



Freshfields Bruckhaus Deringer

Recent trends in resolution planning and resolution practice

Conference on the Banking Union

Dr. Alexander Glos, 15 May 2017



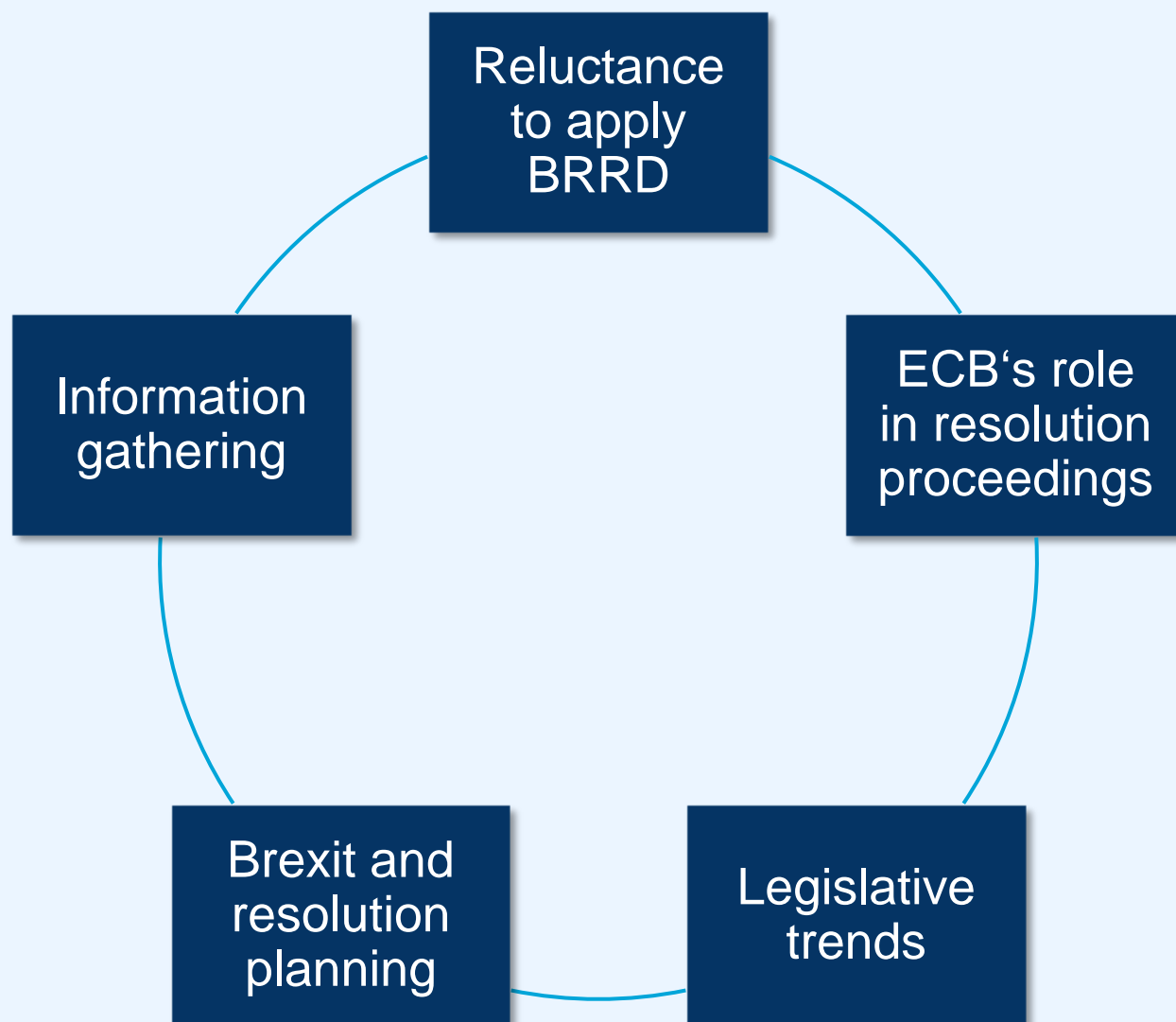
Agenda

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

Introduction

Section 

I. Introduction – Some recent observations



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



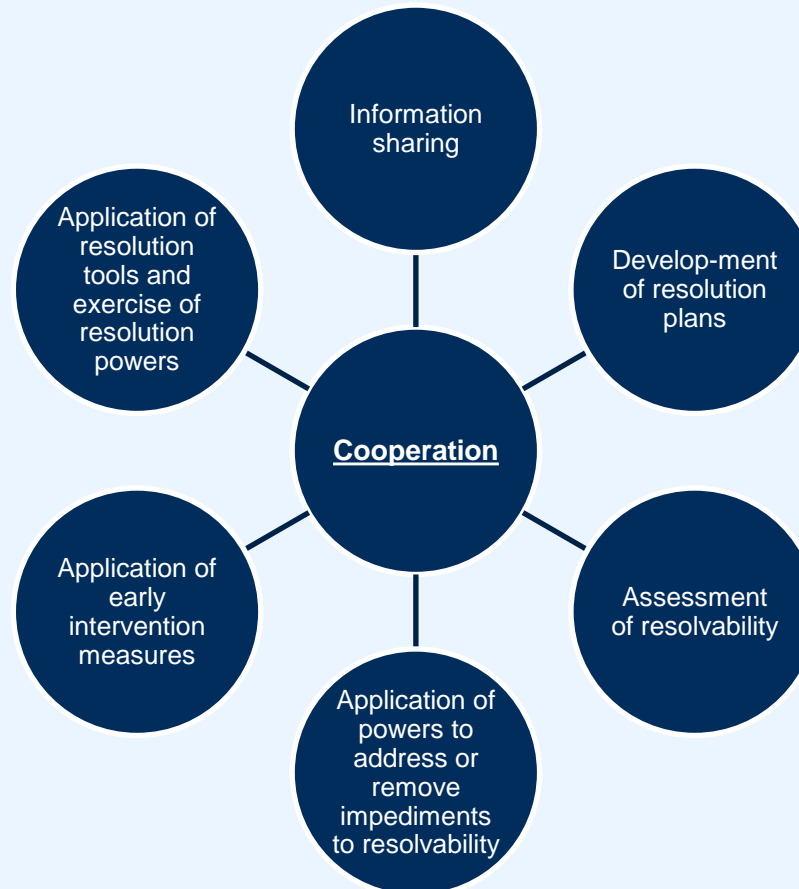
Recognising Third
Country Actions
within EU



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

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

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 GSIs:
 - 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

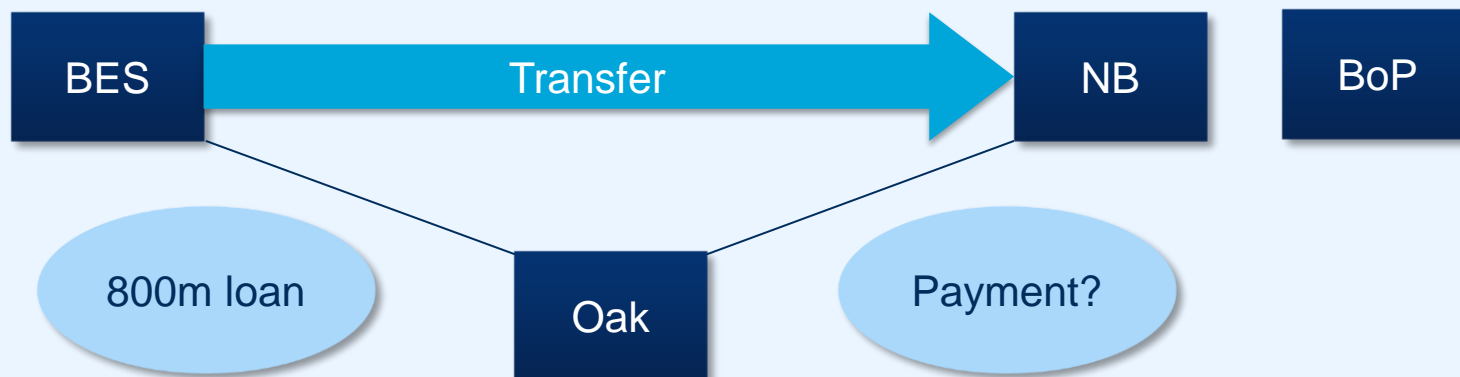
- As a EU member, all resolution actions of EU resolution authorities must be fully recognised and effective in the UK
- In turn, all resolution actions by the Bank of England must be recognised and effective in all Member States
- UK resolution authorities are part of the resolution colleges under Art.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

Section **IV**

IV. Post-Brexit complications



Incoming resolution action

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



Outgoing resolution action

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

Section break subtitle

Section **V**

Thank you

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