
DRAFT STATUTORY INSTRUMENTS

2020 No.

**The Bank Recovery and Resolution
(Amendment) (EU Exit) Regulations 2020**

PART 5

Other Provision made under the European Communities Act 1972

CHAPTER 4

Contractual recognition of bail-in

Interpretation

93. In this Chapter—

“the Act” means the Banking Act 2009,

“additional Tier 1 instruments” has the meaning given by section 3(1) of the Act,

“the FCA” has the meaning given in section 3(1) of the Act,

“fully secured liability” means a liability which, at the time it is created, is fully secured and governed by contractual terms that oblige the debtor to maintain the liability fully collateralised on a continuous basis in compliance with regulatory requirements in EU law or of the law of a third country achieving effects that can be deemed equivalent to EU law.

“mandatory reduction provision” has the meaning given by section 6B(2) of the Act,

“the PRA” has the meaning given in section 3(1) of the Act,

“the recovery and resolution directive” has the meaning given by section 3(1) of the Act,

“special bail-in provision” has the meaning given by section 48B(1) of the Act,

“Tier 2 instruments” has the meaning given by section 3(1) of the Act, and

“unsecured liability” means—

- (a) for liabilities created on or before 31 July 2016, a liability under which the right of the creditor to payment or other form of performance is not—
 - (i) secured by a charge, pledge, lien, or mortgage; or
 - (ii) subject to other collateral arrangements, including liabilities arising from repurchase transactions and other title transfer collateral arrangements; and
- (b) for liabilities created after 31 July 2016, a liability that is not a fully secured liability.

Requirement to include a contractual term recognising bail-in

94.—(1) A relevant undertaking must include a relevant term in a relevant contract.

(2) For the purposes of paragraph (1)—

- (a) a relevant undertaking is an undertaking to which regulation 95 applies;

- (b) a relevant contract is a contract to which regulation 96 applies; and
- (c) a relevant term is a term which meets the requirements in regulation 97.

Undertakings required to include a contractual term

95.—(1) This regulation applies to an undertaking which is—

- (a) an institution;
- (b) a financial holding company;
- (c) a mixed financial holding company; or
- (d) a relevant MAHC.

(2) Notwithstanding paragraph (1), this regulation does not apply to an undertaking to which regulation 99(2) applies.

(3) In this regulation, “institution”, “financial holding company”, “mixed financial holding company”, and “relevant MAHC” each have the meaning given by section 3A(8) of the Act.

Contracts for which a contractual term is required

96.—(1) This regulation applies to a contract governing a liability, provided that such liability is—

- (a) not an excluded liability;
- (b) not an excluded deposit;
- (c) governed by the law of a third country; and
- (d) a liability of a type described in paragraph (3).

(2) Notwithstanding paragraph (1), this regulation does not apply to a liability to which regulation 99(1) applies.

(3) This paragraph applies to a liability—

- (a) created on or after 28 December 2020, regardless of whether it is created under an agreement entered into before 28 December 2020 (including under a master or framework agreement between the contracting parties governing multiple liabilities);
- (b) created before 28 December 2020, if the agreement governing the liability is subject to a material amendment on or after 28 December 2020.

(4) An amendment is material for the purposes of paragraph (3) if it affects the substantive rights and obligations of a party to the agreement.

(5) In this regulation—

“amendment” includes an automatic amendment,

“excluded deposit” means a liability which would become a secondary preferential debt within the meaning of section 386(1B) of the Insolvency Act 1986, and

“excluded liability” has the meaning given by section 48B(8) of the Act, except that a liability is not to be regarded as secured for the purposes of section 48B(8)(b) where—

- (a) it was created after 31 July 2016; and
- (b) at the time it was created, it was not a fully secured liability.

Content of required term

97. A term meets the requirements of this regulation where all creditors or parties to the agreement creating the liability—

- (a) recognise that the liability may be subject to the exercise of a power by the Bank of England to make special bail-in provision or mandatory reduction provision; and
- (b) agree to be bound by any reduction of the principal or outstanding amount due or by any conversion or cancellation effected by the exercise of that power.

Evidence to demonstrate compliance with regulation 94 obligation

98.—(1) The Bank of England may require an undertaking to which regulation 95 applies to provide a properly reasoned legal opinion on the legal enforceability and effectiveness of a term under regulation 97 to one or more of the following—

- (a) the Bank of England;
- (b) the PRA; or
- (c) the FCA.

(2) A legal opinion under paragraph (1) must be prepared by an individual appropriately qualified in the relevant third country.

Exclusions

99.—(1) The obligation in regulation 94(1) does not apply where the Bank of England determines that contracts to which regulation 96 would otherwise apply can be subject to write down and conversion powers pursuant to the law of a third country or a binding agreement concluded with a third country.

(2) The Bank of England may determine that the obligation in regulation 94(1) does not apply to an undertaking in respect of which it has determined it would not exercise stabilisation powers under Part 1 of the Act.

Determination of impracticality

100.—(1) An undertaking to which regulation 95 applies may determine that it is impracticable, whether legally or otherwise, to comply with the requirement in regulation 94(1) in relation to a particular contract.

(2) An undertaking may not make a determination under paragraph (1) in relation to—

- (a) Additional Tier 1 instruments;
- (b) Tier 2 instruments;
- (c) debt instruments referred to in point (48)(ii) of Article 2(1) of the recovery and resolution directive, where those instruments are unsecured liabilities; or
- (d) any other liability which is not senior to the liabilities referred to in points (a), (b) and (c) of Article 108(2) and in Article 108(3) of the recovery and resolution directive.

(3) Where a determination under paragraph (1) has been made, the undertaking must notify the Bank of England.

(4) A notification under paragraph (3) must include—

- (a) the designation of the class of liability; and
- (b) justification of the determination.

Suspension of the regulation 94 obligation

101.—(1) Where the Bank of England receives a notification under regulation 100(3), the obligation in regulation 94(1) is automatically suspended in relation to that particular contract from the moment of receipt.

(2) Regulations made under section 414 of the Financial Services and Markets Act 2000 (services of notices) and subsection (4) of that section apply to any notification under paragraph 102(1).

Assessment of the determination of impracticability

102.—(1) Where the Bank of England has received a notification under regulation 100(3), it may assess the effect of such notification on the resolvability of that undertaking.

(2) An assessment under paragraph (1) must take into account the need to ensure the resolvability of the undertaking.

(3) The Bank of England may request further information from the undertaking in order to carry out the assessment in paragraph (1).

(4) An undertaking must comply with a request under paragraph (3) within a reasonable period from receipt of the request.

Determination that term is not impracticable

103.—(1) Where the Bank of England concludes, following an assessment under regulation 102(1), that it is not impracticable to comply with the obligation in regulation 94(1) in relation to a particular contract—

- (a) it must, within a reasonable period from the notification in regulation 100(3), require the undertaking to comply with the obligation; and
- (b) it may require the undertaking to amend its practices on determinations under regulation 100(1).

(2) An undertaking must comply with any requirement imposed under paragraph (1).

Assessment of resolvability

104.—(1) Where the Bank of England determines that the condition in paragraph (3) is met, the Bank of England must immediately assess the impact of this condition on the resolvability of the undertaking.

(2) An assessment under paragraph (1) must consider the impact of a risk of breaching the creditor safeguards in Article 73 of the recovery and resolution directive when applying write-down and conversion powers to eligible liabilities.

(3) The condition referred to in paragraph (1) is that the combined total of the following liabilities comprises more than 10% of a relevant class of liabilities—

- (a) liabilities in respect of which an undertaking has not included a term under regulation 97 because a determination under regulation 100(1) has been made; and
- (b) liabilities which are excluded under section 48B(8) of the Act or which the Bank of England considers to be likely to be excluded under section 48B(10) of the Act from the exercise of a power to make special bail-in provision.

(4) A class of liabilities is relevant for the purposes of paragraph (3) if it contains eligible liabilities.

(5) In this regulation, “eligible liabilities” has the meaning given by section 3A(4A) of the Act.

Exercise of power to remove impediments to resolvability

105. The Bank of England must exercise its powers under section 3A of the Act where an assessment under regulation 104(1) concludes that the liabilities described in regulation 104(3)(a) create a substantive impediment to resolvability.

Exclusion of liabilities from the minimum requirement for own funds and eligible liabilities

106. A liability is not included within an undertaking's minimum requirement for own funds and eligible liabilities, as required by section 3A(4B) of the Act, if, in relation to that liability, the obligation in regulation 94(1)—

- (a) has not been complied with; or
- (b) is suspended under regulation 101(1).

Exercise of resolution powers where contractual term not included

107. Nothing in this Chapter restricts the Bank of England's ability to exercise a power to make special bail-in provision or mandatory reduction provision where the obligation in regulation 94(1) does not apply or is not met.