Transposition of BRRD2 in the UK

BSA response to HM Treasury consultation

11 August 2020

Building Societies Association

Introduction

The BSA is pleased to respond briefly to HM Treasury's consultation on BRRD 2 transposition, with the benefit of useful discussions at the Banking Liaison Panel in late July. In this response we will concentrate on those issues of direct and/or distinctive impact on our members (principally in Chapter 5 of the consultation document). We leave other matters for practitioners from other sectors to comment on. On the main issue of the extension of moratorium powers to covered and operational deposits, we have liaised with UK Finance, and are -we believe- broadly in alignment in challenging this proposal.

General comments

We agree with and support the overall approach described in paragraph 1.2 : see below, emphasis added -

The UK played a pivotal role in the design of EU financial services regulation. The Government remains committed to maintaining prudential soundness and other important regulatory outcomes such as consumer protection and proportionality. However, rules designed for 28 countries cannot be expected in every respect to be the right approach for a large and complex international financial sector such as the UK. Now that the UK has left the EU, the EU is naturally already making decisions on amending its current rules without regard for the UK's interests. ***We will therefore also tailor our approach to implementation to ensure that it better suits the UK market outside the EU.***

We understand the general policy direction that UK should at least implement the majority of BRRD 2 that takes effect on 28 December, just before the end of the transitional period. We see this as not merely a question of the formalities of implementation (for all of three days!) but that the UK would subsequently have a BRRD 2 compliant baseline which could prove beneficial for equivalence purposes. However, if there are specific items in BRRD 2 that the UK opposed in co-decision, but previously, absent Brexit, the UK would just have had to put up with as a result of Qualified Majority Voting, we do now have the chance to reconsider. So, in principle, there could be a case for ***not*** implementing something that is demonstrably harmful to the UK. That is what "taking back control" should mean.

Treatment of eligible deposits

We refer first to these key paragraphs of the consultation document (from Chapter 5 –and for clarity, we take it that eligible deposits includes the sub-set of covered deposits – as indicated in paragraph 5.3.) :

5.2 BRRDII amends Article 69 of BRRD to extend the scope of this 'in-resolution' moratorium power to permit the suspension of eligible deposits.

5.3 The Directive specifies that resolution authorities should assess carefully the appropriateness of applying this power to eligible deposits, and in particular covered deposits held by natural persons and micro, small and medium-sized enterprises.

5.4 Where this suspension power is exercised in respect of eligible deposits, states subject to BRRD may provide that resolution authorities ensure that depositors have access to an appropriate daily amount of funds, to ensure that they do not enter into financial difficulties.

The possibility of a two-day planned suspension, without warning, of access to customers' covered deposits has quite alarming practical consequences, and the idea should be treated with the very greatest caution. Even apart from resolution situations, severe consumer detriment is caused by occasional outages in major deposit-takers' systems and money transmission services. As a recent example, though in the electronic money rather than the deposit taking space, we refer to the widespread consumer detriment experienced a month or so ago when payment providers using the Wirecard platform were (without notice) unable to access funds which had been frozen temporarily by FCA.

Great efforts are being made by the Bank and PRA to ensure that deposit takers can maintain operational continuity – for critical services such as cash and payments– in and through resolution – so this measure would seem to go in the exactly opposite direction. See, for instance, the "continuity of access" approach of PRA, which included the laborious requirement to be able to separate covered deposits from other eligible deposits of the same customer, precisely in order to keep continuity of access while the rest of the deposit base is frozen. Was this exercise all for nothing ? While BRRD 2 allows for a small amount of money to be taken out for immediate customer needs, no such obligatory safeguard is being proposed in the CP or implemented through the draft Statutory Instrument – or have we missed something ?

Turning to operational deposits, again the knock-on effects on securities markets and financial infrastructure could be serious as UK Finance point out. An institution in, or about to enter, resolution will need some degree of ability to transact in cash and securities markets, and losing access, even for two days, to operational balances, could frustrate settlement of in-flight transactions and result in effective exclusion from such markets.

During the BLP discussions it was pointed out that while UK stakeholders had opposed this item in BRRD 2, apparently the practical need for the two- day moratorium arose from the EU's Single Resolution Board's inability to mobilise itself quickly enough to act in resolution anywhere in the Eurozone / SSM. As was said at the BLP, we think the Bank / PRA does not have this problem, ergo post Brexit we question the UK's need for the solution. We note that the consultation document makes no positive case for the extension of moratorium powers to eligible deposits proposed in Chapter 5, treating it rather as a mechanistic exercise in transposition.

Bearing in mind that (absent an unexpected EEA-type deal with the EU-27, or last- minute extension of the transitional period) the obligation to have transposed the extension to eligible deposits will last for only three or four days, from 28 December to 31 December 2020 inclusive, we suggest a better approach would be as follows. First, and given the previous UK opposition to this item, the Treasury should either make a better case for the merits (for the UK) of the extension (independent of formal transposition obligations). If that case stands up, proceed to implement for the longer term. But if the case for extension, purely on its merits, falls away, then the item should for the time being be deleted from the transposing SI. If nearer December, there is a need to reach total formal compliance with BRRD 2, it can be added by subsequent SI.

So, if the conclusion is that this measure is unsuitable for an independent UK, and undesirable, it should not be transposed for the sake of a show of notional compliance for a few days at the end of December.

Other comments

We have comments on one aspect of Chapter 6 – ***Selling of eligible liabilities to retail clients***. The distribution of complex, less marketable and risk-bearing securities to retail consumers is already addressed in the UK through FCA rules. Specific rules[1] were made in 2015 covering the distribution of regulatory capital instruments, whether contingent convertible securities or mutual society shares. It would seem sensible to deal with eligible liability instruments in a similar way – by extending FCA rules but in a coherent and consistent way. The BSA takes the protection of retail consumers very seriously, and any mis-selling of eligible liabilities to such consumers would prove highly damaging. So we suggest a further development of the FCA's existing policy regarding regulatory capital instruments.

[1] https://www.fca.org.uk/publication/policy/ps15-14.pdf

Jeremy Palmer
Head of Financial Policy
jeremy.palmer@bsa.org.uk
020 7520 5912

York House
23 Kingsway
London WC2B 6UJ

020 7520 5900
@BSABuildingSocs
www.bsa.org.uk

BSA EU Transparency Register No: 924933110421-64

www.bsa.org.uk

The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £420 billion, and account for 23% of the UK mortgage market and 19% of the UK savings market.