

Client Brief

BANKING & FINANCE

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DRAFT LAW TRANSPOSING THE BANK RECOVERY AND RESOLUTION DIRECTIVE

INTRODUCTION

On 11 June 2015, a draft law regarding the recovery and resolution of credit institutions and investment firms, and for amending and completing certain enactments in the financial field (the “**Draft Law**”), transposing the Bank Recovery and Resolution Directive (the “**BRRD**”), was published for public consultation on the web-site of the Romanian Ministry of Public Finances.

The Draft Law is meant to encompass the entire framework for the recovery and resolution of credit institutions and investment firms, and to repeal the existing reorganisation provisions set out under the Banking Act (Government Emergency Ordinance no. 99/2006) consisting in special procedures¹ that may be applied by the National Bank of Romania (the “**NBR**”) with respect to Romanian credit institutions facing financial difficulties.

Furthermore, in view of aligning the existing legal framework with the BRRD, the Draft Law sets out amendment proposals with respect to important enactments including the Banking Act, the Insolvency Act (Law no. 85/2014), the Capital Market Act (Law no. 297/2004) and the Government Ordinance no. 9/2004 regarding financial collateral agreements.

Secondary legislation will be issued by the NBR and the Financial Supervisory Authority (the “**FSA**”), in their capacity as supervisory and resolution authorities, in order to implement the Draft Law further to its entry into force, which will take place within 3 days as of the publication of the enactment with the Official Gazette, except for certain provisions related to the bail-in tool, which will enter into force on 1 January 2016.

TOOLS SET FORTH UNDER THE DRAFT LAW

In line with the BRRD, the Draft Law sets forth the following tools to be used in order to manage a financial crisis:

- ✓ **preparation** - entailing the drafting of *recovery plans* and *resolution plans*;
- ✓ **early intervention** - entailing the supervisory authority’s rights to intervene and require *inter alia* the implementation by the institution’s management body of one or more of the measures set out in the recovery plan or the appointment of one or more temporary administrators to the institution; and

¹ Such procedures include the *special supervision* (in Romanian, *supravegherea specială*), the *special administration* (in Romanian, *administrarea specială*) and the “*stabilisation measures*” (in Romanian, *măsuri de stabilizare*).

- ✓ **resolution** - entailing the resolution authority's right to apply the following resolution tools² 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 maintains critical functions with a view to further selling the business;
 - (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 asset separation tool.

CLOSE-OUT NETTING ISSUES - RESOLUTION POWERS AND SAFEGUARDS UNDER THE DRAFT LAW

The Draft Law fully transposes BRRD provisions with respect to the *resolution powers* and *ancillary powers* the resolution authority is vested with in order to apply the resolution tools to the distressed institutions.

Thus, the National Bank of Romania, as resolution authority is vested *inter alia* with the powers to:

- ✓ close out and terminate financial contracts or derivatives contracts for the purposes of applying the bail-in tool;
- ✓ modify or terminate the clauses of a contract to which the resolved institution is a party ("*contractual modification power*");
- ✓ exclude certain contractual terms in early intervention and resolution - the prohibition of contracts' termination by reason only of a crisis prevention measure taken in early intervention or a crisis management measure taken during resolution, provided that substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed;
- ✓ temporary stay termination rights for 2 business days provided that substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed. Such termination rights may however be exercised at the expiry of the 2 business days term as follows: (a) if all contractual rights and liabilities are transferred as a whole to another entity, the counterparty may exercise its termination rights in accordance with the agreement only provided that the event of default continues or a new event of default occurs and (b) if the

² Romania has not exercised the option set forth under the BRRD to provide for additional resolution tools and, therefore, the Draft Law implements at national level only the four resolution tools set forth under the BRRD.

contractual rights and liabilities are retained by the institution in resolution and the NBR has not applied the bail-in tool, the counterparty may exercise its termination right in accordance with the terms of the agreement once the period of stay has ended.

Furthermore, in line with the BRRD, the Draft Law 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.

In particular, the Draft Law states that there is “*appropriate protection*” for title transfer financial collateral arrangements and set-off and netting arrangements from:

- (a) the transfer by the NBR, as resolution authority, of some, but not all, of the rights and liabilities of an institution in resolution to another entity or from a bridge-bank or an asset management vehicle to another person;
- (b) the modification or termination by the NBR of the clauses of a contract to which the resolved institution is a party (“*contractual modification power*”).

Thus, under the Draft Law, it is expressly stated that title transfer financial collateral arrangements, set-off and netting arrangements benefit from appropriate protection in order to prevent the transfer of some, but not all, of the rights and liabilities under a title transfer financial collateral arrangement, a set-off arrangement, or a netting arrangement, between the institution in resolution and another person and the modification or termination of such protected rights and liabilities by exercise of an ancillary power by the NBR. For such purposes, the rights and liabilities are deemed protected under such arrangements if the parties have the right to set-off or net such rights and liabilities.

As regards the remedy for any breach of the safeguard by the resolution authority, the Draft Law provides that NBR’s decisions may be challenged with NBR’s board of directors and in court, however such challenge does not automatically stay the effects of the challenged decision, which remains enforceable. The annulment of a decision of the NBR, as resolution authority does not affect any administrative act or transaction concluded by the NBR on the basis of the annulled decision and the only remedy with respect to such decision is limited to compensations granted by the NBR, as resolution authority for the losses incurred by the claimant further to its decision or measure.

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

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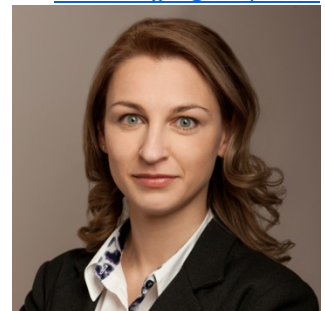
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