

## **ISDA Resolution Stay Jurisdictional Modular Protocol**

### **BRRD II Omnibus Jurisdictional Module**

ISDA has prepared this list of frequently asked questions to assist in your consideration of the **BRRD II OMNIBUS JURISDICTIONAL MODULE** to the **ISDA RESOLUTION STAY JURISDICTIONAL MODULAR PROTOCOL** (the **ISDA Jurisdictional Modular Protocol**).

***THESE FREQUENTLY ASKED QUESTIONS DO NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN CONNECTION WITH THE BRRD II OMNIBUS JURISDICTIONAL MODULE. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING OR ADHERING TO THE BRRD II OMNIBUS JURISDICTIONAL MODULE. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION MAY BE PUT.***

These FAQs address the following questions:

- What is the purpose of the BRRD II Omnibus Jurisdictional Module?
- How does adherence to the BRRD II Omnibus Jurisdictional Module and the ISDA Jurisdictional Modular Protocol work?
- How does the BRRD II Omnibus Jurisdictional Module relate to the BRRD II Stay Recognition Requirements under Article 71a of BRRD?
- What agreements are Covered Agreements under the BRRD II Omnibus Jurisdictional Module?
- What entities are Regulated Entities under the BRRD II Omnibus Jurisdictional Module?
- What are the powers under Articles 33a, 69, 70 and 71 of BRRD and the conditions under Article 68 of BRRD?
- How is the Implementation Date under the BRRD II Omnibus Jurisdictional Module determined?
- How do I incorporate the BRRD II Omnibus Jurisdictional Module into my agreements by reference?
- When do the BRRD II Stay Recognition Requirements under Article 71a of BRRD become effective?
- What are the compliance dates for the BRRD II Stay Recognition Requirements under Article 71a of BRRD?
- What Member States does the BRRD II Omnibus Jurisdictional Module cover?
- Do I have to adhere with respect to all Member States covered by the BRRD II Omnibus Jurisdictional Module?
- What happens if a new Member State gets added to the EU Stay Law Annex of the BRRD II Omnibus Jurisdictional Module?
- What is the process for adding Member States to the EU Stay Law Annex?

- Does the BRRD II Omnibus Jurisdictional Module address compliance with the BRRD II Stay Recognition Requirements of a Member State that is not currently included in the EU Stay Law Annex?
- How do I sign up to the BRRD II Omnibus Jurisdictional Module?
- How does the BRRD II Omnibus Jurisdictional Module relate to the French Module and German Module?
- How does the BRRD II Omnibus Jurisdictional Module interact with the Italian Module?

The BRRD II Omnibus Jurisdictional Module is designed to facilitate market participants' compliance with Article 71a of BRRD as transposed by EU Member States ("BRRD II Stay Recognition Requirements"), related to the stay recognition requirements for certain financial contracts that are governed by the law of a third country. The BRRD II Omnibus Jurisdictional Module includes operational provisions that reference the relevant national laws for certain Member States that have transposed the BRRD II Stay Recognition Requirements and is aimed at enabling parties to comply with the requirements in those jurisdictions. A party can adhere to a particular Jurisdictional Module by submitting an Adherence Letter for such Jurisdictional Module. Each Jurisdictional Module is considered individually. For more information on the ISDA Jurisdictional Modular Protocol and adherence to the ISDA Jurisdictional Modular Protocol, please see the general FAQs for the ISDA Jurisdictional Modular Protocol.

The BRRD II Omnibus Jurisdictional Module was published as a Jurisdictional Module to the ISDA Jurisdictional Modular Protocol on 14 September 2021.

### **What is the purpose of the BRRD II Omnibus Jurisdictional Module?**

The BRRD II Omnibus Jurisdictional Module was created to allow market participants to comply with BRRD II Stay Recognition Requirements for certain financial contracts that are governed by the law of a third country. Adhering Parties will be able to adhere to the BRRD II Omnibus Jurisdictional Module and identify themselves as either (i) "Regulated Entities" that are subject to a BRRD II Stay Recognition Requirement under the national law of a Member State that has transposed Article 71a of BRRD and is included in the EU Stay Law Annex or (ii) "Module Adhering Parties" that are adhering for the purpose of satisfying the regulatory requirements applicable to their counterparties under the BRRD II Stay Recognition Requirements.

### **How does adherence to the BRRD II Omnibus Jurisdictional Module and the ISDA Jurisdictional Modular Protocol work?**

*Does a Module Adhering Party have to amend its Covered Agreements with all Regulated Entities?*

Unlike the other jurisdiction specific modules to the ISDA Resolution Stay Jurisdictional Modular Protocol, the BRRD II Omnibus Jurisdictional Module does not permit a Module Adhering Party to choose which Regulated Entity or Regulated Entities it would like to amend its Covered Agreements with when it adheres to the BRRD II Omnibus Jurisdictional Module. Once a Module Adhering Party chooses to amend its agreements with respect to the BRRD II

Stay Recognition Requirements of a particular Member State, all Covered Agreements entered into prior to the Implementation Date between the Module Adhering Party and a Regulated Entity that has also adhered to the BRRD II Omnibus Jurisdictional Module and identified itself as a Regulated Entity subject to the BRRD Stay Recognition Requirements of the same Member State shall be amended.

*Does a Regulated Entity have to specify which BRRD II Stay Recognition Requirements it is subject to?*

Yes, a Regulated Entity must select the specific Member States included in the EU Stay Law Annex in which it is subject to a BRRD II Stay Recognition Requirement. In other words, a Regulated Entity may not select all future jurisdictions that could be added in the EU Stay Law Annex. A Regulated Entity would therefore need to submit a new Adherence Letter to the extent it became subject to a BRRD II Stay Recognition Requirement in a Member State included in the EU Stay Law Annex that it did not select in a previous Adherence Letter.

Electing to adhere to a Member State in which a Regulated Entity is or may be subject to a BRRD II Stay Recognition Requirement is not a representation or warranty that the Regulated Entity would be subject to a resolution action in the Member State. Further, the inaccuracy of such election shall not constitute an event of default in respect of the Regulated Entity or any other event which would permit a counterparty to terminate a Covered Agreement or transaction thereunder.

*Once I submit my Adherence Letter, is my adherence to the BRRD II Omnibus Jurisdictional Module complete or are there any other steps I have to take?*

Once you submit an Adherence Letter, your adherence to the BRRD II Omnibus Jurisdictional Module is complete for those Member States you selected and any Covered Agreements entered into prior to the Implementation Date. To ensure agreements entered into after the Implementation Date between two Adhering Parties are amended, the parties should incorporate the BRRD II Omnibus Jurisdictional Module by reference in such agreements.

### **How does the BRRD II Omnibus Jurisdictional Module relate to the BRRD II Stay Recognition Requirements under Article 71a of BRRD?**

The BRRD II Omnibus Jurisdictional Module is intended to facilitate compliance with the BRRD II Stay Recognition Requirements under Article 71a of BRRD that have been transposed into national law by the Member States included in the EU Stay Law Annex. The provisions of the BRRD II Omnibus Jurisdictional Module that amend Covered Agreements are based on the stay recognition requirements of Article 71a of BRRD and the regulatory technical standards on the contractual recognition of stay powers under Article 71a(5) of Directive 2014/59/EU published by the European Banking Authority.

Parties should consult with their legal advisers and any other adviser they deem appropriate to understand the requirements of the BRRD II Stay Recognition Requirements under Article 71a of BRRD or of any specific Member State.

## **What agreements are Covered Agreements under the BRRD II Omnibus Jurisdictional Module?**

Covered Agreements are BRRD II Regulated Agreements between Adhering Parties that have elected the same Member States in their Adherence Letter. A BRRD II Regulation Agreement means an agreement subject to a BRRD II Stay Recognition Requirement in a Covered Member State. Article 71a of BRRD requires a Member State to apply the stay recognition requirements under its national law to “financial contracts” as defined under BRRD that is governed by third-country law and that:

- (a) creates a new obligation, or materially amends an existing obligation after the entry into force of the provisions adopted at national level to transpose Article 71a of BRRD;
- (b) provides for the exercise of one or more termination rights or rights to enforce security interests to which Article 33a, 68, 69, 70 or 71 of BRRD would apply if the financial contract were governed by the laws of a Member State.

“Financial contracts” is defined to include the following contracts and agreements:

- (a) securities contracts, including:
  - (i) contracts for the purchase, sale or loan of a security, a group or index of securities;
  - (ii) options on a security or group or index of securities;
  - (iii) repurchase or reverse repurchase transactions on any such security, group or index;
- (b) commodities contracts, including:
  - (i) contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;
  - (ii) options on a commodity or group or index of commodities;
  - (iii) repurchase or reverse repurchase transactions on any such commodity, group or index;
- (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;
- (d) swap agreements, including:
  - (i) swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;
  - (ii) total return, credit spread or credit swaps;

- (iii) any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;
- (e) inter-bank borrowing agreements where the term of the borrowing is three months or less;
- (f) master agreements for any of the contracts or agreements referred to in points (a) to (e).
  - *Could a Member State define the scope of Covered Agreements differently from another Member State?*

Yes, a Member State can, and in the case of Denmark, has, defined the scope of Covered Agreements more broadly than the definition of “financial contract” under BRRD and differently from another Member State. To account for these differences, the BRRD II Omnibus Jurisdictional Module defines a Covered Agreement by reference to agreements that are subject to a BRRD II Stay Recognition Requirement in a Covered Member State (i.e., a Member State included in the EU Law Stay Annex that has been chosen by both the Regulated Entity and the Module Adhering Party as a Covered Member State).

Parties should consult with their legal advisers and any other adviser they deem appropriate to understand what agreements are subject to the BRRD II Stay Recognition Requirements in any Member State which they elect in their Adherence Letter.

*Does the BRRD II Omnibus Jurisdictional Module amend agreements entered into after the Implementation Date?*

No, the BRRD II Omnibus Jurisdictional Module does not amend agreements entered into after the Implementation Date.

### **What entities are Regulated Entities under the BRRD II Omnibus Jurisdictional Module?**

A Regulated Entity under the BRRD II Omnibus Jurisdictional Module is an Adhering Party that has identified itself as a Regulated Entity in its Adherence Letter with respect to this BRRD II Omnibus Jurisdictional Module and that is subject to a BRRD II Stay Recognition Requirement. This includes the following entities referred to in Article 1(1)(b), (c) and (d) of BRRD:

- (a) financial institutions that are established in the European Union when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in (b) and (c) below, and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013;
- (b) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the European Union;
- (c) parent financial holding companies in a Member State, European Union parent financial holding companies, parent mixed financial holding companies in a Member State, European Union parent mixed financial holding companies.

Similar to the scope of Covered Agreements, it is possible that a Member State applies the stay recognition requirements established in its national law more broadly than as required by BRRD II. Accordingly, the definition of Regulated Entity is not limited to the entities identified in BRRD and instead includes any entity that is subject to a BRRD II Stay Recognition Requirement.

**What are the powers under Articles 33a, 69, 70 and 71 of BRRD and the conditions under Article 68 of BRRD?**

Articles 33a, 69, 70 and 71 of BRRD require Member States to ensure that resolution authorities have the following powers to suspend or restrict rights and obligations pursuant to any contract to which a Regulated Entity is a party, where the Regulated Entity either is in resolution or nearing resolution. A summary of each power is set out below.

Article 33a: Subject to certain conditions, a resolution authority, after consulting the competent authorities, has the power to suspend, for a period as short as possible and in any event not longer than the period from the publication of a notice of suspension in accordance with Article 33a(8) of BRRD to midnight at the end of the following business day in the Member State of the resolution authority of the Regulated Entity, a payment or delivery obligation pursuant to any contract to which a Regulated Entity is a party where:

- (a) a determination that the Regulated Entity is failing or likely to fail has been made under Article 32(1)(a) of BRRD;
- (b) there is no immediately available private sector measure referred to in Article 32(1)(b) of BRRD that would prevent the failure of the institution or entity;
- (c) the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the Regulated Entity; and
- (d) the exercise of the power to suspend is either:
  - (i) necessary to reach the determination provided for in Article 32(1)(c) of BRRD; or
  - (ii) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools.

The payment or delivery obligations of the counterparty under the contract shall be suspended for the same period of time.

Article 69: Subject to certain conditions, a resolution authority has the power to suspend any payment or delivery obligations pursuant to any contract to which a Regulated Entity under resolution is a party from the publication of a notice of the suspension in accordance with Article 83(4) of BRRD until midnight at the end of the following business day in the Member State of the resolution authority of the Regulated Entity under resolution. The payment or delivery obligations of the counterparty under the contract shall be suspended for the same period of time.

Article 70: Subject to certain conditions, a resolution authority has the power to restrict secured creditors of a Regulated Entity under resolution from enforcing security interests in relation to any assets of the Regulated Entity from the publication of a notice of the restriction in accordance with Article 83(4) of BRRD until midnight at the end of the following business day in the Member State of the resolution authority of the Regulated Entity under resolution.

Article 71: Subject to certain conditions, a resolution authority has the power to suspend the termination rights of any party to a contract with a Regulated Entity under resolution from the publication of the notice pursuant to Article 83(4) of BRRD until midnight at the end of the following business day in the Member State of the resolution authority of the Regulated Entity under resolution, provided that the payment and delivery obligations and the provision of collateral continue to be performed. Article 71 provides similar powers to a resolution authority to temporarily suspend termination rights of a party to a contract with a subsidiary of the Regulated Entity under resolution as well, provided certain conditions are met. A person may exercise a termination right under a contract before the end of the suspension period if that person receives notice from the resolution authority that the rights and liabilities covered by the contract shall not be: (a) transferred to another entity; or (b) subject to write down or conversion on the application of the bail-in tool.

Article 68 of BRRD generally provides that crisis prevention measures and crisis management measures taken in accordance with BRRD cannot, *per se*, be deemed enforcement events pursuant to Directive 2002/47/EC (on financial collateral arrangements) or insolvency proceedings pursuant to Directive 98/26/EC (on settlement finality in payment and securities settlement systems). It also prohibits counterparties of a Regulated Entity with respect to which crisis prevention measures or resolution measures are taken from (i) exercising any termination, suspension, modification, netting or setoff rights, (ii) obtaining possession or enforcing security over any property of the Regulated Entity, and/or (iii) affecting any contractual rights of the Regulated Entity on the sole basis of such measures, provided that the substantive obligations under the contract, including payment and delivery obligations, continue to be performed. The prohibition under (i) also applies to contracts entered into by counterparties with the Regulated Entity's guaranteed or supported subsidiaries. The prohibitions under (i), (ii) and (iii) also apply to contracts with any group entities that contain cross-default provisions. In relation to Articles 33a, 69 and 70 of BRRD, Article 68 makes clear that suspensions or restrictions under these articles do not constitute non-performance of a contractual obligation for purposes of Article 68 or Article 71.

There may be differences in how these provisions of BRRD have been transposed in the Relevant National Law.

### **How is the Implementation Date under the BRRD II Omnibus Jurisdictional Module determined?**

The Implementation Date is the date that ISDA has received an Adherence Letter from the later of the Module Adhering Party and the Regulated Entity Counterparty. If an Adhering Party files a subsequent Adherence Letter, then the Implementation Date will automatically become the date that the latest Adherence Letter is filed. Accordingly any Covered Agreements that had been

entered into after the original Implementation Date and on or prior to the new Implementation Date will be amended.

However, with respect to any Covered Agreements that were entered into on or prior to the original Implementation Date, such agreements will continue to be deemed to be amended as of the original Implementation Date.

### **How do I incorporate the BRRD II Omnibus Jurisdictional Module into my agreements by reference?**

Parties could use the following language to incorporate by reference the amendments made by the BRRD II Omnibus Jurisdictional Module into their agreements:

ISDA has not undertaken diligence in relation to the language set out below. There may be certain requirements under the legal regime in a Covered Member State that must be met in order to incorporate a contractual term by reference into a contract effectively. Parties must seek their own independent advice as to the efficacy of incorporating by reference the terms of the BRRD II Omnibus Module into an agreement.

“The terms of paragraph 2 of the ISDA BRRD II Omnibus Jurisdictional Module are incorporated into and form a part of this Agreement, and this Agreement shall be deemed a Covered Agreement for purposes thereof. For purposes of incorporating the ISDA BRRD II Omnibus Jurisdictional Module, [•] shall be deemed to be a Regulated Entity, [•] shall be deemed to be a Module Adhering Party, and [•] shall be deemed to be a Covered Member State. In the event of any inconsistencies between this Agreement and paragraph 2 of the ISDA BRRD II Omnibus Jurisdictional Module, the ISDA BRRD II Omnibus Jurisdictional Module will prevail.”

### **When do the BRRD II Stay Recognition Requirements under Article 71a of BRRD become effective?**

The BRRD II Stay Recognition Requirements under Article 71a of BRRD become effective in a Member State as soon as they are transposed in national law. The original deadline for Member States to transpose Article 71a’s requirements in national law was December 28, 2020, although not all Member States have met that deadline.

### **What are the compliance dates for the BRRD II Stay Recognition Requirements under Article 71a of BRRD?**

As noted above, the BRRD II Stay Recognition Requirements under Article 71a of BRRD become effective in a Member State as soon as they are transposed in national law. There is no separate compliance date for the BRRD II Stay Recognition Requirements.

### **What Member States does the BRRD II Omnibus Jurisdictional Module cover?**

The BRRD II Omnibus Jurisdictional Module currently covers the following Member States included in the EU Stay Law Annex: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech



Republic, Denmark, Estonia, France, Finland, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovakia, Spain and Sweden.

**Do I have to adhere with respect to all Member States covered by the BRRD II Omnibus Jurisdictional Module?**

No, an Adhering Party may select which Member States it adheres to. For convenience, a Module Adhering Party may adhere to all current and future jurisdictions identified on the EU Stay Law Annex. A Regulated Entity must always specifically select which Member States in which it is subject to a BRRD II Stay Recognition Requirement.

**What happens if a new Member State gets added to the EU Stay Law Annex of the BRRD II Omnibus Jurisdictional Module?**

An entity that would be a Regulated Entity in the new Member State would need to submit an Adherence Letter (and an existing Adhering Party would need to submit a new Adherence Letter) selecting the Member State in order to amend its Covered Agreements that may be subject to BRRD II Stay Requirements transposed into law within the added Member State. The submission of the new Adherence Letter would update the Implementation Date for all Covered Member States that the Regulated Entity elects in its new Adherence Letter.

If an existing Adhering Party submits a new Adherence Letter, it is not necessary to re-select previously selected Member States in any such new Adherence Letter.

Conversely, if a Module Adhering Party chooses to adhere to all current and future jurisdictions identified on the EU Stay Law Annex, the Module Adhering Party will automatically adhere to the newly added Member State and any Covered Agreements entered into on or prior to the relevant Implementation Date with a Regulated Entity that has filed an Adherence Letter selecting the new Member State will be automatically amended. If a Module Adhering Party has not chosen to adhere to all current and future jurisdictions added on the EU Stay Law Annex, then the Module Adhering Party would need to file a new Adherence Letter selecting the Member State if the Module Adhering Party intends to adhere to the Member State. As above, it is not necessary to re-select previously selected Member States in any new Adherence Letter.

**What is the process for adding Member States to the EU Stay Law Annex?**

Member States will be added to the EU Stay Law Annex after the Member State has transposed the BRRD II Stay Requirement in its national law and ISDA has received sufficient support from market participants to include the Member State. If ISDA determines to add a Member State, ISDA will reach out to local counsel in the Member State to identify the Relevant National Laws. ISDA will then update the EU Stay Law Annex and Adherence Letter to reflect the addition of the new Member State.

**Does the BRRD II Omnibus Jurisdictional Module address compliance with the BRRD II Stay Recognition Requirements of a Member State that is not currently included in the EU Stay Law Annex?**

No, the BRRD II Omnibus Jurisdictional Module does not address compliance with a BRRD II Stay Recognition Requirement of a Member State that is not currently included in the EU Stay Law Annex.

However, as noted above, if a Module Adhering Party chooses to adhere to all current and future jurisdictions identified on the EU Stay Law Annex, when a new Member State is added to the EU Stay Law Annex the Module Adhering Party will automatically adhere to such Member State and any Covered Agreements entered into on or prior to the relevant Implementation Date with a Regulated Entity counterparty will be automatically amended.

### **How do I sign up to the BRRD II Omnibus Jurisdictional Module?**

Please see the general ISDA Jurisdictional Modular Protocol FAQs for information on adherence to Jurisdictional Modules and the ISDA Jurisdictional Modular Protocol.

### **How does the BRRD II Omnibus Jurisdictional Module relate to the French Module and German Module?**

The BRRD II Omnibus Jurisdictional Module effectively replaces the terms of the French Module and German Module. Any amendments to Covered Agreements made as a result of a Module Adhering Party and a Regulated Entity Counterparty previously adhering to either the French or German Module are replaced in their entirety by the amendments made by adhering to the BRRD II Omnibus Jurisdictional Module as of the Implementation Date.

### **How does the BRRD II Omnibus Jurisdictional Module interact with the Italian Module?**

The BRRD II Omnibus Jurisdictional Module does not expressly address the interaction between it and the Italian Module. This situation is not unique; a number of the resolution stay protocols published by ISDA may provide for opt-ins to stay provisions under the same laws as other protocols.

The BRRD II Omnibus Jurisdictional Module includes express language stating that it supersedes the French Module and the German Module. This language was included for clarity, given that, unlike Italy, France and Germany had implemented the BRRD II Stay Recognition Requirement at the time the module was finalized.

While the interaction of the BRRD II Omnibus Jurisdictional Module and the Italian Module is a question of the governing law of the Covered Agreement and parties should consult their legal advisers, New York law and Italian law generally provide for later in time amendments to prevail over earlier amendments to the extent of a conflict. As a result, the BRRD II Omnibus Jurisdictional Module should supersede the Italian Module to the extent of any conflict.