

Changes to the Banking Act 2009—what will they mean in practice?

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Restructuring & Insolvency analysis: Jeremy Jennings-Mares, partner at Morrison & Foerster, explains the background to the Bank Recovery and Resolution Order 2016 and considers its key changes.

Original news

Bank Recovery and Resolution Order 2016, [LNB News 19/12/2016 125](#)

SI 2016/1239: From 16 December 2016, the special resolution regime for banks and investment firms was amended to strengthen and clarify the UK's transposition of the EU Bank Recovery and Resolution Directive 2014/59/EU (BRRD).

When did the new SI come into force?

The instrument was made on 15 December 2016 and came into force on 16 December 2016.

What is the rationale for the changes?

The UK transposed the BRRD into UK law in January 2015, by means of amending part of the Banking Act 2009 (BA 2009). The part of BA 2009 being amended contains the provisions that constitute the UK's special resolution regime, and since January 2015, the UK Treasury has identified a number of instances where changes could be made to BA 2009 which should improve the functioning of the UK resolution regime, as well as clarifying the transposition of the BRRD.

What are the main changes?

Firstly, there were changes in relation to the provisions that preserve the continuity of contracts in the event of a resolution. BA 2009, s 48Z provided that the occurrence of a crisis prevention measure or a crisis management measure (each as defined in BA 2009) would not trigger any default event provision in a contract to which any of the entity under resolution, its subsidiaries or other group entities are party, provided that the relevant entity continues to comply with its substantive obligations under that contract. The changes to BA 2009, s 48Z allow the Bank of England or, in the case of a share transfer order, the Treasury to determine that a resolution instrument should not be prevented from triggering default event provisions in a contract, so long as they consider that making such an exception to BA 2009, s 48Z would assist the resolution proceedings.

Secondly, the Order amends the Financial Services and Markets Act 2000, to provide powers for the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), prior to the onset of resolution proceedings, to remove and replace directors or senior executives of a firm (or its parent) where there is a significant deterioration in its financial situation or a serious infringement of a regulatory requirement or provision of its constitutional documents. In addition, they are given powers to appoint a temporary manager if, among other things, such removal and replacement would not be sufficient to reverse the deterioration or end the infringement. The FCA and the PRA are also given power to convene a shareholder meeting if they had required the management to convene one and the management had failed to do so.

Thirdly, the Order provides the Bank of England, as the resolution authority for UK firms, with power to make a property transfer order in relation to the UK branches of non-EEA institutions, in respect of which the Bank of England has made, or is considering making, a property transfer instrument. This power in respect of UK branches applies in circumstances where the Bank of England has refused to recognise the actions of a non-EEA resolution authority, or if the non-EEA resolution authority has failed to take resolution or other action necessary to stabilise the institution. The powers granted are limited to making property transfer orders in respect of a branch's assets, rights and liabilities and (if required) exercising bail-in powers in relation to the transferred liabilities. The Order also extends, to such situations, the safeguards already provided by BA 2009 in respect of property transfers and bail-ins in relation to UK firms.

One of the resolution tools provided for in BA 2009 is the 'bridge bank tool' whereby assets, liabilities and/or shares of a failing institution can be transferred to a public sector-owned bridge bank. In order that the bridge bank tool can be applied

to a building society by way of a share transfer instrument, the Order gives power to the Bank of England to convert a failing building society into a company, which then enables the shares of the company to be transferred to a bridge bank.

What are the practical consequences for practitioners using the special resolution regime (SRR)?

The consequences are essentially that the regulatory authorities and the Bank of England as resolution authority now have further tools in their toolkit to apply in achieving a successful resolution of a failing institution and its affiliates, as well as to the UK branches of non-EEA institutions, and secondly that certain provisions that might hamper the smooth application of existing resolution tools have been amended or supplemented to remove certain perceived difficulties or disadvantages.

Interviewed by Alex Heshmaty.

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