

EXPLANATORY MEMORANDUM TO
THE BANK RECOVERY AND RESOLUTION ORDER 2016
2016 No. 1239

1. Introduction

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

2. Purpose of the instrument

- 2.1 The instrument amends the special resolution regime for banks and investment firms to strengthen and clarify the UK's transposition of the EU Bank Recovery and Resolution Directive 2014/59/EU (BRRD).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 This instrument improves the UK's resolution regime and transposition of the BRRD. The UK transposed the BRRD on 1st January 2015 through amendments to the Banking Act 2009, the Financial Services and Markets Act 2000 (made in the Bank Recovery and Resolution Order 2014 (S.I. 2014/3329, the Bank Recovery and Resolution (No 2) Order 2014 (S.I. 2014/3348)) and a series of other statutory instruments. This Order makes amendments to this legislation.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales, Scotland and Northern Ireland.
5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 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 Order 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Since the UK's transposition of the BRRD in January 2015, the regulators and industry have uncovered a small number of measures which will improve the functioning of the UK's resolution regime and clarify the transposition of the BRRD.
- 7.2 On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.
- 7.3 Section 48Z of the Banking Act 2009 ensures that a crisis prevention measure or crisis management measure will not trigger any default event provision in any contract to which an institution under resolution, its subsidiaries, or a member of the same group is a party, provided the firm continues to meet its substantive obligations in the contract. This Order amends Section 48Z to ensure that certain instruments can take effect in accordance with their terms, to the extent specified by the resolution authority (the Bank of England or the Treasury as the case may be), to support the stabilisation of the firm. This will be appropriate for a narrow range of contracts.
- 7.4 The Order also gives stand-alone powers to the PRA and FCA to require the removal and replacement of directors and senior managers in accordance with Article 28 of the BRRD, and to appoint temporary managers in accordance with Article 29. While regulators already have the power to undertake these early intervention measures, the stand alone powers provide clarity on the scope of the powers. It also includes new powers for the PRA and FCA to call a shareholder meeting if the management body had been required to call a meeting, and had not done so.
- 7.5 The Order gives the Bank of England back-stop powers independently to resolve the UK branch of a third country (non-EEA) institution, if the Bank has refused to recognise the actions of the third country resolution authority or the third country resolution authority fails to act, in accordance with Article 96 of the BRRD. The Bank of England's power is limited to transferring the assets, rights and liabilities of the branch and the power to bail in transferred liabilities. The Order also extends the safeguards that apply in connection with the exercise of the property transfer and bail-in powers for firms established in the UK to the case of branch resolution.
- 7.6 To ensure the bridge bank tool can be applied by way of a share transfer instrument for building societies, as required by Article 40 of the BRRD, the Order gives the Bank of England powers to convert a failing building society into a company, enabling the shares of this company to be transferred to a bridge bank. The provisions closely mirror the approach taken in the Building Societies (Bail-in) Order 2014, which gave the Bank of England similar powers to ensure the bail-in tool could be used on a building society.

Consolidation

- 7.7 Consolidated versions of the Acts and the other instruments amended by this Order are available on commercial websites. However, given the limited amount of

Parliamentary time available, there are currently no plans to consolidate the legislation amended by this Order.

8. Consultation outcome

- 8.1 A consultation on the changes in the Order was published on 17th December 2015 and closed on 25th February 2016. The consultation responses were broadly supportive of the government's proposals. In addition, the Banking Liaison Panel has been consulted on the government's response to the consultation.¹
- 8.2 Respondents supported the government's amendments of section 48Z. In response to consultation feedback, further guidance will be provided in the Special Resolution Regime Code of Practice (the Code) on which types of contracts could include clauses that are activated by the use of a crisis prevention or management measure.
- 8.3 Respondents were broadly supportive of the introduction of stand-alone powers for the regulators to require the removal and replacement of directors and senior managers, and to appoint temporary managers.
- 8.4 Overall, respondents supported the powers for the Bank of England independently to resolve the UK branch of a third country institution, but some were concerned about the broad definition of the "business of the branch". In response to consultation feedback, further guidance will be provided in the Code on how the Bank of England will judge whether conditions for the use of these powers are satisfied for branches.
- 8.5 To give greater clarity on the insolvency treatment against which 'No Creditor Worse Off' (NCWO) would be calculated, the Order was updated following the consultation to clarify the Treasury would apply the insolvency law of the relevant third country, unless it would be considered just and equitable for the company to be wound up in the United Kingdom under the Insolvency Act 1986, in accordance with section 221 of that Act.

9. Guidance

- 9.1 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.

10. Impact

- 10.1 The Order ensures the UK has fully implemented the BRRD. In doing so, the authorities will have the necessary tools and powers to intervene before problems occur to maintain stability and support the stabilisation of a firm in resolution.
- 10.2 There is no impact on charities or voluntary bodies.
- 10.3 The government's assessment is that these measures do not impose a cost on business on an ongoing basis. Any costs would only arise if a bank were to experience severe difficulties or enter resolution.
- 10.4 The impact on the public sector is also estimated to be zero.
- 10.5 An impact assessment has not been prepared for this instrument.

¹ The Treasury established the Banking Liaison Panel in accordance with section 10 of the Banking Act 2009. The Panel's function is to provide advice to the Treasury about the effect of the special resolution regime (SRR) on banks, persons who do business with banks, and on financial markets. The Panel's function includes giving advice to the Treasury on secondary legislation made under the Act and the SRR Code of Practice.

11. Regulating small business

- 11.1 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.

12. Monitoring & review

- 12.1 The instrument includes a requirement for the Treasury to review the legislation in 2020, when the other instruments implementing the BRRD will be reviewed.

13. Contact

- 13.1 Mushtaq Ahmed at HM Treasury Tel: 020 7270 1701 or email: mushtaq.ahmed@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.