

30 October 2015

Dear Sir/Madam

### **Implementation of Article 55 BRRD**

AFME and its members support the development of effective resolution regimes that work across borders and the implementation of the Bank Recovery and Resolution Directive ("BRRD"). We are, however, very concerned about the scope and implementation of article 55 ("Article 55") of the BRRD which requires banks to include clauses to give contractual recognition to bail-in in a broad range of contracts governed by non-EU law.

In light of the challenges with the scope and implementation discussed below, we are now at a point where urgent action is required to avoid a situation where a significant number of EU banks could unavoidably find themselves in breach of the law on 1 January 2016. Even if the issues with the scope of Article 55 are addressed immediately, it would still be impossible for banks to meet this deadline. A delay to the deadline is therefore needed.

### **Implementation challenges**

Our members are working hard to comply with the requirements of Article 55 and AFME is supporting this through the development of model clauses. Firms face a major implementation challenge to meet the requirements of Article 55, which extends significantly beyond the FSB's proposed scope of loss absorbing capacity and debt instruments.

In addition to including clauses in new contracts, Article 55 requires changes to existing contracts where liabilities could be created after 1 January. This involves a very significant renegotiation programme, potentially involving many thousands of counterparties. Amending existing contracts to include contractual recognition clauses is not something that can be done unilaterally and where it is possible, will take time to implement. In some cases it is likely to be impossible for banks to do so.

AFME's members have undertaken a thorough analysis of the contracts which are within the scope of Article 55 and identified the following categories as presenting particular challenges:

- (a) contracts where there is no realistic possibility of inserting the relevant provisions – and in some cases, it is not clear what these would achieve. Examples include trade finance which, since 1933, has been governed not by national laws but by protocols developed by the International Chamber of Commerce and contracts with central clearing counterparties which would be very difficult to amend and where the bail-in could in any event be counterproductive;

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- (b) contracts where there is clear resistance from the local regulatory authorities to any change in the terms, for example uninsured corporate deposits of a non-EU branch of a bank, which are governed by local law; and
- (c) contracts where it may be possible to insert the relevant provisions but not within the timeframe specified by the BRRD, even though our members have been working on this for some time.

While AFME has progressed with the development of a model clause and our members are working hard on implementation, we still do not have clarity on the final requirements of Article 55, as the Regulatory Technical Standards (“RTS”) have not yet been adopted and final rules in many Member States are either subject to revision following the final RTS or are not yet final. Without this clarity, model clauses cannot be finalised and our members are unable to commence negotiations with counterparties.

Against this background, we are now at a point where it is impossible for banks to meet the requirements by 1 January 2016. With this deadline fast approaching, firms require legal certainty on a timeline for implementation of Article 55, as well as changes to the scope.

### **The need for a solution**

Our members clearly do not wish to find themselves in a position where they are unable to comply with the law. As well as being of concern to boards, non-compliance is likely to have legal and reputational ramifications. Banks are frequently required to confirm their compliance, or otherwise, with laws and regulations and their ability to do so could affect their ability to conduct their business. Non-compliance is binary and providing informal reassurance as to enforcement, for example through the resolvability assessment process in articles 16 and 17 of the BRRD, provides insufficient certainty to firms.

We believe that in the short term there needs to be concerted action by the European authorities, supported by Member States and national authorities, to delay implementation of Article 55. This could be done through reassurance by the Commission that they would not pursue infringement proceedings against Member States for delaying implementation, a targeted amendment to the level 1 text and/or providing banks with appropriate waivers, in each case until the scope can be reviewed and a long-term solution found.

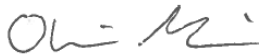
In addition to the need to address the timing, it is clear that the scope of Article 55 needs to be reviewed. We suggest that the scope should be looked at as part of the review under article 45 of the BRRD and understand that the Commission and EBA are willing to consider this. We see this as essential because the impact of Article 55 has not been assessed to date and there are clear unintended consequences which have not been adequately considered.

It is important to note that other jurisdictions outside the EU do not require contractual clauses for this broad range of liabilities, potentially leaving European banks at a significant competitive disadvantage.

Moreover, the scope of Article 55 as currently drafted includes liabilities that are very unlikely to be bailed-in in practice and do not contribute significantly to the loss absorbing capacity of the bank. There is therefore a lack of proportionality between the operational challenges of implementing the clause for certain types of liabilities and the benefits in terms of loss absorbency and resolvability, which are, ultimately, the objectives of Article 55. We suggest that the focus of resolution authorities would be better placed on ensuring that effective resolution plans are in place, supported by adequate loss absorbing capacity, rather than on technical compliance with Article 55.

We therefore encourage you to work with the Commission to address the urgent issue of the deadline, as well as the issue of scope, of Article 55. This is essential to avoid a situation where banks in the EU are unable to meet their obligations both now and in the future, to the detriment of both these banks and the European legislative and regulatory process.

Yours faithfully



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