
EXPLANATORY NOTE

(This note is not part of the Order)

This Order implements in part Directive 2014/59/EU of the European Parliament and of the Council of 15th May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (“RRD”) (OJ L173, 12.6.2014, p.190). The RRD requires EEA states to have powers to manage the failure of credit institutions and investment firms and their group companies (“banks”) as an alternative to insolvency, in order to ensure that critical functions continue to be performed.

The amendments to the Banking 2009 (c.1) (“the Act”) align existing provisions with the requirements of the RRD and create the new powers for the Bank of England required by the RRD.

Article 6 creates a new Chapter 2 to give the Bank of England powers which it may use before a firm reaches the point where it is necessary for the Bank to use its stabilisation powers under the Act to require firms to remove impediments to the use of those powers. The pre-resolution powers are subject to safeguards similar to those for the use of comparable powers when exercised by the Prudential Regulation Authority (“PRA”) or the Financial Conduct Authority (“FCA”) under the Financial Services and Markets Act 2000 (c. 8) (“FSMA”).

Articles 10 imposes a duty on the Bank of England to write down or convert capital instruments (Common Equity Tier 1 instruments, Additional Tier 1 instruments and Tier 2 instruments) before it may use one of the stabilisation options provided for in Part 1 of the Act on a failing bank. Appropriate compensation arrangements are provided through the power of the Bank to provide common equity to holders of the relevant capital instruments where necessary.

Article 11 require the Bank of England to ensure a valuation is conducted of the assets and liabilities of the failing bank before it exercises a stabilisation option. It permits a provisional valuation to be carried out by the Bank of England in an urgent case, after which an independent valuation is required by new section 48X (inserted by article 61).

Articles 12 – 23 amend the stabilisation options in the Act. Article 12 amends the general conditions for the exercise of these options. Articles 15 and 19 add a new stabilisation option of transferring liabilities of the failing bank to an ‘asset management vehicle’, which previously could only be done using a bridge bank. Article 18 imposes further requirements on the use of the bridge bank option. Articles 20 – 22 make changes to the bail in option; the list of liabilities exempt from bail, set out in section 48B, is amended in article 48.

Articles 24 – 98 amend the procedural rules for the use of the stabilisation options to implement RRD requirements and make consequential amendments chiefly to reflect the addition of the asset management vehicle and the requirement to write down or convert capital instruments before using the options. They include the following provisions of note:

- (a) Articles 27, 36 and 55 extend the Bank of England’s existing powers to remove or vary the contracts of directors of the failing bank to senior managers.
- (b) Articles 52 omit sections relating to the ‘bail in administrator’ and Article 70 replaces it with a ‘resolution administrator’, who may be appointed to hold securities in the context of bail in or perform other functions required by the Bank of England in the context of resolution.
- (c) Article 53 extends the Bank of England’s powers in relation to securities when exercising the bail in option to include a power to provide for their relisting without a prospectus.

- (d) Articles 28, 37 and 54 repeal sections 22, 38 and 48M (termination rights, etc). These provisions are replaced and extended by provisions in Article 62, which inserts section 48Z. This section ensures that a wider range of contractual termination rights do not arise merely where a crisis prevention measure or a crisis management measure (including the use of a stabilisation option), as long as the substantive obligations in the contract continue to be performed.
- (e) Article 77 inserts new powers for the Bank of England to impose, until midnight on the business day following the use of a stabilisation option, a stay on contractual obligations to which a bank subject to a stabilisation option is a party, a suspension of the rights of a secured creditor of that bank and a suspension of termination rights of certain persons.
- (f) Article 85 permits the Treasury to require the Bank of England to provide information about whether a condition for financial assistance has been met. This will enable the Treasury to comply with its obligation under the RRD not to provide financing for resolution unless 8% of the liabilities of the failing bank or of the entity on which resolution action will be taken have been bailed in.
- (g) Articles 89 – 96 extend the Bank of England’s powers to act on banking group companies. They may act for example on a UK parent company of a bank elsewhere in the EU or in a third country. The asset management vehicle is added to their powers in respect of a banking group company.
- (h) Article 97 inserts new powers for the Bank of England to gather information and to investigate in support of their exercise of their resolution functions, and enforce their requirements through regulatory or in some cases criminal sanctions.

Article 99 applies the amendments in this Order with modifications to banks not regulated by the PRA, article 100 makes consequential amendments to section 85 of the Act and article 101 applies these amendments to investment firms. Article 102 ensures that the amendments made in this Order do not apply to central counterparties.

Article 103 inserts new provisions to require the Bank of England either to recognise or to refuse to recognise a resolution action of a third country. If the action is recognised, it becomes effective as a matter of United Kingdom law. It also inserts powers for the Bank of England to take action to support a third-country resolution action.

The Order also amends FSMA. Article 113 adds the RRD to the list of ‘relevant directives’ for the purpose of consolidated supervision of banking groups which are active in more than one EEA state.

Articles 114 and 115 amend the listing rules in Part VI of FSMA to permit the FCA to cancel a suspension of listing imposed by the Bank of England in an instrument that applies a stabilisation option through the use of powers inserted by Article 27, 39 and 54.

Articles 117 – 119 amend the rules in Part 12 of FSMA to enable the Bank to require the regulators to speed up analysis of any change of control that arises when creditors’ instruments are converted into shares in the context of a conversion of relevant capital instruments or bail in.

Article 120 extends the powers of the PRA and the FCA to make rules over qualifying parent undertakings in the context of recovery planning, provision of intra-group financial support and the exercise of powers to facilitate the use of resolution powers. Articles 121 and 122 make consequential amendments to the provisions on penalties.

Articles 123 and 124 make consequential amendments to the Corporation Tax Act 2009 and the Financial Services Act 2012. Articles 125 and 126 make consequential amendments to the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 and the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009 respectively. Article 127 amends the definition of “bank” for the purposes of the Banking Act 2009 (Banking Group Companies) Order 2014.

Article 128 imposes a duty on the Treasury to review the regulatory system established by this Order at least once every five years.

A Transposition Table setting out how the recovery and resolution directive is transposed into UK law is available from HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ.

A full impact assessment of the effect that this Order will have on the costs of business and the voluntary sector is available from Her Majesty's Treasury, 1 Horse Guards Road, London SW1A 2HQ or on <http://www.hm-treasury.gov.uk/> and is published alongside the Order on <http://www.legislation.gov.uk/>.