Title: The Bank Recovery and Resolution (Amendment) (EU Exit) 2020 (section 2(2) and section 8)	De minimis assessment
SI No: TBC	**Date: 16/09/2020**
Other departments or agencies: Click here to enter text.	**Type of regulation: EU**
Contact for enquiries: **Joanna Seppala, Sarah Pemberton**	**Date measure comes into force: 28/12/2020**
Cost of Preferred (or more likely) Option Below £5m	**Net cost to business per year** (EANDCB in 2020 prices) **Below £5m**

1. What is the problem under consideration? Why is government intervention necessary?

The Bank Recovery and Resolution Directive II (BRRDII) was published in the Official Journal of the European Union (OJEU) on 7 June 2019 and entered into force on 27 June 2019. During the Transition Period (TP), and under the terms of the Withdrawal Agreement, the Government will implement EU legislation that requires transposition before the end of 2020.This includes the transposition of BRRDII by 28 December 2020. We are intending to lay a Statutory Instrument before Parliament in mid-October.

2. What are the policy objectives and the intended effects?

The Directive makes amendments to the original 2014 BRRD provisions, in order to update the EU's bank resolution regime across the EU. The resolution regime provides the financial authorities (the Bank of England, the Financial Conduct Authority and HM Treasury) with powers to manage the failure of financial institutions in a way that protects depositors and maintains financial stability, while limiting the risks to public funds. The Directive updates the powers that financial authorities have to resolve a failing bank.

3. What policy options have been considered, including any alternatives to regulation? Please justify preferred option

We are transposing BRRDII either via secondary legislation or regulator rules, in line with our previous approach to transposition for BRRD. A Statutory Instrument will make amendments to the relevant primary and secondary legislation, such as the Banking Act 2009 and the Bank Recovery and Resolution (No.2) Order 2014, through which the UK's resolution regime has been previously implemented. Where there is a precedent of BRRD or similar measures having previously been implemented in regulator rules, those BRRDII provisions will also be transposed in rules. These provisions include:

- Article 1(16) of BRRDII which inserts a new Article 44a into BRRD and introduces restrictions on the selling of subordinated eligible liabilities to retail clients, including those issued to meet a firm's requirement for Total Loss Absorbing Capacity (TLAC) or its Minimum Requirement for Own Funds and Eligible Liabilities (MREL) . TLAC and MREL absorb losses and provide for recapitalisation, in the event of resolution. The purpose of TLAC and MREL is to ensure that investors and shareholders, and not the taxpayer, absorb losses when a firm fails.

- Article 1(21) of BRRDII, which updates Article 55 of BRRD on the contractual recognition of bail-in (CROB)

We are not intending to transpose the requirements in the Directive that do not need to be complied with by firms until after the end of the TP, in particular Article 1(17) which revises the framework for MREL requirements across the EU. The UK already has in place a MREL framework in line with international standards (the Financial Stability Board's (FSB) Total Loss Absorbing Capacity (TLAC) standards).

In our transposition of BRDDII we have also considered which provisions would not be suitable for the UK resolution regime after leaving the EU whilst still maintaining prudential soundness and other important regulatory outcomes such as consumer protection and proportionality. We have also taken into account concerns raised in consultation responses on the potential risks to financial stability, consumers and the impact on firms. As a result, we are intending to include sunset clauses in our secondary legislation transposing BRRDII for the following provisions. These provisions will cease to have effect in the UK from 1 January 2021, so will only be place for a period of 4 days at the end of 2020:

- Article 1(6) of BRRDII which inserts a new Article 16a in BRRD to provide the resolution authority with a power to prohibit certain distributions by imposing a maximum distributable amount (MDA) restriction on a firm, where it has insufficient resources to meet its combined buffer requirement, in addition to its MREL requirements, subject to certain conditions.
- Article 1(12), which inserts a new Article 33a in BRRD to introduce a pre-resolution moratorium power
- Article 1(20) of BRRDII which adds new Article 48(7), making changes to the priority of debts in insolvency.
- Article 1(21) of BRRDII, which updates Article 55 of BRRD on CROB
- Article 1(30) which amends the existing in-resolution moratorium power under Article 69 of BRRD

We are also intending to revoke any regulatory technical standards (RTS) and implementing technical standards (ITSs) which relate to provisions not implemented or not suitable for the UK that are developed by the European Banking Authority (EBA) and adopted by the European Commission by the end of the TP.

4. Please justify why the net impacts (i.e. net costs or benefits) to business will be less than £5 million a year.

Given our approach to transposing the Directive, as outlined in Section 3, we estimate that the costs to the banking industry as a whole of transposing BRRDII will be minimal and below £5 million in total.

BRRDII provisions would likely have had significant cost implications to industry if they were implemented in UK law on a long-term basis as they would introduce changes to the UK resolution regime, such as:

- changes to the amount of the minimum amount of equity and debt that a firm must maintain to absorb losses and provide for recapitalisation, in the event of resolution (Article 1(17) of BRRDII which revises the framework for MREL)
- changes to the requirements and processes for firms on CROB in relation to liabilities within the scope of the bail-in powers but governed by the law of a third country (Article 1(21) of BRRDII, which updates Article 55 of BRRD on CROB)

- changes to the resolution powers of the resolution authority (Articles 1(12) and 1(30) of BRRDII, which introduces a pre-resolution moratorium power and amends the existing in-resolution moratorium power respectively)
- introduction of a power for the resolution authority to limit a firm's ability to distribute earnings, subject to certain conditions (Article 1(6) of BRRDII on MDA restrictions)
- changes to the ranking of instruments and more specifically, the priority of debts in insolvency (Article 1(20) of BRRDII which amends the original BRRD under Article 48(7)).

However, as set out in section 3 on policy considerations, these provisions will be either not transposed or sunsetted at the end of the TP, which is within 4 days of taking effect in UK law. As a result of this, little or no action will be necessary on the part of firms, beyond gaining an understanding of this approach and any very minor or temporary consequential changes in the relevant regulator rules. We will communicate this to industry before implementation of the Directive.

In addition, BRRDII gives a mandate to the EBA to develop further RTS and ITS on several areas of BRRDII, such as MREL, CROB, and the contractual recognition of resolution stay powers. It is not possible to estimate the potential cost implications quantitatively at this stage because RTSs and ITSs have not been developed by EBA and adopted by the European Commission. However, these would potentially introduce further compliance costs for firms, should they deviate from the original BRRD and the existing UK resolution regime, as they could change the amount of MREL firms will need to hold as well as require further changes to financial contracts. The revocation of those RTS and ITS which relate to provisions not implemented or not suitable for the UK by the end of the TP will mean there will be no costs to industry to meet any potential requirements that would have been introduced by these RTS and ITS following transposition of BRRDII into UK law. We will communicate this to industry before implementation of the Directive.

Where BRRDII provisions will not be sunsetted at the end of the TP and remain in UK legislation, our estimate is that there will be no significant impact on industry as a result of their introduction into UK law. The key measures that fall into this category include:

- the new Article 44a which will be implemented through FCA rules and introduces restrictions on the selling of subordinated eligible liabilities to retail clients. For these purposes, a retail client is defined as a client who is not a professional client or an eligible counterparty. A professional client is defined as an entity required to be authorised or regulated to operate in financial markets. BRRDII establishes that a firm may only sell subordinated eligible liabilities, as defined within BRRDII, where certain conditions are met. Discussions that have taken place with industry to date suggest that there will be no measurable increase in funding costs for UK firms as a result of the introduction of these restrictions.

- the new Article 71a which introduces requirements on the contractual recognition of stay powers. We will include the new pre-resolution moratorium power within the definition of 'crisis management measure' in the 2009 Banking Act to transpose this. However, this will be sunsetted at the end of TP, alongside Article 1(12) of BRRDII which introduces this power. This will minimise the cost to industry as it will mean that no changes in substance are required to the PRA's stay rules, and therefore will not require firms that are already compliant with the PRA's stay rules to repaper contracts.

- Amendments to the requirements in Article 12 of BRRD on resolution plans to identify for each group the resolution entities and the resolution groups. It also requires a group which comprises more than one resolution group to set out the resolution actions for the resolution entities of each resolution group and the implications of those actions on both other group entities belonging to the same resolution group and other resolution groups. These changes will have minimal impact as the Bank of England already refers to these terms in other requirements they set in relation to bank resolution (for example, their MREL Statement of Policy). This amendment to legislation ensures broader consistency and alignment with international standards and use of terminology across authorities going forward.

Firms may need to obtain advice as and when necessary (e.g. when writing a prospectus for a new debt or equity offering) to gain an understanding of or summarise the provisions. Any costs to do this are likely to be minimal given provisions that would likely have had significant cost implications for firms will either not be transposed (e.g. MREL requirements) or sunsetted at the end of the TP, which is within 4 days of taking effect in UK law. In most cases, any advice will be obtained by firms in the course of a significant transaction and so there will be no identifiable incremental cost attached specifically to the BRRD II-related aspect of the advice. It will be subsumed within the legal adviser's wider mandate. Given it is not possible to attribute the cost of advice to BRRDII, and the needs of firms to obtain advice will depend on the transactions they may make and could vary as they differ in type, it is not possible to quantify the costs to firms or provide a quantitative estimate of costs to the banking industry as a whole.

The UK's resolution regime applies to all banks, building societies, and FCA regulated investment firms. Small and medium-sized firms which have a balance sheet smaller than £15bn - £25bn, and less than 40,000 to 80,000 transactional bank accounts, are regarded as not systemically important firms, and would go through an insolvency procedure if they failed. Therefore, not all amendments made to the UK resolution regime in order to transpose BRRDII will impact small firms. In addition, some of the provisions which may impact small firms are being sunsetted, reducing their overall impact on these firms to a de minimis level.

<u>To do this, please set out the following:</u>

- What will businesses have to do differently? ☐
- How many businesses will this impact per year? ☐
- What is the direct cost/benefit per business per year? ☐

  E.g. what will be the familiarisation costs?
  - Mean staff hours for familiarisation x Hourly labour costs
  - Any non-labour costs of updating systems?

5. Please confirm whether your measure could be subject to call-in by BRE under the following criteria. If yes, please provide a justification of why a full impact assessment is not appropriate:

a) **Significant distributional impacts (such as significant transfers between different businesses or sectors)**
n/a

b) **Disproportionate burdens on small businesses**

c) The UK's resolution regime applies to all banks, building societies, and FCA regulated investment firms. Small and medium-sized firms which have a balance sheet smaller than £15bn - £25bn, and less than 40,000 to 80,000 transactional bank accounts, are regarded as not systemically important firms, and would go through an insolvency procedure if they failed. Therefore, not all amendments made to the UK resolution regime in order to transpose BRRDII will impact small businesses. In addition, some of the provisions which may impact small businesses are being sunsetted, reducing their overall impact on these firms to a de minimis level.

d) **Significant gross effects despite small net impacts**
n/a

e) **Significant wider social, environmental, financial or economic impacts**
n/a

f) **Significant novel or contentious elements**
n/a

Sign-off for de minimis assessment: SCS

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

SCS of Resilience and Resolution Team

Signed: ***Joe Taylor*** Date: 23/09/2020

SCS of Better Regulation Unit

Signed: ***Niva Thiruchelvam*** Date: 23/09/2020

Sign-off for de minimis assessment: Minister

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed: ***John Glen*** Economic Secretary to the Treasury Date: 24/09/2020

Further information sheet

Please provide additional evidence in subsequent sheets, as required.