Recognition of foreign bank resolution actions

Guo, S.

Part II

Comparative Studies in the Selected Jurisdictions

3 The EU*

3.1 Introduction

This chapter examines recognition of foreign resolution actions in the European Union (EU). There are four modes[1] of cross-border bank resolution in the EU: first, resolution of cross-border banking groups under the Single Resolution Mechanism (SRM) within the Banking Union; second, resolution of international banks with presence outside the Banking Union but within the EU which is subject to the Directive 2001/24/EC on the Reorganisation and Winding-up of Credit Institutions[2] (CIWUD); third, resolution of international banking groups with presence outside the Banking Union but within the EU which is subject to the Bank Recovery and Resolution Directive (BRRD); and forth, resolution of international banks or banking groups with presence in the third (non-EU) countries. The first three modes are all subject to special EU rules. The fourth mode, nonetheless, also depends on third-countries' law.

In §3.2.1, EU regulation and supervision in the banking sector is first described, including the establishment of the Banking Union and formulation of a single rule book – the result of financial regulation harmonisation across the EU Member States. Next, §3.2.2 introduces EU bank resolution

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1 Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 155-180; Matthias Haentjens, Bob Wessels and Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming).

2 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of institutions, OJ L 125/15. See literature, e.g. Enrico Galanti, 'The New EC Law on Bank Crisis' (2002) 11 International Insolvency Review 49; Bob Wessels, 'Directive on the Reorganization and Winding-up of Credit Institutions' (2005) American Bankruptcy Institute Journal 34; Bob Wessels, 'Banks in Distress under Rules of European Insolvency Law' (2006) 21 Journal of International Banking Law and Regulation 301; Gabriel Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017).

rules, at both EU level and Member State level. §3.3 examines the central question on recognition of foreign resolution actions in the EU, illustrating both grounds for recognition in §3.3.1 and public policy exceptions in §3.3.2. In particular, four scenarios are analysed, namely, subsidiary (§3.3.1.2.1), branch (§3.3.1.2.2), assets (§3.3.1.2.3) and governing law (§3.3.1.2.4). §3.4 draws conclusions.

3.2 Regulation, supervision and resolution in the EU banking sector

3.2.1 Regulation and supervision

To start with, the general legal and political structure of the EU is briefly introduced. The EU is based on two fundamental treaties agreed by the Member States – the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[3] These two treaties were most recently amended by the Lisbon Treaty.[4] Alongside the course of establishing the current political framework for the EU, an economic and monetary union was created by the Maastricht Treaty in 1992, leading to a single currency area – the Euro Area – and forming a single monetary policy implemented by the European Central Bank (ECB) and national central banks.[5] There are currently 19 countries within the Euro Area [6] and 28 countries (including the UK before 31 January 2020) in the EU. The legislative documents of the EU include primary sources – the treaties, and secondary legislation – regulations, directives, decisions, recommendations and opinions, among which regulations and directives are legally binding in all the Member States.[7] Regulation, such as the Single Resolution Mechanism Regulation (SRMR) is directly applicable in the Member States;

3 See, e.g., D Chalmers, G Davies and G Monti, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 39-46; Karen Davies, *Understanding European Union law* (6th edn, Routledge 2016) 18-20; Alina Kaczorowska, *European Union Law* (4th edn, Routledge 2016) 26-30; Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2017).

4 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (2007/C 306/01). The Lisbon Treaty entered into force in December 2009.

5 See, e.g. Amy Verdun, 'Economic and Monetary Union' in Michelle Cini and N. Borragan (eds), *European Union Politics* (OUP 2016); Alicia Hinarejos, 'Economic and Monetary Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2017).

6 These countries are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. ECB, 'Euro area 1999-2015' <https://www.ecb.europa.eu/euro/intro/html/map.en.html> accessed 25 February 2020.

7 See, e.g. Davies (n 3) 53-70; Margot Horspool, Matthew Humphreys and Michael Wells-Greco, *European Union Law* (8th edn, OUP 2014) 87-100.

directives, such as the BRRD, need to be transposed into national laws. [8] Other sources of Union law include case law made by the Court of Justice of the European Union (CJEU)[9], general principles of the Union law and international agreements.[10]

In the banking sector, the EU has been long endeavouring to harmonise the regulatory rules. The earliest attempt was the so-called 'First Banking Directive' in the 1970s.[11] Additional effort was made in the 'Second Banking Directive' to further revise and supplement the previous directive.[12] A vital mechanism developed in this harmonisation process is the 'EU passport' mechanism, which allows a bank licensed in one Member State to operate and provide services in other Member States without the need to obtain additional authorisation.[13] Moreover, the supervisory authority in the Member State where the bank is authorised is supposed to supervise all the bank's activities across the EU, namely 'home country control'.[14] Later in 2001, a group led by Alexandre Lamfalussy drafted the 'Lamfalussy Report',[15] a significant step towards the legislative process in the banking sector in the EU, resulting in a recast Directive 2006/48/EC (Capital Requirements Directive) which amended the Second Banking Directive.[16]

In 2008, in response to the global financial crisis (GFC), Jacques de Larosière de Champfeu chaired the task of further harmonising European financial regulation and formulated the De Larosière Report,[17] which inspired the creation of a European System of Financial Supervision (ESDS), consisting of the European Banking Authority (EBA), the European Securities Markets

8 Article 288 TFEU.

9 Article 19 TEU. The CJEU includes the Court of Justice, the General Court and specialised courts, and it ensures that in the interpretation and application of the treaties the law is observed. See, e.g. Chalmers, Davies and Monti (n 3) 156-198.

10 See, e.g. Davies (n 3) 53-70; Davies (n 3) 53-70; Horspool, Humphreys and Wells-Greco (n 7) 87-100.

11 First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions. See Matthias Haentjens and Pierre de Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2015) 8.

12 Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. See Haentjens & De Gioia-Carabellese (n 11) 8-10.

13 Haentjens & De Gioia-Carabellese (n 11) 8-10.

14 Ibid.

15 Final Report of the Committee of the Wise Men in the Regulation of European Securities Market, Brussels (15 February 2001). See also Haentjens & De Gioia-Carabellese (n 11) 10-11.

16 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177/1.

17 The High-Level Group on Financial Supervision in the EU, Brussels (25 February 2009).

Authority (ESMA), the European Insurance and Occupational Pension Authority (EIOPA) and the European Systemic Risk Board (ESRB). [18] The EBA is the main authority responsible for banks, and it can develop regulating and implementing technical standards, issue guidelines and recommendations addressed to authorities and financial institutions and assist authorities in the settlement of disagreements.[19]

Subsequent to the Euro Area crisis in 2010/11, the EU leaders decided to create a Banking Union where EU-wide rules apply to banks in the Euro Area and any non-Euro Member States that wants to join.[20] A new regulatory framework was set out together with a 'single rule book', [21] consisting mainly of the prudential requirements for credit institutions as prescribed in the amended Capital Requirements Directive (CRD IV)[22] and Capital Requirements Regulation (CRR),[23] as well as the rules for recovery and resolution such as those in the BRRD, and the rules of deposit guarantee schemes.

Prudential supervision was largely harmonised within the Banking Union, introducing the so-called Single Supervisory Mechanism (SSM) by the Singe Supervisory Mechanism Regulation (SSMR). [24] This SSM empowers the ECB to act as the ultimate prudential supervisor, directly supervising 114

18 See, respectively, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (**EBA Regulation**); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (**ESMA Regulation**); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (**EIOPA Regulation**); Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (**ESRB Regulation**). See Haentjens & De Gioia-Carabellese (n 11) 12-13; Haentjens, Janssen and Wessels (n 1) 10.

19 Article 8 EBA Regulation. See Haentjens, Janssen and Wessels (n 1) 39.

20 Haentjens & De Gioia-Carabellese (n 11) 94.

21 See Haentjens & De Gioia-Carabellese (n 11) 94; Haentjens, Janssen and Wessels (n 1) 22.

22 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.

23 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.

24 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63. See Haentjens & De Gioia-Carabellese (n 11) 13-14.

significant supervised entities as of 1 July 2019, and indirectly supervising less significant institutions through national competent authorities.[25] The SSM is also the first pillar of the Banking Union, while the second one is the Single Resolution Mechanism (SRM) created by the SRMR, with a debated third one – a single deposit guarantee scheme.[26] The debate revolves around the concern that economic resilient Member States may have to pay for the consequences of actions of riskier Member States.[27]

3.2.2 Resolution

Before the GFC, national laws played a leading role in solving failing banks in the EU. There were two different major approaches towards bank insolvency issues. In some Member States, such as the UK, the general corporate insolvency laws applied to credit institutions; while in other Member States, specific modifications to the general national insolvency laws were applied to address the specifies of bank insolvency, for instance, in Germany and the Netherlands, only the domestic bank supervisory authority could file for bankruptcy.[28] By using both approaches, the courts have the ultimate power and the supervisory authorities exercising specific measures have to be approved by the courts. In general, the bank insolvency proceedings in Europe relied on a 'judicial function'.[29]

In the meanwhile, at the EU level, limited harmonisation was achieved, but only in the field of deposit guarantee schemes, settlement finality, and private international law rules. The deposit guarantee schemes were first harmonised in 1994 by the Directive on Deposit Guarantee Schemes (DGS Directive 1994), [30] against the background of collapse of the Bank of Credit

25 ECB, 'Who supervised my bank?' (1 July 2019) <https://www.bankingsupervision.europa.eu/banking/list/who/html/index.en.html> accessed 25 February 2020.

26 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM (2015) 586 final, 2015/0270 (COD). See also, e.g. Daniel Gros and Dirk Schoenmaker, 'European Deposit Insurance and Resolution in the Banking Union' (2014) 52 Journal of Common Market Studies 529; Luc Laeven, 'Deposit Insurance in the European Union' in Charles Enoch and others (eds), *From Fragmentation to Financial Integration in Europe* (International Monetary Fund 2014).

27 ECB, 'Interview with Der Tagesspiegel' (1 October 2018) <https://www.ecb.europa.eu/press/inter/date/2018/html/ecb.in181001.en.html> accessed 25 February 2020.

28 See, e.g. Eva HG Hüpkes, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada* (Kluwer Law International 2000) 49-81; Eva HG Hüpkes, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005); Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009); Haentjens, Janssen and Wessels (n 1) 16.

29 Hüpkes, '*The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada*' (n 28) 81.

30 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes , OJ L 135/5.

and Commerce International (BCCI) in 1991,[31] with the aim of promoting 'harmonious development of the activities of credit institutions throughout the Community' and 'increasing the stability of the banking system and protection for savers'.[32] It set out the minimum deposit coverage level of EUR 20,000 per depositor.[33] Also, depositors at branches set up by credit institutions in Member States were also covered by the deposit guarantee schemes.[34] The DGS Directive was later first amended in 2009 [35] and amended for the second time in 2014.[36] The current coverage level is set at EUR 100,000.[37]

The Settlement Finality Directive 1998[38] provided a harmonized solution at the EU level addressing legal issues for payment and settlement systems.[39] In terms of insolvency proceedings, it aimed to 'minimise the disruption to a system caused by insolvency proceedings',[40] by providing protection for netting and transfer orders as well as collateral security, ensuring enforceability under insolvency proceedings.[41] It also provided certain conflict of law rules among the EU Member States.[42] This Directive was later amended in 2009.[43]

31 See, e.g. Galanti (n 2); Bob Wessels, 'Protection of Small Depositors against Banks in Distress' (2004) 19 Journal of International Banking Law and Regulation 331.
32 Recital DSG Directive 1994. See Haentjens, Janssen and Wessels (n 1) 17-18.
33 Article 7(1) DGS Directive 1994.
34 Article 4(1) DGS Directive 1994. See also Hüpkes, '*The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada*' (n 28) 150-151.
35 Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.
36 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.
37 Article 6 DGS Directive 2014.
38 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45.
39 See, e.g. Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 158-163; Diego Devos, 'Legal Protection of Payment and Securities Settlement Systems and of Collateral Transactions in the European Union' (2008) Current Developments in Monetary and Financial Law 471; Roy M Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2011) 50-51; Matthias Haentjens, 'National Insolvency Law In International Bank Insolvencies' in Bernard Santen and Dick Van Offeren (eds), *Perspectives on International Insolvency Law: A tribute to Bob Wessels* (Kluwer 2014) 74-75; Haentjens, Janssen and Wessels (n 1) 18.
40 Recital (4) Settlement Finality Directive 1998.
41 Section II and IV Settlement Finality Directive 1998.
42 Article 8 Settlement Finality Directive 1998. See Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 161.
43 Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, OJ L 146/37.

The CIWUD harmonised the private international law rules on the cross-border bank insolvency issues among the EU Member States and applies to 'credit institutions and their branches set up in Member States other than those in which they have their head offices'.[44] This Directive supplements the EU Insolvency Regulation (EIR),[45] which excludes credit institutions.[46] This Directive distinguishes two types of proceedings: reorganisation and winding-up.[47] It is stated that the 'administrative and judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States'.[48] In addition, the reorganisation measures 'shall be effective throughout the Community once they become effective in the Member States where they have been taken'.[49] Similar provisions also apply to winding-up proceedings.[50] In such sense, the CIWUD adopts a unity, universality and single entity approach, only allowing the commencement of the insolvency proceedings in home states, and host states are obligated to recognize such proceedings. [51] The rationale behind this choice is explained in the recital that 'a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted',[52] and it would be 'particularly undesirable to relinquish such unity'.[53] This is the reflection of the 'home country control principle' in the cross-border bank supervision. The CIWUD does not harmonise substantive bank insolvency rules. The new resolution law later undertook this task.

44 Article 1(1) CIWUD. See, e.g. Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 164-168; Galanti (n 2); Wessels (n 2); Haentjens, Janssen and Wessels (n 1) 18-20.

45 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1 (EIR 2000). It was later amended by the 2015 recast: Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (EIR 2015 Recast).

46 Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast.

47 Article 2 CIWUD.

48 Article 3(1) CIWUD.

49 Article 3(2) CIWUD.

50 Article 9(1) and 9(2) CIWUD.

51 Haentjens, Janssen and Wessels (n 1) 18-19; Gabriel Moss, Bob Wessels and Matthias Haentjens, 'Principles for Cross-border Financial Institution Insolvencies' in Gabriel S. Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) para 2.60.

52 Recital (3) CIWUD.

53 Recital (4) CIWUD.

The GFC had an enormous impact on the overall European financial market. The national legislators adopted immediate actions to address the crisis with the aim of mitigating the negative effects. For example, the UK,[54] Germany,[55] and the Netherlands[56] successively adopted new laws to address banks in financial difficulties. The lack of cross-border cooperation for orderly resolution of financial institutions, especially in Europe where banks are actively operating internationally,[57] resulted in the harmonisation of substantive bank resolution rules – the BRRD and SRMR – at the EU level. The BRRD is a directive that applies to all EU Member States and has to be transposed into national laws.[58] And the SRMR established the SRM, creating uniform resolution rules that can be directly applicable to credit institutions in the Banking Union. The SRMR also established a Single Resolution Board (SRB) as the resolution authority.[59] At the EU level, credit institutions established in the Banking Union are supervised by the ECB under the SSM, while the resolution powers are conferred upon the SRB. At the national level, a Member State is free to choose and designate its national resolution authority.[60]

Financial institutions that can enter into resolution include entities established in the EU, that is, credit institutions, investment firms, financial holding companies, and subsidiaries of those credit institutions, investment firms or financial holding companies, as well as branches of credit institutions or investment firms that have their head office outside the EU under certain circumstances.[61] As explained in Chapter 2 at §2.1.1, credit institutions in the EU context are understood as banks, which are defined as 'undertaking[s] the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account', not

54 First, in 2008, the Banking (Special Provisions) Act 2008 was passed to bring the failing bank Northern Rock into public ownership. This temporary Act was replaced by the Banking Act 2009. See Matthias Haentjens and Lynette Janssen, 'New National Solutions for Bank Failures: Game-changing in the UK, Germany and the Netherlands?' (2015) Journal of Financial Regulation 294; Haentjens, Janssen and Wessels (n 1) 20-21.

55 The Restructuring Act (Restrukturierungsgesetz) 2011. See Haentjens and Janssen (n 54); Haentjens, Janssen and Wessels (n 1) 21.

56 The Intervention Act (Interventiewet) 2012. See Haentjens and Janssen (n 54); Haentjens, Janssen and Wessels (n 1) 21.

57 As of the end of 2015, activity abroad accounted for 18% for Euro Area banks. See Thomas Gehrig and others, 'European Banking Supervision: The First Eighteen Months' in Dirk Schoenmaker and Nicolas Véron (eds), *Bruegel Blueprint Series 25* (Bruegel 2016).

58 Article 130 BRRD.

59 Article 1 SRMR.

60 For example, in the UK and the Netherlands, the central banks are designated as resolution authorities; while in Germany, a separate agency preforms as the resolution authority, i.e. Bundesanstalt für Finanzmarktstabilisierung (Federal Agency for Financial Market Stabilisation). See EBA, 'Resolution Authorities' <http://www.eba.europa.eu/about-us/organisation/resolution-committee/resolution-authorities> accessed 25 February 2020.

61 Article 1 (e) BRRD.

including central banks, post office giro institutions and certain specific national entities.[62] Any investment firm is defined as 'any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis,' such as the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, dealing on own account, portfolio management, and investment advice.[63] Financial holding company is defined as a financial institution the subsidiaries of which are exclusively or mainly credit institutions, investment firms or financial institutions, and at least one of such subsidiaries is a credit institution or an investment firm; and a financial institution is an undertaking other than a credit institution or an investment firm whose principal activity is to acquire holdings or to pursue certain financial activities, such as financial leasing, the participation in securities issues and the provision of services relating to such issues, and portfolio management and advice.[64]

Under the SRM, the SRB is responsible for cross-border banking groups,[65] significant credit institutions identified by the ECB,[66] significant financial holding companies and significant mixed financial holding companies;[67] and other credit institutions in relation to which the ECB has decided to exercise direct supervision.[68]

The BRRD and SRMR empower national resolution authorities and the SRB with four resolution tools when a bank meets the conditions for resolution: the sale of business tool, the bridge institution tool, and assets separation tool and the bail-in tool.[69] The sale of business tool is about the sale of an institution or part thereof to one or more private sector purchasers, by transferring shares or other instruments of ownership issued by the institution under resolution or all or any of its assets, rights, or liabilities.[70] The bridge institution tool shall be applied when no private buyer is quickly available or the failing institution is too big to merge with another institution, which enables the resolution authorities to transfer all or a part of the business of the institution under resolution to a temporary bridge institution.[71] The asset separation tool authorises the resolution authorities to transfer certain

62 Article 2(1)(2) BRRD; Article 4(1)(1) CRR and Article 2(5) CRD IV.
63 Article 2(1)(3) BRRD; Article 4(1)(2) CRR; Article 4(1)(1), 4(1)(2) and Annex I Section A and C CRD IV.
64 Articles 1, 2(1)(4) and 2(1)(9)-(15) BRRD; Article 4(1)(20)-(33) CRR; Annex I CRD IV.
65 Article 7(2)(b) SRMR.
66 Article 6(4) and 6(5)(b) SSMR.
67 Article 7(2)(a)(i) SRMR; Article 6(4) SSMR.
68 Article 7(2)(a)(ii) SRMR; Article 6(5)(b) SSMR.
69 Article 37(3) BRRD; Article 22(2) SRMR.
70 Articles 2(1)(58) and 38-39 BRRD; Articles 3(1)(30) and 24 SRMR.
71 Articles 2(1)(60) and 40-41 BRRD; Articles 3(1)(31) and 25 SRMR.

assets, rights and liabilities of the institution under resolution or a bridge institution to an asset management vehicle.[72] These three tools are transfer tools.[73]

The bail-in tool refers to the mechanism for empowering a resolution authority with write-down and conversion powers in relation to liabilities of an institution under resolution.[74] Bail-in in the EU context is limited to liabilities, different from the Financial Stability Board (FSB)'s definition that also applies to equity.[75] The EU also introduces the minimum requirement for own funds and eligible liabilities (MREL).[76] To be more specific, 'own funds' refer to 'the sum of Tier 1 and Tier 2 capital';[77] and 'eligible liabilities' refer to 'liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity … that are not excluded from the scope of the bail-in tool'.[78] MREL is similar to the previous mentioned TLAC,[79] with the objective 'of ensuring that institutions and entities … have sufficient loss-absorbing and recapitalisation capacity'.[80]

In addition, resolution authorities can write-down or convert capital instruments before any resolution action is taken.[81] Resolution authorities also have other resolution powers[82] necessary to facilitate the application of the resolution tools, including general powers,[83] ancillary powers,[84] power to require the provision of services and facilities,[85] power to enforce crisis management measures of crisis prevention measures by other Member States,[86] power in respect of assets, rights, liabilities, shares and other instruments of ownership located in third countries,[87] exclusion of certain contractual terms in early intervention and resolution,[88] power to suspend

72 Articles 2(1)(55) and 42 BRRD; Articles 3(1)(32) and 26 SRMR.
73 See Chapter 2, §2.1.4.2.
74 Articles 2(1)(57) and 43-58 BRRD; Articles 3(1)(33) and 27 SRMR.
75 See Chapter 2, §2.1.4.1.
76 Recital (80) BRRD; Article 45 BRRD.
77 Article 2(1)(38) BRRD; Article 3(1)(40) SRMR; Article 4(1)(118) CRR.
78 Article 2(1)(71) BRRD; Article 3(1)(49) SRMR.
79 See Chapter 2, §2.1.4.1.
80 Recital (16) Parliament CRR Amendment Resolution; Recital (2) Commission SRMR Amendment Proposal 2016/0361; Recital (2) Commission BRRD Amendment Proposal 2016/0362.
81 Recital (81) and Articles 59 and 60 BRRD; Recital (86) and Article 21 SRMR.
82 'Resolution power' is defined in Articles 2(1)(20) BRRD as a power referred to in Articles 63 to 72 BRRD.
83 Article 63 BRRD.
84 Article 64 BRRD.
85 Ibid.
86 Article 66 BRRD.
87 Article 67 BRRD.
88 Article 68 BRRD.

certain obligations,[89] power to restrict the enforcement of security interests,[90] and power to temporarily suspend termination rights.[91]

Most recently, two amendments have been enacted, namely, BRRD II[92] and SRMR II.[93] These two amendments incorporate the latest TLAC requirements.[94] The new reform introduces the single point of entry (SPE) within multiple points of entry (MPE) strategy. Two relevant terms are defined. 'Resolution entity' is defined as (a) 'a legal person established in the Union, which, in accordance with Article 12, is identified by the resolution authority as an entity in respect of which the resolution plan provides for resolution action', or (b) 'an institution that is not part of a group that is subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, in respect of which the resolution plan drawn up pursuant to Article 10 of this Directive provides for resolution action'.[95] 'Resolution group' is defined as (a) 'a resolution entity and its subsidiaries that are not: (i) resolution entities themselves; (ii) subsidiaries of other resolution entities; or (iii) entities established in a third country that are not included in the resolution group in accordance with the resolution plan and their subsidiaries'; or (b) 'credit institutions permanently affiliated to a central body and the central body itself when at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries'.[96] Accordingly, within one banking group, there might be several resolution entities entering into resolution at the same time (MPE); a resolution entity might be an intermediate holding, the resolution of which saves its subsidiaries from resolution (SPE). In addition, the new BRRD II and SRMR II distinguish external MREL and internal MREL. Resolution entities should issue external MREL instruments on a consolidated basis

89 Article 69 BRRD.
90 Article 70 BRRD.
91 Article 71 BRRD.
92 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.
93 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.
94 Mariken van Loopik and Maurits ter Haar, 'EU Banking Reform Package: Ready for Implementation' (De Brauw Black Stone Westbrook, April 2019) <https://www.debrauw.com/wp-content/uploads/2019/04/Banking-Reform-Package.pdf> accessed 25 February 2020.
95 Amended Article 2(1)(83a) BRRD, Article 1(1)(e) BRRD II. Amended Article 3(1)(24a) SRMR, Article 1(1)(b) SRMR II.
96 Amended Article 2(1)(83b) BRRD, Article 1(1)(e) BRRD II. Amended Article 3(1)(24b) SRMR, Article 1(1)(b) SRMR II.

to absorb losses of the whole resolution group.[97] Institutions that are subsidiaries of a resolution entity but are not themselves resolution entities should issue internal MREL instruments on an individual basis in order to upstream losses to parent resolution entities.[98]

3.3 Recognition of foreign resolution actions in the EU

3.3.1 Legal grounds for recognition

3.3.1.1 Institutional framework

3.3.1.1.1 Recognition among the EU Member States

When it comes to recognition of foreign resolution actions in the EU, it is necessary to distinguish two situations: recognition among the EU Member States and recognition of third-countries' resolution actions outside the EU. Third-country resolution refers to 'an action under the law of a third country to manage the failure of a third-country institution or a third-country parent undertaking that is comparable, in terms of objectives and anticipated results, to resolution actions under [BRRD]'.[99] In this section, recognition among the EU Member States is first addressed, while recognition of third-country resolution proceedings is illustrated in the next section.

Among the EU Member States, there are three modes that address different types of cross-border bank resolution in the EU. First, within the Banking Union, cross-border banks are subject to the resolution of the SRB.[100] As mentioned above, the SRB is responsible for the resolution of cross-border groups and significant institutions supervised by the ECB.[101] The SRB is *de facto* a supranational authority with the power to determine the conditions and procedures of cross-border bank resolution within the Banking Union.

97 Amended Article 45(e)(1) BRRD, Article 1(17) BRRD II. Amended Article 12(f)(1) SRMR, Article 1(6) SRMR II.

98 Amended Article 45(f)(1) BRRD, Article 1(17) BRRD II. Amended Article 12(g)(1) SRMR, Article 1(6) SRMR II.

99 Article 2(1)(88) BRRD.

100 See, e.g. David Howarth and Lucia Quaglia, 'The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism' (2014) 52 Journal of Common Market Studies 125; Alexander Kern, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) European Law Review 154; Geroge S Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism in the European Banking Union: Legal Foundations, Governance Structure and Financing' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016) 147-150.

101 Article 7(2) SRMR. Text to n 65-68.

The SRMR applies to the SRB decision-making process. If the SRB reaches a resolution decision, national resolution authorities (NRAs) are supposed to implement the decisions made by the SRB in accordance with national laws transposing the BRRD and other applicable national laws,[102] such as the law related to issuing new shares or exercising rights to new shares during a bail-in/conversion process.[103] NRAs are also responsible for the resolution of non-significant and non-cross-border institutions.[104]

Second, outside the Banking Union, the BRRD amends the CIWUD and makes the private international law rules on cross-border bank insolvency applicable to resolution actions.[105] Most importantly, as explained in Chapter 2 at §2.1.3, the amendment confirms that resolution in the EU context is treated as a reorganisation measure.[106] Reorganisation measures taken in a home Member State should be effective across the EU,[107] confirmed in the *LBI hf v Kepler Capital Market SA*[108] case (moratorium) and *Kotnik v Državni zbor Republike Slovenije*[109] case (bail-in), subject to the conditions that the measures (i) 'must be adopted by the competent administrative or judicial authorities of a Member State'; (ii) 'must be adopted with the purpose of preserving or restoring the financial situation of a credit institution'; and (iii) 'the measure must potentially affect third parties' rights'.[110] Accordingly, resolution actions taken by a home State authority should be automatically recognised across the Union, without any public policy exception.[111]

102 Article 29 SRMR. See also Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15).

103 See DNB, 'Operation of the bail-in tool' <https://www.dnb.nl/en/binaries/Communication%20regarding%20the%20operation%20of%20the%20bail-in%20tool_tcm47-370119.pdf> accessed 25 February 2020.

104 Article 7(3) SRMR.

105 Article 117 BRRD.

106 Ibid.

107 Article 3(2) CIWUD.

108 Judgment of 24 October 2013, *LBI hf v Kepler Capital Markets SA and Frédéric Giraux*, C-85/12 EU:C:2013:697.

109 Judgment of 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, C-526/14 EU:C:2016:570.

110 Ibid [135]. See also Jens-Hinrich Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019) 54-55.

111 Moss, Wessels and Haentjens (n 51) para 2.26. *Cf* Haentjens, Janssen and Wessels (n 1) 186-192.

This principle is confirmed in an English case *Goldman Sachs International v Novo Banco SA*.[112] In this case, Novo Banco SA was a bridge entity, to which the Portuguese resolution authority transferred all debt of Banco Espírito Santo in August 2014, including that of Goldman Sachs. However, the Portuguese resolution authority made another decision in December 2014, which excluded the debt of Goldman Sachs from transferring to Novo. Therefore, Goldman Sachs commenced litigation and requested the English court to recognise that its claim had been transferred to Novo. The appeal judgment explicitly stated that '[m]easures taken in the application of [resolution] tools and the exercise of [resolution] powers were by Article 117 expressly brought within the definition of "reorganisation measures" in Article 2 of the [Winding-up Directive] and thus within the scheme of mutual recognition'.[113] The UK Supreme Court also confirmed this opinion, namely, resolution is one type of reorganisation measures.[114]

Another case, *Bayern LB v. Hypo Alpe Adria (HETA)* decided by a German court, showed that in order to apply the above rule, a measure needs to be recognised as a 'resolution' measure.[115] Bayern LB, a German bank, is the shareholder and loan provider of Hypo Alpe Adria, an Austrian bank, which ended up in a deteriorating situation, and the residual asset was later transferred to a bridge institution *HETA* (bad bank) as ordered by the Austrian authority. The Austrian legislator further cancelled or suspended part of the debts held by Bayern according to the HaaSanG Act.[116] The Munich Court, upon the request of Bayern, reached the conclusion that the action taken in Austria cannot be regarded as resolution action and therefore cannot be recognised under the BRRD. First, the court held that the Austrian measure did not contain recapitalisation purposes. However, it seems that the court failed to consider that the asset separation process is with the aim of restructuring the original banking group and making the

112 Rose Lagram-Taylor, 'Goldman Sachs International v Novo Banco SA' (2019) 16 International Corporate Rescue 115. See also comments, e.g. Matthias Lehmann, 'Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders' (2016) 66 International and Comparative Law Quarterly 107; Matthias Haentjens, 'New Bank Resolution Regime as an Engine of EU Integration' (Oxford Business Law Blog, 14 June 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/06/new-bank-resolution-regime-engine-eu-integration> accessed 25 February 2020.

113 *Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA, Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092, [2016] 2 CLC 690 [25].

114 *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683.

115 *Bayern LB v Hypo Alpe Adria (HETA)*, Regional Court Munich I, Judgment of 8 May 2015, 32 O 26502/12. See, e.g. Lehmann (n 112) 133; Binder (n 110) 53; Bob Wessels, 'International Insolvency Law and EU Bank Resolution Rules' in M. Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019) 166.

116 Bundesgesetz über Sanierungsmaßnahmen für die Hypo Alpe Adria Bank International AG (HaaSanG) (Austrian Federal Act on Restructuring Measures for Hypo Alpe Adria Bank International AG), 31 July 2014.

shareholders and creditors bear the losses is the objective of resolution.[117] Second, the court maintained that the Austrian action was a legislative act rather than an administrative action, and therefore, it is not subject to the BRRD. One opinion, however, believes that the scope of mutual recognition should extend to legislation.[118] Before the appeal court could decide on these controversial issues, the Austrian Constitutional Court later ruled that HaaSanG was invalid because it discriminated against certain bondholders,[119] and the judgment of Munich Regional Court was set aside.[120] Although the case did not reach a final conclusion, it raised the awareness that the mutual recognition mechanism can be questioned on the basis of the nature of the subject action.

Another provision worth mentioning is Article 66 BRRD, which is about 'power to enforce crisis management measures or crisis prevention measures by other Member State'.[121] This Article prescribes that 'Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State'. This provision makes the transfer actions taken in one Member State effective in another. Particularly, Lord Sumption stated in the above-mentioned *Novo Banco* case that the main purpose of Article 66 is 'to require other member states to take active steps to enforce transfers of assets or liabilities made in the course of a reorganisation in the home state and to prevent challenges to such transfers in their own jurisdictions'.[122] This Article supplements the mutual recognition mechanism enshrined in the CIWUD.

Third, if an institution or part of the cross-border group institution is located in a non-Banking Union Member State, the SRB cannot exercise its powers and a resolution college should be established,[123] which 'should provide a forum for the exchange of information and coordination of

117 Nikoletta Kleftouri, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017) 18 ERA Forum 263, 273-274. *Cf* Lehmann (n 112) 133.

118 Lehmann (n 112) 133.

119 Austrian Constitutional Court, decision of 3 July 2015, AT:VFGH:2015:G239.2014. See the discussion of this case in below Chapter 8, §8.4.1.

120 *Bayern LB v Hypo Alpe Adria (HETA)*, Higher Court of Munich, Judgment of 25 June 2018, 17 U 2168/15. See, e.g. Binder (n 110) 53.

121 Article 66 BRRD.

122 *Novo Banco* (n 114) [22].

123 Article 88 BRRD.

resolution actions' and 'with a view to agreeing a group resolution'.[124] A resolution college consists of group-level resolution authority,[125] the other resolution authorities and, where appropriate, competent authorities and consolidating supervisors.[126] It is inferred that if a successful group resolution action is reached, there would be no cross-border recognition issue. However, it should be noted that a resolution college is only a 'platform facilitating decision-making by national authorities', but not 'a decision-making body'.[127] And the dissenting resolution authorities can depart from the group resolution action as long as they submit detailed reasons.[128] Thus, hypothetically, authorities of a Member State might refuse to participate in or withdraw from the resolution college, and it is assumed that any following cross-border cooperation or recognition would become extremely difficult.[129] A similar European resolution college is also established when third countries are involved.[130] European resolution colleges provide a cooperation platform for European authorities.[131]

3.3.1.1.2 Recognition of third-country resolution actions

In terms of cross-border resolution related to third-country institutions, two situations are distinguished: with international agreements and without international agreements. If agreements with third countries are in place, the provisions with regard to cross-border resolution in these agreements shall apply.[132] Conversely, if no agreement is effective, or the agreement does not cover the recognition issue, a separate recognition regime shall apply, as provided in Articles 94 to 95 BRRD. Article 94 prescribes the powers of recognition and enforcement of third-country resolution actions, and Article 95 lists five considerations to use when deciding whether to refuse to recognise and enforce third-country resolution actions, specified in below §3.3.2.

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124 Recital (96) BRRD. See also EBA Final draft Regulatory Technical Standards on resolution colleges under Article 88(7) of Directive 2014/59/EU, EBA/RTS/2015/03, 3 July 2015.

125 'Group-level resolution authority' means the resolution authority in the Member States in which the consolidating supervisory is situated. Article 2(1)(44) BRRD. The SRMR is, in the event of cross-border group resolution, the relevant group-level resolution authority. Article 5(1) SRMR.

126 Article 88(1) BRRD.

127 Recital (98) BRRD.

128 Articles 91(8) and 92(4) BRRD.

129 Similar concerns see Lehmann (n 112) 141-142; Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 502. For other criticism on resolution colleges, see, e.g. Seraina Grünewald, *The Resolution of Cross-border Banking Crises in the European Union: A Legal Study from the Perspective of Burden Sharing* (Wolters Kluwer, Law & Business 2014) 114; Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91, 91-138.

130 Article 89 BRRD.

131 Ibid.

132 Article 93 BRRD.

Concerns may arise with regard to the effectiveness of these international agreements. Article 93 BRRD empowers the European Commission to propose the negotiation of agreements with third countries regarding cooperation between resolution authorities. However, the cooperation mainly targets information sharing during the recovery and resolution planning period[133] but there is no mention of the recognition issue. Yet, this is the only type of agreement that can apply in the recognition proceeding,[134] and it is doubtful whether future agreements would actually contain recognition provisions.[135] Apart from such agreement, the EBA may conclude framework cooperation arrangements with third-country authorities.[136] Nevertheless, these arrangements are non-binding[137] and limited to information sharing and cooperation.[138] Also, supervisory and resolution authorities, where appropriate, shall conclude non-binding cooperation arrangements with third-country authorities, but also not on substantive recognition issues.[139] These non-binding agreements cannot guarantee that European authorities would recognise third-country resolution actions.

133 Article 93(1) BRRD.

134 Article 94(1) BRRD.

135 No such statutory agreement is found. The commission, though, has emphasised the importance of cooperation for cross-border resolution of international banks. See, e.g. European Commission, 'Bilateral Relations' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/bilateral-relations_en#regulatory-dialogues-and-high-level-meetings-on-financial-services-regulation> accessed 25 February 2020.

136 Article 97(2) BRRD. For instance, the Framework Cooperation Arrangement between the European Banking Authority ('EBA') and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the U.S. Securities and Exchange Commission, and the New York State Department of Financial Services. See EBA, 'EBA and US Agencies Conclude Framework Cooperation Arrangement on Bank Resolution' (29 September 2017) <https://www.eba.europa.eu/-/eba-and-us-agencies-conclude-framework-cooperation-arrangement-on-bank-resolution> accessed 25 February 2020. However, this Framework only provides principles for further cooperation arrangements in order to support cross-border crisis management information sharing and cooperation (Article 1), but not on recognition issues, at least not mentioned specifically. Also, it is highlighted that this is a non-binding framework (Article 3).

137 Article 92(2) caput BRRD.

138 Article 97(3) caput BRRD.

139 Article 97(4)-(5) BRRD. For instance, the Cooperation Arrangement (CA) between the Single Resolution Board (SRB) and the Federal Deposit Insurance Corporation (FDIC) further strengthened the close cooperation between the two organizations in compliance with the legal frameworks in the United States and the European Union. See SRB, 'Single Resolution Board and Federal Deposit Insurance Corporation Sign Cooperation Arrangement' (14 December 2017) <https://srb.europa.eu/en/node/457> accessed 25 February 2020. This CA is non-binding (para 6) and only covers the information-sharing requirement on the statutory and other legal requirements applicable to the recognition and enforcement of foreign resolution proceedings in each jurisdiction (para 18), thus leaves the recognition issue solely in the hands of each jurisdiction.

Without an effective international agreement, the recognition decision is determined at the national level, either by a European resolution college on a joint decision basis or by each NRA individually. A European resolution college should be established when 'a third country institution or third country parent undertaking has Union subsidiaries established in two or more Member States, or two or more Union branches that are regarded as significant by two or more Member States', and consist of resolution authorities of Member States where those Union subsidiaries are established or where those significant branches are located, and performing similar functions and carrying out similar tasks as resolution colleges.[140] Regarding the recognition request of the third-country resolution actions, the European resolution college should reach a joint decision when the relevant third-country institution or a parent undertaking (a) 'has Union subsidiaries established in, or Union branches located in and regarded as significant by, two or more Member States'; or (b) 'has assets, rights, or liabilities located in two or more Member States or are governed by the law of those Member States.'[141] In the absence of a joint decision between the resolution authorities participating in the European resolution college, or in the absence of a European resolution college,[142] the decision should be made by the national authorities.[143]

The SRB, nevertheless, unlike within the SRM regime where it can exercise resolution powers directly, does not have the power to make decisions, but can only provide assessment and recommendations as to whether or not to recognise third-country resolution actions.[144] The final recommendation is not binding because it is up to the national resolution authorities to determine whether to recognise or not third-country resolution actions, though the national resolution authorities need to provide a reasoned statement to the SRB when they cannot implement the recommendation.[145]

After recognising third-country resolution actions, EU authorities are also empowered to enforce the third-country resolution actions, including actions taken on assets, rights or liabilities[146] and shares or other instruments of ownership,[147] suspension or restriction of payment or delivery obligations, enforcement of security rights and termination rights,[148] and exclusion of right to terminate, liquidate or accelerate contracts or affect

140 Article 89(1)-(2) BRRD.
141 Article 94(2) BRRD.
142 This is the situation where only one Member State is involved, e.g. only one branch in one Member State. See Article 96 BRRD.
143 Article 93(3) BRRD.
144 Article 33(2) SRMR.
145 Article 33(4) SRMR.
146 Article 94(4)(a) BRRD.
147 Article 94(4)(b) BRRD.
148 Articles 69-71, 94(4)(c) BRRD.

the contractual rights.[149] These powers are further explained below using different scenarios. However, despite a clear delegation of enforcement powers, the actual procedures are not clearly prescribed in the BRRD. It is up to the national law to determine them.

3.3.1.1.3 Brexit issues

During most of the time of the writing of this dissertation, starting from October 2016, the UK was an EU Member States subject to the EU law.[150] Yet, the UK stopped being a Member State of the EU as of midnight CET on 31 January 2020.[151] The Withdrawal Agreement between the EU and UK entered into force on 1 February 2020.[152] However, it does not mean all the EU laws stopped being applicable to the UK immediately. Instead, the EU and the UK have agreed on a transition period until 31 December 2020.[153] During this period, '[a]ll EU law, across all policy areas, is still applicable to, and in, the United Kingdom, with the exception of provisions of the Treaties and acts that were not binding upon, and in, the United Kingdom before the Withdrawal Agreement entered into force.'[154] And the EU and UK can decide, before 1 July 2020, to extend the transition period once, by up to one or two years.[155]

In terms of bank resolution laws specifically, the impact of Brexit is expected to be limited. The SRMR only applies to States belonging to the Banking Union, to which the UK does not belong. Brexit will not affect the SRMR or relevant laws concerning the Banking Union. The BRRD, on the other hand, was binding on the UK, and the UK has, on the basis of the Banking Act 2009, transposed the BRRD in several statutory instruments.[156] The UK authority has expressed that '[t]he policy aims of the BRRD will remain a core element of [UK's special resolution] regime, providing continuity

149 Article 94(4)(d) BRRD.

150 For example, *Goldman Sachs v Novo Banco*, see above n 112 - n 114.

151 See European Union, 'A Future EU-UK Partnership', <https://europa.eu/newsroom/highlights/special-coverage/future-eu-uk-partnership_en> accessed 25 February 2020.

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid.

156 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 these 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 25 February 2020.

and certainty as the UK leaves the EU, and conformity with the FSB Key Attributes'.[157] However, cross-border cooperation provisions prescribed in the BRRD may no longer apply to the UK, and the UK will treat EU Member States as third countries.[158] However, the UK also confirmed that such withdrawal from mutual cooperation provisions does not prevent UK authorities from future cooperation with EU authorities.[159]

For recognition of winding-up/reorganisation/resolution actions among EU Member States, the UK transposed the CIWUD into its Credit Institutions (Reorganisation and Winding Up) Regulations and adopts the automatic recognition regime for other EU Member States.[160] The UK authority, in response to Brexit, expressed the intention of removing automatic recognition regimes.[161] EU Member States therefore need to go through the recognition process as third countries. For example, the *Gibbs* rule discussed below may be applicable to the future recognition of EU resolution actions.[162] The same applies *vice versa*. When the EU treats the UK as a third country, discussions in above §3.3.1.1.2 (third country) applies rather than §3.3.1.1.1 (EU Member States). As the negotiation between the UK and the EU is still ongoing, it remains to be seen how relationships will change. Nevertheless, this dissertation focuses on third-country issues without special arrangements such as those among the EU Member States, and the discussions would be useful to address future cases between the UK and the EU.

3.3.1.2 Scenarios (with third countries)

3.3.1.2.1 Subsidiary

The BRRD explicitly stated that 'subsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to the

157 HM Treasury, 'Guidance The Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018: explanatory information' (updated 29 October 2019) <https://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 25 February 2020.

158 Ibid.

159 Ibid.

160 The Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (S.I. 2004/1045).

161 HM Treasury, 'Guidance Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2018: explanatory information' (updated 29 October 2019) <https://www.gov.uk/government/publications/credit-institutions-and-insurance-undertakings-reorganisation-and-winding-up-amendment-eu-exit-regulations-2018/credit-institutions-and-insurance-undertakings-reorganisation-and-winding-up-amendment-eu-exit-regulations-2018-explanatory-information> accessed 25 February 2020.

162 See §3.3.1.2.4.

Union law, including the resolution tools laid down in the [BRRD]'.[163] The BRRD accepts both SPE and MPE,[164] and the new BRRD II and SRMR II allow the SPE within MPE strategy. The new banking package amendment CRD V[165] additionally requires non-EU (third-country) banking groups with two or more institutions in the EU and with the total value of assets no less than EUR 40 billion should establish an intermediate EU parent undertaking (IPU).[166] This is to 'facilitate the implementation of the internationally agreed standards on internal loss-absorbing capacity for Non-EU G-SIIs [Global Systemically Important Institutions] in the Union law, and more broadly, to simplify and strengthen the resolution process of third-country groups with significant activities in the EU'.[167] Therefore, such an EU IPU should hold sufficient funds to absorb the losses of its subsidiaries. It can be seen that EU authorities intend to take actions on Union subsidiaries.

However, it does not exclude the possibility of recognising third-country actions that may have effects on Union subsidiaries. Article 94 BRRD makes it explicit that Member States should ensure resolution authorities have the powers to 'perfect, including to require another person to take action to perfect, a transfer of shares or other instruments of ownership in a Union subsidiary'.[168] This provision should be in light of Article 94 in its entirety which is about 'recognition and enforcement of third-country resolution proceedings'.[169] Accordingly, such power taken on Union subsidiaries is upon the recognition of third-country resolution actions, and, therefore, it produces the effect of enforcement of third-country resolution actions. This corresponds to the scenario explained in Chapter 2 at §2.3.1.

3.3.1.2.2 Branch

According to the BRRD, as a general rule, branches of third-country institutions are subject to the third-country resolution; however, Member States should 'retain the right to act in relation to branches of institutions having their head office in third countries, when the recognition and application of third-country proceedings relating to a branch would endanger financial

163 Recital (102) BRRD.
164 Recital (80) BRRD.
165 Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150/253.
166 Amended 21b (1) and (4) CRD IV. Article 1(9)CRD V.
167 European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, Brussels, 23.11.2016, COM(2016) 854 final, 2016/0364 (COD), 12.
168 Article 94(4)(b) BRRD.
169 Article 94, title.

stability in the Union or when Union depositors would not receive equal treatment with third-country depositors'.[170] In particularly, powers in relation to Union branches of third countries should be exercised when 'a Union branch … is not subject to any third-country resolution proceedings or … is subject to third-country proceedings and one of the circumstances referred to Article 95 applies'.[171]

In order to exercise resolution powers on Union branches, the action must be necessary for the public interest and one or more of the following conditions is met:

> (a) the Union branch no longer meets, or is likely not to meet, the conditions imposed by national law for its authorisation and operation within that Member State and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable timeframe;
> (b) the third-country institution is, in the opinion of the resolution authority, unable or unwilling, or is likely to be unable, to pay its obligations to Union creditors, or obligations that have been created or booked through the branch, as they fall due and the resolution authority is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable timeframe;
> (c) the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country institution, or has notified to the resolution authority its intention to initiate such a proceeding.[172]

In short, Union branches are, in principle, subject to third-country resolution actions, but may also be under resolution by EU authorities when the above conditions are met. In terms of recognition of third-country resolution actions, Articles 94 and 95 also apply. Upon recognition, EU resolution authorities should also be empowered to take actions on 'rights or liabilities of a third-country institution that are booked by the Union branch'.[173]

3.3.1.2.3 Assets

For any assets of third-country institutions, EU authorities are also empowered to recognise third-country resolution actions imposed thereon, subject to the conditions of Articles 94 and 95. Member States should ensure resolution authorities can take resolution powers on 'assets of a third-country institution or parent undertaking that are located in their Member State'.[174]

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170 Recital (102) BRRD. The same recital also reaffirms that '[s]ubsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to Union law'.
171 Article 96(1) BRRD.
172 Article 96(2) BRRD.
173 Article 94(4)(a)(ii) BRRD.
174 Article 94(4)(a)(i) BRRD.

3.3.1.2.4 Governing law

As illustrated in Chapter 2 at §2.2.1, parties to a contract are free to choose the governing law.[175] However, the BRRD explicitly requires that EU Member States should ensure resolution authorities, upon recognition of third country resolution actions, can exercise resolution powers on assets, rights or liabilities of a third-country parent that are governed by the law of EU Member States.[176] It is for the purpose of enforcing third-country resolution actions, and it is inferred that the EU accepts the results of third-country resolution actions imposed on EU-law governed instruments.

However, a particular issue may arise in terms of English law when the *Gibbs* rule applies. This *Gibbs* rule established the long-standing principle that '[a] party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled'.[177] In the *Gibbs* case, Lord Esher explicitly and affirmatively expressed his opinion: '[w]hy should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?'.[178] The *Gibbs* rule subsequently became the overall governing principle regarding recognition of foreign insolvency proceedings in the following years.[179] It is a common law power that can be exercised by the judges outside the scope of Section 426 of the Insolvency Act 1986, the EIR and the Cross-border Insolvency Regulation 2006 (incorporating the Model Law on Cross-border Insolvency (MLCBI)).[180] In the recent *Re OJSC International Bank of Azerbaijan* case, Henderson LJ maintained the application of the *Gibbs* rule, on the basis that 'it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far.'[181] In the *Goldman Sachs v Novo Banco* case mentioned above, the issue of the *Gibbs* rule was also examined in resolution proceedings. As Lord Sumption JSC identified:

175 See Article 3 Rome I Regulation, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

176 Article 94(4)(a) BRRD.

177 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399 (CA).

178 Ibid 406.

179 See, e.g., *National Bank of Greece and Athens S.A. v Metliss* [1957] 3 W.L.R. 1056; [1958] A.C. 509 (HL); *Adams v National Bank of Greece S.A.* [1960] 3 W.L.R. 8; [1961] A.C. 255 (HL).

180 Regarding the methods under English law for assisting foreign insolvency proceedings, see *Rubin v Eurofinance SA* [2012] UKSC 46 [30]; [2013] 1 A.C. 235 (SC), on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971.

181 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2018] 12 WLK 286 [29], on appeal from [2018] EWHC 59 (Ch).

> The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded.[182]

In other words, Lord Sumption JSC considered the Gibbs rule applicable to debt discharge in resolution proceedings, although in this particular case, the *Gibbs* rule cannot impede recognition because of the special arrangement of cross-border resolution within the EU under the CIWUD and the BRRD. Therefore, under the rule in *Gibbs*, it is possible that an English court would not recognise third-country resolution actions imposed on English-law governed debts.[183]

3.3.2 Public policy exception

Among the EU Member States, the CIWUD, which does not allow public policy exceptions,[184] also applies to resolution cases. So, a host jurisdiction has to recognise foreign resolution actions taken in another EU Member State on an unconditional basis.

With regard to the relationship with third countries, the BRRD Article 95 specifically identifies five situations in which a Member State may refuse to recognise a third-country resolution proceeding, collectively referred to as 'public policy exception' in this dissertation:

> (a) … the third-country resolution proceedings would have adverse effects on financial stability in the Member State in which the resolution authority is based or that the proceedings would have adverse effects on financial stability in another Member State;
> (b) … independent resolution action under Article 96 in relation to a Union branch is necessary to achieve one or more of the resolution objectives;
> (c) … creditors, including in particular depositors located or payable in a Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;

182 *Novo Banco* (n 114) [12] (citing *Adams v National Bank of Greece SA* [1961] AC 255).

183 §6.4.4.1.2 in Chapter 6 and § 8.4.3 in Chapter 8 below analyse the *Gibbs* rule from the perspectives of private international law and the creditors' position respectively.

184 See, e.g. Moss, Wessels and Haentjens (n 51) para 2.26. See the rationale behind - the home-country control principle, §3.2.2 above.

> (d) … recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the Member State; or
> (e) … the effects of such recognition or enforcement would be contrary to the national law.[185]

The interpretation is crucial in terms of the application of public policy exception. Since the BRRD only entered into force recently, there is no case of recognition of third-country resolution actions that interprets the five circumstances listed above. Based on the text of Article 95, especially the words used within such as 'adverse', 'necessary' and 'material', this dissertation believes that Article 95 should be interpreted narrowly.

The European Insolvency Regulation (EIR)[186] regulates cross-border insolvency matters within the EU, which provides that an EU Member State 'may refuse to recognize insolvency proceedings in another Member State … where the effects of such recognition … would be *manifestly* contrary to that State's public policy, in particular its *fundamental* principles or the *constitutional* rights and liberties of the individual.'[187] This is the EIR public policy exception. The EIR excludes banks and thus does not apply to bank resolution.[188] However, the interpretation of EIR, including this public policy exception, can be a supportive reason to uphold the narrow interpretation method of Article 95 BRRD, although it should be noted that the EIR is a regulation that can be directly applied at the European level, while the BRRD is a directive that needs to be transposed into national laws, and its interpretation relies on national laws.

The Virgós-Schmit Report[189] provides that:

> Public policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.
>
> Public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings. Rights

185 Article 95 BRRD.
186 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (EIR 2015 Recast).
187 Article 26 EIR 2000; Article 33 EIR 2015 Recast (emphasis added).
188 Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast.
189 The Virgós-Schmit Report, short for Report on the Convention on Insolvency Proceedings (1996) prepared by Miguel Virgós and Etienne Schmit, is the explanation of the EU Convention 1995, and serves as an important accompanying document for the EIR 2000 because the content of 1995 Convention and EIR 2000 is almost identical.

> of participation and non-discrimination play a special role in the case of plans to reorganize businesses or compositions, in relation to creditors whose participation is hindered or who are the subject of unfounded discrimination. [190]

As observed by Moss, Smith as well as Fletcher, the choice of the words 'may' and 'manifestly' and the focus on 'fundamental principles' and 'constitutional rights and liberties of the individual' indicate the restricted application of the public policy exception.[191] Wessels also presents a case of legitimate public interest such as the availability of a minimum quantity of energy.[192] In other words, the violation of non-fundamental and non-constitutional national laws cannot invoke this Article. [193] The *Eurofood* case also confirmed that 'recourse to the public policy clause … is reserved to *exceptional* cases',[194] and a fair legal process should be regarded as a commonly applied public policy, including the right to be notified of procedural documents and the right to be heard.[195] This limited and restricted interpretation method acknowledged in the EU law can be supportive evidence for European national authorities to narrowly interpret Article 95.

3.4 Concluding remarks

The EU framework is quite complicated in terms of recognition of foreign resolution actions because of the different treatment of EU and non-EU resolution actions. Within the Banking Union, the SRB is the authority responsible for cross-border banking groups. Outside the Banking Union, the CIWUD applies, and any resolution action taken in an EU home jurisdiction should be effective in another EU host jurisdiction. Besides, it is required that resolution colleges be established as a platform for cooperation and coordination when a group has different independent entities in several EU Member States.

For recognition of third-country resolution actions, the EU legislation clearly designates resolution authorities, either jointly through a European resolution college or independently, to decide whether or not to recognise and enforce third-country resolution actions. EU authorities are empowered to recognise the effects of third-country resolution actions imposed

190 Virgós-Schmit Report, para 206.
191 Gabriel Moss and Tom Smith, 'Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) para 8.362 ff.
192 Ibid para 8.367.
193 Ibid para 8.366.
194 Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, para 62.
195 Ibid para 66.

on shares of Union subsidiaries, Union branches, assets in the EU, and EU law governed contracts. In addition, upon recognition, EU authorities are designated with a broad range of powers to enforce third-country resolution actions. Last but not least, recognition and enforcement should not violate EU fundamental public policies. A concern is that the English *Gibbs* rule may prevent an English authority from recognising third-country resolution actions on English law governed debts.

EU legislation, compared with the following two jurisdictions, is more clearly prescribed in the way that resolution authorities are clearly designated as the authority to process foreign resolution requests, and specific rules and procedures are also provided in detail. However, given the lack of actual cases decided, it is difficult to authoritatively interpret the public policy exception circumstances listed in Article 95 BRRD.