

# FINNIUS



## Insurers Recovery and Resolution Act

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### Introduction

On 27 November 2018, the Insurers Recovery and Resolution Act (*Wet herstel en afwikkeling van verzekeraars*, the Act) was adopted by Dutch parliament. The Act amends the current recovery and resolution framework for insurers, in order to strengthen and expand this. This way, the Dutch legislator aims to create an effective and efficient framework for the orderly resolution of insurers.

Although no date for the Act's entry into force has yet been announced we expect it to enter into force on 1 January 2019.

### Scope

In short, the Act is applicable to all insurers subject to DNB-supervision, and to some specific other entities within the group of which such insurer forms part. More precise, the Act is applicable to:

- all insurers subject to DNB's prudential supervision (e.g. life insurers, non-life insurers (including health care insurers), reinsurers, and benefit-in-kind insurers);
- insurance holding companies, mixed financial holding companies and mixed insurance holding companies that are part of an insurance group;
- Dutch branches of non-EEA insurers; and
- other undertakings that are part of an insurance group if they perform services of crucial importance to the group's daily activities.

### Current recovery and resolution framework

Currently, the following recovery and resolution mechanisms exist:

- mandatory transfer arrangements (based on the Intervention Act),
- emergency regulations;
- the safety-net scheme for life insurers.

The Act will replace these by a new recovery and resolution framework. However, certain elements of the current measures have been incorporated in the new framework. The emergency regulations for example will be repealed, but a number of the powers conferred on the administrator by the emergency regulations will be

moved to the Bankruptcy Act and will be vested in the bankruptcy trustee. The expropriation powers of the Minister of Finance under part 6 of the Financial Supervision Act will remain in effect.

## Two phases

The Act distinguishes two phases: the preparation phase and the resolution phase. In the preparation phase, both DNB and insurers have requirements in relation to recovery and resolution planning, while in the resolution phase DNB is attributed powers that can effectuate recovery and resolution of insurers. The Act introduces a number of new requirements and measures for both phases.

## Preparation phase

The Act introduces the following measures with respect to the preparation phase:

- **The preparatory crisisplan**

The insurer or holding company is required to draw up a preparatory crisis plan. In this plan, the insurer must provide insight into the restorative measures that can be taken in the event of a significant deterioration in the insurer's financial position. The plan needs to be approved by DNB. In its supervisory priorities for 2019<sup>1</sup>, DNB has indicated that it will issue guidance as to what it expects from insurers with respect to the preparatory crisis plan.

- **The resolution plan**

DNB is required to draw up a resolution plan for each insurer or group. The resolution plan must describe, among other things, the possibility of applying the resolution tools and powers. If DNB encounters substantial obstacles for orderly resolution, it can require the insurer or, in the case of a group, any entity in that group to take measures to remove them.

## Resolution phase

### Solvency II intervention ladder

Starting point is that before DNB takes a decision to proceed with resolution, the steps of the Solvency II intervention ladder will be followed. These steps include the implementation of the recovery plan and short-term finance scheme.

### Resolution conditions

DNB is required to resolve an insurer if the following three conditions are met: (i) the insurer is failing or likely to fail; (ii) there is no reasonable prospect that alternative measures would prevent the insurer's failure within a foreseeable period; and (iii) resolution is in the public interest. The Act elaborates on these conditions.

### Resolution tools

If DNB decides to proceed with resolution, it has a number of tools at its disposal. The Act introduces the following tools, which can be distinguished in bail-in on the one side, and transfer tools on the other:

1. **Bail-in;**

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<sup>1</sup> [https://www.dnb.nl/binaries/DNBToezichtVooruitblik2019\\_tcm46-380420.pdf](https://www.dnb.nl/binaries/DNBToezichtVooruitblik2019_tcm46-380420.pdf)

The bail-in tool enables DNB to write down insurer's liabilities to capital providers and other creditors (including policyholders) and convert these into equity instruments. In principle, the entire liability side of an insurer's balance sheet is subject to bail-in. Bail-in is applied in reverse order to the order in which claims against the insurer's bankruptcy estate would be eligible for payment (i.e. shareholders are the first targets of bail-in). The aim of bail-in is continuation of the insurance portfolio and not of the insurer itself. Rationale hereof is the thought that a policyholder will generally benefit more from this than from a bankruptcy distribution. Other than for banks, the Act does not provide for a requirement such as the MREL for banks (a minimum bail-inable capital).

## 2. Sale of business;

The sale of business tool is, just as the bridge institution tool and the asset separation tool, a transfer tool. This tool enables DNB to transfer shares or other instruments of ownership or the assets and/or liabilities of an insurer to a private party.

## 3. Bridge institution;

DNB can use a bridge institution, if no private party can be found to transfer shares or other instruments of ownership or the assets and/or liabilities of an insurer to. DNB can then temporarily transfer shares or other instruments of ownership or the assets and/or liabilities of an insurer to such bridge institution.

## 4. Asset separation.

This tool can be used when DNB wants to transfer assets and liabilities, might find an acquiring private party for that purpose but suspect that the assets and liabilities will increase in value over time. It can only be used in combination with other resolution tools, so as to avoid an unfair competitive advantage.

### Special powers for DNB

In addition to the abovementioned resolution tools and corresponding powers, the Act provides for some special powers for DNB. These entail the power to:

- take over the management of an insurer under resolution;
- appoint a special director to take over the insurer's management;
- change the legal form of the insurer if this is necessary to be able to apply bail-in;
- terminate or modify the terms of an agreement to which the insurer in resolution is a party.

### No creditor worse off

Finally, the Act provides for certain safeguards for shareholders and creditors (including policyholders). Shareholders and creditors must not suffer greater losses as a result of the application of a resolution tool than they would have suffered if the insurer had been wound up in normal bankruptcy proceedings (the *no creditor worse off* principle).

### **Points of attention**

It is important that insurers are well prepared for the entry into force of the Act. In this respect we note the following points of attention:

- the drawing up of a preparatory crisis plan;
- the identification and removal of possible obstacles for orderly resolution;

- identifying (i) which liabilities fall in the bail-in regulation, and (ii) the possible consequences of bail-in to the organization;
  - assessing the impact of the Act to current and existing agreements between insurer and counterparties;
  - as a consequence of the Act, some current recovery and resolution mechanisms will be repealed, such as the emergency regulations. It has to be assessed whether existing internal policies that are based on the old regime, need to be updated in this respect.
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**In case of questions, please feel free to contact:**



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