

**Alan Marquard**  
CLS Group General Counsel



Exchange Tower  
One Harbour Exchange Square  
London E14 9GE

Tel: +44 (0)20 7971 5409  
Fax: +44 (0)20 7971 5729  
[amarquard@cls-group.com](mailto:amarquard@cls-group.com)

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European Banking Authority  
One Canada Square (Floor 46)  
London E14 5AA

[eba.europe.eu](http://eba.europe.eu)

**Re: The European Banking Authority's Consultation Paper "Draft Regulatory Technical Standards on Resolution Colleges under Article 88(7) of Directive 2014/59/EU"**

Dear Sirs/Mesdames,

Thank you for the opportunity to submit these comments on EBA/CP/2014/46, Consultation Paper on the Draft Regulatory Technical Standards on Resolution Colleges under Article 88(7) of Directive 2014/59/EU (the "Consultation Paper").

CLS Bank International ("CLS") is the operator of a systemically important financial market infrastructure ("FMI") that is the predominant settlement system for foreign exchange transactions (the "CLS System"). The CLS System has been designated for the purposes of Directive 98/26/EC (the "Settlement Finality Directive" or "SFD") and has also been designated a systemically important financial market utility by the United States Financial Stability Oversight Council under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. CLS is subject to collective oversight by the CLS Oversight Committee, comprised of the 22 central banks (including the Bank of England, the European Central Bank and five Eurozone central banks) that collectively oversee CLS pursuant to a Protocol for the Cooperative Oversight Arrangement of CLS.<sup>1</sup>

CLS agrees with the European Banking Authority that although the enactment of the Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (15 May 2014) (the "BRRD") has done much to harmonize and improve the tools to deal with banking crises across the European Union, there still remain issues with regard to cross-border institutions that require advanced consideration and planning.<sup>2</sup> CLS therefore supports the BRRD's creation of resolution colleges, which include the core membership of supervisory colleges as well as resolution authorities, competent ministries, central banks, authorities responsible for deposit guarantee schemes, as well as the European Banking Authority, to engage in resolution planning and advanced efforts to identify and address impediments to resolution for cross-border credit institutions and investment firms (collectively, "institutions"). CLS believes

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<sup>1</sup> [http://www.federalreserve.gov/paymentsystems/cls\\_protocol.htm](http://www.federalreserve.gov/paymentsystems/cls_protocol.htm)

<sup>2</sup> See also Financial Stability Board ("FSB") Consultative Document: Cross-border recognition of resolution action (29 September 2014).

that such advanced planning and cooperation will greatly enhance the probability of successful resolution of cross-border institutions.

### ***Resolution Colleges and FMIs<sup>3</sup> – Impediments to Resolution***

CLS recognizes that FMIs will play an important role in the successful resolution of their participants; CLS will therefore seek to minimize disruptions caused by the failure of a participant institution by allowing the entity or its successor to continue to participate in the CLS System as long as such continued participation does not compromise the continued safe and orderly operations of CLS.<sup>4</sup> Lack of ability to continue to participate in an FMI such as CLS in certain scenarios and for certain institutions would likely be an impediment to resolution. Therefore, it is important that resolution colleges are cognizant of potential legal, operational or other issues which could prevent the relevant institution's access to FMIs, including CLS, in resolution.

#### *Potential Technical Impediments*

When considering whether an institution can successfully maintain uninterrupted access to FMIs during resolution, resolution colleges should consider well in advance any practical obstacles to operational connectivity and access to liquidity, as well as other potential difficulties, that could occur. These obstacles will depend on the subject institution and the resolution strategies pursued: for example a strategy involving a transfer of the institution is likely to be the most complex from an FMI connectivity perspective. Consultation Paper, Article 14(1)(a). In the case of a transfer, connectivity issues such as the ability to use BICs and other data, as well as continued access to agent banks, must be contemplated in advance to facilitate uninterrupted FMI access.

#### *Potential Legal Impediments within the European Union*

In the European Union, CLS and other designated FMIs rely upon the Settlement Finality Directive for statutory finality protections. In the context of the use of the resolution tools contained in the BRRD, the scope of Article 68(1) of the BRRD disapplies certain sections of the Settlement Finality Directive, which would otherwise end finality protections with respect to an institution undergoing a resolution measure which meets the definition of an insolvency event under the SFD. Many of the resolution tools contained in the BRRD contemplate the continuity of the institution in resolution's operations in order to minimize the impact of its failure on the economy and financial system, and therefore the purpose of Article 68(1) is to maintain finality protections during resolution when appropriate. Continued participation in a designated system by an entity in resolution should not jeopardize the legal basis of the system (FMIs must comply at all times with "Principle 1: Legal Basis"<sup>5</sup>) and it is therefore critical that the application of the fundamental legal protections to designated systems will not be called into question as a result of the resolution.

Because the BRRD, and indeed the SFD, have been implemented in a disparate manner in the Member States, there is a risk that resolution proceedings could trigger the end of finality protections under the Settlement Finality Directive inadvertently. Therefore, careful consideration and planning of cross-border resolution measures is particularly important to ensure that these protections are not unintentionally lost or called into question. If there are doubts as to the continuation of such protections, in order to protect the

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<sup>3</sup> CLS, as a systemically important FMI, has limited its comments to issues relevant to an institution's continued participation in FMIs during resolution.

<sup>4</sup> FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions, dated October 15, 2014, Appendix II, Annex 1, relating to resolution of FMI participants.

<sup>5</sup> Principle 1 (Legal Basis) of the Principles for Financial Market Infrastructures requires that an FMI have "a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions."

system and its participants and to limit the risk of systemic impacts, a designated system may well be forced to exclude the resolving entity from the system.

#### *Potential Legal Impediments Regarding Third-Country Proceedings*

In addition, resolution colleges are called upon in Article 88(7) of the BRRD to take into account international standards when working to reach an agreement on a resolution scheme for an institution, and indeed, Article 93 (Agreements with third countries) calls upon resolution authorities, at a high level, to agree to processes and arrangements for cooperation with third-country authorities. If such arrangements are insufficient, resolution colleges may agree to recognize and enforce third-country resolution proceedings with respect to the presence of an institution in a third country. See BRRD Articles 94 and 95. In light of the complexities accompanying third-country proceedings and their interplay with the BRRD and the SFD, CLS supports BRRD Articles 94 and 95, as well as Article 19 of the Consultation Paper, which provides for cooperation with third-country resolution authorities.

In cases where the goal of a resolution of an institution with a subsidiary or significant branch in a third country is the continuity of its service, requiring connectivity to FMIs, in order to avoid any uncertainty regarding the implications of a third-country resolution proceeding with respect to Settlement Finality Directive protections, recognition of the third-country resolution proceeding for the purpose of BRRD Article 68 is important. Therefore, CLS suggests that in determining whether to recognize third-country resolution proceedings, resolution colleges should, as part of their analysis of the impact on financial stability, consider the legal impact on the subject institution with regard to designated systems<sup>6</sup> to avoid any potential legal uncertainty and potential disruption of service, which could occur regardless of the fact that the corresponding resolution proceedings in the European Union contemplate the continuation of the institution's business. Moreover, for the avoidance of doubt, whenever possible, resolution colleges should make determinations about recognition in advance of any resolution so that it is automatic and clear, so as to eliminate unintended consequences. It may also be advisable to specifically provide that third-country proceedings may be recognized retroactively if necessary to meet resolution goals and further financial stability.

#### ***Resolution Colleges and FMIs – Planning***

When considering the issues highlighted above, CLS agrees with the Consultation Paper that resolution colleges should whenever possible take advantage of existing information to avoid duplication. Consultation Paper, page 6. CLS and other FMIs make a great deal of information about their operational rules and membership requirements public, and, in addition, CLS has shared information with regard to resolution issues with its members. To the extent that more information is required by resolution colleges as part of their assessment of a particular institution, resolution colleges should further recognize that many issues related to FMI connectivity will be the same across institutions (e.g., use of SWIFT). Therefore,

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<sup>6</sup> When making its decision under Article 94 as to whether or not to recognize and enforce third-country resolution proceedings, the resolution college "shall give due consideration to the interests of each individual Member State where a third-country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States." Article 94(3).

coordination among resolution colleges in their interaction with FMIs may increase efficiency and consistency.

Please do not hesitate to contact us if you have any questions regarding this letter.

Sincerely,

A handwritten signature in black ink, appearing to be 'Alan Marquard', written over a horizontal line.

Alan Marquard  
CLS Group General Counsel

cc: Dino Kos, Executive Vice President, Head of Global Regulatory Affairs, CLS Bank International  
Lauren Alter-Baumann, Managing Director, Legal and Regulatory Strategic Affairs, CLS Bank International  
Andrea Gildea, Director, Assistant General Counsel, CLS Bank International