The BRRD vs. Normal Insolvency Proceedings. Opposite or Interconnected? The scope of the new EU resolution framework.

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Abstract

This dissertation was written as part of the Master of laws (LLM) in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

Having regard the dramatic outcomes of the recent global financial crisis that proves normal insolvency proceedings to be inadequate to handle financial institutions collapse, the present thesis aspires to offer as comprehensive as possible within the limits of dissertation an analysis of the new EU resolution framework in comparison with normal insolvency proceedings and, in particular, with liquidation procedure. The Bank Recovery and Resolution Directive (BRRD) constitute the core of the research and mainly, its resolution toolkit that applied in a situation of financial distress in cases when the institution's collapse cannot be obviated in any other way.

Accordingly, this thesis focused on what are the new steps and rules that European legislators brought in the aftermath of the financial crisis and how much further did they go in comparison with normal insolvency proceedings. Moreover, aims to present whether the new resolution framework under the BRRD offers something more than the normal insolvency proceedings in relation to its methods and goals, whenever banks turns to be insolvent. In addition, it evaluate if there are any differences between bank resolution under the BRRD and liquidation of banks under normal insolvency proceedings.

Resolution and liquidation cases that occurred after the BRRD enforcement are presented by this thesis in order to illustrate the above matters and, to reflect any weaknesses of the new bank resolution directive. To end with, it will present some reviews by several professors and what should have be done to establish a trend that could be followed by each Member State despite the peculiarities that may have to deal with.

Keywords: BRRD, normal insolvency proceedings, bank liquidation, banks resolution, resolution tools, bail-in tool, Too Big to fail problem

Michalis Zambas
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Preface

The purpose of this thesis is to present and demonstrate the process that has been made since the global financial crisis with the EU new resolution framework for banks and, financial institutions in comparison with the normal insolvency proceedings and in particular, with the liquidation process for failing banks. Intrigued by my real interest into the successive changes that had been established in European Union in the aftermath of financial crisis of 2007-2008 in order to handle effectively and properly the constant challenges and difficulties that were presented by the banking system worldwide, I decided to undertake a legal research scrutinizing the recovery and resolution directive for banks and financial institutions adopted in 2014 to end the significant problems that till then, cost big banks to collapse around the globe.

I was engaged in researching and writing this thesis from October to January 2020. The research was difficult, but conducting broad examination has permitted me to answer the identified questions. However, this could not have been achieved without the catalytic contribution and support of a group of people.

First and foremost, I would like to express my sincere gratitude and thanks to my supervisor, Dr T.R.M.P Keijser (Thomas) for his insightful observations and useful suggestions as well as, his valuable guidance in accomplishing and introducing a satisfying and structured result.

Moreover, I would like to convey my appreciation to the professors at the International Hellenic University, for the essential knowledge that I have been obtained during the academic year.

Last but not least, I could not help but express my deeply thanks and gratitude to my family, specially my parents for their continuous support and encouragement.

List of abbreviations

BRRD	Bank Recovery and Resolution Directive, 2014/59/EU, OJ L173, 12.6.2014, p. 190
BP	Banco Popular
CA(s)	Competent Authority(ies)
CRD IV	Capital Requirements Directive IV
CRR	Capital Requirements Regulation, (EU) No 575/2013, OJ L176, 27.6.2013, p. 1
EBA	European Banking Authority
EIMs	Early Intervention Measures
EU	European Union
FOLTF	Failing Or Likely To Fail
FSB	Financial Stability Board
FSF	Financial Stability Forum
GFST	Government Financial Stabilization Tools
ISP	Intesa San Paolo
KA	Key Attributes
MREL	Minimum Requirements and Eligible Liabilities
MSs	Member States
NCWOL	No Creditor Worse Off than in Liquidation
NPLs	Non Performing Loans
NRAs	National Resolution Authority(ies)
SGA	Societa per la Gestione di Attivita SpA
SREP	Supervisory Review and Evaluation Process
SRM(R)	Single Resolution Mechanism Regulation, Regulation 806/2014, OJ L/225, 30.7.2014, p.1
SSM(R)	Single Supervisory Mechanism Regulation, Council Regulation (EU) No 1024/2013, OJ L 287, 29.10.2013, p.63
TBTF	Too Big To Fail
TFEU	Treaty on the Functioning of the European Union, OJ C 202, 07.06.2016

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Introduction

The last couple of years had been significantly difficult for the global economy. The financial crisis of 2007-2008, also referred to as the global financial crisis, was a drastic worldwide economic crisis and considered to be by several economists one of the most serious financial crises that affected the globe. The whole economic system came across significant challenges to the point that enormous changes ensued to the structure of the banking sector and, new regulatory frameworks and directives appeared into the scene.

Historically, the financial crisis started in 2007 by a crisis in the subprime mortgage market in the United States and by the intensely dramatic collapse of the investment bank Lehman Brothers on September 15, 2008; it was then developed into an international banking crisis. Since the end of 2009, the European debt crisis, also known as the eurozone crisis or, the European sovereign debt crisis, had been taking place in the European Union. Numerous Member States, for instance, Ireland, Spain, Greece, Cyprus, Portugal appeared to be unable to pay their government debt or, to bail out over-indebted banks under their national supervision without the aid of third parties such as, the European Central Bank (ECB), the International Monetary Fund (IMF) or, other eurozone countries. Indisputably, the downfall of American investment bank Lehman Brothers, like a chain, caused an economic decline, which Europe felt extremely hard and intense.

Since the economic downturn in Europe, many politicians and legislators throughout Europe in the aftermath of the downfall have tried to ensure that such a frightening collapse could never happen again. The dramatic fall of Lehman Brothers illustrated that the insolvency of a huge or, linked financial institution can have as an outcome a full downturn of the whole industry. Due to the lack of appropriate tools for the resolution of banks at the time, the need to turn to public funds to sustain financial stability was inevitable. The financial crisis proved normal insolvency to be ineffective. Precisely, normal insolvency proceedings proved to be unsuitable to deal efficiently with the failure of financial institutions. Thus, specific rules for bank resolution were needed and taxpayers should not be liable to bail out financial institutions anymore.

European legislators focused on improving the situation by taking effective measures and creating a framework of tools that enables the proper resolution of banks without the use of public funds and jeopardizing financial stability, which is vital for proper functioning of market economy.

This new instrument, provided by the application of the Directive 2014/59/EU (BRRD) of the European Parliament and the council, which established a new framework for the recovery and resolution of credit institutions and firms. With the above, the primary objective of the Recovery and Resolution plan is to preserve financial stability and to reduce losses for society without the need to rely on taxpayers' assistance. Virtually, the BRRD constitute a core element of European endeavors to end the too big to fail problem. European bank cases that occurred after its establishment demonstrate several issues and confusion, in particular, the resolution of Spain's Banco Popular vs. the liquidation of the Italian's Veneto Banca and Banca Popolare di Vicenza.

Chapter I: The rationale behind the BRRD and its legal framework.

The beginning in order to present a summary of the BRRD background it has to be the beginning of the crisis in 2007, with the sharp increase of money market interest rates and the rise of spreads.

1. *Historical background: The trail towards the implementation of the EU Bank Recovery and Resolution Directive.*[1]

In 2008, Lehman Brothers a family-owned private partnership enduring more than one hundred years and turned to be the fourth-investment banking company in the US had a dramatic collapse. Their decision to invest in subprime mortgages and derivatives proved to be disastrous as losses on these instruments contributed to the firm's filing for bankruptcy.[2] Consequently, Lehman Brothers' failure cost a great recession; the Federal Reserve Bank of New York borrowed billions of dollars for the rescue of the worldwide insurance company American International Group (AIG).[3] The Government concludes that AIG was *too big to fail* as it was linked with other various huge banks and financial institutions and the systemic risk was extremely feasible. Accordingly, without the bailout, AIG's downfall could have cost severe damages to the financial system.[4] Immediately after the report for Lehman Brothers hit the market results

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[1] See: Anastasia Gromova-Schneider, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [April,2017], World Bank Group Finance&Markets Financial Sector Advisory Center (FinSAC), p.17, available at: <http://documents.worldbank.org/curated/en/100781485375368909/Understanding-bank-recovery-and-resolution-in-the-EU-a-guidebook-to-the-BRRD>, accessed 11 Oct 2019

[2] Harvard Business School Baker Library, *'Lehman Brothers Collection'* (Introduction), available at: <https://www.library.hbs.edu/hc/lehman/Exhibition/Introduction>, accessed 11 Oct 2019

[3] Ibid, (Global Impact of the Collapse), available at: <https://www.library.hbs.edu/hc/lehman/Exhibition/Global-Impact-of-the-Collapse> accessed 11 Oct 2019

[4] Financial Crisis Inquiry Commission, *'The Financial Crisis Inquiry Report'*, [January 2011], Official Government Edition, p.352, available at https://books.google.com.cy/books?id=QIKfTVrhNfMC&printsec=frontcover&dq=the+financial+crisis+inquiry+report&hl=el&sa=X&ved=0ahUKEwiHnNnRiq3nAhXJpIsKHSTqCrYQ6AEINDAB#v=onepage&q=the%20financial%20crisis%20inquiry%20report&f=false, accessed 11 Oct 2019

illustrated into another big company, Fannie Mae dipped 16 percent. New York turned truly upsetting that Fannie Mae and Freddie Mac, two of the world's biggest companies could be at risk. Practically, every Wall Street's bank work with them and mortgage market motility rely on them. As tremendous consequences hit, government officials discussed a conservatorship rescued plan and some even suggested more drastic measures i.e. bailout.[5] Additionally the same year, two of the UK's biggest banks, the Bear Stearns Companies along with the Northern Rock, failed as part of the global financial crisis. In 2008 Iceland also came into crisis after the downfall of the country's banking system that considered being more aggressive than the failure on Wall Street in 1929-32, the debt was excessive and there was a multifaceted crisis as it touched various aspects such as political, society and currency.[6] As an outcome, G20 leaders acknowledged the fact that the global financial crisis seriousness brought high demands that were ahead of the capabilities of the Federal Stability Forum (FSF). Major coordination on financial coordination and systematic cooperation among countries was unavoidable hence; the Financial Stability Board (FSB) was created, and with that G20 provides a new regulatory organization with international scope for an extensive improvement of financial regulation and supervision. Additionally, one of FSB's head functions is researching financial shortcomings. Virtually, the establishment of FSB genuinely helped for a confident recovery in the banking system and constitutes a step forward to improvement.[7]

Moreover in 2010, in the US the enactment of the Dodd-Frank Act took place, which its main goal was to avert extra bailouts of the financial system at taxpayers' detriment as

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[5] Charles Duhigg *'Loan-Agency Woes Swell From a Trickle to a Torrent'* [July 11, 2008], The NewYorkTimes, available at: <https://www.nytimes.com/2008/07/11/business/11ripple.html?ex=1373515200&en=8ad220403fcfdf6e&ei=5124&partner=permalink&exprod=permalink> accessed 11 Oct 2019

[6] Stefan Olafsson *'Iceland's Financial Crisis and Level of Living Consequences'*, Working Paper np3:2011,[2011], p.4, available at: <https://thjodmalastofnun.hi.is/sites/thjodmalastofnun.hi.is/files/skrar/icelands_financial_crisis_and_level_of_living.pdf >, accessed 12 Oct 2019

[7] Randal K. Quarles '*The Financial Stability at 10 Years-Looking Back and Looking Ahead'*, Speech [Oct 3, 2019], Board of Governors of Federal Reserve System, available at: <https://thjodmalastofnun.hi.is/sites/thjodmalastofnun.hi.is/files/skrar/icelands_financial_crisis_and_level_of_living.pdf>, accessed 12 Oct 2019

well as to tackle the matters of systemic risk in the financial system.[8] Furthermore, that same year, the Greek national crisis initiated and crisis overflowed into growing markets. Economic crisis in Cyprus result a couple of years later, in 2013 and a form of bail-in was applied before the establishment of the BRRD.[9] Since 2010 the European Commission has promoted almost 30 sets of rules to prevent risk for the financial sector and secure products, markets, and financial actors. The pre-crisis framework seemed incapable of dealing with a financial crisis, for instance, there were no instruments to respond with the failure of huge cross-border banks. Thus, with a powerful financial framework for the single market, improved regulated and supervised banks would become stronger and more effective for the real economy taxpayers would be secured by not having to pay the bill of banks' errors and financial stability would be supported. Furthermore, behind the idea that *'without good supervision, regulation can be worthless'*,[10] financial sector supervision renewed and three European supervisory authorities (ESAs) were introduced in 2011 for a supervisory architecture, the European Bank Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). Also, a European Systemic Risk Board (ESRB) was created to oversee and examine possible risks of financial stability. The European Council made a recommendation for a single rulebook to be applied for all the financial institutions into the single market since 2009, although the core of the single rulebook, which

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[8] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [First published 2016] Oxford University Press, p.30 (par.2.28)

[9] The Cyprus sovereign debt and banking crisis demonstrated several insufficiencies such as the problem of splitting public debt matters from bank resolution. At first, creditors were to be bailed-in regardless of their insolvency priority through a special levy and a protection for major unsecured bondholders was foreseen. However, at the end creditors were bailed in based on their insolvency ranking and higher unsecured creditors having deposits over €100.000 were bailed in, while guarantee deposits were not bailed in. It appears that Cyprus's Domestic Guarantee Scheme (DGS) was not summoned to redress depositors up to €100.000. The Bank of Cyprus recapitalization was succeeded and Laiki Bank was winding down with the transfer of the guarantee deposits into Cyprus of Bank. Cyprus' DGS showed to have poor resources in spite of the protection of guaranteed depositors and above all Cyprus crisis discloses that a completed legal framework and an emergency scheme were highly required. See: *'The Cypriot Crisis Revisited'*, [Sep 2013], available at HeinOnline, p.48

[10] European Commission, '*A Comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the eurozone'*, [28 Mar 2014], MEMO, Brussels, available at: < https://europa.eu/rapid/press-release_MEMO-14-244_en.htm >, accessed 13 Oct 2019

enclosed a tighter pack of rules for banks known as Capital Requirements Directive IV (CRD IV) through a Directive and a Regulation[11]-also referred as Basel III agreement-became activated on 16 July 2013. Still, even a stronger financial sector was not enough to deal with the complex relationship among banks and sovereign debt. Hence, the necessity for a better managed and profound economic and monetary union (EMU) for countries that share the same currency became essential to make it work in the long term. For that reason, EU Heads of State and Government agreed to develop a Banking Union in 2012, completing the EMU that was established particularly for the eurozone countries but it was also open for non-euro EU member states who may want to participate.[12]

Continue with, the BRRD[13]entered into force on 2 July 2014[14] and required to be applied in national legislation by 1 January 2015. In particular, the time limit for the

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[11] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (*OJ L 176, 27.6.2013, p. 1*), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (*OJ L 176, 27.6.2013, p. 338–436)*.

[12] European Commission, *'A Comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the eurozone',* [2014], MEMO, Brussels, available at: < https://europa.eu/rapid/press-release_MEMO-14-244_en.htm >, accessed 13 Oct 2019. The Single Rulebook includes all the rules that all EU financial institutions need to follow and on which Banking Union relies. One part of the single rulebook is BRRD for resolution, the other one is CRD/CRR for supervision and there are also new rules for Deposit Guarantee Scheme (DGS) that altogether constitute a single regulatory frame. Furthermore, the Banking Union has tools for micro and macro-prudential supervision, bank resolution and crisis administration through its Supervision and Resolution powers. Particularly, the Banking Union encompasses three parts, the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM) and, a European Deposit Insurance Scheme (EDIS) that is still in the making process. See: Pamela Lintner, Lira Qefalia, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [April 2017], World Bank Group Finance & Markets (FinSAC), p.24-25

[13] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190

[14] European Commission, '*Law Details, Information about the Directive 2014/59/EU on bank recovery and resolution including date of entry into force and links to summary and consolidated version'*, available at: <https://ec.europa.eu/info/law/bank-recovery-and-resolution-directive-2014-59-eu/law-details_en>, accessed 13 Oct 2019

implementation for the substantially of all of its provisions into the legislation, regulations and administrative rules of Member States was settled to be by 31 December 2014 to 1 January 2015.[15] Along with the Single Resolution Mechanism (SRM)[16], a new multifaceted dualistic plan for the resolution and insolvency of banks and financial institutions has been established in the EU.[17] Moreover, on 1 January 2016, it became requisite according to the BRRD to bail in lenders and stockholders for a number of 8% of full liabilities before any capital injection in a bank under resolution.[18]

1.1 The too big to fail problem.

Taking into account the aforementioned, the global financial crisis-generally appeared as the lowest ever since the Great depression-[19] has revealed great deficiencies in regards to financial systems, and the reasons were numerous and tricky. Nonetheless, one of the major issues that seem to be the link among all the factors was the threat towards financial stability that was caused by the banks that were too big, interconnected and complex to be closed or fail. This is commonly known as the *'too big to fail'*[20] problem, a phrase that has to do with some issues which are partly related

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[15] Pierre de Gioia Carabelesse, Daoning Zhang, *'The legal nature of the recovering and resolution plans'*, [2019] I.C.C.L.R (30)7, 380-398, available at: uk.westlaw.com, p.1, 12

[16] Regulation (EU) No 806/2014 of the European Parliament and the Council 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 of the European Parliament and the Council, OJ EU L 225/1 30.7.2017 (SRM Regulation).

[17] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 1

[18] Benoit Mesnard, *'"Bail ins" in recent banking resolution and State aid cases'*, [July 2016], European Parliament, PE 574.395, p.1, available at: <http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/574395/IPOL_IDA(2016)574395_EN.pdf>, accessed 13 Oct 2019

[19] Arthur E. Wilmarth Jr.*,'Reforming Financial Regulation to Address the Too-Big-to-Fail problem'*, [2010], available at: HeinOnline, p. 707

[20] The TBTF proved to be a massive problem as it produced unreasonable risk-taking and decrease market discipline. Governor Mervyn King of the Bank of England argued that the over the top aid to banks over the globe has created the greatest moral hazard in history and highlighted that those banks took those damaging risks because of the safety they felt as, the

to the size of an institution's balance sheet.[21] The aftermath of the bailout of banks was the need for a transformative regulation to diminish the odds and the effect of a collapse. In the purpose of maximizing banks' resiliency, the improvement of resolution regimes along with higher liquidity and capital requirements was an essential element. Accordingly, a new harmonized international standard for resolution regimes for financial institutions provided by the Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions (KA), approved by the G20 in October 2011.[22] Although, KA mainly pays attention to global systemically important banks (G-SIBs) it was also utilized as a direction for jurisdictions that are altering or endorsing domestic resolution regimes. About that, the EU was a precursor in the implementation of KA, specifically regards to bail-in tool.[23] Concerning the above, the EU Commission's in 2010 define an extensive plan for a legal frame, which let governments to handle effectively the infirm credit institutions. Therefore, comprises apart from the BRRD, the need for additional harmonization of bank insolvency regimes seeking for liquidating and resolving them in the same core standards something that mainly has to do with the ranking of creditors in national law that might have a thoughtful impact on the application of the bail-in tool. Furthermore, a comprehensive resolution regime based on a single European

government, in any case, would support them in a possible failure. See: Ibid p.742. Also, the TBTF label seems to perfectly pinpoint the dysfunctional character of the financial system i.e. the government's repeated scheme to bail out huge financial institutions. See: Saule T. Omarova, *'The Too Big to Fail problem'*, [2019], available at: HeinOnline, p. 2495

[21] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016], OXFORD, p.2

[22] Virtually, with the KA, FSB set out twelve main features for an effective resolution regime, allowing the governments to neatly resolve financial institutions without taxpayers disclosure to losses from solvency assistance, while sustain continuousness of their essential economic acts. On 15 October 2014 FSB added further guidance records that clarify particular KAs that have to do with info sharing for resolution intentions and, how they must be applied to insurers and financial market infrastructures (FMIs). These guidance documents have been included as annexes into the 2014 version without any changes to the 2011 text. See: Financial Stability Board, *'Key Attributes of Effective Resolution Regimes for Financial Institutions'*, [15 Oct 2014], p.1-2

[23] World Bank Group Finance & Markets FinSAC, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017], p.5 (Introduction)

Resolution Authority considered being a part of the completion of the Banking Union for the eurozone states.[24]

2. Resolution under the BRRD: content, scope, objective, powers and tools.

2.1 The EU multi-tier resolution regime: the BRRD and SRM, as well State aid as an alternative option under the BRRD.

Even with sturdy supervision and the utilized of early intervention instruments banks cannot fully avoid the possibility of a collapse. Hence, the SRM as the second pillar of the Banking Union managed bank resolution efficiently, seeking to reduce taxpayer's costs and decrease any harmful results to the real economy in Europe.[25] Consequently, the EU multi-tier resolution regime includes of the BRRD, which is broadly applicable to the EU Member States and to the European Economic Area, something that is noticeable according to its scope, as it applies also to the non-eurozone MSs, for instance to Sweden and UK;[26] and the SRM that operates, along with the SSM[27] only to specific group firms and also banks, which are developed into the eurozone states. While the BRRD needs incorporation into domestic legislation by every Member State, the SRM regulation has a direct effect and collects specific resolution tasks as well as rulings for the Banking Union[28]. The SRM is based on the ground rules set out in the BRRD and in the domestic implementing terms.[29] In other words, the SRM appears to

[24] M Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'* [2016], Oxford, p.5 (para.1.08)
[25] Pamela Lintner, Lira Qefalia, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017], World Bank Group Finance & Markets FinSAC, p.26
[26] Pierre de Gioia Carabellese, Daoning Zhang, *'The legal nature of the recovery and resolutions plans'*, [2019], I.C.C.L.R (30)7 380-398, available at: uk.westlaw.com, p. 2
[27] Ibid
[28] European Commission, 'Report from the Commission to the European Parliament and council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)', [30.4.2019] COM(2019), 213 final Brussels, p.1
[29] Michael Schillig, 'Resolution and Insolvency of Banks and Financial Institutions.', [2016] Oxford, p.98 (para. 4.51)

adopt the recovery and resolution scheme of the BRRD[30] and has a complementary role instead of acting as a substitution or as a replacement.[31]

Moreover, while the BRRD seeks a minimum harmonization measure, the SRM considers being a maximum harmonization tool.[32] Following the requirement of a powerful resolution system after the financial crisis, full-scale harmonization could be predicted. Nonetheless, also with the responsibility provided by the BRRD to apply certain resolution tools whenever a bank fails or is likely to fail (see below), the MSs in addition to designating national resolution authorities (NRAs) that are responsible for resolution may allocate to them further tools and powers[33]. Furthermore, they may decide as a minimum harmonization measure, whether to adopt Government Financial Stabilization Tools (GFST), whenever bank reaches to all the resolution terms under art.32 (1) as a measure of last resort.[34] Hence, the BRRD allows to MSs an alternative to public support with GFST; therefore it appears that bailout of banks remain an option.[35] The BRRD together with the SRM constitutes an alternative option to the implementation of the national corporate insolvency legislation.[36] Both regimes provide effective means of resolving banks, which are failing or are likely to fail, wherein this case as a principle, post-evaluation RAs may conclude that there is a

[30] Ibid p.6 (par. 1.09)

[31] Pamela Lintner, Lira Qefalia, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017], World Bank Group Finance & Markets FinSAC, p. 26

[32] Michael Schillig, '*Resolution and Insolvency of Banks and Financial Institutions.'*, [2016] Oxford, p.6 (par.1.09). The SRM seeks to harmonize the resolution scheme by implementing unified conditions and secure a consistent application by assigning decisions to a central body. It seems that the SRM harmonized the utilized of the resolution tools but not the operation of resolution powers, which are remained upon the NRAs. See: Danny Busch, Mirik B. J. van Rijn & Marije Louisse, *'How Single is the Single Resolution Mechanism?'*, EBI, EBI Working Paper Series, [2019-no. 30], p.9-10

[33] BRRD Art 3, Art 37(9). See also, Art. 1(2) where it provides that MSs may endorse or sustain more stringent rules as long as they are not in dispute with the regulations and acts of the directive. Moreover, SRM regulation highlight through its recital 10 that the BRRD is a major step although it does not join to a decision making and it only provides minimum harmonization regulations.

[34] BRRD Art 56 (3)(4).

[35] Danny Busch, Mirik B. J. van Rijn & Marije Louisse, *'How Single is the Single Resolution Mechanism?'*, EBI, EBI Working Paper Series, [2019-no. 30], p.5-7

[36]Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.98 (para.4.51)

public interest in resolving banks instead of implementing insolvency under national legislation.[37]

This is precisely the rationale behind the application of the EU special resolution framework for banks, i.e. a solution beyond the normal insolvency procedures in cases, where such proceedings appear unlikely to handle bank failures properly and adequately.[38] Thus, NRAs intervention should always take into account the public interest, therefore, the resolution of a bank will be managed efficiently with minimal cost to taxpayers and the real economy. Moreover, in exceptional cases, the Single Resolution Fund (SRF) that controlled by the SRB and is bank financed may be accessed for a bank resolution.[39]

2.2 Resolution conditions and objectives.

Consequently, the determined conditions for bank resolution under the special resolution regime[40] are the following. The bank shall consider as failing or likely to fail (FOLTF)[41], there must be no other possible actions available to avert bank failure

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[37] European Commission, 'Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation), [30.4.2019] COM(2019) 213 final Brussels, p. 1

[38] Single Resolution Board, *'Public Interest Assessment: SRB Approach'*, [2019], p.4, available at <https://srb.europa.eu/sites/srbsite/files/2019-06-28_draft_pia_paper_v12.pdf>, accessed 23 Oct 2019

[39] Single Resolution Board, *'What is a Bank Resolution'*, available at <https://srb.europa.eu/en/content/what-bank-resolution>, accessed 23 Oct 2019

[40] BRRD, Art 32(1), SRMR, Art. 18(1)

[41] Ibid. The examiner of, whether an institution is FOLTF supposed to be the relevant banking supervisor, although the BRRD permits MSs to provide the power to RAs to conduct the research instead of the supervisor. Within the euro area, it is upon the ECB to decide whether an institution is deemed to be FOLTF after consultation with the SRB, or unless the latter decides on the matter and the ECB has not reacted within three days. After the bank identified as FOLTF, it is up to SRB to initiate the resolution proceedings and examine if the resolution prerequisites are fulfilled so as to take a decision for the huge and cross border banks, while NRAs are liable in the eurozone for the resolution of minor institutions and non-cross border banks. The implementation of certain resolution tools to tackle the failure of a bank and if and how much of the SRF may be used, i.e. the resolution scheme, is provided by the SRB through a quite complex voting procedure and veto powers by the European Commission and the Council. In particular, the EC may submit an objection to the scheme or challenging the public interests or unless if the scheme approved by the EC and enters into force. In case of the objections to the public interests, the Council may endorse the objections and only, in this case, the bank would wound up. Otherwise, the scheme would be modified and endorsed by the SRB. See the depicted diagram: Single Resolution Board, *'What is a Bank Resolution'*,

within a reasonable amount of time; for instance, private sector aid, monitoring measures, the write-down and/or conversion of capital tools and, last but not least as the most crucial of the above there must be public interest.[42]

The interpretation of public interest is given by the Arts 32(5) and 18(5) under the BRRD and, the SRMR respectively. In particular, a resolution action to fulfill the public interest element shall be *"necessary and proportionate to one or more of the resolution objectives"* and *"winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent".* It seems that, the public interest test estimated in relation with the BRRD resolution objectives,[43] intends to ensure the continuity of critical functions, to prevent negative effects on the financial system, to reducing dependence on taxpayer funds and by that, safeguards the public funds, lastly, to protect depositors, investors, client capitals and assets.[44] Herewith, the resolution may qualify as the restructuring of a financial institution, that uses the resolution tools to protect the above public interests[45] and, only as an exemption to be given only if the winding-up within normal insolvency proceedings is not justified.[46] Although, these resolution objectives are equally

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[2016], available at: <https://srb.europa.eu/en/content/what-bank-resolution>, accessed 23 Oct 2019. The preconditions of, whether a bank is supposed to FOLTF under the BRRD Art 32(4) are in brief when the institution breaches the conditions for continuing authorization and, by that justifying the withdrawal of the authorization by the competent authority or, when the liabilities surpass the assets-known as "balance sheet" insolvency-, whether the bank is unable to pay its debts-known as illiquidity or "cash flow" insolvency and finally, on a massive public financial aid requirement. The FOLTF definition under the BRRD is quite ambiguous but provides the option to intervene early. A further elaboration regards to when an institution shall be deemed to be FOLTF provided by the European Banking Authority (EBA) guidelines (EBA/GL/2015/07). See: Dominic Freudenthaler, Pamela Lintner, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017], World Bank Group Finance & Markets FinSAC, p.104,106

[42] Single Resolution Board, *'Public Interest Assessment: SRB Approach'*, [2019] Brussels, p.4-5, available at <https://srb.europa.eu/sites/srbsite/files/2019-06-28_draft_pia_paper_v12.pdf> accessed 23 Oct 2019

[43] Dominic Freudenthaler, Pamela Lintner, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017], World Bank Group Finance & Markets FinSAC, p.106

[44] BRRD Art 31&2, SRM Art 14

[45] Single Resolution Board, '*What is a Bank Resolution'*, available at: <https://srb.europa.eu/en/content/what-bank-resolution>, accessed 23 Oct 2019

[46] Silvia Merler, Bruegel, *'Critical Functions and Public Interest in banking services: Need for clarification?',* [2017], European Parliament, Economic Governance Support Unit, PE 614.479, Abstract, available at

important,[47] the BRRD explicitly declares that the safety of covered depositors is one of the most significant objectives of resolution.[48] However, these resolution objectives are diverse, comprehensive, and quite general, hence, they are open to various interpretations which makes it extremely hard to assess in advance, whether they can be met equally within normal insolvency proceedings i.e. liquidation.[49] About that, Andrea Enria, Chair of the EBA argues that there are two distinct definitions of public interest, the EU approach and one more by national authorities.[50] This illustrates the need for possibly a further elaboration for both notions of critical functions and public interest concerning that recent liquidation cases highlighted the exact above distinction.[51](See Chapter III).

2.3 The Resolution tools and powers.

The BRRD resolution regime provides to the RAs a broad power to achieve the resolution objectives. The powers are applied as a package, known as the resolution tools that might be utilized individually or, along with others on a case by case basis, apart from the asset separation tool that is only applied in a conjunction with some other resolution tool.[52] The tools are deemed to be four, which are the three transfer tools,[53] particularly the sale of business tool, the bridge institution tool, and the abovementioned asset separate instrument. The bundle ends with the bail-in

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<http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614479/IPOL_IDA(2017)614479_EN.pdf> accessed 23 Oct 2019

[47] Maciej Podgorski, *'General Articles; The Single Resolution Mechanism in Action. An analysis of the decision-making practice of the Single Resolution Board'*, [2018] 38 Polish Y.B. Int'l L. 229, available at LexisNexis, p.3

[48] BRRD Recital 71

[49] Dominic Freudenthaler, Pamela Lintner *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD',* [2017], World Bank Group Finance & Markets FinSAC, p.107

[50] J Deslandes M Magnus, *'Further harmonizing the EU Insolvency law from a banking resolution perspective'*, [April 2018], European Parliament, Economic Governance Support Unit PE 614.514, p.2, available at <http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614514/IPOL_BRI(2018)614514_EN.pdf> accessed 25 Oct 2019

[51] Ibid

[52] Dominik Freudenthaler, '*Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p. 32

[53] Ibid p.33

instrument, the most progressive of the tools provided to the RAs under the BRRD.[54] Additionally, the bailout of institutions through the Government financial stabilization tools in form of a public equity and a temporary public ownership instrument under the Arts 56, 57 and 58 of the BRRD are not theoretically defined as resolution tools but they may be utilized as ultimate ratio in a systemic crisis and after having exploited all resolution tools.[55] To prepare the application of the tools and be effective, the BRRD provided a list of powers to the RAs. These general powers act as a foundation for the implementation of the resolution tools and having the same importance as the resolution tools.[56] These powers and tools constitute an alternative option to the implementation of the national insolvency law, permitting RAs to take crucial and quick measures to avert contagion and sustain important services.[57]

2.4 The scope of the new regulatory framework.

The BRRD'S scope is equivalent to the EU Capital Requirements Directive (CRD IV)[58]; it therefore applies first and foremost to financial institutions and huge investment firms with a seed capital of EUR 730.000 established in the EU[59]. Those are individual deposit-taking institutions[60] and 730k investment companies[61] in a holding business organization and to the 'big bank' parent and its deposit-taking, and 730k securities affiliates into the big bank form. It also applies to financial holding firms[62] and parent financial holding businesses[63] that settled in the EU and which may be subsidiaries of another parent company established in a different Member State. Nonetheless, it may be applicable to parent credit holding enterprises, which can be subsidiaries of parent

[54] Jeremy Jennings-Mares, '*Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p. 111 and BRRD Art.37 (3) and SRMR Art.22(2)
[55] Ibid p.33
[56] Ibid p.33,34 (BRRD Art. 63)
[57] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 9 (par. 1.13)
[58] BRRD, Recital (11)
[59] Ibid, Art. 1(a), Art.2 (23)
[60] Ibid, Art. 2 (1)(2)
[61] Ibid, Art 2(3)
[62] Ibid, Art. 1(c), Art 2 (1)(9) and CRR, Art 4(1)(20)
[63] Ibid, Art 1(d), Art 2 (1)(12) and CRR, Art.4 (1)(30)

companies set up into third states in the context of the worldwide multi-bank model.[64] The recovery and resolution regime also extends according to the BRRD Art 1(1)(c) and (d) respectively, to 'mixed financial holding companies' and 'mixed-activity holding companies'[65] set up into the EU and 'parent mixed financial holding companies in a Member State' as well as, 'Union parent mixed financial holding companies'.[66] To end with, concerning Art 1(1) (e) the Directive applies to 'branches of institutions' having their headquarter external the EU in line with the particular conditions presented for in the Directive. Except from the financial holding firms, the financial institutions settled in the EU will be included whether they are the affiliate of a credit institution or an investment company or of one of the holding company forms in which the BRRD applies under the prerequisite that is under the monitoring of the parent company on a consolidated form in accordance to the provisions of the CRR. [67]

However, the scope of the Directive generally extends to all kinds of sizes of businesses not only to systemically important institutions because even the collapse of minor firms may lead to dramatic results for the economy as it appears to be hard to foresee beforehand the systemic importance of a company. National authorities take into consideration all the relevant elements of an enterprise such as the size, complexity, and interconnection with other institutions as well as the risk profile, the nature of a company and its shareholding form, as part of the resolution tools and into the implementation of the preparation and prevention framework, especially, for the public interest factor of the resolution activating.[68]

2.5 A form of interconnection between the EU resolution framework and the 'normal' insolvency law.

Virtually, both resolution regimes through their scope of application dislodge the valid national insolvency legislation, while the latter used as a supplement to the otherwise partial framework under the BRRD and SRMR. Therefore, the national insolvency law is

[64] Ibid, Art 2(1)(13) and CRR Art.4(1)(31)
[65] Ibid, Art 2 (1)(10) (11)
[66] Ibid, Art 2 (1)(14)(15)
[67] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.98-100
[68] Ibid, p.100 (para.4.54)

applicable in circumstances where the resolution would not meet the dominant public interest element and the failing bank would be wound up.[69] Under this perspective and according to recital 45 of the BRRD providing that, a failing bank shall as a matter of principle be liquidated, it seems that winding up constitute a default option to handle an institution collapse and its most likelihood, as it has been argued that the additional safety net of resolution it is only for certain and not for many.[70] Furthermore, national insolvency legislation is valid when the residual part would be liquidated after the partial transfer of an institution, or when it may consider factors like transaction evasion, the handling and set-off of secured creditors and the position of various classes of creditors generally. A liquidation analysis is also required regards to the no-creditor-worse-off rule based on national insolvency law.[71] In general terms, the BRRD and the SRMR have greatly assisted in harmonizing EU insolvency law for banks by delegating the resolution powers to the RAs and not to the courts[72], which has a vital role within normal insolvency proceedings, as are those that may order the initiation of procedures and oversees the actions of the officeholders.[73] Both resolution regimes are administrative in character, which means that RAs will be in charge of powers to intervene in an institution's structure and policy and its proprietary rights and into the rights of its stockholders and creditors.[74] Thus, a balanced scheme of court review is needed according to constitutional preconditions.[75] Under the BRRD and SRM, the ex-post judicial control is obligatory, while the ex-ante court review is discretionary to the MSs.[76]

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[69] Ibid, p.9 (para. 1.13)

[70] J. Deslandes and M. Magnus, *'Further harmonizing EU Insolvency law from a banking resolution perspective'*, [2018] PE 614.514 European Parliament, Economic Governance Support Unit, p.1-2

[71] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 9 (para.1.13)

[72] J. Deslandes and M. Magnus, *'Further harmonizing EU Insolvency law from a banking resolution perspective'*,[2018] PE 614.514, European Parliament, Economic Governance Support Unit, p. 1

[73] Michael Schillig, '*Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 109 (para. 5.01)

[74] Ibid (para. 5.02)

[75] Ibid p. 111 (para. 5.04)

[76] Ibid p.116 (para. 5.10)

With the above, resolution proceedings shall be used as the umbrella term that includes the implementation of resolution tools and powers as well as, normal insolvency legislation, with their inter-relation still be in progress. The BRRD discriminate among resolution tools and powers and normal insolvency procedures under the Art.2&1(1) and (47). The matter is that even when the prerequisites for public interest are not fulfilled and the standard insolvency law is applied the case of financial difficulties is still considered to be 'resolved' although, through liquidation or reorganization.[77] Therefore, the distance among the two proceedings seems to be to the methods that offer. The question is, whether the outcome that offers is significantly different and what is that exactly.

[77] Ibid p. 10-11 (para. 1.16)

Chapter II: Preparation and prevention as well as early intervention under the BRRD.

The four pillars under the BRRD, i.e. (i) the preparation and prevention, (ii) early intervention, (iii) resolution tools and powers, and (iv) the required resolution financing arrangements or a SRF under the SRM, supplement each other to reach the aforementioned objectives of the recovery and resolution framework; which are to sustain financial stability in crisis and to reduce losses for society without the necessity to depend on taxpayer assist.[78]

1. Recovery and Resolution plans.

These elements that are enclosed in EU recovery and resolution rulebook appeared to be the answer to the financial crisis dilemma about the government recapitalization or straight liquidation, and about the fact that the cross border financial institutions were 'international in life but national in death'.[79]

The preparation and prevention rule under the BRRD is included in the supervision process of a bank and encompasses recovery and resolution plans, the resolvability examination and intra-group fiscal assist.[80] Along with the application of the BRRD, recovery plans[81] has been accepted as an essential and repeated aspect of regular monitoring as it provides useful information to financial institutions and supervisors. They are prepared and preserved by the bank in contrast from resolution plans,[82] which are drawing-up by the RAs,[83] together with competent supervisory authorities

[78] Ibid p. 9

[79] Pamela Lintner *'Overview on the BRRD'*, [2015], Financial Sector Advisory Center (FinSAC) Workshop, World Bank Group FinSAC, p. 9

[80] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.166

[81] BRRD Arts 5-9 and SECTION A of the ANNEX, where a list of info is provided to be contained into recovery planning.

[82] Ibid Arts 10-14 and SECTION B of the ANNEX

[83] Emmeline van Heukelem, '*Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance&Markets FinSAC, p. 50,52

and RAs of the jurisdictions, where branches are established.[84] With the recovery plans, measures are defined to be taken by the management in case of a significant bank financial distress to restore it to financial strength. Consequently, a double hypothetical event is required, composed by a hypothetical crisis scenario and hypothetical measures to be developed.[85] The bank must examine the credibility and feasibility of the recovery options as this would demonstrate the possibility of recoverability and the bank's readiness to identify several issues.[86]

Additionally, the preparation of resolution plans for each bank provides the resolution actions which might be taken when the bank meets the prerequisites for resolution.[87] The RAs may ask for the needed information to draft resolution plans directly from banks and supervisory bodies. The resolution planning is initiated with the examination of whether it is feasible and credible the liquidation under the normal insolvency procedures, and if not then the RAs are supposed to determine the resolution strategy for banks along with the tools and powers.[88] Resolvability assessment[89] occurs at the same time as the setting up of the resolution plans and, if it reaches potential impediments then the bank may suggest some measures to remedy the situation or, the RAs along with the Competent Authorities (CAs), may request the bank to apply alternative measures.[90] Based on the resolvability assessment the minimum requirement and eligible liabilities (MREL) are determined[91] which are expressed as a proportion of the whole obligations and own funds of the bank, where the numerator consists of own capitals and an exact type of duties. The MREL must make sure that there is adequate absorb loss capacity by stockholders and lenders to permit an

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[84] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.170 (para 7.14)

[85] Ibid p. 167

[86] Emmeline van Heukelem, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance&Markets FinSAC, p. 53

[87] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 170 (para. 7.14)

[88] Georg Merc, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance&Markets FinSAC, p.73

[89] BRRD Arts 15-28 and SECTION C of the annex.

[90] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p 172 (para.7.16)

[91] Georg Merc, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance&Markets FinSAC, p.74

effectual bail-in and organized resolution without the creation of additional contagion and resort to public resources.[92]

2. *The early intervention measures.*

The notion of balance sheet insolvency raises hard issues of the appraisal of assets and liabilities[93] and, it frequently is discovered quite late.[94] Financial assets seemed to be unstable and bank's balance sheet notably complex. A bank is expected to be capable to attract enough deposits to stay able to pay its debts as they become due. Also, reports about a bank's downfall may initiate a crisis of systemic size and it might extend to other equally situated banks, as well as injuring deposit insurance and resolution funds.[95] The question is when does an intervention should take place? Prior or post the bank turns to be no longer viable i.e. insolvent?

Ever since the 30's the bank supervisor duties were extended constantly, as a reaction to technological progress, globalization, innovative products and structural alterations.[96] These, have led to additional regulatory requires such as, the protection of costumers and society in general.[97] For a better understanding of the early intervention measures (EIMs) under the BRRD, we need to look through the two main

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[92] Ibid p.83

[93] According to section (1) and (2) of section 123 under the Insolvency Act 1986, an institution is considered unable to pay its debts, inter alia, whether it is reviewed by the court that the institution could not pay its debts as they fall due and, if the court finds that the value of an institution's assets is less than the percentage of its liabilities considering its possible liabilities. The former is defined as cash-flow insolvency whilst, the latter determined as balance-sheet insolvency but this notion cannot be taken strictly because an institution's statutory balance sheet may exclude some possible assets and liabilities. See: *Bny Corporate Trustee Services Limited and others (Respondents) v Neuberger Berman Europe Ltd (on behalf of Sealink Funding Ltd) and others (Appellants), Bny Corporate Trustee Services Limited and others (Respondents) v Eurosail-UK 2007-3BL PLC (Appellant)*, [2013] UKSC 28 [2011] EWCA Civ 227, para.1, available at: <https://www.bailii.org/uk/cases/UKSC/2013/28.html>, accessed 31 Oct 2019

[94] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxfrod, p. 195 (para. 8.03)

[95] Ibid p.195 (para.8.03)

[96] Eva Hüpkes, *'Insolvency – why a special regime for banks?'*, [2002] Current Developments in Monetary and Financial Law, Vol. 3 (International Monetary Fund, Washington DC), available at SSRN, p. 2

[97] Ibid p.2

differences between the approaches to insolvency by a bank supervisor versus under the general insolvency law. Firstly, the triggers for supervisory activities precede insolvency and the circumstances for initiating proceedings under general insolvency law. Under the latter, it is most common, that the creditors or the debtors to initiate actions and not the supervisor.[98] Secondly, there are procedural differentiations between special banking rules and general insolvency legislation.[99] The banking rules at large, provide broad powers to the bank supervisor to intervene and to take remedial measures, while they have extensive discretion to choose the closure of a bank in due time.[100] In contrast, insolvency law specifies closely the preconditions for the initiation of proceedings, having as a trigger point the debtor institution's difficulty to meet its liabilities. Although, in the case of a bank is that the latter condition is not considered as evidence of insolvency and might be because of a temporary lack of liquidity.[101] Moreover, the banks in contrast with other companies, even with financial deficiencies can continue paying creditors because of a continuing source of cash flow from depositors. Therefore, the general insolvency law seems quite unfit for banks.[102] Given that, it is upon the bank supervisor to appraise bank's capital and to assess the quality of its assets, as well as to decide whether a bank is insolvent and needs to be closed. Consequently, the insolvency is not the primary relevant trigger for bank intervention, after this phase it would be too late to intervene efficiently.[103]

The aforesaid make an early intervention a necessity before a bank proves to be officially insolvent.[104] The raison d'être of prudential regulation and supervision is to secure a close monitoring of the bank's fiscal state of affairs. The bank supervisor

[98] Ibid p.9
[99] Ibid p.9
[100] Ibid p.9-10
[101] Ibid p.10
[102] Ibid p. 10
[103] Ibid p.10
[104] Michael Schillig*, 'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p. 195 (para. 8.03)

should intervene before the financial weaknesses of a bank cost an excessive debt to the detriment of creditors.[105]

Accordingly, the powers of CAs to intervene at an early stage in an institution's capital regulatory position decline are extended under the BRRD.[106] Thus, they may take additional measures to those that CRD already provide, whether a bank stops to meet or is likely to infringe its regulatory capital conditions and prior the need of application of the resolution tools.[107] In particular, MSs shall ensure that CAs have at their disposal the power, inter alia, to assemble shareholders' meeting to raise institution's finances and also may obtain through on-site inspections, and provide to the RAs all the needed information, in order to update the resolution plan and prepare for the possible resolution of the bank. Moreover, the supervisor may require the application of measures that are established in the recovery plan, a phase that seems to be the crucial test of the ex-ante part of EIMs. Whether the action under bank's recovery plan seems to be inadequate the supervisor may ask for extra vigorous alternative actions such as changes to the institution's strategy or its legal and operational structures or even the negotiation of debt reform.[108] The BRRD powers are complementary and are taken without prejudice[109] to the referred measures under the Art.104 of the CRD, and to the ECB'S supervisory powers under the Art.16 of the SSMR.[110]

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[105] Eva Hüpkes, *'Insolvency – why a special regime for banks?*', [2002], Current Developments in Monetary and Financial Law, Vol. 3 (International Monetary Fund, Washington DC) (International Monetary Fund, Washington DC), available at SSRN, p.10

[106] Slaughter and May, *'An introduction to the European Commission's proposals on Recovery and Resolutions of banks and investment firms. Crisis Management moves up a gear in the European Union'*, [2012], p.27, available at <http://www.slaughterandmay.com/media/1825304/an-intro-to-the-european-commissions-proposal-on-recovery-and-resolution-of-banks-and-investment-firms.pdf> accessed 3 Nov 2019

[107] Ibid p.27, in particular and according the BRRD Art.27&1, EIMs might be taken by CAs where an institution breaches or is possible to breach the prudential supervisory purposes and conduct of business conditions established in Regulation (EU) No 575/2013, Directive 2013/36/EU, Directive 2014/65 EU (MiFID II), or Regulation (EU) No 600/2014 (MiFIR).

[108] Dominik Freudenthaler, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p. 63-65, and BRRD Art.27 &1 (a)-(h).

[109] BRRD Art.27&1

[110] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxfrord, p.197,198 (paras.8.08, 8.09)

Concerning the provisions under the BRRD, a clear distinction is developed between the ongoing supervision that includes the EIMs and the resolution.[111] The ECB and SRB argued in several cases, for instance in the *Banco Popular,* as well as in the *Veneto Banca*, that there were no available supervisory actions, or EIMs that could reinstate the liquidity position of a bank, or avert the financial institution's collapse.[112] Moreover, coordination among authorities is noted through the early intervention stage, with the RAs getting involved only when the conditions of triggering resolution are fulfilled.[113] In relation to that, the triggers of EIMs seems reasonable to base on certain criteria that banks and financial institutions are subject to, such as the continuing supervision for safety and soundness in regards to risk-based capital, leverage, huge exposures, and the management of risk, corporate authority and liquidity. Nonetheless, these trigger conditions should be easily noticeable and powerful.[114]

2.1 The triggers of EIMs

The lack of certainty about when exactly CAs can apply EIMs, constitute an important disadvantage of the early intervention process.[115] To ensure consistent application of the trigger conditions, the EBA issued guidelines according to the BRRD Art. 27(4), which gives direction to CAs in respect of, which conditions they should consider the application of EIMs to banks.[116] EBA might develop draft regulatory technical options

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[111] BRRD Art.32(1) (b)

[112] Maciej Podgorski, *'General Articles; the Single Resolution Mechanism in Action. An Analysis of the Decision-Making Practice of the Single Resolution Board'*, [2018], 38 Polish Y.B. Int'l L. 229, available at: LexisNexis, p.9, 12

[113] Dominik Freudenthaler, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p.62

[114] M Schillig, 'Resolution and Insolvency of Banks and Financial Institutions', [2016], p.195 (para. 8.03)

[115] Slaughter and May, *'An introduction to the European Commission's proposals on Recovery and Resolutions of banks and investment firms. Crisis Management moves up a gear in the European Union',* [2012], p.29, available at <http://www.slaughterandmay.com/media/1825304/an-intro-to-the-european-commissions-proposal-on-recovery-and-resolution-of-banks-and-investment-firms.pdf> accessed 3 Nov 2019

[116] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, EBA/GL/2015/03 , [8 May 2015], p.3, available at

to define a minimum set of triggers for the use of EIMs.[117] In particular, a core element of EBA guidelines is to specify a number of common indicators and conditions that may be used by CAs in all the MSs.[118] Hence, EBA guidelines has been developed on alternative technical options according to which, (i) the CAs assess the need to implement EIMs, based on the supervisory review and evaluation process (SREP)[119] and its outcomes, or based on a separate analysis, parallel to SREP, and under (ii) qualitative based triggers and/or on a quantitative type of triggers.[120]

A qualitative based framework of activations can be established by a detailed description of the factors, especially of the results of the SREP that CAs considered when examining the need to apply EIMs.[121] Whilst, quantitative based of triggers might be developed by determining a group of quantitative metrics with predetermined

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<https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[117] BRRD Art.27(5)

[118] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, EBA/GL/2015/03 , [8 May 2015], p.16, available at <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[119] The core activity of supervisors to frequently assess and measures the risks for banks is commonly known as the SREP. It includes all the findings within a year and gives the bank 'homework'. Specifically, it depicts where a bank stands in respect of capital requisites and the way it handles the risks. The SREP provides a harmonized toolkit to assess a bank's risk profile under four different aspects. These are particularly about the business model and whether the bank has a sustainable business strategy, about the bank's capital and if it has adequate buffers to absorb losses, regarding the governance and risk and whether the management body fits, or if the risks handled properly, lastly, they are examining bank's liquidity and if it can cover short-term cash needs. Normally, the supervisor will ask a bank to retain more capital as an extra safety net, or to sell specific portfolios of loans to minimize its credit risk. More rarely, CAs will require for the removal of the bank's management body, or to change its business plan to become more profitable. The idea of SREP was introduced in 2004 with the Basel II accords established by the Basel Committee on Banking Supervision and it has been applied in the EU since 2006, followed ever since by the national supervisors. The innovation of the SREP under the SSM is that there is a common methodology and a common timeline to all-important banks into eurozone, which now are aware of what to expect. The ECB sent out its first SREP decisions in 2015. See: European Central Bank, Banking Supervision, *'What is the SREP?'*, [2016] (updated 13 November 2017), available at: <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html>, accessed 5 Nov 2019

[120] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, EBA/GL/2015/03 , [May 2015], p.16,18, available at: <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[121] Ibid p. 18

thresholds, the infringement of which, may initiate the need to apply EIMs.[122] The former type of triggers, may be given convergence of supervisory practices within EU, but at the same time, provide to the CAs a high level of discretion, while the quantitative indicators may be defined by the guidelines to implement throughout the EU, as well as set up the thresholds for the triggering of EIMs.[123] Certain events are listed under the BRRD as triggers,[124] which mainly are fast decline economic conditions, such as failing liquidity situation, rising level of leverage or a boost of non-performing loans (NPL) portfolios, or concentration of exposures as assessed on the basis of a group of triggers that include institution's own funds requisite, plus 1.5 proportion points. Furthermore, regulatory infringements or an important deterioration of institution's capital situation (CRR/CRD IV) may also activate EIMs in the context of which the supervisor shall act and might order to remove and replace members of the senior management and management body.[125] In case the replacement supposed to inadequate to cure the situation, the supervisor can assign temporary administrators to the bank.[126]

Attempting to look in-depth the triggers of EIMs the most crucial points to mention are the follow. The general approach over the triggers is that they do not establish an automatic application of EIMs; instead they are support CAs into make decisions.[127] An argument has been made under the EBA's Banking Stakeholder Group (BSG)[128] response over the guidelines that there is a connection among the recovery plans, recovery indicators, recovery supervision, the commencement of recovery measures

[122] Ibid p.18
[123] Ibid p.18
[124] BRRD Art.27 (1)
[125] BRRD Art.28
[126] BRRD Art.29
[127] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, EBA/GL/2015/03 , [8 May 2015], p.21, available at <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019
[128] The EBA's BSG must be consulting on actions about regulatory technical standards and applying technical standards and, guidelines and suggestions, as far as these do not affect individual financial institutions. Also, it may provide opinions and advice the Authority on any issue, mainly focused on customary supervisory culture, peer evaluations of CAs and examination of market developments. See: EBA, European Banking Authority, *'Banking Stakeholder Group'*, available at: https://eba.europa.eu/about-us/organisation/banking-stakeholder-group, accessed 23 Jan 2020

and the triggers of EIMs.[129] Hence, CAs must be conscious of the recovery options undertaken by each bank and should consider any of its recovery measures when assessing the most suitable measure to take, whether the institution meets the early intervention conditions.[130] Moreover, the trigger condition of capital infringements (CRR/CRD IV) seems to be extremely ambiguous and provide a lot of discretion to the supervisor, thus, it must be seen in connection with the monitoring of key indicators under the SREP requirements.[131] Therefore, under EBA guidelines, the EIMs must be considered in relation to capital infringements, whether the overall or individual institution SREP score is 4.[132] In this occasion, CAs must consider to gather information for the assessment of the institution's assets and liabilities according to the BRRD Art.27 (1) (h).[133] Furthermore, other circumstances for further investigation could be the identification of material changes, or anomalies in the monitoring of the SREPs key indicators. In particular, EBA guidelines established an absolute minimum trigger of 1.5% above banks own funds that is mostly applicable to smaller institutions without additional set buffers.[134] Moreover, EIMs might be activated by some significant events that may have an impact on a bank's financial condition, for instance, a major operational risk because of fraud, natural disaster, or rating downgrades.[135]

In regards to both types of triggers, present several possible pros and cons. For instance, the wide discretion that is given to CAs under the qualitative type of triggers

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[129] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, EBA/GL/2015/03 , [8 May 2015], p.21, available at <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[130] Ibid p.23

[131] Dominik Freudenthaler, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p. 64

[132] Ibid p.64

[133] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, [8 May 2015] EBA/GL/2015/03, p.10, available at: <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[134] Dominik Freudenthaler, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD',* [2017] World Bank Group Finance&Markets (FinSAC p. 64

[135] Ibid p. 64

does not abolish the risk of supervisory forbearance.[136] During an institution's decline, supervisors might forbear to permit a bank to recover when the economy enhances and by that, evade the embarrassment of having the bank collapse under their control.[137] Meanwhile, under quantitative based framework, the issue of excessive regulatory forbearance may be decreased,[138] consider the fact that under certain quantitative indicators with predefined thresholds that qualified as trigger conditions, cannot be manipulated, or be dependent on subjective evaluation.[139] Additionally, before the implementation of the BRRD, bank creditors and shareholders' did not have standing in the proceedings administered by the bank supervisor and they were not served with documents relating to the proceedings; consequently, such absence appeared to be a lack of due process.[140] Now, a potential benefit under the quantitative type of triggers is that clarity and transparency are submitted to market participants and banks concerning triggers of EIMs.[141] On the other hand, with the quantitative-based framework, room for any estimation is confined, and supervisors may be compelled to trigger intervention even though they do not believe that it will provide the best possible results. Moreover, there is a possibility of exaggeration by the markets whenever banks approached any of the quantitative thresholds and this can cause a bank run.[142] Hereafter, it is evident that the balancing is extremely delicate to the point that EIMs may even produce contrary and unwanted results from its initial purpose, defined by the Basel Committee as: *'adopting a forward-looking approach to supervision through early intervention can prevent an identified weakness from*

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[136] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, [8 May 2015] EBA/GL/2015/03 , p.19, available at: <https://eba.europa.eu/eba-publishes-its-final-guidelines-on-triggers-for-the-use-of-early-intervention-measures> , accessed 5 Nov 2019

[137] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.196 (para.8.05)

[138] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU'*, [2015], EBA/GL/2015/03, p.19

[139] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.196,197 (para.8.06)

[140] Eva Hüpkes ,*'Insolvency – why a special regime for banks?*', [2002] Current Developments in Monetary and Financial Law Vol.3 (International Monetary Fund, Washington DC), available at SSRN, p. 11

[141] EBA Final Report, *'Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU',* [2015], EBA/GL/2015/03, p. 19

[142] Ibid.

developing into a threat to safety and soundness. This is particularly true for highly complex and bank-specific issues (e.g. liquidity risk) where effective supervisory actions must be tailored to a bank's individual circumstances'.[143]

[143] Ibid. p.4

Chapter III: The defining line of the public interest assessment; a sort of complexity.

As it has been already mentioned, Art. 32 of the BRRD establish the resolution conditions of credit institutions and investment companies based on which a resolution action might be taken.

1. *Further elaboration in relation to the resolution triggers.*

In respect of the first condition, an institution must be deemed as FOLTF by the CAs after consultation with the RA or in reverse if so the Member State provides, and the RA is aware of the necessary information for the determination of failure.[144] When the CA determines the FOLTF condition it must do so based on the outcomes of SREP according to Art.97 of CRD.[145] The RAs must be in discussion and consultation with the CAs about the results of their assessments.[146] According to the first prerequisite of whether an institution shall be deemed as FOLTF, the notion *'own funds'* of a bank composed of the sum of its Tier 1 and Tier 2 capital under Art.72 of the CRR.[147] Hence, it is depicted once again that the interrelation between the FOLTF assessment and the early intervention phase, as this 'regulatory threshold' based on minimal capital sufficiency requirements represents the foundation of resolution regimes and, permits to the CAs to intervene at early stages of an institution's financial difficulties prior the appearance of illiquidity or a negative net worth.[148]

EBA guidelines are further elaborated on the interpretation of the different cases in when an institution must be deemed as FOLTF to promote the conjunction of

[144] BRRD Art.32(2)

[145] EBA Final Report, *'Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU'*, [26 May 2015] EBA/GL/2015/07, p.6, available at <https://eba.europa.eu/regulation-and-policy/recovery-and-resolution/guidelines-on-failing-or-likely-to-fail> accessed 8 Nov 2019

[146] Ibid

[147] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.221 (para. 9.12)

[148] Ibid

supervisory and resolution acts.[149] According to those, the determination must be based on certain objective elements[150] and are focusing more on the prerequisites specified under the Art32 (4) (a), (b) and (c).[151] Nonetheless, the determination stays an expert judgment and it's not an automatic result from any of these objective elements alone.[152]

Furthermore, the resolution conditions may not always be met simultaneously; several examples can be used to illustrate the situations in which a bank may be considered as FOLTF but still the conditions to take resolution action under the Art. 32(1) (b) and (c) are not met.[153] For instance, a very small non-important institution that does not carry out critical functions is envisaged to face important losses and its assets are expected to be less than its liabilities. Consequently, it should be deemed that it is FOLTF based on the prerequisites of Art.32 (4) and the EBA guidelines.[154] Nevertheless, if the RA demonstrates that the institution can be liquidated under normal insolvency proceedings then the resolution action is not necessarily in the public interest.[155] Taking into consideration, as well, that in the case of a failing bank the initial option is liquidation under insolvency law[156] and only as a second option[157] whether there is a public interest to keep a failing bank or parts of it alive it may be resolved as per BRRD and SRMR[158] with the application of the resolution tools.[159]

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[149] BRRD Art.32(6)

[150] These are: i) the capital position of an institution, ii) the liquidity position and iii) other requirements for continuing authorization especially governance arrangements and operational capacity. See: EBA, *'Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU'*, [26 May 2015] EBA/GL/2015/07, final report, p.12 (para. 14)

[151] Ibid

[152] Ibid, (para. 15)

[153] Ibid p. 7 (BOX 1 Explanatory text)

[154] Ibid p. 8 (example b)

[155] Ibid

[156] BRRD Recital 45

[157] J. Deslandes, M. Magnus, *'Further harmonizing the EU Insolvency law from a banking resolution perspective'*, [2018] PE 614.514, European Parliament, Economic Governance Support Unit, p.6, (BOX 4 resolution and insolvency).

[158] Ibid p.2

[159] Ibid p.6, (BOX 4 resolution and insolvency)

2. *Crucial European banking cases after the implementation of the BRRD.*

2.1 An overview of the Veneto Banca and Banca Popolare di Vicenza (Veneto banks) cases.

As demonstrated by certain liquidation cases, it has been evaluated differently under the EU approach and national approach whether the resolution of a bank is in the public interest or, whether it must be liquidated.[160] The orderly liquidation of the *Veneto banks*[161] highlights some crucial points that are worth mentioning. The ECB in late June 2017 acknowledged that both Italian banks constantly infringed supervisory capital requirements and were deemed as FOLTF.[162] At the same time, the SRB declared that none of these banks supply critical functions and by extension, their collapse would not affect dramatically the financial stability. Thus, there was no public interest to vindicate resolution action therefore both banks were liquidated under normal insolvency procedures nationally, supervised by the Banca d' Italia as the NRA.[163] A few days later, the European Commission authorized the national support measures for Veneto Banks liquidation on which were included the transfer of the good business i.e. performing loans, financial securities, senior bonds and deposits, branches and staff of the bank to Intesa San Paolo (ISP).[164] Moreover, the transfer of additional assets mostly non-performing loans (NPL) to SGA, the bail-in of stockholders and subordinated lenders, a capital injection by the Italian treasury in ISP.[165] Additionally, they have encompassed measures of funding of the entity in liquidation by ISP and a national assurance to ISP on legal risks up to the amount of €1.5 billion.[166] In conclusion, the good business was sold to ISP subject to a cash injection by the government while the NPLs and other assets were wound down by the SGA.[167] The

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[160] Ibid p.2

[161] B. Mesnard, A. Margerit, M. Magnus, *'The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza'*, [2017] European Parliament PE 602.094, available at: <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602094/IPOL_BRI(2017)602094_EN.pdf>, accessed 10 Nov 2019

[162] Ibid p.1

[163] Ibid

[164] Ibid p. 1,2

[165] Ibid p. 2

[166] Ibid

[167] Ibid

Italian Treasury held a first rank claim of €4.8 billion against the Veneto banks as well as ISP that detained a second rank claim ensured by the government.[168]

The mentioned before measures taken for the liquidation of Veneto Banks are remarkably similar to certain resolution actions that had been taken in other EU MSs during the crisis[169] and at first sight seemed to form a resolution case according to the EU law.[170] In particular, the sale of good business to another entity was an action that was taken for the resolution of several Greek banks.[171] At the same time, Hellenic Financial Stability Fund (HFSF) proceeded to a great deal of cash injections in the bank in liquidation to balance the transferred deposits with adequate amounts of assets, mainly with performing loans.[172] As an example, the Panellinia bank was resolved with the transfer of liabilities to Piraeus bank, while the difference among the liabilities and assets was funded by the State.[173] The Commission argued that, even though Greece not incorporated the BRRD into domestic law, the supporting measure matched perfectly to the sale of business tool[174] and therefore checked whether the aid was in breach with BRRD provisions. Moreover, the Italian decree legislation pinpoints that the application of normal insolvency procedures may lead to dramatic results for the financial industry, a quite similar rationale to the resolution objectives established in Art. 31(2) BRRD and with that it justified the need for special insolvency procedures with the requirement of additional tools.[175]

Despite the above similarities, the decision of the SRB, as the competent RA, it was that the criterion for public interest was not satisfied in the case of Veneto banks, as well as the Commission approved the aid measures as liquidation under normal insolvency proceedings and not as resolution action.[176] In particular, the SRB rejected

[168] Ibid
[169] Ibid p.4
[170] Ibid p.5
[171] Ibid p.4
[172] Ibid
[173] Ibid p.6
[174] Ibid and BRRD Art.38
[175] Ibid p.5,6
[176] Ibid p.6

public interest on the grounds of the absence of any critical functions[177], because of Bank's deposit and lending activities were provided to a few third parties and due to the possibility of their replacement in a suitable manner and in a reasonable time.[178] Thus, these activities were not measured critical per se.[179] Great interest presents the following fact. Due to the arrangement of the operation, the Veneto banks cases were compared with the case of Spanish *Banco Popular*, with the similarity to be located into the sale and transfer of part of the institution to another entity, as it constitutes a resolution tool under Art.38 BRRD.[180] Notwithstanding, the difference lies in the fact that the SRB concluded that the deposit-taking activities and lending activities of the Spanish bank composed critical functions,[181] hence acknowledged the existence of public interest.

Furthermore, one more reason that SRB rejected the existence of public interest was that there was no danger to financial stability and normal insolvency proceedings offered the same level of protection.[182] In addition, the SRB stated that the liquidation of a traditional bank under normal insolvency actions with a precise €62.5 billion balance sheet does not challenge financial stability as far as the bank interconnected with other credit institutions. According to that, Andrea Enria argued that the SRB decision *'set the bar for resolution very high'.*[183] Moreover, the SRB may dismiss the risk of a bank run but did not clarify whether the liquidation of Veneto Banks

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[177] The critical functions defined under Art.2 (35) BRRD as activities, services or operations, which their interruption may lead to several MSs to the disruption of necessary services to the economy or to challenge financial stability because of the size, market share, exterior and interior interconnectedness, complexity or cross border activities of a group or, an institution concerning the sustainability of these activities, services or operations.

[178] B. Mesnard, A. Margerit, M. Magnus, *'The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza',* European Parliament [2017] PE 602.094, <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602094/IPOL_BRI(2017)602094_EN.pdf>, p.6

[179] Ibid

[180] Silvia Merler, Bruegel, '*Critical functions and public interest in banking services: Need for clarification?*', European Parliament, [2017] PE 614.479, p.8

[181] . Mesnard, A. Margerit, M. Magnus, '*The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza*', European Parliament [2017] PE 602.094, <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602094/IPOL_BRI(2017)602094_EN.pdf>, p.7

[182] Ibid

[183] Ibid

concerned the recourse to public funds for the protection of the unsecured senior creditors that are not covered by deposit guarantee schemes.[184] As for the reasoning of the Commission's approval, it seemed that the estimation of liquidation aid under national supporting measures has the same grounds as the estimation of restructuring support.[185] The two different definitions of public interest was the result of the prediction by the EU legal framework to grant national support to allay financial disturbance at a local level,[186] under that the two different approaches seem to justify. Moreover, the Commission stated that the sale process of the good business of the Veneto banks was opened, transparent and fair.[187]

2.2 Resolution vs. Liquidation.

The EU resolution framework provides that the implementation of resolution tools and, the liquidation under normal insolvency procedures constitute two different options.[188] Still, the latter may take place even when the resolution tools are applied and a part of a failing institution will be liquidated under Art. 22.5 SRMR.[189] Moreover, the normal insolvency procedures are the alternative scenario utilized to define if the resolution breached the fundamental rights of creditors, stockholders, and deposit safeguard mechanisms.[190] Thus, it seems that normal insolvency constitutes a comparative measure, as the SRMR provides that an estimate must be made of whether the treatment of creditors and shareholders would vary under standard insolvency proceedings compared with the actual treatment that receive under resolution.[191] Also, the BRRD explicitly provides that *'no creditor shall incur greater*

[184] Ibid
[185] Ibid p.8
[186] Ibid
[187] ibid
[188] In particular, the SRMR provides under its Art. 10.4 That a resolution for a group must take place whether it is viable for the SRB to either winding up group entities under normal insolvency procedures or to resolve them with the resolution tools and exercising resolution powers. See: Ibid p.5, (Box 1: What is resolution and why does it differ from normal insolvency proceedings)
[189] Ibid
[190] Ibid. Art. 15 (1)(g) SRMR
[191] Ibid. Art. 20 (16)(17)(18)

losses than would have been incurred if the institution...had been wound up under normal insolvency proceedings'.[192]

In addition, the BRRD defined differently both proceedings; the resolution is exactly the application of the four resolution tools to attain one, or more of the resolution objectives[193]. Contrastingly, normal insolvency proceedings specified as joint procedures that involve the fully or partially divestiture of a debtor and, the engagement of a liquidator, or an administrator normally applicable at a national level to institutions.[194] Moreover, as it has been already mentioned it is the default option when a bank is collapsing,[195] while the resolution is a step taken prior to the liquidation, when a bank is deemed as FOLTF.[196] Additionally, the latter contributing to the restructuring of the bank and not to its direct closing[197] and, by that allowing the continuity and maintenance of bank's critical functions unlike when the bank fall in liquidation and all liabilities fall due automatically.[198] Thus, the goal of liquidation is the sale of assets in contrast with the resolution that seeks to ensure early and flexible triggers.[199] In respect of that, the "fire sale" of assets that liquidation implies might be harmful to the creditors' interests[200] which their value is increasing under liquidation.[201]

Under the BRRD and its resolution process, the RA passes losses to the creditors and existing risk holders without formal liquidation.[202] Moreover, resolution regimes aim at

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[192] BRRD Art.34&1(g)
[193] BRRD Art.2&1(1)
[194] Ibid Art.2&1(47)
[195] Recital 45 under BRRD provides precisely that "*a failing institution should in principle be liquidated under normal insolvency proceedings. However liquidation…might jeopardize financial stability, interrupt the provision of critical functions and affect the protection of depositors. In such case it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings."*
[196] Pamela Lintner, '*Overview on the BRRD'* , World Bank Group, FinSAC , [2015], p.12
[197] Ibid
[198] Dominik Freudenthaler, *'Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p.31,32
[199] Pamela Lintner, *'Overview on the BRRD'*, [2015] World Bank Group, FinSAC, p.14
[200] Dominik Freudenthaler, '*Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC p.32
[201] Pamela Lintner*, 'Overview on the BRRD'*, [2015] World Bank Group, FinSAC, p.14
[202] Ibid

the No Creditor Worse Off than in Liquidation (NCWOL) principle,[203] in context of the comparative role of normal insolvency proceedings. Through the NCWOL and the procedure that should be followed it must be defined, whether the creditors and shareholders' affected by resolution have a right to compensation of what it has been allocated to them as per resolution action.[204] In other words, they must obtain at least what they would have received in a liquidation of the institution.[205]

In particular, the BRRD provides the above treatment for stockholders and creditors under its Arts 73 and 75 in case of when the resolution tools of partial transfers and the bail-in mechanism get activated.[206] Final, generally, an effective insolvency regime through its proceedings must permit a feasible institution that facing some financial distress to restructure its debts and be able to continue trading.[207] Nevertheless, in some States, there is not yet developed such insolvency proceedings that would manage to reach such objectives,[208] while in contrast, the BRRD stressed that resolution is not justifying the withdrawal of counterparties from their obligations and suspends the contractual termination rights.[209] Thus, central clearing schemes shall not interrupt a bank under resolution from trading.[210]

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[203] ibid

[204] Financial Stability Board, *'Principles on Bail-In in Execution'*, [21 June 2018], p.7, available at <https://www.fsb.org/wp-content/uploads/P210618-1.pdf>, accessed 14 Nov 2019

[205] Ibid

[206] BRRD

[207] Stephen Parker, *'Insolvency regime leaves companies to fail; Thomas Cook shows we need a better 'rescue culture''*, [Oct 2019], The Times, available at LexisNexis, p.1.

[208] For instance, the failing of Thomas Cook and Carillion illustrate exactly that for the UK Insolvency regime, which its biggest innovations with administration and Company Voluntary Arrangements (CVAs), proved to be insufficient. In particular, the administration appeared as a more flexible version of liquidation and CVAs have had quite limited usage. The proposals for reforms in 2018 appeared to be inadequate for example the pre-insolvency moratorium. They did not provide any innovative tools and turned the UK Insolvency law more complex. In addition, they failed to address the deficiencies that the institutions' collapses had stressed, where the most possible result was the liquidation of an institution. Hence a major rethink is needed in order to illustrate how the UK Insolvency regime can facilitate corporate rescue such as a suitable debtor in possession insolvency proceeds that would permit the continuity of the institution or a designation of a mechanism that would promote rescue finance to a business in an insolvency procedure. See: ibid

[209] Dominik Freudenthaler, '*Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD'*, [2017] World Bank Group Finance & Markets FinSAC, p.32

[210] Ibid

2.3 The Banco Popular (BP) case vs. the Veneto Banks case.

Resolution and liquidation have significant differences in the scope of legislation which applied to the utilized of public funding.[211] While in resolution the use of public resources depends on both scopes of the BRRD and the State aid, in liquidation it is only contingent to the State aid requirement of a minor burden-sharing of equity and junior debt.[212] Hence, the use of public funds in case of resolution with the sale of the business to a purchaser needs the preliminary requirement of bail-in[213] of creditors and stockholders equal to 8% of the bank's total liabilities prior the option of using the funds from the SRF, which is depended on the Commission's State aid appraisal;[214] while for the use of public money under liquidation the State aid frame involves only a preliminary contribution of equity and debt.[215] By comparing the BP case-the only resolution that was performed after the SRMR provisions came in force-[216]with the Italian banks case, the practical effects of these two dissimilar legal scopes are illustrated[217] and lead to some significant questions in respect of the Banking Union.[218]

Particularly, the BP resolution represents a milestone in the growth of the Banking Union, as with that market participants could monitor how the institution's capital structure would be used when it handles financial difficulties and whether the creditors, taxpayers' interests and financial stability would be effectively protected and

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[211] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?'*, European Parliament, [2017] PE 614.479, p.5

[212] Ibid

[213] Bail in definition is provided by Arts 2&1(57) BRRD and 3&1(33) SRMR as *'the mechanism for effecting the exercise by a resolution authority of write down and conversion powers in relation to liabilities of an institution under resolution...'*

[214] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?'*, European Parliament, [2017] PE 614.479, p.10

[215] Ibid

[216] European Commission, *'Report from the Commission to the European Parliament and the council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)*, [30.4.2019] COM(2019) 213 final, p.4, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-213-F1-EN-MAIN-PART-1.PDF>, accessed 23 Nov 2019

[217] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?'*, European Parliament, [2017] PE 614.479, p.10

[218] Ibid p.5

balanced. [219] With the BP the SRB for the first time used its powers[220] to write down and restructure the bank's own funds and the sale of the business in the context of the sale of business tool into the Banco Santander.[221] Furthermore, as to the common ground of both cases is that the senior debt remained untouched[222] as in the Veneto banks the subordinated debt was wiped out,[223] while in Popular case was used, with the difference that this time it was placed under the bail-in.[224] Some cases that encompassed only the application of the State aid system on burden-sharing under the application of the BRRD were developed in 2015 before the Spanish bank case and consequently in absence of the implementation of the bail-in tool.[225]

The difficulties for BP initiated in 2016, and in April of 2017, the chairperson required the capital increase of the institution and envisaged the possibility of selling the bank to a participant.[226] Essentially, the bank faced growing deposit outflows, as its share price fell dramatically from 69 to 32 cents and the ECB on early June decided that the condition of FOLTF was fulfilled, under the fact that bank was unable to pay its debts or other liabilities, while the SRB declared that the other two conditions for resolution were satisfied as well.[227] Continuously, the SRB endorsed the sale of the BP to Santander for one euro and with that sustained its operation as a member of the

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[219] Diane de Charette, *'The Banco Popular Resolution Case: A Tainted Success for the SRM?'*, [2018], p.1, available at http://financial-stability.org/, accessed 23 Nov 2019

[220] Ibid

[221] European Commission, *'Report from the Commission to the European Parliament and the council on the application and review of Directive 2014/59/EU and Regulation 806/2014'*, [30.4.2019] COM(2019) 213 final, p.4, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-213-F1-EN-MAIN-PART-1.PDF>

[222] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?',* European Parliament, [2017] PE 614.479, p.10

[223] Ibid

[224] European Commission, '*Report from the Commission to the European Parliament and the council on the application and review of Directive 2014/59/EU and Regulation 806/201*4, [30.4.2019] COM(2019) 213 final, p.4, <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-213-F1-EN-MAIN-PART-1.PDF>

[225] Ibid

[226] Diane de Charette, *'The Banco Popular Resolution Case: A Tainted Success for the SRM?',* [2018], p.1, available at: http://financial-stability.org/, accessed 23 Nov 2019

[227] Ibid p.1-2

group Santander;[228] while the sale of the business was joined by a 7 billion euro fundraise from the Santander and a 3.3 billion euro bail-in of debt and equity.[229]

In contrast, in the case of the Veneto and Vicenza banks the purchaser i.e. ISP, was the one that appeared to be favored from the State liquidation aid.[230] As a consequence, it seems that with the different regulations for the use of public funds in resolution and liquidation under the scope of EU legislation a similar operation can lead to varying results concerning the creditors, taxpayers and the acquiring institution.[231] At this point, it is crucial to look into the notions of critical functions and of public interest, which on the one hand define the distinction among resolution and liquidation and on the other, there was observed a dimension between the SRB and the Italian state in the Veneto banks cases about its existence.

3. *A critical view of the definitions of critical functions and public interest objective. Harmonization as the key answer.*

3.1 Dimension of views on state aid between the Italian government and the SRB.

As it has been illustrated from the abovementioned cases a key component in the appraisal of public interest existence is, if certain functions of the banks that are considered to be FOLTF viewed as critical. Besides the definition for critical functions under the BRRD, the Commission authorized regulation 2016/778, which complements the BRRD among others about the determine criteria of critical operations.[232] Under

[228] Ibid p.2
[229] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?'*, European Parliament, [2017] PE 614.479, p.10
[230] Ibid
[231] Ibid p.11
[232] Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines, C/2016/0424,*OJ L* 131, 20.5.2016, p. 41–47

Art.6 of the regulation, criticality of a function based on, whether it is given by an institution to third parties not related to the company or group and, whether the unexpected disruption of it could, negatively affect the third parties, boost the contagion or, weaken the general confidence of market participants because of the function's systemically relevance for the third parties and, the systemic relevance for the institution or group in offering the operation. As it has been said, the SRB opposed the view of the Italian banks that their functions of deposit-taking and lending activities and payment services were critical because there were given to a limited number of third parties, as well as due to their substitutability in a reasonable manner and timeframe.[233] In particular, the SRB assessing at the liquidation's impact on financial stability stated that *"substitutability of the deposit and lending functions in the Veneto region is expected to be high due to the large number of credit institutions active in the region".* [234] It seems that the SRB rejects the possibility of a systemic impact of liquidation both at a national and local level. In contrast, the Italian State Degree argued that without state aid measures the liquidation *"would lead to the destruction of value of the banks, with serious losses for non-professional creditors…and would entail a sudden interruption in the provision of credit to businesses and families with negative repercussions of economic and social character, as well as on employment".*[235] It concluded that the adoption of state aid measures was needed in order to permit *"the orderly exit of the banks from the market and avoiding a serious disturbance to the local economy".*[236]

Hence, the application of the national support measures, which included a €3.5 billion aid of public funds to ISP,[237] illustrated under the Ministry of Economy and Finance

[233] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?',* European Parliament, [2017] PE 614.479, p.11
[234] Ibid p.11-12
[235] Ibid p.12
[236] Ibid
[237] B. Mesnard, A. Margerit, M. Magnus, *'The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza'*, [2017] PE 602.094, European Parliament, p.1, available at:<http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602094/IPOL_BRI(2017)602094_EN.pdf>, accessed 28 Nov 2019

(MEF) and by the Pier Carlo Padoan as, *"the best way to rescue Veneto banks".*[238] The alleged arguments were that, with liquidation certain injuries would have occurred for bank's investors and the EU does not prevent the state support whether it is provided in line with specific rules; a condition that was satisfied since the European Commission approved the feasibility of state aid[239] on 25 June 2017.[240] Furthermore, he noted that with the national aid it was likely for the ISP to acquire a business complex that would rescue plenty of jobs, ensures credit continuity for companies and, artisans and prevent difficulties for households and savers.[241] In other words, the Italian state did not rescue two banks but the economy of the whole region.[242] Virtually, it seems that the state aid is justified under the assessment of the government on regional effects of liquidation; nonetheless, this appears to oppose the SRB's decision about the substitutability of the bank's functions.[243]

3.2 The interaction between the state aid framework and the implementation of resolution actions under the BRRD.

About the state aid framework,[244] was preceded the BRRD, while the two regimes seems to operate alongside.[245] In particular, the BRRD requires compliance with the EU state aid framework, where applicable, by the MSs when implementing resolution

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[238] Pier Carlo Padoan, *'State aid is the best way to rescue Veneto banks'*, [2017], available at:< http://www.mef.gov.it/en/ufficio-stampa/articoli/article.html?v=/en/ufficio-stampa/articoli/2014_2018-Pier_Carlo_Padoan/article_0004.html accessed 28 Nov 2019

[239] Ibid

[240] B. Mesnard, A. Margerit, M. Magnus, *'The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza'*, European Parliament [2017] PE 602.094, p.1, available at:<http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602094/IPOL_BRI(2017)602094_EN.pdf>, accessed 28 Nov 2019

[241] Pier Carlo Padoan, *'State aid is the best way to rescue Veneto banks'*, Ministry of Economy and Finance, [2017], available at <http://www.mef.gov.it/en/ufficio-stampa/articoli/article.html?v=/en/ufficio-stampa/articoli/2014_2018-Pier_Carlo_Padoan/article_0004.html>, accessed 28 Nov 2019

[242] Ibid

[243] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?',* European Parliament, [2017] PE 614.479, p.12

[244] Communication from the Commission — Framework for State aid for research and development and innovation, *OJ C 198, 27.6.2014, p. 1*

[245] Valia Babis, '*State helps those who help themselves: State aid and burden-sharing'*, [2016] Paper No 62/2016, University of Cambridge Faculty of Law, p.2,3, available at SSRN

actions.[246] The criteria on whether the resolution actions compose state aid are the same as for every other action under the EU state aid frame.[247] Moreover, state aid will at least trigger the write down or conversion capital tools under the BRRD and might also trigger resolution, with the exemption of precautionary recapitalization tool, where state aid does not activate the BRRD framework,[248] and is permitted without resolution under restricted situations.[249]

In regards of bank in liquidation the EU rules also permit state aid.[250] The rationale behind it is that, while the liquidation of less important banks may not have an impact on the European financial scheme, their market exit still may have a serious impact in the areas where those banks are active.[251] Thus, outside the European banking resolution frame, it is on the burden of MSs to choose, whether the exit of such banks can lead to serious effects on the regional economy and, if they wish to use public funds to diminish these effects.[252] The EU state aid support rules predict this likelihood[253]and the European Commission (EC) can approve state aid under art.107 (3) (b) of the TFEU to cure an interruption in MSs economy.[254] Specifically, the EC approached the state aid actions under six commission communications with the most current to be the 2013 EC banking communication.[255] Although, it did not specify the

[246] BRRD Art.34 (3)

[247] EBA, *'Interaction between the state aid framework and the application of resolution actions'*, [2017], available at: https://eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2015_2182, accessed 25 Jan 2020

[248] Valia Babis, *'State helps those who help themselves: State aid and burden-sharing'*, [2016] Paper No 62/2016, University of Cambridge Faculty of Law, p.3, available at SSRN

[249] European Commission, '*State aid: How the EU rule apply to banks with a capital shortfall-factsheet',* [2017], Memo, Brussels, available at: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1792> accessed 1 Dec 2019

[250] ibid

[251] Ibid

[252] Ibid

[253] Ibid

[254] Valia Babis, '*State helps those who help themselves: State aid and burden-sharing*', [2016] Paper No 62/2016, University of Cambridge Faculty of Law, p.3, available at SSRN

[255] Communication from the Commission on the application, from 1 August 2013 , of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') *OJ C 216, 30.7.2013, p. 1*

possible form of a serious impact on the local economy and this could lead to controversial outcomes.[256]

According to the notion of critical functions and state aid, whilst the concept is clear in respect of the SRB's review of the existence of public interest, it is however, not clear about what its purpose is in the EU discipline on the state aid; it may be effective, the SRB to supply a clear assessment of the potential impact of the liquidation at the regional level.[257] In a combination with harmonization of the different national insolvency laws, a more clear assessment could occur regards the decision to provide state aid measures.[258] Moreover, the harmonization of EU Insolvency law, supplementing the EU resolution framework, could enhance the accurate function of the Banking Union, as the creditors, taxpayers, and institutions could be more confident about the regulations that control liquidation and its effects.[259]

Concerning that, the ABLV bank case[260] provides two contradictory rulings, specifically, the liquidation of the ABLV bank in Latvia and, the resolution of its affiliate into Luxembourg[261] illustrates, even more, the significance of harmonizing banks' insolvency legislations. Inter alia, it has been proposed by Daniele Nouy, the amendment of Art.32 of BRRD, to include the statement of FOLTF as criterion for

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[256] Silvia Merler, Bruegel, *'Critical functions and public interest in banking services: Need for clarification?'*, European Parliament [2017] PE 614.479, p.12

[257] Ibid

[258] Ibid

[259] Ibid p.16

[260] On 23 February 2018 the ECB decided that the ABLV bank and its subsidiary were FOLTF according to the SRMR because of its substantial damage to its liquidity situation as the bank seemed unable to pay its liabilities as they expired. See: European Central Bank, *'ECB determined ABLV Bank was failing or likely to fail'*, [24 Feb 2018], available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html > accessed 2 Dec 2019

[261] J Deslandes M Magnus, *'Further harmonizing the EU Insolvency law from a banking resolution perspective'*, [April 2018], European Parliament, Economic Governance Support Unit PE 614.514, p.2

The Luxembourg Commercial court refused to place the subsidiary into liquidation and it has been decided to be sold to new investors. For that reason, the court has appointed two administrators to manage for six months the entity's assets. As an outcome, the subsidiary remains under the protection of the suspension of payment status. See: ABLV, 'The Court Recognizes the Soundness of ABLV Bank Luxembourg, S.A. Which Can Now Be Sold to New Investors', [2018], available at: < https://www.ablv.com/en/press/2018-03-09-the-court-recognises-the-soundness-of-ablv-bank-luxembourg-s-a-which-can-now-be-sold-to-new-investors> accessed 2 Dec 2019

liquidation under national legislation.[262] As a result, in the absence of public interest that leads to resolution tools, banks must be liquidated under national insolvency law and not resolved.[263] This goal has been achieved in 2019 with the new EU Directive of the European Parliament and the Council, amending the BRRD.[264] In particular, under the new Art.32b, the MSs must ensure that in case of, whether no public interest is met then an institution must be wound up in an orderly way under the appropriate national law.

3.3 The European Commission's directive that differs from the normal insolvency proceedings.

Accordingly, the need of harmonization of the national insolvency laws in the EU considered to be essential for a well-functioning Banking Union and to avoid, as much as possible, the different approaches of critical definitions; that leads to the decision of whether the bank's need to be resolved under the BRRD or liquidated under normal insolvency proceedings. Moreover, a senior harmonization degree in insolvency is important for the proper function of a single market union and for a real Capital Markets Union, which are significant matters for the EU.[265] An answer to that appears to be the European Commission's suggestion on 22 November 2016 for a new directive about 'preventive restructuring frameworks, second chance, and measures to increase the efficiency of restructuring, insolvency, and discharge procedures, as well as amending directive of 2012/30/EU'.[266] The proposal's goal was to minimize the

[262] Ibid p.3
[263] Ibid
[264] Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, PE/48/2019/REV/1, *OJ L 150, 7.6.2019, p. 296–344*

[265] European Commission, *'Proposal for a Directive of the European Parliament and of the council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU'*, [2016/0359(COD)], (para. Reasons for and objectives of the proposal), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0723> accessed 5 Dec 2019
[266] Nikolaes W.A. Tollenaar, *'The European Commission's proposal for a Directive on preventive*

barriers to the free movement of capital arising from differences in MSs Restructuring and insolvency procedures.[267] Although, it did not harmonized basic parts of insolvency but concentrated on dealing with the most significant problem that could be tackled with harmonization.[268] The certain proposal has led to a new directive of 2019[269] directed to the MSs[270] and ensures that feasible institutions and entrepreneurs, which are in financial distress, have the right of entry to effective national preventive restructuring frameworks that allows them to continue operating.[271] Moreover, permits debtors in financial distress to continue business and to restructure efficiently at the very beginning and thus avoiding insolvency and preventive the liquidation of feasible institutions.[272] Inter alia, these frameworks help to increase the total value to creditors compared to what they would have received in liquidation of the institution's assets.[273] The directive is wholly compatible with and complements the insolvency proceedings regulation that does not address the differences among national laws regulating insolvency procedures.[274]

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restructuring proceedings', [2017] Insolv. Int. 30(5), 65-81, p.1, available at uk.westlaw.com

[267] European Commission, *'Proposal for a Directive of the European Parliament and of the council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU'*, [2016/0359(COD)] (para. Objectives of the proposal), available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0723>, accessed 5 Dec 2019

[268] Ibid

[269] 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, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), PE/93/2018/REV/1, *OJ L 172, 26.6.2019, p. 18–55,* available at: < https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2019.172.01.0018.01.ENG> , accessed 5 Dec 2019

[270] Ibid Art.36

[271] Ibid Recital 1

[272] Ibid Recital 2

[273] Ibid

[274] Ibid Recitals 12 and 13

Chapter IV: The bail-in tool under an insolvency law perspective.

In case of whether the Bank's financial health keeps to deteriorating even after the early intervention measures or whether it is fading so fast that the latter cannot handle the situation appropriately, then the NRAs have to decide if the resolution of the institution is the proper solution instead of its recovery.[275] As it has been aforementioned in this thesis, the RAs have to choose among four resolution tools under the BRRD.

1. A briefly explore to the transfer resolution tools under the BRRD.

The sale of business tool[276] guarantees that the RAs can transfer to a buyer, which is not a bridge bank, the shares of the resolved bank or any of its assets, rights, or liabilities. The transfer must be made on commercial terms[277] as well as the sale shall be marketed even separately and in a transparent manner except if it entails a material risk to financial stability.[278] The bridge bank tool[279] is again a transfer instrument that is practical in occasions where no purchase is expected due to the huge bank's balance sheet and/or when the whole financial area experiences a systemic crisis.[280] Furthermore, the NCWO rule applies, and it successfully recapitalizes the bank's viable parts and, it might have an equal economic impact with the application of bail-in.[281] Aftermath the termination of its operations under certain events provided in Art.41&3 BRRD, the bank must be liquidated under normal

[275] Slaughter and May, *'An introduction to the European Commission's proposals on Recovery and Resolutions of banks and investment firms. Crisis Management moves up a gear in the European Union',* [2012], p.30, available at <http://www.slaughterandmay.com/media/1825304/an-intro-to-the-european-commissions-proposal-on-recovery-and-resolution-of-banks-and-investment-firms.pdf> accessed 2 Dec 2019

[276] Art. 38 BRRD

[277] Ibid Art. 38&2

[278] Ibid Art. 39

[279] Ibid Art. 40

[280] Michael Schillig, '*Resolution and Insolvency of Banks and Financial Institutions*', [2016] Oxford, p.253 (para. 10.09)

[281] Ibid.p.254

insolvency procedures.[282] The asset separation instrument[283] constitutes the last transfer tool, which may be applied only in combination with one of the other resolution tools.[284] This is because its goal is to remove 'toxic' assets from the bank's balance sheet and insulate them into a separate entity, as a result, this could, inter alia, enhance the moral hazard problem.[285] The RAs can apply this certain tool only in specific circumstances, for instance, where the liquidated assets under standard insolvency procedures may harm the financial markets.[286]

In the case of a partial transfer of the assets, rights or liabilities under the sale of business tool or the bridge bank instrument the remaining entity must be wound up under normal insolvency proceedings[287] that include both the corporate insolvency law and the bank insolvency legislation. With the latter, the remaining entity has the power to give to the receiver all the essential services to guarantee the continuation of critical functions.[288]

2. *The bail-in tool under insolvency and regulatory perspective.*

It has been observed that there were no big surprises in the Commission's proposal of the resolution tools and, that mechanism should exist to go beyond just simple monitoring of divergence in the appliance and understanding of the resolution conditions.[289] Nonetheless, the bail-in tool has been described in legal literature inter alia, as the most important regulatory achievement in the aftermath of crisis attempts

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[282] Art.41&8 BRRD
[283] Ibid Art. 42
[284] Ibid Art. 37&5
[285] Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.255,256 (para.10.12 and 10.13)
[286] Ibid Art. 42&5
[287] Ibid Art.37&6
[288] Michael SChillig, *'Resolution and Insolvency of Banks and Financial Institutions'*, [2016] Oxford, p.251 (para.10.03)
[289] Slaughter and May, *'An introduction to the European Commission's proposals on Recovery and Resolutions of banks and investment firms. Crisis Management moves up a gear in the European Union'*, [2012], available at <http://www.slaughterandmay.com/media/1825304/an-intro-to-the-european-commissions-proposal-on-recovery-and-resolution-of-banks-and-investment-firms.pdf> accessed 2 Dec 2019 p.35

to end the TBTF problem and, as the most disputable weapon between the guns.[290] With the bail-in tool, the NRAs may write-down the unsecured debt of a bank and turn it into equity.[291] In particular, they will apply the certain tool either for the recapitalization of the bank with the writing down of suitable liabilities so as to reinstate its skill to comply with the conditions for its authorization[292] or to convert to equity or to diminish the main amount of the transferred debt to a bridge bank or a private sector purchaser or an asset management vehicle.[293] For its triggering, the resolution conditions must be fulfilled and the resolution powers under art.63&1 BRRD must be met by the RAs. The implement of the bail-in tool for the recapitalization of a bank is more complex than for the conversion of debt into equity.[294] The bail-in tool has some characteristics that seemed to be the same with the write-down or conversion of capital instruments tool pursuant to arts. 59 and 60 under the BRRD and art.21 of the SRMR that is applied either separately from resolution or combined with the implementation of resolution tools.[295]

This thesis mainly explored the bail-in mechanism from an insolvency law comparison. A statutory bail-in tool under an insolvency law viewpoint makes a unique type of debt restructuring system for banks, in particular, this debt to equity exchange has as a goal the recapitalization of the bank or of a new body that obtain assets or liabilities of the bank.[296] It appears that the bail-in tool is alike with a concept that is known to insolvency lawyers as a 'chameleon equity firm', under which the institution supplies debt in many tranches and in a financial difficulty the highest priority claims are

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[290] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.3, available at uk.westlaw.com, accessed 2 Dec 2019

[291] Slaughter and May, *'An introduction to the European Commission's proposals on Recovery and Resolutions of banks and investment firms. Crisis Management moves up a gear in the European Union'*, [2012], available at <http://www.slaughterandmay.com/media/1825304/an-intro-to-the-european-commissions-proposal-on-recovery-and-resolution-of-banks-and-investment-firms.pdf> accessed 2 Dec 2019 p.36

[292] Art.43& 2(a) BRRD, Art.27& 1(a) SRMR

[293] Art. 43&2(b) BRRD, Art. 27&1(b) SRMR

[294] Michael Schillig, *'Resolution and Insolvency of Bank and Financial Institutions'*, [2016] Oxford, p.285 (para.11.10)

[295] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.6, available at:uk.westlaw.com, accessed 2 Dec 2019

[296] Ibid. p.5

converted into equity while the lowest are wiped out.[297] Moreover, the bail-in tool constitutes a pre-packaged process as the debt restructuring based on the resolution plans taken in advance by the SRB after its valuation of the institution's assets and liabilities and its resolvability appraisal.[298] The difference between the insolvency legislation and bank resolution lies in the decision that triggers the reorganization of banks. The former's decision of bank's restructuring or liquidation based on, which way the most profits are produced for the creditors; while under resolution, bail-in mechanism applied only on whether public interest exists even without the consent of creditors.[299] This bank resolution peculiarity may be justified as the insolvency theory of anti-commons actions.[300]

Moreover, the resolution principles[301] disclose a connection between the bail-in tool and insolvency law, as most of them are virtually established principles of the latter.[302] Inter alia, the resolution principles established the hierarchy of claims under the BRRD, which are in alignment with the customary distributional regulations applied in an

[297] Ibid
[298] Ibid p.5,7
[299] Ibid p.5,6
[300] Ibid p.6, this 'cram down' by administrative decision based on the' tragedy of the commons' and 'anti-commons' review. Mainly, it has to do with the individual enforcement rights of creditors vs. the common pool of assets. In particular, when the debtor turns insolvent, the creditor's incentives are misaligned as by exercising a creditor's enforcement right, based on the priority of claims, which this might lead to a complete internalized advantage for that certain creditor. The matter is that, the damages are externalized and involve all the creditors together. Base on that, the misalignment of incentives is an outcome of the mixture of the personal enforcement rights along with a common pool of assets. The personal rights may be used to offload costs on the common pool and the latter may be accessed to gain individual advantages. A way to handle 'the tragedy of the commons' is through a separation of individual rights from the entitled of access to the common pool and by joining personal rights into privatization or collectivization. Still, in case of the latter, the 'tragedy of the commons' might be converted in a 'tragedy of the anti-commons' and may be overcome with a change from 'collectivization' to 'privatization'; for instance, the sale of the viable parts of the debtor's business into a new body. The consent of unsecured creditors for the sale is no needed; however, they sustain their substantive rights. With this restructuring deal between the debtor institution and its senior creditors, the viable parts of the business managed to survive within a new and viable financial structure. See: Michael Schillig, *'Resolution and Insolvency of Banks and Financial Institutions',* [2016] Oxford, p.61-63 (para.3.34-3.36)
[301] Arts.34&1 and 15&1 of the BRRD and the SRMR respectively.
[302] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.8, available at:uk.westlaw.com, accessed 2 Dec 2019

insolvency process[303] under which it appears that in the majority of EU MSs the shareholders are initially liable to bail-in, secondly junior creditors and lastly unsecured creditors.[304] This method illustrates the aforementioned, NCWO principle on which creditors must not be affected worst under bail-n than in liquidation.[305] Nonetheless, in EU bank resolution framework, public interests set as priority over the individual rights of creditors, thus all banks' liabilities may be liable to write down and conversion mechanisms under the bail-in tool with an exemption of certain liabilities that maintain their place into liquidation while into bail-in viewed as de facto senior to a group of 'bail-inable' liabilities.[306] Consequently, the differences among the handling of the bank's liabilities in bail-in and liquidation can increase more whether NRAs choose to exclude specific liabilities from bail-in.[307] As it has been abovementioned the covered deposits is the most important objective of resolution principles and it shall be excluded by the bail-in tool[308], however, in a bank's asset liquidation in virtue of an MSs insolvency legislation it is likely to rank similarly with usual unsecured, non-preferred claims.[309] This may boost the odds of creditors to be allowed to compensation under the NCWO principle as the group of liabilities available to bail-in has been reduced.[310] This could be one more argument for the requisite to be

[303] See Recital 77 of the BRRD under which it provided that "except where otherwise specified in this Directive, resolution authorities should apply the bail-in tool in a way that respects the pari passu treatment of creditors and the statutory ranking of claims under the applicable insolvency law".

[304] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.13, available at:uk.westlaw.com

[305] Ibid. It has been noted that, under the NCWO principle, the bank resolution framework aims to be in line with human rights rules interfering with property rights. Moreover, it follows the existing concepts of national insolvency legislation. See: Ibid, p.8

[306] Ibid p.13 Based on Arts.44&2 BRRD and 27&3 SRMR, the liabilities that are excluded from the bail-in are the covered deposits, secured liabilities, as well as short-term liabilities to other banks or owed to payment and securities settlement schemes, liabilities emerging from the exploitation of client assets or from the bank that acts as a trustee in a trust relationship. Moreover, the liabilities that owed to employees, to commercial and trade creditors, to deposit guarantee systems and liabilities to tax and social security authorities, which are only exempted whether they are preferred under national law.

[307] Ibid p.15

[308] Recital 81 SRMR

[309] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.15, available at:uk.westlaw.com

[310] Ibid

harmonized national insolvency law.[311] In that point, it is worth mentioned, besides that the Art.108 of the BRRD providing additional alignment of depositors and deposit guarantee systems position in resolution, with their position in liquidation, still the significant differences among the ranking of claims in the context of the bail-in tool and those that recognized under national insolvency law lead to many difficulties.[312] For instance, the different handling of creditors and claims into liquidation by national laws can result to differences about the appliance of the bail-in tool, hence, the RAs have the burden to choose in every resolution process which national insolvency legislation is applicable in order to decide the hierarchy of claims, something that in case of great global banks may be significantly intricate and hard for creditors to appraise if their claims may be bailed-in.[313]

At this point, this thesis assessed the bail-in tool under a regulatory perspective through the Cyprus bail-in case, where for the first time in the interlinked sovereign and bank debt disaster the bank senior creditors experienced haircut.[314] A conclusion that has been illustrated afterward was that within the years of the Eurozone financial crisis several rules and political decisions had been taken on an ad hoc, opportunistic and confused manner absent fully consideration and appropriate reflection.[315] Such an ad hoc-unsystematic approach provides inter alia, too broadly proposals that supply no real regulatory guidance.[316] The BRRD resolution tools constitute such excessively wide regulatory measures as it did not supply any guidance about which tools must be used in which cases or as to how they must be calibrated.[317] It has been noted that this broad basis may maximize instead of minimize moral hazard problem; hence the bail-in tool may have a contagion impact and carries market and regulatory risks which reveal the fact that its creation and implementation has not been design

[311] See Recital 111 of the BRRD
[312] Lynette Janssen, *'Bail-in from an insolvency law perspective'*, [2018] J.I.B.L.R, 33(1), 1-23, p.15, available at:uk.westlaw.com
[313] Ibid
[314] Michael Doran, *'The view from Cyprus: paradigm shift in approach to Eurozone crisis'*, [2013], 5 JIBFL 285, p.3, available at: LexisNexis.com, accessed 3 Dec 2019
[315] Ibid
[316] Kerm Alexander, *'Bail-in: a regulatory critique'*, [2017] 1 JIBFL 28, p.2, available at: LexisNexis.com, accessed 3 Dec 2019
[317] Ibid

systematically.[318] Particularly, it constitutes an ad hoc regulatory instrument, which seeks more on preventive the expose of taxpayers to bank bailouts instead of creating sound legal and market circumstances to evade a potential crisis, which is something that it could be reached with less discretion on RAs hands concerning, which groups enforce losses on.[319]

[318] Ibid p.3
[319] Ibid

Conclusions

The present analysis attempted to shed some light on the current EU resolution framework for dealing with banks that are failing or are likely to fail and, its relationship with the normal insolvency procedures that are followed by the MSs in cases where a bank faces financial difficulties. In particular, the comparison of the resolution procedure under the BRRD and the liquidation under the normal insolvency proceedings illustrates how far the EU managed to go since the worldwide financial crisis of 2007-2008. Moreover, it demonstrates what has changed since then, about the methods on which institutions can be saved from collapsing, as till then the normal insolvency proved to be ineffective in the sense that sometimes has shown to be unsuitable to handle efficiently the failure of banks. Because of certain rules for bank resolution, proved to be needed to disclose taxpayers from the burden to bail-out financial institutions and, properly resolved without the use of public funds. Thus, resolution and liquidation differ significantly regarding the relevant legislation of the use of public resources. The former are within the scope of both BRRD and State aid and, thus entail a preliminary bail-in up to 8% of total liabilities, whereas the latter are only subject to State aid burden-sharing conditions. Moreover, one of their biggest disparities constitute the ranking of claims in the context of the bail-in tool as one of the BRRD objective is to protect covered depositors and must be exempted from the bail-in tool, while under national insolvency proceedings and liquidation they may be ranking equal by claims of often unsecured, non-preferred creditors. This may increase the likelihood for creditors to ask for compensation under the NCWO rule. The latter constitutes the key principle of the BRRD for the protection of creditors and the national insolvency law plays a comparison role for its assessment.

Furthermore, throughout the evaluation of the resolution of the Spain's Banco Popular case and, the liquidation of the Italian's Veneto Banca and Banca Popolare di Vicenza cases several issues were demonstrated that helps to provide a critic for the new EU resolution regime. The resolution mechanism for the banks is far from being unproblematic as, the recent cases have demonstrated that banks are simply too different to obey on a single guide. For sure the BRRD constitutes a controversial topic,

as there have been conflicting views about it. Carmen Bell, practice lead at advisory firm Global Counsel in Brussels, argues that the Italian and Spanish cases illustrate *"a half-built system"*,[320] while Lorenzo Codogno, a professor at European Institute of the London School of Economics and Political Science, noted that the issue was that *"Europe decided not to allow for a transition period, which was a political mistake"*.[321] Opponents have stressed that the BRRD is enough flexible to handle different banks, while with the resolution of the Banco Popular the test for the sufficiency of the new resolution framework has passed.[322] As for the Veneto Banks case, Amelie Champsaur, associate at law firm in Paris dispute that *"the emergency decree of June 25 is not a normal insolvency regime. It is an ad hoc resolution regime. It was called liquidation, but the two banks were actually placed in resolution."*[323]

In respect of the Italian banks' cases, a big question that arises is that if Italy does not have to conform by EU resolution rules what consequences this may have to the Banking Union scheme. The EU's permission to the liquidation of the Veneto banks appears to be an infringement to the BRRD and has the risk for the regulation to lose its value and credibility. Giovanni Sabatini, the general director of the Italian Bank Association argued that the reason behind the different approach between MSs is the "desperate desire of national governments to avoid imposing new bail-in rules on investors in their troubled lenders".[324] Virtually, that was Italy's problem with the BRRD rules as the state's banks frequently sell capital bonds to investors, who were looking for a higher-yielding on their money with low awareness of EU bank rules,[325] and the bail-in tool, inter alia, would cost an important injure to bank's reputation over the country.[326] Nevertheless, the BRRD offers a sort of flexibility under Art.32&4(d), which provides a precautionary recapitalization as an alternative to bail-in tool and outside the scope of the BRRD, where public funds can be added in banks without

[320] Louise Bowman, *'Banking: Throwing the Bail-in out with the bath water'*, [2017], p.1, available at LexisNexis.com, accessed 13 Dec 2019
[321] Ibid p.2
[322] Ibid
[323] Ibid p.4
[324] Ibid p.1
[325] Rupert Hargreaves, *'Italy Bailout: Buy Bank Debt Regardless Of Credit Quality?'*, [2017], p.1, available at LexisNexis.com, accessed 13 Dec 2019
[326] Ibid

triggering resolution and the 8% bail-in requirement, after following a certain stress test.[327] In the aftermath of the Veneto Banks bailout, it is crystal clear that the peculiarities of each country need to overcome in order to mark a single approach that should and could be followed by the Member States. To make a trend to happen, the case of the Veneto banks needs to mark an end to any endeavor of avoiding the burden of losses on investors in failed banks.

Moreover, a single EU Insolvency law, that complements the EU resolution regulations is needed to enhance the union's banking system and makes the whole picture for the creditors, taxpayers, and banks more stable and not so unpredictable. Together it would mark a united, interrelated framework that prevents the banks from failing and, protect financial stability. The new EU Directive 2019/1023 on preventive restructuring procedures and, supplementing the insolvency proceedings is a promising step into the right direction.

[327] White Case LLP, *'Italian banks: Thoughts on recapitalization and sharing the burden'*, [2016], p.3, available at LexisNexis, accessed 13 Dec 2019

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