

## **ISLA Response to EBA Consultation Paper on draft RTS on the BRRD Article 71a – consultation on EBA RTS**

The International Securities Lending Association (ISLA) welcomes the opportunity to respond to the EBA consultation and has submitted a response on behalf of ISLA members utilising the EBA's online consultation form.

### **1. 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?**

ISLA supports the comments made by the International Swaps and Derivatives Association (**ISDA**) in response to this question.

In particular, ISLA has the following key concerns:

- **Timing of application:** EU member states are required to transpose BRRD2 into national law by 28 December 2020 and ensure that the measures under BRRD apply from the date of entry into force of the relevant national law. As a result, the obligations under Article 71a will apply from 28 December 2020 at the latest. However, we understand that the RTS are not expected to be adopted until December 2020. This is very unlikely to give firms sufficient time to comply, if they are required to reach out to all relevant counterparties and seek to amend in-scope agreements to meet these obligations.
- **Lack of grandfathering:** Contractual recognition requirements already exist under the law of a number of EU member states and firms subject to those requirements have already amended existing contracts to implement those requirements (either using the ISDA Resolution Stay Jurisdictional Modular Protocol or bilateral amendments). The absence of any grandfathering provisions in the RTS for financial contracts which already contain contractual recognition clauses creates difficulties for these firms, who will need to undertake the costly and time consuming process of renegotiating these financial contracts to make changes which are only minor and do not have any real consequence for the ability of resolution authorities to exercise their resolution powers.

**2. 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?**

ISLA supports the comments made by ISDA in response to this question.

In particular, ISLA would support an approach that more closely aligns with the existing requirements in a number of EU member states for contractual recognition clauses, in order to expedite the process of developing industry standard template wording for the Article 71a clause and also in order to make the process of renegotiating contracts more straightforward as many counterparties will already be familiar with the existing requirements.

**3. Do you believe that having the Art 71a 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 Art 1(5) of the Draft RTS?**

No, ISLA does not consider that having the Art 71a 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. Rather than improving the likelihood that the clause would be effective and enforceable, ISDA is concerned that imposing this requirement would make it significantly more likely that counterparties will refuse to include this clause in contracts and that even if the clause is included in contracts this requirement would introduce significant uncertainty as well as potential negative outcomes regarding requirements to obtain legal opinions.

ISLA supports the comments made by ISDA in response to this question.

**4. 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)?**

ISLA members that are currently required to include contractual recognition clauses in their financial contracts typically do so either by adhering to the ISDA Resolution Stay Jurisdictional Modular Protocol (**ISDA JMP**) or by agreeing the relevant clause bilaterally with counterparties (typically based on the wording of the ISDA JMP or on other industry standard wording). We expect that members would take a similar approach to implementation of the obligation under Article 71a BRRD and that they would aim to



use industry standard templates or protocols wherever possible. Using industry standard template wording reduces the likelihood of counterparties refusing to accept inclusion of contractual recognition clauses in their agreements, as they can review the template wording and confirm that the EU firm is not seeking to obtain any commercial advantage or impose any unreasonable burden by including the wording. Using a protocol approach (such as the ISDA JMP) also significantly reduces the costs and time associated with negotiating inclusion of these clauses in agreements.

However, it takes time to develop such templates. As mentioned in our response to question 1 above, we are extremely concerned that the final RTS will not be available until close to the application date of the obligation under Article 71a, leaving very little time for the industry to develop template wording or for counterparties to undertake bilateral negotiations to include the required clause.

#### **5. Do you agree with the draft impact assessment?**

ISLA supports the comments made by ISDA in response to this question and echoes ISDA's concern that the impact assessment does not address the potential impact of the proposed RTS on firms subject to the Article 71a obligation and on firms who have already included contractual recognition wording in their financial contracts in compliance with existing obligations regarding contractual recognition of stays in resolution.

#### **About ISLA**

International Securities Lending Association (**ISLA**) is a leading industry association, representing the common interests of securities lending and financing market participants across Europe, Middle East and Africa. Its geographically diverse membership of over 160 firms, including institutional investors, asset managers, custodial banks, prime brokers and service providers. Working closely with the global industry as well as regulators and policymakers, ISLA advocates the importance of securities lending to the broader financial services industry. ISLA supports the development of a safe and efficient framework for the industry, by playing a pivotal role in promoting market best practice, amongst other things. ISLA sponsors the Global Market Securities Lending Agreement (**GMSLA**) and the annual enforceability review in over 20 jurisdictions globally. Through member working groups, industry guidance, consultations and first-class events and education, ISLA helps to steer the direction of the industry and is one of its most influential voices on the European and global stage.