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BRRD Transposition, Resilience and Resolution Team
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26 September 2014

Dear Sirs

HMT: Transposition of the Bank Recovery and Resolution Directive: Consultation Document (July 2014)

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the **"Committee"**). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

Preliminary comments

We are focusing in this response on the proposals for removing impediments to resolvability discussed in section 3 of the consultation document; and in particular the proposals to give enforcement powers for early intervention to the Bank of England (**"Bank"**).

Box 3.A: Removing impediments to resolvability

Question 2 – Do you agree with the proposal to model the right of appeal on s. 55Y of FSMA?

We agree that the right of "appeal" should be modelled on the right to refer a matter to the Upper Tribunal under section 55Y of FSMA. The consultation document is not explicit about

the process the Bank will follow before the right to refer the matter to the Tribunal is engaged, although it refers to the firm being notified in writing and having an opportunity to address the impediments. We suggest that the Bank should be required to follow a procedure in line with the other provisions of section 55Y, i.e. that where the Bank proposes to exercise its power to take a crisis prevention measure it should be required to give the relevant institution written notice, specifying a time within which the institution may make representations to the Bank. Where the Bank decides to take a crisis prevention measure it should be required to serve a further written notice on the institution, along the lines set out in subsections (7) to (11) of section 55Y.

Question 3 – Should the Bank of England be given a direct enforcement power in relation to resolution?

We assume that "direct enforcement power" is intended to mean a disciplinary power analogous to the PRA/FCA powers to issue public censures or fines under sections 205 and 206 of FSMA. We do not think that a power of this kind is appropriate or would be effective in requiring firms to remove resolvability impediments. Our answer to the next question sets out our reasons for this view, and why we consider the existing powers of the regulators to be sufficient.

Question 4 – Do you have any comments on the features of that enforcement power? Do you agree that it should be modelled on the current enforcement powers of the PRA, FCA and Bank under FSMA?

The proposed power to require the reduction or removal of impediments to resolvability is broadly analogous with the power of the PRA or FCA to vary a firm's permission or impose a requirement on its own initiative (an **"OIVOP"** or **"OIReq"**). In practice it is not feasible to "enforce" such requirements through the disciplinary powers in section 205 and 206 of FSMA. This would involve an investigation, followed by a decision-making process by the appropriate body (the relevant Decision Making Committee of the PRA or the Regulatory Decisions Committee of the FCA), followed by a possible reference to the Upper Tribunal which will conduct a full rehearing. This process can take several years, during which time the firm would remain in non-compliance with the requirement. The end result, if the regulator is successful, is a public censure or fine, which does not compel the institution to comply with the requirement.

In practice firms comply with OIVOPs and OIReqs because failing to do so is likely to lead to cancellation of their authorisation by the regulators, as they will no longer be considered "fit and proper" to be authorised. This would also be the case if a firm were to fail to comply with a requirement by the Bank to reduce or remove a resolvability impediment. The relevant regulator (normally the PRA, which is part of the Bank) would take action to cancel the firm's authorisation unless it complied with the Bank's requirement. In the circumstances the Bank does not require additional enforcement powers.

In light of this, the de facto ability to enforce in this way decisions to impose requirements means that the need for due process in the making of those decisions is all the greater, emphasising the importance of our points in response to question 2 above regarding the need for representations by the firms.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact either Peter Richards Carpenter by telephone on +44 (0) 20 3400 4178 or by email at peter.richards-carpenter@blplaw.com, or Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours sincerely

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THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

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