

Client Brief

BANKING & FINANCE

JUNE 2014

BANK RECOVERY AND RESOLUTION DIRECTIVE. STATUS OF ROMANIAN RESOLUTION MEASURES

INTRODUCTION

On 12 June 2014, the Bank Recovery and Resolution Directive (the “**BRRD**”) was published with the Official Journal of the European Union. The BRRD provides a full framework for the recovery and resolution of credit institutions and investment firms (generally referred to as “**Institutions**”), by applying adequate tools to prevent insolvency or, when insolvency occurs, to minimise negative repercussions, whilst preserving the systemically important functions of the institution concerned.

The BRRD will enter into force on the twentieth day following that of its publication with the Official Journal of the European Union i.e. on the 3 July 2014. Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the BRRD by 31 December 2014 and must apply such provisions as of 1 January 2015 and, with respect to the bail-in tool, as of 1 January 2016.

TOOLS SET FORTH UNDER THE BRRD

In order to meet the purposes stated above the following tools are set forth under the BRRD:

A. Preparation

Such tool is aimed to minimise the occurrence of situations which might lead to financial stress or to the failure of an Institution and includes the drafting of (i) *recovery plans* – by the Institutions themselves and (ii) *resolution plans* - by the resolution authority, after consultation with the supervision authority.

Recovery plans shall be drafted by Institutions, both at individual level and at group level and should include specific intervention mechanisms in order to reestablish the long term sustainability of the Institution. Such plans shall be assessed and approved by the supervision authorities.

On the other hand, the resolution authorities, in cooperation with the supervision authorities, prepare resolution plans setting out various options that the Institution may implement in respect of resolution tools and powers.

On the basis of such resolution plans, the resolution authorities may assess the resolvability of an Institution. If they identify obstacles to resolvability, the resolution authorities may require an Institution to take appropriate measures, such as: to revise any intragroup financing agreements or review the absence thereof, to limit its maximum individual and aggregate exposures, to impose specific or regular additional information requirements relevant for resolution purposes, to divest specific assets, to restrict or prevent the development of new or existing business lines or to change the legal and operational structure.

B. Early intervention

The BRRD provides that the supervision authorities should be granted with an extended set of powers to enable them to intervene if an Institution infringes or, due to a rapidly deteriorating financial condition, is likely in the near future to infringe certain requirements, such as, *inter alia*, the prudential requirements for credit institutions and investment firms.

Such set of powers includes requiring the management body of the Institution to implement one or more of the arrangements or measures set out in the recovery plan, requiring one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties or requiring changes to the legal or operational structures of the Institution, as well as appointing one or more temporary administrators to the Institution.

C. Resolution

Within the resolution frame, the resolution authorities must comply with certain principles, amongst which (i) the principle that losses are primarily borne by the shareholders and secondly by the creditors of the Institution under resolution, in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in the BRRD and (ii) the principle that no creditor shall incur higher losses than those it might have incurred within the regular insolvency proceedings.

The BRRD sets forth the following resolution tools which are to be applied by resolution authorities in the scenario where a distressed Institution continues to fail:

- (i) ***the sale of business tool*** – such sale is to be performed without the consent of the shareholders and without complying with the regular procedure;
- (ii) ***the bridge institution tool*** – the business is entirely or partly transferred to an institution which is wholly or partially owned by one or more public authorities and which maintains critical functions with a view to further selling the institution;
- (iii) ***the asset separation tool*** – the transfer of assets and liabilities to an asset management vehicle wholly or partially owned by one or more public authorities with a view to maximizing their value through eventual sale or orderly wind down; and

- (iv) *the bail-in tool* – which entails (i) recapitalizing the Institution, if its financial stability may be reestablished, or (ii) converting into equity or reducing the principal amount of claims or debt instruments that are transferred (x) to a bridge institution with a view to providing capital for that bridge institution or (y) under the sale of business tool or the asset separation tool.

The BRRD also provides that the resolutions authorities shall be vested with all *resolution powers*, necessary in order to apply the resolution tools to the Institutions (e.g. power to require from any person the provision of information, power to require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership, power to close out and terminate financial contracts or derivatives contracts, power to remove or replace the management body and senior management of an institution under resolution).

Furthermore, the BRRD provides that, where one or more resolution tools have been applied by the resolution authority, appropriate *safeguards* should also be implemented in relation to such tools.

It is also noteworthy that, in the context of a cross-border group resolution, the BRRD provides for a set of principles aiming at achieving an improved cooperation between resolution authorities, supervision authorities and other authorities ensuring that decisions are made and action is taken in a coordinated and efficient manner and that coordination and cooperation are most likely to achieve a result which lowers the overall cost of resolution.

ROMANIAN BANKING LAW RESOLUTION MEASURES

The Romanian Banking Law (Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, as further amended) provides for a set of special procedures that may be applied by the National Bank of Romania (the “NBR”) in the context where Romanian credit institutions are facing financial difficulties. Such procedures include the *special supervision* (in Romanian *supravegherea specială*), the *special administration* (in Romanian *administrarea specială*) and, more recently¹, the *resolution measures* i.e. the so-called “*stabilisation measures*” (in Romanian, *măsuri de stabilizare*).

The applicability of the stabilisation measures is subject to the existence of a threat to financial stability and the purpose thereof is to maintain the financial stability and market discipline, protect the secured depositors and ensure that the credit institution’s activity continues to be carried out, without interruption.

Depending on the situation, the NBR may decide to adopt one of the following stabilisation measures:

- (i) *total or partial transfer of assets and liabilities* to one or several eligible institutions;
- (ii) *designation of the Bank Deposit Guarantee Fund as manager and, as the case may be, as shareholder*, if the voting rights of the shareholders controlling the credit institution in question has previously been suspended; and

¹ Stabilisation measures are applicable since 21 January 2012, when Government Ordinance no. 1/2012 amending the Romanian Banking Law entered into force

- (iii) *transfer of assets from a credit institution to a bridge bank* set up for such purpose.

Further to the BRRD entering into force, the Romanian legal framework on recovery and resolution measures would have to be reviewed, reinforced and further detailed, particularly, in respect of the tools used during the preparation and early intervention stages, as well as of the powers held by the relevant authorities.

We will keep you updated on further Romanian legal developments in relation to the implementation of the BRRD.

If you are interested in receiving further information on this topic, please do not hesitate to contact us.

You can also find this legal update in the News section of our website www.leroylaw.ro

Contact

LEROY ȘI ASOCIAȚII SCA
10-12 Maior Gh. Șonțu Str.
011448 Bucharest
tel. +40 (21) 223 03 10
fax: +40 (21) 223 03 42
www.leroylaw.ro

ANDREEA TOMA

Partner

andreea.toma@leroylaw.ro



CRISTINA TOGAN

Managing Associate

cristina.togan@leroylaw.ro



ADRIANA SPĂȚARU

Associate

adriana.spataru@leroylaw.ro



DISCLAIMER: This free electronic publication is edited by the law firm Leroy si Asociații and is intended to provide non-exhaustive, general legal information. This publication should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein. Leroy si Asociații shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of this information.