

# CONTRACT

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**Pre-insolvency/early intervention, Reorganization measures and  
winding up proceedings of banking groups**

National Report  
UNITED KINGDOM

By

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**For the purpose of these questions:**

- "reorganization measures" shall mean measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;

- "winding-up proceedings" shall mean collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure;

- "pre-insolvency/early intervention" shall mean any intervention except and before reorganization measures and winding-up proceedings

## **I - Background information**

In November 2005, the European Banking Committee identified five areas (liquidity risk management, crisis management, lending of last resort, deposit guarantee schemes and reorganization measures and winding-up proceedings) as part of the supervisory arrangements review to be performed according to Article 156 of Directive 2006/48/EC. Consequently, the Commission initiated the review process of the Directive on the

reorganization and winding up of credit institutions (2001/24/EC) in August 2006.

Under Directive 2001/24/EC, where a credit institution with branches in other Member States is wound up or reorganised, the winding up or reorganization measures are initiated and carried out under a single procedure by the authorities of the Member State where the credit institution has been authorised (known as the home Member State). This procedure is governed by the law of the home Member State. This approach is consistent with the principle of home Member State supervision pursuant to the EU Banking Directives.

The Directive does not aim at harmonising national legislation, but at ensuring mutual recognition of Member States' reorganization measures and winding up proceedings as well as the necessary cooperation between authorities.

Due to the mere coordinating nature of the Directive, Member States have different reorganization measures and winding up proceedings. Consequently, insolvency proceedings for credit institutions differ. Some Member States use the same general company and insolvency law for the reorganization measures and winding up of credit institutions as for other businesses, while others have special reorganization measures for credit institutions.

The Directive covers only the insolvency of branches of credit institutions in other Member States, but does not cover subsidiaries of banking groups in other Member States.

Directive 2001/24/EC is limited to procedural aspects concerning each legal entity within a cross border banking group. This limited scope does not allow to take into account synergies within such a group, which may benefit all creditors in case of reorganization measures. This lack of group-wide approach to winding up and reorganization measures could lead to the failure of subsidiaries or even the group, which could otherwise have been reorganised and remained solvent in whole or part.

The October 2007 ECOFIN strategic roadmap for strengthening EU arrangements for financial stability requests the Commission

For this purpose, the Commission carried out a public consultation (see also point 6 of the technical specifications). This consultation seeks clarification on:

- whether Directive 2001/24/EC on the reorganization and winding up of credit institutions leaves gaps and ambiguities which need to be removed, and
- issues related to the treatment of cross-border banking groups (i.e. parent credit institutions with subsidiaries in other Member States) in a crisis situation or under reorganization measures.

The purpose of the public consultation was to take stock of legal frameworks in the different Member States relating to the reorganization and winding up of banking groups. The consultation also aimed at identifying problems preventing a smooth crisis management and a smooth resolution process.

The focus of Commission's work is on possible reorganization of banking groups in contrast to ring fencing legal entities (and apply national resolution tools).

### **Abbreviations**

FSMA - Financial Services and Markets Act 2000

FSA - Financial Services Authority

BA 2009 - Banking Bill 2009

BA 1987 - Banking Act 1987

FSCS - Financial Services Compensation Scheme

The Regulations - Cross-Border Insolvency Regulations 2006

## **II - National regulation**

Please provide a presentation of your national regulation (law, cases,...) and attach it as Annex A the relevant legal texts and cases summarized in English.

*The main focus of the work is how to find solutions in a cross border case of a banking group for both pre-insolvency/early intervention systems and formal insolvency (reorganization and winding up measures). Please formulate your answers in light of it.*

## **1) Differences between pre-insolvency/early intervention measures and reorganization/winding-up proceedings**

1.1 Please provide precise information about the key moments during or preceding a banking crisis:

- Moment/event at which competent authorities trigger the requirement on a credit institution to take the necessary steps to redress the situation in order to meet minimum requirements in the Directive and to implement the measures referred to in Article 136(1) CRD.

The Banking Bill does not place a requirement on the credit institution to take steps to redress the situation.

- Moment at which Member States trigger early intervention measures

A stabilisation power may be exercised in respect of a bank only if the FSA is satisfied that two initial conditions are met:

- Condition 1 is that the bank is failing or is likely to fail to satisfy the threshold conditions (within the meaning of s 41(1) FSMA - permission to carry on regulated activities) (s7(2) BA 2009).
- Condition 2 is that having regard to timing and other relevant circumstances it is not reasonably likely that (ignoring the stabilisation powers) action will be taken by or in respect of the bank that will enable the bank to satisfy the threshold conditions (s7(3) BA 2009).

Before making a decision in respect of Condition 2, the FSA must consult the Bank of England and the Treasury (s7(5) BA 2009).

- Moment at which insolvency is declared.

The general rule is that the bank insolvency order is treated as having taken effect when the application for the order was made (s98(3) BA 2009).

However, in the case where notice has been given to the FSA under s114, of an application for an administration order or a petition for a winding up order, and the FSA or Bank of England applies for a bank insolvency order in the period of 2 weeks specified in Condition 3 in that section, the bank insolvency order is treated as having taken effect when the application or petition was made or presented (s98(2) BA 2009).

- Moment at which the Deposit Guarantee Scheme (DGS) is triggered.

The Deposit Guarantee Scheme is known as the Financial Services Compensation Scheme under English law and is governed by Part XV of FSMA. The Banking Act makes some additions to these provisions which can be found at ss169-180 BA 2009. The FSCS will apply to eligible depositors when a bank has failed.

1.2. Are the following criteria used in order to determine the moments you have described:

- The credit institution possesses adequate **resources** for it to be able to continue activities.
- The credit institution maintains adequate **suitability** for it to be able to continue activities
- The credit institution does not comply anymore with the solvency ratio
- The credit institution is facing **liquidity** difficulties

There are a number of criteria that are assessed in order to determine whether the early intervention measures in the BA 2009 will be triggered.

As stated above, the FSA will use the threshold test at s41(1) FSMA in the context of the two conditions at s7 BA 2009. The threshold test set out at Schedule 6 FSMA states as follows:

### **Legal status**

A bank must be a body corporate or a partnership.

### **Location of offices**

If the bank is a body corporate constituted under the law of any part of the UK, its head office and registered office must be in the UK.

### **Close links**

The FSA must be satisfied that:

- the bank's close links are not likely to affect its effective supervision of the bank; and
- if any close link is subject to the laws, regulation or administration of a territory outside the EEA, neither such foreign provisions nor any deficiency in their enforcement would affect its effective supervision of the bank.

### **Adequate resources**

The bank's resources must, in the FSA's opinion, be adequate in relation to its regulated activities. In reaching this opinion, the FSA must take into account:

- the bank's membership of a group;
- the provision which the bank and other group members make for liabilities; and
- the means by which the bank and other group members manage the incidence of risk in connection with its business.

### **Suitability**

The bank must satisfy the FSA that it is fit and proper having regard to all the circumstances including:

- its connection with any person;
- the nature of any regulated activity it carries on;
- the need to ensure that its affairs are conducted soundly and prudently.

## 2) Pre-insolvency and early intervention system

### 2.1 Pre-insolvency/early intervention systems tailored for banks

Are there, in your national legislation, special pre-insolvency/early intervention systems that are tailored for banks?

Yes X

### 2.2 Pre-insolvency/early intervention systems that can be applied to banks

If it is not the case, is there in your legislation, any pre-insolvency/early intervention system that can be applied to banks

Yes

No N/A

### 2.3 Conditions and features

Please explain briefly the systems currently available in your Member states.

Description

The Special Resolution Regime has been introduced by the Banking Act 2009.

This regime makes three separate procedures available:

- The first is the three stabilisation options. The details of these are found at ss11-13 BA 2009. There are three options:
  - (i) Private Sector Purchaser (s11 BA 2009)  
This involves selling all, or part, of the business of the bank to a commercial purchaser. In order to effect this, the Bank of England may make one or more share transfer instruments and/or one or more property transfer instruments (s11(2) BA 2009).

(ii) Bridge Bank (s12 BA 2009)

This involves transferring all or part of the business of the bank to a company which is wholly owned by the Bank of England. In order to effect this, the Bank of England may make one or more property transfer instruments (s12(2) BA 2009). The Code of Practice that will be issued by the Treasury, must make provisions about the management and control of bridge banks (s12(3) BA 2009).

(iii) Temporary Public Ownership (s13 BA 2009)

The entire business of the bank will become publicly owned. In order to effect this, the Treasury may make one or more share transfer orders in which the transferee is a nominee of the Treasury or a company wholly owned by the Treasury (s13(2) BA 2009).

- The second is the bank insolvency procedure (ss90-135 BA 2009). The bank enters the process by court order in which a liquidator is appointed. The liquidator aims to arrange for the bank's eligible depositors to have their accounts transferred or to receive compensation from the FSCS. The bank liquidator then winds up the bank. In these circumstances the liquidator has the normal powers and duties of a liquidator, as amended by these provisions.
- The third is the bank administration procedure (ss136-168 BA 2009). This involves part of the business of the bank being sold to a commercial purchaser in accordance with s11 (as discussed above) or transferred to a bridge bank in accordance with s12 (as discussed above). This procedure requires the court to appoint an administrator on the application of the Bank of England. The administrator is required to ensure that the non-sold or non-transferred part of the bank provides the services or facilities required to enable the commercial purchaser or transferee to operate effectively. Otherwise, the process is very similar to the process for normal administration as set out in the Insolvency Act 1986.

Can it be commenced on a voluntary basis and/or does it have to be ordered by the authorities?

Voluntary basis

Ordered by the authorities X

Description

- Stabilisation options - these can only be exercised if the FSA is satisfied that the conditions in s7 BA 2009 are met.
- Bank Insolvency - an application for a bank insolvency order may be made to the court by the Bank of England, the FSA or the Secretary of State.
- Bank Administration - an application for a bank administration order may be made to the court by the Bank of England.

What are the legal and economic conditions that must be met for these regimes to be prompted and applied?

As stated above, a stabilisation option may only be exercised if Conditions 1 and 2 in section 7 BA 2009 are met.

In order for the court to make a bank insolvency order on the application of the Bank of England or the FSA, the bank must have eligible depositors and must either be unable, or likely to become unable, to pay its debts or it must be fair for the bank to be wound up (s91(1) BA 2009).

In order for the court to make an insolvency order on the application of the Secretary of State, the bank must have eligible depositors and the winding up must either be in the public interest or it must be fair (s91(2)BA 2009).

In order for the court to make a bank administration order the grounds in s137 BA 2009 must be met. These are:

- That the Bank of England has made or intends to make a property transfer instrument in respect of the bank in accordance with s11(2) or s12(2); and
- That the Bank of England is satisfied that the residual bank:
  - (a) is unable to pay its debts, or
  - (b) is likely to become unable to pay its debts as a result of the property transfer instrument which the Bank intends to make.

Is a judicial decision which states that the legal and economic conditions are met necessary?

- Stabilisation powers - the FSA makes the decision in consultation with the Bank of England and the Treasury (see above).
- Bank insolvency procedure - the court will make an order if satisfied that the relevant grounds are met (see above).
- Bank administration procedure - the court will make an order if satisfied that the relevant grounds are met (see above).

## 2.4 Powers and responsibilities of the intervening authorities

For the execution of these measures, what are the powers of (i.e appointment of a negotiator in charge of finding solutions to the difficulties faced; organization of the negotiations with the main creditors of the bank; shares freeze; capital increase in derogatory conditions; forced transfer of the subsidiary; transfer of assets enabling the isolation of the risky activities; stay of actions (full or partial) of payment actions; rescheduling of the main debts due for payment)

the nominated administrator  
Description of the powers

Bank administration procedure - the administrator has the power to ensure that the non-sold or non-transferred part of the bank provides services or facilities required to enable the commercial purchaser or transferee to operate effectively.

the national bank  
Description of the powers

- Bank insolvency procedure - the Bank of England can apply to the court for the appointment of a bank liquidator (s89(1)(a) BA 2009).
- Bank administration procedure - the Bank of England can apply to the court for the appointment of a bank administrator (s130(2)(b) BA 2009).
- Stabilisation powers - the Bank of England has the following powers in respect of each procedure:
  - (a) Private sector purchaser  
The Bank of England can make share or property transfer instruments (s11(2) BA 2009).
  - (b) Bridge bank  
All or part of the business can be transferred so that it is owned by a company wholly owned by the Bank of England (s12(2) BA 2009).
  - (c) Temporary public ownership  
There is no role for the Bank of England in this procedure.

the banking supervisors  
Description of the powers

Bank insolvency procedure - the FSA can make an application to the court for a bank insolvency order (s95(1)(a) BA 2009).

The FSA has no role in the bank administration procedure or the exercise of the stabilisation powers.

the courts  
Description of the powers

Bank insolvency procedure - the court will make the order to appoint the liquidator (s90(2)(a) BA 2009).

Bank administration procedure - the court will make the order to appoint the administrator (s136(2)(b) BA 2009).

The courts have no role in the exercise of the stabilisation powers.

Ministry of Finance  
Description of powers

Stabilisation powers - the Treasury must be consulted before the FSA determines whether Condition 2 in s7(3) is met. In respect of the temporary public ownership option, it is the Treasury who has the power to decide whether the

relevant conditions are satisfied but it must consult the FSA and the Bank of England.

Bank insolvency order - the Treasury has the power to make an application to the court for a bank insolvency order (s95(1)(c) BA 2009).

The Treasury has no specific powers in relation to the bank administration procedure.

Others (including DGS)  
Description of powers

The bank liquidator has the following specific powers:

- the power to effect and maintain insurances in respect of the business and property of the bank;
- the power to do all things necessary for the realisation of the property of the bank; and
- the power to make any payment which is necessary or incidental to the performance of the bank liquidator's functions (s104 BA 2009).

For the execution of these measures (or the lack of decision to set these measures), what are the responsibilities of:

the nominated practitioner

### **Bank Insolvency**

The bank liquidator is responsible for ensuring the eligible depositors have their accounts transferred or receive compensation from the FSCS (s90(2)(b) BA 2009). His ultimate responsibility, however, is to wind up the bank (s90(2)(d) BA 2009).

the nominated administrator

### **Bank Administration**

The bank administrator is responsible for ensuring that the non-sold or non-transferred part of the bank provides services or facilities as required to enable the commercial purchaser or the transferee to operate effectively (s136(2)(c) BA 2009).

the national bank

### **Bank Administration**

The Bank of England is responsible for making the application to the court for the appointment of a bank administrator (s142(1) BA 2009).

### **Bank Insolvency**

The Bank of England can apply to the court for a bank insolvency order (s95(1)(a) BA 2009). However, the FSA and Secretary of State also have this responsibility.

- the banking supervisors (the FSA)

### **Stabilisation Options**

The FSA is responsible for deciding whether the relevant conditions are met so that the stabilisation power can be exercised (s7 BA 2009).

- the courts

Description of the responsibilities

The court has the responsibility of making an order in respect of the bank insolvency or bank administration procedures.

## **2.5 Confidentiality**

Which measures are confidential and which measures must be made public?

None of the measures are confidential.

## **2.6 Powers and responsibilities of the intervening authorities**

Can the intervening authorities reduce the rights of the stakeholders (creditors, shareholders, deposit holders)?

Is there in your legislation a judicial control of those measures? Please explain.

How are handled the rights of the following stakeholders in the execution of this kind of measures?

- Shareholders
- Creditors
- Employees
- Deposit holders

Description

### **Shareholders**

The stabilisation options allow the Bank of England (in respect of the private sector purchaser) and the Treasury (in respect of the temporary public ownership) to make share transfer instruments and share transfer orders (ss11(2)(a) and 13(2) BA 2009). Shareholders can, however, be granted some compensation under ss49(2) and (3) BA 2009.

### **Deposit Holders**

When a bank insolvency order is made the bank liquidator will refer the eligible depositors to the FSCS in order for them to apply for compensation.

### **Employees**

This group will be dealt with as usual during an insolvency procedure.

### **Creditors**

The bank liquidator has an obligation to wind up the bank so as to achieve the best results for the creditors as a whole.

The bank administrator has the "normal" administration responsibilities of either rescuing the residual bank as a going concern, or achieving a better result for its creditors than an immediate liquidation would have done.

Can intervention decisions override shareholder's rights in the scope of these measures?

Yes X

No

#### Description

The stabilisation options allow the Bank of England (in respect of the private sector purchaser) and the Treasury (in respect of the temporary public ownership) to make share transfer instruments and share transfer orders (ss11(2)(a) and 13(2) BA 2009).

## **2.7 Relation with the formal insolvency proceedings**

What is the relation of pre-insolvency/early intervention systems with formal insolvency legislation? How do they interact?

Formal insolvency procedures are set out in statute (Insolvency Act 1986). The bank insolvency procedure and bank administration procedure are designed to be alternatives to the normal insolvency procedures as they are specifically tailored to banks. The stabilisation powers are intended to be an early intervention option that will help to avoid the need to enter into the formal insolvency procedures.

If a petition for a winding up order or an application for an administration order in respect of a bank is made the court can instead make a bank insolvency order (s117(1) BA 2009). This can only be done on the application of the Bank of England or on the application of the FSA with the consent of the Bank of England.

Is there in your legislation any special effect of the pre-insolvency/early intervention measures on special contracts (set off, netting for example)?

If some, but not all, of a bank's financial contracts are transferred, its set-off and netting arrangements could be disrupted. These are important because they are the principal means by which a bank manages its credit risk and reduces its regulatory capital requirements. A partial transfer could mean that counterparties

have to account for their credit exposure to a bank gross rather than net, and that they are unable to obtain clean legal opinions on the effectiveness of their set-off and netting arrangements. The latest proposal is to prohibit the transfer of some but not all contracts containing netting provisions, but with specific carve outs for certain types of contracts.

Where partial property transfers might affect security interests, set-off or netting arrangements, the Treasury can make an order to restrict the making of them, impose conditions on them, require them to include a specified provision or make them void or voidable if they are made, or purport to be made, in contravention of a provision of the order (s48(2) BA 2009). The order must be made by statutory instrument and must be laid before and approved by each House of Parliament (s48(6) BA 2009).

Is there in your legislation any specific financing system for banks under pre-insolvency/early intervention?

See box below.

Can the deposit guarantee scheme be used to finance the pre-insolvency measures?

The FSCS can be used to finance the Special Resolution Regime set out in the BA 2009. Section 171 BA 2009 inserts a new s214B into FSMA which provides that where a stabilisation power is exercised and the Treasury thinks that the institution (bank, building society or credit union) was, or but for the exercise of the stabilisation power, would have become, unable to satisfy claims against it, the Treasury may require the scheme manager to contribute towards the costs of the stabilisation power being exercised (s214B(2)(a) FSMA as proposed by s171(1) BA 2009).

The contributions made by the FSCS will be treated as expenditure under the scheme for all purposes (s214B(2)(b) FSMA as proposed by s171(1) BA 2009).

## **2.8 Group aspect and Cross-border situations**

In a national context (when both the parent company and the subsidiaries are located in your Member state), do the pre-insolvency measures apply to the subsidiaries?

The term "bank" is defined in the Banking Bill as a UK institution which has permission under Part IV of FSMA to carry on the regulated activity of accepting deposits within the meaning of s22 FSMA, Schedule 22 FSMA and any order under s22.

The term "UK institution" is then defined as an institution which is incorporated in, or formed under the law of any part of, the United Kingdom.

These definitions apply to the stabilisation powers and the bank insolvency procedure under the following section of the BA 2009:

- Section 2(1) and (3); and
- Section 91(1) and (3);

Do the systems you have described above apply to cross-border situations (on which legal basis, i.e territoriality or universal principles)? How would a cross border case be managed in the following cases:

- When the ailing bank in your Member state is the subsidiary of a parent company located in another Member state?

In both this question and the next one, the Council Regulation 1346/2000/EC will apply. Under Article 3(1) it is the courts of the Member State within the territory of which the centre of a debtor's main interests is situated that has jurisdiction to open insolvency proceedings. In the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Therefore, it is not relevant that the ailing bank is a subsidiary of a parent company in another Member State. If the subsidiary company's registered office is in the UK, and there is nothing to suggest that the centre of its main interests is not the UK, then under Article 3(2) the UK will have jurisdiction to open the insolvency proceedings.

The Member State where the parent company is located may be able to open secondary insolvency proceedings if the subsidiary has an establishment within that jurisdiction. The existence of a parent company will not be sufficient. This makes sense as the secondary insolvency proceedings will be restricted to the assets of the debtor situated within that Member State.

- When the ailing bank in your Member state is the parent company of one or several subsidiary located in another Member state?

In this situation the same as the above would apply. It would be in the UK where the centre of main interests would be assuming the parent company's registered office was there and there was no proof to the contrary.

It should be noted that there is nothing specific in this legislation that deals with groups.

- When the ailing bank in your Member state is the subsidiary of a parent company located in a third country?

The Cross-Border Insolvency Regulations 2006 (the **Regulations**) amend existing insolvency law so that, in the case of a conflict between the two, these regulations will prevail. It should also be noted, for the previous examples, that where the Regulations conflict with Regulation 1346/2000/EC, the EC law will prevail.

The Regulations give the UNCITRAL Model Law the force of law in the UK (Article (2)(1)). It should be noted that, unlike the Banking Bill, these Regulations do not apply to a building society (within the meaning of s119 of the Building Societies Act 1986) - Schedule 1, Article 1 Para 2(g).

Under the Cross-Border Regulations, a foreign representative administering foreign insolvency proceedings can apply to the British courts for recognition of the proceedings where the debtor has a place of business or assets in Britain or

if, for any other reason, Britain is an appropriate forum. Foreign proceedings for which recognition may be sought are collective insolvency proceedings, which are subject to the supervision and control of a foreign court.

The Regulations provide for the recognition of two types of insolvency proceedings:

- Foreign main proceedings. These are proceedings taking place in the state in which the debtor has its centre of main interests (which is not defined but is subject to a rebuttable registered office presumption substantially similar to the presumption in the Insolvency Regulation).
- Foreign non-main proceedings. These are proceedings taking place in a state in which the debtor has an "establishment" (which is defined as any place of operations where the debtor carries out an economic activity with human means and goods, which is not of a temporary nature (Schedule 1, Article 2 of the Regulations)).

If foreign proceedings are recognised as foreign main proceedings, an automatic stay will apply to certain types of creditor action including: the commencement of proceedings concerning the debtor's assets, rights, obligations or liabilities; execution against the debtor's assets; and the transfer or disposal of the debtors assets (Schedule 1, Article 20 of the Regulations). The stay will not affect a right to enforce security over the debtor's property or to exercise set-off (so long as such rights could be exercised in a British winding-up) (Schedule 1, Article 20, Paragraph 3 and Article 28 of the Regulation). Nor will it stay the commencement of British insolvency proceedings, although any proceedings will be limited to assets in Britain (Schedule 1, Article 20, Para 5 of the Regulations).

For foreign non-main proceedings, no automatic stay applies, but appropriate discretionary relief may be granted to protect the assets of the debtor or the interests of creditors. The same discretionary relief may be granted in respect of foreign main proceedings, in addition to the automatic stay (Schedule 1, Article 21 of the Regulations).

In the above example, if there were foreign proceedings they would be foreign non-main proceedings because the company is a UK company so proceedings abroad would be taking place in the state where it had an establishment.

- When the ailing bank in your Member state is the parent company of one or several subsidiary located in a third country?

The above details on the Regulations would also apply to this situation in the same way as above.

Is there in your legislation state a specific pre-insolvency/early intervention created for cross border situations (please consider both subsidiaries and branches separately)

No.

How does (or would) your national legislation deal with the cross-border aspects (are there situations where the Law of another Member state is applied) in the case of subsidiaries, not branches?

See above.

How does your court deal with a conflict with another Member states' Law: when there is a divergence between both Laws, can an agreement be concluded under the control of your national judge?

## 2.9 Efficiency of those proceedings

Do you think the measures you have described above provide for optimal response in order to deal with problems in an ailing cross-border bank (please explain)?

The Regulation and the EC legislation provide a useful framework within which the courts in the UK can operate so as to create fairness and efficiency when there is a cross-border element to insolvency. However, the UK Government feels that more could be done on an EU basis to align the various Member States.

Are there changes recently adopted or being discussed in your legislation?

The UNCITRAL Model Law was introduced in 1997 and was finally implemented in the UK in 2006. EC Regulation 1346/2000 has been in force since 2000.

The UK Government has recently written to the EU Commission asking for them to consider cross-border issues as a matter of urgency. In particular, the Government is concerned with increasing the level of guaranteed deposits and the speed of resolution and pay-out in the event of a bank failure. A response is expected in Spring 2009.

## 3) Formal reorganization measures and winding up rules

### 3.1 General question

Can you briefly explain what types of insolvency systems currently apply in your Member states (please briefly explain the differences if there are several)?

There are 3 specific systems for corporate insolvency:

- Administration - This is an alternative to the liquidation of a company. It is only available for insolvent companies (Sch B1, Paragraph 11 Insolvency Act 1986). It is intended to be a rescue mechanism. The purpose of an administration is for the company to continue running the business. The revised regime was implemented on 15 September 2003 and replaces administrative receivership for charges coming into existence on or after that date and remodels the old form of administration. The key features of the new regime are as follows:
  - (a) Qualifying floating charge holders (QFCHs), the company or the directors are empowered to appoint an administrator without petitioning the court although the court route does still exist.
  - (b) Creditors other than QFCHs can petition the court for an administration order.
  - (c) A QFCH can apply to the court for an order that its own administrator replace the one proposed or appointed.
  - (d) The administrator is under a duty to act in the interests of all creditors, even where a QFCH has appointed the administrator.
  - (e) Administrators have powers to make payments to creditors.

The advantage of administration is that there is a moratorium on creditors' actions. This is a major factor as it gives the administrator the time to try to rescue the company.

The administrator has to perform his duties with the object of Schedule B1, Para 3(1) Insolvency Act 1986:

- (a) rescuing the company as a going concern;
- (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up; or
- (c) realising property in order to make a distribution to secured or preferential creditors.

He has to perform his duties in the interests of the company's creditors as a whole (Paragraph 3(2) Insolvency Act 1986).

- Liquidation ("winding up") - this is the end of the road for a company as it will cease to exist after the liquidation has taken place. It can either be voluntary or compulsory but the basic steps remain the same in either case. Initially, the liquidation proceedings will be commenced and a liquidator will be appointed. The liquidator will collect the company's assets and review past transactions. Once this is done, the liquidator will distribute the assets in the statutory order to creditors and the company will be dissolved.
- Receivership - this can only be used for floating charges created prior to 15 September 2003 (ss72A-72H Insolvency Act 1986). The receiver will be appointed by the holder of the charge when the company is not complying with the terms of the loan. The receiver's task is to take possession of the charged property and deal with it for the benefit of the charge holder, which will usually mean selling it. After this has been done, the receiver has no further interest in the company other than a duty to pay preferential creditors (s40 Insolvency Act 1986).

### **3.2 Definition and scope of reorganization measures**

What do "reorganization measures" mean in practice in your Member state? (in general and for banks especially)?

Reorganisation measures include administrations (but only when commenced by order of the court), compulsory liquidations, voluntary liquidations that have been confirmed by the court, provisional liquidations and certain types of company voluntary arrangement (**CVAs**). They do not include schemes of arrangement under Part 26 of the Companies Act 2006.

What are the conditions for commencing reorganization measures (for banks especially)?

The Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the **Regulations**) implement the directive of the Parliament and the Council on the reorganisation and winding up of credit institutions (2001/24/EC) for all UK credit institutions.

The Regulations provide that as from 5 May 2004, no winding-up proceedings or reorganisation measures in respect of EEA credit institutions can be undertaken in the UK except in the circumstances permitted by the Regulations.

EEA reorganisation measures and winding-up proceedings are to be recognised in the UK. Provisions are made for the exercise by EEA liquidators of their functions in the UK. Provision is made for the notification of reorganisation measures and winding-up proceedings to competent authorities in other EEA Member States. Modifications are made to UK insolvency law in respect of notifications of various other matters including important stages in the relevant procedures and forms in which creditors in other EEA States may enter claims, to the Financial Services Authority, EEA authorities and creditors.

The Regulations make provision for application to credit institutions whose head office is outside the UK and the EEA. Provision is made for detailed amendment of existing secondary legislation including the insolvency rules in all UK jurisdictions dealing with the reorganisation or winding up of credit institutions.

Who can initiate a reorganization measures (in general and for banks especially)?

The courts.

Are banks treated specifically in insolvency legislation (are there specific rules for either reorganization measures or winding up proceeding)?

They are treated specially in The Credit Institutions (Reorganisation and Winding Up) Regulations.

### **3.3 Relations between reorganization measures and winding up**

Are the triggering events defined by laws for both reorganization and winding up measures or it is up to the courts to decide? Explain

The Insolvency Act 1986 (**IA 1986**) sets out the framework and details the triggers for the various measures that can be instigated under English law.

### **Administration**

The company, the directors, the QFCH and the creditors have the power to appoint an administrator (Sch B1 Para 22 IA). This can be done by the out of court procedure or by court order. If done by court order, the court makes a decision based on criteria set out in the legislation that the company is or is unlikely to become unable to pay its debts (s123 IA 1986) and that the administration order is reasonably likely to achieve the purpose of administration.

### **Compulsory Liquidation**

The creditor who wishes to instigate this process does so by making a petition to the court and the court has the overriding discretion about whether to make the order. However, it should consider the grounds set out in s122(1) IA 1986.

### **Voluntary Liquidation**

The court has discretion as to whether to initiate the insolvency process in the event that it is a floating charge holder who presents a winding up petition (s100 IA 1986).

### **CVA**

The courts do not play a role in the decision making process of a CVA. The process is triggered by the directors making a written proposal to the creditors.

## **3.4 Power and authorities of the authorities intervening**

Regarding reorganization and winding up, what are the powers of (for the commencement and the management of this kind of measures):

- the nominated administrator
- the central bank (if it is not the banking supervisor)
- the banking supervisor
- the court
- Ministry of finance
- Others

Description of the powers

### **Administrator**

The administrator has wide ranging powers to "do anything necessary or expedient for the management of the affairs, business and property of the company" (Sch B1 Para 59 (1) IA 1986).

### **Bank of England**

The Bank does not play a role in these procedures.

### **FSA**

The FSA does not play a role in these procedures.

### **The Court**

As discussed above the court has powers in relation to various insolvency procedures.

It can make an administration order if the in court procedure is used and it can dismiss, adjourn or grant a winding up order.

### **Treasury**

This body does not play a role in relation to these procedures.

For the execution of these measures (or the lack of decision to set these measures), what are the responsibilities of:

- the nominated administrator
- the national bank (if it is not the banking supervisor)
- the banking supervisor
- the court

Description of the responsibilities

### **Administrator**

The administrator has a responsibility to perform his role in the interests of the creditors as a whole (Sch B1 Para 3(2) IA). He also has the following objectives:

- rescuing the company as a going concern;
- achieving a better result for the creditors than would be likely if the company were wound up; or
- realising property in order to make a distribution to one or more secured creditors (Sch B1 Para 3(1) IA).

### **Bank of England**

The Bank of England has no role in the execution of these measures.

### **FSA**

The FSA has no role in the execution of these measures.

### **The Court**

The court has the responsibility to only make an administration order or grant a winding up petition where the appropriate grounds are met.

## **3.5 Group treatment**

The purpose of this paragraph is to determine if group of companies are treated in your Member state at an entity level or in a coordinated way (by the legislation or case law, in internal or cross border situations, for banks specifically or other companies).

For the purpose of this paragraph, please consider that a group is constituted by a parent company and subsidiaries, not branches.

- Is there any legislation or court practise that specifically apply to a group?

No.

- Is there any special legislation or court practise that specifically apply to a banking group?

No.

What is the definition of the "group" that can be treated in a coordinated or joint way?

N/A

Is it possible to include solvent subsidiaries in the formal insolvency proceedings?

N/A

Could you explain if the following measures are available in your Member state (please consider both purely internal situations and if a close notion exists in your Member state, please explain):

- joint application
- joint administrator
- joint or coordinated proceedings
- cooperation of insolvency administrators
- joint reorganization plan
- consolidation or pooling of assets
- extension of liability

- contribution orders
- full/partial liability of majority owner/mother
- Other practises that are in favour of group treatment

N/A

### 3.6 Cross border situations

In a national context (when both the parent company and the subsidiaries are located in your Member state), do the reorganization and winding up proceedings apply to the subsidiaries?

Do the systems you have described above apply to cross-border situations (on which legal basis, i.e territoriality or universal principles)? How would a cross border case be managed in the following cases:

- When the ailing bank in your Member state is the subsidiary of a parent company located in another Member state?

Please see the details given in 2.8.

- When the ailing bank in your Member state is the parent company of one or several subsidiary located in another Member state?

Please see the details given in 2.8.

- When the ailing bank in your Member state is the subsidiary of a parent company located in a third country?

Please see the details given in 2.8.

- When the ailing bank in your Member state is the parent company of one or several subsidiary located in a third country?

Please see the details given in 2.8.

Are there in your legislation specific reorganization/winding up proceedings created for cross border situations (please consider both subsidiaries and branches separately)

Please see the details given in 2.8.

How does (or would) your national legislation deal with the cross-border aspects (are there situations where the Law of another Member state is applied) in the case of subsidiaries, not branches?

N/A

How does your court deal with a conflict with another Member states' Law: when there is a divergence between both Laws, can an agreement be concluded under the control of your national judge?

Usually a decision is made as to which court will have jurisdiction as detailed above and the courts will proceed on this basis.

Is there any legal basis for cross border cooperation in reorganization measures or winding up proceedings at group level? Could you explain precisely which authorities actually cooperate under this legal basis and how?

N/A

Could you explain if the following measures are available in your Member state (please consider only cross-border situations, and if a close notion exists in your Member state, please explain):

- joint application
- joint administrator
- joint or coordinated proceedings
- cooperation of insolvency administrators
- joint reorganization plan
- consolidation or pooling of assets
- extension of liability
- contribution orders
- full/partial liability of majority owner/mother
- Other practises that are in favour of group treatment:

N/A

### 3.7 Efficiency of those proceedings

Do you think the measures you have described above provide for optimal response in order to deal with problems in an ailing cross-border bank regarding:

- The interest of the entity concerned?

N/A

- The interests of its creditors?

N/A

- The interests of the deposit holders?

N/A

- The interest of shareholders

N/A

- The interest of the employees

N/A

Do you think these measures can efficiently solve financial difficulties faced by a bank?

N/A

Are there changes recently adopted or being discussed in your legislation?

No.

#### 4) Recent cases

##### 4.1 Recent cases - pre-insolvency/early intervention measures

Have you had any recent cases of pre-insolvency/early intervention measures applied to a credit institution (standalone, parent, subsidiary or branch) in your country?

- Please provide examples of institutions which experienced difficulties or failures over the past 4 years in your country that required the implementation of pre-insolvency/early intervention measures?

The pre-insolvency / early intervention measures are primarily set out in the Banking Act 2009 which became law on 21 February 2009. For this reason there is not yet any case law.

- Did these credit institutions have branches in other member states?

N/A

- Did these credit institutions have subsidiaries in other member states?

N/A

- Briefly explain the case(s), the procedures followed, the results, the participating authorities, sources of financing

N/A

- Explain how the cross border elements were taken into consideration (cooperation of authorities, administrators etc)

N/A

- Explain how and by which organisation decisions were made about the appropriate measures to implement.

N/A

- Explain how decisions were made (and by whom) on whether to implement the pre-insolvency/early intervention measures the credit institution.

N/A

- Are there things that you would have wanted to do, as part of pre-insolvency/early intervention that you were not able to do under the current legal framework? If so, what?

N/A

#### 4.2 Recent cases – Reorganization and winding-up

Have you had any recent cases of winding-up of a credit institution (standalone, parent, subsidiary or branch) in your country?

- Which institutions had difficulties or failures over the past 4 years in your country that required the implementation of reorganization and winding-up?

- Did these credit institutions have branches in other member states?

- Did these credit institutions have subsidiaries in other member states?

- Briefly explain the case(s), the procedures followed, the results, the participating authorities and the sources of financing

- Explain how the cross border elements were taken into consideration (cooperation of authorities, administrators etc)

- Explain how and by which organisation decisions were made about the appropriate measures to implement.

- Explain how decisions were made (and by whom) on whether to reorganise or wind up the credit institution.

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### **4.3 Contact**

What are the main actors (banks, liquidators, law firms,...) in your country involved in reorganization measures and/or winding-up proceedings of credit institutions:

- Please send us contact details of people/firms who already have applied the provisions of the Winding-up Directive or who might apply the Directive in the future if a credit institution fails in your country.
- Please also send us contacts details of associations of liquidators (if any) dealing with reorganization measures and/or winding up proceedings in the financial sector.

Annex A - The relevant legal texts and cases in English