

# Model clauses for the contractual recognition of bail-in under Article 55 BRRD

August 2016



## Model Clause Package

AFME, working together with Cleary Gottlieb Steen & Hamilton LLP, and certain other law firms, has developed this Model Clause package to help European financial institutions comply with the requirements of Article 55 of the Bank Recovery & Resolution (BRRD). In summary, Article 55 requires financial institutions in the European Union to include clauses in a range of contracts to give contractual effect to a bail-in of the relevant liability in a resolution of the institution.

This Model Clause package contains model contractual terms that market participants can use to comply with the requirements of Article 55 when issuing debt instruments and certain other contracts governed by the law of a jurisdiction outside the European Union law.

Please also see the [disclaimer](#) below.

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## 1. BACKGROUND<sup>1</sup>

In November 2011, the Financial Stability Board issued the [Key Attributes of Effective Resolution Regimes for Financial Institutions](#) (“**Key Attributes**”) as part of the response to the recent financial crisis. The Key Attributes have been implemented in the European Union through the European Union’s Bank Recovery and Resolution Directive (2014/59/EU) (“**BRRD**”).<sup>2</sup> The BRRD establishes a framework across Europe designed to ensure that banks and large investment firms can be resolved without systemic disruption or exposing taxpayers to loss.

In line with the Key Attributes, the BRRD introduces certain “bail-in” provisions which allow resolution authorities to cancel or reduce certain eligible liabilities to creditors or partially or fully to convert such liabilities into debt or equity securities of the institution or another entity. The bail-in tool seeks to ensure that the shareholders and unsecured creditors of a failing credit institution or investment firm are ultimately responsible for the costs of the failure.

In parallel with this power, the provision in the BRRD on the contractual recognition of bail-in (Article 55) also requires that entities eligible for resolution under the BRRD include a contractual “recognition” clause in the contracts giving rise to “eligible liabilities” if the contract is governed by the law of a jurisdiction outside of the European Union (“EU”). Under such “recognition” clauses, the creditor must acknowledge that the liability may be subject to the BRRD write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation resulting from the exercise of such powers by a resolution authority. The purpose of the provision is to ensure that all creditors will be subject to bail-in to the same extent, regardless of the governing law of the agreement under which the liability arises, and to facilitate the cross-border resolution of EU financial institutions.

This “recognition” clause must be included in a wide range of agreements that are governed by the law of a non-EU jurisdiction. The requirement applies not only to capital markets debt instruments, but also to many other unsecured liabilities, including those arising under swaps and other financial contracts, and certain vendor and creditor contracts.

### 1.1 AFME’s Model Clause Initiative

**To assist the market comply with Article 55, AFME has developed model clauses for debt instruments and “other liabilities.”**

AFME, with the assistance of Cleary Gottlieb Steen & Hamilton LLP (“**Cleary Gottlieb**”), its members and certain other law firms, has prepared a set of model clauses to apply to liabilities governed by the law of a non-EU member state (the “**Model Clauses**”).<sup>3</sup> These

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<sup>1</sup> Further information on recovery and resolution issues and AFME’s broader work in this area is available at <http://afme.eu/Resolution/>

<sup>2</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

<sup>3</sup> AFME is also grateful to the International Capital Market Association (ICMA) which has also provided input into the Model Clause for Other Liabilities set out in section 2.2.

Model Clauses have been created to facilitate compliance with (i) Article 55 of the BRRD, as implemented in each EU jurisdiction; (ii) the minimum requirements for bail-in clauses, set out in the regulatory technical standards (“**RTS**”) published by the European Banking Authority (“**EBA**”) and adopted by the European Commission (“**EC**”) as a delegated regulation (“**Delegated Regulation**”); and (iii) the local legislation implementing Article 55 requirements in EU Member States.

## 1.2 **Delegated Regulation on Article 55**

Pursuant to Article 55(3) BRRD, the EBA submitted a [Final Report RTS](#) on Article 55 to the EC on July 3, 2015. The EC adopted the RTS on March 23, 2016 as part of a Delegated Regulation supplementing the BRRD. The [Delegated Regulation](#) was published in the Official Journal of the EU on July 8, 2016 and applies from July 28, 2016 .

**Please direct any feedback in relation to the Model Clauses to Oliver Moullin, Head of Recovery and Resolution and General Counsel ([oliver.moullin@afme.eu](mailto:oliver.moullin@afme.eu)).**

## 2. USING THE MODEL CLAUSE PACKAGE

AFME, with assistance from Cleary Gottlieb, its members and certain other law firms has developed a series of Model Clauses in order to provide market participants with industry-standard clauses that can be applied to a broad range of agreements and instruments that are governed by non-EEA law and subject to the requirements contained in Article 55. The Model Clauses are designed to be compliant with the requirements of the BRRD and of certain relevant EU Member State legislation implementing the BRRD, as well as with the Delegated Regulation. Their purpose is to minimize the need to negotiate the nature of these provisions and facilitate implementation.

The Model Clause Package contains two types of Model Clause: one for use with debt liabilities; and the other addresses compliance with Article 55 and related requirements with respect to liabilities other than debt instruments or liabilities governed by industry-standard master agreements (collectively, “**Other Liabilities**”). Below, we set out the generic versions of both Model Clauses as a starting point for any governing law where the entity is organized under the law of any EU Member State:

- For debt liabilities, please see [section 2.1](#).
- For Other Liabilities, please see [section 2.2](#).

These Model Clauses are a starting point only for such an exercise. Users are strongly encouraged to consult counsel in the relevant non-EU jurisdiction to ensure that the clause is appropriately modified to reflect any requirements of that non-EU law, and is both effective and enforceable in that jurisdiction.

For entities organized under the laws of the following EU Member States, where the liabilities are governed by New York law, please refer to the specific tailored model clauses:

- For entities organized in the UK, please see [section 3](#).
- For entities organized in France, please see [section 4](#).
- For entities organized in Italy, please see [section 5](#).
- For entities organized in Belgium, please see [section 6](#).
- For entities organized in Germany, please see [section 7](#).

### 2.1 Type of liability: debt liabilities

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities incurred by entities organized in EU jurisdictions, and eligible for resolution under national legislation in their respective jurisdictions.

The Model Clause below has been created as a starting point, and the template should be populated accordingly with the relevant definitions applicable to the obligor’s jurisdiction

set out in the EU Bail-In Legislation Schedule produced by the Loan Market Association, available [here](#).

## **Section 1. Recognition of Bail-in<sup>4</sup>**

### **Section 1.01. Agreement and Acknowledgement with Respect to the Exercise of Bail-in Power**

Notwithstanding and to the exclusion of any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder],<sup>5</sup> by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]), acknowledges and accepts that the Amounts Due arising under these [Securities / Notes] may be subject to the exercise of Bail-in Powers by the Resolution Authority, and acknowledges, accepts, consents and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Power by the Resolution Authority,<sup>6</sup> that may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due;<sup>7</sup>
  - (ii) the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];<sup>8</sup>
  - (iii) the cancellation of the [Securities / Notes];<sup>9</sup>
  - (iv) the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes],

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<sup>4</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>5</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>6</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>7</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>8</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>9</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements of Article 44(2) of the Delegated Regulation.

or the date on which the interest becomes payable, including by suspending payment for a temporary period;<sup>10</sup>

- (b) the variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of Bail-in Power by the Resolution Authority.<sup>11</sup>

#### Section 1.02. Definitions

- (a) For these purposes, the “Amounts Due” are the principal amount of [or outstanding amount]<sup>12</sup>, together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of Bail-in Power by the Resolution Authority.]<sup>13</sup>
- (b) For these purposes, the “Bail-in Power” means [see [LMA EU Bail-In Legislation Schedule](#) for applicable definition],<sup>14</sup>
- (c) A reference to a “regulated entity” is to any entity eligible for resolution under the laws of [●].
- (d) A reference to the “Resolution Authority” is to [*insert name of the national authority*].

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of Amounts Due on the [Securities / Notes], will become due and payable or be paid after the exercise of any Bail-in Power by the Resolution Authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

#### Section 1.04. Event of Default

Neither a reduction or cancellation, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of

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<sup>10</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>11</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>12</sup> **Note to counsel preparing the transaction disclosure:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient.

<sup>13</sup> Relevant for AT1 and Subordinated Tier 2 issuances.

<sup>14</sup> **Note to counsel preparing the transaction disclosure:** Where the clause is developed in countries subject to the Single Resolution Mechanism (the “SRM”), the definition may need to be amended accordingly to refer to Regulation (EU) No 806/2014 establishing a Single Resolution Mechanism (the “SRM Regulation”).



the exercise of the Bail-in Power by the Resolution Authority with respect to the Issuer, nor the exercise of the Bail-in Power by the Resolution Authority with respect to the [Securities / Notes] will be an event of default.<sup>15</sup>

Section 1.05. Notice to [Securityholders / Noteholders]

Upon the exercise of the Bail-in Power by the Resolution Authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [the clearing system] as soon as practicable regarding such exercise of the Bail-in Power.<sup>16</sup> The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

## 2.2 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by non-EU law incurred by entities organized in EU Jurisdictions and eligible for resolution under national legislation in their respective jurisdictions.

The Model Clause below has been created either for use as presented below, or it can be populated with the relevant definitions applicable to the obligor's jurisdiction set out in the EU Bail-In Legislation Schedule produced by the Loan Market Association, available [here](#). This is also likely to be a useful starting point where multiple BRRD entities in different jurisdictions are party to the agreement.

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<sup>15</sup> **Note to counsel preparing the transaction disclosure:** Capitalize “event of default” if the term is defined in the terms and conditions.

<sup>16</sup> **Note to counsel preparing the transaction disclosure:** Revise as appropriate to reflect the notices clause in the terms and conditions.

## **Section 1. Recognition of Bail-in<sup>17</sup>**

### **Section 1.01. Contractual Acknowledgment<sup>18</sup>**

Notwithstanding and to the exclusion of any other term of this *[Agreement]* or any other agreements, arrangements, or understanding between *[[BRRD Party]* and *[Creditor or Counterparty of BRRD Party]*<sup>19,20</sup> *[Creditor or Counterparty of BRRD Party]*<sup>21</sup> acknowledges and accepts that a BRRD Liability arising under this *[Agreement]* may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>22</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of *[[BRRD Party]* to *[Creditor or Counterparty of BRRD Party]*<sup>23</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>24</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of *[BRRD Party]*<sup>25</sup> or another person, and the

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<sup>17</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>18</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>19</sup> Include “*[[BRRD Party]* and *[BRRD Party]* (each a “**BRRD Party**)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>20</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>21</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>22</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>23</sup> Include “a BRRD Party (“**Relevant BRRD Party**)” to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>24</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>25</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>26</sup> of such shares, securities or obligations;<sup>27</sup>

(iii) the cancellation of the BRRD Liability;<sup>28</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>29</sup>

(b) the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>30</sup>

#### Section 1.02. Bail-in Definition

**“Bail-in Legislation”** means in relation to a member state of the European Economic Area which has implemented, or which at any time implements, the BRRD, the relevant implementing law, regulation, rule or requirement as described in the EU Bail-in Legislation Schedule from time to time

**“Bail-in Powers”** means any Write-down and Conversion Powers as defined in the EU Bail-in Legislation Schedule, in relation to the relevant Bail-in Legislation.

**“BRRD”** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

**“EU Bail-in Legislation Schedule”** means the document described as such, then in effect, and published by the Loan Market Association (or any successor person) from time to time at <http://www.lma.eu.com/pages.aspx?p=499>.

**“BRRD Liability”** means a liability in respect of which the relevant Write Down and Conversion Powers in the applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*]<sup>31</sup>.

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<sup>26</sup> Include “the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>27</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>28</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>29</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>30</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>31</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

## 2.3 **Please note that the Model Clauses are not intended for use with master agreements**

The Model Clauses are not intended for use with master agreements sponsored by a trade association or similar group, such as master agreements published by the International Swaps and Derivatives Association, the International Capital Market Association, the International Securities Lending Association, or the Securities Industry and Financial Markets Association. Parties should consult with the sponsor of any such master agreement with respect to compliance with Article 55 and related requirements.

## 2.4 **Disclaimer**

**Whilst every care has been taken in the preparation of this Model Clause Package, no representation or warranty is given by AFME, its advisors, or any of the participants of its working group, including without limitation:**

- as to the effectiveness or suitability of any definition contained in a Model Clause for meeting any applicable regulatory requirements;
- as to the suitability of a Model Clause for any particular transaction or purpose;
- that a Model Clause will cover any particular eventuality;
- as to the accuracy or completeness of the contents of a Model Clause for the agreement or instrument in question.

Users of the Model Clause Package must satisfy themselves as to the regulatory and other implications of its use.

Neither AFME nor its advisors are liable for any losses suffered by any person as a result of any contract or agreement made using the terms of a Model Clause or which may arise from the presence of any errors or omissions in a Model Clause, and no proceedings shall be taken by any person against AFME or its advisors in relation to such losses.

For the avoidance of doubt, the Model Clause Package is in a non-binding, recommended form. Its intention is to be used as a starting point for negotiation only. Individual parties are free to depart from their terms, and should always satisfy themselves of the regulatory implications of its use.

Your receipt of this document is subject to paragraphs 3, 4, 5, 9, 10, 11 and 13 of the [Terms of Use](#) which are applicable to AFME's website and, for the purposes of such Terms of Use, this document shall be considered a "Material" (regardless of whether you have received or accessed it via AFME's website or otherwise).

### 3. ENTITIES ORGANIZED IN THE UK

This section of the Model Clause Package addresses compliance with Article 55 BRRD and related requirements by entities and managers organized under United Kingdom (“UK”) law and eligible for resolution under the Banking Act 2009, as amended, where the governing law of the liability is New York law.

When considering which clause below to use, please choose the relevant liability (debt, or other).

• Debt instruments liability

• Other Liabilities

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in the jurisdiction of the governing law of the liability, and the UK, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the liability, the legal framework of the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

#### 3.1 Background – UK implementation of Article 55 and the Delegated Regulation

In the UK, bail-in provisions were introduced prior to the EU deadline of January 1, 2016. An amendment to the Banking Act 2009 implemented a “special bail-in provision” for debt instruments from February 19, 2015. This amendment was further supplemented by Chapter 2.1 of the Contractual Recognition of Bail-in Sourcebook in the Prudential Regulation Authority Rulebook, which provides that certain liabilities of a “BRRD undertaking” governed by the laws of non-EU jurisdictions are required to include “a term by which the creditor or party to the agreement creating the liability recognises that the liability may be subject to the exercise of power by the Bank of England to make a special bail-in provision or mandatory reduction provision and agrees to be bound by any reduction of the principal or outstanding amount due or by any conversion or cancellation effective by the exercise of that power...”

The Financial Conduct Authority (the “FCA”) has implemented rules for other instruments and liabilities from January 1, 2016 in its [Prudential Sourcebook for Investment Firms \(“IFPRU”\)](#) at IFPRU 11.6.

On November 25, 2015, the Prudential Regulation Authority (the “PRA”) issued a [modification by consent](#) of certain rules in the Contractual Recognition of Bail-in Part of the PRA Rulebook. This modification disappplies the relevant rules in circumstances where compliance with such rules in respect of all liabilities (other than unsecured debt instruments, additional tier 1 instruments and tier 2 instruments) subject to the contractual recognition of bail-in requirements is impracticable. A similar [modification by consent](#) was issued by the FCA on December 31, 2015, which applies until June 30, 2017. On March 15, 2016, the PRA published a [consultation paper and supervisory statement](#) on amendments to the rules on the contractual recognition of bail-in, intended to address circumstances where the

inclusion of contractual recognition language was at times impracticable. Finally, on June 29, 2016, the PRA published a [policy statement](#) and [supervisory statement](#). The policy statement confirms the amendment to the PRA rules that will have the same effect as the modification by consent, with the amended rules to apply from August 1, 2016. It also further aligns the UK PRA rules with the wording of the RTS. The supervisory statement lists non-exhaustive examples where contractual recognition may be impracticable for unsecured debt instruments.

### 3.2 **Type of liability: debt liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities governed by New York law incurred by entities organized under UK law and eligible for resolution under the Banking Act 2009, as amended.

#### **Section 1. Recognition of Bail-in<sup>32</sup>**

##### **Section 1.01. Agreement and Acknowledgement with Respect to the Exercise of the UK Bail-in Power**

Notwithstanding and to the exclusion of any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder],<sup>33</sup> by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]), acknowledges and accepts that the Amounts Due arising under these [Securities / Notes] may be subject to the exercise of Bail-in Powers by the Resolution Authority, and acknowledges, accepts, consents,<sup>34</sup> and agrees to be bound by:

- (a) the effect of the exercise of the UK bail-in power by the relevant UK resolution authority,<sup>35</sup> that may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due;<sup>36</sup>
  - (ii) the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or

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<sup>32</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>33</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>34</sup> Although the delegated act does not contain the term “consent,” the Model Clause retains this term in order to satisfy section 316(b) of the Trust Indenture Act.

<sup>35</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>36</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];<sup>37</sup>

(iii) the cancellation of the [Securities / Notes];<sup>38</sup>

(iv) the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes], or the date on which the interest becomes payable, including by suspending payment for a temporary period;<sup>39</sup>

(b) the variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of the UK bail-in power by the relevant UK resolution authority.<sup>40</sup>

#### Section 1.02. Definitions

(a) For these purposes, the “Amounts Due” are the principal amount of [or outstanding amount]<sup>41</sup>, together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of the UK bail-in power by the relevant UK resolution authority.]<sup>42</sup>

(b) For these purposes, the “UK bail-in power” is any write-down, conversion, transfer, modification, or suspension power existing from time to time under, and exercised in compliance with, any laws, regulations, rules or requirements in effect in the United Kingdom, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**BRRD**”) as amended from time to time, including but not limited to the Banking Act 2009 as amended from time to time, and the instruments, rules and standards created thereunder, pursuant to which:

(i) any obligation of a regulated entity (or other affiliate of such regulated entity) can be reduced, cancelled, modified, or converted into shares, other

<sup>37</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>38</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements of Article 44(2) of the Delegated Regulation.

<sup>39</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>40</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>41</sup> **Note to counsel preparing the transaction disclosure:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient.

<sup>42</sup> Relevant for AT1 and Subordinated Tier 2 issuances.

securities, or other obligations of such regulated entity or any other person (or suspended for a temporary period); and

- (ii) any right in a contract governing an obligation of a regulated entity may be deemed to have been exercised.<sup>43</sup>

A reference to a “regulated entity” is to any BRRD Undertaking as such term is defined under the PRA Rulebook promulgated by the United Kingdom Prudential Regulation Authority, as amended from time to time, which includes, certain credit institutions, investment firms, and certain of their parent or holding companies.

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of Amounts Due on the [Securities / Notes], will become due and payable or be paid after the exercise of any UK bail-in power by the relevant UK resolution authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

#### Section 1.04. Event of Default

Neither a reduction or cancellation, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the Issuer, nor the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes] will be an event of default.<sup>44</sup>

#### Section 1.05. Notice to [Securityholders / Noteholders]

Upon the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [DTC / the clearing system] as soon as practicable regarding such exercise of the UK bail-in power.<sup>45</sup> The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

#### Section 1.06. Trust Indenture Act<sup>46</sup>

- (a) By its acquisition of the [Securities / Notes], each [securityholder / noteholder] ], (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Security / Note]), to the extent permitted by the Trust Indenture Act, will waive any and all claims, in law and/or in equity, against the trustee for,

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<sup>43</sup> Reflecting section 48B(1)(c) of the Banking Act 2009.

<sup>44</sup> **Note to counsel preparing the transaction disclosure:** Capitalize “event of default” if the term is defined in the terms and conditions.

<sup>45</sup> **Note to counsel preparing the transaction disclosure:** Revise as appropriate to reflect the notices clause in the terms and conditions.

<sup>46</sup> **Note to counsel preparing the transaction disclosure:** These provisions are only necessary if the relevant instrument is subject to the Trust Indenture Act. Please consult issuer’s counsel to determine whether necessary.



agree not to initiate a suit against the trustee in respect of, and agree that the trustee will not be liable for, any action that the trustee takes, or abstains from taking, in either case in accordance with the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes].

(b) Additionally, by its acquisition of the [Securities / Notes], each [securityholder / noteholder] will acknowledge and agree that, upon the exercise of the UK bail-in power by the relevant UK resolution authority:

- (i) the trustee will not be required to take any further directions from the [securityholders / noteholders] with respect to any portion of the [Securities / Notes] that are written-down, converted to equity and/or cancelled under Section [●] of the Indenture, which section authorizes holders of a majority in aggregate outstanding principal amount of the [Securities / Notes] to direct certain actions relating to the [Securities / Notes]; and
- (ii) the Indenture will not impose any duties upon the trustee whatsoever with respect to the exercise of the UK bail-in power by the relevant UK resolution authority,

provided, however, that notwithstanding the exercise of the UK bail-in power by the relevant UK resolution authority, so long as any [Securities / Notes] remain outstanding, there will at all times be a trustee for the [Securities / Notes] in accordance with the Indenture, and the resignation and/or removal of the trustee and the appointment of a successor trustee will continue to be governed by the Indenture, including to the extent no additional supplemental indenture or amendment is agreed upon in the event the [Securities / Notes] remain outstanding following the completion of the exercise of the UK bail-in power.

(c) By its acquisition of the [Securities / Notes], each [securityholder / noteholder] acknowledges and agrees that neither a cancellation or deemed cancellation of the principal or interest (in each case, in whole or in part), nor the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes] will give rise to a default for purposes of Section 315(b) (Notice of Default) and Section 315(c) (Duties of the Trustee in Case of Default) of the Trust Indenture Act.

By purchasing the Securities/Notes, each [securityholder / noteholder] (including each beneficial owner) shall be deemed to have authorized, directed and requested DTC and any direct participant in DTC or other intermediary through which it holds such [Securities / Notes] to take any and all necessary action, if required, to implement the exercise of the UK bail-in power with respect to the [Securities / Notes] as it may be imposed, without any further action or direction on the part of such [securityholder / noteholder].

### 3.3 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by New York law incurred by entities organized under UK law and eligible for resolution under the Banking Act 2009, as amended.

## **Section 1. Recognition of Bail-in<sup>47</sup>**

### **Section 1.01. Contractual Acknowledgment<sup>48</sup>**

Notwithstanding and to the exclusion of any other term of this *[Agreement]* or any other agreements, arrangements, or understanding between *[[BRRD Party]* and *[Creditor or Counterparty of BRRD Party]*<sup>49,50</sup> *[Creditor or Counterparty of BRRD Party]*<sup>51</sup> acknowledges and accepts that a BRRD Liability arising under this *[Agreement]* may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>52</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of *[[BRRD Party]* to *[Creditor or Counterparty of BRRD Party]*<sup>53</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>54</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of *[BRRD Party]*<sup>55</sup> or another person, and the

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<sup>47</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>48</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>49</sup> Include “*[[BRRD Party]* and *[BRRD Party]* (each a “**BRRD Party**)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>50</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>51</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>52</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>53</sup> Include “a BRRD Party (“**Relevant BRRD Party**)” to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>54</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation

<sup>55</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>56</sup> of such shares, securities or obligations;<sup>57</sup>

(iii) the cancellation of the BRRD Liability;<sup>58</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>59</sup>

(b) the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>60</sup>

#### Section 1.02. Definitions

**“Bail-in Legislation”** means Part I of the UK Banking Act 2009 and any other law or regulation applicable in the UK relating to the resolution of unsound or failing banks, investment firms or other financial institutions or their affiliates (otherwise than through liquidation, administration or other insolvency proceedings).

**“Bail-in Powers”** means the powers under the Bail-In Legislation to cancel, transfer or dilute shares issued by a person that is a bank or investment firm or affiliate of a bank or investment firm, to cancel, reduce, modify or change the form of a liability of such a person or any contract or instrument under which that liability arises, to convert all or part of that liability into shares, securities or obligations of that person or any other person, to provide that any such contract or instrument is to have effect as if a right had been exercised under it or to suspend any obligation in respect of that liability.

**“BRRD”** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

**“BRRD Liability”** means a liability in respect of which the relevant Bail-in Powers in the applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*].<sup>61</sup>

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<sup>56</sup> Include “the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>57</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>58</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>59</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>60</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>61</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

#### 4. ENTITIES ORGANIZED IN FRANCE

This section of the Model Clause Package addresses compliance with Article 55 BRRD and related requirements by entities organized under French law and eligible for resolution under Book VI, Title I, Chapter III, Section 4 of the French Monetary and Financial Code (*Code Monétaire et Financier*), as amended.

When considering which clause below to use, please choose the relevant liability (debt, or other).

- Debt instruments liability
- Other Liabilities

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in the jurisdiction of the governing law of the liability, and France, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the liability, the legal framework of the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

##### 4.1 Background – French implementation of Article 55 and the Delegated Regulation

In France, bail-in provisions were introduced pursuant to the enactment of the French decree-law No. 2015-1024 dated August 20, 2015 (*Ordonnance portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière financière*), which amended the French Monetary and Financial Code (*Code Monétaire et Financier*).

The bail-in provisions provided under the French Monetary and Financial Code (*Code Monétaire et Financier*) came into force as of January 1, 2016 and apply to liabilities undertaken following that date.

Article L.613-55-13 of the French Monetary and Financial Code (*Code Monétaire et Financier*) provides for a quasi-literal implementation of Article 55 of the BRRD into French law.

##### 4.2 Type of liability: debt liabilities<sup>62</sup>

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities incurred by entities organized under French law and eligible for resolution under the Book VI, Title I, Chapter III, Section 4 of the French Monetary and Financial Code (*Code Monétaire et Financier*), as amended.

#### **Section 1. Recognition of Bail-in**

##### Section 1.01. Acknowledgment

<sup>62</sup> Please note that this debt liabilities clause reflects discussion with French counsel and is based upon the generic version of the clause.

By its acquisition of the Notes, each Noteholder (which, for the purposes of this Condition [•], includes any current or future holder of a beneficial interest in the Notes) acknowledges, accepts, consents and agrees:

- (a) to be bound by the effect of the exercise of the Bail-in Power (as defined below) by the Relevant Resolution Authority (as defined below), which may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due (as defined below);
  - (ii) the conversion of all, or a portion, of the Amounts Due into shares, other securities or other obligations of the Issuer or another person (and the issue to the Noteholder of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the Notes, in which case the Noteholder agrees to accept in lieu of its rights under the Notes any such shares, other securities or other obligations of the Issuer or another person;
  - (iii) the cancellation of the Notes; and/or
  - (iv) the amendment or alteration of the maturity of the Notes or amendment of the amount of interest payable on the Notes, or the date on which the interest becomes payable, including by suspending payment for a temporary period;
- (b) that the terms of the Notes are subject to, and may be varied, if necessary, to give effect to, the exercise of the Bail-in Power by the Relevant Resolution Authority.

For these purposes, the “**Amounts Due**” are the Prevailing Outstanding Amount of the Notes, and any accrued and unpaid interest on the Notes that has not been previously cancelled or otherwise is no longer due.

#### Section 1.02. Bail-in Power

For these purposes, the “**Bail-in Power**” is any power existing from time to time under any laws, regulations, rules or requirements in effect in France, relating to the transposition of Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (as amended from time to time, the “**BRRD**”), including without limitation pursuant to French decree-law No. 2015-1024 dated August 20, 2015 (*Ordonnance portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière financière*) (as amended from time to time, the “**August 20, 2015 Decree Law**”), Regulation (EU) No 806/2014 of the European Parliament and of the Council of July 15, 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (as amended from time to time, the “**Single Resolution Mechanism Regulation**”), or otherwise arising under French law, and in each case the instructions, rules and standards created thereunder, pursuant to which the obligations of a Regulated Entity (or an affiliate of such Regulated Entity) can be reduced (in part or in whole), cancelled, suspended, transferred, varied or otherwise modified in any way, or securities of a Regulated Entity (or an affiliate of such

Regulated Entity) can be converted into shares, other securities, or other obligations of such Regulated Entity or any other person, whether in connection with the implementation of a bail-in tool following placement in resolution or otherwise.

A reference to a “**Regulated Entity**” is to any entity referred to in Section I of Article L.613-34 of the French Monetary and Financial Code (*Code Monétaire et Financier*) as modified by the August 20, 2015 Decree Law, which includes certain credit institutions, investment firms, and certain of their parent or holding companies established in France.

A reference to the “**Relevant Resolution Authority**” is to the *Autorité de contrôle prudentiel et de résolution* (the “ACPR”), the Single Resolution Board established pursuant to the Single Resolution Mechanism Regulation, and/or any other authority entitled to exercise or participate in the exercise of any Bail-in Power from time to time (including the Council of the European Union and the European Commission when acting pursuant to Article 18 of the Single Resolution Mechanism Regulation).

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of the Amounts Due will become due and payable or be paid after the exercise of the Bail-in Power by the Relevant Resolution Authority with respect to the Issuer unless, at the time such repayment or payment, respectively, is scheduled to become due, such repayment or payment would be permitted to be made by the Issuer under the laws and regulations in effect in France and the European Union applicable to the Issuer or other members of its group.

#### Section 1.04. No Event of Default

Neither a cancellation of the Notes, a reduction, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the Bail-in Power by the Relevant Resolution Authority with respect to the Issuer, nor the exercise of any Bail-in Power by the Relevant Resolution Authority with respect to the Notes will be an event of default or otherwise constitute non-performance of a contractual obligation, or entitle the Noteholder to any remedies (including equitable remedies) which are hereby expressly waived.

#### Section 1.05. Notice to Noteholders

Upon the exercise of any Bail-in Power by the Relevant Resolution Authority with respect to the Notes, the Issuer will provide a written notice to the Noteholders in accordance with Condition [•] (*Notices*) as soon as practicable regarding such exercise of the Bail-in Power. The Issuer will also deliver a copy of such notice to the Fiscal Agent for informational purposes, although the Fiscal Agent shall not be required to send such notice to Noteholders. Any delay or failure by the Issuer to give notice shall not affect the validity and enforceability of the Bail-in Power nor the effects on the Notes described in clauses 1 and 2 of this section.

#### Section 1.06. Duties of the Fiscal Agent

Upon the exercise of any Bail-in Power by the Relevant Resolution Authority, the Issuer and each Noteholder (including each holder of a beneficial interest in the Notes) hereby agree

that (a) the Fiscal Agent shall not be required to take any directions from Noteholders, and (b) the Agency Agreement shall impose no duties upon the Fiscal Agent whatsoever, in each case with respect to the exercise of any Bail-in Power by the Relevant Resolution Authority.

Notwithstanding the foregoing, if, following the completion of the exercise of the Bail-In Power by the Relevant Resolution Authority, any Notes remain outstanding (for example, if the exercise of the Bail-In Power results in only a partial write-down of the principal of the Notes), then the Fiscal Agent's duties under the Agency Agreement shall remain applicable with respect to the Notes following such completion to the extent that the Issuer and the Fiscal Agent shall agree pursuant to an amendment to the Agency Agreement.

#### Section 1.07. Proration

If the Relevant Resolution Authority exercises the Bail-in Power with respect to less than the total Amounts Due, unless the Fiscal Agent is otherwise instructed by the Issuer or the Relevant Resolution Authority, any cancellation, write-off or conversion made in respect of the Notes pursuant to the Bail-in Power will be made on a pro-rata basis.

#### Section 1.08. Conditions Exhaustive

The matters set forth in this Condition [•] shall be exhaustive on the foregoing matters to the exclusion of any other agreements, arrangements or understandings between the Issuer and any holder of a Note.

### 4.3 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by New York law incurred by entities organized under French law and eligible for resolution under the Book VI, Title I, Chapter III, Section 4 of the French Monetary and Financial Code (*Code Monétaire et Financier*), as amended.



## Section 1. Recognition of Bail-in<sup>63</sup>

### Section 1.01. Contractual Acknowledgment<sup>64</sup>

Notwithstanding and to the exclusion of any other term of this [Agreement] or any other agreements, arrangements, or understanding between [[BRRD Party] and [Creditor or Counterparty of BRRD Party]]<sup>65,66</sup> [Creditor or Counterparty of BRRD Party]<sup>67</sup> acknowledges and accepts that a BRRD Liability arising under this [Agreement] may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>68</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of [[BRRD Party] to [Creditor or Counterparty of BRRD Party]]<sup>69</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>70</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of [BRRD Party]<sup>71</sup> or another person, and the

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<sup>63</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>64</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>65</sup> Include “[BRRD Party] and [BRRD Party] (each a “**BRRD Party**”)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>66</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>67</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>68</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>69</sup> Include “a BRRD Party (“**Relevant BRRD Party**”) to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>70</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation

<sup>71</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>72</sup> of such shares, securities or obligations;<sup>73</sup>

(iii) the cancellation of the BRRD Liability;<sup>74</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>75</sup>

the variation of the terms of this [*Agreement*], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>76</sup>

#### Section 1.02. No Non-Performance

Neither a reduction, in part or in full, of any BRRD Liability, the conversion thereof into another security or obligation of the [*BRRD Party*] or another person, as a result of the exercise of the Bail-in Power by the Relevant Resolution Authority with respect to the [*BRRD Party*], nor the exercise of any Bail-in Power by the Relevant Resolution Authority with respect to the [*Agreement*] will be an Event of Default or otherwise constitute non-performance of a contractual obligation, or entitle the [*Creditor or Counterparty of BRRD Party*] to any remedies (including equitable remedies), which are hereby expressly waived.

#### Section 1.03. Definitions

**"Bail-In Legislation"** means Ordinance no. 2015-1024 of August 20, 2015 as it may be superseded, and any other law or regulation relating to the transposition of Directive 2014/59/EU under French law.

**"Bail-in Powers"** means any write-down, conversion, transfer, modification or suspension power existing from time to time under, and exercised in compliance with, any law or regulation in effect in France, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, including but not limited to the Bail-In Legislation and Regulation (EU) No 806/2014 and the instruments, rules and standards created thereunder, pursuant to which:

(a) any obligation of a bank or investment firm or of an affiliate of a bank or

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<sup>72</sup> Include "the other BRRD Party" where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>73</sup> Reflecting Article 63(1)(f) of the BRRD as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>74</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>75</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>76</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

investment firm, to the extent such affiliate is capable of being subject to Write-down and Conversion Powers under the Bail-In Legislation, can be reduced (in such case it may also be modified or suspended for a temporary period), cancelled, or converted into shares, other securities or other obligations of such entity or any other person; and

- (b) any right in a contract governing an obligation of a bank or investment firm or affiliate of a bank or investment firm may be deemed to have been exercised..

**“BRRD”** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

**“BRRD Liability”** means a liability in respect of which the relevant Bail-in Powers in the applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*].<sup>77</sup>

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<sup>77</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

## 5. ENTITIES ORGANIZED IN ITALY

This section of the Model Clause Package addresses compliance with Article 55 BRRD and related requirements by entities organized under Italian law and eligible for resolution under Italian Legislative Decree no. 180 of 16 November 2015 (the “**Italian BRRD Decree**”), where the governing law of the liability is New York law.

When considering which clause below to use, please choose the relevant liability (debt, or other).

- Debt instruments liability
- Other Liabilities

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in the jurisdiction of the governing law of the liability, and Italy, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the liability, the legal framework of the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

### 5.1 Background – Italian implementation of Article 55 BRRD and the Delegated Regulation

In Italy, bail-in provisions were introduced pursuant to the enactment of the Italian BRRD Decree and the Italian Legislative Decree no. 181 of 16 November 2015 (the “**Italian Decree 181**”), which amended Italian Legislative Decree no. 385 of 1 September 1993 (the “**Italian Banking Law**”) and Italian Legislative Decree no. 58 of 24 February 1998.

The bail-in provisions provided under Title IV, Chapter IV, Section III of the Italian BRRD Decree came into force as of January 2016 and apply to liabilities undertaken following that date. Article 59 of the Italian BRRD Decree implements Article 55 of the BRRD and provides that, the agreements relating to liabilities governed by the laws of non-EU jurisdictions that are included among the type of liabilities that may be subject to bail-in powers, must include “*a term by which the creditor recognizes that the liability may be subject to a possible bail-in adopted by the Bank of Italy and accepts to suffer its effects. The term shall be deemed, in any case, inserted by law in the contract, also in substitution of any conflicting terms possibly inserted by the parties, without any indemnities being due for its omission.*”

### 5.2 Type of liability: debt liabilities

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities governed by New York law incurred by entities organized under Italian law and eligible for resolution under the Italian BRRD Decree.

## **Section 1. Recognition of Bail-in<sup>78</sup>**

### **Section 1.01. Agreement and Acknowledgement with Respect to the Exercise of the Italian Bail-in Power**

Notwithstanding and to the exclusion of any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder],<sup>79</sup> by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]), acknowledges and accepts that the Amounts Due arising under these [Securities / Notes] may be subject to the exercise of Bail-in Powers by the Resolution Authority, and acknowledges, accepts, consents,<sup>80</sup> and agrees to be bound by:

- (a) the effect of the exercise of the Italian bail-in power by the relevant resolution authority,<sup>81</sup> that may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due;<sup>82</sup>
  - (ii) the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];<sup>83</sup>
  - (iii) the cancellation of the [Securities / Notes];<sup>84</sup>
  - (iv) the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes],

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<sup>78</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>79</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>80</sup> Although the delegated act does not contain the term “consent,” the Model Clause retains this term in order to satisfy section 316(b) of the Trust Indenture Act.

<sup>81</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>82</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>83</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>84</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements of Article 44(2) of the Delegated Regulation.

or the date on which the interest becomes payable, including by suspending payment for a temporary period;<sup>85</sup>

- (b) the variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of the Italian bail-in power by the relevant resolution authority.<sup>86</sup>

#### Section 1.02. Definitions

- (a) For these purposes, the “Amounts Due” are the principal amount of [or outstanding amount],<sup>87</sup> together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of the bail-in power by the relevant resolution authority.]<sup>88</sup>
- (b) For these purposes, the “Italian bail-in power” is any write-down, conversion, transfer, modification, or suspension power existing from time to time under, and exercised in compliance with, any laws, regulations, rules or requirements in effect in Italy, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**BRRD**”) as amended from time to time, or pursuant to, and in accordance with, Regulation 806/2014 establishing uniform rules and uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Single Resolution Fund (the “**SRM Regulation**”), pursuant to which any obligation of a regulated entity (or other affiliate of such regulated entity) can be reduced, cancelled, modified, or converted into shares, other securities, or other obligations of such regulated entity or any other person (or suspended for a temporary period).
- (c) A reference to a “regulated entity” is to any (i) credit institution, established in Italy, (ii) parent company of an Italian banking group, (iii) entity belonging to a banking group pursuant to articles 60 and 61 of the Italian Banking Law, (iv) entity subject to consolidated supervision pursuant to article 65, paragraph 1, lit. c) and h) of the Italian Banking Law and (v) entity established in Italy subject to the consolidated supervision of another EU member state.

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<sup>85</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>86</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>87</sup> **Note to counsel preparing the transaction disclosure:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient.

<sup>88</sup> Relevant for AT1 and Subordinated Tier 2 issuances.

- (d) A reference to the “relevant resolution authority” is to (i) the Bank of Italy, (ii) the Single Resolution Board (the “**SRB**”) established pursuant to the SRM Regulation and defined therein, and/or any other authority entitled to exercise or to participate in the exercise of any bail-in power from time to time pursuant to a resolution regulation.
- (e) A reference to a “resolution regulation” is to (i) the Italian BRRD Decree, the Italian Decree 181 as well as any laws, regulations, rules or requirements, in each case as amended from time to time, in effect in Italy relating to the transposition of the BRRD, as amended from time to time, and/or (ii) the SRM.

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of Amounts Due on the [Securities/Notes] will become due and payable or be paid after the exercise of any Italian bail-in power by the relevant resolution authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

#### Section 1.04. Event of default

Neither the cancellation of the [Securities / Notes], a reduction of all or a portion of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the Italian bail-in power by the relevant resolution authority with respect to the Issuer, nor the exercise of the Italian bail-in power by the relevant resolution authority with respect to the [Securities / Notes] will be an event of default.<sup>89</sup>

#### Section 1.05. Notice to [Securityholders / Noteholders]

Upon the exercise of the Italian bail-in power by the relevant resolution authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [DTC / the clearing system] as soon as practicable regarding such exercise of the Italian bail-in power.<sup>90</sup> The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

#### Section 1.06. Trust Indenture Act <sup>91</sup>

- (a) By its acquisition of the [Securities / Notes], each [securityholder / noteholder], (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Security / Note]), to the extent permitted by the Trust Indenture Act, will waive any and all claims, in law and/or in equity, against the trustee for,

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<sup>89</sup> **Note to counsel preparing the transaction disclosure:** Capitalize “event of default” if the term is defined in the terms and conditions.

<sup>90</sup> **Note to counsel preparing the transaction disclosure:** Revise as appropriate to reflect the notices clause in the terms and conditions.

<sup>91</sup> **Note to counsel preparing the transaction disclosure:** These provisions are only necessary if the relevant instrument is subject to the Trust Indenture Act. Please consult issuer’s counsel to determine whether necessary.

agree not to initiate a suit against the trustee in respect of, and agree that the trustee will not be liable for, any action that the trustee takes, or abstains from taking, in either case in accordance with the exercise of any Italian bail-in power by the Bank of Italy, the SRB or any relevant resolution authority with respect to the [Securities / Notes].

(b) Additionally, by its acquisition of the [Securities / Notes], each [securityholder / noteholder] will acknowledge and agree that, upon the exercise of the Italian bail-in power by the Bank of Italy, the SRB or any other relevant resolution authority:

(i) the trustee will not be required to take any further directions from the [securityholders / noteholders] with respect to any portion of the [Securities / Notes] that are written-down, converted to equity and/or cancelled under Section [●] of the Indenture, which section authorizes holders of a majority in aggregate outstanding principal amount of the [Securities / Notes] to direct certain actions relating to the [Securities / Notes]; and

(ii) the Indenture will not impose any duties upon the trustee whatsoever with respect to the exercise of the Italian bail-in power by the Bank of Italy, the SRB or any other relevant resolution authority,

provided, however, that notwithstanding the exercise of the Italian bail-in power by the Bank of Italy, the SRB or any other relevant resolution authority, so long as any [Securities / Notes] remain outstanding, there will at all times be a trustee for the [Securities / Notes] in accordance with the Indenture, and the resignation and/or removal of the trustee and the appointment of a successor trustee will continue to be governed by the Indenture, including to the extent no additional supplemental indenture or amendment is agreed upon in the event the [Securities / Notes] remain outstanding following the completion of the exercise of the Italian bail-in power.

(c) By its acquisition of the [Securities / Notes], each [securityholder / noteholder] acknowledges and agrees that neither a cancellation or deemed cancellation of the principal or interest (in each case, in whole or in part), nor the exercise of the Italian bail-in power by the Bank of Italy, the SRB or any other relevant resolution authority with respect to the [Securities / Notes] will give rise to a default for purposes of Section 315(b) (Notice of Default) and Section 315(c) (Duties of the Trustee in Case of Default) of the Trust Indenture Act.

By purchasing the Securities/Notes, each [securityholder / noteholder] (including each beneficial owner) shall be deemed to have authorized, directed and requested DTC and any direct participant in DTC or other intermediary through which it holds such [Securities / Notes] to take any and all necessary action, if required, to implement the exercise of the Italian bail-in power with respect to the [Securities / Notes] as it may be imposed, without any further action or direction on the part of such [securityholder / noteholder].



### 5.3 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by New York law incurred by entities organized under Italian law and eligible for resolution under the Italian BRRD Decree.

## Section 1. Recognition of Bail-in<sup>92</sup>

### Section 1.01. Contractual Acknowledgment<sup>93</sup>

Notwithstanding and to the exclusion of any other term of this *[Agreement]* or any other agreements, arrangements, or understanding between *[[BRRD Party]* and *[Creditor or Counterparty of BRRD Party]*<sup>94, 95</sup> *[Creditor or Counterparty of BRRD Party]*<sup>96</sup> acknowledges and accepts that a BRRD Liability arising under this *[Agreement]* may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>97</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of *[[BRRD Party]* to *[Creditor or Counterparty of BRRD Party]*<sup>98</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>99</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of *[BRRD Party]*<sup>100</sup> or another person, and

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<sup>92</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>93</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>94</sup> Include “*[BRRD Party]* and *[BRRD Party]* (each a “**BRRD Party**”)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>95</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>96</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>97</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>98</sup> Include “a BRRD Party (“**Relevant BRRD Party**”) to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>99</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>100</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

the issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>101</sup> of such shares, securities or obligations;<sup>102</sup>

(iii) the cancellation of the BRRD Liability;<sup>103</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>104</sup>

(b) the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>105</sup>

#### Section 1.02. Definitions

**"Bail-In Legislation"** means the Italian Legislative Decrees no. 180 and 181 of November 16, 2015 (as implemented and integrated from time to time) relating to the resolution of banks, banking group companies, credit institutions, investment firms or financial institutions, or any of their affiliates.

**"Bail-in Powers"** means any write-down, conversion, transfer, modification or suspension power existing from time to time under, and exercised in compliance with, any law or regulation in effect in Italy, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, including but not limited to the Bail-In Legislation and Regulation (EU) No 806/2014 and the instruments, rules and standards created thereunder, pursuant to which:

(a) any obligation of a bank or investment firm or affiliate of a bank or investment firm can be reduced, cancelled, modified or converted into shares, other securities or other obligations of such entity or any other person (or suspended for a temporary period); and

(b) any right in a contract governing an obligation of a bank or investment firm or affiliate of a bank or investment firm may be deemed to have been exercised..

**"BRRD"** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

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<sup>101</sup> Include "the other BRRD Party" where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>102</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>103</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>104</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>105</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

**“BRRD Liability”** means a liability in respect of which the relevant Bail-in Powers in the applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*].<sup>106</sup>

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<sup>106</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

## 6. ENTITIES ORGANIZED IN BELGIUM

This section of the Model Clause Package addresses compliance with Article 55 BRRD and related requirements by entities organized under Belgian law and capable of being subject to resolution under the Law of April 25, 2014 on the legal status and supervision of credit institutions, as amended (the “Law of April 25, 2014”), where the governing law of the liability is New York law.

When considering which clause below to use, please choose the relevant liability (debt, or other).

- Debt instruments liability
- Other Liabilities

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in the jurisdiction of the governing law of the liability, and in Belgium, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the liability, the legal framework of the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

### 6.1 **Background – Belgium implementation of Article 55 BRRD and the Delegated Regulation**

In Belgium, the bail-in resolution tool has been implemented by the Law of April 25, 2014 as amended by the Royal Decree of December 18, 2015 amending the Law of April 25, 2014 on the legal status and supervision of credit institutions, and the Royal Decree of December 26, 2015 amending the Law of April 25, 2014 on the legal status and supervision of credit institutions with respect to recovery and resolution of groups.

The bail-in provisions of the Law of April 25, 2014 entered into force on January 1, 2016.

Articles 267/15 (with respect to credit institutions) and 453 (with respect to financial holding companies, and financial institutions members of a banking group subject to supervision on a consolidated basis) of the Law of April 25, 2014 provide for a literal implementation of Article 55 BRRD into Belgian law.

### 6.2 **Type of liability: debt liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities governed by New York law incurred by entities organized under Belgian law and capable of being subject to resolution under the Law of April 25, 2014.

## **Section 1. Recognition of Bail-in<sup>107</sup>**

### **Section 1.01. Agreement and Acknowledgment with Respect to the Exercise of the Belgium Bail-in Power**

Notwithstanding and to the exclusion of any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder],<sup>108</sup> by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]), acknowledges and accepts that the Amounts Due arising under these [Securities / Notes] may be subject to the exercise of Bail-in Powers by the Resolution Authority, and acknowledges, accepts, consents,<sup>109</sup> and agrees to be bound by:

- (a) the effect of the exercise of the bail-in power by the relevant resolution authority,<sup>110</sup> that may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due;<sup>111</sup>
  - (ii) the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];<sup>112</sup>
  - (iii) the cancellation of the [Securities / Notes];<sup>113</sup>
  - (iv) the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes],

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<sup>107</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>108</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>109</sup> Although the delegated act does not contain the term “consent,” the Model Clause retains this term in order to satisfy section 316(b) of the Trust Indenture Act.

<sup>110</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>111</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>112</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>113</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements of Article 44(2) of the Delegated Regulation.

or the date on which the interest becomes payable, including by suspending payment for a temporary period;<sup>114</sup>

- (b) the variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of the bail-in power by the relevant resolution authority.<sup>115</sup>

#### Section 1.02. Definitions

- (a) For these purposes, the “Amounts Due” are the principal amount of [or outstanding amount],<sup>116</sup> together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of the bail-in power by the relevant resolution authority.]<sup>117</sup>
- (b) For these purposes, the “bail-in power” is any write-down, conversion, transfer, modification, or suspension power existing from time to time under, and exercised in compliance with, any laws, regulations, rules or requirements in effect in Belgium, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**BRRD**”) as amended from time to time, including but not limited to the Law of April 25, 2014 as amended from time to time, or pursuant to, and in accordance with, Regulation 806/2014 establishing uniform rules and uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Single Resolution Fund (the “**SRM Regulation**”), and the instruments, rules and standards created thereunder, pursuant to which any obligation of a regulated entity (or other affiliate of such regulated entity) can be reduced, cancelled, modified, or converted into shares, other securities, or other obligations of such regulated entity or any other person (or suspended for a temporary period);
- (c) A reference to a “regulated entity” is to any entity referred to in Article 267/15 or Article 453 of the Law of April 25, 2014 or Article 2 of the SRM, as the case may be, in each case as amended from time to time, which includes certain credit institutions, investment firms, and certain of their parent or holding companies.
- (d) A reference to the “relevant resolution authority” is to the *Collège de résolution* /

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<sup>114</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>115</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>116</sup> **Note to counsel preparing the transaction disclosure:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient.

<sup>117</sup> Relevant for AT1 and Subordinated Tier 2 issuances.

*Afwikkelingscollege* of the National Bank of Belgium, the Single Resolution Board established pursuant to the SRM Regulation and defined therein, and/or any other authority entitled to exercise or to participate in the exercise of any bail-in power from time to time.

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of Amounts Due on the [Securities / Notes] will become due and payable or be paid after the exercise of any bail-in power by the relevant resolution authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

#### Section 1.04. Event of default

Neither a reduction or cancellation, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the bail-in power by the relevant resolution authority with respect to the Issuer, nor the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes] will be an event of default or otherwise constitute non-performance of a contractual obligation.<sup>118</sup>

#### Section 1.05. Notice to [Securityholders / Noteholders]

Upon the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [DTC / the clearing system] as soon as practicable regarding such exercise of the bail-in power.<sup>119</sup> The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

#### Section 1.06. Trust Indenture Act<sup>120</sup>

- (a) By its acquisition of the [Securities / Notes], each [securityholder / noteholder], (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Security / Note]), to the extent permitted by the Trust Indenture Act, will waive any and all claims, in law and/or in equity, against the trustee for, agree not to initiate a suit against the trustee in respect of, and agree that the trustee will not be liable for, any action that the trustee takes, or abstains from taking, in either case in accordance with the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes].
- (b) Additionally, by its acquisition of the [Securities / Notes], each [securityholder /

<sup>118</sup> **Note to counsel preparing the transaction disclosure:** Capitalize “event of default” if the term is defined in the terms and conditions.

<sup>119</sup> **Note to counsel preparing the transaction disclosure:** Revise as appropriate to reflect the notices clause in the terms and conditions.

<sup>120</sup> **Note to counsel preparing the transaction disclosure:** These provisions are only necessary if the relevant instrument is subject to the Trust Indenture Act. Please consult issuer’s counsel to determine whether necessary.



noteholder] will acknowledge and agree that, upon the exercise of the bail-in power by the relevant resolution authority:

- (i) the trustee will not be required to take any further directions from the [securityholders / noteholders] with respect to any portion of the [Securities / Notes] that are written-down, converted to equity and/or cancelled under Section [●] of the Indenture, which section authorizes holders of a majority in aggregate outstanding principal amount of the [Securities / Notes] to direct certain actions relating to the [Securities / Notes]; and
- (ii) the Indenture will not impose any duties upon the trustee whatsoever with respect to the exercise of the bail-in power by the relevant resolution authority,

provided, however, that notwithstanding the exercise of the bail-in power by the relevant resolution authority, so long as any [Securities / Notes] remain outstanding, there will at all times be a trustee for the [Securities / Notes] in accordance with the Indenture, and the resignation and/or removal of the trustee and the appointment of a successor trustee will continue to be governed by the Indenture, including to the extent no additional supplemental indenture or amendment is agreed upon in the event the [Securities / Notes] remain outstanding following the completion of the exercise of the bail-in power.

- (c) By its acquisition of the [Securities / Notes], each [securityholder / noteholder] acknowledges and agrees that neither a cancellation or deemed cancellation of the principal or interest (in each case, in whole or in part), nor the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes] will give rise to a default for purposes of Section 315(b) (Notice of Default) and Section 315(c) (Duties of the Trustee in Case of Default) of the Trust Indenture Act.

By purchasing the Securities/Notes, each [securityholder / noteholder] (including each beneficial owner) shall be deemed to have authorized, directed and requested DTC and any direct participant in DTC or other intermediary through which it holds such [Securities / Notes] to take any and all necessary action, if required, to implement the exercise of the bail-in power with respect to the [Securities / Notes] as it may be imposed, without any further action or direction on the part of such [securityholder / noteholder].

### 6.3 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by New York law incurred by entities organized under Belgian law and capable of being subject to resolution under the Law of April 25, 2014.

## **Section 1. Recognition of Bail-in<sup>121</sup>**

### **Section 1.01. Contractual Acknowledgment<sup>122</sup>**

Notwithstanding and to the exclusion of any other term of this *[Agreement]* or any other agreements, arrangements, or understanding between *[[BRRD Party]* and *[Creditor or Counterparty of BRRD Party]*<sup>123,124</sup> *[Creditor or Counterparty of BRRD Party]*<sup>125</sup> acknowledges and accepts that a BRRD Liability arising under this *[Agreement]* may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>126</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of *[[BRRD Party]* to *[Creditor or Counterparty of BRRD Party]*<sup>127</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>128</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of *[BRRD Party]*<sup>129</sup> or another person, and

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<sup>121</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>122</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>123</sup> Include “*[BRRD Party]* and *[BRRD Party]* (each a “**BRRD Party**”)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>124</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>125</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>126</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>127</sup> Include “a BRRD Party (“**Relevant BRRD Party**”) to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>128</sup> Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation

<sup>129</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

the issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>130</sup> of such shares, securities or obligations;<sup>131</sup>

(iii) the cancellation of the BRRD Liability;<sup>132</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>133</sup>

(b) the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>134</sup>

#### Section 1.02. Definitions

**"Bail-In Legislation"** means the law of April 25, 2014 on the status and supervision of credit institutions, and any other law or regulation relating to the transposition of Directive 2014/59/EU under Belgian law.

**"Bail-in Powers"** means any write-down, conversion, transfer, modification or suspension power existing from time to time under, and exercised in compliance with, any law or regulation in effect in Belgium, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, including but not limited to the Bail-In Legislation and Regulation (EU) No 806/2014 and the instruments, rules and standards created thereunder, pursuant to which:

(a) any obligation of a bank or investment firm or affiliate of a bank or investment firm can be reduced, cancelled, modified or converted into shares, other securities or other obligations of such entity or any other person (or suspended for a temporary period); and

(b) any right in a contract governing an obligation of a bank or investment firm or affiliate of a bank or investment firm may be deemed to have been exercised..

**"BRRD"** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

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<sup>130</sup> Include "the other BRRD Party" where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>131</sup> Reflecting Article 63(1)(f) of the BRRD, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>132</sup> Reflecting Article 63(1)(g) of the BRRD, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>133</sup> Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>134</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

**“BRRD Liability”** means a liability in respect of which the relevant Bail-in Powers in the applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*].<sup>135</sup>

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<sup>135</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

## 7. ENTITIES ORGANIZED IN GERMANY

This section of the Model Clause Package addresses compliance with Article 55 BRRD and related requirements by entities organized under German law and eligible for resolution under the German Act on Recovery and Resolution of Institutions and Financial Groups (*Sanierungs- und Abwicklungsgesetz*, the “**German Recovery and Resolution Act**”) and Regulation 806/2014 establishing uniform rules and uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Single Resolution Fund (the “**SRM Regulation**”), in each case as amended, where the governing law of the liability is New York law.

When considering which clause below to use, please choose the relevant liability (debt, or other).

- Debt instruments liability
- Other Liabilities

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in the jurisdiction of the governing law of the liability, and in Germany, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the liability, the legal framework of the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

### 7.1 Background – German implementation of Article 55 BRRD and the Delegated Regulation

In Germany, bail-in provisions were introduced prior to the EU deadline of January 1, 2016. The German Act on the Implementation of the BRRD (*BRRD-Umsetzungsgesetz*, the “**German BRRD Implementation Act**”) implemented the BRRD in Germany. Among other things, the BRRD Implementation Act introduced the German Act on Recovery and Resolution of Institutions and Financial Groups (*Sanierungs- und Abwicklungsgesetz*, the “**German Recovery and Resolution Act**”), which also implemented Article 55 BRRD into German law. The German Recovery and Resolution Act became effective in large part on January 1, 2015. The German Recovery and Resolution Act as well as other laws were amended in November 2015 by the German Resolution Mechanism Act (*Abwicklungsmechanismusgesetz*), which conformed German law to the SRM Regulation. However, the German Resolution Mechanism Act did not change the provision that implemented Article 55 BRRD into German law.

### 7.2 Type of liability: debt liabilities

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to debt liabilities governed by New York law incurred by entities organized under German law and eligible for resolution under the German Recovery and Resolution Act and Resolution Act and the SRM Regulation, in each case, as amended.

## **Section 1. Recognition of Bail-in<sup>136</sup>**

### **Section 1.01. Agreement and Acknowledgment with Respect to the Exercise of the Bail-in Power**

Notwithstanding and to the exclusion of any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder],<sup>137</sup> by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]), acknowledges and accepts that the Amounts Due arising under these [Securities / Notes] may be subject to the exercise of Bail-in Powers by the Resolution Authority, and acknowledges, accepts, consents,<sup>138</sup> and agrees to be bound by:

- (a) the effect of the exercise of the bail-in power by the relevant resolution authority,<sup>139</sup> that may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the Amounts Due;<sup>140</sup>
  - (ii) the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];<sup>141</sup>
  - (iii) the cancellation of the [Securities / Notes];<sup>142</sup>
  - (iv) the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes],

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<sup>136</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>137</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>138</sup> Although the delegated act does not contain the term “consent,” the Model Clause retains this term in order to satisfy section 316(b) of the Trust Indenture Act.

<sup>139</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>140</sup> Reflecting Article 63(1)(e) BRRD / Section 90 German Recovery and Resolution Act, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>141</sup> Reflecting Article 63(1)(f) BRRD / Section 90 German Recovery and Resolution Act, as per the requirement in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>142</sup> Reflecting Article 63(1)(g) of the BRRD / Section 90 Germany Recovery and Resolution Act, as per the requirements in Article 44(2) of the Delegated Regulation.

or the date on which the interest becomes payable, including by suspending payment for a temporary period;<sup>143</sup>

- (b) The variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of the bail-in power by the relevant resolution authority.<sup>144</sup>

#### Section 1.02. Definitions

- (a) For these purposes, the “**Amounts Due**” are the principal amount of [or outstanding amount],<sup>145</sup> together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of the bail-in power by the relevant resolution authority.]<sup>146</sup>
- (b) For these purposes, the “**bail-in power**” is any write-down, conversion, transfer, modification, or suspension power existing from time to time under, and exercised in compliance with, any laws, regulations, rules or requirements in effect in Germany, relating to the transposition of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**BRRD**”) as amended from time to time, including but not limited to the German Act on Recovery and Resolution of Institutions and Financial Groups (Sanierungs- und Abwicklungsgesetz, the “**German Recovery and Resolution Act**”), as amended from time to time, or pursuant to, and in accordance with, Regulation 806/2014 establishing uniform rules and uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Single Resolution Fund (the “**SRM Regulation**”), and the instruments, rules and standards created thereunder, pursuant to which any obligation of a regulated entity (or other affiliate of such regulated entity) can be reduced, cancelled, modified, or converted into shares, other securities, or other obligations of such regulated entity or any other person (or suspended for a temporary period)
- (c) A reference to a “**regulated entity**” is to any entity referred to in Section 1 of the German Recovery and Resolution Act, or Article 2 of the SRM Regulation, as the case may be, in each case as amended from time to time, which includes certain

<sup>143</sup> Reflecting Article 63(1)(j) BRRD / Section 78(1) no. 3 German Recovery and Resolution Act, as per the requirement in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>144</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

<sup>145</sup> **Note to counsel preparing the transaction disclosure:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient.

<sup>146</sup> Relevant for AT1 and Subordinated Tier 2 issuances.

credit institutions, investment firms, and certain of their parent or holding companies.

- (d) A reference to the “**relevant resolution authority**” is to the German Federal Agency for Financial Market Stabilization (*Bundesanstalt für Finanzmarktstabilisierung*), the Single Resolution Board established pursuant to the SRM Regulation and defined therein, and/or any other authority entitled to exercise or participate in the exercise of any bail-in power from time to time.

#### Section 1.03. Payment of Interest and Other Outstanding Amounts Due

No repayment or payment of Amounts Due on the [Securities / Notes] will become due and payable or be paid after the exercise of any bail-in power by the relevant resolution authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

#### Section 1.04. Event of default

Neither a reduction or cancellation, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the bail-in power by the relevant resolution authority with respect to the Issuer, nor the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes] will be an event of default.<sup>147</sup>

#### Section 1.05. Notice to [Securityholders / Noteholders]

Upon the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [DTC / the clearing system] as soon as practicable regarding such exercise of the bail-in power.<sup>148</sup> The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

#### Section 1.06. Trust Indenture Act<sup>149</sup>

- (a) By its acquisition of the [Securities / Notes], each [securityholder / noteholder], (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Security / Note]), to the extent permitted by the Trust Indenture Act, will waive any and all claims, in law and/or in equity, against the trustee for, agree not to initiate a suit against the trustee in respect of, and agree that the trustee will not be liable for, any action that the trustee takes, or abstains from

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<sup>147</sup> **Note to counsel preparing the transaction disclosure:** Capitalize “event of default” if the term is defined in the terms and conditions.

<sup>148</sup> **Note to counsel preparing the transaction disclosure:** Revise as appropriate to reflect the notices clause in the terms and conditions.

<sup>149</sup> **Note to counsel preparing the transaction disclosure:** These provisions are only necessary if the relevant instrument is subject to the Trust Indenture Act. Please consult issuer’s counsel to determine whether necessary.



taking, in either case in accordance with the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes].

- (b) Additionally, by its acquisition of the [Securities / Notes], each [securityholder / noteholder] will acknowledge and agree that, upon the exercise of the bail-in power by the relevant resolution authority:
  - (i) the trustee will not be required to take any further directions from the [securityholders / noteholders] with respect to any portion of the [Securities / Notes] that are written-down, converted to equity and/or cancelled under Section [●] of the Indenture, which section authorizes holders of a majority in aggregate outstanding principal amount of the [Securities / Notes] to direct certain actions relating to the [Securities / Notes]; and
  - (ii) the Indenture will not impose any duties upon the trustee whatsoever with respect to the exercise of the bail-in power by the relevant resolution authority,

provided, however, that notwithstanding the exercise of the bail-in power by the relevant resolution authority, so long as any [Securities / Notes] remain outstanding, there will at all times be a trustee for the [Securities / Notes] in accordance with the Indenture, and the resignation and/or removal of the trustee and the appointment of a successor trustee will continue to be governed by the Indenture, including to the extent no additional supplemental indenture or amendment is agreed upon in the event the [Securities / Notes] remain outstanding following the completion of the exercise of the bail-in power.

- (c) By its acquisition of the [Securities / Notes], each [securityholder / noteholder] acknowledges and agrees that neither a cancellation or deemed cancellation of the principal or interest (in each case, in whole or in part), nor the exercise of the bail-in power by the relevant resolution authority with respect to the [Securities / Notes] will give rise to a default for purposes of Section 315(b) (Notice of Default) and Section 315(c) (Duties of the Trustee in Case of Default) of the Trust Indenture Act.

By purchasing the Securities/Notes, each [securityholder / noteholder] (including each beneficial owner) shall be deemed to have authorized, directed and requested DTC and any direct participant in DTC or other intermediary through which it holds such [Securities / Notes] to take any and all necessary action, if required, to implement the exercise of the bail-in power with respect to the [Securities / Notes] as it may be imposed, without any further action or direction on the part of such [securityholder / noteholder].

### 7.3 **Type of liability: Other Liabilities**

This section of the Model Clause Package addresses compliance with Article 55 and related requirements with respect to Other Liabilities governed by New York law incurred by

entities organized under German law and eligible for resolution under the German Recovery and Resolution Act and Resolution Act and the SRM Regulation, in each case, as amended.

## **Section 1. Recognition of Bail-in<sup>150</sup>**

### **Section 1.01. Contractual Acknowledgment<sup>151</sup>**

Notwithstanding and to the exclusion of any other term of this *[Agreement]* or any other agreements, arrangements, or understanding between *[[BRRD Party]* and *[Creditor or Counterparty of BRRD Party]*<sup>152,153</sup> *[Creditor or Counterparty of BRRD Party]*<sup>154</sup> acknowledges and accepts that a BRRD Liability arising under this *[Agreement]* may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority,<sup>155</sup> and acknowledges, accepts, and agrees to be bound by:

- (a) the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of *[[BRRD Party]* to *[Creditor or Counterparty of BRRD Party]*<sup>156</sup> under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:
  - (i) the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;<sup>157</sup>
  - (ii) the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of *[BRRD Party]*<sup>158</sup> or another person, and

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<sup>150</sup> **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

<sup>151</sup> **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing this contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

<sup>152</sup> Include “*[BRRD Party]* and *[BRRD Party]* (each a “**BRRD Party**)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>153</sup> Reflecting Article 44(4) of the [Delegated Regulation](#).

<sup>154</sup> Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>155</sup> Reflecting Article 44(1) of the Delegated Regulation.

<sup>156</sup> Include “a BRRD Party (“**Relevant BRRD Party**)” to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>157</sup> Reflecting Article 63(1)(e) of the BRRD / Section 90 German Recovery and Resolution Act, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>158</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

the issue to or conferral on [*Creditor or Counterparty of BRRD Party*]<sup>159</sup> of such shares, securities or obligations;<sup>160</sup>

(iii) the cancellation of the BRRD Liability;<sup>161</sup>

(iv) the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;<sup>162</sup>

(b) the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.<sup>163</sup>

#### Section 1.02. Definitions

**"Bail-In Legislation"** means (i) the Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz, "SAG") which implements the Directive 2014/59/EU and (ii) the Regulation (EU) No 806/2014.

**"Bail-in Powers"** means any write-down, conversion, transfer, modification or suspension power existing from time to time under, and exercised in compliance with, any law or regulation in effect in Germany, relating to the Bail-In Legislation and the instruments, rules and standards created thereunder, pursuant to which:

(a) any obligation of a bank or investment firm or affiliate of a bank or investment firm can be reduced, cancelled, modified or converted into shares, other securities or other obligations of such entity or any other person (or suspended for a temporary period); and

(b) any right in a contract governing an obligation of a bank or investment firm or affiliate of a bank or investment firm may be deemed to have been exercised.

**"BRRD"** means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

**"BRRD Liability"** means a liability in respect of which the relevant Bail-in Powers in the

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<sup>159</sup> Include "the other BRRD Party" where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

<sup>160</sup> Reflecting Article 63(1)(f) of the BRRD / Section 90 German Recovery and Resolution Act, as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

<sup>161</sup> Reflecting Article 63(1)(g) of the BRRD / Section 90 Germany Recovery and Resolution Act, as per the requirements in Article 44(2) of the Delegated Regulation.

<sup>162</sup> Reflecting Article 63(1)(j) of the BRRD / Section 78(1) no. 3 German Recovery and Resolution Act, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

<sup>163</sup> Reflecting Article 44(3)(b) of the Delegated Regulation.

applicable Bail-in Legislation may be exercised.

**“Relevant Resolution Authority”** means the resolution authority with the ability to exercise any Bail-in Powers in relation to [*BRRD Party*].<sup>164</sup>

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<sup>164</sup> Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

# / About AFME

The Association for Financial Markets in Europe (AFME) is the voice of Europe's wholesale financial markets.

We represent the leading global and European banks and other significant capital market players.

We believe that liquid capital markets and a well-functioning banking system are central to any successful modern economy.

We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

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**London Office**

39th Floor  
25 Canada Square  
London, E14 5LQ  
United Kingdom

Switchboard:  
+44 (0)20 3828 2700

**Brussels Office**

Rue de la Loi, 82  
1040 Brussels  
Belgium

Switchboard:  
+32 (0)2 788 3971

**Press enquiries**

Rebecca Hansford  
rebecca.hansford@afme.eu  
+44 (0)20 3828 2693

**Membership**

membership@afme.eu  
+44 (0)20 3828 2700

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