

EBA/RTS/2020/10

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16 December 2020

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# Final Report

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Draft regulatory technical standards on the contractual recognition of stay powers under Article 71a(5) of Directive 2014/59/EU

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# 1. Executive summary

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Pursuant to Article 71a(1) of Directive 2014/59/EU (the Bank Recovery and Resolution Directive – BRRD), Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of that Directive to include in any financial contract which they enter into and which is governed by third-country law terms by which the parties recognise that the financial contract may be subject to the exercise of powers by the resolution authority to suspend or restrict rights and obligations under Articles 33a, 69, 70 and 71 of the BRRD and recognise that they are bound by the requirements of Article 68 of the BRRD.

Where an institution or entity does not include the contractual term required, that shall not prevent the resolution authority from applying the powers referred to in Articles 33a, 68, 69, 70 or 71 in relation to that financial contract.

Article 71a(5) of the BRRD requires that the EBA develop draft regulatory technical standards (RTS) in order to further determine the contents of the term required in that paragraph, taking into account banks' different business models.

This Report includes the EBA's proposal for the draft RTS and explains the approach that the EBA has taken in relation to the proposal.

In consistency with its mandate under Article 71a(5) of the BRRD, the EBA has proposed in the draft RTS a list of mandatory components that must be present in the contractual term required in the financial contracts. These include provisions specifying the acknowledgement and acceptance that the contract may be subject to the exercise of the powers by the resolution authority, a description of the powers in question and the parties' recognition that they are bound by those powers to suspend certain obligations and restrict some rights and that they are bound by the requirements of Article 68 of the BRRD. In addition, the parties must acknowledge that no other contractual term impairs the effectiveness and enforceability of this clause.

This approach is intended to strike a balance between achieving an appropriate level of convergence and ensuring that differences in the legal systems of third countries and other differences arising from different forms of financial contracts can be taken into account by resolution authorities, institutions and relevant entities through the addition of further elements if these are required to achieve the policy goal of ensuring that powers to suspend or restrict rights and obligations can be applied effectively in relation to financial contracts governed by the law of a third country.

The draft RTS will be submitted to the Commission for endorsement before being published in the *Official Journal of the European Union*. The technical standards will apply from the twentieth day following that of their publication in the *Official Journal of the European Union*.

## 2. Background and rationale

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### Objective

The BRRD requires Member States to confer on their resolution authorities a number of powers, including powers to suspend or restrict rights and obligations under Articles 33a, 69, 70 and 71 of the BRRD.

Member States must ensure that such powers may be applied to all financial contracts to which an institution or entity is a party.

Financial contracts to which an institution or relevant entity is party may be governed by the law of a Member State, in which case the application of the resolution powers would be effective as a matter of law.

However, some financial contracts may be governed by the law of a third country. In the absence of a legal framework (either under the local law of the relevant third country or pursuant to an international standard agreement) that secures the effectiveness of the application of the suspension and restrictions powers by a Member State resolution authority, it is possible that a third-country court might not recognise the effect of the application of the powers by that resolution authority.

For this reason, Article 71a(1) of the BRRD requires Member States to require institutions and entities to include in any financial contract governed by the laws of a third country a contractual term by which the parties recognise that the financial contract may be subject to the exercise of powers by a Member State resolution authority to suspend or restrict rights and obligations.

‘Financial contracts’ are defined in Article 2(100) of the BRRD.

### Content

Article 71a(5) of the BRRD requires that the EBA develop draft RTS in order to determine the contents of the contractual term required to be included in relevant financial contracts, taking into account institutions’ and entities’ different business models.

The EBA’s proposal for the draft RTS is set out in the Chapter 3 of the Consultation Paper. An overview of the content of the draft RTS is set out below.

#### **Article 1: The contents of the contractual term required by Article 71a(1) of Directive 2014/59/EU**

The EBA is tasked with determining the ‘contents’ of the contractual term required to be included pursuant to Article 71a(1) of the BRRD.

The EBA considered whether to propose in the draft RTS a specific clause or a list of mandatory components to be included in the term.

The specification of a particular wording, rather than components to be included in the clause, is in principle a preferable option, since it would help to ensure harmonisation in the implementation of the RTS, including in their cross-border implementation. However, the EBA does not consider it appropriate to specify the wording of the clause, as the particular wording might not be effective in all jurisdictions – bearing in mind the need for the RTS to cover the various national transpositions of the stay powers – and it might not take into account or be suitable for all forms of liability falling within the scope of Article 71a(1) of the BRRD. Rather, the EBA considers that listing the key mandatory elements of the term strikes the right balance between achieving an appropriate level of convergence and ensuring that differences in the legal systems of third countries and other differences arising from different forms of financial contracts can be taken into account by Member State resolution authorities, institutions and relevant entities.

Accordingly, it is proposed that the draft RTS include a list of mandatory components that must be present in the contractual term required pursuant to Article 71a(1) of the BRRD. These include provisions specifying the express acknowledgement of and a description of the powers and the parties' recognition that they are bound by the effect of an application of the powers by the requirements of Article 68 of the BRRD as transposed by national law. In addition, the parties should acknowledge that no other contractual term impairs the effectiveness and enforceability of the clause and that the contractual term is exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreement.

The mandate under Article 71a(5) of the BRRD requires the EBA to 'take into account institutions' and entities' different business models when determining the contents of the contractual term'.

The types of transactions or contracts that institutions engage in are considered more relevant than their different business models, and potentially particularly relevant aspect is the frequency (occasional or otherwise) with which institutions engage in contracts governed by third-country law. However, as the BRRD clearly imposes the requirement to include the contractual term in any financial contract governed by third-country law, no reason was found to specify differing approaches based either on type of transaction or contract or on type of business model.

## Ongoing international work in this area

The EBA is aware of ongoing international work in relation to statutory and contractual approaches to the recognition of the exercise of resolution powers. In particular, the EBA notes the *Principles for cross-border effectiveness of resolution actions* of the Financial Stability Board (FSB) published on 3 November 2015<sup>1</sup> and has sought to align its proposals with the FSB's proposals insofar as is compatible with the BRRD and otherwise appropriate.

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<sup>1</sup> <https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>

# 3. Draft regulatory technical standards

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**COMMISSION DELEGATED REGULATION (EU) .../..**  
**of **XXX****

**supplementing Directive 2014/59/EU of the European Parliament and of the Council**  
**with regard to regulatory technical standards to determine the contents of the**  
**contractual term for the recognition of stay powers**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council, and in particular Article 71(a)(5) thereof,

Whereas:

- (1) In line with the relevant international standards for cross-border effectiveness of resolution actions – such as the Financial Stability Board’s *Key attributes of effective resolution regimes for financial institutions*, and *Principles for cross-border effectiveness of resolution actions*, the latter published on 3 November 2015 – Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amended Directive 2014/59/EU by introducing, among other things, certain safeguards in order to enhance effective resolution execution in relation to financial contracts subject to third-country law in the absence of a statutory cross-border recognition framework (as indicated in recital 31 of Directive (EU) 2019/879).
- (2) Article 68 of Directive 2014/59/EU provides, in the interest of an efficient resolution, that crisis prevention measures or crisis management measures, as defined in Directive 2014/59/EU and including events directly linked to them, should not be deemed enforcement events or insolvency proceedings. In addition, under Article 68 of Directive 2014/59/EU such measures should not entitle contracting counterparties in relevant contracts to exercise certain contractual rights solely as a result of the application of such measures. The parties’ acceptance to be bound by these requirements should be included in the contents of the contractual term to be determined under this Regulation, in accordance with Article 71(a)(1) of Directive 2014/59/EU.



- (3) In addition, under Articles 33a, 69, 70 and 71, resolution authorities may, for a limited period of time, suspend contractual payment or delivery obligations due under a contract with an institution or an entity referred to in points (b), (c) and (d) of Article 1(1) of Directive 2014/59/EU under resolution or in certain circumstances before resolution, restrict the enforcement of security interests and suspend certain rights of counterparties to, for instance, close out, net gross obligations, accelerate future payments or otherwise terminate financial contracts. As these resolution authorities' stay powers might not be effective when applied to financial contracts under third-country law, institutions and entities subject to Directive 2014/59/EU are required by Article 71a(1) of that Directive to include contractual recognition of these stay powers in their financial contracts.
- (4) In order to be effective in resolution and have convergence in the approaches adopted while ensuring that differences in legal systems or those arising from a particular contractual form or structure can be taken into account by resolution authorities, institutions and entities referred to in points (b), (c) and (d) of Article 1(1) of Directive 2014/59/EU, it is appropriate to lay down the mandatory contents of the contractual term required under Article 71a. In this regard, as mandated in Article 71a(5) of that Directive, the contents of the contractual term should take into account institutions' and entities' different business models. However, as the scope of the mandate covers entities with financial contracts in relation to international transactions, there is no basis for creating different contents for contractual recognition clauses.
- (5) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (the European Banking Authority – EBA) to the Commission.
- (6) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010.<sup>2</sup>

HAS ADOPTED THIS REGULATION:

*Article 1 – Contents of the contractual term*

The contractual recognition term in a relevant financial contract governed by third-country law shall include the following:

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<sup>2</sup> OJ L 331, 15.12.2010, p. 12.



(1) the acknowledgement and acceptance by the parties that the contract may be subject to the exercise of powers by a resolution authority to suspend or restrict rights and obligations under Articles 33a, 69, 70 and 71 of Directive 2014/59/EU as transposed by the applicable national law and that the conditions set out in Article 68 of that Directive as transposed by the applicable national law will apply.

(2) a description of or a reference to the powers of the relevant resolution authority as set out in Articles 33a, 69, 70 and 71 of Directive 2014/59/EU as transposed by the applicable national law, and a description of or a reference to the conditions of Article 68 of Directive 2014/59/EU as transposed by the applicable national law.

(3) the recognition by the parties:

(a) that they are bound by the effect of an application of the powers referred to in point (2), which include:

(i) the suspension of any payment or delivery obligation in accordance with Article 33a of Directive 2014/59/EU as transposed by the applicable national law;

(ii) the suspension of any payment or delivery obligation in accordance with Article 69 of Directive 2014/59/EU as transposed by the applicable national law;

(iii) the restriction of enforcement of any security interest in accordance with Article 70 of Directive 2014/59/EU as transposed by the applicable national law;

(iv) the suspension of any termination right under the contract in accordance with Article 71 of Directive 2014/59/EU as transposed by the applicable national law;

(b) that they are bound by the conditions of Article 68 of Directive 2014/59/EU as transposed by the applicable national law;

(4) the acknowledgement and acceptance by the parties that the contractual recognition term is exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreement.

### *Article 2 – Entry into force*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



Done at Brussels, []

*For the Commission*  
*The President*

*On behalf of the President*

*[Position]*

## 4. Accompanying documents

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### 4.1 Draft cost–benefit analysis/impact assessment

1. Article 71a(5) of Directive (EU) 2019/879 of the European Parliament and of the Council (the BRRD) amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (BRRD2) mandated the EBA to develop regulatory technical standards (RTS) to further determine the contents of the term that shall be included in financial contracts governed by third-country law to recognise that the contract may be subject to the exercise of stay powers, taking into account institutions' and entities' different business models.
2. The current RTS aim to fulfil this mandate.
3. As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any RTS developed by the EBA are to be accompanied by an impact assessment (IA) that analyses 'the potential related costs and benefits' when they are submitted to the European Commission. The analysis should provide the reader with an overview of the findings as regards the problem identified, the options to address the problem and their potential impacts.
4. For the purposes of the IA section of the Report, the EBA prepared a cost–benefit analysis of the policy options considered in drafting the RTS. Given the nature of the study, the IA is high-level and qualitative in nature.

#### A. Problem identification

5. Financial contracts of an institution or an entity referred to in points (b), (c) and (d) of Article 1(1) of the Directive may be governed by the law of a Member State, in which case the application by resolution authorities of powers to suspend or restrict rights and obligations under Articles 33a, 69, 70 and 71 and the binding requirements of Article 68 would be effective as a matter of law.
6. However, some financial contracts to which an institution or relevant entity is a party may be governed by the law of a third country. In the absence of a statutory cross-border recognition framework for financial contracts governed by the law of a third country, to which these requirements do not apply directly, it is possible that a third-country court might not recognise the effect of the application of these powers by a resolution authority. A refusal to recognise the application of the powers could undermine the effectiveness of actions on the part of a Union resolution authority to restore the financial condition of an institution or relevant entity for the purposes of addressing a threat to financial stability and/or protecting the interests of depositors and clients.

7. For this reason, Article 71a of the BRRD requires Member States to require institutions and relevant entities to include a contractual term in financial contracts governed by third-country law. By this contractual term, parties shall recognise that the financial contract might be subject to the suspension of certain payment and delivery obligations, the restriction of enforcement of security interests or the temporary suspension of termination rights and that they are bound by conditions for the exclusion of certain contractual terms in early intervention and resolution.
8. The inclusion of the contractual term could cause a number of problems if its contents were not specified, including the following.
  - a. Ineffectiveness of resolution powers in third countries: the lack of specification of the mandatory contents of the contractual term might reduce the effectiveness of the inclusion of the term as regards financial instruments governed by the law of a third country, for example where a Union resolution authority had determined that a contractual term was sufficient but it did not, in fact, ensure the effective application of stay powers. This could have financial stability implications for the Member State concerned and the Union as a whole.
  - b. Lack of an appropriate level of convergence and existence of an uneven playing field between institutions: a heterogeneous application of the requirement to include the contractual term could lead to a situation where the contractual term was generally effective in some jurisdictions and not effective in others. This situation would have an impact on the availability and cost of funding for institutions and relevant entities.

## B. Policy objectives

9. The main objective of these RTS is to fulfil the mandate established in Article 71a(5) of the BRRD.
10. As a result, the general objective is to determine the contents of the contractual term in order to achieve an appropriate level of convergence while ensuring that differences in legal systems or those arising from a particular contractual form or structure can be taken into account by resolution authorities.

## C. Baseline scenario

11. As noted above, in the absence of Union action there is a risk of divergences between the Member States regarding the interpretation of the contents of the contractual term, which could lead to the aforementioned problems.

## D. Options considered

12. When drafting the present RTS, the EBA considered several policy options under two main areas:
  1. The degree of flexibility regarding the contents of the contractual term:
    - a. Option A: the specification of the mandatory contents with no flexibility for institutions and relevant entities to supplement these components.

- b. Option B: the specification of the mandatory contents with flexibility for institutions and relevant entities to supplement the clause with additional components from a closed list set out in the RTS.
  - c. Option C: the specification of the mandatory contents with flexibility for institutions and relevant entities to supplement these components with additional components (i.e. no closed list).
2. The inclusion of wording referring to the fact that the counterparty should be bound by the contractual term:
- a. Option A: not to include this specific wording as Article 71 does not specifically refer to it.
  - b. Option B: to include this specific wording even though Article 71 does not specifically refer to it.

#### E. Assessment of the options and the preferred option(s)

13. Regarding the degree of flexibility in the contents of the contractual term, under Option A the contents of the contractual term would be specified with no flexibility for institutions and relevant entities to supplement these components. This option would ensure a very high degree of consistency as regards the approaches taken by Member States, institutions and entities to the contents of the contractual term. However, this option would not enable institutions and relevant entities to supplement these contents as necessary to take account of any specificities arising in relation to a particular type of financial contract or a specific third-country law.
14. Option B would offer a greater degree of flexibility while specifying the mandatory components. This option would also promote a high degree of convergence, but, in addition, it would enable some specificities arising in relation to a particular type of financial contract or a specific third-country law to be taken into account. However, it does not seem feasible to anticipate in advance all potential issues that might be identified with regard to a particular type of financial contract or a specific third-country law.
15. Option C aims to find a balance between the need for harmonisation and the need for flexibility. Under this option, the mandatory contents are set out in the RTS, but there are no limits on the ability of institutions and relevant entities to supplement the contents to take into account issues arising in relation to a particular type of financial contract or a specific third-country law. For these reasons, the preferred option is Option C.
16. Regarding the inclusion of wording referring to the fact that the counterparty should be bound by the contractual term, Article 71a specifically refers to a binding obligation only with regard to the requirements of Article 68. For other stay powers (those set out in Articles 33a, 69, 70 and 71), only recognition of the contractual term and not of a binding obligation is required by Article 71a. Nevertheless, the counterparty should be formally bound by the contractual term to ensure that stay powers can be applied adequately. In order to ensure an adequate framework for the application of stay powers, the preferred option is Option B: the inclusion of wording referring to the fact that the counterparty should be bound by the contractual term.

## 4.2 Views of the Banking Stakeholder Group

The Banking Stakeholder Group did not submit a response to the draft RTS set out in the EBA/CP/2020/04 Consultation Paper.

## 4.3 Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 3 months and ended on 15 August 2020. Twelve responses were received, of which ten were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated its comments in response to different questions. In such cases, the comments and the EBA's analysis are included in the section of this paper where the EBA considers them most appropriate.

General comments have been grouped by category, as appropriate, regardless of whether the answers were submitted in response to one of the questions or in a separate document.

Changes to the draft RTS have been incorporated where appropriate as a result of the responses received during the public consultation.

### 4.3.1 Summary of key issues and the EBA's response

One key issue raised by respondents was that a few EU jurisdictions already require contractual recognition of stay powers and that there are in place some standardised master agreements covering stay powers. Additional concerns related to the lack of grandfathering possibilities and the related costs of repapering.

The EBA is aware of the existence of national stay powers and standardised industry contracts covering EU stay powers. National laws will have to be updated to reflect and be compliant with the BRRD provisions. In any case, BRRD2 introduces a new stay power in Article 33a: '*power to suspend certain obligations*'.

Regarding the standardised contracts developed by various bodies, these will have to be updated to reflect the new legislative requirements in order to be compliant.

Regarding concerns about repapering, the EBA believes that it is important to follow how the provisions of Article 71a(3) of the BRRD will be transposed. In addition, it should be taken into account that the two conditions in Article 71a(3) are cumulative, as per the Commission notice (2020/C 321/01) relating to the interpretation of certain legal provisions of the revised bank resolution framework, issued in response to questions raised by Member State authorities.<sup>3</sup>

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<sup>3</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2020.321.01.0001.01.ENG&toc=OJ:C:2020:321:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.321.01.0001.01.ENG&toc=OJ:C:2020:321:TOC)

Respondents supported the EBA's approach to use components rather than prescribe a specific wording to be used in contracts. However, there was a sentiment that certain terms might not be used efficiently if the exact same wording should be used as in the draft RTS, considering that the context of the contracts would be various third-country laws.

The EBA acknowledges that the first sentence in Article 1 of the draft RTS used the word 'term' to refer to the components that the contractual term needs to include. The word 'term' has been removed from the draft RTS, aligning the draft RTS provisions with those of the existing RTS on contractual recognition of bail-in, allowing the institutions to meet the requirements through the most effective and appropriate means.

Respondents also indicated that the various components of the term seemed repetitive and overlapping, especially in relation to the components specified in the first paragraph of Article 1 of the draft RTS (regarding acknowledgement and acceptance) and the third paragraph (regarding acceptance to be bound). The EBA believes that those two components achieve different goals and are necessary for the effective application of the powers: the first paragraph requires the counterparty to recognise and accept that its EU counterparty can be put under resolution and therefore be subject to stay powers, while the third paragraph requires the counterparty to be bound by the effects of such actions. The EBA notes that the requirement for the counterparty to be bound by those effects is compliant with the *Principles for cross-border effectiveness of resolution actions*.

The majority of respondents noted concerns about the fifth component, requiring the contractual recognition term to be subject to EU law. Respondents felt that no proven benefits could be identified, and that this would pose potential hurdles in negotiating contracts and even make court rulings more difficult. Although MREL<sup>4</sup> instruments governed by third country law have been seen in practice to have the bail-in powers contractually recognised in the transaction documentation under EU law, the EBA decided to discard this component in order, in particular, to avoid the risk that its implementation might reduce the availability of financial products to EU institutions. However, the EBA would encourage institutions to consider, where possible, that the recognition term be governed by EU law.

A few respondents pointed out that the requirement to include contractual recognition of stay powers could trigger cases of impracticability (i.e. the inclusion of the term would not be possible). This observation was based on experiences of the requirement for contractual recognition of bail-in under Article 55 of the BRRD. However, the EBA's mandate is limited to defining the contents of the contractual term; the requirement to include the contractual term is based on Level 1 text provisions.

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<sup>4</sup> minimum requirement for own funds and eligible liabilities

### 4.3.2 Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>General comments on Consultation Paper EBA/CP/2020/04</b>			
Grandfathering/repapering/ correspondence with existing stay powers, national laws or standards	<p>Respondents noted that equivalent national Member State laws as well as International Swaps and Derivatives Association (ISDA) Stay Modules already exist. Requests varied from asking that the draft RTS be aligned with existing measures to asking that the RTS specifically indicate that financial contracts (including master agreements) already referring to stay powers would not have to be updated.</p> <p>Respondents also indicated the relatively large number of existing contracts that already include stay powers (including in anticipation of Brexit).</p>	<p>The EBA acknowledges the existence of relevant EU national laws as well of ISDA Stay Modules. However, BRRD2 introduces a new stay power, under Article 33a, that is not included in the existing agreements. The EBA has no power to change the Level 1 text. The EBA is also mindful of the fact that existing national stay power laws will have to be updated to reflect the BRRD2 provisions. Furthermore, the EBA expects international bodies to update their standard agreements to reflect the provisions of BRRD2 and of these RTS on contractual recognition of stay powers.</p> <p>The EBA's mandate is limited to specifying the contents of the contractual term required by Article 71a of the BRRD. Therefore, it is not part of the EBA's mandate to specifically indicate that financial contracts (including master agreements as per the BRRD definition in Article 2(1)(100)) already referring to stay powers should or should not be updated.</p> <p>Furthermore, the BRRD specifies (in Article 71a(3)) the scope of application through the two conditions that need to be met cumulatively.<sup>5</sup></p>	No change

<sup>5</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2020.321.01.0001.01.ENG&toc=OJ:C:2020:321:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.321.01.0001.01.ENG&toc=OJ:C:2020:321:TOC)



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Date of entry into force	<p>Some respondents submitted that the industry/institutions would need a certain period of time (estimated at between 6 months and 1 year) to update their practices to take account of the BRRD2 transposition and the requirements of these RTS.</p> <p>Some respondents requested an implementation period.</p>	<p>The EBA notes these views; however, 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.</p> <p>Delaying 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 standardised requirement for this contractual term.</p>	No change
Potential instances of impracticability	Some respondents indicated that, in practice, there could be situations where contractual recognition cannot be achieved, including cases of illegality (citing experiences of the requirement for contractual recognition of bail-in powers under Article 55 of the BRRD).	The EBA notes this concern. However, its mandate does not include a provision to address situations of impracticability relating to contractual recognition of stay powers. The mandate is limited to specifying the contents of the contractual term.	No change
Reference to Article 71a(4) of the BRRD	A few respondents indicated that they did not see a need for the RTS provisions, as the BRRD (Article 71a(4)) indicates that non-inclusion of the contractual term shall not prevent the resolution authority from applying stay powers.	The rule set out in Article 71a(1) is that the contractual recognition of stay powers must always be included in those contracts that meet the scope of application. The EBA has been mandated to specify the contents of the contractual term for recognition of stay powers.	No change
Recital on general exercise of stay powers	One respondent suggested that the recitals should mention that, irrespective of the existence in the contract of recognition of stay powers, stay powers could still be exercised.	This is a provision of the BRRD. There would be no value added to the RTS (including in the recitals) to repeat Level 1 provisions.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Provide exclusions	Some respondents referred to the need for flexibility to exclude contracts with, for example financial market infrastructures and central banks.	Such exclusions are not in the scope of these RTS. Furthermore, the BRRD already specifies in the relevant articles for each power if there are exclusions.	No change
Differentiate requirements for third-country subsidiaries	A few respondents indicated the need for a different approach to the requirements for financial contracts of third-country subsidiaries.	The EBA's mandate for these RTS relates to Article 71a(1) and not Article 71a(2); therefore, this is not within the scope of the mandate.	No change
Liaising with Member States and resolution authorities	Some respondents suggested that the EBA liaise with Member States and resolution authorities for the effective implementation of Article 71a, for example with respect to the transposition of Article 33a.	<p>The EBA has no power to liaise with Member States regarding transposition of BRRD2. The EBA's mandate is very clearly defined and refers only to the contents of the contractual term for recognition of stay powers.</p> <p>As with all regulatory products, the EBA has engaged with resolution authorities in designing these technical standards and will engage with them on their implementation.</p>	No change
<b>Responses to questions in Consultation Paper EBA/CP/2020/04</b>			
<p>Question 1</p> <p>Do you agree with the approach the EBA has proposed for the purposes of further determining the first paragraph of Article 71a of the BRRD?</p>	<p>All respondents agreed with the EBA's decision to specify components of the clauses as opposed to prescriptive language to be used.</p> <p>Comments received on this question were of a general nature and therefore have been dealt with other sections of this table (above or below).</p>	The EBA acknowledges the agreement with the approach.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Question 2</p> <p>Do you agree with the approach the EBA has proposed with regard to the components of the contractual term required pursuant to Article 71a of the BRRD?</p>	<p>The prevalent response was that there should be more flexibility in the approach, by providing that the institution has to achieve the intended effect but not necessarily include prescribed terms. A majority of the comments identified the components as being rigid and too detailed.</p> <p>Respondents considered that having the flexibility to aim for the effect would better achieve the goal, considering the various third-country laws governing the contracts, than the mandatory inclusion of a specific term. A potential approach suggested in this regard was to ‘ensure and clarify that the RTS requirements do not restrict the ability to make adjustments as long as the clauses have the intended effect and address the core elements set out above’.</p> <p>Respondents also considered the component terms too rigid, particularly in using specific legal terminology (e.g. ‘accept’ and ‘acknowledge’). The respondents noted that specific legal terminology is tied to the jurisdiction in question and is not used or may even not be enforceable in another jurisdiction.</p> <p>A few comments stated that the draft RTS provisions were not consistent with the FSB’s <i>Principles for cross-border effectiveness of resolution actions</i>. The requirement for the counterparties to ‘be bound’ was identified as going beyond the FSB principles.</p>	<p>The EBA agrees that in certain cases the prescription of a specific word might not correspond to the applicable law and therefore could inhibit the intended result.</p> <p>On the other hand, the EBA’s mandate is to determine the contents of the contractual term. Too much flexibility would go against the purpose of the mandate and potentially be counterproductive in respect of the contractual recognition of stay powers.</p> <p>The EBA has adjusted the wording of the introductory phrase of Article 1 (in particular by eliminating the word ‘term’) to allow a certain degree of flexibility in achieving the goal of the component. Changes to the first sentence of Article 1 also have the purpose of aligning these draft RTS provisions with the RTS on contractual recognition of bail-in.</p> <p>Furthermore, the second paragraph (on the requirement to describe) now provides increased flexibility by allowing the use of a reference to the powers.</p> <p>The EBA notes that the FSB principles clearly indicate that the parties should agree to be bound and should be bound (point 8, page 14, of the FSB principles). As respondents do not indicate further inconsistencies between the draft RTS provisions and the FSB principles, the EBA can make no further clarifications or assessments.</p>	<p>Changes to Article 1, first sentence (removal of the word ‘term’)</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Component 1 (Article 1(1))	<p>Respondents queried the use of specific terms ('acknowledge' and 'accept'), as the requirements may have to be implemented in contractual agreements in other languages and may also be subject to contract law and contractual practices that do not have a direct equivalent to an acknowledgement.</p>	<p>By removing the word 'term' in the first sentence of Article 1, the EBA believes that the draft RTS allow flexibility to achieve the effect in those jurisdictions that do not have the terms 'accept' and 'acknowledge' as such. On the other hand, the EBA is reluctant to use the alternatives proposed, such as directly saying 'phrases that would achieve the same effect', as this could result in greater uncertainty: for example, it is difficult to say what is a similar thing to an acknowledgement or acceptance while not being an acknowledgement or acceptance.</p>	No change
Clarification on paragraph 1	<p>One respondent asked for clarification on the reference to 'certain powers' in paragraph 1 of Article 1.</p>	<p>The word 'certain' can be removed from the wording and can specify that the institution can be subject to any of those stay powers.</p> <p>The EBA believes that the next component of the term, the description or reference to the stay powers, clarifies the powers referred to in Article 1.</p> <p>Furthermore, for greater clarity, Article 1, paragraph 1, now specifies the powers to which it refers.</p>	<p>Removal of the word 'certain' in Article 1, paragraph 1, and inclusion of a clear reference to the BRRD2 articles on the relevant powers</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Duplication/overlapping of provisions in paragraphs 1 and 3 (Article 1(1) and Article 1(3))</p>	<p>Some commentators indicated that the provisions in paragraphs 1 and 3 seemed to overlap and duplicate the requirements.</p>	<p>The EBA is of the view that the provisions in the two paragraphs have different purposes and are necessary for the intended objective.</p> <p>Paragraph 1 notifies the counterparty that the EU party can be put under resolution and therefore be subject to stay powers.</p> <p>Paragraph 3 requires specifically (in line with the FSB principles and the BRRD provisions) that the counterparty acknowledge and accept being bound by the effect of such actions.</p> <p>The wording of Article 1(1) has been reviewed in order to align it with the wording used in paragraph 3, while avoiding duplication of the content.</p>	<p>Change to wording of Article 1(1) to use similar wording while avoiding redundancy</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Component 2 (Article 1(2))</p>	<p>Respondents point out that (i) current national regimes in relevant EU Member States and other jurisdictions do not require descriptions of powers, (ii) this adds another element of negotiation and (iii) it is not necessary for the clause to be effective.</p> <p>One respondent acknowledged that a description of the relevant powers is likely to be useful to non-EU counterparties.</p> <p>In any case, some respondents asked for flexibility on how to achieve this goal, and one of the respondents indicated that a more suitable approach would be through a template disclosure document or a central source of information or in a prospectus, rather than requiring amendments to contracts to meet this requirement.</p> <p>Supporting arguments for such requests also indicated that potentially many EU banks could be in scope, therefore requiring a description of the stay powers in several EU jurisdictions.</p>	<p>The EBA is of the view that a description or reference to the powers is necessary. As one respondent indicated in relation to paragraph 1 (when querying to which stay powers the provision refers), the description is a component that is necessary, especially if the counterparties are not familiar with the EU framework.</p> <p>The EBA also acknowledges that a slightly more flexible approach could help in achieving the desired effect and therefore has introduced the possibility to use a reference to the stay powers in question. In some cases, a description may be more suitable, while at other times a reference may be more appropriate.</p>	<p>Change to wording of Article 1(2) to allow the use of reference in addition to description</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Component 3 (Article 1(3))</p>	<p>A few respondents indicated they agreed with this provision and saw its merits.</p> <p>Some respondents saw this provision as overlapping with the first two.</p> <p>One respondent asked about the difference between ‘to agree’, ‘to acknowledge’ and ‘to be bound’.</p> <p>Furthermore, there was concern about what it means and how it should be achieved in practice to ‘endeavour to ensure the effective application of these powers’. Queries relate to what is an appropriate undertaking to obtain from a counterparty given the extraterritoriality of the provision. In addition, there were queries about how a counterparty is to ‘ensure the effective application’ of the powers of its resolution authority.</p> <p>One respondent argues that ‘this requirement goes well beyond what is required for contractual recognition of stays and seems to seek to impose additional requirements on in-scope firms and their counterparties’.</p>	<p>The requirement to be bound by the provisions of stay powers is aligned with the FSB principles and is also clearly specified in the BRRD for powers under Article 68. The EBA believes that this is a component that needs to remain in the RTS.</p> <p>In addition, ‘to be bound’ is the correct term in English for contracts where a party accepts and agrees to apply the terms of the contract; therefore, the party agrees ‘to be bound’ by the contract.</p> <p>The EBA acknowledges that the phrase requiring the counterparty to ensure the effective application of the powers, in practice and based on the reasoning put forward, might not help to achieve the purpose of the contractual recognition of stay powers. For this reason and also consistency with the RTS on contractual recognition of bail-in, this phrase will be removed.</p>	<p>Removal of the phrase ‘endeavour to ensure the effective application of these powers’ from Article 1(3)</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Component 4 (Article 1(4))	<p>Respondents considered that the requirement set out in Article 1(4) would not make the clause more effective and that it seemed to be of a declarative nature.</p> <p>Some respondents proposed adjustments and improvements to the wording of the clause.</p> <p>Concerns were also noted about the wording 'acknowledge and agree', similar to those expressed with regard to Article 1(1).</p>	<p>The EBA considers that one of the components of the clause should be to make sure that no other clause of the contract contradicts the implementation of the clause. The EBA believes that inserting such language strengthens the effectiveness of the clause.</p> <p>Minor wording changes have been made to provide more clarity on the desired effect and to align the wording with the similar component of the RTS on contractual recognition of bail-in.</p>	<p>Minor rewording in Article 1, subparagraph 4, to provide more clarity and for better alignment with the equivalent component for contractual recognition of bail-in</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Question 3</p> <p>Do you believe that having Article 71a of the BRRD clause governed by the laws of an EU jurisdiction would improve the likelihood that it would be effective and enforceable before the courts of the relevant third-country jurisdiction? Please provide your reasons for this view. Further, what do you consider to be the advantages or the disadvantages of using the provision proposed under Article 1(5) of the draft RTS? (Component 5) (Article 1(5))</p>	<p>Feedback indicates that the requirement to have the clause governed by the law of an EU jurisdiction would not improve the likelihood that the clause would become effective and enforceable before the courts of the relevant third country.</p> <p>Furthermore, respondents identified several issues that could arise in practice from this requirement.</p> <p>Some respondents made reference to European Central Bank (ECB) netting agreements: one respondent requested confirmation that in case the EBA intended to keep this component, it would not trigger a requirement for firms to notify the ECB of a new type of netting agreement.</p>	<p>The EBA acknowledges the feedback received.</p> <p>The EBA notes a practice in MREL transactions issued under third-country law to have part of the contract governed by EU law. Furthermore, the EBA observes that this practice is legally possible.</p> <p>The EBA notes, however, that the financial contracts within scope of the contractual recognition requirement would be more varied than MREL instruments. In this respect, the EBA believes that the potential barriers to complying with this requirement might outweigh the potential additional security provided by such a provision.</p> <p>That being said, the EBA believes that, to increase certainty in the application of stay powers, it would be beneficial, where possible, to use a split law governance of the contract to ensure that the term for contractual recognition will be governed by EU law. The EBA would then encourage institutions, where possible, to consider subjecting the contractual recognition term to EU law.</p>	<p>Remove subparagraph 5 that required the contractual term to be governed by EU law.</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Question 4</p> <p>What are the standard clauses you are likely to use for your financial contracts pursuant to this requirement? Will the clause differ for various types of financial contracts (please detail if yes)?</p>	<p>Answers indicated that standard clauses/standard market documentation where available are preferred and will be used.</p> <p>The main industry associations are expected to publish such standards. ISDA modules were the main specific example given (ISDA Resolution Stay Jurisdictional Modular Protocol (ISDA JMP)). The ISDA JMP does not differ for various types of financial contracts.</p> <p>Institutions will use clauses developed for a certain type of financial contract and/or contractual documentation or certain sub-groups of financial contract types, as opposed to using one single contractual recognition clause for all types of financial contracts.</p> <p>Institutions indicated that, in some cases, they might also develop individual solutions for other types of financial contracts, especially for financial contracts not based on standard market documentation.</p>	<p>The EBA acknowledges that the tendency will be to use standard market documentation and protocols once those are available.</p>	<p>N/A</p>

<p>Question 5</p> <p>Do you agree with the draft impact assessment?</p>	<p>Respondents views were split, indicating that they broadly agreed, agreed with certain parts or were dissatisfied with the impact assessment.</p> <p>The main aspects with which respondents disagreed were:</p> <ul style="list-style-type: none"> <li>a. not estimating the costs for institutions of implementing the proposed approach;</li> <li>b. not considering the burdens of any additional repapering exercises/firms that have already included contractual recognition wording in their financial contracts in compliance with existing obligations regarding contractual recognition of stay powers in resolution;</li> <li>c. not taking into account the additional disruption effect related to English law agreements becoming third-country law agreements after Brexit;</li> <li>d. cases of impracticability that would arise from the implementation of the EBA's RTS;</li> <li>e. how the draft RTS would increase the effectiveness of recognition of stay powers compared with the regime already existing in several Member States and in relation to current industry practice;</li> <li>f. not assessing the impact of the additional obligations on firms subject to Article 71a resulting from the requirement proposed in the RTS that the parties recognise that they are bound by the effect of the application of powers under Articles 33a,</li> </ul>	<p>The general objective of the draft RTS is to determine the contents of the contractual term in order to achieve an appropriate level of effectiveness and convergence while ensuring that differences in legal systems or those arising from a particular contractual form or structure can be taken into account by resolution authorities.</p> <p>The alignment of the content is required in the mandate included in the Level 1 text and is outside the scope of the EBA's discretion.</p> <p>The impact assessment aims to provide an overview of the costs and benefits of the different options analysed by the EBA when specifying the content of the contractual term.</p> <p>The impact assessment does not weigh up the option of doing nothing against the option of proposing a standard: the former is not an option, as the EBA is explicitly mandated to determine the contents of the contractual term.</p> <p>The specific cost of implementation of the proposed approach (including the cost for each of the components) for institutions can be measured only by collecting data from institutions. Due to the short timeline specified in the mandate and the additional burden that this would have created for institutions, it was considered that a data collection should not be carried out. The EBA believes that trying to identify the cost related to each of the components would have resulted in a significant burden in itself and that it would probably have been difficult to ensure a reliable outcome.</p>	<p>No changes</p>
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Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>69, 70 and 71 and that they must endeavour to ensure the effective application of these powers.</p>	<p>Furthermore, any potential repapering exercise should be considered in the light of the provisions of Article 71a(3) and its transposition in national law. In any case, the BRRD introduces a new stay power, in Article 33a, which must also be included in national laws.</p> <p>While cases of impracticability could arise, they are outside the EBA’s mandate. The EBA believes that the likelihood of each of the proposed components triggering situations of impracticability – as opposed to situations of impracticability being triggered by the general requirement to have contractual recognition of the stay powers, as required under the BRRD – cannot be determined.</p> <p>The requirement to be bound is specifically included in the BRRD provisions and is in line with the FSB’s <i>Principles for cross-border effectiveness of resolution actions</i>. The requirement to ensure the effective application of these powers has been removed.</p>	