

Bail-In Trends

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Contractual Recognition of Stay Clauses

Directive 2019/879 (Bank Resolution and Recovery Directive or “**BRRD II**”) introduced a new Article 71a into Directive 2014/59/EU (BRRD). Article 71a provides that entities subject to BRRD are required to include clauses that recognise the stay powers of resolution authorities (known as contractual recognition of stay or ‘CROS’ clauses) in certain financial contracts that they enter into which are governed by the law of a non-EU Member State. This obligation was implemented into Irish law with effect from 28 December 2020 under Regulation 131A of the European Union (Bank Recovery and Resolution) Regulations 2015 (the “**2015 Regulations**”).

In Ireland the obligation applies to any financial contract which creates a new obligation or materially amends an existing obligation on or after 28 December 2020, or provides for the exercise of one or more termination rights or rights to enforce security interests to which stay powers would apply if the financial contract were governed by the laws of Ireland.

Article 71a(5) of BRRD empowers the European Commission to adopt delegated acts specifying the content of the CROS clause, taking into account institutions' and entities' different business models. On 22 April 2021 the Commission adopted regulatory technical standards determining the content of the contractual terms on recognition of resolution stay powers. These RTS are subject to a three month review period before publication in the Official Journal of the EU and entry into force. Assuming neither the European Parliament nor the European Council object during the review period, the RTS are expected to entered into force in August 2021.

Therefore, while the obligation to include CROS clauses has applied in Ireland since 28 December 2020, the RTS specifying the content of the CROS clause will not enter into force for a number of months, and there is still the potential that the RTS could change. There has been some reluctance by industry representative bodies to publish standard CROS clauses until the RTS enter into force. So, while not ideal in light of the potential for divergent approaches in the market, we have seen entities develop their own standard CROS clauses to include in financial contracts. These standard clauses are generally drafted to seek to comply with the RTS as adopted by the Commission and either:

(a) refers to the relevant provisions in BRRD, meaning the clause is more generic and may be used regardless of the jurisdiction of incorporation of the entities; or

(b) refers to the relevant provisions in the national legislation which implements BRRD in the jurisdiction(s) of the relevant BRRD party(ies) (in Ireland the 2015 Regulations), meaning the clause must be tailored depending on the jurisdiction of incorporation of the parties.

In our view the second approach is preferable as it is more in keeping with the RTS as approved by the Commission, which require that the CROS clause contain an acknowledgment that the parties are bound by the relevant BRRD articles “*as transposed by applicable national law*”.

Counterparties that have prepared their own form of CROS clause should carefully monitor future developments in this area. In particular, as industry representative bodies publish template CROS clauses counterparties may look to amend any standard wording they have developed independently, and may even consider amending any CROS clauses included in existing contracts to ensure consistent wording is used across all of their financial contracts.

LMA Form of Bail-In Clause and User's Guide

The LMA on 15 April 2021 published clarificatory changes to the bail-in clause in the **LMA Recommended Form of Bail-In Clause and Users Guide**. The changes mostly relate to the UK's altered status following the end of the Brexit transition period.

Following the UK's departure from the EU on 31 January 2020 and the end of the Brexit transition period on 31 December 2020, the requirement under Article 55 of BRRD to include a bail-in clause has, for EEA financial institutions, become applicable to English law documentation in the same way as for documentation governed by the law of any other non-EEA country. Contracts governed by English law which contain in-scope liabilities of EU financial institutions entered into or materially amended after 31 December 2020 will be within the scope of the Article 55 Requirement.

The UK has introduced a contractual recognition of the bail-in requirement for UK financial institutions which also now applies to documents governed by the law of any EEA member state entered into or materially amended after the end of the Brexit transition period on 31 December 2020, as well as continuing to apply to documents governed by the law of any non-EEA country (other than the UK).

The UK bail-in regime has been included as standard in all relevant definitions in the LMA guidance. In addition, the LMA Bail-In Clause has now been amended to reflect the fact that the UK is no longer an "EEA Member Country which has implemented Article 55 BRRD."

Single Resolution Board ("SRB") Guidance for ICSDs

On 29 March 2021 the SRB issued guidance describing the elements that banks should consider for the operationalisation of bail-in in respect of international bearer debt securities issued by and safekept in the international central securities depositories (ICSDs).

The guidance provides information about how the bail-in of such instruments would be reflected in the books of the ICSDs and supports banks in preparing their bail-in playbooks, in particular for securities issued and safekept in the ICSDs. The guidance also explains the role of ICSDs in respect of the bail-in of instruments for which they are issuer CSD and investor CSD, the stakeholders involved, processes and steps to follow, data and information requirements, communication timelines and channels used.

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