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ALERT MEMORANDUM

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Bank Recovery and Resolution: Contractual Recognition of Bail-in

Under Article 55 of the European Union's Bank Recovery and Resolution Directive (2014/59/EU) ("**BRRD**"), certain financial institutions subject to the BRRD must include a "bail-in" clause in a wide range of agreements that are governed by the law of a non-EU member state. This clause is intended to help ensure that losses are borne equally by creditors, regardless of the governing law of the contract, and to facilitate the cross-border resolution of EU financial institutions.[1]

The bail-in clause requires a creditor to acknowledge and accept that the amount due to it may be subject to cancellation, reduction, or conversion into other types of securities in the event that a resolution authority exercises its bail-in power: most commonly when an institution enters resolution. 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.

Various industry bodies have been working to create a series of "model clauses" to apply to liabilities governed by the law of a non-EU member state.[2] These model clauses are intended to harmonize the manner in which bail-in is effected for various liabilities, by helping to ensure compliance with Article 55 of the BRRD, as implemented in each EU jurisdiction, and the minimum requirements for bail-in clauses set out in the regulatory technical standards published by the European Banking Authority ("**EBA**").

This alert memorandum provides a background to and discussion of the requirements under the BRRD and the bail-in regime, principally in the UK[3]. It also details the requirements for contractual recognition of bail-in in non-EU law governed contracts and sets out the continuing issues that financial institutions are likely to encounter.

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1 This alert memorandum uses the term "bail-in" to refer to both the mandatory write-down and conversion provisions forming part of a resolution authority's general powers in Article 63 of the BRRD, as well as the bail-in tool set out in Article 43 of the BRRD.

2 For example, see the Association for Financial Markets in Europe ("**AFME**") "model clause for the contractual recognition of bail-in," providing model language for UK institutions issuing debt governed by New York law, available at http://www.afme.eu/Documents/Standard-forms-and-documents.aspx. AFME is currently developing model clause language for issuers in other EU jurisdictions and debt governed by other governing laws.

3 This alert does not consider the operation of the BRRD in the context of the Single Resolution Mechanism Regulation 806/2014

Background

During the financial crisis of 2007/2008, a number of financial institutions were bailed out across Europe. Taxpayers shouldered the losses through a series of public support and nationalization measures, in whole or in part, in member states.

In response, the European Commission introduced a number of initiatives that are codified in the BRRD. These measures aim to establish a harmonized regime across Europe designed to address the risk of the future failure of credit institutions and investment firms and, should a failure occur, to ensure the continuity of essential financial services and to reduce reliance on public funds. Central to the objectives of the BRRD are provisions that: (i) grant the resolution authority of an EU member state (a "**resolution authority**") the power to introduce preventative measures; (ii) allow these resolution authorities to intervene early in failing credit institutions; and (iii) establish resolution tools to address the failure of firms and provide for the continuity of critical functions. These provisions are expected to minimize the risk to public funds in the event of an institution's failure.

Of particular note in the BRRD are the "bail-in" provisions, which allow the resolution authority to cancel or reduce liabilities to creditors or partially or fully to convert such liabilities into debt or equity securities of the institution or another entity. To promote a level playing field, the BRRD has also introduced a requirement for the contractual recognition of these bail-in provisions for certain EU entities issuing liabilities under the law of a non-EU member state, with the aim that all such creditors should be subject to bail-in to the same extent, regardless of the governing law of their liability. This bail-in tool aims 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.

Implementation

The BRRD was published in the Official Journal on June 6, 2014.[4] Member states were required to transpose the BRRD into their national legislation by December 31, 2014 to apply from January 1, 2015, with the exception of the bail-in provisions, which apply from January 1, 2016.

There has been a divergence in the speed of implementation within the EU. On May 28, 2015, the European Commission requested that Bulgaria, the Czech Republic, France, Italy, Lithuania, Luxembourg, the Netherlands, Malta, Poland, Romania, and Sweden complete the process of adopting the BRRD, as they had failed to meet the December deadline. Drafted as a reasoned opinion, this request constitutes the second stage of the EU's infringement measures and failure to accede to the European Commission's demands within two months now may result in the referral of the countries to the EU Court of Justice. Some of these jurisdictions, such as France, have since implemented the BRRD.

4 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0059

Key provisions in the BRRD

The BRRD applies to:

(a) credit institutions and investment firms established in the EU;[5]

(b) financial institutions established in the EU that are subsidiaries of credit institutions or investment firms;[6]

(c) financial institutions that are subsidiaries of financial holding companies, mixed financial holding companies, or mixed-activity holding companies (all as defined in the Capital Requirements Regulation[7]) established in the EU and that are subject to consolidated supervision of their parent;[8]

(d) financial holding companies, mixed financial holding companies, and mixed-activity holding companies established in the EU;[9]

(e) parent financial holding companies in an EU member state, EU parent financial holding companies, parent mixed financial holding companies in a member state, and EU parent mixed financial holding companies[10]; and

(f) branches of institutions established outside the EU in accordance with the specific conditions laid down in the BRRD (with all of the above, "**BRRD entities**").[11]

The BRRD is intended to provide a comprehensive set of measures for the recovery and resolution of these entities, through the following core objectives:

- Preparation: The BRRD requires BRRD entities to submit recovery plans to an appointed resolution authority.[12] These plans outline what actions the entity

5 Art. 1(1)(a) BRRD

6 Art. 1(1)(b) BRRD

7 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (the "**Capital Requirements Regulation**")

8 Art 1(1)(b) BRRD

9 Art. 1(1)(c) BRRD

10 Art. 1(1)(d) BRRD

11 Art. 1(1)(e) BRRD

12 Article 4 BRRD

would take to improve its financial position in the event of financial instability. In the UK, for example, the Bank of England has been designated as the resolution authority and has the power to implement changes in the structure of a BRRD entity to make recovery plans feasible. Resolution authorities are also required to prepare resolution plans that would be implemented upon the failure of an institution based on input provided by the institution.

- Early Intervention: The BRRD gives resolution authorities the power to intervene earlier than previously authorized to address financial difficulties within a BRRD entity.[13] The resolution authority can implement certain resolution measures. These measures include the removal of senior management and requiring management to implement the resolution authority's recovery plan.[14]

- Resolution: The BRRD provides resolution authorities with significant powers to address the resolution of a firm that is failing, or is determined to be likely to fail, to help ensure continuity of critical functions performed by the firm, while limiting the exposure of taxpayers to losses of the firm.[15] These powers include, for example, selling all or parts of the business or creating a bridge institution by which assets, liabilities, or shares are transferred to an institution or institutions owned at least in part by public authorities.

Bail-in and mandatory write-down and conversion powers

One of the primary tools that the BRRD gives to resolution authorities is the power to bail-in a failing BRRD entity. While a "bail-out" of a failing institution is associated with state action and use of taxpayer funds, a bail-in is intended to place the responsibility of a failing credit institution on holders of the failing institution's debt and equity securities. Under the BRRD, the resolution authority can increase the capital of a failing or failed BRRD entity through the write-down, reduction, cancellation, or conversion of liabilities held by unsecured creditors. Such write-down or conversion would generally be carried out according to the order of priority of creditors and shareholders in insolvency, although, in certain circumstances, authorities can treat some creditors better than other similarly-situated creditors, provided that all creditors receive at least what they would have received in insolvency proceedings of the firm.

The scope of the liabilities subject to the bail-in tool is extremely wide. All liabilities are deemed to be 'eligible liabilities' subject to bail-in, unless explicitly excluded under Article 44(2) of the BRRD. Such excluded liabilities are limited and include, for example, deposit guarantee schemes and employee wages. Therefore, in theory, a broad range of the unsecured liabilities and contracts of a BRRD entity will be subject to the bail-in tool. Whether or not such liabilities

[13] Article 27 BRRD

[14] Article 28 BRRD

[15] Title IV, Articles 31 - 86 BRRD

are likely to be bailed-in will depend on the circumstances and, to some extent, to the discretion of the resolution authority.

The resolution authority can exercise powers of bail-in when the BRRD entity is determined to be in financial distress and when normal insolvency proceedings or other initiatives are not considered appropriate to secure the stability of the economy; for example, when other stabilization tools in the BRRD, such as transfer of all or part of the BRRD entity's business to a commercial purchaser or asset management vehicle, may not be possible.

In addition, Article 59 of the BRRD grants resolution authorities a separate power of mandatory write-down and conversion of capital instruments. The resolution authority can use this power independently of resolution action or, when certain conditions are met, in combination with resolution action.

Article 55: the contractual recognition of bail-in

Under Article 55 of the BRRD, BRRD entities issuing eligible liabilities governed by non-EU law must include in the agreement creating (or amending, where the amendment is of a material nature) the liability, a term that recognizes the bail-in contractually. This requirement is intended to ensure that liabilities under contracts governed by the law of a non-EU member state issued by a BRRD entity embody the bail-in provisions incorporated automatically through statute for EU-law governed liabilities. In addition, BRRD entities must be able to provide authorities with a legal opinion on the enforceability and effectiveness of the contractual term. The failure to include such a contractual recognition provision will not, in itself, preclude an EU resolution authority from exercising its bail-in or write-down and conversion power in relation to the liability. However, such a failure will typically constitute a breach of the BRRD entity's legal or regulatory obligations.

The obligation to include a bail-in term does not apply where the resolution authority of an EU member state determines that the eligible liability is subject to the bail-in or write-down and conversion powers of the resolution authority pursuant to the law of the relevant third country or to a binding agreement concluded with that third country. Such measures could include, for example, third-country statutory recognition regimes. There are currently no such third-country statutory recognition regimes in place. In a number of jurisdictions which have implemented this provision, national law requires that the determination in question must be made by the resolution authority of that member state. In others, the position is unclear, and it may be arguable that a determination by a resolution authority of *any* EU member state will result in the disapplication of the obligation to include such a term.

The Article 55 requirement has a delayed implementation date of January 1, 2016. However, certain jurisdictions have chosen to implement Article 55 ahead of this date.

The UK

In the UK, bail-in provisions were introduced earlier than 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 Handbook, 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* recognizes 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…" (italics in original).

The Financial Conduct Authority will implement rules for other instruments and liabilities from January 1, 2016. The Financial Conduct Authority published a policy paper on these rules in January 2015.[16]

Germany

In Germany, as a key element to transpose the BRRD into German law, the Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz*) came into force on January 1, 2015.[17] Accordingly, the bail-in provisions and the requirement for contractual recognition of them, which are included in the German Recovery and Resolution Act, have been applicable in Germany since January 1, 2015. Under section 55(6) of the German Recovery and Resolution Act, any capital instruments required to contain a contractual recognition of the bail-in tool and not containing such recognition cannot be included in the issuing institution's own funds. This restriction goes beyond the requirements of the BRRD.

Belgium

In Belgium, the Banking Act of April 25, 2014 implemented most provisions of the BRRD into Belgian law. Bail-in provisions (including the requirement for contractual recognition) have not, however, yet been transposed. Powers to implement bail-in provisions into Belgian law have been delegated, under section 255 of the Belgian Banking Act, to the Belgian government. Such delegation of powers will expire on December 31, 2015.

France

In France, Article 55 has been implemented by means of amendments to the Monetary and Financial Code, introduced by an Ordinance of August 20, 2015.

16 https://www.fca.org.uk/static/documents/policy-statements/ps15-02.pdf

17 http://www.gesetze-im-internet.de/bundesrecht/sag/gesamt.pdf

Excluded liabilities

Unless explicitly excluded from the bail-in requirements under Article 44(2), all liabilities of a BRRD entity are subject to the Article 55 contractual recognition of bail-in requirement. Article 44(2) excludes the following types of liability:

- Covered deposits;
- Secured liabilities used for hedging purposes, including covered bonds;
- Liabilities that arise from holding client money and client assets, but only where the client is protected under relevant insolvency law. For example, these excluded liabilities include client money or assets held under the Undertakings for Collective Investment in Transferable Securities Directive,[18] or the Alternative Investment Fund Managers Directive;[19]
- Any liability that arises from a fiduciary relationship between the BRRD entity and a beneficiary, provided that the beneficiary is protected by relevant insolvency or civil law;
- Liabilities to institutions with an original maturity of less than seven days. This exclusion does not apply if the entities are part of the same group;
- Liabilities with a remaining maturity of less than seven days that are owed to systems or the result of participation in systems under the Settlement Financial Directive[20] (as such, this does not include non-EU settlement systems);
- Employee liabilities in relation to salary, pension benefits, or other fixed remuneration. This exclusion does not apply to variable remuneration unless regulated by a collective bargaining agreement;
- Commercial or trade creditor agreements considered critical to the functioning of the BRRD entity's operations. These liabilities can include contracts for IT services, utilities and rental, servicing, and upkeep of premises;
- Preferred liabilities owed to tax and social security authorities; and
- Deposit guarantee schemes arising from contributions under the Deposit Guarantee Scheme Directive.[21]

[18] Directive 2009/65/EC

[19] Directive 2011/61/EU

[20] Directive 98/26/EC

The Regulatory Technical Standards on Article 55

Pursuant to Article 55(3) of the BRRD, the EBA submitted a final report on regulatory technical standards ("**Final Report RTS**") on Article 55 to the EU Commission on July 3, 2015,[22] following an initial consultation published on November 5, 2014.[23]

The Final Report RTS was intended to clarify the scope of liabilities subject to the requirement to include a contractual recognition of bail-in term in the agreement creating or materially amending the liability. However, despite many consultation responses to the draft RTS requesting further clarification and reduction of the scope of eligible liabilities, the EBA stated that the creation of new exclusions "would involve changing an essential element of the Level 1 text (the BRRD) and making policy choices which the EBA is not empowered to do as such matters are reserved to the co-legislators under Article 290(1) of the Treaty on the Functioning of the European Union." In addition, the Final Report RTS specified the content of the contractual term.

The EU Commission has indicated that it intends to adopt final regulatory technical standards no later than the end of September 2015, ensuring that the new regime will come into effect from January 1, 2016.

Liabilities not requiring the contractual recognition term

Article 2 of the Final Report RTS "further determines" the list of excluded liabilities, without creating new categories of exclusions. According to the Final Report RTS, exclusions can arise due to: (a) the secured nature of the liability;[24] (b) the date the liability was created or materially amended;[25] or (c) the third-country law governing the liability.[26]

To qualify for the secured liability exclusion in Article 2(1) of the Final Report RTS, a liability must be fully secured and governed by contractual terms that ensure full collaterization on a continuous basis, in compliance with the applicable EU law or equivalent third-country law.

Article 2(2) of the Final Report RTS clarifies Article 55(1)(d) of the BRRD, which requires contractual recognition for all liabilities that are created after the date on which the relevant EU

21 Directive 2013/36/EU

22 http://www.eba.europa.eu/documents/10180/1132911/EBA-RTS-2015-06+RTS+on+Contractual+Recognition+of+Bail-in.pdf

23 https://www.eba.europa.eu/documents/10180/882606/EBA-CP-2014-33+(Draft+CP+on+RTS+on+contractual+recognition+of+bail-in).pdf

24 Article 2(1) of the Final Report RTS

25 Article 2(2) of the Final Report RTS

26 Article 2(3) of the Final Report RTS

member state transposes the BRRD. Liabilities created after the transposition, even if created under "relevant agreements" (i.e., any agreements creating an Article 55 liability)[27] such as master agreements entered into before the transposition, must contain the contractual term.[28] If a relevant agreement or debt instrument created before the transposition date is subject to a material amendment after the transposition date, all liabilities under the relevant agreement or debt instrument, regardless of when those liabilities were created, must contain the contractual term.[29] A "non-material amendment" is defined as an amendment "which does not affect the substantive rights and obligations of a party to a relevant agreement such as a change to the contact details of a signatory or the addressee for the service of documents, typographical changes to correct drafting errors or automatic adjustments of interest rates".[30] Material amendments would accordingly appear to include any other species of adjustment.

Article 2(3) of the Final Report RTS permits a resolution authority to waive the requirement for a contractual term in an agreement governed by the law of a third country when it is satisfied that the law of that third country, or a binding agreement concluded with that third country, provides for a procedure to recognize and give effect to the resolution authority's exercise of write-down and conversion powers in accordance with the bail-in provisions under the BRRD.

Contents of the contractual term

Article 3 of the Final Report RTS sets out the minimum requirements for the contractual term recognizing bail-in:

- A counterparty must "acknowledge and accept" that the liability is subject to a resolution authority's write-down and conversion powers.[31]

- The contractual term must contain a description of the write-down and conversion powers of each resolution authority in accordance with the EU member state national law transposing the BRRD, with an emphasis on the powers set out in Article 63(1) of the BRRD.[32]

- The counterparty must acknowledge and accept that it is bound by such exercise of power, including:

27 Article 1(4) of the Final Report RTS

28 Article 2(2)(a) of the Final Report RTS

29 Article 2(2)(b) and Article 2(2)(d) of the Final Report RTS

30 Article 1(3)(a) of the Final Report RTS

31 Article 3(a) of the Final Report RTS

32 Article 3(b) of the Final Report RTS

(a) the effect of an application of the write-down and conversion powers of each resolution authority in accordance with the EU member state national law transposing the BRRD,[33]

(b) any reduction in the principal amount or outstanding amount due, including accrued interest, in respect of the liability;[34] and

(c) the conversion of that liability into ordinary shares or other instruments of ownership.[35]

- The counterparty must acknowledge and accept that the terms of the relevant agreement governing the liability may be varied,[36] and that ordinary shares or other instruments of ownership may be issued or conferred on the counterparty, as a result of the exercise of the write-down or conversion powers.[37]
- Finally, the counterparty must acknowledge and accept that the contractual term is "exhaustive" on the matters described therein, to the exclusion of any other agreements, arrangements, or understandings of the counterparties on these matters.[38]

Bail-in Procedure

Under Article 36 of the BRRD, and in accordance with the regulatory technical standards on valuation in resolution published by the EBA, which are yet to be finalized,[39] a "fair and realistic valuation of the assets and liabilities of the institution should be carried out" before bail-in commences.[40]

If the conditions for bail-in are met, the resolution authority will write down or convert liabilities in accordance with normal insolvency proceedings. Equity is written-down or converted

33 Article 3(c)(1) of the Final Report RTS

34 Article 3(c)(1)(a) of the Final Report RTS

35 Article 3(c)(1)(b) of the Final Report RTS

36 Article 3(c)(2) of the Final Report RTS

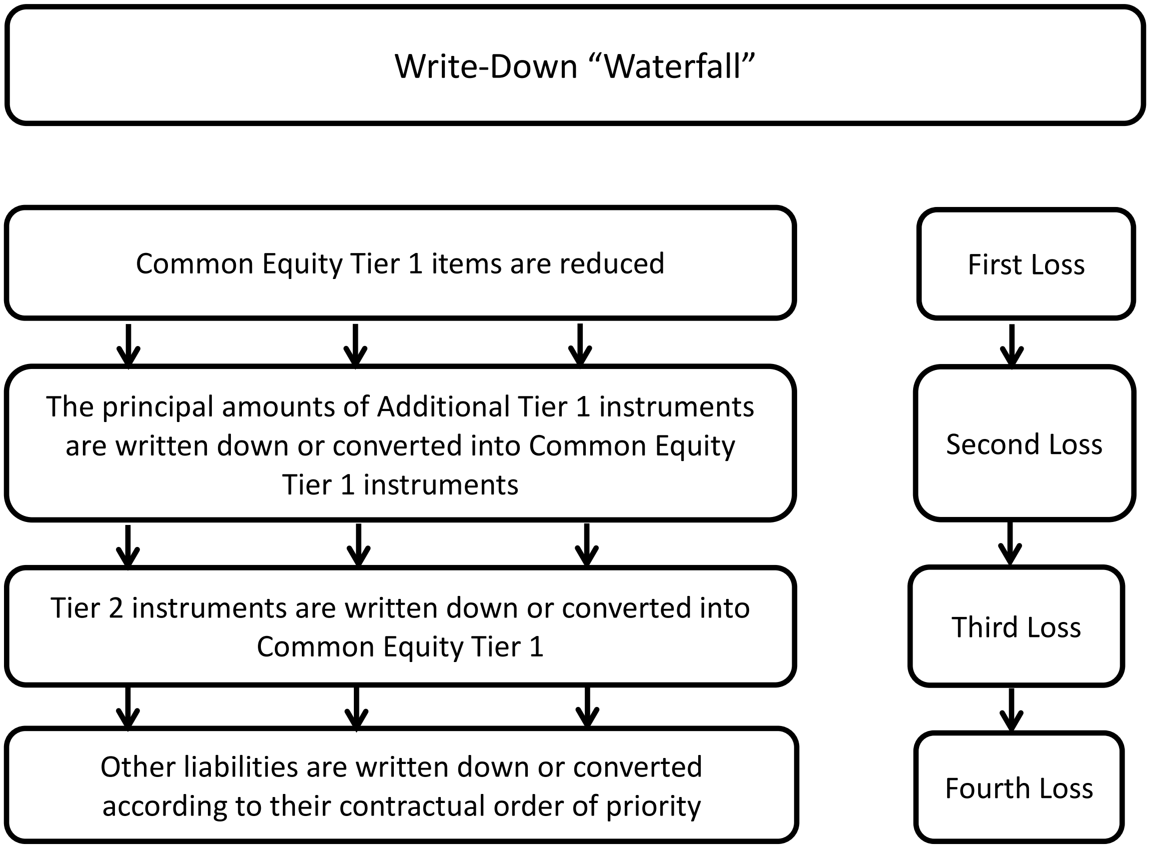
37 Article 3(c)(3) of the Final Report RTS

38 Article 3(d) of the Final Report RTS

39 EBA consultation paper published on November 7, 2014: https://www.eba.europa.eu/documents/10180/886895/CP+on+draft+RTS+on+valuation+-+EBA-CP-2014-38.pdf

40 Article 36 BRRD

by the resolution authority before debt is written-down or converted. A basic outline of the write-down hierarchy "waterfall" is illustrated below:



In extraordinary circumstances, the resolution authority can exercise the right to exclude liabilities from bail-in that are not excluded under Article 44(2). The resolution authority can exclude liabilities if:

- the resolution authority is unable to exercise bail-in within a reasonable timeframe;
- by bailing-in the liability, the continuity of critical aspects of the BRRD entity would be compromised;
- bail-in would lead to contagion among other parts of the financial services sector; or
- the application of bail-in would lead to more substantial losses among other creditors than if the liabilities were not bailed-in.

A minimum level of 8% bail-in of liabilities applies before resolution funds can be used to support the credit or investment firm. Under the BRRD, EU member states are required to set up resolution funds (or other funds independent of the BRRD that create resolution funds) to which credit and investment institutions contribute. In the event of financial distress, up to 5% of these funds could be used to support the BRRD entity. Public funds are generally used after the bail-in of liabilities and the resolution funds. However, in extraordinary circumstances public funds can be used before resolution funds.

Ongoing issues under the Article 55 regime

Below, we discuss certain of the ongoing issues relating to the implementation of Article 55 and adherence to its requirements that have given rise to uncertainty and concern.

- Breadth of scope: Article 55 applies to a broad range of liabilities, arising in a variety of contexts. Financial institutions may find that they are unable to enter into certain contracts which are exclusively made orally, or which are governed by standard terms and conditions which may not be negotiated or amended.

- Counterparty adherence: As a practical matter, counterparties in non-EU jurisdictions are likely to be unfamiliar, initially at least, with the requirements of Article 55 and may refuse to enter into agreements which contain the required bail-in clause. It is to be hoped that the widespread adoption of standard language by financial institutions in their in-scope contracts will, over time, assist in the negotiation of such terms.

- Financial market infrastructures (“FMIs”): In particular, liabilities to the operators or participants of certain non-EU FMIs which are not designated according to Directive 98/26/EC are not excluded under Article 44. Accordingly, such FMIs would need to rewrite their rules to accommodate the contractual recognition requirement in order for BRRD entities to be able to continue as members. It is unlikely that those third-country FMIs will make such changes (or that such changes would be consistent with FMI risk management standards).

- Contingent liabilities: Contingent liabilities, such as letters of credit, are generally not recorded as liabilities on the balance sheet or viewed as part of the loss-absorbing capacity of the institution. However, certain jurisdictions, including the United Kingdom, include such liabilities within the scope of bail-in, while in other jurisdictions the position is unclear. Including contingent trade obligations within the scope of Article 55 could cause disruption in the financing of cross-border trade transactions, and may make letters of credit issued by EU banks uncompetitive. In practice, contingent liabilities are unlikely to be bailed in because of their contingent nature and their uncertain value.

Further Information

For further information on Article 55, bail-in or the BRRD in the UK, please do not hesitate to contact David Gottlieb, David Toube, or Christina Edward in the London office, or any of your regular contacts at Cleary Gottlieb.

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