



Universiteit
Leiden
The Netherlands

Insolvency of significant non-financial enterprises: lessons from bank failures and bank resolution

Kokorin, I.

Citation

Kokorin, I. (2021). Insolvency of significant non-financial enterprises: lessons from bank failures and bank resolution. *European Business Law Review*, 32(3), 521-555. Retrieved from <https://hdl.handle.net/1887/3242822>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3242822>

Note: To cite this publication please use the final published version (if applicable).

Insolvency of Significant Non-Financial Enterprises: Lessons from Bank Failures and Bank Resolution

ILYA KOKORIN*

Abstract

In the aftermath of the global financial crisis the EU bank resolution regime went through fundamental changes that seek to preserve financial stability and ensure continuity of critical functions. The same cannot be said of insolvency rules applicable to non-financial enterprises. Unlike bank resolution with its macroprudential and proactive focus, insolvency law has largely remained microprudential and reactive. Admittedly, unlike bank failures, corporate insolvencies usually do not pose systemic risk. However, in practice this may not hold true for significant non-financial enterprises (SNFEs). Such enterprises oftentimes play a major role in national economies and serve important public functions. Their failure may trigger contagion and cause disruptive consequences. Insofar as insolvency of SNFEs raises concerns common to bank failures, the question arises whether certain strategies and tools embraced within the EU bank recovery and resolution framework should be extended to regulate SNFE insolvency. This article explores the feasibility of such an extension.

Keywords

Bank resolution, insolvency, significant non-financial enterprises, enterprise groups, Carillion, early intervention, recovery and resolution planning, living wills, public interest, systemic risk, critical functions.

1. Introduction

The global financial crisis of 2008 has revealed the inadequacy of traditional insolvency law tools in handling distress of complex cross-border banks. In its aftermath the EU has carried out significant reforms to effectively deal with bank failures – avoid bailouts, preserve banks’ critical functions and ensure stability of the financial system. While the EU bank resolution regime has undergone fundamental changes,

* Meijers PhD candidate, Department of Financial Law, Leiden University, The Netherlands.

I am very grateful to Bob Wessels, Matthias Haentjens, Reinout Vriesendorp, Ebbe Rogge, Shuai Guo and Bilal Kurbanov for helpful comments and discussions. I also thank the anonymous reviewer for the insightful suggestions. All errors and omissions are the author’s own.

the same cannot be said of rules applicable to insolvency of non-financial enterprises. Unlike bank resolution with its macroprudential focus and proactive pre-insolvency orientation, insolvency law has largely remained: (i) microprudential – single entity-focused and designed to protect individual companies and their creditors; (ii) contractarian – implementing the idea of creditors’ bargain and solving coordination problems between creditors of a single entity; and (iii) reactive – centred around post-crisis liquidation of assets and allocation of proceeds among creditors.

It is true that unlike banks, non-financial entities typically do not possess inherent vulnerabilities associated with banks’ balance sheets. Their failure usually does not create systemic risk. The conceptual distinction between traditional entity-centric insolvency law and systemic public-interest-oriented bank resolution works well for relatively small non-financial entities. However, it is less persuasive for failures of large and interconnected businesses – significant non-financial enterprises (SNFEs). Such enterprises can play a major role in national economies, employing thousands of peoples and serving critical public functions. They may be highly integrated and complex both in internal corporate and financial structures and their interactions with larger economies. Their failure may trigger a chain reaction leading to the fall of other companies and corporate groups – contractors, distributors, suppliers and financiers. Due to these disruptive consequences, insolvency of SNFEs may require state intervention. For example, significant public funds have been used to bail out the US automotive industry in the 2000s. Arguably, the otherwise unavoidable failure of Chrysler and General Motors (GM) could have ‘posed a significant risk to financial market stability, threatened the overall economy’.¹

The recently adopted EU Directive on preventive restructuring frameworks (Restructuring Directive)² seeks to minimize the economic and social costs of business failures to ensure stability of financial markets, protect jobs and stimulate economic growth. It acknowledges that national insolvencies can have an impact on the functioning of the internal market ‘through the so-called domino effect of insolvencies’,³ whereby debtor’s insolvency spreads contagion nationally and internationally. Nevertheless, the Restructuring Directive fails to offer any tools to address this problem.

To the extent that insolvency of SNFEs raises concerns similar to those common to bank failures, the question arises: *can and should certain regulatory strategies and tools embraced within the EU bank recovery and resolution framework be extended to SNFE insolvency?* This relates to both the proactive (e.g. recovery and resolution planning) and reactive (e.g. administrative-led resolution process) strategies. In order to test the potential feasibility of bank resolution strategies for SNFEs, the article adopts a functional approach and discusses legal regimes of bank resolution and

¹ U.S. Department of the Treasury, *Troubled Asset Relief Program, Auto Industry* (8 January 2015).

² Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

³ *Ibid.*, Recital 11.

corporate insolvency from the perspective of purposes they pursue or functions they serve. By studying the collapse of Carillion, ‘the largest ever trading liquidation in the UK’⁴ as an example of the recent SNFE failure, it argues that the boundary between private and public interest in insolvency becomes less clear. In the current economic situation heavily affected by the outbreak and spread of the novel coronavirus (COVID-19) and the subsequent drastic governmental measures supporting businesses,⁵ the discussion about the role of ‘public’ and ‘private’ in insolvency becomes even more topical. It underscores the need to reconsider and redesign the prevailing approaches to crisis prevention and administration of insolvencies of significant enterprises.

It should be emphasized that the article does not suggest replacing current insolvency regimes, but instead examines bank recovery and resolution tools, relates them to insolvency of significant non-financial enterprises and, based on such analysis, proposes mechanisms that can supplement and improve general restructuring and insolvency law. It also does not seek to analyse the state of emergency experienced by insolvency laws around the world as a result of the coronavirus.⁶ It may be too early to fully grasp its consequences and determine the long-term effects (if any) on the foundations or principles of insolvency law. This article also does not argue that SNFEs should always be rescued. Just like banks, SNFEs should be allowed to fail in an orderly manner, without significant adverse consequences. After all, insolvency and liquidation may be a natural outcome,⁷ especially for businesses operating in the so called ‘sunset industries’.⁸ The fact that many SNFEs are active in such industries makes their failure conceivable and maybe even likely. This justifies the in-depth inquiry into the effects of their insolvency and practical ways to reduce the negative externalities connected to market exit.

⁴ UK Insolvency Service, *Carillion contracts complete transfer* (6 August 2018), <<https://www.gov.uk/government/news/carillion-contracts-complete-transfer>>.

⁵ *Great white night. Governments are once again splurging to keep big companies afloat* (The Economist, 4 April 2020). See also Guy Chazan, *Germany to spend extra €122.5bn to counter coronavirus slump* (Financial Times, 22 March 2020).

⁶ For an overview of insolvency law responses to COVID-19, see *The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog*, Oxford Legal Studies Research Paper No. 15/2020 (15 April 2020). See also Aurelio Gurrea-Martínez, *Insolvency Law in Times of COVID-19*, Ibero-American Institute for Law and Finance, Working Paper 2/2020 (17 April 2020). See also OECD, *Insolvency and Debt Overhang Following the COVID-19 Outbreak: Assessment of Risks and Policy Responses* (27 November 2020).

⁷ Tim Verdoes & Anthon Verweij, *The (Implicit) Dogmas of Business Rescue Culture* 27 Int. Insolv. Rev. 398 (2018).

⁸ The term ‘sunset industry’ describes an industry that holds little prospect for future development due to technological, societal or other changes. Steel and auto industries are sometimes referred to as sunset industries. See Victoria E. Marklew, *Cash, Crisis, and Corporate Governance: The Role of National Financial Systems in Industrial Restructuring*, 42 (Ann Arbor: University of Michigan Press, 1995).

2. Insolvency of Banks and Non-Financial Entities

2.1. *Are Banks Different from Other Companies?*

The global financial crisis (GFC) has shown that banks are, by nature, especially vulnerable to economic shocks and the effects of market instability. This vulnerability can be (partially) attributed to the economic model of banks and, to a large extent, other financial enterprises. Banks acquire liquid short-term liabilities (e.g. deposits, short-term bonds) and invest in illiquid long-term assets (e.g. corporate loans and mortgages).⁹ This business model has several implications. First, since the withdrawal of deposits happens on demand and the return of loans is fixed on a particular (future) date, it may be difficult for a bank to satisfy all the withdrawal requests of depositors at once. As a result, a liquidity shortage may be triggered.¹⁰ Second, because long-term assets are not easily tradeable, in times of the worldwide economic downturn banks may need to resort to a rapid liquidation of their assets at depressed prices ('fire sales') in order to get the necessary cash. This leads to a decrease in the bank's asset value and crisis deterioration.¹¹

The inherent fragility of banks facilitates bank runs – the behaviour of panicked depositors to withdraw funds from a financial institution, whenever there are signs of financial distress.¹² Such first-come-first-serve strategy may increase payoffs to some depositors. However, bank runs further aggravate the financial stability of a bank and harm its general body of creditors. They may also foster contagious bank runs at other banks.¹³ This behaviour is characteristic not only for deposit-taking banks, but for all financial institutions. For example, the insolvency of Lehman Brothers in 2008, at that time the fourth largest investment bank in the US with assets exceeding USD 600 billion, was facilitated by the demands from its short-term lenders under repurchase

⁹ Todd A. Knoop, *Global Finance in Emerging Market Economies*, 83 (Routledge, 2013), pointing out that banks are inherently illiquid.

¹⁰ Banks do not typically hold enough cash reserves to meet all the withdrawal requests. In other words, financial institutions maintain a buffer of reserves, which covers a fraction of liabilities (fractional reserve banking). This model works in times of economic stability, as only a few depositors demand payment at any given time. While increasing the profitability of banks, since they can use the 'freed' reserves, fractional reserve banking may facilitate instability of the banking system.

¹¹ The Basel Committee on Banking Supervision (BCBS) also notes that fire sales not only erode market confidence of a particular bank, but also 'generate mark-to-market losses for banks holding similar instruments and add to the pressure on their liquidity position, thus encouraging further fire sales and declines in prices and market liquidity'. See BCBS, *Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools* (January 2013), at para. 25.

¹² Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity* 91 *J. Political Econ.* 401 (1983). Lynette G. Janssen, *EU Bank Resolution Framework: A Comparative Study on the Relation with National Private Law*, 23 (Leiden: E.M. Meijers Instituut, 2019), pointing out that 'banks are confronted with a more dramatic form of common pool problem than most non-financial companies'.

¹³ Martin Brown, Stefan T. Trautmann & Razvan Vlahu, *Understanding Bank-Run Contagion*, ECB Working Paper Series, n. 1711 (2014), discussing how observed withdrawals affect depositors' beliefs and behaviour.

agreements. As the housing market deteriorated, the value of the mortgage-backed securities held by Lehman Brothers and guaranteeing its obligations, fell. As a result, the bank's counterparties either withdrew their funding, demanded more collateral or curtailed lending, ultimately forcing the bank into insolvency.¹⁴

Insolvency of Lehman Brothers has also revealed the interconnectedness of financial markets and the ease and quickness with which contagion can spread through them. Harvey Miller, the bankruptcy attorney for the Lehman estate, noted that 'the bankruptcy of Lehman was a catalyst for systemic consequences throughout the world [that fostered] a negative reaction that endangered the viability of the financial system'.¹⁵ The collapse of Lehman Brothers and the ensuing panic affected debt markets, making the short-term commercial paper financing almost unavailable. The shutting down of debt-market financing significantly reduced corporate credit availability, thus impacting the real economy.¹⁶ The negative effect of bank failures is also linked to the key role banks play in settling financial transactions. Insolvency of a large bank or a group of banks could cause disruption to the payment system, depriving society and economy of its capital and resulting in the 'catastrophic social and economic impact'.¹⁷

The propensity of bank failures to spread across different industries, national borders and to affect our day-to-day life is closely associated with the phenomenon of systemic risk. This risk arises when a triggering event (e.g. an economic shock) is likely to produce through certain transmission channels adverse economic consequences, such as failures of financial institutions and markets.¹⁸ It is unclear what level of impact is required to qualify the risk as systemic. Schwarcz defines such an impact rather broadly as 'increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility'.¹⁹ Kaufman defines systemic risk as 'the probability that cumulative losses will occur from an event that ignites a series of successive losses along a chain of institutions or markets comprising a system'.²⁰ Levitin notes that systemic risk leads to 'a socially unacceptable

¹⁴ See Financial Inquiry Commission, *The Financial Crisis Inquiry Report*, 324 (2011), describing the events leading to the collapse of Lehman Brothers.

¹⁵ *Ibid.*, 339.

¹⁶ Steven L. Schwarcz, *Controlling Financial Chaos: The Power and Limits of Law* 3 Wis. L. Rev. 815, 817 (2012). On the contagious effects of Lehman Brothers' failure see also Rosalind Z. Wiggins & Andrew Metrick, *The Lehman Brothers Bankruptcy H: The Global Contagion* 1 Journal of Financial Crises 172 (2019).

¹⁷ Independent Commission on Banking, *Final Report*, para. 4.10 (September 2011), <<https://webarchive.nationalarchives.gov.uk/20120827143059/http://bankingcommission.independent.gov.uk/>>.

¹⁸ Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions*, 48-49 (Oxford: OUP 2016).

¹⁹ Steven L. Schwarcz, *Systemic Risk* 97 Geo. L. J. 193, 204 (2008).

²⁰ George G. Kaufman, *Bank Failures, Systemic Risk, and Bank Regulation* 16 Cato Journal 17, 20 (1996).

macroeconomic contraction'.²¹ Scott argues that, most broadly, systemic risk is 'the risk that a national, or the global, financial system will break down'.²²

Thus, due to special elements characterizing the business model of banks, they are vulnerable to financial instability. As a result of market panic, financial institutions may experience a sudden increase of withdrawal requests, exposing them to financial shocks. Because of the high degree of bank interconnectedness, their failure may instigate a domino-like fall of bank counterparties, other financial institutions and markets, leading to interruptions in the provision of critical functions and amounting to a systemic crisis.

As opposed to banks, non-financial institutions usually do not pose systemic risks. While business models of non-financial companies and enterprise groups vary, it is fair to say that the majority of them do not possess inherent vulnerabilities characterizing banks' balance sheets. Additionally, a failure of a micro, small or a medium-sized enterprise (MSME) typically does not spread the contagion across different sectors of the economy and does not surpass national borders.²³ This is because MSMEs may not be as interconnected and international in their operations as banking groups. It is common that the failure of a bank causes insolvency of non-financial enterprises, but not the other way around. This logic holds true for MSMEs but may be questioned in the case of large and interconnected enterprise groups.

Just like banks, non-financial enterprises are not immune to creditor runs that lead to the destruction of going concern value and inhibit the prospects of recovery.²⁴ Just like banks, large companies may comprise of complex networks of interconnected subsidiaries and branches, established in several jurisdictions.²⁵ Such networks can be deeply integrated in local, national and regional economies, expanding the interconnections to non-group entities, such as suppliers, sub-contractors, distributors and franchisees. It is argued that the failure of a large enterprise, like General Motors or Chrysler could have led to the asymmetric shock in the particular geographic area, 'with devastation of the local tax base and a perceived need to provide unemployment relief, training, assistance and relocation packages as well as other transfer

²¹ Adam J. Levitin, *In Defence of Bailouts* 99 Geo. L. J. 435, 446 (2011).

²² Hal S. Scott, *Reducing Systemic Risk Through the Reform of Capital Regulation* 13 J. Int. Econ. Law 763, 764 (2010).

²³ There is no single generally accepted definition of MSME. The most common method used to characterize MSME enterprises is to look at the number of employees they have. See World Bank, *Report on the Treatment of MSME Insolvency* (2017).

²⁴ Thomas H. Jackson & David A. Skeel, *Bankruptcy and Economic Recovery*, Faculty Scholarship at Penn Law 476, (2013), <https://scholarship.law.upenn.edu/faculty_scholarship/476/>. However, unlike depositors who are free to withdraw their funds at any time, trade creditors usually cannot withdraw performance or terminate, accelerate or modify contracts unless a debtor has defaulted. *Ipsa facto* clauses allowing for such termination are currently prohibited or restricted by Article 7(5) Restructuring Directive and Article 68 BRRD.

²⁵ Jay L. Westbrook, *Transparency in Corporate Groups* 13 Brook. J. Corp. Fin. & Com. L. 1 (2018), describing the business reality of corporate groups and the role played by asset-partitioning, intra-group guarantees and group branding in the perception of creditors and in insolvency.

payments'.²⁶ Thus, insolvency could have resulted in a socially unacceptable outcome. Similar macro-level effects have been discussed by Warren, who emphasized that '[b]usiness closings affect employees who will lose jobs, taxing authorities that will lose reliable property, suppliers that will lose customers, nearby property owners who will lose beneficial neighbours, and current customers who must go elsewhere'.²⁷ A recent example of an enterprise group whose collapse has caused such a ripple effect is Carillion. A detailed analysis of its insolvency is carried out in section 5 below.

To the extent that large multinational or national entities and corporate groups, further referred to as significant non-financial enterprises or SNFEs, suffer from economic shocks and creditor runs, they may fail, spreading contagion to other market players and destabilizing local or even national economy, ultimately triggering state intervention.²⁸ In this respect SNFEs are not much different from banking groups, since insolvency of both may pose systemic risk and result in disruptive economic and social consequences.

2.2. Principles of Insolvency Law and Bank Resolution

Failure of banks and non-financial entities often falls under separate, at times very distinct regulation. To understand why this is the case, it is beneficial to consider the principles underlying such regulation. Westbrook defines this approach as functional,²⁹ as it proceeds from determining the functions or the aims and policy goals that law pursues. In other words, it asks what it is that the regulation tries to achieve in a given instance.

Both UNCITRAL³⁰ and the World Bank³¹ mention among the key objectives of insolvency law: (i) maximization of the value of firm's assets and recoveries by creditors (insolvency estate value maximization or the optimal realization of the debtor's assets); (ii) ensuring the equitable treatment of similarly situated creditors (*par condicio creditorum*); (iii) guaranteeing transparent and predictable procedure, entailing supervision by courts or administrative authorities and facilitating creditor participation in decision-making. In contrast, the Financial Stability Board (FSB) in describing the objectives and functions performed by bank resolution authorities, prioritizes preservation of financial stability and continuity of systemically important

²⁶ Gerard McCormack, Andrew Keay & Sarah Brown, *European Insolvency Law: Reform and Harmonization*, 228 (Cheltenham: Edward Elgar Publishing, 2017).

²⁷ Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World* 92 Mich. L. Rev. 336, 355 (1993).

²⁸ Oscar Couwenberg, Stephen J. Lubben, *Not a Bank, not a SIFI; Still too Big to Fail* 35 Emory Bankr. Dev. J. 53 (2019), noting that the of concept of 'too-big-to-fail' is not restricted to systemically important financial institutions, but may apply to large firms that are not banks.

²⁹ Jay L. Westbrook, *A Functional Analysis of Executory Contracts* 74 Minn. L. Rev. 227, 230 (1989).

³⁰ UNCITRAL, *Legislative Guide on Insolvency Law, Parts I and II* (2004).

³¹ World Bank, *Principles for Effective Insolvency and Creditor/debtor Regimes* (2015).

financial services, such as payment, clearing and settlement activities.³² A similar approach is replicated in the Bank Recovery and Resolution Directive (BRRD),³³ which states that the aim of bank resolution is to ensure the continuity of critical functions, avoid adverse effects on financial stability, protect public funds and safeguard rights of depositors and clients.³⁴ This does not mean that traditional insolvency law principles are neglected or disregarded in bank resolution.³⁵ However, it may indicate that the value assigned to such principles or the hierarchy of policy objectives may differ. Commenting on the differences in the principles underlying corporate insolvency law and bank resolution, Haentjens concludes that the objectives of bank resolution ‘imply a dramatic paradigm shift from normal insolvency law’.³⁶

The changed ladder of priorities in bank resolution is, for instance, evidenced in the multitude of exceptions to the principle of equal treatment of creditors. The BRRD provides that certain categories of creditors (e.g. covered deposits) are excluded from the application of the write-down or conversion powers.³⁷ Resolution authorities may also exempt other liabilities from bail-in, inter alia, where such an exemption ‘is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines’ or when it is needed to prevent widespread contagion.³⁸ Another area in which the distinction between normal insolvency proceedings³⁹ and bank resolution is apparent concerns the role of courts, creditors and other stakeholders in the resolution of financial distress. As explained in more detail below, under EU law (but also in accordance with Title II of the Dodd-Frank Act⁴⁰) resolution is largely an administrative process, in which the participation rights of creditors and the supervisory role of courts are significantly reduced. This is a departure from a corporate insolvency process in which creditors, as residual owners, are empowered to decide the debtor’s fate.

³² FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, para. 2.3. (2014).

³³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

³⁴ BRRD, Recital 45.

³⁵ For example, estate value maximization can be found in the rules governing the sale of business tool (Article 39 BRRD).

³⁶ Matthias Haentjens, *National Insolvency Law in International Bank Insolvencies* in Bernard Santen & Dick van Offeren (eds.), *Perspectives on International Insolvency Law: A Tribute to Bob Wessels*, 76 (Deventer: Kluwer, 2014). See also Dirk Schoenmaker, *A Macro Approach to International Bank Resolution* in Matthias Haentjens & Bob Wessels (eds.), *Research Handbook on Cross-Border Bank Resolution*, 64 (Cheltenham: Edward Elgar Publishing, 2019), noting that when there is a conflict of objectives between the micro and macro approaches to resolution, the macro-prudential concerns and interests should prevail, because ‘the stability of the system is more important than the soundness of the components’.

³⁷ BRRD, Article 44(2).

³⁸ BRRD, Article 44(3).

³⁹ BRRD, Article 2(1)(47).

⁴⁰ Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 2010 (Dodd-Frank Act). For comparison of the US corporate and bank resolution regimes see Robert R. Bliss & George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation* 2 Va. L. & Bus. Rev. 144 (2007).

2.3. *Private and Public in Insolvency Law and Bank Resolution*

Traditionally, insolvency has been considered as a mechanism for the collective enforcement of claims. One of the most influential theories of insolvency law, the creditors' bargain theory, holds that the primary function of insolvency law is to solve coordination ('collective action') problems existing between creditors. According to this theory, a collective procedure embodies a hypothetical creditors' bargain, 'the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position'.⁴¹ A collective system should lead to the reduction of strategic costs, increase the aggregate pool of assets (maximize the estate value) and produce administrative efficiency. In essence, this is a contractarian vision of insolvency law, which pursues a function of resolving conflicts between the firm and its investors (shareholders and creditors).⁴² As a result, insolvency law may lack the tools to protect entitlements of other 'victims of corporate decline'.⁴³

This somewhat narrow vision of insolvency law, as solely or predominantly centred around creditors' wealth maximization, has been criticized in the literature.⁴⁴ The idea that insolvency law should protect other values, going beyond the interests of bargaining parties, has been expressed in the Cork Report.⁴⁵ This report recognizes that good modern insolvency law should recognize the interests not merely of debtors and their creditors, but those of society, and must ensure that public interests are safeguarded and that viable commercial enterprises are preserved.⁴⁶ Nevertheless, this 'enhanced' stakeholder approach to insolvency has not been widely implemented at the national level, where the interests of creditors and estate value maximization continue to take precedence.⁴⁷

⁴¹ Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain* 91 Yale L.J. 857, 860 (1982).

⁴² Steven L. Schwarcz, *Beyond Bankruptcy: Resolution as a Macropprudential Regulatory Tool* 94 Notre Dame L. Rev. 709, 729 (2018).

⁴³ Vanessa Finch & David Milman, *Corporate Insolvency: Perspectives and Principles*, 29 (3d ed. Cambridge: Cambridge University Press, 2017).

⁴⁴ Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay* 72 Wash. U. L. Q. 1031 (1994); David G. Carlson, *Philosophy in Bankruptcy* 85 Mich. L. Rev. 1341 (1987); Andrew Keay, *Insolvency Law: A Matter of Public Interest?* 51 North Irl Leg Q 509 (2000); Warren, *supra* n. 27, at 355 arguing that insolvency policy should give consideration to the distributional impact of business failures on parties who are not creditors. In her recent book, Paterson frames this debate among scholars adopting an economic approach to corporate reorganization law and scholars adopting a progressive approach, as a 'debate about the ways in which a capitalist economy promotes public interest and social welfare'. Sarah Paterson, *Corporate Reorganization Law and Forces of Change*, 2 (Oxford: Oxford University Press 2020).

⁴⁵ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report). This report has played a crucial role in the formation of the modern English corporate insolvency law.

⁴⁶ *Ibid.*, para. 198(i).

⁴⁷ See Janssen, *supra* n. 12, at 21, noting that 'Dutch, German, and English insolvency law has traditionally been directed towards the maximization of the value for their creditors and their equal treatment'.

Since the GFC, the regulatory strategy for banks has focused on making banks more resilient to economic shocks, avoiding state-funded bailouts, internalizing losses and preventing spill-over effects of bank failures. This strategy does not easily fit the microprudential contractarian and reactive framework of the creditors' bargain theory, described above. Instead, the major focus is macroprudential. Bank resolution seeks to preserve stability of the financial system and ensure continuity of critical functions performed by banks. Lubben argues that the primary aim of bank resolution is therefore not adjudicatory, but regulatory.⁴⁸

The distinction of functions performed by traditional entity-centric creditor-oriented insolvency law and enterprise-centric system-oriented bank resolution works well for collapses of relatively small non-financial companies. However, it is less persuasive for insolvencies of large, complex and interconnected enterprises – SNFEs. In reality, large-scale insolvencies manifest the desire and actions to protect public interest and preserve social and economic stability at local, national and regional levels. For example, in 2009 the US and Canadian governments provided around USD 9.2 billion on the bailout of Chrysler and more than 50 billion on the rescue of General Motors.⁴⁹ In 2019, following the collapse of Thomas Cook Airlines, the UK government and the Civil Aviation Authority hired dozens of charter planes to repatriate around 600,000 customers of the defunct airline – the largest repatriation outside war context.⁵⁰ These are examples of ad hoc solutions, involving massive state intervention and casting doubts on the adequacy of the existing regulatory and insolvency frameworks.⁵¹

These cases demonstrate that in practice the effects of SNFE insolvency may overstep the boundaries of a single enterprise, further exposing the limits of the entity-centric creditors' bargain. Essentially, the function performed by insolvency law becomes increasingly similar to or moves in the direction towards that of bank resolution – it tries to preserve economic and social stability and prevent public unrest. Another overlapping function is preventive, as both bank resolution and increasingly so, insolvency law, encourage early action to avert crises from escalation.⁵² In this respect, they seek to avoid insolvency in the first place instead of simply allocating the sale proceeds in accordance with the pre-insolvency entitlements.

⁴⁸ Stephen J. Lubben, *A Functional Analysis of SIFI Insolvency* 96 Tex. L. Rev. 1377, 1396 (2018).

⁴⁹ Rodrigo Olivares-Caminal, *Creditor Equality, Secured Transactions, and Systemic Risk: A Complex Trilemma* 81 Law & Contemporary Problems 87 (2018).

⁵⁰ *Thomas Cook: plans made for biggest UK peacetime repatriation* (The Guardian, 19 September 2019), <<https://www.theguardian.com/business/2019/sep/20/thomas-cook-in-talks-stave-off-collapse-biggest-peacetime-repatriation>>.

⁵¹ David A. Skeel, *From Chrysler and General Motors to Detroit* 24 Widener Law Journal 121, 125 (2015); Barry E. Adler, *A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors* 18 Am. Bankr. L. Inst. Rev. 305 (2010).

⁵² The BRRD provides for the early intervention measures, which can be applied to remedy the deterioration of a financial and economic situation before the bank becomes insolvent (BRRD, Title III). The Restructuring Directive obliges Member States to ensure that debtors have access to early warning tools to avert insolvency (Article 3).

Having established that in some situations the functions or goals of insolvency law and bank resolution coincide, and that the failure of banks and significant non-financial enterprises may have similar disruptive consequences justifying state intervention, it is reasonable to inquire or hypothesize whether certain regulatory strategies and tools characteristic of bank resolution can be feasible and useful in preventing insolvencies of SNFEs or diminishing their negative effects. The next section describes a number of such tools and compares them, where possible, with the tools or mechanisms available under general insolvency proceedings.

3. Bank Resolution in the EU: Reactive and Proactive Regulation

3.1. Legal Framework of Bank Resolution in the EU

Haentjens and Wessels characterize the legislative developments that took place in Europe after the GFC in the area of bank resolution in terms of ‘three paradigm shifts’.⁵³ The first shift concerns the predominance of the public interest as a policy objective, at times subordinating the private interest.⁵⁴ The second shift indicates the leading role of government authorities in resolving financial distress of credit institutions, letting courts play a supplementary role. The third shift refers to the EU harmonization and unification of a bank resolution framework. The latter has been achieved with the adoption of the BRRD and the Single Resolution Mechanism Regulation (SRMR).⁵⁵

The BRRD was agreed in 2014 and entered into force on 1 January 2015 (with bail-in available from 1 January 2016). It represents the first major attempt to harmonize substantive rules on bank resolution across the EU/EEA.⁵⁶ Before this newly introduced system of rules, financial distress in the European banking sector was addressed solely at the national level, inter alia, by way of general insolvency law with possible modifications, or via special legislation tailored to financial institutions. The BRRD accepts that cooperation between national authorities is key to effective

⁵³ Matthias Haentjens & Bob Wessels, *Three Paradigm Shifts in Recent Bank Insolvency Law* 31 JIBLR 396 (2016).

⁵⁴ This is especially evident in the fact that under exceptional circumstances (e.g. when strictly necessary to achieve the continuity of critical functions or to avoid widespread contagion) the *pari passu* treatment may be disregarded. See BRRD, Article 44(3).

⁵⁵ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

⁵⁶ Prior to the BRRD, some harmonization was facilitated by the Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes; the Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems; the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (CIWUD).

crisis management.⁵⁷ Whereas it provides for minimum harmonization rules, leaving the application of resolution tools to national authorities, bank resolution within the Eurozone is centralized. This is done through the Single Resolution Mechanism (SRM), which, together with the Single Supervisory Mechanism (SSM), comprise the EU Banking Union. Responsibilities within the SRM are divided between national authorities and the Single Resolution Board (SRB). To the extent that the SRB has special centralized decision-making powers,⁵⁸ the regime of the SRM ensures a higher level of procedural coordination compared to the BRRD.⁵⁹

The bank resolution framework coexists with national insolvency laws. According to Article 32(1) BRRD, there are three conditions for the application of resolution measures: (i) the bank should be failing or likely to fail; (ii) there should be no reasonable prospect for a private solution to resolve financial distress; (iii) resolution must be *necessary in the public interest*. If all three conditions are satisfied, resolution authorities may apply one or several resolution tools.⁶⁰ Otherwise, a bank should be liquidated under national insolvency law.⁶¹ Thus, normal insolvency proceedings are the default outcome in the event of a bank failure, while bank resolution is an exception, inter alia, requiring meeting the high bar of the public interest test.⁶²

While the bank resolution rules in the EU are harmonized, no substantial harmonization has been achieved in the area of (bank) insolvency law.⁶³ As a result, such issues as the availability of reorganization procedures and the ranking of creditors' claims remain in the competence of national legislators. The CIWUD is an instrument

⁵⁷ BRRD, Recitals 17 and 96, recognizing that further action is necessary to 'promote cooperation and prevent fragmented national responses'.

⁵⁸ See e.g. SRMR, Articles 8, 10 and 16. See also Danny Busch, Mirik B.J. van Rijn & Marije Louisse, *How Single is the Single Resolution Mechanism?* EBI Working Paper Series, n. 30 (2019).

⁵⁹ On relationship between the SRM and the BRRD, see George S. Zavvos & Stella Kaltsouni, *The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, in Matthias Haentjens & Bob Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, 125-126 (Cheltenham: Edward Elgar Publishing, 2015).

⁶⁰ Resolution tools include sale of business, creation of a bridge institution, asset separation and bail-in. BRRD, Article 37(3).

⁶¹ See BRRD, Recital 45, highlighting that a 'failing institution should in principle be liquidated under normal insolvency proceedings'.

⁶² SRB, *Public Interest Assessment: SRB Approach* (2019). As of January 2021, the case of Banco Popular (June 2017) remains the only resolution case carried out after entry into force of all the provisions of the SRMR. In other instances (e.g. Banca Popolare di Vicenza and Veneto Banca, ABLV Bank AS, AS PNB Banka) it was considered that the resolution action was not in the public interest. See Report from the Commission on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation), COM(2019) 213 final (April 30, 2019). On the public interest test, see Jens-Hinrich Binder, *Proportionality at the Resolution Stage: Calibration of Resolution Measures and the Public Interest Test*, 21 EBOR 453 (2020), emphasising that this test is designed to limit the application of resolution tools to cases that give rise to systemic stability considerations.

⁶³ Several calls have been made to facilitate harmonization of national insolvency law for banks. See J. Deslandes & M. Magnus, *Further Harmonising EU Insolvency Law from a Banking Resolution Perspective?* (April 2018), <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI\(2018\)614514](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2018)614514)>.

of private international law, addressing issues of international insolvency jurisdiction and applicable law. It does not foster harmonization of substantive insolvency law. The recently adopted Restructuring Directive facilitates minimum harmonization across the EU by mandating the Member States to introduce preventive restructuring proceedings to enable debtors to restructure effectively at an early stage to avoid insolvency. This Directive, however, does not extend to banks and other financial institutions.⁶⁴

3.2. *Reactive and Proactive Resolution Strategies*

Schwarcz determines three major approaches to the resolution of financial distress in banks – reactive resolution, proactive resolution and counteractive resolution.⁶⁵ While the first two approaches directly relate to resolution, the third approach aims to reduce the need for it. Counteractive resolution may, for instance, entail imposition of certain capital and liquidity requirements.⁶⁶ Consideration of this type of regulation falls outside the scope of this article, as it concerns prudential supervision rather than resolution of financial distress *per se*.

Reactive resolution refers to different strategies and mechanisms applied to companies, once they become financially distressed. This is the traditional and most common approach used in insolvency laws around the world. Once in financial distress, a firm can either restructure its debt through negotiations with creditors or fall subject to a piecemeal asset liquidation or a going concern sale. Thus, general insolvency law is reactive (post-crisis oriented) and applies on an entity-by-entity basis. As shown below, the EU bank resolution framework goes further by facilitating early intervention and resolution at an entity or group level. *Proactive resolution* concerns pre-planned enhancements, which can make insolvency or restructuring more effective and efficient. Unlike the reactive strategies, proactive enhancements are designed and implemented in times when there are no signs of financial distress or insolvency. The rationale behind anticipatory crisis preparation comes from the understanding that no business is immune from insolvency and that failures are almost inevitable in complex systems.⁶⁷ The logical solution is therefore to make systems less complex or interdependent. The latter is particularly important in addressing the systemic consequences of failures.

This article takes as a starting point the typology proposed by Schwarcz to discuss some of the tools and innovations in bank resolution, introduced in the EU and the world in the aftermath of the GFC. The choice of a particular tool or strategy is based

⁶⁴ Restructuring Directive, Article 1(2).

⁶⁵ Schwarcz, *supra* n. 42.

⁶⁶ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firm; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

⁶⁷ Steven L. Schwarcz, *Regulating Complexity in Financial Markets* 87 Wash. U. L. Rev. 211, 248 (2009).

on its potential relevance or feasibility for non-financial enterprises and large enterprise groups. For instance, the requirement to have a certain amount of liabilities that can either be written down or converted into share capital (so called bail-inable liabilities) in a situation of financial distress can hardly be transplanted to non-financial companies due to the variety of their business models and balance sheets, as well as the lack of an agreement about the interests that should be prioritized (by analogy with the interests of depositors in bank resolution). Besides, transplanting bail-in would impose significant financial risks on creditors and shareholders, raising the issue of proportionality of interfering in the property rights, as well as affecting the cost and availability of credit. It will also signify a radical departure from the still overwhelmingly creditor-oriented insolvency law. As discussed below, it may also be too ambitious from the political and unnecessary from the legal points of view to replace the court-driven insolvency process with a largely administrative one.

3.2.1. *Early Intervention Measures*

When a company is insolvent, the majority of EU Member States require that directors take certain actions, including filing for the opening of insolvency proceedings.⁶⁸ However, at that moment it may be too late to reduce economic loss or avert the negative externalities caused by the failure. The problem may be amplified by irrational decision-making behaviour due to overoptimism, the unwillingness of the debtor's management to take severe measures to escape further economic deterioration or to lose control upon insolvency filing.⁶⁹

In order to preserve financial stability and prevent the escalation of contagion, the BRRD and the SRMR establish rules, allowing the competent (supervisory) authorities to intervene in an unsound and failing bank prior to actual insolvency.⁷⁰ According to the Basel Committee on Banking Supervision, '[e]arly intervention relies on supervisors to identify weaknesses before they become irreparable, by using forward-looking risk analysis and early intervention powers'.⁷¹ Such powers include requiring

⁶⁸ Gerard McCormack et al., *Study on a New Approach to Business Failure and Insolvency. Comparative Legal Analysis of the Member States' Relevant Provisions and Practices*, University of Leeds, 48 (2016). Note that due to the coronavirus pandemic, many countries (e.g. Germany, Russia, Spain, Switzerland, the Czech Republic) have suspended insolvency filing obligations. On these and other business support measures see CERIL, *Executive Statement 2020-1 on COVID-19 and Insolvency Legislation* (20 March 2020).

⁶⁹ Frederik Drescher, *Insolvency Timing and Managerial Decision-Making*, 4 (Springer, 2014). It is argued that in a situation of a financial distress, debtor's shareholders tend to prefer riskier strategies and "gamble for resurrection". Paul Davies, *Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency* 7 EBOR 301, 306 (2006), stating that in the vicinity of insolvency directors may focus solely on the upside however remote the probability of success is. However, the empirical evidence of risk shifting is inconclusive. See Erik Gilje, *Do Firms Engage in Risk-Shifting? Empirical Evidence*, 29(11) *The Review of Financial Studies*, 2925 (2016), finding that companies in distress actually reduce investment risk.

⁷⁰ BRRD, Article 27; SRMR, Article 13.

⁷¹ BCBS, *Frameworks for Early Supervisory Intervention*, 8 (March 29, 2018).

the management body to implement certain arrangements,⁷² to examine the situation and identify measures to overcome financial difficulties,⁷³ and to make legal and operational changes to the business structure.⁷⁴ More severe measures involve the removal of senior management⁷⁵ and the appointment of a temporary administrator.⁷⁶

The adoption of early intervention measures is linked to certain triggers. Among them the European Banking Authority (EBA) lists: (i) the overall score under the common European supervisory review and evaluation process (SREP) framework and pre-defined combinations with individual SREP elements; (ii) material changes and anomalies in key financial and non-financial indicators under SREP; and (iii) significant events indicating that the conditions for early interventions are met.⁷⁷ The SREP Guidelines were published in 2014 and became applicable in January 2016.⁷⁸ These guidelines provide a common framework for the work of supervisors in the assessment of risks to banks' business models, internal governance, as well as capital and liquidity adequacy. The specific elements of the SREP framework are assessed and scored on a scale of 1-4. As to significant events, the European Banking Authority (EBA) mentions major operational risk events (e.g. fraud, natural disaster, severe IT problems, hefty fines), significant outflows of funds, including from retail deposits (e.g. caused by reputational damage), and even unexpected losses of senior management or key staff. In any case, early intervention measures are not applied automatically, but result from thorough case-by-case analysis and a dialogue between a bank and a supervisor.⁷⁹ This may be necessary to avoid or mitigate the negative publicity caused by early intervention measures.

Application of early intervention measures in the context of banking groups is centralized in the eurozone, where the European Central Bank (ECB) acts as the final supervisory authority. Outside the eurozone it is based on consultations between supervisors. For instance, where more than one competent authority intends to appoint a temporary administrator or apply any other preventive measure to more than one institution in the banking same group, they should communicate and coordinate the application of such measures. The assessment shall take form of a joint decision of the consolidating supervisor and other relevant competent authorities. At the request

⁷² BRRD, Article 27(1)(a).

⁷³ BRRD, Article 27(1)(b).

⁷⁴ BRRD, Article 27(1)(g).

⁷⁵ BRRD, Article 28.

⁷⁶ BRRD, Article 29.

⁷⁷ EBA, *Guidelines on Triggers for Use of Early Intervention Measures pursuant to Article 27(4) of Directive 2014/59/EU*, Final Report, EBA/GL/2015/03 (8 May 2015).

⁷⁸ EBA, *Guidelines on Common Procedures and Methodologies for the Supervisory Review and Evaluation Process (SREP)*, EBA/GL/2014/13 (19 December 2014). See also EBA, *Guidelines on the Revised Common Procedures and Methodologies for the Supervisory Review and Evaluation Process (SREP) and Supervisory Stress Testing*, Final Report, EBA/GL/2018/03 (19 July 2018).

⁷⁹ Andrew Campbell & Paula Moffatt, *Early Intervention* in Matthias Haentjens & Bob Wessels (eds.), *Research Handbook on Cross-Border Bank Resolution*, 89 (Cheltenham: Edward Elgar Publishing, 2019).

of such authorities, the EBA may assist and facilitate a coordinated agreement.⁸⁰ Since the application of early intervention measures can have significant consequences for individual group members and the group as a whole, the BRRD requires that the decision of each competent authority must be reasoned and made having regard to the views and reservations of other supervisors, as well as the potential impact of the decision on financial stability in the EU Member States concerned.⁸¹

3.2.2. *The Rise of Administrative Resolution*

The complexity of banking groups and the potential systemic consequences arising from their failures have transformed the approach to handling their insolvency. The GFC has revealed that insolvency law, based on the engagement of different stakeholders (e.g. firm owners, creditors, employees, insolvency practitioners) and the control and direction by courts was at times ill-suited to resolve complex and large cross-border insolvencies impinging upon the matters of national social and economic interest.⁸² As a response, both the EU and the USA adopted legislation, which largely substitutes the court-supervised creditor/debtor-driven insolvency process with the one managed by administrative authorities. Such authorities are given the power to take over and resolve distressed financial institutions.

While some commentators clearly favour the administrative resolution,⁸³ others highlight its shortcomings when compared to traditional insolvency procedures.⁸⁴

The supporters of the administrative resolution provide three main arguments. First, they claim that court-led negotiations-based insolvency proceedings are too slow and cumbersome to efficiently deal with financially distressed multinational banking groups.⁸⁵ They argue that unlike regulators, courts have limited knowledge about the institution in financial distress, its strengths and weaknesses, may lack the requisite economic or financial expertise and can be prevented from efficiently dealing with multiple insolvencies in an economy-wide crisis.⁸⁶ Levitin argues that resolution of systemically important financial institutions is a political question involving

⁸⁰ BRRD, Article 30(4).

⁸¹ BRRD, Article 30(7).

⁸² BCBS, *Report and Recommendations of the Cross-border Bank Resolution Group*, para. 2 (18 March 2010), noting that reactions to the GFC tended to be ad hoc, severely limited by time constraints and frequently involved significant amounts of public support. For the discussion of the dominance of national interests during the GFC, see Paul Davies, *Resolution of Cross-Border Groups* in Matthias Haentjens & Bob Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, 263 (Cheltenham: Edward Elgar Publishing, 2015).

⁸³ Mark Roe, *Don't Bank on Bankruptcy for Banks* (Project Syndicate, 18 October 2017).

⁸⁴ David A. Skeel, *Bankruptcy for Banks: A Tribute (and Little Plea) to Jay Westbrook*, U of Penn, Inst for Law & Econ Research Paper No. 18-31 (2018).

⁸⁵ Schillig, *supra* n. 18, at 65, noting that complexity of banks' balance sheets complicates negotiations between key stakeholders and leads to delays in the adoption of measures to prevent contagion and stop further deterioration of asset value.

⁸⁶ Howell E. Jackson & Stephanie Massman, *The Resolution of Distressed Financial Conglomerates* 3 RSF: The Russell Sage Foundation Journal of the Social Sciences 48, 62 (2017).

macroeconomic policy concerns, which should not be left for courts to decide.⁸⁷ Second, it is suggested that communication and cooperation between courts and foreign financial regulators may be frustrated by the lack of relevant international instruments.⁸⁸ In the absence of such close cooperation, it is very difficult (if not impossible) to reach and implement a group-wide resolution strategy in order to prevent the loss of public confidence and piecemeal state-by-state asset liquidation.⁸⁹ Third, supporters of administrative resolution point out that the need to stop contagion, preserve critical functions and ensure financial stability necessitates large and expedient governmental support of ailing banks.⁹⁰ Due to the substantial amount of funds required and timing constraints, such rescue funding may be difficult to obtain from private parties in (pre)insolvency negotiations.

Specialized administrative resolution rules and regulator-centric bank resolution have been criticized for granting the unfettered discretion to resolution authorities (including on matters of initiating resolution measures), for the alleged lack of transparency in decision-making⁹¹ and the insufficient expertise of public bodies in running a major financial institution.⁹² Compared to an administrative resolution process, ordinary insolvency law is (primary) creditor-oriented and may benefit from ‘rule of law virtues’.⁹³ It gives an opportunity to creditors, employees, shareholders and other parties to shape the insolvency process and challenge its course in state courts. It is thus more transparent. It may also be more efficient to the extent that creditors as principal decision-makers (unlike regulators) have a stake in the successful resolution of financial distress. In other words, creditors have ‘skin in the game’. A working group at the Hoover Institution has come up with a set of proposals to reform insolvency rules for large financial institutions in the USA, referred to as Chapter 14.⁹⁴ The

⁸⁷ Adam J. Levitin, *Bankruptcy’s Lorelei: The Dangerous Allure of Financial Institution Bankruptcy* 97 N.C. L. Rev. 243, 250 (2019).

⁸⁸ *Ibid.*, 281, pointing out that Chapter 15 of the US Bankruptcy Code prescribes international coordination only between US and foreign insolvency proceedings.

⁸⁹ It must be noted that in the absence of rules prescribing cooperation, state authorities may be even more protective and territorial than courts. They may (and frequently do) ring-fence assets in order to protect local depositors, counterparties and other creditors. John Armour et al., *Principles of Financial Regulation*, 630 (Oxford: Oxford University Press, 2016). See also Michael Schilling, *Global Solutions in Matthias Haentjens & Bob Wessels (eds.), Research Handbook on Cross-Border Bank Resolution*, 3 (Cheltenham: Edward Elgar Publishing, 2019).

⁹⁰ David A. Skeel, *Financing Systemically Important Financial Institutions* in Kenneth E. Scott, Thomas H. Jackson & John B. Taylor (eds.), *Making Failure Feasible: How Bankruptcy Reform Can End “Too Big to Fail”*, 63 (Stanford: Hoover Institution Press, 2015), highlighting that unlike Title II of the Dodd-Frank Act, Chapter 11 does not provide any special arrangements for financing of SIFIs.

⁹¹ Tobias H. Tröger, *Too Complex to Work: A Critical Assessment of the Bail-in Tool under the European Bank Recovery and Resolution Regime* 4 Journal of Financial Regulation 35 (2018).

⁹² Thomas H. Jackson & David A. Skeel, *Dynamic Resolution of Large Financial Institutions* 2 Harv. Bus. L. Rev. 435 (2012).

⁹³ *Ibid.*, at 447.

⁹⁴ Thomas H. Jackson, *Bankruptcy Code Chapter 14: A Proposal* in Kenneth E. Scott & John B. Taylor (eds.), *Bankruptcy Not Bailout: A Special Chapter*, 14 (Stanford: Hoover Institution Press, 2012). See also Thomas H. Jackson, *Building on Bankruptcy: A Revised Chapter 14 Proposal for the*

proposal takes advantage of judicial (transparent, public and appealable) process, while giving more room for participation of the regulatory authority (e.g. allowing it to file for the commencement of insolvency proceedings, to be heard and raise different motions, including filing a reorganization plan) and permitting rescue (debtor-in-possession) financing upon court approval after notice and a hearing. Several bank insolvency proposals implementing the ideas of the Hoover Institution have been set out in the bills before the US Congress.⁹⁵ Nevertheless, none of them have materialized into law.

3.2.3. *Recovery and Resolution Planning*

One of the FSB's Key Attributes relates to recovery and resolution planning. According to the FSB, recovery plans must be prepared by the relevant financial institutions and contain measures to restore financial strength and viability.⁹⁶ In particular, such plans should include scenarios to address capital shortfalls and liquidity pressures, as well as steps to ensure timely implementation of recovery options. Resolution plans prescribe substantive resolution strategies with the aim of improving resolvability.⁹⁷ The obligations for the adoption of recovery and resolution plans (commonly referred to as 'living wills') have been introduced both in the USA⁹⁸ and in the EU.⁹⁹

The European Commission has adopted a regulation that specifies the content of recovery and resolution plans.¹⁰⁰ For instance, as regards recovery plans, it clarifies that such plans should be integrated in the overall corporate governance of the institution or the group and should provide for indicators or early warning signals, which

Recapitalization, Reorganization, or Liquidation of Large Financial Institutions in Kenneth E. Scott, Thomas H. Jackson & John B. Taylor (eds.), *Making Failure Feasible: How Bankruptcy Reform Can End "Too Big to Fail"*, 63 (Stanford: Hoover Institution Press, 2015).

⁹⁵ See e.g. H.R. 10 – Financial CHOICE Act of 2017. If passed, the bill would have replaced the Dodd-Frank Act's Orderly Liquidation Authority (OLA) with a new bankruptcy (court-led) procedure, the Financial Institution Bankruptcy Act (FIBA). Dissatisfied with the prospects of such an outcome, a group of leading insolvency scholars have submitted a letter to the members of Congress, opposing the adoption of the Financial CHOICE Act. See Mark J. Roe, *Financial Scholars Oppose Eliminating "Orderly Liquidation Authority" As Crisis-Avoidance Restructuring Backstop*, Harvard Law School Forum on Corporate Governance (23 May 2017), <<https://corpgov.law.harvard.edu/2017/05/26/financial-scholars-oppose-eliminating-orderly-liquidation-authority-as-crisis-avoidance-restructuring-backstop/>>.

⁹⁶ FSB, *supra* n. 32, para. 11.5.

⁹⁷ *Ibid.*, para. 11.6.

⁹⁸ Dodd-Frank Act, section 165(d). The US legislation does not make a distinction between recovery and resolution planning.

⁹⁹ BRRD, Articles 5 and 10. Under the BRRD, recovery plans are drawn up by banks themselves, while resolution plans are prepared by the SRB and national resolution authorities. In contrast, under the Dodd-Frank Act, banks must draft resolution plans and submit them to the Federal Reserve Board, the Financial Stability Oversight Council and the Federal Deposit Insurance Corporation.

¹⁰⁰ Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans.

may facilitate early action to remedy the unfolding crisis situation.¹⁰¹ Recovery plans also need to identify legal entities within the group in which core business lines and critical functions are located. The description of enterprise group members shall contain both the general characterization of the entities covered by the recovery plan and a detailed description of the group legal and financial structures, including intra-group exposures and funding relationships, such as intra-group guarantees, group financial support agreements and profit and loss transfer agreements.¹⁰² Thus, recovery plans reveal corporate, operational and legal interconnectedness of banking groups. In light of such interconnectedness, recovery plans must include a list of all recovery options and describe each of them.¹⁰³ Resolution plans should feature resolution strategies for each institution and a group as a whole, highlight internal and external interdependencies which are critical to the maintenance of operational continuity, and outline the financing requirements and financing sources necessary for the implementation of the resolution strategy foreseen in the plan.¹⁰⁴

There are several important reasons for and goals of taking such *ex ante* crisis preparation steps, as drafting recovery and resolution plans. First, detailed and up-to-date plans provide resolution and other authorities with information, necessary for efficient monitoring, timely early intervention and execution of resolution tools. Second, living wills play an educational and disciplining role and improve the awareness of the banks' own management of the potential problems or weaknesses.¹⁰⁵ As a result, they can serve as a warning indicator and a catalyst for action. This may concern, *inter alia*, the enhancement of corporate and financial structure of a bank or a banking group, its lines of business and organizational division of tasks between group entities. Third, living wills can contribute to the simplification of relations and reduction of complexity within banking groups.¹⁰⁶ Such complexity is common for banks and is frequently driven by extensive intra-group transactions.¹⁰⁷ Fourth, *ex ante* crisis preparation and disclosure of (some) information in living wills may

¹⁰¹ See EBA, *Guidelines on the Minimum List Of Qualitative And Quantitative Recovery Plan Indicators*, Final report, EBA-GL-2015-02 (6 May 2015).

¹⁰² Commission Delegated Regulation (EU) 2016/1075, Article 7. See also EBA, *Recommendation on the Coverage Of Entities in a Group Recovery Plan*, Final report, EBA/Rec/2017/02 (1 November 2017).

¹⁰³ Commission Delegated Regulation (EU) 2016/1075, Article 8.

¹⁰⁴ *Ibid.*, Article 22. On interlinkages between recovery and resolution planning, see EBA, *Report on Interlinkages between Recovery and Resolution Planning*, EBA/Rep/2020/16 (2020).

¹⁰⁵ Marco Ventoruzzo & Giulio Sandrelli, *O Tell Me the Truth About Bail-In: Theory and Practice*, ECGI Law Working Paper n. 442/2019, 20 (2019).

¹⁰⁶ Emiliós Avgouleas, Charles Goodhart & Dirk Schoenmaker, *Bank Resolution Plans as a Catalyst for Global Financial Reform* 9 *Journal of Financial Stability* 210, 211 (2013).

¹⁰⁷ Jens-Hinrich Binder, *Resolution Planning and Structural Bank Reform within the Banking Union*, SAFE Working Paper n. 81 (2015), <<https://ssrn.com/abstract=2540038>>. Binder also mentions the opacity of the existing legal structures of firms and groups, organizational issues (e.g. IT support), conflicting national legal frameworks, powers and interests.

‘clarify expectations and strengthen market confidence in the resolution actions of authorities’.¹⁰⁸

Some scholars remain sceptical of the practical relevance of recovery and resolution planning. For example, Schwarcz writes: ‘In my many years as a workout and bankruptcy lawyer, I rarely saw a firm’s failure that accurately reflected, much less closely resembled, expectations about the firm when it was profitable’.¹⁰⁹ However, the impact of ex ante planning should not be tested solely by matching the actual (reactive) measures with those highlighted at the preparatory (proactive) stage. As noted above, efficient pre-crisis planning may improve supervision, positively affect corporate governance and promote investor confidence. The next section discusses whether the reactive and proactive strategies of bank resolution had any influence on the recent reforms of national insolvency law applicable to large and significant enterprises.

4. Insolvency of Significant Non-Financial Enterprises

4.1. Defining ‘Significant Non-Financial Enterprise’

Defining a SNFE is not an easy task. This article does not aim at offering a one-size-fits-all definition but suggests the criteria that may be useful in deciding if a company is a SNFE. In this respect the methodology applied by the FSB in determining global systemically important banks (G-SIBs) can serve as a source of inspiration.¹¹⁰ This methodology is developed by the BCBS and adheres to an indicator-based measurement approach. It involves the assessment of the size, complexity, interconnectedness, substitutability and the international (cross-jurisdictional) scope of activities pursued by a bank.¹¹¹ All these elements relate to the potential negative externalities of a bank failure, and therefore the likelihood of a state intervention to prevent or mitigate such externalities. Each category of systemic importance has equal weight and is further sub-divided into several indicators. For instance, ‘cross-jurisdictional activity’ includes the evaluation of cross-jurisdictional claims and cross-jurisdictional liabilities, while ‘substitutability’ looks at assets under custody, payment activity, trading volume and underwritten transactions in debt and equity markets.

¹⁰⁸ FSB, *Public Disclosure on Resolution Planning and Resolvability. Discussion Paper for Public Consultation* (3 June 2019). It must be noted that in the EU recovery and resolution plans are not publicly available. However, some information in them must be revealed (e.g. general terms of group financial support agreements, see Article 26 BRRD). In the US resolution plans consist of a private section that contains confidential supervisory and proprietary information and is not available to the public, and an open public section.

¹⁰⁹ Schwarcz, *supra* n. 42, at 719.

¹¹⁰ See *2019 List of Global Systemically Important Banks (G-SIBs)* (Financial Stability Board, 22 November 2019), <<https://www.fsb.org/wp-content/uploads/P221119-1.pdf>>.

¹¹¹ BCBS, *Global Systemically Important Banks: Revised Assessment Methodology and the Higher Loss Absorbency Requirement* (5 July 2018), <<https://www.bis.org/bcbs/publ/d445.pdf>>.

The FSB methodology has been criticized for being oversimplistic and for ignoring significant differences in banks' structures and activities (e.g. investment v. retail banking).¹¹² The BCBS recognizes these shortcomings and provides for the possibility of supplementing the quantitative indicator-based calculations with qualitative judgment, intended to capture important information that cannot be easily quantified (e.g. a major restructuring of a bank's operation).¹¹³

Creating a comprehensive methodology for determining SNFEs is even more challenging than determining a G-SIB, considering an array of non-financial activities and operational and financial structures embraced by such enterprises. Nevertheless, the categories of systemic importance used by the FSB (i.e. size, interconnectedness, substitutability, cross-jurisdictional activity and complexity) are useful in assessing the significance (systemic character) also of non-financial firms. For example, in case of Chrysler and GM it was argued that the 'collapse of the companies would not only throw thousands of autoworkers onto the streets', but also 'reverberate through the economy, affecting suppliers and dealerships'.¹¹⁴ Both companies were large in size, complex and closely integrated in local economies through the networks of subsidiaries and counterparties.¹¹⁵ One can argue that the carmakers did not satisfy the 'substitutability' and 'cross-jurisdictional activity' requirements. However, we need to take into account the overall picture and the relative weight of other indicators (size, interconnectedness, complexity), which have been satisfied. Besides, the FSB criteria are specific for global financial institutions, whereas SNFEs may play a crucial role (be systemically important) at the national or regional levels in the absence of significant cross-border relations.

Financial institutions operate in an organized legal environment characterized by the existence of specific prudential requirements related to capital and liquidity. In contrast, non-financial enterprises are usually not subject to the same requirements. They vary widely in their economic and organizational structures, and therefore in the nature and degree of risks they pose. These risks are also dependent on the local conditions and the role of the enterprise in local or national economy. This is why a flexible approach to determining SNFEs is justified. In addition to the above elements, systemic importance of companies may be determined by the type of business activity pursued. For example, entities performing public functions (e.g. provision of electricity, health and educational services, maintenance of prisons, emigration centres and state infrastructure) pose distinctive risks and deserve increased attention, in

¹¹² Katarzyna Parchimowicz, *Three Hidden Issues in the List of Global Systemically Important Banks*, Oxford Business Law Blog (30 January 2020), <<https://www.law.ox.ac.uk/business-law-blog/blog/2020/01/three-hidden-issues-list-global-systemically-important-banks>>.

¹¹³ BCBS, *supra* n. 111, at 8.

¹¹⁴ Eric A. Posner, *Last Resort: The Financial Crisis and the Future of Bailouts*, 131 (Chicago: The University of Chicago Press, 2018).

¹¹⁵ According to the GM Annual Report for the year 2010 (Form 10-K), GM group employed 202,000 workers. According to the Chrysler Annual Report for the year 2010 (Form 10-K), Chrysler group employed 51,623 workers.

and outside the insolvency context.¹¹⁶ Thus, initial determination of a SNFE should start with the assessment of negative externalities (systemic risk and systemic disruption) arising from its potential failure. Such externalities may depend on the value of assets, a number of employees, interconnectedness in the regional or national economy, performance of publicly important functions and the level of cross-border activity. However, it is important to keep in mind that such criteria are indicative rather than determinative.

4.2. *Special Insolvency Regimes for Large Enterprises: Italian Experience*

In parallel to the harmonization of the bank resolution regime, several EU jurisdictions have adopted special laws dealing with insolvency of credit institutions.¹¹⁷ This trend did not concern other (non-financial) types or categories of companies. As a result, the same insolvency rules are likely to apply to both a small family business and a large multinational enterprise. The inadequacy of this one-size-fits-all approach has been widely recognized. For instance, both the World Bank¹¹⁸ and UNCITRAL¹¹⁹ have noted that standard insolvency processes, due to high costs, extensive length and complexity may be unavailable or unsuitable for micro, small and medium-sized enterprises (MSMEs). Surprisingly, similar discussions about special insolvency rules for large and significant enterprises are hard to find. Nevertheless, a few European jurisdictions have passed laws addressing insolvency of large non-financial companies. Among them – Italy. This section concisely reviews the Italian experience, as Italy has the longest history in Europe of devising and applying special insolvency regimes for large non-financial businesses.¹²⁰

¹¹⁶ Stephanie Palmer, *Public Functions and Private Services: A Gap in Human Rights Protection* 6 Int. J. Const. Law 585, 586 (2008), noting that private and public values differ and that conflicts of interest may arise, requiring strengthened public accountability of private entities performing public functions.

¹¹⁷ For an overview and analysis of national bank insolvency laws, see Sophie Buckingham et al., *Study on the Differences Between Bank Insolvency Laws and on Their Potential Harmonization* (November 2019), <<https://op.europa.eu/en/publication-detail/-/publication/1bb47b24-7879-11ea-a07e-01aa75ed71a1/language-en>>.

¹¹⁸ World Bank, *Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency* (2018).

¹¹⁹ UNCITRAL Working Group V, *Draft Text on a Simplified Insolvency Regime*, A/CN.9/WG.V/WP.170/Rev.1 (28 September 2020), <<http://undocs.org/en/A/CN.9/WG.V/WP.170/Rev.1>>.

¹²⁰ Another, more recent example of a special law comes from Croatia, which on 4 April 2017, in response to the financial distress of the food conglomerate Agrokor, passed the Law on Extraordinary Administration Procedure in Enterprises of Systematic Importance for the Republic of Croatia, known as ‘Lex Agrokor’. Under this law, special extraordinary administration procedure is available to a company or a group of companies with more than 5,000 workers and with balance sheet obligations exceeding HRK 7.5 billion (appr. EUR 1 billion). The rationale behind these criteria was to identify companies of systemic importance, taking into account the number of employees, integration in the national economy, connections with other companies, dominant market position and the likelihood of a chain reaction following the collapse. For discussion of Lex Agrokor see Djuro Djuric & Vladimir Jovanovic, “Too

As early as in 1979 Italy introduced the first extraordinary administration procedure for large enterprises in crisis.¹²¹ This law, sometimes referred to as ‘Prodi law’, was aimed at protecting companies and employment through preservation of business and its restructuring, taking account of the national industrial policy considerations. It was criticized for giving state authorities unfettered discretion for admitting companies into the procedure and the excessive powers conferred on them.¹²² In the *Piaggio* case of 1999, the ECJ ruled that the law in question allowed the entities to continue trading in circumstances in which that would not be possible pursuant to normal insolvency law.¹²³ Its other elements included granting of state guarantees, release from the obligation to pay fines and other pecuniary penalties, reduced tax rates, extension of the prohibition and suspension of all individual enforcement actions. These benefits were regarded as capable of giving rise to the grant of state aid, which required notification to and approval (or no objection) by the European Commission.

Following the *Piaggio* case, a revised version of the Prodi law was adopted – ‘Prodi-bis’.¹²⁴ Prodi-bis is available to enterprises employing at least 200 workers and with total liabilities of at least two-thirds of the total assets or turnover,¹²⁵ and showing good prospects for economic recovery.¹²⁶ The procedure offered by Prodi-bis has a quasi-administrative character because of the heavy involvement of the Ministry of Economic Development and the commissioners proposed by it. Alongside the Prodi-bis regime, another procedure for large enterprise groups was introduced in 2004 to address the failure of the Parmalat group – the so called ‘Marzano law’.¹²⁷ Compared to Prodi-bis, extraordinary administration under Marzano law is more flexible, less cumbersome in terms of the admission and the involvement of court. It is even more administrative and is available to companies with at least 500 workers and EUR 300 million in debt.¹²⁸

Following the empirical analysis of special insolvency regimes in Italy, Belhocine, Garcia-Macia and Garrido concluded that the rules of extraordinary administration ‘lead to costly and lengthy procedures, undermine the protection of creditor rights, and open opportunities for potential state interference in the insolvency of large enterprises’.¹²⁹ They highlighted that many companies entered special proceedings in a

Big To Fail?” The Agrokor Case and its Impact on West Balkan Economies 28 Int. Insolv. Rev. 22, 32 (2019).

¹²¹ Law no. 95 of 3 April 1979.

¹²² Nazim Belhocine, Daniel Garcia-Macia & José Garrido, *The Insolvency Regime for Large Enterprises in Italy: An Economic and Legal Assessment*, IMF Working Paper WP/18/218, 4 (2018).

¹²³ *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v. International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa*, 17 June 1999, Case C-295/97, ECLI:EU:C:1999:313.

¹²⁴ Legislative decree No. 270 of 8 July 1999.

¹²⁵ *Ibid.*, Article 2.

¹²⁶ *Ibid.*, Article 27.

¹²⁷ Law no. 39 of 18 February 2004.

¹²⁸ Originally, Marzano law only applied to companies with at least 1,000 workers and EUR 1 billion in debts. These entry criteria were relaxed in 2005.

¹²⁹ Belhocine, *supra* n. 122, at 19.

state of deep insolvency, when it was too difficult and too costly to reorganize. In other words, private interests and rights were subordinated to broader social considerations, including the preservation of employment. At the same time, the strategic importance of enterprises falling under the special insolvency regimes was not always evident, particularly in cases of relatively small companies, still eligible for special insolvency procedures.¹³⁰

The Italian experience shows that the state intervention to control and direct insolvency is not a panacea and may lead to inefficiencies and imbalances between different insolvency goals and the interests of different stakeholders. I will return to this point when discussing the desirability of application of bank recovery and resolution tools to SNFEs.

5. When Private Insolvency Goes Public: Collapse of Carillion

5.1. *Carillion's Road to Insolvency*

Carillion, once the UK's second-largest construction company, was a significant entity, holding around 420 governmental contracts with the Ministry of Justice, Ministry of Defence, Department of Education, Network Rail, HS2 Ltd and various hospitals. It was the central government's sixth largest supplier.¹³¹ This is why its insolvency makes a strong case to explore the characteristic features of SNFE insolvency and to test the hypothesis whether the regulatory strategies common to bank recovery and resolution can be feasible and useful in preventing insolvency of SNFEs or diminishing their negative effects.

It is estimated that the UK Government spends appr. GBP 251 billion per year on outsourcing and contracting. The public procurement consumes 13.7% of GDP.¹³² Carillion was one of the biggest suppliers of public services. When it applied for liquidation in January 2018, its activities ranged from supplying school dinners and maintaining (i.e. cleaning, landscaping and catering) about half of the UK's prisons, to engagement in various construction projects across the UK, including works on the HS2 high speed railway, the Library of Birmingham, the Royal Opera House, the Midland Metropolitan Hospital and the Royal Liverpool Hospital. While some of these projects were profitable, others incurred significant losses.¹³³ Carillion had around 43,000 workers, of whom 19,000 were employed in the UK. Its supply chain

¹³⁰ For example, Prodi-bis covers companies with 200 workers, which puts them in the category of medium-sized enterprises. See Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC.

¹³¹ National Audit Office, *Report by the Comptroller and Auditor General, Investigation into the Government's Handling of the Collapse of Carillion*, HC 1002, 6 (7 June 2018).

¹³² Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*, HC 748 (July 9, 2018).

¹³³ National Audit Office, *supra* n. 131, at 6.

extended to more than 30,000 companies, including direct and indirect subcontractors and suppliers.¹³⁴

Carillion grew rapidly at the end of the 1990s and the beginning of the 2000s. Its growth was mostly driven by acquisitions. For example, it purchased its competitors Mowlem in 2006 for GBP 250 million and Alfred McAlpine in 2008 for GBP 565 million.¹³⁵ The active growth strategy had also resulted in the expansion to new markets, including Canada, the Caribbean and the Middle East. Some of the foreign projects turned out to be loss making.¹³⁶ Another characteristic of the Carillion's business model was the inherent riskiness of its long-term construction projects, many of which had been bid at low margins,¹³⁷ thus making them unprofitable in case of unforeseen developments, such as the cracks in the concrete beams at the Royal Liverpool University Hospital.

Carillion issued three profit warnings between July and November 2017.¹³⁸ These profit warnings announced the significant reduction in the value of contracts, held by the company, deterioration in cash flows and a working capital outflow. Following the warnings, the market price of Carillion's shares fell by more than 70%. On 31 December 2017 it asked the government for financial assistance, including deferral of tax liabilities, as well as short- and long-term funding. The failure to secure governmental support could, according to Carillion's chairman Philip Green, lead to 'a very disorderly and value destructive insolvency process, with no real ability to manage the widespread loss of employment, operational continuity, the impact on ... customers and suppliers'.¹³⁹ Nevertheless, the government declined to support Carillion. On 15 January 2018 the company filed for liquidation, owing around GBP 2 billion to its suppliers, contractors and other short-term creditors, and having pension liability exceeding GBP 2.5 billion.¹⁴⁰

5.2. *Special Features of Carillion's Failure*

5.2.1. *Too-late-to-save or Failure of Early Intervention*

It is now clear that the signs of financial distress or financial irregularities were present long before Carillion filed for liquidation. For example, one such sign is the consistent failure by the construction company to fund its pension schemes. Underfunded

¹³⁴ Business, Energy and Industrial Strategy and Work and Pensions Committees, *Carillion, Second Joint report from the Business, Energy and Industrial Strategy and Work and Pensions Committees of Session 2017-19*, HC 769, 24 (16 May 2018).

¹³⁵ Carillion Annual reports 2006 (at 74) and 2008 (at 101), <<http://www.annualreports.com/Company/carillion-plc>>.

¹³⁶ Business, Energy and Industrial Strategy and Work and Pensions Committees, *Oral Evidence: Carillion*, HC 769, Q413 (6 February 2017).

¹³⁷ *Ibid.*, Q508.

¹³⁸ Profit warning is a declaration to investors about the decline in projected profits. See *Carillion Trading Update*, RNS Number: 5229K (10 July 2017).

¹³⁹ *Letter from Philip Green to Permanent Secretary for the Cabinet Office* (13 January 2018).

¹⁴⁰ Second Joint report, *supra* n. 134, at 3.

pension schemes are the common feature for major corporate insolvencies, including insolvency of British Home Stores (BHS) and British Steel.¹⁴¹ Nevertheless, while being concerned about the increasing debt and pension liabilities, the UK Pensions Regulator (TPR) took no active measures. Commenting on this lack of an effective and timely response, the Work and Pensions Committee noted that ‘[r]egulatory intervention is ... concentrated at stages when a scheme is in severe stress or has already collapsed’.¹⁴² Another authority that could have flagged problems with Carillion was the Financial Reporting Council (FRC), which regulates auditors, accountants and actuaries. Having reviewed the Carillion’s 2015 accounts, it raised concerns on 12 issues, including the calculation of goodwill, deficits in retirement benefits and accounting for contracts.¹⁴³ Despite these findings, the FRC did not proceed with further investigation up until the first profit warning in July 2017.¹⁴⁴ The potential crisis of Carillion could have also been inferred from the behaviour of its investors, some of whom started selling their shares in 2015, citing increasing debt burden and unsustainable dividend payments.¹⁴⁵

In recognition of the importance of services provided by certain enterprises, in 2011 the UK Government established a network of Crown Representatives. Such persons are tasked to manage relations with ‘strategic suppliers’, which include companies with contracts across a number of state departments whose revenue from government work exceeds GBP 100 million per year and/or who are deemed significant suppliers for the UK public sector.¹⁴⁶ As of January 2021, the list of strategic suppliers includes construction companies Kier Group and Balfour Beatty, professional service firms Accenture, Ernst & Young (EY) and Deloitte, and various public service providers.¹⁴⁷ Before its failure, Carillion was also considered a strategic supplier. Nevertheless, its profit warnings came as a complete surprise to the government, which decided not to raise the construction company’s risk rating to ‘High Risk’,¹⁴⁸

¹⁴¹ See e.g. Work and Pensions and Business, Innovation and Skills Committees, *BHS, First Report of the Work and Pensions Committee and Fourth Report of the Business, Innovation and Skills Committee of Session 2016-17*, HC 54 (25 July 2016).

¹⁴² Work and Pensions Committee, *Defined Benefit Pension Schemes, Sixth Report of Session 2016-17*, HC 55 (21 December 2016).

¹⁴³ *Letter from CEO of the FRC Stephen Haddrill to the House of Commons* (2 February 2018).

¹⁴⁴ FRC, *Investigation into the Audit of the Financial Statements of Carillion plc*, PN 2/18 (29 January 2018).

¹⁴⁵ Business, Energy and Industrial Strategy and Work and Pensions Committees, *Oral Evidence: Carillion*, HC 769, Q1116 (7 March 2018).

¹⁴⁶ Cabinet Office, *Strategic Supplier Risk Management Policy*, section 2.1. (November 2012). In 2019, the government introduced a new approach to the monitoring and management of strategic suppliers through a Memorandum of Understanding (MOU) between the government and each of its strategic suppliers. As a result, the ‘Strategic Supplier Risk Management Policy’ that was in place prior to this MOU is no longer in effect.

¹⁴⁷ Cabinet Office, *Crown Representatives and Strategic Suppliers* (last updated 25 January 2021).

¹⁴⁸ A strategic supplier may be designated as ‘High Risk’ when it shows signs of financial distress or has seriously or/persistently underperformed on a government contract and such underperformance has not been resolved in due course. The purpose of this designation is to ensure that the risks ‘are proactively identified and managed’.

fearing that it would affect market confidence and accelerate insolvency.¹⁴⁹ In addition, between August and November 2017, due to staff turnover, there was no Crown Representative responsible for Carillion.¹⁵⁰ In July 2017, following the profit warning, the Cabinet Office began contingency planning. This was, however, complicated by the lack of a complete list of government contracts in which Carillion was involved. When the company filed for liquidation, the Cabinet Office was still collecting such information.¹⁵¹

Two main conclusions can be drawn. First, both the special system of Crown Representatives and the UK regulators failed to notice (or having noticed, failed to act on) serious problems with one of its key suppliers. In other words, they missed the indicators or early warning signals, which could have facilitated timely intervention. Second, even after the profit warnings, which appear to be clear signs of potential financial distress, the government did not intervene until Carillion filed for liquidation. At that moment it was too late to rescue the ailing business and avoid the use of public funds to prevent disruption of critical services.

5.2.2. *Insolvency and Threat of Public Disruption*

Failure of a strategic supplier like Carillion may have significant implications for the provision of public services, leading to disruptions and raising significant environmental, health and safety concerns. The importance of these considerations was highlighted in the case of *British Steel Limited*.¹⁵² In that case the court approved the immediate winding-up order in respect of the UK manufacturer of steel products British Steel Ltd, citing numerous potential hazards, including the risks of a gas explosion, flooding, as well as the presence of significant amounts of hazardous materials on construction sites.¹⁵³ Similar considerations are relevant to Carillion, taking into account its involvement in various construction projects and provision of essential public services to schools, prisons, hospitals and military bases.

The liquidation of such a significant contractor as Carillion required urgent state intervention. This included state action to guarantee the uninterrupted supply of services under current contracts and their transfer to new companies.¹⁵⁴ The UK Insolvency Service noted that it was the first example of a public limited company that continued to trade while being wound up.¹⁵⁵ In order to provide liquidity to the Offi-

¹⁴⁹ The validity of such concerns was questioned by the Committee of Public Accounts, which noted that it was highly improbable that the ‘High Risk’ designation would become public. See Committee of Public Accounts, *Strategic Suppliers*, 58th Report of Session 2017-19, HC 1031, 8 (24 July 2018).

¹⁵⁰ Cabinet Office, *Letter of the Minister for the Cabinet Office Hon David Lidington to Chair of the Work and Pensions Committee* (1 August 2018), explaining that Crown Representatives can only react to information given to them by the company. As a result, if the company provides incorrect information or fails to share information, the effectiveness of the regime of Crown Representatives may be undermined.

¹⁵¹ 58th Report, *supra* n. 149, at 33.

¹⁵² *Re British Steel Limited* [2019] EWHC 1304 (Ch).

¹⁵³ For more on British Steel liquidation see Andrew Keay & Peter Walton, *British Steel – Is It a Wind Up?* 12 Corporate Rescue and Insolvency 125 (2019).

¹⁵⁴ UK Insolvency Service, *supra* n. 4.

¹⁵⁵ National Audit Office, *supra* n. 131, at 9.

cial Receiver appointed by the court to administer Carillion's liquidation, the government secured GBP 150 million.¹⁵⁶ Thus, while the construction company was not bailed out (i.e. it was allowed to fail), its insolvency has led to large public expenditures, ultimately paid by the taxpayers. Still, the actual economic and social costs of Carillion's insolvency are likely to be much higher given the necessary employment terminations and losses borne by investors and the large network of suppliers and distributors.

5.2.3. *Group complexity and special expertise*

The treatment of Carillion in insolvency has been determined by both its organizational structure and the nature of its business activities. It is reported that at the time of its collapse, the Carillion group consisted of 326 companies, among them 199 based in the UK. Carillion acknowledged that the group 'has become too complex with an overly short term focus, weak operational risk management and too many distractions outside of ... 'core'.¹⁵⁷ Some of the group members were located outside the UK, thus falling under separate insolvency or liquidation proceedings, out of reach of the Official Receiver and English courts, further complicating the adoption of a group-wide strategy.

The Official Receiver appointed in liquidation proceedings¹⁵⁸ is an officer of the UK's Insolvency Service, an executive agency sponsored by the Department for Business, Energy and Industrial Strategy. When appointed, he or she acts as an officer of the court under the court's direction, independent of the government.¹⁵⁹ Just like in the case of British Steel, the failure of Carillion was managed by the Official Receiver instead of an insolvency practitioner proposed by creditors. While the liquidation procedure is not administrative, one may assume that the increased role of the state is advanced by the figure of the Official Receiver. One of the reasons why the liquidation and not administration was initiated against Carillion related to considerable operational risks and potential liability involved in running a wide range of public services. Additionally, there was no certainty whether there would be enough money to pay private sector insolvency practitioners.¹⁶⁰

Another feature characterizing failure of large and significant enterprises is the complexity and the scale of insolvency proceedings. Administration of such proceedings requires industry knowledge, extensive resources and, ideally, some familiarity with the debtor. To support the Official Receiver of Carillion, the court has appointed six members of PwC as Special Managers of the liquidation. The need for a special manager may be determined by the nature of the business or property of the debtor

¹⁵⁶ Second Joint report, *supra* n. 134, at 63.

¹⁵⁷ Carillion plc, *Group Business Plan*, 6 (January 2018).

¹⁵⁸ Insolvency Act 1986, section 136.

¹⁵⁹ *Re Oasis Merchandising Ltd* [1998] Ch 170.

¹⁶⁰ The CEO of the Insolvency Service Sarah Albon recognized that it was most likely that there were no sufficient assets to meet even the costs of Carillion's winding up. See Business, Energy and Industrial Strategy Committee & Work and Pensions Committee, *Oral Evidence: Carillion*, HC 769, Q116 (30 January 2018).

or the interests of its creditors.¹⁶¹ Both the Official Receiver and the Committees of the House of Commons have recognized the exceptional size and complexity of liquidation, and ‘an extremely limited pool’ of experts who could assist the Official Receiver.¹⁶²

The next section explores to what extent the specificity of SNFE insolvency may justify learning from and utilizing certain tools or mechanisms peculiar to bank recovery and resolution. While periodic references to the experience of Carillion are made, conclusions and recommendations of this article are of general character and are not limited to a particular legal regime.

6. Application of Bank Recovery and Resolution Tools to SNFEs: Conceptual and Practical Considerations

6.1. Conceptual Similarities between Bank Resolution and Insolvency of SNFEs

The boundary between the public and private function of insolvency law is oftentimes blurred. As noted in section 2.3. above, insolvency law is primarily thought of as a mechanism to resolve (private) claims of creditors in the most effective way. This microprudential vision is not entirely applicable to the context of bank insolvency, or at least to bank resolution, where the public interest plays a leading role.

The public-private divide is especially difficult to uphold in failures of SNFEs. It appears that this boundary tends to shift towards safeguarding the public interest, even though not completely trumping private interests. This observation is based on cases like Chrysler, GM and Carillion. I refer to these companies or corporate groups as significant to highlight their importance for local, national or regional economies. Such importance may be determined by different factors, including the size (e.g. number of employees, contribution to national GDP, asset value), complexity (e.g. of products and services), interconnectedness (e.g. internal – between enterprise group members and external – with the supply chain, financial – through financial (liability) arrangements and operational – by way of contractual obligations) of such enterprises, as well as functions performed by them. For example, the Carillion group had a large and complex business, integrated in the national economy through a wide network of financiers, contractors, suppliers and distributors. It was also engaged in the provision of critical public services, posing significant environmental and health risks. In other words, its collapse could have led to socially unacceptable and disruptive consequences.

Conceptually and functionally, regulation of bank and SNFEs insolvency could be aligned. Both aim at minimizing negative externalities and preventing social harm, stemming from the interruption of critical services and large-scale economic shocks.

¹⁶¹ Insolvency Act 1986, section 177.

¹⁶² Second Joint report, *supra* n. 134, at 65. *Letter from the Official Receiver David Chapman to the House of Commons* (5 February 2018).

To the extent that both, to one degree or another, pursue macroprudential goals and are guided by similar considerations, it may be beneficial to explore whether the tools and strategies applied in bank resolution and introduced in section 3.2. above may be extended to insolvency of SNFEs. This article primarily focuses on three such strategies: early intervention, administrative involvement (administrative character of resolution) and recovery and resolution planning.

6.2. *Facilitation of Early Intervention*

The collapse of Carillion has revealed that despite supervision by various regulators, as well as the establishment of Crown Representatives, responsible for communication with strategic suppliers, no early intervention has occurred. The company filed for liquidation at the time when it was too late to restore its financial soundness. As a consequence, the failure of Carillion has resulted in significant costs, including the cost of liquidation and losses sustained by employees, pensioners and suppliers.

The recently adopted Restructuring Directive encourages resolving financial problems at an early stage, avoiding the unnecessary liquidation of viable enterprises.¹⁶³ Nevertheless, it does not authorize any type of public intervention in the absence of insolvency.¹⁶⁴ Preventive restructuring frameworks introduced by the Directive are addressed primarily to the debtor's management. This is why according to Article 4(7) of the Directive, '[p]reventive restructuring frameworks ... shall be available on application by debtors'.¹⁶⁵ Thus, public authorities are not explicitly authorized to engage to prevent the escalation of financial distress. In contrast, the bank recovery and resolution framework permits early intervention by the competent authorities before actual insolvency. Such intervention is considered a key component of bank supervision, adopted to 'prevent an identified weakness from developing into a threat to safety and soundness'.¹⁶⁶

Insolvency of SNFEs can cause systemic consequences going beyond direct relationships or the sphere of interests of the debtor and its creditors. The need to curb the potentially disruptive consequences and avert bailouts justify the increased state engagement prior to actual insolvency. In the context of the too-big-to-fail discussion, additional costs or requirements for significant enterprises are oftentimes compared to a tax (i.e. systemic risk tax or a tax on complexity) imposed on them to offset disproportionate losses associated with bailouts.¹⁶⁷ The increased role of state in the early

¹⁶³ Restructuring Directive, Recital 2.

¹⁶⁴ Restructuring Directive, Recital 38, holding that Member States should be allowed to empower public authorities acting in a general interest to request the opening of insolvency proceedings.

¹⁶⁵ EU Member States may also allow creditors to request the opening of preventive restructuring frameworks, subject to the agreement of the debtor. The requirement to obtain the debtor's agreement may be limited to cases where debtors are SMEs. Article 4(8) Restructuring Directive.

¹⁶⁶ BCBS, *Core Principles for Effective Banking Supervision*, 4 (September 2012).

¹⁶⁷ Schillig, *supra* n. 18, at 60. See also Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework* 86 *Notre Dame Law Review* 1349, 1402 (2011), noting in

intervention context seeks to internalize the costs of negative externalities by taxing them.

The early intervention measures can range from less to more intrusive. Among the former, development and adoption of a recovery plan to improve debtor's performance, restore its financial health and mitigate the negative consequences of the possible collapse.¹⁶⁸ The latter may authorize public authorities to require debtors to implement specific changes to their legal, operational or financial structures. This can be done to reduce complexity of a corporate group, decrease interdependence of group members, improve corporate governance practices (e.g. board oversight and independence) and the overall business model by, inter alia, addressing funding structures, earning asymmetries and financial volatility.¹⁶⁹

The more far reaching measures include the removal and replacement of senior management. Arguably, this measure can trigger negative market reaction and cause reputational damage to the debtor, therefore harming its survival prospects. This is why it should be applied with caution. Depending on the facts of the case, it may instead be more effective to initiate discussions with company's board of directors or major shareholders. Should the above measures fail, it might be necessary to permit public authorities to commence a restructuring or insolvency procedure with respect to a SNFE.

6.3. *Insolvency of SNFEs and Administrative Engagement*

Section 3.2.2. discussed the administrative character of bank resolution in the EU and the USA. The prominent role of state authorities in resolution of financial institutions arises from the goal of minimizing private and public costs of bank failures.¹⁷⁰ As shown above, failures of non-financial companies like Carillion can also have a systemic character, leading to significant environmental, economic and societal losses. In bank resolution, state authorities are the primary decision makers. They largely supplement or even replace creditors and courts. Tegelaar and Haentjens argue that the post-crisis bank resolution rules 'give greater weight to efficiency and effectiveness of resolution rather than to fairness towards creditors'.¹⁷¹ It is doubtful whether

application to the risk management that 'when the social cost of an action exceeds its private cost, a tax equal to the difference between the two can correct the market outcome'.

¹⁶⁸ Interestingly, the UK Strategic Supplier Risk Management Policy prescribes the development of a strategy ('Improvement Plan') to address the underperformance by strategic suppliers. However, the adoption of an Improvement Plan is listed as a consequence of 'High Risk' designation, which, as noted above, has not occurred in case of Carillion.

¹⁶⁹ On similar assessment within the bank supervisory review process, see BCBS, *Guidelines for Identifying and Dealing with Weak Banks* (July 2015).

¹⁷⁰ Jens-Hinrich Binder et al., *The Choice between Judicial and Administrative Sanctioned Procedures to Manage Liquidation of Banks: A Transatlantic Perspective* 14 Cap. Mark. Law J. 178 (2019).

¹⁷¹ Jouke Tegelaar & Matthias Haentjens, *Judicial Protection in Cross-Border Bank Resolution* in Matthias Haentjens & Bob Wessels (eds.), *Research Handbook on Cross-Border Bank Resolution*, 260 (Cheltenham: Edward Elgar Publishing, 2019).

a similar administrative regulation can or should be used in insolvency of non-financial enterprises, even if significant ones.

First, judicial process has significant advantages when it comes to rule of law considerations. It is more transparent, public, open, adversarial and appealable compared to a highly administrative bank resolution.¹⁷² The Italian experience of using extraordinary administration procedures, discussed in section 4.2., shows that the increased state control over insolvency proceedings is not necessarily a good thing and may cause economic inefficiencies, undermine protection of creditors' rights and lead to political interference. Creditors should be engaged and incentivized to participate in the insolvency process for a simple reason that they have the most direct stake in its outcome.¹⁷³ The same applies to debtors. To the extent that in resolution the top management is promptly replaced, managers may resist insolvency filing or adoption of early measures to address financial difficulties.

Second, effective and efficient bank resolution in the EU cannot exist without a developed organizational and regulatory backup (i.e. BRRD, SRMR) and a network of supervisory and resolution authorities, established after the GFC. Creation of a similar infrastructure for non-financial enterprises may be politically unfeasible due to the divergence of national approaches to insolvency law, the desire to protect local interests and to avoid interference by foreign governments.¹⁷⁴ The Restructuring Directive, while mandating the establishment of harmonized preventive restructuring frameworks, does not contain provisions related to the role of public authorities, and is therefore unlikely to facilitate administrative engagement in insolvency of SNFEs or lead to an institutional set-up to address insolvency of multinational enterprise groups, many of which are SNFEs.

Third, public interest considerations can be encapsulated in the insolvency process without replacing the judicial procedure with an administrative one. For example, English courts have acknowledged the existence of a public interest in discouraging and punishing commercially culpable conduct to promote higher standards of business morality. In *Re Pantmaenog Timber Co Ltd* the court noted that the functions of insolvency law were not limited to the collection and distribution of assets, but also included investigation of the causes of insolvency and the conduct of the debtor's management, pursued in the public interest.¹⁷⁵ In *Whitehouse v. Wilson* the court recognized that on some facts and in consideration of a public interest, the liquidator may be required to adopt a course of actions that is not necessarily in the best com-

¹⁷² David Skeel, *The New Synthesis of Bank Regulation and Bankruptcy in the Dodd-Frank Era* in Barry E. Adler (ed.), *Research Handbook on Corporate Bankruptcy Law*, 70 (Cheltenham: Edward Elgar Publishing, 2020), noting that in comparison to bankruptcy, bank resolution 'is much more discretionary and does not honor rule of law virtues such as transparency and clear priorities'.

¹⁷³ World Bank, *supra* n. 31, para. C7, prescribing that '[c]reditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings'.

¹⁷⁴ John A.E. Pottow, *Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to "Local Interests"* 104 Mich L Rev 1899 (2006). Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps*, 70 (Oxford: Oxford University Press, 2018).

¹⁷⁵ *Official Receiver v Hay, Pantmaenog Timber Co (In Liquidation), Re* [2003] UKHL 49.

mercial interests of creditors.¹⁷⁶ The importance of stakeholder interests in insolvency has been acknowledged in the USA, France and Canada.¹⁷⁷ Development of the notion of public interest also underlies the Restructuring Directive, which seeks to prevent or minimize social and economic costs of business failure, not only for the benefit of creditors but also in the interests of the wider community.¹⁷⁸

The aim of minimizing contagion, ensuring continuity of vital functions and maximization of estate value of SNFEs can be achieved by providing regulators with additional rights. As argued above, under certain conditions public authorities should be permitted to intervene with the application of early intervention measures and, as a last resort, to initiate restructuring or insolvency proceedings against an SNFE. Additionally, public authorities should be given standing to appear and be heard on issues that may affect public interest. Borrowing from the ideas behind the Chapter 14 project, this would provide authorities with ‘a voice for systemic consequences in the bankruptcy proceedings’.¹⁷⁹

6.4. *Living Wills for SNFEs*

Section 5.2.1. has shown that one of the major problems, inhibiting efficient reaction to the demise of Carillion was the lack of full and comprehensive information available to the government, which prevented a timely and targeted intervention. When the construction company filed for liquidation in January 2018, it was not even clear how many government contracts were affected and what the potential impact on society could be. The liquidation process was further complicated by the fact that Carillion was a very complex enterprise group, closely integrated in the national economy and interconnected with a large network of direct and indirect subcontractors and suppliers across the UK and abroad.

The problems of complexity and information gaps are not unique to SNFEs and represent a typical feature of insolvency of large financial institutions.¹⁸⁰ To solve these problems, both the EU and the USA have introduced detailed rules on recovery and resolution planning. Section 3.2.3. described some of the key advantages of this regulatory strategy. One of them relates to the improvement of information awareness – key to effective monitoring by regulators and investors, and for a well-timed early

¹⁷⁶ *Whitehouse v Wilson (liquidator of Vol-Mec Ltd)* [2006] EWCA Civ 1688.

¹⁷⁷ Janis Sarra, *Creditor Rights and Public Interest: Restructuring Insolvent Corporations* (University of Toronto Press, 2003). See also Andrew Keay, *Insolvency Law: A Matter of Public Interest?* 51 Northern Ireland Legal Quarterly 509, 534 (2000), emphasizing that insolvency is not divorced from society and arguing that public interest should be balanced with interests of the debtor and its creditors.

¹⁷⁸ Restructuring Directive, Article 19, prescribing that in the vicinity of insolvency directors shall have due regard to the interests of creditors, equity holders and other stakeholders.

¹⁷⁹ Skeel, *supra* n. 172, at 28.

¹⁸⁰ For example, the Lehman Brothers group consisted of over 900 legal entities located in around 40 jurisdictions. Its insolvency has resulted in at least 75 separate proceedings in some 9 jurisdictions. See Emily Lee, *Investor Protection in Lehman Brothers’ Insolvency Litigation* 7 J. Comp. Law 284, 289 (2012).

intervention. Another advantage refers to educational and disciplining role of recovery planning, which may facilitate adequate internal knowledge, stimulate better corporate governance, simplification of an enterprise group corporate and financial structure and identification of potential weaknesses in the debtor's business model. Finally, crisis preparation can make insolvency or liquidation more orderly, thus mitigating the risks of interruption in the provision of public services and the spread of contagion. The experience of recovery planning should therefore be useful for SNFEs.¹⁸¹ The requirement to prepare and regularly update recovery plans may result in additional costs. However, such costs are clearly outweighed by the potential benefits of *ex ante* planning and the seriousness of negative consequences associated with failures of SNFEs.

7. Conclusion

Recent years have witnessed a series of large corporate debacles, including failures of Parmalat, Chrysler, General Motors, British Steel and Carillion. These cases reveal that non-financial enterprises can be highly complex, deeply integrated in local and national economies and interconnected with wider communities through complex ecosystems of subsidiaries, offices, suppliers and distributors. This article refers to such enterprises as significant non-financial enterprises or SNFEs. Insolvency of SNFEs may produce significant social and economic externalities, affecting thousands of people and businesses, resulting in increased state expenditures and bailouts, and potentially leading to interruptions of vital public services. To the extent that insolvency exceeds the boundaries of a single company or an enterprise group, it stops being a purely private matter. This observation, however, does not sit well with traditional assumptions and long-standing views of corporate insolvency law, which treat insolvency as a private firm-specific issue, predominantly aimed at effective and efficient resolution of conflicts between shareholders and creditors and between creditors themselves. This article questions this microprudential vision of insolvency law.

In contrast to non-financial enterprises, as a response to the financial crisis of 2008, bank resolution has increasingly embraced the macroprudential vision, recognizing the need for a good preparation and a speedy intervention to ensure continuity of critical functions performed by financial institutions and the preservation of financial stability. Having outlined the typical characteristics of SNFEs (e.g. size, complexity, interconnectedness, cross-jurisdictional activity) and having explored the potential effects of their failures (e.g. bailouts, contagion, interruption of critical services), I have come to the conclusion that there are certain conceptual similarities which align

¹⁸¹ In the wake of Carillion's collapse, the UK Committee of Public Accounts recommended that strategic suppliers draft and maintain living wills. It has also pointed out that information provided in living wills would enable the government to seamlessly transfer contracts for the delivery of public services to new suppliers. 58th Report, *supra* n. 149, at 33.

bank resolution and insolvency of SNFEs. They both seek to prevent disruptive economic consequences and social harm, restrain contagion and preserve important public functions. Such similarities may facilitate convergence of functions and principles of bank resolution and corporate insolvency law. They also permit the inquiry into whether the select reactive and proactive resolution strategies applicable to financial institutions may be feasible and useful for SNFE insolvencies.

The conclusion of this article suggests that corporate insolvency can learn from recent bank resolution developments. The failure of Carillion, once the UK's second-largest construction company, has shown that the reactive approach to crisis resolution, centred around post-crisis liquidation, poses significant risks not only for creditors but also for other stakeholders and communities at large. Instead, the proactive and precautionary approach accepted by the BRRD and the SRMR (but also promoted in the Restructuring Directive) should be embraced. This approach manifests itself in granting state authorities the intervention powers of early reaction to the escalation of financial problems before actual insolvency. Such powers range from giving instructions to the debtor's management to address identified problems, to more robust alternatives, including the replacement of debtor's management and the initiation of insolvency or restructuring proceedings. Effective early intervention is inconceivable without adequate and complete information about the debtor's financial and operational status. This is why the article has advocated for the introduction of a requirement that SNFEs prepare and regularly update recovery plans or living wills. Taking this *ex ante* crisis preparation step may also improve corporate discipline, uncover economic and organizational weaknesses, reduce complexity and interdependence within corporate groups.

A more controversial issue is the role of public authorities in insolvency or liquidation. After the GFC, both in Europe and in the USA resolution of financial institutions has concentrated around administrative decision-making. While an administrative-led process has certain advantages, it may be difficult and unnecessary to replicate or transpose to non-financial enterprises. Instead, a transparent court-supervised process with active involvement of creditors and debtors, as well as a limited and targeted engagement of public authorities on matters of public interest should be encouraged. This article welcomes further discussions about the role of the state and the balancing of private and public interests in insolvency and restructuring. Such balancing acquires a new topicality in the current times of economic shocks and massive state intervention.