
Press release

AFME publishes model clauses for the contractual recognition of bail-in under Article 55 BRRD

1 August 2016

The Association for Financial Markets in Europe (AFME) has today **published** model clauses for the contractual recognition of bail-in for the purposes of satisfying the requirements of Article 55 of the EU Bank Recovery and Resolution Directive (BRRD).

The model clauses seek to support cross-border effectiveness of resolution and assist banks with complying with the requirements of Article 55 BRRD by providing model wording for inclusion in debt instruments and other contracts.

Commenting on the publication of the model clauses, Oliver Moullin, Head of Recovery & Resolution and General Counsel at AFME, said:

“AFME’s model clauses for the contractual recognition of bail-in should support cross-border effectiveness of resolution and assist banks in meeting the requirements of Article 55 BRRD. However, very significant challenges remain and the scope of Article 55 should be amended to align it with the international standard, increasing consistency and clarity for the market.”

Continued concerns with the scope of Article 55 BRRD

The scope of Article 55 is very broad and requires banks to include contractual recognition clauses in contracts giving rise to all liabilities governed by non-EEA law, save where these are expressly excluded from bail-in under the BRRD. The requirement gives rise to significant challenges, for example where banks are unable to unilaterally amend contracts, such as in relation to trade finance and membership of financial markets infrastructure.

A number of authorities have acknowledged that in many cases inserting such a clause is impracticable. While several authorities have sought to adopt a pragmatic approach to implementation, there remains uncertainty and potential inconsistency in application. A clear and consistent approach across the European Union is required to provide banks and counterparties with a clear and workable solution.

AFME believes that the scope of Article 55 should be amended to align it with that agreed at the international level through the Financial Stability Board (FSB)¹. These principles propose that the scope should cover instruments eligible for loss absorbing capacity requirements and any other “debt instruments”. This would provide a much clearer scope of liabilities and significantly reduce the impact on firms while meeting the objective of ensuring resolvability.² Alignment with the FSB principles is particularly important where inconsistencies in approach could severely impact the competitiveness of European banks operating in global markets.

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¹ See FSB Principles for Cross-border Effectiveness of Resolution Actions: <http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>

² In addition to article 55, resolution authorities have powers to require firms to address include contractual recognition clauses in any other contracts where they believe that this is necessary to ensure that the bank can be resolved without the use of public resources.

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Background:

Article 55 of the BRRD requires EU-domiciled banks to insert clauses into a broad scope of contracts governed by non-EEA law to give effect to a bail-in by European resolution authorities in the event of their failure.

The model clauses published today are part of a continued effort by AFME to promote the effectiveness of cross-border resolution. The model clauses include an updated version of the previous AFME model clause for the contractual recognition of bail-in of eligible debt instruments (published on 24 September 2015) reflecting the final Regulatory Technical Standards made under Article 55 and also a clause for broader use in other contracts subject to the requirements.

The model clauses have been developed by AFME, with the assistance of Cleary Gottlieb Steen & Hamilton LLP and input from AFME members including a number of other law firms.

Further materials

AFME publication of model clause on 24 September 2015: [press release/model clause](#)

AFME [paper](#) highlighting concerns with the scope of article 55 BRRD, 18 June 2015

AFME [letter](#) to resolution authorities and Member States regarding implementation of article 55 BRRD, 30 October 2015

AFME [response](#) to PRA consultation on implementation of article 55, 16 May 2016

Notes:

1. AFME (Association for Financial Markets in Europe) promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. 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. AFME participates in 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) through the GFMA (Global Financial Markets Association). For more information please visit the AFME website: www.afme.eu.
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