

Bank Restructuring “à la belge”

A primer on *Law in the Books vs Law in Action*

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Prelude

- “Fortis-case” (Oct. 2008)
 - No resolution powers for state/supervisor
 - No resolution toolbox
 - Interference of courts
 - Dec. 2008: Minority shareholders obtained court order to convene general meeting of shareholders (Dec. 2008)
 - Jan. 2009: General meeting of shareholders rejects sale of business -> renegotiation
 - Apr. 2009: General meeting of shareholders accepts renegotiated sale

Prelude (2)

- “Crisis law” – Oct. 2008:
 - Authorises Government to amend/complement existing supervision laws in situations of “sudden crisis in the financial markets” or “serious threat of a systemic crisis”
 - Provides legal basis for state guarantees to distressed financial institutions
 - Used in various cases
 - No resolution toolbox



Financial Institution Resolution Law

- Law 2 June 2010
 - Facilitation of ‘voluntary’ resolutions:
 - -> board of directors can, in exceptional situations, set aside limitations of powers stemming from company bylaws
 - Extension of ‘early intervention’ powers of financial supervisor
 - Swift intervention in situations of urgency
 - Temporary suspension of activities
 - Resolution powers and measures
 - -> Inspired by UK Banking Act 2009



Financial Institution Resolution Law

- Scope of application
 - All categories of financial institutions (banks, investment firms, insurance firms, financial holdings, ...)
 - Goes along with exclusion of general ‘Chapter 11’ law to those institutions
 - What if distressed FI does not threaten financial stability ?



Financial Institution Resolution Law

- Resolution Authority
 - Powers entrusted to the (federal) government
 - Resolution order by Royal Decree
 - No specific powers for MoF – government as a whole acts
 - Immunisation of civil liability
 - State and all persons acting for the account of the state in the resolution
 - Immunisation for ‘fraud’ and ‘gross negligence’



Financial Institution Resolution Law

- Criteria for resolution measures
 - “Threat to Belgian or international financial stability”
 - Criteria to be taken into account are further specified, but remain vague
 - Eg Banks: volume of deposits, importance on the credit market or role in the financial system
 - No set of transparent criteria of quantitative triggers



Financial Institution Resolution Law

- Resolution toolkit
 - Mainly focused on ‘bail-out’
 - Mandatory transfer of assets/activities/shares
 - To the state or to other public or private entities
 - Includes ‘bridge bank’
 - No statutory bail-in regime
 - Resolution order prohibits concerned FI to dispose of the assets,
 - Resolution does not affect existing contracts/no termination
 - => resolution seems to neutralise close out-netting

Financial Institution Resolution Law

- Resolution and the courts
 - Automatic and immediate court scrutiny of the resolution measure
 - Strict deadlines: decision within max. 1 month
 - Excludes all other possibilities for court interference
 - Scope of court scrutiny:
 - Legality of the resolution order
 - Formal legality
 - Substantive legality: threat to financial stability ?
 - Fairness of the compensation to the ‘owners’
 - Competent court: Court of first instance Brussels
 - Court decision gives effect to the resolution order

Conclusions

- Financial crisis calls for exceptional laws
 - But: are fundamental safeguards sufficiently put into balance ?
 - Lawyers will have to take into account economic concepts in legal assessment ('financial stability')
- Lack of effectiveness in situations with cross-border ramifications
 - Dexia 2011: law was not used to sell Dexia Bank to Belgian state -> fear of 'retaliations' ?
- "Work in progress"
 - Statutory regime for 'bail-in' ?
 - EU regime is inevitable in EU single market