BANK RESOLUTION (RECAPITALISATION) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Bank Resolution (Recapitalisation) Bill [HL] as introduced in the House of Lords on 18 July 2024 (HL Bill 2).

- These Explanatory Notes have been prepared by HM Treasury in order to assist the reader and help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1 The purpose of the Bank Resolution (Recapitalisation) Bill is to enhance the UK's resolution regime for managing the failure of financial institutions. Specifically, it:

- Expands the statutory functions of the Financial Services Compensation Scheme (FSCS), requiring it to provide funds to the Bank of England upon request which could be used to meet certain costs arising from the use of the resolution regime to manage the failure of a bank, building society or Prudential Regulation Authority (PRA)-authorised investment firm.

- Allows for the FSCS to use its levy-raising powers to recover any funds provided to the Bank of England after a failure event through imposing levies on the banking sector.

- Extends the Bank of England's ability, through explicit provision, to require the issuance of shares in connection with a resolution, to facilitate the Bank's use of the funds provided by the FSCS to meet a failing bank's recapitalisation costs.

- Makes a number of minor and consequential amendments to legislation to support the measures outlined above and ensure FSCS funds can be used effectively in a resolution.

Policy background

2 The UK has a resolution regime for banking institutions (the "special resolution regime", which is set out in Parts 1 to 3 of the Banking Act 2009), which was implemented in 2009 in the wake of the Global Financial Crisis. The regime made the Bank of England (the Bank) the UK's resolution authority and provided it with a set of options and powers to stabilise banking institutions that fail, in order to protect financial stability, enhance confidence in the financial system and protect depositors, whilst limiting risks to public funds.

3 The UK's regime was used in March 2023 in response to the failure of US bank Silicon Valley Bank, which triggered the failure of its UK subsidiary, Silicon Valley Bank UK (SVB UK). In the case of SVB UK, the Bank used its powers to write down regulatory capital and transfer SVB UK to HSBC, delivering good outcomes for financial stability, customers and taxpayers, and demonstrating the effectiveness and flexibility of the resolution regime.

4 SVB UK was classed as a small bank. Normally it is expected that when small banks fail, they would be placed into a modified insolvency procedure. Instead of the Bank using resolution powers, this means placing the bank into insolvency and eligible depositors being paid out by the Financial Services Compensation Scheme (FSCS), currently up to £85,000 per eligible depositor. Placing SVB UK into insolvency would have resulted in an interruption of full access to deposits placed at the firm, particularly in relation to eligible deposits in excess of £85,000 and ineligible deposits. In the case of SVB UK, the Bank ultimately determined that use of its resolution powers would better meet the public interest compared to placing SVB UK into insolvency.

5 Whilst a good outcome was achieved in this case, it exposed the potential challenges of managing the failure of a small bank where resolution action is judged to be necessary in the public interest at the time of failure. Small banks are not required to maintain additional equity and debt in excess of their minimum capital requirements that can be written down

and converted into equity (a process called bail-in). These resources provide a means to recapitalise the firm, after its existing resources have absorbed losses and is known as the Minimum Requirement for Own Funds and Eligible Liabilities (MREL). Larger banks are subject to these requirements. Without these additional resources, there is not the means to recapitalise the firm, absent use of external, such as public, funds.

6 If a credible buyer is not forthcoming when a small bank fails, this means the only option available to preserve immediate continuity for customers is to transfer the firm (or some of its business) to a bridge bank. As set out in section 12 of the Banking Act 2009 (bridge bank), a bridge bank is wholly or partially owned by the Bank of England, with the aim of maintaining continuity for the failed bank's critical functions until the sale of the bridge bank.

7 Whether a failing bank is sold to a private sector purchaser or transferred to a bridge bank to achieve stabilisation, a failed bank may need additional capital, for example in order for the bank to meet the minimum levels of capital required for them to be allowed to operate (known as the minimum capital requirements for authorisation) or to cover the costs of restructuring. At present, these costs (as well as any costs of operating a bridge bank) may at least initially have to be borne by taxpayers. This means taxpayers are exposed if a small bank failure is judged to require resolution action but the firm in question does not possess sufficient MREL resources to provide for recapitalisation, unlike larger banks that do possess these resources.

8 For these reasons, while insolvency remains an important part of the toolkit for managing bank failures, the government believes it is important to ensure that, subject to the existing statutory tests being met, certain existing resolution tools can be applied to small banks in a way that achieves good outcomes for financial stability while also protecting taxpayers.

The role of this Bill

9 To that end, the Bill introduces a new mechanism to allow the Bank to use funds provided by the banking sector to cover certain costs associated with resolution. Mirroring the arrangements for a modified insolvency, these funds would be initially provided by the FSCS as needed in the event of a failure and subsequently funded by a levy on the banking sector. Credit unions will be exempt from paying the FSCS levy when it is used to recoup funds provided under this mechanism. As such, for the purposes of this document, the banking sector refers to those PRA-authorised banks, building societies and investment firms which take deposits and are thereby subject to the PRA Depositor Protection rules.

10 To achieve this policy outcome, the Bill contains a number of core provisions:

a. It expands the statutory functions of the FSCS, requiring it to provide funds to the Bank of England upon request which could be used to meet certain costs arising from the use of stabilisation tools to manage the failure of a bank, building society or PRA-authorised investment firm;

b. It allows the FSCS to then use its existing levy-raising powers to recover its costs from the banking sector, while exempting credit unions from any levy raised in respect of recapitalisation payments under this mechanism;

c. It gives the Bank the express ability to require the issuance of shares in connection with a resolution, facilitating the Bank's use of these funds to meet a bank's recapitalisation costs; and

d. It makes a number of minor and consequential amendments to support the measures outlined above and ensure FSCS funds can be used effectively in resolution. These include:

   i. Expressly scoping FSCS funds provided in resolution out of the definition of "extraordinary public financial support" in the Banking Act 2009. This reflects that the new mechanism is intended to reduce risk to the kind of public funds described within this definition. It will also enable the Bank to discharge its resolution functions effectively in relation to the use of those FSCS funds;

   ii. Allowing the Bank to take into account the funds provided by the FSCS when they are calculating the contribution of shareholders and creditors required when exercising the bail-in write-down tool. This is to ensure that the Bank is not required to write-down more capital than necessary;

   iii. Ensuring that FSCS funds provided in resolution are taken into account when the Treasury makes Compensation Scheme Orders or Resolution Fund Orders after a resolution event and determining whether compensation or proceeds of sale are due to transferors;[1] and

   iv. Amending section 78A of the Banking Act 2009 (pre-conditions for financial assistance: duty of Bank to give information) by scoping use of FSCS funds provided in resolution out of the requirement on the Bank to inform the Treasury where conditions for financial assistance are met.

11 Taken together, the Bill seeks to ensure that the Bank has a more flexible toolkit for managing the failures of smaller banks in a way that strengthens protections for public funds. It also does this in a way that intends to avoid additional upfront financial costs for the financial services sector, by relying on the existing FSCS funding system where industry is only levied to pay for the costs of failure after the event.

[1] After a resolution, the Treasury must ensure that shareholders and creditors of the resolved firm receive any compensation or share of sale proceeds to which they are entitled. Compensation Scheme Orders and Resolution Fund Orders are two of the vehicles used to achieve this. The former establishes a scheme to determine whether transferors (i.e., those who owned the firm before the Bank transferred it) are owed compensation and, if so, to pay that compensation. The latter establishes a scheme to determine who is entitled to the proceeds of the sale of the property that was transferred.

Legal background

12 The current legal framework which sets out the functions and powers of the FSCS is the Financial Services and Markets Act 2000 (FSMA 2000)[2] and the main legislation relevant to the powers of the Bank to resolve banks is the Banking Act 2009.[3]

13 Part 15 of FSMA 2000 makes provision for the FSCS to operate a compensation scheme for claimants in respect of regulated activities and, by virtue of PRA rules which sit underneath it, a scheme of depositor protection for eligible depositors who suffer loss as a consequence of an authorised person's inability to meet its liabilities. It gives a power to the manager of the FSCS to impose levies on authorised persons for the purpose of both covering the compensation but also the FSCS's expenses.

14 Part 1 of the Banking Act 2009 establishes the special resolution regime and its objectives. The special resolution regime contains options for stabilisation (transfer to a private sector purchaser, transfer to a bridge bank, transfer to an asset management vehicle, bail-in by the Bank and transfer to temporary public ownership) and the powers required to exercise a stabilisation option (including to effect the transfer of shares and other securities or property, rights and liabilities, by operation of law). There is a duty upon the Bank to write down or convert capital instruments before it exercises its powers to carry out a stabilisation option. Part 1 also contains arrangements for compensation that may be available in respect of the transfer of shares or other property or for third parties affected by a transfer.

Territorial extent and application

15 This Bill extends and applies to England and Wales, Scotland and Northern Ireland.

16 The subject matter of this Bill relates to the UK's resolution regime for banking institutions (banks, building societies, and PRA-designated investment firms). Financial services is a reserved matter.

17 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

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[2] https://www.legislation.gov.uk/ukpga/2000/8/contents

[3] https://www.legislation.gov.uk/ukpga/2009/1/contents

Commentary on provisions of Bill

Clause 1: Recapitalisation payments

18 This clause amends Part 15 of FSMA 2000, specifying the text that will be inserted as a new section 214E (recapitalisation payments). This includes:

a. Allowing the Bank to require the FSCS (referred to as the "scheme manager") to transfer funds to the Bank or another person (e.g., directly to the failing firm) when the Bank is exercising its stabilisation powers under the resolution regime to either transfer a failing or failed bank to a private sector purchaser or a bridge bank (subsection (1) of new section 214E);

b. Specifying that such a payment will be known as a "recapitalisation payment" and will be the Bank's estimate of the likely costs of recapitalising the firm and any other expenses that the Bank or any other person may incur in connection with the recapitalisation or the exercise of the stabilisation power (subsection (2) of new section 214E). The reference to "another person" will, in particular, allow HM Treasury to recover its expenses associated with the recapitalisation;

c. Requiring that the Bank must consult the FSCS before requesting that the FSCS transfer funds under the new mechanism (subsection (3) of new section 214E);

d. Specifying that the funds the FSCS provides will be classed as an "expense under the compensation scheme" of the FSCS (subsection (4) of new section 214E). This has the effect of ensuring that the FSCS can levy the financial services industry to recover these expenses; and

e. Specifying that, in the new sections 214E and 214F of FSMA 2000, a "financial institution" means a bank, building society or investment firm (subsection (5) of new section 214E).

Clause 2: Reimbursement in respect of recapitalisation payments

19 This clause specifies the text that will be inserted into FSMA 2000 as a new section 214F (reimbursement in respect of recapitalisation payments). This new section will set out that the Bank must reimburse the FSCS for any funds it has provided which are not needed to cover the costs set out in 214E(2). This is intended to account for situations where the costs were lower than the Bank expected or where the Bank recovers certain amounts in resolution, such as any funds it recovers through a sale of the institution (in full or part), the institution being wound-up or otherwise.

Clause 3: Amendments to the Financial Services and Markets Act 2000

20 *Subsection (1)(a)* amends subsection (5) of section 213 (the compensation scheme) which specifies a matter that regulators must take account of in relation to levies. The amendment inserts some new text into this provision to ensure that this also applies in respect of levies to recover funds provided under new section 214E.

21 *Subsection (1)(b)* specifies the text that will be inserted into FSMA 2000 as the new (5A) and (5B) in section 213 (the compensation scheme). The new (5A) specifies that the FSCS cannot impose levies on credit unions for the purpose of recouping funds provided under the new recapitalisation mechanism, to reflect the fact that credit unions are not within scope of that mechanism under new section 214E(5). The new (5B) defines "credit unions" in (5A).

22 *Subsection (2)* amends section 223 (management expenses) to specify that payments made under section 214E (i.e., recapitalisation payments) are not management expenses. Other expenses incurred, or expected to be incurred, by the scheme manager in relation to making recapitalisation payments would be management expenses.

23 *Subsection (3)* amends section 223C (payments in error) so that, as with other FSCS functions, payments in connection with section 214E that are made in error can be levied for.

Clause 4: Amendments to the Banking Act 2009

24 *Subsection (1)* states that the following subsections amend the Banking Act 2009.

25 *Subsection (2)* amends section 3 (interpretation: other expressions) to exclude FSCS funds provided from the definition of extraordinary public financial support. This reflects that the new mechanism is intended to reduce risk to the kind of public funds described within this definition.

26 *Subsection (3)* amends section 12AA (bail-in: sequence of write-down and conversion of capital instruments and liabilities) to allow the Bank to take into account the funds provided by the FSCS when they are calculating the contribution of shareholders and creditors required when exercising the bail-in write-down tool. This is to ensure that the Bank is not required to write-down more capital than necessary.

27 *Subsection (4)* inserts new text into section 15 (share transfer instrument) to give the Bank an explicit power to require the issuance of securities by the firm in resolution where the FSCS has made a recapitalisation payment under new section 214E. This is intended to ensure that the Bank can move swiftly to ensure FSCS funds are able to recapitalise the failing firm in question.

28 *Subsection (5)* amends section 57 (valuation principles) so that funds provided by the FSCS are disregarded for the purposes of the valuation used to determine compensation for transferors. This would avoid any assessment of the compensation payable to former shareholders and creditors including value that was contributed by the banking sector.

29 *Subsection (6)* amends section 58 (resolution fund) so that funds provided by the FSCS are included in public financial assistance for the purpose of section 58(2). This means that funds would be able to be subtracted when calculating the proceeds of the sale used to determine compensation for transferors. This would avoid any assessment of the compensation payable to former shareholders and creditors including value that was contributed by the banking sector.

30 *Subsection (7)* specifies that section 78A (pre-conditions for financial assistance: duty of Bank to give information), which places a duty on the Bank to provide information to the Treasury about the pre-conditions for financial assistance, will not apply where FSCS funds provided under section 214E have been used.

Clause 5: Extent, commencement and short title

31 *Subsection (1)* specifies that this Act extends to England and Wales, Scotland and Northern Ireland.

32 *Subsection (2)* specifies that clauses 1 and 2 will come into force on a day to be specified by HM Treasury in regulations.

33 *Subsection (3)* specifies that regulations under this section are to be made by statutory instrument.

34 *Subsection (4)* provides the short title of the Bill.

Commencement

35 Clauses 1 to 4 of this Bill will come into force on a day to be specified by HM Treasury in regulations. Clause 5 will commence on Royal Assent.

Financial implications of the Bill

36 This Bill does not entail any direct costs for HM Treasury.

37 The intention of this Bill is to allow the FSCS to provide funds to support the resolution of small banks as the failure of these firms may otherwise pose a risk to public funds. As such, the Bill is expected to reduce the risk to public funds over the long-term.

Parliamentary approval for financial costs or for charges imposed

38 This section will be completed when the Bill is transferred to the House of Commons.

Compatibility with the European Convention on Human Rights

39 Lord Livermore, Financial Secretary to the Treasury, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

"In my view, the provisions of the Bank Resolution (Recapitalisation) Bill are compatible with the Convention rights."

Duty under section 20 of the Environment Act 2021

40 Lord Livermore, Financial Secretary to the Treasury, is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Duty under section 13C of the European Union (Withdrawal) Act 2018

41 Lord Livermore, Financial Secretary to the Treasury, is of the view that the Bill as introduced in the House of Lords does not contain provision which, if enacted, would affect trade between Northern Ireland and the rest of the United Kingdom. Accordingly, no statement under section 13C of the European Union (Withdrawal) Act 2018 has been made.

Related documents

42 The following documents are relevant to the Bill and can be read at the stated locations:

- Enhancing the Special Resolution Regime: Consultation, available at: https://www.gov.uk/government/consultations/enhancing-the-special-resolution-regime-consultation

- Enhancing the Special Resolution Regime: Consultation Response, available at: https://www.gov.uk/government/consultations/enhancing-the-special-resolution-regime-consultation

- Bank Resolution (Recapitalisation) Bill: Cost-Benefit Analysis, available at: https://www.gov.uk/government/consultations/enhancing-the-special-resolution-regime-consultation

Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	**Extends to E & W and applies to Wales?**	**Legislative Consent Motion process engaged?**	**Extends and applies to Scotland?**	**Legislative Consent Motion process engaged?**	**Extends and applies to Northern Ireland?**	**Legislative Consent Motion process engaged?**
Clause 1: Recapitalisation payments	Yes	Yes	N/A	Yes	N/A	Yes	N/A
Clause 2: Reimbursement in respect of recapitalisation payments	Yes	Yes	N/A	Yes	N/A	Yes	N/A
Clause 3: Amendments to the Financial Services and Markets Act 2000	Yes	Yes	N/A	Yes	N/A	Yes	N/A
Clause 4: Amendments to the Banking Act 2009	Yes	Yes	N/A	Yes	N/A	Yes	N/A
Clause 5: Extent, commencement and short title	Yes	Yes	N/A	Yes	N/A	Yes	N/A

Subject matter and legislative competence of devolved legislatures

43 The subject matter of this Bill relates to the UK's resolution regime for banking institutions (banks, building societies, and PRA-designated investment firms). Financial services is a reserved matter. This Bill does not make provision in areas which are devolved to the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly.

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