Banking & Finance Law

Lecture Title: Bank recovery, resolution and winding up

Lecturers: Dr. Michael Buhagiar

Date: 5 May 2026

CAMILLERI PREZIOSI
ADVOCATES

Introduction

- Background to the BRRD

- Resolution vs recovery

- Recovery and Resolution Regulations

- Legislative framework for winding up of credit institutions in Malta

Background to the BRRD

- The financial crisis evidenced that there was a significant lack of adequate tools at EU level to deal with unsound or failing credit institutions.
- No harmonisation of the procedures for resolving institutions at Union level.
- Use of general corporate insolvency laws that are not necessarily adequate for the purposes of credit institutions.
- Major factor that forced Member States to save institutions using taxpayers' money.

Objectives of the BRRD

- Establishing a harmonised framework for resolving banks in an orderly manner, minimizing the risk of contagion and preserving financial stability, whilst ensuring the continuity of the bank's critical financial and economic functions.
- Promote the use of private sector solutions: losses borne by shareholders and creditors rather than tax payers.
- Shareholders bear losses first and the 'no creditor worse-off principle'
- Protect depositors and ensure access to essential services.
- Increase transparency and accountability

Recovery, Resolution and Winding Up

- Recovery refers to the process of restoring a bank to a sound financial position after it has experienced financial difficulties.
- Objective of recovery is to ensure that the bank can continue to operate on a viable basis and avoid the need for resolution.
- Resolution, on the other hand, refers to the process of resolving a bank that is no longer viable and cannot be restored to financial health through recovery measures.
- The objective of resolution is to minimize the impact of the bank's failure on the broader financial system and ensure that depositors and creditors are protected
- Winding up

Maltese legislative framework

- Recovery and Resolution: Recovery and Resolution Regulations (Subsidiary Legislation 330.09).

- Winding Up: various legislation
  (a) Companies Act (Cap. 386 of the laws of Malta);
  (b) Banking Act (Cap. 371 of the laws of Malta);
  (c) Controlled Companies (Procedure for Liquidation) Act (Cap. 383 of the Laws of Malta);
  (d) Credit Institutions (Reorganisation and Winding-Up) Regulations (S.L. 371.12);
  (e) the Residual Balances Fund Act (Cap. 618 of the Laws of Malta)

Recovery and Resolution Regulations

- Transpose the provisions of the BRRD into Maltese law.

- Brief outline of regulations:
  - (a) competent authority / resolution authority
  - (b) recovery plans
  - (c) resolution plans
  - (d) resolvability assessments
  - (e) impediments to resolvability
  - (f) early intervention measures
  - (g) resolution tools

Competent authority, resolution authority and resolution committee

- MFSA is responsible for the prudential supervision of credit institutions.

- The resolution authority, through the resolution committee is the authority responsible for the resolution of credit institutions.

MFSA powers

- Besides its supervisory powers the MFSA also has other powers under the RRR, including:

  (a) cooperating closely with the committee in the preparation, planning and application of resolution decisions;

  (b) determining the contents and details of recovery and resolutions plans together with the committee; and reviewing and assessing the recovery plans submitted by banks

  (c) applying early intervention measures;

  (d) power to remove senior management or board of directors;

  (e) power to appoint a temporary administrator;

  (f) determining whether a bank is failing or is likely to fail, after consulting the committee;

MFSA powers (cont'd)

(g) addressing any breaches, together with the committee, of the minimum requirements for own funds and eligible liabilities set out in the RRR;

(h) receive notifications from the board of directors of a bank where they consider that the bank is failing or likely to fail;

(i) To publicly publish a copy of the order or instrument by which a resolution action is taken;

(j) To impose administrative penalties and other administrative measures in respect of breaches of the provisions of the MFSA Act, the R&R Regulations and/or any rules issued thereunder transposing the BRRD II.

- General consultative role under the RRR.

Resolution Authority

- Established under the MFSA Act.
- Composed of the board of governors of the MFSA, namely:

  (a) the Chairman appointed by the Prime Minister acting on the advice of the cabinet;

  (b) The Chief Executive Officer appointed by the board of governors;

  (c) five members or more, appointed by the Prime Minister from among persons who have distinguished themselves in business, financial activities, the professions, the public services or academic affairs and who in his opinion are able to represent the points of view of the industry and consumers of financial services.

- Powers delegated to the Resolution Committee

Resolution Committee

- Composition, powers and functions of the committee are governed by the provisions set out in the First Schedule to the MFSA Act.

- Committee is composed of three persons: (a) a person appointed by the Central Bank of Malta; (b) a person appointed by the MFSA; and (c) a person appointed by the Ministry responsible for Finance, who has distinguished themselves in banking and financial related matters or have the relevant experience in financial supervision, regulation, resolution and insolvency of institutions.

Resolution Committee (cont'd)

- The MFSA Act also sets up a resolution unit which is required to carry out the following functions:
  (a) assess whether an institution is failing or is likely to fail, after consulting the MFSA;
  (b) draw up resolution plans, after consulting the MFSA, on how to deal with financial stress or failure of banks;
  (c) carry out resolvability assessment of institutions;
  (d) cooperate, liaise and exchange information, as necessary, with the units respectively responsible for supervision of banks within the MFSA

- Through the MFSA Act the committee is empowered to apply the resolution tools and exercise the resolution powers set out in the RRR.

Timeline

Pre Resolution	Resolution and Post Resolution
(a) The drawing up of recovery plans by banks; (b) The drawing up of resolution plans by the committee; (c) Assessment of resolvability of banks by the committee; (d) Application of measures required to address or remove impediments to resolvability; (e) Early intervention measures; (f) Removal of senior management and board of directors; (g) Appointment of a temporary administrator; (h) Valuation of assets and liabilities of the bank; (i) Write down or conversion of capital instruments and eligible liabilities.	(a) Resolution action and government intervention measures (b) Suspension of payment and other contractual obligations; (c) Appointment of a special manager to replace the board of a bank under resolution.

Recovery Plans

- Banks are required to draw up and maintain a recovery plan providing for measures to be taken by them to restore their financial position following a significant deterioration of their financial situation.
- Required to be updated annually or more frequently due to a change in the business or financial situation.
- Role of recovery plans is to ensure that banks consider, in advance, which corrective actions they could effectively take in situations of stress in order to restore their financial strength and viability.
- Recovery plans drawn up by banks are required to be submitted to the MFSA for review. The MFSA, in turn, is required to share the recovery plans with the Committee to identify any actions which may adversely impact the recoverability of bank.

Recovery Plans (cont'd)

- Recovery plan should include the information set out in section A of the schedule to the RRR, including:

  (a) A framework of indicators to trigger early warning systems; and

  (b) A range of scenarios of severe macroeconomic and financial distress designed as 'near-default' situations.

- Intended to assist banks to monitor and respond to the emergence of a stress situation and should act as points of reference for banks to initiate an internal escalation process and to assess what appropriate actions referred to in the recovery plan may be taken.

Recovery plans (cont'd)

- EBA Guidelines on recovery plan indicators (EBA/GL/2021/11) provide further detail on what the framework of indicators should consist of.

(a) Capital indicators - should identify any significant actual and likely future deterioration in the quantity and quality of capital in a going concern, including leverage;

(b) Liquidity indicators - should refer to both the short-term and long-term liquidity and funding needs of a bank and capture the bank's dependence on wholesale markets and retail deposits;

(c) Profitability indicators - should capture any bank's income-related aspect that could lead to a rapid deterioration in the bank's financial position through lowered retained earnings (or losses) impacting on the own funds of the bank;

(d) Asset quality indicators - should cover aspects such as off-balance-sheet exposures and the impact of non-performing loans on the asset quality.

Recovery plans (cont'd)

- The guidelines provide that recovery plans should also contain market-based indicators and macroeconomic indicators unless a bank justifies that they are not relevant to it.
- Breach of recovery plan: no automatic activation of recovery options and banks have full discretion whether to act or not in case of a breach.
- EBA expects banks to notify the competent authorities promptly after escalation process has been initiated and following notification to maintain active dialogue providing rationale of decisions taken.

Resolution plans

- Committee is required to draw up a resolution plan for each bank.
- The resolution plan sets out the preferred resolution strategy of the particular bank i.e. tools and powers that may be exercised where a bank meets the conditions for resolution.
- Plan must be drawn up in consultation with the MFSA.
- Updated annually or more frequently due to a change in the business or financial situation of the relevant bank

Resolution plans (cont'd)

- Information to be included in the resolution plans is set out in regulation 10(7) of the RRR and includes:

  (a) a detailed description of the assessment of resolvability carried out;

  (b) a description of any measures required to address or remove impediments to resolvability;

  (c) detailed description of the different resolution strategies that could be applied according to the different possible scenarios and the applicable timescales;

  (d) demonstration of critical functions and core business lines could be legally separated, to the extent necessary, from other functions so as to ensure continuity;

  (e) an estimation of the time-frame for executing each material aspect of the plan;

  (f) a plan for communicating with the media and the public.

- Committee may request banks to provide it with necessary information.
- Commission Delegated Regulation 2016/1075 provides further detail on the content of resolution plans
- Committee is required to transmit the resolution plan and any changes thereto to the MFSA and relevant European regulatory authorities,.

Resolvability Assessment

- The Committee, after consulting with the MFSA, is required to assess the extent to which a bank is resolvable.

- Assessment is carried out without the assumption of: (i) extraordinary public financial support besides the use of the financing arrangements established in terms of regulation 100 of the RRR; (ii) central bank emergency liquidity assistance; and (iii) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

Resolvability Assessment

- When carrying out assessment the committee must take into consideration the matters set out in section C of the RRR. These include:

(a) the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;

(b) the extent to which the service agreements that the institution maintains are fully enforceable in the event of resolution of the institution;

(c) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;

(d) the amount and type of bail-inable liabilities of the institution;

(e) the extent to which the resolution of the institution could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;

(f) the extent to which the resolution of the institution could have a significant effect on the operation of payment and settlement systems.

Resolvability Assessment

- A bank is deemed to be ‘resolvable’ if it is feasible and credible for the Committee to either: (i) liquidate the bank under normal insolvency proceedings; or (ii) to resolve the bank by applying the different resolution tools and powers to the bank while avoiding, to the maximum extent possible, any significant adverse effect on the financial system.

- In the event that a bank is deemed not to be resolvable, the Committee is required to notify the EBA

Impediments to resolvability

- In the event that the committee determines that there are substantive impediments to the resolvability of a bank, the committee is required to notify the bank and the MFSA.

- Within 4 months the relevant bank is required to propose to the committee possible measures to address or remove the substantive impediments identified in the notification.

Impediments to resolvability

- If the measures proposed by the bank do not effectively reduce or remove the impediments, the committee has the right to require the bank to take alternative measures set out in regulation 17(5) of the RRR, which include

  (a) requiring the bank to revise any intra-group financing agreements or review the absence thereof, or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;

  (b) requiring the bank to limit its maximum individual and aggregate exposures;

  (c) imposing specific or regular additional information requirements relevant for resolution purposes;

  (d) requiring the bank to divest specific assets;

  (e) requiring the bank to limit or cease specific existing or proposed activities;

  (f) restricting or preventing the development of new or existing business lines or sale of new or existing products.

- Description measures to be included in resolution plan.

Early Intervention Measures

- The RRR equips the MFSA with a set of early intervention measures.

- Applicable where a bank infringes or is likely to infringe (due to amongst others, a rapidly deteriorating financial conditions) the CRD, the CRR and certain provisions of BRRD II.

Early Intervention Measures

- Measures include:

(a) requiring the bank to implement the arrangements /measures set out in its recovery plan;

(b) requiring specific action from the board, such as drawing up a plan for negotiation on restructuring of debt with some or all of its creditors;

(c) requiring one of more directors or members of senior management to be removed or replaced if found to be unfit to perform their duties;

(d) making changes to the bank's business strategy;

(e) requiring changes to the legal or operational structures of the bank.

Early Intervention Measures

- The MFSA is required to notify the Committee upon determining that the conditions for early intervention measures are met.

- The Committee shall have the power to require the bank to contact potential purchasers in order to prepare for the resolution of the bank.

- However the adoption of an early intervention measure is not a condition for taking a resolution action.

Removal of senior management and board of directors

- Where there is a significant deterioration in the financial situation of a bank or where there are serious infringements of law or serious administrative irregularities and the 'early intervention measures' are not sufficient, the MFSA may require the removal of the senior management or the board of the bank.

Appointment of temporary administrator

- Where the removal of the senior management or board of directors is deemed to be insufficient by the MFSA to remedy the situation, the MFSA may appoint one or more temporary administrators.
- May either replace the board or work temporarily therewith.
- The powers, role and functions of the temporary administrator are specified by the MFSA at the time of appointment.
- Powers may include some or all of the powers vested in the directors and the role may include ascertaining the financial position of the bank, managing the business or part of it with a view to preserving or restoring the financial position of the bank and taking measures to restore the sound and prudent management of the business of the bank.

Appointment of temporary administrator (cont'd)

- Power to remove or appoint the temporary administrator or vary the terms of appointment vest in the MFSA.
- MFSA may require that certain acts of the temporary administrator necessitate MFSA consent.
- The appointment of a temporary administrator shall not last more than a year, but the period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to apply.
- Competent person: Banking Act Article 29(1)

Resolution objectives

- When applying the resolution tools and exercising the resolution powers, the Committee is required to have regard to the following resolution objectives:

  (a) ensuring the continuity of critical functions;

  (b) avoiding a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

  (c) protecting public funds by minimising reliance on extraordinary public financial support;

  (d) protecting depositors and investors;

  (e) protecting client funds and client assets.

- Objectives are of equal significance.

- Should minimize cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

Resolution Action

- Committee is required to take resolution action if all of the following conditions are met:
  (a) The bank is failing or likely to fail;
  (b) there is no reasonable prospect that any alternative private sector measures or supervisory action, including early intervention measures or the write down or conversion of capital instruments and eligible liabilities, would prevent the failure of the bank within a reasonable time frame;
  (c) resolution action is necessary in the public interest.

Failing or likely to fail

- If the bank satisfies one or more of the circumstances listed in regulation 32(4)(a) of the RRR namely:
  (a) the bank infringes or there are objective elements to support a determination that the bank will in the near future infringe the requirements for continuing authorisation;
  (b) the assets of the bank are or there are objective elements to support a determination that the assets of the bank will in the near future be less than its liabilities;
  (c) the bank is or there are objective elements to support a determination that the bank will in the near future be unable to pay its debts or other liabilities as they fall due; and
  (d) there is a need for extraordinary public financial support.

Failing or likely to fail

- EBA provides guidelines on objective elements to support competent authorities in determining whether a bank is failing or likely to fail. The objective elements set out in the guidelines are:

(a) The capital position of a bank: infringement of own funds requirement that would justify withdrawal of license or assets that are less than its liabilities;

(b) The liquidity position of a bank: infringement of liquidity requirements that would justify withdrawal of license or unable to pay debts and liabilities as they all due;

(c) any other requirements for continuing authorisation: focus is whether there are serious weaknesses in the bank's governance arrangements (such as prolonged deadlock in the bank's management body), as well as in its operational capacity (such as the bank's inability to fulfil its obligations towards its creditors) and whether these weaknesses have a material impact on the bank's reliability and capacity to provide.

Failing or likely to fail

- Assessment of objective elements is usually carried out by the competent authority in the course of the supervisory review and evaluation process (SREP).
- Framework of the SREP assessment is set out in the Banking Act (Supervisory Review) Regulations (S.L. 371.16).
- SREP Regulations require the MFSA to carry out an annual supervisory stress test.
- The results of the SREP assessment are used by competent authorities as a benchmark to consider whether they should trigger early intervention measures.
- The board of directors of a bank are required to notify the MFSA where they consider that the bank is failing or likely to fail.

Public interest test

- A resolution action is to be treated as ‘in the public interest’ if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives set out in the RRR and winding up of the bank under normal insolvency proceedings would not meet those resolution objectives to the same extent.

Insolvency proceedings

- In the event that only the first two conditions for the resolution trigger are satisfied but the third condition (the public interest test) is not satisfied, the RRR Regulations require the relevant bank to be wound up in accordance with Maltese law.
- Under Maltese law, various legislative instruments govern the winding up of credit institutions.

Power to suspend certain obligations

- Subject to certain conditions, the committee has the power, after consulting the MFSA, to suspend any payment or obligations to any contract to which a bank is a party where all of the following conditions are satisfied:

(a) the first two conditions for the taking of resolution action are satisfied;

(b) the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the bank; and

(c) the exercise of the power to suspend is either necessary: (i) to reach the determination of the public interest test; or (ii) to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools.

Special management

- The committee has the right to appoint a special manager to replace the board of a bank under resolution. The special manager is to have all the powers of the shareholders and the board of the bank but may only exercise such powers under the control of the committee.
- The appointment of the special manager expires after one year from date of appointment unless the committee determines that the conditions for the special manager's appointment continue to subsist, in which case the appointment is to be renewed.

Valuation

- Before a resolution action is taken and before the committee exercises its power to write down or convert relevant capital instruments and eligible liabilities, a valuation of the assets and liabilities of the bank subject to resolution action or write down or conversion needs to be carried out by an independent person.

- The valuation should form an integral part of the committee's decision to apply a resolution tool or exercise a resolution power.

Resolution Tools

- When resolution is triggered, the committee has a broad range of tools and various other broad powers.
- Tools include sale of business tool, the bridge institution tool, the asset separation tool and the bail-in.
- Other powers include power to take control of the relevant bank and the power to transfer shares or other instruments of ownership of the bank.
- Tools may be used individually or in combination with other tools. But the asset separation tool may only be used together with another resolution tool.

Resolution Tools

- Where the sale of business tool or the bridge institution tool are used by the Committee to transfer part of the assets, rights or liabilities of a bank under resolution, the residual bank ought to be wound up under normal insolvency proceedings.
- EBA Guidelines: MS have flexibility as to the manner in and timeframe within which the residual bank should be wound down. However, the residual bank should not be wound up until the resolution authority is satisfied that: (a) the transferee no longer requires the services or support of the residual bank; and (b) the continuation of the residual bank is not necessary to achieve the resolution objectives.

Resolution Tools

- Committee should ensure that resolution action is taken in accordance in accordance with the following resolution principles:

(a) Shareholders bear losses first;

(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceeding;

(c) Board of directors and senior management are replaced (unless it is necessary to retain them to achieve the resolution objectives);

(d) Board of directors and senior management shall provide all necessary information;

(e) Civil or criminal liability for persons responsible;

(f) Creditors in the same class are treated in an equitable manner;

(g) No creditor incurs greater losses than would have to be incurred had the bank been wound up under normal insolvency proceedings;

(h) Covered deposits are fully protected.

Sale of business tool

- The committee is empowered to transfer to a purchaser (that is not a bridge institution):

  (a) shares or other instruments of ownership issued by a bank under resolution;

  (b) all or any assets, rights or liabilities of a bank under resolution.

- Consent of shareholders or third parties not required, and procedural requirements for transfer need not be adhered to.
- Does not constitute a default or termination event in relation to any obligation relating to transferred assets or liabilities or under any contract to which the failed institution is a party.

Sale of business tool

- Transfer shall be made on commercial terms and committee must take reasonable steps to conform with valuation carried out.
- Benefit of consideration to be paid (sale of shares v sale of assets).
- Tool may be applied more than once in respect of the same institution.
- Purchaser must hold the appropriate license but derogation from usual assessment process by the MFSA – should not delay transfer and were not completed in time transfer is still given legal effect but voting rights vest solely in the resolution committee.
- Possible to retransfer back to the bank with consent of the purchaser.

Bridge institution tool

- Similar to sale of business tool but in respect of a bridge institution.
- Bridge institution has to be a legal person that: (i) is wholly or partially owned by one or more public authorities (which may include the Committee); (ii) it is created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by a bank under resolution or some or all of the assets, rights and liabilities.
- Total value of liabilities transferred to the bridge institution should not exceed the total value of the rights and assets transferred from the institution under resolution.
- Following transfer, the committee may transfer back or to a third party.
- May transfer back where: (a) instrument of transfer expressly allowed for transfer back; and (b) the share, ownership instrument, asset or liability did not fall within scope of the instrument of transfer.

Bridge institution tool

- The committee has an important say in the operation of the bridge institution (eg: approves constitutional documents, appoints the board and determines their remuneration and approves strategy and risk appetite).
- The bridge institution should be licensed under the CRD and have the appropriate authorisation to carry out the activities or services it has acquired. But MFSA may grant a waiver for an initial period of time.
- Bridge institution is to be managed with a view to maintaining access to critical functions and selling.

Bridge institution tool

- The Committee may decide that a bridge institution is no longer a bridge institution in the following events, whichever occurs first:
  (a) the bridge institution merges with another entity;
  (b) the bridge institution ceases to meet the requirements of a bridge institution as set out in the RRR;
  (c) the sale of all or substantially all of the bridge institution's assets, rights or liabilities to a third party;
  (d) the expiry of two years after the date on which the last transfer from an institution under resolution pursuant to the bridge institution was made;
  (e) the bridge institution's assets are completely wound down and its liabilities are completely discharged.
- Time period for (d) may be extended for additional one year periods.

Asset Separation Tool

- Similar to sale of business and bridge institution tool but: (a) limited to transfer of rights, assets and liabilities; (b) transferee is an asset management vehicle; (c) transferor may also be a bridge institution.
- The asset management vehicle has to be a legal person that: (a) is wholly or partially owned by one or more public authorities (which may include the committee); (b) it is created for the purpose of receiving some or all of the assets, rights and liabilities of one or more banks under resolution or a bridge institution.

Asset Separation Tool

- The asset management vehicle is required to manage the assets transferred to it with a view to maximising their value through eventual sale or orderly wind down.
- Committee may transfer assets, rights or liabilities only if:
  - (a) situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on one or more financial markets;
  - (b) such a transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution; or
  - (c) such a transfer is necessary to maximise liquidation proceeds.
- Consideration determined by committee in accordance with valuation.
- Transfer back under certain conditions.
- Tool may be used multiple times.

Bail-in tool

- The bail-in tool is the mechanism for effecting the exercise by the Committee of the write-down and conversion powers in relation to liabilities of a bank under resolution.
- May be exercised in respect of all liabilities other than the ones specifically excluded by the RRR.
- Excluded liabilities include covered deposits (up to the amount covered by the DCS), secured liabilities, salaries, pensions and other fixed remuneration owed to employees, liabilities owed to the tax authorities.

Bail-in tool

- Besides excluded liabilities set out in the RRR, the committee may also exclude liabilities from bail-in where:
  (a) It is not possible to bail-in that liability within a reasonable time-frame;
  (b) the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;
  (c) the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion;
  (d) the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in.

Bail-in tool

- When exercising the write-down and conversion powers (through the bail-in tool) the committee must first determine the aggregate amount by which bail-inable liabilities must be reduced.
- Thereafter the following order of priority should be followed:
  (a) Firstly, the CET 1 items are reduced;
  (b) Secondly, the principal amount of AT1 instruments are reduced;
  (c) Thirdly, the principal amount of Tier 2 instruments are reduced;
  (d) Fourthly, the principal amount of subordinated debt that is not AT1 or Tier 2 capital are reduced;
  (e) Fifth, the principal amount of the rest of bail-inable liabilities are reduced.

Government Intervention

- The Ministry responsible for Finance has the right to provide extraordinary public financial support through additional financial stabilisation tools in accordance with certain conditions (including Union State aid framework) for the purpose of participating in the resolution of a bank in order to avoid its winding up.
- The stabilisation tools are:

  (a) Public equity support tool: Ministry responsible for Finance may participate in the recapitalisation of the bank by providing capital in exchange for CET1 instruments, AT1 instruments or Tier 2 instruments;

  (b) Temporary public ownership tool: Ministry responsible for Finance may take a bank into temporary public ownership.

Write down and conversion

- The committee has the power to write-down or convert ‘relevant capital instruments’ and ‘eligible liabilities’ into shares or other instruments of ownership of banks, either:

  (a) Independently of resolution action; or

  (b) in combination with a resolution action, where certain conditions for resolutions are met.

- The power to write-down or convert eligible liabilities independently of resolution action, may only be exercised in relation to the eligible liabilities that satisfy the conditions of regulation 45F(2) of the RRR.

Write down and conversion

- The committee is required to exercise this power in accordance with the priority of claims under normal insolvency proceedings, in a way that it produces the following results:
  (a) CET1 items are reduced first in proportion to the losses;
  (b) The principal amount of AT1 instruments is written down or converted into CET1 instruments or both;
  (c) The principal amount of Tier 2 instruments is written down or converted into CET1 instruments or both;
  (d) The principal amount of eligible liabilities is written down and converted into CET1 instruments or both.

Bail-in tool vs. power to write down and convert

- Bail-in tool (which qualifies as a resolution action) can only be applied once the resolution conditions are satisfied.
- Power to write down and convert can be applied in the event that one or more circumstances listed in regulation 59(3) of the RRR apply (independently of a resolution action or in combination of a resolution action).
- The Committee must first exercise the write-down and conversion power before using (if necessary) the bail-in tool or in conjunction with it.

Other powers

- Subject to certain conditions, the Committee is empowered to:

(a) suspend any payment or delivery obligations pursuant to any contract to which a bank under resolution is a party;

(b) restrict secured creditors of a bank under resolution from enforcing security interests in relation to any assets of that bank under resolution;

(c) suspend the termination rights of any party to a contract with a bank under resolution.

- Moratorium may last from publication of notice until midnight of the following BD.
- Committee may exercise control over the bank under resolution in order to operate and conduct the activities and services of the bank under resolution with all the powers of its shareholders and board of directors.

Winding Up

- Trigger for winding up not clearly defined.

- However in terms of the RRR any decision to wind up a credit institution must be taken with the consent of the committee, and proceedings may only be commenced at the initiative of the committee.

- Winding up proceedings are then governed by various legislation under Maltese law.

Companies Act

- Companies Act broadly distinguishes between a court winding up and winding up outside of court.
- Court winding up:

(a) application filed in court following a decision of its general meeting or its board of directors, or by any debenture holder, creditor or contributory of the company;

(b) Application may be filed (a) following an extraordinary resolution of the company to be dissolved and wound up by the court; or (b) on the grounds set out in articles 214(2)(a) and (b) of the Companies Act.

Companies Act

- Extraordinary resolution: not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51%, or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting.
- Grounds under 214(2)(a):
  - (a) If the business of the company is suspended for an uninterrupted period of twenty-four (24) months; or
  - (b) If the company is unable to pay its debts.
- Inability to pay debts: Cash flow test and balance sheet test

Companies Act

- Grounds under 214(2)(b):
  - (a) Number of members reduced to less than 2 for more than 6 months;
  - (b) Number of directors reduced to below the prescribed minimum;
  - (c) Grounds of sufficient gravity;
  - (d) Lapse of fixed duration.
- Court is bound to accede to the request to wind up the company in certain cases.
- Court process

Companies Act

- Winding up outside of court (also termed voluntary winding up).
- Members voluntary winding up:

(a) Board resolution and declaration of solvency;

(b) Extraordinary resolution;

(c) Winding up of affairs by liquidator;

(d) Liquidation accounts, auditors and scheme of distribution laid before EGM;

(e) MBR submission and striking off.

- Creditors voluntary winding up: no declaration of solvency.

Companies Act

- Potential issues:

(a) No involvement of MFSA or resolution committee;

(b) Provisions not enacted with credit institutions in mind (eg: number of directors reduced below minimum prescribed at law)

Banking Act

- Does not provide a framework for winding up. But grants the competent authority a broad range of powers in relation to credit institutions which would lead to their dissolution and winding up.
- In certain circumstances the competent authority may, amongst others, (a) appoint a competent person; (b) require the credit institution to wind up; (c) appoint a liquidator; (d) appoint a controller for the purposes of the Controlled Companies Act.
- Recent amendment whereby the MFSA may file an application before the Civil Court (Commercial Section) for the dissolution and winding up by the court of a bank as there exist grounds of sufficient gravity.

Banking Act

- Issues:

(a) Number of powers but no winding up framework;

(b) Lack of clarity as to how MFSA ought to utilise powers which may lead to claims and delays in the process.

(c) Winding up on the basis of grounds of sufficient gravity ill conceived.

Controlled Companies (Procedure for Liquidation) Act

- CCA applies when MFSA appoints a controller in terms of the Banking Act to assume control of the credit institution, and the MFSA, in consultation with the CMB, makes an order for liquidation of the credit institution.
- Procedure broadly entails: (a) appointment; (b) publication of notices; (c) objections to claims; (d) winding up by the controller; (e) publication in government gazette; (f) appeal by aggrieved persons before appeals board; (g) approval of scheme of distribution by appeals board.
- Provides for procedure but requires further clarification: (a) time periods for publication of notices; (b) tools available; (c) unclear whether intended to refer to insolvent situations only; (d) non-recognition of security post-insolvency.

Credit Institutions (Reorganisation and Winding-Up) Regulations

- Transpose Directive 2001/24/EC (as amended) into Maltese law.
- Main purpose of the directive is to regulate private international law issues, particularly in cross-border group contexts, where a credit institution has one or more branches in other jurisdictions.
- Makes reference to certain aspects of the winding up procedure. However there is a lack of clarity as to how process commences and the steps to be taken.
- References to winding up by the court.
- PIL issues.

Residual Balances Fund Act

- Grants MFSA a broad discretionary power to require a solvent credit institution to transfer its deposit liabilities and the corresponding deposit assets to the Fund, together with all of the property or rights pertaining to such deposits.
- Conditions for power to be triggered:

(a) The licence granted to the relevant credit institution must have been withdrawn in terms of applicable legislation;

(b) The relevant credit institution must be in the process of being wound up;

(c) The deposit liabilities being transferred are covered by liquid assets of the credit institution.

- Procedure for depositors to lodge claim.

Nemea and Satabank cases

- Nemea license withdrawn in 2017 and Satabank license withdrawn in 2020.
- However winding up still ongoing – undesirable since depositors are placed in situation of uncertainty.
- Reasons for delay: lack of clarity, claims.
- Both being wound up under the CCA.