



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY

Publication



Policy Statement | PS28/20

Bank Recovery and Resolution Directive II

December 2020





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1 Overview

1.1 This Prudential Regulation Authority (PRA) Policy Statement (PS) provides feedback to responses to Consultation Paper (CP) 18/20 ‘Bank Recovery and Resolution Directive II’.¹ It also contains the PRA’s final policy, as follows:

- amended Contractual Recognition of Bail-in (CROB) Part of the PRA Rulebook (Appendix 1); and
- amended Stay in Resolution (Stays) Part of the PRA Rulebook (Appendix 2).

1.2 This PS is relevant to Bank Recovery and Resolution Directive (BRRD) undertakings to which the CROB and Stays Parts apply (firms).

Background

1.3 In CP18/20, the PRA set out proposals to reflect the UK’s transposition of BRRD II, which amends the BRRD.² The UK is required to transpose BRRD II by Monday 28 December 2020.

1.4 HM Treasury’s statutory instrument for BRRD II (the SI)³ was made on Wednesday 2 December 2020 in order to deliver the transposition of BRRD II. The SI results in changes to primary legislation that will affect the existing PRA regime for CROB and Stays.

1.5 Most elements of the SI that are relevant to the CROB and Stays Rules will for the most part come into force on Monday 28 December 2020, but will subsequently cease to have effect from 11pm on Thursday 31 December 2020 (Implementation Period (IP) completion day). In the CP, the PRA referred to this process as ‘sunsetting’.⁴

1.6 To reflect these changes, the PRA proposed to:

- temporarily suspend part of the CROB Part⁵ of the PRA Rulebook from Monday 28 December 2020;⁶
- reinstate the existing CROB Part, with minor amendments, to come into force on IP completion day;
- amend the Stays Part of the PRA Rulebook from Monday 28 December 2020 until IP completion day; and
- reintroduce the existing Stays Part on IP completion day.

¹ October 2020: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/bank-recovery-and-resolution-directive-ii>.

² Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

³ The Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 (referred to in this paper as ‘BRRD II Statutory instrument’ or ‘SI’) available at <https://www.legislation.gov.uk/ukxi/2020/1350>.

⁴ To give effect to this process, HM Treasury have included sunset clauses in the SI transposing Articles 33a, 55, and 69.

⁵ PRA CROB 2.1 to 2.3 shall not apply from Monday 28 December 2020 until IP completion day as defined in the European Union (Withdrawal Agreement) Act 2020.

⁶ This results in the expectations set out in Supervisory Statement (SS) 7/16 ‘The contractual recognition of bail-in: impracticability’ June 2016: <https://www.bankofengland.co.uk/prudential-regulation/publication/2016/the-contractual-recognition-of-bail-in-impracticability-ss> ceasing to apply for the period during which the CROB Part is temporarily suspended.

Summary of responses

1.7 The PRA received one response to the CP. The respondent requested clarification regarding the PRA's proposal to amend the definition of 'crisis management measure' in the Stays Part. Details of the response and the PRA's feedback are set out in Chapter 2. The PRA has considered that request and decided to publish final policy as consulted upon.

Implementation

1.8 The policy set out in this PS has been designed in the context of the UK's withdrawal from the European Union and entry into the transition period. During the transition period, the UK remains subject to European law and must transpose Directives that become applicable before IP completion day. The PRA policy applicable only during the end of the transition period and ceasing to have effect on IP completion day will not need to be amended under the EU (Withdrawal) Act 2018 (EUWA).⁷ Therefore, no such EUWA changes will be made to the Stays Part, which will be in place for four days.

1.9 The policy set out in this PS that will come into effect at the end of the transition period (on IP completion day) will need to be amended under the EU (Withdrawal) Act 2018 (EUWA). These changes will be made separately by the PRA Rulebook (EU Exit) Instrument 2020.⁸ Please see PS27/20 'UK withdrawal from the EU: Changes before the end of the transition period for further details.'⁹

1.10 Changes to relevant obligations made by the PRA Rulebook (EU Exit) Instrument in relation to rules that become applicable on IP completion day are within the scope of the temporary transitional power (TTP) set out in the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019.¹⁰ However, the majority of changes to CROB and Stays Rules remain express exceptions to the PRA application of the TTP, and firms are expected to comply with the new rules from the end of the transition period. See the TTP webpage for further information.¹¹

1.11 The temporary suspension of CROB 2.1 to 2.3 will be effective from Monday 28 December 2020 until IP completion day. The existing CROB Part in its entirety, with minor amendments, will be effective on IP completion day.

1.12 During the four-day period from Monday 28 December 2020 until IP completion day, the expectations set out in Supervisory Statement (SS) 7/16 'The contractual recognition of bail-in: impracticability' will be treated as being in abeyance. SS7/16 will apply to firms simultaneously with the amended CROB Part, starting from IP completion day.

1.13 In the CP, the PRA addressed the possibility of a firm submitting an impracticability notification to the Bank under the SI impracticability notification process,¹² in the period from Monday 28 December 2020 until IP completion day. The PRA confirms a notification submitted during these four days will automatically lapse on IP completion day if not acted upon by the Bank during that period.

⁷ April 2019: <https://www.bankofengland.co.uk/paper/2019/the-boes-amendments-to-financial-services-legislation-under-the-eu-withdrawal-act-2018>.

⁸ The final draft PRA Rulebook: (EU Exit) Instrument 2020. Available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2020/ps2720app-b5.pdf>.

⁹ December 2020: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/uk-withdrawal-from-the-eu-changes-before-the-end-of-the-transition-period>.

¹⁰ March 2019: <https://www.legislation.gov.uk/ukdsi/2019/9780111179970/contents>.

¹¹ Available at: <https://www.bankofengland.co.uk/eu-withdrawal/temporary-transitional-power>.

¹² BRRD II establishes a new procedural requirement for firms to submit a notification of impracticability to the resolution authority: Article 55(2)-(4) BRRD II: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.150.01.0296.01.ENG.

1.14 The reinstated CROB Part will capture contracts currently in scope of the existing CROB Part, as well as any contracts entered into or materially amended between Monday 28 December 2020 and IP completion day, or thereafter.

1.15 The temporary amendment to the Stays Part will be effective from Monday 28 December 2020 until IP completion day. The existing Stays Part will be reinstated on IP completion day.¹³ This means that the definition of ‘crisis management measure’, which will apply from IP completion day, will be the same definition which has applied since the Stays Rules were last amended with effect from Wednesday 1 June 2016.

1.16 Following consultation, the PRA confirms that it does not expect firms to amend existing third-country law governed contracts to reflect the temporary change to the definition of ‘crisis management measure’ in the Stays Rules, which will apply during the period from Monday 28 December 2020 until IP completion day.

Other SI provisions to be ‘sunsetting’ on IP completion day

1.17 Firms are reminded that, as set out by HM Treasury in their response to the consultation on the transposition of BRRD II,¹⁴ in addition to most of the elements of the SI which are relevant to CROB and Stays, the following chapters of Part 5 of the SI will cease to have effect in the UK from IP completion day:

- Chapter 1, which introduces a pre-resolution moratorium power for the Bank of England and amends the existing in-resolution moratorium power;
- Chapter 2, which introduces a power for the Bank of England to prohibit a firm from distributing more than the maximum distributable amount, which relates to the minimum requirement for own funds and eligible liabilities where the firm fails to meet the combined buffer requirement; and
- Chapter 5, which makes certain changes to the priorities of debts in insolvency in the case of insolvency proceedings commenced during the period from Monday 28 December 2020 until IP completion day.

1.18 In addition, under Regulation 80 of the SI, any regulatory technical standards and implementing technical standards that relate to provisions of BRRD II not implemented in or not suitable for the UK,¹⁵ which are adopted by the EU Commission and in force immediately before IP completion day, will be revoked with effect from IP completion day.

¹³ The only amendment will be to reintroduce the definition of ‘crisis management measure’ that applied before Monday 28 December 2020.

¹⁴ <https://www.gov.uk/government/consultations/consultation-on-the-transposition-of-the-bank-recovery-and-resolution-directive-ii>.

¹⁵ See HM Treasury’s Consultation Response document on BRRD II: <https://www.gov.uk/government/consultations/consultation-on-the-transposition-of-the-bank-recovery-and-resolution-directive-ii>.

2 Feedback to response

2.1 Before making any proposed rules, the PRA is required by FSMA to have regard to any representations made to it, and to publish an account, in general terms, of those representations and its feedback to them.¹⁶

2.2 The PRA received one response to the CP. This chapter sets out the PRA's feedback to that response, and its final decisions.

2.3 The respondent requested clarification regarding the PRA's proposal to amend the definition of 'crisis management measure' as referenced in the Stays Part. The PRA proposed to amend Stays 1.4 to reflect the temporary amendment to the definition of 'crisis management measure' in section 48Z of the Banking Act 2009 made by the SI. The respondent queried whether it was necessary to update statutory references in Stays 1.4 during the four day period from Monday 28 December 2020 until IP completion day.

2.4 The respondent commented that the PRA's proposal to update statutory cross-references would be burdensome for firms that would need to update their contractual documentation as a result, to reflect the PRA rule changes to statutory references. The respondent requested clarification that, as the substance of Stays 1.4 would remain unchanged, it was not necessary to amend the Stays Rules as proposed.

2.5 The PRA has considered the impact resulting from the introduction of the SI. The SI makes changes to two definitions in the Banking Act 2009 which are relevant to the CROB and Stays Parts. To support HM Treasury's sunseting process, the PRA must amend its rules to reflect the changes made to primary legislation that has been amended after the relevant PRA rule has come into force.

2.6 This is relevant to the PRA's approach to BRRD II transposition in the following way:

- for CROB, the definition of 'excluded liability' under Section 48(B)(8) of the Banking Act 2009; and
- for Stays, the definition of 'crisis management measure' under Section 48Z(1) of the Banking Act.

2.7 The PRA considers that the meaning of the statutory cross-references in the Stays and CROB Parts are fixed at the point in time at which the rules containing the cross-references are made. The content of the relevant Banking Act section – and so the content or effect of the PRA rule which refers to it – has changed. The CROB and Stays Parts therefore need to be amended in order to track the new Banking Act 2009 definitions.

2.8 For the Stays Part, the change is temporary. The definition of 'crisis management measure' in Stays 1.4 that will apply from IP completion day will be the same definition which has applied since the Stays Part was last amended with effect from Wednesday 1 June 2016. The PRA does not expect firms to amend existing third-country law governed contracts. For the CROB Part, the amended rules coming into force on IP completion day will contain an amendment to reflect the updated definition of 'excluded liability' that will apply from IP completion day.

2.9 Having considered this response, the PRA has decided to publish final policy as consulted upon.

¹⁶ Sections 138J(3) and 138J(4) of FSMA.

Appendices

- 1 PRA RULEBOOK: CRR FIRMS AND NON-AUTHORISED PERSONS: CONTRACTUAL RECOGNITION OF BAIL-IN AMENDMENT INSTRUMENT 2020, available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2020/ps2820app1.pdf>

- 2 PRA RULEBOOK: CRR FIRMS AND NON-AUTHORISED PERSONS: STAY IN RESOLUTION AMENDMENT INSTRUMENT 2020, available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2020/ps2820app2.pdf>