

EXPLANATORY MEMORANDUM TO
THE BANK RECOVERY AND RESOLUTION (AMENDMENT) (EU EXIT)
REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument implements Directive (EU) 2019/879 of the European Parliament and of the Council (the Bank Recovery and Resolution Directive II or “BRRDII”). The Directive amends the EU’s Bank Recovery and Resolution Directive (Directive 2014/59/EU or “BRRD”), in order to update the EU’s resolution policy and Minimum Requirements for Own Funds and Eligible Liabilities (“MREL”) framework.
- 2.2 As these implementing provisions will subsequently form part of retained EU law at the end of the Transition Period, this instrument also corrects deficiencies arising in retained EU law to ensure that the UK maintains a fully functioning regulatory and legal framework following the end of the Transition Period.

Explanations of changes made to correct deficiencies arising from leaving the EU

What did any relevant EU law do before exit day?

- 2.3 This instrument transposes the requirements of BRRDII, as explained in paragraphs 7.1 to 7.8 below.

Why is it being changed?

- 2.4 The requirements include separate provision for undertakings established in the EEA, and include references to EU legislation and EU institutions. Once the Transition Period comes to an end, it will no longer be appropriate to distinguish between EEA states and other third countries, nor to retain references.

What will it now do?

- 2.5 At the end of the Transition Period, Part 4 of these Regulations will amend the new provisions inserted by Parts 2 and 3 so that the requirements refer to the relevant national legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is to the whole United Kingdom.
- 4.2 The territorial application of this instrument is to the whole United Kingdom.

5. European Convention on Human Rights

- 5.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument implements BRRDII requirements under powers conferred by section 2(2) of the European Communities Act 1972. The instrument amends Part 1 of the Banking Act 2009, Section 137R of the Financial Services and Markets Act 2000, the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, the Credit Institutions (Reorganisation and Winding up) Regulations 2004, the Banking Act 2009 (Restriction of Special Bail-in Provisions, etc) Order 2014, and the Bank Recovery and Resolution (No.2) Order 2014 and the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019. The instrument also makes legislative provision in Part 5 which does not require amendment of existing legislation.
- 6.2 This instrument also makes amendments under powers conferred by section 8(1) of the European Union (Withdrawal) Act 2018. It makes amendments to the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 and the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019. It also revokes retained direct EU legislation which is not applicable or is no longer required.
- 6.3 Under section 1A(5) of the European Union (Withdrawal) Act 2018, the BRRDII provisions cease to have effect in domestic law after 31 December 2020. This instrument implements certain requirements only for the period prior to this date.

7. Policy background

What is being done and why?

Transposition

- 7.1 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, 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 requirement to transpose BRRDII by 28 December 2020.
- 7.2 We have consulted with the Bank of England, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) on transposition of the Directive. The Directive makes amendments to the original 2014 BRRD provisions, in order to update the bank resolution regime across the EU. The resolution regime provides the financial authorities 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.

- 7.3 It also updates the Minimum Requirement for Own Funds and Eligible Liabilities (MREL) framework. MREL is the minimum amount of equity and debt that a firm must maintain to absorb losses and provide for recapitalisation, in the event of resolution. The purpose of MREL is to ensure that investors and shareholders, and not the taxpayer, absorb losses when a firm fails. These amendments intend to bring the harmonised EU resolution and MREL frameworks into conformity with international standards. The substantive provisions in BRRDII are set out below.
- 7.4 The Directive amends BRRD to introduce the concepts of ‘resolution entities’ and ‘resolution groups’ which derive from the same terms as used in the Financial Stability Board’s (“FSB”) Total Loss Absorbing Capacity (“TLAC”) standard. These concepts are used to determine TLAC requirements. A resolution group is a resolution entity together with any subsidiaries that are not themselves resolution entities or subsidiaries of another resolution entity.
- 7.5 In line with the introduction of these new concepts, Article 1(3) of BRRDII amends 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.
- 7.6 Article 1(6) of BRRDII inserts a new Article 16a in BRRD to provide resolution authorities with the power to impose 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. Article 1(7) of BRRDII also amends the powers in Article 17 of BRRD to address or remove impediments to resolvability, providing additional detail on circumstances where there is an impediment to resolvability.
- 7.7 Article 1(16) of BRRDII inserts a new Article 44a in BRRD to introduce 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.
- 7.8 Article 1(21) of BRRDII amends Article 55 of BRRD which relates to liabilities within the scope of the bail-in powers but governed by the law of a third country. It requires that any such liabilities, issued or entered into after implementation, include a contractual term which states that the liability may be subject to the write-down and conversion powers, and that the creditor agrees to be bound by any actions of the resolution authority in relation to the liability. BRRDII updates Article 55 to recognise that in practice, this requirement can be difficult to implement. It therefore specifically addresses the scenario in which it is impracticable for entities to include such contractual recognition clauses within liabilities contracts governed by third country law, and allows firms to not include such contractual terms in certain unsecured liabilities contracts.

Non-transposition and sunseting

- 7.9 In our transposition of BRRDII we have not transposed the requirements in the Directive that do not need to be complied with by firms until after the end of the Transition Period, in particular Article 1(17) which revises the framework for MREL requirements across the EU.
- 7.10 The UK already has in place a MREL framework in line with international standards (the FSB's TLAC standards).
- 7.11 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 necessary transposition of BRRDII by 28 December 2020. We will not transpose provisions which apply to firms after the end of the TP.
- 7.12 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 and consumers. As a result, we are sunseting the following at the end of the Transition Period:
- Article 1(6) of BRRDII which inserts a new Article 16a in BRRD and provides the resolution authority with the power to prohibit an entity from distributing more than the 'Maximum Distributable Amount' relating to the minimum requirement for own funds and eligible liabilities (M-MDA), where the entity fails to meet the combined buffer requirement, 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 introduces Article 48(7) of BRRD, making changes to priority of debts in insolvency
 - Article 1(21) of BRRDII, which updates Article 55 of BRRD on the contractual recognition of bail-in
 - Article 1(30) which amends the existing in-resolution moratorium power under Article 69 of BRRD

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument used powers under section 8 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) to correct any deficiencies arising in retained EU law and ensure that the UK maintains a functioning regulatory and legal framework following the end of the Transition Period.
- 8.2 Alongside the European Union (Withdrawal) Act 2018 powers, the instrument is also being made under section 2(2) of the European Communities Act 1972 (c.68).

9. Consolidation

- 9.1 Consolidated versions of the Acts and the other instruments amended by this Order are available on commercial websites. However, there are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 In June 2020, The Treasury published a consultation document, ‘Transposition of the Bank Recovery and Resolution Directive II’¹.
- 10.2 The consultation ran from 23 June 2020 to 11 August 2020, during which time the Government received 9 written responses.
- 10.3 The consultation document indicated our intention to not transpose the MREL provisions. It also set out at a high-level a description of the main provisions within the Directive and sought views on how the UK should seek to implement the provisions. The Banking Liaison Panel (“BLP”) was convened in July 2020 to seek further views from key stakeholders.
- 10.4 The consultation did not cover the entirety of the Directive, and instead focused on areas where there was a policy choice in transposition.
- 10.5 The consultation responses focused on the potential adverse impact and risks of introducing a pre-resolution moratoria power which would give the Bank of England the power to suspend a firm’s payment or delivery obligations, including the ability to suspend access to eligible deposits, and the extension of the existing in-resolution moratoria power to eligible deposits. Concerns were also raised about the cost to industry if transposition led to a change in regulator rules which required industry to repaper contracts, and the market impact of a change to where instruments rank in the insolvency hierarchy.
- 10.6 The consultation response document was published on 15 October 2020.

11. Guidance

- 11.1 Under section 5 of the Banking Act 2009, the Treasury is obliged to issue a code of practice about the use of the stabilisation powers. The Special Resolution Regime Code of Practice will contain further material on this Order.

12. Impact

- 12.1 The net impact of the Directive on business is considered to be less than £5m, and a de-minimis Impact Assessment has been published.
- 12.2 There is no impact on charities or voluntary bodies.
- 12.3 There is no cost to the public sector.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. While no deposit-taking banks or building societies in the UK are likely to meet the definition of a small or medium-sized enterprise (SME) there may be investment firms which are small businesses and are covered by this legislation.

14. Monitoring & review

- 14.1 This instrument does not include a requirement to review.

¹ <https://www.gov.uk/government/consultations/consultation-on-the-transposition-of-the-bank-recovery-and-resolution-directive-ii>

15. Contact

- 15.1 Lucinda Greenslade at Her Majesty's Treasury, Telephone: 020 7270 5443 or email: Lucinda.Greenslade@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Joe Taylor, Deputy Director of the Resilience and Resolution team at Her Majesty's Treasury, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen MP, Economic Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Economic Secretary to the Treasury (John Glen MP) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 do no more than is appropriate”.

- 1.2 This is the case because the use of Section 8 of the European Union (Withdrawal) Act 2018 in this instrument follows the approach taken in previous instruments to fix deficiencies in retained EU law to ensure that the UK financial services regulatory regime continues to operate in a coherent, effective and transparent manner at the end of the Transition Period.

2. Good reasons

- 2.1 The Economic Secretary to the Treasury (John Glen MP) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 These are: the approach taken with this instrument is consistent with the approach previously taken in earlier instruments, and maintains the intended effect of those instruments. The amendments made to previous instruments are necessary to ensure that legislation operates effectively at the end of the Transition Period, and the amendments go no further than what is required for this purpose.

3. Equalities

- 3.1 The Economic Secretary to the Treasury (John Glen MP) has made the following statement(s):

“The Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 3.2 The Economic Secretary to the Treasury (John Glen MP) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020, I, Economic Secretary to the Treasury, John Glen MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 and section 7 of the main body of this explanatory memorandum.