BaFin Federal Financial Supervisory Authority

Law & Regulation

Guidance notice on section 60a of the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz – SAG)

Contractual recognition of temporary suspension of termination rights

Date: 21.12.2018

Please note: This is a non-binding convenience translation provided for information purposes only.

The German Resolution Mechanism Act (Abwicklungsmechanismusgesetz – AbwMechG) of 2 November 2015 added section 60a to the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz – SAG).

In order to ensure there is sufficient time to implement resolution measures when institutions encounter financial difficulties, the resolution authority has the power to temporarily suspend termination rights and other contractual rights of counterparties under certain conditions. Since the extent to which such a suspension might be recognised by other jurisdictions is not always clear in the case of financial contracts governed by the laws of a third country or with a legal venue in a third country, a lack of enforceability could be a material impediment to the resolvability of an institution (cf. explanatory memorandum to the act in Bundestag printed paper 18/5009, p. 65).

Section 60a (1) of the SAG therefore requires institutions and group entities to include in financial contracts governed by the laws of a third country or with a legal venue in a third country contractual provisions which require the counterparty to recognise that the provisions on the temporary suspension of termination rights and other contractual rights pursuant to sections 82 to 84, 144 (3) and 169 (5) nos. 3 and 4 of the SAG may be applied to the liabilities of the institution or group entity. In addition, the contractual provisions shall include the agreement of the counterparty to a suspension of termination rights and other contractual rights issued in exercise of the powers under sections 82 to 84, 144 (3) and 169 (5) nos. 3 and 4 of the SAG.

Pursuant to **section 60a (2) of the** SAG the obligation under paragraph 1 does not apply
1. to liabilities generated before 1 January 2016, unless the liability in question is subject to a netting agreement which also includes liabilities generated after 1 January 2016,
2. to financial contracts or framework agreements concluded by or with the participants, system operators, central counterparties and central banks referred to in section 84 (4) of the SAG.

According to **section 60a (3) of the** SAG, parent undertakings pursuant to section 10a of the German Banking Act (Kreditwesengesetz – KWG) must ensure that their subsidiaries pursuant to section 10a of the KWG which are domiciled outside Germany comply with the provisions laid down in paragraphs 1 and 2, provided that the financial contracts in question contain obligations, the fulfilment of which is guaranteed or otherwise ensured by a group entity domiciled in Germany; section 10a (8) of the KWG applies mutatis mutandis. Parent undertakings of a mixed financial holding group that are not institutions are exempt from this obligation.

In accordance with **section 60a (4) of the** SAG the resolution authority may enforce the obligations set out in paragraphs 1 to 3 by means of an administrative act. In exercising its discretion, the resolution authority may take into account in particular the characteristics of the business model, of the foreign market concerned, of the type of contract concerned and the systemic relevance as well as the likely impact on the resolvability of the institution or group entity concerned, in the case of paragraph 3 of the group entity domiciled in Germany.

The **"Common understanding on the implementation of the obligations under §§ 55 and 60a** SAG **by the institutions"** between the German Banking Industry Committee and the FMSA of 11 February 2016 remains unaffected by this guidance notice.

Contents of the guidance notice:

I. Frequently asked questions

II. Request of detailed data in cases of non-implementation

I. Frequently asked questions

1. Does the term "financial contracts" also include spot contracts in securities and bonds/debt securities?

The term "financial contracts" is defined in section 2 (3) no. 21 (a) to (g) of the SAG. Spot contracts in securities (cf. spot contracts within the meaning of Article 38(2) of Commission Regulation (EC) No 1287/2006) are securities contracts within the meaning of section 2 (3) no. 21 (a) of the SAG. In contrast to this, bonds/debt securities are **not** covered by the definition of financial contracts within the meaning of section 2 (3) no. 21 (a) to (g) of the SAG, since the respective bond/debt security does not in itself constitute a contract on/for a security.

2. Which obligations exist regarding “interbank borrowing agreements with a term of up to three months” (section 2 (3) no. 21 (e) of the SAG) that have been concluded verbally and confirmed on the basis of the SWIFT format, and which therefore do not include any contractual provisions pursuant to section 60a of the SAG?
(Note: SWIFT (Society for Worldwide Interbank Financial Telecommunication) is a provider of global telecommunication services for the exchange of information on financial transactions in a standardised format.)

In cases where the obligations pursuant to section 60a (1) to (3) SAG have not been implemented, the comments in section III. below apply to the entities concerned, i.e. the resolution authority may generally enforce the obligations pursuant to section 60a (1) to (3) of the SAG by means of an administrative act. Insofar as implementation is not possible in certain cases for legal or other reasons, i.e. in relation to certain financial contracts or certain counterparties, the entities concerned communicate detailed data on the individual cases to the resolution authority, which then exercises its discretion pursuant to section 60a (4) of the SAG.

3. How are FX spot contracts to be treated that have been concluded outside of framework agreements and confirmed via the SWIFT system, and which therefore do not include any contractual provisions pursuant to section 60a of the SAG?

The comments in section III. below apply to the entities concerned, i.e. they are required, in principle, to communicate detailed data on the individual cases to the resolution authority, which exercises its discretion pursuant to section 60a (4) of the SAG.

4. How is the case to be treated if there are several legal venues for a financial contract?

If several legal venues have been agreed upon, the obligation pursuant to section 60a of the SAG already applies if one of the legal venues is located in a third country (cf. explanatory memorandum to the act in Bundestag printed paper 18/5009, p. 65).

5. Which “institutions” and “group entities” are subject to an obligation according to section 60a of the SAG?

“Institutions” within the meaning of the SAG means CRR credit institutions and CRR investment firms within the scope of application of section 1 of the SAG (section 2 (1) of the SAG). A “group entity” is an entity which is parent or subsidiary of a group (section 2 (3) no. 30 of the SAG).

It is not possible to subject foreign entities to an obligation directly. According to section 60a (3) of the SAG, parent undertakings pursuant to section 10a of the KWG must ensure that their subsidiaries pursuant to section 10a of the KWG which are domiciled outside Germany fulfil the respective obligations, provided that the financial contracts in question contain obligations, the fulfilment of which is guaranteed or otherwise ensured by a group entity domiciled in Germany. For mixed financial holding groups this applies only insofar as the parent undertakings themselves are institutions (cf. explanatory memorandum to the act in Bundestag printed paper 18/5009, p. 66).

6. Do “non-binding letters of comfort” (weiche Patronatserklärungen) constitute guaranteeing or otherwise ensuring within the meaning of section 60a (3) of the SAG?

So-called “non-binding letters of comfort” do not constitute guaranteeing or otherwise ensuring within the meaning of section 60a (3) of the SAG.

7. What are the exceptions according to section 60a (2) no. 2 of the SAG?

The obligation pursuant to section 60a (1) of the SAG does not apply to financial contracts or framework agreements which are concluded **by** or **with** the participants, system operators, central counterparties and central banks referred to in section 84 (4) of the SAG. According to section 84 (4) of the SAG, these are participants in systems within the meaning of section 1 (16) of the KWG, system operators within the meaning of section 1 (16a) of the KWG, central counterparties within the meaning of section 1 (31) of the KWG and central banks.

Examples of systems within the meaning of section 1 (16) of the KWG include cash clearing as conducted by Clearstream Banking AG and Eurex Clearing AG as well as the securities settlement systems of these companies. System operator means the entity or entities legally responsible for the operation of a system (section 1 (16a) of the KWG).

A central counterparty is an entity within the meaning of Article 2(1) of Regulation (EU) No 648/2012, i.e. a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer. Eurex Clearing AG is a central counterparty (CCP), for example.

II. Request of detailed data in cases of non-implementation

The assessment of the adequacy of the implementation of the requirements under section 60a of the SAG takes place in the context of resolution planning.

In cases where the obligations pursuant to section 60a (1) to (3) of the SAG have not been implemented, the resolution authority may enforce these by means of an administrative act according to section 60a (4) of the SAG. In exercising its discretion the resolution authority may take into account in particular the characteristics of the business model, of the foreign market concerned, of the type of contract concerned and the systemic relevance as well as the likely impact on the resolvability of the institution or group entity concerned, in the case of paragraph 3 of the group entity domiciled in Germany.

Insofar as it is not possible for institutions and entities to implement the obligations under section 60a of the SAG in certain cases for legal or other reasons, i.e. in relation to certain financial contracts or certain counterparties, the institutions and entities concerned are requested to transmit in particular the following information in table format **(see template in the attachments below)** to the resolution authority in the interests of establishing the relevant facts. Contracts may be summarised per type of financial contract.

The resolution authority requests the data relating to a specific reference date (e.g. the latest balance sheet date) from the institutions and entities in the context of resolution planning. In doing so, the resolution authority makes use of its power pursuant to section 42 of the SAG.

This guidance notice is intended to provide assistance in the implementation of section 60a of the SAG and is not intended to be exhaustive. In individual cases, additional information and data may be requested. If you have any further questions, please use the e-mail address AG3@bafin.de.

Additional information

Attachments

Attachment
Template (PDF, 13KB, File does not meet accessibility standards.)

https://www.bafin.de/dok/11861916