



BANK OF ENGLAND

December 2015

# The Bank of England's power to direct institutions to address impediments to resolvability

Responses to Consultation and Statement of Policy





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This document contains the Bank of England's final policy for exercising its power to direct institutions to address impediments to their resolvability under section 3A of the Banking Act 2009.



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## 1 Introduction

1.1 The Bank of England (Bank) published a consultation paper in May 2015<sup>1</sup> describing its proposed policy for exercising its power to direct institutions to address impediments to resolvability under section 3A of the Banking Act 2009 (Banking Act), as amended following transposition of the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD). This document sets out the Bank's final Statement of Policy (contained in the Appendix) and provides feedback on responses to the consultation.

1.2 The Bank's power of direction applies to: (i) banks building societies and certain investment firms<sup>2</sup> that are authorised by the Prudential Regulation Authority (PRA) or Financial Conduct Authority (FCA) and are incorporated in, or formed under the law of any part of, the United Kingdom ('institutions'); (ii) parent companies of such institutions that are financial holding companies or mixed financial holding companies and are established in, or formed under the law of any part of, the United Kingdom; and (iii) subsidiaries of such institutions or such parent companies that are financial institutions<sup>3</sup> authorised by the PRA or FCA, and are established in, or formed under the law of any part of, the United Kingdom. For the purposes of this paper, references to an 'institution' should in general be taken to also include the entities referred to in (ii) and (iii). The Bank is the United Kingdom's resolution authority, and the PRA or FCA is the competent authority.<sup>4</sup>

1.3 The Bank received seven responses to the consultation from UK and overseas institutions, and trade associations. Some respondents fully supported the proposed policy, while others suggested that the Bank provides further clarity in some respects. Most respondents found the proposed Statement of Policy helpful, and welcomed the acknowledgement that the Bank's power of direction will be used in a way that is proportionate and is aligned to the institution's preferred resolution strategy.

## 2 Feedback to responses

2.1 The Bank's responses to the issues raised are set out below, noting those areas where the Bank is making a change to the proposed Statement of Policy as contained in the consultation paper.

### Scope of the Bank's direction power

2.2 The proposed Statement of Policy set out the scope of the Bank's power of direction. One respondent asked the Bank to clarify whether its power applies to UK subsidiaries and UK branches of foreign-incorporated institutions.

2.3 The Bank's power of direction does not apply to UK subsidiaries of groups incorporated in another EEA country or a non-EEA country, unless the UK subsidiary in question is itself a bank, building society of investment firm authorised by the PRA or FCA.

<sup>1</sup> Bank of England, 'The Bank of England's power to direct institutions to address impediments to resolvability', A Consultation Paper, May 2015, available at [www.bankofengland.co.uk/financialstability/Documents/role/risk\\_reduction/srr/cp/resolutiondirectinstitutions.pdf](http://www.bankofengland.co.uk/financialstability/Documents/role/risk_reduction/srr/cp/resolutiondirectinstitutions.pdf).

<sup>2</sup> For the purposes of the UK special resolution regime, the term 'investment firm' means those firms that are required to hold initial capital of €730,000, in particular those that deal as principal. The majority of such firms are prudentially regulated by the Financial Conduct Authority; the nine largest, more complex investment firms are prudentially regulated by the Prudential Regulation Authority.

<sup>3</sup> The term 'financial institution' has the meaning given by article 4 (1) (21) of Regulation 575/2013/EU.

<sup>4</sup> According to article 2 of the BRRD and article 4 of the Capital Requirements Regulation (EU No. 575/2013), 'competent authority' means a public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned.

2.4 The BRRD requires resolution colleges to be established for groups of EEA-incorporated institutions that operate on a cross-border basis and have at least one subsidiary or significant branch in another Member State. Resolution colleges will provide a framework for the relevant authorities to take joint decisions on resolution planning at EEA level and the Bank is responsible for establishing such colleges for those groups for which it is the home resolution authority. The BRRD also requires European resolution colleges to be established by the resolution authority in the jurisdiction of the consolidating supervisor, where an institution incorporated in a non-EEA country has subsidiaries established in two or more EEA jurisdictions, or significant branches located in two or more EEA jurisdictions.

2.5 For groups of EEA-incorporated institutions whose parent head office is not in the United Kingdom and which have a subsidiary in the United Kingdom, the Bank (and the PRA or FCA depending on the type of the institution) will be a member of the relevant resolution college where a joint decision will be taken on measures to address barriers to resolvability. For non-EEA groups that have a subsidiary in the United Kingdom, similar joint decisions will be taken if a European resolution college is required to be established under article 89 of the BRRD.

2.6 The Bank's power of direction does not apply to foreign subsidiaries of UK groups. However, such firms may fall within the scope of the group resolution strategy conducted by the Bank, as the group-level resolution authority. In such capacity, the Bank will lead the joint decision processes of the resolution college, where the members will identify and address barriers to resolvability.

2.7 The Bank's power of direction does not apply to UK branches of institutions incorporated in another EEA country. These branches are subject to the resolution regime of their home country of incorporation. If a significant branch is located in the United Kingdom, the Bank (and the PRA or FCA depending on the type of the institution) will be a member of the relevant resolution college where a joint decision will be taken on actions to remove barriers to resolvability.

2.8 The Bank's power of direction does not apply to UK branches of institutions incorporated in a non-EEA country. If a significant branch is located in the United Kingdom, the Bank will be a member of the European resolution college if required to be established under article 89 of the BRRD.

2.9 The Bank's direction may be given to a parent company in relation to impediments at a subsidiary level. Some respondents asked the Bank to clarify whether the subsidiary in question will be within the scope of the Bank's power of direction.

2.10 The Bank considers that there may be circumstances where it is necessary to use the power of direction to address an impediment to resolvability, for example in relation to a group's service company to ensure the continuity of provision of critical services to the group in resolution. This direction will be aligned to the preferred resolution strategy of the UK institution and the special resolution objectives.

### **The four-month period**

2.11 Following a resolvability assessment, the Bank will inform the institution of any identified substantive impediments to its resolvability. The institution will then have four months to make its own proposal on how to remove the impediments. One respondent argued that, on occasion, the nature of the issue or the level of granularity required by the Bank may lead to institutions requiring a more flexible deadline. Another respondent suggested that the framework include a further stage of consultation with the relevant institution immediately



prior to the direction being given, for example by allowing the relevant institution a short period (for example, 48 hours) to review the final draft direction and raise any material concerns.

2.12 In light of article 17(3) of the BRRD and article 64 of the Bank Recovery and Resolution (No. 2) Order 2014 (No. 2 Order), which include a reference to the four-month period, the Bank does not have flexibility and is obliged to follow this timeframe in the process leading up to the use of its power of direction. But the four-month period relates to the period of time in which the firm must table its proposals to address the identified impediments to resolvability. The Bank will take into account the nature of the issue and the level of granularity required in specifying the subsequent deadlines for implementation of the proposals, if the Bank approves the firm's proposals. Although the institution must submit its plan for compliance with the direction within one month from the date of the direction, the actual implementation may cover a longer period. Separately, a direction must be accompanied by a notice that specifies a reasonable period within which the institution may make representations to the Bank about the direction. The institution will therefore be given the opportunity to review the terms of the direction and raise any comments and concerns. The Bank must, within a reasonable period, consider those representations and decide whether to confirm or revoke the direction (and give a different direction).

2.13 The use of the Bank's power will follow a resolvability assessment, or arise independently of the resolvability assessment process where the Bank considers it necessary. One respondent asked whether, in the latter context, the four-month period would be available, during which the institution could make its own proposals for removing the impediments to its resolvability.

2.14 In this circumstance, the Bank would not be obliged to follow the process leading up to the use of the power of direction. However, under section 3B of the Banking Act the institution will have a reasonable time to make representations to the Bank about the direction and a right of appeal once the notice confirming the direction is issued. All other legislative obligations on the Bank in relation to the process for giving a direction would also hold.

### **Use of the direction power in relation to resolved institutions**

2.15 The proposed Statement of Policy sets out the process leading up to the use of the Bank's power of direction. One respondent proposed that the Bank consider providing a temporary moratorium on exercising its power of direction in relation to an institution that has been resolved and is at the reorganisation stage.

2.16 The Bank notes that such a moratorium is not envisaged by the BRRD and it is not clear why the power of direction should not be available in such circumstances. The reorganisation would need to ensure that the firm emerging from resolution is itself resolvable should it fail at some stage in the future. As such the need for a moratorium should not arise.

### **Consulting the Financial Policy Committee**

2.17 The Bank must consult the PRA and the FCA and, where appropriate, the Financial Policy Committee (FPC) before determining remedial measures intended to address impediments to an institution's resolvability. One respondent argued that FPC involvement would be relevant where the FPC had identified a common impediment to resolution across a group of firms and suggested that this be further clarified.

2.18 Consultation of the FPC may be appropriate for the Bank to meet its obligation, when assessing relevant proposals and determining remedial measures, to take into account: (i) the

threat to financial stability posed by the impediments; and (ii) the effect of the remedial measures on: the business and financial stability of the institution and its ability to contribute to the economy of the United Kingdom and other EEA States; the effect on the EEA market for financial services; and the financial stability of any EEA state or of the EEA as a whole. Consultation of the FPC is more likely to be appropriate where the direction applies to a class of institutions or has general effect (as per section 3A (7) of the Banking Act), as there may be a greater impact on financial stability in those cases than where the direction concerns an individual institution.

### Process for cross-border groups

2.19 The proposed Statement of Policy sets out the statutory requirements for use of the Bank's power in relation to groups that operate on a cross-border basis within the European Economic Area (EEA). For those groups, joint decisions will be taken in the resolution college. Some respondents proposed that the framework be extended to include the interaction with Crisis Management Groups (CMGs). One respondent was concerned that the proposed framework did not consider the impact of the Bank's decisions on non-EEA States, and another respondent argued that to achieve effective cross-border cooperation in addressing impediments to resolvability, it is important that non-CMG regulators are also closely engaged.

2.20 The BRRD and the UK implementing legislation are designed to reflect the Financial Stability Board's Key Attributes, which set an international standard for effective resolution regimes agreed by the G-20 leaders in 2011.<sup>1</sup> The Key Attributes requires that at least all global systemically-important financial institutions (G-SIFIs) are subject to regular resolvability assessments. Home and key host authorities of all G-SIFIs should maintain CMGs with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the institution. CMGs should, among other things, keep the resolvability of G-SIFIs under active review.

2.21 CMGs and resolution colleges/European resolution colleges will therefore be operating in parallel, and the Bank intends to invite non-EU members of a CMG to attend the relevant resolution college as participating observers. Resolution colleges will be taking account of the expected effect of any decisions on EEA States as well as non-EEA States, which is also consistent with the Bank's obligations under the UK Banking Act. In particular, section 7A provides that where the Bank is considering the exercise of a stabilisation power in respect of a bank which is a member of a group, the Bank must have regard to the potential effect on the financial stability of third countries, particularly those third countries in which any member of that group is operating. The Bank will also engage and coordinate with other non-CMG authorities; this is likely to be relevant where a UK bank has operations in a third country which, while not necessarily material to the group as a whole, are nevertheless important to financial stability in that country. The Bank intends to follow a practical approach and make the interaction between these forums as efficient as possible, in order to avoid unnecessary duplication. The Bank has made amendments to the final Statement of Policy to clarify how CMGs interact with resolution colleges.

2.22 Some respondents argued that when assessing organisational structures against the objective of resolvability it will be important for the Bank to consider the interconnections and cross-border nature of the services provided by the institution, its operating model and business mix, as well as any associated requirements from regulators or other authorities with responsibility for elements of the group.

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<sup>1</sup> For the latest version, see Financial Stability Board (2014), Key Attributes of effective resolution regimes for financial institutions, available at [www.financialstabilityboard.org/wp-content/uploads/r\\_141015.pdf](http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf).

2.23 The Bank agrees with respondents and notes that under the No. 2 Order the Bank is required to take account of the effect on the business and financial stability of the institution for the purposes of determining remedial measures. For groups that operate on a cross-border basis, the Bank will cooperate and coordinate with other regulators and authorities through the relevant CMG and resolution college processes.

### **Interaction with the preferred resolution strategy and special resolution objectives**

2.24 The Bank will exercise its power of direction having regard, among other things, to the stabilisation powers it would expect to use in the preferred resolution strategy and the extent to which the impediment identified would prevent its ability to achieve the special resolution objectives. A number of respondents recognised the benefits of linking the Bank's power to the preferred resolution strategy and special resolution objectives, and proposed that this also be reflected in the examples provided of possible scenarios in which the Bank may consider exercising its power.

2.25 The Bank maintains the view that the final Statement of Policy is clear and that the above relationship between the power of direction on the one hand and the preferred resolution strategy and special resolution objectives on the other is pertinent to all illustrative examples provided.

### **Bank's approach to responding to representations from institutions**

2.26 The Bank will endeavour to respond within a reasonable period to an institution's proposals for remedial measures or to an institution's representations in relation to the direction given by the Bank. Some respondents asked for more guidance on the timeframe and argued that a long period of uncertainty could be destabilising for the institution.

2.27 Although the Bank recognises that respondents want to have more clarity, it maintains the view that the timeframe will depend on the facts and circumstances at the time and notes that any delay in developing a plan to address impediments to resolvability would be undesirable as it would further impede the drawing up (or review) of a resolution plan for the institution. Moreover, for directions in the context of group resolvability assessments, the resolution college will have four months in which to endeavour to reach a joint decision on the institution's observations or alternative proposals (articles 72 and 78 of the No. 2 Order).

### **Publication of directions**

2.28 The Bank may choose to make its directions public, if appropriate and depending on the circumstances at the time. A number of respondents argued that directions should only be made public in very limited circumstances and asked for more clarity on the circumstances in which publication would occur and the processes that would be followed to ensure the potential implications of disclosure were assessed, understood and mitigated. Respondents also noted that the Bank will need to be mindful of the disclosure obligations applicable to the relevant institutions that have listed equity or debt securities or otherwise form part of listed groups.

2.29 The Bank confirms that in each individual case it will assess the circumstances at the time before making any direction public. The Bank will decide whether to make any direction, or any information about the direction, public depending on whether the publication would assist it in exercising its public functions as the UK resolution authority and in accordance with the statutory confidentiality regime applicable to it. The Bank would expect to inform the affected institution in advance of making any direction public.

### Effect on third party rights

2.30 One respondent argued that the exercise of the Bank's power could in certain circumstances have a detrimental impact on the rights of third parties, for example where a relevant institution was directed to cease undertaking certain activities and was prohibited from continuing to comply with contractual arrangements with third parties relating to those activities.

2.31 The Bank's power of direction does not, in itself, extend to overriding the rights of third parties. If an institution was directed to cease undertaking certain activities, the Bank will expect the institution to do this in a manner consistent with its contractual obligations.

### Bank's direction power and directors' duties

2.32 One respondent noted that the directors of a relevant institution have both statutory and common law duties to act, among other things, in a manner which is most likely to promote the success of the relevant institution for the benefit of its members as a whole (or, where it is in insolvency, in the best interests of its creditors). The directors of the relevant institution will still need to ensure that they comply with their existing duties when performing their statutory obligations in relation to the direction from the Bank.

2.33 The Bank considers that the need to comply with regulatory requirements is in itself an action that will be in the interests of the company. In addition, the Bank's directions to require institutions to remove impediments to their resolvability will be in the best long-term interests of these institutions and the broader financial system; resolvable institutions are critical to ensuring that the risks attached to investing in those institutions are priced appropriately. Removing the implicit guarantee from the government to these institutions will improve market discipline in the pricing of risks being taken by such institutions. This should strengthen their incentives to demonstrate to their customers, clients and investors that they are not taking excessive risks.

### Appeal process

2.34 An institution has a right of appeal in relation to the exercise of the Bank's power of direction and can therefore refer the matter to the Upper Tribunal.<sup>1</sup> One respondent suggested that the Bank provide further guidance on the timescales of the appeal procedure and on whether the Bank's relevant decision is suspended upon an institution's challenge.

2.35 The timeframes of the appeal process will be in line with the Tribunal Procedure Rules, which will be applicable under article 67 of the No. 2 Order and Part 9 of the Financial Services and Markets Act 2000. If the Bank reasonably considers it necessary, the direction may take effect immediately or on a later date specified in the direction. In any other case, the direction will take effect when the period during which the direction may be referred to the Upper Tribunal has expired, or the reference and any appeal against the Tribunal's determination has been finally disposed of. The Bank has decided to clarify this in the final Statement of Policy.

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<sup>1</sup> The Upper Tribunal is a superior court of record, like the High Court and the Employment Appeal Tribunal.

### **3 Conclusion**

3.1 The Bank has given careful consideration to all responses received and intends to continue to engage with institutions as it performs its new statutory obligations.

3.2 This document meets the legislative requirement to prepare a Statement of Policy with regard to the Bank's power to direct institutions to address impediments to their resolvability and, in accordance with section 3B (10) of the Banking Act, the Bank will be entitled to use its powers of direction from the date of publication of this Statement of Policy.

3.3 The Bank will keep the Statement of Policy under review and update it where necessary to reflect a change in the Bank's policy approach.

## Appendix: Statement of Policy on the Bank of England's power to direct institutions to address impediments to resolvability

### 1 Background

1.1 This Statement of Policy is issued by the Bank of England (Bank), as the UK resolution authority, under section 3B(9) of the Banking Act 2009 as amended (Banking Act). The Statement of Policy sets out how the Bank expects to use its power to direct a 'relevant person' to address impediments to resolvability under section 3A of the Banking Act.

1.2 A 'relevant person' means:

- (i) an institution<sup>1</sup> authorised for the purpose of the Financial Services and Markets Act 2000 (FSMA) by the Prudential Regulation Authority (PRA) or Financial Conduct Authority (FCA);<sup>2</sup>
- (ii) a parent of such an institution which (i) is a financial holding company or a mixed financial holding company; and (ii) is established in, or formed under the law of any part of, the United Kingdom; or
- (iii) a subsidiary of such an institution or of such a parent which (i) is a financial institution<sup>3</sup> authorised by the PRA or FCA; and (ii) is established in, or formed under the law of any part of, the United Kingdom.

### 2 Statutory framework

#### Process leading up to the use of the Bank's power

2.1 The process for use of the Bank's power is set out in sections 3A and 3B of the Banking Act and, where applicable, articles 64–82 of the Bank Recovery and Resolution (No. 2) Order 2014 (No. 2 Order). The process to be followed depends upon whether the impediment to resolvability is identified as part of the resolvability assessment or is made independently of that assessment.

#### Use of the Bank's power following a resolvability assessment

2.2 The Bank must prepare resolution plans for all institutions within scope of the special resolution regime. The purpose of resolution planning is to develop a set of actions that would be taken by the Bank and relevant stakeholders (including other UK authorities and overseas authorities) in the event that an institution fails. Resolution planning includes: (i) gathering information to facilitate resolution; (ii) conducting resolvability assessments; (iii) developing resolution strategies; and (iv) enhancing resolvability.

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<sup>1</sup> For the purposes of this Statement of Policy the term 'institution' means UK-incorporated banks, UK-incorporated building societies and those UK-incorporated investment firms that are required to hold initial capital of €730,000, in particular those that deal as principal. References in this Statement to an 'institution' shall, in general and unless otherwise stated, be taken to also include 'relevant persons'.

<sup>2</sup> The PRA and FCA are the UK competent authorities. According to article 2 of the Bank Recovery and Resolution Directive and article 4 of the Capital Requirements Regulation (EU No. 575/2013), 'competent authority' means a public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned.

<sup>3</sup> The term 'financial institution' has the meaning given by article 4 (1) (26) of Regulation 575/2013/EU.

2.3 As part of resolution planning, the Bank, in consultation with the competent authority (that is, the PRA or the FCA), must assess the extent to which it would be feasible and credible<sup>1</sup> to place the institution into resolution and implement the preferred resolution strategy, while avoiding to the maximum extent possible any significant adverse effect on the financial system of any European Economic Area (EEA) State or the continuity of the institution's critical functions. The Bank must not assume that the institution will be in receipt of any: extraordinary public financial support; central bank emergency liquidity assistance; or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms. This resolvability assessment shall be based on the following consecutive stages: (i) assessment of the feasibility and credibility of the liquidation of the institution under normal insolvency proceedings; (ii) selection of a preferred resolution strategy; (iii) assessment of the feasibility of the selected resolution strategy; and (iv) assessment of the credibility of the selected resolution strategy. The resolvability assessment will be conducted annually, unless the Bank determines otherwise in accordance with articles 53 and 54 of the No. 2 Order,<sup>2</sup> at the same time as, and for the purposes of, drawing up or updating the resolution plan. The Bank must notify the European Banking Authority without delay if it concludes that an institution is not resolvable.

2.4 Following a resolvability assessment, the Bank will inform the institution of any identified substantive impediments to resolvability.<sup>3</sup> The institution will then have four months to make its own proposal to remove the identified impediments. If the Bank concludes that the institution's proposal is insufficient or no proposal is received, the Bank must use its power to require the institution to take measures to address impediments to the effective exercise of the stabilisation powers or the winding up of that institution.<sup>4</sup> The institution must propose a plan to achieve the measures required by the Bank, within one month beginning on the date of the direction.

2.5 The process for exercising the power to address impediments to resolvability following a resolvability assessment is set out in Figure 1 overleaf.

2.6 The Bank must consult the PRA and the FCA and, where appropriate, the Financial Policy Committee before determining remedial measures to address impediments to resolvability. For the purposes of assessing the institution's proposals and determining remedial measures, the Bank must take account of: (i) the threat to financial stability posed by the impediments; and (ii) the effect of the remedial measures on: the business and financial stability of the institution and its ability to contribute to the economy of the United Kingdom and other EEA States; the EEA market for financial services; and the financial stability of any EEA State or of the EEA as a whole.

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<sup>1</sup> For resolution to be feasible, the authorities should have the necessary legal powers — and the practical capacity to apply them — to ensure the continuity of functions critical to the economy. For resolution to be credible, the application of those resolution tools should not itself give rise to unacceptable adverse broader consequences for the financial system and the real economy. See FSB (2014), *Key attributes of effective resolution regimes for financial institutions*, available at [www.financialstabilityboard.org/wp-content/uploads/r\\_141015.pdf](http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf). The European Banking Authority's (EBA's) draft regulatory technical standards on assessment of resolvability list a number of criteria which the resolution authorities need to consider when assessing the feasibility and credibility of liquidation and of the resolution strategy. See EBA (2014), *EBA FINAL Draft Regulatory Technical Standards on the content of resolution plans and the assessment of resolvability*, available at [www.eba.europa.eu/documents/10180/933992/EBA-RTS-2014-15+\(Final+draft+RTS+on+Resolution+Plan+Contents\).pdf](http://www.eba.europa.eu/documents/10180/933992/EBA-RTS-2014-15+(Final+draft+RTS+on+Resolution+Plan+Contents).pdf).

<sup>2</sup> For example, a new resolvability assessment would need to be conducted in the event of major changes in the institution's business or structure.

<sup>3</sup> Such notice has the effect of suspending the Bank's duty to draw up (or review) a resolution plan for the institution, until the Bank has approved the institution's proposals to address identified substantive impediments or exercised the power of direction.

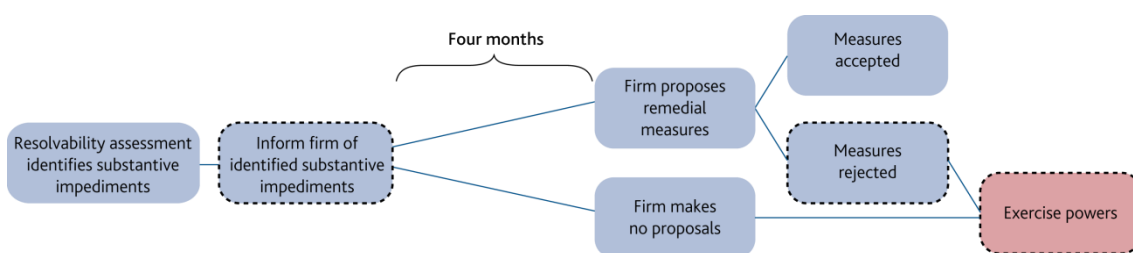
<sup>4</sup> See article 66(3) of No. 2 Order.



2.7 For groups that operate on a cross-border basis within the European Union, articles 68–82 of the No. 2 Order set out additional procedural requirements to be followed alongside those described in the preceding paragraphs. Joint decisions will be taken in the resolution college. Where the Bank is the group-level resolution authority (that is, where the PRA or the FCA is the consolidating supervisor), it will lead the joint decision-making process for the preferred resolution strategy, resolvability assessment, identification of substantive impediments to resolvability and actions to address them. The Bank will also set a minimum requirement for own funds and eligible liabilities in the resolution college.

2.8 The Financial Stability Board's international standard for effective resolution regimes (the *Key Attributes*)<sup>1</sup>, agreed by the G-20 leaders in 2011, state that home and key host authorities of all global systemically-important financial institutions (G-SIFIs) should maintain Crisis Management Groups (CMGs) with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the institution. CMGs will keep the resolvability of G-SIFIs under active review and operate in parallel with resolution colleges.

**Figure 1 Process for exercising the power of direction following a resolvability assessment**



Note: The dashed boxes indicate where a right of appeal is available.

### Use of the Bank's power in other circumstances

2.9 There may be circumstances which arise independently of the resolvability assessment process where the Bank considers it necessary to direct the institution to take certain measures in order to address impediments to the effective exercise of the stabilisation powers, or the winding up of that institution. For example, this could occur during late stage contingency planning where the Bank needs to act to address an impediment prior to placing the institution into resolution.

### Process for giving a direction

2.10 Bank directions must be in writing and may be given with general effect or with respect to a particular institution or a class of institutions. Section 3A of the Banking Act provides that the directions may include, but are not limited to:

- (i) a requirement to amend a group financial support agreement or, where there is no such agreement, to review the need to enter into one;
- (ii) a requirement to enter into an agreement for the provision of services relating to the provision of critical functions;

<sup>1</sup> For the latest version, see Financial Stability Board (2014), Key Attributes of effective resolution regimes for financial institutions, available at [www.financialstabilityboard.org/wp-content/uploads/r\\_141015.pdf](http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf).



- (iii) a restriction on maximum individual and aggregate exposures;
- (iv) a requirement to produce information which is relevant to the exercise of the stabilisation powers and to provide that information to the Bank;
- (v) a requirement to dispose of specified assets;
- (vi) a requirement to cease carrying out specified activities, or observe restrictions in relation to the carrying out of specified activities;
- (vii) a requirement to cease the development of new or existing business operations, or observe restrictions in relation to the development of such operations;
- (viii) a requirement to change its legal or operational structure to ensure that the performance of critical functions can be legally or operationally separated from the performance of other functions;
- (ix) a requirement to establish a financial holding company which is not a subsidiary of an institution, another financial holding company or a mixed financial holding company;
- (x) a requirement to maintain a minimum requirement for own funds and eligible liabilities;
- (xi) for the purposes of (x), a requirement to maintain or issue particular kinds of eligible liabilities, or take other specified steps; and
- (xii) a requirement to endeavour to renegotiate any eligible liability or relevant capital instruments to ensure that any decision by the Bank to write down or convert the liability or instrument would have effect under the law which governs that liability or instrument.

2.11 A direction by the Bank must be accompanied by a notice which: (i) states when the direction takes effect; (ii) gives the Bank's reasons for giving the direction; and (iii) specifies a reasonable period within which the institution may make representations to the Bank about the direction.

2.12 The Bank must demonstrate how the remedial measures will adequately address the impediments in a manner proportionate to the burden or restriction imposed by the direction. As is the case with any public body in the exercise of its functions, the Bank will have regard to restrictions and conventions of public law, in particular the requirement for the authorities to act reasonably and to have respect for the rule of law and the principle of legal certainty. The Bank must also act in accordance with common law principles of procedural fairness when exercising its power of direction.

2.13 If a person fails to comply with a direction given under section 3A(2) of the Banking Act, remediation will be sought through the general enforcement powers contained in sections 83ZQ–83ZY of the Banking Act, which include one or more of the following:

- (i) publication of a statement to that effect;
- (ii) imposition of a penalty in respect of the failure of such amount that the Bank considers appropriate;
- (iii) direction to refrain from any conduct, with a view to ensuring that the failure ceases or is not repeated or the consequences of the failure are mitigated; and

- (iv) prohibition of specific persons from holding an office or position involving responsibility for taking decisions about the management of a named bank, a bank of a specified description or any bank.

### 3 The Bank's approach to using the power of direction

3.1 The Bank will exercise the power of direction when required to address impediments to the effective exercise of the stabilisation powers or the winding up of that institution. When determining what constitutes 'effective' exercise of the stabilisation powers for these purposes, the Bank will have regard to the stabilisation powers it would expect to use in the preferred resolution strategy and the extent to which the impediment identified would prevent or reduce its ability to achieve the special resolution objectives. In the context of the bail-in tool, this extends to assessing whether there are impediments to restructuring the activities of an institution as part of the resolution, which could adversely affect the effectiveness of the tool in stabilising the institution and advancing the special resolution objectives.

3.2 The Bank will endeavour to respond within a reasonable period to an institution's proposals for remedial measures or to an institution's representations in relation to the direction given by the Bank. The Bank will prioritise the different impediments to resolvability and require the firm to follow a staged approach, where the most material impediments are addressed first.

3.3 The Bank's direction may be given to a parent company in relation to impediments at a subsidiary level. Directions will include a timeframe by which the identified impediments to resolvability must be addressed. The period of time allowed may vary, taking into account the expected length of time to complete resolution planning, including the time required within a resolution college for cross-border groups. The Bank will oversee the institution's progress and may choose to make its directions public, if appropriate and depending on the circumstances at the time.

3.4 Article 17(5) of the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD) and section 3A(3) of the Banking Act identify a non-exhaustive set of examples of directions that the resolution authority may seek to make, as listed in paragraph 2.9. In addition, the list below provides a number of illustrative examples of possible scenarios in which the Bank may consider exercising its power of direction:

#### Loss-absorbing capacity

- (i) Where action is required to ensure issuance of liabilities at the parent company level that would allow for loss absorption and recapitalisation of group entities.

#### Funding arrangements

- (ii) Where the funding of subsidiaries by the parent company is not adequately subordinated or is subject to set-off or where there are no arrangements in place that would allow for losses to be transferred to the legal entity to which resolution tools would be applied.
- (iii) Where more information is required to assess the institution's potential liquidity needs implied by the resolution strategy, including a breakdown by currencies, legal entities, business lines, intraday needs and location of collateral across the group.

### Continuity of contracts in resolution

(iv) Where action is required to ensure continuity of contracts in resolution, including continuity of operational services (whether provided within the group or by third parties), of trading agreements and of access to payment services and financial market infrastructures.

### Information systems and data requirements

(v) Where action is required to ensure that there are systems in place that produce a rapid and effective valuation for the purposes of resolution, and that the institution's valuation systems, process, controls and resources are aligned to support the institution's resolution strategy.

(vi) Where an institution's information systems and data availability do not ensure that the institution is able to produce required resolution-related data quickly and accurately, and/or that the Bank has access to information necessary to implement the resolution strategy.

### Post bail-in restructuring

(vii) Where, to address the causes of failure and restore the long-term viability of an institution, action is required to ensure that a business line and/or legal entity could maintain continuity of service, be unwound or be transferred to a third party following a bail-in.

## 4 Decision-making

4.1 In accordance with article 3 of the BRRD, the Bank has been designated as the resolution authority for the United Kingdom. All decisions made by the Bank as resolution authority, including decisions in relation to the Bank's resolution plans, resolvability assessments and the exercise of the power to direct institutions to address impediments to resolvability, will therefore be taken in the Bank's resolution decision-making structures. Decisions on the use of the Bank's resolution powers will be taken by the Governor, the Deputy Governor, Financial Stability or the Executive Director, Resolution (or their delegates), as appropriate, where applicable as advised by the Bank's advisory committees which include staff from the Bank and PRA.

4.2 Before deciding to exercise its power of direction over an institution, the Bank, as resolution authority, will consult with the PRA and FCA. The PRA has its own formal decision-making structure for responding to Bank consultations, which mirrors the Bank process in allocating consultation decisions, taking into account the category of institution and impact of the decision on the PRA's objectives.

4.3 Once the Bank has considered PRA and FCA views and reached a final decision, the Bank will co-ordinate with the PRA or FCA on issues pertaining to resolvability. For example, depending on the nature of the barrier identified in the resolvability assessment, the Bank could choose to exercise its power of direction, or alternatively, the Bank could propose that the PRA take action to require an institution to address an impediment to resolvability. Where there are common impediments affecting a range of institutions, the PRA could require the impediments to be addressed through rules of general application made pursuant to its statutory rule-making powers, or the Bank could give a direction with general effect or with respect to a particular class of institutions.

4.4 The decision-making framework for the exercise of the Bank's power of direction will be guided by two principles: (i) complying with legal requirements, including those for operational

independence of the resolution authority and structural separation of staff and reporting lines; and (ii) maintaining close co-operation between the supervisory and resolution functions in relation to resolution activities, with institutions receiving co-ordinated Bank and PRA or FCA communications on resolution matters. More broadly, institutions' primary point of contact for going-concern prudential matters remains the PRA or the FCA.

## **5 Right of appeal**

5.1 An institution has a right of appeal in relation to: (i) the Bank's determination that there are substantive impediments to the resolvability of an institution; (ii) the Bank's conclusion that the measures set out in the institution's proposals would not adequately address the impediments; or (iii) the use of the Bank's power of direction. Section 3B(7) of the Banking Act requires the Bank to inform the institution of the right to refer the matter to the Upper Tribunal and to indicate the procedure for such a reference.

5.2 Unless otherwise decided by the Bank (in accordance with section 3B (2) of the Banking Act), a Bank direction will not take effect until the period during which the direction may be referred to the Upper Tribunal has expired, or the reference and any appeal against the Tribunal's determination has been finally disposed of.