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Status	Final Q&A
Legal act	Directive 2014/59/EU (BRRD)
Topic	Resolution plans
Article	17
Paragraph	5
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	Not applicable
Article/Paragraph	n.a.
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Disclose name of institution / entity	No
Type of submitter	Competent authority
Subject matter	Prohibition for institutions to enter into agreements with third country counterparties
Question	Can Article 17 of Directive 2014/59/EU (BRRD) be considered a sufficient basis for supervisors to prohibit institutions to enter into agreements with third country counterparties which do not accept having cross border contractual recognition language in their contracts as regards bail-in and stays on early termination rights?
Background on the question	Article 17 of Directive 2014/59/EU (BRRD) deals with the powers to address or remove impediments to resolvability and Article 17 (5) lists a series of powers available to the resolution authority to address impediments to resolvability. The question raised is whether those provisions are a sufficient basis for supervisors to impose on institutions the prohibition to enter into agreements with third country counterparties which do not accept having cross border contractual recognition language in their contracts as regards bail-in and stays on early termination rights. The basis for such a prohibition would be that, in the absence of temporary stays, resolution could be compromised if, for instance, large amounts of derivative contracts were terminated at the same time. As a matter of background, this question comes from the ongoing discussion of the LEG of the FSB on improving recognition

and enforcement of cross-border resolution actions. One of the issues dealt with is that of enforcement of the power of resolution authorities to impose temporary stays of early termination rights in the case of contracts which are, for instance, governed by the law of a third country. Within the EU, a temporary stay imposed by the resolution authority under Article 71 of Directive 2014/59/EU (BRRD) will be part of the “reorganisation measures” under the winding up Directive and the mutual recognition rules therein would apply. Internationally there is not an overall statutory recognition cross border of this type of powers. Therefore, in the interim, the LEG is working on a contractual approach so that the ISDA (International Swaps and Derivatives Association) Master agreement, under which most derivatives are traded, includes appropriate cross border recognition language and that institutions sign up to that agreement. It is within that context that the question was raised by several jurisdictions whether Article 17 of the BRRD was enough to impose signature to that agreement and to forbid institutions to enter agreements with third country counterparties which do not accept having cross border contractual recognition language in their contracts, as regards stays on early termination rights.

Final answer

Article 17(5) BRRD enables resolution authorities to take a number of measures in order to remove any substantive impediments to the resolvability of an entity.

Such provision does not constitute a sufficient legal basis for resolution authorities to prohibit the concerned entity to enter into agreements governed by third country law that does not accept cross-border contractual recognition of bail-in. In fact, Article 55(2) BRRD provides for a different course of action. It requires that, further to the notification from an entity of the assessed impracticability to contractually recognise the bail-inability of the relevant liability, the resolution authority may either concur or disagree with the impracticability assessment. If it disagrees, the relevant clause must be inserted; if it concurs with the impracticability and deems it to create a substantive impediment to resolvability, the resolution authority may rely on any of the powers provided in Article 17 BRRD to remove that impediment, but it may not prevent the entity from entering the relevant transaction.

The same does not hold true for contractual recognition of resolution stay powers. In fact, contrarily to Article 55 BRRD, Article 71a BRRD does not provide for a specific discipline of the matter, but simply states that the entity’s failure to include a contractual provision recognising stay powers does not prevent the resolution authority from exercising such powers. Thus, Article 17 BRRD is a sufficient legal basis to enable the resolution authority to prevent the concerned entity to enter the agreement, if this would constitute a substantive impediment to the resolvability of the entity.

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The answers clarify provisions already contained in the applicable

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Link	<p>https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2015_2101</p>

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