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Banking Bill Committee Stage Report

This Paper summarises the Committee stage of the *Banking Bill* (Bill 147 of 2007/08). The Bill represents part of the Government's legislative response to the ongoing banking crisis affecting the UK. It continues powers provided temporarily in the aftermath of the Northern Rock nationalisation; provides a framework for new rescue initiatives of failing banks; alters the existing regulatory structure surrounding banks and makes changes to the compensation scheme which protects depositors' deposits.

There were 17 committee sittings including two oral evidence sessions. The Report stage (but not Third Reading) is on 26 November. The Bill has received broad cross party support.

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Summary of main points

Events over the last year have posed significant challenges for financial markets and regulatory responses across the world. Powers granted to the UK Authorities (the Bank of England, HM Treasury and the Financial Services Authority (FSA)) to deal with a previous crisis cease in February 2009. This Bill extends these powers and provides new ones.

The Bill contains provisions to:

- enable the Bank of England to lend in a more effective manner (including by allowing short-term disclosure of liquidity assistance by the Bank of England);
- enable the Financial Services Authority (FSA) to collect information from banks in difficulty, and remove any impediments to them sharing it with the Financial Services Compensation Scheme (FSCS) to assist it carrying out its functions and the Bank of England or HM Treasury, where relevant to maintain financial stability;
- introduce a special resolution regime (SRR) which would allow the Authorities to intervene when a bank gets into severe difficulties and bring about a more orderly resolution of a failing bank - this includes the introduction of a specific insolvency regime for banks;
- Formalise the Bank of England's role in the oversight of banking payment systems
- improve the FSCS to facilitate faster pay outs; and
- provide the Bank of England with a financial stability objective and amending the size and composition of the Bank's court.

The Committee stage consisted of all 17 sittings allocated by the Programme motion. Most clauses were debated on a stand part basis. The bill has broad cross party support. There were no Government defeats and only four divisions.

As well as dealing with the financial crisis, the Bill also contains provisions with respect to the issuance of Scottish and Northern Ireland banknotes.

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I Second Reading

The Second Reading was held on 14 October 2008[1]

In the opening exchanges, the Chancellor and Shadow chancellor made comments that are pertinent to the subsequent proceedings. First, the legislation should be seen alongside the significant financial action the Government has taken to try to stabilise the banking system, notably the plan to recapitalise the banks, reminding Members that the focus of the Bill is not an answer to all the current difficulties, nor does it pretend to address all the possible causes of the crisis. For example, it does not address issues about executive pay levels, or dividend policies of banks, which have assumed political importance. Secondly, the Chancellor made the point that the *Banking (Special Provisions) Act 2008* introduced after the failure of the Northern Rock bank and which the current bill to an extent replicates, refines and extends, will lapse on 20 February 2009. There is therefore a relatively short timeframe within which to consider the Bill (leaving out Pre-Budget Reports, the Christmas recess etc). The Shadow chancellor, George Osborne, acknowledged the opposition's willingness to meet the timetable: "we will do everything we can to get the Bill on the statute book by next February",[2] something the Chancellor said "I really do welcome".[3] A member of the Bill committee (Mark Todd) noted that:

> [The] Committee might need to be run somewhat unusually. The clause stand part process, whereby we discuss the general arguments in each clause, may have to be approached rather more permissively than usual.

At the start of his comments, the Chancellor was able to resolve one issue relating to the passage of the *Banking (Special Provisions)* legislation. It had been thought that one reason for extending that bill beyond applying it simply to Northern Rock was to avoid the complications associated with the House's private bill procedure. The Chancellor was able to say on Second Reading that:

> we were going beyond the clauses necessary to acquire Northern Rock [and] I had to put it somewhat delicately because I knew a number of things that were not then in the public domain, but I said that there might be cases in which we would have to intervene.[4]

There has been considerable interest in how much the Government knew, and when, about the soundness of both domestic and foreign banks in the UK.

The Chancellor outlined the contents of the Bill. Mr Osborne reiterated the support for the Bill as far as it went but expressed the view that it could have gone further:

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1 HC Deb 14 October cc691-764
2 Ibid c693
3 Ibid c692
4 Ibid 693

> I would have liked to see more far-reaching changes to the management of overall debt levels in the economy, and a strengthening of the Bank of England's role in that process.[5]

Developing his theme, he raised what was to prove to be the most contentious issue in the Bill, the introduction of a partial transfer scheme as part of the special resolution tools which will have a serious impact on creditor rights. He also called for "more to entrench the independence of the Bank."[6]

The Chairman of the Treasury Select Committee welcomed many aspects of the Bill, reflecting as it did some of the recommendations of the Committee. He particularly welcomed the "return for the Bank to the heart of financial stability"[7] but expressed concerns over the constitution of the new Financial Stability Committee which would lack the equivalence of status and independence of the Monetary Policy Committee. He did not think that the new objective for the Bank had been properly "calibrated to its actual functions".[8]

II Public Bill Committee proceedings

A. Introduction

The Committee used all its allotted time under the Programme motion. There were no defeats of Government new clauses or amendments and no opposition amendments were made. Most clauses were debated on a stand part basis.

B. Oral evidence sessions

The first session heard evidence from representatives of the Bank of England, Treasury, FSA and Financial Services Compensation Scheme

Since it was referred to frequently in the later sittings it is worth noting the definition of financial stability given by one witness, Nigel Jenkinson, Executive Director, (Financial Stability, Bank of England). He said:

> ***Nigel Jenkinson:*** For my interpretation I can do no better than quote the Governor when he was asked that question by the Treasury Committee. We consider a situation of financial stability to be one where the financial intermediation mechanism works normally, where households and corporates can mediate their savings into real investment in the economy at home and abroad, and where the payment system operates normally. It is a situation where intermediation works well, where people have confidence in the system and where the payment system operates well. That is a reasonable working definition, although there are clearly many definitions of financial stability.

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[5] Ibid c701
[6] Ibid c707
[7] Ibid c711
[8] Ibid c713

> **Q 54Mr. Hoban:** Yes, but do you think that it would be helpful to define financial stability in the Bill? Clearly, the Bank will be held to account on its ability to deliver financial stability. At the moment that is a high-level concept, which is undefined in the Bill. How can we hold the Bank to account if there is no definition, even along the lines that you have outlined?
>
> ***Nigel Jenkinson:*** I do not personally think that it is necessary to have a definition of financial stability in the Bill[9]

Another informative contribution came from Loretta Minghella, Chief Executive Financial Services Compensation Scheme, when talking about the impact of the 2008 Act in the context of the current Bill (contribution annotated by author):

> Over the last year we have also been able to participate, thanks to the Banking (Special Provisions) Act 2008, in much larger-scale rescues. For example, in the case of Bradford & Bingley, we paid £14 million overnight so that 2.5 million people went to bed on 28 September banking with Bradford & Bingley and woke up on 29 September banking with Abbey. That was a tremendous result in terms of consumer protection. That was only possible because of the provisions of the 2008 Act, which is why it is terribly important to us that the Bill goes through. It will allow that kind of thing to happen in the future.
>
> That is not the only kind of scenario that we will face. There will be circumstances in which payouts will be necessary for larger numbers of people than is contemplated in smaller credit union failures. We must be able to speed up payment. Eight measures must be taken to help speed up payment. Four are delivered by the Bill and four can be delivered by changes to be made to FSA rules, which Tom might want to comment on.
>
> I will speak about the measures contained in the Bill. Those are [1] allowing us early access to information about firms before they fail, [2] assistance from the liquidator in the event of a failure to prioritise the payout of depositors, [3] a streamlined process that will not need all the forms that go backwards and forwards between us and the claimants—in other words, no forms and deemed assignment of rights—and [4] immediate access to the liquidity that we need to pay people promptly. Those are the four changes that the Bill will deliver. We have realised how important they are in delivering consumer confidence.
>
> There are four sets of changes under the Bill that will also help us: [5] simplifying the eligibility criteria, [6] ensuring that banks have the data that we can use immediately to pay out showing a single view of each customer and what they are owed, [7] the need not to set off people's loans against their deposits before they are paid out and [8] streamlined arrangements for people to open new accounts with other banks, so that they can pay their compensation cheques into them if necessary. We have learned over this past year how important all those things are, and that is why we support the Bill.[10]

Later she added a crucial rider:

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[9] PBC 21 October 2008 c21

[10] Ibid c30

> I have set out the eight things that need to change, and I would say that missing out one or two of them would probably defeat the whole object, so we commend to Parliament the list of changes as a whole.

The second session heard evidence from industry and consumer groups, British Bankers Association, Building Societies Association, London Investment Banking Association, Association of British Insurers, Investment Management Association, Citizens Advice and Which? The BBA representative raised what would later prove to be one of the more contentious issues, namely the practical arrangements and consequences of the partial rescue and transfer of assets rules, especially clauses 42, 43 and 65.

C. Remaining sessions

There were 15 'normal' committee sessions. The order the clauses were dealt with was not the order in which they appeared in the Bill. This was to allow drafts of secondary legislation and in particular, the codes of practice that would support aspects of the Special Resolution Regime (SRR) to be written so that they might be considered alongside the clauses they support and supplement.

1. Financial Services Compensation Scheme[11]

Debate started with clauses relating to the Financial Services Compensation Scheme (FSCS) and two new clauses put forward by the opposition to be discussed on a 'clause stand part' debate. New clause 1 would introduce 'objectives of the FSCS'; the second would put in the Bill the level of the compensation paid (this is currently set out in FSA rules). The transparency of the rules and who would and would not qualify for compensation was discussed by Mr Hoban. He looked at various transparency-related problem areas – EEA banks (Iceland)[12], small firms' access[13], related family members in senior positions[14] and the confusion between brands v banks.[15]

The Economic Secretary, Ian Pearson, made several revealing comments about the Government's intentions and about the situation of UK citizens with deposits in offshore banks. First, he addressed the issue of the Government announcing compensation, in the case of Northern Rock and the Icelandic banks, which exceeded the compensation levels set out in the FSCS rules. He said that:

> The situation with the Icelandic banks was exceptional. It was right for the Government to say that all retail deposits would be guaranteed. We did that to be quite clear. We wanted to ensure that there was confidence in the banking system. We do not see it as a permanent measure for the future. The Government will not for all time guarantee all retail deposits. In the circumstances, we think that was the right course of action.[16]

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[11] Aspects of the FSCS are also discussed later in this Paper in relation to the new insolvency procedures
[12] PBC 23 October c65
[13] Ibid c67
[14] Ibid c67
[15] Ibid c70
[16] PBC 23 October (morning) c79

With respect to depositors with offshore banks he said:

> I also want to clarify the position with respect to deposits in the Isle of Man. The hon. Member for Wellingborough is right in his belief that they are not covered by the FSCS. As he is aware, offshore jurisdictions aggressively market themselves as being outside the UK regulation and tax regime. They clearly are outside UK regulation and thus outside UK compensation.[17]

The new clauses were not moved.

The question of whether the FSCS should include elements of pre-funding (i.e. the banks should contribute in advance of calls on the fund) was discussed on clause 156. Opposition amendments focused on the uses of contingency funds and on the issue of whether one sector should 'cross subsidise' another. Should, for example, one class of activity (banking) susidise another (securities markets); should building societies have to pay for (simplifying greatly) risky banks, or insurers for less well funded intermediaries? The Minister responded by saying that "Just to set the record straight, the Government are clear that now is not the right time to introduce pre-funding" and "I entirely agree with the general principle that each sector should consume its own smoke"[18]

Mr Hoban, however, pressed the point:

> The Government have included in the Bill a wide-ranging power to set up a contingency fund. The debate up to today has focused on whether that should apply to the banking sector. I was hoping that we would hear from the Minister a clear statement that that was the extent of the fund. That is why I tabled these probing amendments. It now becomes clear that the Government are taking powers that will enable the FSCS to introduce pre-funding to cover not just bank depositors but any aspect of regulated financial services activity, and that any regulated financial services company can contribute to the fund in whatever way it believes to be right at the time. Amendments Nos. 5 and 7 reflect the wording in the Financial Services and Markets Act 2000. The current scheme works according to that wording—it is nothing new. It seems odd to have an approach to levies that relates to an existing pay-as-you-go scheme when there may be a different form of levy for contingency funding, and when the Government will want flexibility with regard to contributions relating to the likely risk of future claims in that sector.
> Cross-subsidy is a big issue in this debate. That is why I pressed the Minister when he began his remarks about the current problems that face us. The reality is that if the claims on the FSCS in respect of the banking sector exceed £1.8 billion, that cost will be borne by other financial service companies.
>
> I have spoken to various people in the financial services sector—banks and non-banks—who are concerned that that might happen. The FSCS is paying interest on the amount of money linked to the transfer of Bradford & Bingley accounts to Banco Santander. It is picking up the gap between the £16,000 and £50,000 limit in relation to the Icelandic banks. There is genuine concern in the sector that IFAs, insurance brokers, insurers and fund managers will have to pick up the

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[17] Ibid

[18] PBC 23 October (afternoon) cc 96 & 98

> excess if those costs exceed £1.8 billion. I wonder why the Minister did not accept that point when I intervened. It worries me that the Government are not on top of the cross-subsidy issue, which is at the heart of a series of amendments in this group.[19]

The amendment was defeated on a division. A long debate followed, on clause stand part, as to the merits and problems of a pre funded scheme. One difficulty was knowing how large it should be -"How long is a piece of string" - commented one member, and the period of time over which it might be expected to be built up. Mr Breed in his speech summarised many of the salient points.[20]

Clause 156 was approved after a division 8-2.

2. Payment systems

One of the non-emergency aspects of the Bill is to give the Bank of England formal responsibility for oversight of the payment systems (Part 5 of the Bill). Apart from one 'probing' opposition amendment and a technical one (carried) from the Government, the clauses in this section were discussed on a stand part basis. The Government saw this subject as part of "wider work to strengthen the framework for financial stability. I emphasise that these measures are not the results of problems in the payment systems".[21] An annual document published by the Bank of England *Payment Systems Oversight Report* provides background to the discussion. Not yet published are the codes of practice that will support both the provisions in the Bill and FSA rules. The interaction between these three sources led to some debate. The Minister attempted to explain the interaction and in so doing outlined the generality of the system the Bill attempts to create:

> It might help the Committee if I briefly explain how the principles, the codes of practice, system rules and directions fit together. We see them as a complementary suite of available powers. Clause 175 differs from clause 174—which is on principles—in that the codes of practice are intended to set out binding requirements in relation to specific areas, such as messaging standards, or levels of resilience, whereas the principles are intended to provide high-level, overarching guidance. The principles will set out the general conduct expected of recognised payment systems and they will be interpreted by the Bank in a manner proportionate to the risks posed by individual systems; whereas the codes of practice will focus on a more specific level of detail. For example, a code of practice may require certain types of system to observe specific minimum standards in relation to business continuity. I can confirm that it is the Bank of England's intention to issue a code of practice, and it will consult with interested parties before doing so.

[…]

> If I can, I shall say something briefly without straying on to those stand part debates—if they are thought to be necessary, Mr. Hood—because it explains the overall architecture. In clause 176 the Bank of England may want to ensure that

[19] Ibid c99
[20] Ibid c107
[21] PBC28 October c132

> the operator of a recognised inter-bank payment system makes rules relating to specific aspects of the payment system in question. For example, the Bank may wish to ensure that the system has rules in place to manage the default of a participant effectively. In clause 177, the Bank of England may wish to use its formal power to impose certain directions or instructions pertaining to how a specific recognised inter-bank payment system may operate. This may include requiring or prohibiting certain actions in relation to the system or setting standards to be met in the operation of the system. For example, the Bank might direct a system to set up a programme of tests of its crisis management arrangements, which were referred to earlier. This suite of powers will enable the Bank of England to carry out its function of oversight of payments effectively and efficiently.[22]

3. Issuance of banknotes

Part 6 of the Bill deals with another 'non-emergency' aspect of bank regulation included in the Bill, namely the introduction of a new regime for the regulation of note issuance by banks other than the Bank of England. In practice, this affects Scotland the most. Again, apart from a series of Government technical amendments (carried) that distinguish between insolvency and an insolvency process all of Part 6 was discussed on a 'stand part'.

One important clarification was made by the Minister, Angela Eagle, when asked about the impact of the merger between HBOS and Lloyds TSB. Under the Bill, if an issuing bank ceases to exist it loses its issuing power and no new banks can assume its old rights. The Minister commented:

> As I said earlier, issuing rights are vested in the underlying corporate entity. If that corporate entity were to disappear in a merger with another institution, its issuing rights would go. In the case of Lloyds TSB-HBOS, the Bank of Scotland—a subsidiary of HBOS—is the issuing bank. A change of ownership at Bank of Scotland, as long as it remains an entity, will not affect its issuing rights. If Lloyds TSB was going to take over and extinguish the Bank of Scotland, I am sure that the hon. Member for Dundee, East would have a few words to say. If the Bank of Scotland ceased to exist, that would extinguish its issuing rights. However, the fact that it remains a subsidiary means that that is not an issue in this case.[23]

4. Government support for banks

It is often asked under what authority government can 'bail out' banks. Clauses 214 and 215 provide some increased statutory guidance. As the Minister explained speaking to Government amendments:

> The Treasury has the power, as a matter of common law, to make loans to any person or to give them financial assistance in any form, but it has the money to make those loans or to make good on any commitment it has given only if Parliament, rightly, provides the money in estimates. The annual Appropriation Acts can give full statutory cover for expenditure on estimates, but in line with the

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[22] PBC 28 October 2008 c153
[23] PBC 28 October (afternoon) c189

> Public Accounts Committee concordat of 1932, specific enabling legislation is normally required to enable the finance for a new service to be provided from public funds. That is what the clause provides.
>
> Clause 215, which fits with this clause, enables the Treasury to draw money from the national loans fund to make loans to financial institutions where it needs to do so urgently to protect financial stability. Financial crises can arise at any time and it might not be possible to get an estimate approved quickly enough for the Treasury to make a loan from voted money, most obviously during a recess when Parliament is not sitting.
>
> As originally drafted, clauses 214 and 215 provided for loans or financial assistance to be given only to UK authorised institutions that have permission to accept deposits, in other words UK deposit takers. It was realised in the light of recent events, including those surrounding the Icelandic banks, that such a limitation could make it more difficult to protect the interests of UK consumers or safeguard the interests of UK taxpayers where there is a failure of an overseas institution. The amendments address that limitation which, as we all know, has been shown to be actual rather than potential in the last few days.[24]

5. The Financial Stability Committee

There was a lengthy debate on clause 216 which gives the Bank of England a new objective (financial stability) and establishes the machinery (Financial Stability Committee (FSC)) to meet it. Two issues, in various guises, interested the Committee. First, should (could?) financial stability be defined more closely? Second, what should the status of the FSC be within the Bank? Should it be an advisory or executive body? Was the MPC an appropriate model to follow? To what extent should the FSC be independent of the Bank? Amendments proposed by the opposition were as much designed to provoke debate as to change things. For example, Mr Hoban spoke to amendments that would propose a wholly executive body for the FSC and to amendments that did the opposite. His aim was to "tease out the hybrid nature of the committee".[25] He also noted that

> The present Economic Secretary, in his evidence to the Committee, described the concept of financial stability as a high-level one. There has been a debate about the objective. The former Economic Secretary, the hon. Member for Burnley (Kitty Ussher), when giving evidence to the Treasury Committee in July, held out the prospect of a bit more definition than we have in the Bill when she said:
>
> "I think we will be setting that out legally in the legislation, so the technical answer to that question will come in October...We will define it clearly, I presume, in the legislation."
>
> Clearly things have changed since she gave the evidence. Not only is she no longer the Economic Secretary, but we have gone from that tantalising promise that was held out to us of a definition to what we have in the Bill, which is:

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24 PBC 30 October c201

25 Ibid c209

> "An objective of the Bank shall be to contribute to protecting and enhancing the stability of the financial systems of the United Kingdom".[26]

His, speech reflected on the problems the Bank would have in meeting its stability objective. For example, the Bank had written warnings about possible problems in 2006 but:

> The question is then, "What could the Bank have done at that point?" It has clearly flagged up the risk to the market, and to the other members of the tripartite authorities, but in terms of the Bank's ability to influence that, its role was reduced to having flagged up the risk; the next measure is beyond its control. The FSA is not required to respond formally to the financial stability report about how it would reflect the Bank's assessment of risks, in terms of how it might supervise individual institutions.
>
> One of the conventional responses to the asset price bubble would have been to increase interest rates, making credit more expensive and thus reducing upward pressure on asset prices. However, the remit of the Bank of England, which was introduced in the Bank of England Act 1998, is that setting interest rates is limited to combating inflation, so its actions are constrained by that objective.

Responding, the Minister said that:

> Financial stability cannot simply be guaranteed on a national basis like an interest rate. The interest rate either is or is not at a certain level, like a price, but financial stability is a much more complex concept to grab hold of, and what is important for delivery might shift over time as the institutional framework shifts and as markets and market participants evolve. It is therefore a moving target and a complex matter to deal with. It is important that we bear that in mind when considering the institutional approach that the Government suggest in the Bill.
>
> We are clarifying the Bank of England's position by setting out an objective in legislation. That has been widely supported by respondents to our public consultations and by the Treasury Committee, even if it did not quite go along with the model that the Government decided to put forward in the Bill.
>
> New section 2A(2) sets out that the strategy that the Bank will follow to fulfil its new objective will be set by the Bank's court of directors, consulting with the Treasury, and on the recommendation of the new financial stability committee, as set out in new section 2B(2)(a). It is right that the court, as the body with the ultimate responsibility for the Bank's affairs, has the final say on setting the financial stability strategy.[27]

The Committee also discussed the difficulty that might be encountered in finding people to sit on the FSC who were both experienced and who were not subject to conflicting interests. The Minister said that, once the Bill was passed, existing Court[28] members would all resign and appointments (or reappointments) to a smaller Court and FSC

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[26] Ibid c220
[27] Ibid c241
[28] The Court is the main decision making body in the Bank of England

would take place. She acknowledged the issues that needed to be balanced when deciding who to appoint but concluded:

> the Monetary Policy Committee is not a model on which to base the financial stability committee, simply because the FSC's job is very different from and more complex and more difficult than the nevertheless important one of the MPC—deciding on the price of money, as reflected in an interest rate decision. The FSC's functions as set out in the Bill and as reflected in its membership are primarily advisory, but they are also supported by monitoring functions. However, that does not mean that the committee should be constituted of only non-executive members.

[…]

> On a day-to-day basis, the financial stability committee will advise the Bank's executives, because it is they who will often need to make decisions on how to deal with individual institutions, in perhaps fast-moving conditions. The Governor and his executives derive their authority from the court: they have delegated responsibility from the court and are ultimately accountable to it. That will be consistent with the strategy that the court of directors has agreed for fulfilling the financial stability objective, and it will be the court that holds executives and the committee to account for supporting it in meeting that objective.

[…]

> Our model provides the best of both worlds; it allows executives and non-executives to come together to discuss, debate and advise on issues, including crucial decisions regarding banks and the operation of the special resolution regime. In designing the financial stability committee, the priorities of the Government have been to provide the Bank with a single source of co-ordinated expertise and advice; to monitor its functions and actions in relation to financial stability; to ensure that the Bank's executives can take timely and informed decisions to safeguard financial stability in fast-moving situations; and to draw clear lines of accountability from the executive and from the financial stability committee to the Bank's governing body. The model that we are proposing will allow us to achieve those objectives.
>
> By establishing the financial stability committee as a sub-committee of the court, we integrate it into the existing governance structure rather than tearing it up and starting again. That helps to ensure that the financial stability committee will be central to the Bank's decision making on financial stability. The non-executive members of the committee will provide vital expertise on financial stability, while the executive members on the committee, including the Governor as chair, will mean that the committee will be close enough to the action to be able to give informed advice, often in fast-moving situations.[29]

Clause 228, gives the FSA powers to collect information relating to financial stability, Mr Breed moved an amendment that would restrict unlimited FSA action. The amendment would delete "or in any other way" from the proposed extension of circumstances when the FSA could collect information. He pressed his amendment to a division which was defeated 1-9.

[29] Ibid cc243-244

6. Special Resolution Regime

Finally, the Committee considered Part 1 of the Bill. The Special Resolution Regime (SRR) is the main 'meat' of the Bill. It is the umbrella term for the mechanisms by which a failing institution would be rescued. The SRR tools include:

- a private sector purchaser tool;
- a bridge bank tool;
- partial transfers, including a new special bank administration procedure;
- a temporary public ownership tool; and
- A new bank insolvency procedure.

a. Clause 1 overview

Clause 1 was debated 'stand part' and was an opportunity for Members to talk about the generality of the banking crisis.

b. Clause 2 – Interpretation of "bank"

Although, as one Member put it, "I do not normally get excited about the definition bit of a Bill" this clause was an opportunity for a discussion on whether SRR tools were appropriate for non-deposit taking institutions. In particular, should investment banks be treated in much the same way as retail banks? Twice the Minister, Ian Pearson, indicated that this issue was currently being examined by the Treasury and other members of the tripartite authorities. The difficulty with simply extending the system to include investment banks was:

> such an approach might include the fact that the tools might not be the most appropriate for non-deposit-taking financial institutions. The SRR, including the infrastructure, objectives, powers and some of the tools, has been designed with an emphasis on depositor protection as well as being part of financial stability. The cross-border nature of the largest and most systemically important non-deposit-taking institutions suggests that the national approach on its own might not be enough. That applies to some extent to any deposit-taking multinational but the issue is far more acute for investment banks.[30]

He reiterated the point that the legislation was created with a depositor-protection focus and attempts to bolt on new areas of activity had to be considered carefully. The fact that, as one member pointed out, investment banks had been responsible for most of the problems had not gone unnoticed by the Government.

A minor technical amendment was approved.

c. Clause 3 Interpretation: Other expressions & new clause 9 Financial Assistance

The Government moved an amendment and new clause the purpose of which was to define when financial assistance was financial assistance from the point of view of the

[30] PBC 4 November 2008 c287

Bill. The Minister promised to supplement his explanation by writing to the Committee. Put simply, there is a need to distinguish between system-wide assistance, such as access to the Bank's special liquidity scheme, and assistance that is institution specific. However, the situation is not as simple as that, some forms of assistance are 'assistance' under parts of the Bill but not others.

d. Clause 4 Special Resolution objectives

The objectives of the SRR are:

1. to protect and enhance the stability and resilience of the financial systems of the UK;
2. to protect and enhance public confidence in the stability of the banking systems of the UK
3. to protect depositors (i.e. by providing effective compensation arrangements in which consumers have confidence);
4. to protect public funds; and
5. to avoid interfering with property rights in contravention of a Convention right, within the meaning of the Human Rights Act 1998.[31]

One of the main areas of interest to the Committee in discussing this clause was the priority of these objectives. With respect to the SRR was, one Member asked, priority 3 and 4 above the others? If this was the case, it would matter, for example, when the government had to judge whether to increase depositor protection levels above the FSA rule book level of £50,000. It could also be significant in cases where the rights of a bank's creditors were perhaps at odds with those of depositors as, potentially, in the case of partial transfers of operations.

The Minister said that the 'primary objective' of the Bill was protection of depositors and financial stability, but it was unwise to set this out in the Bill as each case would have its own priorities or circumstances.[32]

e. Clause 5 & clause 6: Code of Practice

The Code of Practice provides the detailed rules supporting the SRR. The opposition argued to a series of amendments that the Code was not detailed enough; it didn't provide clarity as to when the threshold conditions (of failure) would be breached. Discussion also touched on the question of moral hazard which some Members had not thought had had a high enough profile during the crisis. In reply, the Minister said that:

> I want to respond directly to comments raised by my hon. Friend the Member for South Derbyshire. I can confirm that it is the Government's intention not to create a zero-failure regime. Indeed, the bank insolvency procedure has been created expressly so that there is a credible failure option. It is possible that the authorities could decide in the event of a bank or building society failure that there is not a systemic risk, that the requirement for action under the special resolution regime is not necessary. I would, however, point out that if a significant number of

[31] TPA, *Financial stability and depositor protection: special resolution regime*, Cm 7459, pp2.2

[32] PBC 4 November (afternoon) c313

> retail depositors were affected we might still want to use the bank insolvency procedure to ensure effective, fast payout under objective 3, or because perhaps public funds had already been committed previously to the institution which relates to objective 4.[33]

The Minister also pointed out that where the Code did not provide full detail of a specific set of circumstances it would itself be supplemented by changes made by the FSA to its Rulebook.

On the same pair of clauses in the following session, the opposition raised the question 'who pulls the trigger'? The trigger here is the decision to decide that a bank does not meet its threshold conditions; i.e. it has failed. The Conservative spokesman thought it should be the Bank, not, as in the Bill, the FSA. But further debate was curtailed in order to pass the Bill speedily. Summarising his Party's reservations about the code Mr Hoban said:

> I should like to go back to the central purpose of having the code in the Bill and why the code is important. The Bill includes some quite invasive powers: it gives the tripartite authorities powers to interfere with the rights that creditors and investors would normally enjoy. For example, it gives the tripartite authorities the right to take control of the bank and to transfer part of its assets into a bridge bank. The code is meant to provide confidence to creditors and investors about how the powers will be exercised. Increased uncertainty about that means that there is high risk in the eyes of investors and creditors. Higher risk means an increase in the cost of capital, which will make it harder for banks to raise capital, which will have an impact on the wider economy. If the cost of capital of a bank increases, so will the cost of the loans it makes to households and families.
>
> I believe that the Government recognise that, which is why they have accepted that it is important that the code sets out the limitations on the exercise of powers in the Bill. However, to give confidence to the sector, the code needs to be explicit about the circumstances in which, and when, the powers will be exercised. The Government must therefore produce a much more detailed code if they are to allay any fears about the use of the powers. They need to provide clear guidance to the tripartite authorities rather than produce a rewrite of the explanatory notes, and to set out, in the context of clauses 10, 11 and 12, the hierarchy of the stabilisation options, and what is the preferred option.
>
> Not only the code but the threshold conditions need to be more specific to avoid the sense that they can be used in an arbitrary fashion. The Government will argue that they need flexibility; that an overly restrictive code will constrain the freedom of action. However, if the use of invasive powers in the Bill is perceived to be unconstrained, markets will make their own judgments on whether they should invest in British banks. If the code as redrafted does not provide significantly greater detail on how and when the powers will be used, there will be demand for the constraints to be in the Bill rather than the code.[34]

Amendments to clause 5 were accepted. Clause 6 was agreed to.

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[33] Ibid c333
[34] PCB 6 November 2008 c340

f. Clause 9 temporary public ownership

The main debate was whether nationalisation was truly a 'last resort' option. The Minister said that "the authorities would always want to look for another solution first" and cited the higher level test that would need to be passed before nationalisation:

> The Bill achieves that purpose by ensuring a higher public interest test for temporary public ownership than for the stabilisation options of transfer to a private sector purchaser or a bridge bank. The hon. Member for Fareham will appreciate that under clause 9 a bank can be taken into temporary public ownership only if there is a serious threat to financial stability or if it is necessary to protect the public interest when financial assistance has been provided to the failing bank to reduce or resolve that threat to financial stability.
>
> Under clause 8, however, a bridge bank or private sector purchase can be exercised if it is necessary to protect financial stability, to protect confidence in the banking systems or to protect depositors—or any combination of the three. Under clause 8, the Bank of England can exercise a private sector purchaser or bridge bank tool if it believes that it is necessary to protect the failing bank's depositors, even if it believes that there is no risk to financial stability. That is not allowed for temporary public ownership.[35]

Clauses 9 to 24 were debated on a stand part basis and agreed to without amendment.

g. Clause 25: Supplemental instruments

With this clause the Government introduced one minor amendment and two new clauses. These would provide 'share transfers' in circumstances such as temporary public ownership or the setting up of a bridge bank. As the Minister explained, when a Resolution procedure is commenced it may be done at short notice and 'due diligence' over the value of assets etc may not be done to as high a standard as one might wish. It is important to have a procedure under which there can be a 'settling up' of the true value of assets to be transferred. Supplemental instruments would allow further assets to be transferred to the new entity. Reverse share transfers allow for the reverse. Two 'mirror' new clauses were introduced and accepted with respect to clause 39 to deal with *property* (i.e. not shares) transfers.

h. Clause 42 Restriction of partial transfers; clause 43 Power to protect certain interests

Clauses 42 and 43 have been described by all sides, including witnesses, as the most contentious in the entire bill. At issue is the extent to which a rescue package may infringe the rights of investors or creditors. As there were no amendments they were taken together on a stand part basis.

A partial transfer allows a failed bank to be split between a viable section and a 'toxic' section. Mr Gauke, for the Conservatives, expressed concern:

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[35] PBC 6 November 2008(afternoon) c361

> The Government have experience of how partial transfer works, and that is clearly guiding them, whether with concrete examples of problems that have arisen in the course of those transactions or through something less direct that has none the less been provoked and inspired by them. It is probably helpful to the Government, in assessing whether they are getting legislation right, to have gone through the experience of Bradford & Bingley, Kaupthing and Heritable, but it would be useful if the Committee could benefit from that experience as well. I encourage the Minister to be as open as possible with the Committee about the issues that have arisen from those cases.
>
> I return to the concerns raised by outside bodies, particularly the BBA and LIBA. Essentially the concern relates to the cherry-picking of assets and liabilities so that the good bank gets what is commercially the best for it, leaving the bad bank with the more difficult assets and liabilities. The creditor is therefore left with a divide between the various assets and liabilities, which makes netting and set-off very difficult. It cannot be sure whether it can net or set off its assets, liabilities and contractual positions, which creates a great deal of uncertainty and increases its credit risk and its insolvency risk for counterparties dealing with British banks.
>
> That will ultimately increase the cost of capital for British banks and reduce liquidity. That could have a long-term impact on the UK banking sector. The Treasury consultation document refers to the fact that the UK has a competitive advantage in this area. English law is attractive to creditors in such circumstances and that competitive advantage could be lost. That is perhaps a relatively cheery way of putting it. The fact is that we could be left with a competitive disadvantage if we get this wrong. The safeguards that we are debating in the context of clauses 42 and 43 are, therefore, very important.[36]

Again, the provisions in the Bill are to be supplemented by secondary legislation. Concern was raised that the Expert Liaison Group responsible for this were experiencing difficulty in meeting all the concerns expressed by the Bankers Association and others about issues such as 'netting off' contracts.

Members pointed out that partial transfers was one of the few areas of a SRR where the Government had recent experience, namely the rescue of Bradford and Bingley. The Minister was urged to describe lessons learnt from that process. The Minister was only willing to make comments of a general nature. He said:

> It may also help the hon. Member for Wellingborough to set out how a partial transfer might work, but I want to stress that this is just one example. The Bank of England could use the bridge bank stabilisation options to transfer a deposit book of a failing bank to a bridge bank. The residual company—that is the banking business not transferred—would enter the bank administration procedure, as provided for by part 3. The residual company would be wound up by a bank administrator, while providing necessary services to the bridge bank. The Bank of England would work to stabilise the bridge bank and sell on to a private sector purchaser as quickly as possible. That is an example of one way that the powers could be exercised in the future.[37]

[36] PBC 11 November 2008 c413
[37] PBC 11 November 2008 c430

The Minister concluded by saying that the Expert Liaison Group was making 'good progress' on developing satisfactory safeguards and he hoped that "we can pass the secondary legislation at a similar time to the passing of the primary legislation".[38] Both clauses were agreed to.

i. Clauses 49 -52 The valuation procedures and the valuer

The role of the valuer (of the compensation to be given to the ex-shareholders) in a rescue plan is always likely to be controversial and the current Northern Rock process illustrates this. Clause 52 sets out the principles on which a valuation would be conducted. The Minister commented on these:

> Clause 52 sets out the valuation principles that may be required to be specified in any compensation scheme order. In summary, the clause allows the Government to include in a compensation scheme order a number of valuation principles. Those may cover a range of issues, including the method of valuation, whether certain matters should or should not be taken into account by the valuer and whether the valuer may make particular assumptions in carrying out his functions, such as the assumption that the bank is unable to continue as a going concern. The aim of the provisions is to allow the Government to set out the principles that they believe should be adhered to in assessing any compensation. Parliament can of course debate those, as the draft affirmative resolution procedure applies to compensation scheme orders, as I previously outlined.
>
> One specific valuation principle that is required to be taken into account by the clause is that in determining an amount of compensation an independent valuer must disregard actual or potential financial assistance provided by the Bank of England or the Treasury. That is to ensure that taxpayer support does not artificially inflate the value of the failing bank.[39]

j. Clause 65 Power to change law

In terms of contested divisions this was one of the most contentious clauses. Two opposition amendments and one Government amendment were divided upon. There were no defeats for the Government.

The clause allows the Treasury to use secondary legislation to amend the Bill (Act) – often described as a Henry VIII clause. Opposition Members claimed that this created too much uncertainty in the City for transactions to be made and contracts finalised. What safeguards there are in the Bill were described as 'weak':

> It states that the Treasury has to have regard to the special resolution objectives. That test is insufficiently strong. We propose that in using the exceptional powers the Treasury should, at the very least, be satisfied that not to do so threatens the stability of, or confidence in, the UK financial systems. I dare say that the Minister will point out that the objectives of the special resolution regime touch upon that,

[38] Ibid c432

[39] Ibid c443

> but the Treasury merely "having regard" is not reasonable. The wording is so weak that it seems to attempt to avoid any kind of judicial review of decisions made under the clause. It needs to be toughened up, so that the Treasury is at the very least "satisfied" that there is systemic risk before using the powers. I would usually say "reasonably satisfied", but we have debated that it is not normal to insert "reasonable" in a provision that applies to a public body. The Treasury should not be able to use the powers as a routine way of trying to improve the legislation. It is the purpose of the Committee to examine and improve the Bill, and it is not appropriate for the Government subsequently to be able to do so, by producing an unamendable order.[40]

Not all Members supported this argument. There was an acceptance that speed of action might be necessary, perhaps at a weekend or when Parliament was in recess. Further, it gives the Government the chance to put right deficiencies in legislation that has not had the benefit of years of thoughtful consideration to aid it.

The Minister described how the legislation might be used in practice:

> In broad terms, there are two ways in which this power can be used. The first way would be for the Treasury to make a specific amendment to a piece of legislation for the purposes of making effective the resolution of a specific bank. The amendment would apply only to the specific bank. It would be localised to the particular resolution. It would not apply to any other bank, or any other banks in respect of which the powers of the special resolution regime were used.
>
> The second way would be for the Treasury to make an amendment to legislation that applied to all resolutions or a class of resolutions carried out under the SRR. For example, the power could be used to disapply a particular provision of the Companies Acts in relation to bridge banks. That would then apply in each resolution in which the Bank of England used the bridge bank tool. It will not apply to other banks.
>
> It is envisaged that that form of modification will be made in the light of resolution experience. For example, it might become clear that a certain provision of legislation is an impediment to resolution in general, and so it is beneficial to disapply it for all subsequent resolutions. The ability to make such amendments limits the need for resolution-specific amendments, and ensures that the tools of the special resolution regime may be future-proofed as the financial markets and banks develop over time.[41]

Opposition amendments were defeated 6-9 on both occasions. The Government amendment was approved.

D. New Insolvency procedures

Scrutiny of both the Bank Insolvency Procedure (BIP) and the Bank Administration Procedure (BAP) was confined to the final two sessions of the Committee on 13 and 18 November 2008. In considering these new insolvency procedures, Ian Pearson,

[40] PBC 13 November 2008 c462

[41] Ibid c468

Economic Secretary to the Treasury, led for the Government. Mark Hoban, David Gauke and Sir Peter Viggers contributed in the main for the Conservatives. Dr John Pugh represented the Liberal Democrats.

Cross party support continued in respect of the new BIP and BAP and there were no divisions. A few probing amendments were moved but all were withdrawn. However, the Committee spent some time considering the technical clauses of the Bill, and questioning how the two insolvency procedures would work in practice. Given the technical nature of the clauses, debate on the BIP and the BAP will be outlined separately.

E. Bank insolvency procedure (BIP)

1. Objectives

Clause 77 of Part 2 of the Bill outlines the BIP in broad terms. Very briefly, a bank enters the process by court order, appointing a bank liquidator. The bank liquidator aims to arrange for the bank's eligible depositors to have their accounts transferred or to receive compensation from the FSCS. To achieve that, the bank liquidator will work with the initial liquidation committee, made up of the authorities and the FSCS. When that is done, the bank liquidator winds up the bank. To carry out those functions, the bank liquidator has the powers and duties of a liquidator in normal insolvency as applied and modified by clauses of the Bill.

Commenting on clause 77, Sir Peter Viggers probed the thinking behind the introduction of a new bank insolvency regime. He drew attention to the fact that the majority of respondents to the January 2008 consultation felt that wholesale changes to current insolvency provisions were not required to ensure rapid payments to eligible FSCS claimants whilst several parties suggested that any new procedure should be closer to liquidation than the creation of a new regime. Sir Peter asked what discussions the Minister had had to try to ensure that the new insolvency regime would not stand alone, but is carefully co-coordinated and preferably made similar to those in other countries.

In response, Ian Pearson set out the thinking behind clause 77 and the principles that were applied in framing the subsequent clauses. He stressed that measures enabling depositors to access their funds quickly were important for their own sake, but also to build confidence in the banking system as a whole, and for the maintenance of financial stability. He also confirmed that the BIP had been consulted on to a very large extent and had the broad support of insolvency practitioners. A lengthy debate followed on the objectives of the new BIP and whether the procedure created depositor preference.[42] Clause 86 of the Bill sets the two objectives for the liquidator.

[42] There may be a hierarchy of claims against an insolvent institution; better placed creditors are often called preferential creditors.

- First, to work with the FSCS to ensure that as quickly as possible either depositors' accounts are transferred to another financial institution or payments are made to eligible depositors from (or on behalf) of the FSCS.
- Second, to wind up the affairs of the failed bank in the interests of creditors as a whole. No changes are proposed to the current statutory order of priority of creditors for distribution purposes.

Clause 86(4) makes it clear that objective 1 takes precedence over objective 2 with the authorities committed to a target of seven days, providing the depositors of a failed bank with at least a proportion of their deposits and the balance within the following few days. Mark Hoban challenged this clause on the basis that one group of creditors were being given preference over another:

> That creates a situation in which the interests of one group of creditors take precedence over the interests of other groups. A depositor preference is being built into this regime. We might find that the liquidator, to fulfil objective 1, incurs additional costs to the detriment of achieving objective 2. That particularly applies to the administration procedure in part 3, but it also applies here. For example, the liquidator might need to keep the branch network open for two or three weeks to enable payments to be made to depositors. Running a branch network is an expensive business—rent has to be paid, staff have to be employed, there are computer costs and so on. Those costs will be not be borne by the depositor group, but by the creditors, who will find that their dividend or distribution on liquidation is lower as a consequence. Will the Minister comment on that?
>
> This is a move away from the traditional way that administration and liquidation work. The creditors would normally rank pari passu, but here there is one subset of creditors—the depositors—who are given preferential treatment over the others, to the detriment of other creditors.[43]

Looking at the detail of the Clause 86, Mark Hoban also expressed concern that the BIP is not entirely consistent with the *Credit Institutions Reorganisation and Winding – Up Directive 2001*. This Directive requires the same legal process and procedures for winding up a credit institution to apply to the European Economic Area (EEA), with creditors being treated equally. He questioned whether the pursuit of objective 1 meant that the procedure might be viewed as being about regulation rather than insolvency:

> Linked to that is a point that has been raised with me by some lawyers. The Minister was right in his remarks on the previous clause. There has not been a flurry of commentary on part 2 or part 3 of the Bill, but that does not mean that there is total satisfaction. There is great dissatisfaction with it. The credit institutions reorganisation and winding-up directive 2001—I am sure that we are all intimately familiar with it—enables the same legal process and procedures for winding up a credit institution to apply in all the then EU states, but now European economic area states.
>
> The process is a formality. That directive is predicated on treating creditors collectively and applying the same treatment. The Minister referred to the special insolvency regimes for railways, water and electricity. Yes, there are special

[43] PBC Deb 13 November 2008 c494

> cases to ensure that there is a transfer of functions, but in those situations all creditors are treated equally, whereas in this situation one group of creditors will have preference.
>
> Concern has been expressed that the action taken by our good friend Iceland was not deemed to be consistent with the directive because it was seen to be of a regulatory nature. The concern expressed to me is that objective 1 could suggest—and there is a stronger argument for this in part 3—that the procedure is not necessarily about insolvency, but is principally a regulatory issue. I would be grateful for the Minister's confirmation that he believes that the bank insolvency process is entirely consistent with the directive. I hope he can satisfy the Committee on that point.[44]

Both points were concerned with the real objectives of the BIP. In response, Ian Pearson argued that although the legislation provides for objective 1 to take precedence over objective 2, it is very clear from clause 86(4) that a bank liquidator is obliged to start working towards achieving both objectives as soon as he or she takes office – the statutory order of priority of creditors remains unchanged. He argued that payment to depositors will be made by the FSCS, not from the assets of the failed bank. The FSCS would take the place of eligible claimants within the insolvency and would rank as an ordinary unsecured creditor in the proceedings alongside the claims of other creditors. Ian Pearson stressed more than once that:

> We are not introducing depositor preference. The difference is that we want to pay out fast to depositors. That is the purpose of the measure, and what the Treasury Committee wanted us to do.
>
> As I have described, the bank liquidator is also obliged to wind up the affairs of the company from day one in the best interests of creditors as a whole. As we can discuss, if necessary, in relation to clause 87, in a normal winding-up, a liquidation committee would not even be formed until a month or two into the proceedings. Given that we are aiming for eligible depositors to be paid within seven days, and that the liquidator will be working on both objectives at once, realistically, in comparison with a normal insolvency, there will be no delay in the start of winding-up in the interests of all creditors.
>
> These objectives and the other provisions in part 2 mean that when a bank fails, the interests of both eligible depositors and other creditors will be protected. The key purpose is to ensure fast pay-out, without disadvantaging other creditors, and certainly without introducing depositor preference. I am happy to clarify that.[45]

2. Liquidation committee

Under clause 87, the BIP is subject to a two-stage committee process. In the first stage, representatives from the Bank of England, FSA and the FSCS are obliged to form an initial liquidation committee until such time as objective 1 is achieved. In addition to giving consent (or otherwise) to certain proposed actions by the bank liquidator, the committee is required to make a 'full payment resolution' – that is, it resolves that, as far

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[44] PBC Deb 13 November 2008 c494

[45] PBC Deb 13 November 2008 c496

as practicable, it considers that objective 1 had been achieved. Only when this resolution has been made by the initial liquidation committee, can the bank liquidator call a meeting of creditors. At that meeting, the creditors could resolve to elect new members to the liquidation committee. At this stage, representatives from the Bank and the FSA would be obliged to stand down from the committee, although the FSCS representative (as the largest of the failed bank's creditors) would have the option of remaining.

Mark Hoban asked why creditors would not be represented on the initial liquidation committee given that the liquidator is supposed to work towards achieving both objectives 1 and 2 simultaneously. He asked why it is that creditors may be represented on the committee only when a full payment resolution had been made. The explanation provided by the Minister was that creditors are excluded because of the need for quick action to ensure that depositors receive their compensation or have their accounts transferred as quickly as possible. He disagreed that creditors would be put at a disadvantage as a consequence of this two-stage committee process:

> Creditors are excluded only from the initial liquidation committee, because of the need for quick action to ensure that depositors receive their compensation or have their accounts transferred as quickly as possible. The initial liquidation committee will be formed by the Bank of England, the FSA and the FSCS, who will work with the bank's liquidator to ensure that appropriate arrangements are in place for a transfer of accounts, or to ensure that eligible depositors are paid quickly.
> […]
> In a normal insolvency, a meeting of creditors may decide on formal liquidation, but it would be a month or two before any meeting of creditors is held, so the timing in the Bill should not delay things. We are saying only that creditors other than the FSCS would be excluded from the initial liquidation committee. However, very quickly, once a bulk transfer and the arrangements that I have outlined are made, we would move towards a normal liquidation situation. In those circumstances, creditors would be expected to be part of the liquidation committee.[46]

Unconvinced, Peter Bone argued that creditors would be happier to have some representation right at the beginning of the BIP.[47] Mark Hoban questioned the time-scale involved. He wondered if the initial liquidation committee could be expected to last for only one or two weeks, rather than several months. In response, Ian Pearson outlined how he envisaged the two-stage committee process would work in practice. He described the initial liquidation committee as a fast front-end process with a committee consisting of representatives of the FSA, the Bank and the FSCS, working with the liquidator to ensure a quick bulk transfer of accounts or fast payout to depositors. After that, the rump of the liquidation would go through the normal process, with creditors involved on the liquidation committee. He did not accept that creditors would be disadvantaged and argued that clause 87 was important if the objectives of the BIP were to be achieved:

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[46] PBC Deb 13 November 2008 cc496 - 497
[47] PBC Deb 13 November 2008 c 498

> A key point in response to the hon. Gentleman is that the assets are not being removed from the liquidation. The FSCS pays out when it comes to depositors and will become an ordinary, unsecured creditor as part of the liquidation. Once we have moved from stage one of the process, we move to stage two. Once eligible depositors have been paid by the FSCS, or their accounts have been transferred, the liquidation committee will pass a full payment resolution. Following that, if the creditors elect to continue with a liquidation committee they will take the place of the authorities on that committee, so we move into a normal liquidation phase. Many of the formalities concerning membership and the role of an ordinary liquidation committee are set out in secondary legislation and subsection (7) preserves that position for the bank insolvency procedure.[48]

3. Appointment of provisional liquidator

The Government tabled an important amendment to clause 90.[49] This provided for the appointment by a court of a provisional bank liquidator, following an application for a bank insolvency order. Ian Pearson explained that the ability to make such an appointment was crucial to protect the interests of creditors:

> The amendment provides for the appointment by a court of a provisional bank liquidator, following an application for a bank insolvency order. Clause 82(3) specifies that a bank must be given notice of an application for such an order. That is important, because to ensure compatibility with human rights legislation, it is necessary for the directors of the bank or other parties to put their case to the court against the making of the order. That is a standard approach in insolvency proceedings.
>
> There will thus be a gap between making the application for an insolvency order, and the court hearing that considers whether it should be made. It is crucial to avoid the possibility of a run on the bank or any other scramble for assets during that period. In an ordinary compulsory liquidation, if it is considered that assets may be at risk in the period between the filing of an insolvency application and the making of a winding-up order, the court may appoint a provisional liquidator, without notice if necessary, to protect the interests of creditors. The amendment applies that provision to the bank insolvency procedure.
>
> Being able to appoint a provisional bank liquidator will protect the interests of all creditors. For example, such a liquidator should be able to take steps to shut down operations, preventing any scramble for assets. In practice, the period between the application for a bank insolvency order and the court hearing is likely to be hours only, but the court's facility to appoint a provisional bank liquidator will be a useful provision if the court needs to adjourn a hearing.[50]

Mr Pearson reassured the Committee that the provisional bank liquidator's powers would be limited. For example, he would not be able to make payments to creditors. Neither would he be able to facilitate the payout to depositors under objective 1. The Committee agreed to this amendment.

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[48] Op cit
[49] Government amendment No. 158 to clause 90 of Part 2 of the Bill
[50] PBC Deb 13 November 2008 cc500-501

4. Secondary legislation - rules for the BIP

The Government also tabled a number of amendments to clause 112[51] concerning the secondary legislation that will set out rules for the BIP and the BAP. As a consequence of the accepted amendments, the general BIP rules for England and Wales—those that do not affect court procedure—will be made with the concurrence of the Treasury, rather than the Secretary of State for Business, Enterprise and Regulatory Reform. Rules that affect court procedure will be drawn up with the concurrence of the Lord Chief Justice, as usual. The Treasury, rather than the Secretary of State, will make the rules for Scotland. Other accepted Government amendments make the same provision for the BAP. In explaining why these amendments were considered necessary, Ian Pearson said:

> We have done this because the Treasury rather than the Secretary of State for BERR takes policy responsibility for banks. The BIP and BAP have been designed with specific objectives, which have been set out by the Treasury. It is right that the Treasury should take responsibility for agreeing the rules to make the procedures function in pursuit of those objectives. It is likely that the rules for the BIP and BAP will draw on existing insolvency rules. Throughout, the Government's approach has been to ensure that we follow existing insolvency provisions as closely as possible, as I have previously outlined to the hon. Member for Gosport. In considering the rules for the BIP or BAP, the Treasury will draw on the expertise of BERR, the Insolvency Service and others in the practitioner community.[52]

5. Extending the BIP to building societies and credit unions

Clauses 117 and 118 of the Bill would give the Treasury the power to apply the BIP to building societies and credit unions, with any necessary modifications. This would be achieved by secondary legislation using the affirmative procedure. Sir Peter Viggers asked when it was the Government's intention to bring forward this secondary legislation. Ian Pearson said that the Government had consulted widely on this issue and extending the SRR to building societies and credit unions was strongly supported by stakeholders, including the Building Societies Association. Detailed provision for applying the BIP to building societies had not been put on the face of the Bill because insolvency legislation is complex and building society and credit unions have their own legal features, which differ greatly from those of banks. In effect, more time was needed by the Government to ensure that procedures are brought forward that are fit for purpose. He confirmed that the Government would consult on the necessary regulations, which would be laid before the House in due course.[53]

Stewart Hosie (SNP) highlighted certain ambiguities in the terminology used in the Bill, Specifically, clause 120 of the Bill would give the Secretary of State powers to include Scottish partnerships as institutions that might fail and therefore be required to be covered by the BIP. However, in Scotland, if a partnership fails it is dealt with by sequestration rather than liquidation. Ian Pearson confirmed that it is the Government's

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[51] Government amendments No. 160, 161, 162, 175 and 176, in clause 112
[52] PBC Deb 13 November 2008 c503
[53] PBC Deb 13 November 2008 c505

intention that regulations made under clause 120 will reflect the legal terms and practices that are used in Scotland.[54]

Some tabled government amendments were straightforward tidying-up provisions and all such amendments were agreed. Some new government clauses were also introduced to correct an omission in the original drafting or to avoid any ambiguity.

F. New bank administration procedure (BAP)

Part 3 of the Bill introduces a new BAP. Briefly, where part of a failing bank's business is transferred to either a bridge bank or a private sector purchaser, the residual part of the bank may be left as an insolvent entity. However, it may be vital that the insolvent residual company continues to provide support services (for example IT support) to the commercial purchaser or bridge bank. Under a normal administration, the administrator would have no obligation to provide any service to either a commercial purchaser or a bridge bank and would be required to take actions in the best interests of creditors. However, the new BAP will oblige the bank administrator of an insolvent residual bank to provide essential services and facilities to the transferee. In effect, the administrator would be subject to two statutory objectives: first, to provide support to a commercial purchaser or bridge bank and secondly, to rescue the residual bank as a going concern or wind up its affairs in the best interests of creditors. Once it becomes no longer necessary for the residual bank to continue to provide support services, the procedure would continue in a similar way to an ordinary administration, although to protect the interests of creditors by providing for a full range of outcomes, some of the existing powers of a liquidator have been built into the procedure.

Early in the Committee proceedings, when the BAP as a whole was considered rather than its specific technical clauses, Ian Pearson acknowledged that one of the main concerns with the BAP raised by stakeholders was that following a partial transfer those creditors who remain in the residual bank might lose out. However, he disagreed with this view:

> We have debated this before, which is why the Government have put measures to mitigate the risks in clauses 42, 43 and 55, and in the code and regulations on which we are consulting. We are continuing to discuss the subject with the expert liaison group.
>
> The bank administration procedure also provides that the bank administrator will work on both objectives simultaneously, to protect the interests of creditors. The bank administrator will be required to ensure that essential services and facilities are supplied to the private sector purchaser or bridge bank. At the same time, he or she will be able to take action to rescue the residual bank or to wind up its affairs, provided that these do not interfere with the first objective. It might be perfectly feasible to realise some of the residual bank's assets without prejudicing the operation of the transferred business.
>
> […]

[54] PBC Deb 13 November 2008 c506

> The bank administration procedure is a well designed measure, for use only in very specific circumstances, which builds on existing insolvency procedures and forms an essential part of the special resolution regime. It has been consulted on and there is substantial agreement that it is necessary. The subsequent clauses have attracted very little comment and have wide-ranging support. [55]

David Gauke agreed that a new BAP has a large part to play in the Bill's SRR. However, he made two observations. First, in the context of the financial difficulties of Northern Rock, he drew attention to previous comments by the Chancellor and the Prime Minister that indicated that administration effectively amounted to a fire sale of assets:

> I welcome the attempt to address the difficulties that we face by improving the structure of administration for failing banks. We strongly believe that administration has a large part to play. Indeed, we advocated some kind of administration structure in the case of Northern Rock. We welcome the Minister's saying that this is appropriate. If I may, I will contrast that constructive approach with the comments made by his senior colleagues earlier this year. For example, the Chancellor of the Exchequer, in the context of Northern Rock, said:
>
> "Administration would mean that control would immediately pass to an administrator who would look to realise the value of the company's assets, which, under current market conditions, would amount to a fire sale."— [*Official Report*, 21 January 2008; Vol. 470, c. 1208.]
>
> The Prime Minister, two days later, said:
>
> "Let me just tell the House what administration means. It means a fire sale of the assets, it means closing down the company and it means the Government losing billions of pounds. It is the worst possible solution and the Conservatives are not only guilty of inconsistency, but guilty of putting the stability of the economy at risk." [*Official Report*, 23 January 2008; Vol. 470, c. 1490.]
>
> Now we find that the Government recognise that administration for a financial institution does not necessarily put the economy at risk, cost the Government billions, and lead to mass unemployment and a plague of locusts. Indeed, I asked the Minister at the beginning of these Committee proceedings whether administration means a fire sale of assets to which to he replied:
>
> "It is not right to say how the administrator would want to pursue its duties. The administrator would certainly have objectives for ensuring the supply of essential services and either rescue it as an ongoing concern or wind up its affairs. It would normally want to do that in the best possible way. If it can rescue the bank, it will want to do that and, if it is to wind up its affairs, it will want to do that in a responsible and appropriate manner." [*Official Report, Banking Public Bill Committee,* 21 October 2008; c. 8, Q12.]
>
> The Minister puts it very well; that is what administrators do. Some of his colleagues appeared to be confused about the difference between administration and liquidation. Clearly, administration does not mean a fire sale of assets. It is

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[55] PBC Deb 18 November 2008 cc510-511

> one of the useful and necessary tools that need to be available to the authorities in the case of a failing bank, and we therefore welcome the inclusion of part 3. We will make one or two comments on it during the proceedings, but—as the Minister says—it has not produced many comments from outside bodies. We have debated other parts of the Bill at great length, but that will not be necessary with part 3.[56]

In his response to this point, Ian Pearson said that there was a world of difference between putting a whole bank and putting part of a bank into administration.[57]

His second observation was that as the Bill stands, when a financial institution runs into difficulties the 'good' assets will always be transferred to a bridge bank, or straight to a private sector purchaser. He queried whether it was ever possible for the good assets to be retained in the residual bank and the bad assets transferred out. In answer, Ian Pearson made two points:

> Certainly there are powers in the legislation to have multiple transfers. Those could be transfers of good assets. They could possibly be transfers of bad assets as well. Certainly the Bill provides for flexibility.
>
> With regard to the specific points, I do not think that it would meet the Government's policy objectives to leave good assets under the control of the original owner once the bank has failed its threshold conditions. However, it is certainly perfectly possible that a decision could be taken to take the whole of the bank into temporary public ownership and then bad assets could be transferred out using the onward transfer powers. That would be a conceivable scenario.[58]

1. Objectives

During consideration of clause 124, Mr Gauke reiterated points he had previously raised in connection with the BIP and challenged the compatibility of the BAP with the *Credit Institutions Reorganization and Winding-up Directive 2001* and the 2004 regulations that enforced it. He also sought clarification of the objectives of the new BAP, arguing that the procedure could feel more like regulatory arrangements than insolvency arrangements, particularly with objective 1 taking priority over objective 2:

> […] so I seek reassurance from the Minister that in those circumstances, as far as the Government are concerned, those arrangements will be recognised under the directive, creditors will be treated equally, we will not run into difficulties and essentially those arrangements will not be recognised in other jurisdictions. That means that for assets held in other jurisdictions we will have two separate sets of insolvency proceedings or administration proceedings, so the whole process will become rather confused and dragged out and there will be an issue concerning what happens to assets held in other jurisdictions within the EEA.
>
> Will the Minister also mention the "normal" administration objective 2, which is subservient—to use the Treasury language—to objective 1? Does that mean that

56 PBC Deb 18 November 2008 cc511-512
57 Ibid cc512-513
58 Ibid c513

> shareholders in a bank that is in administration will be in a worse position than those in a company that is in normal administration because we have objective 1? We are broadly supportive of clause 124, but it might be helpful if he could outline that to the Committee and address those points.[59]

Ian Pearson replied:

> I can confirm to the hon. Gentleman that the bank administration procedure will fall within the scope of the directive he mentioned as a reorganisation measure, and shareholders in the administration will be in the same position in the bank administration procedure as in a normal administration procedure, so there is no intention to do anything differently. I remind him about clause 55 and the "no creditor worse off" position outlined in the Bill. We believe that there are proper safeguards, and those in the industry, whom we will continue to talk to, are broadly satisfied with what we are trying to achieve.[60]

The Minister was asked a number of technical questions about how the new BAP would work in practice. David Gauke felt there was ambiguity in the Bill on the exact grounds for applying for a bank administration order under clause 130 and the conditions that must apply before the Bank of England may apply for such an order. Ian Pearson sought to clarify the process of application as follows:

> The legislation is framed so that the FSA has responsibility for deciding whether the threshold conditions have been met. Clause 7 relates to this in subsection (1) where it says:
> "A stabilisation power may be exercised in respect of a bank only if the FSA is satisfied that the following conditions are met."
>
> We have talked about this before. First, the FSA—having consulted the Bank and the Treasury—decides whether the threshold conditions are met and pulls the trigger. Then, the Bank is responsible for deciding which stabilisation option should be taken. If the Bank decides that one stabilisation option is a bridge bank and wants to make a property transfer instrument, then clause 130—subsections (1) and (2) in particular—would apply. The FSA's decision to trigger the special resolution regime comes first. As I understand it, the Bank could not decide to make a property transfer instrument before the decision had been taken that a bank was failing.[61]

The Committee was satisfied with this explanation.

2. Appointment of a provisional bank administrator

A significant Government amendment agreed in Committee provides for the appointment of a provisional bank administrator, following an application for a bank administration order.[62] It became apparent to the Government that during the brief period of time

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[59] Ibid c514
[60] Ibid c514
[61] PBC Deb 18 November 2008 c515
[62] Government amendment number 166, c516

between the application for a bank administration order and the court hearing to make the order, it might be necessary for the residual bank to continue to provide services to the bridge bank or private sector purchaser. The appointment of a provisional bank administrator would allow that and would also protect assets for the benefit of creditors in that initial brief period. Ian Pearson described the role of the provisional administrator as being simply to keep things ticking over until the court hearing. As such, the duties and powers of the provisional administrator would be restricted:

> The court will also be able to appoint a provisional bank administrator where necessary, granting him or her powers to protect assets and manage the residual company in accordance with objective 1 of the bank administration procedure, which is to provide services to the bridge bank or private sector purchaser. The provisional bank administrator will not be entitled to pursue either strand of objective 2, and will not be allowed to make subsequent transfers, which means that the powers of a provisional bank administrator will be suitably restricted. Those are the equivalent powers that we were talking about in relation to the bank insolvency procedure. A typical activity that the provisional bank administrator might undertake would be facilitating access to e-mail or computer systems.
>
> In effect, the role of the provisional bank administrator is simply to keep things ticking over for a few hours until the full court hearing for the making of a bank administration order. It is an important provision, which will minimise disruption and protect assets for the benefit of creditors, prior to the making of a bank administration order.
>
> The provisional bank administrator's appointment will lapse when a bank administrator is appointed, although there is nothing to stop him or her then being appointed as the bank administrator. In all cases, the provisional bank liquidator must be a qualified insolvency practitioner who consents to take on the role. Amendment No. 166 is a necessary provision, which protects the assets of the residual bank and allows for the provision of services to the private sector purchaser or bridge bank.[63]

David Gauke sought confirmation from the Minister that the provisional administrator would do nothing to prejudice the objective 2 requirements.[64]

3. Bank administrator's power to disclaim onerous property

The issue of the administrator's ability to disclaim onerous property was also raised during Committee proceedings. Section 178 of the *Insolvency Act 1986* specifically gives power to a liquidator to disclaim any onerous property. For the purposes of the Act, onerous property includes unprofitable contracts and property that is unsaleable or not easily saleable, or that might give rise to a continuing liability. Under clause 132 of the Bill, a bank administrator would also be able to disclaim property. David Gauke questioned the need for this, given that as a rule administrators do not have the ability to

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[63] PBC Deb 18 November 2008 cc516-517

[64] PBC Deb 18 November 2008 cc517

disclaim property, and moved an amendment to remove this ability. In making his case for the amendment, he said:

> Why should that power of disclaiming onerous property be available to an administrator rather than a liquidator? I recognise that the power is only to be given with the Bank of England's consent and exercised with that consent, but it does not seem appropriate to give the power of disclaiming onerous property to an administrator, especially given the protection for creditors in section 178(6) of the 1986 Act:
> "Any person sustaining loss or damage in consequence of the operation of a disclaimer under this section is deemed a creditor of the company to the extent of the loss or damage and accordingly may prove for the loss or damage in the winding up."
>
> With an administration there may not be a winding-up, so that section does not fit well with the modification to it in clause 132. It would help the Committee if the Minister could explain why section 178 is amended and why it is necessary for an administrator to be able to disclaim property, given that as a rule administrators do not have that ability.[65]

Ian Pearson disagreed and argued that the ability of a bank administrator to disclaim onerous property was an important tool for the benefit of creditors:

> The ability to disclaim onerous property is a useful tool for the benefit of creditors, but it is normally available—as the hon. Gentleman says—only to a liquidator. We have applied the provision to bank administration, with some modifications, as giving the bank administrator that power will help to achieve the best result for creditors. Many members of the insolvency community, including practitioners and lawyers, think that an ordinary administrator should also be able to disclaim onerous property, so it is sensible to apply such a provision, which benefits creditors, to the bank administration procedure.
>
> The modifications in clause 132 are in line with the application of other powers that are normally available only to a liquidator, for example the ability to bring an action before the court for fraudulent or wrongful trading and to pay dividends to unsecured creditors without requiring permission from the court. Such provisions will ensure that a bank administrator has all the powers necessary to fulfil his or her objectives. The application of the liquidation powers, including the power to disclaim, will also help to ensure that the bank administration procedure is a cost-effective and efficient stand-alone regime, which operates in the best interests of creditors.[66]

David Gauke was not entirely convinced by the Minister's argument that, because some insolvency lawyers think the power to disclaim onerous property should apply to administrators generally, it should therefore apply in these provisions. However, he did not press to a division and withdrew the amendment.

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[65] PBC Deb 18 November 2008 cc518-519
[66] PBC Deb 18 November 2008 c519

4. Ending a bank administration and the disqualification of directors

Under clause 140 of the Bill, the decision as to whether a successful rescue of a residual bank has been achieved is left to the bank administrator. However, David Gauke asked what would happen if the FSA or the Bank of England took a different view. Specifically, if, on examining the rescued bank and finding the threshold conditions had not been achieved, could either the FSA or the Bank influence the bank administrator? In his response Ian Pearson highlighted the fact that before even reaching this stage, the Bank would already have issued an objective 1 achievement notice. He successfully argued that clause 140 was a straightforward technical clause providing a simple way to bring a bank administration to an end when objectives 1 and 2 had been achieved.[67] The approach taken was consistent with the ways in which an ordinary administration could be brought to a close.[68]

In respect of the disqualification of directors, Ian Pearson said that if the public were to be protected it was necessary to apply the *Company Directors Disqualification Act 1986* to the bank administration procedure:

> Clause 142 applies the Act with necessary modifications. These are important powers to protect the public and it is therefore appropriate to apply them to the bank administration procedure. The provisions of the Company Directors Disqualification Act are of long standing and will therefore be familiar to companies and their professional advisers. The provisions of the clause are straightforward and consistent with the Government's overall approach that the bank administration procedure should be generally consistent with existing insolvency law and practice. That is an approach strongly supported by stakeholders.[69]

5. Henry VIII clause – changing primary insolvency legislation by order

There was also debate on the Government's tabled amendment to clause 143, a Henry VIII clause that enables the Treasury to change primary legislation by order. To reassure the Committee, Ian Pearson confirmed that any changes to insolvency legislation would be subject to full parliamentary scrutiny through the affirmative resolution procedure. However, Peter Bone was unconvinced. He pointed out that the problem with an affirmative statutory instrument is that it cannot be amended—the whole thing is either accepted or rejected. Dr. John Pugh drew attention to the exact wording of clause 143. He argued that the clause specifically says, "provide for an enactment", which he took to mean that new legislation could be produced, as well as tweaking and altering existing legislation. He asked what the Treasury had in mind to provide in the fullness of time. In his response, Ian Pearson reiterated that the legislation in Part 3 is effective as it stands. He argued that when legislation is made, it is right that the government has the opportunity to amend it in the future, if circumstances require it, without having completely new primary legislation. This was the sole purpose of clause 143. The Committee agreed to the amendment.

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[67] PBC Deb 18 November 2008 cc521-522

[68] As set out in paragraph 80 of schedule B1 to the Insolvency Act 1986

[69] PBC Deb 18 November 2008 c523

6. Extending the BAP to building societies

Clause 145 of Part 3 of the Bill states: "the Treasury may by order provide for this Part to apply to building societies…as it applies to banks". This approach is consistent with that taken in clause 117 of the Bill for applying the BIP to building societies. However, David Gauke asked why the Government felt the need to wait; as a precaution why not set up a building society administration procedure. Ian Pearson explained that given the unique legal and commercial characteristics of building societies, more time was needed to ensure that the procedures introduced for building societies were fit for purpose. He confirmed that the Government would consult on the regulations in due course.[70]

7. Technical amendments and new clauses

The Government introduced a number of, mostly technical, new clauses. However, agreed new clause 8 is of interest since it has the effect of formally recognizing in legislation an expert liaison group, set up on 1 October 2008, to advise ministers on the development of the secondary legislation that will implement the Bill's special resolution regime provisions. During the proceedings, Ian Pearson elaborated on the significance of this expert liaison group:

> The expert liaison group will advise the Government on the permanent secondary legislation relating to parts 1 to 3 of the Bill. It will not have input into any specific orders such as the stabilisation powers, compensation schemes, the resolution fund and third-party compensation orders, as consultation on such matters would be inappropriate due to the market-sensitive nature of such orders and the potential need to exercise these powers on a very urgent basis.
>
> […] While not mentioned in the new clause, there could be a role for the group in wider matters such as the development of the code of practice and, over time, reviewing the SRR in general. As I have said before, we will consult the expert liaison group over any changes made to clause 65 and its application to the Banking Bill to strengthen legal certainty around that vital power. The new clause provides for the expert liaison group to include representatives from the Treasury, the FSA, the Bank of England and the Financial Services Compensation Scheme. It also provides for the Treasury to appoint persons it believes are able to represent banks and persons who, in the Treasury's opinion, have expertise in financial services and insolvency law. The Treasury will chair the group which is consistent with its role in formulating Government policy. I believe that the expert liaison group has already shown its value in advising the Government on some of the safeguards relating to the Bill.[71]

In response to a question from John Pugh, Ian Pearson sought to reassure the Committee that the expert liaison group genuinely reflects the wider concerns of the financial services industry and was not another name for government advisers.

[70] PBC Deb 18 November 2008 c525
[71] PBC Deb 18 November 2008 c530

Sally Keeble sought to introduce new clause 15 in respect of the rights of tenants in properties that are then repossessed. Whilst John Pugh sought to introduce new clause 16 in respect of mortgage possession proceedings by banks that would remove the remedy of foreclosure from residential properties. It would also restrict the ability of lenders to recover the costs of possession proceedings and proceedings to recover money, by making such recovery subject to the precondition of obtaining a court order. In his response, Ian Pearson said why he thought the *Banking Bill* was an inappropriate vehicle for addressing these matters:

> We need to look at all the issues together. The new clauses address only the actions of banks, but clearly building societies and other lenders need to be considered. In relation to new clause 16, we also need to consider carefully how any restriction on the power of sale will interact with existing mortgages, where the power of sale forms part of the contractual rights of the lender. The Justice Secretary is actively considering whether further action should be taken in relation to repossession cases. We are committed to working with lenders, regulators and the judiciary to ensure that timely action is taken in response to problems.
>
> The Government have already taken specific action. We have made clear our concern for families in financial difficulty and facing repossession. We are actively working with lenders, regulators and the judiciary to ensure that borrowers are treated fairly. In 2004 the Government extended the scope of Financial Services Authority regulation to cover mortgages. FSA regulation ensures that borrowers are afforded important protections and have appropriate means of redress. On 22 October the Master of the Rolls approved a new protocol for possession proceedings. It is intended to ensure that lenders and borrowers use every effort to ensure that there is a genuine attempt to find other solutions.
>
> The protocol will come into force from tomorrow, and we will continue to provide advice and assistance through the courts and other agencies to individuals with mortgage payment problems. We will consider the policy issues underlying the amendments, and with that assurance I hope that my hon. Friend will withdraw the new clause.[72]

Neither of the new clauses was pressed to a vote.

John Pugh also proposed new clause 20 that would compel banks in receipt of public money for recapitalization purposes, to act on advice from the Treasury regarding economic stability. Explaining the reasoning behind the clause, he said:

> Anecdotal and real evidence suggests that the hardening of the banks' stance has been simultaneous with the Government's charity to them. What we do to recapitalise banks may not achieve the objectives that Governments have in mind, and the banks may act contrary to what the Government intend.
>
> One solution employed by the Chancellor is simply to gather bankers together and give them a good telling off. Obviously, that public pillorying will have some

[72] PBC Deb 18 November 2008 cc539-540

> effect, but it may not have a radical effect or the strength that people desire. It does not by itself create an obligation. It is simply a telling off.
>
> New clause 20 would put into the Bill an explanation of what we have in mind when we capitalise a bank, which is that to some extent the recapitalisation process should coincide with wider economic stability. If the banks receive help they must have regard to advice from the Treasury and thus do precisely what they are expected to do and what they are clearly not doing in many circumstances at present.[73]

He acknowledged however, that it would not be a good idea for the Treasury to micro-manage the lending policy of banks. David Gauke said that his party could not support the clause. He argued that any conditions imposed on a bank (whether in respect of public policy, remuneration, and lending or dividend policy) not as part of the original recapitalisation agreement, would create uncertainty and do nothing for the long-term situation. John Pugh disagreed; he argued that uncertainty could be avoided as long as the Government narrowed the scope of the Treasury advice.

The Minister argued that it would not be in the long-term interests of the banking sector or its consumers if the authorities could override commercial decisions. He believed that the right mechanisms were in place to ensure that the Government had sufficient influence and power over recapitalised banks:

> We have the power to set the terms on which banks that have been recapitalised can obtain recapitalisation funding. As part of the recapitalisation, the Government have agreed a range of commitments with the banks supported by the recapitalisation scheme. The hon. Member for South-West Hertfordshire seemed to suggest that it had been a muddle. I entirely refute that. He will be aware of the conditions that have been imposed on banks accessing the recapitalisation scheme—those conditions have been published. It is important that over the next three years banks maintain the availability of competitively priced lending to home owners and small businesses at 2007 levels, and actively market it. The hon. Gentleman will also be aware of the conditionality on the remuneration of senior executives, the support for schemes to help those struggling with mortgage payments to stay in their homes, and the right for the Government to agree with boards both the appointment of new independent non-executive directors and the dividend policy, which was also part of the conditionality.[74]

John Pugh withdrew new clause 20 but promised to return to the issue on Report.

The Government tabled a number of technical amendments, largely in response to comments from stakeholders and to improve clarity. Government amendments Nos. 173 and 174 provide for an added level of flexibility in relation to onward property transfers from a bridge bank. The amendments provide that both the original residual bank and the original bridge bank may provide services to business transferred from the bridge bank. In effect, the amendments ensure that the bank administration procedure is

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[73] PBC Deb 18 November 2008 cc541-542
[74] PBC Deb 18 November 2008 cc544-545

effective for additional resolution scenarios. Clause 138 provides for the transfer of services from the original residual bank to the final transferee bank (the institution in receipt of assets from the bridge bank) when the transfer takes place. However, the final bank may also require services from the bridge bank because some of the facilities necessary for it to operate may have been already transferred from the residual bank to the bridge bank.

III Appendix – Members of the Public Bill Committee

Chairmen: Mr. Roger Gale, Mr. Jim Hood, Mr. Eric Illsley

Members:
Barlow, Ms Celia (Hove) (Lab)
Blizzard, Mr. Bob (Lord Commissioner of Her Majesty's Treasury)
Bone, Mr. Peter (Wellingborough) (Con)
Breed, Mr. Colin (South-East Cornwall) (LD)
Eagle, Angela (Exchequer Secretary to the Treasury)
Flello, Mr. Robert (Stoke-on-Trent, South) (Lab)
Gauke, Mr. David (South-West Hertfordshire) (Con)
Hoban, Mr. Mark (Fareham) (Con)
Hosie, Stewart (Dundee, East) (SNP)
Keeble, Ms Sally (Northampton, North) (Lab)
Newmark, Mr. Brooks (Braintree) (Con)
Pearson, Ian (Economic Secretary to the Treasury)
Pugh, Dr. John (Southport) (LD)
Robertson, John (Glasgow, North-West) (Lab)
Smith, Geraldine (Morecambe and Lunesdale) (Lab)
Todd, Mr. Mark (South Derbyshire) (Lab)
Viggers, Sir Peter (Gosport) (Con)
Wilson, Phil (Sedgefield) (Lab)

IV Glossary of insolvency terms relevant to the Banking Bill

The following glossary is an extract from a glossary compiled by The Insolvency Service.

Administration order (company)
A court order in respect of a company that appoints an administrator to take control of the company. A company can also be put into administration if a floating charge holder, or the directors or the company itself file the requisite notice at court.

Administrative receiver
An insolvency practitioner appointed by the holder of a debenture (lender) that is secured by a floating charge that covers the whole or substantially the whole of the company's assets. The insolvency practitioner's task is to realise those assets on behalf of the debenture holder.

Administrative receivership
The process where an insolvency practitioner is appointed by a debenture holder (lender) to realise a company's assets and pay preferential creditors and the debenture holder's debt. The right of a debenture holder to appoint an administrative receiver has been restricted by the *Enterprise Act 2002.*

Administrator
An insolvency practitioner appointed by the court under an administration order or by a floating charge holder or by the company or its directors filing the requisite notice at court.

Assets
Anything that belongs to the debtor company that may be used to pay business debts.

Charge
Security interest taken over property by a creditor to protect against non-payment of a debt (such as a mortgage).

Compulsory liquidation
Winding up of a company after a petition to the court, usually by a creditor.

Creditor
Someone owed money by a company.

Debenture
A document in writing, usually under seal, issued as evidence of a debt or the granting of security for a loan of a fixed sum at interest (or both). The term is often used in relation to loans (usually from banks) secured by charges, including floating charges, over companies' assets.

Liquidation (winding up)
Applies to companies or partnerships. It involves the realisation and distribution of the assets and usually the closing down of the business. There are three types of liquidation - compulsory, creditors' voluntary and members' voluntary.

Liquidator
The Official Receiver or an insolvency practitioner appointed to administer the liquidation of a company or partnership.

Provisional liquidator
The Official Receiver or an insolvency practitioner appointed to preserve a company's assets pending the hearing of a winding up petition.

Unsecured creditor
A creditor of the company who does not hold security; some unsecured creditors may also be preferential creditors.

Winding up order
Order of a court, usually based on a creditor's petition, for the compulsory winding up or liquidation of a company or partnership.