



BANK OF ENGLAND

July 2016

Establishment of the Enforcement Decision Making Committee

A Consultation Paper



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Responses are requested by Friday 21 October 2016.

Please address any comments or enquiries to:

Ref: CP/2016EDMC

Regulatory Action Division

Prudential Regulation Authority

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1 Overview

1.1 This consultation paper sets out the proposal for the establishment of a unified Enforcement Decision Making Committee (EDMC) to take decisions in respect of: (1) the PRA; (2) Financial Market Infrastructure (FMI); and (3) Resolution contested enforcement cases.

1.2 The Bank also proposes to use the EDMC in enforcement cases in relation to Scottish and Northern Ireland banknotes issuance by the banks who are authorised to issue their own banknotes (the authorised banks), pursuant to Part 6 of the Banking Act 2009, the Scottish and Northern Ireland Banknote Regulations 2009 and related rules¹. On the basis of the relatively limited number of authorised banks and the distinct nature of the Scottish and Northern Ireland Banknote regime, the Bank will conduct a separate consultation with the authorised banks.

1.3 This joint consultation, between the PRA, FMI and Resolution Directorates is part of a wider process to produce a consolidated and comprehensive external policy statement on the Bank's enforcement processes. The Bank aims to publish this guidance during the course of 2017.

1.4 This joint consultation also responds directly to a recommendation from HM Treasury (HMT) regarding the PRA's enforcement decision making processes.

Who does this consultation affect?

1.5 This consultation will be of interest to all authorised firms and their professional advisers involved in providing financial services.

Is this of interest to consumers?

1.6 This consultation does not directly affect consumers. However, as these proposals concern the transparency of the Bank's approach to enforcement decision making and its enforcement process, they may be of general interest to consumers and the organisations which represent them.

Equality and diversity considerations

1.7 We have assessed the likely equality and diversity impacts of the proposals and do not think they give rise to any concerns, but we would welcome your comments.

Cost benefit analysis (CBA)

1.8 This proposal responds directly to a recommendation from HMT and is focused on securing objectivity in decision making in contested enforcement cases – for that reason, a separate CBA is not considered to be necessary.

1.9 This consultation closes on Friday 21 October 2016. The Bank invites feedback on the proposals set out in this consultation. Please address any comments or enquiries to CP_2016EDMC@bankofengland.co.uk.

¹ For the Scottish and Northern Ireland Banknote regime, the Bank has the power to impose financial penalties under section 222 of the Banking Act 2009. Full details of these penalties are set out in the Statement of Penalty Policy for Scottish and Northern Ireland banknotes. See online at: http://www.bankofengland.co.uk/banknotes/Documents/about/scottish_northernireland_notes_rules.pdf.

2 Proposal: Establishment of the EDMC

Background

2.1 The Bank proposes to strengthen the independence and robustness of the decision making process in contested enforcement cases through the establishment of the EDMC. The EDMC model proposed by the Bank is primarily based on an adapted version of the Financial Conduct Authority's Regulatory Decisions Committee (FCA RDC).

2.2 The EDMC will be decision maker in contested enforcement cases. A case is considered to be a contested enforcement case where the matter does not proceed to successful settlement by the Bank operating through its executive settlement processes. This will occur in one of three situations: (i) the parties have been engaged in settlement proceedings with the Bank but cannot agree on the terms and conditions of the settlement agreement within an appropriate timeframe; (ii) the Bank does not consider it appropriate to invite settlement due to the circumstances of the particular case; or (iii) the subject does not wish to engage in settlement discussions with the Bank.

2.3 In shaping its proposals, in this joint consultation between the PRA, FMI and Resolution Directorates, the Bank has had specific regard to the following:

- **HMT Recommendations:** On 18 December 2014, HMT published the HMT Review.¹ The focus of the HMT Review was on the transparency, effectiveness and speed of the FCA's and the PRA's enforcement decision-making processes. The HMT Review acknowledged that both regulators had delivered strong enforcement action. It made a number of recommendations to the FCA and PRA with the aim of enhancing current decision making processes and arrangements. On 14 April 2016, the FCA and PRA published a joint consultation paper² to support the implementation of certain of the HMT Review recommendations. In this Section 2 of the consultation paper the Bank sets out its response to the HMT Review recommendations relating to the decision making process.
- **The Bank's Strategic Plan:** In March 2014, the Bank of England launched a 3 year Strategic Plan (One Bank) to transform the institution. One Bank acknowledges the underlying connection between monetary and financial stability, which both ultimately underpin the public trust and confidence in their money and their ability to access it. Placing responsibility for microprudential supervision, macroprudential policy and monetary policy within the same organisation recognises this fundamental connection. It means that the Bank is better placed to deliver key economic benefits: stable inflation, economic growth, and the continuous provision of financial services. In keeping with One Bank, the Bank's proposals go beyond the recommendations set out in the HMT Review as they extend the proposed EDMC model across all regulatory areas where the Bank has been granted enforcement powers consistently. At the time of consultation, these areas are the PRA, Financial Markets Infrastructure and Resolution.
- **The Bank of England and Financial Services Act 2016:** On 4 May 2016, The Bank of England and Financial Services Bill received Royal Assent, making it an Act of Parliament (the Bank of England and Financial Services Act 2016 (the Act)). The reforms contained within the Act, once commenced, will effect certain changes to the Bank's corporate governance structure, including moving the PRA from being a subsidiary of the Bank to an

¹ www.gov.uk/government/uploads/system/uploads/attachment_data/file/389063/enforcement_review_response_final.pdf
² PRA Consultation Paper 14/16 'Proposed Implementation of the Enforcement Review and the Green Report', April 2016: www.bankofengland.co.uk/pr/Pages/publications/cp/2016/cp1416.aspx.

authority within the Bank with the creation of a new committee of the Bank known as the Prudential Regulation Committee (the PRC). As part of this new organisational structure, the PRC will replace the PRA Board as the PRA's key policy decision making body. On its creation, membership of the PRC will be the same as the current PRA Board. Through the PRC, the PRA will continue to exercise its functions to make rules and policies, and take supervisory decisions.

The relevant regimes:

2.4 The enforcement regimes to which the EDMC proposals apply are:

- **The PRA:** The PRA is the prudential supervisor responsible for deposit-takers, insurers and major investment firms operating in the United Kingdom. It supervises around 1,700 firms and groups. This includes over 900 banks, building societies and credit unions and nearly 700 insurers of all sizes (general insurers, life insurers, friendly societies, mutuals). The PRA has two primary objectives: a general objective to promote the safety and soundness of the firms it regulates, focusing on the adverse effects that they can have on the stability of the UK financial system; and an objective specific to insurance firms, to contribute to ensuring that policyholders are appropriately protected. Since 2014, the PRA has also had a secondary objective which states that: 'When discharging its general functions in a way that advances its objectives..., the PRA must so far as is reasonably possible act in a way which, as a secondary objective, facilitates effective competition in the markets for services provided by PRA-authorized persons in carrying on regulated activities.'¹ The PRA's approach to enforcement has been consistent with its preference for 'ex ante remedial action'. This is set out in *The PRA's Approach to Enforcement: Statutory Statements of Policy and Procedure* (Updated version, January 2016)².
- **Financial Market Infrastructure (FMI):** The Bank is responsible for the supervision of central counterparties, recognised payment systems and securities settlement systems and the associated policy making in relation to FMIs. The legislative framework for the Bank's supervision of FMIs is set out in Part 18 of FSMA (for recognised clearing houses) and Part 5 of the Banking Act 2009 (for recognised payment systems). The Bank undertakes its supervision of FMIs as part of pursuing its Financial Stability objective (under section 2A(1) of the Bank of England Act 1998) to protect and enhance the stability of the financial system of the UK.
- The Bank's risk-based, forward-looking supervision of FMIs plays an important role in maintaining UK financial stability and promoting the effective functioning of financial markets by enhancing the stability and resilience of these key entities. The role that enforcement can play in pursuit of the Bank's objectives is set out in *The Bank of England's approach to the supervision of financial market infrastructures, April 2013*.³
- **Resolution:** The Bank is the UK's resolution authority. Alongside its policy work, the Resolution Directorate of the Bank coordinates use by the Bank of its powers under the UK Banking Act 2009 in relation to the resolution of failing UK banks, building societies, investment firms (and group companies) and central counterparties, having regard to the statutory objectives of the Special Resolution Regime (SRR). The Bank has various powers that it can use to ensure firms are able to fail in an orderly way, that is, without excessive

¹ Section 2H(1) of the Financial Services and Markets Act 2000 (FSMA).

² See online at: <http://www.bankofengland.co.uk/pr/Pages/publications/sop/2016/approachenforcementupdate.aspx>.

³ See online at: <http://www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf>.

disruption to the financial system, without avoidable interruption to the critical functions that these firms provide, and without exposing public funds to losses.

- Resolution regimes enable the authorities to resolve failed financial institutions in a way that protects critical economic functions without severe systemic disruption and without exposing the taxpayer to loss. The Resolution Directorate has an important role in refining the UK's approach to bank resolution by, inter alia, defining the preferred resolution strategy for UK financial institutions and ensuring that these firms make the necessary legal, financial and operational structural changes so their failure can be orderly. The enforcement powers relevant to the Bank as resolution authority are, pursuant to 83ZR Banking Act 2009, to: (i) publish a statement that a person has failed to comply with a relevant requirement; (ii) impose a financial penalty; (iii) direct a person to refrain from certain conduct in future; and (iv) prohibit a person from holding offices or positions of responsibility in respect of a bank or banks.

Creation of the EDMC

2.5 The EDMC will be established by the Court of Directors of the Bank of England (Court). The EDMC and its members will be independent from the Bank's executive management structure.

2.6 The Bank will appoint up to 15 independent members to the EDMC. The members will not be employees of the Bank. The members shall be appointed by Court for a renewable 3 year term. At least 3 of the EDMC members will be legally qualified. Court will keep the proportion of legally qualified members under review.

2.7 Decision making powers shall be delegated to the EDMC by the PRA Board (or the PRC, when introduced) for the PRA enforcement regime. Decision making powers in contested enforcement cases for the FMI and Resolution regimes shall be delegated to the EDMC by Court. The EDMC is accountable to Court for the EDMC's conduct and its exercise of those powers in contested cases, including the EDMC's procedures, policies and general arrangements.

2.8 Court will appoint EDMC members with relevant senior expertise and significant experience in taking independent and evidence based decisions and who can apply this experience appropriately to the regulated population¹. The Bank will ensure that the EDMC members will have an appropriate mix of expertise across its members, including legal, accounting and financial expertise.

¹ The regulated population includes deposit-takers, insurance firms, investment firms, recognised clearing houses (central counterparties), securities settlement systems and payment systems.

Appointing a panel for a contested enforcement case

2.9 A panel will be selected from the EDMC members by the Secretary to the Bank, having consulted the General Counsel, to decide a contested enforcement case. The panel will have at least three members, including a chairperson. The composition and size of panels of the EDMC may vary depending on the nature of the case.

2.10 The chairperson will be drawn from the legally qualified members and have the appropriate experience and expertise to ensure that cases are determined effectively and expeditiously. The chair will have a casting vote.

Jurisdiction of the EDMC and scope of decision making

2.11 The EDMC process is administrative, not judicial. The EDMC is not an appeal body¹. It is the final stage of the administrative decision making by the Bank in contested enforcement cases. A decision by the EDMC may lead to a reference to the relevant judicial body for further consideration of their case. The conduct of such proceedings is not however a matter for the EDMC.

The PRA

2.12 The EDMC will take all of the PRA's contested enforcement statutory notice decisions. The Bank considers statutory enforcement notice decisions to be those decisions arising out of enforcement investigations, which give rise to an obligation to issue a Warning or Decision Notice pursuant to s.395(1)(c) of FSMA.

FMI

2.13 The EDMC will similarly take all of the FMI related contested enforcement statutory notice decisions. The Bank considers statutory enforcement notice decisions to be those decisions arising out of enforcement investigations which give rise to an obligation to issue a Warning or Decision Notice pursuant to section s395(1)(c) FSMA or relate to similar powers under the Banking Act 2009 (BA) in relation to payment systems.

Resolution

2.14 The EDMC will take all of the Resolution related contested enforcement decisions. The Bank considers contested enforcement decisions to be decisions giving rise to a Warning or Decision Notice pursuant to sections 83ZT and 83ZU of the BA respectively.

2.15 Specific sanctioning powers for the relevant regimes are set out in Appendix 1.

EDMC procedure in contested cases

2.16 The EDMC, meeting as a full Committee or in a panel of at least three persons, will, once appointed, meet as often as necessary to discharge its functions. Each member appointed to a case panel and present is entitled to vote on the matter under consideration. Decisions by the EDMC are made by majority vote. If the numbers of votes for and against are equal, the Chairperson of the panel will have the casting vote.

¹ As stated above there will be a separate consultation about the EDMC's status in relation to the Scottish and Northern Ireland Banknote regime.

2.17 The EDMC will conduct itself in the manner appropriate to enable the Committee to determine the matter under consideration in an effective and timely manner. The EDMC will follow the procedures set out in Terms of Reference. Subject to that, the EDMC may determine its own procedures where they are not so specified.

2.18 Where the EDMC decides that the Bank should issue a Warning Notice the EDMC will:

1. notify the relevant parties in writing of that decision;
2. determine the wording of the Warning Notice; and
3. make appropriate arrangements for the Warning Notice to be issued and, if required, published.

2.19 Where the EDMC issues a Warning Notice, it will invite the addressee of the Warning Notice to make written representations in the first instance on the matters referred to in the Warning Notice. This may include representations regarding the facts relied on by the Bank and set out in the Warning Notice. The EDMC will specify the time allowed for making such written representations, but it will not be less than 14 days.

2.20 There is no obligation for the addressee to submit a response. The addressee may also choose to inform the EDMC that it does not wish to make such submissions and that it wishes to refer their case, via expedited procedure, directly to the Upper Tribunal or relevant judicial body, without making representations.¹ In these circumstances, the EDMC will proceed to determine whether to issue the relevant Decision Notice as soon as possible.

2.21 On receipt of written representations from an addressee, the EDMC will also invite that addressee of the Warning Notice to indicate whether it wishes to attend an oral hearing. If the addressee wishes to attend an oral hearing, the EDMC will arrange a suitable date for this to take place.

2.22 Where the EDMC decides that the Bank should issue a Decision Notice the EDMC will:

1. determine the wording of the Decision Notice; and
2. make appropriate arrangements for the Decision Notice to be issued.

2.23 If the EDMC determines that the Bank should not issue a Decision Notice, the EDMC will notify the parties in writing of that decision.

Support structure to assist the functioning of the Committee

2.24 For each contested case the Bank will appoint a team to provide secretarial support to the EDMC panel. The EDMC support team will be drawn from existing Bank secretariat resources, but would report to the EDMC Chairperson.

2.25 The EDMC will also be supported, as appropriate, by a lawyer of appropriate seniority who has not previously been involved in the investigation to provide appropriate legal advice, including from external advisers as required. The lawyer will report to the EDMC Chairperson.

1 Recommendation 35 of the HMT Review. See online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389063/enforcement_review_response_final.pdf

Cooperation with the FCA on joint or parallel investigations

2.26 As set out in the joint PRA and FCA Consultation Paper CP14/16, given the comparatively small number of joint investigations completed to date, the FCA and the Bank are approaching each investigation on a case by case basis. Both regulators believe it is too early to come to a settled approach to joint and parallel investigations and decision making in contested enforcement cases following joint or parallel investigations. The regulators intend to provide more detailed guidance on these matters once they have more experience of relevant joint investigations.

2.27 Question : Do you agree with the Bank proposals for the creation of the EDMC in terms of composition and independence, jurisdiction, decision making powers and process?

Appendices

1 Summary of sanctioning powers for the relevant regimes

Appendix 1 – Overview of the sanctioning powers of the Bank’s regimes:

The PRA

The PRA has the following powers in statutory enforcement notice decisions which give rise to an obligation to issue a Warning or Decision Notice pursuant to s.395(1)(c) of FSMA:

- withdrawing approved person status from an individual (s.63 of FSMA);
- issuing a prohibition order against an individual (s.56 of FSMA);
- imposing a fine (s.66(3)(a) of FSMA), suspending for such a period as it considers appropriate, any approval of the performance by an individual of any function to which the approval relates (s.66(3)(aa) of FSMA) or publishing a statement of an individual's misconduct (s.66(3)(b) of FSMA);
- the suspension of an authorised firm's Part 4A permissions (s.206A of FSMA); and
- imposing a fine (s.206 of FSMA) or public censure (s.205 of FSMA) on an authorised firm.

FMI

For the FMI regime, the Bank has the following powers in statutory enforcement notice decisions which give rise to an obligation to issue a Warning or Decision Notice pursuant to section s395(1)(c) FSMA or under the Banking Act 2009 (“BA”) in relation to Payment systems:

- the power to censure publicly (section 312E FSMA or section 197 BA);
- the power to impose a financial penalty (section 312F FSMA or section 198 BA);
- the power to impose a financial penalty or publicly censure parent undertakings (section 192K and Schedule 17A, para 17(1)(h) FSMA); and
- the power to disqualify a person from being an operator or holding a management position in a recognised payment system (section 200 BA).

Resolution

For the Resolution regime, the Bank has the following powers pursuant to 83ZR Banking Act 2009:

- publish a statement that a person has failed to comply with a relevant requirement;
- imposition of a financial penalty;

- Direct a person to refrain from certain conduct in future; and
 - Prohibit a person from holding offices or positions of responsibility in respect of a bank or banks.
-