

# HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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26th Report of Session 2012-13

**Draft Bank of England Act 1998 (Macro-prudential Measures) Order 2013**  
and 2 associated instruments

**Draft Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013**

Also includes an Information Paragraph on 6 Instruments

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*Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)*

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
  - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
  - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

*Members*

Lord Bichard	Lord Methuen
Baroness Eaton	Rt Hon. Baroness Morris of Yardley
Lord Eames	Lord Norton of Louth
Rt Hon. Lord Goodlad ( <i>Chairman</i> )	Lord Plant of Highfield
Baroness Hamwee	Rt Hon. Lord Scott of Foscote
Lord Hart of Chilton	

*Registered interests*

Information about interests of Committee Members can be found in the Appendix.

*Publications*

The Committee's Reports are published on the internet at [www.parliament.uk/seclegpublications](http://www.parliament.uk/seclegpublications)

*Information and Contacts*

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email [seclegscrutiny@parliament.uk](mailto:seclegscrutiny@parliament.uk).

*Statutory instruments*

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

# Twenty-Sixth Report

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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**A. Draft Bank of England Act 1998 (Macro-prudential Measures) Order 2013**

**Draft Financial Services and Markets Act 2000 (Financial Services Compensation Scheme) Order 2013**

**Draft Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013**

*Date laid: 24 January 2013*

*Parliamentary Procedure: affirmative*

*Summary: The draft Orders serve to specify important details of the new framework for financial regulation under the Financial Services Act 2012, including aspects of the relationship between the Financial Policy Committee, the Prudential Regulation Authority, and the Financial Conduct Authority, all of which are established under that Act.*

**We draw these instruments to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.**

1. HM Treasury (HMT) has laid these draft Orders, to come into force substantively in April 2013. It has also provided accompanying Explanatory Memorandums (EM) and Impact Assessments (IA).

*New framework for financial regulation*

2. The Financial Services Act 2012 provided a new framework for financial regulation in the United Kingdom, and established three new bodies: the Financial Policy Committee (FPC); the Prudential Regulation Authority (PRA); and the Financial Conduct Authority (FCA). The FPC, as a committee of the Bank of England, will have responsibility for overseeing the financial system as a whole, identifying potential risks to its stability and taking concerted action to address them (macro-prudential regulation). The PRA, an operationally independent subsidiary of the Bank, will regulate all deposit-takers, all insurers and investment firms which may pose a risk to the stability of the UK financial system (micro-prudential regulation). The FCA, as the successor to the Financial Services Authority, will be responsible for conduct of business regulation of all regulated financial firms, and the prudential regulation of those not covered by the PRA. These three instruments serve to specify important details of the new framework, including aspects of the relationship between these newly established bodies.

*The draft Orders*

3. The **draft Bank of England Act 1998 (Macro-prudential Measures) Order 2013** sets out the measures which the FPC may direct the PRA or the FCA to implement. In its EM, HMT states that the FPC will have the power

to give directions to the regulators, but that the scope of the direction-making power is confined to those measures specified by HMT. The Order provides that the FPC may direct the PRA to require UK banks or UK investment firms to maintain additional capital requirements by reference to their exposure to residential property, commercial property or other entities in the financial sector. This would allow the FPC to target risks that emerge in particular sectors. For example, if the FPC believed that systemic risks were arising from the growth of residential mortgage exposures, it could use this power to require institutions to hold capital above normal micro-prudential requirements for exposures to that sector.

4. The Government intend that the FPC will also have a power to set the level of the Countercyclical Capital Buffer (CCB), a mechanism which should help to increase the resilience of the financial system by requiring banks, building societies and larger investment firms to build up capital during periods of “over-exuberance”. However, HMT states that the CCB mechanism is part of the Basel III agreement,<sup>1</sup> to be implemented in Europe by a proposed new EU Capital Requirements Directive (“CRR/D4”); and that, since that Directive is still under negotiation, this Order does not include CCB requirements in the scope of the direction-making power.
5. The **draft Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013** divides responsibility for prudential regulation between the PRA and the FCA. Deposit-taking, effecting and carrying on contracts of insurance and certain activities in relation to the Lloyd’s market are to be prudentially regulated by the PRA. In addition, dealing in investments as principal is to be prudentially regulated by the PRA when carried on by a person who is designated under this Order by that Authority.
6. In the EM, HMT states that the scope of firms that require expert micro-prudential regulation by the PRA may change over time. The FPC will be responsible for monitoring the perimeter of prudential regulation and will be able to make recommendations to HMT about changes to the scope of regulation by the PRA or the FCA. In order to provide the flexibility to respond to such future changes, the scope of activities regulated by the PRA is to be set out in secondary legislation.
7. The **draft Financial Services and Markets Act 2000 (Financial Services Compensation Scheme) Order 2013** divides the allocation of rule-making responsibility for the Financial Services Compensation Scheme (FSCS) between the PRA and the FCA. In the EM, HMT states that the FSCS is the UK’s compensation fund of last resort for customers of authorised financial services firms. The Department comments that, because the provision of compensation is essential to both supporting consumer confidence and promoting stability, the role of the FSCS will interact with both the FCA and the PRA in the new regulatory system. The Government are implementing a model where the FCA and PRA will have joint oversight of the FSCS, but split rule-making responsibilities that reflect the general division of regulatory responsibilities. The PRA may (or may not) make compensation rules for deposit-takers and insurers; the FCA may (or may not) make compensation rules for all other types of financial activity.

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<sup>1</sup> “Basel III” is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector.

**B. Draft Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013***Date laid: 24 January 2013**Parliamentary Procedure: affirmative*

*Summary: The draft Order amends provisions relating to collective redundancies in the Trade Union and Labour Relations (Consolidation) Act 1992. In cases of “large-scale collective redundancy”, where an employer proposes to dismiss 100 or more employees as redundant within a period of 90 days or less, the draft Order reduces the minimum period of time which must elapse before the first dismissal can take effect from 90 to 45 days. The changes proposed will provide greater flexibility to employers and reduce burdens on business. However, in specifying the objectives behind the Order, the Government have also identified benefits to employees and the overall process of consultation. It is far from clear from the evidence provided that these other objectives will be achieved.*

**We draw this instrument to the special attention of the House on the ground that it may imperfectly achieve some of its policy objectives.**

8. The Department for Business, Innovation and Skills (BIS) has laid this draft Order, to come into force on 6 April 2013. It has also provided an accompanying Explanatory Memorandum (EM) and Impact Assessment (IA).

*Review of rules on collective redundancies*

9. In the EM, BIS states that, in 2010, the Government undertook to review the rules on collective redundancies, which have been largely unchanged since 1975, as part of a wider review of employment law. The review is intended to ensure there are no unnecessary barriers to business success by providing that the rules are fit for the UK’s modern and flexible labour market. The Department explains that, while for large-scale collective redundancies EU legislation<sup>2</sup> requires a minimum of 30 days before the first dismissal can take effect, the rules in this country require a minimum of 90 days. BIS states that it has found that, in practice, there is a high degree of confusion about the current rules and overall poor quality consultation.
10. The EM confirms that the Government have decided to reduce the minimum period before the first dismissal can take effect from 90 to 45 days in cases involving 100 or more redundancies, but not to go as far as reducing this to 30 days, in view of the importance of allowing sufficient time to local government organisations to respond to potential job losses. The Government have also decided to exclude the termination of fixed term contracts from the rules on collective redundancies where this is taking place at the agreed end of the contract.<sup>3</sup> BIS states that these changes will not affect the individual notice periods required to be given by employers, and that the qualifying period for employees to claim protective awards will not be changed.

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<sup>2</sup> Council Directive 1998/59/EC on the approximation of the laws of the Member States relating to collective redundancies (“the Directive”)

<sup>3</sup> BIS states that this exclusion is expressly permitted by article 2(a) of the Directive.

*Consultation*

11. BIS carried out consultation between 21 June and 19 September 2012. The Government response (published in December 2012) explains that there were 160 responses to the consultation, including 32 from large businesses and 17 from business representative organisations; 25 from trades unions; 18 from representatives of the legal profession; and 30 from individuals.<sup>4</sup>
12. In the EM the Department states that 100 respondents answered a question relating to the minimum period before first dismissal. Of these, 52% favoured a reduction to 30 days; 19% supported 45 days; 22% favoured retaining the existing 90-day period; and 9% of respondents were not sure. Employers and independent legal bodies generally supported a reduction to 30 days, while trades unions argued against reducing the current minimum period, and most did not support either of the proposed options.

*Objectives*

13. BIS has set out the policy objectives and intended effects of the changes on page 1 of the accompanying IA: “The aim of the proposed policy is to create a simple, understandable process that promotes quality consultation and will: allow the parties to engage in consultation that is best suited to their circumstances; improve business flexibility to restructure effectively; and reduce business burdens. [It will] balance the needs of employees made redundant with those that remain.” There is a fuller exposition of the policy objective at paragraphs 31 to 35 of the IA, which repeats the aims already quoted, and also states that the new regime will “increase the likelihood of agreement between employers and employees’ representatives” and “increase employee buy-in to the decision-making process”.
14. It is not obvious from the evidence presented by BIS that the changes are likely either to promote agreement between employers and employees’ representatives, or to gain greater employee support for the process. As noted above, the trade union respondents to the consultation process consistently argued against reducing the current minimum period. In the IA, in the “Description and scale of key monetised costs by main affected groups”, BIS sets out that, for employees, the changes proposed will mean a reduction in the amount of time paid by their current employer, and therefore in the pay received: “We expect this reduction in pay to total £252m per annum across all affected employees.” We would not expect such factors to pre-dispose employees, or their representatives, to view the new regime favourably.
15. We note as well that the IA (paragraphs 12 to 15) contains information taken from a Workplace Employment Relations Survey conducted in 2004. BIS states that the survey included a question on whether consultation led to changes in managers’ original proposals: “In 78 per cent of cases the answer was ‘no’”. As previously noted, BIS acknowledges that, at present, consultation in relation to large-scale collective redundancies is overall of poor quality. BIS states that it has agreed with the Advisory Conciliation and Arbitration Service (ACAS) that it will produce non-statutory guidance on collective redundancies, which “will in particular address the principles and

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<sup>4</sup> See Government response:

<https://www.gov.uk/government/consultations/collective-redundancies-consultation-on-changes-to-the-rules>

behaviours behind a good quality consultation and when employers need to consult”.

16. The Government response to the consultation acknowledges that a significant number of respondents felt that guidance, such as a Code of Practice, would need to have a statutory footing in order to help bring about the required culture change (paragraph 8.17). It quotes (at paragraph 8.30) comments made by some respondents that “it would be confusing to have a Code of Practice that had no statutory basis as this is what most people would expect of a formal Code.” Without offering a specific response to these concerns, BIS re-affirms the Government’s view that a statutory Code is inappropriate: “It is not possible to prescribe in legislation a number of the issues that need to be covered (e.g. establishment). A statutory Code would also encourage a ‘tick-box’ approach and reduce...flexibility”.

#### *Conclusion*

17. It seems clear that the changes proposed will provide greater flexibility to employers in planning for large-scale collective redundancies, and will reduce burdens on business. However, in specifying the objectives of the policy behind this draft Order, the Government have identified benefits both to employees and to the overall process of consultation, as well as benefits to employers. The evidence provided by BIS does little to inspire confidence that these other objectives will be achieved.

## INSTRUMENTS OF INTEREST

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### ***Draft Civil Legal Aid (Costs) Regulations 2013 and 5 associated instruments***

18. These Regulations all amend different aspects of legal costs in civil law cases to implement provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the recommendations made by Lord Justice Jackson in his *Review of Civil Litigation Costs*.<sup>5</sup>
19. The **draft Civil Legal Aid (Costs) Regulations 2013** make provision about costs orders in civil proceedings in favour of or against a legally aided party and, in certain circumstances, against the Lord Chancellor. To improve the assessment of means-testing the **draft Legal Aid (Information about Financial Resources) Regulations 2013** give the Director of Legal Aid Casework the power to request information from Department for Work and Pensions, Her Majesty's Revenue & Customs and Northern Ireland Departments about an applicant's income and from other Departments about any benefits that the person may be receiving.
20. Further instruments reform the way in which conditional fee agreements (CFA) and "after the event" insurance operate.<sup>6</sup> In his Review, Lord Justice Jackson recommended that "after the event" insurance premiums should not continue to be recoverable under costs orders in any area of civil litigation – however the **Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013** (SI 2013/92) make a limited exception for expert reports establishing liability and causation in clinical negligence cases only. Lord Justice Jackson further argued that the current "no win, no fee" CFA regime had led to excessive costs in civil litigation with risk-free litigation for claimants and additional costs being paid by defendants, including a "success fee" of up to 100% on top of the claimant's lawyer's base costs. He therefore recommended that recoverability of the success fee from the losing side should be abolished in all categories of civil litigation, and that, in personal injury claims, the success fee should be limited to 25% of damages awarded (excluding damages awarded for future care and loss). The **draft Conditional Fee Agreements Order 2013** implements this cap. The **draft Damages-Based Agreements Regulations 2013** set a similar cap so that the lawyers' fee is limited to 25% in personal injury claims (excluding damages awarded for future care and loss) and 50% of the damages for other civil litigation. The employment provisions - a cap of 35% of the damages recovered by the claimant - have been replicated from previous regulations.
21. Lord Justice Jackson also considered that the current regime did not provide sufficient incentive for defendants to settle claims. The **Offers to Settle in Civil Proceedings Order 2013** (SI 2013/93) makes provision for the court to order a defendant to pay an additional sanction of up to 10% of the award

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<sup>5</sup> Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response March 2011 (Cmd 8041)

<sup>6</sup> After the Event (ATE) insurance is taken out after an actionable event has occurred to protect the claimant from having to pay certain legal costs. It has often been used in conjunction with "no win, no fee" agreements.

in cases where the defendant has refused a claimant's offer to settle the claim and the court subsequently gives judgement in favour of the claimant which is at least as advantageous as the claimant's offer.

## **INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE**

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The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

### **Draft Instruments subject to affirmative approval**

Charities (Incorporated Church Building Society)  
(England and Wales) Order 2013

Civil Legal Aid (Costs) Regulations 2013

Conditional Fee Agreements Order 2013

Damages-Based Agreements Regulations 2013

East Hertfordshire and Stevenage (Boundary Change)  
Order 2013

Gateshead and Northumberland (Boundary Change)  
Order 2013

Legal Aid (Information about Financial Resources)  
Regulations 2013

### **Instruments subject to annulment**

SI 2013/92 Recovery of Costs Insurance Premiums in Clinical  
Negligence Proceedings Regulations 2013

SI 2013/93 Offers to Settle in Civil Proceedings Order 2013

SI 2013/105 Pension Protection Fund and Occupational Pension  
Schemes (Levy Ceiling and Compensation Cap) Order  
2013

SI 2013/106 Non-Domestic Rating (Transitional Protection Payments)  
Regulations 2013

SI 2013/107 Non-Domestic Rating (Designated Areas) Regulations  
2013

SI 2013/108 Non-Domestic Rating (Renewable Energy Projects)  
Regulations 2013

SI 2013/109 Uplands Transitional Payment Regulations 2013

## APPENDIX 1: INTERESTS AND ATTENDANCE

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 5 February 2013 Members declared no interests.

### *Attendance:*

The meeting was attended by Lord Bichard, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Plant of Highfield, and Lord Scott of Foscote.