

Resilience and Resolution Team

HM Treasury

11 August 2020

1 Horse Guards Road

London SW1A 2HQ

BRRDII.Consultation@hmtreasury.gov.uk

Dear Sir or Madam,

Consultation on Transposition of the Bank Recovery and Resolution Directive II

ISLA and its members welcome the opportunity to respond to HM Treasury's consultation on Transposition of the Bank Recovery and Resolution Directive II (the **Consultation**)¹. Our response focusses on the question in Box 8.A regarding contractual recognition of resolution stay powers, as ISLA is particularly concerned by the potential need for members to make multiple amendments to contracts in order to address Brexit-related changes to the Stay in Resolution Part of the PRA Rulebook as well as changes implementing Article 71a BRRD.

By way of a high level summary, ISLA would welcome confirmation of HM Treasury's intended approach to implementing Article 71a BRRD (and the extent to which this approach will be co-ordinated with the PRA) as well as confirmation that any new requirements will apply only to contracts entered into after the effective date of the requirements and that firms who have already included contractual provisions in compliance with the Stay in Resolution Part of the PRA Rulebook as it currently stands will not be required to amend their existing contractual provisions.

1. HM Treasury's intended approach to implementing Article 71a BRRD

We note that the Consultation does not comment on HM Treasury's intended approach to onshoring the provisions of Article 71a and the related RTS.

Member States are required to transpose the provisions of BRRD2 (including Article 71a) into national law and to apply the national implementing measures from the date of their entry into force in national law, which shall be no later than 28 December 2020. However, Article 71a requires the European Banking Authority (EBA) to develop regulatory technical standards determining the contents of the contractual recognition clause required under Article 71a. While the EBA has published a consultation paper on these draft technical standards, we understand that these technical standards are unlikely to be submitted to the Commission until later in the year and there is a risk that they will not be published in the Official Journal ahead of 28 December 2020.

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/894192/220620_HMT_BRRDII_consultation_document.pdf

ISLA members are extremely concerned about the timing for application of this obligation, as previous experience with implementing contractual recognition clauses has shown that this is not a quick process. Once the detailed requirements for the clause have been finalised, firms will need to prepare a draft clause for their use (or use an industry standard template clause) and then go through the process of reaching out to their counterparties either to negotiate inclusion of the clause into relevant contracts or to explain the existence of industry solutions such as the ISDA Resolution Stay Jurisdictional Modular Protocol (**ISDA JMP**) and suggest that counterparties adhere to these solutions.

The protocol approach has been very effective in reducing the obligation on firms in the context of the contractual recognition requirements already in effect in the UK, France, Germany and Italy (and in fact this approach has been endorsed by the FSB), but it takes time to agree the drafting for a protocol and publicise it so that it is adopted widely, and this work can only begin once the RTS (or UK standards) is adopted in its final form. It took over six months to agree the original drafting for the ISDA JMP, even with the benefit of prior resolution protocols, which collectively took several years to produce. It took almost a year to draft the separate U.S. Resolution Stay Protocol even though it, again, was largely based on prior resolution protocols. It is unlikely that ISDA would be able to produce an updated Protocol in the days or weeks between publication of the final version of the RTS and the effective date of the obligation.

ISLA would welcome confirmation of the approach that HM Treasury intends to take regarding transposition of Article 71a, and in particular:

- If the EBA RTS are not published in the Official Journal prior to 28 December 2020, whether HM Treasury will provide further guidance on the approach that UK firms should take to meet their obligations (for example, confirming that UK firms may meet their obligations under Article 71a by complying with the existing provisions of the Stays in Resolution Part of the PRA Rulebook, and giving the PRA the power but not the obligation to make binding technical standards under Article 71a; or delaying the effective date of Article 71a and requiring the PRA to make binding technical standards specifying the contents of the required contractual recognition clause);
- If the EBA RTS are published in the Official Journal prior to 28 December 2020, whether HM Treasury will require UK firms to implement these requirements immediately from 28 December 2020 or whether HM Treasury is considering an alternative approach.

Because of the timeframes involved in implementing these requirements, ISLA respectfully requests that HM Treasury give UK firms as much notice as possible of its intended approach.

ISLA also respectfully requests that HM Treasury consider providing an implementation period of 12 – 18 months before the Article 71a requirements start to apply. This period would allow time for ISLA and other trade associations to develop industry standard wording and for UK firms to communicate with their counterparties to encourage them to adopt this industry standard wording either through mechanisms such as the ISDA JMP or through bilateral agreements.

ISLA would also welcome confirmation that a co-ordinated approach will be adopted regarding any changes that the PRA have to make to the Stays in Resolution Part of its Rulebook, so that UK firms are not required to make multiple changes to their documents to reflect successive changes to these obligations within a short period of time.

2. Treatment of contracts that already contain contractual recognition clauses

ISLA would also welcome confirmation from HM Treasury that firms which have already taken steps to include contractual recognition clauses in their contracts, in compliance with the Stays in Resolution Part of the PRA Rulebook, will be deemed to have complied with any changes to the obligations under that Part and will not be required to amend these contracts again.

UK firms have encountered significant resistance from non-EU counterparties to including this wording in contracts, and this resistance is exacerbated where firms are seeking to amend an existing contract for no other reason than to include contractual recognition wording.

We are at your disposal to discuss the issues raised in our response and any other questions you may have.

Yours faithfully,

Andrew Dyson
Chief Executive Office, ISLA

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.