30 July 2018

FINANCIAL MARKETS LAW COMMITTEE

Gunnar Hokmark
Parlement europeen
Bat. Altiero Spinelli
07FISS
60, rue Wiertz
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Dear Mr Hokmark

Bank Recovery and Resolution Directive: Legal Uncertainties in the Proposal to Amend Moratorium Powers

The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

Earlier this year, the Committee undertook research on issues of legal complexity arising in the context of the European Commission's legislative proposal to amend certain moratorium provisions in Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**Bank Recovery and Resolution Directive**" or the "**BRRD**").[1] On 13 April 2018, the FMLC published a paper entitled *Bank Recovery and Resolution Directive: Legal Uncertainties in the Proposal to Amend Moratorium Powers* (the "**FMLC Paper**"), which was sent to you and which, for ease of reference, I enclose here.[2]

The FMLC Paper drew attention to issues of legal uncertainty in the original proposal to amend moratorium powers in the BRRD, which expanded authorities' pre- and in-resolution moratorium powers, primarily through the introduction of a new Article 29a and through amendments to Article 63(1) of the BRRD. As the existing moratorium powers in Article 69 continued to apply, the FMLC highlighted the danger that any suspension of payment obligations could last five days (if the in-resolution moratorium periods provided by Articles 63 and 69 were to overlap) or seven days if the in-resolution moratoria were to apply consecutively. If combined with the proposed pre-resolution moratorium period, which could last a maximum of five working days, the institution might find its payment and delivery obligations suspended for ten or 12 days, respectively.

In this context the FMLC drew attention to the legal uncertainties which arise in relation to: (1) the impact on financial collateral arrangements and international coordination; (2) the custody of assets which certain regulated funds are required to retain; and (3) residual risks arising out of exemptions to moratorium powers. The FMLC Paper also anticipates and reflects on some of the practical issues that may arise when implementing these recommendations. The extension of the moratorium period, in particular, may amplify market disruption and risk of contagion.

The New Proposals

On 25 June 2018, the European Parliament in a Plenary Sitting considered new proposals clarifying amendments to the BRRD (the "**New Proposals**").[3] The New Proposals recommend the insertions of a new Article 33a, which provides for a suspension to payment obligations both to avoid further deterioration in the financial conditions of the institution and to enable the resolution authority to determine the most appropriate resolution action. The new Article 33a(2) reiterates that the duration of suspension not exceed the minimum period of time the resolution authority considers necessary and in any event, must not exceed two working days. It also adds an additional requirement that, where a resolution authority opts to apply a new Article 33a stay to a financial institution, it may only subject that institution to an Article 69 stay after 10 business days have lapsed.[4] While it is outside the

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FMLC's remit to engage in the legislative process, it would like to take this opportunity to reiterate its concerns with regards to any extension to the moratorium periods.

The Committee appreciates the clarification on the interaction of the proposed moratoria with the existing moratorium powers in the BRRD. The proposals continue, however, to be discordant with internationally agreed standards previously identified by the Financial Stability Board ("**FSB**"), which recommends limiting stays to 48 hours but also states that moratorium powers should only be available during resolution.[5]

The new Article 33a(6) also refers to a broad discretion on the part of the resolution authority to reach a decision on the basis of an assessment of the impact that the exercise of that power might have on the orderly functioning of financial markets. This does not, however, take into account the impact of the ten-day window between the two-day pre-resolution moratorium and the two-day resolution stay (under Article 69). These proposals will continue to give rise to the types of market and legal uncertainties which were raised in the FMLC Paper.

Recommendations

The FMLC urges reconsideration and recommends that further thought be given to synchronising the new moratorium powers with existing international standards.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

Joanna Perkins

Joanna Perkins
FMLC Chief Executive[6]

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1 The legislative proposal can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0852:FIN.

The text of the BRRD is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059.

2 FMLC Paper "Bank Recovery and Resolution Directive: Legal Uncertainties in the Proposal to Amend Moratorium Powers" (23 November 2017) available at: http://fmlc.org/report-bank-recovery-and-resolution-directive-13-april-2018/.

3 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU, available at: http://www.europarl.europa.eu/cmsdata/150015/A8-0218_2018_EN.pdf

4 New Article 33a 2-4

5 Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, (updated in October 2014), p. 7, available at: http://www.fsb.org/wp-content/uploads/r_141015.pdf.

6 In view of the role of the Bank of England as the U.K.'s resolution authority, Sinead Meany took no part in the preparation of this paper and the views expressed should not be taken to be those of the Bank of England.