

BRRD Implementation in Germany

Focusing on covered bonds

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1. Sec. 36a Pfandbrief Act (a primer)
2. BRRD Transposition Act of 10 December 2014 (BRRD-Umsetzungsgesetz / BRRD-UmsG, Federal Law Gazette I, p. 2091)
 - a) Establishment of Act on Restructuring and Resolution of Institutions and Financial Groups (Sanierungs- und Abwicklungsgesetz / SAG) [Article 1]
 - b) Amendment to sec. 36a Pfandbrief Act [Article 4]
3. Bill on Resolution Mechanism (Abwicklungsmechanismengesetz / AbwMechG, Bundestag approved on 24 September 2015, due to pass Bundesrat on 16 October 2015, latest version Bundesratsdrs. 419/15)
 - a) Amendment to SAG [Article 1]
 - b) Amendment to sec. 36a Pfandbrief Act [Article 5]

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1. sec. 36a Pfandbrief Act (a primer)

Sec. 36a Pfandbrief Act

- in general gives prevalence to Pfandbrief investor protection mechanism (established for issuer insolvency) in cases of (forced) restructuring or resolution
- in general requires restructuring measures with direct impact on Pfandbrief business to be implemented by cover pool administrator (rather than to take direct effect)
- provides for possibility to re-establish effect of immediate legal transfer in respective transfer order ...
- ... but in case of non-EEA cover assets affected, only upon appointment of cover pool administrator as trustee for transferee

rationale:

- trust agreements according to national law of non-EEA cover assets for the benefit of Pfandbrief creditors typically require cover pool administrator as agent for beneficiary in involuntary transfers;
- geographical carve-out based on obligation to implement Article 3 par. 2 of Directive 2001/24/EC; BRRD-changes to definition of "reorganization measures" deemed immaterial in nature, thus pending introduction of BRRD into EEA Treaty irrelevant

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2. a) Restructuring and Resolution Act (SAG)



The Restructuring and Resolution Act (SAG, Article 1 BRRD-UmsG), in force per 1 January 2015, inter alia establishes:

- Federal Agency for Financial Market Stabilisation (FMSA) as resolution authority, sec. 3 par. 1 SAG (FMSA to be integrated with semi-legal status into BaFin)
- NCWO by inter alia no extension of bail-in effect for the benefit of guarantors, sec. 99 par. 8 SAG (mirroring respective rules in insolvency law, cf. sec. 254 par. 2, sec. 301 par. 2 InsO) [→ NCWO principle established in Article 32 par. 1 lit. g BRRD, Article 15 par. 1 lit. g SRMR]
- definition of covered bonds along compliance with Article 52 (4) UCITS Directive, sec. 2 par. 3 no. 24 SAG [→ Article 2 par. 1 no. 96 BRRD, Article 3 par. 1 no. 52 SRMR]
- exemption from broad power to modify terms of transactions, sec. 79 par. 6 SAG [→ Article 63 par. 1 lit. g, j, Article 79 par. 1 lit. b BRRD, implicitly for NRA acting: Article 29 par. 1 sub-par. 3 icw Article 18 par. 9, Article 23 sub-par. 1, Article 15 par. 1 lit. i (but: "safeguards in this Regulation": Ø) SRMR, **for Board acting in emergency acc. to Article 29 par. 2 SRMR: ???**]
- bail-in exemption for covered bonds (and cover pool derivatives) to the extent the cover is of value, sec. 91 par. 2 no. 2 SAG [→ Article 44 par 2 lit. b, sub-par. 3 BRRD, Article 27 par. 3 lit. b, par. 4 SRMR]

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2. a) SAG (cont'd) & 2. b) Pfandbrief Act

SAG (cont'd):

- MREL to be set individually by FMSA, after consultation of NCA, based on general criteria in sec. 49 *et seq.* SAG [→ Article 45 BRRD; Article 12 SRMR]
- covered bond liabilities, to the extent the cover is of value, do not qualify as (MR)EL, sec. 49 par. 2 no. 2 SAG [→ Article 45 par. 4 lit. b BRRD; Article 12 par. 16 lit. b SRMR]
- ban on separation of assets entered into cover register and corresponding liabilities from circulating covered bonds for transfer tool, sec. 110 par. 3 no. 5 SAG [→ Article 76 par. 2 lit. e, Article 79 par. 1 BRRD, implicitly for NRA acting: Article 29 par. 1 sub-par. 3 icw Article 18 par. 9, Article 23 sub-par. 1, Article 15 par. 1 lit. i (but: "safeguards in this Regulation": Ø) SRMR, **for Board acting in emergency acc. to Article 29 par. 2 SRMR: ???**]

Amendment of sec. 36a par. 2 Pfandbrief Act [Article 4 no. 13 BRRD-UmsG]

- no immediate effect of transfer of Pfandbrief business, but transfer to be effected in accordance with mechanism established for insolvency of Pfandbrief bank / issuer (cover pool administrator)
- continuation of possibility to specifically provide for immediately effective transfer, subject to establishment of cover pool administrator in case of non-EEA cover assets

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3. a) SAG amendment & 3. b) Pfandbrief Act

Amendment to sec. 113 par. 1 SAG, mirroring “legal halt” clause for transfer of Pfandbrief business of sec. 36a par. 2 Pfandbrief Act into SAG [Article 1 no. 30 AbwMechG-E]

Amendment of Pfandbrief Act (BRRD/SRM context) in sec. 36a Pfandbrief Act [Article 5 no. 5 AbwMechG-E]

- Competence *of resolution authority* (not BaFin as special public supervisor) to establish cover pool administrator in case of transfer of non-EEA cover assets
- Rules provided for in case of transfer tool also to apply in case of transfer of Pfandbrief business in accordance with Articles 24 to 26 of SRM-Regulation