

**MEMO# 32996**

December 18, 2020

# **EBA Publishes Final Draft Regulatory Technical Standards on Contractual Recognition of BRRD Resolution Stays**

[32996]

December 18, 2020 TO: ICI Members

ICI Global Members

Derivatives Markets Advisory Committee

ICI Global Regulated Funds Committee

ICI Global Trading & Markets Committee SUBJECTS: Derivatives

International/Global

Investment Advisers

Trading and Markets RE: EBA Publishes Final Draft Regulatory Technical Standards on Contractual Recognition of BRRD Resolution Stays

Following its May consultation, the European Banking Authority (EBA) has published final draft regulatory technical standards (RTS) on the contractual recognition of stay powers under the European Bank Recovery and Resolution Directive (BRRD).[\[1\]](#) Under BRRD, EU member states are required to implement amendments to BRRD into national law by December 28, 2020. The final draft RTS, which are summarized below, have been submitted to the European Commission (EC) for endorsement and will be deemed adopted, following a three-month no-objection period. After that, the RTS will enter into force 20 days after publication in the *Official Journal of the European Union*.[\[2\]](#)

## **Background**

In June 2019, the EU adopted final amendments to moratorium powers under BRRD.[\[3\]](#) The amendments included a provision on cross-border recognition of resolution stays for financial contracts subject to third-country laws. EU member states must require EU banks to include, in financial contracts governed by third-country law, terms by which the parties recognize that the contract may be subject to the exercise of moratorium powers by resolution authorities, as if the contract were governed by the law of the relevant member state. The amendments to BRRD required the EBA to develop draft RTS to determine the contents of this requirement. In May, EBA launched a consultation requesting feedback on its draft RTS.[\[4\]](#)

## **The Final Draft RTS**

The final draft RTS are substantially similar to the draft RTS EBA published in May. In

response to concerns raised by commenters, however, EBA has made some notable revisions, which we highlight below.

The final draft RTS include a list of mandatory components that would be applicable to EU banks entering into financial contracts under third-country law. The final draft RTS are intended to ensure that the parties to the contract recognize that the contract may be subject to the exercise of moratorium powers by resolution authorities under BRRD. These mandatory provisions include acknowledgment by the parties that:

- The contract may be subject to the exercise of stay powers, including a description of, or a reference to, those powers (EBA revised this provision to permit a reference to the relevant provisions of BRRD, in lieu of a description);<sup>[5]</sup>
- They are bound by the powers under BRRD to suspend or restrict certain rights and obligations; and
- The contractual recognition term is exhaustive on the matters it describes, to the exclusion of other agreements (EBA made clarifying changes to the language of this provision).

In a change from the May draft RTS, EBA has deleted the provision that would have required the parties to acknowledge that the contractual term is subject to EU law.<sup>[6]</sup> This proposed requirement had raised significant concern among commenters. EBA, however, failed to provide for grandfathering of existing financial contracts that reference stay powers, or provide for a longer implementation period. On the latter point, EBA acknowledged commenters' concerns about the time that may be needed for repapering of contracts and, potentially, the development of revised industry protocols, but noted that "the timing of the requirement to include the contractual recognition term for stay powers is regulated by the transposition into national law of BRRD2, for which the deadline is 28 December 2020."<sup>[7]</sup>

Sarah A. Bessin  
Associate General Counsel

#### endnotes

<sup>[1]</sup> EBA, Final Report: Draft regulatory technical standards on the contractual recognition of stay powers under Article 71a(5) of Directive 2014/59/EU, EBA/RTS/2020/10 (Dec. 16, 2020), *available at* [https://eba.europa.eu/sites/default/documents/files/document\\_library/Publications/Draft%20Technical%20Standards/2020/RTS/961455/Draft%20RTS%20on%20stay%20powers%20%28art71a\\_BRRD%29.pdf](https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2020/RTS/961455/Draft%20RTS%20on%20stay%20powers%20%28art71a_BRRD%29.pdf).

<sup>[2]</sup> We appreciate that this timing raises the question of the sequencing of the implementation of amendments to BRRD and the transposition of the RTS into national law, as well as how the relevant provisions of BRRD may be enforced during any interim period. We understand that the EC and EBA are aware of this issue.

<sup>[3]</sup> For a summary of the amendments to BRRD, please see ICI Memorandum No. 31833 (July 2, 2019), *available at* [https://www.ici.org/my\\_ici/memorandum/memo31833](https://www.ici.org/my_ici/memorandum/memo31833).

[4] For a summary of the draft RTS, please see ICI Memorandum No. 32466 (May 19, 2020), available at [https://www.ici.org/my\\_ici/memorandum/memo32466](https://www.ici.org/my_ici/memorandum/memo32466).

[5] EBA explains that “[i]n some cases, a description may be more suitable, while at other times a reference may be more appropriate.”

[6] EBA notes, however, that it would “encourage institutions, where possible, to consider subjecting the contractual recognition term to EU law.”

[7] EBA explained further its view that “[d]elaying the entry into force of these RTS would in practice, create a void: the law will require the inclusion of the contractual term but there will be no standardized requirement for this contractual term.”

---

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.