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July 2, 2019

EU Publishes Amendments to BRRD Moratorium Powers

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July 2, 2019 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: EU Publishes Amendments to BRRD Moratorium Powers

Last month, the final legislative texts for the EU banking package, including amendments to moratorium powers under the European Bank Recovery and Resolution Directive (BRRD), were published in the EU Official Journal.[1] EU member states now have until December 28, 2020 to implement the amendments under national law.

As background, in November 2016, the European Commission proposed amendments to BRRD that would add two additional moratorium powers to BRRD, a pre-resolution stay and an in-resolution stay.[2] Each of these new moratorium powers could be applied for up to five working days, in addition to the existing two working day stay power under BRRD, resulting in a stay of up to 12 working days or more. ICI Global, in coordination with SIFMA AMG, urged EU authorities to limit moratoria under BRRD to no longer than two business days total, consistent with principles of the FSB's Key Attributes of Effective Resolution Regimes of Financial Institutions ("FSB Key Attributes").[3]

Toward the end of last year, EU authorities reached a binding political agreement on the EU banking package, including moratorium powers under BRRD, which was subsequently approved by the European Parliament and the Council of Ministers. The final amendments include a new moratorium power that allows resolution authorities to impose a stay when a determination has been made that a bank is "failing or likely to fail" and other conditions are met, including that there is no immediately available private sector measure that would prevent the bank's failure and the stay is deemed necessary to avoid the further deterioration of the bank.[4] The stay must be as short as possible and cannot last longer than the period from the publication of a notice of the stay to midnight of the next business day in the member state of the resolution authority. If the new pre-resolution stay is exercised, the existing in-resolution moratorium powers under BRRD may not be exercised, thus effectively limiting the maximum total stay under BRRD to no longer than two business days.[5] This position is generally consistent with the two-day maximum length of the existing stay under BRRD and the FSB Key Attributes, although the final amendments permit a stay to be imposed either when a bank is determined to be "failing or likely to fail" and/or is in resolution.

The final amendments to BRRD also include a provision on cross-border recognition of resolution stays for contracts subject to third-country laws.[6] 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 European Banking Authority will develop draft regulatory technical standards with respect to this provision, which it will submit to the European Commission by June 28, 2020.

Sarah A. Bessin
Associate General Counsel

endnotes

[1] *See* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0879&from=EN.

[2] *See* Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC (November 23, 2016) (COM/2016/0852 final), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0852&from=EN.

[3] *See, e.g.,* Letters from ICI Global and SIFMA AMG dated June 29, 2017, *available at* https://www.ici.org/pdf/30761a.pdf, Jan. 23, 2018, *available at* https://www.ici.org/pdf/31084a.pdf, and Sept. 10, 2018, *available at* https://www.ici.org/pdf/31378a.pdf. The FSB Key Attributes provide that any stay should be "strictly limited in time (for example, for a period not exceeding 2 business days) . . ." FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (October 15, 2014), *available at* http://www.fsb.org/what-we-do/policy-development/effective-resolution-regimes-and-policies/key-attributes-of-effective-resolution-regimes-for-financial-institutions/#4set-off.

[4] *See* Article 33a.

[5] The preamble notes this specifically, stating that "[t]he duration of the suspension should be limited to a maximum of two business days. Up to that maximum, the suspension could continue to apply after the resolution decision is taken." *See* paragraph 27 of the preamble.

[6] *See* Article 71a.