

## Client Brief

BANKING & FINANCE

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### LAW REGARDING THE RECOVERY AND RESOLUTION OF CREDIT INSTITUTIONS AND INVESTMENT FIRMS

#### INTRODUCTION

*On 03 December 2015, Romania's President has promulgated the law regarding the recovery and resolution of credit institutions and investment firms (the "BRR Law"), transposing the Bank Recovery and Resolution Directive (the "BRRD").*

*The BRR Law is now pending publication with the Official Gazette and will enter into force within three days as of such publication, except for certain provisions related to the bail-in tool and the government financial stabilisation tools, which will enter into force on 1 January 2016.*

In a nutshell, the BRR Law transposes all the principles and tools set forth under the BRRD with a view to achieving the required harmonisation of the procedures for resolving institutions at European Union level.

As of the date of its entry into force, the BRR Law will repeal and replace the special reorganisation procedures currently set out under the Banking Act (Government Emergency Ordinance no. 99/2006) and will amend certain provisions of 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 with a view to aligning such enactments with the BRRD principles.

Secondary legislation will be enacted by the National Bank of Romania ("NBR") in line with the recommendations issued by the European Banking Authority ("EBA").

#### TOOLS SET FORTH UNDER THE BRR LAW

*Preparation, early intervention and resolution* are the three tools to be used in accordance with the BRR Law in order to manage a financial crisis. Furthermore, the **resolution tools** regulated under the BRR Law are the following: (i) *the sale of business tool* (shares or other instruments of ownership issued by the relevant institution or of all or part of its assets, rights or liabilities are transferred to a purchaser that is not a bridge institution), (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), (iii) *the asset separation tool* (assets, rights or liabilities of an institution under resolution or of a bridge institution are transferred to one or more asset management vehicles wholly or partially owned by one or more public authorities) and (iv) *the bail-in tool* (either (i) recapitalising the institution, if its financial stability may be re-established, or (ii) converting into equity or reducing the principal amount of claims or debt instruments that are transferred (x) to a bridge institution or (y) under the sale of business tool or asset separation tool).

**ISSUES RELATING TO DERIVATIVES AND FINANCIAL CONTRACTS - RESOLUTION POWERS AND SAFEGUARDS UNDER THE BRR LAW**

The BRR Law fully transposes BRRD provisions with respect to the *general* and *ancillary resolution powers* vested in the resolution authority 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;

As regards the **scope of the bail-in tool**, the BRR Law states that the NBR shall not exercise the write down or conversion powers in relation to certain liabilities, amongst which, *secured liabilities* including covered bonds and liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which, according to national law, are secured in a way similar to covered bonds and *liabilities to institutions with an original maturity of less than seven days*. Note that the *secured liability* is defined under the BRR Law as “*a liability where the right of the creditor to payment or other form of performance is secured by a privilege, pledge or other real security agreement or by any other means of securing, regardless of the legal form in which the security is created, including liabilities arising from repurchase transactions or other title transfer collateral arrangements*”.

As regards the **implementation of the bail-in tool** with respect to derivatives, the BRR Law states that:

- (i) the NBR shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the derivatives.
  - (ii) where a derivative liability has been excluded from the application of the bail-in tool, the NBR shall not be obliged to terminate or close out the derivative contract.
  - (iii) where derivative transactions are subject to a netting agreement, the NBR, as resolution authority, or an independent person shall determine, as part of the required valuation, the liability arising from those transactions on a net basis in accordance with the terms of the agreement.
- ✓ 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 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 BRR 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, it being specified that, both in case of partial transfers and in the case of the bail-in tool, the shareholders and those creditors whose claims have not been transferred or the shareholders and creditors whose claims have been written down or converted to equity, respectively, *shall not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings*.

In particular, the BRR Law states 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 BRR 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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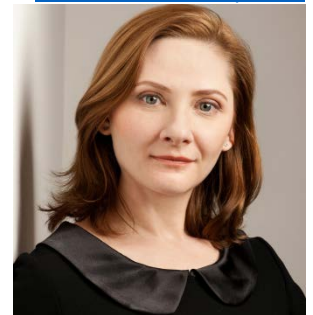
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