EU bank resolution framework: A comparative study on the relation with national private law

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4 National and supranational coherence

1 Introduction

The implementation of an EU directive into national law is usually associated with some sort of alignment of the EU legislation with existing national legislation.[1] We associate harmonization of laws through a directive typically with the bringing together of the laws of the EU Member States and a process in which elements are combined to make it a coherent whole.[2] At the same time, it is an accepted view that EU secondary legislation often contains detailed rules and terminology that are difficult to integrate into the national law.[3] Moreover, since the rules stemming from an EU directive or regulation interface with diverse areas of national law and national legal cultural diversity, the entry into force of the EU legislation does not necessarily result in full convergence of the areas of national law that are affected by the EU legislation.[4]

The present study aims to test how the bank resolution frameworks relates to private law at the national level. Chapters 5 and 6 will, therefore, analyze several important relations between the bank resolution rules, principles, and objectives, and the rules, principles, and objectives of domestic private law that are directly affected by or closely related to the bank resolution frameworks. The emphasis is on the relationship with national substantive insolvency law. Furthermore, since the SRM Regulation mainly creates an institutional framework and all resolution decisions in the EU are implemented under national law transposing the BRRD, the present study focuses on the national rules stemming from the BRRD rather than on the SRM Regulation.

This chapter makes explicit which benchmarks are used in the book to assess the relations. More specifically, the chapter defines two notions of coherence, namely national coherence and supranational coherence, to

1 *Cf.* e.g., HM Government, 'Transposition guidance: how to implement EU Directives into UK law effectively', February 2018, para. 2.19-2.20, which discusses the question of '[h]ow do I bring EU legislation into harmony with existing UK law?' and that one should '[t]hink about the best way to implement so that there is no overlap or contradiction with existing legislation.'

2 Wessels & Fletcher 2012, p. 22-23; Van Gerven 2006, p. 65; Boodman 1991, p. 702.

3 *See* Smits 2012, p. 14-15.

4 *See* Havu 2012, p. 26-29.

examine the relations at the national levels. On that basis, it can be explored how the EU legislation has been aligned with national law and which possible differences may arise in bank resolution procedures across jurisdictions. Thus, the chapter does not advocate the ideal of coherence in a national legal system or at the EU level as a whole. The goal of the sections below is also not to improve the general legal coherence theory in the literature. The notions of coherence are rather defined to analyze the bank resolution frameworks.

In practice, the coherence standards may not always prevail over other considerations when determining policy actions in the field of bank resolution. For instance, the national legislatures may have to weigh the coherence concerns against other considerations, such as the optimal realization of certain policy goals and objectives, to determine how the bank resolution frameworks should develop. Furthermore, the EU secondary legislation typically requires specific changes in the law that are considered economically or socially desirable without taking into account the coherence with existing national law of the new rules stemming from EU law.[5] Also, the law is not politically neutral and only technical, and in some cases, legislatures and judges make decisions that are influenced by external factors and are not solely based on the law in the books.[6] Research shows, for example, that, in practice, courts are sometimes reluctant to apply EU law because of their national legal traditions.[7]

Nevertheless, as already indicated in chapter 2,[8] one of the goals of the EU bank resolution framework is that market participants price bank capital and debt instruments based on the actual default probability rather than the expected government subsidy. Accordingly, the framework should enable these participants to get an accurate picture of their possible position and losses in a bank failure.[9] We, therefore, might expect both the EU and national legislatures to seek to create clear bank resolution frameworks that contribute to clarity of rights of parties and predictability of the interpretation and application of the law. Coherence considerations in the further development of the bank resolution frameworks may help to avoid uncertainties about the bank resolution rules. Furthermore, the BRRD also seeks to establish a harmonized bank resolution framework and the SRM Regulation to enhance uniform application of the bank resolution rules.

5 *See* Hesselink 2001, p. 40.
6 As particularly advocated by the Critical Legal Studies movement. *See* generally e.g., Kennedy 1976. On European private law, *see* e.g., Kennedy 2002; Hesselink 2002a; Hesselink 2002b.
7 Caruso 1997, p. 21-22 and 26-27.
8 Paragraphs 2.2.2, 2.2.3 and 3.2.1 of chapter 2.
9 Tröger 2018, p. 36-37 and 41-42; Paterson 2017, p. 619-621.

Accordingly, we may also expect the EU legislature to at least consider how supranational coherence in the application and interpretation of bank resolution rules can be enhanced in the development of the EU bank resolution framework.

Paragraph 2 of this chapter further discusses why clarity of and consistency in the bank resolution frameworks are essential. Paragraph 3 then sets out a scheme developed in the literature to analyze how a national legal order evolves and concludes that the development of EU law differs in comparison with the national legal orders. Also, it explores what according to the literature in the investigated jurisdictions are the implications of the entry into force of EU secondary legislation for the national legal orders. Paragraphs 4 and 5 then explore the notions of national coherence and supranational coherence.

2 Call for clarity and consistency in the bank resolution frameworks

In a short story that has the heading 'Eight Ways to Fail to Make Law', Fuller tells about Rex, a king who tried to create and maintain a system of legal rules in his country but did not succeed. In one of his attempts, for instance, Rex made a code that was 'truly a masterpiece of obscurity.' Both his legal experts and other citizens did not understand a single sentence. Rex then asked his staff to clarify the code. Unfortunately, the next version was full of inconsistencies: 'there was not a single provision in the code that was not nullified by another provision inconsistent with it.' After a few other unsuccessful attempts, the king decided to act as the only judge in the country. However, he was unable to ensure congruence between his decisions and the existing law. The first act of the successor of Rex thereupon was to take the powers of government away from the lawyers in the hope that his subjects would be happy without laws.[10] According to Fuller, his tale illustrates that there are 'eight kinds of legal excellence toward which a system of rules might strive',[11] which include the requirements to create clarity of laws and to avoid contradictions such as logical inconsistencies in the law.[12]

10 Fuller 1964, p. 33-38.
11 Fuller 1964, p. 41.
12 Fuller 1964, p. 65-70. The other requirements are: generality, public promulgation, no retroactivity, laws should not require impossible results, constancy trough time, and congruence between laws as they are announced and applied. *See* Fuller 1964, p. 46-91.

The legislatures of the EU Member States do not have an easier job than the king in the story of Fuller. National law has been more and more governed by EU legislation that deals with very specific topics and objectives and contains rules and terminology that are entirely different from that in the existing national legislation. The national legislatures are charged with the difficult task of implementing the rules of directives into their domestic laws and aligning their national laws with regulations. In addition to the legislatures and courts at the national and EU level, actors such as EU agencies have been increasingly involved in the development of EU law by drafting guidelines and other regulatory products. Hence, multiple actors and sources have become involved in the making of legal norms.[13]

The EU bank resolution framework provides an excellent example of the complexity of EU law. The previous chapters considered and the following chapters will illustrate that the framework provides for rules, principles, and objectives and contains terminology that deviate from that in existing national private law. At the same time, these rules, principles, and objectives have to be interpreted and applied in a way that is consistent with domestic private law, and vice versa. Chapter 1 already indicated that the European Commission noted in this context in its Impact Assessment accompanying the proposal for the BRRD that

> '[b]ecause the crisis management tools and powers are used at the point when an institution is failing or has failed, they inevitably interact with national insolvency regimes. Substantive insolvency law is not harmonised, and the measures proposed in the bank resolution framework need to be implemented in a way that is consistent with that national law. Furthermore, the application of the tools and exercise of the powers will almost certainly affect contractual and property rights, that are also rooted in national law.'[14]

The literature has already advocated alignment of bank resolution rules with existing rules of insolvency law. Lubben, for example, employed the idea of consistency of the resolution rules with more general insolvency law to argue that the bank resolution rules provided by the US Dodd-Frank Act should be harmonized with the US Bankruptcy Code. He argues, amongst other things, that to ensure that the result of financial distress is clear and

13 For an analysis of the development of European private law by multiple state actors *see* Van Schagen 2016.

14 Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012), p. 79.

predictable, the consequences of rejecting an executory contract should be comparable in the procedures under both acts.[15]

The present study maintains that in the EU there is a need to adequately incorporate the bank resolution framework into the existing body of national law. The better aligned the bank resolution framework and national private law are, the more predictable the results of bank resolution procedures become.[16] Furthermore, potential differences in the interpretation and application of the regime across the Member States have to be considered in the further development of the EU bank resolution framework. In this way, the bank resolution frameworks in the EU can produce consistent outcomes.

Why are clarity and consistency in the EU bank resolution framework so important? Clarity of the bank resolution rules and confidence of market participants in these rules, including of banks, creditors, and shareholders, are considered necessary preconditions for the EU bank resolution framework to reach its underlying policy goal of strengthening market discipline.[17]

As discussed in chapter 2,[18] averting the moral hazard problems arising from the expected injection of public funds in banks should they ultimately run into trouble is one of the main pillars of the EU bank resolution framework. To restore market discipline and, thus, ensure that the costs of bank capital are sensitive to actual risks rather than implicit government guarantees, the resolution rules require the shareholders and creditors of a failing bank to absorb the losses and risks in resolution as an alternative to a government-funded rescue.[19]

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15 Lubben 2011, p. 1262 and 1276-1277. On the treatment of executory contracts under the Dodd-Frank Act, *see* Baird & Morrison 2011, p. 302. *See also* Lubben 2012, p. 204-205: 'In an ideal world, the treatment of derivatives under the Bankruptcy Code, the Securities Investor Protection Act, the OLA [Title II of Dodd-Frank, LJ], and other insolvency statutes would be entirely reconsidered, and these various insolvency systems would be further integrated. [...] regardless of the type of debtor, it seems that if financial institutions are allowed twenty-four hours to save their financial contracts, real economy companies should also have this option. Moreover, if financial institutions are to ever use Chapter 11 as their resolution tool, such a change is quite obviously necessary.'

16 *Cf.* Kirshner 2015, p. 832; Lubben 2012, p. 197; Lubben 2011, p. 1262.

17 Tröger 2018, p. 37 and 45-46; Cappiello 2015, p. 433-434. *Cf.* Article 31(2)(b) BRRD.

18 Paragraphs 2.2.2, 2.2.3 and 3.2.1 of chapter 2.

19 *See* Tröger 2018, p. 36 & 40. *See also* Avgouleas & Goodhart 2015, p. 3-5; Zhou et al. 2012, p. 20.

The prevailing view in the literature is, however, that market participants can only price the bank capital based on the actual default probability if they know what to expect.[20] Hence, they need to be able to predict to a certain extent the chances of a start and the outcome of a resolution procedure, such as their potential losses in bail-in.[21] While it is an accepted view that discretionary application of the resolution tools and powers is essential to allow authorities to determine on a case-by-case basis which measures are necessary, it is also believed that the discretionary elements in the bank resolution framework have to be limited.[22] In particular, the literature argues that the uncertainty created by the discretionary use of the framework has to be limited by making the bank resolution procedure as clear and predictable as possible.[23] This condition requires that the bank resolution criteria and procedures are clearly specified in legislation.[24] Clarity and predictability in cross-border bank resolution procedures have been argued to benefit in many cases from greater a convergence of national bank resolution frameworks.[25]

3 Existence and structure of a national and the EU legal order

3.1 Multi-layered conception of national law

Before we can explore in more detail what the literature has considered the implications of the entry into force of EU secondary legislation for the Dutch, German, and English legal orders, including for their clarity and consistency, we first have to determine how a national legal order evolves and how this evolvement differs from the development of EU law.

The theoretical starting point of this analysis of a national legal order is the 'multi-layered conception' of the law developed by Tuori. According to this approach, which builds on the tradition of legal positivism,[26] national law consists of three layers.[27] The first level is the visible surface level, which contains, for example, statutes and other regulations, court decisions in individual cases, and publications by legal scholars.[28] It is traditionally

20 Tröger 2018, p. 36-37 and 45-46; Allen et al. 2015, p. 44.
21 Tröger 2018, p. 37. *See also* Krahnen & Morretti 2015, p. 136-142.
22 Tröger 2018, p. 37 and 46; Zhou et al. 2012, p. 10-11. *Cf.* Goodhart & Schoenmaker 2009, p. 160, who 'propose full transparency on crisis-management arrangements (the "how" question) but constructive ambiguity on the application of these arrangements (the "whether" question).'
23 Zhou et al. 2012, p. 11.
24 Tröger 2018, p. 46. *See also* Sjöberg 2014, p. 194-197.
25 Krimminger 2011, para. 11.85 & 11.89.
26 *See* Tuori 2002, p. 5-8.
27 Tuori 2002, p. 147-196; Tuori 1999, p. 403-412. The ideas of Tuori show some similarity with the concept of a national legal system as multi-level framework discussed by Bussani 2000.
28 Tuori 2002, p. 154-155; Tuori 1999, p. 403-404.

analyzed within the borders of each jurisdiction.[29] The layer is subject to continuous change due to the debate to which, depending on the legal culture, the legislature, judges, and academics contribute.[30]

In addition to this top level, the law has two deeper layers, which are the legal culture and the deep structure. The legal culture is more stable than the first level and has been shaped over time. Although it forms a whole, according to Tuori, it has methodical, conceptual and normative elements.[31] The methodical side, which is also called 'juridical logic', includes the prevailing doctrine of the sources of law and the hierarchy of these sources. It also consists of standards to solve inconsistencies between rules and methods of interpretation of legal norms, such as interpretation by analogy or teleological interpretation.[32] The general doctrines of different areas of law form the conceptual and normative elements of the legal culture. Examples are legal concepts such as 'contract' in private law and 'intent' in criminal law, and general legal principles, such as 'pacta sunt servanda', 'nulla poena sine lege' and 'proportionally'.[33]

Finally, Tuori calls the third and most stable layer of the law the 'deep structure' or 'common core'.[34] It represents what several legal cultures, such as the Roman Germanic and Anglo-Saxon legal cultures, have in common, despite mutual differences at the other two levels. Thus, the level has a wider geographical scope than the other layers of the law.[35] Examples of the components of this level are basic legal concepts and fundamental principles, including human rights.[36]

Although we can distinguish between the surface level, legal culture and deep structure, in practice the layers are closely connected. For example, a judge does not reach his decision in court based on only the materials that are available at the surface level but also applies legal concepts and principles of the two other layers of the law.[37] Furthermore, lawmaking and court decisions produce immediate outcomes in surface level materials but may also leave traces in the legal culture and deep structure.[38] Also, the deeper layers create preconditions for and restrictions on the development of the surface level. To take an example, the legal doctrines of the legal culture

29 Tuori 2002, p. 185.
30 Tuori 2002, p. 155; Tuori 1999, p. 403-404.
31 The literature uses the term 'legal culture' in a variety of ways. For a brief discussion of the concept of legal culture, *see* Nelken 2012.
32 Tuori 2002, 166-168 and 192.
33 Tuori 2002, p. 174-179.
34 Tuori 2002, p. 183-184; Tuori 1999, 405.
35 Tuori 2002, 194.
36 Tuori 2002, p. 183-192.
37 Tuori 1999, p. 408.
38 Tuori 1999, p. 407.

may link and justify decisions in similar court cases, which is conducive to legal predictability.[39]

If we apply this scheme to EU law, the picture becomes very different. Because EU secondary legislation made by the EU institutions often only deals with specific topics, it has a fragmentary character.[40] Moreover, the expansion of EU law, including the directives and regulations and decisions of the Court of Justice of the European Union (CJEU), mainly takes place on a surface level. The CJEU has emphasized that the EU created 'a new legal order of international law' that 'on the entry into force of the Treaty, became an integral part of the legal systems of the Member States'.[41] The case law of the CJEU and EU legislation also provide for general legal principles, such as the principle of proportionality.[42] Nevertheless, the primary and secondary legislation of the EU lacks fully developed deeper levels. It is dependent on its continuous interactions with the national legal orders and is intertwined with the diverse legal cultures of the Member States.[43] This point is illustrated by the fact that, although national courts are required to interpret national law, where possible, in conformity with EU law,[44] legal scholars expect the courts to also interpret and apply the rules of EU law through the lens of existing national legislation and their national legal cultures.[45] Van Dam, for example, notes that:

> 'European rules provide the body but the national courts have to provide them with a soul in the spirit of Community law. This process will often be influenced along the lines of national legal concepts, language, political, socio-economic and cultural backgrounds. This is particularly the case if the rule provides for general concepts rather than precise technical rules.'[46]

Thus, the reliance on the existing surface level and deeper levels of national law affect the way in which EU law is understood and applied.[47]

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39 Tuori 1999, p. 409-410.

40 Wilhelmsson 1999, p. 444 notes that EU law is 'scattered'. According to Roth 2002, p. 762 EU law has a 'pointillist' character: it is 'patchy, piece-meal legislation that does not end up with a balanced, well-drawn picture when you look at it from not too close.'

41 Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, para. 12

42 Tuori 1999, p. 413. For a discussion of general principles of EU law, *see* Hartkamp 2012, para. 105-151.

43 Wilhelmsson 2002, p. 80-81; Tuori 1999, p. 412-413; Wilhelmsson 1999, p. 439. *See also* Walker 2015, p. 23-26, who analyzes the debate on the systemic character of EU law.

44 *See* Hartkamp 2012, para. 100.

45 Havu 2012, p. 29; Wilhelmsson 2002, p. 81; Tuori 1999, p. 413.

46 Van Dam 2007, p. 72.

47 Havu 2012, p. 28; Wilhelmsson 2002, p. 81; Wilhelmsson 1999, p. 449; Tuori 1999, p. 412-413. *See also* Künnecke 2008, showing that German and English courts have diverging approaches to the Europeanisation of tort law rules. Teubner 1998, p. 17-19, however, argues that some rules have closer ties to the national legal culture and social discourse than other rules.

3.2 Impact of EU law on the national legal orders

The English, Dutch, and German literature have extensively discussed what is the effect of EU secondary legislation, particularly of directives, on the national legal orders.

In the legal tradition of the European continental lawyers, including the Dutch and German lawyers, national law, or at least private law, forms an integrated system of rules and principles.[48] According to Bloembergen and Canaris, unity ('*eenheid*', '*Einheit*') and consistency ('*samenhang*', '*Folgerichtigkeit*') are characteristics of such a system.[49] This systemization is regarded to contribute to clarity and legal certainty, for instance because court cases can be dealt with in a systemic, logical manner.[50] Given this emphasizes on systemization, it is not surprising that inconsistencies in the law are perceived to threaten the coherence in the legal order.[51] In particular, in the debate on the EU integration of the law, the Dutch and German literature has very much focused on the fragmentation of their legal systems caused by EU legislative actions.[52] Since EU secondary legislation only deals with specific topics and objectives as a result of the limited competences of the EU legislature, such as with the removal of internal market impediments, it is considered to cause a part of national law to fall apart. It creates one part affected by EU law and one part only governed by national law.[53]

Hesselink clarifies the point that EU law has created 'frictions'[54] in the national legal systems with an example from Dutch law.[55] The Burgerlijk Wetboek (BW) traditionally distinguishes between the legal concepts 'nullity' (*nietigheid*) and 'annullability' (*vernietigbaarheid*). The Dutch legislature implemented article 6 Unfair Terms in Consumer Contract Directive[56]

48 *See e.g.* Caruso 1997, p. 5-6. *Cf.* Friedmann 1967, p. 16, who notes that a legal system constitutes 'a structure in which the different organs, participants, and substantive prescriptions of the legal order react upon each order' and it is 'essentially the corollary to the increasing complexity of modern society, in which millions of individuals depend on the functioning of a complicated network of legal rules of many different types, and the interplay of public authorities of many different levels.'

49 Canaris 1983, p. 11-12; Bloembergen 1977, p. 2-3. *See also* Bloembergen 1992, p. 316-317.

50 Loos 2007, p. 516. *See also* Bloembergen 1977, p. 325-326.

51 Loos 2007, p. 516.

52 E.g., Smits 2012; Roth 2002.

53 Van Gerven 2006, p. 66. *See also* Wissink 1999, p. 4-5.

54 Hesselink 2001, p. 41.

55 Hesselink 2004, p. 406 and 410-412.

56 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29-34). Article 6 of this directive provides that 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

(which provides, in short, that unfair terms used in a consumer contract shall not be binding on the consumer) in section 6:233 BW, a general provision on standard terms in contracts. Similar to other contracts, the clause in a contract with a consumer was valid unless the consumer or the court at the request of the consumer, annulled it.[57] The CJEU, however, then held that:

> '[t]he protection which the Directive confers on consumers [...] extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.'[58]

This paragraph seems to refer to the Dutch nullity (which the court must rule on its own motion) instead of annullability.[59] According to Hesselink, the decision illustrates that an important part of Dutch law is not developed exclusively by the Dutch courts and legislature but together with the EU court and legislature, which phenomenon puts the idea of private law as a coherent national system under pressure.[60] More concretely, he notes that:

> 'the concept of annullability […] in the Dutch civil code no longer has the same meaning in all cases: 'to annul' […] in Article 6:233 BW means something different when it is applied to consumer contracts from what it means when applied to other contracts to which Article 6:233 may be applicable and – broader – from other cases of (an)null(abil)ity in the BW. The reason for this is that the preservation of the unity of the concept of (ver)nietig(baar)heid is no longer exclusively in the hands of the Dutch Hoge Raad [Supreme Court, LJ].' [61]

In sum, the Dutch and German legal scholars have pointed especially to a disintegration of their national legal system caused by the EU legislation that aims at European integration.[62]

Can English law also be understood as a system?[63] Statute law has historically played a different role in the development of English law than it has played in continental Europe. The reason is that courts performed an important role in developing the common law.[64] The literature and judges have emphasized that the common law is traditionally more oriented towards

57 Hesselink 2004, p. 406-407. *Cf*. Section 3:49 BW.
58 Case C-473/00 *Cofidis* [2002] ECLI:EU:C:2002:705, para. 33 and 34.
59 Hesselink 2004, p. 405-407.
60 Hesselink 2004, p. 406 & 410.
61 Hesselink 2004, p. 407.
62 *See* Hesselink 2001, p. 41; Joerges 1997, p. 385. Van Gerven 2001, p. 490-491 calls these effects the 'bright side' (i.e., uniformity between national laws) and 'dark side' (i.e., national fragmentation) of harmonization.
63 *See* Riesenhuber 2011, p. 122.
64 Zwalve 2008, p. 58-59; Van Gerven 2006, p. 42; Zweigert & Kötz 1998, p. 265.

individual cases than systemization. For example, they indicate explicitly that

> '[t]he common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection'[65]

and that

> '[t]he common law was never systematised nor has it ever aspired to be. [...] In England law is seen as a technique of dispute resolution. In other words, the role of the law, and therefore the role of the courts, is to solve the problem presented to it by litigants.'[66]

Although a more significant part of English law is now provided for by statutes enacted by Parliament, such as the BA 2009 and the IA 1986, statute law still does not aim to regulate English law as a whole but deals with particular topics. Moreover, it uses and presupposes the doctrines developed by the courts.[67] This may explain the less-systematized approach to the law of English lawyers than of their Dutch and German colleagues.[68] Teubner, for example, notes about the concept of 'good faith' that

> '[t]he specific way in which continental [European, LJ] lawyers deal with such a 'general clause' is abstract, open-ended, principle oriented, but at the same time strongly systematised and dogmatised. This is clearly at odds with the more rule-oriented, technical, concrete, but loosely systematised British style of legal reasoning, especially when it comes to the interpretation of statutes.'[69]

Nevertheless, the literature has voiced concerns about the challenges presented by the integration of EU law into English law. The UK government's official guidance document on the transposition of directives contains a paragraph on how EU legislation has to be brought 'into harmony' with existing national law so that 'transposition neither has unintended consequences in the UK nor risks infraction.'[70] Scholars indicate, however, that

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65 Lord Porter in *Best v Samuel Fox & Co. Ltd* [1952] AC 716, 727. As also referred to by Riesenhuber 2011, p. 122-123. *See also* Legrand 1996, p. 65-67.

66 Legrand 1996, p. 65-66. *See also* Legrand 1997a, p. 50.

67 Zwalve 2008, p. 65; Zweigert & Kötz 1998, p. 200-201.

68 Van Gerven 2006, p. 42.

69 Teubner 1998, p. 19.

70 HM Government, 'Transposition guidance: how to implement EU Directives into UK law effectively', February 2018, para. 2.19-2.20. See also HM Government Cabinet Office, Guide to making legislation', July 2017, para. 5.1, stating that '[m]istaken perceptions of what the law requires can encourage risk-aversion and inaction. Excessively complex or inaccessible legislation hinders economic activity. It places burdens on people, communities and businesses. It damages people's trust in the law. Good law is: necessary, clear, accessible, effective and coherent.'

the aim stated in this document to 'create one coherent regulatory regime'[71] of EU and UK legislation has not always been achieved. For example, it has been argued that the fact that the implementations into English law of directives in the field of consumer law continued 'to be scattered across a range of measures rather than having been combined into one more coherent Act of Parliament' caused fragmentation in domestic consumer legislation. Arguably, the fragmentation made it more difficult to identify and apply the relevant rules.[72]

Other UK lawyers have been more concerned about the ties of the law with national cultures and traditions and the difficulties these ties create in the European harmonization project.[73] For instance, in a well-known analysis of the effect of the above-mentioned Unfair Terms in Consumer Contract Directive on English law, Teubner gave his opinion on the possibility of legal transplants. The literature typically uses the term 'legal transplant' as a metaphor for a rule that is transplanted from one country to another.[74] When Teubner wrote his article, the feasibility of such legal transplants had been fiercely debated. While Watson had provided historical evidence to show that legal transplants have been commonplace in law,[75] Legrand had claimed that legal transplants are impossible. A rule cannot simply be displaced from one jurisdiction to another without undergoing a fundamental change in meaning as a result of differences in the legal cultures.[76] Hence, Legrand emphasized the diverging legal traditions. An implication of this conclusion was, according to Legrand, that harmonization in legislation at the EU level also cannot result in effective convergence of legal systems.[77] In his thesis, Teubner then took the concept of 'good faith', a major pillar of the continental European contract law and through the Unfair Terms in Consumer Contract Directive also introduced into English contract law, as an example of a transplanted rule. The concept had been transposed with some difficulty into English law because it does not sit well with the traditional English contract law concepts and practice. Teubner submitted that the metaphor of legal transplant is misleading and that the term 'legal irritant'

71 HM Government, 'Transposition guidance: how to implement EU Directives into UK law effectively', February 2018, para. 2.20.
72 Twigg-Flesner 2015.
73 E.g., Teubner 1998; Collins 1995.
74 E.g., Berkowitz et al. 2003.
75 Watson 2000. *See also* Fedtke 2012.
76 Legrand 1997b. *See also* Teubner 1998, p. 14.
77 Legrand 1996, who notes at p. 57 that 'rules are but the outward manifestation of an implicit structure of attitude and reference, they are a reflection of a given legal culture.' Smits 2007, p. 1196 does not fully agree with Legrand. He argues that 'Legrand is right to say that European legal systems "have not been converging" and "are not converging." To hold that they also "will not be converging" is a more problematic statement because this is unpredictable: legal culture can change.'

is a better expression. A rule cannot move easily to a new environment and continue to play its old role. He argued that

> 'when a foreign rule is imposed on a domestic culture [...] something else is happening [...] it works as a fundamental irritation which triggers a whole series of new and unexpected events.' The transferred rules 'are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.'[78]

Hence, the result of importing the foreign rule can be that the legal system in the recipient jurisdiction is changed, but it does not become the same as the original legal system. Instead, it may disorder the law. Teubner emphasized the ties of the law with the legal culture and the social context. He expected the concept of 'good faith' to be understood differently in different jurisdictions because of differences in the legal traditions and market practices. Therefore, in his view, no convergent effect would be achieved, but the result is a new concept in English law that has little to do with the concept in continental European contract law.[79]

In sum, although they have a less-systematized approach to the law than Dutch and German scholars, English lawyers have also pointed to the specific legal concepts of EU law that do not always fit very well into their domestic law.

4 Coherent relations with national private law

The question arises how can be determined whether an EU directive has been brought 'into harmony' with and fits well into existing national law.[80] According to the present author, the notion of horizontal, local coherence developed in this paragraph offers a useful tool for such an analysis.[81]

78 Teubner 1998, p. 12.

79 Teubner 1998. *See also* Smits 2007, p. 1196.

80 *Cf.* Dworkin 1986, p. 228-232, who discusses 'fit' in the context of how judges decide cases.

81 The question of whether coherence in the law is important has been heavily debated in the literature. The scholars of the Critical Legal Studies movement would read an analysis of whether some rules, objectives, and principles of an area of law accord with rules, objectives, and principles of another areas of law as the present study makes with reservations. They claim that the law contains many opposing principles and ideals. *Cf.* Unger 2015, p. 143-178; Kennedy 1976, p. 1685.

As already noted, this book does not advocate the ideal of coherence in the whole of the law. As Raz claims, the law is not a single act but its content is the product of various activities of courts and legislatures, and its specific fields contain different legal norms, underlying principles, and policy goals.[82] As such, achieving coherence between all legal components of the entire legal system seems unfeasible.[83] Legislatures often introduce rules that deviate from existing rules or have a different meaning in the context of their particular field.[84] Horizontal, local coherence rather calls for coherence in one specific field or amongst closely dependent branches.[85]

The following chapters use this idea of 'area-specific coherence'[86] as a tool to explore how the EU bank resolution framework has been aligned with national private law and whether inconsistencies exist. In particular, they apply a notion of constitutive coherence in the law, which means that a coherence test is applied to the legislation and case law of a jurisdiction to determine what the law is. This notion is to be distinguished from coherence accounts of judicial reasoning, which is about coherence in deciding court cases.[87] As stated above, several relations of the rules, principles, and objectives of the bank resolution frameworks with specific branches of national private law have been selected for this analysis. The investigation focuses on the relations with rules, principles, and objectives of private law which directly interact with or are closely related to the resolution rules, which especially include substantive insolvency law. Further research might consider whether the bank resolution framework fits well into other aspects of the national legal culture and the social environment, as Teubner did in his analysis of the concept of good faith, but that is for another day.

The literature has extensively debated the role of coherence in the law, but there is no general agreement about what coherence constitutes precisely.

82 Raz 1992, p. 296 and 310.

83 *Cf*. Levenbook 1984, p. 371. *Contra* Dworkin 1986, who advocates coherence in the whole legal system. In particular, Dworkin claims that the 'government [should] speak with one voice, to act in a principled and coherent manner towards all its citizens'. This requires the adherence to two principles: 'a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible.' The latter principle 'instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.' Dworkin 1986, p. 165, 176 and 225.

84 *See* Desmet 1987, p. 133-134.

85 *Cf*. Raz 1992, p. 310; Levenbook 1984, p. 371-372.

86 Levenbook 1984, p. 371.

87 For an extensive analysis of coherence theories in legal reasoning, *see* Amaya 2015.

Legal theorists often use rather vague terms such as 'hang together'[88] and 'tightly knit unit'.[89] Raz views coherence in terms of unity in principles underlying the court decisions and legislation.[90] Kress and Bertea, by contrast, both provide a list of criteria to evaluate coherence.[91] According to the present author, we can distinguish between two aspects of coherence in the law. At the surface level of the law, a rule of the bank resolution framework is coherent with the surface level material in the field of private law with which it interacts if a consistent relation exists. At a deeper level, a coherent relation requires that the bank resolution framework shares some of its general principles and objectives with directly related areas of law.[92]

We saw already that coherence in the relations with the existing national law is not the only principle that national legislatures consider when implementing EU secondary legislation. As such, coherence is an ideal feature in the relations that rivals other principles.[93] The main aim of making the relations coherent is to make them comprehensible, which feature promotes legal certainty and predictability.[94] According to Brouwer, a national legislature typically weighs the coherence concerns against considerations that include clarity, thrift, completeness, and the optimal realization of general legal principles, values, and objectives.[95] These principles can all be fulfilled in different degrees. For example, the legislature may have to weigh pursuing specific objectives in a field of law against the principle to reach full

88 MacCormick 1984, p. 37. Kress 2010, p. 521 claims that '[a]n idea or theory is coherent if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single unified viewpoint. An idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjoined, or contains thoughts that are unrelated to and do not support one another.'

89 Alexy & Peczenik 1990, p. 130. *See also* Bertea 2005, p. 156-157.

90 Raz 1992, p. 286.

91 Kress 2010, p. 521-522 lists the properties consistency, comprehensiveness, completeness, monism, unity, articulateness and justified. According to Bertea 2005, p. 159 coherence should at least include consistency, comprehensiveness and completeness, support of varying scope and force, and cross-connection and mutual justification between the parts as a whole.

92 The notion of coherence discussed here, is based on the notion of coherence of Haentjens 2007, p. 13-28. *See also* Smits 2012, p. 10 who also distinguishes between two aspects of coherence, namely coherence of the law itself and coherence of the policies underlying the legal norms. MacCormick 1984, p. 38 and Tuori 2002, p. 170, by contrast, claim that consistency is not a condition for coherence.

93 *Cf.* MacCormick 1984, p. 47. *See also* Alexy & Peczenik 1990, p. 145.

94 *See* Smits & Letto-Vanamo 2012, p. 2.

95 Brouwer 1999, 232-236; Haentjens 2007, 15-16. Brouwer 1999, p. 232 uses the term 'mixed-value good', indicating that full realization of the principles cannot always be reached. Haentjens 2007, p. 16-17 also uses this term and argues that the meta-principles which are used for the weighing of conflicting legal principles (the requirements of optimization, consistency and proportionality) should be applied to weigh the systemic principles against each other.

coherence. Which balance the legislature ultimately chooses depends on the facts and legal possibilities.[96]

If a particular rule stems from EU secondary legislation, the national legislature has less influence on the outcome of the balancing act. Several authors have claimed that EU secondary legislation pursues political, economic, and social objectives and does not consider the coherence of the law in which it has to be integrated.[97] Indeed, directives and regulations that are adopted under article 114 TFEU, for instance, provide for rules that are considered of particular importance for the development of the internal market. It is up to the national legislature to incorporate the EU rules into national law and assess to what extent the principles other than the realization of specific objectives in the law can also be adhered to, including coherence of the rule stemming from EU law with closely related, existing rules of national law.

Consistency

Consistency requires that the relevant surface level material has a non-contradictory and logically valid character.[98] In the present study, it means that particular rules of the bank resolution framework and rules of national private law which directly interact with or are closely related to the resolution rules do not contradict each other and have a logically valid relation.[99] This book uses the term 'rules' broadly to cover legal rules and norms formulated in legislation and case law.[100]

The consistency analysis distinguishes between three levels of coherence in the investigated relations: coherence, moderate coherence, and incoherence.[101] If the following chapters ascertain that a particular relation is moderate coherent or incoherent, it will be explored whether coherence in the relationship can be enhanced.

In some cases, a conflict between two rules can be settled, and the rules can continue to exist alongside each other without their application or interpretation being questioned by introducing a clause that one rule derogates

96 *See* Alexy 2000, p. 295. *See also* Alexy & Peczenik 1990, p. 145.

97 Manko 2015, p. 14; Hesselink 2001, p. 40. *Cf.* Van Gerven 2001, p. 493-494 who argues that the laws of the Member States must also have an impact on European law. In particular, the European legislature should look for principles which the national laws have in common.

98 Haentjens 2007, p. 18-19.

99 *Cf.* Kress 2010, p. 521-522; Haentjens 2007, p. 18-19; Tuori 2002, p. 170; Bloembergen 1992, p. 316-325.

100 Civil law jurisdictions and common law jurisdiction traditionally have a different approach to the concept of rules. For example, in the civil law tradition, rules are considered to be part of the legal system, under the common law, according to Legrand 1996, p. 67-68, '[j]udicial decisions may, in time, produce what *appears* like a set of rules [...] Common law "rules" having minimal prescriptive impact, the courts effectively make and unmake the law at will.'

101 *Cf.* Haentjens 2007, p. 25-26.

from the other rule. To take a simple example from the literature, the rule that a student is not allowed to leave the classroom during a class conflicts with the rule that he or she has to leave the school building in the event of a fire alarm. The conflict is not problematic if an exception to the prohibition to leave the classroom exists so that the student is allowed to leave if the alarm goes off.[102]

In other cases, a conflict between two rules can be avoided if one rule pre-empts the other.[103] Traditional solutions include general standards of interpretation of the legal culture, such as the rule that a later law repeals an earlier law (*lex posterior derogat priori*) and that special laws repeal general laws (*lex specialis derogat generali*).[104] Standards such as that EU law has precedence over conflicting national law may solve inconsistencies between rules developed by legislatures or courts at different levels.[105]

If in the following chapters of the present study, the bank resolution framework provides for explicit deviations from national private law, or the above-mentioned general standards of interpretation can solve a conflict in the relation between a bank resolution rule and a private law rule, the relation is considered moderate coherent.

An inconsistency may be problematic and undermine legal certainty if, for instance, two contradictory rules or definitions are simultaneously applicable, or a rule of the bank resolution framework does not fit logically into the branch of private law with which it interacts or to which it is closely related.[106] For example, a relation may not have a logically valid character because the effect of the application of a bank resolution rule in private-law terms is unclear. Hence, in these cases, the legislature or court has not explicitly solved the rule conflict, and the above-mentioned standards to solve rule conflicts also do not sufficiently settle the inconsistency. An incoherent relation is established.

A general example to illustrate the point that two contradictory rules can apply to the same case at the same time relates to fire safety. Assume that a national fire service regulation requires the keys of cars to be left in the ignition at all times so that, if necessary, the cars can be removed from the showroom quickly. Such a policy contradicts the car theft insurance policy

102 Alexy 2000, p. 295.
103 *See* Kress 2010, p. 529; Alexy 2000, p. 295-296.
104 Langer & Sauter 2017, p. 43. *See also* Desmet 1987, p. 115-139.
105 Langer & Sauter 2017, p. 43; Hartkamp 2012, para. 8, who refers to the European Court of Justice case 6/64 *Costa v. ENEL* [1964] ECLI:EU:C:1964:66. *See also* Kress 2010, p. 529; Alexy 2000, p. 295-296.
106 *Cf.* Haentjens 2007, p. 18-19.

of many insurance companies that do not allow that keys are left in the car.[107] Thus, the car owners are subject to two mutually exclusive rules.[108]

However, the parts of the national bank resolution frameworks that are analyzed in the following chapters especially give a few examples of resolution rules which do not have a logically valid relation with national private law. In these cases, the conflicts of rules can be solved if the legislature or a court clarifies and explicitly provides how the inconsistent rules relate to each other. Such a solution makes the relation between the inconsistent rules moderate coherent rather than incoherent.[109]

A general example from Dutch law illustrates this point. Section 6:217(1) BW provides that, as a general rule of Dutch private law, an agreement requires an offer and its acceptance. Section 5:1(a) Wft explicitly indicates that the meaning of an offer of securities to the public under the Wft, which offer may require a prospectus,[110] is broader than the meaning of a general private law offer.[111] The offer under the Wft also includes issuing an invitation to make an offer and placing securities through financial intermediaries. Thus, the section provides for an explicit derogation from the general private law rule of section 6:217(1) BW and creates a moderate coherent relation with private law.

Unity

In addition to consistency between the bank resolution rules and rules of national private law at the surface level, the following chapters investigate if the bank resolution framework shares some underlying, principles and objectives with directly related areas of law, which are national corporate restructuring and insolvency law.

Hence, the present study does not claim that the law is based on one consistent set of principles.[112] It instead assesses whether the implemented bank resolution frameworks and restructuring and insolvency law have some general principles and objectives in common. The term 'principles' is in that context understood as fundamental and basic standards.[113] As Bork

107 Dutch Ministry of Economic Affairs, *Strijdige regels in de praktijk, Resultaten meldpunt strijdige regels*, November 2003, p. 9.
108 *Cf.* Haentjens 2007, p. 19.
109 *Cf.* Haentjens 2007, p. 26-27.
110 Sections 5:2-5:5 Wft.
111 *See* Grundmann-van de Krol 2012, p. 73-77.
112 As emphasized in particular by the Critical Legal Studies movement. The scholars of this movement claim that the law has many irresolvable opposed principles and ideals, and a judge has to make a choice which is not dictated by the law. *See* Kennedy 1976, p. 1724. *See also* Maris van Sandelingenambacht 2002, p. 114.
113 *See* Bork 2017, p. 12-13.

suggests, principles are the 'building blocks underlying the rules' and they systemize the law and legitimize the legal consequences of the rules.[114]

Most legal theorists seem to support an investigation of the underlying, general principles and objectives as part of a coherence analysis. They claim that consistency between rules is not sufficient for coherence in the law.[115] Raz maintains that the more unified the set of principles underlying the rules is, the more coherent is the law. In turn, there will be less coherence in the law if all principles result from a broader set of principles with a unified approach, or even less if this set contains pluralistic and unconnected principles.[116]

MacCormick illustrates the argument that coherence is to be considered in terms of unity of principles with an example.[117] Assume that the road traffic laws in a country aim to promote the safety of road users, the economy in the use of fuel, and the prevention of excessive wear and tear of road surfaces. One of the important principles of the laws is, for instance, that motor traffic on the roads must not unduly endanger human life, which principle justifies speed limit laws. The legislature in the country introduces a statue that provides for different speed limits for different cars according to the color in which the cars are painted. One might say that this color-based speed limit does not entirely cohere with the other road traffic laws because the color-based limit fails to adhere to the common principles of the traffic laws. The color-based speed limit seems to be arbitrary because the different treatment of differently painted, but otherwise similar, cars cannot be explained by reference to the relevant principles of the other road traffic laws.[118]

Pawlowski provides an example of the role of underlying principles and objectives in insolvency laws.[119] Under the German InsO, the insolvency plan procedure facilitates a reorganization of the business of a debtor with the objective, as is explicitly stated in section 1 InsO, to satisfy the credi-

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114 Bork 2017, p. 13. For a discussion of the meaning of the word 'legal principles', *see also* Tuori 2002, p. 177-179. On the distinction between rules and principles, *see also*, famously, Dworkin 1977, p. 22 et seq., although the present study does not necessarily adhere to this theory.

115 E.g., Smits & Letto-Vanamo 2012, p. 2; Nieuwenhuis 2005, p. 27; Tuori 2002, p. 170 Brouwer 1992, p. 181. Alexy & Peczenik 1990, p. 130 claim that 'consistency is a necessary but not sufficient condition for coherence. Physics and chemistry, for example, are highly coherent with each other, whereas there is a lesser degree of mutual coherence between physics and religion although it cannot be said that they contradict each other.' *Cf.* however European Commission, Communication for the Commission to the European Parliament and the Council: A more coherent European contract law. An action plan (2003/C 63/01), which suggests that 'coherence' means consistency in the law.

116 Raz 1992, 286.

117 MacCormick 1984, p. 39-40.

118 *See* MacCormick 1984, p. 39-40.

119 Pawlowski 2001, p. 51.

tors collectively. Thus, it is used as an instrument to satisfy the creditors' interests best. The German legislature based this procedure largely on Chapter 11 of the US Bankruptcy Code. However, according to Pawlowski, the relevant provisions of the InsO may be interpreted and applied differently than the equivalent provisions of the Bankruptcy Code. In contrast to the objective of the InsO, the US Chapter 11 traditionally has a strong debtor rather than creditor orientation and has focused on the rescue of the company. Hence, although some surface level rules may look similar, divergences in the procedures which the rules provide for may be rooted in different objectives and principles.[120]

The following chapters seek to unpack some principles and objectives of national corporate restructuring and insolvency law, on the one hand, and bank resolution law, on the other hand. If the areas of law share some principles and objectives, this contributes to a coherent relation between the fields.

5 Supranational coherence in interpretation and application of the bank resolution rules

We saw in chapter 2 that the BRRD is an instrument of the EU legislature that aims to contribute to the establishment and functioning of the EU internal market in financial services.[121] Its recital 44 stresses that the 'national resolution authorities should have at their disposal a minimum harmonized set of resolution tools and powers' and that the exercise of these tools and powers should be subject to common conditions, objectives, and principles. The EU legislature expects the harmonized legal framework for bank resolution to foster the cooperation and coordination between authorities when dealing with a failing cross-border operating bank. Also, it should avoid obstacles to the exercise of the freedom of establishment and the free provision of services within the internal market, for instance, because divergent national approaches to bank resolution affect the funding costs of banks differently across jurisdictions.[122]

120 Pawlowski 2001, p. 51. *See also* Eidenmüller 2018, para. 3.3.2.

121 *See* paragraph 3.2.2 of chapter 2; Tuominen 2017, p. 1369.

122 Recital 9 BRRD; Recitals 3 and 4 SRM Regulation. *Cf.* European Parliament, Committee on Economic and Monetary Affairs, 'Report with recommendations to the Commission on Cross-Border Crisis Management in the Banking Sector' (2010/2006(INI), 28 June 2010), Explanatory Statement, para. 5, which notes that '[p]resently there is patchwork of national frameworks, not always compatible between themselves. It is difficult to deal swiftly and efficiently with cross-border groups involving several jurisdictions. A robust and sound European single financial market requires coherence and cohesiveness of regulations across the 27 members.' and in the accompanying Motion for a European Parliament Resolution, para. N that 'a robust response to crisis requires a coherent and comprehensive approach entailing […] an effective EU crisis-management framework for financial institutions.'

The term 'harmonized' or 'harmonization' does not have one definition in the literature. Adopting Boodman's general description, harmonization is 'a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality.'[123] In the context of the EU, according to Lohse, the term refers to 'a conscious process that has the aim of leading to the insertion of a concept into the national legal orders, which triggers a process of adaption to form a European concept as uniform as required to serve the objectives of the European Union.'[124] Thus, some form of approximation is preferred over fragmentation in the particular field of law.[125]

The above-mentioned definitions of the term 'harmonization' suggest that the harmonization process does not necessarily result in unification.[126] The term is in the EU most commonly used for the process triggered by directives.[127] Similar to other directives, the BRRD gives the EU Member States discretion as to their implementation. It binds the Member States as to the result to be achieved and leave to the national authorities the choice of form and methods.[128] Although some scholars claim that many directives provide for detailed rules that leave the Member States not much room in the implementation,[129] it is well established, as discussed in paragraph 3 of this chapter, that the effect of directives ultimately depends on the national transpositions.[130]

It should be noted that the BRRD contains minimum harmonization clauses.[131] Minimum harmonization means that the EU legislation establishes a minimum level of harmonization from which the national legislation may derogate to create more stringent rules.[132] It is the present author's view that in the context of the BRRD, the minimum harmonization entails that the Member States may adopt more stringent provisions than created by the BRRD as long as the provisions promote the achievement of the resolution

123 Boodman 1991, p. 702.
124 Lohse 2012, p. 313.
125 Havu 2012, p. 27. *See also* Van Gerven 2006, p. 45-47.
126 *See also* Slot 1996, p. 379. According to Lohse 2012, p. 311, 'unification is [...] the most intensive form of harmonisation. Approximation can be sufficient if that way obstacles to free movement are removed or, respectively, the aim of the European legislative act can be reached.'
127 *See* Slot 1996, p. 379. *Contra* Lohse 2012, p. 297, who suggests that the term 'harmonization' should be understood more broadly to also cover the effect of regulations. Cf. article 114 TFEU, which uses the term 'approximation'.
128 Article 288 TFEU.
129 Lohse 2012, p. 310; Slot 1996, p. 379.
130 Havu 2012, p. 27.
131 Recital 10 BRRD.
132 *See* Slot 1996, p. 384-386.

objectives and adherence to the resolution principles of the BRRD.[133] For the SRM participating Member States, the SRM Regulation does not leave the Member States much discretion to establish additional, national resolution tools and powers. The SRM Regulation explicitly indicates that it aims to enhance the uniform application of the bank resolution regime and it does not give the Member States the option to keep own instruments for a resolution procedure.[134] Instead, for most banks a resolution scheme of the SRB will prescribe which measures specified in the BRRD the national resolution authorities have to implement.[135]

In the debate about the further harmonization of the EU bank resolution framework, scholars and policymakers have paid much attention to the possible differences in the interpretation and application of the bank resolution framework across the Member States. As chapter 1 indicated, this debate has partly focused on the divergences caused by differences in substantive insolvency law. In addition to a notion of national coherence to assess the relations of the bank resolution rules, principles, and objectives with private law, the following chapters, therefore, use a notion of supranational coherence to identify some of the differences across jurisdictions.[136] The chapters investigate if uniformity in interpretation and a possible degree in similarity in the results of the application of the studied EU-derived bank resolution rules exist at the level of the Member States. Thus, in this analysis of supranational coherence, only comparable-looking bank resolution rules in the investigated jurisdictions are not sufficient.[137] Moreover, we need to distinguish the notion of supranational coherence in the law which this book uses

133 *See* Sluysmans et al. 2015, p. 391.

134 Recital 11 SRM Regulation: 'The uniform application of the resolution regime in the participating Member States will be enhanced as a result of it being entrusted to a central authority such as the SRM.' Recital 18 SRM Regulation: 'In order to ensure a level playing field within the internal market as a whole, this Regulation is consistent with Directive 2014/59/EU. It therefore adapts the rules and principles of that Directive to the specificities of the SRM and ensures that appropriate funding is available to the latter.'

135 Articles 23 and 29 SRM Regulation.

136 *Cf.* European Parliament, Committee on Economic and Monetary Affairs, 'Report with recommendations to the Commission on Cross-Border Crisis Management in the Banking Sector' (2010/2006(INI), 28 June 2010), Explanatory Statement, para. 5, which notes that '[p]resently there is patchwork of national frameworks, not always compatible between themselves. It is difficult to deal swiftly and efficiently with cross-border groups involving several jurisdictions. A robust and sound European single financial market requires coherence and cohesiveness of regulations across the 27 members.' and in the accompanying Motion for a European Parliament Resolution, para. N that 'a robust response to crisis requires a coherent and comprehensive approach entailing […] an effective EU crisis-management framework for financial institutions.'

137 For a similar notion of coherence in the field of EU competition law, *see* Havu 2012, p. 26.

from coherence in decision-making by national and EU authorities, which type of coherence has been advocated by other scholars.[138]

We can distinguish between two types of supranational differences. Although in some cases a sharp distinction cannot be made, given the aim to explore supranational coherence in the bank resolution framework, the identification of a line between these two types of differences seemed essential.

First, differences in interpretation and application of the bank resolution rules between jurisdictions may be caused by diverging interpretations of provisions and incorrect implementations of the EU legislation. Diamant gives an example of a provision of the Financial Collateral Directive that has been interpreted in diverging ways at the national level. Following the implementation of this directive in 2003, the rule that financial collateral is provided if it is 'in the possession or under the control of the collateral taker' was understood differently in national law. The English literature and courts favor a strict approach to the 'possession or control' requirement, which approach is based on the control requirement that forms the basis for the distinction between a floating charge and fixed charge under English law. The Belgium legislature had a less strict approach when implementing the directive by providing that the requirement is satisfied if a pledge is created under Belgium law. In her thesis, Diamant concludes that the Collateral Directive has led to a lesser degree of harmonization of property law than initially was believed the implementation of the Directive would bring.[139]

Second, the transposition of EU legislation may result in divergences between the Member States that are not caused by an incorrect implementation of a provision or an unclear provision in the EU law but remain within the boundaries of the harmonized legal framework. The legal culture and existing rules of national law often mold the legal concept or term stemming from EU law. For example, the Winding-up Directive provides a broad definition of the term 'liquidator' and the insolvency laws of the Member States have to give further substance to the term.[140]

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138 Besson 2004, who discusses a notion of European coherence according to which 'all national and European authorities should make sure that their decisions cohere with the past decisions of other European and national authorities that create and implement the law of a complex but single European legal order.' *See also* Bertea 2005, who considers coherence in the case law of the CJEU.

139 Diamant 2014, p. 112-119, 128-135 and 246-247. In 2016, the CJEU gave a ruling on the question of what constitutes the 'possession or control' requirement for the purpose of the Financial Collateral Directive. Case C156/15, Private Equity Insurance Group v Swedbank [2016] ECLI:EU:C:2016:851.

140 Article 2 Winding-up Directive.

It should be noted that the mere finding of potential differences in the bank resolution procedures of the investigated jurisdictions does not justify further approximation of laws at the EU level. First, since the scope of the present study is limited to the bank resolution frameworks of three jurisdictions, the results of the following chapters may not represent the resolution frameworks of all EU Member States. Second, the EU legislature has only limited competences for the adoption of measures for such approximation. As chapter 7 will discuss, article 114 TFEU provided the legislative basis for the legislative instruments that established the current bank resolution framework, and the European Commission considers this provision also the appropriate legal basis for several proposed legislative instruments in the field of bank resolution.[141] Article 114 TFEU allows the EU the adopt 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' It is well established that the mere disparity between national legislation does not justify recourse to this article. In the words of the CJEU, a measure adopted under article 114 TFEU 'must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.'[142] Related to this point, according to the principle of subsidiarity the EU may only adopt the measures under article 114 TFEU if the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at the EU level. The principle of proportionality also limits the competences of the EU by requiring that the content and form of the EU action not exceed what is necessary to achieve the objectives of the EU Treaties.[143]

The present study explores the potential differences in the bank resolution procedures in the three jurisdictions to identify, as an initial question, what we can put on the table in the debate about the closer harmonization of the EU bank resolution framework. Further research might consider whether the conclusions that the present study draws can also be reached regarding other jurisdictions and if the found differences justify recourse to section 114 TFEU.

141 Paragraph 3.2 of chapter 7. For an extensive discussion of whether article 114 TFEU is the proper legal basis for the EU legislative instruments in the field of bank resolution, *see* Tuominen 2017.

142 Case C-376/98, *Germany v Parliament and Commission (Tobacco Advertising I)* [2000] ECLI:EU:C:2000:544, para. 84 and *see* Tuominen 2017, p. 1366; Azoulai 2015, para. II; Moloney 2014, p. 1653; Kuipers 2014, p. 179-180 who all note that in more recent cases, the CJEU has adopted a less rigid interpretation on the scope of article 114 TFEU.

143 For an in-depth discussion of the principle of subsidiarity and the principle of proportionality, *see* Schütze 2015.

6 Conclusions

This chapter developed two notions of coherence to assess the relations between the national bank resolution frameworks and branches of national private law that are directly affected by or closely related to the bank resolution frameworks. The following chapters investigate several examples of relations. Such an analysis shows how the EU legislation has been aligned with existing national law and which possible differences may arise in the bank resolution procedures across jurisdictions. Coherence considerations in the further development of the EU bank resolution framework may help to avoid uncertainties about the bank resolution framework that complicate the assessment by market participants when buying bank capital and debt instruments of their possible position and losses in a bank failure. Thus, the coherence notions are tools to ascertain which parts of the national bank resolution frameworks and which supranational differences in interpretation and application of the resolution rules may have to be considered in the further development of the resolution framework.

First, the preceding paragraphs developed a notion of horizontal, local coherence in national law to assess coherence in the relations between the bank resolution frameworks and national private law. This type of coherence requires that at the surface level of the law, a rule of the bank resolution framework has a consistent relation with rules in the field of private law. It means that they should have a non-contradictory and logically valid character. A moderate coherent relation may exist between the rules if the rules are inconsistent but the law explicitly provides that one rule derogates from the other rule or if general standards of interpretation can solve the rule conflicts. An incoherent relation is established if the legislature or court has not explicitly solved the inconsistency between two rules and the standards to solve rule conflicts also do not sufficiently settle it. If, at a deeper layer, bank resolution law shares some of its principles and objectives with directly related areas of law, this contributes to coherence between the fields of law.

Second, the preceding sections developed a notion of supranational coherence. The following chapters investigate if uniformity in interpretation and a possible degree in similarity in the results of the application of the studied bank resolution rules exist at the level of the Member States. For example, the chapters may find possible differences that are caused by diverging interpretations of provisions or incorrect implementations of the BRRD. The next chapters may also conclude that differences in the application and interpretation of the bank resolution rules possibly arise that remain within the boundaries set by the harmonized legal framework. They may, for instance, be the result of differences in substantive insolvency law.

Part II

Bank resolution framework of selected jurisdictions