

Jersey's Bank Recovery and Resolution Law

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The Bank (Recovery and Resolution) (Jersey) Law 2017 (the **Law**) will, save for article 72, come into force on 31 January 2022.

What is it?

The Law will provide a new bank resolution regime reflecting the international legislation implemented in response to the financial crisis of 2008 and 2009, namely the EU Bank Recovery and Resolution Directive (2014/59) and the UK's Banking Act 2009 (as amended).

The Law aims to ensure the continuity of critical banking functions to preserve financial stability and to protect public funds by mitigating the use of public finances to support failing banks. Its principal objectives are:

- to ensure that Jersey can assist a foreign jurisdiction in respect of resolution action being taken on a failing bank conducting business in Jersey; and
- to deal with the scenario where a bank in Jersey fails and additional powers are needed to resolve the local banking business, for instance either as a result of the home jurisdiction not taking action which satisfactorily deals with the local business or because Jersey is the home jurisdiction of the bank.

What does it do?

The Law will implement a number of "Key Attributes" established in the EU and UK resolution legislation.

Specifically, it will establish the Jersey Resolution Authority (the **Authority**) which will be granted administrative powers to stabilise and/or resolve distressed banks.

It will also establish a new fund (the **Resolution Fund**), which is capped at £100 million, to provide short term funding and the provision of guarantees or capital to enhance the effectiveness of the various resolution tools that may be deployed by the Authority. The Authority

will have the power to recover from a bank any funds paid out in respect of that bank, to raise contributions from Jersey banks where funds are insufficient and to borrow from any source, including Jersey's strategic reserve fund.

Where temporary funding from the Resolution Fund will be used to accomplish the stabilisation of a bank, such funds will be recovered from shareholders and unsecured creditors (subject to the principle that no creditor should be worse off in stabilisation than in a winding up) or if necessary by way of contribution from the financial system more widely.

The Resolution Fund will be in addition to the administrative financial resources required by the Authority and which will be paid for by an administration levy payable by the Jersey banks and from other sources.

Who will be subject to the Law?

The Law will apply to any person registered to carry on deposit taking business under the Banking Business (Jersey) Law 1991 and any Jersey incorporated company which is a parent or subsidiary of a person so registered.

It therefore will apply to Jersey subsidiaries or branches of foreign banking groups established in Jersey. The Law will permit the Authority to recognise foreign resolution actions or, where the foreign resolution actions might endanger financial stability in Jersey or where Jersey depositors would not receive equal treatment with the depositors in the bank's home or other jurisdictions, to undertake its own action in respect of such branches or subsidiaries of foreign banking groups.

What powers will the Authority have?

The Authority will have a number of resolution tools available to it in the event that a bank is failing or is likely to fail. Therefore, in addition to the Law applying as a consequence of a bank being insolvent (for instance, where the bank's assets are valued at less than its liabilities, or the bank is unable to pay its debts as they fall due), the Law could also apply where the bank is not technically insolvent; for instance where the bank has failed to satisfy the Jersey Financial Services Commission (the **Commission**) that it is a fit and proper person to carry on deposit taking business or where the bank requires extraordinary public financial support.

The tools will comprise:

- the power to sell all or part of the bank's business to another bank;
- the power to sell all or part of the bank's business to a bank established by the Authority (referred to in the Law as a "bridge bank");

- the power to separate performing from underperforming assets by way of transfer to a bridge bank or asset management vehicle (for instance, to establish "good" and "bad" banks); and
- the bail in of shareholders and creditors (including writing down or converting debt into equity).

In each case the deployment of a tool will be subject to resolution safeguards.

Given that one of the purposes of the regime is to minimise the risk of Jersey taxpayers carrying the costs of resolving a failing bank, the Authority is most likely to deploy the bail in tool. In doing so, the shareholders and creditors would incur appropriate losses and assume an appropriate part of the costs arising from the failure of the bank (subject to the principle that no creditor should be worse off in stabilisation than in a winding up).

Importantly, however, from the perspective of customers of the failed bank, the bail in tool will not apply to claims that are secured, collateralised, insolvency remote or are otherwise guaranteed.

The Law will also establish a new procedure for the winding up of a bank in the place of Jersey's normal insolvency procedures. The new procedures are modelled on the combination of the "just and equitable" winding up procedure set out in the Companies (Jersey) Law 1991 and the powers given to a liquidator under a creditors winding up under that law.

What is the impact to Jersey banks?

Article 72 of the Law will require banks to contractually recognise the bail in provisions to the extent that, amongst other things, the liability that may be subject to the bail in is not governed by Jersey law. Failure to do so will be a criminal offence (subject to a fine of up to £10,000) and will not, in any event, prevent the bail in tool from being deployed. However, pursuant to the Bank (Recovery and Resolution - Amendment of Law) (Jersey) Regulations 2022, Article 72 will not come into force on 31 January 2022. Instead, banks will have the opportunity to liaise with the Authority to ensure that the requirements of Article 72 will be met once it comes into force.

Therefore, to the extent not already done when complying with the EU's or the UK's resolution regimes, in due course banks will need to amend their non-Jersey law terms and conditions and other documentation under which a liability may arise to contractually recognise the bail in provisions.

There are a number of recommended forms of bail in provisions which have been drafted to comply with a range of non-EEA governing laws (for instance the LMA bail in clause) so it is likely that such clauses can be inserted into the relevant documents without much amendment.

Ogier's regulatory team will be able to assist with this process.

Jersey banks could be required to draw up for the approval of the Commission a recovery plan setting out measures that would be taken to restore the financial position of the bank in the event of a significant deterioration.

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