Financial Services

Baker & McKenzie

Bank recovery and resolution

Ending the spectre of "too big to fail"

CONTENTS:

INTRODUCTION:

Recovery and resolution initiatives have been a priority for governments following the collapse of Lehman Brothers. The financial crisis evidenced the fragility of the financial system on the failure of a major bank. In order to protect the stability of the financial system and mitigate the systemic impact of any future bank failure efforts have been focussed on ensuring that banks are prepared for potential failure and that authorities have appropriate powers of intervention.

This Briefing reviews the background to international initiatives in this area and focusses in more detail on the European Union's Recovery and Resolution Directive. New legislation in this area has major implications for banks, as well as investors and counterparties.

The Financial Stability Board has urged the adoption of measures across the G20 States by the end of this year so that developments to achieve this will continue both in Europe and internationally.

The European Directive

On the first of January this year, the European Recovery and Resolution Directive (the "RRD")[1], which establishes a new framework for the resolution of failing credit institutions and investment firms, entered into force[2]. The RRD supersedes and replaces a patchwork of special resolution and special administration regimes enacted unilaterally by EU member states, including the UK, Germany, Spain, Belgium, France, Italy and Luxembourg.

By imposing a unified framework, the RRD goes some way towards removing the obstacles to an orderly cross-border resolution in the event of another European banking crisis. Furthermore, by introducing minimum standards for liabilities which are eligible to be written down or converted in the event of a bank's failure and by taking steps to prevent a bank's trading positions from being unwound or terminated disruptively, the RRD also represents a significant milestone in the battle to end "too-big-to-fail". Speaking on the eve of its entry into force, Jonathan Hill, the then newly appointed EU Commissioner for Financial Stability, Financial Services and Capital Markets Union, claimed that the RRD had brought an end to the spectre of taxpayer "bail-outs" in Europe[3].

However, the RRD is a highly complex measure, drafted and negotiated under pressures both practical and political. It imposes a number of onerous new practical requirements on financial institutions while leaving them only a few months to prepare for the introduction of these requirements.

Moreover, the measures reflect an approach to implementing international regulation which diverges from that taken in other jurisdictions, creating an uneven playing field in some areas and considerably exacerbating the challenges of cross-border resolution in relation to banks with a presence outside the EU.

Background and international context

On finalising the text of the RRD on 15 April 2014, Michel Barnier, then EU Commissioner for Internal Market and Services, declared that it was an essential part of a trio of new measures designed to secure a banking union for the Euro Area. In both its foundations and its reach, however, the RRD is much broader than his claim would suggest.

After Pittsburg, the European Commission published a communication identifying the reforms necessary to achieve an effective crisis management regime which would allow for the orderly resolution of a failing cross-border bank[4]. This communication launched the development of Commission policy in an area that would yield, in June 2012, a Commission proposal for a directive on bank recovery and resolution and, ultimately, the complex and comprehensive framework of the RRD.

The Commission was not, however, developing policy in an international vacuum at this time. In March 2010, the Basel Committee on Banking Supervision ("BCBS") published a report and a set of ten recommendations on cross-border bank resolution[5]. Three months later, at the Toronto Summit, the G20 Leaders endorsed the BCBS Recommendations and expressed their commitment to implement them[6].

The RRD, which applies to all EU member states, not just the Euro Area countries, has its historical roots in the 2009 G20 Pittsburgh Summit. Commitments entered into by G20 Leaders that year included an undertaking to...

"... develop resolution tools and frameworks for effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in the future."

[1] Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

[2] Provisions on bail-in will apply from 1 January 2016.

[3] European Commission press release, "A single rulebook for the resolution of failing banks will apply in the EU as of 1 January 2015" (31 December 2014).

[4] COM(2009) 561 "An EU Framework for Cross-Border Crisis Management in the Banking Sector" (20 October 2009).

[5] Basel Committee, Report and Recommendations of the Cross-border Bank Resolution Group (March 2010).

[6] G-20 Leaders' Declaration, Toronto Summit (27 June 2010).

The same year, the Financial Stability Board issued recommendations on systemically important financial institutions and called for an assessment of the legislative reform measures needed to accomplish effective resolution[7].

The Key Attributes of Effective Resolution

The FSB published recommendations on the Key Attributes of Effective Resolution Regimes of Financial Institutions (the "Key Attributes")[8] in 2011. These were endorsed by the G20 at the Cannes Summit[9]. They were ambitious in their scope and included a long list of elements to be incorporated into effective resolution regimes, including recommendations as to: scope; resolution authority; resolution powers; set-off; netting; collateralisation; segregation of client assets; safeguards; resolution funding; a legal framework for cross-border cooperation; crisis management groups; institution-specific cross-border cooperation agreements; resolvability assessments; recovery and resolution planning; access to information; and information sharing. The FSB urged the G20 Leaders to commit to implementing the Key Attributes by the end of 2015.

Not all G20 countries will be able to demonstrate compliance with the Key Attributes within the timeframe contemplated by the FSB and those who have already complied have adopted significantly different timetables within the window allowed.

The EU regime, as we have seen, came into force at the beginning of 2015 but was preceded by national regimes introduced in at least seven Member States (with a significant proportion of Europe's largest banks).

This staggered implementation of international regulation has meant that, if a globally systemically important financial institution were to fail during the transition period before full compliance with the Key Attributes, a significant number of legal uncertainties would undoubtedly be faced by national and regional authorities.

Not only has implementation of the Key Attributes been staggered, among the G20 jurisdictions which have introduced reforms to comply with the Key Attributes, divergent approaches have been taken to core recommendations.

An example which is likely to have practical implications for the cross-border financial markets is the divergence between the approaches to bail-in taken by the RRD and the Dodd-Frank Act in the US. This is discussed further below in the section on the bail-in resolution tool.

The Scheme

The schema of the RRD identifies three key stages in recovery and resolution:

- Planning for recovery and resolution;
- Early intervention for recovery; and
- Implementing resolution.

These three stages broadly correspond to Titles II, III and IV of the directive. Of these, it is resolution planning which is likely to represent the greatest practical challenge for financial institutions in the near future.

The development of recovery and resolution initiatives has taken place at an international level and not in a vacuum. Even so discrepancies in regimes exist.

The FSB's Key Attributes frame the debate on the scope of recovery and resolution initiatives.

The FSB's timetable for implementation are unlikely, however, to be met in all jurisdictions.

The staggered implementation of initiatives globally has given rise to inconsistency and will cause complexity and uncertainty in the event of a bank's failure.

- The UK, in particular, was an early adopter under the Banking Act 2009 of many of the elements subsequently incorporated into the Key Attributes. The UK's own framework proved to be a template for the European Union's RRD in several important respects.
- Likewise, the US introduced a new resolution framework in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd Frank Act") before the publication of the Key Attributes.
- The Japanese Deposit Insurance Act was revised in 2013 to implement the Key Attributes, the revised Act entering into force in March 2014.
- Hong Kong's supervisory authorities published a consultation paper on an effective resolution regime for financial institutions in January 2014, with a view to publishing a second stage consultation before introducing a draft Bill to the Legislative Council in 2015.

[7] FSB, Reducing the moral hazard posed by systemically important financial institutions – FSB Recommendations and Timelines (October 2010).

[8] Published 4 November 2011, revised with additional guidance on non-banking financial institutions 15 October 2014.

[9] G-20 Leaders' Declaration, Cannes Summit (4 November 2011).

Resolution Plans

Financial institutions established in the European Union and within the scope of the RRD—broadly, credit institutions and investment firms (collectively "institutions"), their financial subsidiaries, financial holding companies and EU branches of institutions established in third countries (i.e. non-EU jurisdictions)—are required to draw up and maintain a "recovery plan" under the provisions of the RRD. A recovery plan must set out the conditions and procedures which may be imposed on an institution in the event of a "significant deterioration of its financial situation" to ensure the timely implementation of any actions which must be taken to restore its financial position. These plans are to be submitted by institutions to their Competent Authorities for review and must include all the information set out in Section A of the Annex to the RRD.

The European Banking Authority ("EBA") has an important role in issuing guidelines to give further specification as to the information which must be set out in the recovery plan, the range of scenarios against which the plan must be stress-tested and the criteria by which it is to be assessed by the Competent Authority.

The EBA will play an important role in developing detailed requirements under the RRD.

In addition, Resolution Authorities (as designated by Member States) are required to develop a "resolution plan" for each institution within the scope of the RRD and will do so with the cooperation of the institution concerned and on the basis of information provided by the institution itself or its parent undertaking. The information to be provided to the Resolution Authority on request may include, at a minimum, the details set out in Section B of the Annex to the RRD, although, again, the EBA has a role in specifying the procedures, standard forms and templates for the provision of information.

Plans of both kinds are required for financial or mixed groups within the scope of the requirement, as well as for individual institutions.

The planning provisions of the RRD are likely to carry significant practical implications for institutions. Two practical matters are worthy of particular note.

- First, recovery and resolution plans are required to be updated at least annually which implies a significant ongoing commitment of human and other resources by both banks and their Competent Authorities.

Conflicts can arise within a group where an institution's financial situation may be affected by the position of another group company. These conflicts must be correctly managed.

- Second, attention should be given at an early stage to the possibility of conflicts of interest arising in the context of recovery or resolution planning for parent and subsidiary entities, where the solvency of one entity could potentially be preserved by taking action to the detriment of the other entity. Even where there are no conflicted individuals (for example, directors serving on the boards of both entities), the potential for such an outcome may present practical difficulties at the planning stage, particularly in a cross-border context. A further complexity will arise where there are group entities located in third countries, which are subject to resolution planning requirements in those countries.

In addition to requirements for recovery and resolution plans, Title II of the RRD also provides for the possibility of intra-group financial support arrangements, which may cover one or more subsidiaries and provide for financial support from a parent. Such arrangements must meet the conditions set out in the RRD and also any additional conditions developed by the EBA in technical standards. The arrangements must be notified to the parent entity's Competent Authority, which will review the proposal and authorise the arrangements if they meet the specified conditions. Presumably, the benefit for the group in entering into an agreement for support of this kind is that it may be perceived to improve the overall resolvability of the group and thus stave off unwelcome pre-emptive intervention by Resolution Authorities who have wide powers, under Article 17, to remove impediments to resolvability, including the power to require an institution to divest assets and/or to cease specified activities.

Early intervention

A number of powers are conferred on Competent Authorities under the RRD to intervene in the event of a deterioration in the financial situation of an institution by taking measures *prior to resolution* to bolster or reform its governance, management, legal or operational structures. These measures may include the appointment of a temporary administrator. There are a number of triggers for early intervention, one of which is that the institution is "likely in the near future" to breach capital adequacy requirements. The EBA is required to issue guidelines to promote the consistent application of triggers for the use of early intervention measures by Competent Authorities.

Given that early intervention measures will be implemented not only prior to insolvency but prior to resolution and in view of the fact that certain of the measures, including the appointment of an administrator, must be made public (under Article 29(1)), it will be important for institutions and their counterparties to consider whether measures of this kind are likely to constitute an event of default under financial contracts on market standard terms.

Intervention powers exist which are aimed at bolstering an institution prior to resolution. This includes powers to bring about a reform of governance, management, legal and operational structures.

Resolution

Title IV of the RRD sets out the tools and powers which a Resolution Authority will have at its disposal in the event of the failure or likely failure of an institution; the triggers which will enable it to use those tools and powers; and the resolution objectives to be pursued. These last include, amongst others, the objective of ensuring the continuity of critical functions, the avoidance of detriment to the financial system and the protection of public funds.

There are three broad threshold conditions which must be met in order for a Resolution Authority to exercise its powers:

1. The institution's Competent or Resolution Authority determines that the institution is failing or likely to fail. Circumstances in which an institution is deemed to be failing or likely to fail are set out in the RRD and require Competent Authorities to support their assessment by reference to "objective elements";
2. There is no reasonable prospect, having regard to the circumstances and taking other relevant factors into account, that any alternative action would prevent the failure of the institution within a reasonable time frame; and
3. A resolution action is necessary in the public interest. A resolution action will be treated as in the public interest if it is necessary for the achievement of and is proportionate to one of the resolution objectives set out in Article 31, and only be taken if a winding up or insolvency of the institution would not meet those objectives to the same extent.

Member States must ensure that four resolution tools are available to Resolution Authorities.

Member States are required to ensure that, where an institution is failing, a Resolution Authority will have the following four resolution tools at its disposal:

- a sale of business tool: this enables authorities to sell part of the business without shareholder consent;
- a bridge institution tool: this allows authorities to transfer all or part of the business to an entity owed by the authorities, which can continue to provide essential financial services pending onward sale;
- an asset separation tool: this enables the transfer of assets to a separate vehicle; and
- a bail-in tool, allowing unsecured debt to be written down or converted to equity to ensure that the creditors of an institution bear appropriate losses and that the need for a taxpayer "bail-out" is avoided.

Specified resolution tools are a sale of business tool, a bridge institution tool, an asset separation tool and a bail-in tool.

Of these, the asset separation tool can be used only in conjunction with one of the other resolution tools. Otherwise, the tools are exercisable either individually or in combination.

Resolution Tools

The sale of business tool and the bridge institution tool will be readily recognisable to those who are familiar with the Banking Act 2009 and bail-in has been on the table of regulatory reform since at least October 2010 when the FSB announced the establishment a working group to "examine the legal and operational aspects of both contractual and statutory bail-in mechanisms".[10]

The asset separation tool, however, is a new introduction under the RRD. It allows the Resolution Authority to transfer assets to one or more purpose-built asset management vehicle(s) owned, wholly or in part, by public authorities. It is not entirely clear how this tool will be applied in practice. Article 42(3), which provides that the asset managers appointed by the Resolution Authority must manage the assets "with a view to maximising their value through eventual sale or orderly wind down" may suggest with equal likelihood that the tool will be applied to ringfence valuable assets or to isolate non-performing ones.

The asset separation tool is a new tool under the RRD.

The threshold conditions set out in Article 42(5) suggest, however, that the tool will be applied to protect not the assets themselves but, first, any financial markets at risk of being overwhelmed by a disorderly disposal of the assets and, second, the viability of the institution under resolution. This being so, the objective of value maximisation set out in Article 42(3) is a key constraint and should prevent any attempt to exploit the assets for the benefit of the institution in resolution in a way which is destructive of their value. This is particularly important where the assets being separated consist of shares in a solvent subsidiary, which itself may be a financial entity located in a different jurisdiction to the resolution forum.

[10] FSB, Reducing the moral hazard posed by systemically important financial institutions – FSB Recommendations and Timelines, ibid., p. 6.

Bail-in

The bail-in tool will potentially apply to all liabilities of an institution in resolution unless they fall within the exceptions set out in the RRD, which are broadly:

- guaranteed deposits,
- secured liabilities;
- client assets or client monies liabilities;
- short-term liabilities owed in the interbank market or to clearing systems;
- and/or operational liabilities owed to employees, trade creditors, deposit guarantee schemes and tax and social security authorities.

The categories of liabilities to which a bail-in applies will remain somewhat unclear, however, until the resolution takes place. Article 44(3) provides that the Resolution Authority may, exceptionally, exclude certain liabilities to achieve specified objectives, such as the prevention of contagion. Derivatives are to receive tailored treatment and will be the subject of detailed regulatory technical standards on valuation for the purpose of write-down issued by the EBA. To ensure that banks have sufficient liabilities within the scope of the bail-in tool to achieve effective resolution and avoid a liquidation, the RRD establishes a "minimum requirement for eligible liabilities" or "MREL". This approach stems from international regulatory commitments on bail-inable liabilities, where it is referred to as establishing a bank's "loss-absorbing capacity" (also "total loss absorbing capacity" or "TLAC"). In November 2014 the FSB published a proposal on the *Adequacy of Loss-Absorbing Capacity of Global Systemically Important Banks*, including a term sheet giving details of its recommendations for eligible liabilities.

Bail in raises many complexities. These are particularly acute in a cross-border context.

Bail-in raises a number of challenging issues that are beyond the scope of this paper. Some of the complexities which arise in the context of cross-border resolution, however, are worth noting.

The first is that while uninsured depositors may be bailed-in under the RRD, the same is not true under the Dodd-Frank Act in the United States. This difference in the priority of claims may impede cross-border resolution by creating an uneven playing field for uninsured depositors. The impediment may be exacerbated by the difference in the amount which is insured by the public deposit guarantee scheme—in the US, deposits are guaranteed to a value which is at least twice the value of deposits guaranteed under schemes available in the EU.

The second is that there are significant differences between the MREL provisions of the RRD and the FSB recommendations on TLAC with respect, inter alia, to the scope of eligible instruments. These differences could, if replicated in other G20 countries, create an uneven playing field for banks in different jurisdictions. Moreover, many G20 countries continue to face difficulties in meeting international deadlines and objectives for adopting provisions on bail-in which will exacerbate any competitive discrepancies.

Finally, whilst the RRD endeavours to provide for the bail-in of liabilities under instruments governed by the law of a third—i.e. non-EU—country, by requiring institutions to include a term in the instrument contemplating write-down or conversion in the event of the institution's resolution, it is not clear that this will ameliorate the challenges posed by resolving groups of companies which are located partly outside the EU or facilitate the bail-in of debt issued by group companies in third countries.

Overall, markets have yet to determine the extent to which bail-in should cause the cost of banks' funding to rise and it is unclear how, if at all, it is being factored in to the pricing of debt. It seems likely, however, that the new provisions are being considered in legal opinions produced for regulatory purposes as to the recognition and enforceability of derivative transactions.

Resolution powers

Chapters V and VI of the RRD confer a number of powers on resolution authorities which are designed to facilitate the optimal use of the resolution tools. These include, but are not limited to, powers to:

- write down or convert capital instruments (the exercise of this power will be required where the conditions for resolution have been met, before any other resolution action is taken);
- transfer assets rights liabilities, shares and other instruments of ownership;
- write down, convert, reduce, cancel or amend the maturity of the eligible liabilities, debt instruments and/or the shares and other instruments of ownership issued by an institution in resolution;
- require an institution to issue new shares or other capital instruments;
- close out and terminate financial contracts;
- temporarily suspend the termination rights of counterparties;
- suspend payment or delivery obligations;
- restrict the enforcement of security interests; and
- take control of an institution and/or remove or replace the management body.

The suspension of termination rights is an issue that has received considerable attention recently. Much progress has been made in establishing contractual agreement to RRD requirements in these areas.

Of these powers, one which has been receiving a considerable amount of international attention recently is the power to suspend termination rights. It is clear that, in a cross-border context, the RRD's provisions on the exclusion and suspension of termination rights may have no effect whatsoever if the counterparty is in a position to claim under the terms of the contract, applying a foreign governing law, in a third country jurisdiction against assets in that jurisdiction. This raises the spectre of a disorderly resolution as some overseas counterparties proceed to terminate and others are prevented from doing so by a temporary suspension of their rights.

In a consultative document published 29 September 2014, the FSB noted this problem in relation to the growing adoption of suspension provisions in G20 countries and recommended the use of contractual mechanisms to achieve cross-border recognition.[11]

The Resolution Stay Protocol has given contractual effect to the stay and suspension provisions.

The most notable example of a move to incorporate such mechanisms has been the development of a Resolution Stay Protocol (the "Protocol") by the International Swap and Derivatives Association ("ISDA"). The Protocol relates to over-the-counter ("OTC") bilateral derivatives traded under the ISDA Master Agreement (1992 and 2002 versions) and enables adhering counterparties to opt into the stay and suspension provisions of overseas resolution regimes by agreeing a change to their ISDA derivatives contracts. The first wave of voluntary adoption of the Protocol occurred in early November 2014 and includes eighteen major banks and certain of their affiliates. This may be extended to other banks and institutions in due course. Some asset management firms have stipulated, however, that since the opt-in provisions entail the giving up of certain advantageous contractual rights on close-out, they are unable to adopt the Protocol voluntarily owing to their fiduciary obligations.

[11] FSB, Cross-border recognition of resolution action – Consultative Document (29 September 2014).

Cross-border resolution

The RRD is the first initiative by a major G20 jurisdiction to provide a framework for cooperation on resolution planning with public authorities in foreign jurisdictions and for the recognition and enforcement of foreign resolution proceedings. Provisions in Title VI of the RRD provide, first, that the Commission may submit to the Council proposals for the negotiation of agreements with one or more third countries regarding the means of cooperation regarding resolution planning; and, second, that decisions on the recognition of third county resolution proceedings are to be reached by resolution colleges (i.e. cooperative groups of resolution authorities which will be established in respect of the resolution of international groups with a significant branch presence in the EU under Article 89 of the RRD) or, in their absence, by resolution authorities on an individual basis.

Pending ratification of international agreements on cooperation, the EBA may conclude non-binding framework agreements with third country authorities. It should be noted that, despite being a welcome attempt to provide for cross-border resolution, the RRD does not significantly increase transparency or predictability with regard to the outcome of conflicts of resolution regimes. The language is broadly permissive and discretionary and the framework set out in Title VI does little to undercut the lessons learnt in the last crisis: i.e. that bank resolution can quickly become a localised, political issue rather than a coordinated rule-driven process.

The fact that bank resolution is likely to be an important local political issue means that conflicts between different national regimes will continue to be likely.

Within the borders of Europe the key to group resolution will be resolution colleges established in respect of the resolution of institutions subject to consolidated supervision under Article 88 of the RRD. These will be chaired by the group Resolution Authority.

Safeguards

The RRD is designed to protect creditors from incurring greater losses in a resolution than they would do in a winding up. This safeguard is readily recognised as an embodiment of the "no creditor worse off" principle first adopted under the UK Banking Act 2009 and its subsidiary legislation. This means that where, in the circumstances of a partial transfer of the institutions' assets and liabilities to another entity (e.g. a bridge bank), some creditors' claims are not transferred and/or where there is a bail-in of creditors' claims against the institution, there is a mechanism in place to ensure that each creditor receives at least as much, in satisfaction of its claim, as it would have done in insolvency proceedings. Compensation is payable from the resolution financing arrangements where any creditor can demonstrate that it has incurred greater losses than the safeguard would otherwise allow.

In order to implement this safeguard effectively, the RRD provides that Member States should ensure that an independent valuation of the institution is carried out after the exercise of resolution powers. The valuation will be subject to challenge in judicial proceedings. In the case of the resolution of the Dunfermline Building Society in the UK under the Banking Act 2009, provision was made by means of the Dunfermline Building Society Independent Valuer Order 2009 for "any person who is affected by the determination" to refer a determination by the independent valuer to the Upper Tribunal for review.

As far as counterparties are concerned, the RRD provides further safeguards in respect of security arrangements, title transfer collateral arrangements, set-off arrangements, netting arrangements, structured finance arrangements and covered bonds. It also requires member states to ensure that resolution "does not affect" the operation of trading, clearing and settlement systems.

Interaction with the Credit Institutions Winding Up Directive

Resolution may or may not be successful. Even a successful resolution may result in the winding up of a residual "bad bank" after a bridge bank has been created or in the liquidation of underperforming subsidiaries within a larger group. For that reason, it is important for banks and their creditors to consider how a transition will be effected from bank resolution to bank insolvency. A framework for the latter has long been established under the umbrella of Directive 2001/24/EC on the reorganisation and winding-up of credit institutions ("CIWUD"). The question arises how the RRD will interact with that measure.

Article 117 of the RRD applies CIWUD in all situations in which resolution tools are applied under the RRD and amends CIWUD in certain key respects, the first and most significant of which is to extend the insolvency regime to investment firms so that all institutions covered by the RRD are also covered by CIWUD. The definition of "reorganisation measures" is also amended expressly to include "the application of the resolution tools and the exercise of resolution powers provided for in [the RRD]". Other modifications are less significant and include revisions to CIWUD's provisions on netting and on repurchase agreements to allow for the suspension of termination rights under the RRD.

These revisions do not, however, precisely clarify the manner in which the two directives will interact and several questions remain. One of these is whether early intervention measures under Title III of the RRD—which could theoretically affect the position of third parties by, for example, changing the legal structure of the failing institution—would ever amount to "reorganisation measures" under CIWUD, even though they do not involve the application of resolution tools. On balance, it would appear from the drafting of the amendments that early intervention is not intended to trigger the application of CIWUD. Another question is how Article 23 of CIWUD, which preserves creditor's rights of set-off in the event of reorganisation measures and which remains unamended, is intended to interact with the RRD's provisions staying and suspending termination rights (defined in Article 2 of the RRD to include set-off rights). A purposive reading of CIWUD would suggest that Article 23 is intended to be "without prejudice" to the suspensory provisions of the RRD and it seems likely that this is how it will be interpreted.

Recovery and Resolution in the UK

The RRD has been implemented in the UK by means of a series of amendments to the existing regime established by the Banking Act 2009. For the purposes of this framework, the Bank of England is the Resolution Authority and the Prudential Regulation Authority ("PRA") is the competent authority for banks, building societies, credit unions, insurers and major investment firms with responsibility for, among other things, overseeing the submission of recovery and resolution plans and determining whether the threshold conditions for early intervention have been satisfied. The Financial Conduct Authority ("FCA") is the Competent Authority for any investment firms caught by the RRD which are not regulated by the PRA.

Chief among the statutory instruments implementing the RRD is the Bank Recovery and Resolution Order 2014 which makes revisions to several existing provisions in order to align them with the RRD and create new powers for the Bank of England, as resolution authority. It is supplemented, with respect to building societies, by the Building Societies (Bail-in) Order 2014.

Separately, key creditor protection measures which apply to any exercise of the bail-in tool are introduced by the Banking Act 2009 (Restriction of Special Bail-in Provision etc) Order 2014—which imposes restrictions on the making of special bail-in provision by the Bank of England and introduces protection for claims not otherwise covered by exclusions set out in the Banking Act—and the Banking Act 2009 (Mandatory Compensation Arrangements Following Bail-in) Regulations 2014, which specify provisions to be included in a compensation order following the exercise of bail-in powers.

In addition, HM Treasury, the PRA and the FCA have all released rules and/or guidance on the implementation of the RRD in the UK. Of particular note is the *Revised Special Resolution Regime Code of Practice* released by HM Treasury on 15 March 2015 which gives further detail on how resolution tools and powers are expected to be used. The PRA and FCA have both released policy statements setting out rules and supervisory guidance on the submission of recovery and resolution plans.[12]

The role of the EBA

Under the RRD the EBA has an important role in giving further specification as to the application of the RRD by national authorities in order to promote a consistent approach to the directive across the European Union. To date, the EBA has published final regulatory or implementing technical standards in the following areas:

- the content of recovery plans;
- the assessment of recovery plans by competent authorities;
- the content of resolution plans; and
- establishing the independence of valuers.

And the EBA has published final guidelines on:

- the type of tests, reviews or exercises which may lead to the precautionary recapitalisation of an institution;
- measures to reduce or remove impediments to resolvability; and
- the range of scenarios to be used in recovery plans.

The EBA has also consulted on 24 sets of draft guidelines or standards which it is mandated to issue under the RRD variously by 3 July 2015, 3 January 2016 or 3 July 2016. Further consultations can be expected in due course.

[12] See FCA, PS15/2; PRA PS1/15; PRA SS8/13 (updated January 2015); and PRA SS19/13 (updated January 2015).

CONCLUSION:

The RRD is in many ways a remarkable achievement and a timely one; it ensures that the resolution of a systemically significant cross-border European bank will not have to take place under the patchwork of conflicting national resolution regimes which preceded it. Nonetheless, it is highly complex, reflects an approach to implementing international regulation in a way which diverges from that taken in other jurisdictions and gives rise to a resolution regime which is far from being as transparent and predictable as the markets would wish, particularly in a cross-border context.

Inevitably, the proof of the RRD pudding will be another EU banking crisis. Banks and their counterparties will then discover whether or not it is as palatable as its supporters currently claim.

Your Baker & McKenzie contacts

Corinne Schot
Partner, Amsterdam
+31205517415
corinne.schot
@bakermckenzie.com

Pierre Berger
Partner, Antwerp
+ 32 3 213 40 40
pierre.berger
@bakermckenzie.com

Manuel Lorenz
Partner, Frankfurt
+496929908606
manuel.lorenz
@bakermckenzie.com

Arun Srivastava
Partner, London
+44 207 919 1285
arun.srivastava
@bakermckenzie.com

Laurent Fessmann
Partner, Luxembourg
+352261844205
laurent.fessmann
@bakermckenzie.com

Ana Garcia
Partner, Madrid
+34912304514
ana.garcia
@bakermckenzie.com

Eugenio Muschio
Associate, Milan
+390276231468
eugenio.muschio
@bakermckenzie.com

Max Gutbrod
Partner, Moscow
+74957872700
max.gutbrod
@bakermckenzie.com

Cyril Tour
Partner, Paris
+33144176437
cyril.tour
@bakermckenzie.com

Libor Basl
Partner, Prague
+420236045001
libor.basl
@bakermckenzie.com

Sofia Törnroth-Nyberg
Partner, Stockholm
+46856617763
sofia.tornroth-nyberg
@bakermckenzie.com

Georg H. Diwok
Partner, Vienna
+43124250430
georg.diwok
@bakermckenzie.com

Konrad Konarski
Partner, Warsaw
+48224453129
konrad.konarski
@bakermckenzie.com

Theodor Haertsch
Partner, Zurich
+41443841211
theodor.haertsch
@bakermckenzie.com

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