

8 June 2015

European Banking Authority
Floor 46
One Canada Square
London
E14 5AA

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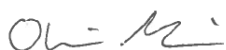
Consultation paper on draft RTS and guidelines on Business Reorganisation Plans under the BRRD

Dear Sir / Madam

Please find enclosed the response of the Association for Financial Markets in Europe to the EBA consultation paper on draft Regulatory Technical Standards and guidelines on Business Reorganisation Plans under Directive 2014/59/EU (EBA/CP/2015/05).

Please do not hesitate to contact us if you have any questions or wish to discuss these issues further.

Yours faithfully



Oliver Moullin
Director, Recovery and Resolution
AFME

Association for Financial Markets in Europe

London Office: St. Michael's House, 1 George Yard, London EC3V 9DH T: +44 (0)20 7743 9300 F: +44 (0)20 7743 9301

Brussels Office: Rue de la Loi 82, 1040 Brussels, Belgium T: +32 (0)2 788 3971

Company Registration No: 6996678 Registered Office: St. Michael's House, 1 George Yard, London EC3V 9DH

www.afme.eu

Consultation response

Regulatory Technical Standards and guidelines on Business Reorganisation plans under Directive 2014/59/EU (EBA/CP/2015/05)

8 June 2015

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**”) and draft guidelines (“**Guidelines**”) on Business Reorganisation Plans under the Bank Recovery and Resolution Directive (2014/59/EU) (the “**BRRD**”).

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

A. General comments on the draft RTS and guidelines

We set out below some general comments on the draft RTS and Guidelines. These address some questions regarding the timeframe for the submission of a business reorganisation plan and the governance arrangements for approval of the plan within the institution.

Timing and governance considerations

The draft RTS establishes detailed requirements for the contents of business reorganisation plans under article 52 BRRD. We are broadly supportive of the proposed contents of plans, but we remain concerned as to the practicality of satisfying these requirements and producing a detailed, considered and appropriate business reorganisation plan supported by scenario analysis within the one month deadline prescribed by the BRRD, even with the possibility of a one month extension in exceptional circumstances. For example, article 3(5) of the draft RTS contemplates expert valuation and market sounding exercises for various parts of the business which could take some time to complete.

The likely circumstances in which the plan would be prepared are also likely to make preparation of a detailed strategic plan difficult during this period. For example, despite being recapitalised, the group might still be in a period of stabilisation, potentially within a systemic crisis and with new management in place.

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 Transparency Register, registration number 65110063986-76.

A related issue which would benefit from clarification is when the time period for preparation of the plan commences. Article 52(1) BRRD refers to “one month after the application of the bail-in tool”. Should this be read as one month after the date upon which the use of the bail-in tool was announced/commenced or completion of the recapitalisation following any ex post definitive valuation? If it is the former, then it is possible that the definitive valuation will not have been completed by the expiry of the deadline for submission of the business reorganisation plan, which could create additional challenges in the development of a plan. We therefore suggest that the time period should only commence once the bail-in has been completed.

A related question arises as to the distinction between the resolution and the “reorganisation period” defined in the RTS. We are unclear as to precisely when resolution comes to an end and the reorganisation period begins. This would benefit from clarification. In addition to our concerns regarding the timeframe for preparing a detailed strategic plan, this question is also relevant to the governance arrangements for approval of and commitment to a business reorganisation plan. For example, it must be clear when the shareholders of the recapitalised institution may exercise their voting rights. Article 72(1) BRRD provides that shareholders may not exercise voting rights during the “period of resolution” but again the duration of this period is unclear.

We suggest that, in order that effective business reorganisation plans can be prepared and reduce the likelihood that plans have to be frequently amended, it would be appropriate to permit the institution to submit a high level plan setting out its strategy for restoring its long-term viability with the ability to supplement this with the necessary additional detail set out in the RTS where it is not feasible to provide this within the initial timeframe.

We therefore encourage the EBA to consider these questions of timing and governance and clarify them to ensure consistency throughout the European Union.

Cooperation between competent and resolution authorities

We agree with the requirement that both competent authority and resolution authority should assess the plan. It is important for there to be coordination and agreement between supervisory and resolution authorities in this assessment process. Potential conflict between the authorities could send contradictory messages to the market and create uncertainty about the institution’s capacity to restore its long-term viability. We therefore support the inclusion of Title III of the draft Guidelines. However, we suggest that the RTS should emphasise that sharing of business reorganisation plans between authorities in different jurisdictions should be subject to appropriate confidentiality and information sharing provisions.

Scope of the business reorganisation plan

The requirement to prepare a business reorganisation plan applies to an institution or entity referred to in point (b), (c), or (d) of article 1(1) BRRD where the bail-in tool has been applied, or where the bail-in tool has been applied to two or more group entities, to the Union parent institution². However, the precise scope of the plan could benefit from clarification, in particular for groups which have operations outside the EU.

² Article 52 BRRD

For example, in our view at a minimum subsidiaries located in third countries and belonging to a group that has a multiple point of entry (MPE) resolution strategy should not be within the scope of a business reorganisation plan under the BRRD. These subsidiaries would be resolved separately under the relevant local resolution framework and might not remain within the same group following resolution.

We do not agree that it is necessary for the business reorganisation plan to include a description of the measures to be taken at the level of every individual entity in the group, as proposed in article 3(2)(b) of the draft RTS. We suggest that this should be amended to require a description of the strategy at “group, significant legal entity and business line level”.

B. Comments in response to the questions raised in the CP

Q1. Do you consider it relevant to define the “reorganisation period”? Do you consider the current definition clear?

Subject to our comments above regarding the need for clarity as to when this period begins, we agree with the proposed approach to defining “reorganisation period” in the draft RTS. We expect that the reorganisation period is likely to be different depending upon the particular group, the market conditions and the type of reorganisation proposed. Therefore setting a particular timeframe applicable to all resolutions is unlikely to be appropriate. However, we suggest that the RTS clarifies that the anticipated reorganisation period is clearly set for the relevant institution so that there is transparency to stakeholders on the likely timeframe for the reorganisation. The reorganisation period should be proposed by the institution as part of its business reorganisation plan and approved by the authorities as part of their assessment.

Q2. Is the concept of “business line” sufficiently clear? Can measures and performance be provided at a “business line” level?

We regard the concept of business line as sufficiently clear and believe that measures and performance can be provided at a business line level. However, the delineation of business lines will vary between banks and it is unlikely that there will be publicly available performance benchmarks at business line level on a sector-wide basis. Therefore it might not be possible to assess performance against sector-wide benchmarks on a business line basis as required by paragraph 2.2 of the draft Guidelines.

Q3. Do you agree that an institution under resolution should use the reorganisation opportunity to address any shortcomings in the remaining business?

It is not the role of the business reorganisation plan to address issues that did not cause the failure of the institution. Therefore we do not support the requirement for business reorganisation plans to address broader shortcomings in the institution’s business.

If such a requirement is retained, then rather than being a strict requirement subject to assessment by the competent and resolution authorities, the decision whether or not address any broader shortcomings should be at the option of the institution’s management and should not impact upon the outcome of the assessment of the plan. Additionally, as discussed in our general comments above, we expect that it is likely to be difficult for management to prepare a

detailed long-term strategy within the timeframe for submitting the plan and there might be insufficient time to evaluate all potential shortcomings in the whole business.

Q4. Is it appropriate to consider the impact of the reorganisation strategy and measures on the functioning of financial system and the overall financial stability? Would it be appropriate to further detail the requirement regarding the impact of the reorganisation strategy on specific metrics, such as lending?

The BRRD provides that the resolution authority (in agreement with the competent authority) shall assess “the likelihood that the plan, if implemented, will restore the long-term viability of the institution... If the resolution authority and the competent authority are satisfied that the plan would achieve that objective, the resolution authority shall approve the plan.”³ Therefore the scope of the assessment is limited to the objective of restoring the long-term viability of the institution and does not extend to considering any broader impact on the financial system or financial stability. Accordingly, we do not believe that it is appropriate to include these broader considerations in the assessment of the plan. A distinction should be made between the EU state aid framework and resolution where save for exceptional circumstances, no state aid should be involved. If this criteria is retained, it could also raise further questions from a governance perspective, for example how this objective sits with directors’ duties.

We expect that the impact of a reorganisation strategy on the wider financial system can only be predicted to a limited extent because it depends upon prevailing market conditions and assumptions regarding the actions of other market participants. If the impact on the financial system is retained as a factor, we suggest that it should not be a requirement for the institution to assess the impact on the financial system of its reorganisation plan, but rather a factor that the competent and resolution authority could take into account when assessing the plan. This is because the authorities would be better placed to make this assessment than the institution.

Q5. Is it feasible to obtain a commitment from the managers of the institution about the implications of the Plan and the appointment of responsible individuals in the institution for the implementation of the Plan?

We agree that the commitment of the management body of the institution under resolution should be understood not only in terms of preparing the business reorganisation plan but also in terms of monitoring and implementation during the reorganisation period. However, we suggest that it would be preferable to appoint responsible departments within the bank rather than the appointment of individuals. This would ensure continued responsibility despite any changes in personnel at the bank.

We are unclear as to what form the commitment is expected to take. Please also refer to our comments above regarding the need for clarity in the governance framework for approval and performance of the reorganisation plan. In addition to the question of shareholder approval of the plan, the commitment of management is likely to require commitment from shareholders to support the plan. Obtaining this commitment might also take some time, contributing to our concerns regarding the feasibility of obtaining this within the required time period.

³ Article 52(7)

Q6. The BRRD requires for a Plan apply only in the event of use of the bail-in tool to recapitalise an existing institution. Are any of the provisions of the RTS and GL relevant in the event of use of the bridge institution tool, given the requirement that the resolution authority must approve the strategy and risk profile of the bridge institution? If so, which provisions do you consider relevant and why?

It is important that the outcome of resolution is clear to stakeholders and the market regardless of the tool that is used. While the nature and detail of the plan might differ depending upon the resolution action that is taken, we consider that the strategy for what remains of the institution's business following resolution should be set out. It is possible that a very similar outcome could be achieved through the use of either the bail-in or bridge institution tools and therefore the approach to the reorganisation strategy should be similar. We therefore support a similar approach to development and assessment of the reorganisation strategy following the use of the bridge institution tool. However, our comments above regarding the timeframe for producing a detailed reorganisation plan would also apply to any reorganisation plan following the use of the bridge institution tool.