable under one resolution strategy, there is no requirement for it to be resolvable under another "fall-back" or "variant" resolution strategy.

The issue of resolution plans needing to be able to adapt to specific circumstances could be better addressed by expressing any "variants" as being *part of* the preferred resolution strategy where alternative actions may be taken in response to certain key risks and therefore subject to a single resolvability assessment whereby provided that one or more variants of (or options within) the strategy is credible and feasible, the institution is resolvable.

B. Comments in response to specific questions

Question 1: Do you agree that this step [i.e. the assessment of the feasibility and credibility of liquidation under normal insolvency proceedings] should be distinguished from the assessment of resolution strategies and carried out first?

We agree that the feasibility and credibility of liquidation under normal insolvency proceedings should be distinguished from the assessment of resolvability in resolution. However, whilst a separate assessment of the feasibility and credibility of liquidation could make sense for small and medium sized firms, for those institutions where it is clear that liquidation would not be a credible or feasible strategy, a detailed assessment is likely to be a very expensive and counterproductive exercise and should not be necessary. This should be clarified in the RTS.

Question 2: Do you agree that this initial stage (preliminary identification of resolution strategies) should be separately identified?

We strongly agree that the identification of an appropriate resolution strategy should be identified separately in the RTS. This reflects the need for the preliminary assessment of what an appropriate preferred resolution strategy should be to take place before an assessment of its feasibility and credibility can be performed on the basis of supplementary information requests. We support a phased approach to information requirements, with an initial phase of information relevant to the choice of preferred resolution strategy and a second phase of more detailed information that is required to implement that particular strategy. As noted in the CP, this should help ensure that the information requested is relevant to the selected resolution strategy and ensure that demands on the resources of institutions and resolution authorities are proportionate. We question whether in fact the selection of the most appropriate resolution strategy should be a separate matter and form part of the development of resolution plans rather than part of the resolvability assessment exercise.

Question 3: Do you have comments on the criteria proposed in Article 5 of the RTS, or their application to single- and multiple- point of entry strategies?

We assume that this question is directed at Article 6 of the draft RTS rather than Article 5. As discussed in our general comments above, the resolution planning and resolvability assessment

processes are inter-related and the matters to be considered when assessing resolvability should assist in developing the preferred resolution strategy.

As set out above in our answer to question 2, we support the separate identification of the most appropriate resolution strategy prior to the assessment of its feasibility and credibility. However, while the intention that this be a separate stage is clear under Article 4(1) of the draft RTS, Article 6(1) refers to an assessment of "whether ***the*** resolution strategy is appropriate..." It should be clarified that this assessment under Article 6(1) should not lead to the group being assessed as not resolvable where an alternative resolution strategy would be appropriate.

This could be achieved by changing the emphasis in the first sentence of Article 6(1) to selecting the most appropriate resolution strategy rather than assessing a particular strategy. We also suggest defining "selected resolution strategy" which is used in Articles 7(1) and 8(1) as cross-referring to the outcome of the selection of the most appropriate resolution strategy. Otherwise there could be a risk that an assessment under Article 6 could lead to a firm being classed as not resolvable because "***the*** resolution strategy" tested under Article 6(1) is inappropriate, despite another resolution strategy being feasible and credible. The application of the process needs to be considered carefully to ensure that it does not result in groups that are resolvable under one resolution strategy being assessed as not resolvable on the basis of a less appropriate resolution strategy.

As discussed in our general comments above, we suggest that Article 6 makes it clear that SPE and MPE are two stylized types of resolution strategies, but that it is not a binary choice and resolution strategies could include elements of both.

Question 4: Do you have comments on how those criteria should be applied to variant strategies?

Please see our general comments on "variant strategies" above. As discussed in our general comments, it is important to clarify that a group is resolvable provided that there are one or more feasible and credible resolution strategies. It should not therefore be necessary for a group to be resolvable under more than one resolution strategy or variant thereof.

Question 5: Do you agree that these categories are appropriate and comprehensive?

As discussed in our general comments above, impediments to resolvability should be focused on the stabilisation phase and should not extend to requiring changes that could be made once the institution has been placed into resolution. Accordingly it should be clarified that impediments to a potential business reorganisation should not be the focus in Article 7(2) of the draft RTS. We are otherwise supportive of the categories of impediments to be considered.

Question 6: Do you have comments on the matters identified under each category?

We are broadly supportive of the matters identified under each category in Article 7 of the draft RTS. We suggest that Article 7(6)(c) should be amended to clarify that the information would be provided to enable the resolution authority and/or independent valuers to carry out a valuation, rather than the institution itself performing the valuation.

It should be emphasised in Article 7(7), in particular Article 7(7)(b), that the absence of binding assurances from other resolution authorities should not necessarily be an impediment to resolution. As well as the processes for coordination and communication and ensuring that the necessary tools are in place for cross-border cooperation and implementation of the group resolution plan, consideration should be given to the incentives for and benefits of cooperation amongst resolution authorities in different jurisdictions. In practice cooperation in a global resolution should result in reduced costs by minimising value destruction, maintaining critical functions and minimising the impact on financial stability, thereby incentivising cooperation.

Therefore while some authorities might be unable or unwilling to provide binding assurances or commitments as to their actions, where it would be in their interests to cooperate in the group resolution, the working assumption should be that they would follow the group resolution plan. This assessment should take account of the principles of cross-border cooperation set out in the Key Attributes, non-binding understandings and resolution authorities' obligations under Article 87 of the BRRD including to follow the group resolution plan under Article 87(j) of the BRRD. This assessment could be helpfully assisted by a cross-border simulation exercise to demonstrate this. It should be borne in mind that the assessment is of the feasibility of the resolution strategy, i.e. whether the authorities should have the necessary legal powers and the practical capacity to apply them to ensure the continuity of critical functions, not whether they have given a binding assurance that they will do so.

Articles 7(7)(c) and 7(8)(b) should be limited to material contracts which contain rights to terminate the contract on entry into resolution which cannot be overridden by resolution powers or the recognition of resolution powers in another jurisdiction. The proposed drafting would not take into account powers to override such termination rights.

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