Recent trends in resolution planning and resolution practice

Conference on the Banking Union

Dr. Alexander Glos, 15 May 2017
Agenda

I. Introduction
II. Statutory Framework
III. Pre-Brexit: Recognition of EU Resolution Measures in the UK
IV. Post-Brexit Complications
V. Conclusion
Introduction
I. Introduction – Some recent observations

- Reluctance to apply BRRD
- Information gathering
- Brexit and resolution planning
- ECB’s role in resolution proceedings
- Legislative trends
I. Introduction – Impact of Brexit

Given the interconnectedness of UK and continental banks, what next in terms of banking resolution after Brexit?
Statutory Framework
II. Statutory Framework

Recognition of cross-border resolution

- Recognising Third Country Actions within EU
- Ensuring Recognition of EU Actions outside EU
II. Statutory Framework

• Cross-border recognition is a pre-condition for successful resolution actions. The BRRD provides for a set of precautions to ensure the effective implementation in third countries.
## II. Statutory Framework

<table>
<thead>
<tr>
<th>Cooperation arrangement</th>
<th>Competent body</th>
<th>Binding nature</th>
<th>Published/known examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement, Art. 93 BRRD</td>
<td>Council/Commission</td>
<td>Yes, superseding bilateral agreements</td>
<td>none</td>
</tr>
<tr>
<td>Framework cooperation arrangement, Art. 97 BRRD</td>
<td>EBA</td>
<td>No, but predefining other cooperation arrangements</td>
<td>none</td>
</tr>
<tr>
<td>Cooperation arrangement/ MoU</td>
<td>SRB/NRA</td>
<td>No</td>
<td>SRB - Switzerland, SRB - USA</td>
</tr>
<tr>
<td>Bank-specific cooperation arrangement (CoAg)</td>
<td>SRB/NRA</td>
<td>No</td>
<td>„several“ according to SRB Work Programme 2017</td>
</tr>
</tbody>
</table>
II. Statutory Framework

- Mutual recognition of resolution actions can also be achieved through contractual bail-in clauses (Art. 55 BRRD)
  - In-scope entities are required to include contractual bail-in clauses
  - Counterparties thereby accept a future write-down or conversion of the liability
  - Currently applies to all contracts not excluded from bail-in
  - Binding agreements with third countries can avoid the requirement to include contractual bail-in clauses
  - Contractual bail-in clauses are hard to assess:

  “Of all forms how to define subordination, contractual subordination is, in our view, a practical nightmare. We would then probably have to indeed go through every single contract, assisted by lawyers.”

  Elke König, interview with “Börsen-Zeitung”
II. Statutory Framework

Two proposed changes:

• Art. 55 BRRD is currently being revised:
  - The Commission has proposed that resolution authorities can grant a waiver for certain types of liabilities
  - Liabilities under the waiver would not count towards an institution’s MREL

• Proposed change regarding non-EU GSIIIs:
  - Must establish an intermediate EU parent undertaking where two or more institutions established in the EU have the same ultimate parent undertaking in a third country
Pre-Brexit: Recognition of EU Resolution Measures in the UK
III. Pre-Brexit EU Resolution Regime in the UK

- As a EU member, all resolution actions of EU resolution authorities must be fully recognised and effective in the UK.
- In turn, all resolution actions by the Bank of England must be recognised and effective in all Member States.
- UK resolution authorities are part of the resolution colleges under Art. 88 BRRD.

That is, at least, the requirement of EU law, yet …
III. Pre-Brexit EU Resolution Regime in the UK

Recent English case law: Banco Espírito Santo and Banco Novo

- Facts (shortened): Oak Finance Luxembourg S.A. lent approx. 800m USD to BES. The credit facility was governed by English law.
- In August 2014, Bank of Portugal established a bridge bank, Novo Banco, and transferred the “good” assets and liabilities of BES onto it; Oak sued NB for payment.
- NB and the BoP stated that the oak liability was not transferred; they argued that the English courts were bound to give effect to the Portuguese reorganisation measures.
III. Pre-Brexit EU Resolution Regime in the UK

Recent English case law: Banco Espírito Santo and Banco Novo

- The High Court assumed its jurisdiction, disregarding the BoP resolution measure
- The decision to assume jurisdiction was overturned by the Court of Appeals in November 2016
- The Court of Appeals highlighted that it is for the home Member State to deal with a failing institution and that this requires universal recognition of resolution measures, also in the UK
Post-Brexit complications
IV. Post-Brexit complications

What happens within the EU if a UK resolution authority employs a resolution action?
Either there is an agreement that provides for mutual recognition and enforcement
Otherwise, Art. 94 BRRD governs the recognition and enforcement of third-country resolution proceedings

What happens within the UK if a EU resolution authority employs a resolution action?
Either there is an agreement that provides for mutual recognition and enforcement
Otherwise, non-binding (framework) cooperation arrangements/MoU between EBA and/or SRB and UK
IV. Post-Brexit complications

Problem I: English courts already second-guessing resolution actions
- Novo Banco Case
- UK courts might feel less inclined to follow EU law after Brexit

Problem II: Repeal bill
- After Brexit, the legislative mutual recognition in the UK can be repealed at any time, depending on the form of future cooperation between EU and UK resolution authorities

Problem III: Contractual recognition (Art. 55 BRRD)
- Only post Brexit problem?
- Impact of Commission proposal of November 2016
Conclusion

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Thank you