



BANK OF ENGLAND

October 2018

UK withdrawal from the EU: The Bank of England's approach to resolution statements of policy and onshored Binding Technical Standards

A Consultation Paper



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The response will be assessed to inform our work as a regulator and central bank, both in the public interest and in the exercise of our official authority. We may use your details to contact you to clarify any aspects of your response.

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Responses are requested by Wednesday 2 January 2019.

Please address any comments or enquiries to:

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1 Overview

1.1 The UK's withdrawal from the EU¹ requires changes to be made to UK legislation to ensure that it remains functional. The European Union (Withdrawal) Act 2018 (the 'Act') converts directly applicable EU law (eg EU Regulations) into UK law, and preserves domestic law that relates to EU membership (including domestic law that was introduced to implement EU Directives). This body of law is referred to as 'retained EU law'. The Act also provides Government ministers powers to make changes to the law so that it continues to operate effectively after the UK's withdrawal from the EU. These processes are often referred to as 'onshoring' or 'Nationalising the Acquis'² (NtA).³

1.2 Under the draft Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (the Regulations),⁴ HM Treasury proposes to delegate responsibility for fixing deficiencies arising in onshored Binding Technical Standards (BTS) to the UK financial regulators.⁵ In particular, the regulators have the power to make instruments, where appropriate, to prevent, remedy or mitigate any failure of the onshored BTS to operate effectively or any other deficiency in the onshored BTS arising from the UK's withdrawal from the EU.

1.3 HM Treasury has decided that, subject to Parliamentary approval, responsibility for the BTS adopted by the European Commission pursuant to the Bank Recovery and Resolution Directive (the BRRD, 2014/59/EU) should rest with the Bank of England (the Bank) where they concern resolution, and with the Prudential Regulation Authority (PRA) and/or the Financial Conduct Authority (FCA) where they concern supervisory responsibilities. For the purposes of this consultation paper (CP), such BTS adopted pursuant to the BRRD are referred to as the 'BRRD BTS'. The BTS allocated to the Bank in its capacity as resolution authority are set out in Part 3 of the Schedule to the Regulations.

1.4 This CP sets out the Bank's proposals to fix deficiencies arising from the UK's withdrawal from the EU in relation to those onshored BRRD BTS for which it is responsible. This CP also sets out how references to EU legislation and concepts in existing statements of policy (SoPs) issued by the Bank in its capacity as resolution authority should be interpreted after the UK leaves the EU. The CP is relevant to all firms subject to the Bank's resolution powers. Further information on the PRA approach to the BRRD BTS for which the PRA is responsible can be found in PRA CP26/18. Of particular relevance to resolution will be the PRA's proposed changes to contractual recognition of bail-in and stay in resolution rules. The FCA plans to consult on its approach to BTS for which it is responsible in due course.

1.5 This CP is published as part of the Bank's consultation package on amending financial services legislation under the Act.⁶ CP25/18 'The Bank of England's approach to amending

¹ References in this CP to the EU and/or its Member States include, as appropriate, the European Economic Area (EEA) States of Norway, Iceland and Liechtenstein.

² Acquis refers to the 'acquis communautaire'.

³ HM Treasury has set out its approach to onshoring EU financial services regulation in 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act', June 2018:

<https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

⁴ The Regulations have been laid before Parliament and are expected to come into force in October 2018.

⁵ In addition to the power to address deficiencies, the Regulations also delegate to the regulators an ongoing power to make and maintain technical standards but these powers cannot be exercised until after the UK has left the EU.

⁶ The Bank and PRA has issued four consultation papers on Thursday 25 October 2018:

<http://www.bankofengland.co.uk/news/2018/october/boes-approach-to-amending-financial-services-legislation-under-the-eu-withdrawal-act-2018>.

financial services legislation under the European Union (Withdrawal) Act' (the 'NtA approach CP') provides the Bank's general approach to addressing deficiencies in onshored BTS and to non-binding EU materials, including EBA Guidelines. The two documents should be read together.

1.6 As noted in the NtA approach CP, HM Treasury is responsible for addressing deficiencies in primary and secondary UK financial services legislation that arise following the UK's withdrawal from the EU. This includes the legislation governing the UK resolution regime, principally the Banking Act 2009 and associated secondary legislation (such as the Bank Recovery and Resolution (No. 2) Order 2014). HM Treasury consulted the Bank, PRA and FCA on its approach to amending this legislation and HM Treasury has laid the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018⁷ (BRR (EU Exit) Regulations) before Parliament, which sets out the amendments HM Treasury proposes to make in that regard. The changes the Bank proposes to onshored BRRD BTS are consistent with changes that HM Treasury proposes to make in the draft BRR (EU Exit) Regulations.

1.7 The proposed changes are technical amendments to ensure an operable legal framework when the UK leaves the EU. The power to make 'EU Exit Instruments' under the Regulations can only be used to fix deficiencies that arise as a result of the UK's exit from the EU. They cannot be the basis for policy changes unrelated to the UK's withdrawal. As such, this CP does not include a cost benefit analysis, reflecting the fact that the proposed amendments to onshored BTS contained in this CP reflect the need to fix deficiencies, and do not constitute further policy changes.

1.8 As set out in the NtA approach CP, this CP focuses on changes where the Bank proposes to depart from the general approach described in Chapter 3 of that document, or where the Bank considers that an explanation would be appropriate to make clear the rationale for following the general approach.

1.9 HM Treasury has announced its intention to provide the financial services regulators with powers to introduce transitional measures that they could use to phase in onshoring changes. The NtA approach CP also sets out the Bank's proposed approach to applying transitional relief in relation to obligations on firms that are changing as a result of the UK's withdrawal from the EU. Readers of this CP should take this into account when considering the proposals.

1.10 The NtA approach CP also details, in paragraph 4.11, where the PRA has, at this stage and subject to responses to the consultation, identified examples of where it would not expect to provide transitional relief. These include elements of the PRA rules on contractual recognition of bail-in and contractual stays in resolution, which are required to ensure orderly resolution. Further detail is provided in PRA CP26/18. These proposals are, in particular, relevant to firms issuing or materially amending liabilities from exit day, including those issued to meet the minimum requirement for own funds and eligible liabilities (MREL).

1.11 The changes to BRRD BTS set out in this CP would have effect from 29 March 2019 ('exit day')⁸ only in the event that there is no Implementation Period as set out in the draft Withdrawal Agreement between the UK and EU.⁹ If the Withdrawal Agreement is ratified and the Implementation Period commences on 29 March 2019, changes would not take effect until

⁷ The relevant statutory instrument (including explanatory memorandum), as laid on Tuesday 23 October 2018, is available here: <http://www.legislation.gov.uk/ukdsi/2018/9780111173732>.

⁸ As defined in the Act.

⁹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', March 2018: <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>.

after the end of the Implementation Period. To the extent that it is necessary, further modifications to the onshored BTS may be required to reflect any agreement that is reached between the UK and EU on their future relationship.

1.12 The changes that the Bank proposes to make to onshored BRRD BTS are set out in a draft EU Exit Instrument that is appended to this CP. The BRRD BTS to which changes are proposed to be made are set out below:

- Articles 22 to 32 (on group resolution plans and assessments of resolvability), 37 to 41 (on the independence of valuers), and 50 to 109 (on joint decisions as part of resolution colleges) of Commission Delegated Regulation (EU) 2016/1075;
- Commission Delegated Regulation (EU) 2016/1400 (on business reorganisation plans);
- Commission Delegated Regulation (EU) 2016/1401 (on the methodologies and principles for valuation of derivatives liabilities);
- Commission Delegated Regulation (EU) 2016/1450 (on the methodology for setting a minimum requirement for own funds and eligible liabilities);
- Commission Delegated Regulation (EU) 2016/1712 (on the minimum level of information on financial contracts that should be maintained);
- Commission Implementing Regulation (EU) 2016/962 (on the transmission of information to the EBA);
- Commission Delegated Regulation (EU) 2018/344 (on methodologies for valuation of difference in treatment in resolution);
- Commission Delegated Regulation (EU) 2018/345 (on the methodology for assessing the value of assets and liabilities); and
- Commission Implementing Regulation (EU) 2018/308 (on the transmission of information concerning firms' minimum requirements for own funds and eligible liabilities to the EBA).

1.13 The Bank is not consulting on amendments to Commission Implementing Regulation (EU) 2016/1066 (on provision of information for the purpose of resolution plans) in this CP. This is because the EBA has proposed to repeal this BTS and replace it with an updated BTS. The new BTS is currently awaiting adoption by the European Commission. The Bank will bring forward proposals for addressing any deficiencies in that BTS, together with any other BTS adopted before exit day.

1.14 The remaining chapters to this CP are structured as follows:

- **Chapter 2 - Interpreting existing Bank of England Statements of Policy on resolution** explains how to interpret Bank SoPs in light of any deficiencies arising from the UK's withdrawal from the EU;
- **Chapter 3 - Material amendments to BRRD BTS** sets out those changes to BTS which deviate from the approach to fixing deficiencies as set out in CP25/18 'The Bank of England's approach to amending financial services legislation under the European Union

(Withdrawal) Act' or where, in resolving a deficiency, the Bank has a choice between multiple options;

- **Chapter 4 – The Bank's obligations under the Regulations** sets out the Bank's legal obligations under the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018;
- **Chapter 5 - Next steps** invites feedback from firms on this CP; and
- **Appendix** provides the proposed draft EU Exit Instrument for the BRRD BTS allocated to the Bank.

1.15 This consultation closes on Wednesday 2 January 2019. The Bank invites feedback on the proposals set out in this consultation. Please address any comments or enquiries to ResolutionBTS@bankofengland.co.uk.

1.16 Responses to this CP will be shared with the FCA.

2 Interpreting existing Bank of England Statements of Policy on resolution

2.1 This chapter addresses the three resolution SoPs made by the Bank under section 3B(9) of the Banking Act 2009. It provides guidance on how these policies should be interpreted when the UK leaves the EU in light of the changes made by the draft BRR (EU Exit) Regulations, and following the 'baseline' approach where it is assumed that the EU/EEA states would be treated as 'third countries' by the UK and would treat the UK as a 'third country'.

2.2 In particular, this chapter concerns:

- The Bank of England's power to direct institutions to address impediments to resolvability;¹⁰
- The Bank of England's approach to setting a minimum requirement for own funds and eligible liabilities (MREL) within groups, and further issues;¹¹ and
- The Bank of England's policy on valuation capabilities to support resolvability.¹²

2.3 In addition to the above SoPs, the Bank has published a document explaining the Bank's approach to resolution.¹³ The Bank does not propose to update these documents in advance of exit day to reflect the UK's withdrawal from the EU, although they will be reviewed and updated in due course. Instead, in the event that there is no Implementation Period, the published versions of these documents will be updated to include a statement noting that they continue to apply after exit day but should be interpreted consistently with the principles set out in the NtA approach CP.

2.4 The NtA approach CP also sets out the Bank's proposed expectations regarding Guidelines and Recommendations issued by the European Supervisory Authorities (ESAs). The Bank continues to expect firms to comply with those Guidelines and Recommendations that firms are currently expected to comply with, to the extent that they remain relevant, when the UK leaves the EU. This includes Guidelines issued by the EBA in relation to resolution.

References to the Bank Recovery and Resolution Directive and other EU legislation

2.5 The BRRD has been transposed into UK law. After the UK leaves the EU, the BRRD will no longer be a feature of the UK legal framework. The domestic legislation that transposes the BRRD will continue to apply, subject to any revisions made in accordance with the BRR (EU Exit) Regulations. While the BRRD may provide some context as to the original transposition of the requirements, at the point at which the UK leaves the EU, the BRRD itself will not have legal effect in the UK. Instead, the relevant domestic legislation that transposed the BRRD, as amended pursuant to the BRR (EU Exit) Regulations, will provide the source of the relevant

¹⁰ December 2015: <https://www.bankofengland.co.uk/paper/2015/the-boes-power-to-direct-institutions-to-address-impediments-to-resolvability-sop>.

¹¹ June 2018: <https://www.bankofengland.co.uk/paper/2018/boes-approach-to-setting-mrel-2018>.

¹² June 2018: <https://www.bankofengland.co.uk/paper/2018/the-boes-policy-on-valuation-capabilities-to-support-resolvability>.

¹³ 'The Bank of England's approach to resolution', published October 2017: <https://www.bankofengland.co.uk/paper/2017/the-bank-of-england-approach-to-resolution>.

legal duties, powers and obligations. Therefore, references to BRRD (and other European Directive) requirements should be read as being references to the relevant UK legislation that transposed the relevant provisions. References to EU Regulations should be treated as references to the relevant onshored regulation – that is, the UK version of the Regulation which has been retained and amended to address any deficiencies arising from the UK's withdrawal from the EU.

2.6 Following the UK's withdrawal from the EU, it may be that some aspects of the UK's implementation of the BRRD will no longer be appropriate. For example, the Bank will have no obligation to take joint decisions with other EEA resolution authorities through BRRD resolution colleges (see below for further detail). Where this is the case, those aspects of the domestic implementation of the BRRD will be deleted by the BRR (EU Exit) Regulations – any associated obligations as they appear in SoPs should therefore be interpreted as no longer applying.

References to Binding Technical Standards

2.7 The SoPs may refer to existing BTS. After exit, references to any BRRD BTS should be taken to refer to the relevant onshored BTS as amended by the Bank or PRA/FCA. For example, references to Commission Delegated Regulation (EU) 2016/1450, setting out the methodology for setting MREL, should instead be taken to refer to the UK onshored version of this BTS as amended by the Bank.

2.8 The Appendix to this CP contains a draft EU Exit Instrument that sets out the BTS articles the Bank proposes to amend to fix deficiencies. Where an onshored BTS no longer contains a provision from the original EU BTS, because that provision (or the BTS itself) has not been retained, such provision should be interpreted to no longer apply.

References to European resolution colleges

2.9 Any references to European resolution colleges, or to associated responsibilities or procedural obligations that the Bank has with regards to resolution colleges, should be interpreted as not applying.

2.10 For example, the Bank will have sole responsibility for determining MREL for groups subject to consolidated supervision in the UK after the UK leaves the EU. This, therefore, replaces references to joint decisions with other EEA regulators regarding MREL. The Bank will, however, continue to co-operate with EEA authorities and will continue to participate in Crisis Management Groups for global systemically important banks (G-SIBs) where the UK is either the home or a host authority.

References to the European Banking Authority (EBA)

2.11 Where a SoP states that the Bank will engage with the EBA, this should be considered as no longer applying in accordance with the BRR (EU Exit) Regulations. For example, where a SoP says that the Bank will notify the EBA of a decision, the Bank will no longer have any obligation to notify the EBA from exit day.

Other references to the European Economic Area (EEA)

2.12 SoPs may refer to obligations for the Bank to consider the economy, financial markets (including markets for financial services), financial system and/or financial stability of EEA states when exercising its powers. This might apply, for example, with regard to making decisions on the resolvability of a firm. After the UK leaves the EU, these references should instead be interpreted as requirements to consider the economy, financial markets (including markets for financial services), financial system and/or financial stability of the UK.

2.13 References to third countries should be read to include all EEA states. Accordingly, any requirements for the Bank to consider the interests of third countries (such as those detailed in Section 7A of the Banking Act 2009) continue to apply and will include the interests of EEA states.

2.14 SoPs may refer to liabilities that are governed by 'non-EEA law' – for example, with reference to the write-down or conversion of debt instruments. The PRA is currently consulting on proposals to amend the Contractual Recognition of Bail-In Part of the PRA Rulebook to ensure the rule is operable when the UK leaves the EU. The PRA is also clarifying its approach in respect of obligations under EEA law financial arrangements in scope of the Stay in Resolution Part of the PRA Rulebook. Readers should refer to the PRA CP26/18¹⁴ in order to interpret the application of these provisions.

2.15 SoPs may refer to EEA authorities, or refer to EEA authorities when defining terms. In such cases, EEA authorities should be treated as within scope of that reference or definition only insofar as a third country authority would be in scope.

¹⁴ October 2018: <http://www.bankofengland.co.uk/prudential-regulation/publication/2018/uk-withdrawal-from-the-eu-changes-to-pra-rulebook-and-onshored-bts>.

3 Material amendments to BRRD BTS allocated to the Bank

3.1 The Appendix to this CP contains the draft EU Exit Instrument that provides for the changes the Bank is proposing to fix deficiencies in the BRRD BTS arising from EU withdrawal.¹⁵ As noted in the NtA approach CP, the Bank considers it appropriate to provide specific commentary for 'material' fixes, judged as those that:

- deviate from the principles and approach to fixing deficiencies set out in the NtA approach CP; or
- reflect a specific solution proposed by the Bank where multiple solutions to the inoperable are available.

3.2 In the case of those BRRD BTS allocated to the Bank, the Bank does not consider there to be any amendments that meet this standard. The Bank does, however, consider that it may be of assistance to explain some of the changes where the reasoning behind the changes may not be obvious.

References to resolution financing

3.3 The Bank proposes to remove references to 'resolution financing arrangements' in Commission Delegated Regulation (EU) 2016/1450 (on the methodology for setting a minimum requirement for own funds and eligible liabilities) (MREL), and instead cross-refer to the UK legislation that contains the relevant provisions concerning resolution financing. This reflects the UK's arrangements for resolution financing, under which the Bank is entitled to an amount raised by the bank levy in order to support the exercise of the resolution powers, providing the relevant safeguards have been met.¹⁶

Deleted BTS

3.4 A number of BRRD BTS will be deleted as the requirements set in these BTS will no longer be applicable post exit – for example, the Bank will no longer be required to transmit information to the EBA. This deletion will also be done through the EU Exit Instrument, which deletes the onshored BTS in retained EU law (see Appendix). The following BTS will be deleted:

- Articles 50 to 109 of Commission Delegated Regulation (EU) 2016/1075 (regarding the organisation of resolution colleges and taking of joint decisions on group resolution planning, resolvability assessments, removal of impediments to resolution, setting of MREL and taking resolution);

¹⁵ Other draft EU Exit Instruments for those BRRD BTS delegated to the PRA are included in the PRA CP26/18, published alongside this CP: <http://www.bankofengland.co.uk/prudential-regulation/publication/2018/uk-withdrawal-from-the-eu-changes-to-pra-rulebook-and-onshored-bts>

¹⁶ Further detail on the UK arrangements for resolution financing can be found in Chapter 11 of the HM Treasury's 2017 'Banking Act 2009: special resolution regime code of practice', available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602948/Special-Resolution-Regime-Code-of-Practice.pdf.

- Commission Delegated Regulation (EU) 2016/962 (specifying uniform formats, templates and definitions for identifying and transmitting information regarding the application of simplified obligations for certain institutions to the EBA); and
- Commission Implementing Regulation (EU) 2018/308 (specifying uniform formats, templates and definitions for identifying and transmitting information on MREL to the EBA).

Interpretation of the BTS

3.5 The Bank has not sought to make changes to the BRRD BTS where certain concepts, while not identical, have a pre-existing and clear counterpart in UK law. For example, certain BRRD BTS refer to 'ex ante' and 'ex post' valuations; these are and should be continued to be read as references to the pre-resolution and full valuations under the Banking Act 2009. Similarly, certain BRRD BTS refer to the 'sale of business tool' and 'bridge institution tool'; these are and should continue to be read as references to the 'private sector purchaser' and 'bridge bank' options under the Banking Act 2009.

4 The Bank's obligations under the Regulations

4.1 The Regulations will, subject to Parliamentary approval, delegate power to make changes to relevant BTS under Section 8 of the Act to the Bank by HM Treasury. As such the restrictions that apply to the use of the power in Section 8 also apply to the Bank.

4.2 In accordance with those restrictions, the Bank considers that all changes proposed in this CP are appropriate to prevent, remedy or mitigate any:

- (a) failure of the relevant BTS to operate effectively, or
- (b) other deficiency in the relevant BTS, arising from the UK's withdrawal from the EU.

4.3 The types of changes that fall within the scope of 'deficiency' are listed in Section 8(2) of the Act. This list is exhaustive, ie all amendments must address deficiencies of these types or make consequential, supplementary, transitory or transitional provision in connection with them.

4.4 The Bank also confirms that the proposals do not:

- (a) impose or increase taxation or fees;
- (b) make retrospective provision;
- (c) create a criminal offence which is capable of leading to imprisonment of more than two years;
- (d) establish a public authority;
- (e) implement the Article 50 Withdrawal Agreement;
- (f) result in the transfer of a function of an EU authority to a UK authority;
- (g) confer any power to legislate by means of orders, rules, regulations or any other subordinate instrument; or
- (h) amend any legislation other than the relevant BTS.

Equality and diversity

4.5 The Bank does not consider that the proposals give rise to equality and diversity implications.

5 Next steps

5.1 The Bank invites feedback on the proposals set out in this paper by Wednesday 2 January 2019. Please provide those comments by email to the address below:

ResolutionBTS@bankofengland.co.uk

Alternatively you may provide comments by post to:

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