



Economy

Consultation: Transfer of the Jersey Bank Depositors Compensation Scheme

FEBRUARY 2024

Summary:

Government is consulting on plans to transfer the functions of the Jersey Bank Depositors Compensation Board (“**the DCS Board**”) to the Jersey Resolution Authority (“**the JRA**”). To perform this, Government is proposing an amendment to the [Bank \(Recovery and Resolution\) \(Jersey\) Law 2017](#) (the “**Resolution Law**”) to transfer the functions of the DCS Board and necessary legislation establishing the Jersey Bank Depositors Compensation Scheme (“**the Scheme**”) currently contained in the [Banking Business \(Depositors Compensation\) \(Jersey\) Regulations 2009](#) (the “**2009 Regulations**”).

Further to the transfer of the Scheme and functions, Government is consulting on further proposals to:

- Make necessary changes to the DCS legislation to support the effective delivery of the Scheme; and
- Make necessary amendment to Article 72 of the Resolution Law to reflect its intended scope and to allow for effective application.

It should be noted that Government is not consulting on, at this stage, adjustments to the protected deposit value, adjustment to the liability cap or revisions to the eligible depositor definition.

It is Government’s intention to transfer these functions by 1 January 2025.

Ahead of publication of this consultation, the Government has worked with representatives of the JRA, DCS and JFSC to inform the proposal.

Date published:
29 February 2024

Closing date:
29 March 2024

1. BACKGROUND

1.1 The 2009 Regulations introduced the Scheme and established the DCS Board. The DCS Board's functions, generally, are to administer the Scheme¹ as enacted; and to arrange for the publication of information for the public on the operation of the Scheme to foster consumer confidence.

1.2 In more recent years, the International Association of Deposit Insurers ("IADI") developed 16 principles for the assessment of deposit guarantee schemes ("IADI Principles"). Whilst Jersey is not a member of the IADI, it recognised that the IADI Principles are considered best practice for all reputable jurisdictions, and as such compliance with them should be considered where reasonably practicable. In response to the IADI Principles, [The Draft Bank Depositors Compensation \(Jersey\) Law 201-](#) ("the Draft DCS Law") was lodged au Greffe on 20 December 2016, identifying improvements to the 2009 Regulations. This proposition was however withdrawn to allow further analysis to be carried out, in particular emphasis was given to emerging international best practice on deposit compensation.

1.3 On 14 February 2017, the Resolution Law was adopted by the States which implemented a framework to plan for, and to mitigate the impact to the public of, a bank failing. The Resolution Law aims to implement the Key Attributes of Effective Resolution Regimes for Financial Institutions alongside the international standards that have developed since the 2008 financial crisis. The Resolution Law, save for Article 72 relating to a contractual recognition of bail-in, came into force on 31 January 2022, leading to the establishment of the JRA. Generally, the functions of the JRA are to make preparations to facilitate, and to administer, the resolution of banks. The JRA also publishes Policy and Guidance surrounding its functions in line with its guiding principles under Article 8 of the Resolution Law.

¹ Whilst Jersey has a strong and robust banking sector, and the island is yet to see a bank failure as a result of a global financial crisis, the DCS aims to provide depositors with confidence in such situations with a means of financial protection of up to £50,000.00 per person per banking group for eligible depositors.

1.4 Through this consultation Government will outline its intentions to bring the functions of the DCS Board and the JRA together, as well as make key improvements with proposals to amend parts of the existing 2009 Regulations by reference to the Draft DCS Law and its interactions with the Resolution Law.

2. OBJECTIVES & SUMMARY OF PROPOSALS

2.1 The Government's primary aim is to ensure the transfer of powers and functions from the DCS Board, under the 2009 Regulations, to the JRA, under the Resolution Law, by consolidating the two pieces of legislation. Alongside consolidation, the Government intends to make only the necessary amendments to ensure an effectively delivered depositors compensation scheme, and amendment to Article 72 of the Resolution Law as set out below.

2.2 The Government's current objectives are to:

2.2.1 Transfer the functions from the DCS Board to the JRA, in particular the administration of the Scheme, and consolidate the legislation establishing the Scheme into the Resolution Law such that there is one statutory provision relating to banking failure. Consequentially, this includes the winding-up of the DCS Board;

2.2.2 Make amendments, in line with those proposed in the Draft DCS Law, for the improved administration of an effective Depositors Compensation Scheme which is better aligned with international best practice; and

2.2.3 Amend Article 72 of the Resolution Law to reflect its intended scope as well as make amendment to allow for more practical application.

2.3 In summary, this Consultation considers the following proposals:

2.3.1 Transfer the functions of the DCS Board to the JRA through the consolidation of legislation into the Resolution Law;

2.3.2 Providing necessary flexibility to activate the Scheme through the determination of when a bank should be considered in default;

- 2.3.3 The setting of improved delivery timescales to make compensation alongside changes to the relevant law to facilitate the finalisation of a Straight-Through Payout system in accordance with work which has been ongoing with banks in previous years;
- 2.3.4 The introduction of a “pro-rata” payment system, including an amended priority of payment;
- 2.3.5 Introduce a requirement for cooperation between the liquidator and the Successor Board; and
- 2.3.6 Amending Article 72 of the Resolution Law relating to contractual recognition of bail-in and amending the power for the JRA to waive the contractual recognition requirement where it is considered to be impracticable.

3. PROPOSALS

Proposal 1 – Transfer the functions of the DCS Board to the JRA through the consolidation of legislation into the Resolution Law

3.1 The 2009 Regulations and the Resolution Law both act as parts of a complementary banking regime. Where a bank is considered systemically important by virtue of its collapse potentially resulting in a financial crisis then the Resolution Law provides a range of resolution tools to avoid a disorderly failure. However, where a bank is not considered to be systemically important or where the resolution plan allows the Jersey entity to enter insolvency, then the Scheme is likely to be the preferred tool and provides a means of ensuring that depositors have almost immediate access to their essential savings.

3.2 In light of the aforesaid, it is clear that the 2009 Regulations through operation of the Scheme, and the Resolution Law both serve to operate as a means of ensuring the continuity of critical banking functions to preserve financial stability and in turn fostering public confidence; yet each regime is currently administered by a separate independent body with overlap in their functions.

3.3 Government has outlined in its [Delivery Framework for Sustainable Economic Development 2023-26](#) the importance of aligning public services for sustainable economic growth, in particular the reduction of duplication to enable businesses to grow and the need for agility efficiency and improved accessibility. This extends to Arms Length Organisations and public authorities to deliver a framework and operations which is proportionate to the island.

3.4 In the event of crisis speed and efficiency will become of key importance. The Government has considered it preferable that having one independent body operating these regimes under one consolidated piece of legislation would enhance the swift and effective administration of the Scheme; including particularly with consideration of the proposed amendments to timeframes for compensation payments to be made as discussed at Proposal 3 of this Consultation Paper.

3.5 It is intended that the JRA, as the current Authority established under the Resolution Law, is the appropriate body under which the Scheme and related functions should be transferred. Pursuant to this it is intended the DCS Board, as a body incorporated via statute, will cease through the repeal of the respective regulation.

Question 1: *Do you agree with the Government's approach to consolidating both pieces of legislation relating to banking failure under one statutory provision, and the bringing of the Scheme within the functions of the JRA? If not, please state your reasons for disagreement.*

Proposal 2 – Providing necessary flexibility to activate the Scheme through the determination of when a bank should be considered in default

3.6 In recognition of Proposal 1 to transfer the functions of the DCS board to the JRA, the future board with responsibility for the DCS will be herein referred to as the "Successor Board" for the purposes of the consultation.

3.7 As currently drafted, Regulation 15 of the 2009 Regulations mandates the DCS Board to activate the Scheme "*as soon as practicable after a bank becomes bankrupt*". As is apparent, the DCS Board currently has no discretion whether to activate the Scheme where it has determined that the threshold test has been met. Careful consideration has since been given to alternative deposit protection schemes of other jurisdictions, alongside the IADI Principles. Though not yet implemented, Article 15(1) of the Draft DCS Law would amend Regulation 15 of the 2009 Regulations by requiring the Successor Board to declare a bank to be in default, where, in its opinion a bank "*is bankrupt or insolvent*" as opposed to only in circumstances of "*bankruptcy*" under the 2009 Regulations.

3.8 Whilst the language of Article 15(1) *prima facie* appears to be mandatory in nature, the Successor Board, under Article 15(2) of the Draft DCS Law is not required to declare a bank to be in default where it considers that:

3.8.1 A resolution procedure has started and has not finished, or is likely to start within a reasonable time, in respect of the bank; and,

3.8.2 It is appropriate, in light of that procedure, not to declare the bank in default for the time being or at all.

3.9 It is noted that in the exercise of its functions under the Draft DCS Law, the Successor Board must act in accordance with its objectives in that it must have regard to (a) the protection of the interests of depositors; and (b) contributing to financial stability. As such, if the Successor Board does not consider the activation of the Scheme is compliant with these objectives, it is not mandated to declare a bank to be in default. Further, as indicated

aforesaid, Article 15(1) of the Draft DCS Law expands the threshold test for the activation of the Scheme to also include situations of insolvency. In doing so, the Successor Board has greater discretion and/or flexibility in administering the Scheme in a prudent and economical manner.

3.10 There is a clear trade-off between providing the Successor Board with increased discretion and flexibility, and the cost of efficiency and speed of decision making. However, Article 8(1)(b) of the Draft DCS Law provides that the general functions of the Successor Board, amongst others, are to arrange the publication of information for the public on how it intends to operate the Scheme, and extends generally to what circumstances it may declare a bank in default in line with Article 15 of the Draft DCS Law.

3.11 As such, Government is confident that, upon the transfer of functions and powers from the DCS Board to the JRA, the JRA as a Successor Board will be able to swiftly and efficiently administer and/or activate the Scheme by reference to:

- 3.11.1 The JRA's own Policy and Guidance papers in pursuance with its functions;
- 3.11.2 The making of a winding up Order against the relevant bank;
- 3.11.3 The appointment of receiver (whether or not by the Court);
- 3.11.4 The making of any voluntary arrangements with the relevant bank's creditors;
- 3.11.5 Where a judicial authority has made a ruling directly related to the financial circumstances of the relevant bank;

3.12 The examples provided at 3.9 are not intended to be an exhaustive list of examples and it would be for the Successor Board to determine its approach. However, such has been provided by way of working example as to how the Successor Board may consider activating the Scheme and draws similar parallels to the UK's Financial Service Compensation Scheme, and the Isle of Man's Depositors' Compensation Scheme. It is not intended to codify the examples provided within the amended Resolution Law; instead, the Government seeks to provide greater discretion to the Successor Board.

Question 2: *Do you agree with the increased flexibility envisaged under the Draft DCS Law as regards the threshold test? If not, please provide your reasons for disagreement.*

Question 3: *Do you agree that the JRA should hold discretion as to whether to activate the Scheme where an alternative resolution procedure has started, or is likely to start within a reasonable time? If not, please provide your reasons for disagreement*

Proposal 3 – Setting of improved delivery timescales to make compensation alongside amendment to facilitate the finalisation of the Straight-Through Payout system

3.13 As it stands, Regulation 18(1) and (2) of the 2009 Regulations require a “*valid application*” for compensation to be made to the DCS Board. The 2009 Regulations gives considerable discretion to the Board, including requiring the applicant to provide sufficient evidence to show that they are an eligible depositor, and to identify the eligible depositors eligible deposit and the amount of that deposit.

3.14 Upon receipt of a valid application, the DCS Board must currently make payment of compensation within 3 months of receipt of that application². Where a request is made within a valid application for interim payment, for example where such deposit constitutes the eligible depositors’ essential savings and immediate access is of utmost importance, this mandates the DCS Board to make interim payment of £5,000.00 (or an amount equal to the eligible deposit of the applicant on the relevant date)³.

3.15 Upon reflection of the IADI Principles, the proposed amendment under the Draft DCS Law intends to remove, in most circumstances, the requirement of a valid application, and to provide for a mechanism of “*Straight-Through Payout*”⁴. The mechanism intends for eligible depositors to receive compensation due under the Scheme automatically, without any application. Such compensation is to be calculated based on the deposit data of the bank in default, currently by way of a bank’s Single Customer View (“**SCV**”) file i.e., a document which contains a comprehensive aggregation of the data held by the bank on the relevant eligible depositor.

3.16 Article 47(3) of the Draft DCS Law provides the power for the DCS Board to, by way of published notice, (a) designate a format that may be used by a bank for the provision of the relevant data, or (b) after consulting the Minister, designate a mandatory format that must be used by a bank when providing relevant data to the DCS Board.

² Regulation 19 of the 2009 Regulations

³ Regulation 18 of the 2009 Regulations

⁴ Article 19 of the Draft DCS Law

3.17 It is Governments intention to set the primary payment date to be 7 working days, in most circumstances, after the administrating board is satisfied that the bank in default has provided to it the relevant data required for compensation to be calculated and paid to an eligible depositor⁵. As such, a mechanism of Straight-Through Payout enables the Successor Board to comply with the proposed reduced primary payment date for compensation to be paid, most of the time, providing that the pre-requisites are met. This change will align with Core Principle 15 of the IADI Principles, and closely mirrors schemes elsewhere such as the UK.

3.18 The Government does not envisage imposing any liability upon the Successor Board if it fails to meet the primary payment date, unless there has been an omission or act committed in bad faith⁶. Instead, Article 16(10) of the Draft DCS Law stipulates that the responsible person for the bank in default may be guilty of an offence and is liable to a fine for any delays in the provision of the relevant data.

3.19 It is proposed that the relevant data to be provided by the bank in default is detailed as it is under Article 16(2) and (3) of the Draft DCS Law. These Articles would mandate the Successor Board to issue a Notice upon the Bank in default to provide, as soon as practicable but by no later than 2 working days, a statement of its relevant holding i.e., the total amount held by the bank in default at the time of its default by way of eligible deposits and any other evidence required to ensure its accuracy. Since the original proposition of the Draft DCS Law in 2016, subsequent changes have been made to the DCS Regulations to empower the DCS Board to demand data at a potentially quicker turnaround time than two days as expressed above⁷. It is envisaged that whilst bringing in Article 16(2) and (3) of the draft law, the Successor Board will retain the power to establish quicker turnaround times consistent with the current law and operation, thus removing requirement for the notice to be set at a period of 2 days or longer.

⁵ Article 18(2) of the Draft DCS Law

⁶ Currently drafted under Article 13(3) of the Draft DCS Law

⁷ [Regulation 35A of the DCS Regulations](#)

3.20 As regards expediency and efficiency of the payment of compensation to eligible depositors, the obligation to ensure the accuracy of the relevant data⁸ is intended to be placed upon all licenced banks. As such, the Successor Board, in most circumstances, will be able to treat the relevant data provided by the bank as accurate, and make payment of compensation due under the Scheme.

3.21 Government is aware that there may be increased risk regarding the accuracy of the relevant data, and the importance of assessing compensation correctly where the deposit constitutes an individual's essential savings. As such, it is proposed that the Successor Board will retain the power to still require a valid application for compensation by eligible depositors⁹, in circumstances¹⁰ where it has:

3.21.1 Reasonable grounds for believing such information provided by the bank in default is of insufficient quality to safely assess the amount of compensation payable to each eligible depositor; or,

3.21.2 Other reasons it considers it not reasonable to assess the compensation payable without further data.

3.22 In circumstances where a valid application is still required, it is proposed that the Successor Board must not pay compensation unless it has received a valid application within 6 months of the relevant date on which a bank was declared in default by the Successor Board, unless the reason that an eligible depositor failed to make such an application was outside of his or her control.

3.23 The availability and accuracy of relevant data is critical to effective and timely delivery of the Scheme. Further to maintaining the power that enables the DCS Board to request

⁸ Article 16(2) and (3) of the Draft DCS Law

⁹ As outlined in Article 20 of the Draft DCS Law

¹⁰ Article 19(2) of the Draft DCS Law,

and test bank's SCV files¹¹, it will be required that all banks within Jersey which hold eligible deposits to, at the end of the relevant calendar year end, provide to the board its annual holdings return containing, amongst others, the bank's relevant holding¹². This will support the continued review of deposits under cover by the Successor Board.

3.24 In consideration of paragraphs 3.13 to 3.23 of this Consultation Paper, the Government has confidence that the Successor Board upon completion of the intended consolidation exercise will have the ability to assess whether the Straight-Through Payment system is preferable in the circumstances, or whether a valid application is required during its determination.

Question 4: *Do you agree with the Government's approach to improve pay-out timing with introduction of a system of Straight-Through Payout? If not, please provide reasons for your disagreement.*

Question 5: *Subject to Proposal 4, do you agree with the Government's proposals to require compensation to be paid, in most circumstances, within 7 days? If not, please provide reasons for your disagreement.*

¹¹ [Regulation 35A of the DCS Regulations](#)

¹² Article 30 of the Draft DCS Law

Proposal 4 – The introduction of replacement of a “pro-rata” payment system, including an amended priority of payment

3.25 Whilst Principle 15 of the IADI requires that insured depositors are reimbursed within seven working days, as considered at Proposal 3, where a deposit insurer cannot meet this target then it must have a credible plan in place to do so. Alongside desiring compliance with the IADI Principles where appropriate, the Government is aware that in the event of financial crisis, there must be flexibility to cope with the strain of any operational and/or unforeseen circumstances.

3.26 Currently, Regulation 18(2) of the 2009 Regulations requires the DCS Board, upon request within a valid application, to make an interim payment of £5,000.00. Upon reflection, it may be considered that such a figure may not be conducive nor practical to the successful operation of the Scheme and may contrarily frustrate the order of priority. This is evident with consideration of the large administrative costs in making an interim compensation on a somewhat arbitrary figure for an individual's essential savings. Instead, it is proposed to introduce a pro-rata system of payment in accordance with Article 18(4) of the Draft DCS Law, as discussed further in paragraph 3.29 below.

Revision to the hierarchy of payment

3.27 It is proposed that the hierarchy for payment will be revised in line with Article 42 of the Draft DCS Law. In this regard, subject to Article 34 of the Draft DCS Law, the order of priority of a compensation fund is:

3.27.1 Payment by way of adjustment;

3.27.2 Payment of default-related administrative costs;

3.27.3 Payment of compensation;

3.27.4 Payment to each depositor whose excess rights were vested in the DCS Board, of the amount in respect of which that depositor's excess rights were so vested;

3.27.5 Repayment of any States loan;

3.27.6 Repayment, to each bank that paid a compensation levy in relation to the fund of the amount so paid.

3.28 It is thereby important to note that the payment of default-related administrative costs sits at higher priority than the payment of compensation. This is relatively self-explanatory, given the administrative costs are required for the actual operation of the Scheme itself.

Proportional Allocation of Compensation

3.29 In the absence of sufficient funds, the Successor Board simply will not have sufficient funds to make payment of compensation. As such, and in consideration of paragraph 3.26 of this Consultation Paper, the Successor Board will have the power to make proportional reductions in total compensation payments where there is insufficient money within the compensation fund to make maximum payments of compensation within 7 days of declaring a bank in default and/or where the Successor Board has assessed upon completion of the compensation exercise there will be insufficient money within the compensation fund to pay the default-related administrative costs¹³.

3.30 In the aforesaid circumstances all compensation payable to each eligible depositor will be reduced by a proportionate amount i.e., on a pro-rata basis and/or as appears prudent to the Successor Board. Such sums will still be required to be paid within 7 days of receiving the relevant data from the bank in default, such that the pro-rata amount of compensation payable to the depositor will be paid and not an amount limited to the payment of £5,000.00, as provided for under the current 2009 Regulations.

¹³ Article 42(3) of the Draft DCS Law

3.31 In circumstances where proportionally allocated compensation has been paid to the eligible depositor, the Successor Board will maintain the power to make any further and/or final payments on a proportioned basis provided they are confident they can continue to satisfy the revised order of priority under the Draft DCS Law. Note that the Successor Board shall complete the payment of its default-related administrative costs within 5 years of the relevant date in relation to declaring a bank in default¹⁴ subject to necessary extensions as permitted within the law.

Postponement of the Primary Payment Date

3.32 In line with Article 18(9) of the Draft DCS Law, the Successor Board will be provided with the power to postpone the primary payment date (7 days from the date the bank is declared in default) if both the Successor Board and the Minister are satisfied that doing so would:

3.32.1 Assist the Successor Board in the application of the order of priority and timing of payments out of the compensation fund; or,

3.32.2 Would otherwise be appropriate to do so for the better administration of the depositor compensation scheme or a related purpose. Such related purposes would include those outlined in Article 18(7) of the Draft Law:

- Where a resolution procedure has started and not finished or is likely to start in a reasonable timeframe, and it is considered appropriate not to declare the bank in default¹⁵;
- The bank in default has a right or duty to postpone or refuse payment, the account in which the deposit is held is dormant, or there is some other reason for the board to exercise the power to postpone payment¹⁶. The latter general power is intended to allow the Successor

¹⁴ This will be in line with Article 43(1) of the Draft DCS Law

¹⁵ Article 15(7) of the Draft DCS Law

¹⁶ Article 21(2) of the Draft DCS Law

Board to delay compensation when dealing with complicated cases which prevent payment, such as incomplete data.

- Where postponement allows for the meeting of conditions, in line with Article 36 of the Draft Law, which are imposed to a bank to achieve the recognition of depositor's rights under foreign law as they would under Jersey Law¹⁷.
- Where the board is awaiting the depositor to enter written agreement or contract to vest their interests in the Board¹⁸.
- Where the board is awaiting the depositor to enter written agreement or contract to vest their interests, with regards to their excess rights relating to amounts in excess of the maximum amount of compensation payable to the depositor, in the Board ¹⁹.

3.33 It is not intended for any further caveats to be introduced other than as currently envisaged and/or by virtue of the above proposed amendment or as set out in Article 21 (2) of the Draft DCS Law.

Question 6: *Do you agree with the Government's proposal to introduce a pro-rata style payment in consideration of the order of priority and the likely benefit to depositors? If not, please provide reasons for your disagreement.*

Question 7: *Would further caveats to the payment of compensation be necessary? If yes, please provide your reasoning.*

¹⁷ Article 36(5) of the Draft DCS Law

¹⁸ Article 38(6) of the Draft DCS Law

¹⁹ Article 39(6)(a) of the Draft DCS Law

Proposal 5 – A requirement for cooperation between the liquidator and the Successor Board

3.34 In order to aid the effective payment of compensation in line with the Scheme, it is intended to bring forward amendments from Article 35 of the Draft Law. This will require the liquidator to cooperate with the Successor Board to ensure that compensation is paid out as soon as reasonably practicable, in particular the liquidator:

3.34.1 must comply with every reasonable requirement of the Successor Board to provide any assistance in relation to the Scheme; and

3.34.2 must give precedence to the duties imposed to ensure cooperation with the Successor Board over any other duties relating to the winding up of the affairs of the bank, but must begin working towards compliance with both such classes of duty immediately upon appointment.

Question 8: *Do you agree with the requirement for the liquidator to prioritise cooperation with the Successor Board in the delivery of compensation to depositors subject to the Scheme? Please highlight any concerns or reasons if not.*

Proposal 6 – Amendment to Article 72 of the Resolution Law regarding contractual recognition of bail-in and amending the power for the JRA to waive the contractual recognition requirement where it is considered to be impracticable

3.35 The purpose of the bail-in tool under Article 72 of the Resolution Law is to minimise the costs to Jersey taxpayers of the resolution of a failing bank. It intends to preserve financial stability and associated risks to depositors by ensuring that shareholders and creditors of a failing bank suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the bank. With the aim of supporting the effectiveness of the bail-in tool on a cross border basis, Article 72(1) of the Resolution Law requires banks to recognise the possibility that instruments may be written down or converted via bail-in within the contractual terms of certain liabilities.

3.36 The bail-in tool will therefore give shareholders and creditors of banks a stronger incentive to monitor the health of a bank during normal circumstances and meets the Financial Stability Board’s recommendation that statutory debt write-down and conversion powers be included in a framework for resolution, as an additional option in conjunction with other resolution tools.

3.37 However, as referred to at Paragraph 1.3 of this Consultation Paper, the Resolution Law came into force on 31 January 2022 save for Article 72. The rationale was that, if enacted as drafted, the very nature of Article 72 of the Resolution Law coming into force would have immediately rendered Jersey banks in breach of the Law to some extent. Article 72(4) of the Resolution Law stipulates that any failure on behalf of the bank to do so will constitute an offence and rendering the bank liable to a fine, and shall not, in the event of a breach, prevent the bail-in tool from being utilised in any event.

3.38 Instead, it has previously proposed to amend Article 72 of the Resolution Law so that it can be brought into force at a later date than the date upon which the Law comes into force i.e., by means of an Order specifying the commencement date; the date of which would be on the advice of the JRA. This would in turn provide Jersey banks adequate time

and preparation to be compliant with the revised version of Article 72 of the Resolution Law by the time the provision comes into force.

3.39 As currently drafted, Article 72(1) of the Resolution Law mandates banks to include a contractual term by which the creditor, or party to an agreement creating an eligible liability, recognises that that liability may be subject to the write down and conversion power, and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of that power by the JRA. This is provided that such liability is:

3.39.1 not excluded under Article 65(7);

3.39.2 not a covered deposit;

3.39.3 governed by the law of a jurisdiction other than Jersey; and

3.39.4 issued or entered into after the date on which this Law comes into force or where entered into or issued prior to the date on which this Law comes into force, the bank has the ability to amend the contract after the date of entry into force of this Law to include such a contractual term.

Article 72(1) of the Resolution Law

3.40 As highlighted above, Article 72(1) of the Resolution Law applies to “banks”. Under Article 3(1) of the Resolution Law a bank is defined as “a person registered to carry on deposit-taking business in or from within Jersey under the 1991 Law”; or “a company incorporated under the Companies (Jersey) Law 1991 that is a holding company or a subsidiary of a person specified” aforesaid. The Government understands that this results in the bail-in tool under Article 72(1) applying to Jersey branches of overseas incorporated banks.

3.41 By way of comparison, Article 55 of the EU Bank Recovery and Resolution Directive (2014/59/EU) (“**BRRD**”) refers to institutions or entities generally²⁰, applying to EU incorporated institutions or entities. As such, the Government intends to re-align with this and limit the in-scope entities applicable under Article 72 of the Resolution Law to banks incorporated within Jersey; and to not include Jersey Branches.

Article 72(2) and 72(6) of the Resolution Law

3.42 As currently drafted, Article 72(6) of the Resolution Law provides the JRA with the power to “*waive the requirements set out in paragraph (1) in respect of a bank*”. This power was intended to be used in circumstances where it would be impossible for a bank to comply with Article 72(1) of the Resolution Law. By way of example, this may be in circumstances where a bank is unable to comply due to host country law or regulations, or where the bank has no power to amend the contractual terms due to internationally agreed standard terms. Since the drafting of the Resolution Law, the Government has now been able to consider the approach taken in other jurisdictions, such as the EU and the UK.

3.43 Briefly, 2.1A of the UK’s PRA Rulebook provides a similar waiver to that which was intended at the time of drafting Article 72 of the Resolution Law. 2.1A of the PRA Rulebook stipulates that “*the inclusion of a contractual term in a contract is not required ... in respect of any phase two liability where it would be impracticable for the BRRD undertaking to include it in respect of that phase two liability*”. In determining what is “*impracticable*”, the Bank of England has published a supervisory statement providing further clarity and suggesting that deposit-taking banks are “*required to make their own reasoned assessment*”.

3.44 Similarly, on 23 December 2020, the European Banking Authority (“**EBA**”) as empowered under Article 55(3) of the BRRD has submitted draft Regulatory Technical Standards (“**RTS**”). These define the conditions under which it would be legally or

²⁰ Referred to in points (b), (c) and (d) of Article 1(1) of the BRRD

otherwise impracticable for an institution or entity to include the contractual term for the recognition of the bail-in, and the reasonable timeframe for such inclusion. Alongside this, they specify uniform templates for notification to the relevant resolution authorities which meet the conditions of impracticability defined in the RTS.

3.45 As such, the Government intends to adopt a similar approach as follows:

3.45.1 To expand upon Article 72(2) of the Resolution Law to also provide the power to set standards in a similar fashion to Article 55(3) of the BRRD as referenced at paragraph 3.44 of this Consultation Paper i.e., by allowing the Minister to set by Order the prescribed conditions;

3.45.2 To replace the waiver under Article 72(6) of the Resolution Law with the power to disapply the liabilities defined at Article 72(1) in circumstances where it would be impracticable and upon application by the relevant bank identifying the underlying conditions creating the impracticability.

3.46 Finally, it is noted that 72(1) of the Resolution Law refers to “eligible liability” but Article 72(2) refers simply to other liabilities. For the purposes of clarity, the government also intends to amend 72(2) to refer to the liabilities defined at 72(1) of the Resolution Law i.e., those described at paragraph 3.39 of this Consultation Paper.

Article 72(3) of the Resolution Law

3.47 Currently, Article 72(3) of the Resolution Law provides the JRA the power to disapply paragraph 72(1)(a) of the Resolution Law i.e., the requirement upon a bank to include bail-in provisions within its contracts where such liabilities are not excluded under Article 65(7) of the Resolution Law when the liability can be subject to write down or conversion powers by the resolution authority of another jurisdiction or pursuant to a binding agreement concluded with that other jurisdiction.

3.48 Upon review, Government has now considered that Article 72(3) should in fact read “*paragraph (1) shall not apply*”. This will align with Article 55 of the BRRD. The proposed amendment would provide the JRA the power to disapply all such liabilities set out at Article 72(1) in circumstances where the liability can be subject to write down or conversion powers by the resolution authority of another jurisdiction or pursuant to a binding agreement concluded with that other jurisdiction.

3.49 Governments proposals related to Article 72 above are purposefully aligned with those within the [Position Paper in respect of the Minimum Requirement for own funds and Eligible Liabilities \(MREL\)](#) published by the JRA in December 2023, in particular Section 6.5.

Question 9: *Do you agree with the proposed changes to Article 72? If not, please state the reasons for your disagreement.*

Conclusion

Government seeks to ensure that the Scheme and the functions of the DCS Board are transferred to the JRA, such that the JRA can effectively administer the scheme on transfer, as well as its other functions and responsibilities relating to resolution. It is expected that in turn this will reduce frictions in the public sector response to a banking failure and provide for an improved response. Government welcomes any additional general comments on the proposals made within this consultation.

Question 10: *Do you have any further comments in relation to the proposals made under this consultation?*

Subsequent to this consultation, Government will bring forward proposed legislative amendments in keeping with the proposals made within this consultation.

Responses may be provided online using the Smart Survey facility provided on gov.je/consultations or alternatively via:

- email to economy@gov.je
or post to: FAO Thomas Wright, Associate Director of Financial Services, Department for Economy, 19-21 Broad Street, St Helier JE2 3RR

Should you wish to find out more about those authorities discussed within this consultation, please follow the links below.

The Jersey Bank Depositor Compensation Board – [Jersey Bank Depositors Compensation Scheme | Home \(jerseydcs.je\)](http://jerseydcs.je)

The Jersey Resolution Authority - [Jersey Resolution Authority | Home \(jra.org.je\)](http://jra.org.je)

Appendix A – Summary of questions asked

Question 1: *Do you agree with the Government’s approach to consolidating both pieces of legislation relating to banking failure under one statutory provision, and the bringing of the Scheme within the functions of the JRA? If not, please state your reasons for disagreement.*

Question 2: *Do you agree with the increased flexibility envisaged under the Draft DCS Law as regards the threshold test? If not, please provide your reasons for disagreement.*

Question 3: *Do you agree that the JRA should hold discretion as to whether to activate the Scheme where an alternative resolution procedure has started, or is likely to start within a reasonable time? If not, please provide your reasons for disagreement.*

Question 4: *Do you agree with the Government’s approach to improve pay-out timing with introduction of a system of Straight-Through Payout? If not, please provide reasons for your disagreement.*

Question 5: *Subject to Proposal 4, do you agree with the Government’s proposals to require compensation to be paid, in most circumstances, within 7 days? If not, please provide reasons for your disagreement.*

Question 6: *Do you agree with the Government’s proposal to introduce a pro-rata style payment in consideration of the order of priority and the likely benefit to depositors? If not, please provide reasons for your disagreement.*

Question 7: *Would further caveats to the payment of compensation be necessary? If yes, please provide your reasoning.*

Question 8: *Do you agree with the requirement for the liquidator to prioritise cooperation with the Successor Board in the delivery of compensation to depositors subject to the Scheme? Please highlight any concerns or reasons if not.*

Question 9: *Do you agree with the proposed changes to Article 72? If not, please state your disagreement.*

Question 10: *Do you have any further comments in relation to the proposals made under this consultation?*