THE BANKING REGULATION REVIEW

NINTH EDITION

Editor
Jan Putnis

THE LAWREVIEWS

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PREFACE

Banking regulation is a never-ending quest to balance the three major policy objectives of financial stability, consumer protection and the needs of developed economies for reliable services involving the provision and intermediation of finance. It is safe to say that the relative importance of these factors to policymakers will never be constant. Driven by events – whether political, economic or financial – governments and regulators will move their centre of focus from one objective to another as circumstances require, while continuing to pay lip service to the need to balance all three. For their part, banks have to maintain the right quantity and quality of resources to react to policy shifts and, hopefully, to ensure that they can communicate their views clearly to the authorities before those shifts take place.

But what happens when there are developments that leave everyone – governments, regulators and banks alike – unsure of how to react, or even, in some cases, unsure of whether or not there are serious concerns to address? That is what we now face with the rise of technology in banking. Is technology simply an opportunity for banks to improve their service or does it present threats to customers and ultimately to financial stability? If there are threats, do these go beyond the much-publicised cyber risks?

Starting with the opportunity, the position is not quite what many new so-called fintech banks would have you believe. Their orthodox view of the world is that large, established banks will be supplanted by nimbler upstarts, particularly those new firms that are not actually banks and are relatively unburdened by regulation (or think they are). Particularly in the area of payments, those upstarts aim to appropriate banks' customer relationships, not by shutting banks out of payment transactions entirely, but by relegating them to mere infrastructure in payment clearing. I refer to this view as 'orthodox' because it ignores at least four important and fast-developing features of the way that technology is revolutionising many major, established banks:

a The ability of banks to fight back and the vast resources that large, established banks have to throw at this effort if they are minded to do so and have sufficient strategic focus to stick to the task.

b The capacity of technology to cut the costs and improve the efficiency of established banks.

c The strategy (and ability) of some banks to follow an inorganic approach to acquiring technology and new ideas; while cultural differences and other integration challenges often mean that banks do not realise the full benefits of acquiring newer technology-focused firms, if only a small proportion of these acquisitions succeed then much of the apparent hype around some start-up firms pursuing novel fintech strategies could evaporate as large, established banks become the principal means by which new ideas hatched by the founders of start-ups are put into practice.

d Legal and regulatory changes in some parts of the world to open up banking, and payment services, to increased competition and therefore innovation – particularly PSD2 in the European Union – are pushing banks to adopt new technologies and are starting to foster a more creative and entrepreneurial culture in some banks.

Commentators frequently write that banks that fail properly to capitalise on the opportunities that technologies present will fail. This has become a truism as technologies once thought to be novel – contactless payments, for example – have become commonplace in many parts of the world. In other words, new technology has become such a pervasive feature of both wholesale and retail banking in most of the world that to say that banks have to use it effectively to survive has become little different from saying that banks will fail if they don't run their businesses effectively. That said, a proportion of banks will fail on this simple ground, and may therefore fail in business terms as others with a better understanding of the power of technology to improve and expand services and increase efficiency forge ahead. Many banks have also, so far, failed to create the right sort of creative environment in which genuinely new business ideas originate. There are a number of reasons for this that exist to varying degrees in all large banks, including complex and bureaucratic management structures, which can stifle innovation; a necessary preoccupation with legacy issues and structural reform; an understandably risk-averse approach to business development; and the opportunities that exist for talented and creative staff outside the banking sector. It would be entirely wrong, however, to assume that these issues simply cannot be overcome in any large, established banks.

So much for the opportunities; what about the threats? Cyber risk remains a very significant concern for regulators, perhaps the single most important area of bank regulatory concern worldwide at present. But there is another challenge that banks must face from technology, which is simply that more will be expected of them by regulators and customers alike once technology makes banking more transparent. So, from a front office perspective, technology does not just offer ways of providing better services to customers; it also raises their expectations, and banks will have to be ready to live up to those expectations, or they will simply lose customers. From a back-office perspective, technology is beginning to provide banks with innovative ways of understanding better the risks they have taken and their relationships with providers of funding, hedging services and other counterparties. For example, machine learning has now advanced to a level where it can provide real assistance to banks in understanding very quickly, in a very detailed way, the terms of the agreements to which they are party, how they interrelate with each other and how they would perform in a crisis. One of the lessons of the financial crisis was that recovery and resolution planning is a very resource-intensive exercise when done by means of a manual review of documents. Machine learning will eventually allow many of these review processes to be done in almost real time and for banks to verify the application of policies and procedures to documents and customer relationships as they develop, rather than retrospectively. Once these capabilities are developed to a usable level, which is likely to be in the next few years, it will not be surprising if regulators begin to expect banks to apply them. The fact that it might take a bank several months to review 100,000 documents manually will then no longer be a complete excuse for not having fairly immediate answers to regulators' straightforward questions about the nature of the risks on a bank's balance sheet; the bank should either know the answers or will be expected to have the means to find out quickly.

Much of this would suggest that the adoption of new technology may ultimately have more profound effects on large banks than post-crisis structural reform. Apart from customer services, I would expect these effects to manifest themselves in reductions in staff numbers, particularly in front-office roles, risk management and compliance. It is apparent that even the most sophisticated and well-resourced banking regulators around the world are still behind the curve in realising the true impact of these developments: just as the banks have an enormous challenge in devising profitable and prudent ways of applying technology, regulators have an almost equal challenge in understanding the risks as well as the benefits.

Away from technology, the past year has failed to produce the destructive earthquake in international regulatory initiatives that some commentators predicted following the election of Donald Trump as President of the United States. Nevertheless, further and deeper international regulatory cooperation now looks significantly less likely than it did two years ago and regulators should be trying to work out what this will mean in a future banking crisis. For their part, the Basel Committee on Banking Supervision and other international organisations that promulgate bank regulatory reform will no doubt be wary of proposing ideas that do not receive widespread support from major banking jurisdictions.

In Europe, the preparations that banks are making for the UK's departure from the European Union in 2019 continue apace, even as the progress towards a political agreement and related transitional arrangements remains, at the time of writing, slow and fraught with difficulty. Almost whatever the nature of this agreement, the legal and regulatory barriers to cross-border banking and securities business that will be erected between the United Kingdom and the European Union when, as currently planned, the UK leaves the EU single market, are expected to make Europe as a whole a more expensive region for global banks. As a result, many of these banks are reconsidering their participation in certain less profitable business lines and some geographical markets in Europe. It remains to be seen whether smaller EU banks with a domestic or a regional focus can capitalise on these developments. Meanwhile, attempts to strengthen and deepen the eurozone's banking union continue, albeit very slowly. The move of some business from London to mainland Europe as a result of Brexit is unlikely to achieve the natural desire of many European politicians and central bankers for the eurozone to have its own, genuinely global financial centre.

In Asia it remains, as ever, as foolish as it is difficult to generalise about developments across such a diverse and fast developing region. However, the continuing growth of wealth management services is still of great interest to many banks in the region and beyond. It remains to be seen whether all the most important bank regulators in the region can keep up with understanding and monitoring the increased risks associated with this development, from investor protection to money laundering.

In the United States, we saw tangible proposals for regulatory reform during 2017, although at the time of writing it is not yet clear what the outcome will be.

This ninth edition of *The Banking Regulation Review* contains chapters provided by authors in 35 countries and territories in March and April 2018, as well as the usual chapters on International Initiatives and an overview of the European Union.

My thanks go once again to the authors, who thankfully find this subject sufficiently interesting and profitable both to continue to advise clients on it as well as to write about it in their spare time. However, I remain conscious of the fact that spare time has been in very short supply to many of the authors during the past year, and I am therefore very grateful for their dedication in contributing to this book.

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Chapter 15

IRELAND

Robert Cain and Sarah Lee[1]

I INTRODUCTION

Ireland took a series of exceptional steps to contain the crisis in the banking sector that emerged in 2008. Its strategy was to provide liability guarantees, transfer non-performing eligible assets to a government-backed entity (the National Asset Management Agency (NAMA)), established by legislation enacted in 2009, and to provide capital and liquidity to weakened and distressed banks and building societies.

The strain on the state's resources ultimately led to the intervention of the European Union and the International Monetary Fund (IMF) in November 2010. The EU/IMF Programme of National Support for Ireland (Programme of Support) necessitated a restructuring and downsizing of the banking sector. Legislation to facilitate the immediate stabilisation of the domestic banking sector was passed in December 2010, in the form of the Credit Institutions (Stabilisation) Act 2010 (the Stabilisation Act). A permanent resolution regime was introduced under the Central Bank and Credit Institutions (Resolution) Act 2011 (the Resolution Act). The Bank Recovery and Resolution Directive (Directive 2014/59/EU) (BRRD) was transposed into Irish law by the European Union (Bank Recovery and Resolution) Regulations 2015 (the BRRD Regulations), which supersede existing domestic resolution legislation where applicable.

Ireland exited the Programme of Support in December 2013 with a restructured banking system that is recovering well in line with a much-improved domestic economy. Bank of Ireland and Allied Irish Banks, plc (AIB), in particular, now act as 'pillar banks' in the Irish retail banking system, and it is envisaged that additional competition in the sector will be provided by subsidiaries of foreign-owned banking groups, including the Royal Bank of Scotland and KBC groups, and Permanent TSB.

Banking regulation has undergone considerable change since the beginning of the crisis. Institutionally, there has been a reconstitution of the regulator, the Central Bank of Ireland (Central Bank), while regulatory policy and objectives have also been refocused. Ireland is also part of the single supervisory mechanism (SSM).

Domestically, the largest retail banks are AIB, Bank of Ireland, Permanent TSB, KBC and Ulster Bank. There are also a number of large international financial institutions with branches or licensed banks in Ireland and these numbers are expected to increase as a result of Brexit.

1 Robert Cain is a partner and Sarah Lee is an associate at Arthur Cox.

II THE REGULATORY REGIME APPLICABLE TO BANKS

i The regulator

The Central Bank is responsible for prudential regulation and conduct of business of financial institutions in Ireland, and was established under the Central Bank Act 1942. This legislation has been subject to extensive amendment since its enactment.

From November 2014, banks have been subject to EU-wide regulation under the SSM. On 29 October 2013, the two regulations comprising the SSM were published in the Official Journal of the European Union. The first, conferring specific tasks on the European Central Bank (ECB) in relation to the prudential supervision of credit institutions, came into force five days later, and the second, amending the regulation governing the operation of the European Banking Authority, came into force on 30 October 2013. The ECB assumed its supervisory role on 4 November 2014.

ii Objectives

The Central Bank is required to ensure proper and effective regulation of financial institutions and markets, to ensure that the interests of consumers are protected, and to ensure the stability of the financial system overall.

In the context of the regulation of financial institutions and markets, the objective of regulation in Ireland is to minimise the risks of systemic failure or insolvency of an institution by ensuring compliance with prudential and other requirements.

The Central Bank is responsible for developing rules governing the authorisation of financial services providers and for the continuing supervision of the entities that it has authorised (including as part of the SSM).

iii Legislation in respect of regulation of financial institutions

The primary legislation in respect of the regulation of banks is the Central Bank Acts 1942 to 2017.

Building societies and credit unions are primarily regulated under the Building Societies Act 1989 and the Credit Union Act 1997 respectively.

In addition, certain guidelines and codes have been issued by the Central Bank with which regulated entities are obliged to comply. For example, the Central Bank's Consumer Protection Code sets out conduct of business requirements applicable to banking services (and other types of financial services) provided in Ireland.

iv Legal structures of banks

Most banks have been established as limited liability companies, although, in the past, the Central Bank has authorised banks established as unlimited companies with limited liability holding companies. Building societies and credit unions are typically constituted as mutual societies.

III PRUDENTIAL REGULATION

i Relationship with the prudential regulator

The Central Bank employs a risk-based approach to regulation, supported by the ability to take enforcement action where breaches of its requirements are identified. The risk-based approach is used so that resources are focused on financial institutions with the highest impact and risk profile.

In November 2011, the Central Bank introduced a risk-based supervisory mechanism called PRISM (Probability Risk and Impact SysteM), which allocates the Central Bank's supervisory resources based on risk to the economy. This allows the Central Bank to focus on those financial institutions that pose a greater threat to the financial stability of the economy. The SSM approach to supervision is also risk-based. It takes into account both the degree of damage that the failure of an institution could cause to financial stability and the likelihood of such a failure occurring. Where the SSM judges that there are increased risks to a credit institution or group of credit institutions, those banks will be supervised more intensively until the relevant risks decrease to an adequate level. The SSM approach to supervision is based on qualitative and quantitative approaches, and involves judgement and forward-looking critical assessment.

Compliance monitoring

Central Bank compliance monitoring involves reviewing regulatory returns provided by banks, and conducting both on-site and off-site review meetings and inspections. Those institutions that carry the greatest risk to the stability of the financial system or that deal directly with customers are subject to a higher level of scrutiny.

The Central Bank has the power to impose administrative sanctions to ensure compliance with the regulatory requirements imposed on banks through the Central Bank (Supervision and Enforcement) Act 2013 (the 2013 Act). This legislation substantially strengthened the Central Bank's powers and increased its potential enforcement remedies. The 2013 Act also gave the Central Bank power to direct regulated financial services providers to make appropriate redress to affected customers for widespread or regular relevant defaults, and provided affected customers with a right of action if they have suffered loss as a result of a breach of regulatory requirements.

The Central Bank's Strategic Plan for 2016–2018 indicates that the Bank will enhance supervisory engagement, processes and tools in light of its new powers and mandates and upgraded international standards, and use its enforcement powers to achieve credible deterrence. The Strategic Plan states that the Central Bank will supervise banks within the SSM framework, and undertake reactive supervisory work based on triggers, including regulatory returns, market intelligence and whistle-blowing complaints.

Disclosure obligations

The Central Bank has broad supervisory powers and can compel licensed banks to make disclosures relating to any aspect of their business. Under the Companies Act 2014, licensed banks are also required to disclose increased levels of detail relating to certain transactions (including loans) with directors and connected persons in their annual accounts. The 2013 Act also introduced protection for persons who disclose to the Central Bank alleged contraventions of financial services legislation.

On 1 July 2013, the Central Bank's revised Code of Practice on Lending to Related Parties came into force. It sets out statutory requirements (including disclosure obligations) in relation to lending by banks and building societies to related parties, including subsidiaries and senior office holders.

Principal matters in which the regulator will become involved

The most common form of enforcement issue is failure by a bank to comply with the technical requirements of a regulation or code, particularly consumer protection, anti-money laundering and regulatory capital requirements. Based on an analysis of the Central Bank's recently published sanctions, a major concern of the Bank is system and control failures by regulated entities and failure to comply with their internal policies and procedures. Sanctions are disclosed on the Central Bank's website.

ii Management of banks

The Central Bank must be satisfied that the structure of the board and senior management of a bank and its internal control systems and reporting arrangements are such as to provide for the effective, prudent and efficient administration of its assets and liabilities. In this respect, it is necessary for all banks to have in place such committees of directors and management and other management structures as are necessary to ensure that the business of the credit institution is being managed, conducted and controlled in a prudent manner.

The Central Bank's fitness and probity regime, established under Part 3 of the Central Bank Reform Act 2010, came into effect on 1 December 2011 and was fully implemented on 1 December 2012. Regulated financial services providers, including banks, are responsible for ensuring that persons performing pre-approval controlled functions or controlled functions comply with the Fitness and Probity Standards (the Standards), both on appointment to such functions and on an ongoing basis. Specifically, a regulated financial services provider must not permit a person to perform a pre-approval controlled function or controlled function unless it is satisfied on reasonable grounds that the person complies with the Standards and has obtained confirmation that the person has agreed to abide by those Standards.

The Central Bank must be satisfied that directors and senior executives are fit and proper persons and have appropriate competence and experience in banking and financial services to enable them to fulfil their duties.

Previously, all appointments to the board of a bank and certain senior management appointments were subject to the prior approval of the Central Bank. However, following the implementation of the SSM, the ECB is now the exclusive competent authority regarding the fitness and probity of the management boards of significant credit institutions and the management boards of all credit institutions applying for authorisation.

A proposed director or senior manager must complete an 'individual questionnaire' disclosing details of his or her interests, background and any regulatory censures to which he or she has been subjected. A detailed *curriculum vitae* outlining the proposed appointee's relevant experience must also be attached. All retirements from the board must also be notified to the Central Bank.

The Central Bank requires that the ultimate decision-making body of a bank be located in Ireland and that the bank be adequately staffed to carry out its head office operations in Ireland.

The Corporate Governance Requirements for Credit Institutions 2015 (the Corporate Governance Requirements) set out minimum statutory corporate governance requirements for Irish incorporated credit institutions. Compliance with the Corporate Governance Requirements is mandatory, and there is no scope to 'explain' departures from them.

In addition to the regulatory requirements imposed on directors of Irish banks, directors must also comply with the directors' duties imposed by Irish company law and Irish common law.

Remuneration

Directive 2013/36/EU (CRD) and Regulation (EU) No. 575/2013 (CRR) (together referred to as CRD IV) were implemented in Ireland by the European Union (Capital Requirements) Regulations 2014 (2014 Regulations) (which transposed the CRD) and the European Union (Capital Requirements) (No. 2) Regulations 2014 (which gave effect to a number of technical requirements necessary to ensure the effective operation of the CRR). The 2014 Regulations place an obligation upon firms to have remuneration policies that are consistent with, and that promote, sound and effective risk management and place restrictions on variable remuneration in particular. The 2014 Regulations also contain disclosure requirements related to remuneration policies and practices. Remuneration practices that are not consistent with effective risk management or that run contrary to the CRD IV remuneration principles will be scrutinised by the Central Bank.

In November 2013, the Central Bank confirmed to the European Securities and Markets Authority (ESMA) its intention to comply with ESMA's Guidelines on Remuneration Policies and Practices. All affected firms (including credit institutions that provide investment services) are required to comply with the guidelines and to take the guidelines into account when formulating their remuneration arrangements. On 31 January 2017, the Central Bank published a policy statement setting out its position in relation to proportionality relating to the payout process applicable to variable remuneration for Irish 'less significant' credit institutions and CRD IV investment firms.

The Corporate Governance Requirements also contain certain guidelines relating to remuneration, including a prohibition on remuneration policies that encourage risk-taking and a requirement that major institutions appoint a remuneration committee.

iii Regulatory capital and liquidity

Under CRD IV, a bank is required to have an initial capital of at least €5 million and then to comply with risk-based ongoing capital requirements. The purpose of CRD IV is to implement the Basel III global regulatory standards and to strengthen the EU banking sector to enable it to better withstand any future economic or financial crisis.

A range of sanctions may be imposed by the Central Bank to ensure enforcement of the 2014 Regulations, but in any event the Central Bank will require a bank to inject additional capital immediately should it fail to meet the minimum capital requirements.

In 2014, three credit institutions were fined €650,000, €315,000 and €100,000 for breaches of the European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 (these Regulations have been revoked by the 2014 Regulations). The breaches included having exposures to sovereign bonds and clients in excess of the permitted limits. In 2015, one firm was fined €49,000 in respect of breaches of its obligations under the CRR.

The Central Bank published detailed requirements for the management of liquidity risk in June 2009, which must be complied with by Irish banks.

The Solvency II regime for insurance and reinsurance companies has been given legal effect in Ireland by the European Communities (Insurance and Reinsurance) Regulations 2015.

The Credit Union Act 1997 (Regulatory Requirements) Regulations 2016, which came into force on 1 January 2016, deal with reserves, liquidity, lending, investments, savings and borrowings for the credit union sector.

Insolvency

In the event that a bank becomes insolvent, an examiner may be appointed to that bank. If a bank is or is likely to be unable to pay its debts, the Central Bank may present a petition to the court for the appointment of an examiner to the bank. The petition to appoint an examiner must be accompanied by a report prepared by an independent accountant, a statement of the bank's assets and liabilities, and the opinion of the independent accountant as to whether the bank, or part of it, would have a reasonable prospect of survival, and whether an attempt to continue the whole or part of the business would be more advantageous to the members and creditors than a winding up.

An examiner may be appointed for 70 or 100 days, during which time no proceedings for the winding up of the bank may be taken, no receiver may be appointed over any part of the bank's property, and no attachments, sequestration, distress or execution may be carried out. An examiner is required to formulate proposals for a compromise or scheme of arrangement in relation to the bank and may carry out such other duties as the court may direct.

In the event that a bank is unable to pay its debts, a creditor may petition the court to have the bank wound up or the shareholders may convene a meeting of the shareholders to resolve to wind up the bank. In the former case, the court may appoint a liquidator. If the shareholders resolve to wind up the bank, the creditors will appoint a liquidator.

Under the Resolution Act, the Central Bank may present a petition to wind up an authorised credit institution. Other persons may only do so if the Central Bank is notified and confirms that it does not object. If a petition is presented by a person other than the Central Bank, the Bank retains a key role. For example, the Central Bank must be given notice prior to certain steps in the process being taken, and a liquidator cannot be appointed without its prior approval. The Resolution Act also sets out specific objectives for liquidators of authorised credit institutions.

The EU Insolvency Regulation will also apply to an insolvency when the bank has a place of establishment in another EU Member State (other than Denmark).

The EC (Reorganisation and Winding-Up of Credit Institutions) Regulations 2011 (the CIWUD Regulations) give effect to the Credit Institutions Reorganisation and Winding-Up Directive. These Regulations apply to banks whose head office is located in Ireland and to branches of those institutions located in EU Member States.

The Resolution Act, which came into effect on 28 October 2011, aims to provide an effective and expeditious regime for dealing with failing credit institutions while minimising the cost to the state. The Resolution Act has applied to credit institutions in Ireland since 31 December 2014, when the temporary emergency regime under the Stabilisation Act expired. The Resolution Act has now largely been superseded by the BRRD Regulations. The Central Bank has sweeping powers to intervene where a credit institution is failing. Further details on the Stabilisation Act, the Resolution Act and the BRRD Regulations are set out in subsection iv, below.

Future developments

At this stage, there are no plans for purely domestic legislation that would alter the Irish capital adequacy requirements.

iv Recovery and resolution

Ireland has introduced three specific pieces of resolution legislation following the crisis of recent years.

The Stabilisation Act

The Stabilisation Act came into effect on 21 December 2010. The Stabilisation Act provided a legislative basis for the immediate restructuring and stabilisation of the Irish banking system as set out in the National Recovery Plan 2011–2014 and agreed in the Programme of Support. The powers in the Stabilisation Act were temporary and expired on 31 December 2014.

The Resolution Act

The Resolution Act came into effect on 28 October 2011 and granted the Central Bank sweeping powers to intervene where any Irish credit institution is failing. The powers in the Resolution Act became fully effective upon expiry of the Stabilisation Act on 31 December 2014.

There are various preconditions that must be met before the Central Bank can intervene under the Resolution Act, which include:

a the existence of a present or imminent serious threat to the financial stability of the credit institution, or serious concerns relating to its financial stability or that of the state;

b the credit institution failing, or the likelihood that a credit institution will fail, to meet a regulatory requirement; and

c the existence of circumstances under which it is not in the public interest to wind up the credit institution immediately.

The Resolution Act established a fund for the resolution of financial instability in credit institutions. This fund is financed by a levy on credit institutions and any contribution from the Minister for Finance.

If the preconditions are met, and if it is considered necessary, the Central Bank is able to make an application to the High Court seeking an order to transfer the assets or liabilities of a failing institution or impose a special management regime on that failing institution, or both.

The Central Bank is empowered to present a petition to the High Court for the winding up of a failing credit institution in certain circumstances; further, no person is allowed to petition to wind up a credit institution without giving the Central Bank notice and receiving its approval.

The Central Bank is able to direct an ailing credit institution to submit and implement a recovery plan. If deemed necessary, the Central Bank can itself prepare a resolution plan in relation to a credit institution.

The Resolution Act was largely superseded when the BRRD Regulations came into force during 2015, but is still applicable to credit unions.

The BRRD Regulations

The BRRD was transposed into Irish law on 9 July 2015 by the BRRD Regulations. The Central Bank was designated as the competent authority in Ireland under the BRRD Regulations, save as regards the specific tasks conferred on the ECB as part of the SSM, in which case the ECB will function as the competent authority. The Central Bank was appointed as the resolution authority in Ireland for BRRD purposes under the BRRD Regulations. The BRRD Regulations also require the Central Bank to publish internal rules (including rules on professional secrecy) on information exchanges between it as resolution authority and its other functional areas. These internal rules were published by the Central Bank on 17 August 2015.

The following conditions must be met for the resolution of an institution to be regarded as necessary:

a the competent authority, having consulted with the Central Bank as resolution authority, must determine that the institution is likely to fail;
b there is no reasonable prospect of an alternative private sector measure (i.e., a sale to, or merger with, a private sector purchaser) that could remedy the situation;
c resolution must be necessary in the public interest; and
d the Minister for Finance must be informed.

There are four resolution tools available under the BRRD Regulations (the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool), which can be exercised individually or in a combination of two or more. To avail of one of the four resolution tools, the Central Bank must make a 'proposed resolution order' and then make an *ex parte* application to the High Court for a 'resolution order'. The institution itself, a shareholder or the holder of a capital instrument or liability affected by a resolution order may apply to the Court, within 48 hours of publication of the order, for the order to be set aside. The resolution order may provide for (among other matters) the transfer of shares, assets and liabilities, the reduction of principal under a capital instrument or in respect of eligible liabilities (or their conversion into shares), the cancellation of debt instruments (other than secured liabilities), the close-out or termination of financial contracts, and the removal and replacement of management by a special manager.

The BRRD Regulations provide for another resolution measure whereby the Central Bank can apply to the High Court for a 'capital instruments order' to write down or convert relevant capital instruments into shares, or other instruments into shares or other instruments of ownership in respect of an institution that requires resolution.

Stabilisation Scheme and Restructuring Support Scheme for credit unions

In November 2014, the Minister for Finance announced the introduction of two schemes of support for the credit union sector: the Stabilisation Scheme and the Restructuring Support Scheme. The Minister signed the Credit Union Fund (Stabilisation) Levy Regulations 2014 into law on 26 November 2014, giving effect to the introduction of a stabilisation levy to provide stabilisation support for credit unions under the Stabilisation Scheme. Separately, the Minister announced the introduction of a Restructuring Support Scheme for credit unions. The latter will provide financial assistance to restructuring credit unions that are not in a position to finance the process themselves for excess capital within participating credit unions.

IV CONDUCT OF BUSINESS

i Consumer Credit Act 1995

The Consumer Credit Act 1995 (CCA) applies to consumer lending in Ireland. It is not, however, limited to banks and financial services companies. The CCA also regulates some credit-related activities, such as money lending and credit and mortgage intermediation. In addition, the CCA contains detailed provisions relating to housing loans. Certain of the consumer credit provisions of the CCA have been replaced by the EC (Consumer Credit Agreements) Regulations 2010, which give effect to Directive 2008/48/EC. Nevertheless, the CCA remains in force in relation to credit agreements outside the scope of these regulations.

The regulations transposing the Mortgage Credit Directive (2014/17/EU) into Irish law (the European Union (Consumer Mortgage Credit Agreements) Regulations 2016) were published with effect from 21 March 2016.

ii Consumer Protection Code

A general Consumer Protection Code for financial institutions providing financial services (except MiFID investment services), including banks, was introduced by the Central Bank in 2006 and substantially overhauled with effect from 1 January 2012. Regulated entities must comply with the Consumer Protection Code as a matter of law, and the Central Bank has the power to administer sanctions for a contravention of it.

The Consumer Protection Code contains a set of general principles combined with more detailed requirements in certain areas, and applies to financial services providers operating in Ireland, as well as those passporting into Ireland on a branch or services basis.

iii Code of Conduct on Mortgage Arrears

The Central Bank has issued the Code of Conduct on Mortgage Arrears (CCMA), which applies to the mortgage lending activities of all regulated entities operating in Ireland, including mortgage lending provided by a regulated entity into Ireland on a branch or cross-border basis. A revised CCMA was introduced from July 2013.

The CCMA contains a number of requirements with which mortgage lenders must comply. Under the CCMA, lenders are restricted from bringing repossession proceedings any sooner than three months after the date of the letter that specifies whether a repayment arrangement will be offered or, if later, eight months from the date on which the arrears arose. Where a borrower is classified as 'not cooperating' (as defined in the CCMA), repossession proceedings may be started immediately.

iv Mortgage arrears resolution strategies

Mortgage arrears resolution strategies (MARS) are implemented by mortgage lenders in their dealings with consumers who have fallen into arrears. The Central Bank requires all lenders to deliver effective strategies and plans for dealing with consumers in difficulty and to cover pre-arrears, arrears and forbearance, and loan modifications or resolution. The Central Bank aims to ensure that dealing with mortgage arrears is a top priority for mortgage lenders.

v The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 (as amended)

The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 (as amended) (the SME Regulations) came into force on 1 July 2016 and replaced the Code of Conduct on Lending to Small and Medium Enterprises. The SME Regulations apply to credit provided to micro, small and medium-sized enterprises, which can include natural persons acting within the course of a business, trade or profession. The SME Regulations contain conduct of business requirements, including in relation to communications with borrowers, information to be provided to borrowers and dealing with borrowers in financial difficulties.

vi Personal insolvency and bankruptcy reform

The Personal Insolvency Act 2012 (as amended) (the Act) was signed into law on 26 December 2012, and its provisions were brought into effect during the course of 2013. The Act introduced reforms to the Bankruptcy Act 1988 and three forms of non-judicial debt settlement arrangement, which allow (subject to certain conditions being met) the write-down or restructuring of both secured and unsecured debt owed by certain eligible individuals: (1) personal insolvency arrangements, (2) debt settlement arrangements and (3) debt relief notices.

The Act provides debtors with a process whereby they can apply for write-downs; however, it is unlikely that mortgage lenders will frequently be compelled to accept a write-down of secured debt. It is also worth noting that the Act provides certain protections for secured creditors, including a clawback provision.

As regards bankruptcy, the Bankruptcy (Amendment) Act 2015 has reduced the standard bankruptcy term from three years to one year.

vii Investment services

The Central Bank regulates a wide range of investment services carried on in Ireland, including the provision of investment advice, dealing in financial instruments, receiving and transmitting orders, and portfolio management. Where a bank intends to provide investment services, it must notify the Central Bank. The provision of investment services in Ireland is subject to detailed conduct of business rules, including those contained in the European Union (Markets in Financial Instruments) Regulations 2017 (as amended), which implemented MiFID II (Directive 2014/65/EU) in Ireland.

viii Payment services and e-money

Ireland has implemented the Payment Services Directive 2015/2366, which contains certain licensing and conduct of business requirements for entities that provide payment services. The relevant implementing legislation is the European Union (Payment Services) Regulations 2018. Ireland has also implemented the E-Money Directive.[2]

ix Bank secrecy and confidentiality

An obligation of bank–client confidentiality arises from the operation of the common law. The common law implies a duty of confidentiality on a bank in its relationship with its customers subject to certain limited exemptions. Obligations in relation to personal data also arise under the Data Protection Acts 1988 and 2003.

V CREDIT REPORTING

The Central Bank established a central credit register (CCR), a national mandatory database of credit information, under the Credit Reporting Act 2013 (the Reporting Act). The purpose of the CCR is to collect and hold information about credit applications, credit agreements

2 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

and the parties to those agreements, and obliges lenders to report certain information relating to credit applications and agreements, borrowers (natural and legal persons) and guarantors in relation to loans of €500 or more.

Since 30 June 2017, lenders have been required to submit to the CCR personal and credit information in relation to loans provided to consumers. From 30 September 2018, lenders will be required to submit personal and credit information to the CCR in relation to business loans.

While the Reporting Act provides the statutory basis for the establishment and operation of the CCR, details of the type of personal and credit information to be provided to the CCR by lenders are set out in separate Regulations, namely the Credit Reporting Act 2013 (Section 6) (Additional Personal Information) Regulations 2016 and the Credit Reporting Act 2013 (Section 11) (Provision of Information for the Central Credit Register) Regulations 2016.

Three further regulations provide details of how lenders and borrowers can access information about the CCR, the steps that lenders must take to verify the identity of potential borrowers and guarantors, and the form and content of the warning notice that lenders must include on all credit application documentation. These regulations are the Credit Reporting Act 2013 (Section 17) (Access to the Central Credit Register) Regulations 2016, the Credit Reporting Act 2013 (Section 20) (Verification of Identity of Credit Information Subjects) Regulations 2016 and the Credit Reporting Act 2013 (Section 24) (Notices) Regulations 2016.

VI FUNDING

i Typical sources

In addition to the taking of deposits, domestic banks have typically relied heavily on wholesale funding and the capital markets through issuing bonds and short-term instruments.

ii Recent national measures to improve access to liquidity

State guarantees

On 20 September 2008, the government increased the limit for the deposit guarantee scheme for banks and building societies from €20,000 to €100,000 per depositor per institution. A depositor who suffers a loss must make a claim under this scheme before invoking any of the guarantees provided for below. The scheme was activated for the first time when the Irish Bank Resolution Corporation was liquidated in February 2013.

The Minister for Finance established the Credit Institutions (Financial Support) Scheme (the CIFS Scheme) on 20 October 2008. This gave effect to the state bank guarantee announced by the government on 30 September 2008. Under the CIFS Scheme, the Minister guaranteed certain 'covered liabilities' of 'covered institutions' between 30 September 2008 and 29 September 2010, inclusive.

The Eligible Liabilities Guarantee Scheme (the ELG Scheme) started on 9 November 2009. This enabled those domestic institutions (and certain of their subsidiaries) that benefited from the CIFS Scheme to issue debt securities and take deposits on a state-guaranteed basis. Eligible liabilities for the purposes of the ELG Scheme are any of the following:

a all deposits (to the extent not covered by deposit protection schemes in Ireland other than the CIFS Scheme or in any other jurisdiction);
b senior unsecured certificates of deposit;
c senior unsecured commercial paper; and
d other senior unsecured bonds and notes.

The closure of the ELG Scheme was announced in January 2013 so that new liabilities would not be guaranteed with effect from 28 March 2013. Liabilities already guaranteed as of 28 March 2013 are not affected by the closure.

NAMA

NAMA is a commercial, semi-state entity under the governance, direction and management of the National Treasury Management Agency. The central objective of NAMA is to stabilise Irish credit institutions by strengthening their balance sheets and reducing uncertainty in relation to their distressed loans so as to facilitate lending to individuals and businesses.

NAMA purchased eligible assets (e.g., credit facilities issued, created or otherwise provided by a participating institution to a debtor for the direct or indirect purpose, whether in whole or in part, of purchasing, exploiting or developing development land, or to a debtor for any purpose, where the security connected with the credit facility is or includes development land) from participating banks by issuing government-backed bonds to the participating banks.

VII CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

i Control regime

The Central Bank is opposed to an individual holding a 'dominant' interest in a bank. The Central Bank has a preference that ownership of a bank be held by 'one or more banks or other financial institutions of standing', or that there be a wide spread of ownership (such as through a stock exchange listing). Historically, the Central Bank's position has been that an insurance company would not be permitted to hold a controlling interest in a bank.

There are no restrictions on foreign ownership of banks. Where a bank is owned by a foreign bank or financial institution, the Central Bank will consult with the relevant foreign supervisor before granting the application. There is no restriction on private equity ownership of Irish banks.

The 2014 Regulations require the Central Bank to supervise credit institutions and their subsidiary and associated companies on a consolidated basis.

An entity or individual that controls a bank will have certain duties and responsibilities. The Central Bank will require the controlling entity to give an undertaking that the bank will be in a position to meet its liabilities during such time as the controlling entity holds a majority of the bank's ordinary share capital. In the event that a bank becomes insolvent, the controlling entity will be required to provide sufficient capital to the bank to make it solvent.

There is a general prohibition under Irish company law where a company provides financial assistance (e.g., security) for the purchase of its shares (subject to certain exemptions).

Changes in control

Under the 2014 Regulations, the Central Bank must be notified and approval sought in advance of the proposed acquisition of a direct or indirect 'qualifying holding' in a bank (i.e., 10 per cent or more of the voting rights or capital in the bank, or a holding that allows that person to exercise a 'significant influence' over the bank's direction or management) and, therefore, this includes the acquisition of an interest in its parent. Notification and approval are also required in respect of direct or indirect increases (above thresholds of 10, 20, 33 or 50 per cent) in such a qualifying holding. Approval is granted by the ECB under the SSM.

A business plan must be provided with the application for regulatory approval in certain circumstances, including where the proposed acquisition would:

a result in a change of the legal form of the bank;

b result in a change of the management of the bank;

c result in a change of any corporate governance; or

d have an impact on the day-to-day operations of the bank.

ii Transfers of banking business

The assets and liabilities of a bank can be transferred by operation of law under a procedure provided by Part III of the Central Bank Act 1971 (a Part III transfer). The assets and liabilities of certain entities can also be transferred by operation of law pursuant to new procedures provided under the Resolution Act where certain preconditions are met.

It is also possible to transfer the business of certain companies under the EC (Cross-Border Mergers) Regulations 2008, which implement the Cross-Border Mergers Directive[3] in Ireland.

Part III transfers

Whenever the holder of a banking licence agrees to transfer, in whole or in part, to another holder of a banking licence, the business to which the licence relates and all or any of the other assets and liabilities of the transferor, the transferor and transferee may submit a scheme for the transfer for ministerial approval.

Where the Minister for Finance approves the scheme by ministerial order (not less than two months before the transfer), the assets and liabilities described in the scheme will transfer under the order by operation of law without the need to obtain the consent of individual deposit holders or counterparties.

If the Minister is of the opinion that the order is made with the intention of preserving or restoring the financial position of the transferor, but could affect the rights of third parties existing before the transfer, the order must state that it is made with this intention and that it should take effect outside as well as inside the state. The CIWUD Regulations will then apply.

Resolution transfers

The BRRD Regulations empower the Central Bank to transfer assets and liabilities from one bank to another if certain conditions are met.

VIII THE YEAR IN REVIEW

The past year has seen a period of continuing stability following the enormous challenges and radical changes affecting both banking regulation and the banking sector in Ireland since the start of the financial crisis in 2008. In terms of regulation, the Central Bank has been active in the field of enforcement for regulatory breaches (as described in Section III).

In October 2015, the Central Bank commenced an industry-wide examination of tracker mortgage-related issues, including the transparency of communication with, and contractual rights of, borrowers with tracker mortgages. The industry-wide examination arose following a review by the Central Bank of practices adopted by certain lenders in which borrowers with tracker mortgages were switched to variable rate mortgages. The principal issue related to a

3 Directive (EU) 2017/1132 relating to certain aspects of company law.

failure by lenders to inform borrowers of the consequences of switching mortgage products, in particular that borrowers would lose their contractual right to a tracker mortgage. During the course of 2016 and 2017, lenders were cooperating with the Central Bank to develop detailed plans and frameworks, including establishing appropriate governance and reporting structures, for conducting internal reviews of their mortgage books. The lenders involved have been carrying out internal reviews of their mortgage books to identify any customers who may have been affected by a failure to honour their contractual entitlements, or to comply with the regulatory requirements regarding disclosure and transparency of information. AIB, Bank of Ireland, Ulster Bank, KBC Bank and Bank of Scotland plc are just some of the lenders that are subject to this tracker mortgage examination.

Permanent TSB and its subsidiary company, Springboard Mortgages Limited (Springboard), have been the subject of enforcement investigations as a result of significant failings that were identified in relation to their tracker mortgage book. The majority of the affected customer accounts (1,152) are accounts of Permanent TSB, and the remaining 220 are accounts of Springboard. Permanent TSB agreed in 2016 to implement a major redress and compensation programme to address the detriment suffered by affected Permanent TSB and Springboard customer accounts. On 24 November 2016, the Central Bank announced that it had imposed a €4.5 million fine on Springboard. The Central Bank has confirmed that it has launched further enforcement investigations against other lenders involved in the tracker mortgage examination.

IX OUTLOOK AND CONCLUSIONS

The Central Bank has indicated that the prudential regulatory regime will continue to be more intrusive in the future, and that it will follow the risk-based model that is now in place and apply supervisory measures in conjunction with the ECB under the SSM. While the legal and regulatory policy is likely to change further in the short or medium term as the government and Central Bank continue to respond to the effects of the financial crisis in Ireland, much of the change is likely to be EU-driven. It is anticipated that, after a number of years of radical change in Irish financial regulation and the banking sector, domestically at least, 2018 is likely to bring further evolution, rather than revolution.

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