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

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# 6 European bank resolution framework: transfer tools[1]

## 1 Introduction

After the discussion of the bail-in mechanism in the previous chapter, this chapter takes a detailed look at the other three resolution tools created by the BRRD and SRM Regulation, namely the 'sale of business tool', the 'bridge institution tool' and the 'asset separation tool'. The tools are together called the 'transfer tools'. Paragraph 2 provides a brief discussion of conceptual aspects of the transfer tools from a regulatory perspective and an insolvency law perspective, while paragraph 3 examines the transfer tools as codified in the BRRD and SRM Regulation. Against this background, paragraphs 4 and 5 analyze four prominent relations between the objectives, principles, and rules of the national legal framework on the transfer tools established by the BRRD and SRM Regulation on the one hand, and national private law on the other hand. The paragraphs show how the domestic legal frameworks on the transfer tools interact with and how they have been embedded into private law.

In particular, paragraph 4 investigates the main objectives pursued by the legal framework on the transfer tools on the one hand and by Dutch, German, and English general insolvency law on the other hand. The central question is whether the rules on the transfer tools share objectives with more general national insolvency law. Hence, this paragraph explores the deeper levels of the national legal orders, namely the objectives.

Paragraph 5 then analyzes three sets of rules on the transfer tools. The sections show that the national legislatures closely aligned some of the rules with rules of national private law, that some rules on the transfer tools explicitly depart from national private law, and that the relation of some rules with national private law is unclear. It is also suggested that differences in national private laws interacting with the resolution rules may create diverging outcomes in the interpretation and application of the rules on the transfer tools between jurisdictions.

More specifically, paragraph 5.1 questions how the national legislatures ensured that the transfers ordered by a resolution authority have an immediate effect. The paragraph also examines how the effect and scope of the application of the transfer tools relate to other types of acquisition of assets,

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1 This chapter contains and builds on the following work previously published by the author: Janssen 2018a.

rights, and liabilities or shares under national private law. Paragraph 5.2 scrutinizes how the resolution rules protect in case of a partial transfer of assets, rights, and liabilities, security rights under a security arrangement and set-off or netting rights under a set-off or netting arrangement, respectively. Relevant questions in this context are whether creditors also benefit from these rights if an insolvency procedure is opened under national insolvency law and whether other areas of national private law also offer protection against a loss of these rights in case of a partial transfer. Finally, paragraph 5.3 analyzes what is considered a 'normal insolvency proceeding' for a bank under national insolvency law. It discusses as well which role the national resolution authority plays in the opening of such a procedure.

## 2 Conceptual aspects of the transfer tools from a regulatory and insolvency law perspective

### 2.1 Transfer tools from a regulatory perspective

A transfer of a failing bank or a part thereof to another party can take many forms.[2] If there is a buyer for the bank as a going concern, a business sale transaction may be the preferred resolution strategy in the resolution procedure. This measure is typically directed towards the continuation of the bank's operations without significant disruptions to payment and clearing and settlements systems. By providing a resolution authority the power to expropriate the existing shareholders' shares in the capital of the failing bank and transfer the shares to a private sector purchaser, a transfer of the bank can relatively easily be accomplished.[3] Moreover, this instrument provides the resolution authority the possibility to transfer the bank's entire business in its present condition.[4] It is recognized, however, that in practice third parties may be unwilling to take over the ownership of the legal entity as a whole or all the assets, rights, and liabilities. For example, there may be only little time available for these parties to analyze the target bank's balance sheet and the acquisition may pass on risks to the purchasing party.[5]

2 *See* Basel Committee on Banking Supervision, 'Guidelines for identifying and dealing with weak banks', July 2015, p. 47-48; Gleeson 2012, p. 16; Asser 2001, p. 143-144; Hüpkes 2000, p. 88-89.

3 Van der Zwet 2011, p. 18-19.

4 Schillig 2016, p. 251; Schelo 2015, p. 147.

5 Schelo 2015, p. 56; Gleeson 2012, p. 16; Asser 2001, p. 145; Hüpkes 2000, p. 89. Cash injections or guarantees of a resolution fund or a reduced purchase price may be necessary to make the business attractive for potential purchasers. *See* Binder 2017a, p. 63; Basel Committee on Banking Supervision, 'Guidelines for identifying and dealing with weak banks', July 2015, p. 47. According to Huertas 2014, p. 93, a sale of a systemically important bank is generally not the preferable resolution strategy. Such a sale can pose concentration risks in the markets as well as contract risks to the buyer, for example, because there is little or no time available to conclude the sale and the acquiring bank may not have a full picture of the problems of the failing bank.

Alternatively, the resolutions authorities reorganize the failing bank through a split up of the business into two or more parts. The reorganization is most often accomplished through a transfer to a buyer of all or a portion of the assets and rights plus all or some of the liabilities.[6] The transferred part typically includes assets, rights, and liabilities that are considered to be systemically relevant and in the public interest to be separated. Other assets, such as a non-performing loan portfolio,[7] and liabilities are left behind and are made subject to an insolvency procedure under insolvency law.[8] According to the literature, this resolution method of separating a balance sheet has laid at the core of several bank resolution regimes around the world for many years.[9] Authorities may prefer to hand over, for instance, the covered deposit portfolio to another bank and ask the deposit guarantee scheme to contribute to cover a deficit between the value of the assets, rights, and liabilities.[10] Such a transfer of deposit accounts can be more efficient than making payments to all depositors. Furthermore, the costs for the deposit guarantee scheme may be lower if the acquiring bank is willing to pay an amount for taking over the failing bank's customers.[11]

Another alternative forms the establishment of a temporary bridge institution. This measure focuses in most cases on the transfer of assets, rights and liabilities that are related to the critical functions of the failing bank. The legal entity serves as a successor of the failing bank until a more permanent solution for the business is found.[12] As such, the bridge institution takes

6 Transfers of banks' assets, rights, and liabilities arranged by authorities in or outside formal resolution procedures have been extensively discussed in literature. Scholars have used theoretical perspectives and have discussed experiences in several jurisdictions. The literature often uses the term 'purchase and assumption transaction'. *See* e.g., Binder 2016, p. 50; Schelo 2015, p. 55-58; Binder 2013b, p. 389-398; Huertas 2012, p. 73-78; Van der Zwet 2011, p. 19-21; Bolzico 2007, p. 16; Seelig 2006, p. 106-114; Asser 2001, p. 144-147; Hüpkes 2000, p. 90-92; Olson 1999, p. 145-148.

7 'Non-performing loans' is a term the literature often uses but it has no uniform definition. In its 'Guidance to banks on non-performing loans' of March 2017 the European Central Bank defines the term as '[l]oans other than held for trading that satisfy either or both of the following criteria: (a) material loans which are more than 90 days past-due; (b) the debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past-due amount or of the number of days past due.' For a discussion of the definition of 'non-performing loans' in general, *see* Arner et al. 2017, p. 4-7; Kvarnstroem & Ortwein 2006, p. 1452-1453.

8 *See* Schelo 2015, p. 147; Davies & Dobler 2011, p. 214.

9 Davies & Dobler 2011, p. 214, who discuss that the United States has had a bank resolution authority since 1933 and Canada since 1967 and the powers for authorities to transfer a part or all of a failing bank's business already exist in Italy, Germany, and the United Kingdom for some time as well.

10 *See* Seelig 2006, p. 106-107; Asser 2001, p. 145.

11 Van der Zwet 2011, p. 19. According to Seelig 2006, p. 110, however, the fact that the deposits need to be identified and separated within only a short period can cause operational obstacles.

12 Schelo 2015, p. 141-142; Huertas 2012, p. 75-78; LaBrosse 2009, p. 220-221; Hüpkes 2000, p. 90-91; Olson 1999, p. 147.

over enough assets, rights, and liabilities to be able to operate independently, although the resolution authority is likely to exercise some control over its operations and management.[13] Moreover, the measure gives potential third party purchasers some time to assess the books of the bank and prepare the acquisition.[14] Authorities may also first arrange a transfer of the whole business and transfer certain parts back to the bank under resolution at a later stage. They may prefer to do so if they experience difficulties in quickly determining which assets, rights, and liabilities of the bank under resolution should be included in the transaction.[15]

Nonetheless, the widely accepted view in the literature seems to be that splitting a bank's balance sheet can be complicated, in particular, if the bank operates across borders.[16] The sale of business technique and bridge institution technique can, therefore, generally only be applied to banks with a simple business and assets and liability structure.[17] The BoE, for example, expects to use these techniques only for smaller and medium-sized banks that are large enough to meet the public interest test for the opening of a resolution procedure.[18] For banks with balance sheets of more than £15-25 billion it is said to be unlikely that a buyer is willing to take over the business in case of failure. Furthermore, it may not be practically feasible to split up such a large and interconnected business within a short period to make a sale of business and bridge institution technique possible. For these banks, bail-in is considered to be the preferred resolution strategy.[19]

Finally, a variation on the transfer of shares or 'good' assets, rights, and liabilities to another financial institution or a bridge institution is the transfer of some of the failing bank's liabilities and underperforming assets, such as a non-performing loan portfolio, to a separate vehicle. Such a legal entity is known as a 'bad bank', 'asset management company', and 'asset management vehicle'. The entity, which can be privately or publicly owned, aims to sell the underperforming assets for the best possible price while the failing bank's viable parts stay behind.[20] An advantage of the use of an asset management company is that the entity can, for instance, wait until the market

13 Schelo 2015, p. 142; Huertas 2012, p. 75; Olson 1999, p. 147. *Cf*. Asser 2001, p. 146.
14 Basel Committee on Banking Supervision, 'Guidelines for identifying and dealing with weak banks', July 2015, p. 49.
15 Schuster & Westpfahl 2011, p. 283-284; Bachmann 2010, p. 467.
16 LaBrosse 2009, p. 221; Mayes 2009, p. 305.
17 Binder 2017a, p. 63; Bank of England, 'The Bank of England's approach to setting a minimum requirement for own funds and eligible liabilities (MREL)', Responses to consultation and statement of policy, November 2016, p. 21 (which lists several factors that are taken into account to determine whether the use of one of the BoE's transfer powers is the preferred resolution strategy); Binder 2013b, p. 397; Huertas 2012, p. 76-77; Gleeson 2012, p. 16; LaBrosse 2009, p. 221.
18 *Cf*. Section 7 BA 2009.
19 Brierley 2017, p. 469-470.
20 Schelo 2015, p. 57-58; Van der Zwet 2011, p. 20; Seelig 2006, p. 15-16 & 113-114.

conditions for a sale are better than at the time of the bank failure. Also, in practice, such a vehicle often does not have operations that require a banking license, including attracting deposits and issuing loans. In such a case it is not subject to the strict capital requirements that apply to banks.[21] It is believed, however, that the possibility of having underperforming assets ring-fenced into and the related financial burden shifted onto a separate vehicle can be a source of moral hazard.[22] The asset separation technique, therefore, may have to be combined with other resolution tools, including the bail-in mechanism, to allocate losses to the creditors and shareholders of the bank if the assets are sold to the asset management company below the initial book value. As such, the assets can, for example, be transferred to the vehicle at the real economic value while forcing the bank's shareholders and creditors to bear any losses equivalent to the difference with the book value. The measure helps to minimize potential losses for the vehicle.[23] Asset separation methods have been applied many times around the world now, whether it was in the form of the creation of a vehicle that acquires assets, rights, and liabilities of only one bank or several banks.[24] Examples include the German winding-up agencies that were established under the in 2009 adopted section 8a FMStFG, which was discussed in chapter 3.[25] As is further examined in chapter 7,[26] in March 2018 the European Commission presented a package of measures to reduce the level of non-performing loans in the EU, which included a blueprint for national authorities on how they can set-up asset management companies.[27]

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21 Commission staff working document AMC Blueprint accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, Second progress report on the reduction of non-performing loans in Europe (SWD (2018) 72 final, 14.3.2018), p. 17; Schelo 2015, p. 57-58 and 149-152. *See also* Arner et al. 2017, p. 56-58.

22 Avgouleas 2012, p. 414.

23 Commission staff working document AMC Blueprint accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, Second progress report on the reduction of non-performing loans in Europe (SWD (2018) 72 final, 14.3.2018), p. 50-51. *See also* Schelo 2015, p. 58 & 150; Seelig 2006, p. 16.

24 *See* Demertzis & Lehmann 2017, p. 6-10; Lehmann 2017, p. 7-9; Arner et al. 2017, p. 18-55; Gandrud & Hallerberg 2017; Binder 2016, p. 52; Schelo 2015, p. 57-58; Calomiris et al. 2012, p. 15-17; Günther 2012, p. 141-192; Kvarnstroem & Ortwein 2006, p. 1451-1471. For an analysis of non-performing loans of German banks before 2006 and how these loans could be transferred under German law at that time, *see* Froitzheim et al. 2006. Günther 2012, p. 148 refers to the study of Laeven & Valencia 2008, p. 5 & 23, who identify 124 banking crises in the period 1970 to 2007 and note that asset management companies, in particular, centralized companies, have been set up in 60 percent of the crises.

25 Paragraph 3.2 of chapter 3. *See* Schelo 2015, p. 149; Bornemann 2015, p. 460-462; Günther 2012, p. 177-192.

26 Paragraph 3.2 of chapter 7.

27 Commission staff working document AMC Blueprint accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, Second progress report on the reduction of non-performing loans in Europe (SWD (2018) 72 final, 14.3.2018).

## 2.2 Transfer tools from an insolvency law perspective

As paragraph 4 discusses in more detail, from an insolvency law angle the resolution rules on the transfer tools create a legal framework directed towards the distribution of a failing company's assets, which distribution is arranged and supervised by a public authority.[28] Some scholars compare the transfer tools with the instruments an insolvency trustee or administrator may have at its disposal under insolvency law to sell parts of a failing company's business to the benefit of the company's creditors.[29] In many jurisdictions, going concern sales are used in corporate reorganization and liquidation procedures as alternatives to a restructuring of the business in the hands of the existing legal person or a piecemeal liquidation, respectively.[30] In principle, a resolution authority and an insolvency trustee or administrator both aim to agree on a sale price with the purchasing party. Nevertheless, whether it is in a bank resolution or general corporate insolvency procedure, in practice the parts of the failing company are often not sold for the best possible price because the sales are arranged quickly and behind closed doors.[31]

Moreover, the resolution techniques to place certain underperforming assets in an asset management vehicle or transfer shares or well-performing assets temporarily to a bridge institution replicate methods known to reorganize failing, non-financial corporate debtors.[32] Dutch literature, for example, uses the term *sterfhuisconstructie* for the split-up of a company into viable and non-viable business parts.[33] An example from German literature is the temporary transfer of shareholders' shares in a distressed company's capital to a trustee (*Treuhänder*), which shares then serve as security for the loan provided by an investor.[34]

In theory, for creditors of the failing bank the creation of a bridge institution can economically have the same effect as the application of the bail-in mechanism.[35] For example, resolution authorities may transfer assets, rights, and liabilities from the bank under resolution to the bridge institution, while leaving sufficient liabilities behind to ensure that the bridge institution is

28 *Cf.* Binder 2017b, p. 2.
29 Binder 2017b, p. 2; Thole 2016, p. 66; Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 10; Hadjiemmanuil 2015, p. 232; De Weijs 2013, p. 216.
30 Eidenmüller 2018, para. 8.5.1.
31 For a general insolvency law perspective on this issue, *see* Eidenmüller 2018, para. 8.5.1; Hummelen 2016, p. 166-183; Verstijlen 2014, p. 21-29. For a bank resolution perspective, *see* Schelo 2015, p. 148.
32 Schelo 2015, p. 57.
33 Slagter 2000, p. 83.
34 Undritz 2012, p. 1153-1161. *See also* Schelo 2015, p. 57.
35 Schelo 2015, p. 142; Jackson & Skeel 2012, p. 452. *See also* Bornemann 2015, p. 469-470.

well-capitalized. They then put the residual entity in a liquidation procedure.[36] Moreover, they issue shares in the capital of the bridge institution to the creditors who have been left behind, following the ranking of claims under national insolvency law.[37] These measures recapitalize the bridge institution in a similar way as the application of the bail-in mechanism.[38] It has been argued that discrimination between creditors who rank *pari passu* in an insolvency procedure rank is unavoidable in such a separation of the balance sheet of a failing bank.[39] Creditors whose claims are transferred are treated *defacto* senior to the creditors left behind. For instance, the contracts of the former are likely to be continued by the bridge institution or private sector purchaser while the latter become creditors in a liquidation procedure.[40]

## 3 Transfer tools as codified in the BRRD and SRM Regulation

The BRRD and SRM Regulation incorporate the resolution techniques that the previous paragraph discussed.[41] The Dutch legislature transposed most of the rules of the BRRD on the transfer tools into sections 3a:28-43 Wft[42] and the Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees pursuant to the Wft (*Besluit bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie Wft)*, [43] while in Germany

36 Schelo 2015, p. 142; Jackson & Skeel 2012, p. 452.
37 Schelo 2015, p. 146-147; Jackson & Skeel 2012, p. 452.
38 Jackson & Skeel 2012, p. 452.
39 Binder 2015b, p. 14-15. *See also* Huertas 2012, p. 76; Riethmüller 2010, p. 2301-2302.
40 Binder 2015b, p. 14-15; Binder 2013b, p. 394-395; Thole 2012, p. 234; Huertas 2012, p. 76.
41 *Cf.* Articles 38-42 BRRD; Articles 24-26 SRM Regulation.
42 The Wft uses the term 'transfer of the business' (*overgang van de onderneming*) rather than 'sale of business', as is used by the BRRD. The use of the former term is, according to the legislative history, more in line with the wording used in the provisions on the bridge institution tool and the asset separation tool. *See* Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 18. Moreover, according to the legislative history, the term 'entity for management of assets and liabilities' (*entiteit voor activa- en passivabeheer*) is to be preferred over the BRRD's term 'asset management vehicle' to indicate that assets as well as liabilities can be transferred to the newly created entity. *See* Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 102.
43 Chapter 5a Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees pursuant to the Wft (which heading is 'resolution' (*afwikkeling*)) contains detailed rules on the establishment and termination of an asset management vehicle and bridge institution by DNB. It distinguishes between a bridge institution which can acquire assets, rights, and liabilities of a bank under resolution, which is a so-called bridge company (*overbruggingsonderneming*), and a bridge institution which holds and owns shares (or other instruments of ownership) in the capital of a bank under resolution, bridge company or asset management vehicle, which is a so-called bridge foundation (*overbruggingsstichting*). *See* Explanatory Notes to the Draft Implementation Decree European framework on the recovery and resolution of bank and investment companies (*Stb.* 2015, 433), p. 14-20.

most of the rules can be found in sections 107-135 SAG.[44] The UK BA 2009 provides for most of the rules in its sections 14-48A.

With the 'sale of business tool', the bank under resolution can be wholly or partly sold. Articles 38 BRRD and 24 SRM Regulation provide that this can take the form of a transfer of the shares from the existing shareholders to a private sector purchaser or purchasers. The BRRD and SRM Regulation also allow a transfer of assets, rights, and liabilities, while the failing bank is left behind under its original ownership and license.[45] As is further discussed in paragraph 5.3, article 37(6) BRRD stipulates that after a transfer of only a part of the business of the bank under resolution, the residual entity is 'wound up under normal insolvency proceedings'. The transfer can take place without first obtaining the consent of the shareholders of the bank or any other party and without complying with procedural requirements under company or securities law, such as requirements to file or register a document with an authority.[46] An exception is that the consent of the purchaser is required.[47] The resolution authority has to base its decision as to what is transferred out of the failing bank on the resolution objectives listed in the BRRD and SRM Regulation, including the aim to ensure the continuity of critical functions.[48] Transfers of shares or assets, rights, and liabilities can be made more than once and transferred shares or assets, rights, and liabilities can also be transferred back at a later stage, provided that the purchaser has consented to such a retransfer.[49]

Marketing of the bank is required for the application of the sale of business tool and the sale needs to be made on 'commercial terms', with any consideration paid by the purchaser benefiting either the existing shareholders in case of a share transfer or the bank under resolution in case of a transfer of assets, rights, and liabilities.[50] Moreover, the BRRD stipulates that the resolution authority has to cooperate closely with the competent supervisory

44 According to the legislative history of the SAG, the 'transfer order' (*Übertragungsanordnung*) in the SAG is regarded an 'umbrella instrument' (*Sammelbegriff*) for the three transfer tools of the BRRD. The general provisions on the transfer order (sections 107-125 SAG) cover common requirements on and features of the three tools. *See* Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 179. *See also* Schillig 2016, p. 261; Binder 2015a, p. 96-97.

45 *See* Schillig 2016, p. 251. *Cf.* IMF & World bank 2009, p. 39.

46 Articles 38(1) and 63(2) BRRD.

47 Article 38(1) BRRD.

48 *See* European Banking Authority, 'Final Draft Guidelines on the minimum services or facilities that are necessary to enable a recipient to operate a business transferred to it under Article 65(5) of Directive 2014/59/EU', EBA/GL/2015/06, 20 May 2015, p. 4. *Cf.* Article 31 BRRD; Article 14 SRM Regulation.

49 Article 38(5)-(6) BRRD.

50 Article 38(2)-(4) BRRD.

authority. The latter authority needs to check whether the purchaser has the appropriate authorization. The approval of the competent supervisory authority for the acquisition is required if the application of the sale of business tool results in the acquisition of or increase in a qualifying holding in a bank.[51] To allow the purchaser – or the bridge institution or asset management vehicle that are discussed below – to continue the acquired business, under article 65 BRRD the residual legal entity can be required to provide the transferee services or facilities. According to the EBA, these services include services and facilities related to human resources and legal services.[52]

The 'bridge institution tool' is comparable to the sale of business tool. Specific features of the former tool are that it creates only a temporary solution and that the transferee is wholly or partly owned by one or more public authorities, such as the resolution authority, and is controlled by the resolution authority.[53] If the bridge institution pays a consideration, for instance, in the form of shares in the entity's capital, the consideration has to benefit either the former shareholders of the bank under resolution if a share transfer is conducted or the residual entity if assets, rights, and liabilities are transferred.[54] Also, the BRRD requires the resolution authorities to ensure that the total value of transferred liabilities does not exceed the total value of the rights and assets that are either transferred from the bank under resolution or provided by other sources.[55] The BRRD's legislative history suggests that the ultimate objective of the bridge institution tool is to facilitate the sale of the bridge institution, or its assets, rights, and liabilities, as a whole or in part on commercial terms. The management of the entity should be directed towards the preservation of the business and not towards an expansion.[56] Under the BRRD, the resolution authority has to terminate a bridge institution's operations if, within a period of two years, which period can be extended, the entity has not merged with another entity, a third party has not acquired the majority of the shares in the capital or all or almost all the assets, rights, and liabilities, and the assets have not been wound up and the liabilities discharged.[57]

51 Article 38(7)-(9) BRRD. *Cf*. Article 30 SRM Regulation.
52 European Banking Authority, 'Final Draft Guidelines on the minimum services or facilities that are necessary to enable a recipient to operate a business transferred to it under Article 65(5) of Directive 2014/59/EU', EBA/GL/2015/06, 20 May 2015.
53 Article 40(2) and 41(3)-(5) BRRD.
54 Article 40(4) BRRD. *See* Schelo 2015, p. 144.
55 Article 40(3) BRRD.
56 European Commission, 'Technical details of a possible EU framework for bank recovery and resolution', March 2011, available at ec.europa.eu, p. 53. *Cf*. IMF & World Bank 2009, p. 41-42.
57 Article 41(3)-(8) BRRD.

Articles 42 BRRD and 26 SRM Regulation govern the creation of a vehicle that temporarily manages a part of the assets, rights, and liabilities of a bank under resolution to maximize their value through a sale or wind down. The resolution authorities may only use the 'asset separation tool' in combination with one or more other resolution tools.[58] The BRRD's legislative history indicates that this requirement exists because the fact that the tool allows easy transfers of underperforming assets from the balance sheet of the bank under resolution may otherwise give rise to moral hazard concerns, which concerns were discussed in the previous paragraph.[59] Similar to a bridge institution, an asset management vehicle is to be wholly or partially owned by one or more public authorities, which may include the resolution authority, and is controlled by the resolution authority.[60] The resolution authorities may only use the tool if the liquidation of the assets in a normal insolvency procedure could have adverse effects on the financial markets, the transfer is required to ensure the proper functioning of the bank under resolution or bridge institution, or the transfer is necessary to maximize liquidation proceeds.[61] Article 42(1) BRRD clarifies that not only assets but also rights and liabilities may be transferred to the vehicle. Shareholders and creditors who are left behind with the bank under resolution have no rights over or to the vehicle's assets, rights, and liabilities. The assets, rights, and liabilities of the bank under resolution have to be transferred against a consideration.[62] This consideration may have a nominal or negative value,[63] for instance, if the value of the transferred liabilities exceeds the value of the transferred assets and rights.

## 4 Parallels between the resolution objectives and insolvency law objectives

### 4.1 Introduction

The literature has paid attention to the fact that well-known academic theories of the role and function of insolvency law help to understand which trade-offs are made and which goals and objectives can be pursued when dealing with a bank failure.[64] These theories include the creditors' bargain theory, which argues that insolvency is a common pool problem and advocates a coordinated corporate insolvency procedure with the only

58 Article 37(5) BRRD.
59 European Commission, 'Technical details of a possible EU framework for bank recovery and resolution', March 2011, available at ec.europa.eu, p. 54. *Cf.* Article 37(5) BRRD.
60 Article 42(2) BRRD.
61 Article 42(5) BRRD.
62 Article 42(6) and (12) BRRD.
63 Article 42(6) BRRD.
64 Schillig 2016, p. 61-66; De Weijs 2013, p. 201-224 and *see* paragraphs 2.2.1 and 3.2.1 of chapter 2.

objective of maximizing the returns to the creditors.[65] This idea contrasts, for instance, with the view of insolvency law that is offered by Warren, who argues that the goals of insolvency law are broader. Amongst other things, she claims that an insolvency law system should consider the impact of business failure on parties who are not creditors and lack formal legal rights to the assets of the debtor, who may include employees, suppliers, and customers. For instance, insolvency law may indirectly protect the interests of these parties by permitting going concern sales and reorganizations so that the business of a failing company can remain in operation rather than being shut down.[66] These theories were considered briefly in chapter 2.[67]

This paragraph focuses on a dilemma the resolution authorities may be confronted with when applying transfer tools in a resolution procedure. This dilemma mainly deals with the question of whether and how the objective to maximize the satisfaction of creditors' claims should be weighed against other, potentially conflicting goals and objectives that can be pursued, such as the continuation of the debtor's business. Scholars have argued that the primary objectives in a resolution procedure differ significantly from the main objectives pursued by general insolvency law.[68] However, the literature also indicates that national general insolvency laws, in their turn, differ in their approaches on the outcome of the mentioned dilemma. In some jurisdictions, insolvency law focuses only on the joint interests of the insolvency creditors. In other countries, it allows that in some cases the operations of a failing debtor's business are continued because this is in the interest of the preservation of employment, even though this is not the way the creditors' financial interests are best served.[69]

Against this background, the sections below examine the objectives pursued by the national general insolvency laws on the one hand and by the rules on the transfer tools on the other hand. The main question is whether the rules on the transfer tools share objectives with the insolvency laws. It is discussed that under Dutch, German, and English general insolvency law a going concern sale of a part of a corporate debtor's business *en bloc* is often made as an alternative to a piecemeal liquidation of a debtor's assets. The sections investigate to what extent the insolvency laws in such a case also pursue other objectives than serving the joint creditors' financial interests and the former objectives, such as the preservation of employment, can affect the course of an insolvency procedure. This question is especially relevant if the respective interests are not alike. This then leads to the question

65 *See* De Weijs 2013, p. 207-209 and *see* the references to articles of Jackson and Baird provided in paragraph 2.1 of chapter 2.
66 Warren 1993, p. 354-356. *See also* De Weijs 2013, p. 209-210 and paragraph 2.1 of chapter 2.
67 Paragraph 2.1 of chapter 2.
68 Hadjiemmanuil 2015, p. 232. *See also* Tröger 2018, p. 52.
69 Eidenmüller 2018, para. 3.3.2; Verstijlen 1998, p. 154. *See also* Finch & Milan 2017, p. 28-52.

of how these objectives of the national insolvency laws relate to the role the creditors' financial interests and societal interests play in the decision on the application of the transfer tools in a resolution procedure. It is shown that according to case law, Dutch insolvency law permits considering societal-related objectives in insolvency procedures. Nevertheless, in the three jurisdictions, the objective of maximizing the returns to creditors is regarded the primary objective. The paragraph also ascertains that the bank resolution rules define their own primary objectives, which are the resolution objectives. These conclusions about the objectives of national corporate insolvency law and the bank resolution frameworks are further analyzed in the coherence study in chapter 7.

## 4.2 Objectives of the national general insolvency laws

### *4.2.1 Going concern sales under Dutch insolvency law*

The Fw provides for two types of procedures for insolvent corporate debtors: the bankruptcy procedure (*faillissement*) and the suspension of payments procedure (*surseance van betaling*). When the Dutch legislature introduced the Fw in 1893, the bankruptcy procedure was considered to be oriented towards liquidation, which primary objective was regarded the realization of the debtor's assets for the benefit of the joint creditors (*gezamenlijke crediteuren*).[70] Since then this objective is confirmed by the Dutch Supreme Court and in the literature.[71] To this end, the Fw assigns an important role to the bankruptcy trustee (*curator*), whose task is the management and liquidation of the insolvent estate. According to the generally accepted view in the literature, the task is directed towards maximization of the pro-

70 Vriesendorp 2013, p. 136; Verstijlen 1998, p. 23, who both refer to the legislative history of the Fw in Kortmann & Faber 2016a, p. 7 ('Wenschelijkheid van herziening der oude wetgeving'), arguing that: 'het faillissement is een gerechtelijk beslag op het geheele vermogen des schuldenaars ten behoeve zijner gezamenlijk schuldeischers.' *See also* Kortmann & Faber 2016a, p. 27 ('Opheffing der onderscheiding tusschen den staat der kennelijk onvermogen en dien van faillissement'): 'De instelling van het faillissement beoogt niets anders dan, bij staking van betaling door den schuldenaar, diens vermogen op eene billijke wijze onder al zijne schuldeischers, met eerbiediging van ieders recht, te verdeelen, en het geheele samenstel der bepalingen, welke in eene faillietenwet worden gevonden, heeft geen ander doel dan die billijke verdeeling voor te bereiden, te waarborgen en te bewerkstelligen.'

71 Verstijlen 1998, p. 23, referring, *inter alia,* to HR 28 September 1991, *NJ* 1991, 247 (*Faillissement Suriname*), in which the Supreme Court rules in para. 3.17 that '[d]e faillissementsprocedure strekt tot het leggen van een algemeen beslag op het gehele vermogen van de schuldenaar met het doel dit vermogen te gelde te maken ten voordele van alle crediteuren gezamenlijk', as well as to Molengraaff 1951, p. 31-33, who notes that '[w]èl beschouwd heeft de instelling van het faillissement geen ander doel dan de toepassing, de praktische verwezenlijking van de bepalingen, vervat in art. 1177 B.W. […] Verdeling van de opbrengst van het gehele vermogen onder de gezamenlijke schuldeisers, ziedaar dus wat wordt beoogd. Die verdeling is het einddoel, de slotbehandeling. Het middel daartoe te geraken: het beslag.'

ceeds.[72] If the insolvent debtor and the creditors have conflicting interests, the trustee chooses, in principle, the interests of the joint creditors.[73] In a suspension of payments procedure, by contrast, a deferment of payment is imposed on unsecured, non-preferential claims against a debtor who foresees that it will not be able to pay its creditors.[74] The procedure traditionally aims to provide an instrument that allows a continuation of the debtor's business.[75] In practice, however, it is regarded the 'gateway to bankruptcy' because most suspension of payments procedures have resulted in the commencement of a bankruptcy procedure.[76]

Nevertheless, the bankruptcy procedure under the Fw now seems to serve as an instrument to pursue goals which the Dutch legislature originally did not envisage.[77] The procedure is often used to reorganize and sell a debtor's business or a part thereof on a going concern basis as an alternative to piecemeal liquidation.[78] Such a sale is in most cases effected at an early stage under section 101 Fw rather than under a composition (*faillissementsakkoord*) agreed upon at a later stage in the procedure.[79] Moreover, in practice asset sales in bankruptcy procedures are often prepared and negotiated before the bankruptcy declaration (*faillietverklaring*), generally called 'pre-packed sales' or 'pre-pack', although this practice does not have an explicit foundation in

72 Wessels 2015a, para. 4092-4093; Wessels 2008, p. 3-4; Verstijlen 1998, p. 103-104. *See also* HR 23 December 1994, *NJ* 1996, 628, para. 4.3.2: 'diens taak de belangen van de gezamenlijk bij het faillissement betrokken schuldeisers te behartigen', as also referred to by Hummelen 2016, p. 136; Wessels 2015a, para. 4093 & 4202; Verstijlen 1998, p. 104.

73 Verstijlen 1998, p. 142-148, who notes that the principle of reasonableness and fairness (*redelijkheid en billijkheid*), for instance, may require otherwise.

74 Sections 214, 230, 232 and 233 Fw.

75 *See* Kortmann & Faber 2016b, p. 336 ('Memorie van Toelichting. Van Surséance van Betaling. Algemeene beschouwingen'): 'Terwijl bij faillissement de boedel, voor zooverre geen akkoord tot stand gekomen is, door den curator wordt vereffend en onder de crediteuren verdeeld, is juist het behoud van den boedel en de voortzetting der zaak het doel der surséance. […] Faillissement zal dus in den regel te pas komen daar waar een onherstelbaar verlies en tekort aanwezig is; surséance daarentegen, indien de zaken van den schuldenaar levensvatbaarheid hebben en slechts tijdelijk zijn vastgeraakt. De grondslag van surséance is vertrouwen in de zaak en den persoon des schuldenaars.' *See also* Wessels 2014, para. 8004-8005; Joosen 1998, p. 120; Leuftink 1995, p. 8-9.

76 Wessels 2014, para. 8011; Vriesendorp 2013, p. 61 and 113-114. The suspension of payments procedure is generally considered not a satisfactory instrument because it is mainly oriented towards deferment, as the name implies, rather than a reorganization of the business and the procedure is not applicable to preferential and secured claims. For a critical discussion of the suspension of payments procedure and proposed amendments to the procedure, *see* Van Galen 2015, p. 150-156; Wessels 2014, para. 8011-8016h.

77 Joosen 1998, p. 7.

78 *See* Vriesendorp 2013, p. 137-138; Joosen 1998, p. 3-8. For a discussion of the restart (*doorstart*) of a company's business as part of a bankruptcy procedure, *see also* Grapperhaus 2008.

79 *See* Hummelen 2016, p. 129 & 135; Joosen 1998, p. 179-183. *Cf*. Kortmann & Faber 2016b, p. 63-64 (Explanatory Notes to Section 101 Fw).

the Fw. The search for potential takeover candidates can, for instance, be part of the preparation. A legislative proposal is pending that aims to introduce a statutory basis for the pre-pack.[80] Section 101 Fw currently stipulates that the trustee can sell assets of the debtor before the debtor has entered the 'state of insolvency' (*staat van insolventie*),[81] but only if and to the extent this is necessary to cover the costs of the insolvency procedure or if the assets could not be preserved without loss to the estate. The legislative history of the Fw indicates that the starting point in a bankruptcy procedure should be that as long as the actual liquidation of the estate has not been commenced, the estate is preserved and is not sold by the insolvency trustee. A composition plan may be adopted and the assets should then be returned to the debtor.[82] Based on case law of 1937,[83] however, modern-day legal practice interprets the wording of section 101 Fw broadly and allows the disposal of the debtor's assets by the trustee shortly after the bankruptcy declaration.[84]

From decisions of the Dutch Supreme Court it can be inferred that in a bankruptcy procedure the trustee may also have to consider societal interests involved in the management and liquidation of the estate.[85] Moreover, according to the majority opinion in the literature, it follows from case law that compelling ('*zwaarwegende*') societal interests may even prevail over interests of individual creditors, such as a creditor's interests in its claim under a retention of title. It has been submitted, however, that the Fw leaves only little room for safeguarding societal interests at the expense of the

80 For a discussion of pre-pack sales under Dutch insolvency law, *see* Verstijlen 2014, p. 29-32; Tollenaar 2011. The proposal for the Continuity of Enterprises Act I (*Wet continuiteit ondernemingen I*) was published in 2015, *see Kamerstukken II* 2014/15, 34218, no. 2. At the end of 2017, the handling of the proposal was deferred.

81 Under section 173 Fw the insolvency estate is in the 'state of insolvency' if no composition has been proposed at the creditors' meeting (*verificatievergadering*) or the composition has been dismissed or the confirmation has been denied. Under those circumstances, the liquidation (*vereffening*) of the estate starts. *See* Wessels 2013b, para. 7006 & 7023.

82 Kortmann & Faber 2016b, p. 63-64. *See* Hummelen 2016, p. 135; Wessels 2015a, para. 4390; Joosen 1998, p. 180-182; Van der Burg 1975, p. 38.

83 HR 27 August 1937, Nederlandse Jurisprudentie 1938, 9 (*Nieuw Plancius*). The Supreme Court held that limiting the trustee's competences to a sale of only a part of the assets would be incompatible with the purpose of section 101 Fw. *See* Wessels 2015a, para. 4392; Van der Burg 1975, p. 39.

84 Hummelen 2016, p. 135; Joosen 1998, p. 182.

85 In HR 19 April 1996, *NJ* 1996, 727 (*Maclou*), para. 3.6 the Dutch Supreme Court for instance held that '[v]oorts miskent die stelling dat de curator, anders dan de beoefenaar van een beroep als dat van advocaat, niet in een contractuele betrekking staat tot degenen wier belangen aan hem in zijn hoedanigheid zijn toevertrouwd, alsmede dat hij bij de uitoefening van zijn taak uiteenlopende, soms tegenstrijdige belangen moet behartigen en bij het nemen van zijn beslissingen — die vaak geen uitstel kunnen lijden — óók rekening behoort te houden met belangen van maatschappelijke aard.' *See* Wessels 2008, p. 5-10; Verstijlen 1998, p. 34-40 & 149-163. *See also* Joosen 1998, p. 179-185 and Wessels 2015a, para. 4170-4173.

interests of the joint creditors in the highest possible yield.[86] The societal interests include the continuity of the debtor's business and maintaining of employment.[87] According to the literature, it can also include interests that are linked to business continuity, such as interests in the preservation of capital and know-how, protection of industrial heritage, and protection of the environment.[88] However, this has not been legally enshrined.[89] An important case in this context is the case *Sigmacon II*, in which an individual creditor had attached the debtor's business assets with a view to satisfaction of his tax claims. The Supreme Court held that the mere fact that this creditor advocated alternatives which would have been more favorable for him from a financial point of view than the course of action eventually chosen by the trustee, did not make the trustee's course of action unlawfully. The trustee in the case had aimed to continue the business and preserve jobs through a sale of the debtor's business.[90]

A more recent case of the CJEU sparked a fierce debate in the literature about the use and objectives of pre-packed sales under Dutch law.[91] The case focused on the pre-packed sale of a part of the business of the insolvent company Estro to Smallsteps in a bankruptcy procedure under the Fw. The central question in the case was whether the rights and obligations of employees of the transferor were automatically transferred to the transferee as required by the EU Directive on transfer of undertakings.[92] Under the Directive, the employees do not have to be protected with such an automatic transfer if the transferor is the subject of a bankruptcy or analogous insolvency procedure which is instituted with a view to the liquidation of the assets of the transferor and is under the supervision of a competent

86 Wessels 2015a, para. 4221-4224; Adams 2014, p. 16; Wessels 2008, p. 12; Verstijlen & Vriesendorp 2004, p. 991-997; Verstijlen 1998, p. 152-160. *See also* Vriesendorp 1996, p. 140-145. *Contra* Van Hees 2004, p. 200-203; Van Hees 2015, arguing that case law shows a clear trend and attaches more weight to societal interests in insolvency cases as well as that trustees in practice often rightly give priority to societal interests over the interests of the joint creditors.

87 *See* HR 19 December 2003, *NJ* 2004, 293 (*Curatoren Mobell/Interplan*), para. 3.5.1-3.5.2; HR 19 April 1996, *NJ* 1996, 727 (*Maclou*), para. 3.6; HR 24 February 1995, *NJ* 1996, 472 (*Sigmacon II*), para. 3.5 and *see* for a discussion of the case law Wessels 2015a, para. 4221-4224a; Verstijlen 1998, p. 149-160.

88 Wessels 2015a, para. 4224; Wessels 2008, p. 12; Huydecoper 2007, p. 2; Ophof 1996, p. 205; Wessels 1997a, p. 169-170.

89 *See* Wessels 2016, para. 1066, who argues that it is the task of the Dutch legislature rather than a trustee or administrator to balance the interests in a liquidation procedure.

90 HR 24 February 1995, *NJ* 1996, 472 (*Sigmacon II*), para. 3.5. For a discussion, *see* Wessels 2015a, para. 4222; Verstijlen 1998, p. 155-158.

91 Case C-126/16 *Federatie Nederlandse Vakvereniging e.a./Smallsteps* [2017] ECLI:EU:C:2017:489.

92 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 082, 22.03.2001, p. 16-20).

public authority.[93] According to the Court, a procedure focuses on the liquidation of assets if the primary goal is maximizing satisfaction of the collective claims of the creditors.[94] It held that the exception to the protection of employees does not apply – and the protection of workers is thus maintained – if the procedure is aimed at the continuation of the operational character of the undertaking or its viable units.[95] The Court ruled that the pre-pack procedure that was at issue did not fall within the scope of the exception of the Directive since the primary objective of the procedure was safeguarding the activities of the undertaking rather than liquidating the assets.[96] It then referred the case back to the Dutch court which requested the preliminary ruling.

The debate in the literature following the decision has mainly focused on the question of what are the consequences for the Dutch pre-pack practices and other types of procedures, such as a restart (*doorstart*) of a company as part of a bankruptcy procedure which is not a pre-pack restart.[97] For a pre-pack sale or restart to be sucessful, it is often key to leave a part of the employees behind with the transferor entity.[98] Tollenaar expects the consequences of the CJEU decision to be limited. He argues that maximizing satisfaction of the collective claims of the creditors is the primary objective in a bankruptcy procedure under the Fw. Thus, if the business or a part thereof is in a bankruptcy procedure sold as a going concern to a third party, the continuation is not the primary objective but a means to maximize the proceeds.[99] Fliek and Verstijlen, by contrast, have claimed that a restart of a company in a bankruptcy procedure does not, by definition, fall within the scope of the exception of the Directive because it may be considered initiated with the aim to keep the undertaking in business rather than liquidate the assets.[100] One of the first court cases following the CJEU case gave some clarification. The court in that case interpreted the CJEU decision narrowly.

93 Article 5(1) Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 082, 22.03.2001, p. 16-20). *See* Case C-126/16 *Federatie Nederlandse Vakvereniging e.a./Smallsteps* [2017] ECLI:EU:C:2017:489, para. 43-44.

94 Case C-126/16 *Federatie Nederlandse Vakvereniging e.a./Smallsteps* [2017] ECLI:EU:C:2017:489, para. 47-48.

95 Case C-126/16 *Federatie Nederlandse Vakvereniging e.a./Smallsteps* [2017] ECLI:EU:C:2017:489, para. 48.

96 Case C-126/16 *Federatie Nederlandse Vakvereniging e.a./Smallsteps* [2017] ECLI:EU:C:2017:489, para. 49-52.

97 E.g., Tollenaar 2018; Fliek & Verstijlen 2018; Spinath 2017; Verstijlen 2017; Vroom & Sperling 2017, p. 397-400; Schaink 2017; Van der Pijl 2017.

98 Vroom & Sperling 2017, p. 400.

99 Tollenaar 2018. *See also* Spinath 2017.

100 Fliek & Verstijlen 2018, para. 5.

It ruled – in line with the opinion of Tollenaar – that the primary objective of a bankruptcy procedure under the Fw is maximization of the satisfaction of the creditors' claims. The sale at issue was not prepared down to the last detail before the bankruptcy declaration but made during a bankruptcy procedure and the insolvency trustee stated that he had wanted to maximize the proceeds through a going concern in bankruptcy. The exception to the protection of employees in the Dutch provisions implementing the Directive on transfer of undertakings, therefore, did apply.[101]

Uncertainty currently still exists about the consequences of the CJEU decision for the Dutch pre-pack practice and restart of a company as part of a bankruptcy procedure under the Fw.[102] It seems fair to say, however, that although case law leaves room to consider other interests than the financial interests of the joint creditors in a bankruptcy procedure, the starting point still is that the primary objective in a bankruptcy procedure is maximizing the payment of the collective claims of the creditors.

### *4.2.2 Going concern sales under German insolvency law*

Under the InsO, an insolvency application can lead to a piecemeal liquidation of assets, a so-called asset-deal restructuring (übertragende *Sanierung*) and the opening of an insolvency plan procedure (*Insolvenzplanverfahren*).[103] Upon opening of the insolvency procedure, the debtor's right to manage and transfer the estate's assets is vested in the insolvency trustee (*Insolvenzverwalter*).[104] The InsO requires the trustee to report on the prospects of a continuation of the debtor's business in the creditors' meeting and the creditors decide whether the business is closed down or maintained.[105] The trustee subsequently liquidates the assets if the creditors' meeting decides against preservation of the business as a going concern and the debtor and the trustee have not presented an insolvency plan.[106]

101 Rb. Noord-Holland, 12 October 2017, ECLI:NL:RBNHO:2017:8423 (*Bogra*). *Cf.* Rb. Gelderland, 1 February 2018, ECLI:NL:RBGEL:2018:447 (*Tuunte*).
102 *See* Letter of the Minister for Legal Protection (*Kamerstukken I* 2017/18, 34218, no. J).
103 MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 45.
104 Section 80 InsO.
105 Sections 156-157 InsO. *See* Zimmer 2014, para. 231-244.
106 Section 159 InsO. *See* Zimmer 2014, para. 254-263.

A going concern sale of the business or a part thereof outside an insolvency plan procedure is a favored method in insolvency procedures.[107] In specific cases, the trustee needs the consent of the creditors for such sales, which purpose is according to the literature ensuring a fair market price for the assets to be sold.[108] For example, certain 'transactions of particular importance' (*besonders bedeutsame Rechtshandlungen*) in an insolvency procedure, which includes a sale of the debtor's business, require the prior consent of the creditors' committee. The committee consists of representatives of several groups of creditors.[109] Moreover, a sale to 'insiders', including persons holding a large share of the insolvent company's capital, requires a majority vote in the creditors' meeting.[110] In practice, a preliminary insolvency trustee (*vorläufigen Insolvenzverwalter*) is often appointed by the court to negotiate the asset deal at an early stage, which the creditors' committee then needs to approve once the insolvency procedure has been commenced.[111]

German insolvency law seems to have a more restrictive view than Dutch law regarding the objectives it pursues. Since the introduction of the InsO in 1999, German insolvency law explicitly provides that the primary objective of an insolvency procedure is the collective satisfaction of a debtor's creditors. This objective is pursued by liquidation of the debtor's assets and distribution of the proceeds, or by reaching an agreement in an insolvency plan procedure.[112] According to the literature, German insolvency law is clearly creditor oriented.[113] Nevertheless, early proposals for section 1 InsO provided that – besides the mentioned primary objective – interests of the debtor, the debtor's family and its employees were taken into account in

107 Wessels & Madaus 2017, p. 285-286; MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 91; Undritz 2010, p. 205; Bitter 2010, p. 155-157; Schmerbach & Staufenbiel 2009, p. 459. *Cf*. Brünckmans 2014, p. 1857-1866.

108 Bork 2012a, para. 5.09 and 9.56. *Cf*. Flessner 2003, who notes at p. 330 that '[t]raditionally the role of the German insolvency court is essentially procedural. The court is to open, drive forward, and close the proceeding. But it should not be involved in business decisions nor be called upon to decides in disputes on substantive legal issues. The decisions in managing and liquidating the assets are made by the administrator, and in some important instances, by the creditors.'

109 Sections 160(2)(1) and 67(2) InsO.

110 Sections 162 and 138(2) InsO. *See* Bork 2012a, para. 5.09 and 9.56.

111 Section 22 InsO. *See* Wessels & Madaus 2017, p. 297; Bork 2012a, para. 5.09.

112 Section 1 InsO provides that '[d]as Insolvenzverfahren dient dazu, die Gläubiger eines Schuldners gemeinschaftlich zu befriedigen, indem das Vermögen des Schuldners verwertet und der Erlös verteilt oder in einem Insolvenzplan eine abweichende Regelung insbesondere zum Erhalt des Unternehmens getroffen wird. Dem redlichen Schuldner wird Gelegenheit gegeben, sich von seinen restlichen Verbindlichkeiten zu befreien.' *See* MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 20.

113 Eidenmüller 2018, para. 3.3.2 notes that German insolvency law 'is debt collection law and nothing else', which 'philosophy' is according to Eidenmüller different than the 'philosophies' of French, English and US insolvency law.

the procedure.[114] Whether the reorganization and continuation of the operations of the debtor's business is now a secondary objective,[115] an equivalent objective[116] or only a means[117] to ensure the satisfaction of the creditors' claims is debated in the literature.[118] Most scholars seem to agree that societal interests such as the protection of the environment should not have direct effect on the course of an insolvency procedure and a German court does not reject an insolvency plan only because it fails to protect the preservation of jobs.[119] They maintain that insolvency law does not interfere with existing market mechanisms.[120] This is justified by the fact that economic and social issues are addressed by other areas of law.[121] In that view, the decision whether the debtor's business is liquidated on a piecemeal basis, or continued through a going-concern sale or financial restructuring, or a com-

114 MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 1-4, refer to a proposal for section 1 InsO (Gesetzentwurf der Bundesregierung, Entwurf einer Insolvenzordnung (InsO), Deutscher Bundestag, Drucksache 12/2443, 15 April 1992), which provided that: '(1) Das Insolvenzverfahren dient dazu, die Gläubiger eines Schuldners gemeinschaftlich zu befriedigen, indem das Vermögen des Schuldners verwertet und der Erlös verteilt wird. (2) Die Interessen des Schuldners und seiner Familie sowie die Interessen der Arbeitnehmer des Schuldners werden im Verfahren berücksichtigt. Dem redlichen Schuldner wird Gelegenheit gegeben, sich von seinen restlichen Verbindlichkeiten zu befreien. Bei juristischen Personen und Gesellschaften ohne Rechtspersönlichkeit tritt das Verfahren an die Stelle der gesellschafts- oder organisationsrechtlichen Abwicklung. (3) Die Beteiligten können ihre Rechte in einem Insolvenzplan abweichend von den gesetzlichen Vorschriften regeln. Sie können insbesondere bestimmen, daß der Schuldner sein Unternehmen fortführt und die Gläubiger aus den Erträgen des Unternehmens befriedigt werden.' The Explanatory Notes to the draft section indicate at p. 108-109 that the satisfaction of creditors was the primary objective.

115 Smid 2012, Section 1 InsO, para. 13-17.

116 Bork 2012b, para. 356.

117 Bitter 2010, p. 152; JaegerKomm-InsO/Henckel 2004, Section 1, para. 2; Eidenmüller 1999, p. 26-27.

118 MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 85; Paulus & Berberich 2012, p. 315.

119 Von Wilmowsky 2016, p. 246-247; Smid 2012, Section 1 InsO, para. 16-17; Bork 2012a, para. 3.21. *Cf.* Gesetzentwurf der Bundesregierung, Entwurf einer Insolvenzordnung (InsO), Deutscher Bundestag, Drucksache 12/2443, 15 April 1992, p. 76: 'Das Insolvenzrecht soll auch nicht mit der Aufgabe einer gesamtwirtschaftlich orientierten – etwa auf Ziele der Industrie-, Regional-, Arbeitsmarkt- oder Stabilitätspolitik gerichteten – Prozeßsteuerung belastet werden. Es kann die Wirtschafts-, Sozial- und Arbeitsmarktpolitik nicht ersetzen. Insbesondere dient das gerichtliche Insolvenzverfahren auch nicht dazu, das Arbeitsplatzinteresse der Arbeitnehmer gegenüber Rentabilitätsgesichtspunkten durchzusetzen.'

120 *See* MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 43, who note that '[n]ach der Vorstellung des Gesetzgebers hat, wenn es zur Insolvenz kommt, nicht der Markt versagt, sondern der Schuldner. Die Insolvenz ist deshalb kein Anlass, die Marktmechanismen durch hoheitliche Wirtschaftsregulierung zu verdrängen. […] Das öffentliche Interesse an der Erhaltung insolventer Unternehmen oder an der Kontinuität ihrer Unternehmensträger darf nicht gegen die Marktgesetze durchgesetzt werden.'

121 Von Wilmowsky 2016, p. 246-247; Paulus & Berberich 2012, p. 315; Häsemeyer 2003, para. 2.19-20.

bination, depends on how the most value is obtained for the creditors.[122] Smid notes in this context about the role of the insolvency trustee under the InsO that:

> '[i]n Europa trifft man auch „etatistische" Modelle des Insolvenzrechts an; so wird Insolvenzrecht in Frankreich herkömmlich auch von wirtschaftsplanerischen Zwecken her verstanden; in Italien kennt man das Verfahren der amministrazione straordinaria, dessen Auslösung in den Händen der Wirtschaftsverwaltung liegt. Hiervon unterscheidet sich das deutsche Insolvenzrecht: §1 Satz 1 InsO statuiert gegenüber allen möglichen hoheitlichen Zwecken (des Steuer-, Umwelt- oder des europäischen Beihilferechts) die Rigidität des Insolvenzrechts. […] Gegenüber der Forderung nach dem Erhalt von Arbeitsplätzen, dem Schutz der Umwelt oder der Wahrung des Wirtschaftsstandorts eines Industrieunternehmens kann sich daher der Verwalter aufgrund §1 InsO darauf berufen, sein Handeln bewege sich in dem durch den Gesetzgeber abgesteckten Spielraum und löse daher nicht als pflichtwidriges Handeln Schadenersatzpflichten aus.'[123]

It has been argued that section 251 InsO illustrates that under the InsO a reorganization under an insolvency plan may not take place at the expense of the insolvency creditors. It provides that the approval of an insolvency plan in an insolvency plan procedure is to be refused on the application of a creditor or shareholder if this creditor or shareholder voted against the proposal and he shows the court that he is likely to be placed in a worse position under it than without the plan.[124]

### *4.2.3 Going concern sales under English insolvency law*

The primary objectives of English insolvency law have been considered to be: maximizing the returns to the creditors, creating a system to distribute the proceeds in a fair and equitable manner, and investigating the causes

122 Von Wilmowsky 2016, p. 245-254; MünchKomm-InsO/Ganter/Lohmann 2013, Section 1, para. 44-45; Thole 2010, p. 56-57; Eidenmüller 1999, p. 25-27. Thole 2010, p. 58 argues that '[o]bwohl sich jedes Insolvenzverfahren den sozialen, politischen und ökonomischen Realitäten stellen muss, steht immer – unter Berücksichtigung legitimer schuldnerinteressen und rechtsstaatlich geforderter Beteiligungsrechte – die gemeinschaftliche Gläubigerbefriedigung als Verfahrensziel im Vorgrund.'

123 Smid 2012, Section 1 InsO, para. 16-17. Free translation by the present author: In Europe there are also 'statist' insolvency law models; insolvency law in France is traditionally considered to have economic purposes; in Italy, the amministrazione straordinaria procedure is placed in the hands of the economic administration. This contrasts with German insolvency law: section 1 sentence 1 InsO lays down the rigidity of insolvency law by opposing all possible public objectives (tax, environmental or European state aid). [...] Instead of pursuing the objective to preserve jobs, to protect the environment or to preserve the business location of an industrial company, the administrator can claim that his actions are within the scope of the InsO created by the legislature and, therefore, he cannot be held liable to pay damages because of a breach of his duty.

124 Verstijlen 1998, p. 154. *See also* Bork 2012a, para. 17.60-17.62.

of failure and, where relevant, holding those to account who conducted mismanagement.[125] Similarly, following its review of English insolvency law in 1982, the Review Committee on Insolvency Law noted that the law aims to distribute the proceeds of the assets of an insolvent debtor amongst the creditors. Two other important insolvency law objectives laws were, according to the Committee, to serve 'as a weapon in persuading a defaulting debtor to pay or make proposals for the settlement of debt' and 'through their investigation processes, [to serve as, LJ] the means by which the demands of commercial morality can be met.'[126]

The Review Committee on Insolvency Law, whose report is known as the Cork Report, also advocated a major reform of English insolvency law. Disposal of the business through liquidation had long dominated English insolvency law.[127] The Cork Report recommended, amongst other things:

> '[t]o encourage, wherever possible, the continuation and disposal of the debtor's business as a going concern and the preservation of jobs for at least some of the employees, and to remove obstacles which tend to prevent this.'[128]

Although liquidation continued to be a centerpiece of English insolvency law, the publication of the Cork Report has been considered an important step towards the growth of a so-called 'rescue culture'.[129] The literature defines it is 'a philosophy of reorganising companies so as to restore them to profitable trading and enable them to avoid liquidation.'[130] The instruments that have been provided by the IA 1986 and the reforms in the Enterprise Act 2002 to implement this culture following the publication of the Report include the administration procedure.[131] In this procedure, an administrator takes over the management and has broad statutory powers[132] to do 'anything necessary or expedient for the management of the affairs, business and property of the company', in accordance with proposals approved by the creditors' committee and directions given by the court.[133] In practice,

125 Goode 2011, para. 2.01.
126 Cork Report 1982, para. 235.
127 Xie 2016, p. 36; Goode 2011, para. 11.02.
128 Cork Report 1982, para. 1980. *Cf.* Cork Report 1982, para. 1734, which starts the Chapter with the heading 'The Public Interest'. The paragraph states that '[i]nsolvency proceedings have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them.' The chapter then discusses, inter alia, the liability of directors.
129 Goode 2011, para. 11.03. For a discussion of the 'rescue culture' and its legal framework, *see* e.g., Armour 2012, p. 43-78; Finch 2008, p. 756-777; Frisby 2004.
130 Goode 2011, para. 11.03.
131 Goode 2011, para. 11.03.
132 *Cf.* the list in Schedule 1 to the IA 1986.
133 Schedule B1 to the IA 1986, para. 53, 59(1) and 68, as also referred to by Finch & Milan 2017, p. 315.

the procedure is often used to arrange a going concern sale of substantially all the assets.[134] Furthermore, the literature notes that almost one-third of all administrations are pre-packaged administrations. Similar to the pre-pack practices under Dutch and German law, in a pre-packaged administration the arrangement on the sale is negotiated before the appointment of the administrator, who concludes the deal immediately after his appointment.[135]

Notwithstanding the growth of this 'rescue culture', the IA 1986 explicitly provides that the function of a liquidator in a winding-up by the court is to realize and distribute the assets amongst the creditors.[136] He only has the power to continue the business of the debtor if this is beneficial to the liquidation.[137] Scholars consider liquidation to be a collective mechanism that is not intended to serve social interests.[138] Nevertheless, case law shows that societal goals can play an important role in the procedure. For example, in *Re Mineral Resources Ltd, Environmental Agency v Stout* the High Court judge held that there is a significant public interest in maintaining a healthy environment. In the case the continued compliance with an environmental license by the company was considered to have priority over the interests in a fair and orderly winding up.[139] As Goode has discussed, this decision was later overturned in *Re Celtic Extraction Ltd*, in which the Court of Appeal decided that the liquidator could disclaim the environmental license of the company, with the effect that the obligations under the license ceased. The Court stated that it was not desirable that assets were used to cover the costs of compliance rather than being equally divided amongst the unsecured creditors.[140]

In contrast to the liquidator in a winding-up procedure, the administrator in an administration procedure is provided a more extended list with specific objectives. He must perform his functions with the aim of (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realizing property in order to make a distribution to one or more secured or preferential creditors.[141]

134 Wessels & Madaus 2017, p. 287; Goode 2011, para. 11.17.
135 Goode 2011, para. 11.37. For a discussion of the pre-packaged administration, *see* Finch 2011.
136 Section 143(1) IA 1986. *See* Fletcher 2017, para. 22.080.
137 Schedule 4 to the IA 1986, para. 5. *See* Goode 2011, para. 1.39.
138 E.g., McCormack 2012, p. 235.
139 *Re Mineral Resources Ltd, Environmental Agency v Stout* [1999] Env. L.R. 407. *See* Goode 2011, para. 2.25.
140 *In Re Celtic Extraction Ltd* [2001] Ch. 475. *See* Goode 2011, para. 2.25 & 8.30.
141 Schedule B1 to the IA 1986, para. 3(1).

He pursues objective (a) unless he thinks that (1) it is not reasonably practicable to achieve that goal, or (2) objective (b) would achieve a better result for the company's creditors as a whole.[142] Objective (c) is only pursued if he thinks that it is not reasonably practicable to achieve aims (a) and (b) and he does not unnecessarily harm the interests of the creditors of the company as a whole.[143] Although the structure of this provision is complicated, it is clear that the administrator does not have to save the company at all costs. The IA 1986 allows him to make arrangements to rescue the business rather than the company if he can achieve a better result for the creditors in that way.[144] Moreover, Fletcher notes that by explicitly providing that the overall objective of the administrator is to perform his functions in the interests of the creditors as a whole, the IA 1986 underlines the traditional approach of English insolvency law. This approach is that the interests of creditors are given priority to any other interests, including interests in the preservation of employment and interests of individual creditors.[145]

### 4.3 Objectives of going concern sales under bank resolution law

The BRRD and SRM Regulation provide the resolution authorities with the three transfer tools to enable them to deal with the insolvent or near-insolvent business of the bank.[146] They suggest that the objective to maximize the returns to the creditors of the insolvent debtor, which is recognized as the primary objective of Dutch, German, and English insolvency law, can play a role in the application of one of the three transfer tools.

For example, as was shown previously, the application of the sale of business tool under the BRRD and SRM Regulation requires marketing of the shares or assets, rights, and liabilities that the resolution authority intends to transfer and the transfer is to be made on commercial terms.[147] Requirements for the marketing process include that it is transparent, that it does

142 Schedule B1 to the IA 1986, para. 3(3).
143 Schedule B1 to the IA 1986, para. 3(4).
144 Finch & Milan 2017, p. 315. *See also* Fletcher 2017, para. 16.022-24; Goode 2011, para. 11.23. For a detailed discussion of the purpose of administration under Schedule B1 to the IA 1986, para. 3, *see* Armour & Mokal 2005, p. 41-49; Frisby 2004, p. 260-263.
145 Fletcher 2017, para. 16.024. *See also* Frisby 2004, p. 261, who refers to a remark of Lord McIntosh of Harringey about the function of the administrator in a debate on the Enterprise Bill: 'there may be times when company rescue is not the best option, when the medium to longer-term viability of the business is poor. We do not want the administrator to be constrained to attempting to rescue every company irrespective of whether there is a business worth preserving. We do not want an administrator to have to pursue a company rescue that may be reasonably practicable but would result in a lower return to creditors as a whole'. Hansard, House of Lords, Vol 639, 1101, 21 October 2002.
146 *See* De Weijs 2013, p. 216.
147 *See* paragraph 3 above and *see* Article 38(2)-(3) and 39(1) BRRD; Article 24(2) SRM Regulation.

not unduly favor or discriminate between potential purchasers and that it aims at maximizing, as far as possible, the sale price.[148] Paragraph 3 above also noted that a bridge institution can be created to maintain access to critical functions and to sell the entity under resolution.[149] If the resolution authority then seeks to sell the bridge institution or its assets, rights, and liabilities, the institution is, or the assets, rights, and liabilities are to be marketed openly and transparently, and the sale is to be made on commercial terms.[150] Article 41 BRRD allows authorities to postpone a bridge institution's termination, not only if this is necessary to ensure continuity of essential banking and financial services, but also if this supports the sale of the business or the liquidation of assets and discharge of liabilities.[151] Moreover, the BRRD provides that an asset management vehicle is created to maximize the value of the transferred assets and rights through a sale or orderly wind down.[152] Hence, the resolution authorities apply the three tools to achieve a sale for the best possible price. After a transfer of the assets, rights, and liabilities with one of the three transfer tools, any consideration paid is to benefit the entity under resolution, and hence indirectly its creditors and shareholders.[153] If the sale of business tool or bridge institution tool is applied by transferring shares or other instruments of ownership, the resolution authorities have to distribute any proceeds amongst the former owners of the instruments.[154]

However, value maximization is not the only objective of the rules on the transfer tools. As chapter 2 briefly discussed, the BRRD and SRM Regulation provide a list of five resolution objectives that have to be taken into account by the resolution authorities when applying their resolution tools.[155] The objectives underline that the resolution regime is primarily designed to protect the functioning of the financial system and depositors of the bank, and to minimize moral hazard.[156] Chapter 2 showed that the policymakers and scholars justify these objectives by referring to the 'specialness' of a banking business. The resolution objectives are:

148 Article 39(2) BRRD; Article 24(2) SRM Regulation. *Cf*. Roe & Adams 2015, p. 363 who argue that '[f]or bankruptcy to handle a systemically important financial institution successfully, it must be able to market those parts of the failed institution's financial contracts portfolio that are saleable at their fundamental value, i.e., other than at fire sale prices. [...] Bankruptcy needs authority, first, to preserve the failed firm's overall portfolio value, and, second, to break up and sell a very large portfolio that is too large to sell intact.'

149 Article 40(2) BRRD; Article 25(2) SRM Regulation.

150 Article 41(4) BRRD; Article 25(2) SRM Regulation.

151 Article 41(6) BRRD.

152 *See* paragraph 3 and *see* Article 42(3) BRRD; Article 26(2) SRM Regulation.

153 Articles 38(4), 40(4) and 42(7) BRRD.

154 Articles 38(4) and 40(4) BRRD.

155 Article 31(2) BRRD; Article 14(2) SRM Regulation; Paragraphs 2.2.3 and 3.2.1 of chapter 2.

156 *See* Sjöberg 2014, p. 194 and *see* Paragraph 2.2.3 of chapter 2.

> '(a) to ensure the continuity of critical functions;
> (b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;
> (c) to protect public funds by minimising reliance on extraordinary public financial support;
> (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC;
> (e) to protect client funds and client assets.'

The BRRD provides that these five 'resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.'[157] The Impact Assessment accompanying the proposal for the BRRD suggests that two of them are especially of importance, but it is the present author's view that they are closely intertwined with the other three resolution objectives.[158] The Impact Assessment notes that:

> '[i]nsolvency procedures may take years, and the objective of authorities is to maximise the value of assets of the failed firm in the interest of creditors. In contrast, the primary objective of a resolution is to maintain financial stability and minimise losses for the society, in particular taxpayers. For this reason, certain critical stakeholders and functions (such as depositors, payment systems) need to be protected and maintained as operational, while other parts, which are not considered key to financial stability, may be allowed to fail in the normal way.'[159]

Under article 39 BRRD the above-mentioned requirements of marketing the shares or assets, rights, and liabilities of a bank and selling them for the best possible price, may have to give way for the five resolution objectives. It provides that the marketing requirements in the application of the sale of business tool may be waived if compliance with the requirements would undermine the resolution objectives. They can be waived, in particular, if there is a material threat to financial stability and compliance would under-

157 Article 31(3) BRRD.

158 *See also* Sjöberg 2014, p. 196, who notes that '[l]isting so many different items and suggesting they are equally important objectives is at best confusing and could, in the worst case scenario, paralyze the resolution authority. In my view, the existence of two overriding objectives of sufficient, these being to preserve systemic stability and at the same time uphold market discipline.'

159 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 June 2012, SWD(2012) 166 final, p. 11, as also referred to by De Weijs 2013, p. 216.

mine the effectiveness of the tool in addressing the threat or achieving the resolution objectives.[160] Articles 31 BRRD and 14 SRM Regulation add that if it is necessary to achieve the resolution objectives, a resolution authority is also not required to comply with the requirement to seek to minimize the cost of resolution and avoid destruction of value. The provisions do not clarify for whom the costs are otherwise to be minimized.[161] It is the present author's view that the exception allows a resolution authority, for instance, to apply a resolution tool and ask the Single Resolution Fund or the national resolution financing arrangement to contribute. It may be justified to apply a particular resolution tool to ensure that depositors have continued access to their deposits in the bank under resolution, even though other resolution measures would not require a contribution from a resolution fund or from a deposit guarantee scheme.[162] Moreover, the above-mentioned exception in article 39 BRRD may provide a resolution authority a legal basis to sell the business of the bank under resolution without openly marketing the business, and to do this in a short period and for a low or negative price. The authority may for example do so if this is necessary to avoid adverse effects on the financial system.[163] In June 2017 the SRB decided that the sale of business tool had to be applied to sell a bank to a private sector purchaser overnight and for only EUR 1. Even though this bank was marketed, the case shows that a resolution authority may consider contacting only a few bidders to be

160 Article 39(3) BRRD. *Cf*. Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 183, which notes that section 126(2)(5) SAG 'zielt auf eine möglichst hohe Gegenleistung ab, wobei gleichzeitig die Abwicklungsziele und, wie die Formulierung „soweit möglich" verdeutlicht, andere Restriktionen (z. B. die Eilbedürftigkeit) zu beachten sind.'

161 An early working document on the resolution framework of the European Commission of 2011 notes that an authority should, in addition to the current requirements in Article 38 BRRD, be required to establish that the application of the sale of business tool is less costly compared to alternative options like partial or total liquidation. *See* European Commission, 'Technical details of a possible EU framework for bank recovery and resolution', March 2011, available at ec.europa.eu. The Commission does not clarify for whom the measure should be less costly, such as for the creditors of a bank under resolution, the resolution fund or the deposit guarantee schemes. According to Lastra, Olivares-Caminal & Russo 2017, p. 7 '[l]east cost is a test mandated by law in the US, while it is an important consideration in the choice of resolution procedures in the EU. The 'cost' in the EU context is not the cost to the resolution authorities (like the FDIC in the US) but costs to taxpayers. In the context of the BRRD and SRMR there must be a minimum impact on public finances, financial stability and the real economy. This must be assessed against the 'value' given to the continuity of critical banking functions.'

162 *Cf*. Articles 101 and 109 BRRD; Articles 76 and 79 SRM Regulation.

163 *Cf*. Schelo 2015, p. 148.

> '[j]ustified on the basis of financial stability grounds and the substantial risk that marketing of a wider circle of potential purchasers and the disclosure of risks and valuations or the identification of critical and non-critical functions in respect of the Bank may result in additional uncertainty and in a loss of market confidence. Moreover, contacting a wider number of purchasers might increase the probability of leakage and thus, the risk that the Bank may enter resolution within an extremely short timeframe.'[164]

It has been argued that the fact that the resolution rules require the resolution authorities to pursue a wide range of societal-oriented objectives, namely the resolution objectives, can be considered a victory of the above-mentioned theory of insolvency law advocated by Warren.[165] It is the present author's view that it indeed contrasts with the primary objectives pursued by Dutch, German, and English insolvency law, under which insolvency trustees and administrators seem to be left hardly any room for prevailing societal interests over the financial interests of the joint creditors.

The fact that the resolution objectives are the primary objectives in a bank resolution procedure does not entail, however, that a resolution authority does not consider the objectives of insolvency law in its assessment of how the shareholders and creditors should be treated.[166] The transfer tools offer an alternative means to distribute the value of the common pool of assets and the no creditor worse off-principle requires that in such distribution, shareholders and creditors are not made worse off than in an insolvency procedure.[167] As noted in Chapter 2,[168] the results of the resolution procedure have to be compared with the outcome of a hypothetical insolvency procedure for the bank. Shareholders and creditors are entitled to compensation if they have incurred greater losses in resolution than in such an insolvency procedure. As paragraph 5.3 below discusses, under Dutch and German law, the collective satisfaction of the claims of the creditors is the primary objective in the liquidation of a bank's business. In the bank-specific insolvency procedure under the BA 2009, a liquidator is also required to pursue the objective of achieving the best result for the bank's creditors as a whole if the primary statutory objective is achieved. The primary statutory objective is ensuring that either the deposit portfolio of the bank is transferred to another bank or depositors receive payments from the deposit guarantee scheme.[169]

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164 Single Resolution Board, 'Decision of the Executive Session of the Board of 3 June 2017 concerning the marketing of Banco Popular Español (hereinafter the "Bank"). Addressed to the Fund for Orderly Bank Restructuring (hereinafter "FROB")' (SRB/EES/2017/06).

165 De Weijs 2013, p. 216.

166 *See* De Weijs 2013, p. 216-217.

167 De Weijs 2013, p. 216.

168 Paragraph 3.2.1 of chapter 2.

169 Section 99 BA 2009.

# 5 Implementation of the rules on the transfer tools into national law

## 5.1 Effect and scope of the application of the transfer tools

### *5.1.1 Introduction*

This paragraph further investigates the alignment of the legal framework on the transfer tools with Dutch, German, and English private law. The BRRD requires that resolution authorities have the power to transfer shares issued by a bank under resolution or bridge institution, and that they have the power to transfer assets, rights, and liabilities of a bank under resolution, bridge institution or asset management vehicle.[170] Member States have to make sure that legal barriers to the transfers created by requirements that apply under law or contract or otherwise apply are removed. These barriers include, for instance, requirements to first obtain the consent of the shareholders or to file or register a document with an authority.[171] As stated in paragraph 3, an exception is that the consent of the purchaser is required if the sale of business tool is used.[172] Article 38(8)-(9) BRRD provides another example of an exception by stipulating that the approval of the competent supervisory authority is required if the application of the sale of business tool results in the acquisition of or increase in a qualifying holding in a bank.

The sections below discuss in more detail how Dutch, German, and English law ensure that the transfers ordered by the resolution authority have an immediate effect, and what can be included in the authority's transfer decision. Although important differences exist between the application of the transfer tools and a merger or division of a company under national law, similarities regarding the scope and effect of the measures under Dutch law seem to justify a cautious comparison. The sections also show that the English legal framework on the transfer tools, by contrast, forms a framework separated from the private law framework normally applicable to transfers of shares or assets, rights, and liabilities. The German legislature considers the application of the transfer tools to effectuate a transfer *sui generis*, but it remains unclear what this means in private law terms.

170 Articles 37(1), 38(1), 40(1) and (7), 42(1) and (10) and 63(1) BRRD.

171 Articles 38(1), 40(1), 42(1) and 63(2) BRRD. *Cf.* Articles 119-122 BRRD and Recital 120 BRRD: 'Union company law directives contain mandatory rules for the protection of shareholders and creditors of institutions which fall within the scope of those directives. In a situation where resolution authorities need to act rapidly, those rules may hinder effective action and use of resolution tools and powers by resolution authorities and appropriate derogations should be included in this Directive.'

172 Section 38(1) BRRD.

### 5.1.2 Application of the transfer tools under Dutch law

Section 3:80(2) BW provides that assets (*goederen*)[173] are acquired under universal title (*algemene titel*) through hereditary succession (*erfopvolging*),[174] joining of estates under matrimonial property law (*boedelmenging*),[175] merger (*fusie*) of two or more legal persons,[176] and division (*splitsing*) of a legal person.[177] Moreover, assets are acquired under universal title through the application of a transfer tool for a failing insurance company, bank or other type of financial institution as set out in Part 3a Wft.[178] In contrast to acquisition under particular title (*bijzondere titel*), in which case one or more specific assets, liabilities, or legal relationships are acquired,[179] acquisition under universal title is traditionally considered to be the acquisition of a whole estate (*vermogen*) or a proportional part thereof. The acquirer continues the position of the legal predecessor and formal delivery (*levering*), assumption of individual debts (*schuldoverneming*) and takeover of contracts (*contractsoverneming*) are not required for the acquisition.[180]

173 Sections 3:1, 3:2 and 3:6 BW.

174 Section 4:182 BW.

175 Section 1:94 BW.

176 Section 2:309 et seq. BW.

177 Section 2:334a et seq. BW. Section 2:334a BW provides that a division includes a split-up (*zuivere splitsing*) and a split-off (*afsplitsing*). In the former case the company that is to be divided ceases to exist on the division, while in the latter case this company does not cease to exist.

178 Sections 3:a2, 3a:28, 3a:37, 3a:41 Wft (banks, investment firms and several other types of financial institutions), 3a:78, 3a:104, 3a:112 and 3a:117 Wft (insurance companies).

179 Section 3:80(3) BW. *See* Pitlo/Reehuis & Heisterkamp 2012, para. 91 and 93.

180 This definition of acquisition under universal title is based on the description provided in Dutch in Van Zeben et al. 1981 (legislative history Book 3 BW), p. 307 (Toelichting-Meijers): 'De wet stelt voorop de onderscheiding van verkrijging van goederen onder algemene titel en die onder bijzondere titel. De onderscheiding is van belang voor de vraag of de verkrijger de positie van een derde inneemt of als de voorzetter van de volledige rechtspositie van zijn voorganger moet worden beschouwd. In verband met dit rechtsgevolg vindt verkrijging onder algemene titel alleen plaats, wanneer een gans vermogen op een ander overgaat. Een zodanige overgang voltrekt zich in het ontwerp evenals in het tegenwoordige recht alleen krachtens wettelijk voorschrift zonder dat een bijzondere rechtshandeling daartoe nodig is.' *See also* Verstappen 1996, p. 77-78, who defines acquisition under universal title under Dutch law as: 'de opvolging in of de verkrijging van een onbepaald aantal goederen, schulden en/of rechtsbetrekkingen, welke opvolging of verkrijging is gebaseerd op één titel, de rechtsgrond of rechtvaardiging voor de opvolging of de verkrijging, zonder dat voor de verkrijging van de afzonderlijke goederen, schulden en/of rechtsbetrekkingen levering, schuld- dan wel contractsoverneming is vereist.' According to Wessels 1997b, p. 176, the term 'indefinite' (*onbepaald*) in Verstappen's definition is not concrete enough. Moreover, Wessels 1997b, p. 176 does not agree with Verstappen that the term '*goederen*' in Dutch private law does not include liabilities (*schulden*). Verstappen 2002, p. 103-104, changes his definition of acquisition under universal title by excluding the term 'an indefinite number of' ('*een onbepaald aantal*').

Some authors, however, have claimed that the traditional understanding of acquisition under universal title is outdated.[181] Since the entry into force of the rules on the division of a company in 1998 it may also concern the acquisition of a specific set of assets, liabilities, and legal relationships. In contrast to, for example, hereditary succession and joining of estates under matrimonial property law, a division requires a specification of the assets, liabilities, and legal relationships that pass to the acquiring party.[182] Against this background, Buijn maintains that the Dutch legislature needs to exercise some restraint in allowing more types of acquisition under universal title as it now bears a strong likeness with acquisition under particular title.[183] It has also been argued that for dogmatic reasons the acquisition through division of a company under the BW or approval of a transfer plan for a bank or insurance company under the Wft[184] – which is since the entry into force of Part 3a Wft the application of a transfer tool – should rather be considered a special type of acquisition which does not require formal delivery, debt assumption or contract takeover on the basis of the BW.[185]

It is the present author's view that by referring to the application of the transfer tools under Part 3a Wft, section 3:80(2) BW confirms the view that acquisition under universal title under Dutch law is no longer limited to the passing of a whole estate or a proportional part thereof. Under Part 3a Wft and the SRM Regulation relevant instruments, assets, rights, and liabilities

181 Pitlo/Reehuis & Heisterkamp 2012, para. 91; Verstappen 2002, p. 103-104. *Cf.* Verstappen 1996, p. 34.

182 *See* Pitlo/Reehuis & Heisterkamp 2012, para. 91; Verstappen 2002, p. 103-104. *Cf.* Section 2:334f(2)(d) BW.

183 Buijn 1996, p. 18.

184 The Intervention Act introduced a transfer regime for insurance companies and banks in the Wft in 2012. Banks are now subject to the resolution regime in Part 3a Wft. The currently pending proposal for the Act recovery and resolution of insurance companies (*Wet herstel en afwikkeling van verzekeraars*) is intended to abolish the existing transfer regime for insurance companies under the Intervention Act and to introduce a resolution regime for insurance companies in Part 3a Wft. *See* paragraphs 2.2 and 2.3 of chapter 3.

185 Van Es 2012 (GS Vermogensrecht), para. 20-21, who claims that acquisition under universal title through division of a company under the BW or through approval of a transfer plan under the Wft is an 'atypical' type of acquisition under universal title. Van Es refers to Verstappen 1996, p. 33-34 for the discussion of the division as special type of acquisition ('overgang heeft meer kenmerken van een bijzondere wijze van overgang van goederen en schulden waarvoor geen levering, schuld-, dan wel contractsoverneming is vereist') and to De Serière 2012, p. 6, who considers the acquisition through approval of the transfer plan under section 3:159l, 3159p and 3:159s Wft, acquisition under particular title by operation of law. *See also* Van den Hurk & Strijbos 2012, para. 6 and footnote 41; Verstappen 2002, p. 103-104.

of a bank under resolution can pass promptly and *en bloc*.[186] The SRM Regulation requires the SRB's resolution scheme to provide for the details on the application of the resolution tools, including, where relevant, a specification of the instruments, assets, rights, and liabilities to be transferred by a national resolution authority to a private sector purchaser, bridge institution or asset management vehicle.[187] Although this is not explicitly required by Part 3a Wft, it is assumed here that if the business of a bank under resolution is divided, DNB's decision on the application of the transfer tools, similar to a proposal on a division in accordance with section 2:334f(2) BW, also includes a description on the basis of which can be determined which part of the bank's business passes and which part stays behind.[188]

Part 3a Wft also does not provide what happens with assets, rights, and liabilities which would not be allocated by DNB's decision in such a case because certain assets were, for instance, not known at the time the decision was taken. It is the present author's view that the application of section 2:334s BW by analogy may provide a solution in that case. Accordingly, these assets would be allocated to the recipient company or companies if the whole business of the bank under resolution is acquired by another

186 *Cf.* Explanatory Notes to the Draft Intervention Act (*Kamerstukken II* 2011/12, 33059, no. 3), p. 48: '[i]n het voorstel is gekozen voor een regeling die met zich brengt dat de deposito-overeenkomsten waarop het overdrachtsplan betrekking heeft, snel en eenvoudig kunnen overgaan op de overnemer, zonder dat toestemming of medewerking van derden nodig is en zonder dat per actief of passief afzonderlijk de voor levering of contractsoverdracht benodigde formaliteiten behoeven te worden vervuld. Medewerking van elke individuele depositohouder zou in de situatie waarop het wetsvoorstel betrekking heeft ondoenlijk zijn. Het zou te veel tijd vergen. Bovendien zou de situatie waarin een deel van de depositohouders wel toestemming geeft en een ander deel niet, onpraktisch zijn.'

187 Articles 23, 24(2), 25(2) and 26(2) SRM Regulation.

188 *Cf.* Section 2:334f(2)(d) BW; Article 3(2)(h) Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC) (OJ L 378, 31.12.82, p. 47-54). The Explanatory Notes to the Draft Law concerning the division of a company (*Kamerstukken II* 1995/96, 24702, no. 3), p. 10 note that '[h]oe gedetailleerd de beschrijving moet zijn om de vereiste mate van nauwkeurigheid te bieden, zal afhangen van de omstandigheden van het geval. Soms zullen vermogensbestanddelen precies moeten worden aangeduid («de grond met opstallen, plaatselijk bekend als ..., kadastraal bekend als ...»; «de rekening-courantverhouding met ...»), maar in andere gevallen kan een meer globale omschrijving voldoende zijn, bijvoorbeeld een aanduiding van vermogensbestanddelen naar de plaats waar zij zich bevinden of de aard ervan («alle vorderingen op handelsdebiteuren»). Als bepaalde vermogensbestanddelen overgaan op de ene verkrijgende rechtspersoon en het overige vermogen op de andere, zal ten aanzien daarvan vaak met die aanduiding («het overige vermogen») kunnen worden volstaan. De beschrijving moet zodanig zijn dat niet alleen de betrokken rechtspersonen zelf maar ook belanghebbende derden aan de hand daarvan kunnen vaststellen waar het vermogen terecht zal komen.' For a discussion of this requirement, *see* Verstappen 2002, p. 104-108; Wessels 1997b, p. 176; Buijn 1996, p. 54-55.

party or parties, who would then also made be jointly and severally liable for liabilities that are not allocated, and to the bank under resolution if only a part of the business passes.[189]

It is a general rule of Dutch law that companies are prohibited from entering into a merger or being party to a division during bankruptcy or suspension of payments procedure.[190] The Dutch legislature created an exception to this rule if the company being divided during such a procedure becomes the sole shareholder of the newly established company.[191] The legislative history explicitly indicates that a division is an excellent means to ensure a separation of the viable parts of a failing company's business so that these parts are not involved in the liquidation.[192] Some scholars, however, maintain that the legislature's view on the use of a division in bankruptcy and suspension of payments procedures is too optimistic and several requirements to the division create obstacles to the use of the concept.[193] These include the requirement that the recipient companies and the company being divided remain liable for the performance of the latter company's obligations at the time of the division, and the procedural requirements that a detailed proposal to the division has to be written. This proposal is then filed at the commercial register and the filing is published in a newspaper.[194]

By contrast, to enable the resolution authority to act rapidly, the application of the transfer tools under Part 3a Wft derogates on important points from the BW. Section 3a:6 Wft provides, for example, that the resolution authority's decision on the transfer supersedes any approval, notification,

189 *Cf.* Buijn 1996, p. 90-95; Wessels 1997b, p. 185; Article 3(3) and 22(1) Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC) (OJ L 378, 31.12.82, p. 47-54).

190 Sections 2:310(6) and 2:334b(6) BW.

191 Section 2:334b(7) BW. The transferee must also be a public limited liability company (*naamloze vennootschap*) or private company with limited liability (*besloten vennootschap*).

192 Explanatory Notes to the Draft Law concerning the division of a company (*Kamerstukken II* 1995/96, 24702, no. 3), p. 6: '[e]lke splitsing in faillissement of surseance te verbieden, zou tot een te starre opzet leiden. Splitsing is juist een bij uitstek geschikt middel om van een rechtspersoon in financiële moeilijkheden levensvatbare onderdelen af te scheiden, zodat deze niet in de deconfiture worden meegesleurd. Vanzelfsprekend moet de afscheiding wel zodanig geschieden, dat schuldeisers daardoor niet worden geschaad. Artikel 334b lid 7 beperkt de splitsing in faillissement of surseance daarom tot rechtspersonen die bij de splitsing enig aandeelhouder worden van alle verkrijgende rechtspersonen. Het verlies dat de rechtspersoon door de overgang van (een deel van) haar vermogen lijdt, wordt in dat geval gecompenseerd door de aanwas die zij geniet doordat zij de aandelen in de verkrijgende vennootschappen verwerft. Per saldo blijft de vermogenspositie van de splitsende rechtspersoon gelijk.' *See* Slagter 2000, p. 86; Joosen 1998, p. 40; Buijn 1996, p. 29-30. *See also* Raaijmakers 1980, p. 122.

193 Slagter 2000, p. 86-88; Joosen 1998, p. 39-45; Van Zadelhoff 1998, p. 151-152.

194 Sections 2:334h and 2:334t BW. *See* Slagter 2000, p. 86-88; Joosen 1998, p. 39-45; Buijn 1996, p. 29-30; Van Zadelhoff 1998, p. 151-152.

or other procedural requirements that would otherwise apply by virtue of law, articles of association, or internal regulations.[195] The requirements include the requirements of the BW on the approval of the general meeting of shareholders,[196] to register newly established companies in the commercial register[197] and the rights of creditors to state their opposition to a proposed merger or division.[198] Hence, although the effects can be similar under section 3:80(2) BW, from a procedural point of view this new type of acquisition under universal title clearly distinguishes itself from the division and merger under the BW.

The question arises what can exactly be included in DNB's decision on the application of the transfer tools.[199] According to the relevant provisions in Part 3a Wft, DNB has the authority to decide on the passing (*overgang*) of instruments of ownership as well as assets and liabilities.[200] When presenting the Draft Intervention Act,[201] the Dutch government stated that the term 'assets and liabilities' used in the provisions in the Wft on DNB's transfer plan for a failing bank can include 'all transferable rights and liabilities' (*alle overdraagbare rechten en verplichtingen*), whether they are included in the bank's balance sheet or not.[202] Section 3:83 BW provides in this context that ownership, limited rights and claims are transferable, unless this is precluded by law or the nature of the right. The transferability of claims can be contractually excluded by the creditor and debtor and other rights are only transferable if this is provided by law. According to the Dutch doctrine, however, the fact that a legal relationship is non-transferable under section 3:83 BW does not necessarily mean that it cannot be acquired under universal title.[203] It has been argued, for instance, that the contractual non-transferability of a claim in accordance with section 3:83(2) BW or restrictions in the power of disposition (*beschikkingsbevoegdheid*), including for shares under section 2:87 BW, does not preclude acquisition under universal title.[204]

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195 *See* Explanatory Notes to the Draft Financial Markets Amendment Act 2017 (*Herstelwet financiële markten 2017*, *Kamerstukken II* 2016/17, 34634, no. 3), p. 13-15; Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 80-82. *Cf.* Recitals 120-124 and Articles 63(2) and 119-122 BRRD.

196 *Cf.* e.g., Section 2:107a BW.

197 *Cf.* Section 2:69 BW.

198 *Cf.* Sections 2:316, 2:334k and 2:334l BW.

199 *Cf.* Articles 24-26 SRM Regulation; Sections 3a:28-43 Wft.

200 Sections 3a:28, 3a:37 and 3a:41 Wft.

201 *See* paragraph 2.2 of chapter 3.

202 Explanatory notes to the Draft Intervention Act (*Kamerstukken II* 2011/12, 33059, no. 3), p. 12.

203 Zaman 2004, p. 128; Verstappen 1996, p. 249-250.

204 Verstappen 1996, p. 249-250.

The general rule is that assets, liabilities as well as legal relationships qualifying as proprietary rights (*vermogensrechtelijke rechtsverhoudingen*),[205] including certain agreements,[206] can be acquired under universal title.[207] Thus, in principle, non-proprietary legal relationships (*niet-vermogensrechtelijke rechtsverhoudingen*) do not pass to another party under universal title.[208] Examples of these relationships discussed in the literature include the right of the company to appointment a director or a supervisory director (*benoemingsrecht*), a company's two-tier board structure (*structuurregime*)[209] and a running power of attorney (*volmacht*) which is not connected to a specific asset.[210] Moreover, certain legal relationships cannot be acquired under universal title because of their 'person-related nature'.[211] As is further discussed in paragraph 5.2.2, an example is all monies security (*bankzekerheid*) for which the parties contractually agreed that it is person-related.[212] It is also a general rule of Dutch private law that a person who succeeds to the possession of another under universal title continues an already running prescription (*lopende verjaring*)[213] and this person also succeeds to the transferor's rights of possession (*bezit*) and detention (*houderschap*).[214] Also, an agreement's legal effects bind a successor under universal title, unless the agreement provides otherwise.[215]

It is less clear which public-law legal relationships, including licenses, can be acquired under universal title. According to Verstappen, the starting point is that if a license can be acquired under particular title, it can also be acquired under universal title. Nevertheless, the nature of the license or the law may provide whether a specific type can be acquired under universal

205 *Cf.* Section 3:6 BW, which defines 'proprietary rights' (*vermogensrechten*) as '[r]echten die, hetzij afzonderlijk hetzij tezamen met een ander recht, overdraagbaar zijn, of er toe strekken de rechthebbende stoffelijk voordeel te verschaffen, ofwel verkregen zijn in ruil voor verstrekt of in het vooruitzicht gesteld stoffelijk voordeel'.

206 *See* Verstappen 1996, p. 267-269.

207 *See* Verstappen 2002, p. 64-65; Verstappen 1996, p. 267 et seq.

208 *See* Zaman 2004, p. 131; Verstappen 2002, p. 64-65; Wessels 1997b, p. 179; Verstappen 1996, p. 149-150.

209 Section 2:164 BW.

210 Schoonbrood & Klaver 2017, p. 313-322 (on the two-tier board structure) and Zaman 2004, p. 131-132; Wessels 1997b, p. 179 (on the right of appointment and power of attorney). *See also* Memorandum of Reply to the Draft Law concerning the division of a company (*Kamerstukken II* 1995/96, 24702, no. 6), p. 4 & 15-16.

211 Zaman 2004, p. 133; Verstappen 2002, p. 67-71; Wessels 1997b, p. 182-183. *See also* Verstappen 1996, p. 279.

212 Asser/Van Mierlo 3-VI 2016, para. 55; Overes, in: Raaijmakers et al. 2005, Section 2:334j BW, para. 5, both referring to Explanatory Notes to the Draft Law concerning the division of a company (*Kamerstukken II* 1995/96, 24702, no. 6), p. 9-10.

213 Section 3:102 BW.

214 Section 3:116 BW. *Cf.* Wessels 1997b, p. 177.

215 Section 6:249 BW.

title.[216] For a banking license a specific rule in the Wft applies, which indicates that such a license is closely connected to the whole banking business (it is *persoonlijk)* and cannot be acquired under particular title.[217] However, according to the legislative history of this section, a banking license passes by operation of law to the acquiring party who acquires the bank's business under universal title, such as through a merger under the BW. It adds that the license may have to be assessed again and amended if changes are made to the activities that are acquired by the party.[218] The present author assumes that this rule also applies if the application of the transfer tools results in a merger of the bank under resolution with another company or split-off of activities for which a license was granted.

### *5.1.3 Application of the transfer tools under German law*

The German legal doctrine makes a distinction between the singular succession (*Singularsukzession*, also called *Einzelrechtsnachfolge*) and the universal succession (*Universalsukzession*, also called *Gesamtrechtsnachfolge*).[219] The former refers to the transfer of a particular asset, liability or legal relationship in accordance with the applicable requirements of the BGB, such as an agreement on the assignment of a claim between the former and the new creditor under section 398 BGB.[220] In case of universal succession, by contrast, assets, liabilities, and legal relationships pass as a whole ('*zum Vermögen gehörenden Gesamtheit von Rechten und Plichten*'[221]) to another party *uno actu*. It includes a whole estate or a specified part thereof.[222] This type of transfer is only possible if explicitly provided for by law. A traditional example is universal succession under the law of inheritance (*Erbrecht*). Under the Transformation Act (*Umwandlungsgesetz*, UmwG), a merger (*Verschmelzung*) or division (*Spaltung*) of a company also entails universal succession.[223] Hence, universal succession under German law shows strong similarity to acquisition under universal title under Dutch law.

The literature indicates that in insolvency procedures under the InsO, the fact that certain legal relationships cannot be easily transferred can form a substantial obstacle to an asset-deal restructuring (übertragende *Sanierung*). For example, third party may not be able to acquire a contractual position without the cooperation of the counterparty, such as in case of a debt

216 Verstappen 2002, p. 74-75 & 131-134. *See also* Zaman 2004, p. 136-139; Wessels 1997b, p. 182; Verstappen 1996, p. 199-206.
217 Section 2:1 Wft.
218 Explanatory Notes to the Draft Wft (*Kamerstukken II* 2005/06, 29708, no. 19), p. 427.
219 Lieder 2015, p. 33-37.
220 *See* Lieder 2015, p. 112.
221 Lieder 2015, p. 716.
222 *See* Lieder 2015, p. 716-719.
223 *See* Lieder 2015, p. 36-37 and 714-718.

assumption (*Schuldübernahme*) under section 415 BGB.[224] Since the reform of the InsO in 2012, the InsO explicitly provides that all measures allowed under company law can be included in an insolvency plan,[225] such as a merger or division under the UmwG.[226] Consensus exists that the possibility to use (partial) universal succession in an insolvency plan procedure offers many practical advantages.[227] It is a matter of debate, however, whether the provisions of the UmwG on creditor protection are applicable in such a procedure. The provisions include the rule that involved companies are jointly and severally liable for the obligations of a divesting company at the time of a division.[228] It has been argued that such applicability makes the usefulness of the measures under the UmwG questionable.[229]

Against this background, the German bank resolution rules that have been introduced since 2008 have offered authorities more and more flexibility in the implementation of the measures. As discussed in chapter 3,[230] since 2009 section 8a FMStFG provides that a bank's[231] risk exposures[232] and non-core business divisions can be transferred to a winding-up agency in two

224 Thole 2015, p. 100; Bitter 2010, p. 155-161; Bitter & Laspeyres 2010, p. 1157-1158. *See also* Eidenmüller & Engert 2009, p. 542. The issue is also recognised in the legislative history of the InsO (Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur weiteren Erleichterung der Sanierung von Unternehmen, Deutscher Bundestag, Drucksache 17/5712, 4 May 2011, p. 30): '[i]n der Rechtswirklichkeit ist die übertragende Sanierung aber nicht immer ein gleichwertiger Ersatz für die Sanierung des Unternehmensträgers durch einen Insolvenzplan. [...] Das insolvente Unternehmen kann Inhaber von Rechtspositionen sein, die nicht oder nur mit Schwierigkeiten und Kosten übertragen werden können; Beispiele sind Lizenzen, Genehmigungen und günstige langfristige Verträge.'

225 Section 225a(3) InsO.

226 *See* Thole 2015, p. 100-102; Bork 2012a, para. 15.16; MünchKomm-InsO/Eidenmüller 2014, Section 225a, para. 23 and 97-98. Section 123 UmwG distinguishes three types of divisions: a split-up (*Aufspaltung*), spin-off (*Abspaltung*) and hive-down (*Ausgliederung*). In the first case assets of the transferring company are divided and the transferring company is dissolved. Both in case of a spin-off and a hive-down, a part of a company's assets is transferred but in the first case the owners of the shares in the transferring company receive shares in return while in the latter case the transferring company receives the shares in the recipient company or companies in return. Section 174 UmwG provides that another type of consideration than shares can be provided. On the universal succession and its effects under the UmwG, *see* Schmitt/Hörtnagl/StratzKomm-UmwG/Stratz 2016, Section 20 UmwG, para. 23-31; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 4-8; Froitzheim et al. 2006, p. 115-124.

227 Thole 2015, p. 100 and 103-104; Kahlert & Gehrke 2013, p. 976; Drouwen 2009, p. 1053.

228 Section 133 UmwG. *See* Thole 2015, p. 104-105 and s*ee* Kahlert & Gehrke 2013, p. 977-978, who argue that section 133 UmwG does not apply in an insolvency plan procedure, and MünchKomm-InsO/Eidenmüller 2014, Section 225a, para. 100; Bork 2012a, para. 15.16, who hold the view that the provision does apply.

229 Bork 2012a, para. 15.14.

230 Paragraph 3.2 of chapter 3.

231 *Cf.* Section 8a(2) FMStFG.

232 According to Günther 2012, p. 179 the risk positions include claims, securities, derivatives, rights and duties from loan commitments or guarantees and equity participations, together with the relevant collateral. *Cf.* Section 8(1) FMStFG.

ways.[233] It can be carried out through a legal transaction (*Rechtsgeschäft*), including the assignment of claims under section 398 BGB and debt assumption under section 414 BGB. It can also be carried out through a division under the UmwG.[234] With a view to a simplification of the procedure ('*einer Vereinfachung des Umwandlungsverfahren*' and '*Verfahrenserleichterung*'),[235] section 8a(8) FMStFG excludes several formalities and provisions that would otherwise be applicable in case of a division under the UmwG. Audit requirements are, for instance, excluded.[236] Nonetheless, a division can still be a complex procedure. The UmwG requires, inter alia, a division and takeover agreement that contains comprehensive information about the division, a shareholder resolution, and the entry of the division into the commercial register.[237]

Section 48a et seq. KWG and the KredReorg, which both entered into force in 2010, rely only to a limited extent on the framework for universal succession created by the UmwG. Section 48f KWG stated that a transfer decision of the BaFin in accordance with section 48a et seq. KWG was directed towards a transfer by way of a hive-down (*Ausgliederung*). In a hive-down one or more parts of the assets of the bank are transferred to one or more

233 Besides the establishment of a winding-up agency governed by Federal law (*Bundesrechtliche Abwicklungsanstalt*) under section 8a FMStFG, section 8b FMStFG provides that a winding-up agency can be established under the laws of the states (*Landesrechtliche Abwicklungsanstalt*). The latter type of winding-up agency is not further discussed here.

234 Section 8a(1) FMStFG. *See* Pannen 2010, p. 108-109; Günther 2012, p. 193 et seq; Explanatory Notes to the draft Financial Market Stabilisation Fund Act (Gesetzentwurf der Bundesregierung, Bericht des Haushaltsausschusses, Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung, Deutscher Bundestag, Drucksache 16/13591, 2 July 2009), p. 10. Under section 8a(1)(4) FMStFG, the risk positions or business divisions can also be hedged without a transfer, for instance by way of guarantees or sub-participations (*Unterbeteiligungen*). The Explanatory Notes to the draft Financial Market Stabilisation Fund Act (Gesetzentwurf der Bundesregierung, Bericht des Haushaltsausschusses, Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung, Deutscher Bundestag, Drucksache 16/13591, 2 July 2009), p. 10 indicate that this option may for instance be of relevance if risk positions are subject to foreign law and cannot be easily transferred. *See* Günther 2012, p. 217; Wolfers & Rau 2009, p. 2405.

235 Explanatory Notes to the draft Financial Market Stabilisation Fund Act (Gesetzentwurf der Bundesregierung, Bericht des Haushaltsausschusses, Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung, Deutscher Bundestag, Drucksache 16/13591, 2 July 2009), p. 14.

236 Section 8a(8)(3) FMStFG. *Cf.* Sections 9-12 and 125 UmwG. *See* Explanatory Notes to the draft Financial Market Stabilisation Fund Act (Gesetzentwurf der Bundesregierung, Bericht des Haushaltsausschusses, Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung, Deutscher Bundestag, Drucksache 16/13591, 2 July 2009), p. 12-14.

237 *See* Section 125 in conjunction with sections 4, 6, 13 and 61, and sections 126 and 131 UmwG. *Cf.* Section 8a(8) FMStFG; Explanatory Notes to the draft Financial Market Stabilisation Fund Act (Gesetzentwurf der Bundesregierung, Bericht des Haushaltsausschusses, Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung, Deutscher Bundestag, Drucksache 16/13591, 2 July 2009), p. 13-15; Günther 2012, p. 220 et seq.

companies as a whole and the shares in the transferee entities are allocated to the transferring entity.[238] Although the regime was based on and followed in terms of its effects to a certain extent the provisions of the UmwG, the legislative history indicates that the measures were executed under sections 48f-k KWG.[239] For example, the KWG explicitly provided that the BaFin's transfer decision (Übertragungsanordnung) and the consent of the transferee entity rather than a shareholder resolution were required for the transfer to become effective.[240] Section 11 KredReorg provides that a hive-down under the UmwG can be included in a reorganization plan for a bank. The literature argues that the German legislature promoted the usefulness of the measures available under the KredReorg. It limited the liability of the transferee company for the existing obligations of the transferor to the hypothetical recovery rate the creditors would have received without the hive-down. Accordingly, the KredReorg derogates from section 133 UmwG, which requires full joint and several liability for all transferor's obligations.[241] Similar provisions were applicable for the transferor bank as well as the transferee entity after a transfer under sections 48a et seq. KWG.[242]

When the German government presented the draft SAG in 2014, it stated that the decision of the resolution authority on the application of the transfer tools results in a transfer *sui generis*.[243] While section 48a et seq. KWG referred to the UmwG several times, for a transfer under the SAG only the

238 Section 123(3) UmwG.

239 Explanatory Notes to the draft Restructuring Act (Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung (Restrukturierungsgesetz), Deutscher Bundestag, Drucksache 17/3024, 27 September 2010), p. 65. *See also* Beck/Samm/Kokemoor/Bornemann 2013, Section 48a KWG, para. 64-67 and 136-139; Schuster & Westpfahl 2011, p. 284-285; Bachmann 2010, p. 467-468. *Cf.* Sections 48a (1) and 48g KWG; Section 123(1)(3) UmwG.

240 Section 48f(1) KWG. *See* Explanatory Notes to the draft Restructuring Act (Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung (Restrukturierungsgesetz), Deutscher Bundestag, Drucksache 17/3024, 27 September 2010), p. 65-66; Bliesener 2012, p. 141; Beck/Samm/Kokemoor/Bornemann 2013, Section 48a KWG, para. 138.

241 Section 11(4) KredReorg; Bork 2012a, para. 15.14-15.15.

242 *See* Sections 48h(1), 48j(4) and 48k(3) KWG. In contrast to section 11 KredReorg, sections 48h(1), 48j(4) and 48k(3) KWG provided that the liability for the transferor bank only existed to the extent the creditors were not paid off by the transferee company and vice versa. For a discussion of the provisions, *see* Bliesener 2012, p. 142; Boos/Fischer/Schulte-Mattler/Komm-Kreditwesengesetz/Fridgen 2012, Section 48h KWG, para. 1, Secion 48j KWG, para. 22, Section 48k KWG, para. 7; Riethmüller 2010, p. 2302.

243 Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181. *See* Schillig 2016, p. 261.

resolution decision (*Abwicklungsanordnung*) and the SAG are decisive.[244] Section 113 SAG provides that the decision supersedes any statutory or contractual procedural requirement that would normally apply to the transfer, such as shareholders' resolutions.[245] This also entails that the provisions of the UmwG that aim to protect creditors involved in a merger or division do not apply to a transfer order under the SAG. An example is the provision requiring that creditors is to be provided security if they can demonstrate that the satisfaction of their claims is endangered because of the merger or division.[246] However, if the transferor receives shares in the transferee as compensation and a resolution of the transferee's shareholders is required for the capital increase, under section 109(2) SAG the transfer order is only issued once the shareholder resolution has become unchallengeable. The literature argues that this requirement in the SAG may be 'problematic', especially in a resolution procedure in which time is of the essence.[247]

The legislative history does not clarify what the effect of the application of the transfer tools is in private law terms. It is the present author's view that section 114 SAG suggests that the resolution decision effectuates a (partial) universal succession, provided that, where relevant, consent (*Einwilligung*) of the purchaser has been obtained[248] and the decision has been published.[249] The section provides that when the transfer becomes effective, the objects covered by the resolution order are transferred to the acquiring legal entity ('[m]*it Wirksamwerden der Übertragung gehen die von der Abwicklungsanordnung erfassten Übertragungsgegenstände auf den übernehmenden Rechtsträger über*'). Although the SAG requires a registration of the transfer

244 *See* Engelbach & Friedrich 2015, p. 666; Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181. *Cf.* Section 136 SAG.

245 *See* Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181; Schillig 2016, p. 261. Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181: 'Außerhalb dieses Gesetzes oder einzelvertraglich geregelte Verfahrensschritte, (z. B. arbeitsrechtlicher) Beteiligungs- und Zustimmungserfordernisse, Übertragungshindernisse, Eintragungen und Formvorschriften hindern nach den Absätzen 1 und 2 die Rechtwirkungen der Abwicklungsanordnung nicht. Die Ersetzungswirkungen des Absatz 2 sind allerdings begrenzt: Insbesondere gelten nur diejenigen gesetzlichen oder vertraglichen Beteiligungs- und Zustimmungserfordernisse als erfüllt, die sich auf die Übertragung als solche beziehen.'

246 *See* Sections 22 and 125 UmwG; Engelbach & Friedrich 2015, p. 666. *Cf.* Section 68 SAG on the no creditor worse off-principle.

247 Schillig 2016, p. 261-262.

248 Section 109 SAG; Section 183 BGB. *See* Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181.

249 Section 137 SAG.

of assets, rights, and liabilities or shares in the commercial register to ensure clarity for the markets about the resolution measures taken,[250] section 136(4) SAG indicates that such a registration only has a declaratory character.[251]

Although the prevailing opinion in German literature used to be that the rules on hereditary succession applied by analogy to the merger of a company, it is generally accepted now that a company merges or divides under the UmwG on the basis of a legal act (*Rechtsgeschäft*) and as specified in the agreement rather than by operation of law.[252] By contrast, the SAG's transfer tools are applied on the basis of an administrative act (*Verwaltungsakt*).[253] Based on section 48e KWG,[254] the SAG requires the resolution decision to specify the objects subject to the transfer (Übertragungsgegenstande), which can include shares, assets, liabilities and legal relationships.[255] Although this is not discussed in the legislative history, the present author assumes that,

250 *See* Explanatory Notes to the draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181. *Cf.* Section 48f(3) KWG; Section 171 UmwG as well as the Notes of the Bundesrat to the draft SAG (Bundesrat, Empfehlungen der Ausschüsse, BRRD-Umsetzungsgesetz, Drucksache 357/1/14, 8 September 2014), p. 13: [d]a die Abwicklungsanordnung in diesem Fall einen Übernahmevertrag zwischen über nehmendem und übertragendem Rechtsträger ersetzen kann (§ 107 Absatz 1 Satz 1 SAG-E), muss der Anordnungsinhalt – trotz der im Fall ihres Erlasses gebotenen besonderen Eile – dem Gebot der Bestimmtheit der übertragenen Gegenstände und Rechte genügen, um die Reichweite der Rechtsnachfolge und die Anteile an dem übernehmenden Rechtsträger hinreichend sicher bestimmen zu können. Deshalb wird gebeten, im weiteren Gesetzgebungsverfahren sicherzustellen, dass durch gesetzliche Vorgaben die Abwicklungsanordnung ein Mindestmaß an inhaltlichen Vorgaben enthält, um eine genaue Bezeichnung und Aufteilung aller Gegenstände und Rechte des Aktiv- und Passivvermögens zu ermöglichen. Solche Mindestvorgaben erscheinen auch deshalb von besonderer Bedeutung, als aus weislich der Einzelbegründung zu § 115 SAG-E mit Erlass der Anordnung bei den Marktteilnehmern Klarheit über die Vermögenszuordnung bestehen soll und spätere Streitigkeiten über Inhalt und Tragweite der Anordnung vermieden werden sollen'.

251 *See* Schillig 2016, p. 261.

252 *See* Rieble 1997, p. 303: '[d]er Vergleich mit dem Tod natürlicher Personen war stets nur ein Notbehelf. Denn der Verschmelzungsvertrag als Rechtsgeschäft führt nicht wie der Tod zuerst das Erlöschen des übertragenden Rechtsträgers herbei, so dass dann als gesetzliche Nebenfolge notwendig eine Universalsukzession eintreten muss, um subjektlose Rechte und Pflichten zu verhindern. Der Rechtsgeschäftswille der Parteien des Verschmelzungsvertrages ist zuerst auf die Vermögensübertragung gerichtet. Und nur weil die Universalsukzession den Rechtsträger aller Rechte und Pflichten entledigt, ihn „entleert", kann dann als logisch zweiter Schritt der Rechtsträger, der im Wortsinne keiner mehr ist, erlöschen. Die Universalsukzession ist nicht Folge der Verschmelzung, sondern ihr Ziel.' *See also* Lieder 2015, p. 722-724.

253 *Cf.* Section 136 SAG; Beck/Samm/Kokemoor/Bornemann 2013, Section 48a KWG, para. 64; Bliesener 2012, p. 141.

254 *Cf.* Boos/Fischer/Schulte-Mattler/Komm-Kreditwesengesetz/Fridgen 2012, Section 48e KWG, para. 6-9.

255 Sections 107(2) and 136(1) SAG.

similar to a transfer under section 48g KWG,[256] the principles as to what can be subject to universal succession under the UmwG also apply to universal succession under the SAG. This means, for example, that the transferee entity succeeds to the transferor's right of possession (*Besitz*),[257] and a contractually agreed prohibition of assignment under section 399 BGB does not preclude the passing of a claim under the SAG.[258] Legal relationships with a 'personal character' (*höchstpersönliche Rechte und Plichten*) are not acquired, which arguably include many types of public-law legal relationships.[259] For example, according to the literature, a banking license is granted to the bank itself and, in contrast to the view of the Dutch legislature, cannot be acquired through universal succession.[260] Section 118 SAG provides that a transferee entity may need to be granted appropriate authorization for the business it acquires.[261]

### *5.1.4 Application of the transfer tools under English law*

In contrast to Dutch and German law, under English law the concept of universal succession does not exist. Under English law, a transfer of assets, rights, and liabilities of, or a transfer of shares in a company to another company is in principle effected by agreement. For a transfer of assets, rights, and liabilities, a sale is to be arranged in accordance with the legal formalities applicable under contract and property law.[262] An administrator who aims to transfer a business in an administration procedure under the IA 1986 may want to transfer rights under loan agreements by way of

256 *See* Bliesener 2012, p. 149; Explanatory Notes to the draft Restructuring Act (Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung (Restrukturierungsgesetz), Deutscher Bundestag, Drucksache 17/3024, 27 September 2010), p. 66.

257 *Cf.* Schmitt/Hörtnagl/StratzKomm-UmwG/Stratz 2016, Section 20 UmwG, para. 83; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 24. *Cf.* Section 857 BGB.

258 *Cf.* Schmitt/Hörtnagl/StratzKomm-UmwG/Stratz 2016, Section 20 UmwG, para. 74; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 31. Cf. also Rieble 1997, p. 302-303.

259 *Cf.* Schmitt/Hörtnagl/StratzKomm-UmwG/Stratz 2016, Section 20 UmwG, para. 84-86 and 88-90; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 69 and 76.

260 Schmitt/Hörtnagl/StratzKomm-UmwG/Stratz 2016, Section 20 UmwG, para. 90; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 69. *See* Günther 2012, p. 225.

261 *Cf.* Articles 38(7) and 41(1)(e) BRRD. In contrast to section 118 SAG, section 48g(6) KWG provided that the authorization for the acquired business was granted by the transfer order. *See* Beck/Samm/Kokemoor/Bornemann 2016, SAG, para. 129.

262 *See* Kershaw 2016, para. 2.01-2.31.

assignment. However, if the contracts contain a non-assignability clause, the assignment of the rights under the contracts will be ineffective in the sense that it does not provide the assignee any rights against the borrower or will only be effective with the consent of the latter contracting party.[263] This is, according to the literature, justified by the importance of private autonomy in English law.[264]

English law does not provide for a statutory mechanism to effectuate a merger or acquisition by operation of law if required board and shareholder approvals have been obtained and documents have been filed. This contrasts with the Dutch and German statutory merger and acquisition regimes.[265] However, a merger or division of a company and other types of reorganizations can take place through a scheme of arrangement under the CA 2006.[266] As noted in paragraph 4 of chapter 5, under the Act the court may sanction a scheme if a majority in number representing 75 percent in value in each relevant class of creditors or shareholders approved it.[267] The court also assesses the fairness and reasonableness of the scheme.[268] After the delivery of the court order to the Companies Register, the scheme is binding on all shareholders and creditors who voted on the scheme.[269] Thus, if the scheme provides for a transfer of the shares in the target company to a bidder and the scheme becomes legally effective, the bidder becomes 100 percent shareholder even though some of the former shareholders voted against the scheme.[270] For mergers and divisions of public companies through a scheme and cross-border mergers additional requirements are to be met, but they remain court-controlled processes.[271] If a scheme is used to effect a transfer of a company or its business as a whole or in part to another company, section 900 CA 2006 may be relevant. The section provides the court specific powers to effectuate the measures, including the power to transfer the property and liabilities of any transferor company, in which case the property and liabilities are transferred by virtue

263 *See Helstan Securities Ltd v Hertfordshire CC* [1978] 3 All E.R. 262; Peel 2015, para. 15.050; Kershaw 2016, para. 2.17; Barratt 1998, p. 52.
264 Bork 2011, para. 12.30.
265 *See* Kershaw 2016, para. 2.33.
266 *See* Kershaw 2016, para. 2.33.
267 Section 899 CA 2006.
268 See paragraph 4 of chapter 5 and *see* Payne 2014a, p. 73-78.
269 Section 899(4) CA 2006. *See also* Kershaw 2016, para. 2.63.
270 *See* Payne 2014a, p. 87; Kershaw 2016, para. 2.35.
271 Part 27 CA 2006 applies to mergers and divisions of public companies through a scheme of arrangement. For a discussion, *see* Kershaw 2016, para. 2.68-2.70. Cross-border mergers are governed by the Companies (Cross-Border Mergers) Regulation 2007. *See* Kershaw 2016, para. 2.71-76.

of the order.[272] Nevertheless, in such a case the court order cannot override the contractual rights of a third party.[273]

The legislative history of the BA 2009 explicitly indicates that the above-mentioned general private law framework and the framework created by Part 7 of the FSMA 2000 are not considered appropriate legal frameworks for transferring shares in or the business of a failing bank. They may not always enable quick transfers.[274] The banking business transfer scheme under Part 7 FSMA 2000 can be used to transfer the whole or a part of the business of a bank to another legal entity *en bloc* by court order.[275] However, the FSMA 2000 requires that a strict procedure is followed, including the hearing of any person who believes that he would be adversely affected by the transfer.[276]

Under the BA 2009, the BoE can make a share transfer instrument and a property transfer instrument. The former instrument effectuates a transfer to a private sector purchaser or a bridge institution of securities specified in the instrument and falling within the classes of securities listed in section 14 BA 2009, such as shares, debentures, and warrants.[277] The property transfer instrument is used to effectuate a transfer of some or all the specified prop-

272 Section 900 CA 2006.

273 Davies & Worthington 2016, para. 29-12; Kershaw 2016, para. 2.67, all referring to the case *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014. In this case, the House of Lords held that without the consent of the employee the employee's contract could not be transferred to another company by the court under the Companies Act 1929.

274 I. Pearson, comments on Banking Bill, Clause 10, Public Bill Committee, 6 November 2008 argued that: '[t]he means to transfer the ownership and business of deposit takers already exists but commercial transfer mechanisms are not appropriate for dealing with failing banks. They are often too slow and do not provide sufficient certainty for parties involved in the transaction. The same is true of the part 7 procedure in the Financial Services and Markets Act 2000. The private sector purchaser tool in the clause provides for swift and certain transfer of some or all of the banking business from a failing bank to a private sector purchaser.'

275 Section 106 and 111 FSMA 2000. *See also* Lord McIntosh of Haringey, comments on Financial Services and Markets Bill, Amendment no. 202, Column 202, 21 March 2000, who noted that '[t]he Committee will wish to note that the problems that are addressed by this part are specific to the insurance and banking industries. […] It might be helpful if I clarify that we are talking about transfer of a business from one company to another — often, though not always, when two companies within a group are being restructured. It is not directly linked to mergers and take-overs, where the ownership of the company may change, although where a take-over has occurred the new parent company may subsequently decide to amalgamate or restructure the business of its subsidiaries. Another situation where such transfers occur is when a company is failing and, in order to protect the interests of its creditors or customers, another company agrees to take over part of the business of the failing firm. […] It will be for the courts to decide whether to sanction a business transfer.'

276 Section 110(1) FSMA 2000.

277 Sections 11-12, 14-15 BA 2009.

erty, rights or liabilities to a private sector purchaser, bridge institution or asset management vehicle.[278]

Although the BA 2009 provides which types of instruments are considered 'securities' that can be transferred with a share transfer instrument,[279] it does not provide a definition of the term 'property'.[280] It is the present author's view that the definition of the term 'property' in English general insolvency law may be relevant in this context. Under the IA 1986 it has a broad meaning and includes

> 'money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.'[281]

According to case law, rights or interests are considered 'property' if they are 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability',[282] to which definition Goode adds the element 'capable of possessing realisable value.'[283] Thus, to determine whether it is 'property' under the IA 1986, one has to determine:

> 'whether the right is of a kind having a value which is realizable by the insolvent company, as opposed to a right of a kind which is of value only to the company itself. Where the right is truly non-transferable in the sense that it is of a kind having value only in the hands of the company in liquidation and cannot be sold or otherwise disposed of for value, then it is not property for the purposes of the Insolvency Act.'[284]

The literature notes it was on this ground that the Court of Appeal ruled that a secure period tenancy cannot be considered 'property' under the IA 1986 as it is by its nature personal to the tenant and cannot be realized by the trustee for the benefit of the creditors.[285] Hence, the English doctrine makes a distinction between things that are considered 'purely personal to

278 Sections 11-12ZA, 33 BA 2009.
279 Section 14 BA 2009.
280 *Cf.* however section 35 BA 2009 on 'transferable property', which states that the property, rights and liabilities that can be transferred include those acquired or arising between the making of the instrument and the transfer date, rights and liabilities arising on or after the transfer date in respect of matters occurring before that date, property in another jurisdiction, and rights and liabilities under the law of another jurisdiction or under enactment.
281 Section 436 IA 1986.
282 *National Provincial Bank Ltd v Hasting Car Mart Ltd* [1965] A.C. 1175.
283 Goode 2011, para. 6.07.
284 Goode 2011, para. 6.09
285 *City of London Corporation v Bown* [1990] 22 H.L.R. 32; Goode 2011, para. 6.14.

the company' and things that are not to ascertain what is property.[286] It is the present author's view that these analyses of the concept of property may be relevant to determine what is considered 'property' under the BA 2009.

It cannot be inferred from the BA 2009 that general private law requirements for a transfer of shares or assets, rights, and liabilities apply to the transfers under the BA 2009. It is the present author's view that the BA 2009 instead provides for its own regime to transfer property, rights, and liabilities or shares and other instruments, and derogates from the legal framework normally applicable to such transfers.[287] It gives the resolution authority flexibility in applying the transfer tools. For example, the BA 2009 explicitly provides that the transfers take effect despite any restriction arising by virtue of contract or legislation or in any other way. Such a restriction includes any restriction relating to what can and cannot be assigned and to a requirement for consent.[288] The transfers take effect by virtue of the instrument of the resolution authority and in accordance with its provisions as to the timing or other ancillary matters.[289] According to the Explanatory Notes, it means that the transfer takes place by operation of law.[290] The BA 2009 provides that the resolution authority can make additional provisions to specify the effects of the transfers. For example, both types of instruments may provide that the transferee is treated as the same person as the transferor, and that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. Also, legal proceedings that relate to something transferred may be required to be continued in relation to the transferee, and the terms of a trust on which property or shares that are transferred are held may be removed or altered.[291] Under section 36 BA 2009 the property transfer instrument may provide that the transfer is to be treated as a succession and that contracts of employment are continued. Accordingly, contracts entered into by the transferor can be easily continued by the transferee.[292]

The BA 2009 contains a specific provision on the effect of the application of a property transfer instrument on licenses. The starting point is that a license, which includes permission and approval and any other permis-

286 Goode 2011, para. 6.09 and 6.14, referring to the analysis in Penner 2000.
287 *Cf.* Davies & Dobler 2011, p. 215: '[t]he SRR is an 'administrative' rather than 'judicial' process; the Bank of England does not need court approval to exercise its transfer powers and can do so once the SRR has been triggered simply by issuing a written transfer document (the 'transfer instrument'). The transfer instrument sets out the terms of the transfer and the time at which the transfer becomes automatically effective.'
288 Sections 17(3) and 34(3) BA 2009.
289 Section 17(2) and 34(2) BA 2009.
290 Explanatory Notes BA 2009, p. 8, para. 53.
291 Sections 17(5), 18, 34(7)-(8) and 36 BA 2009.
292 *Cf.* Sections 18 and 36 BA 2009; Explanatory Notes BA 2009, p. 8, para. 54-57 and p. 12, para. 93-101.

sive document in respect of anything transferred, continues to have effect despite the transfer. The instrument may divide responsibility for exercise and compliance between the transferor and transferee. Nevertheless, the BoE also has the power to determine that a license is discontinued.[293]

## 5.2 Protection against cherry-picking

### *5.2.1 Introduction*

This paragraph takes a detailed look at the 'safeguards' in a resolution procedure provided by articles 76-79 BRRD, which were in the Netherlands implemented in sections 3a:60-3a:61 Wft and in Germany in section 110 SAG. In the UK, sections 47-48 BA 2009 and the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 provide for the safeguards.

Article 76 BRRD requires in two circumstances 'appropriate protection' for six types of arrangements[294] and the counterparties to these arrangements. The arrangements are security arrangements, title transfer financial collateral arrangements, set-off arrangements, netting arrangements, covered bonds, and structured finance arrangements. Which form of protection is considered 'appropriate' for each type of arrangement is specified in articles 77-79 BRRD. For the safeguards to apply, it does not matter how many parties are involved in the arrangement and whether the arrangement is created by contract, trust, or other means, or arises by operation of law.[295] The safeguards do not affect a resolution authority's power to suspend certain contractual obligations and rights in a resolution procedure under of articles 69-71 BRRD, including the powers to temporarily restrict the enforcement of security interests and temporarily suspend termination rights.[296]

293 Section 37 BA 2009.

294 It is worth noting that the English and Dutch language versions of articles 76-79 BRRD use the terms 'arrangements' and 'agreements' inconsistently. For example, in the English version, the heading of article 77 BRRD is 'Protection for financial collateral, set off and netting agreements' (emphasis added), while the article itself and the other four articles in the BRRD use the term 'arrangements'. In the Dutch version of the articles, including article 76(2) BRRD, the terms 'zekerheidsregelingen', 'financiëlezekerheidsovereenkomsten', 'verrekeningsovereenkomsten', 'salderingsovereenkomsten' and 'gestructureerde financieringsregelingen' (emphasis added) are used. This makes the scope of article 76(3) BRRD unclear because the paragraph provides that the 'appropriate protection' requirement under article 76(2) BRRD is applicable 'ongeacht het aantal partijen bij de regelingen en ongeacht of de regelingen: a) bij overeenkomst, trust, of andere middelen zijn opgezet, dan wel van rechtswege automatisch zijn ontstaan' (emphasis added). The German language version, by contrast, seems to be more consistent in those cases by only using the term 'Vereinbarungen'.

295 Article 76(3) BRRD.

296 For a discussion of the resolution powers provided by articles 69-71 BRRD, *see* Haentjens 2017, para. 7.86-99; Garcimartín & Saez 2015, p. 341-343.

The first case in which the safeguards apply is a transfer of some but not all assets, rights, and liabilities of a bank under resolution, a bridge institution or an asset management vehicle to another entity. In such a case, in principle, a resolution authority cannot selectively choose or 'cherry-pick' which assets, rights, and liabilities falling within one of these types of arrangements are transferred and which stay with the residual entity. If the safeguards are applicable, the resolution authority should either transfer all linked contracts within a protected arrangement or leave them all behind.[297] Accordingly, a counterparty does not run the risk that he loses the set-off or netting rights under the protected set-off or netting arrangement respectively because the transfer does not result in the splitting of claims and liabilities under the arrangement.[298] The safeguards also aim to prevent that a claim against a transferor, such as a bank under resolution, is transferred without the assets against which the transferor's liability is secured, and vice versa.[299] Hence, they aim to minimize uncertainty as to whether a counterparty of the bank under resolution can still exercise his security rights under the protected security arrangement after the transfer.

Similar safeguards apply if the resolution authority uses its power to cancel or modify the terms of a contract to which the bank under resolution is a party, or substitute the transferee entity as a party, as specified in article 64(1)(f) BRRD. With this power, the authority may, for example, amend the terms and conditions of an agreement or substitute the transferee as a party to a contract so as to enable the transferee to operate the transferred business. However, under articles 76-79 BRRD, a resolution authority cannot,

297 Recital 95 BRRD. The safeguards closely resemble the safeguard provided by section 2:334j BW, which protects creditors involved in a division of a company by requiring that a legal relationship to which the company is a party may in principle only be transferred in its entirety. However, in contrast to the BRRD, the section allows an exception to the rule by a separation of the legal relationship on a proportional basis if the relationship is connected to assets, rights, and liabilities that are transferred to several transferees or it is also connected to assets, rights, and liabilities that remain with the transferor. According to the legislative history (Explanatory Notes to the Draft Act on the amendments to the BW and several other acts regarding the act on the division of a company (*Kamerstukken II* 1995/96, 24702, no. 3), p. 12-13), this means, for instance, that a building maintenance agreement can be split up into two agreements if two transferees acquire a transferor's building. Similarly, under section 93 BGB, assets cannot be separated from their 'essential parts' (*wesentlichen Bestandteile*). This means, according to Lieder 2015, p. 729, that in case of a division of a company a building is to be transferred to the same transferee as the plot on which it is built.

298 Article 77 BRRD. *Cf.* Zerey/Fried 2016, part 3, section 17, para. 49; Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 113; Explanatory Notes to the Draft Financial Markets Amendment Act 2015 (*Wijzigingswet financiële markten 2015*, *Kamerstukken II* 2013/14, 33918, no. 3), p. 20-22; Rank & Diamant 2014.

299 Article 78 BRRD. *Cf.* Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 115.

for instance, cancel or modify rights and liabilities under a protected set-off arrangement if the parties then lose their set-off rights, or cancel or modify a security arrangement if this means that the debt is no longer secured.[300]

*Contravening the restrictions*
It cannot be immediately inferred from the BRRD what happens if a decision of a resolution authority on the application of the transfer tools is not in accordance with the specific forms of protection for the arrangements required by articles 77-79 BRRD.

Conversely, section 3a:61(6) Wft explicitly provides that a transfer, termination or modification in conflict with the protection required by that section is not void or voidable. According to its legislative history, the structures of the relevant parts of the BRRD and Part 3a Wft suggest what are the implications if a transfer order does not protect arrangements in the specific forms required by articles 77-79 BRRD and section 3a:61 Wft. In such a case, one should rely on the general rules of article 76 BRRD and section 3a:60 Wft.[301] The general rule of the former article is that there has to be some form of protection for the arrangements and the counterparties to the arrangements. Section 3a:60 Wft requires that the rights arising from the arrangements are not affected. As can be inferred from the Explanatory Notes to the Draft Part 3a Wft, this means, for instance, that parties should have the opportunity to exercise their set-off rights under a protected set-off arrangement or security rights under a protected security arrangement. The partial transfer, termination or modification itself is not void or voidable.[302]

Three sections of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 contain more detailed provisions on the consequences of a breach of its safeguards for the above-mentioned arrangements. The sections exist 'to provide certainty to the market as to the outcome should the safeguards be inadvertently contravened.'[303] Section 10 provides for the consequences if the resolution authority exercises its powers to cancel or modify the terms of an arrangement, or to substitute the transferee as a party. In such a case, the partial property transfer is void in so far as it is made in contravention of the safeguards that the rights or liabilities under a protected arrangement may not be terminated or modified in the exercise of these powers. Section 11 sets out the consequences if the authority

300 Articles 77(1) and 78(1) BRRD.
301 Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 112 and 117.
302 Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 117.
303 HM Treasury, 'Banking Act 2009: special resolution regime code of practice', March 2017, para. 8.13-14. *See also* Gleeson & Guynn 2016, para. 14.105-107.

partially transfers assets, rights, and liabilities and the transfer contravenes the provision that the transfer may not include only some, but only all, the protected rights and liabilities under a protected set-off or netting arrangement. In that case, the transfer does not affect the exercise of the rights to set-off or net. Finally, section 12 of the Order applies if sections 10 and 11 do not apply. This may be the case, for instance, if a partial property transfer instrument contravenes the rule that the benefit of the security may not be transferred without the secured liability under a protected security arrangement.[304] Moreover, the section only applies if a person, such a creditor, considers a property transfer to be in breach of the safeguards and that as a result his property, rights or liabilities have been affected. Under those circumstances, the person may notify the resolution authority. The authority must then either take steps to remedy the breach by, for example, transferring property, rights or liabilities to the transferee, or explain why no safeguard has been contravened.[305]

Section 110 SAG does not contain a paragraph equivalent to section 3a:61(6) Wft and sections 10-12 Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009. However, literature discussing section 48k KWG may provide a solution. Until the entry into force of the SAG, section 48k KWG contained safeguards for partial transfers similar to the safeguards of articles 76-79 BRRD. According to Fridgen, under sections 134 and 139 BGB only the part of the resolution authority's decision on the partial transfer violating the statutory 'appropriate protection' requirements can be considered void.[306] The sections specify the consequences if a legal transaction violates a statutory prohibition.[307] Whether these consequences also apply in case of breach of the safeguards of the SAG is not evident from the SAG or literature.

304 *See* Gleeson & Guynn 2016, para. 14.110.

305 Section 12 Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009.

306 Boos/Fischer/Schulte-Mattler/Komm-Kreditwesengesetz/Fridgen 2012, Section 48k KWG, para. 6, who notes that: '[s]oweit jedoch Ausgliederungsgegenstände nach Abs. 2 Satz 1 oder 2 betroffen sind und nicht vollständig übertragen werden, sieht das Gesetz keine Fehlerfolge vor. In Betracht kommt hier die Annahme der Nichtigkeit wegen Verstoßes gegen ein gesetzliches Verbot entsprechend § 134 BGB, das sich i. S. v. § 139 auf diejenigen Gegenstände beschränkt, die nur insgesamt übertragen hätten werden sollen. Die partielle Übertragungsanordnung wird aber nicht insgesamt unwirksam, wenn von ihr noch weitere – von der Unwirksamkeit nicht betroffene – Ausgliederungsgegenstände erfasst sind.'

307 Section 134 BGB provides that '[e]in Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt' and section 139 BGB that '[i]st ein Teil eines Rechtsgeschäfts nichtig, so ist das ganze Rechtsgeschäft nichtig, wenn nicht anzunehmen ist, dass es auch ohne den nichtigen Teil vorgenommen sein würde.'

*Existing safeguards under EU legislation*

The safeguards of the BRRD in partial transfers of assets, rights, and liabilities build on existing insolvency law safeguards law for several types of transactions and contracts of banks under EU legislation. The Financial Collateral Directive, for instance, aims to facilitate the provision of financial collateral under so-called financial collateral arrangements of certain parties, such as repos.[308] The financial collateral may consist of financial instruments, such as shares, cash or credit claims. For example, the Directive requires that a collateral taker can use and dispose of financial collateral provided under a security financial collateral arrangement, and that title financial collateral arrangements and close-out netting provisions in financial collateral arrangements can take effect in accordance with their terms. Moreover, the Financial Collateral Directive provides that several provisions of insolvency law are to be dis-applied. A collateral arrangement and the provision of collateral under it may not be affected by the retroactive effects of a declaration of insolvency. Title transfer financial collateral arrangements now form one of the classes of arrangements listed in article 76 BRRD, while security financial collateral arrangements can qualify as security arrangements that are protected under this article. Also, article 80 BRRD requires that if the resolution authorities partially transfer assets, rights, and liabilities or use their contract modification or cancellation powers, this may not affect the operation of payment and securities settlement systems covered by the Settlement Finality Directive. Hence, these systems need to be allowed to operate unaffected, as is also required under the Settlement Finality Directive in the event of insolvency of a system participant.[309]

However, exceptions to the safeguards of articles 77-79 BRRD are allowed 'where necessary' to ensure the availability of deposits covered by a deposit guarantee scheme, which coverage the Deposit Guarantee Scheme Directive requires.[310] Authorities may transfer covered deposits without transferring the assets, rights, and liabilities that are part of the same financial collateral, set-off, netting or security arrangement. Furthermore, the BRRD allows the authorities to transfer, modify or terminate these assets, rights, or liabilities without transferring the covered deposits.[311]

308 *See* Schillig 2016, p. 381-382; Sumpter & Blundell 2016, p. 81-84. For an in-depth discussion of the Financial Collateral Directive, *see* Diamant 2015; Keijser 2006.

309 Haentjens 2017, para. 7.108; Schillig 2016, p. 380-381.

310 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173 12.6.2014, p. 149).

311 Article 77(2), 78(2) and 79(2) BRRD. *See also* Sumpter & Blundell 2016, p. 82-83.

*Delegated Regulation on partial transfers*

A Commission Delegated Regulation on partial transfers,[312] which is based on an opinion of the EBA,[313] limits the scope of the safeguards provided by articles 76-79 BRRD. It was adopted under article 76(4) BRRD to further specify the types of arrangements to which the safeguards apply. Its recital 4 indicates that the Regulation aims to enhance certainty in terms of the scope of the safeguards.[314]

Article 5 Delegated Regulation, however, allows resolution authorities to derogate from the limitations provided in the Regulation by protecting 'any type of arrangement which can be subsumed under one of the classes in points (a), (c), (d) and (f) of article 76(2) of Directive 2014/59/EU [BRRD, LJ]',[315] which are security arrangements, set-off arrangements, netting arrangements and structured finance arrangements, or 'any type of arrangements which do not fall within the scope of article 76(2) of Directive 2014/59/EU'.[316] The protection is allowed if the arrangements are 'protected in normal insolvency proceedings against a temporary or indefinite separation, suspension or cancellation of assets, rights, and liabilities falling under the arrangements under their national insolvency law including the national transposition of Directive 2001/24/EC [the Winding-up Directive, LJ].' According to recital 8, this is the case if a creditor would still benefit from the rights arising under the arrangement once an insolvency procedure is initiated, unless the whole transaction was made void under national insolvency law, and it particularly applies to security arrangements and set-off and netting arrangements.[317] It is the present author's view that the European Commission has introduced the derogation in article 5 Delegated Regulation to allow resolution authorities to comply with the principle of the BRRD that no creditor shall incur greater losses in the resolution procedure than he would have been incurred if the bank had been wound up under a normal insolvency procedure, i.e., the no creditor

312 Commission Delegated Regulation (EU) 2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council (OJ L 131, 20.5.2017, p. 15-19) ('Delegated Regulation on partial transfers').

313 European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015.

314 Recital 4 Commission Delegated Regulation on partial transfers.

315 Article 5(1)(a) Commission Delegated Regulation on partial transfers.

316 Article 5(1)(b) Commission Delegated Regulation on partial transfers.

317 Recital 8 Commission Delegated Regulation on partial transfers. *See also* European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 8.

worse off-principle.[318] The provision ensures that resolution authorities can protect security arrangements, set-off arrangements, netting arrangements and structured finance arrangements notwithstanding the limitations to the safeguards provided by the Delegated Regulation. According to the present author, it is unclear which other types of arrangements 'which do not fall within the scope of article 76(2) of Directive 2014/59/EU' the resolution authorities may prefer to protect.

The Delegated Regulation, including its article 5 and recital 8, gives rise to the questions what type of security arrangements and set-off and netting arrangements are protected by articles 76-79 BRRD. Moreover, the question arises how these arrangements are protected in insolvency procedures under national insolvency law. Sections 5.2.2 and 5.2.3 discuss these questions for Dutch, German, and English law. The sections investigate as well if other areas of national private law also offer safeguards in case of a partial transfer of assets, rights, and liabilities against a loss of security rights under a security arrangement or a loss of set-off or netting rights under a set-off or netting arrangement.

### *5.2.2 Security arrangements*

*The safeguards for 'security arrangements'*

According to article 76(2) BRRD, its 'appropriate protection' requirement is applicable to security arrangements 'under which a person has by way of security an actual or contingent interest in the assets or rights that are subject to transfer, irrespective of whether that interest is secured by specific assets or rights or by way of a floating charge or similar arrangement.'[319] Article 78 BRRD clarifies that 'appropriate protection' of these arrangements means that a resolution authority prevents

> '(a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;
> (b) the transfer of a secured liability unless the benefit of the security are also transferred;
> (c) the transfer of the benefit of the security unless the secured liability is also transferred; or
> (d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.'

318 Article 34(1)(g) BRRD. *Cf.* European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 7-8.

319 *Cf.* the similar definitions in sections 3a:1 Wft and 48(1)(a) BA 2009. The SAG does not provide for a definition of the term 'security arrangements'.

While the Dutch and UK legislatures transposed these sections of article 78 BRRD almost literally into section 3a:61(2) Wft and section 5 BA 2009 (Restriction of Partial Property Transfers) Order 2009 respectively, section 110 SAG implements this requirement into German law, under which

> 'die Übertragungsgegenstände nur zusammen mit den bestellten Sicherheiten übertragen werden [können, LJ] und können Sicherheiten nur zusammen mit den Übertragungsgegenständen, für welche die Sicherheiten bestellt sind, übertragen werden.'[320]

The above-mentioned definition in article 76(2) BRRD seems to refer to *in rem* security, i.e., security in a tangible or intangible asset of the debtor or a third party.[321] This type of security is traditionally distinguished from personal security, which the literature defines as a security in the form of a personal undertaking, typically provided by a third party, to reinforce the primary obligation of the debtor.[322] The legislative history of section 3a:61 Wft also only discusses the protection of *in rem* security, which under Dutch law typically takes the form of a pledge (*pandrecht*) or mortgage (*hypotheekrecht*), and does not mention personal security, such as suretyship (*borgtocht*) under sections 7:850 et seq. BW. Similarly, in its opinion on the safeguards provided by articles 76-79 BRRD, the EBA defines 'security rights' as

> 'any contractual arrangement that permits one party to seize or appropriate, sell or have sold assets of the other party upon the occurrence of a certain event (enforcement event), typically a default or non-payment of an obligation of that party, to use the proceeds to pay a specified liability. However, security rights can also result by virtue of law from another legal relationship without an explicit security arrangement, for example a property lease may imply a right of lien over assets of the lessee in the property.'[323] (Emphasis added)

Conversely, the first paragraph of article 2 Delegated Regulation on partial transfers uses a broader definition of the term 'security arrangements' in article 76(2)(a) BRRD by providing that these arrangements include

320 Translation by the present author: the items that are transferred can only be transferred together with the created security rights, and security rights can only be transferred together with the items for which the rights have been created.

321 This definition is based on the definition provided by Gullifer 2013, para. 1.06. *Cf.* Wood 2007a, para. 1.001 and 2.001; Ali 2002, para. 2.33-34.

322 Gullifer 2013, para. 1.06. *See also* Weber 2012, p. 7.

323 European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 8.

> '(1) arrangements stipulating guarantees, personal securities and warranties;
> (2) liens and other real securities interests;
> (3) securities lending transactions which do not imply a transfer of full ownership of the collateral and which involve one party (the lender) lending securities to the other party (the borrower) for a fee or interest payment and in which the borrower provides the lender with collateral for the duration of the loan.'

Hence, this paragraph does not only require a resolution authority to protect security financial collateral arrangements, under which security over financial collateral is typically provided to a creditor,[324] and other *in rem* security arrangements but also personal security arrangements. It means that article 78 BRRD now prevents a resolution authority in a partial transfer from modifying or terminating a personal security arrangement to which the bank under resolution is a party if the effect would be that the liability would otherwise no longer be secured.[325] Also, if another legal entity in the same group guarantees a liability of the bank, the guarantee has to be transferred to another party together with the liability.

Unclear in this context is, however, why the second paragraph of article 2 Delegated Regulation on partial transfers provides that

'[s]ecurity arrangements shall qualify as security arrangements pursuant to Article 76(2)(a) of Directive 2014/59/EU [BRRD, LJ] only if the rights or assets to which the security interest is attached or would attach upon an enforcement event are sufficiently identified or identifiable in accordance with the terms of the arrangement and the applicable national law.' (Emphasis added)

A possible interpretation is that according to this paragraph 'guarantees, personal securities and warranties' qualify as 'security arrangements' if the obligations of the principal debtor are sufficiently identified or identifiable. The better view seems to be that the term 'security arrangements' in this second paragraph only refers to *in rem* security interests, because only this type of security is typically attached or attaches upon an enforcement event to assets or rights, and that the paragraph leaves section (1) of article 2 unaffected.

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324 *Cf*. the definition of 'security financial collateral arrangements' in article 2(1) Financial Collateral Directive: 'an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established.'

325 *Cf*. Articles 64(1)(f), 76(1)(b) and 78(1)(d) BRRD.

According to the EBA, the 'appropriate protection' requirement of article 78 BRRD should not always be identical to a prohibition of separation of secured liabilities from the related collateral. It stressed in its above-mentioned opinion that the definition of 'security arrangements' provided in article 76(2)(a) BRRD significantly reduces the flexibility of resolution authorities to implement partial transfers of assets, rights, and liabilities because the definition explicitly includes floating charges.[326] Under English law, a floating charge is a security interest in a potentially constantly changing fund of assets rather than in specific assets. It attaches to the relevant assets by converting into a fixed charge upon the occurrence of an event, which may include the failure to pay the sum due under the charge.[327] Accordingly, if such a security interest extends to, for instance, all assets of the bank, it may not be possible for a resolution authority to transfer the secured liability without these assets or to transfer only a few of these assets. By contrast, the UK government noted in 2008 that it did not intend to carve out floating charges from the safeguards included in the draft version of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009. It added that, in practice, banks rarely grant such charges over all or substantially all their assets, although these types of charges may be granted if a bank receives emergency liquidity assistance from the BoE.[328] Banks create floating charges more often over a specific pool of assets, such as securities.[329]

The question arises if the above-mentioned second paragraph of article 2 Delegated Regulation on partial transfers follows the opinion of the EBA by excluding floating charges and similar security interests from the scope of the protection offered to security arrangements under articles 76 and 78 BRRD. The paragraph requires the assets to be 'sufficiently identified or identifiable'. It is the present author's view that this is not the case because the paragraph adds the phrase 'in accordance with the terms of the arrangement and the applicable national law'. In contrast to Dutch and German law,[330] English law does not require specificity of assets for the purpose of security interests at the time of the agreement. A debtor may grant a security interest over a specific asset, but a security arrangement may also cover a cluster of assets and even all present and future assets that will become

326 European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 9.

327 Gullifer 2013, para. 4.03-4.04 and 4.32-4.60.

328 HM Treasury, 'Special resolution regime: safeguards for partial property transfers', CM 7497, November 2008, para. 3.2-3.7.

329 The City of London Law Society, Transposition of the Bank Recovery and Resolution Directive, 2014.

330 *See* Thiele 2003, para. 75 and 402.

identifiable as falling within the terms of the agreement, without providing a specification.[331] According to the present author, the second paragraph of article 2 Delegated Regulation on partial transfers, therefore, does not aim to exclude floating charges under English law from the scope of the safeguards. This view seems to be supported by section 5(1) Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009, which requires the resolution authority to protect security arrangements under which 'the liability is secured against all or substantially all of the property or rights of a person'. In a resolution procedure, the resolution authority and the creditor, which is in the above-mentioned case of emergency liquidity assistance the BoE itself, may agree on termination or modification of the floating charge.

*The protection offered by national insolvency law*

The question arises which insolvency-specific privileges the creditors with *in rem* security rights enjoy in insolvency procedures under national insolvency law. As a general rule, if a company enters an insolvency procedure, the secured creditors have claims against specific corporate assets.

It can be argued that the approach taken by the BRRD to require resolution authorities to protect parties' *in rem* security rights differs from the Fw's approach to secured creditors, although these creditors are offered protection by both the resolution rules and Dutch insolvency law. In bankruptcy procedures under the Fw, creditors whose claims are secured by a pledge or mortgage over one or more assets of the debtor, in principle, take care of their own interests and the trustee is only required to respect their interests.[332] These creditors can exercise their security rights as if the procedure was not opened.[333] One exception is that the trustee can require creditors with a pledge or mortgage to perform the execution within a reasonable period and he can realize the relevant assets if the creditors have not done so within that period.[334] Similarly, in the winding-up of a company under the IA 1986, creditors whose claims are fully secured can realize their secu-

331 Goode 2017, para. 23.12; Gullifer 2013, para. 2.05-2.06, who note that an exception applies in case of contracts of sale. *See also* Wood 2007a, para. 7.005-7.012.

332 Verstijlen 1998, p. 197-198.

333 Section 57 Fw. *Cf.* Section 232 Fw, under which the suspension of payments procedure is not applicable to secured creditors.

334 Section 58 Fw. *See also* HR 20 December 2013, *NJ* 2014, 151 (*Glencore AG/Curatoren Zalco*), para. 4.6.2; HR 19 June 2008, *NJ* 2008, 222 (*Cantor/Arts q.q.*), para. 3.6.

rity to satisfy what is due and are largely unaffected by the procedure.[335] An exception applies to the position of floating charge holders. Under section 176A IA 1986 a liquidator has to make a prescribed part of the property of the company that would otherwise be available for the satisfaction of the floating charge holders available for the satisfaction of unsecured debts. He may not distribute that part to a floating charge holder except in so far as it exceeds the amount required for the satisfaction of unsecured debts.[336]

Under the InsO, by contrast, secured creditors are more involved in insolvency procedures.[337] After the creditors' meeting, the trustee rather than the secured creditor, in principle, liquidates all movable assets that are in the trustee's possession (*Besitz*) and to which the creditor has a right to separate satisfaction (*Absonderungsrecht*), such as in case of a so-called transfer of title for security purposes (*Sicherungsübereignung*). Such a security transfer allows the debtor-transferor to keep the assets in his possession while the legal title to the assets is transferred to the creditor transferee. Moreover, the trustee collects or in another way disposes of claims assigned by the debtor to secure a claim, such as in the event of an assignment for security purposes (*Sicherungsabtretung*). [338] The trustee then distributes the proceeds to the secured creditors, after deduction of the costs of determining and disposing of the assets.[339] This rule does not apply to immovable assets, which can be realized by the secured creditor as well as the trustee, and to assets which are not in possession of the trustee, such as a pledged asset which is as a general rule realized by the secured creditor himself.[340]

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335 Goode 2011, para. 8.47 and 8.49. Anderson 2017, para. 21.04 refers to *Buchler v Talbot* [2004] UKHL 9, para. 51, in which case Lord Millett explained the position of secured creditors in the following way: '[Liquidation is] not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up. As James LJ observed in In re Regents Canal Ironworks Co, Ex p Grissell (1877) 3 Ch. D. 411, 427 charge holders are creditors "to whom the [charged] property belong[s] with a specific right to the property for the purpose of paying their debts". Such a creditor is a person who "… is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property" per James LJ in In re David Lloyd & Co.'

336 The IA 1986 (Prescribed Part) Order 2003 sets out how the prescribed part is calculated. In contrast to the rights of the other secured creditors, the rights to the proceeds of a floating charge security are subject to the prior payment of expenses of the procedure as well as of preferential creditors. *Cf.* section 175(2) IA 1986.

337 Verstijlen 1998, p. 192-194.

338 Section 166 InsO. *See* MünchKomm-InsO/Tetzlaff 2013, Section 166, para. 6.

339 Sections 170-171 InsO.

340 Sections 49, 50, 165 and 173 InsO. *See* MünchKomm-InsO/Tetzlaff 2013, Section 165, para 2 and Section 173, para. 6

*The protection offered by other areas of national private law*
Can other areas of national private law also prevent that claims of parties cease to be secured in the event of a partial transfer of assets, rights, and liabilities in a resolution procedure? The sections below show that articles 76(2)(a) and 78 BRRD required transposition into the Wft, the SAG, and the BA 2009 because their safeguards are broader in scope than the protection provided under Dutch, German, and English private law, respectively.

The Explanatory Notes to the draft Part 3a Wft suggest that articles 76(2)(a) and 78 BRRD were only implemented into Dutch law to ensure that the safeguards required by the articles are applicable if a transfer in a resolution procedure involves assets and security arrangements that are governed by non-Dutch law. According to the Notes, Dutch private law provides for appropriate protection of security arrangements if the assets encumbered by a pledge or mortgage are transferred, or the bank's claim for which *in rem* security is provided is transferred to a new creditor.[341] Indeed, as a general principle of property law, the principle of *droit de suite* ensures that a debtor's/security giver's counterparty can assert his right of pledge or mortgage against a third party to which the encumbered asset is transferred.[342] Moreover, according to the Dutch doctrine a pledge and mortgage are so-called 'dependent rights' (*afhankelijke rechten*). The BW defines this term as rights that can only exist in conjunction with the claim which they secure and that follow this claim by operation of law if the claim passes to a transferee.[343] Section 6:142 BW provides that pledge and mortgage are also 'ancillary rights' (*nevenrechten*). Accordingly, if a bank's claim would be acquired by a new creditor under universal title (*algemene titel*) under section 3:80(2) BW and Part 3a Wft, in principle, this creditor automatically also receives the corresponding pledge or mortgage.[344]

Similarly, the German doctrine classifies the pledge (*Pfand*) and mortgage (*Hypothek*) that are established under the BGB as security rights which are by their nature accessory (*akzessorisch*) to the secured claim.[345] This legal nature entails that they only exist if the secured claim exists, cease to exist when the secured claim is discharged, and automatically pass to a trans-

341 Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 115-116.
342 *Cf.* Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 115; Snijders & Rank-Berenschot 2017, para. 67.
343 Sections 3:7 and 3:82 BW. *See* Achterberg 1994a, p. 297.
344 *Cf.* Section 6:142 BW; Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 115-116; Asser/Hartkamp & Sieburgh 6-II 2013, para. 257; Asser/Van Mierlo 3-VI 2016, para. 52; Achterberg 1994a, p. 297.
345 Swinnen 2014, p. 11, who refers, inter alia, to Baur & Stürner 2009, para. 36, no. 74-76 and para. 55, no. 4. *See also* Wilhelm 2010, para. 2198-2207.

feree together with the secured claim.[346] The literature calls such a security right an 'addition' (*Anhängsel*) to the claim.[347] A contractual agreement to transfer a claim without the corresponding mortgage or vice versa does not have any effect (*Wirkungslos*).[348] The BGB itself uses the term 'ancillary rights' (*Nebenrechten*) to explicitly indicate that a pledge and mortgage pass to a new creditor together with the corresponding passed claims, whether it concerns singular succession or universal succession.[349]

By contrast, the English doctrine does not recognize a concept of accessoriness of *in rem* security rights to the secured claim in the same way as the Dutch and German doctrine do. The English legal literature uses the term 'accessory' when discussing a suretyship guarantee as a type of personal security.[350] While scholars maintain that a security interest in an asset cannot exist if there is no obligation of the debtor to the creditor,[351] they do not refer to accessoriness in the context of *in rem* security rights.[352] A security interest in an asset can, in principle, be transferred without the underlying secured debt.[353] In contrast to the Dutch literature as regards Dutch law,[354] in the English literature, no doubt exists that under English law the security holder and creditor do not necessarily have to be the same person and that a security trustee can hold the security for the benefit of the secured creditors.[355] McKendrick, however, argues that a transfer of a mortgage, and presumably also of a charge, without reference to the secured debt or other obligation nevertheless carries with it by necessary implication of law a transfer of the underlying secured obligation.[356]

346 MünchKomm-BGB/Lieder 2017, Section 1153, para. 1-5; MünchKomm-BGB/Roth/Kieninger 2016 BGB, Section 401, para. 1, 3-4; MünchKomm-BGB/Damrau 2017, Section 1250, para. 1; Baur & Stürner 2009, para. 36, no. 75-76 and para. 55, no. 4. *Cf.* Sections 401, 1153 and 1250 BGB.

347 Baur & Stürner 2009, para. 36, no. 75.

348 Von StaundingersKomm-BGB/Wolfsteiner 2015, Section 1153, para. 11-12.

349 Section 401 BGB; Lieder 2015, p. 755-756; Von StaundingersKomm-BGB/Busche 2015, Section 401, para. 1, 12, 16.

350 *Cf.* e.g., McKendrick 2016, para. 30.05: 'a guarantee is […] an accessory engagement.' Also referred to by Steven 2009, p. 390-391. *Cf. also* Gullifer 2013, para. 8.02: 'a suretyship guarantee is an accessory contract, not a primary contract. That is to say, the surety's obligations are co-terminous with those of the principal debtor, his liability does not arise until the principal debtor has made default and anything which nullifies, reduces or extinguishes the liability of the principal debtor has the same effect on the liability of the surety.'

351 McKendrick 2016, para. 23.15-23.17; Gullifer 2013, para. 1.47.

352 Steven 2009, p. 390-391.

353 Gullifer 2013, para. 1.47; Wibier 2009, p. 23.

354 Meijer Timmerman Thijssen 2009, p. 133-136.

355 *Cf.* e.g., Wood 2008, para. 17.15 and *see* Wibier 2009, p. 23.

356 McKendrick 2016, para. 23.55, who refers to *Jones v Gibbons* (1804) 9 Ves 407.

The Explanatory Notes to the draft Part 3a Wft do not adequately discuss what happens with *in rem* security interests that secure a bank's liability rather than its claim if the resolution authority's decision only states that this liability is acquired by a new debtor.[357] As a general rule, section 6:157 BW provides that a pledge or mortgage granted for debt assumed by a new debtor under sections 6:155 et seq. BW remains effective, as do the other ancillary rights connected to the claim. However, a pledge or mortgage over assets that do not belong to either the former or new debtor ceases by the assumption, unless the security provider previously consented to the preservation.[358] Assuming that this provision can be applied by analogy to acquisition under universal title through the application of one of the transfer tools under Part 3a Wft, it ensures that *in rem* security rights over assets of the bank or the new debtor remain in place. Nonetheless, it does not offer this protection if the assets subject to the security interest stay behind with a third-party security provider.[359] As suggested by Rank, the resolution authority's transfer decision can offer a solution in such a case, for instance, by explicitly providing that a pledge converts into a third-party pledge for the debts of the new debtor.[360] However, relevant views in this context can also be found in the literature on the acquisition under universal title through a merger under Book 2 BW. Most legal scholars agree that section 6:157 BW is not applicable to such an acquisition under universal title because, in contrast to a debt assumption under sections 6:155 et seq. BW, the transfer of liabilities to a new debtor through a merger is not dependent on the consent of the involved creditors. They argue that a pledge, including a third-party pledge, should, therefore, remain in effect.[361] According to the present author, the same argument can be used as regards the application of the transfer tools under Part 3a Wft, because this also results in acquisition under universal title which does require the involved creditors' consent.

Similar conclusions can be drawn from a German law perspective. Section 418 BGB applies if a bank's debt rather than claim is assumed by a third party under section 414 BGB. The provision stipulates that in the interest of the security provider, a security right created for the claim against the original debtor ceases to exist. However, this rule does not apply if the party to which the secured assets belong ('*derjenige welchem der verhaftete Gegenstand zur Zeit der Schuldübernahme gehört*') has consented to the preservation of the

357 *Cf.* Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 115-116.

358 Section 6:157(2) BW. *See* Asser/Hartkamp & Sieburgh 6-II 2013, para. 304-305; Achterberg 1994b, p. 312.

359 *Cf.* Rank 2015, p. 33-34.

360 Rank 2015, p. 34. *Cf.* Asser/Van Mierlo 3-VI 2016, para. 66; Snijders & Rank-Berenschot 2017, para. 513.

361 Raaijmakers & Van der Sangen in: Raaijmakers et al. 2005, Section 2:316 BW, para. 2b; Achterberg 1994b, p. 312.

security right.[362] Assume that a German court allows application of section 418 BGB by analogy in case of universal succession through the application of a transfer tool under the SAG. Security arrangements can in such a case be protected if the new debtor acquires a bank's liability by asking the creditor or third-party security provider his consent for the preservation of the pledge. However, similar to the arguments used in Dutch literature, the prevailing opinion in German literature is that section 418 BGB is not applicable in case of universal succession through a merger or division under the UmwG. German legal scholars maintain that the divided company's creditors do not consent to the passing of the company's debt to a new debtor.[363] This view may serve as an argument that also under German law a pledge remains in existence if the corresponding liability is acquired through the application of a transfer tool under the SAG.

English law does not provide for the concept of debt assumption in the same way as Dutch and German law do and, therefore, does not contain a provision similar to sections 6:157 BW and 418 BGB. While rights under a contract can be transferred through assignment, the obligations under a contract cannot.[364] Obligations can be novated from one party to another. The original liability extinguishes and is replaced by a new liability in the same amount in favor of the new debtor.[365] It is the prevailing view in the literature that the new party should not be considered a legal successor of the former debtor and that any security comes to an end. New security rights would need to be created by the new debtor.[366] It is unclear if these standards would also apply if the BoE transfers a liability of a bank under resolution by operation of law.

From a Dutch law perspective, the implementation of articles 76(2)(a) and 78 BRRD seems to be especially relevant in the context of a pledge or mortgage that does not secure only one claim but extends to all existing and future claims of the bank against a debtor (known as *bankzekerheid* or all monies security).[367] Consensus exists in the Dutch literature that under section 6:142 BW a new creditor receives such security interest if he acquires the entire credit relationship between the original creditor and the debtor under universal title. He obtains the security interest for all claims arising from the credit relationship, provided that the original parties did

362 MünchKomm-BGB/Bydlinksi 2016, Section 418, para. 1.
363 Von StaundingersKomm-BGB/Rieble 2012, Section 418, para. 5; Rieble 1997, p. 309.
364 *See* Smith & Leslie 2013, para. 21.01; Barratt 1998, p. 51.
365 Thiele 2003, p. 151; Burgess 1996, p. 247.
366 Wood 2008, para. 10.30-10.3232; Thiele 2003, p. 152-153.
367 *Cf*. Section 3:231 BW and *see* Snijders & Rank-Berenschot 2017, para. 511; Asser/Van Mierlo 3-VI 2016, para. 47.

not explicitly provide that the security has a person-related nature.[368] It has been a matter of debate, however, if the security interest also passes by operation of law to a new creditor if this creditor obtains only one or a few claims against the debtor out of all the existing and future claims covered by the security interest. Some authors hold the view, for instance, that this is not the case because the security interest is bound to the credit relationship between the original creditor and debtor and it can only pass together with the claim if the original credit relationship is terminated.[369] The majority opinion in literature now seems to be that the new creditor can acquire the security interest, provided that it does not seek to secure the final net claim between the original creditor and debtor.[370] Nonetheless, this has not been confirmed in case law and, therefore, uncertainty still exists about the transfer of the *bankzekerheid* if not the entire credit relationship is taken over.[371] Most scholars maintain that a transfer of one or a few claims results in one security interest that belongs jointly to both the transferor and transferee.[372] To ensure that the new creditor acquires the security right if the credit relationship with the original creditor is continued, in practice the original creditor often renounces (*doet afstand*) or terminates (*zegt op*) his security rights to the extent it relates to claims that were not transferred to the new creditor.[373] In sum, if the safeguards under articles 76(2)(a) and 78 BRRD did not exist, under Dutch law uncertainty would exist as to whether the *bankzekerheid* is transferred to a successor creditor who does not take over the entire credit relationship which the bank under resolution has with its debtor.[374]

By contrast, the German literature and English literature have not fiercely debated the question what happens with a security interest that covers all existing and future claims that the debtor owes to a creditor, such as a bank, under any arrangement if a new creditor acquires a part of the secured claims. The literature indicates that a security interest is not non-transferable under German law or English law only because it secures all claims against a debtor.[375] Case law has clarified that unless otherwise agreed, under English law the security would not cover the claims of a transferee

368 Asser/Van Mierlo 3-VI 2016, para. 55; Overes, in: Raaijmakers et al. 2005, Section 2:334j BW, para. 5, both referring to Explanatory Notes to the Draft Law concerning the division of a company (*Kamerstukken II* 1995/96, 24702, no. 6), p. 9-10.

369 *See* Swinnen 2014, p. 360; Thiele 2003, p. 65, who refer to, amongst others, Vriesendorp 1988, p. 315-317.

370 Asser/Van Mierlo 3-VI 2016, para. 54, who discusses the views in literature, and Bergervoet 2014, p. 84-89.

371 *See* Asser/Van Mierlo 3-VI 2016, para. 54; Thiele 2003, p. 66.

372 *See* Swinnen 2014, p. 11, who refers, inter alia, to Derksen 2010, p. 796; Bos 2010, p. 59.

373 *See* Thiele 2003, p. 66-67.

374 *Cf.* Thiele 2003, p. 64.

375 Thiele 2003, p. 150 and 216. *Cf.* Sections 1113(2) and 1204(2) BGB, providing that a mortgage or pledge can secure existing as well as future claims.

other than the transferred claims.[376] Moreover, in principle, the all monies security continues to secure also the claims that may arise between the debtor and the transferor creditor.[377] German legal scholars agree that if only one claim passes to a new creditor while a pledge secures a large number of claims, under German law the pledge does not pass with the claim to the new creditor by operation of law if the credit relationship for which the pledge was created remains in existence. Accordingly, in such a case the pledge only follows the claim under section 1250 BGB if the new creditor acquires the entire creditor relationship from which the claim arises. [378] It is a matter of debate in German literature, however, if the transfer of one claim to several creditors leads to a division of the pledge. Hence, it is unclear whether such a transfer results in a joint security right or several independent security rights.[379]

From the perspective of German law, the safeguards provided by section 110 SAG are especially relevant in the context of the several types of security rights which are not connected to the secured claim by operation of law (*nicht akzessorische Sicherung*).[380] The land charge (*Grundschuld*),[381] the transfer of title for security purposes (*Sicherungsübereignung*) and the assignment for security purposes (*Sicherungsabtretung*) all create non-accessory security interests, although only the former has an explicit legal basis in the BGB. The latter two were developed in legal practice as alternatives to pledges and are recognized by German courts.[382] If section 110 SAG does not exist and a resolution authority decides to transfer only the secured claims to a new creditor, the non-accessory character of these security rights could cause a separation of these rights and the claims.[383]

376 Thiele 2003, p. 150; Burgess 1996, p. 249, who both refer to *Re Clark's Refriferated Transfport Pty Ltd* [1982] VR 989.

377 Thiele 2003, p. 150.

378 Von StaundingersKomm-BGB/Wiegand 2009, Section 1250, para. 6; Baur & Stürner 2009, para. 55, no. 33; Westermann 1998, para. 132, no. I.1.

379 Von StaundingersKomm-BGB/Wolfsteiner 2015, Section 1153, para. 9; Von StaundingersKomm-BGB/Wiegand 2009, Section 1250, para. 5, arguing that a partial transfer of a claim or a transfer of a claim to several creditors results in a joint mortgage or pledge for the creditors. *Contra* MünchKomm-BGB/Damrau 2017, Section 1250, para. 2, arguing that a partial transfer of the claim to another creditor results in a division of a pledge between the creditors.

380 *See* MünchKomm-BGB/Roth/Kieninger 2016, Section 401, para. 3, 14-15; Von StaundingersKomm-BGB/Busche 2012, Section 401, para. 37, 40-41; Wilhelm 2010, para. 1339-1355, 2218-2231.

381 *See* Swinnen 2014, p. 49-53. *Cf.* Section 1191 BGB.

382 Sections 1192 et seq. BGB (land charge). For a discussion of the security transfer and security assignment, *see* Wilhelm 2010, para. 2223-2228; Weber 2012, p. 132-151, 241-256.

383 *Cf.* Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, 2016, Section 131 UmwG, para. 23.

The fact that several types of non-accessory security rights have been developed and increasingly used in legal practice as alternatives to accessory security rights shows, according to Swinnen, that over the years there has been a development in the direction away from the use of accessory security rights (*'evolutie weg van accessoriteit'*) in national laws of security.[384] As mentioned above, the non-accessory security rights include the transfer of title for security purposes under German law. Moreover, Dutch, German, and English private law distinguish accessory and non-accessory personal security. While both the independent guarantee (*onafhankelijke garantie, selbstständige Garantie*) and suretyship guarantee (*borgtocht, Bürgschaft*) are considered personal security under Dutch, German, and English law, according to the national doctrine only the former creates an independent, non-accessory commitment.[385] The literature indicates that an independent guarantee may be preferred in legal practice precisely because parties can agree that the guarantor's obligations are not dependent on the underlying relationship.[386]

These characteristics of *in rem* security under national law contrast with the safeguards under articles 76(2)(a) and 78 BRRD under which security rights are protected in a partial transfer of assets, rights, and liabilities, whether they are accessory security rights or not. Furthermore, the distinction between accessory and non-accessory personal security contrasts with the Commission Delegated Regulation, under which personal security arrangements have now also been included in the scope of the safeguards in resolution procedures. In sum, the provisions on the safeguards required transposition into national law because national contract and property law derogates in its protection to parties with *in rem* or personal security in partial transfers from the protection offered by the resolution rules.

384 Swinnen 2014, p. 5. *See also* Van Erp & Akkermans 2012, p. 433-434 and 539, who note that 'several developments in the legal systems and in international instruments demonstrate that the accessory nature of property security rights in general is in decline.' They discuss the land charge under German law as an example.

385 *Cf.* Section 7:851 BW, providing that the existence of a suretyship guarantee is dependent on the existence of the obligation of the primary debtor, and section 767 BGB, which limits a surety's obligation to the amount of the principal debtor's debt. For a discussion of the English law perspective, *see* McKendrick 2016, para. 30.14 and 35.153.

386 Swinnen 2014, p. 5; Bergervoet 2014, p. 60. *See also* Weber 2012, p. 8; Snijders & Rank-Berenschot 2017, para. 483. *Cf.* Bertrams 2013, p. 4-5 for a discussion of the use of the term 'guarantee' in several jurisdictions.

### 5.2.3 Set-off and netting arrangements

*The safeguards for 'set-off arrangements' and 'netting arrangements'*

The safeguards for set-off arrangements and netting arrangements, which include close-out netting arrangements, can be found in article 77 BRRD.[387] The Commission Delegated Regulation on partial transfers limits the scope of these safeguards to specific qualifying set-off arrangements and netting arrangements. It provides, for example, that set-off arrangements and contractual netting agreements, which is a term defined in the CRR,[388] of the bank under resolution and a single counterparty qualify as set-off arrangements or netting arrangements under articles 76 and 77 BRRD if they relate to rights and liabilities arising under financial contracts or derivatives.[389] Financial contracts include securities, commodities and swap contracts.[390]

387 In Article 2(1)(99) BRRD the term 'set-off arrangement' is defined as 'an arrangement under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other'. Article 2(1)(98) BRRD defines the term 'netting arrangement' as '[...] an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC'. According to article 2(1)(n) Financial Collateral Directive, a 'close-out netting provision' is '[…] a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise'. Article 2(k) Settlement Finality Directive defines 'netting' as: 'the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed'. The literature and EU legislation provide various definitions of the terms 'netting' and 'set-off'. *Cf.* e.g., Zerey/Fried 2016, part 3, section 17, para. 51; Garcimartín & Saez 2015, p. 331-333. Berger 1996, p. 19-20 notes in this context: 'dass sich der Nettingbegriff sowohl im operativen als auch im bankbetriebswirtschaftlichen und bankrechtlichen Bereich zu einem abstrakten Schlagwort mit diffuser Begrifflichkeit entwickelt hat. Er gehört dabei seit längerem zum festen Bestandteil der Nomenklatur des Bankaufsichtsrecht, hat jedoch auch dort keine festen Konturen.' The SAG only defines 'Saldierungsvereinbarung' and does not define 'Aufrechnungsvereinbarung', although the definition of the former also refers to 'Aufrechnungen'. The Bankenverband argued in its consultation reaction on the Draft SAG of 9 September 2014 that only the term 'Aufrechnungsvereinbarung' should be used, to cover both netting arrangements and set-off arrangements, because this is more in line with the terminology used in practice.

388 *See* Article 1(2) Delegated Regulation on partial transfers; Article 295 CRR, under which 'contractual netting agreements' are in particular bilateral agreements between a bank and its counterparty which meet the provided requirements, including that they are recognised by the competent supervisory authority.

389 Article 2(1)(100) BRRD.

390 Article 2(1)(65) BRRD.

The same applies if the set-off arrangements and contractual netting agreements are linked to the counterparty's activity as a central counterparty or they are related to rights and obligations towards payment or securities settlement systems. Finally, authorities have the option to include other types of set-off and netting arrangements if their protection is required for the recognition of the arrangements' risk mitigation effects under prudential rules.[391]

Set-off and netting arrangements do not fall within the scope of the safeguards if they contain so-called 'catch all' or 'sweep up' clauses, extending to, for example, all rights and liabilities between the parties, because such a clause could hinder the feasibility of a partial transfer of a bank's assets, rights, and liabilities.[392] Moreover, resolution authorities may exclude from the protection arrangements containing so-called 'walk away' clauses, permitting a non-defaulting counterparty to make only limited payments or no payment at all to the estate of the defaulter, even if the defaulting party is a net creditor.[393] This provision was added to the Delegated Regulation, inter alia, because arrangements containing such a clause are not recognized for the purpose of calculating capital requirements under the CRR.[394]

Nonetheless, as indicated in paragraph 5.2.1 above, article 5 of the Commission Delegated Regulation allows resolution authorities to derogate from these limitations provided in the Delegated Regulation by protecting any type of set-off or netting arrangement. Such protection is allowed if the arrangement is protected in an insolvency procedure under insolvency law 'against a temporary or indefinite separation, suspension or cancellation of assets, rights and liabilities falling under the arrangements'. According to its recital 8, this is the case if a creditor would still benefit from the rights arising under the arrangement once an insolvency procedure is initiated. The sections below analyze how set-off and netting rights are treated in insolvency procedures under national insolvency law.

*The protection offered by national insolvency law*

Article 77 BRRD aims to ensure that parties do not lose their set-off or netting rights when a partial transfer is conducted or when contracts are modified or terminated in a resolution procedure. By contrast, the provisions on set-off in Dutch, German, and English insolvency law mainly focus on the

391 Articles 3 and 4 Delegated Regulation on partial transfers. *See* European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 14-15.

392 Recital 5 Delegated Regulation on partial transfers.

393 Article 5 Delegated Regulation on partial transfers.

394 *See* European Banking Authority, Technical advice by the European Banking Authority on classes of arrangements to be protected in a partial property transfer, EBA/Op/2015/15, 14 August 2015, p. 15. *Cf*. Article 296(2) CRR.

question of whether claims can be set-off notwithstanding the commencement of an insolvency procedure in which the debtor's estate is traditionally protected against the enforcement of claims by individual creditors.[395]

As a general rule, both the Dutch and German insolvency laws do not affect parties' statutory or contractual set-off positions gained before insolvency.[396] Notwithstanding the special rules on set-off and netting added to the Fw by the Settlement Finality Directive and the Financial Collateral Directive,[397] section 53 Fw provides that in a bankruptcy procedure a debtor/creditor of a bankrupt may set-off his liability and claim provided that the liability and claim both date from before the date of bankruptcy or result from acts with the bankrupt that took place prior to the bankruptcy. This provision has led to much case law clarifying that the rule has to interpreted narrowly.[398] The Fw allows claims that are not due and payable to be set-off.[399] It does not allow set-off if the bankrupt's debtor/creditor acquired the liability or claim after the bankruptcy or if an assignee did not acquire his liability or claim in good faith.[400] Similarly, under section 94 InsO a creditor's statutory or contractual set-off right which existed at the time the insolvency procedure was opened is not affected by the procedure.[401] If set-off is not yet possible at the start of the procedure because, for instance, the claims are of different types or a claim is not yet due, the InsO protects the potential set-off

395 *Cf*. Fletcher 2007, para. 7.97 who notes about insolvency set-off under national laws that '[t]he laws of the Member States diverge sharply over the operation of set-off in the event of a debtor's insolvency. In the United Kingdom, set-off is treated as a mandatory process which must be applied, as a matter of public policy, in both individual and corporate insolvencies in which the necessary requirement of mutuality is present. In most Civil law systems, on the other hand, the prevailing view is that set-off constitutes a violation of the principle of pari passu distribution, and that as a matter of public policy it must be confined to the most carefully limited circumstances, as where the cross-border liabilities arise out of one and the same contract or obligation. Therefore, in a cross-border insolvency, the outcome for any creditor who is also a debtor to the estate can be drastically affected by the way in which the issue of the applicable law is resolved, if the competing laws happen to belong to the different schools of opinion with regard to set-off.'

396 The general rules on statutory set-off can be found in sections 6:127 et seq. BW and 387 et seq. BGB respectively but contractual set-off is recognised as as being valid and enforceable. Sections 53 Fw and 94 InsO apply to both statutory and contractual set-off. *See* Rank & Silverentand 2018, para. 22.09-22.11; Verstijlen 2016 (T&C Insolventierecht), section 53 Fw, para. 1; MünchKomm-InsO/Brandes/Lohmann 2013, Section 94, para. 44-48; Rosskopf 2008, p. 189-200; Nijenhuis & Verhagen 1994, para. 2. For an analysis of contractual set-off under German law, *see* Berger 1996.

397 Sections 63e(2) and 212b(3) Fw.

398 *See* Verstijlen 2016 (T&C Insolventierecht), section 53 Fw.

399 Sections 53(2), 130 and 131 Fw. *See* Verstijlen 2016 (T&C Insolventierecht), section 53 Fw, para. 4; Faber 2005, p. 452-453.

400 Section 54 Fw.

401 Exceptions to the provisions on insolvency set-off were added to the InsO to implement the Settlement Finality Directive and the Financial Collateral Directive, *see* Sections 96(2) and 104(2)(6) InsO. For a discussion of the implementation of these directives into German law, *see* Ruzik 2010, p. 235-251 and 364-618.

position but only if the insolvent debtor's claim is not enforceable earlier than the creditor's claim.[402] The InsO does not permit set-off, however, if the creditor becomes a debtor of the insolvent estate or is assigned a claim of a third party only after the opening of the procedure, or he acquired the opportunity to set-off by a voidable transaction.[403] Under both the Fw and the InsO, a contractual exclusion or limitation of set-off remains in effect after the opening of the insolvency procedure.[404]

Under English insolvency law, by contrast, insolvency set-off is mandatory, operates automatically and cannot be waived by contractual agreement.[405] According to the Insolvency (England and Wales) Rules 2016 (IR 2016), '[a]n account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.'[406] The substance of the provision is similar for administration and winding-up procedures. For the claims to be included they do not have to be due and payable.[407] They may be present or future claims, and certain or contingent claims.[408] However, the claims must exist between the same parties in the same right ('mutual') and must both result in a pecuniary liability ('commensurable').[409] If there is a balance owed to the creditor, only that balance is provable in the winding-up or administration procedure. If there is a balance owed to the company, that balance must be paid to the liquidator or administrator, respectively.[410] Claims of the company or the creditor that are not eligible to be set-off include claims arising from obligations incurred at the time when the creditor had notice that a petition for the winding-up of the company was pending or after the company went in administration.[411]

Although the Fw does not explicitly provide that contractual netting provisions can be validly invoked after the declaration of bankruptcy, in the literature consensus seems to exist that these provisions are enforceable only to the extent that they are within the boundaries created by the Fw.[412]

402 Section 95(1) InsO; Bork 2012a, para. 11.52-54.
403 Section 96(1) InsO.
404 *See* Verstijlen 2016 (T&C Insolventierecht), section 53 Fw, para. 1; Wessels 2015b, p. 238; MünchKomm-InsO/Brandes/Lohmann 2013, Section 94, para. 39-41; Rosskopf 2008, p. 192-193, 199-200.
405 *See Stein v Blake* [1996] A.C. 243; *Westminister Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] A.C. 785 and *see* Fletcher 2017, para. 9.056 and 23.020; Gullifer 2013, para. 7.78-7.79.
406 Sections 14.24(2) and 14.25(2) IR 2016.
407 Fletcher 2017, para. 23.022.
408 Sections 14.24(7) and 14.25(7) IR 2016.
409 Fletcher 2017, para. 23.021; Gullifer 2013, para. 7.83 and 7.86.
410 Sections 14.24(3)-(4) and 14.25(3)-(4) IR 2016.
411 Sections 14.24(6) and 14.25(6) IR 2016.
412 *See* Rank 2010, p. 322; Keijser 2006, p. 295; Nijenhuis & Verhagen 1994, para. 2-4.

According to legal scholars, the fact that the Dutch legislature did not add any provision to the Fw to guarantee the enforceability in insolvency of close-out netting provisions in financial collateral arrangements, as required by the Financial Collateral Directive, confirms this view.[413] Close-out netting is likely to be considered enforceable by a Dutch court if its effect complies with the requirements for insolvency set-off listed in sections 53 and 54 Fw.[414] However, some Dutch scholars argue that sections 37 and 37a Fw apply to contractual close-out netting.[415] Section 37 Fw applies to a mutual agreement has not or has not been fully performed by both the debtor and the counterparty at the time of the bankruptcy declaration. It stipulates that the bankruptcy trustee loses his right to demand performance of the agreement if the trustee does not declare within a reasonable period of time, as specified in writing by the counterparty, that he is prepared to perform the agreement. If the counterparty then rescinds the mutual agreement (*ontbinding* or *vernietiging*), he may file his claim for damages in the insolvency procedure under section 37a Fw. The better view seems to be that sections 37 and 37a Fw do not necessarily overrule close-out netting provisions and do not require that these sections' procedure is followed.[416] Arguably, section 37 Fw aims to create the same result as contractual close-out netting, namely to provide the non-defaulting counterparty clarity about the performance of the reciprocal obligations under the agreement.[417] There has also been some debate about the exact scope of section 38 Fw. The section provides that mutual agreements which relate to the delivery of goods traded in the commodities market are automatically terminated (*ontbonden*) as a result of the bankruptcy order if the agreed period for delivery of the goods expires or the date of delivery falls after the declaration of bankruptcy. The counterparty may then lodge a claim for damages in the insolvency procedure. While some authors argue that this provision also applies to derivatives agreements and perhaps even to agreements involving financial collateral,[418] the majority opinion in literature seems to be that close-out

413 Rank 2010, p. 322; Keijser 2006, p. 295. *See also* Rank & Silverentand 2018, para. 22.23.

414 *See* Rank 2010, p. 325; Keijser 2006, p. 295.

415 Nijenhuis & Verhagen 1994, para. 4. *See also* Wessels 1997c, para. 5; Wessels 1997d, p. 94-95.

416 Rank 2010, p. 325.

417 Rank 2010, p. 325. *Cf.* Van Zanten 2013 (GS Faillissementsrecht), section 37 Fw, para. A2, who argues that section 37 Fw 'is bedoeld om de wederpartij een instrument te bieden om een einde te maken aan de onzekere situatie waarin zij als gevolg van het faillissement van haar contractpartij kan komen te verkeren, doordat zij niet weet of de curator bereid zal zijn de overeenkomst na te komen.'

418 Keijser 2006, p. 307 (arguing that the possibility that a Dutch court rules that section 38 Fw is applicable to derivatives agreements cannot be excluded and that it is even more likely that the section applies to repurchase and securities lending agreements); Nijenhuis & Verhagen 1994, para. 4 (arguing that section 38 Fw may also be applicable to certain derivatives agreements).

netting is upon insolvency under most types of agreements not likely to be affected by section 38 Fw.[419]

In the German literature, there has also been some debate about the precise nature of contractual close-out netting. Most authors agree that close-out netting results in set-off by agreement (an *Aufrechnungsvertrag*).[420] After the commencement of an insolvency procedure, set-off of the compensation amounts for the outstanding transactions takes place, provided that this complies with sections 94, 95 and 96 InsO.[421] Similar to section 38 Fw, section 104 InsO indicates that certain types of agreements are terminated by operation of law if the agreed period for performance expires, or the performance date falls after the date the insolvency procedure is opened. It explicitly provides that in such a case only a compensation amount can be claimed. However, the scope of section 104 InsO is broader than the scope of section 38 Fw.[422] Section 104 InsO applies to goods (*Waren*) and financial performances (*Finanzleistungen*) with a market or stock exchange price. Its non-exclusive list with financial performances contains, for example, options and – since the implementation of the Financial Collateral Directive[423] – financial collateral. Moreover, section 104 InsO provides how the claim for non-performance is determined, although parties may deviate from the provisions, including from the valuation standards.[424] Thus, although contractual netting provisions are generally enforceable upon insolvency if they are within the parameters of the InsO, this provision creates a statutory netting regime for certain types of agreements.

From an English law perspective, two principles of English insolvency law are relevant in the discussion of whether contractual netting on insolvency is enforceable.[425] The first is the anti-deprivation principle, under which

419 *See* Nijenhuis 1998, p. 612-613; Wessels 1997c, para. 5; Wessels 1997d, p. 94; Meesters 1994, p. 35 (all arguing that section 38 Fw is unlikely to be applicable to derivatives agreements) and *see* Rank 2010, p. 324 (arguing that even if section 38 Fw applies to repurchase and securities lending agreements, a Dutch court is likely to rule that parties can validly agree on the method of calculating the damages in the insolvency procedure).

420 Fuchs 2013, p. 46; Binder 2005, p. 439; Böhm 1999, p. 118-119; Berger 1996, p. 34. *Contra* Zerey/Behrends 2016, part 2, section 6, para. 54-55, who argues that contractual close-out netting does not result in set-off on the basis of a set-off arrangement (*Aufrechnungsvertrag*) but on the basis of an arrangement on the conditions for set-off (*Vertrag über die Voraussetzungen der Aufrechnung*). The arrangement ensures that the conditions for set-off are present. Comparable to set-off under sections 387-388 BGB, set-off requires a declaration to the other party. *Cf.* Von StaundingersKomm-BGB/Gursky 2011, Vorbemerkungen zu Section 387, para. 83.

421 Zerey/Behrends 2016, part 2, section 6, para. 56-57.

422 For a discussion of section 104 InsO, *see* Braun/Kroth 2017, InsO § 104; Ruzik 2010, p. 553 et seq. For a comparison of sections 38 Fw and 104 InsO, *see also* Keijser 2006, p. 308-310.

423 *See* Ruzik 2010, p. 575.

424 Section 104(2) and (4) InsO.

425 *See* Murray 2017, para. 11.12.1.4-11.12.2.8; Gullifer 2013, para. 7.90-7.93.

an arrangement is void if its effect is depriving an insolvent entity of its assets that would otherwise have been available for distribution amongst the creditors.[426] In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* the Supreme Court held that clauses do not violate the principle if they are part of a 'commercial transaction entered into in good faith' and they 'do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties.'[427] The accepted view in the literature seems to be that based on these grounds, close-out netting provisions do not violate the anti-deprivation rule. The purpose of the provisions can be considered to be the increase of certainty and reduction of credit risk.[428] The second relevant principle is the *pari passu* principle. A leading House of Lords decision indicates that an English court may avoid an arrangement as a matter of public policy if it creates a method that alters and is intended to alter the *pari passu* distribution amongst the creditors in an insolvency procedure under the IA 1986.[429] The accepted view in literature seems to be that the principle does not invalidate contractual netting as long as the contractual netting does not give better rights than those provided by the provisions on insolvency set-off in the IR 2016. Close-out netting can be said to achieve the same result as the operation of insolvency set-off.[430] Furthermore, special statutory provisions exist that aim to safeguard the validity of netting arrangements on insolvency. These include, in addition to the special provisions introduced by the Settlement Finality Directive and the Financial Collateral Directive, the provisions in Part 7 of the Companies Act 1989. The provisions preserve the validity of netting provisions in contracts entered into on, or subject to the rules of, an exchange or through a recognized clearing house.[431]

In sum, in the investigated jurisdictions, counterparties to set-off and netting arrangements still benefit from their rights arising under the arrangements once an insolvency procedure is initiated, provided that the set-off or netting is within the boundaries created by national insolvency law. In principle, the scope of the set-off and netting arrangements which national insolvency law protects is broader than the scope of the arrangements protected by the safeguards under article 77 BRRD and articles 3-4 Commission Delegated Regulation on partial transfers. Nevertheless, article 5 Delegated Regulation allows resolution authorities to protect all set-off and netting

426 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, para. 104.
427 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, para. 104 and 108. *See* Murray 2017, para. 11.12.2.3.
428 Murray 2017, para. 11.12.2.4-11.12.2.6; Gullifer 2013, para. 7.90-7.93.
429 *British Eagle International Airlines v Cie Nationale Air France* [1975] 1 WLR 758. *See* Derham 1991.
430 Murray 2017, para. 11.12.2.7-11.12.2.8; Gullifer 2013, para. 7.93; Paech 2014, p. 12-13.
431 *See* Gullifer 2013, para. 7.94.

arrangements under which counterparties still benefit from their set-off and netting rights upon opening of an insolvency procedure.

*The protection offered by other areas of national private law*
If the Commission Delegated Regulation on partial transfers, articles 76 and 77 BRRD and the national implementing legislation did not exist, can other areas of national private law also safeguard the enforceability of parties' set-off or netting rights in case of a partial transfer of assets, rights, and liabilities in a resolution procedure? The sections below show that the safeguards provided by the bank resolution rules are broader than the protection offered to set-off or netting rights in such a case under Dutch, German, and English contract law.

It has been investigated in the Dutch literature what the relevant provisions in Dutch law would be in such a case.[432] As a general rule of private law, an agreement's legal effects bind a successor under universal title, unless the agreement provides otherwise.[433] To this end, following acquisition under universal title through the application of a transfer tool under Part 3a Wft, the transferee is, in principle, brought into the same legal relationships as the transferor.[434] Nonetheless, the provision is of minor importance as regards legal relationships that stay behind. Accordingly, it may not prevent that parties lose their set-off or netting rights in a resolution procedure.[435] As discussed by Rank, in theory, section 6:130(1) BW may offer a solution in specific cases.[436] The section provides that

> '[i]s een vordering onder bijzondere titel overgegaan, dan is de schuldenaar bevoegd ondanks de overgang ook een tegenvordering op de oorspronkelijke schuldeiser in verrekening te brengen, mits deze tegenvordering uit dezelfde rechtsverhouding als de overgegane vordering voortvloeit of reeds vóór de overgang aan hem is opgekomen en opeisbaar geworden.'[437]

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432 Rank 2015, p. 25-35. The immediate reason for Rank's analysis in 2013 (published in 2015) was the fact that at that moment the Dutch Intervention Act did not contain safeguards comparable to the safeguards in articles 76-79 BRRD.

433 Section 6:249 BW.

434 *Cf.* Valk 2017 (T&C Burgerlijk Wetboek), Section 6:249 BW, para. 1.

435 *See* Rank 2015, p. 25-26.

436 Rank 2015, p. 26-28.

437 Translation of section 6:130(1) BW by the present author: [a] debtor has a right to set-off a counterclaim against the original creditor if the original creditor's claim is transferred under particular title but only if the counterclaim resulted from the same legal relationship as the transferred claim or the counterclaim existed and was due and payable before the transfer. For a general discussion of the requirements and examples of the application of section 6:130 BW, *see* Asser/Hartkamp & Sieburgh 6-II 2013/233-236; Van Gaalen 1996, p. 39-58.

Thus, if a creditor acquires a claim of a bank against a counterparty of the bank under section 6:159 BW (contract takeover, *contractsoverneming*), the counterparty of the bank is, in principle, allowed to set-off his counterclaim against the bank.[438] Section 6:130 BW is of non-mandatory law, and contracting parties may deviate from its requirements before the transfer takes place.[439] However, the section does not provide that the counterparty can set-off the amounts due to the bank with his claim against the bank, such as a deposit claim, if the liability of the bank – rather than a claim of the bank – is assumed by a new debtor under sections 6:155 et seq. BW.[440] Furthermore, it is uncertain if a Dutch court allows the application of section 6:130 BW by analogy in case of acquisition under universal title. It has been argued that the provision is only applicable to acquisition under particular title and is not relevant in case of acquisition under universal title because a successor under universal title is traditionally bound by all rights and obligations of his legal predecessor.[441] However, as was argued in paragraph 5.1, acquisition under universal title is under Part 3a Wft not necessarily limited to the passing of a whole estate or a proportional part thereof. It is the present author's view that above-mentioned argument in literature supports the view that the provision should apply if a third party acquires only a few rather than all rights and obligations under universal title. Nonetheless, even if section 6:130 BW is applied by analogy, the enforceability of netting rights may not be fully safeguarded.[442] Close-out netting, for instance, requires the termination of the outstanding transactions and the valuation of the resulting obligations before a set-off can take place.[443]

Uncertainty may also exist as to whether the claim of a bank under resolution and a counterparty's claim falling within one set-off or netting arrangement can be considered to result from the same legal relationship as required in section 6:130 BW.[444] If follows from case law that the sole fact that a claim and counterclaim are provided for by the same document does not necessarily mean that they arise from the same legal relationship, although this can be an indication for the required sufficient close relationship.[445] Moreover, section 6:130 BW would not protect a counterparty if the whole bank is split-up and, accordingly, the 'original creditor' does no longer exist.

438 *Cf.* Faber 2005, p. 247-248.
439 *See* Faber 2005, p. 300; Van Gaalen 1996, p. 56-57.
440 Rank 2015, p. 26. *Cf.* Faber 2005, p. 246; Van Gaalen 1996, p. 49.
441 Faber 2005, p. 248.
442 Rank 2015, p. 27.
443 *See* Wood 2007b, para. 1.004-5 and 1.029-30.
444 *See* Rank 2015, p. 26-27.
445 *See* Rank 2017 (T&C Burgerlijk Wetboek), Section 6:130 BW, para. 2b, who refers to HR 27 January 2012, *NJ* 2012, 244 (*Gangadin/Sheoratan*), para. 3.5.2-3.6.2; Rank 2015, p. 27.

The BGB also does not seem to offer full protection of set-off and netting rights in case of a partial transfer in a resolution procedure. Section 406 BGB, which largely corresponds with the Dutch section 6:130 BW, provides that

> '[d]er Schuldner kann eine ihm gegen den bisherigen Gläubiger zustehende Forderung auch dem neuen Gläubiger gegenüber aufrechnen, es sei denn, dass er bei dem Erwerb der Forderung von der Abtretung Kenntnis hatte oder dass die Forderung erst nach der Erlangung der Kenntnis und später als die abgetretene Forderung fällig geworden ist.'[446]

To apply section 406 BGB in case of a partial transfer under section 107 SAG, several issues need to be addressed. Firstly, section 406 BGB provides that a set-off right is not preserved in cases that involve a specific chronology of due dates of the claims, namely if the counterclaim becomes due and payable after the debtor discovered the assignment and later than the assigned claim.[447] Secondly, section 406 BGB applies to a contractual assignment of a claim under section 398 BGB (Übertragung einer Forderung) while under section 107 SAG the claim passes by operation of law. However, this does not form an obstacle in this case because section 412 BGB provides that section 406 BGB applies to an assignment by operation of law (*cessio legis*) mutatis mutandis.[448] Thirdly, while it is undisputed that section 412 BGB applies to several types of assignments of a particular claim, legal scholars argue that the provision does not apply to all types of universal succession.[449] It has been submitted, for instance, that section 412 BGB does not apply to a merger under the UmwG because after a merger a 'former creditor' does not exist.[450] Nevertheless, the provision seems to leave room for application in case of universal succession through division of a company under the UmwG.[451] It has also been argued that, in view of the protection of the debtor, section 406 BGB itself has to be applied by analogy in case of a universal succession.[452] These views support the view that section 406 BGB should apply to a partial transfer of assets, rights, and liabilities on the basis of section 107 SAG.

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446 Translation of section 406 BGB by the present author: [t]he debtor may set-off against the new creditor as well a counterclaim which he has against the former creditor, unless when acquiring the counterclaim, he was aware of the assignment or unless his counterclaim became due only after he became aware of the assignment and later than the assigned claim became due.

447 MünchKomm-BGB/Roth/Kieninger 2016, Section 406, para. 10-11.

448 MünchKomm-BGB/Roth/Kieninger 2016, Section 406, para. 15.

449 MünchKomm-BGB/Roth/Kieninger 2016, Section 412, para. 15-18.

450 MünchKomm-BGB/Roth/Kieninger 2016, Section 412, para. 15; Rieble 1997, p. 309.

451 *See* MünchKomm-BGB/Roth/Kieninger 2016, Section 412, para. 15-18; Schmitt/Hörtnagl/StratzKomm-UmwG/Hörtnagl 2016, Section 131 UmwG, para. 30; Kresse & Eckard 2012, Section 412, para. 1. *See also* Von StaundingersKomm-BGB/Busche 2012, Section 412, para. 9-10.

452 Lieder 2015, p. 768.

However, according to several authors, section 406 BGB is not applicable to a contractual set-off arrangement which is concluded already before the assignment, because the claim and the counterclaim have already been disposed of by the set-off contract and cannot be assigned. Hence, in this view, the contractual disposal before the assignment takes precedence over the later disposal by assignment.[453] It is unclear if a German court would accept this view and decide that this rule of general private law can overrule the transfer order under section 107 SAG.

Moreover, similar to section 6:130 BW, section 406 BGB may not fully safeguard the enforceability of netting rather than set-off rights, and the provision is not applicable if a third party acquires a liability rather than a claim of the bank. Section 417 BGB seems to offer an important safeguard in the latter case by providing that after a debt assumption by a third party under section 414 BGB, the new debtor may, in principle, raise against the creditor any defenses arising from the legal relationship between the creditor and the former debtor. The section, however, also provides that he may not set-off a claim to which the former debtor is entitled. A provision equivalent to section 406 BGB does not exist in this case.[454] Furthermore, although it has been argued that section 417 BGB should be applicable to universal succession,[455] literature also indicates that this is not the case at the moment.[456] The latter provision, therefore, does not provide parties any safeguards in case of universal succession.

Comparable conclusions can be drawn under English law. English law also protects set-off that was available between the original creditor and his debtor after a transfer of the claim to an assignee. The assignment does not disrupt contractual set-off if the set-off agreement was concluded between the assignor and the debtor and the reciprocal claims were incurred before the date on which the debtor received a notice of the assignment.[457] It is a matter of debate if a debtor can also assert a contractual set-off if the set-off agreement existed before the notice of assignment but the cross-claim of the debtor arose out of new transactions with the original creditor. Most authors seem to agree that this is possible because the assignee takes subject to the set-off agreement, including to any cross-claims falling within the set-off agreement that arose after the assignment.[458] As regards statutory and equitable set-off, two rules apply.[459] First, a debtor cannot successfully

453 Von StaundingersKomm-BGB/Busche 2012, Section 406, para. 10; PalandtKomm-BGB/Grüneberg 2015, Section 406, para. 3.
454 Von StaundingersKomm-BGB/Rieble 2012, Section 417, para. 31.
455 Lieder 2015, p. 768.
456 Von StaundingersKomm-BGB/Rieble 2012, Section 414, para. 21; Rieble 1997, p. 309.
457 Wood 2007b, para. 5.012; Derham 2003, para. 17.40, who both refer to the case *Mangles v Dixon* [1852] 3 HLC 702.
458 Gullifer 2013, para. 7.27; Derham 2003, para. 17.42.
459 Tettenborn 2002, p. 489-490.

set-off against an assignee a cross-claim against the assignor if the claims do not qualify for set-off.[460] Set-off is, for example, not possible if claims do not meet the mutuality requirements, i.e., they are not between the same parties in the same right.[461] Second, temporal restrictions exist.[462] Set-off is available for the debtor if he incurred or acquired his cross-claim before the day on which he received the notice of assignment.[463] This requirement is not met if the cross-claim arises under an agreement that was reached before this notice was given.[464] Moreover, although his cross-claim does not have to be due at the date of the notice, this claim has to be due and payable before assigned claim becomes due and payable.[465] The claim of the assignor, by contrast, does not have to arise and to be payable at that date. It is sufficient that the contract existed.[466]

Nonetheless, also under English law, it is unclear if the rules on set-off after assignment offer parties any safeguards in the event of a partial transfer under the BA 2009. It is uncertain if a court allows the application of the rules by analogy in case of a transfer by operation of law of claims of a bank under resolution. Moreover, the rules may not sufficiently protect netting positions of parties, and do not protect set-off rights if a liability of the bank rather than a claim of the bank is transferred to a third party by a resolution authority.

## 5.3 Liquidation of the transferor or transferee

### *5.3.1 Introduction*

The BRRD and SRM Regulation emphasize the strong ties between the bank resolution rules and more general national insolvency law by using the terms 'liquidation', 'wound up' and 'normal insolvency proceedings'. The BRRD defines the latter term as

> 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person.'[467]

460 Gullifer 2013, para. 7.68-7.69; Tettenborn 2002, p. 490-493.
461 Gullifer 2013, para. 7.43 and 7.53.
462 Tettenborn 2002, p. 493-496.
463 *See Roxburghe v Cox* [1881] 17 Ch.D. 510 and *see* Gullifer 2013, para. 7.70; Smith & Leslie 2013, para. 26.69-26.70.
464 Gullifer 2013, para. 7.70.
465 Wood 2007b, para. 5.020-5.021.
466 *See Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] Q.B. 1 and *see* Gullifer 2013, para 7.70.
467 Article 2(1)(47) BRRD.

The definition is broad and acknowledges the distinction made in the Winding up Directive between bank insolvency procedures administered by a liquidator on the one hand, who is 'any person or body appointed by the administrative or judicial authorities whose task is to administer winding-up proceedings', and by an administrator on the other hand, who is 'any person or body appointed by the administrative or judicial authorities whose task is to administer reorganization measures'.[468]

Hence, 'normal insolvency proceedings' seem to potentially include several types of national insolvency procedures for banks which are considered 'normal' under national law compared to a resolution procedure, whether it is under general insolvency law or a bank-specific insolvency regime.[469] The BRRD and SRM Regulation, however, use the term only in the context of liquidation or winding up and thus seem to consider this (and not reorganization measures) the only alternative to a resolution procedure.[470] As mentioned in chapter 2, they require that a bank is only put under resolution if it 'cannot be wound up under normal insolvency proceedings without destabilizing the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions'.[471] Thus, '[t]he winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied.'[472] Besides, the no creditor worse off-principle requires the resolution authorities to compare the actual treatment of shareholders and creditors in the resolution of the bank with the position of these stakeholders in a hypothetical 'winding-up under normal insolvency proceedings'.[473] After application of the sale of business tool or bridge institution tool under the BRRD and SRM Regulation, the residual part of the bank is to be 'wound up under normal insolvency proceedings'.[474] Moreover, following the termination of a bridge institution's operations this entity also is to be 'wound up under normal insolvency proceedings'.[475]

468 Article 2 Winding up Directive. The BRRD itself does not define the terms 'liquidator' and 'administrator'. For a discussion of the meaning of the term 'normal insolvency proceedings', *see also* Haentjens, Janssen & Wessels 2017, p. 59-61.

469 *See* Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 48.

470 *See* Binder 2015a, p. 94-95.

471 Recital 49 BRRD. *Cf.* Article 32 BRRD; Article 18 SRM Regulation.

472 Recital 46 BRRD.

473 Article 75 BRRD. *See also* Article 34(1)(g) BRRD; Article 15(1)(g) SRM Regulation.

474 Article 37(6) and Recital 50 BRRD; Article 22(5) and Recital 62 SRM Regulation.

475 Article 41(8) BRRD.

The central questions in this paragraph are what is considered a 'normal insolvency proceeding' for a bank under national insolvency law, and what role does the national resolution authority play in the opening of such a procedure. The sections below do not aim to make a comprehensive study of the insolvency procedures available for a bank but analyzes some important aspects. They show that the Dutch, German, and English rules on bank insolvency procedures deviate from general insolvency law. It is also shown that the legislatures of the three investigated jurisdictions have considerable discretion in determining how an insolvency procedure for a bank looks like. For instance, differences exist as to what is regarded a 'normal insolvency proceeding', what are the grounds for the opening of the procedure, and what is the role of the resolution authority in the context of such a procedure.

### *5.3.2 Liquidation under Dutch bank insolvency law*

The Fw has a Chapter 11AA with the heading 'Of the bankruptcy of a bank' (*Van het faillissement van een bank*), which currently consists of over 50 bank-specific insolvency provisions.[476] Following the transposition of the BRRD into Dutch law, it has long been unclear if only the bankruptcy procedure under Chapter 11AA Fw or also the emergency procedure (*noodregeling*) under sections 3:160 et seq. Wft should be considered a 'normal insolvency proceeding' for a bank under Dutch law. As discussed in chapter 3 of the present study,[477] in the latter procedure, the Amsterdam district court appoints an administrator (*bewindvoerder*) who is authorized to restructure or liquidate the failing bank. The Explanatory Notes to the Draft Part 3a Wft suggest that both procedures are a 'normal insolvency proceeding' within the meaning of the BRRD.[478] Section 3a:20 Wft confirmed this view at that time (November 2015) by requiring that for the application of the no creditor worse off-principle the position of shareholders and creditors in resolution is compared with the outcome of liquidation in a hypothetical emergency procedure under the Wft or bankruptcy procedure under the Fw. At another part of the Explanatory Notes it is suggested, however, that a

476 Under sections 214(4) and 284(5) Fw, the suspension of payments procedure (*surseance van betaling*) and the statutory debt management scheme for natural persons (*schuldsaneringsregeling natuurlijke personen*) under the Fw are not applicable to banks.

477 Paragraphs 2.1.2 and 2.1.3 of chapter 3.

478 Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 48, stating that '[d]aarnaast bestaan voor banken en verzekeraars in de huidige wet- en regelgeving twee insolventieprocedures: de noodregeling en het faillissement. […] Voor de goede orde wordt opgemerkt dat in de richtlijn regelmatig sprake is van 'normale insolventieprocedures'. Met 'normaal' wordt bedoeld: normaal ten opzichte van het afwikkelingsinstrumentarium. Men houde evenwel in het oog dat de noodregeling ten opzichte van het faillissement, dat kan worden uitgesproken ten aanzien van iedere schuldenaar, juist een bijzondere procedure is.'

resolution procedure under the Wft and a bankruptcy procedure under the Fw are the only available procedures for a failing bank under Dutch law.[479]

The literature argues that the emergency procedure for a bank did no longer exist following the implementation of the BRRD. According to that view, the provisions in Chapter 11AA Fw that contained references to the emergency procedure were mistakenly not deleted when the legislature implemented the BRRD in 2015.[480] It is the present author's view, however, that the procedure still exists under Dutch law at the moment since section 3:160 Wft explicitly provides that the procedure can be opened for a bank. The currently pending proposal for the Act recovery and resolution of insurance companies (*Wet herstel en afwikkeling van verzekeraars*) is intended to repeal the emergency procedure for both banks and insurance companies.[481] According to the parliamentary notes, the bank resolution procedure and bankruptcy procedure almost entirely overlap this procedure and, therefore, the emergency procedure does not have any added value.[482] Thus, once adopted, this Act would leave the bankruptcy procedure under Chapter 11AA Fw as the only available 'normal insolvency proceeding' for a bank under Dutch law. Similar to a bankruptcy procedure under general Dutch insolvency law,[483] in a bankruptcy procedure for a bank, the task of the bankruptcy trustee is considered to be directed towards the maximization of the proceeds for the joint creditors.[484]

Following a transfer of assets, rights, and liabilities of a bank under resolution to a private sector purchaser or a bridge institution in a resolution procedure, under section 3a:30 Wft the national resolution authority, which is DNB, must request the Amsterdam district court to order the bankruptcy of the residual entity. It must do so unless the continuation of the entity is

479 Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 127, which state that '[n]u in beginsel slechts een keuze bestaat tussen de route van afwikkeling ingevolge Deel 3A en faillissement is het ook niet langer noodzakelijk de bewindvoerder in de noodregeling een bevoegdheid te geven faillissement aan te vragen.' *See also* Wessels 2016, para. 1530.

480 Berends 2017 (SDU Insolventierecht), sections 212l and 212m Fw. *See also* Wessels 2018, para. 1515b.

481 Proposal for the Dutch Act on recovery and resolution of insurance companies (*Wet herstel en afwikkeling van verzekeraars*) (*Kamerstukken II* 2017/18, 34842, no. 2).

482 Proposal for the Dutch Act on recovery and resolution of insurance companies (*Wet herstel en afwikkeling van verzekeraars*) (*Kamerstukken II* 2017/18, 34842, no. 3), p. 7-8.

483 *See* paragraph 4.2.1 of this chapter.

484 *See* e.g., A.A.M. Deterink, H. Oosterhout & E.M. Jansen Schoonhoven, 'Deskundigenbericht inzake Bepaling werkelijke waarde onteigende effecten en vermogensbestanddelen SNS Bank en SNS Reaal per 1 februari 2013', Enterprise Chamber of the Amsterdam Court of Appeal (*Hof Amsterdam, Ondernemingskamer*), 27 April 2018, case number 200.122.906/01 OK, p. 197.

required for the achievement of the resolution objectives or compliance with the resolution principles set out in the SRM Regulation.[485] In all other cases, DNB must apply for a bankruptcy order for a bank on the basis of section 212ha Fw. The section explicitly provides that for a bankruptcy order, two of the three conditions for resolution listed in article 18(1) SRM Regulation have to be met: the bank is failing or likely to fail, and no private sector measure is available to prevent the failure. The resolution condition that the opening of a resolution procedure is in the public interest must not be fulfilled.[486] A bankruptcy request by another party than DNB is inadmissible.[487] Thus, these provisions explicitly depart from the general rule in section 1 Fw. According to the latter provision, a debtor who has ceased to pay can be declared bankrupt (*in staat van faillissement*) by a court order on his own request, at the request of one or more creditors, or at the request of the Public Prosecution Service (*Openbaar Ministerie*).[488] The court can order the opening of a bankruptcy procedure for a bank if it is summarily satisfied that the bank meets the two conditions referred to in section 212ha Fw.[489] According to the parliamentary notes to Part 3a Wft, it can be assumed that a bank which has been placed under resolution, meets the conditions for the opening of a bankruptcy procedure in most cases, as the resolution conditions are more stringent.[490]

The Fw does not answer the question of whether DNB initiates the bankruptcy procedure under section 212ha Fw in its capacity as a national resolution authority or as a bank supervisory authority.[491] According to the present author, this question is relevant to determine which authority within DNB is responsible for filing the request. The task used to be regarded a

485 *See* Memorandum of Amendment to the Dutch Draft Financial Markets Amendment Act 2017 (*Herstelwet financiële markten 2017*, *Kamerstukken II* 2016/17, 34634, no. 7), p. 4; Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 97-98.

486 *See* Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 127.

487 Section 212ha(2) Fw. *See* Wessels 2016, para. 1543d. Under section 212ha(3) Fw the bank can also file a request for its own bankruptcy, but in that case, the Amsterdam district court will allow the ECB or DNB, depending on the allocation of competences under Articles 4 and 6 SSM Regulation, to be heard before deciding on the request.

488 *See* Explanatory Notes to the Dutch Draft Intervention Act (*Kamerstukken II* 2011/12, 33059, no. 3), p. 78.

489 Section 212hg(1) Fw. *See* Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 98 and 127.

490 Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 97.

491 *Cf*. Explanatory Notes to the Dutch Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 97, which state that under section 3a:30 Wft the resolution authority initiates the bankruptcy procedure.

task of DNB in its capacity as a supervisory authority.[492] Since the entry into force of the SRM Regulation, however, section 212ha Fw requires an assessment of whether the bank meets the resolution conditions listed in article 18(1) SRM Regulation. The national supervisory authority and the ECB in principle only assess whether a bank is failing or likely the fail. It is then the task of the national resolution authority or the SRB, in close cooperation with the national resolution authority,[493] to assess whether the other two resolution conditions in article 18(1) SRM Regulation are also fulfilled.[494] It is the present author's view that DNB is then likely to initiate the bankruptcy procedure in its capacity as resolution authority if the public interest condition is not met. Accordingly, the Fw limits the role of the Dutch resolution authority in the context of a bankruptcy procedure for a bank mainly to the filing of the request for the opening of the procedure and making of recommendations for the appointment of the bankruptcy trustee.[495]

### *5.3.3 Liquidation under German bank insolvency law*

In contrast to the approach followed by Dutch insolvency law, the German bank-specific insolvency provisions can be found in the KWG rather than in the German general insolvency legislation, which is the InsO. Except for these few provisions in the KWG, some of which this section further discusses below, the general insolvency provisions of the InsO govern the insolvency procedure over a bank's assets.[496] This means, for example, that under section 1 InsO the primary objective of such a procedure is the collective satisfaction of the creditors by the liquidation of the debtor's assets and distribution of the proceeds or by rescuing the company as a going concern. Section 46b KWG, which the literature considers a *lex specialis* to the InsO,[497]

492 Explanatory Notes to the Draft Intervention Act (*Kamerstukken II* 2011/12, 33059, no. 3), p. 2.
493 Article 30(2) SRM Regulation.
494 Article 18(1) SRM Regulation.
495 Sections 212ha and 212hga Fw.
496 *Cf.* Bauer & Hidler 2015, p. 252, who note that 'im KWG [verbleibt, LJ] […] ein besonderes Bankeninsolvenzrecht, welches durch die allgemeine Insolvenzordnung (InsO), die auch im Bankensektor Geltung beansprucht, abgerundet wird und einen abschließenden Rahmen um die speziellen sanierungs- und abwicklungsrechtlichen Gesetzeswerke bildet.' and Weber 2009, p. 632, who notes that '[m]it dem insolvenzantrag enden die Besonderheiten einer Bankeninsolvenz. Die Eröffnung des Verfahrens und deren weiterer Verlauf richtet sich nach dem algemeinen Bestimmungen der InsO.' *See also* Explanatory Notes to the German Draft SAG (Gesetzentwurf der Bundesregierung, BRRD-Umsetzungsgesetz, Deutscher Bundestag, Drucksache 18/2575, 22 September 2014), p. 181, noting that '[n]ach der Anwendung eines Abwicklungsinstruments ist der Weg für den Beginn eines Insolvenzverfahrens in Bezug auf das in Abwicklung befindliche Institut frei, das ohne die „too-big-to-fail"-Problematik zur Anwendung gekommen wäre.'
497 Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 2.

provides that the BaFin has the exclusive power to request the court to order the opening of an insolvency procedure for a bank under the InsO. The rule derogates from section 13 InsO under which the debtor or creditors may file the request for a procedure. Section 46b KWG also sets out some duties the insolvency court and the insolvency trustee have in relation to the BaFin, including the duty of the trustee to inform the BaFin on an ongoing basis about the progress of the procedure. The grounds for the opening of an insolvency procedure under section 46b KWG are insolvency (*Zahlungsunfähigkeit*), over-indebtedness (Überschuldung) and imminent insolvency (*drohenden Zahlungsunfähigkeit*), which terms are further defined in the InsO.[498] In the event of imminent insolvency, the BaFin may file the request only with the consent of the bank. It is an accepted view in German literature that the request by a creditor or the bank itself on the basis of section 13 InsO is inadmissible.[499] Contrary to Dutch bank insolvency law, under German insolvency law, there is not one exclusive court to decide on the opening of an insolvency procedure for a bank.[500]

The InsO provides for all insolvency measures that can be taken, also for a bank, such as the opening of a self-administration (*Eigenverwaltung*) or insolvency plan procedure (*Insolvenzplanverfahren*).[501] Moreover, some scholars hold the view that section 46b KWG does not exclude the possibility for a bank to request the court to order the opening of such a self-administration procedure or to submit an insolvency plan to the court for a reorganization in an insolvency plan procedure.[502] Literature also indicates, however, that in practice in most cases a liquidation procedure is opened for a bank.[503]

498 *See* Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 2 and 17-24. *See also* Pannen 2010, p. 114-120.

499 Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 36; Boos/Fischer/Schulte-Mattler/Komm-KWG/CRR-VO/ Lindemann 2016, Section 46b, para. 26 and 30; MünchKomm-InsO/Schmahl & Vuia 2013, Section 13, para. 55. According to Schmahl & Vuia at para. 55, the BaFin can confirm a request made by a creditor or the debtor. *Contra* Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 36.

500 *Cf.* Sections 2-3 InsO. For an overview of recent bank insolvency procedure in Germany and the competent courts, *see* Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 13.

501 Sections 218 and 270 InsO. *See* Schillig 2016, p. 448-449; Pannen 2010, p. 123.

502 Beck/Samm/Kokemoor/Skauradszun 2016, Section 46b KWG, para. 38a.

503 Schillig 2016, p. 448-449; Pannen 2010, p. 124. *See also* Binder 2005, p. 542-553, arguing at p. 544-547 that the self-administration procedure and the insolvency plan procedure are not suitable procedures for the restructuring of a bank. He claims, amongst other things, that the insolvency plan procedure is not flexible enough to facilitate rapid solutions and that the news that a self-administration procedure is opened for a bank is likely to cause panic amongst creditors.

Notwithstanding the bank-specific insolvency rule of section 46b KWG, the SAG provides that the national resolution authority files the request for an order to open an insolvency procedure over the residual entity's assets after application of the sale of business or bridge institution tool. The conditions mentioned above for the opening of such a procedure have to be met. Under the SAG, the resolution authority also files the request for an order opening a procedure over a bridge institution's assets after termination of the operations.[504] Section 46b KWG applies mutatis mutandis in such a case. Since 1 January 2018 the BaFin is the German resolution authority. The legislative history of the SAG does not clarify how the above-mentioned power of the resolution authority under sections 116(1) SAG and 128(5) SAG relates to the supervisory power of the BaFin under section 46b KWG and whether the BaFin can, for instance, also file the request for the residual entity or bridge institution on the basis of section 46b KWG. The literature assumes that the resolution authority has the exclusive power to apply to the court for an order opening an insolvency procedure if this application follows the prior use of resolution tools. Sections 116(1) and 128(5) SAG are then to be considered *leges speciales* to section 46b KWG.[505]

### *5.3.4 Liquidation under English bank insolvency law*

In England, the UK BA 2009 provides for a bank-specific administration procedure and bank-specific insolvency procedure. It stipulates that the term 'normal insolvency proceedings' used in the Act has the meaning given by the BRRD 'and, in particular, includes the bank insolvency procedure and the bank administration procedure.'[506] Both procedures are based on and exist in parallel with the general administration and winding-up procedures out-of-court and by court order under the IA 1986 and the IR 2016.[507] The bank itself, the directors, one or more creditors, and the competent supervisory authority may apply for a general administration or winding-up order.[508]

Unlike the insolvency procedures for banks under Dutch and German law, a bank insolvency procedure governed by the BA 2009 is a modified procedure in which the bank liquidator has a special primary, statutory objective. This objective is to work with the UK deposit guarantee scheme, i.e., the Financial Services Compensation Scheme, to ensure that the depositors have access to their accounts, either through a transfer of the accounts to

504 Sections 116(1) SAG and 128(5) SAG.
505 Bauer & Hidler 2015, p. 261.
506 Sections 8ZA(5), 12AA(2) and 81ZBA(9) BA 2009.
507 *See* Singh et al 2016, para. 7.10
508 Section 124 IA 1986 and Schedule B1 to the IA 1986, para. 12; Section 359 and 367 FSMA 2000. *See* Schillig 2016, p. 391-392, 440-441.

another institution or payments from the deposit guarantee scheme. This objective is given priority over the objective to wind up the affairs of the bank to achieve the best result for the bank's creditors as a whole,[509] which the literature considers the primary objective of general English insolvency law.[510] For example, although it may be in the interests of the creditors as a whole to reduce costs by closing down the operations of the failing bank, it seems that a liquidator in a bank insolvency procedure may be required to keep a part of the banking business open and retain the employees to assist the deposit guarantee scheme.[511] The bank insolvency procedure under the BA 2009 takes precedence over other insolvency procedures.[512] The BoE as resolution authority, the competent supervisory authority, and the Secretary of State may apply for a bank insolvency order by the court on different grounds.[513] For example, the former may do so if (1) it has been informed by the supervisory authority that the bank is failing or likely to fail, and that (2) it is satisfied that the failure cannot be averted, (3) the bank has depositors and (4) either the bank is unable, or likely to become unable, to pay its debt or the winding up is considered to be 'fair'.[514] These grounds contrast with the primary ground for a winding-up order for most corporate debtors other than banks under the IA 1986, which is that 'the company is unable to pay its debt'.[515] Besides a possible role in the initiation of the bank insolvency procedure under the BA 2009, the BoE is involved in the procedure as it nominates members for the liquidation committee, which is informed by and can make recommendations to the bank liquidator.[516]

Contrary to the approach followed by Dutch and German bank insolvency law, after a partial transfer of assets, rights, and liabilities to a private sector purchaser or a bridge institution, a bank administration rather than a winding-up procedure is opened for the residual entity under the BA 2009.[517] According to the literature, it would appear that the bank administration procedure may result in a reorganization of this entity, even though the BRRD requires that such a company is wound-up.[518] A bank administration procedure can also be opened following the application of the asset

509 Section 99 BA 2009. *See* Singh et al 2016, para. 7.62
510 *See* paragraph 4.2.3 of this chapter.
511 *See* The City of London Law Society, Response to consultation document dated July 2008 entitled 'Financial Stability and Depositor Protection: Special Resolution Regime', September 2008, schedule 1, para. 4.2.
512 Section 120(1)-(8) BA 2009. *See* Schillig 2016, p. 440.
513 Sections 95-96 BA 2009.
514 Sections 7 and 96(1)-(2) BA 2009. Section 93(8) BA 2009 provides that the term 'fair' has the same meaning as the term 'just and equitable' under general insolvency law. *See* Schillig 2016, p. 441-442, 445-446. *Cf.* Section 122(1)(g) IA 1986.
515 Section 122(1)(f) IA 1986.
516 Sections 100 and 102 BA 2009.
517 Section 136(2)(a) BA 2009.
518 Schillig 2016, p. 405.

separation tool so that the residual entity is placed in administration.[519] For example, following the application of the bridge institution tool, the resolution authority may prefer to place the assets that are used to provide services to the bridge institution in an asset management vehicle. It may do so because the assets may later be required by the bridge institution and have to be separated for that purpose.[520] The resolution authority plays a central role in the bank administration procedure, not only during but also after the initiation phase.[521] Only the BoE can apply to the court for a bank administration order appointing an administrator if the residual entity is unable or is likely to become unable to pay its debts as a result of the transfer.[522] Moreover, the BA 2009 explicitly provides that the bank administrator is 'able and required', as the primary, statutory objective, to ensure the supply to the transferee of services and facilities to enable it operating successfully.[523] Only if the BoE considers that this objective has been achieved, the objectives that are pursued in a 'normal administration'[524] procedure come into play,[525] i.e., to rescue the entity as a going concern or to achieve a better result for the creditors than under a liquidation without administration.[526] Other modifications to the normal administration procedure under the IA 1986 include that when is pursued, the bank administrator may only make distributions to creditors with the BoE's consent.[527]

## 6 Conclusions

This chapter investigated the objectives, principles, and rules of the national legal frameworks on the transfer tools established by the BRRD and SRM Regulation. Resolution authorities have the transfer tools at their disposal to transfer shares or assets, rights, and liabilities in a resolution procedure to a private sector purchaser, a bridge institution or an asset management vehicle. The paragraphs paid particular attention to the question of how the legal frameworks on the transfer tools currently interact with and how they have been embedded into private law at the national levels. The sections below summarize the main conclusions of the chapter.

519 Section 136(2)(a) BA 2009.
520 *See* The City of London Law Society, Joint response of the Financial Law Committee and the Insolvency Law Committee of the CLLS and the Banking Reform Working Group of the Law Society of England & Wales to the HMT consultation paper on the transposition of the Bank Recovery and Resolution Directive, October 2014, para. 8.2.
521 *See* Singh et al 2016, para. 7.21.
522 Sections 136(2) and 141-143 BA 2009.
523 Sections 136(2)(c) and 138 BA 2009.
524 *Cf.* the heading of Section 140 BA 2009.
525 *See* Singh et al 2016, para. 7.27.
526 Section 140 BA 2009.
527 Section 145(3) and Table 1 of applied provisions in the BA 2009; Schedule B1 to the IA 1986, para. 57.

*6.1 Do the rules on the transfer tools and national general insolvency law share objectives?*

The rules on the transfer tools and Dutch, German, and English insolvency law share objectives but only to a limited extent. The resolution rules and national general insolvency law recognize that besides a restructuring of a debtor's business with the existing legal entity, a going concern sale of a part of the debtor's business *en bloc* to an external party can be an alternative to a piecemeal sale of the debtor's assets in liquidation. Differences exist between the Dutch, German, and English general insolvency laws as to the extent societal interests can affect the course of an insolvency procedure. Nevertheless, the primary objective of Dutch, German, and English general insolvency law is considered the collective satisfaction of the creditors. Maximizing the returns to creditors and shareholders may also play a role in the application of the transfer tools. The resolution rules require the authorities, inter alia, to market the shares or assets, rights, and liabilities that they intend to transfer to obtain the best possible sale price and to realize sales to a private sector purchaser on commercial terms. Any proceeds have to benefit the creditors and shareholders directly or indirectly. However, the primary objectives in a resolution procedure are the resolution objectives. These objectives include the objectives to avoid significant adverse effects on the financial system and to ensure the continuity of critical functions of the bank under resolution. The fact that the resolution objectives are the primary objectives does not entail that a resolution authority does not consider the objectives of insolvency law in its assessment of how shareholders and creditors should be treated. The no creditor worse off-principle ensures that the claims of shareholders and creditors are satisfied up to at least the level that they would have been satisfied in a liquidation procedure under insolvency law.

*6.2 How did the national legislatures ensure that the transfers ordered by a resolution authority have an immediate effect? How do the effect and scope of the application of the transfer tools relate to other types of acquisition of assets, rights, and liabilities or shares under national private law?*

Under Dutch, German, and English law, the application of a transfer tool is a legal instrument whereby shares or assets, rights, and liabilities are acquired as a whole and *uno actu* by one or more legal entities. The resolution authority specifies in its decision which shares or assets, rights, and liabilities pass to the other party. To offer resolution authorities flexibility in the implementation of the measures, several procedural requirements that would otherwise apply to the measures do not apply if transfer tools are used, such as approval and notification requirements. The Dutch legislature provided that the application of the transfer tools results in acquisition under universal title under section 3:80 BW. To this end, the effect and scope of the application of the transfer tools can be comparable to the effect and

scope of a merger or division of a company under book 2 of the BW. The English legal framework on the transfer tools, by contrast, forms a framework separated from the legal framework normally applicable to a merger or division of a company. According to the German legislature, the resolution authority's decision on the application of the transfer tools under the SAG results in a transfer *sui generis*.

*6.3 In case of a partial transfer of assets, rights, and liabilities, how do the resolution rules protect security rights under a security arrangement and set-off or netting rights under a set-off or netting arrangement respectively? Would creditors also benefit from these rights if an insolvency procedure is opened under national insolvency law? Do other areas of national private law also offer protection against a loss of these rights in case of a partial transfer in a resolution procedure?*

The bank resolution rules require the resolution authorities to protect six types of arrangements, including security arrangements and set-off and netting arrangements, and the counterparties to these arrangements against a loss of the rights arising from the arrangements. The safeguards apply if the authorities transfer a part of the assets, rights, and liabilities of a bank under resolution and if they cancel or modify the terms of the contracts of a bank under resolution. The safeguards have a strong link with national general insolvency law because the resolution rules allow the resolution authorities to protect all arrangements under which creditors would benefit from their rights if an insolvency procedure is opened. In principle, under both Dutch and German insolvency law set-off positions gained before insolvency are not affected and netting rights are enforceable to the extent they remain within the boundaries created by the Fw or InsO, respectively. Under English insolvency law, insolvency set-off is mandatory and operates automatically. Contractual netting on insolvency is enforceable as long as it does not violate the anti-deprivation rules and does not give better rights than the provisions on insolvency set-off. Creditors with propriety security rights enjoy insolvency-specific privileges under Dutch, German, and English insolvency law. It has also been shown that Dutch, German, and English contract and property law cannot offer counterparties the same protection of their set-off, netting and security rights as the bank resolution rules do in a resolution procedure. The protection provided by the bank resolution rules in a partial transfer is broader.

*6.4 What is considered a 'normal insolvency proceeding' for a bank under national insolvency law? Which role does the national resolution authority play in the opening of such a procedure?*

The liquidation of a transferor or transferee as required by the bank resolution rules is largely left to existing national insolvency law. 'Normal insolvency proceedings' are the procedures for a bank that are considered

'normal' under national insolvency law as compared to a resolution procedure. Dutch, German, and English law have different approaches as to what is regarded a 'normal insolvency proceeding' for a bank, what the grounds are for the opening of such a procedure, and what the role is of the national resolution authority. For example, under Dutch insolvency law, the bankruptcy procedure under the bank-specific chapter 11AA Fw should be considered the 'normal insolvency proceeding'. In Germany, at least in theory, all general insolvency procedures under general insolvency law can be used for banks. English bank insolvency law, by contrast, provides for four types of insolvency procedures for a bank: the bank insolvency procedure and the bank administration procedure under the BA 2009, and the general administration and winding-up procedures under the IA 1986. When implementing the bank resolution rules, the Dutch and German legislatures both introduced the provision that the national resolution authority petitions the court to order the opening of an insolvency procedure for a bank under national law. The BaFin in its capacity as resolution authority does so following the application of resolution tools, such as a procedure over the assets of a residual entity or bridge institution, and DNB for all bank insolvency procedures under the Fw. The BoE as resolution authority now plays a central role in the bank insolvency procedure and bank administration procedure under the BA 2009, not only in the initiation phase but also during the procedure.