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

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Citation

Janssen, L. G. A. (2019, September 19). *EU bank resolution framework: A comparative study on the relation with national private law*. Retrieved from https://hdl.handle.net/1887/76856

Version:	Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

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Title: EU bank resolution framework: A comparative study on the relation with national private law
Issue Date: 2019-09-19

7 Bank resolution frameworks and national and supranational coherence

1 Introduction

The first chapter of the present study asked the question of how the bank resolution frameworks established by the BRRD and SRM Regulation currently relate to national private law.

Against that background, chapter 2 examined why a special legal framework to deal with failing banks is considered crucial. It concluded that it is the widely accepted view in the EU that the importance of both protecting financial stability and strengthening market discipline require special bank insolvency rules that deviate from rules of general insolvency law and other areas of private law. The European Commission, for example, pointed out in 2012 that:

> 'Special bank resolution tools (e.g. sale of business, asset separation, bridge banks), applied outside of judicial insolvency proceedings, would enable timely intervention, the maintenance of key banking services and the protection of depositors. Debt write-down and conversion would protect taxpayers' money even in the case of large and complex institutions. Changes in company law would ensure legal certainty for stakeholders. This part aims to put the burden on bank shareholders and debt holders instead of taxpayers and at the same time maintain financial stability and discourage moral hazard.'[1]

Chapter 3 then provided a historical overview of the development of bank insolvency rules in the Netherlands, Germany, and England and showed that over the years, banks acquired a more special position within national law. National, formal prudential supervisory frameworks were created first, although in different periods. Later also some special rules for bank failures were adopted. In response to national bank failures during the latest global financial crisis, the three countries introduced their own bank resolution frameworks.

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1 Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012), p. 60.

Nevertheless, it is generally acknowledged that having a national bank resolution framework in place in each national legal system is 'not enough'. The national frameworks 'must be compatible at a minimum and mutually supportive at their best.'[2] It has been shown that the BRRD introduced a harmonized set of bank resolution tools and powers to enable resolution authorities in the EU to intervene in banks that are deemed to be failing or likely to fail. Also, it requires cooperation and coordination across borders. Under the SRM Regulation, a resolution authority at the EU level, i.e., the SRB, decides on the resolution of significant and cross-border operating banks in the SRM participating Member States.[3]

Chapters 2 and 4 also discussed that the BRRD and SRM Regulation aim to remove the implicit guarantees of government support to failing banks in the EU.[4] The price of bank debt should, as a result, be more sensitive to the actual risks banks face rather than reflect the expected government subsidy.[5] However, it is argued that market participants can only price the bank capital and debt instruments based on the actual default probability if they know what to expect.[6] It is important, therefore, that the national legislatures seek to adequately incorporate the EU bank resolution framework into their national legal orders to ensure that the interpretation and application of the bank insolvency rules are clear and predictable. Clarity and predictability in cross-border bank resolution procedures benefit in many cases from the greater convergence of national bank resolution regimes. Accordingly, at the EU level, potential differences in the interpretation and application of the resolution rules across jurisdictions have to be considered in the further development of the EU bank insolvency framework.[7]

To explore how the EU legislation in the field of bank resolution has been aligned with national private law and which differences may arise in bank resolution procedures across countries, chapters 5 and 6 analyzed several examples of relations between the existing bank resolution frameworks and Dutch, German, and English private law.

This chapter concludes the present study.[8] Paragraph 2 applies the national coherence theory that was developed in chapter 4 to the results of the

2 Hüpkes 2010, p. 219. *Cf.* Recitals 9-10 BRRD; Recital 10 SRM Regulation.
3 *See* paragraph 3.2.2 of chapter 2.
4 Tröger 2018, p. 36 and 41; Paterson 2017, p. 619 and *see* paragraph 3.2.1 of chapter 2 and paragraph 2 of chapter 4.
5 Tröger 2018, p. 36 and 41; Paterson 2017, p. 619.
6 Tröger 2018, p. 37, 41 and 45-46; Paterson 2017, p. 619.
7 *See* paragraphs 1 and 2 of chapter 4.
8 Since the outcomes of the Brexit are highly uncertain at the moment of finalizing this dissertation, which is August 2018, the options for the EU to agree with the UK, and vice versa, on legislation or soft law in the field of bank insolvency law are not considered here.

analysis in chapters 5 and 6 to investigate how the bank resolution rules, principles, and objectives relate to national private law. It discusses that the developments in the field of EU bank insolvency law entail that national bank insolvency law has been and will be increasingly governed by EU legislation. The EU legislation on bank insolvency deals with specific topics and objectives and contains rules and terminology that are entirely different from that in the existing national legislation, such as general insolvency law. Indeed, section 2.1 shows that the bank resolution frameworks provide for objectives and rules that explicitly depart from these in private law. Thus, moderate coherent connections with national private law exist. While the bank resolution frameworks may appear to be a fundamental shift from national private law, section 2.2 highlights that the bank resolution frameworks also seek to mirror some key private law rules and consider corporate restructuring and insolvency law practices.[9] Thus, the BRRD and SRM Regulation have created specialist legal frameworks for bank failures that diverge from but also incorporate certain parts of national private law, especially insolvency law.[10] The legislatures of the Member States are faced at the moment and will also be charged in the future with the difficult task of aligning their national legal orders with the quickly expanding EU legal framework on bank insolvency to ensure that their bank insolvency laws can continue to procedure clear and predictable outcomes. Section 2.3 argues that to contribute to the desirable clarity and predictability, the national legislatures should at least seek to solve the incoherent relations resulting from inconsistencies in the relations of their bank insolvency regime with existing rules of private law.

Paragraph 3 subsequently examines which potential differences can be put on the table in the debate about the closer harmonization of the EU bank insolvency framework (section 3.1). It also analyzes existing proposals for the harmonization of specific parts of national bank insolvency law (section 3.2). The sections maintain that the results of the analysis in chapters 5 and 6 suggest that differences currently may arise in the EU in the interpretation and application of the bank resolution rules. The EU Member States are left discretion in the field of substantive insolvency law, as has been observed by other scholars and policymakers. However, the investigated parts of the bank resolution frameworks suggest that divergences in bank resolution procedures may also be created by different national approaches and procedures to apply the harmonized bank resolution rules, which approaches and procedures are not directly related to insolvency law. Therefore, in the discussions about the further development of the EU bank insolvency framework, we may also need to consider the current implementations of

9 *Cf.* Massman 2015, p. 631 and 644; Baird & Morrison 2011, p. 287 and 300, who make the similar claim that the resolution regime in the US Dodd-Frank Act implements several traditional bankruptcy practices, rules, and principles.

10 *Cf.* Massman 2015, p. 631 and 644; Baird & Morrison 2011, p. 287 and 300.

the bank resolution framework and their effect on supranational coherence in the bank resolution procedures.

2. National coherence

2.1 Explicit departure from national private law

The bank resolution frameworks contain major deviations from national private law, especially insolvency law. They are designed to deal with the peculiarities of a bank failure when compared to a more traditional business failure.[11] Insolvency law is traditionally mainly directed towards the interests of the creditors of the insolvent debtor. By contrast, the bank resolution rules provide for a procedure to protect financial stability, such as by securing the failing bank's role in payment systems and its deposit-taking functions. To this end, they grant all powers over the resolution process to an administrative resolution authority with the aim to facilitate immediate and firm action. The key differences with national private law are evident from the resolution objectives set out in the BRRD and SRM Regulation and the resolution rules that explicitly depart from national private law. We will examine these resolution objectives and rules in turn. Because these rules explicitly derogate from national private law, their relations with domestic private law are considered moderate coherent.

2.1.1 Objectives of the transfer tools and national insolvency law

Chapter 6 showed that the bank resolution rules on the transfer tools and Dutch, German, and English insolvency law demonstrate only a limited unity in objectives.[12] It discussed that in insolvency procedures under Dutch, German, and English insolvency law, the objective of maximizing the returns to the creditors is considered the primary objective. In the three investigated jurisdictions, going concern sales of the business of a corporate debtor or a part thereof form a well-established practice as an alternative to piecemeal liquidation. The sales are often negotiated and concluded before the opening of the formal insolvency procedure, which practice is known as pre-packs. It is undisputed in the literature that these going concern sales allow viable parts of the business to be continued and that societal interests may be served. Moreover, Dutch case law leaves some room for a bankruptcy trustee to consider other interests than the financial interests of the joint creditors in a bankruptcy procedure. Nonetheless, according to the Dutch, German, and English doctrine, the sales in insolvency procedures should be primarily aimed at serving the financial interests of the joint creditors.

11 *Cf.* Massman 2015, p. 644.
12 Paragraph 4 of chapater 6.

When a resolution authority applies the transfer tools in a bank resolution procedure under the BRRD and SRM Regulation, it may need to consider how to obtain the best possible proceeds. For example, the BRRD requires the resolution authorities to market the shares or assets, rights, and liabilities of the bank under resolution and to try to sell them for a high price if the sale of business tool is applied. The sale of a bridge institution or sale of its assets, rights, and liabilities has to take place on commercial terms. Furthermore, the resolution authorities can establish an asset management vehicle to maximize the value of the transferred assets through a sale or orderly wind down. Hence, the rules on the transfer tools share with the national insolvency laws a value maximization objective. After a transfer of assets, rights, and liabilities with one of the three transfer tools, any consideration paid is to benefit the entity under resolution, and hence indirectly the creditors and shareholders that were left behind with this entity. If the sale of business tool or bridge institution tool is applied by transferring shares, the resolution authorities have to distribute any proceeds amongst the former owners of the shares.

Nevertheless, obtaining the best possible proceeds is not the primary objective in a bank resolution procedure. The bank resolution rules have five more important objectives. The five primary objectives in a resolution procedure are: to ensure the continuity of critical functions of the bank; to avoid significant adverse effects on the financial system; to protect public funds; to protect covered depositors and investors; and to protect client funds and client assets. These resolution objectives are of equal importance. The resolution authorities may, for instance, agree on a sale without openly marketing the shares or business of the bank and arrange a sale for a low price if the resolution objectives so require.

At the same time, the resolution rules do not put fully aside the objectives of Dutch, German, and English insolvency law. The no creditor worse off-principle requires a resolution authority to compare the position of creditors and shareholders in resolution with the position of these stakeholders in a hypothetical insolvency procedure for the bank and to ensure that the creditors and shareholders are not made worse off. Accordingly, the authority – or at least the valuer whom it appoints – has to consider the objectives of insolvency law in its assessment of how shareholders and creditors should be treated in a resolution procedure. Under Dutch and German insolvency law, the collective satisfaction of the creditors' claims is the primary objective in an insolvency procedure for a bank. In the bank-specific insolvency procedure under the UK BA 2009, a liquidator is also required to pursue the objective of achieving the best result for the bank's creditors. He must do so if its primary statutory objective is achieved, which is ensuring that either the deposit portfolio of the bank is transferred to another bank or depositors receive payments from the deposit guarantee scheme.

2.1.2 *Explicit departure from rules of national private law*

The bank resolution rules provide for many explicit derogations from the rules of national private law. These deviations aim to ensure, amongst other things, that a resolution procedure can operate quickly to promote financial stability and that certain groups of creditors are offered protection in the resolution process. We will consider a few examples.

To secure that the resolution measures can be implemented in a very short period, the BRRD and SRM Regulation explicitly require the Member States to remove procedural impediments to the exercise of the resolution tools and powers stemming from articles of association, contract, and law, including company law.[13] Under the laws of the investigated jurisdictions, the bank resolution tools and powers are exercised on the basis of a decision by the national resolution authority.[14] As a result, any reduction, conversion or cancellation in the application of the bail-in mechanism is immediately binding on the bank and affected creditors and shareholders,[15] unless the decision of the resolution authority provides otherwise.[16] The resolution authorities are, in principle, not subject to requirements to obtain consent or approval from any person, to publish a notice or prospectus, or to file or register a document with an authority.[17] This requirement entails, for instance, that approval of the general meeting of shareholders under company law is not necessary for amendments to the articles of association of the bank under resolution, and that the resolution authorities can modify the terms of a contract to which a bank under resolution is a party without the consent of the counterparty as would normally be required under private law.[18] An exception is that the consent of the purchaser is required if the sale of business tool is applied.[19]

Accordingly, the national bank resolution frameworks give far-reaching powers to the resolution authorities. The UK BA 2009 established a new legal framework that gives the BoE flexibility to transfer property, rights, and liabilities or securities to another legal entity and decide what the effects

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13 Articles 38(1), 40(1), 42(1), 54 and 63(2) BRRD and *see* paragraph 5.2.1 of chapter 5 and paragraph 3 of chapter 6.

14 *Cf*. Section 3a:6 Wft; sections 99(4) and 136-137 SAG; sections 12A and 48B BA 2009.

15 Article 53(1) BRRD.

16 *Cf*. Section 3a:6(4) Wft.

17 Article 63(2) BRRD.

18 De Nederlandsche Bank, 'Operation of the bail-in tool', December 2017, p. 16; Explanatory Notes to the Draft BRRD Implementation Act (*Kamerstukken II* 2014/15, 34208, no. 3), p. 80.

19 Article 38(1) BRRD. *See also* articles 81-84 BRRD, which provide for some procedural obligations, including the requirement that a resolution authority notifies certain authorities when a resolution procedure is opened for a bank.

of such a transfer are.[20] A resolution instrument of the BoE may provide, for example, that in certain contracts the transferee is to be treated as the same person as the transferor, that the responsibility for the compliance with a license is divided between the transferee and transferor, and that a banking license is discontinued. In contrast to Dutch and German law, under English law, the concept of universal succession does not exist. While a transfer of assets, rights, and liabilities or shares of a company under English private law is typically effected on the basis of an agreement or on the basis of a scheme of arrangement to be sanctioned by a court, a transfer by virtue of a resolution instrument takes effect by operation of law. Hence, in the interest of speed in the resolution process, the transfers under the BA 2009 derogate from transfers under English private law, which traditionally attaches great value to private autonomy.

The national laws also grant the resolution authorities special powers in the context of the insolvency procedures which are applicable, for example, to the business of a residual entity following the application of the sale of business tool and a bridge institution following the application of the bridge institution tool.[21] For instance, under national general insolvency law, insolvency procedures are typically opened at the request of one or more creditors or the debtor. Chapter 6 concluded that, by contrast, the Fw provides that only the Dutch resolution authority, which is DNB, can request the court to order the opening of a bankruptcy procedure for a bank under the bank-specific Chapter 11AA Fw.[22] In Germany, the SAG empowers the national resolution authority, which is the BaFin, to file a request for the opening of an insolvency procedure following the application of resolution tools. In all other cases, the BaFin can initiate an insolvency procedure for a bank in its capacity as the supervisory authority under the KWG. The UK BA 2009 provides for a bank insolvency procedure, which is opened at the request of the BoE, competent supervisory authority or Secretary of State, and for a bank administration procedure. Only the BoE may apply to the court for a bank administration order. These national authorities are considered to be better suited to initiate an insolvency procedure than the creditors or the bank itself.

The resolution rules do not only aim to secure that authorities can move quickly and decisively through the resolution procedure but also to protect several types of creditors in the process. By way of illustration, it has been shown that the safeguards of the BRRD in partial transfers of assets, rights,

20 *See* paragraph 5.1.4 of chapter 6.
21 *See* paragraph 5.3 of chapter 6.
22 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.

and liabilities for several types of arrangements, including security, set-off and netting arrangements, depart in all investigated jurisdictions from national private law.[23] In principle, a resolution authority cannot selectively choose which assets, rights, and liabilities falling within one of these types of arrangements are transferred and which stay with the residual entity. For example, it has to transfer all linked rights and liabilities within a set-off or netting arrangement or leave them all behind. Moreover, the authority may not transfer a liability of a transferor, such as a bank under resolution, without the assets against which this liability is secured, and vice versa. The safeguards aim to minimize uncertainty as to whether counterparties can still exercise their rights under such arrangements after a transfer ordered by a resolution authority. It has been shown that outside an insolvency procedure, Dutch, German, and English contract and property law do not offer set-off and netting arrangements and *in rem* security arrangements the same degree of protection against a loss of the rights under the arrangements as is offered by the bank resolution rules. Thus, these areas of private law would not prevent in all cases that the claim of a party against the bank ceases to be secured or that a party loses its set-off or netting rights under an arrangement in the event of a partial transfer of assets, rights, and liabilities.

Another example is that the German legislature included in the SAG an exception to the statutory subordination of shareholder loans under section 39 InsO.[24] A claim is not subordinated by operation of law on the basis of section 39 InsO if the creditor has also become a shareholder of the company only because of the application of the bail-in mechanism to his claim under the SAG. Hence, the provision in the SAG aims to protect the creditor by preventing the situation that he is 'hit twice' since bail-in also affects his remaining claim because it is statutorily subordinated.[25]

Furthermore, in all investigated jurisdictions the hierarchy of claims in bail-in explicitly derogates from the distributional order of priority in an insolvency procedure. Chapter 5 showed that Dutch and English law provides for a complex statutory ranking in insolvency.[26] German insolvency law recognizes four creditor groups and indirectly protects some other types of creditors, although it does not provide for a class with creditors who are formally granted preferential rights. The bail-in rules provide for a different system than national insolvency law to protect various types of claims. They follow in bail-in the national insolvency distributional order of priority and, thus, recognize that some types of claims may have a more

23 *See* paragraph 5.2 of chapter 6.
24 Section 99(5) SAG.
25 *See* paragraph 5.2.2 of chapter 5.
26 Paragraph 5.3 of chapter 5.

senior or more junior position than other types of claims. At the same time, they derogate from the system followed in an insolvency procedure by also excluding classes of liabilities from the scope of the bail-in mechanism. For instance, the bail-in rules exclude several types of debts that are granted a priority treatment under the national insolvency laws, including covered deposits. Furthermore, the resolution authorities have discretion to exclude or partially exclude other categories of liabilities in exceptional circumstances. Thus, the bank resolution rules combine the system in which some liabilities have higher priority ranking than other liabilities with a policy under which specific types of claims are carved out from bail-in.

2.2 Elements of national private law in the bank resolution frameworks

While the resolution objectives and many resolution rules depart from objectives and rules of national private law, we also concluded that other resolution rules copy or refer to private law provisions and consider corporate restructuring and insolvency law practices. Hence, the resolution frameworks do not fully set aside insolvency law and some other areas of national private law.[27] A resolution procedure may involve reorganization and liquidation. Accordingly, the economic effect of the restructuring measures in a bank resolution procedure may not be very different from the effect of a restructuring of another type of business, whether it is a restructuring within the same legal entity or through the establishment of a new one.[28] The BRRD and SRM Regulation require that in the procedure, the shareholders and creditors bear the losses, as they would do in an insolvency procedure, and that the resolution authorities apply a no creditor worse off-principle, which principle is also adhered to in corporate procedures under national law. Allocating to costs of failure to the shareholders and creditors should help to address market distortions known as moral hazard.[29]

The sections below highlight some principles in bail-in that seem to correspond to principles we already know from restructuring and insolvency law (section 2.2.1) and then give a few examples of rules of the resolution frameworks with which we are familiar because they were copied from general insolvency law (section 2.2.2). These examples of the close alignment of the bank resolution rules with national private law point to coherent connections between the bank resolution framework and private law.

27 *Cf.* Massman 2015, p. 631 and 644; Baird & Morrison 2011, p. 287.
28 Schillig 2018, para. 3.2.
29 *See* paragraph 3.2.1 of chapter 2.

2.2.1 *Principles that look similar to those in national restructuring and insolvency law*

When we take a look at the level of the principles of the legal frameworks on bail-in, we can conclude that the bail-in rules share some important underlying principles with the investigated national corporate restructuring and insolvency laws.

In particular, it has been shown that the bail-in mechanism and a corporate restructuring or insolvency procedure can both be used to reduce the outstanding debt burden of a company through a debt write-down and conversion of claims into equity. Both seek to enable a company to continue operating and to avoid a liquidation procedure under insolvency law.[30] As discussed in chapters 2 and 5,[31] when seeking an informal financial restructuring through a contractual arrangement, whether it concerns the debt and equity of a bank or a non-financial corporate debtor, coordination issues may present itself.[32] These issues are called 'anticommons problems'. The literature on corporate restructuring procedures argues that if all involved creditors and shareholders need to agree with the financial restructuring plan, some of them may refuse to take part in the restructuring and to give their consent. They may be confident that if they hold out they have a chance to receive a larger individual stake in the pie. Accordingly, the shareholders and creditors holding out frustrate the adoption of the restructuring plan.[33] Similarly, in case of a bank failure, creditors and shareholders may hold out and prevent the implementation of a restructuring plan, confident that if the plan does not go ahead, the bank will, for instance, be bailed-out by the government. If the government does so, their equity stake or claim may be saved.[34]

Chapter 5 ascertained that the Dutch, German, and English laws that facilitate a corporate financial restructuring and the rules on the bail-in mechanism all seek to address potential hold out issues.[35] They share the underlying principle that a financial restructuring can be imposed or 'crammed down' on shareholders and creditors.[36] However, the corporate procedures differ from the bail-in mechanism as to the conditions under which such a cramdown can take place. The proposed Dutch extrajudicial plan procedure, the German insolvency plan procedure, and the English

30 Gracie 2012, p. 4-5.
31 Paragraphs 2.2.1 and 3.2.1 of chapter 2 and paragraph 2.2 of chapter 5.
32 *See* Schillig 2016, p. 61-66; De Weijs 2013; De Weijs 2012, who refers to the literature on insolvency law and property law that introduced and applied the theory of anticommons, including to Baird & Rasmussen 2010; Heller 1998.
33 De Weijs 2013, p. 210-215; De Weijs 2012, p. 74-78.
34 De Weijs 2013, p. 215-221.
35 Paragraph 4 of chapter 5.
36 *Cf.* De Weijs 2013.

scheme of arrangement, for instance, require the approval of the financial restructuring plan by a certain percentage of affected shareholders and creditors in a class or classes rather than unanimous vote, and they require a subsequent confirmation of the plan by the court. In the three procedures, the court performs an important oversight role and may refuse its confirmation if it finds that the plan does not comply with the applicable safeguards for involved shareholders and creditors.[37] The bank resolution rules have replaced both the vote of the stakeholders and the court confirmation with a 'fast-tracked'[38] administrative decision taken by resolution authorities in the public interest.[39] According to the EU legislature, an administrative authority is better suited than a court to make the necessary proactive decisions on a bank financial restructuring within a short period.[40]

The bail-in mechanism also shares another principle with the English scheme of arrangement and the draft bill for the Dutch extrajudicial plan procedure, namely that a financial restructuring can take place outside a traditional, court-centered insolvency procedure.[41] A company does have to be insolvent, and a formal insolvency procedure does not have to be opened for the use of a scheme of arrangement or extrajudicial plan procedure, or for the use of the bail-in mechanism. For a financial restructuring through an insolvency plan under German law, by contrast, the court has to open a formal insolvency procedure under the InsO. The literature argues that this may change, however, after the implementation of the proposed EU Directive on preventive restructuring frameworks.[42] According to the proposal, EU Member States have to ensure that corporate debtors in financial difficulty have access to a restructuring framework that enables them to restructure their debts or business, where there is a 'likelihood of insolvency'.[43] Accordingly, in the future German corporate financial restructuring law and the bail-in mechanism may demonstrate a stronger unity of underlying principles.

2.2.2 *Rules that incorporate national private law*

The fact that the bank resolution frameworks seek to mirror parts of insolvency law and some other areas of national private law also appears from the resolution rules. The previous chapters highlighted that some bank resolution rules look quite similar to those under national insolvency law.

37 *Cf.* Payne 2018.
38 Ugena Torrejon 2017, p. 237.
39 *See* De Weijs 2013, p. 219-220.
40 *Cf.* Recitals 4 and 5 BRRD.
41 *See* paragraph 4 of chapter 5.
42 Madaus 2017, p. 333.
43 Article 4 Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM (2016) 723 final, 22.11.2016).

An example is the definition of the term 'liabilities' in the provisions on the PRA Rulebook on bank resolution, which is based on the definition of 'provable debts' in English insolvency law.[44]

Moreover, the German legislature copied several provisions of the InsO to clarify what are the effects of resolution action under the SAG. A provision in the SAG that closely resembles section 254a(2) InsO on the effect of an insolvency plan in an insolvency plan procedure provides what the effect of a resolution decision is.[45] The resolution decision replaces all decisions and approvals which company law requires for the ordered measures. Also, resolutions, announcements and other measures required in the preparation of the measures under company law as well as declarations of involved parties needed for the implementation of the measures under company law are deemed to have been effected in the prescribed form. Section 99(8) SAG mirrors another provision of the InsO to clarify that a reduction of a liability of a bank does not affect the rights the involved creditors may have against the debtor's co-debtor, a surety or any other party who is liable for the debtor's obligations. Equivalent to the effect of an insolvency plan, an indemnity claim of these parties against the bank is then treated as discharged to the same extent as the bank's original liability is reduced.[46] The SAG also largely copies section 254(4) InsO by providing that after conversion of claims into shares, the new shareholders are not liable for any shortfall in value (*Differenzhaftung*) because their claims were initially overvalued, which risk would otherwise exist for them under German company law.[47] Thus, in addition to being a radical departure from national private law, the resolution procedures share some basic characteristics with insolvency procedures.[48]

2.3 Further alignment with national private law

The sections above showed that the bank resolution rules have created specialist legal frameworks for bank failures that diverge from but also incorporate certain parts of national private law. As we concluded in chapter 3, special rules for bank failures are not new in the three investigated jurisdictions, but since the latest financial crisis, the adoption of such rules has gathered pace. While the three countries first established national bank resolution frameworks, the resolution regimes are now strengthened and harmonized by a constantly expanding EU legal framework. Chapter 4 discussed that EU law typically pursues political, economic, and social objectives, such as the development of the internal market, without considering

44 *See* paragraph 5.1.2 of chapter 5.
45 Section 99(4) SAG and *see* paragraph 5.2.2 of chapter 5.
46 *See* paragraph 5.1.3 of chapter 5.
47 *See* paragraph 5.2.2 of chapter 5.
48 *Cf*. Massman 2015, p. 631 and 644; Baird & Morrison 2011, p. 287 and 300.

the coherence with the law in which it has to be integrated.[49] It also showed that Dutch, German, and English scholars have expressed concerns about the challenges presented by the incorporation of EU law into national law because the specific legal concepts of EU law do not always fit very well with existing domestic law.

The question arises whether the national legislatures need to and can something to more closely align the derogating bank resolution frameworks with other areas of national law, for instance, to ensure more consistency between the effects and outcomes of bank resolution and corporate insolvency procedures.

The literature suggests two solutions. The solutions are legislative spill-over and judicial spill-over.[50] In the first case, the national legislature expands the scope of the new rules deriving from EU law to areas of national law that are not directly covered by the EU legislation. A hypothetical example to illustrate this point seems to be the introduction of transfer tools to reorganize non-financial companies under national law while pursuing public objectives that are based on the resolution objectives.[51] Broadening the scope of the transfer tools and their societal-related, primary objectives to other types of companies would ensure, at least in theory, that the reorganization of these companies can be dealt with in the same way as the resolution of banks.[52]

In the second case, a court applies rules and principles of EU law by analogy to a non-harmonized area of national law, which it can only do if the national laws leave room for such an application.[53] A hypothetical example to illustrate this option is that a court would apply the resolution rules that exclude certain types of financial obligations from bail-in to a corporate financial restructuring.[54] It may rule in a specific case, for example, that liabilities such as short-term liabilities to other companies should not be included in the financial restructuring. Such a decision would derogate from general rules on corporate debt restructuring procedures, which, in principle, do not distinguish between liabilities that need to be excluded from restructuring to protect certain interests and all other liabilities of a company. The application would broaden the influence of the bail-in rules in national law.

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49 *See* paragraph 4 of chapter 4.

50 Manko 2015, p. 16-17; Van Gerven 2006, p. 65-67. *See also* Loos 2007, p. 523-529, who calls it 'spontaneous harmonization by the legislator' and 'spontaneous harmonization by the courts'.

51 *Cf*. paragraph 4 of chapter 6.

52 *Cf*. paragraph 4 of chapter 6.

53 *Cf*. Loos 2007, p. 527-529.

54 *Cf*. paragraph 5.3 of chapter 5.

It is questionable that these two solutions are realistic solutions to better cohere the derogating bank resolution rules and their objectives with other areas of national law. Moderate coherence in national legal orders caused by EU legislation may not persuade national legislatures and courts to broaden the scope of rules contained in EU legislation. Even if they introduce rules and concepts of the bank resolution framework in another area of national law, the explicit derogations from some other fields of national law will remain in effect.[55] For example, in the Netherlands a legislative proposal for a resolution framework for insurance companies was recently submitted to the Senate. The proposed regime is based on the BRRD and also deviates from existing rules of national private law.[56] It is submitted, therefore, that the resolution frameworks will remain specialist regimes that enable authorities to deal with the particular circumstances that may surround the failure of a bank and other types of financial institutions.

Nevertheless, this dissertation did not only give examples of provisions that explicitly deviate from and provisions that incorporate national private law. The parts of the national bank resolution frameworks that were analyzed in the present study also gave a few examples of resolution rules which have an incoherent relation with national private law. Their private-law effect is unclear because they do not have a logically valid relation with private law. As we saw above, the bank resolution frameworks should enable market participants to get an accurate picture of their possible position and losses in a bank failure. Therefore, it is the present author's view that the national legislatures should at least consider how such inconsistencies in their national bank insolvency laws can be prevented or removed to contribute to the desirable clarity and predictability of bank resolution and insolvency procedures. They will remain entrusted with this challenging task since, as we will see in the next paragraph, the EU bank insolvency framework will significantly expand in the future.

For example, it has been shown that some unclarity exists in German law. The parliamentary notes to the SAG state that the decision of the resolution authority on the application of the transfer tools under the SAG results in a transfer *sui generis*. The notes do not provide how such a transfer is to be classified in private law terms. Chapter 6 assumed that the resolution decision effectuates a (partial) universal succession and that the principles as to what is the effect and scope of universal succession under the UmwG also apply to the transfers under the SAG.[57] If that is the case, such a universal succession would not create uncertainty in terms of its effect. The German legislature or case law may need to provide some clarification as to what

55 *Cf.* Hesselink 2006, p. 303-304.

56 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).

57 Paragraph 5.1.3 of chapter 6.

the transfer *sui generis* constitutes and how it relates to and differs from universal succession under other statutes. As explained in chapter 4,[58] such a clarification would improve the relation between the resolution rules and private law.

Moreover, some aspects of the course and effects of the procedures for the conversion of claims into equity as proposed by DNB and the BoE remain unclear.[59] To take an example, it is unclear in both papers whether the tradeable certificates/claim rights would be transferred together with the part of a liability to the creditor that is not reduced by the resolution authority and with the rights to a potential write-up at a later stage. If a certificate/right holder can sell his certificate/claim right separately from the non-reduced part of his claim against the bank, it may become unclear who is entitled to a write-up of the bailed-in claim of the creditor at a later stage. The Dutch paper does not discuss if different types of claim rights would be issued to reflect the different types of creditors in bail-in, as determined based on the distributional order of priority amongst creditors under national insolvency law. Moreover, part 3a Wft and the paper by DNB do not provide if the general, Dutch private law rule on priority substitution applies in bail-in. If the rule would apply if a pledged claim against or pledged share in the capital of the bank is bailed-in, the right of pledge may become a right of pledge on a share or compensation claim following the bail-in. An obvious answer to this problem would be that the resolution authorities devote more attention in their papers to the course and effects of the procedures. According to the Financial Stability Board in its principles on bail-in execution, the disclosure of the relevant information about the anticipated exchange mechanic by resolution authorities enhances the predictability of the procedure for market participants.[60]

3. Supranational coherence

3.1 Differences between the national bank resolution frameworks

It is generally acknowledged that EU directives do not necessarily create a uniform application and interpretation of rules. They harmonize national law on the basis of common standards but leave room for different domestic legislation, legal traditions, and terminology.[61] The selected parts of the national bank resolution frameworks that were analyzed in chapters 5 and 6 of this study show that the BRRD is not an exception. The directive leaves some room for divergent national approaches to bank resolution.

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58 Paragraph 4 of chapter 4.
59 *See* paragraph 5.2.3 of chapter 5.
60 Financial Stability Board, 'Principles on bail-in execution', 21 June 2018, principle 10.
61 Saintier 2011, p. 544. *See also* Hartkamp 2012, p. 125-157. *Cf.* article 288 TFEU.

The SRM Regulation aims to enhance the uniform application of the bank resolution frameworks in the SRM participating Member States.[62] It is, as opposed to the BRRD, directly applicable in the legal orders of the Member States.[63] However, the Regulation also provides that the national resolution authorities implement the decisions taken under the Regulation based on the national legislation transposing the BRRD.[64] Hence, it does not create a unified bank resolution framework.

The results of the present study show that jurisdictions are left discretion in the design of the hierarchy of claims in resolution and insolvency and in the design of the insolvency procedures for banks. They suggest that divergences in bank resolution procedures may be created by national insolvency law as well as by different national approaches and procedures to apply the harmonized bank resolution rules that are not directly related to insolvency law. We will consider both types of differences in the sections below.

3.1.1 Divergent approaches in national insolvency law

As indicated in chapter 2, the bank resolution and bank insolvency procedures in the EU are both governed by the procedural principles established by the Winding-up Directive under which the starting point is that the law of the home Member State of the bank is the applicable law in the procedures.[65] Hence, if a banking group consists of separate legal entities (subsidiaries) in several Member States and resolution action is expected to be taken at the level of these group entities in case of failure, the resolution authorities rely on the laws of the home Member States of the legal entities, for instance, to determine the ranking of claims.[66]

Chapter 5 discussed that the hierarchy of claims in bail-in follows to a large extent the distributional order of priority in insolvency procedures under national law.[67] It showed that differences in the application of the bail-in mechanism may exist between the investigated jurisdictions because Dutch, German, and English law have their own approaches to the hierarchy of claims in insolvency and resolution. Chapter 6 subsequently ascertained that the EU Member States also have leeway to determine how an insolvency procedure for a bank under national insolvency law looks like.[68] The national bank insolvency procedures and harmonized resolution procedure

62 *Cf.* Recital 10 SRM Regulation.
63 *Cf.* Article 288 TFEU.
64 Articles 23 and 29 SRM Regulation.
65 *See* paragraphs 3.1 and 3.2.1 of chapter 2.
66 *Cf.* Article 10(2)(h) Winding-up Directive.
67 *See* paragraph 5.3 of chapter 5.
68 Paragraph 5.3 of chapter 6.

are closely related. For instance, an insolvency procedure – rather than a resolution procedure – is still the preferred choice in case of a bank failure. After application of the sale of business tool or bridge institution tool in a resolution procedure, the residual part of the bank is to be made subject to an insolvency procedure. Moreover, 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 insolvency procedure.

The literature has argued that the existing national differences and national discretion in the field of insolvency law create uncertainty for shareholders and creditors about the possible outcomes of resolution and insolvency procedures for banks.[69] For example, the Member States are not prevented from changing their insolvency framework if a particular bank insolvency case so requires.[70] Furthermore, the heterogenous national approaches to the ranking of claims complicate for investors in bank debt the assessment of where they would stand in the hierarchy in resolution and insolvency.[71] The diverging national approaches to the ranking of claims and differences in bank insolvency procedures are also expected to make the application of the no creditor worse off-principle by a resolution authority more difficult. The assessment required by the principle is to be performed at the level of each group entity subject to resolution to take into account the national insolvency laws that would be applicable had the group entities entered insolvency procedures.[72] In particular, the principle requires the SRB at the supranational level – or at least the valuer whom it appoints – to be able to take into account the diverse national legal frameworks to determine the possible outcomes of a hypothetical insolvency procedure.[73]

The discretion that the BRRD left at the national level as regards the hierarchy of claims in bail-in and insolvency is illustrated by the fact that, in contrast to the Dutch and the English legislature, in 2017 the German legislature introduced a new class of bank debt in German law that was statutorily subordinated in resolution and insolvency to the other senior unsecured

69 International Monetary Fund, 'Euro Area Policies. Financial sector assessment program. Technical note – bank resolution and crisis management', IMF Country Report No. 18/232, p. 14; Merler 2018, p. 2 and 8-11.

70 Merler 2018, p. 2 and 8-11, who discusses that in an Italian bank insolvency case the opened liquidation procedure was an amended version of the ordinary bank liquidation procedure under national law.

71 *See* Wojcik 2016, p 125-126.

72 European Banking Authority, Single Rulebook Q&A, article 74 BRRD, Question 2015_2458, as referred to by Deslandes & Magnus 2018, p. 5. The conclusion may be different if the national insolvency regime provides for specific treatment of groups of companies.

73 Wojcik 2016, p. 125-126.

claims against banks.[74] Furthermore, chapter 5 set out that since liabilities to tax authorities are only excluded from the scope of bail-in under the BRRD if they are awarded a preferential treatment under national law, these liabilities do not fall within the scope of the bail-in mechanism under Dutch law but are bail-inable under German and English law. Article 108 BRRD does not stipulate how the priority position required by that provision for claims of depositors and deposit guarantee schemes should relate to the priority positions of claims of other preferential creditors and secured claims. In contrast to Dutch and German law, under English law covered deposits and the related claims of deposit guarantee schemes rank equally with other preferential claims in resolution and insolvency, such as the preferential claims of employees. The UK legislature also had the discretion to decide how the position of floating charges in the insolvency ranking of claims relates to the position of deposits and claims of deposit guarantee schemes in that ranking. It ultimately decided to give floating charges a more junior ranking than the deposits and claims of deposit guarantee schemes that are awarded preferential treatment under article 108 BRRD.

Chapter 6 showed that Dutch, German, and English law differ in their approaches as to what is regarded as a 'normal insolvency proceeding' for a bank, what the grounds are for the opening of such a procedure, what the role is of the resolution authority, and which objectives are pursued. For example, under Dutch insolvency law the bankruptcy procedure under the bank-specific chapter 11AA Fw is the only available insolvency procedure for a bank, whereas in Germany, at least in theory, all general insolvency procedures under the InsO can be used for banks. English 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.

The different procedures and the divergent objectives the insolvency trustees or administrators have to pursue in such procedures may lead to differences in terms of the preferred strategy and outcomes.[75] In the insolvency procedures under Dutch and German law, for instance, the collective satisfaction of the claims of the creditors is the primary objective, as is the case in insolvency procedures for other types of corporate debtors. In contrast to German insolvency law, Dutch case law on insolvency law leaves some room for the bankruptcy trustee to consider other interests than the financial interests of the joint creditors.[76] In the bank-specific insolvency

74 As we saw in Paragraph 5.3 of chapter 5 and is also discussed below, the relevant provisions in German law have now been amended to implement a directive that introduces a harmonized class of senior non-preferred debt.

75 *Cf.* De Groen 2018, p. 11.

76 *See* paragraphs 4.2.1 and 4.2.2 of chapter 6.

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 but only if the primary statutory objective is achieved. The primary statutory objective in the procedure is ensuring that either the deposit portfolio of the bank is transferred to another bank or depositors receive payments from the deposit guarantee scheme. For example, as we saw in chapter 6, 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 the primary statutory objective may require a liquidator in a bank insolvency procedure to keep a part of the banking business open and retain the employees to assist the deposit guarantee scheme.[77]

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. The BA 2009 explicitly provides that the bank administrator is required, as the primary, statutory objective, to ensure the supply to the transferee of services and facilities to enable this transferee operating successfully.[78] Only if the BoE considers that this objective has been achieved, the objectives that are pursued in a 'normal administration' procedure come into play. 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. Thus, it would appear that the bank administration procedure under the BA 2009 may result in a reorganization of this entity, even though the BRRD requires that such a company is wound-up.[79]

Another example of a possible difference relates to the fact that the conditions for the opening of a bankruptcy procedure for a bank under Chapter 11AA Fw have been aligned with the resolution conditions in the SRM Regulation. Under the Fw, the conditions are that the bank is failing or likely to fail and that no private sector measure is available to prevent the failure, which conditions are defined in the SRM Regulation. Hence, the third resolution condition in the SRM Regulation, i.e., the condition that the opening of a resolution procedure is in the public interest, must not be satisfied. Assume that the resolution authority determines in its assessment of

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77 *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.

78 Such supply of services and facilities is required by articles 37(6) and 65 BRRD. *See* paragraph 3 of chapter 6. *Cf.* Sections 3a:36 and 3a:30 Wft (which provides that DNB should not request the Amsterdam district court to order the bankruptcy of the residual entity if the continuation of the entity is required for the achievement of the resolution objectives or compliance with the resolution principles) and section 80 SAG.

79 Schillig 2016, p. 405.

the resolution conditions that a resolution procedure should not be opened for a bank that is deemed to be failing or likely to fail because this public interest condition is not met. In the Netherlands, the bank is then likely to meet the conditions to be put in a bankruptcy procedure instead, although a court order is required for the opening of the procedure. In Germany, by contrast, in such a case more uncertainty may exist as to whether a court decides to open an insolvency procedure for the bank that is considered to be failing or likely to fail by the supervisory authority. The grounds for the opening of a bank insolvency procedure under German law are defined by general insolvency law. The grounds are insolvency, over-indebtedness and imminent insolvency. Accordingly, if a resolution authority determines that a bank has to be put into an insolvency procedure, this decision does not necessarily entail that an insolvency procedure is indeed opened for the bank – including a legal entity within a banking group – at the national level.[80]

3.1.2 Other types of possible divergent approaches in bank resolution

The parts of the national bank resolution frameworks which this dissertation investigated suggest that differences in the application and interpretation of the bank resolution rules may not only be caused by the different national insolvency laws. Divergences may also be created by different national approaches and procedures to apply the harmonized bank resolution rules that are not directly related to insolvency law. We need to take into account these differences as well in our debate about the closer harmonization of the EU bank insolvency framework.

One example of such divergent national approaches to apply the provisions in the BRRD which this book discussed relates to guarantees.[81] It has been shown that between the investigated jurisdictions, differences may exist as to what is the effect on guarantees under national law, including a guarantee of a group company, if the resolution authority reduces a liability of a bank. The potential inconsistencies are caused by a different effect of the national provisions that transpose article 53(3)-(4) BRRD. It is the present author's view that this article aims to ensure that if an authority reduces a bank's liability, the bailed-in (part of the) debt can no longer be collected from this bank. The article does not aim to interfere in the relationship of a creditor and another party and does not require that a claim of this creditor against the other party is also treated as discharged by operation of law.

Indeed, German law explicitly provides that the debt reduction by the resolution authority does not affect the rights the involved creditors may have against the bank's co-debtor, a surety or any other party who is liable

80 *Cf.* Deslandes & Magnus 2018, p. 17-18.
81 Paragraph 5.1.3 of chapter 5.

for the debtor's obligations. An indemnity claim of these parties against the bank is treated as discharged to the same extent as the bank's original liability is reduced. By contrast, if the bank's liabilities are bailed-in under Dutch law, national private law determines whether the discharge of the principal debt claim by operation of law results in a release of the guarantee liability. It has been shown that under Dutch law, the likely effect of the debt reduction is that a surety is then no longer liable to the creditor and a co-debtor no longer for the joint and several obligation (*hoofdelijke verbintenis*) to the extent the liability of the bank is reduced. The position of a guarantor may be different if the guarantee agreement is structured as an independent guarantee (*onafhankelijke garantie*) and the creditor beneficiary is entitled to payments on first demand and without evidence of the size of his loss. In such a case, the obligation of the guarantor is typically independent of that of the obligor and the beneficiary is entitled to receive payments in accordance with the terms of the guarantee. The UK BA 2009 seems to leave it to the discretion of the BoE to provide in its resolution instruments that a liability of the bank is, for example, canceled and what is the effect of such a cancelation on a liability of a guarantor under a related guarantee. However, similar to Dutch law, the general rule under English private law is that the surety is discharged if the principal liability is extinguished by operation of law.

Chapter 5 also highlighted that the bail-in rules may be applied differently in different Member States because divergent procedures are followed to apply the harmonized bail-in rules.[82] In particular, it showed that jurisdictions intend to use different processes for the conversion of bank debt to equity in a resolution procedure. The conversion procedure under the SAG seems to follow to a large extent the provisions of general German company and insolvency law that are normally applicable to a debt-to-equity swap. The Dutch legislature and resolution authority and the BoE have proposed their own conversion procedures in which creditors are first provided tradeable claim rights or certificates of entitlement, and they are delivered a share in the resolved bank only at a later date. It has been shown that the papers of DNB and the BoE do not address all relevant aspects of the conversion procedures. To take an example, the papers do not discuss if the market value of the claim rights/certificates of entitlement plays a role in the determination of the rate of conversion of debt to equity. Different outcomes of the proposed national conversion procedures may be achieved, for instance, if in some jurisdictions the market value of the claim rights of certificates is taken into account to set this conversion rate.

82 Paragraph 5.2 of chapter 5.

3.2 Further alignment of the national bank resolution frameworks

When the European Commission presented its proposal for the BRRD, it explicitly stated that insolvency procedures fell outside the scope of the harmonization efforts. A coordination framework for bank resolution was regarded the first necessary step at that moment. '[T]he need for further harmonisation of bank insolvency regimes, with the possible aim of resolving and liquidating banks under the same procedural and substantive rules', including the introduction of 'administrative liquidation proceedings for banks to facilitate a faster and more orderly liquidation than the standard court-based procedure' was seen as a project for the longer term.[83] Even though the BRRD eventually did harmonize a small part of national insolvency law, namely the position of depositors and deposit guarantee schemes in the distributional order of priority amongst creditors,[84] the Commission noted in 2012 that

> '[b]ank resolution has many ties with insolvency procedures (e.g. bridge banks, debt write down). Liquidation under judicial insolvency procedure is not discussed in this impact assessment, as the current proposal does not aim to change insolvency procedures and legislation in the EU.'[85]

The harmonization of substantive insolvency law in the EU has always been considered a politically highly sensitive matter.[86] Insolvency laws are strongly intertwined with other areas of national legislation and are deeply rooted in domestic legal traditions.[87] Fletcher and Wessels note in that context that 'the combination of "harmonisation" and "insolvency law" in

83 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the European Court of Justice and the European Central Bank, 'An EU Framework for Cross-Border Crisis Management in the Banking Sector' (COM(2010) 579 final), p. 16.

84 Article 108 BRRD.

85 Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012), p. 62.

86 Mucciarelli 2013, p. 178 and 196-199.

87 *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the European Court of Justice and the European Central Bank, 'An EU Framework for Cross-Border Crisis Management in the Banking Sector' (COM(2009) 561/4), p. 16, noting that '[t]he difficulty and sensitivity of such work [harmonization of insolvency laws for banks, LJ] should not be underestimated. Insolvency law is closely related to other areas of national law such as the law of property, contract and commercial law, and rules on priority may reflect social policy. Accommodating particular national concepts such as "trusts" or "floating charges" in a unified code would be complex.'

Europe was [long, LJ] regarded just as impossible as a combination of fire and water.'[88]

This approach to the scope of the harmonization efforts at the EU level now seems to have changed to a certain extent. The changed approached is illustrated by the fact that, as indicated in chapter 1 and further discussed below,[89] since the entry into force of the BRRD and SRM Regulation, academic and policy discussions have devoted much attention to need to adopt new EU legislative instruments for bank resolution. Several proposals deal with the harmonization of substantive insolvency law. According to some scholars, the current developments and legislative proposals in the field of bank insolvency law should be seen as a step towards an eventual single bank insolvency regime in the EU.[90]

Even though bank insolvency law has been and is likely to be more and more harmonized at the EU level, it is the present author's view that the EU legislature is unlikely to achieve full supranational coherence in the application and interpretation of bank insolvency law in the EU soon. Obviously, the adoption of new EU legislative instruments to unify or harmonize specific areas of bank insolvency law would not render fully compatible national provisions in other fields of law. In unified or harmonized areas of bank insolvency law, there would be a need to apply the provisions in conjunction with provisions of national law which EU law does not cover. Moreover, while the Member States may now generally be more favorably disposed towards harmonization of insolvency law, the process to closer harmonize insolvency law is still expected to be 'be complex and time-consuming'.[91] Accordingly, we may need to focus on a selection of specific parts of national insolvency law to make these areas more consistent at the EU level in the near future.

Removing all differences in bank resolution and insolvency procedures across jurisdictions may also not be necessary, for example, if the different national laws do not lead to substantial differences in the procedures that undermine the predictability of the timing and outcomes of the procedures for market participants, which concern chapter 4 examined.[92] An example can be found in chapter 6.[93] The chapter discussed that several types of arrangements, including *in rem* security arrangements, are subject to

88 Fletcher & Wessels 2012, p. 35.
89 Paragraph 1 of chapter 1.
90 Véron 2018, p. 9; Bénassy-Quéré at al. 2018, p. 6.
91 International Monetary Fund, 'Euro Area Policies. Financial sector assessment program. Technical note – bank resolution and crisis management', IMF Country Report No. 18/232, p. 22.
92 Paragraphs 1 and 2 of chapter 4.
93 Paragraph 5.2 of chapter 6.

safeguards in partial transfers of assets, rights, and liabilities in resolution procedures. It was shown that the safeguards aim to prevent that a liability of the transferor, such as the bank under resolution, is transferred without the assets against which that liability is secured, and vice versa. Significant differences exist between the *in rem* security interests under Dutch, German, and English law. Nevertheless, the effect of the safeguards for *in rem* security arrangements should be the same. The assets and secured liability or liabilities should either be transferred together or both left behind. Accordingly, the safeguards may not require more harmonization of national security rights to achieve the intended effects in a resolution procedure.

As indicated in chapter 1, the debate about the further development of the EU bank insolvency framework has already selected several parts of national law that may need to be closer harmonized. Recent academic and political discussions have called for the harmonization of the hierarchy of claims in resolution and insolvency, national collateral enforcement procedures that allow banks to recover value from secured non-performing loans, and bank insolvency procedures. We will briefly consider the developments in the mentioned three fields.

First, as discussed above,[94] a directive that amends article 108 BRRD to harmonize a small part of the hierarchy of claims under national insolvency law was adopted in December 2017 and has to be transposed into national law by 29 December 2018.[95] The directive introduces a new class of bank debt, namely so-called 'senior non-preferred debt'. The new debt class ranks in resolution and insolvency senior to regulatory capital instruments and other subordinated liabilities, and junior to other senior debt. However, since the new directive only harmonizes a small part of the hierarchy of claims in resolution and insolvency, it has now been argued that more aspects of the hierarchy have to be aligned, including the treatment of deposits.[96]

Second, in March 2018 the European Commission published a proposal for a directive that creates a common 'accelerated extrajudicial collateral enforcement procedure'.[97] The proposal was part of a package of measures

94 Paragraph 5.3.4 of chapter 5.

95 Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy (OJ L 345, 27.12.2017, p. 96–101).

96 International Monetary Fund, 'Euro Area Policies. Financial sector assessment program. Technical note – bank resolution and crisis management', IMF Country Report No. 18/232, p. 22 & 25-27.

97 Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (14.3.2018, COM(2018) 135 final).

to reduce the level of non-preforming loans of banks in the EU.[98] Under the proposal, banks as lenders and their borrowers can contractually agree in advance on a mechanism to recover the value from a loan secured by collateral. According to the Commission, the procedures to enforce collateral under national insolvency law are often slow and differ from Member State to Member State. In the meantime, the secured loan remains on the balance sheet of the bank, which reduces the capacity of the bank to grant new loans. A harmonized collateral enforcement procedure would enable a bank as a lender to recover its money from the secured loan out of court if the borrower defaults and may stimulate cross-border lending transactions.[99] Because the proposed procedure would facilitate the removal of a secured non-performing loan[100] from a bank balance sheet, according to the present author, it is to be considered an alternative to the separation of assets into an asset management vehicle in a bank resolution procedure under the BRRD.

Finally, scholars have advocated further alignment of the insolvency procedures for banks.[101] The literature recommends that the common bank insolvency chapter within the national insolvency laws of the EU Member States contains at least provisions on the right to file an insolvency procedure for a bank, the conditions for the opening of such a procedure, the types of companies to which the chapter is applicable, the procedure itself, and the continuation of the business of the company.[102] According to another proposal, the SRB has to be equipped with an administrative liquidation tool so that it can initiate an insolvency procedure and appoint a trustee for failing banks in the SRM, and it is less dependent on the national insolvency laws and authorities to take such action.[103]

The results of the present study that were analyzed in the previous paragraphs confirm these conclusions that jurisdictions are left much discretion in the design of the hierarchy of claims in resolution and insolvency, and in the design of the insolvency procedures available for banks. It is submitted

98 The Commission also proposed to amend the CRR to require banks to set aside funds to cover the risks associated with non-performing loans and published a blueprint that provides national authorities guidance on how to set up asset management companies to deal with non-performing loans. The proposed directive that creates a common 'accelerated extrajudicial collateral enforcement procedure' also includes measures to encourage the development of secondary markets for non-performing loans. *See* https://ec.europa.eu/info/publications/180314-proposal-non-performing-loans_en.

99 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (14.3.2018, COM(2018) 135 final), p. 3 and 8-10.

100 For a definition of the term 'non-performing loan', *see* paragraph 2.1 of chapter 6.

101 E.g., Merler 2018; Philippon & Salord 2017, p. 46.

102 Philippon & Salord 2017, p. 46.

103 International Monetary Fund, 'Euro Area Policies. Financial sector assessment program. Technical note – bank resolution and crisis management', IMF Country Report No. 18/232, p. 22-23.

that the EU legislature may indeed need to consider the differences in these fields in the further development of the EU bank insolvency framework. As we saw above, clear specification in legislation of the potential treatment of creditors in the bank resolution and insolvency, including transparent and predictable hierarchies of claims and bank insolvency procedures, will help market participants to better price the credit risks.[104]

New EU legislative instruments may need to be adopted to achieve the closer harmonization in these fields of bank insolvency law. Article 114 TFEU may be the appropriate legal basis for the instruments. The European Commission has used article 114 TFEU as the legal basis in its proposals for the adoption of legislative instruments to expand the EU bank insolvency framework further. For instance, it considers this provision the appropriate legal basis for the introduction of the accelerated extrajudicial collateral enforcement procedure.[105] Article 114 TFEU also provided the legal basis for the adoption of the SRM Regulation, BRRD, and directive on national bank creditor hierarchies. The provision allows the adoption of measures for the 'approximation' of national provisions 'which have as their object the establishment and functioning of the internal market'.[106] Thus, it limits its scope to the measures that contribute to the elimination of competitive distortions or obstacles to trade.[107] For example, the rationale for using article 114 TFEU as the legal basis for the BRRD was that ensuring that Member States use the same tools and procedures to resolve failing banks would eliminate distortions to competition between banks and improve the functioning of the internal market in financial services.[108]

The question arises which other types of measures can be used at the EU level to create more supranational coherence in interpretation and application of the bank insolvency laws, including in the abovementioned national approaches and procedures to apply the harmonized bank resolution rules.

In addition to the EU legislative instruments proposed by the Commission, the 'regulatory products'[109] of the EBA are likely to play an important role in achieving greater consistency in the existing EU bank insolvency framework in the future. The BRRD currently already confers specific tasks on this agency, including to develop draft regulatory and implementing

104 *Cf.* Tröger 2018, p. 45, 47 and 71.

105 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (14.3.2018, COM(2018) 135 final), p. 7-9.

106 *Cf.* Article 26 TFEU. *See* paragraph 5 of chapter 4.

107 Tuominen 2017, p. 1366. *See also* Moloney 2014, p. 1653-1659.

108 Tuominen 2017, p. 1369. *Cf.* Recitals 9 and 108 BRRD. *See also* paragraph 3.2.2 of chapter 2.

109 Ferran 2016, p. 294.

technical standards and to issue guidelines.[110] The technical standards further specify the content of certain provisions in the BRRD and become binding EU rules after endorsement by the European Commission under articles 290-291 TFEU.[111] They are intended to be technical, but, in practice, they often contain political and strategic decisions.[112] The standards on MREL, for example, take important decisions on the scope of regulatory criteria for the MREL framework.[113] Furthermore, several provisions in the BRRD mandate the EBA to develop guidelines with the formal objective of creating 'consistent, efficient and effective supervisory practices' and ensuring 'the common, uniform and consistent application of Union law.'[114] These guidelines include the guidelines on the treatment of shareholders in bail-in.[115] The EBA may, however, also issues guidelines and recommendations addressed to authorities and financial institutions on its own initiative.[116] Although they are not formally binding, financial institutions and authorities are expected to 'make every effort to comply'.[117] Other regulatory products the EBA produces include opinions,[118] such as its opinion addressed to the European Commission on the classes of arrangements to

110 Recitals 114-118 BRRD. *Cf.* Article 1(2) Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12) (EBA Regulation), as amended by Regulation 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (OJ L 287, 29.10.2013, p. 5).

111 Articles 10-15 EBA Regulation.

112 Ferran 2016, p. 295-296; Cappiello 2015, p. 428-429.

113 Ferran 2016, p. 295-296. Article 45(2) BRRD provides that the 'EBA shall draft technical regulatory standards which specify further the assessment criteria […] on the basis of which, for each institution, a minimum requirement for own funds and eligible liabilities […] is to be determined.' It resulted in the 'Final Draft Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU' of 3 July 2015 (EBA/RTS/2015/05), which were endorsed by the Commission as the Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities (OJ L 237, 3.9.2016, p. 1).

114 Article 16(1) EBA Regulation.

115 Article 47(6) BRRD; European Banking Authority, 'Final Guidelines on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments', 5 April 2017, EBA/GL/2017/04.

116 Recital 115 BRRD; Ferran 2016, p. 298.

117 Article 16(3) EBA Regulation, which provides that if authorities decide not to comply they must give reasons for non-compliance and institutions may also be required to do so. *See* Ferran 2016, p. 298-299.

118 Articles 8(1)(a) and 34(1) EBA Regulation.

be protected in partial transfers under article 76 BRRD,[119] and the Q&A tool on its website.[120]

Accordingly, different applications of the EBA toolkit are conceivable to foster consistent transpositions of bank insolvency rules and national procedures to apply the harmonized rules. By way of example, the EBA could issue guidelines on the execution of the conversion of claims in bail-in at the national level, which execution chapter 5 analyzed. Likewise, one could consider mandating the EBA to draft technical standards on the effects of bail-in on guarantees in resolution procedures since we have seen that differences may also exist in this field. Legal practice has already called for EBA guidelines to address divergences in national implementations of another provision of the BRRD, namely article 69 BRRD on the powers of resolution authorities to temporarily suspend certain payment and delivery obligations of a bank.[121]

4 Conclusions

This chapter has applied the coherence theory that was developed in chapter 4 to the results of the analysis in chapters 5 and 6. The results of the research indicate that essential differences in the field of substantive insolvency law to which the literature and policymakers have paid attention indeed exist across jurisdictions. In particular, they confirm the conclusions of academic and policy discussions that jurisdictions are left much discretion in the design of the hierarchy of claims in resolution and insolvency and in the design of the insolvency procedures available for banks. At the same time, the parts of the bank resolution framework that were selected for the present study illustrate that other types of potential differences in bank resolution procedures may also need to be considered in the debate about the closer harmonization of the EU bank insolvency framework. Different national approaches and procedures to apply the harmonized bank resolution rules may also lead to different application and interpretation of bank resolution rules.

Moreover, the examination of how selected bank resolution rules, principles, and objectives currently interact with and how they have been embedded into existing areas of national private law signals that inconsistencies in legislation may not only exist at the supranational level. The developments in

119 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.
120 *See* Ferran 2016, p. 296-299 and 304; Cappiello 2015, p. 430.
121 International Swaps and Derivatives Association (ISDA), 'ISDA position paper: Challenges with expanding BRRD moratoria powers', August 2017, p. 18.

the EU bank insolvency framework entail that the national bank insolvency laws have been and will be increasingly governed by EU legislation. The EU legislation on bank insolvency deals with specific topics and objectives and contains rules and terminology that are entirely different from that in the existing national legislation. The legislatures of the Member States are faced at the moment and will also be charged in the future with the difficult task of aligning their national legal orders with a quickly expanding EU legal framework on bank insolvency. The national legislatures should seek to solve incoherent relations resulting from inconsistencies in the relations of their bank insolvency regime with existing rules of private law to contribute to the desirable clarity about and predictability of bank resolution procedures.