

# 1 INTRODUCTION

## 1.1 BANK INSOLVENCY LAWS IN THE GLOBAL CONTEXT: CHINA, EUROPE AND BEYOND

Since the latest global financial crisis (GFC) of 2008, an orderly resolution regime for banks and other financial institutions has been a central topic among global leaders and policymakers. The structural importance of a stable and trustworthy regime – either on national, regional or global level – necessitates continuous scrutiny and considerate action where such a regime loses track. Against this backdrop, we conducted the following comparative research. As a brief summary of the basis of our comparative, we provide the following.

Both China and Europe have taken actions to reform their bank insolvency regimes since the GFC. In China, discussions have been ongoing since 2008, but progress was quite slow. The traditional bank insolvency legal framework that rests on the general Enterprise Bankruptcy Law (EBL),<sup>1</sup> as well as the Commercial Bank Law (CBL)<sup>2</sup> and the Law on Regulation of and Supervision over the Banking Industry (RSBIL),<sup>3</sup> is still the main regime regulating bank insolvency matters. A significant legal reform was the adoption of the Deposit Insurance Regulation (DIR)<sup>4</sup> in 2015, which sent out the message that banks would

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1 The Enterprise Bankruptcy Law of the People's Republic of China (《中华人民共和国企业破产法》) was first promulgated on 2 December 1986 and came into force on 1 November 1988. It was later amended on 27 August 2006, and the revision came into force on 1 June 2007. It is worth noting that the 1986 Law was promulgated during a drastic economic transition period in China and the Law only applied to state-owned enterprises and missed many details under the modern insolvency legal regime. So, in practical terms, the current insolvency legal framework in China was established by 2006 Law.

2 The Commercial Bank Law of the People's Republic of China (《中华人民共和国商业银行法》) was first promulgated on 10 May 1995 and came into force on 1 July 1995. It was later amended on 27 December 2003 and 29 August 2015 and the lasted version came into force on 1 October 2015. However, the 2015 version only has two changes compared to that of 2003, one is Item (2), Paragraph 1 of Article 39, i.e. "the ratio of the outstanding of loans to the outstanding of deposits may not exceed 75 percent" shall be deleted; and the other is the "ratio of deposits to loans" in the Item (3) of Article 75 shall be deleted. This new amendment is mainly to reduce regulation on the ratio of deposits to loans in order to stimulate banks' businesses. As such, the 2015 Law is not quite different from the 2003 Law.

3 The Law on Regulation of and Supervision over the Banking Industry of the People's Republic of China (《中华人民共和国银行业监督管理法》) was first promulgated on 27 December 2003 and came into effect on 1 February 2004. It was later amended on 31 October 2006 and came into effect on 1 January 2007.

4 The Deposit Insurance Regulation (《存款保险条例》) was promulgated by the State Council of the People's Republic of China on 1 May 2015 and came into force on the same day.

never be 'too big to fail' and also laid down the foundation for future legal reforms on Chinese bank insolvency regime.<sup>5</sup>

In Europe, in some of the laws of the jurisdictions we studied, immediate national legal reforms were taken to orderly deal with failing financial institutions against the outburst of the financial crisis, such as the Banking Act 2009 (the United Kingdom (UK)), the Restructuring Act 2011 (Restrukturierungsgesetz, Germany) and the Intervention Act 2012 (Interventiewet, the Netherlands).<sup>6</sup> Within the European Union (EU), a more harmonised bank resolution legal regime was discussed and later implemented to solve troubled credit institutions and investment firms: the Bank Recovery and Resolution Directive (BRRD).<sup>7</sup> As an EU legal instrument, the Directives aim to harmonise the key elements of a harmonised legal system of bank resolution, to be implemented on the national level of the Member States and leaving them some leeway for including certain details in these national laws. Also, the Single Resolution Mechanism Regulation (SRMR)<sup>8</sup> was enacted, and the Single Resolution Board (SRB) was established to decide about the resolution of systemically important and cross-border banks in the Euro Area. The BRRD is part of the 'single rulebook' in the banking sector consisting of other legislation including the amended Capital Requirements Directive (CRD) IV<sup>9</sup> and newly introduced the Capital Requirements Regulation (CRR),<sup>10</sup> the Deposit Guarantee Schemes (DGS) Directive,<sup>11</sup> the

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5 See Kong, *New Bank Insolvency Law for China and Europe Volume 1: China*, The Hague: Eleven International Publishing, 2017, 97-102.

6 See M. Haentjens & L. Janssen, 'New National Solutions for Bank Failures: Game-changing in the UK, Germany and the Netherlands?', *Journal of Financial Regulation* (2015), 294-297; Haentjens et al., *New Bank Insolvency Law for China and Europe Volume 2: European Union*, The Hague: Eleven International Publishing, 2017, 20-21.

7 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173/190.

8 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1.

9 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338.

10 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1. The CRR is the successor of the Second Banking Directive.

11 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes Text with EEA relevance, OJ L 173/149.

Payment Services Directive (PSD2),<sup>12</sup> the Mortgage Credit Directive (MCD)<sup>13</sup> and the other technical standards.<sup>14</sup>

It is well known that the UK stopped being a Member State of the EU as of midnight CET on 31 January 2020, and the Withdrawal Agreement between the EU and the UK entered into force on 1 February 2020.<sup>15</sup> However, during most of the time of research on this project, the UK was part of the EU, and thus the following sections also mention UK legislation. Moreover, we decided to involve UK bank resolution law because of the following considerations: (i) the SRMR only applies to Banking Union Member States that do not include the UK; (ii) the BRRD has been transposed in the UK,<sup>16</sup> and (iii) the UK authorities have confirmed that ‘[t]he policy aims of the BRRD will remain a core element of [UK’s special resolution] regime ... [in] conformity with the FSB [Financial Stability Board] Key Attributes’.<sup>17</sup> UK legislation therefore remains of relevance to understand the BRRD and the FSB Key Attributes.

Subsequent to the publication of the previous two volumes in 2017, proving the status quo at the time, legal reforms towards bank insolvency laws continue to be adopted in both China and Europe.

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12 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance), OJ L 337/35.

13 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance, OJ L 60/34.

14 European Banking Authority (EBA), ‘Interactive Single Rulebook’, <https://eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook> (accessed on 20 March 2021). See, e.g. M. Haentjens & P. de Gioia-Carabellese, *European Banking and Financial Law* (Abingdon: Routledge, 2015), 94; Haentjens et al., *New Bank Insolvency Law for China and Europe Volume 2: European Union*, 22.

15 See European Union, A Future EU-UK Partnership, [https://europa.eu/newsroom/highlights/special-coverage/future-eu-uk-partnership\\_en](https://europa.eu/newsroom/highlights/special-coverage/future-eu-uk-partnership_en) (accessed on 20 March 2021).

16 See, e.g. the Bank Recovery and Resolution Order 2014, the Banking Recovery and Resolution (No 2) Order 2014; 2016 No 1239 BANKS AND BANKING FINANCIAL SERVICES AND MARKETS The Bank Recovery and Resolution Order 2016. See the full list of national transposition EUROPA, National transposition measures communicated by the Member States concerning: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0059> (accessed on 20 March 2021).

17 HM Treasury, Guidance The Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018: explanatory information (updated 29 October 2019), [www.gov.uk/government/publications/draft-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018/the-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018-explanatory-information](http://www.gov.uk/government/publications/draft-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018/the-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018-explanatory-information) (accessed on 20 March 2021).

In China, the China Banking Regulatory Commission (CBRC) confirmed that a new Commercial Bank Insolvency Risk Resolution Regulation (CBIRRR) is being discussed.<sup>18</sup> In its letter of 2017 in response to the National People's Congress (NPC) Recommendations, the CBRC announced that it is in the process of drafting a regulation in accordance with the standards formulated by the FSB, and it is in close cooperation with the International Swaps and Derivatives Association (ISDA) on the regulation of close-out netting in the risk resolution proceedings in China.<sup>19</sup> In addition, in November 2018, three major financial sector authorities, the People's Bank of China (PBOC) (i.e. the Chinese central bank), the China Banking and Insurance Regulatory Commission (CBIRC) (which is the successor of the previous CBRC and China Insurance Regulatory Commission since March 2018),<sup>20</sup> and the China Securities Regulatory Commission (CSRC), jointly issued the Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (SIFI Guiding Opinions).<sup>21</sup> These Guiding Opinions added new requirements on bank resolution.<sup>22</sup> In practice, the PBOC and the CBIRC jointly decided to assume control over the Baoshang Bank in 2019.<sup>23</sup> And more recently, in February 2021, new draft Interim Measures for Banking and Insurance Institutions on Implementing Recovery and Resolution Plans (Draft RRP Measures) were circulated for public consultation.<sup>24</sup>

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18 This Commercial Bank Insolvency Risk Resolution Regulation (《商业银行破产风险处置条例》) is listed in the CBRC 2017 Legislation Plan, see CBRC, 'Announcement on Issuing 2017 Legislation Plan' (中国银保监会办公厅关于印发2017年立法工作计划的通知), 9 May 2017, [www.cbrc.gov.cn/chinese/home/docView/2017D188DE4B4FBABA4EE1F3A3519899.html](http://www.cbrc.gov.cn/chinese/home/docView/2017D188DE4B4FBABA4EE1F3A3519899.html) (accessed on 20 March 2021, in Chinese).

19 See CBRC, 'Letter to the 12<sup>th</sup> NPC 5<sup>th</sup> Meeting Recommendation No. 2691' (对十二届全国人大五次会议第2691号建议答复意见的函), Yin Jian Shen Han [2017] No 105, 4 July 2017, [www.cbrc.gov.cn/gov-View\\_AB039466FD0144C08EC9FC46B4E1E73D.html](http://www.cbrc.gov.cn/gov-View_AB039466FD0144C08EC9FC46B4E1E73D.html) (accessed on 20 March 2021, in Chinese).

20 The CBIRC was established and replaced the previous CBRC and the China Insurance Regulatory Commission (CIRC) in 2018. See State Council, 'State Council Institutional Reform Plan (国务院机构改革方案)', 17 March 2018, [www.gov.cn/guowuyuan/2018-03/17/content\\_5275116.htm](http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm) (accessed on 20 March 2021).

21 The Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (《关于完善系统重要性金融机构监管的指导意见》) was published on 27 November 2018, [www.pbc.gov.cn/goutongjiaoliu/113456/113469/3672549/index.html](http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3672549/index.html) (accessed on 20 March 2021, in Chinese).

22 Articles 24-29 SIFI Guiding Opinions.

23 See CBIRC, Announcement of the PBOC and the CBIRC on Assumption of Control of Baoshang Bank, 24 May 2019, [www.cbrc.gov.cn/chinese/newShouDoc/F630D8A10309400D8C9F5F1ECAAC6B84.html](http://www.cbrc.gov.cn/chinese/newShouDoc/F630D8A10309400D8C9F5F1ECAAC6B84.html) (accessed on 20 March 2021). The first assumption period was from 24 May 2019 to 23 May 2020. This period was extended for six months until 23 November 2020. See CBIRC, Announcement on Extending the Assumption of Control Period on Baoshang Bank, 23 May 2020, [www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=906042&itemId=925](http://www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=906042&itemId=925) (accessed on 20 March 2021).

24 See CBIRC, Announcement of the CBIRC on Public Consultation on Interim Measures for Banking and Insurance Institution on Implementing Recovery and Resolution Plans (Draft for Comments)(《银行保险机构恢复和处置计划实施暂行办法(征求意见稿)》), 26 February 2021, [www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=968428&itemId=925&generaltype=0](http://www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=968428&itemId=925&generaltype=0) (accessed on 20 March 2021).

In Europe, the European Commission issued two proposals in 2016 regarding the ranking of unsecured debt instruments in insolvency hierarchy<sup>25</sup> and loss absorption and recapitalisation capacity of credit institutions and investment firms<sup>26</sup> respectively. The first one was adopted as a new Directive 2017/2399, and it entered into force on 28 December 2017.<sup>27</sup> The second one was adopted as a new Directive 2019/879, also known as the BRRD II.<sup>28</sup> In parallel, a new Regulation 2019/877 has also been in place as the amendment to the SRMR, or known as SRMR II.<sup>29</sup> In practice, since the adoption of the BRRD and SRMR, resolution has been applied in a few cases. Within the Banking Union, the Single Resolution Board (SRB) exercised its resolution powers on several banks.<sup>30</sup> For example, in the resolution of Banco Popular, the SRB decided to transfer the shares of Banco Popular to another bank, Banco Santander.<sup>31</sup> At each Member State level, several banks have also been put into resolution.<sup>32</sup>

Beyond China and Europe, legal reforms on bank resolution have been ongoing across the globe. According to the 2018 FSB report, '[j]urisdictions have undertaken substantial reforms to help end [too big to fail]. Implementation is most advanced in the banking sector where most home and key host jurisdictions of global systemically important banks (G-SIBs) have introduced resolution regimes that are broadly aligned with the Key Attributes and launched a continuous process of resolution planning for G-SIBs'.<sup>33</sup>

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25 European Commission, Proposal for a Directive of the European Parliament and of the Council on amending Directive 2014/59/EU of the European Parliament and of the Council as regards the ranking of unsecured debt instruments in insolvency hierarchy, COM/2016/0853 final – 2016/0363 (COD).

26 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms, COM/2016/0851 final – 2016/0361 (COD). European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC, COM/2016/0852 final – 2016/0362 (COD).

27 Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy, OJ L 345/96.

28 Directive (EU) 2019/879 of The European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150/296.

29 Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, OJ L 150/226.

30 See SRB, 'Resolution Cases', <https://srb.europa.eu/en/content/resolution-cases> (accessed on 20 March 2021).

31 See SRB, 'Banco Popular', <https://srb.europa.eu/en/content/banco-popular> (accessed on 20 March 2021).

32 See European Banking Authority (EBA), 'Notifications on resolution case and use of DGS funds', <https://eba.europa.eu/regulation-and-policy/recovery-and-resolution/notifications-on-resolution-cases-and-use-of-dgs-funds> (accessed on 20 March 2021).

33 FSB, 'FSB 2018 Resolution Report: "Keeping the pressure up" Seventh Report on the Implementation of Resolution Reforms', 15 November 2018, iii.