DISSERTATIONES
IURIDICAE
UNIVERSITATIS
TARTUENSIS
85

MÄRT MAARAND

Credit institution's limited rights for appealing the recovery and resolution measures in the European Union laws

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
85

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
85

MÄRT MAARAND

Credit institution's limited rights for appealing the recovery and resolution measures in the European Union laws

UNIVERSITY OF TARTU
Press
1632

School of Law, University of Tartu, Estonia

The dissertation has been accepted for the commencement of the degree of Doctor of Philosophy (PhD) in law by a resolution of the Council of the School of Law of 20 June 2022.

Supervisor: Prof. Irene Kull (University of Tartu, School of Law)

Opponent: Prof. Filippo Annunziata (Bocconi University, Department of Legal Studies)

The commencement will take place on 26 August 2022 at 2:00 p.m. via video bridge.

Publication of this dissertation was supported by the School of Law, University of Tartu.

The research leading to this dissertation was supported by the Dora Plus Programme founded by the European Union Regional Development Fund and the Republic of Estonia.

ISSN 1406-6394
ISBN 978-9949-03-913-5 (print)
ISBN 978-9949-03-914-2 (pdf)

Copyright: Märt Maarand, 2022

University of Tartu Press
www.tyk.ee

TABLE OF CONTENTS

LIST OF ORIGINAL PUBLICATIONS 7

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION 8

1. Introduction 8
   1.1. Setting the field of research, its relevance and research aims 8
   1.2. Defining the research problems, objectives, and research questions 14
   1.3. Methods and sources 15
2. Defining the recovery of credit institutions 18
   2.1. Prudential supervision 18
      2.1.1. Supervision system's background, objectives and scope 18
      2.1.2. Main supervisory measures 22
      2.1.3. Supervision execution mechanism – the Single Supervisory Mechanism (SSM) 23
   2.2. Resolution 27
      2.2.1. Resolution objectives and scope 27
      2.2.2. Main resolution measures 30
         2.2.2.1. Resolution tools as the 'umbrella' for resolution measures 37
         2.2.2.2. General resolution powers 44
         2.2.2.3. Special management and appointing resolution authority's agents 47
         2.2.2.4. Powers to restrict rights and obligations 50
         2.2.2.5. Powers of write-down and conversion 53
      2.2.3. Resolution execution mechanism – the Single Resolution Mechanism (SRM) 57
      2.2.4. Conditions for resolution proceedings 61
   2.3. Recovery – Summary of Publication I 62
      2.3.1. Recovery objectives and scope 62
      2.3.2. Recovery measures 63
         2.3.2.1. Recovery planning 63
         2.3.2.2. Early intervention measures 65
         2.3.2.3. Additional recovery measures 67
      2.3.3. Conditions for recovery proceedings 68
3. Bank recovery and resolution measures' intrinsic restrictive effects on appealing – Summary of Publication II 70
   3.1. Interest in appealing unlawful administrative acts 70
   3.2. Negative effects of recovery measures on appealing 72
      3.2.1. Effects of recovery planning and early intervention measures 72
      3.2.2. Effects of transitional recovery measures 73

3.3. Negative effects of key resolution measures on appealing..... 74
3.3.1. Effects of general resolution tools and general resolution powers 74
3.3.2. Effects of special management..... 76
3.3.3. Effects of naming agents for resolution and other measures..... 76
4. Forcing the EU judicial system when appealing measures of Banking Union composite procedures – Summary of Publication III..... 77
4.1. Principles laid down by European Court of Justice for SSM and developing the three-stage jurisdiction test 77
4.1.1. CJEU judicial practice..... 77
4.1.2. The three-stage jurisdiction test 79
4.2. Applicability of the three-stage jurisdiction test for the SRM..... 79
4.3. Application of the three-stage jurisdiction test for acts under SRMR..... 81
4.3.1. Acts by the European Union institutions..... 81
4.3.2. Acts by the national resolution authorities..... 82
5. Conclusions..... 84
REFERENCES..... 90
Literature and Publications..... 90
Legislation and Normative Documents..... 95
Case law 98
ABBREVIATIONS..... 100
ACKNOWLEDGEMENTS 101
SUMMARY IN ESTONIAN 102
PUBLICATIONS 113
CURRICULUM VITAE 154
ELULOOKIRJELDUS..... 155

LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications (together referred to as the Publications):

Publication I Maarand, M. The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive – Juridica International 28/2019, DOI: https://doi.org/10.12697/JI.2019.28.12.

Publication II Maarand, M. Bank recovery and resolution measures' restrictive effects on appealing against them – Juridica International 30/2021, DOI: https://doi.org/10.12697/JI.2021.30.18.

Publication III Maarand, M. The Impact of The Judgement in Case C-219/17, Berlusconi and Fininvest, on Court Jurisdiction Regarding Legality of Acts by Institutions of Single Resolution Mechanism – International Comparative Jurisprudence 2019, 5(2), DOI: https://doi.org/10.13165/j.icj.2019.12.004.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. Introduction

1.1. Setting the field of research, its relevance and research aims

This dissertation concentrates on research of the European Union ('EU') laws with the focus on inherent negative outcomes of addressee's ability to contest public authorities' actions in the specific field of banking regulation. The focus is on the newest parts of the EU Banking Union – the framework of the recovery and resolution established by the Recovery and Resolution Directive ('BRRD')[1]. 'Banking Union' as a term has somewhat limited legal meaning in the EU law. While without a legal definition in the EU law, it is used as the umbrella term for post 2007–2008 financial crisis EU initiative for regulating the credit institutions[2] covering the single rulebook, i.e., unified pre-existing and new material laws, the system for unified prudential supervision procedures consisting of the European Central Bank ('ECB') and the national competent authorities – the Single Supervisory Mechanism ('SSM') – and the system for unified resolution procedures consisting of the Single Resolution Board ('SRB') and the national resolution authorities – the Single Resolution Mechanism ('SRM')[3] – and still missing unified European Deposit Insurance Scheme.[4]

---

[1] 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 L173/190, 12.6.2014.

[2] The term 'bank' is widely used interchangeably with the term 'credit institution' in both academic and non-academic settings. While 'bank' and 'credit institution' may have different scopes of meaning in some specific legal contexts, such differences have no effect in the context of this dissertation. Therefore, for the purposes of this dissertation, terms 'bank' and 'credit institution' are considered coinciding and are used interchangeably in the legal meaning of 'credit institution'.

[3] Recitals 11, 12 and art 2(9) and 6 of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions – OJ L 287/63, 29.10.2013 (hereinafter 'SSMR'); Recitals 5 to 7, 11 and art 1 of the Council Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 – OJ L225/1, 30.7.2014 (hereinafter 'SRMR').

[4] About the missing European Deposit Insurance Scheme (EDIS), see for example: Chiaramonte, L., et al. Deposit insurance schemes and bank stability in Europe: how much does design matter? – The European Journal of Finance 2020/26 (7–8).

This dissertation tackles the problem that credit institutions' rights to appeal unlawful application of public powers within the BRRD framework are being severely restricted because of the unclear rules for applying some of these measures, the novel inherent effect these measures have, as well as substantive and procedural limitations. This dissertation focuses on these three specific areas of the general problem of limiting the credit institution's rights in the BRRD. It aims to outline the recovery of credit institutions as a separate coherent concept – a specific public administrative procedure – by drawing the lines between the pre-existing bank supervision, and the new recovery and resolution concepts, and to outline and offer solutions to interconnected specific problems associated with appealing these new recovery and resolution tools and powers[5] created with the BRRD.

The recovery is, as it stands now, conducted by and its tools are at the disposal of the same authority conducting the prudential supervision during bank's normal operating situations – the national competent authorities – the concept of recovery is not immediately distinguishable from the bank supervision, which is meant for bank's normal operating, and from the resolution, which is meant for winding up insolvent banks. Recovery of credit institutions is undefined in the EU laws. The recovery and its specific tools are under threat of becoming fused into the general idea of first stage of resolution, or more likely, simply a part of everyday banking supervision. Moreover, even the national authorities may largely overlap being *de facto* actually the same national body conducting several roles of micro- and macro level supervision, recovery, resolution and even deposit guarantee schemes – e.g., the central bank can also be, next to its original role, both the national competent authority conducting supervision and the national resolution authority conducting the resolution proceedings.[6] With this, the specific conditions for using recovery tools become under threat of being overlooked and different sets of public powers meant for different situations may become incorrectly mixed.

This dissertation argues that mistaking recovery as part of supervision or resolution should not happen and the recovery is a distinct concept with different substance from the supervision on the one side and the recovery on the other side. Therefore firstly, the systematic understanding of recovery as a concept and its boundaries from supervision and resolution are researched. This enables to complete the systematic view of existing supersystem of Banking Union, which includes three interconnected, but distinct systems with their own sets of proce-

---

[5] All administrative measures, tools and powers given to the authorities are referred in this dissertation together as the 'measures' irrespective of the title given to a specific measure in the legislation.

[6] BRRD, Recital 15, art 2(1)(21), 3(1) and 3(3); art 4(1)(40) of 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 176/1, 27.6.2013 (hereinafter 'CRR'); European Commission. Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM (2012) 280 final (hereinafter 'Proposal for the BRRD'), p 9.

dures and tools, separate conditions and their own goals. This means that the recovery and resolution procedures and relevant measures, while formally codified together on the EU level, are distinct from each other, while both are also distinct from the pre-existing concept of financial supervision and its measures. This systematic baseline gives the opportunity for the development of specific practices and application rules for all three concepts, and to investigate further the implications of specific recovery and resolution measures regarding challenging the application of such measures.

The relevance is based on the fact that if recovery is to be considered a differentiable concept, some or even all of the legal rules and principles applicable within the supervisory or resolution framework might not be automatically applicable to the recovery proceedings, and vice versa. If public powers of recovery are to be exercised by the authorities, the questions of making correct lawful decisions by correct public authorities have a direct connection with challenging such decisions, determining the court jurisdiction, and ultimately, although not the subject matter of this dissertation, with state liability. Operating with a clearly outlined system of public powers is obviously favourable over obscurity and disorder. This dissertation argues that bank recovery has already at least some dedicated legal principles applicable only to recovery proceedings. With recovery treated as a separate dogmatic concept, it is less complicated to lay down further legal requirements, rules and principles for specifically dealing with only the recovery procedures. Furthermore, it could be argued that failure of a bank may ultimately be, to some extent, also failure of the supervisor, and it could be argued that the powers related to recovery as a whole could or should be grated to new or other authorities. Such changes would be legally straightforward if the subject matter is clearly outlined.

When the relevant recovery measures or resolution measures are put into use, the BRRD is conflicting regarding usable legal remedies available for banks as the addressees and direct damage bearers of application of measures created with the BRRD. Articles 85(2) and 85(3) of the BRRD established the general rule that Member States must ensure that appeal procedures are in place for both crisis prevention measures and crisis management measures, i.e., for application of both recovery measures and resolution measures. However, the same Article's Section 4 imposes significant restrictions on the appeal procedures by prohibiting interim relief and limiting the remedies for a wrongful decision or action on the part of the resolution authority to compensation for the losses suffered. Moreover, this dissertation argues that the nature and outcomes of some of recovery measures and resolution measures themselves have profound material influence on the effectiveness of the credit institution's defensive actions[7] by removing the representation rights of managers who should and could challenge the application of such measure, or considerably hampering the independent decision making of

[7] From this dissertation's view there is no need to differentiate between the appeal procedures within the same authorities, or via court proceedings challenging the relevant administrative act – both are included when referred in this dissertation as 'appealing' or 'challenging', except third main chapter which deals with jurisdiction over court proceedings only.

the bank in question. This means that the banks could be considerably hindered when deciding to fight back against unlawful application of some recovery and resolution measures. More graphically – the formal right to appeal by the victim after immediate beheading is absurd. This dissertation aims for outlining such cases with main recovery and resolution measures, and to propose a minimal EU-wide legal protective measures which would help to alleviate or remove such effects.

The focus of this dissertation is on central measures set in the relevant EU legal acts which enable the relevant authorities to impose administrative obligations, intervene into bank's operations, or to forcefully change ownership of assets on relevant authority's discretion. Monetary fines or similar punitive sanctions, as well as decisions in 'normal' administrative proceedings (e.g., decisions regarding giving an authorisation to a bank authorisation applicant) are out of the scope of this dissertation. To put it into other words, the focus is on harmonised main actions the authorities can take to either prevent or react to the non-compliance of a bank. More detailed criteria are given in the main sections as appropriate.

The more obvious result of some recovery or resolution measures is the loss of independent managers, and therefore the representation rights of the company in appeal procedures. The other key property of some measures is a restrictive effect on the credit institution's independent decision-making and on the management's loyalty toward the shareholders and the credit institution, which, in turn, exerts a negative influence on motivation to appeal against harmful unlawful administrative acts adopting the same measures. Considering that the result of applying respective specific administrative powers in either recovery or resolution proceedings may make it impossible for a bank to defend itself from unlawful application of these powers, finding out and outlining such effects is paramount to providing remedies for both unintentional mistakes and intentional abuse of power by the authorities. These problems have also raised in practice at the highest level of court proceedings at the CJEU.

To clarify, for the purpose of this dissertation, the objective legal justice in the sense of mounting a challenge against unlawful measures targeted at a bank is presumed to be in the interest of the bank whose interests the management should pursue. Possible pragmatic or materialist reasons for not defending oneself from an unlawful state action are out of scope of this dissertation. Applying the presumption that eliminating the injustice, whether or not any material damage is involved, is considered the most beneficial action for the entity and, accordingly, the expected goal from the management's perspective.

The bank's ability to put its rights into effect are also heavily influenced via the court proceedings when appealing the measures in focus of this dissertation – instead of familiar, close and presumably cheaper proceedings in national courts, the proceedings are often pushed unexpectedly to the EU court system. Moreover – the addressee wishing to appeal may not even be aware of the interconnections resulting in a specific decision, which may result in erroneous impression of the court jurisdiction. The questions arise regards where to search for a possible remedy against an unlawful act stripping the bank's ability to start or continue appeal procedures, and more specifically for this dissertation – which is the right court to decide on admissibility of contest, and legality of such acts? The setup

of the execution mechanisms of the recovery and resolution, the SSM and SRM, both depend heavily on composite procedures[8] and mixed administration involving the ECB and national competent authorities (for SSM) or the SRB and the national resolution authorities (for SRM). Jurisdictional questions are especially important taking into account the lack of clarity that has been pointed out, for example regarding the allocation of liability between ECB and national competent authorities, especially in borderline and concurrent supervisory competence cases.[9]

The correct court system for appeals of decisions resulting from composite procedures has become an ongoing basis of dispute in the Court of Justice of the European Union ('CJEU'). While generally Member State legislation is applied on the representation rights of a bank as a legal person,[10] the composite procedures involve applying consecutively and/or simultaneously both Member State and EU laws, and Member State and EU authorities. Prominently, the restrictive effects of prudential measures have brought up the question of possible removal of the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union[11] and the question of court jurisdiction in composite procedures in landmark cases of the CJEU.[12] It could be argued that the same questions are waiting for the measures of the BRRD.

The EU-Member state court jurisdiction division is unclear in deciding on legality of acts in recovery proceedings, and admissibility of such appeal proceedings. To illustrate this, in cases where an unlawful act of composite recovery

---

[8] For composite procedures, see: Bastos, F. B. Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi – Common Market Law Review 2019/56 (5); Demkova, S. The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism – Review of European Administrative Law, 2019/12 (1); Wissink, L., et al. Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection – Utrecht Law Review 2014/10 (5); Witte, A. The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law? – Maastricht Journal of European and Comparative Law 2014/21 (1).

[9] Gortsos, C. V. Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM) – European Business Organization Law Review 2015/16 (3), p 418.

[10] Limited in some aspects, e.g., with minimum requirements set in Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law – OJ L 169/46, 30.6.2017; for an overview of differences in EU governance practices, see: International Finance Corporation. A Guide to Corporate Governance Practices in the European Union – 2015, available at: https://www.ifc.org/wps/wcm/connect/506d49a2-3763-4fe4-a783-5d58e37b8906/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES&CVID=kNmxTtG (11 November 2021).

[11] Charter of Fundamental Rights of the European Union – OJ C 326/391, 26.10.2012.

[12] Judgement of the Court (Grand Chamber) of 5 November 2019 in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *ECB v Trasta Komercbanka and Others*, ECLI:EU:C:2019:923, para 70; Judgment of the Court (Grand Chamber) of 19 December 2018 in Case C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, ECLI:EU:C:2018:1023, para 41.

procedure removes, according to the Member State laws or otherwise, the possibility to challenge the lawfulness of such act, which system of courts is the correct one to rule in such cases? If the roadblocks for challenging the unlawful administrative acts enforcing recovery or resolution measures are not present or are overcome, by enforcing the proposals of this dissertation or otherwise, it is far from clear if national or EU courts have the jurisdiction to decide over legality of the decisions regarding bank resolution which are the results of proceedings involving both an EU institution and national authorities. CJEU has laid down certain rules for deciding between national and EU court jurisdictions on reviewing legality of acts and proposals adopted in SSM.

One of the aims is to develop and propose, based on CJEU practise, a universal test to determine the EU and member state court jurisdiction of reviewing the legality of acts adopted by institutions within both the SSM and within the SRM frameworks, and therefore also deciding on admissibility of such proceedings. In composite procedures the final formal administrative act may be the result of several visible or unseen preparatory interconnections between the public authorities. Therefore, the scope of included acts is not limited to binding formal administrative act. The objective is to cover a wider range of borderline cases with legal situations unclear – decisions to initiate procedures, preparatory acts and non-binding proposals made by institutions that other institutions may base their final decisions on – all of which are referred to as 'acts' for the purposes of court jurisdiction in composite procedures. Guidelines and recommendations by the European Supervisory Authorities as a form of EU 'soft law'[13] are not included. Developing a test for practical use for determining the court jurisdiction completes the research on the impediments and obscurities in the scope of this dissertation regarding challenging the unlawful application of measures in bank recovery and bank resolution procedures.

The restrictive effects of appealing recovery and resolution measures continues in the court proceedings where banks are forced in a lot of situations to EU court systems with their appeals instead of presumably familiar and cheaper local national court systems. This means that even if the bank manages to appeal an unlawful measure, its legal action might be blocked from local national court system. Resolving the question of court jurisdiction may mean considerable time and resource loss for both the bank and the public authorities.

As the same court will naturally first decide the admissibility of the case before resolving it, solving the question of finding the right court system also solves the question of which court is to decide the acceptance of representation

[13] For more on nature of European Supervisory Authorities' guidelines, see: Schemmel, J. The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market – Capturing the Administrative Influence – Indiana Journal of Global Legal Studies, 2016/23 (2); for latest developments on the non-binding nature of EBA guidelines, see: Judgment of the Court (Grand Chamber) of 15 July 2021 in Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:599; for relevant debate, see for example: Annunziata, F. The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni – European Banking Institute Working Paper Series No. 106, 2021.

rights, whether statutory or issued power of attorney, of the persons bringing the case of challenging a recovery or resolution measure to the court. To find out if, when reaching the challenging stage in courts despite such negative effects, the unclear court jurisdiction can be solved by developing and applying a universal test for finding if EU courts or national courts have the jurisdiction over acts of composite procedures in the Banking Union, that can be used for acts of composite procedures in both the SSM and the SRM frameworks.

To author's knowledge, mapping out the recovery as a concept of its own has not been within direct scope of any prominent legal research. Also, there is no significant prominent legal research with the scope of finding out and mapping out the recovery and resolution measures' restrictive effects on appealing by the banks, nor comprehensive synthesis of CJEU judgements for finding out court jurisdiction as proposed in this dissertation, making this research original.

1.2. Defining the research problems, objectives, and research questions

The main problem is that EU credit institutions' rights to appeal unlawful application of public powers within the BRRD framework are being severely restricted because of the unclear rules for applying some of these measures, of the novel inherent effect these measures have, and of substantive and procedural limitations. Based on the above, this dissertation aims to address three more specific research problems regarding EU credit institutions' rights to appeal measures created by the BRRD, and has the corresponding objectives and research questions.

The first specific research problem is that the recovery of credit institutions is not immediately recognisably and clearly distinguished from the bank supervision and from the bank resolution in relevant EU law, which may lead to overlooking unique preconditions of recovery proceedings, as well as relevant set of rules, requirements and principles applicable to this stage of saving a bank from a collapse. Accordingly, the objective of this dissertation is to prove that the bank recovery could be considered a distinguishable concept within the Banking Union, distinct from pre-existing supervisory framework and the concept of resolution, with its own set of procedures and tools at authorities' disposal, and to map out its boundaries and contents.

To achieve the above described objective of outlining the recovery concept and to examine the proposition, the research questions to achieve this objective are: (i) how to define the scope, functions and measures of the supervisory framework?; (ii) how to define the scope, functions and measures of the resolution framework?; (iii) which characteristics enable to consider the bank recovery as a distinguishable concept from the supervision and resolution?; and (iv) how to define the substance of bank recovery, i.e., its dedicated procedures and measures?

The second specific research problem is the conflict between the requirement that all recovery and resolution measures must be appealable by affected persons, and the inherent effect of some recovery and resolution measures, especially in combination with immediate effect and enforceability, considerably hindering or

making it impossible for the bank to use its theoretical legal remedies against applying these measures. Accordingly, the objective is to identify and describe the direct negative effects that the specific measures available to authorities in bank recovery proceedings and resolution proceedings have on the bank for deciding to use its legal remedies against unlawful application of the measure in question, and to provide possible uniform solutions to overcome such problems. Not a dedicated major focus of this research, but highlighting certain problems within Estonian transposition of the BRRD also helps to contribute for supplementing Estonian legal discourse in the subject field.

To achieve the objectives covered above, the research questions are: (v) how to define the probable interests for a bank to challenge the unlawful administrative acts?; (vi) what are the relevant impediments for challenging the unlawful administrative acts?; (vii) which main recovery measures entail such impediments because of their inherent effects?; and (viii) which main resolution measures entail such impediments because of their inherent effects?

The final specific research problem of EU credit institutions' rights to appeal BBRD measures is that when trying to appeal against application of a resolution measure, which are usually taken in complex composite procedures involving both EU and member state authorities, the court jurisdiction between EU courts and member state courts is not clear. Accordingly, the objective is to develop and propose a universal test for finding out the court jurisdiction between EU courts and member state courts for all relevant Banking Union administrative acts – the decisions in supervision, recovery as well as resolution of banks.

To achieve this objective of developing an universal test for finding out the court jurisdiction, the research questions are: (ix) what are the rules and reasoning of the CJEU for differentiating between EU and national court jurisdiction in SSM-related and other composite procedures?; (x) are application mechanisms SSM and SRM similar enough to apply the CJEU practice regarding SSM on SRM?; (xi) what would be the construction of the universal test for finding out EU and member state court jurisdiction for both SSM and SRM?; and (xii) how such test would work in practice? i.e., application of the test on acts implementing main resolution measures.

1.3. Methods and sources

The research is based on critical systematic analysis of positive law, its concepts, terms and theories. The main tools used in the research for this dissertation are based on combining the dogmatic, systematic, analytical and teleological methods. Dogmatic and systematic methods are used for creating a comprehensive view of consistent and systematic setup of the subject field comprising of logically fitting set of comprehensive regulations with a clear goal, relevant legal practice, and previous legal research. This also includes investigating the connections, interaction and influence of relevant legal acts, previous legal research, theories and legal practice, and for distinguishing relevant (sub)systems and their substance within the general legal environment. The analytical research is based on

dismantling the subject, practice and theory, and detailed examination of relevant elements. The teleological method is aimed at finding out the real aim and meaning of relevant legal regulations. Combining these methods has given the opportunity to comprehensively answer the research questions and achieve the aims of the dissertation.

As the topic, the aims and the research questions are mainly directed by the EU law, the normative focus and research is concentrated on relevant EU legal acts. More specifically, the EU legal acts dominantly in focus are the BRRD (as amended by the BRRD II[14]), the SSMR, the SRMR (as amended by 'SRMR II'[15]), the Capital Requirements Directive ('CRD IV')[16] (as amended by 'CRD V'[17]) and the Capital Requirements Regulation ('CRR') (as amended by 'CRR II'[18]). It must be highlighted that at the time of submitting the Publications, important overhauls of several key EU legal acts were in progress, mainly the adoption and/or transposition of recovery- and resolution-related BRRD II, CRD V, CRR II and SRMR II. Regarding the scope of the Publications and this dissertation, such changes have not been directly relevant to the conclusions of the Publications. However, this dissertation provides for legal changes and additions where relevant, especially where the new legislation provides for additional relevant recovery or resolution powers for the authorities. As a number of relevant EU legal acts are directives without direct effect, author's native Estonian state law is used to a limited extent in the second and third chapters for providing the view of implementation of the directives, to highlight problems.

The theoretical sources are mainly composed of articles publicised in peer-reviewed legal journals and other trustworthy and authoritative sources. The general pattern of relevant theoretical literature is mainly focusing ultimately on praising or criticising the systems, structures or specific measures based on their

---

[14] 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 – OJ L 150/296, 7.6.2019.

[15] Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms – OJ L 150/226, 7.6.2019.

[16] 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC – OJ L 176/338, 27.6.2013.

[17] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures – OJ L 150/253, 7.6.2019.

[18] Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 – OJ L 150/1, 7.6.2019.

presumed impact on the markets or customers, and concentrating significantly less on impact on addressees of the relevant regulations and measures – the banks as persons. This compendium is intended to contribute into relevant academic discussions by filling that gap in research aims. For teleological purposes, the corresponding preparatory and other documents in legislative proceedings of relevant legal acts have been included as the sources of the research. Also, the judicial practice plays a very important role in this dissertation with interpreting the legislative acts, and for formulating or proposing the teleological background of norms. Therefore, the research, especially in the fourth chapter, is also based on critical analysis of relevant court decisions, mainly judgements of the CJEU.

The dissertation is based on three previous Publications written as the sole author and previously each publicised in peer-reviewed legal journals with international editorial boards and blind peer-review process. This dissertation does not only reflect or summarise the reasoning, argumentation and findings of these Publications, but builds upon this research by supplementing the topics covered in these Publications with additional relevant additions to tie the more specific problems covered in the Publications together, and provide a comprehensive overview of the subject fields. This dissertation also provides legal and judicial updates to the underlying Publications.

The structure is based on the three main research objectives and relevant research questions. To start answering the main research questions, the core of pre-existing EU bank supervisory system is and the concepts of resolution and recovery are covered in the second chapter. The second chapter targets the questions related to defining the boundaries and substance of bank recovery. This is possible only by defining the boundaries of pre-existing supervision system on one side and more clear resolution system on the other side, and then defining the boundaries of bank recovery. The main conclusions of the second chapter with the regard of the research questions are based on Publication I. In addition, this dissertation provides a more detailed analysis of both the supervision and resolution, and relevant execution mechanisms, in first and second subchapters of the second chapter, respectively.

The third covers the questions related to inherent negative effects the recovery measures and the resolution measures outlined in the second chapter, have or may have on challenging the administrative acts implementing these measures. The third chapter is primarily based on Publication II, which reflects the main focus of the second group of research questions. This dissertation builds upon Publication II by providing relevant additions and new judicial practice, as well as Estonian law-based example of relevance of the subject matter.

The fourth chapter covers the third group of research questions related to actually challenging the administrative acts which enact the recovery measures or the resolution measures outlined in the previous chapters, and which negative effects on bringing up such a challenge, in the correct EU or Member State level court. This chapter is based on Publication III, which is supplemented by analysis of important new judicial practice, and also with applying the developed test for main recovery measures.

2. Defining the recovery of credit institutions

2.1. Prudential supervision

2.1.1. Supervision system's background, objectives and scope

The recovery of credit institutions is not immediately, recognisably and clearly distinguished from the bank supervision and from the bank resolution in relevant EU law, which may lead to overlooking unique preconditions of recovery proceedings, as well as relevant set of rules, requirements and principles applicable to this stage of saving a bank from collapse.

An overview of the supervisory framework's core properties and its boundaries is given before answering the research questions can begin. The supervisory application system SSM is also the application system for the recovery measures,[19] which is in turn basis and a model for the resolution application system.[20] Also, the Commission has seen the new recovery and resolution as extension to the pre-existing supervision[21] which provides the supervision framework as the starting point and boundary for the newer recovery and resolution frameworks which helps to ascertain the boundaries of the recovery and resolution, the novelty of the relevant measures available to the authorities, and differences and similarities of relevant application systems and procedures.

The concept of standardised prudential requirements and relevant supervision has been in place and in development for considerably longer than the unified bank recovery and resolution concepts. Standardised capital and liquidity rules are based on three non-obligatory Basel Accords from 1988,[22] 2004[23] and 2010[24]

---

[19] SSMR, art 4(1)(i) and 6(4).

[20] European Commission. Proposal for a Regulation of the European Parliament and of 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM (2013) 520 final, p 6.

[21] European Commission. Commission Staff working document: Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, SWD (2012) 166 final (hereinafter 'Impact Assessment of the BRRD), p 8.

[22] Basel Committee on Banking Supervision. International convergence of capital measurement and capital standards – 15 July 1988 (Basel I), available at https://www.bis.org/publ/bcbs04a.pdf (11 November 2021).

[23] Basel Committee on Banking Supervision. Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework – 10 June 2004 (Basel II), available at https://www.bis.org/publ/bcbs107.pdf (consolidated text, 11 November 2021).

[24] Basel Committee on Banking Supervision. Basel III: A global regulatory framework for more resilient banks and banking systems – 16 December 2010, revised 01 June 2011 (Basel III), available at https://www.bis.org/publ/bcbs189.pdf (consolidated text, 11 November 2021).

by Basel Committee on Banking Supervision. Although Basel Committee on Banking Supervision only comprised of 11 members[25] when approving Basel I, and has from then grown to 28 jurisdictions[26], the Basel Accords which have been, to a smaller or larger extent,[27] at least formally basis for the prudential supervision regulations for the majority of world countries.[28] The basic concept of EU-level unified prudential requirements transposing the core of Basel Accords[29] together with providing the frameworks of supervision and supervisory powers, but also market entry (authorisation) and providing services in other Member States, began with the first CRD – directive 2000/12/EC[30] – entering into force in year 2000, and has evolved through several iterations of the relevant legal acts into the current dual setup of CRD V and CRR together with accompanying acts.

It must be noted that there are numerous additional harmonised rules for service conduct, anti-money laundering, consumer protection and other related fields which have also been fully or partially added to the bank supervisory network, but which are not universal meaning that the relevance and applicability of which depend heavily on specific services and activities of a specific bank,[31] and mainly have national level execution mechanisms that may or may not coincide

---

[25] Eleven industrial countries making up the Group of Ten: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States: Basel Committee on Banking Supervision. G10 – available at https://www.bis.org/list/g10publications/ (11 November 2021).

[26] More specifically composing of 45 central banks and supervisory authorities from 28 jurisdictions: Basel Committee on Banking Supervision. Basel Committee membership – available at: https://www.bis.org/bcbs/membership.htm (11 November 2021).

[27] For limited implementation of Basel II, see: Jones, E., Zeitz, A. O. The Limits of Globalizing Basel Banking Standards – Journal of Financial Regulation 2017/3 (1).

[28] Stephanou, C., Mendoza, J. C. Credit Risk Measurement Under Basel II: An Overview and Implementation Issues for Developing Countries – World Bank Policy Research Working Paper No. 3556, 2005, p 3, 26; for the last report on adoption by Basel Committee on Banking Supervision member states, see: Basel Committee on Banking Supervision. Progress report on adoption of the Basel regulatory framework – 14 October 2021, available at: https://www.bis.org/bcbs/publ/d525.pdf (11 November 2021).

[29] CRD IV, Recitals 1, 10, 41, 82, 92.

[30] Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions – OJ L 126/1, 26.5.2000.

[31] For example, if offered by bank, payment services are subject to laws based on Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC – OJ L 337/35 23.12.2015 (Payment Services Directive 2 or 'PSD 2'), and on Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features – OJ L 257/214, 28.8.2014 (Payment Account Directive or 'PAD').

with conducting prudential supervision.[32] For stated reasons such additional service related regulations are not in the scope and are not researched further in this dissertation.

Contrary to international worldwide *de facto* standards in prudential requirements, the unified recovery and resolution systems also differ as being mainly non-existent in member states before adoption on the EU level. According to the impact assessment of the BRRD both the national recovery and resolution systems were fragmented,[33] and only a few Member States (UK, Germany, Sweden, Denmark, the Netherlands) had special bank resolution systems in place[34] with a few more (Ireland, Greece, Portugal) were in process of developing a national resolution system.[35] Exiting supervisory powers were seen as the way to deal with crisis situations and early intervention as it was understood then.[36] Without the pre-existing dogmas like in the field of prudential requirements and supervision, the Commission naturally had more manoeuvring room when drafting the new systems for saving and resolving the failing banks, which in turn naturally created novel problems this dissertation is dealing with. No longstanding dogmas to base on together with the fact that standardised recovery and resolution concepts were formalised and adopted in EU considerably more recently (2014) contribute to the arisen questions this dissertation addresses.

For the purposes of this dissertation, only the micro-level supervision and related tools are in focus. The difference between micro- and macro-view is that the micro-level view concentrates on an individual bank, while in contrast the macro-level view concentrates on the financial system as a whole[37] to make sure the financial market functions. Although, the micro- and macro-prudential views are not fully separatable, micro- and macroprudential policies have mutual interactions,[38] and relevant tools may be in cross-usage.[39] Despite these factors, the general idea of dealing with an individual institution corresponds to the logic of recovery and resolution which also deal with saving a failing individual bank, and with resolving a failed bank, respectively. It must be noted that the underlying

---

[32] For example, in Estonia the competent authority (Finantsinspektsioon) and the consumer protection authority (Consumer Protection and Technical Regulatory Authority) enjoy joint supervisory powers over payment service conduct as well as related misdemeanours: Tarbijakaitseseadus, RT I, 31.12.2015, 1, § 21, § 4(2), § 65, § 75(3) and § 75(4); Finantsinspektsiooni seadus, RT I 2001, 48, 267, § 2(1); Makseasutuste ja e-raha asutuste seadus, RT I 2010, 2, 3, § 3(5), 63(1).

[33] *op cit* 21, Impact Assessment of the BRRD, p 11, 15, 19.

[34] *Ibid*, p 15.

[35] *Ibid*, p 61, 79.

[36] *op cit* 21, Impact Assessment of the BRRD, p 16.

[37] Boissay, F., Cappiello, L. Micro- versus Macro-prudential supervision: potential differences, tensions and complementarities – Financial Stability Review, European Central Bank May 2014, p 135.

[38] *Ibid*, p 115.

[39] *Ibid*, p 100.

reason for saving a bank or resolving it, or doing it in a specific way (choosing measures in relevant proceedings), may also be based on macroprudential policy aims, but such aims are irrelevant in current context.

The aims of the pre-existing prudential requirements and supervisory system are mainly the financial market stability[40] and smooth functioning of the internal market[41]. This can be translated into the micro-view context as to making sure an individual bank is on sufficiently reliable grounds, and making sure a bank operates in another Member State by following the EU standardised rules. The corresponding view from the supervisory subject's side is firstly that the regulatory framework is common for it and its competitors in all the Member States, which is together with the common recovery and resolution rules generally referred to as the single rulebook[42]. And secondly, that the bank can make use of the standard rules for offering services in other Member States.

The EU prudential supervision system functions to achieve the above stated goals can be grouped by more specific topic as follows:

1. General access to the market for a bank – composing of granting and revoking the authorisations/activity permits/licences[43] for banks,[44] and of regulations for providing services in other countries,[45]
2. Access to the market for bank's shareholders – composing of allowing or prohibiting acquisition of qualifying holdings in banks,[46]
3. Governance – composing mainly of internal structure and arrangements,[47] and of requirements for managers,[48]
4. Capital requirements – the core composing of capital buffers,[49] own funds requirements,[50] requirements limiting large exposures,[51] liquidity requirements,[52]

---

40 CRR, Recitals 7 and 12.

41 CRD IV, Recitals 5, 6, 13, 28 and 100; CRR Recitals 7, 8, 9 and 14.

42 *op cit* 20, Commission. COM (2013) 520 final, p 2, 6, 8, 12, 90; For usage by the Commission, see for example: European Commission. A rulebook for all financial actors in the EU – available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/what-banking-union_en#deeper-integration-of-the-euro-area-banking-system (18 May 2022).

43 Specific terms may wary by country.

44 Covered in: CRD IV, Chapter 1, Title III.

45 Covered in: CRD IV, Titles IV and V.

46 Covered in: CRD IV, Chapter 2 of Title III.

47 Covered in: CRD IV, Chapters 2 and 3 of Title VII.

48 Covered in: CRD IV, art 91.

49 Covered in: CRD IV, Chapter 4 of Title VII.

50 Covered in: CRR, Parts two, three and seven.

51 Covered in: CRR, Part four.

52 Covered in: CRR, Part six.

5. Reporting[53] and disclosure requirements,[54]
6. Supervisory system and supervisory powers.[55]

Based on CRD IV Articles 1, 2(1) and 3(1)(1), prudential supervision is ongoing and lasts as long as the bank fulfils conditions in CRR 4(1)(1), i.e., is a credit institution, plus access to the activity of credit institutions, i.e., the administrative procedures for granting relevant authorisation. From that it can be derived that prudential supervision is an ongoing process, although using specific supervisory measures may require additional perquisites to be fulfilled.

2.1.2. Main supervisory measures

Article 64 of the CRD IV could be seen as indicating to the central prudential powers. As the partial directive-based approach leaves considerable freedom for Member States to decide the exact proceedings and supervisory powers, there are differences in national administrative proceedings, and additional functions could be potentially given to relevant national authorities, the focus is on main measures every competent authority must have according to the CRD IV and CRR. Article 64 of the CRD IV outlines the supervisory powers as part of the principles of prudential supervision. Article 64(1) refers that competent authorities must, in particularly, have at their disposal the measures and powers towards banks referred to in Articles 18, 104 and 105 of the CRD IV. Of the referred Articles, Article 104 gives a more elaborate list of supervisory powers in prudential supervision. In addition, the powers set in Articles 65(3), 66(2) (points (a), (b) and (f), 66(3) (points (a), (b) and (c)), 91(1) and 106 have potentially similarly high impact and intrusion into bank's operations. Therefore, the named powers should arguably be considered as part of the core supervisory powers. The full list, distilled from non-relevant aspects[56] could be consolidated as the rights to:

1. withdraw the authorisation granted to a credit institution;
2. require banks to have additional own funds in excess of the default requirements;
3. require the reinforcement of the arrangements, processes, mechanisms and strategies;
4. require banks to submit a plan to restore compliance with supervisory requirements, set a deadline for the plan's implementation, require improving the plan;

---

53 Covered in: CRR, Part seven A.

54 Covered in: CRD IV, Title VII; CRR, Part eight.

55 Covered in: CRD IV, Titles II, VII and IX; CRR, Parts one and nine; SSMR in full.

56 Measures may contain preconditions and/or may be in addition covered in specific clauses in more detail. Some specifics without meaningful relevance for this dissertation have been left out from the wording of the list.

5. require banks to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;
6. restrict or limit the business, operations or network of banks or to request the divestment of activities that pose excessive risks to the soundness of a bank;
7. require the reduction of the risk inherent in bank's activities, products and systems;
8. require banks to limit variable remuneration;
9. require banks to use net profits to strengthen own funds;
10. restrict or prohibit distributions or interest payments to shareholders, members or holders of Additional Tier 1 instruments;
11. impose additional or more frequent reporting requirements;
12. impose specific liquidity requirements;
13. require additional disclosures;
14. ask and get information and documents from banks, representatives, staff and certain third parties;
15. remove management body members not fulfilling the requirements from the management body;
16. require to publish certain information more often or using specific media or locations;
17. in case of some breaches, publicise a statement identifying the person or bank responsible, and the nature of a breach;
18. in case of some breaches, issue an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;
19. in case of some breaches, suspension of the voting rights of the shareholder or shareholders held responsible for the breaches.

2.1.3. Supervision execution mechanism – the Single Supervisory Mechanism (SSM)

The execution of prudential supervision has several layers. On the primary level the powers are vested with national competent authorities who must carry the functions and duties provided for in CRD IV and CRR.[57] CRD IV sets the overall rules for supervision within the EU. According Article 5, it is allowed for a Member State also to divide the prudential supervision tasks and powers between several competent authorities. According to Article 49, the competent authorities of home Member State remain responsible for prudential supervision also in regards of bank's cross-border activities with Article 41 setting a mechanism for

[57] CRD IV, art 4; see also CRD IV, Recital 25.

the host Member State authorities to inform them of non-compliance or of such risk. Based on Article 43, the host Member States are, however, allocated limited powers for precautionary measures for emergency situations to protect against financial instability that would seriously threaten the collective interests of depositors, investors and clients in the host Member State. In addition, the host Member States enjoy a general right to take preventive measures and right to punish for breaches committed within their territories or in the interests of the general good according to Article 44, and the right to require information according to Article 40. The wording of relevant sections and recitals 27 and 28 of the CRD IV still strongly refer that taking supervisory measures by host Member States should be an exception and not a rule.

As for the second layer, in 2014,[58] the SSM, a radical new supranatural supervisory system for the EU prudential supervision, became operational. The radicality lies in creating a peculiar semi-centralised system where Articles 1, 4, and 5 and Chapter III of SSMR gave the European Central Bank direct prudential supervisory powers for significant banks, and for banks of ECB's choosing, and Article 6(1) gave the ECB the centralising role,[59] which considerably reduced national competent authorities' powers. The role of national competent authorities is reduced to be ECB's assistants,[60] while according to Articles 6(4) and 6(6) the national authorities retain limited powers for ongoing supervision of less important banks by default, until ECB does not decide to take matters into their own hands. Exceptionally, it can be seen from Articles 6(4), 4(1)(a) and 4(1)(c) of the SSMR that approving and revoking authorisations as well as approving qualifying holdings remain ECB's exclusive power. The CJEU has judged the ECB's competence to be absolute for all credit institutions within the EU, even if formally under national competent authority's supervision where it should be understood as simply implementing the ECB's competence on national level[61] –

---

58 SSMR, art 33.

59 Framework for which has been enacted with Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14.5.2014.

60 *Inter alia*, SSMR, art 6(2), 6(3), 6(5) and 9(1).

61 Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 May 2017 in Case T-122/15, Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank, ECLI:EU:T:2017:337, para 54 to 64 and 72, upheld by Judgment of the Court (First Chamber) of 8 May 2019 in Case C-450/17 P, Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank, ECLI:EU:C:2019:372.

a widely criticised interpretation[62] which also resulted in changes in legislation for removing the ECB competence over the appellant on directive level.[63]

Jurisdictionally SSM applies only within the eurozone and in voluntarily joined Member States whose currency is not the euro.[64] Currently only Croatia[65] and Bulgaria[66] are SSM's non-euro Member States, both were accepted in 2020. Structure and decision-making processes within the SSM are analysed in more detail in Chapter 4. The practical outcome of this legal setup is that ECB supervises directly a very small number of banks with a large asset proportion and controlling the entry to and exclusion from EU banking market. With the help of national competent authorities, ECB conducts direct ongoing prudential supervision of 113 significant banks (groups counted as one) which hold almost 82% of banking assets of SSM participating states.[67] The remaining more than 2400 banks, or more than 95%, have been left under national supervision[68] with ECB retaining the right to take the supervision over if deemed necessary according to the provisions of the SSMR.

As covered before, the ECB has been given the sole discretion over approving and terminating authorisations of banks, but the legal construction of deciding over approving the authorisation is legally questionable and potentially problematic. The ECB has, based on national competent authority's draft decision, the

---

62 For example, see: Tröger, T. H. How not to do banking law in the 21st century – SAFE Policy Letter No. 56, Goethe University Frankfurt 2017; Annunziata, F. European Banking Supervision in the Age of the ECB. Landeskreditbank Baden-Wüttenburg v. ECB – European Business Organization Law Review 2020/21; Anzini, M. What Role is left for National Authorities within the Single Supervisory Mechanism? – A Critical Assessment of the L-Bank Case – Centrum für Europäische Politik 2019, available at https://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/cepAdhoc_L-Bank/cepAdhoc_What_Role_is_left_for_National_Authorities_within_the_Single_Supervisory_Mechanism_.pdf (19 March 2022).

63 CRD V, art 1(1)(5).

64 SSMR, art 2(1) and 4(1); Procedures for joining are governed by: Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5) (2014/434/EU) – OJ L 198/7, 5.7.2014.

65 European Central Bank. ECB establishes close cooperation with Croatia's central bank – Press Release 10 July 2020, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200710_1~ead3942902.en.html (11 November 2021).

66 European Central Bank. ECB establishes close cooperation with Bulgaria's central bank – Press Release 10 July 2020, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200710~ae2abe1f23.en.html (11 November 2021).

67 European Central Bank. Single Supervisory Mechanism – available at: https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html (18 May 2022).

68 European Central Bank. List of supervised entities – 1 October 2021, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities202111.en.pdf?3cc68294ea26e5820547f77d05886b26 (11 November 2021); For dynamics in numbers of the less significant institutions, see: European Central Bank. Risk report on less significant institutions – available at: https://www.bankingsupervision.europa.eu/ecb/pub/html/ssm.lsiriskreport202001~48ecda4549.en.html (11 November 2021).

exclusive right to approve applications for authorisations,[69] but the negative rejection decision is left for the national competent authorities.[70] To put it into other words – to get the authorisation, the applicant must first convince the national competent authority to give its initial approval with providing draft positive decision to the ECB, and then also convince the ECB to give its final approval. The legal situation may be especially obscure if the opinions of the national authority and the ECB do not match – namely if a national competent authority is of the opinion to approve the application, but ECB disagrees. Although it would certainly not give the applicant the right to start operating as a bank, there could be two materially opposite decisions by two authorities and unwillingness for the national authority to make the rejective decision despite ECB's unwillingness to approve the authorisation. This would mean there is no specific negative administrative act to appeal.

The legal structure of centralising the prudential supervision could be considered peculiar. ECB has been conferred specific powers and tasks, and is in such cases 'inserted' into national laws as replacing the national competent authority in relevant laws, and also applying both EU and national laws.[71] This means that within or the purposes of carrying out the tasks conferred on the ECB by the SSMR, the explicit references to a national competent authority in national legislation should be actually read as referring to ECB. A situation where national law's literal text is not definite nor clear, or may even be considered untrue, certainly raises questions of legal certainty. Also, ECB must follow both the material and procedural norms of the national legislation in these situations.[72] To that end, ECB is heavily dependent on national authorities for both getting the information, drafts and recommendations needed for the prudential supervision, and for application of national laws to actually achieve its purpose.[73]

The effects of this semi-centralised approach have been proven to be mixed. Both the SSM and SRM initiatives have been considered to lead to a profound change in the regulation and governance of the banking business and have been considered to represent a relevant step in safeguarding financial stability in Europe, particularly in mitigating moral hazard[74] and to have positive effects on

---

[69] SSMR, art 4(1), 6(4) and 14(1) to 14(3).

[70] SSMR, art 14(2).

[71] SSMR, art 4(3) and 9.

[72] For specifically on authorisation and assessments of qualifying holdings, see additionally SSMR, art 14(1), 14(2) and 15(1).

[73] According to the Commission's proposal, this seems to have been exactly the intention from the beginning: European Commission. Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM (2012) 511 final, p 5.

[74] García-Olalla, M., Luna, M. Market reaction to supranational banking supervision in Europe: Do firm- and country-specific factors matter? – Empirica 2021/48, p 947, 948.

reducing the credit risk perspective.[75] On the other side the approach has proven to be ineffective and negative on ECB supervised bank disclosures.[76]

The specific rights and powers conferred to ECB are strictly limited with prudential supervision and specific tasks set in the SSMR.[77] ECB can be understood to have the rights to directly apply all the main supervisory measures of CRD IV listed above,[78] but also interestingly, according to paragraph 3 of Article 9(1), indirectly via instruct the national competent authorities to apply certain measures. Therefore, assuming correct transposition of CRD IV in Member States, there would be no technical need for doubling the powers of CRD IV transposed into national laws, in the SSMR. However, this is not the case – the main supervisory powers are doubled in Chapter III of SSMR, with also providing more detailed provisions for investigatory powers in Chapter III, Section 1. In addition, according to Article 18 of the SSMR, the ECB is designated as the imposer of relevant administrative penalties, which are not directly in this dissertation's focus. In conclusion, the ECB has been designated the same supervisory powers as the national competent authorities, but has the right to impose them only in the case of breaches with provisions of authorisation, qualifying holding, and prudential requirements. In all other cases, the national competent authorities are still competent for imposing the supervisory measures.

2.2. Resolution

2.2.1. Resolution objectives and scope

Of the three concepts this dissertation is concerned with, resolution is the only one with a clear legal definition in the EU legal acts. According to Article 2(1)(1) of the BRRD, 'resolution' means the application of a resolution tool or a tool referred to in Article 37(9) of the BRRD in order to achieve one or more of the resolution objectives referred to in Article 31(2) of the BRRD. From this it is apparent that the resolution is defined via its objectives, and the measures created and available to the resolution authorities, which are examined in this subchapter together with the execution mechanism for the resolution – the SRM.

While during the recovery phase the control should stay in the hands of the credit institution's management, the approach taken in resolution is the opposite – the authorities take over the decision-making, with far-reaching resolution measures.[79] By their very nature, the resolution actions created with the BRRD

---

[75] Avignone, G., et al. Centralised or decentralised banking supervision? Evidence from European banks – Journal of International Money and Finance 2021/110.

[76] Altunbas, Y., et al. European Banking Union and bank risk disclosure: the effects of the Single Supervisory Mechanism' – Review of Quantitative Finance and Accounting 2022/58.

[77] SSMR, art 1 paragraph 2, 4, 9(1) and 16(1).

[78] SSMR, art 4(3), 9(1) and 9(3).

[79] BRRD, Recital 39; *op cit* 21, Impact Assessment of the BRRD, p 83.

and the SRM Regulation bring infringements of rights of shareholders and creditors.[80] The BRRD includes a vast set of central powers, along with preparatory and ancillary supportive powers linked to bank resolution, from which resolution authorities can choose at their discretion in line with the resolution strategy devised for the individual institution.[81] The term 'resolution objectives' has a legal definition, which again refers to Article 31(2) – according to Article 2(1)(16) of the BRRD, 'resolution objectives' means the resolution objectives referred to in Article 31(2). Paragraph 2 of the referred Article contains the specific list of resolution objectives, which is also doubled in Article 14(2) of the SRMR as:

(a) to ensure the continuity of critical functions;[82]
(b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;[83]
(c) to protect public funds by minimising reliance on extraordinary public financial support;
(d) to protect depositors covered by Directive 2014/49/EU[84] and investors covered by Directive 97/9/EC[85];
(e) to protect client funds and client assets.

The last subparagraph of the same paragraph states that the resolution authority shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives, and according to paragraph 3 of the same Article, the resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.

---

[80] Binder, J.-H. Proportionality at the Resolution Stage: Calibration of Resolution Measures and the Public Interest Test – European Business Organization Law Review 2020/21, EBI Working Paper Paper No. 12, 2017, SAFE Working Paper No. 179, Goethe University Frankfurt, 2017, p 453.

[81] Tröger, T. H. Too Complex to Work: A Critical Assessment of the Bail-In Tool Under the European Bank Recovery and Resolution Regime – Journal of Financial Regulation 2018/4 (1), p 19.

[82] 'Critical functions' is itself defined as activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations: BRRD, art 2(1)(35).

[83] See also: SRMR, Recital 55.

[84] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes – OJ L 173, 12.6.2014.

[85] Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes – OJ L 84/22, 26.03.1997.

The defined resolution objectives are very broad and by themselves not enough to define the content of resolution. Firstly, all of the five objectives deal with general goals of ensuring the EU financial market as a whole continues to function properly, the damage would be minimal and the protections of depositors.[86] The most tangible problem the new legal system tries to solve is saving banks with public money – it has been found that European taxpayers have covered more than two-thirds of the cost of resolving and/or recapitalising distressed banks and if the private sector would have effectively contributed up to only 8% of assets, this would have halved the taxpayer burden.[87]

Except to the specific objective of minimise reliance on taxpayers' money, these are no different from the prudential supervision, and it could be argued, that they are even essentially the same as the general macro- and macroprudential objectives covered above. The difference may be seen in objectives of specific tools – for example resolution framework's aim of improving resolvability vs higher capital requirement's aim for reducing the probability of a failure,[88] but the defined resolution objectives are too general to address such specific differences from the prudential supervision. Secondly, the listed objectives lack any meaningful precision. It could be argued that the wording of the listed objectives is so general, that it is impossible to understand the actual goals without additional investigation of conditions for resolution and without the help of analysing the presumed effect of the resolution tools. These factors raise the question if such very broad and unspecific definition of resolution objectives is appropriate or necessary at all.

While the resolution objectives fail to give the context and substance of what the resolution is, adding the conditions for resolution help to mitigate the shortage of content and help to understand what is actually meant by the resolution. The objectives and conditions have been combined by scholar Michael Schillig in a relatively coherent way as resolution applying where:

1. the competent authority, after consulting the resolution authority (or *vice versa*), determines that the institution is failing or likely to fail; provided
2. there is no reasonable prospect that failure could be prevented through alternative, in particular, private sector measures; and
3. resolution action is necessary in the public interest, that is, it achieves, and is proportionate to, one or more of the resolution objectives, and winding up of the institution pursuant to normal insolvency proceedings would not meet those objectives to the same extent.[89]

---

[86] For the resolution objectives, see also: *op cit* 6, Proposal for the BRRD.

[87] Philippon, T., Salord, A. Bail-ins and bank resolution in Europe: A progress report – Geneva Reports on the World Economy Special Report 4, International Center for Monetary and Banking Studies 2017, p 34 and the executive summary.

[88] *op cit* 21, Impact Assessment of the BRRD, p 17.

[89] Schillig, M. EU bank insolvency law harmonisation: What next? – International Insolvency Review 2021/30 (2), 240.

To further clarify the resolution, the same scholar's conclusions cover the essence of resolution meticulously: in the absence of systemic implications, 'normal insolvency proceedings' apply as the default option (based on Articles 32(5), 32b of the BRRD and Article 18(5) of the SRMR); when resolution is triggered, the BRRD/SRM resolution regime supersedes and displaces the applicable national bank insolvency law (based on Article 86 of the BRRD) and the BRRD/SRM resolution framework seeks to replicate the loss allocation principles of general insolvency law so as to curtail moral hazard and enhance market discipline; while at the same time providing a tailored administrative procedure with far-reaching powers to prevent the systemic implications of contagious knock-on effects.[90] It can only be agreed with those conclusions. However, to fully cover the essence of the resolution, the resolution measures must be outlined.

2.2.2. Main resolution measures

In the focus of this dissertation are the key resolution measures available to resolution authorities in connection with resolution proceedings, which leaves out of the scope all non-central accompanying rights for specialised situations which scattered through the legislation. The BRRD includes a vast set of central powers, along with preparatory and ancillary supportive powers linked to bank resolution, from which resolution authorities can choose at their discretion in line with the resolution strategy devised for the individual institution.[91] For the purposes of this dissertation, the scope is limited to the general-application central measures set in the BRRD which make it possible to enforce the resolution proceedings as intended. The core resolution measures for this dissertation are considered to include preparatory measures, resolution tools, general resolution powers, special management, appointing persons exercising resolution powers, powers related to suspending certain obligations, rights and enforcement, power to prohibit certain distributions, and the power to require to write down or convert relevant capital instruments and eligible liabilities.

Resolution's preparatory measures

Two new concepts were developed with the BRRD in regards to preparing for the resolution of any bank in the EEA – the minimum requirement for own funds and eligible liabilities (MREL) and resolution planning. Although neither of the two are reactive measures applied by the authorities in case of a bank starting to fail, both are integral elements of the resolution system. While the resolution procedure itself has defined conditions that must be met in order for the resolution procedure to be legally valid to start,[92] preparing for resolution of a bank starts

---

90 *Ibid*.

91 *op cit* 81, Tröger 2018, p 19.

92 BRRD, art 32 to 33; SRMR, art 18.

together with authorisation and relevant regulatory burdens remain for banks until they operate. These two concepts make up the backbone of preparing for the unfortunate situation where a failing bank is no longer left to continue operating as-is, but is forcefully resolved by the authorities instead. These are the tools in resolution authorities' toolboxes to assure the resolution procedure would be successful, if it should ever be activated. In addition, the resolution authorities have the power to remove impediments of resolvability, which can be grouped together with MREL and resolution planning as the obligations, controlled by resolution authorities, which are always on the background with the objective to be prepared for potential resolution procedures.

MREL

MREL is a minimum amount of capital that must be held by a bank at all times to ensure the effectiveness of bank resolution, and specifically, of the bail-in tool, which is expressed as a percentage of the total liabilities and own funds of the institution.[93] Without MREL, the loss incurred by a bank in a financial crisis, would presumably be too large for that credit institution to fully absorb by either cancelling or converting the MREL to equity and the bail-in tool would not work. [94] The primary purpose of MREL is to ensure the feasibility of resolution once the bank is already failing or likely to fail,[95] specifically by ensuring enough liabilities, which can be used in when applying the bail-in tool, to absorb the losses.[96] This is different form the purpose for capital requirements to avoid the failure altogether. However, it is obvious that an obligation to hold capital with the goal of ensuring the effectiveness one resolution tool if it should be ever used can be seen as another layer of capital requirements with doubling or additional effects of prudential capital requirements.[97]

---

93 BRRD, Recital 79; *op cit* 6, Proposal for the BRRD, p 13.

94 de Gioia Carabellese, P., Zhang, D. Bail-in Tool and Bank Insolvency: Theoretical and Empirical Discourses around a New Legal (or Illegal) Concept – European Business Law Review 2019/30 (3) via https://repository.canterbury.ac.uk/download/bf8f74a916e446f9d8d574d0bec54af104896df7b39cdfb2a541a9db49a99c21/293144/Bail-in%20Paper%20Pierre%20and%20Daoning%2024022019%20rev%20mark-up.pdf (08 June 2022), p 14–15.

95 Martino, E., Parchimowicz, K. Go Preventive or Go Home – a New Role of MREL – European Company and Financial Law Review 2021/18 (4), p 1.

96 Bodellini, M. To Bail-In, or to Bail-Out, that is the Question – European Business Organization Law Review 2018/19 (2), p 376.

97 *op cit* 95, Martino, p 7; Single Resolution Board. List of public Q&As on MREL – available at https://www.srb.europa.eu/en/system/files?file=media/document/list_of_public_qas_on_mrel_-_clean.pdf (12 December 2021); Oliveira, V., Raposo, C. The Determinants of European Banks' Capital Structure: Is There a Difference Between Public and Private Banks? – International Journal of Central Banking Volume 2021/17 (3), p 198.

Effectiveness of measures is not the focus of this dissertation, but MREL has been criticised as being ineffective,[98] partial and insufficient,[99] and negatively affecting the access of private banks to capital compared to the public sector banks,[100] although the competitive opinions are that MREL is necessary to achieve the resolution goals[101] and contributes to the broader market discipline.[102] BRRD provides specific and complex rules for determining and calculating the MREL amount,[103] but according to Article 45c(1), in the end, it is determined by the resolution authority's individual decision addressed to the specific bank, which should make it, if no peculiar Member State legislation provides an exception, a conventional administrative act that can be appealed by the bank as the addressee. As seen from the rules for calculating MREL amount, it is directly impacted by, *inter alia*, resolution plans.[104] Finally, according to Article 45j(1) of the BRRD, the resolution authorities themselves must report to the European Banking Authority ('EBA')[105] of the MREL they have set for each entity under their jurisdiction, for which EBA has developed and the Commission adopted implementing technical standards specifying such reporting between the authorities.[106]

---

98 For example, see: Asimakopoulos I., Howarth D. Stillborn Banking Union: Explaining Ineffective European Union Bank Resolution Rules – Journal of Common Market Studies 2022/60 (2).

99 Tröger, T. H. Why MREL Won't Help Much: Minimum requirements for bail-in capital as insufficient remedy for defunct private sector involvement under the European bank resolution framework – SAFE Working Paper No. 180, Goethe University Frankfurt 2017.

100 *op cit* 97, Oliveira, p 158, 198.

101 Adelwald, P. H. From bailout to bail-in: Making banking a legitimate part of the market economy – Economic Affairs 2021/ 41 (3), p 434.

102 *op cit* 97, Oliveira, p 158, 159.

103 BRRD, Section 5, Subsection 2.

104 BRRD, art 45b(4)(a), 45c(1)(c), 45c(2), 45(3), 45 (7) and 45e.

105 The European Banking Authority is an independent EU body that does not supervise the subject institutions *per se* but does have important guidance, standard-setting, and legislative roles, along with some tasks related to oversight of national authorities, see: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC – OJ L 331/12, 15.12.2010, art 1(1), 2, 3, 8, 9, 10, 15, 16, and 173.

106 Commission Implementing Regulation (EU) 2021/622 of 15 April 2021 laying down implementing technical standards for the application of Directive 2014/59/EU of the European Parliament and of the Council with regard to uniform reporting templates, instructions and methodology for reporting on the minimum requirement for own funds and eligible liabilities – OJ L 131/123, 16.4.2021.

Resolution planning

Title II, Chapter I, Section 3 of the BRRD provides the unified legal grounds for resolution planning which is also mirrored in Part II, Title I, Chapter 1 of the SRMR. The resolution plans must be drafted by the resolution authorities in cooperation with supervisors during normal times and provide for the possible resolution actions which the resolution authority may take in range of scenarios where the institution meets the conditions for resolution,[107] with detailed limitations and mandatory elements laid down for both individual entity and group resolution plans.[108] For groups, Article 13 of the BRRD sets a specific procedure for group resolution planning including cooperation requirements and joint decisions of several resolution authorities with backup options if the cooperation between authorities fails. EBA has further drafted and the Commission approved technical standards specifying the content of resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans[109] as well as for procedures and standard forms and templates for the provision of information for the purposes of resolution plans.[110]

Although the resolution planning is heavily dependent on the information provided by the banks,[111] according to Article 10(1) the resolution plan itself is not public nor fully revealed even to the relevant bank with only the summary of key elements being disclosed to the latter. This shows clearly that resolution plans are meant to be a working tool for the resolution authorities in legislator's attempt to force them to plan ahead during the resolution planning process. But as calculating MREL amount is directly impacted by, *inter alia*, resolution plans not fully disclosed to the bank,[112] it also raises serious doubts if a bank can defend itself from resolution authority's possible breach of law in a clear situation of asynchronous information. The BRRD does not seem to indicate that the resolution

---

[107] BRRD, art 10(1); *op cit* 6, Proposal for the BRRD, p 9.

[108] BRRD, art 10(3), 10(4), and10(7) for individual level, and art 12(1), 12(3) and 13 for group level resolution plans.

[109] Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges – OJ L 184/1, 8.7.2016.

[110] Commission Implementing Regulation (EU) 2018/1624 of 23 October 2018 laying down implementing technical standards with regard to procedures and standard forms and templates for the provision of information for the purposes of resolution plans for credit institutions and investment firms pursuant to Directive 2014/59/EU of the European Parliament and of the Council, and repealing Commission Implementing Regulation (EU) 2016/1066 – OJ L 277/1, 7.11.2018.

[111] BRRD, art 7(h), 10(8), 11 and 12(2).

[112] BRRD, art 45b(4)(a), 45c(1)(c), 45c(2), 45(3), 45 (7) and 45e.

authorities are strictly tied to the resolution plans, and for group resolution plans even specifically state in Article 87(j) that the resolution authority does not have to follow the resolution plan if it considers, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans. It can be presumed that the same principle applies to actions taken in individual level resolution proceedings.

It could be argued that the two most important elements of the resolution planning are the assessment of resolvability[113] and choosing the resolution strategy.[114] The connection between these two key elements may not be immediately obvious, but these are tied together by the Commission's Delegated Regulation defining the resolution strategy as a set of resolution actions provided for in a resolution plan[115] and clearly consolidating choosing the resolution strategy into the process of assessment of resolvability.[116] It is important to note that the resolution strategy may have a broader meaning in this context as it may include not only resolution, but also the option to not resolve the bank but instead let it be liquidated in normal insolvency proceedings,[117] which is by definition outside of resolution proceedings in the strict legal sense. This means the assessment of resolvability should entail firstly evaluating if an individual bank or bank group is eligible and should be subject to resolution proceedings at all or should be liquidated under normal insolvency proceedings, and secondly, if resolution is necessary and justified, choosing the possible resolution measures for different scenarios. In turn, such decisions are possible only after assessing if the conditions for resolution, which are laid down in Articles 32 to 33 of the BRRD, are met in different scenarios. The logical order in resolution planning is therefore first assessing if conditions for resolution are met, then based on the outcome choosing either regular insolvency proceedings or resolution proceedings, and only if resolution proceedings are warranted, choosing specific resolution measures.

The importance of resolvability appears in the case of a bank or a group fails to be considered resolvable, which opens up a specific category of measures available to the resolution authorities laid down in Articles 17 and 18 of the BRRD. According to Article 15(1) an individual institution is deemed to be resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system-wide events,

---

[113] BRRD, art 10(7)(e) and 15 for individual level and art 12(4) and 16 for group level.

[114] BRRD, art 10(1) and 10(7)(f) for individual level, and art 12(3) for the group level.

[115] *op cit* 109, Commission Delegated Regulation (EU) 2016/1075, art 2(2).

[116] *Ibid*, art 23(1)(b) to (c), 25 to 32.

[117] BRRD, art 22(7)(b), 23(1)(a) 24 and 25(1); see also indications in BRRD, art 45c(2) and 45i(4).

of the Member State in which the institution is established, or other Member States or the Union and with a view to ensuring the continuity of critical functions carried out by the institution. The group level conditions for resolvability in Article 16(1) include modifications addressing presumably higher risks and cross-border nature of groups. One of the obligatory elements of a resolution plan set in Article 10(7)(f) requires it to include a description of any measures required pursuant to Article 17 to address or remove impediments to resolvability identified as a result of the assessment of resolvability, which opens up the relevant measures not available regularly.

Powers to address or remove impediments to resolvability

Article 17(5) of the BRRD provides specific measures targeted at banks available for the resolution authorities, which can be summarised as follows:

1. require the entity to revise any intragroup financing agreements or review the absence thereof, or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;
2. require the entity to limit its maximum individual and aggregate exposures;
3. impose specific or regular additional information requirements relevant for resolution purposes;
4. require the entity to divest specific assets;
5. require the entity to limit or cease specific existing or proposed activities;
6. restrict or prevent the development of new or existing business lines or sale of new or existing products;
7. require changes to legal or operational structures of the entity or any group entity, either directly or indirectly under its control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;
8. require an entity or a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company;
9. require to submit a plan to restore compliance with the MREL;
10. require to issue eligible liabilities to meet the MREL;
11. require to take other steps to meet the MREL, including in particular to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument;
12. for the purpose of ensuring ongoing compliance with MREL, require to change the maturity profile of:

12.1. own funds instruments, after having obtained the agreement of the competent authority, and

12.2. eligible liabilities referred to in Article 45b and in point (a) of Article 45f(2) of BRRD;

13. where an entity is the subsidiary of a mixed-activity holding company, requiring that the mixed-activity holding company set up a separate financial holding company to control the entity, if necessary in order to facilitate the resolution of the entity and to avoid the application of the resolution tools and the exercise of the powers referred to in Title IV of the BRRD ('Resolution') having an adverse effect on the non-financial part of the group.

It could be argued that although worded differently, some of these measures are actually at least partly already available to the competent authority or very similar to those, with no 1 in this list comparable to no 3, 6 and 7 of the list in subchapter outlining the main supervisory measures; no 2 to no 7; no 3 to no 11; no 4, 5, 6 and 7 all to no 3, 6 and 7. Based on this comparison, only measures listed 8 through 13 which deal mainly with meeting the MREL and setting up financial holding companies could be considered entirely new. However, the entitled authorities are at least nominally different, although as covered above, in reality competent authority and resolution authority for a given state can be and often are also the same public body. The specific references to either supervisory or resolution objectives remain the limiting and distinguishing factor, if the measure includes such specifics.

Article 17 measures can be applied only if the specific conditions are met. According to Article 17(1) the prime condition for applying any of the aforementioned measures is that the resolution authority determines in the assessment of resolvability that there are substantive impediments to resolvability of an entity. Hence, these measures are not available to the resolution authorities *ad hoc* as they might desire, but only after the specific procedure of assessment of resolvability of a specific bank, which has been covered above, has been conducted, including choosing and testing the resolution strategies in different scenarios, and the bank is found to have substantive impediments for put such strategies into practice if the need arises. Article 18 of the BRRD specifies additionally how groups should be treated for addressing or removing impediments to resolvability.

Moreover, there is a specific proceeding which must be followed, making application of these measures procedurally distinct from measures commonly at resolution authorities' or competent authorities' disposal. Articles 17(1), 17(3) and 17(4) set a multilevel approach, according to which first the resolution authority must notify the addressee bank in writing of the substantive impediments to its resolvability, then the bank has generally 4 moths to propose the resolution authority possible measures it plans to take to address the impediments, after which the resolution authority must assess whether the proposed measures are effective, and only if the relevant opinion is negative can the resolution

authority proceed with enacting the specific measures covered above. For some cases related to MREL, combined buffer requirement of CRD IV and requirements of own funds and eligible liabilities of global systemically important institutions of CRR, the time limit is 2 weeks instead of the general 4 months, with the additional requirement of a timeline for addressing these issues. According to the same provisions, the resolution authority has also the obligation to consult to the relevant competent authority both before sending the bank the notice of substantive impediments to resolvability, as well as during assessing if the steps proposed by the bank would be considered effective. To combine it with the problem of the bank not knowing the full contents of its resolution plan nor the assessment of its resolvability, the bank is left, at least to some extent, in an absurd situation of guessing which steps it could take that would be considered effective to address the problems with the undisclosed plans. And if this guessing goes wrong, it might be impossible for the bank, without knowing the detailed basis for decisions, to defend itself against resolution authority's arbitrary decisions under Article 17(5) of the BRRD.

2.2.2.1. Resolution tools as the 'umbrella' for resolution measures

The legislation of resolution of credit institutions is centred around four 'resolution tools'. This is evident first from the definition of resolution, according to which 'resolution' in the context of BRRD means the application of a resolution tool or a tool referred to in Article 37(9) of the BRRD in order to achieve one or more of the resolution objectives referred to in Article 31(2) of the BRRD. As Article 37(9) of the BRRD enables Member States to enact additional national tools and powers[118] under certain conditions, it shows that the resolution in the meaning of the BRRD is unambiguously tied to the resolution tools. This notion is further solidified by setting the resolution tools and resolution powers as the main objectives of the resolution plans[119] and resolution strategies.[120] According to Article 2(1)(19) and Article 37(3) of the BRRD, 'resolution tools' mean one of the following tools: the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool. One of the main reasons for creating the universal bank recovery and resolution framework was that supposedly many Member States did not have adequate bank-specific resolution tools and powers to handle the failure of banks and were left with no choice other than to intervene with public funds or most likely unsuccessfully reorganise banks under insolvency procedures.[121] Hence, these four tools should be the key in solving one of the main problems addressed by the BRRD and act as umbrella for all other more specific measures created under the EU resolution system.

---

[118] Possible additional national tools and powers fall outside of this dissertation's focus.

[119] BRRD, art 10(7); *op cit* 6, Proposal for the BRRD, p 9.

[120] *op cit* 109, Commission Delegated Regulation (EU) 2016/1075, art 25(3)(a).

[121] *op cit* 21, Impact Assessment of the BRRD, p 11.

Sale of business tool

The sale of business tool involves the resolution authority's power of forced sale of the institution's shares or other instruments of ownership or all or any assets, rights, or liabilities (all together the 'assets') to a third party.[122] The key is that according to Article 38(1) of the BRRD such a sale is specifically taking place without obtaining the consent of the shareholders of the institution or any third party other than the purchaser, and without complying with any procedural requirements under company or securities law other than procedural requirements set in Article 39. The main limitations for sale of business tool are that the receiving party must not be a bridge institution,[123] according to Articles 38(7) and 38(8), the purchaser must have the appropriate authorisation for qualified holding and authorisation to carry out the business it acquires via application of the sale of business tool, and if this is the only tool used and only part of assets, rights or liabilities of the institution under resolution, the residual institution or entity from which the assets, rights or liabilities have been transferred, must be wound up under normal insolvency proceedings as set in Article 37(6). The last limitation is especially significant because it makes impossible to leave the institution under resolution as functioning legal person without applying at least one other resolution tool. In addition, Articles 76 through 80 of the BRRD set rules for protection of the counterparties of certain agreements and arrangements, and of the trading, clearing and settlement systems.

The general rules seem to protect the person whose assets are being transferred. As the general rule, the proceeds from sale of business must go to the original owner. Specifically, according to Article 38(4) of the BRRD, any payments from the purchaser for the sale of business must benefit the owners of the shares or other instruments of ownership, where the sale of business has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the purchaser, or benefit the institution under resolution, where the sale of business has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the purchaser. The sale must happen on commercial terms by finding out the realistic valuation of the assets and liabilities subject to sale by an independent person[124] or provisionally by the resolution authority itself as the backup solution where it is impossible to conduct the third-party definitive valuation *ex-ante*.[125] Also, there are listed criteria of procedural requirements in Article 39 the resolution authority should follow, which include, *inter alia*, the obligations of transparency, objectivity and obligation to aim at maximising as far as possible the sale price.

---

[122] BRRD, art 2(1)(58), 38 and 39.

[123] By definition: BRRD, art 38(1).

[124] BRRD, art 36(1), 36(3), 36(4)(f), 38(2), 38(2) and 38(3); *op cit* 21, Impact Assessment of the BRRD, p 122

[125] BRRD, art 36(2), 36(9) through 36(12).

However, judgements by European Court of Justice may open up interpretations weakening the original shareholder's right to receive fair compensation. The European Court of Justice in has found that the original shareholder may lose their status as a shareholder in this context if their shares are written down and therefore may not demand the definitive valuation *ex-ante* to be conducted as it cannot have any effect on their legal position any more.[126] And even more interestingly, that the sale of business tool, de facto, settles any debate on the potential economic value of the assets of the transferred institution, and consequently, at least in that case, an ex post definitive valuation could only have recorded that market value and therefore it would have had no effect at all on the original shareholder.[127] This position opens possibility for interpreting the sale price in sale of business on other tools as overriding the (final) valuation obligations. As the sale price in this case is in the end agreed between the resolution authority and the purchaser, the legal possibilities for original shareholders to find fair compensation may be more limited than it may initially seem.

In addition, there are several provisions that may put the original owner's rights and expectations at risk. Firstly, according to Article 38(5) of the BRRD, the resolution authority may exercise its transfer power more than once, creating a series of transactions which may obscure, for the original owner, the terms of transfers the original owner is not part of, including the selling price of each subsequent transaction. It is not clear and remains up to debate if the difference in selling price for subsequent transactions should benefit the original owner or the seller party to the specific subsequent transaction. If the resolution authority has correctly obtained and enforced the commercial terms, such situation should not happen, but could also happen in case of several subsequent transfers of smaller pieces of the original sold business may individually add up to a different total valuation than the original sold business. Based on the general rule, it could be argued that the original owners should still get the full benefit also if the subsequent transfers are taken into account.

Secondly, the sale may not be final as, according to Article 38(5) of the BRRD, it can with the consent of the purchaser, be reverted by the resolution authority and the original owners are obliged to take back the shares, assets, rights or liabilities. Back-and forth forced sales of property and reversals together with strings of consecutive transactions may create a very blurry situation for the original owners and buyers. The series of transactions result may even resemble the layering phase of money laundering with switched roles of state and person, where the money (asset) is transferred between a series of accounts/persons distancing it from the original source (owner) and making it more difficult to trace

[126] Judgment of the Court (Third Chamber) of 21 December 2021 in Case C-874/19 P, *Aeris Invest Sàrl v SRB*, ECLI:EU:C:2021:1040, para 37 and 78.

[127] *Ibid*, para 82; Judgment of the Court (Third Chamber) of 21 December 2021 in Case C-934/19 P, *Algebris (UK) Ltd and Anchorage Capital Group LLC v SRB*, ECLI:EU:C:2021:1042, para 93.

the situation.[128] Such factors clearly contribute to the original owner's, including the bank's, vulnerabilities in defending its rights against possible misuse of the sale of business tool. In a situation where only part of the business is sold, the remaining shareholders and debtors whose claims have not been transferred are protected by minimal floor to get as much as they would have received if the institution would have been wound up under normal insolvency proceedings at the time of resolution authority's relevant decision with the difference being payable from the resolution financing arrangements.[129] The buyers on the other hand are protected with Article 38(13) from any claims from the remaining owners whose assets are not transferred. Such guarantees are much more tangible and measurable than the general principles covered in previous paragraph that should protect the persons whose assets are being forcefully sold.

Bridge institution tool

The bridge institution tool is in essence very similar to the sale of business tool, the difference being that the ownership is transferred to a 'bridge institution'.[130] Bridge institution is according to Article 40(2) of the BRRD defined as a special dedicated legal person wholly or partially owned by public authorities and controlled by the resolution authority or specifically created for temporary holding of the assets with a view to maintaining access to critical functions and selling the institution. Article 41 BRRD sets rules for operating the bridge institution. As an interesting exception, according to last paragraph of Article 41, the bridge institution may be established and authorised without complying with CRD IV for a 'short time at the beginning of its operation' if it is necessary to meet the resolution objectives and the competent authority decides to grant such an authorisation.

Using bridge institution tool has virtually the same consequences for the original owner as for the sale of business tool. Like for sale of business tool, the sale is enforceable without following any procedural requirements under company or securities laws (Article 40(1) of the BRRD), the transfer can be forcefully reverted, albeit under more limited conditions (Articles 40(6)(a) and 40(7)), and the transfer power can be exercised more than once (Article 40(5)) including transferring shares or assets from the bridge institution to a third party (Article

[128] For layering phase of money laundering, see: Financial Action Task Force. FARF Report: Professional Money Laundering – 2018, available at: https://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf (19 January 2022); For analysis of money laundering stages in practice, see: Matanky-Becker, R., Cockbain, E. Behind the criminal economy: using UK tax fraud investigations to understand money laundering myths and models' (2021), Crime, Law and Social Change 2022/77; Teichmann, F. M., Falker, M.-C. Money laundering through consulting companies – Journal of Financial Regulation and Compliance 2020/28 (3).

[129] BRRD, art 38(10), 73(a), 74, 75 and 82.

[130] BRRD, art 2(1)(60) and 40(1).

40(6)(b)). Pursuant to Article 37(6), if this is the only tool used and if only part of the assets are transferred, the requirement to wind up the residual institution also applies for the bridge institution tool. The relevant protection measures covered for sale of business tool are also essentially identical[131] with additional protections for the bridge institution in Article 40(12) to be clear that it and its management do not have any duty, responsibilities or liability towards shareholders or creditors of the institution under resolution unless the act or omission by the bridge institution's management implies gross negligence or serious misconduct in accordance with national law which directly affects rights of such shareholders or creditors. Therefore, the bridge institution tool is almost identical to the sale of business tool from the institution's and its shareholders view with legal and practical outcomes for the original owners the same as for using sale of business tool, except that the counterparty to their transactions is the state controlled entity instead of a third party.

Asset separation tool

Asset separation tool is also virtually identical to the previously covered tools in all relevant aspects,[132] with important limitations for use cases. The first material difference from the sale of business tool and bridge institution tool is again the recipient of the assets. According to Article 42(2)(b) of the BRRD, in this case, it is an asset management vehicle, which is a legal person partially or fully owned by public authorities and is under resolution authority's control or specifically created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution. As seen from Article 42(4), operation of an asset management vehicle is relatively lightly regulated compared to the bridge institution with only limited demands for the resolution authority to approve its constitutional documents, management, management remuneration and responsibilities, strategy and risk profile. There are no authorisation requirements for the asset management vehicle.

Use of asset separation tool is relatively limited. According to Article 42(3) of the BRRD, the main objective is to manage the assets transferred to it with a view to maximising their value through eventual sale or orderly wind down, or in other words – ensuring the effectiveness of other resolution tools.[133] According to Article 42(1) of the BRRD, the asset separation tool is limited to the institution's assets, rights and liabilities which excludes using this tool for the shares or other instruments of ownership of the institution. This means that contrary to the previous two tools the bank's shares cannot be forcefully sold using this resolution tool. Secondly, according to Article 37(5) of the BRRD this tool can only be used together with at least one other resolution tool. Thirdly, the use of the asset

[131] BRRD, art 40(4), 40(8), 40(10), 40(11), 73(a), 74, 75 and 82.

[132] BRRD, art 42(1), 42(6), 42(7), 42(9), 42(10), 42(11), 42(12), 42(13), 73(a), 74, 75 and 82.

[133] *op cit* 21, Impact Assessment of the BRRD, p 122.

separation tool is by Article 42(5) limited only to conditions where: the situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on one or more financial markets; such a transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution; or such a transfer is necessary to maximise liquidation proceeds. Presuming from the no authorisation requirement and the objective of asset management, the asset management vehicle cannot continue operating any services, but as this is not clearly stated, it could be questioned. These limitations obviously considerably limit the use cases for the asset separation tool.

It is questionable why the sale of business tool, the bridge institution tool and the asset separation tool are legally separated and treated as individual tools. The previous analysis shows that the core of these three tools is extremely similar – only significant differences being the receiver of the assets and the requirements related to the receiver. Likewise, they were all considered relatively insignificant or otherwise not worthy of a deep analysis during drafting of the BRRD – sale of business is mentioned in the impact assessment of the BRRD about 7 times, bridge institution/bank 36 times and asset separation 9 times without any actual discussion or analysis on their impact or effectiveness, compared to at least 616 mentions of bail-in/write down,[134] as well as grouped together and separated from the bail-in tool from the detailed impact assessment view, which was actually totally lacking about these three tools.[135] Relevant differences and limitation could have been tied to the receiver of the assets which would have arguably been legally and practically clearer and technically simpler solution.

Bail-in tool

The bail-in tool is designed to give resolution authorities the power to write down the claims of unsecured creditors of a failing institution and to convert debt claims to equity with the aim of being used to recapitalise an institution that is failing or about to fail, allowing authorities to restructure it through the resolution process and restore its viability after reorganisation and restructuring.[136] More specifically, according to Article 2(1)(57) of the BRRD, the bail-in tool is a mechanism for effecting a resolution authority's exercise of write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with Article 43 of the BRRD. According to Article 2(1)(66) of the BRRD 'write-down and conversion powers' means the powers referred to in Article 59(2) and in points (e) to (i) of Article 63(1). Article 59 states the requirement to write down or convert relevant capital instruments and eligible liabilities and Article 63 lists the general resolution powers. Hence, the bail-in tool is fundamentally different

[134] *Ibid*, *passim*; bail-in is also referred to there as debt write-down, see: *Ibid*, p 43.

[135] *Ibid*, Annex XII, p 122 and 123 in contrast to Annex XIII, p 124 through 204.

[136] *op cit* 6, Proposal for the BRRD, p 13.

from the other resolution tools in its inclusion of direct losses, which, according to Article 44(9)(a) should be borne firstly by shareholders and then by creditors of the institution in order of preference. The theoretical purpose of the bail-in tool is to help with the problem of capital requirements not helping against defaults enough and give additional options for loss absorbency in resolution context.[137] The bail-in tool is designed to replace state support for banks (the bailout) by enabling the healthy part of a financial institution to continue operating with writing off equity, subordinated debt and either writing down certain other liabilities or converting them to new equity.[138] As covered above, the MREL is supposed to cover the amount of own funds liabilities to be bailed in if the need arises, but there are no limitations to bail in more liabilities than covered by MREL.

There are limitations for purposes the bail-in tool is allowed to be used for. Articles 43(2) and 43(3) limit the bail-in to be used to recapitalise an institution to the extent sufficient to restore its compliance with authorisation requirements and to continue normal operation, and to sustain sufficient market confidence in the institution or entity, if there is a reasonable prospect for long-term viability of the institution; or to convert to equity or reduce the principal amount of claims or debt instruments that are transferred either: to a bridge institution with a view to providing capital for that bridge institution, or under the sale of business tool or the asset separation tool. Article 44 states that the scope of bail-in tool covers all liabilities if not specifically excluded (e.g., covered deposits), or limited. Instead of a state putting resources into a failing bank to keep it from defaulting, the bank is kept solvent by writing down the existing equity capital at an amount corresponding to the losses that precipitated the failure and, then, converting some of the creditors' claims into new equity.[139] To say it in other words, the bail-in can be used for reducing bank's liabilities towards creditors or converting these liabilities into shares or other capital instruments of the bank, and to reduce the nominal amount of bank's shares or cancel the shares. Instead of using public funds, the shareholders and creditors bare the losses for saving a bank. Considering bank's economic health and solvency should be shareholder's and creditor's business risk and not state's risk, it is difficult to argue with the underlying objective of the bail-in tool.

However, the bail-in tool is still by far in most complex and controversial of the resolution tools. Comparing the technical volume of the legislation, it is the only resolution tool which provisions warrant several subsections within the BRRD.[140] The bail-in tool has been heavily criticised as too complex to work in reality.[141] Also, it is found that there have been uses of different loopholes to bypass the resolution framework and the bail-in tool, especially in Italy, but also

---

[137] *op cit* 21, Impact Assessment of the BRRD, p 17.

[138] *op cit* 21, Impact Assessment of the BRRD, p 43 and 44.

[139] *op cit* 101, Adelwald, p 433.

[140] BRRD, Section 5, Subsections 1 through 4; Includes MREL regulations.

[141] *op cit* 81, Tröger 2018, p 35.

in Germany.[142] On the other hand, the credibility of the bail-in tool in particular has been identified as essential for banks' optimal debt structure and for ruling out extreme leverage,[143] and it has been found that the bail-in regulation has improved market discipline by banks in the bond market because of the premium in bond yields that comes with diminished bailout expectations.[144] The same has been found when comparing yields of bail-inable and non-bail-inable bonds, although the yield premium may not fully follow the risk that comes with hierarchy of bail-in of different types of securities.[145] It has also been found that the regulatory move towards bail-in rather than bailout policies to deal with financially distressed banks has reduced the too-big-to-fail expectations concerning large banks.[146] This means the market has largely priced in the changes in risk that come with replacing the expectation of low investor's risk that comes with bailout with bail-in where investor's must first bare the losses. Complexity and functioning of the bail-in tool in reality remain up to debate, however.

2.2.2.2. General resolution powers

The resolution tools are mainly applied via resolution powers. It could be seen from the previous subchapters, the resolution tools make up the umbrella of objectives and conditions of resolution, but the legislation of resolution tools provides very few actual measures for the resolution authorities. The logic behind is that the application of resolution tools is achieved via applying more specific resolution powers[147] with the objective to give resolution authorities the powers to take control of an institution that has failed or is about to fail, take over the role of shareholders and managers, transfer assets and liabilities, and enforce contracts.[148]

---

[142] *op cit* 101, Adelwald, p 437; Financial Times. A German bail-out tests EU bank rules to the limit – Editorial, 10 December 2019, available at: https://www.ft.com/content/8024e7dc-1b62-11ea-97df-cc63de1d73f4 (22 January 2022); Standard & Poor's. Continued Bank Bail-Outs Stretch the Credibility of Europe's Resolution Framework – 2020, available at: https://www.spglobal.com/ratings/en/research/articles/200226-continued-bank-bail-outs-stretch-the-credibility-of-europe-s-resolution-framework-11364018 (20 January 2022).

[143] On the bail-in tool's effect on a bank's debt structure and leverage, see: Leanza, L, et al. Bail In vs Bail-Out: Bank Resolution and Liability Structure – International Review of Financial Analysis 2021/73.

[144] Cutura, J. A. Debt holder monitoring and implicit guarantees: Did the BRRD improve market discipline? – Journal of Financial Stability 2021/54.

[145] Cucinelli, D., et al. Do bond yields follow the hierarchy of risk post BRRD? – European Financial Management 2021/27 (3).

[146] Tölö, E., et al. Have Too-Big-to-Fail Expectations Diminished? Evidence from the European Overnight Interbank Market – Journal of Financial Services Research, 2021/60 (1).

[147] BRRD, Articles 43(1), 50(1), 53(1), 53(2), 53(4), 54(1), 63(1); *op cit* 21, Impact Assessment of the BRRD, p 122.

[148] *op cit* 6, Proposal for the BRRD, p 12.

General resolution powers are a fixed set of specific measures. According to Article 2(1)(20) of the BRRD, 'resolution power' means a power referred to in Articles 63 to 72 of the BRRD. More specifically, the general resolution powers are covered by Article 63, while the following referred Articles mainly deal with non-central measures designed for ensuring the effectiveness of the procedures.[149] For that reason, the general the general powers set in Article 63(1) of the BRRD are in scope of this dissertation. From the referred provision, the relevant measures available to the resolution authorities towards the banks can be distilled as the following, can be exercised individually or in any combination:

1. require any person to provide any information required for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;
2. take control of an institution under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the management body of the institution under resolution;
3. transfer shares or other instruments of ownership issued by an institution under resolution;
4. transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;
5. reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of bail-inable liabilities, of an institution under resolution;
6. convert bail-inable liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution or entity BRRD applies to, a relevant parent institution or a bridge institution to which assets, rights or liabilities are transferred;
7. cancel debt instruments issued by an institution under resolution;
8. reduce, including to reduce to zero, the nominal amount of shares or other instruments of ownership of an institution under resolution and to cancel such shares or other instruments of ownership;
9. require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments;
10. amend or alter the maturity of debt instruments and other bail-inable liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other bail-inable liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period;

[149] See also BRRD, Recital 87 and art 37(6).

11. close out and terminate financial contracts or derivatives[150] contracts;
12. the power to remove or replace the management body and senior management of an institution under resolution;
13. the power to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of CRD IV and Article 12 of MiFID II[151].

The only purpose of these general resolution powers is to enforce the resolution tools. Article 63(1) of the BRRD which lists the general resolution powers explicitly states that these powers are for applying the resolution tools to institutions that meet the applicable conditions for resolution. The same general goal of limiting the use of resolution powers to resolution only can be seen from the preparatory documents of the BRRD, where because of the limitations to the property rights, exercising the resolution powers was intended to be as close as possible to insolvency, and limited to the extent necessary in order to meet an objective of general interest, namely preserving financial stability in the Union.[152] There are also certain specific limitations for using some of these measures. Measures listed in points 7 and 10 cannot be used for secured liabilities subject to Article 44(2) of the BRRD.[153] Measure listed in point 11 is applicable only for the purposes of applying Article 49 of the BRRD, which applies to implementing bail-in tool on derivatives.[154] On the other hand, according to the general principles of resolution (Article 34(1)(c)), removing management bodies and senior management should be the default action of the resolution authorities, which makes using the measure listed in point 12 almost automatic.

From the view of potential threats of misuse and bank's inability to defend itself, however, there are very broad immunity from otherwise applicable legislation for the resolution authority when applying the resolution powers. Resolution authorities are free from otherwise applicable requirements no matter if set in law, contract or otherwise, if not stated in the BRRD, to seek approvals or consents from any person, either public or private, including the shareholders or creditors of the institution,[155] and, according to Article 63(2)(b) of the BRRD, free from any pre-notifications, including publishing prospectus or to file or register any document with any other authority. These immunities from otherwise applicable legislation effectively removes all associated rules and oversight and

[150] For the purposes of applying BRRD, art 49.

[151] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments – OJ L173/349, 12.6.2014.

[152] *op cit* 6, Proposal for the BRRD, p 8.

[153] BRRD, art 63(1)(g) and 63(1)(j).

[154] BRRD, art 49 and 63(1)(k).

[155] BRRD, art 63(2)(a), doubled for sale of business tool in art 38(1), for bridge institution tool in art 40(1), and for asset separation tool in art 43(1).

supervision of acts and transactions which would otherwise in normal circumstances be covered by relevant regulations.

While not seeking consent from the subject and its bodies is what makes relevant acts obligatory administrative measures, cutting it fully away from all other legal mechanisms intended for overseeing and supervising such acts and transactions may result in a result that these other mechanisms are specifically designed to avoid. An obvious example would be that the transactions enforced by the resolution authority may end up creating monopolies which would otherwise be subject to the competition laws. Resultingly, the resolution has been given absolute precedence over all other legal fields. In addition, the BRRD is a minimum harmonisation directive in this regard and explicitly allows for additional national resolution powers.[156] Because not explicitly stated, it could be argued that such national additional powers are not subject to the same freedoms from all otherwise relevant regulations.

2.2.2.3. Special management and appointing resolution authority's agents

Resolution authorities have several measures targeted at naming persons resolution authority finds suitable to manage the institution under resolution instead or next to the original managers of that institution. First measure enables the resolution authorities to directly name persons as managers. Article 35 of the BRRD gives resolution authorities the power to appoint a special manager to replace the management body of the institution. The second group of measures enable resolution authorities to appoint agents exercising the resolution powers, which is covered by Articles 72 and 51(2) of the BRRD.

Special management is incompatible with standard regulations regarding management and governance of a bank. By default, the special manager appointed by the resolution authority is a single person having total power over the institution. Language, including the use of singularity in the phrasing of Article 35[157] and no indications in the BRRD that there might be more than one person in the role suggest that the special management consists of only one physical person. Articles 35(1) and 35(2) of the BRRD state the status and default power range of the special manager: the special manager is appointed to replace the management body of the institution under resolution and shall have all the powers of the shareholders and the management body of the institution. Although Article 35(1) states that the special manager must have the qualifications, ability and knowledge required to carry out his or her functions, the deviation from the standard logic of demanding at least two persons, or more if appropriate, holding executive

[156] Busch, D., et al. How Single is the Single Resolution Mechanism? – European Banking Institute Working Paper no 30, 2019, European Business Law Review 2019/30 (4), p 7; BRRD, art 37(9).

[157] Singularity is also used for a special manager in BRRD, art 2(1)(102).

directorships in a bank[158] inevitably results in impossibility to follow some requirements of bank's organisational framework, including at least allocation of responsibilities on management body level,[159] requirements for diversity in management bodies[160] and probably requirements related to the collective suitability.[161] Obvious questions of potential conflicts arise of management and supervisory functions reporting to the same person while by standard these must be separated.[162] Existence of committees which are required according to the applicable legislation[163] or internal procedures is also impossible if the relevant body consists of only one person. In other words, it is impossible for the special manager to fulfil all the standard requirements of a management body and one-person management is not compatible with a range of requirements for internal governance and management of a bank.

Special manager's duties differ from regular day-to-day management. Special manager's statutory duty is to take all the measures necessary to promote the resolution objectives and implement resolution actions according to the decision of the resolution authority, including increasing capital, reorganisation of the ownership structure or takeovers. According to Article 35(3) of the BRRD, where necessary, that duty shall override any other duty of management in accordance with the statutes of the institution or national law, insofar as they are inconsistent. Taking into account that special manager should be named only in cases where the bank is failing or likely to fail, it has been presumably a conscious choice of the legislator to replace the regular management structures and duties with one manager with special powers. If this right is used by the resolution authority without full regard of the conditions laid down in the laws, the result may, however, be catastrophic for the bank from the view of defending itself from such arbitrary use of this power.

Although free in its activities by default, the special manager is under resolution authority's full control. According to Article 35(2) of the BRRD, the special manager may only exercise its powers under the control of the resolution

---

[158] CRD IV, art 13(1); European Securities and Markets Authority, European Banking Authority. Guidelines on the assessment of the suitability of members of the management body and key function holders, 2 July 2021, ESMA35-36-2319, EBA/GL/2021/06, para 128.

[159] *Ibid*, para 7, 39, 43, 63 and 147; see also: European Securities and Markets Authority, European Banking Authority. Final report on joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive, 2 July 2021, 2014/65/EU, ESMA35-36-2319, EBA/GL/2021/06, para 18 and 23.

[160] CRD IV, art 91(10); *op cit* 158, European Securities and Markets Authority, European Banking Authority ESMA35-36-2319, EBA/GL/2021/06, Title V.

[161] CRD IV, art 91(7); *op cit* 158, European Securities and Markets Authority, European Banking Authority ESMA35-36-2319, EBA/GL/2021/06, guidelines 2, 7, 17, 19.

[162] European Banking Authority. Guidelines on internal governance under Directive 2013/36/EU, 2 July 2021, EBA/GL/2021/05, para 20 and guidelines 2, 3, 19, 20.

[163] For example, risk committee according to CRD IV, art 76(3), nomination committee according to art CRD IV, 88(2), remuneration committee according to CRD IV, art 95.

authority. Also, as referred previously, the special manager's one of two statutory duties is to take all measures to implement the decisions of the resolution authority. Furthermore, resolution authorities may limit special manager's powers or require that certain acts of the special manager be subject to the resolution authority's prior consent according to Article 35(4). Special manager's term in position is generally limited with one year with Article 35(6), but the resolution authorities may remove the special manager from the position at any time irrespective of the term based on Article 35(4). It can be concluded that the special manager has exactly as wide powers as the resolution authority decides and is ultimately fully under resolution authority's control.

The other two relevant powers enable the resolution authorities to appoint a peculiar intermediate agent between the resolution authority itself and the management of the bank in question. The general rule is stated in Article 72(1), according to which the resolution authority must be able to operate and conduct the activities and services of the institution under resolution with all the powers of its shareholders and management body, and manage and dispose of the assets and property of the institution under resolution, and do it either directly or indirectly by a person or persons appointed by the resolution authority. The extra measure not already covered by the general resolution powers is the ability to name third person or persons to exercise the control over the institution for the resolution purposes. In contrast to the previous power of naming special manager, this measure does not indicate replacing the institution's management, but rather an option to delegate resolution authority's powers to thirds person or persons. Interestingly the initial proposal for the BRRD included references that such person may include a person named under final article 51(2) or a temporary administrator,[164] but such references are absent from the final text giving free hands and no indications to the resolution authority about which persons they should appoint. There are also no limitations on who they can appoint. Also, as the temporary administrator is a recovery-specific position, the original proposal clearly erroneously mixed the resolution and recovery proceedings and measures. Therefore, this measure gives an option to delegate some of resolution authority's more practical powers to a third person.

Power of Article 51(2) should not be considered a separate power. As covered above, the powers of Articles 51(2) and 72(1) of the BRRD are technically treated as separate powers, but the former only repeats the latter in a specific situation in bail-in procedure enabling resolution authority to appoint a person according to Article 72(1) for drawing up and implementing the business reorganisation plan required by Article 52. It is obvious that the resolution authority has this right

[164] *op cit* 6, Proposal for the BRRD, p 111. Note the inconsistency of terms in the Proposal for the BRRD and the Impact Assessment of the BRRD (*op cit* 21) compared to the final text of the BRRD – based on the terminology used in the Proposal for the BRRD, the term 'special administrator' in the referred section was an error in language and it should have read 'special manager', which in turn was changed to 'temporary administrator' for the final adopted text. The term 'special manager' was in turn transferred to a resolution measure of BRRD, art 35.

anyway based on the general rule of Article 72(1) and such repetition does not seem to grant the resolution authority any additional rights. The original proposal of the BRRD included references to an 'administrator' named under final Article 52(2) as a separate role in bail-in procedure,[165] which is absent from the final text of the BRRD. Therefore, the originally intended separate function was never created, such an article of law itself is redundant, as are specific referrals to it as a separate power of the resolution authority.

2.2.2.4. Powers to restrict rights and obligations

Specific measures were created with the BRRD specifically targeted at intervening with the bank's performance of obligations under private law. Article 16a contains a specific measure for prohibiting certain distributions under certain circumstances associated with complying with the combination of capital requirements and MREL. There are two powers titled the same – the power to suspend certain obligations – under Articles 33a and 69, respectively. In addition, Article 70 created the power to restrict the enforcement of security interests, and Article 71 the power to suspend termination rights. The common characteristic between the three measures of Articles 16a, 33a and 69 is that these all directly give power for the resolution authorities to intervene and prohibit the bank's performance of bank's obligations under contracts and its own decisions by management bodies, but may also have a wider effect.

The power to prohibit certain distributions is tied to assessment of resolvability, to removing impediments to resolvability, and to complying with MREL, which have all been covered in previous subchapters. Article 16a has been added to the regulatory toolbox with Article 1(6) of the BRRD II. From the justifications for this power, it also seems that the basis for it has been the concern for the resolvability of institutions.[166] The original proposal for the BRRD II[167] nor the relevant impact assessment[168] did not include references to such a power, which

---

[165] *op cit* 6, Proposal for the BRRD, p 93 through 95 which contain basis for final Articles 51 and 52 of the BRRD.

[166] BRRD II, Recital 24.

[167] European Commission. Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC, COM (2016) 852 final.

[168] European Commission. Commission Staff working document: Impact Assessment Accompanying the document Proposal amending: – Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; – Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; – Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; – Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, SWD (2016) 377 final.

means it was not part of the original joint package[169] of BRRD II, CRR II, CRD V and SRMR II, making lack of such power obviously not the most critical imperfection of the BRRD according to the Commission. This measure was added later in the proceedings of the referred package by the Council of the EU as part of a compromise relating to different opinions if and how to modify the MREL requirements.[170] This power is technically placed under the resolvability chapter (BRRD, Title II, Chapter II) within the BRRD, and is directly referred as being one of the measures to address breaches with MREL in Article 45k(1)(b). As it connects to removing problems of resolvability, its objective is similar to the objective of the measures for removing impediments to resolvability.

The power to prohibit certain distributions relates to both capital requirements and the resolution. According to Article 16a(1) of the BRRD, this measure contains the resolution authority's power to prohibit from distributing more than the Maximum Distributable Amount related to the minimum requirement for own funds and eligible liabilities ('M-MDA'), which is a new amount introduced with the BRRD II and SRMR II for breaches of the combined capital buffer requirement considered in addition to MREL or MREL breach themselves.[171] Combined capital buffer requirement itself is a prudential requirement.[172] According to the same Article, the resolution authority has the power to prohibit such distributions through: making a distribution in connection with Common Equity Tier 1 capital (a prudential requirement[173]); or creating an obligation to pay variable remuneration or discretionary pension benefits, or to pay variable remuneration (a contractual obligation) if the obligation to pay was created at a time when the entity failed to meet the combined buffer requirement; or making payments on Additional Tier 1 instruments (again, a prudential requirement[174]). In conclusion, this power enables the resolution authority to prohibit distributions from bank's funds that would lessen capital calculations under certain prudential requirements, as well as prohibiting payments of certain remuneration or pension benefits.

---

169 *op cit* 167, Commission. COM (2016) 852 final, p 2.

170 Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC – Presidency compromise' (2018) ST 6202 2018 INIT, p 12 and 24. For relevant legislative discussions, see: the Council of the EU documents in: European Commission. Documents in procedure 2016/0362/COD – available at https://eur-lex.europa.eu/procedure/EN/2016_362 (22.01.2022).

171 Single Resolution Board. Minimum Requirement for Own Funds and Eligible Liabilities (MREL): SRB Policy under the Banking Package – May 2021, https://www.srb.europa.eu/system/files/media/document/mrel_policy_may_2021_final_web.pdf (22 January 2022), p 8

172 BRRD, art 2(109); SRMR, art 3(1)(55); CRD IV, art 128.

173 BRRD, art 2(1)(68a); SRMR, art 3(1)(45a); CRR, art 50.

174 BRRD, art 1(69); SRMR, art 3(1)(46), CRR, art 52(1).

Use of the power to prohibit certain distributions is limited to specific conditions and is limited with exceptionally cumbersome and time-consuming proceedings. In addition to the limitations of exact types of distributions the resolution authority may prohibit, Article 16a(1) of the BRRD limits this measure's use only to situations where the institution in question simultaneously meets the combined buffer requirement alone, but fails to meet the combined buffer requirement when considered in addition to the MREL. Procedurally, Articles 16a(2) and 16a(3) considerably limit resolution authorities' actual power to enforce the measure with a nine-month waiting time during which the resolution authority must every month assess whether to exercise the power, but can only enforce the measure only if the institution is in breach for straight nine months. Article 16a(3) provides additional conditions which must be met to use the measure. In addition, the last subparagraph of Article 16a(1) together with Articles 16a(2) and 16a(3) seem to tie the resolution authority's right of action to the institution in question following its obligation to notify the resolution authority of such situation. Such procedural peculiarities and additional conditions clearly deviate from the resolution procedure's general logic of immediate and swift action to a point where it is very questionable if such measure could be used at all before the bank fails or is likely to fail and other resolution measures are put into force.

The power to suspend certain obligations according to Article 69 of the BRRD is a short-term measure for the immediate confusion after starting resolution proceedings. This power enables the resolution authority to suspend any payment or delivery obligations pursuant to any contract the institution in question is party to limited to, except to payment and settlement systems and their operators, central counterparties and central banks.[175] The power's use case is limited to situations for putting a bank under resolution or application of some other resolution tool or power.[176] The time for such suspension is also very narrow, lasting from the notification of suspension until the midnight after the following business day, after which all the suspended obligations shall be immediately due.[177] By the properties and nature of this power, it could be understood as a measure to mitigate possible immediate confusion and panic, as well as malicious transactions by the bank and its managers when the bank is put under resolution. It also gives time for the resolution authority to practically take control of the bank it has put under resolution.

The power to suspend certain obligations according to Article 33a of the BRRD is almost identical to its namesake. As can be seen from the first paragraph of the referred Article, the measure is targeted at saving the bank from immediate collapse. Based on second paragraph, the exclusions of payment and settlement

[175] BRRD, art 69(1) and 69(3); Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems – OJ L 166/45, 11.6.1998; Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, 27.7.2012, art 2(1), 14 and 25.

[176] BRRD, art 2(1)(40), 69(1), 83(4).

[177] BRRD, art 69(1) and 69(2).

systems and their operators, central counterparties and central banks are the same as for the measure under Article 69, as well as the maximum time it can be in force according to Article 33a(4). The detailed conditions do wary, but it can be seen that the powers to suspend certain obligations set in two different provisions are overlapping in core, with the use case for Article 69 being only the immediate aftermath of putting the bank under resolution, and the use case for Article 33a being avoiding immediate collapse of the bank in question. The original proposal for the BRRD II included a proposal for a moratorium as part of the early intervention measures,[178] which in turn are part of the recovery proceedings. It is unclear why this was transformed into a doubling article instead of modifying Article 69, but it seems to be part of the compromise during legislative proceedings.[179] As the same measure is virtually doubled in two articles with minimal differences in substance, such distinction and doubling should be eliminated by consolidating relevant provisions.

In addition to the previous measures, the resolution authorities have the right to restrict the enforcement of security interests and to temporarily suspend termination rights. Specifically, under Article 70 of the BRRD the resolution authorities have the right to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution. Likewise, under Article 71 of the BRRD, the resolution authorities have the power to suspend the termination rights of any party to a contract with an institution. Both can last until the midnight following the next business day and the same excluded counterparties as for power to suspend certain obligations.[180] According to Article 71(2), the latter power also extends, under certain conditions, to the subsidiaries of the bank under resolution. As it can be seen, the resolution authorities have wide powers which directly affect the rights and expectations of third parties as well, but from the other hand the use cases and timelines are relatively limited.

2.2.2.5. Powers of write-down and conversion

Powers of write-down and conversion are in essence satellite measures of the bail-in tool and are more specifically covered in Article 59 of the BRRD. As covered above, the bail-in tool is by definition in Article 2(1)(57) the application of write-down and conversion powers, which in turn, according to Article 2(1)(66), means the powers referred to in Article 59(2) and in points (e) to (i) of

---

[178] *op cit* 167, Commission. COM (2016) 852 final, p 12, 25 and 26.

[179] Council of the European Union. Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC, Presidency compromise, ST 6202 2018 INIT – 2016/0362 (COD), p 15, 16, 36 through 39.

[180] BRRD, Articles 70(1), 70(2), 71(1) and 71(3).

Article 63(1) of the BRRD (points 5 to 9 of subchapter 2.2.2.2). It can be also seen that the provisions of the bail-in tool largely consist of relatively general descriptions of conditions and objectives, and not so much of specific rights the resolution authorities have to achieve these objectives. The specific powers of write-down and conversion should fill this gap by providing detailed powers for the resolution authorities. In contrast to other general powers and similarly to the powers to restrict rights and obligations covered previously as well as measures listed no 5 through 9 in the subchapter 2.2.2.2 on general resolution powers, the powers of write-down and conversion are directly connected to a specific resolution tool – the bail in. As such, this power's objectives coincide with the ones of the bail-in tool – protect taxpayers' money.[181]

However, BRRD is conflicting in regards if the measure of write-down and conversion is considered resolution action and conditions for resolution apply to it or not, and inconsistent in relevant terminology. Confusingly, write-down and conversion powers are used in two meanings within the BRRD. The broader meaning is as defined in Article 2(1)(66), according to which 'write-down and conversion powers' means the powers referred to in Article 59(2) and in points (e) to (i) of Article 63(1) (points 5 to 9 of subchapter 2.2.2.2). The narrower meaning is stated in Article 59(2) of the BRRD as resolution authorities' power to write down or convert relevant capital instruments and eligible liabilities into shares or other instruments of ownership of banks. One conflict lies in definitions and conditions for resolution. As covered in subchapter 2.2.1, BRRD Article 32 lists the conditions for resolution. Paragraph 1(b) of the same Article indicates that write-down and conversion under Article 59(2) is considered not a resolution action but as a supervision action. However, by the definition, exercising write-down and conversion power in accordance with Article 43 means using the bail-in tool defined in Article 2(1)(57), which in turn is a resolution action according to Article 2(1)(40). This means the notion of using write-down and conversion independently or in combination with a resolution action may be nonsense as the write-down and conversion itself may be the resolution action.

Despite the unfortunate conflicts and inconsistencies, the conditions for resolution must almost always be met also for using write-down and conversion power. Using write-down and conversion powers in the narrower meaning is limited to circumstances listed in BRRD Article 59(3) which give the resolution authority to use this power if conditions for resolution are met and before any (other) resolution action is taken, the institution or group will not be viable unless exercised in relation to specific instruments and liabilities, or extraordinary public financial support is required. In turn, using power to write down or convert eligible liabilities independently of resolution action may be, according to BRRD Article 59(1a) exercised only in relation to eligible liabilities that meet the conditions referred to BRRD Article 45f(2)(a), except the condition related to the remaining maturity of liabilities as set out in Article 72c(1) of CRR. BRRD Article 45f(2)(a) lists own funds and liabilities of entities that are not themselves resolution entities.

[181] *op cit* 21, Impact Assessment of the BRRD, p 60.

In conclusion, the narrow write-down and conversion can be used without (other) resolution actions only for institutions not under resolution, all other cases automatically mean using it together with resolution actions, which means conditions for resolution must be fulfilled. The write-down and conversion in wider sense also mean using the general resolution powers, which also mean conditions for resolution must be met. Write-down and conversion powers are clearly part of a resolution toolbox and can be used only for resolution purposes. Therefore, reference in Article 32(1)(b) to write-down and conversion powers as supervisory powers is incorrect. The same section also refers to early intervention measures as supervisory measures, which is also incorrect as early intervention measures form part of the recovery proceedings as covered in subchapter 2.3.2.2 below. This suggests an unintentional error in language.

The legislation differentiates the 'relevant capital instruments' and the 'eligible liabilities' this measure is aimed at. In this context the relevant capital instruments mean Additional Tier 1 instruments and Tier 2 instruments according to the CRR.[182] The eligible liabilities mean either bail-inable liabilities that meet the specific conditions set in Article 45b of the BRRD and the Tier 2 instruments according to the CRR, if the powers of write-down or conversion are used in combination of other resolution measures, or are limited to meeting the specific conditions referred to in Article 45f(2)(a) of the BRRD, except the condition related to the remaining maturity of liabilities as set out in Article 72c(1) of the CRR, in case of using this tool independently of other measures.[183] More specifically, Article 47(1)(a) of the BRRD explicitly covers the resolution authority's right to cancel or transfer to bailed-in creditors bank's existing shares or other instruments of ownership, and Article 47(1)(b) covers the right in cases of bank's positive net value to dilute shareholdings via converting relevant capital instruments or liabilities issued by the institution into shares or other instruments of ownership. For example, this could mean converting a creditor's loan to the bank under resolution to shares of the bank, or writing the loan down to zero which reduces or deletes bank's obligations towards this creditor.

The order of application of write-down and conversion is pre-determined. The write-down and conversion must follow the general principles of shareholders bearing the first losses, after which the creditors should bear losses in accordance with the order of priority of their claims under normal insolvency proceedings unless expressly provided otherwise.[184] Also according to the general principle set in Article 34(1)(f) of the BRRD, the creditors of the same class must be treated in an equitable manner unless provided otherwise, and some types of liabilities like covered deposits are fully protected from the write-down and conversion measure.[185] More specific sequence of write down and conversion are listed under

[182] BRRD, art 2(1)(69), 2(1)(73) and 2(1)(74); CRR, art 52(1) and 63.

[183] BRRD, art 2(1)(40), 2(1)(71a), 59(1), 59(1a) and 59(2).

[184] BRRD, art 34(1)(a) and 34(1)(b).

[185] BRRD, art 34(1)(h) and 44(2).

provisions for implementation of the bail-in tool and apply also to this specific power of write-down and conversion.[186] Based on these rules, the actual business and credit risks for shareholders and creditors can again come into play instead of eliminating these risks with the bail-out with the taxpayers' money, as was one of the main objectives of the new bank recovery and resolution framework.

Prominent use of write-down and conversion powers in practice has been the Banco Popular Español, S.A. (Banco Popular) resolution procedure. In this case the SRB made a resolution decision by which it decided:

1. first, to write down Banco Popular's full share capital, resulting in the cancellation of 100% of Banco Popular's share capital;
2. subsequently, to convert all the outstanding principal amount of the Additional Tier 1 instruments issued by Banco Popular into newly issued shares of Banco Popular ("New Shares I");
3. subsequently, to write down to zero the nominal amount of the "New Shares I", resulting in the cancellation of 100% of those "New Shares I";
4. subsequently, to convert all the outstanding principal amount of Tier 2 instruments issued by Banco Popular into newly issued shares of Banco Popular ("New Shares II");
5. finally using sale of business tool to transfer all New Shares II to Banco Santander S.A., free of any rights or liens of any third party, for a transfer price of 1 EUR.[187]

In addition, the SRB decided not to compensate the original shareholders and creditors of Tier 1 and Tier 2 instruments as an independent valuation determined that there was no difference in their treatment compared to the treatment they would have received had the institution been wound up under normal insolvency proceedings.[188] As the net result of subsequent write-downs, conversions and using the sale of business tool, all shareholders as well as holders of Tier 1 capital instruments fully lost their relevant assets, and holders of Tier 2 capital instruments received 1 EUR to be shared between them proportionally, which also translates to losing virtually all relevant assets, and Banco Santander S.A. received

---

[186] BRRD, art 2(1)(66) and 48.

[187] Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. – OJ L 178/15, 11.7.2017; Decision of the Single Resolution Board in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., SRB/EES/2017/08, non-confidential version available at: https://www.srb.europa.eu/en/system/files?file=media/document/srb_decision_srb_ees_2017_08_non-confidential_scanned.pdf (15.02.2022), Articles 6.1 and 6.5.

[188] Single Resolution Board. Decision of the Single Resolution Board of 17 March 2020 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected (SRB/EES/2020/52) – available at https://www.srb.europa.eu/system/files/media/document/srb_ees_2020_52_final_decision_en.pdf (15 February 2022), Section 7 and Article 2.

100% of shares of Banco Popular, free of any third party rights, for 1 EUR. The decision has been so far upheld in the European Court of Justice.[189]

For bail-in, the MREL is the preparation and the write-down or conversion is the execution. While it has been found previously that the MREL is supposed to ensure that there is at least minimal capital and liabilities for a successful application of the bail-in tool, the powers of write-down and conversion are measures by which the bail-in tool is put into practice in case of writing down relevant capital and liabilities. It is important that the application of write-down and conversion is not limited to the MREL amount nor the own funds and liabilities included in the MREL calculation – the write-down and conversion can be applied to all capital and liabilities covered in this paragraph.

2.2.3. Resolution execution mechanism – the Single Resolution Mechanism (SRM)

The resolution Single Resolution Mechanism is the system for executing resolution measures. The legal framework of SRM providing its structure is comprised of the SRMR that established the SRM (Article 1), the Single Resolution Board (Article 42) and the Single Resolution Fund (Article 67), and of a separate intergovernmental agreement detailing the financing agreements of the Single Resolution Fund.[190] The cooperation framework for the authorities involved is complemented with the Single Resolution Board's decision of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the SRM between the Board and national resolution authorities.[191]

The general composition of SRM mirrors the SSM. The SRM is similarly mainly composed of a central EU body and national authorities – the Single Resolution Board and the national resolution authorities respectively. The Single Resolution Board is responsible for effective functioning of the SRM and decisions regarding entities under direct ECB prudential supervision, all cross-border groups, entities the ECB decides to exercise its powers directly, entities given under its authority by member states, and in situations the resolution action

[189] In relation to shareholders, see: Order of the Court (Eighth Chamber) of 30 September 2021 in Case C-27/21 P, *Ramón González Calvet v Single Resolution Board*, ECLI:EU:C:2021:789; In relation to holders of Tier 2 instruments, see: Judgment of the Court (Eighth Chamber) of 4 March 2021 in In Case C-947/19 P, *Liaño Reig v SRB*, ECLI:EU:C:2021:172.

[190] Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, 24 May 2014 – available at: https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf (18 May 2022).

[191] Single Resolution Board. Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15) – available at https://www.srb.europa.eu/system/files/media/document/decision_of_the_srb_on_cofra.pdf (30 January 2022).

requires the use of the Single Resolution Fund.[192] According to Article art 7(3) of the SRMR, national resolution authorities are responsible for resolution decisions, including adopting relevant measures, regarding all other entities. The same division continues more specifically for drawing up and adopting resolution plans as can be seen in Articles art 8(1) and 9(1). The peculiar setup of superseding all national legislation on national resolution authorities with the EU-level Single Resolution Board has been copied from the SSMR Article 5(1), which creates the same legal uncertainty as in supervision with the national law's text not being finite and correct in relation to resolution authorities.

In contrast to the supervisory functions, the resolution procedures may demand funds in excess of regular operating costs for resolving banks. For this purpose, a central fund for such use cases was also created. Article 67 of the SRMR established the Single Resolution Fund as a separate entity owned by the Single Resolution Board. The Single Resolution Fund does not have its own separate management or independence and thus there are no separate decisions or acts by the Single Resolution Fund. This makes the backbone of the SRM very similar to the SSM with the addition of a central fund for situations where funds are needed for resolving a bank.

SRM differs from the SSM with adding a direct political element to the decision-making procedures. The central Single Resolution Board was created as a new EU body without any conflicting responsibilities which contrasts to the pre-existing ECB, which has also the central bank functions of the eurozone. But next to the Single Resolution Board, there are also other public instances involved in the decision making. According to Article 1 of the SRMR, the SRM is composed of the Single Resolution Board, the Council, the Commission and the national resolution authorities. It has been emphasised that resolution can sufficiently complement supervision to form an effective Banking Union only if the resolution authority has strong, broad powers not subject to the veto of an interested member state[193] and this is what creating the independent Single Resolution Board enables to achieve. However, the European Commission and the Council of the European union have powers that directly contradict the goal of immunity from member states' political interests.

The procedure for using the political powers is strictly regulated, but ultimately very broad. Article 18(7) of the SRMR provides exclusive powers for the Commission and the Council for endorsing, demanding modification or objecting the resolution schemes. Commission must decide its action within 24 hours after receiving the resolution scheme from the Board and may endorse or object the discretionary elements of the scheme. If the Commission finds problems with public interest or use of the Single Resolution Fund, it may within 12 hours propose the Council to object the resolution scheme, or to approve or object modifications to the amount of the Single Resolution Fund provided for in the

[192] SRMR, art 2, 7(1) and 7(2); SSMR, art 6(4) and 6(5)(b).

[193] Gordon, J. N., Ringe, W.-G. Bank Resolution in the European Banking Union: a Transatlantic Perspective On What It Would Take – Columbia Law Review, 2015/115 (5), p 1350.

resolution scheme. The legal consequences of the failure to act within the time limits by the Commission or the Counsel are not entirely clear. The Article in hand provides that resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board. In legal literature, the failure to act or non-objection by the Commission have been considered endorsing the resolution scheme.[194] There are no restrictions to the discretion of the Commission while the Council's discretion is limited to the Commission's proposals to the Council. Such procedures clearly leave the resolution proceedings open to political considerations.

National resolution authorities' powers are subjected to the Single Resolution Board's powers. Foremost, the resolution authorities' powers for final decisions are limited to entities not covered by the Single Resolution Board's authority and are subject to general cooperation clauses of the SRM Regulation. Articles 31(1)(a) and 31(1)(d) of the SRMR give the Single Resolution Board powers to issue guidelines and general instructions to national resolution authorities on how to perform its tasks and adopt resolution decisions, as well as to receive from the national resolution authorities their draft decisions on which it may express its views, and indicate where it thinks the draft does not comply with SRMR or with the Single Resolution Board's general instructions. The Single Resolution Board's referred powers are limited to effective and consistent application of Article 31(1) that sets responsibilities on the Board to perform its tasks in close cooperation with the national resolution authorities and approve a framework to organise the practical arrangements for the implementation of the same Article.

Similarly, Articles 7(3) and 29(2) of the SRMR provide that national resolution authorities shall inform the Single Resolution Board of the measures and decisions that national resolution authorities plan to take and set close coordination requirement with the Single Resolution Board when taking those measures. It has been covered above that the Board has materialised its coordinating powers foremost with the decision of 17 December 2018 establishing the framework for the cooperation within the SRM. This clause is paired with the Single Resolution Board's powers under Article 7(4) of the SRMR to issue warnings to national resolution authorities if the Single Resolution Board considers their draft decisions not in compliance with the SRMR or its general instructions; and at any time to decide, in particular if its warning is not appropriately addressed, to exercise directly all of the resolution powers regarding entities otherwise under national resolution authorities' responsibility. These centralising powers effectively mean that the national resolution authorities only have as much power as the Single Resolution Board lets them have. This is identical to the setup of the SSM where

[194] Zavvos, G. S., Kaltsouni, S. The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing – published as a separate chapter in: Matthias Haentjens & Bob Wessels (eds.), Research Handbook on Crisis Management in the Banking Sector, Edward Elgar Publishing Ltd 2015, p 30.

the ECB can whenever take any relevant bank under its direct supervision stripping the national competent authority of its powers related to a specific bank.

Interestingly the Commission proposal for the SRMR[195] did not contain these tools for the Single Resolution Board to influence the national resolution authorities. On the other hand, there is also no clause in the SRMR directly obliging the national resolution authorities to the Single Resolution Board's guidelines and general instructions. This setup and lack of clear obligation indicate that the nature of guidelines and general instructions by the Board under Article 31(1)(a) are not legally binding to the national resolution authorities in the decision-making process. Therefore, although the practical outcome of the possible next steps by the Single Resolution Board could be intimidating enough to follow, the coordination obligation provided for in Article 7(3), and the guidelines and general instructions provided for in Article 31(1)(a), should be considered not legally limiting the discretion of the national resolution authorities as long as the Single Resolution Board has not decided to take over the responsibilities and depriving the national resolution authority of its powers.

Like the substantive law of BRRD, the SRM has also been both glorified and criticised. It has been found that although the SRM provides an important institutional step at EU level to build a more effective bank resolution framework, it suffers from institutional weaknesses and legal uncertainty regarding the use of resolution tools, such as bail-in, that undermine its ability to manage effectively a bank resolution.[196] The SRM together with the bail-in regime has been found to significantly reduce the interconnections between the sovereign and banking sector risks.[197] However, the EU resolution framework has also been found to rely almost exclusively on MREL rather than offsetting MREL requirements with sufficient collective financing in national and EU level resolution funds, which fundamentally undermines the credibility of the EU bank resolution regime, ultimately leading to government funded bail-outs instead of private sector bail-ins.[198] It is clear that the goal of eliminating the practice of injecting taxpayers' money into banks has not fully disappeared with the new recovery and resolution framework as state aid to banks is still possible and practiced in cases of both resolving and liquidating a bank, but also for temporary liquidity while being solvent.[199] The national variations in resolution has been considered a source of concern and the centralisation should go even further at the same time retaining

---

[195] *op cit* 20, European Commission. COM (2013) 520 final.

[196] Alexander, K. European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism – European Law Review, 2015/40 (2), p 159, 187.

[197] Fiordelisi, F., et al. On the nexus between sovereign risk and banking crises – Journal of Corporate Finance 2020/65.

[198] *op cit* 98, Asimakopoulos, p 13.

[199] Nicolaides, P. State aid after the Banking Union: serious disturbance and public interest – Journal of Banking Regulation 2021/23, p 10.

the national resolution authorities.[200] Going a step further from the unified resolution framework and execution mechanism, there have been proposals for harmonising the frameworks for liquidation of banks,[201] which would tackle the question of how the banks not resolved are treated and this deserves further academic debate. It is clear that the SRM and BRRD are not perfect and the debate on improving the resolution framework continues.

2.2.4. Conditions for resolution proceedings

Resolution proceedings may be started only under specific circumstances. According to Article 32 of the BRRD, generally recovery procedures can only be started if all of the following conditions are fulfilled:

1. competent authority or resolution authority determines that the institution is failing or is likely to fail (paragraphs 1(a) and 2). Conditions for an institution to be considered failing or likely to fail are specified in paragraph 4, and different circumstances when an institution shall be considered to be failing or likely are further interpretated by EBA guidelines;[202]
2. having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an institutional protection scheme, or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59(2)[203] taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe; and
3. a resolution action is necessary in the public interest. A resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to above in this subchapter and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

---

[200] Georgosouli A. The transnational governance of bank resolution and the treatment of national regulatory variation in the EU – Cambridge Law Journal, 2021/80 (1), p 100.

[201] Binder, J.-H. The next step: Towards harmonised frameworks for the liquidation of non-systematically relevant credit institutions in the EU? A discussion of policy choices and potential impediments – European Company and Financial Law Review 2021/18 (4).

[202] European Banking Authority. 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, 06 August 2015, EBA/GL/2015/07.

[203] Referring to early intervention as well as write-down and conversion as supervisory actions is incorrect – see subchapters 2.2.2.5 and 2.3.2.2 above; Precondition for using the write-down and conversion powers may usually be used only together with (other) resolution actions and almost always require the same resolution conditions be met – see subchapter 2.2.2.5 above.

As it can be seen, the contrast with prudential supervision is very clear. Compared to the constantly ongoing supervision, resolution itself can only start, and the resolution authority may use relevant measures, only if specific conditions are met – the bank has reached a point of (near) failure, no other actions presumably prevent the failure, and it is necessary and proportionate for meeting at least one resolution objective that cannot be met to the same extent under normal insolvency proceedings. According to Article 32(3) of the BRRD, resolution proceedings can be triggered also without previous recovery proceedings. In addition to the resolution itself, the resolution framework also includes an ongoing preparatory phase during which the resolution authorities have powers in relation to preparing for possible future resolution during resolution planning, removing impediments for resolvability, and for meeting MREL. In the context of appealing the resolution measures, strict limitations on access to documents on adoption of resolution schemes[204] considerably limit the options for a bank to defend itself.

2.3. Recovery – Summary of Publication I

2.3.1. Recovery objectives and scope

The aim of this subchapter is to distinguish the concept of recovery of credit institutions from the resolution of credit institutions and the prudential framework. This is done by identifying and examining the elements, as well as the powers provided to public authorities, that can be considered constituent to the concept of recovery. The proposition is that bank recovery can be handled as a distinguishable stage in the bank regulative cycle based on its functions and its substance, and it can be defined by a set of actions in the regulatory structure consisting of three connected phenomena – recovery planning, early intervention measures and other recovery measures.

In contrast to resolution, there is no specific list of recovery objectives in legislation or the definition of recovery, although the Recitals of the BRRD indicates the distinction of recovery and resolution of credit institutions.[205] On the other hand, other Recitals of the BRRD and documents accompanying its legislative proceedings are inconsistent and unclear how to divide the recovery and resolution phases.[206] The main reason is that there are mixed uses of conceptual and timeline-based approaches. The timeline-based approach describes the phases of recovery and resolution framework as (i) preparation and prevention, (ii) early intervention, and (iii) resolution,[207] which describes the chronological order of

[204] Judgment of the General Court (Third Chamber, Extended Composition) in Case T-827/17 of 6 October 2021, *Aeris Invest Sàrl v European Central Bank*, ECLI:EU:T:2021:660.

[205] BRRD, Recitals 1, 6 and 12.

[206] See categorisation of early intervention measures in BRRD, Recitals 39 vs 22; *op cit* 21, Impact Assessment of the BRRD, p 60 vs BRRD, Article 2(101).

[207] *op cit* 21, Impact Assessment of the BRRD, p 12.

actions. However, preparation and prevention phase include both recovery and resolution measures and procedures, foremost resolution planning and resolvability related measures of resolution vs recovery planning.[208]

Recovery is distinct from the prudential supervision and resolution process in terms of its objectives and function. In contrast to prudential supervision's function of controlling entry into the banking market and ensuring credibility during bank's normal operation, and in contrast to resolution's function of winding up a failed bank after it has reached a stage of failure, recovery is aimed at correcting problems at an early stage, helping banks to return to normal business, avoiding the need for resolution actions restoring long-term viability in the event of material deterioration of their financial situation via preparing for it with recovery planning[209] and applying early intervention.[210] The distinction of recovery and resolution is also evident by the aspect of empowered authorities – competent authorities vs resolution authorities. The concept of recovery covers the intermediate phase between the supervision and the resolution with the goal of avoiding resolution and insolvency, and is composed of measures aimed at achieving this.

According to Article 1 of the BRRD; the scope of recovery is identical to the resolution, while the execution mechanism is identical to the prudential supervision.[211] This means that relevant measures of recovery and resolution are found in the same legal act, but are applied via different mechanisms – the SSM and the SRM, respectively.

2.3.2. Recovery measures

2.3.2.1. Recovery planning

Core principles of recovery planning

As can be seen from Article 5(1) of the BRRD, in contrast to resolution plans, recovery plans are the responsibility of the banks and not the authorities. This is conceptually different from recovery plans, which must be drawn up and maintained by the resolution authority as covered above. Similarly to the resolution plans the recovery plans must cover a list of specific elements[212] while the competent authorities are allowed to determine the contents and details of its elements.[213] Recovery planning is also heavily influenced by various standards and guidelines.[214] Recovery plan itself is not legally obligatory to be followed even if

---

[208] BRRD, Title II, Chapters I and II, and Article 2(101).

[209] *op cit* 21, Impact Assessment of the BRRD, p 25 and 64.

[210] *op cit* 21, Impact Assessment of the BRRD, p 8 and 11.

[211] SSMR, art 4(1)(i), 6(4), 6(6) and 9(1).

[212] For the minimal list of elements, see: BRRD, art 5(5), 7(5), and Annex A.

[213] BRRD, art 4(1)(a) and 4(1)(c).

[214] *op cit* 109, Commission Delegated Regulation (EU) 2016/1075; European Banking Authority. Guidelines on the range of scenarios to be used in recovery plans, 18 July 2014,

the conditions it is composed for, arrive. Recovery plans address a hypothetical crisis scenario in a hypothetical manner[215] with providing *ex ante* plans of steps for later implementation, which may bring in difficulties of its own.[216] The EU legal acts do not provide the recovery plan itself to be obligatory and are put into effect with other measures, e.g., the early intervention measures. Nevertheless, there are various rules and requirements the recovery plan must comply with.

Three important principles can be identified that must be considered in drafting and assessment of the recovery plan. First, recovery plans must be detailed and based on realistic assumptions applicable in a range of robust and severe scenarios,[217] meaning realistic and precise plans of action presenting thought-through substance, realistic steps, and achievable goals. Secondly, recovery plans should be applied proportionately, specifically reflecting the systemic importance of the institution or the group and its interconnectedness, including through mutual guarantee schemes.[218] Most obvious implementations of the principle of proportionality are the possibility to apply simplified obligations for recovery plans,[219] and direct obligations in Article 6(7) of the BRRD for the measures that competent authorities are permitted to take after the assessment of recovery plans to be proportional. The third principle is to not assume any access to or receipt of extraordinary public financial support covered primarily in Article 5(3), i.e., it must include only private funds the bank has access to. This, again, contrasts recovery to resolution, where using public funds is not out of the question.[220]

EBA/GL/2014/06; European Banking Authority. Recommendation on the development of recovery plans, 23 January 2013, EBA/REC/2013/02; European Banking Authority. Recommendation on the coverage of entities in a group recovery plan, 26 January 2018, EBA/REC/2017/02.

215 Schelo, S. Bank Recovery and Resolution, 2nd edn, Kluwer Law International B.V. 2020, s 3.01.

216 Russo, C. A. Resolution Plans and Resolution Strategies: Do They Make G-SIBs Resolvable and Avoid Ring Fence? – European Business Organization Law Review 2019/20, 736, 738.

217 BRRD, Recital 21, art 5(6); Also influenced by: European Banking Authority. Guidelines on recovery plan indicators, 09 November 2021, EBA/GL/2021/11.

218 BRRD, Recital 21.

219 BRRD, art 4; More specifically covered in: Commission Delegated Regulation (EU) 2019/348 of 25 October 2018 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions – OJ L 63/1, 4.3.2019; formerly covered in: European Banking Authority. Guidelines on the application of simplified obligations under Article 4(5) of Directive 2014/59/EU, 16 October 2016, EBA/GL/2015/16, (repealed).

220 For example, see: government financial stabilisation tools and public equity support tools in the BRRD, art 56 and 57.

Measures related to recovery plans

The institutions are responsible for drawing up recovery plans themselves, but recovery plans are made subject to full assessment by the competent authority to make sure it is comprehensive, realistic and reasonably likely to maintain or restore the institution's viability and the financial position.[221] Crucially, the competent authorities themselves do not have the capacity to change the recovery plans, but according to can direct removal of deficiencies or impediments to recoverability[222] by the institution via three-stage procedure.[223] The competent authority may first require to address the deficiencies or impediments by the institution and provide a revised plan. If this is unsuccessful, then direct the institution to make specific changes to the plan. If this nevertheless results in absent or inadequate recovery plan, the competent authority is then empowered with the following measures. It may direct the institution to:

1. reduce the risk profile of the institution, including liquidity risk;
2. to enable timely recapitalisation measures;
3. to review the institution's strategy and structure;
4. to make changes to the funding strategy so as to improve the resilience of the core business lines and critical functions;
5. to make appropriate changes to the governance structure of the institution.

It can be debated, based on the wording of 'may direct', if these measures are obligatory in nature.

2.3.2.2. Early intervention measures

Early intervention measures differ from prudential and recovery measures by nature and substance. Early intervention measures are different from recovery measures from core aspect of leaving the institution in control. [224] This stands in stark contrast to the resolution process, where it has been verified that the authorities may take charge of the decisions on business operations. The early intervention measures represent the competent authorities' powers to force an institution to act in various ways and are available if the financial condition of an institution is rapidly deteriorating or that institution is infringing or is likely to infringe specific requirements of prudential or investment services legislation,[225]

---

[221] BRRD, art 6(2)(a) and Recital 21; art 8 (for groups).

[222] BRRD, art 6(6) and 2(1)(101).

[223] BRRD, Articles 6(5) and 6(6).

[224] *op cit* 21, Impact Assessment of the BRRD, p 83.

[225] See BRRD, art 27; European Banking Authority. Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU, 29 July 2015, EBA/GL/2015/03.

but the competent authority does not itself infringe in the execution of such acts. For substance, the question is if the measures in the BRRD broaden the powers derived from pre-existing EU prudential measures on one hand, and from resolution measures on the other hand.[226] The results of relevant analysis of Publication I are as follows.

First measure, Article 27(1)(a) of the BRRD, which can be summarised as competent authority's right to require an institution to activate parts of the recovery plan or to require updating the plan, is recovery-specific.

Second measure is Article 27(1)(b) of the BRRD, by which the management body of the institution may be compelled to examine the situation, identify measures to overcome any problems identified, and draw up an action programme to overcome those problems and a timetable for its implementation. This measure greatly resembles the supervisory power under the prudential framework referred to in point 4 of subchapter 2.1.2 above to require institutions to present a plan to restore compliance with the requirements of CRD IV or the CRR,[227] but is broader as the institution is not yet in breach of the prudential requirements. A resolution measure with similar characteristics is the power to request to submit a plan to restore compliance with the MREL as covered in point 9 of powers to address or remove impediments to resolvability in subchapter 2.2.2 above, but it differentiates by being limited to MREL only.

Third measure, Article 27(1)(c) of the BRRD, is to require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution. As sub-measures, the competent authority in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders. The measure is layered by intensity of intervention – imposing an obligation is the first stage, and against the objective of leaving the bank in control, taking over specific direct powers from the management is the second one, but does not entail the final decision instead of shareholders. This is a recovery-specific measure and contrasts to resolution tools covered in subchapter 2.2.2 where the resolution authority makes relevant decisions directly or indirectly via agents.

Fourth measure, Article 27(1)(d) of the BRRD, entails requiring that one or more members of the management body or senior management be removed or replaced if found unfit to perform their duties pursuant to Article 13 of CRD IV or Article 9 of MiFID II. It has similar objectives as the prudential supervision measure covered in point 15 of subchapter 2.1.2 above and to resolution measure referred to in point 12 of subchapter 2.2.2.2 above, but differs from both as the competent authority has no direct power to remove the manager, but only to demand the institution to remove the manager.

Fifth measure, Article 27(1)(e) of the BRRD, to require the management body of the institution to draw up a plan for negotiation on restructuring of debt with

---

[226] It is possible that similar powers may be derived from other EU or national legislative acts, not subject to this dissertation.

[227] CRD IV, art 104(1)(c); SSMR, art 16(2)(c).

some or all of its creditors in according to the recovery plan, where applicable, is recovery-specific. However, resolution measures covered in points 5, 7, 10 and 11 of subchapter 2.2.2.2, in subchapters 2.2.2.4 and 2.2.2.5, and in point 2 of powers to address or remove impediments to resolvability in subchapter 2.2.2, may have similar end effects, but all differ in substance.

Sixth and seventh measures, Article 27(1)(f) and 27(1)(g) of the BRRD, respectively, to require changes to the institution's business strategy and to require changes to the legal or operational structures of the institution, are similar to supervisory measure covered in point 3 of subchapter 2.1.2, to require reinforcement of the arrangements, processes, mechanisms, and strategies implemented in accordance with articles 73 and 74 of the CRD IV. As these supervisory powers are tied to internal capital and governance arrangements, and do not include changes in legal structures, this recovery measure is somewhat broader. On the opposite side, again, resolution measures covered in points 7 and 6 of powers to address or remove impediments to resolvability in subchapter 2.2.2 and point 2 of subchapter 2.2.2.2 enable the resolution authorities to take full control of the institution and reorganise it themselves.

Eight measure, 27(1)(h) of the BRRD, to acquire necessary information, reiterates the power to obtain the required information for prudential supervision covered in point 14 of subchapter 2.1.2, and is also present in recovery proceedings as covered in point 1 of subchapter 2.2.2.2. This makes this measure universal.

2.3.2.3. Additional recovery measures

There are two competent authority powers that are not in the same list of designated early intervention measures *per se* but are closely related to them and have the same purpose. Firstly, according to Article 28 of the BRRD, the competent authority may, if the explicit early intervention measures are not sufficient to reverse the deterioration of the institution, require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. It differs from the measure of Article 27(1)(d) of the BRRD covered above, because of the absence of the prerequisite of the member or management body being unfit for the duties. The managers should remain in place as representatives of the bank and may appeal against such action.[228] Secondly, if this still proves insufficient, the competent authorities may, according to Article 29 of the BRRD, appoint one or more temporary administrators for the institution themselves. A temporary administrator can be appointed either to temporarily replace the management body or to temporarily work with the management body, with the powers, role and functions, and term of the temporary administrator being

[228] An example of erroneous mixing of different measures can be seen in erroneous transposition in Estonian legislation, where the competent authority has been seemingly given direct power to remove managers itself as the mechanism of early intervention – see *Finantskriisi ennetamise ja lahendamise seadus*, RT I, 19.03.2015, 3, 52, § 36(7).

determined by the competent authority, certain acts of a temporary administrator be subject to the prior consent of the competent authority, and the temporary administrator can be removed by the competent authority at any time for any reason.

These measures are borderline cases that can be considered transitional between recovery and resolution phases. Appointing a temporary administrator entails, uncharacteristically to recovery, direct involvement in the internal affairs of the institution, and its effect is depriving the bodies normally entitled to appoint the ultimate managers of their right and powers to do so. On the other hand, this is not a power to interfere in the business decisions. Structurally, these measures are still part of recovery proceedings and regulation. The second measure is similar to the resolution measure of removing and replacing the management as covered in point 12 of subchapter 2.2.2.2, and to appointing special management in resolution proceedings as covered in subchapter 2.2.2.3. However, temporary administrator does not supersede the shareholder meetings as does the special manager,[229] and the goal of relevant positions is different – reverse the deterioration of an institution vs resolving the institution.[230] A potential conflict lies in interpretation of who has got the power in case of simultaneously filled positions of a temporary administrator appointed by competent authority, and of a special management appointed by resolution authority. It could be derived from the general logic of resolution taking place if the recovery has failed, and after recovery proceedings, that the powers of a special management would prevail over or end the powers of a temporary administrator, but it is to be determined by future judiciary proceedings.

2.3.3. Conditions for recovery proceedings

Conditions for early intervention measures are that the institution infringes or is likely in the near future to infringe the requirements of CRR, CRD IV, Title II of MiFID II or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of MiFIR,[231] while the infringement may be due, *inter alia*, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points as covered in Article 27(1) of the BRRD. Title II of MiFID II and referred MiFID articles are applicable to a credit institution only if it provides investment services or performs investment activities and only to limited extent in relation to the operating conditions and to the rights for offering services in other Member states and access to the central counterparties, regulated markets,

[229] See BRRD, art 29(5) and 29(8) vs 35(2)

[230] See BRRD; art 29(1) in conjunction with art 28 vs art 35(3).

[231] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84, 12.6.2014.

clearing and settlement facilities and systems, and transparency and reporting.[232] It is clear that the use of early intervention measures is centred on infringement or likely infringement of capital requirements. EBA has further issued guidelines on triggers for use of early intervention measures,[233] which sets a clearer line between applying the regular supervision measures during regular operation of a bank and the recovery measures during saving the bank from failure.

As covered in subchapter 2.3.2.3, the transitional recovery measures have additional conditions for application. Requiring the removal of the senior management or management body is, according to Article 28 of the BRRD, subject to additional conditions of:

1. At least one of the following is true:
   a. there is a significant deterioration in the financial situation of an institution; or
   b. there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities; and
2. early intervention measures taken are not sufficient to reverse that deterioration.

According to Article 29 of the BRRD, appointing temporary administrator is, in turn, tied to the precondition that the measure of Article 28 has already been used, and it has been deemed ineffective. In addition to the recovery itself, the preparing phase is constant similarly to preparing for resolution and also to constant prudential supervision.

It can be seen that the conditions for recovery are relatively broad and leave quite a broad room for interpretation and discretion for authorities compared to resolution proceedings. However, recovery measures have distinct conditions, predominantly that the subject institution is in significant problems, making it distinct from regular time-to-time infringements of regulations which are not fatal for the financial situation of the bank, and are subject to day-to-day prudential supervision.

[232] MiFID II, art 1(3)(b) and 1(3)(c).

[233] *op cit* 225, European Banking Authority. EBA/GL/2015/03.

3. Bank recovery and resolution measures' intrinsic restrictive effects on appealing – Summary of Publication II

3.1. Interest in appealing unlawful administrative acts

There is a conflict between the requirement that all recovery and resolution measures must be appealable by affected persons, and the inherent effect of some recovery and resolution measures in combination of immediate effect and enforceability considerably hindering or making it impossible for the bank to use its theoretical legal remedies against applying these measures. Reasons for restrictions and limitations for appealing a decision of applying an administrative measure can be of varying legal and practical reasons. First, it must be defined which properties are relevant to this dissertation. Secondly, the BRRD provides general rights for appealing recovery and resolution measures, but at the same time provides considerable limitations to enforcing this right. It is unclear to what extent can the pre-decision situation be restated if a credit institution appeals a recovery or resolution measure. Thirdly, it must be defined which properties will be searched from specific recovery and resolution measures. Applying administrative measures by authorities may put credit institution's managers in a conflict of interest where they are unmotivated to act in the best interests of the credit institution and appeal the decision applying the relevant measure. The conflict of interest will be the property searched for in the analysis of specific recovery and resolution measures.

Specific protective actions a credit institution may take to defend itself from unlawful application of the new measures have not been harmonised on the EU level except for general appealing rights. According to BRRD Articles 85(2) and 85(3), both crisis prevention measures and crisis management measures, which in combination cover both recovery and resolution measures,[234] must be appealable. Article 66(6) of the BRRD sets rights for shareholders, creditors and third parties to use the rights of Article 85 for assets in other member states for certain measures. Additional measure-specific appealing rights are laid down on EU level in Article 6(7) for appealing against measures for directing removal of deficiencies or impediments to recoverability, and in Article 17(6)(c) for powers to address or remove impediments to resolvability, which are both preparatory measures for recovery and resolution planning. Importantly, the scope of persons with appealing rights is different for crisis prevention measures (i.e., recovery measures and resolution measures of requiring addressing or removing impediments to resolvability and write-down or conversion power in the narrower meaning[235]) where *all persons affected* have the appealing right, and for crisis

[234] BRRD, art 2(1)(101) and 2(1)(102).

[235] For the difference in broader and narrower meaning of write-down and conversion power, see subchapter 2.2.2.5.

management measures (i.e., all resolution measures except preparatory measures and the write-down and conversion in the narrower meaning) which can be argued to be limited to addressee only.

There are several additional restrictions on appealing. BRRD Article 85(4) imposes significant restrictions on the appeal procedures for crisis management measures, effectively prohibiting interim relief and provides immediate effect for relevant decisions even if unlawful. Also, the remedies for a wrongful decision or action of the resolution authority are limited to only compensation for the losses suffered. Additional limitation for appeals is set in Article 36(13) of the BRRD for valuations for the purpose of resolution, which cannot be appealed individually, but only with a decision applying a measure applying such valuation, and measures added with BRRD II – to restrict rights and obligations of BRRD Articles 16a and 33a – have been left out of provisions of appeal altogether.

In the scope of this dissertation is the effect of recovery and resolution measures on the subject institution, i.e., the addressee bank of the relevant decision imposing recovery or resolution measures. The key property investigated is the recovery and resolution measures' effect on credit institution's independent decision-making and on the management's loyalty toward the shareholders and the credit institution, which in turn exerts a negative influence on motivation to appeal against harmful unlawful administrative acts adopting the same measures. More specifically, the focus is on effects on the executive top management with representation rights (in contrast to management in supervisory roles)[236] that hold the mandate for external representation to launch appeal procedures in courts.

The relevant core values expected from a manager of a bank but under threat are loyalty and lack of conflicts.[237] Decisions applying recovery or resolution measures may impact these values if relevant decision should be beneficial to the individual manager. Full removal of conflicts of interests is almost impossible as the management bodies are themselves responsible for management of conflicts of interests,[238] and are in turn supervised by the same authorities potentially creating the conflict in the first place. This means the authorities may create the problem resolving of which it should be supervising over. It is obvious that relevant authority's interest is of the opposite. There are two main aspects in relation to this dissertation which may cause obvious conflict of interest for a bank to challenge unlawful application of recovery or resolution measure: conflict of interest at the level of individual managers and conflict of interest arising from the authority itself taking over the management functions. First, if any of the

---

[236] See distinction of management roles in: CRD IV, art 3(1)(7) to 3(1)(9).

[237] *op cit* 158, European Banking Authority, European Securities and Markets Authority. EBA/GL/2021/06, ESMA35-36-2319, Guideline 9 and paragraph 81(h), and Annex II, point h; European Central Bank. Guide to Fit and Proper Assessments, December 2021 – available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit_and_proper_guide_update202112~d66f230eca.en.pdf (16 February 2022), Chapter 3.3.

[238] CRD IV, art 88; *op cit* 162, European Banking Authority. EBA/GL/2021/05, paragraphs 22(l), 34(g), Sections 11, 12 and 16.

recovery or resolution measures should have the material effect of removing the managers or transferring management powers to the supervisory or resolution authority – for complete fulfilment of the proper management functions, that authority should then challenge its own act. Secondly, if application of the recovery or resolution could be personally beneficial for an individual manager.

3.2. Negative effects of recovery measures on appealing

3.2.1. Effects of recovery planning and early intervention measures

Three recovery measures have similar potential but very limited theoretical negative effect on appealing: measure of the right to require an institution to activate parts of the recovery plan or require updating the plan (Article 27(1)(a) of the BRRD), requiring changes to the business strategy (Article 27(1)(f) of the BRRD) and requiring changes to the legal or operational structures (Article 27(1)(g) of the BRRD). The first of these three measures has this effect only if from the 20 elements listed in Annex of the BRRD listing recovery plan measures, the element of activating arrangements and measures to restructure business lines may be seen as potentially tied in with some personal interests of managers, presuming the managers are not unsuitably major counterparties to bank's liabilities. Considering the expected division of responsibilities and individual managers' accountability in the banking industry,[239] each manager could be seen as potentially interested in the benefits that unlawful activation of the recovery plan might bring to his or her responsibility area compared to the other areas. This may have a theoretical negative effect on specific manager's motivation to appeal the measure, but other managers should balance it by being motivated to appeal a measure unbeneficial for their areas of responsibility. The effects are limited to individual benefitting managers, but every manager and the management body as a whole retain their capacity to appeal against adoption of these measures.

Although the two steps of measure of requiring the bank's management body to convene or, if the management body fails to comply with the imposition of that requirement, directly convene a meeting of shareholders, set the agenda for this, and require certain decisions to be considered for adoption (Article 27(1)(c) of the BRRD) have different characteristics as covered in subchapter 2.3.2.2, both have the same effect on management's interest in appealing. The first stage may bring limited effects on individual managers that are similar to those of the first intervention measure discussed above. The second step involves usurping the management body's functions and directly exercising its powers, but as the managers are not removed from their positions or powers, the presumed effects on appealing can be considered identical to the first step's.

[239] Davies, P., Hopt, K. J. Non-Shareholder Voice in Bank Governance: Board Composition, Performance and Liability – ECGI Working Paper Series in Law No. 413, 2018, p 7–8.

Other recovery measures should not have any meaningful effect on appealing by the bank. Measures of requiring the management body of the institution to examine the situation, identify measures to overcome any problems, and draw up an action programme and a timetable for its implementation (Article 27(1)(b) of the BRRD), requiring the management body to draw up a plan for negotiation on restructuring of debt in accordance with the recovery plan (Article 27(1)(e) of the BRRD) and the power to require information (Article 27(1)(h) of the BRRD) can be seen as purely burden-creating requirements that, in essence, do not impose any significant conflicts of interests with regard to the decision to appeal nor does the competent authority take over the management duties. For the measure to require one or more members of the management body or the senior management to be removed or replaced if found unfit to perform the corresponding duties (Article 27(1)(d) of the BRRD), the targeted managers will stay in their positions until the obligation to remove them has been fulfilled and the credit institution retains its decision-making power to challenge such a measure and appeal against it.

Based on the above, if the recovery planning and early intervention measures are transposed correctly by Member States, these should not give the competent authorities any new powers that create a direct consequence of rendering appeals impossible. Although some measures may have an indirect effect on motivation to appeal, the effect in this regard is limited.

3.2.2. Effects of transitional recovery measures

The transitional recovery measures of requiring removal of managers (Article 28 of the BRRD) and appointment of temporary administrator (Article 29 of the BRRD) may have serious impact on a bank's ability to appeal the relevant act. The first measure, if transposed correctly by the Member States, has the same effect as requiring removal of managers under Article 27(1)(d) of the BRRD – the measure discussed in previous subchapter. The managers stay in place and retain full capacity to appeal the requirement to remove them. But, for example Estonia has transposed the measure incorrectly, giving competent authority direct power to remove managers itself.[240] If a legal person's representatives are removed from their position with immediate effect, the legal person is also stripped from the capacity to lodge an appeal against such a measure.

Measure of appointing temporary administrator is even more extensive. It has been recognised already in the legislative proceedings as an intrusive measure that should be applied only in exceptional cases.[241] The temporary administrator is under competent authority's full control via options for prior consultation or consent by competent authority (Articles 29(1) and 29(5) of the BRRD), the competent authority has discretion which powers the temporary administrator has

[240] Finantskriisi ennetamise ja lahendamise seadus, RT I, 19.03.2015, 3, 52, § 36(7).

[241] *op cit* 21, Impact Assessment of the BRRD, p 36.

up to full powers of any management body (Article 29(2) of the BRRD), and the temporary administrator may be removed by the competent authority at any time and for any reason (Article 29(4) of the BRRD). The competent authority possesses full control of the bank managers' and the temporary administrator's powers and actions – including actions against its acts and the target credit institution is stripped of any capacity to fight back against unlawful application of such power.

The result of the transitional recovery measures is that the bank's right of appeal may become only declarative since the very application of power at issue may remove the capacity to appeal. The concerns expressed by industry players about such measures in the early intervention stage[242] seem to be well founded.

3.3. Negative effects of key resolution measures on appealing

3.3.1. Effects of general resolution tools and general resolution powers

For the purposes of this chapter, key resolution measures are limited to the active phase of resolution procedures, i.e., the preparatory resolution measures are not in focus. The resolution tools form a general umbrella for resolution measures and are put into practice via other specific measures, e.g., the general resolution powers,[243] and *per se*, do not directly exert negative effects with regard to the interests of members of the management bodies in appealing the application of the tool. Indirect impact connected with an individual manager's responsibilities is not out of the question, but the effect of such an impact on appealing the application of a resolution tool is limited similarly to the impacts accompanying early intervention measures. The negative effects on appealing may become apparent via adopting more specific resolution measures when adopting any resolution tool depending on how the general tools will be put into practice via specific resolution measures.

Negative effects of the general resolution tools on appealing these measures are heavily influenced on the legal limitation of Article 63(2) of the BRRD that these may not be subject to any prior approvals or consents from any person or shareholders, except if a member state has decided to apply *ex-ante* judicial approval or pre-approval by competent ministry for decisions with direct fiscal impact, nor subject to even any procedural requirements to notify any person or publish any notice. Together with the prohibition of interim relief and the follow-up decisions staying in effect even if the application of the initial measure was unlawful, the effect is that these measures are effective immediately without any interim relief for provisional protection to the addressee bank's rights. This makes up additional layer of complexity standing in the way of the managers' fulfilment of their expected obligation to challenge unlawful application of the resolution powers.

---

[242] *op cit* 21, Impact Assessment of the BRRD, p 222–223.

[243] BRRD, art 63(1); *op cit* 21, Impact Assessment of the BRRD, p 122.

Article 63(1)(b) of the BRRD stipulates a key power for the resolution authorities – that of taking control of an institution and exercising all the rights and powers conferred upon the shareholders, the other owners, and the management body of the institution under resolution. It is obvious that a resolution authority would not appeal its own acts. Moreover, it may permit withdrawal of any appeals that former or remaining managers have set in motion, thereby resulting in complete breakdown of defending the bank's rights via the mechanism of management actions. The latter problem has been acknowledged by the CJEU and rectified in a judgement concerning application of the ultimate supervisory measure – revoking a bank's authorisation by the ECB. The CJEU accepted an appeal on the ECB's decision to revoke the bank's authorisation by attorney with powers of attorney originally issued by the bank before liquidation proceedings and later revoked by the liquidator of the bank.[244] If, based on analogy, the same would apply for appealing against resolution measures, the bank's attorney appointed before application of the measure would be acceptable as representative of the bank in the specific case. This leaves out situations where such power of attorney has not been previously issued. In the same case, the shareholders of the bank were denied as appellants of the ECB's decision to revoke the bank's authorisation as they were found not directly concerned by the decision.[245]

The measure of removing or replacing the management body and senior management (Article 63(1)(l) of the BRRD) has even extensive – the conventional defence of the bank by managers is inadequate if the unlawful act removes the very managers who should exercise the power in the bank's name. If not all managers are removed, removing some managers has potentially highly negative impact on the remaining managers' motivation to appeal because of the possibility to be removed as well.

Other measures of demanding information (Article 63(1)(a) of the BRRD); transferring ownership of shares, other instruments, rights, assets, and liabilities (Articles 63(1)(c) and (d) of the BRRD); more specific powers encompassed by the bail-in tool (Articles 63(1)(e) to (k) of the BRRD); and requiring the competent authority to assess the buyer of a qualifying holding in a timely manner with exceptions to timelines set in the prudential requirements of CRD IV and MiFID II (Article 63(1)(m) of the BRRD), mainly repeat the resolution tools' description, albeit in more detail, or otherwise do not bring in any meaningful direct conflicts of interest connected with challenging the adoption of such powers.

---

[244] *op cit* 12, *ECB v Trasta Komercbanka and Others*, para 30–35, 52, 53, 104–119.

[245] *Ibid*, para 54–79.

3.3.2. Effects of special management

The effect of special manager on bank's decision making is very similar to the recovery measure of temporary administrator. Besides differences in objectives, the main difference is that the temporary administrator is generally expected to follow the shareholder decisions and company law,[246] while for the special managers the resolution objectives specifically override any other management duties with Article 35(3) of the BRRD. The special management is specifically interested in not contesting any acts in the name of the bank appointing the special management. Also, the resolution authority may set the requirement of consent for such appeals. This means conflict of interest on both the personal manager's level, but also the bank would be under full control of the authority issuing the unlawful act which creates this situation.

3.3.3. Effects of naming agents for resolution and other measures

Option to appoint a third party acting on their behalf according to Articles 72(1) or 51(2) differs from the temporary administration and from the special manager in that it provides for an option of appointing an agent to exercise the resolution powers as such, which is fundamentally different from managing a credit institution through the recovery or resolution. However, the person appointed will have all the powers of the institution's shareholders and management bodies and has a clear interest in not contesting an act that results in his or her appointment, resulting the ability to appeal to be similarly hampered. The measure of Article 51(2) of the BRRD reiterates Articles 72(1) for a specific case and its reference as a separate power or measure in the BRRD is a mistake.

The powers of write-down and conversion as well as powers to restrict rights and obligations do not create inherently obvious conflicts of interests and therefore do not have the negative effects in the scope of this dissertation.

[246] BRRD, art 29(2) and 29(8).

4. Forcing the EU judicial system when appealing measures of Banking Union composite procedures – Summary of Publication III

4.1. Principles laid down by European Court of Justice for SSM and developing the three-stage jurisdiction test

4.1.1. CJEU judicial practice

When trying to appeal against a resolution measure, which are usually taken in complex composite procedures involving both EU and member state authorities, the court jurisdiction between EU courts and member state courts is not clear. Not only some recovery and resolution measures have intrinsic negative effects on appealing them, in some cases making it impossible even if the relevant authority does not follow the laws, the judicial system for appealing relevant acts also has considerable implications for appealing. The principles of subsidiarity and proportionality in the EU laws,[247] but also common sense on complexity, cost, and ease of access would suggest that it should be preferrable to appeal public acts via judicial process within home Member State in contrast to EU courts. In legal literature, the question has been raised from the beginning if decisions made in the SSM should be under the jurisdiction of EU or national courts as both EU and national authorities are involved in making the procedures leading to final decisions.[248]

The decisions of CJEU have resulted in widening the CJEU's own jurisdiction beyond what is immediately apparent from TFEU defining its jurisdiction[249] and for acts in composite proceedings, it is not clear if the court jurisdiction lies with Member State court system or EU court system. Specifically, the landmark judgement in case C-219/17, *Berlusconi and Fininvest*,[250] laid down important rules for differentiating between jurisdiction of EU courts and national courts in actions challenging final decisions of composite procedures in Single Supervisory Mechanism, but this judgement does not directly cover all scenarios and decisions in the Banking Union.

For the purpose of this dissertation, the scope of included acts is not limited to formal binding decisions, but all decisions to initiate procedures, preparatory

---

[247] Consolidated version of the Treaty on the Functioning of the European Union – Protocol (No. 2) on the application of the principles of subsidiarity and proportionality – OJ C 326/206.

[248] *op cit* 8, Demkova; Wissink, L. Challenges to an Efficient European Centralised Banking Supervision (SSM): Single Rulebook, Joint Supervisory Teams and Split Supervisory Tasks – European Business Organization Law Review 2017/18 (4); *op cit* 8, Witte.

[249] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47, 26.10.2012, Article 263.

[250] *op cit* 12, *Berlusconi*.

acts and non-binding proposals made by authorities that other authorities may base their final decisions on. All such adoptions are referred to here as 'acts'.

The interaction between EU and national courts continues to be a prominent topic for legal research and the Banking Union with its challenges has been called a fruitful laboratory for the development of forms of dialogue between them.[251] Within that setting, the Case C-219/17, *Berlusconi and Fininvest* tackles the fundamental question of court jurisdiction in SSM. Court jurisdiction problems are part of a vast range of legal and practical problems that have been under discussion with the creation of the composite procedures and mixed administration involving the ECB and the national competent authorities and Judgement in Case C-219/17, *Berlusconi and Fininvest*, of 10 December 2018 has been considered a remarkable judgement concerning the judicial review in the context of composite procedures, i.e., the procedures which involve the participation of both the EU and national authorities.[252] The case concerned primary ruling if TFEU gives the jurisdiction to EU Courts or national courts when challenging decisions to initiate procedures, preparatory acts and non-binding proposals adopted by the national competent authorities within the procedures governed by CRD IV, SSMR, SSM Framework Regulation and national law.

CJEU judged in contrary to the prior interpretations on Article 263 of the TFEU. Advocate General pointed out that prior judgements had held that where the EU institution is bound to the decisions of national authorities, the EU courts have no jurisdiction to rule on the lawfulness of measure adopted by national authorities,[253] and that preparatory acts of the final decision are not reviewable at all by neither EU nor domestic courts.[254] The Advocate General's opinion was contrary to the prior interpretations,[255] which has in turn been found downsizing the role of the national competent authorities.[256] The judgement provides that if the EU authority is the final formal decision maker and is not bound to prior national decisions, the EU courts have the jurisdiction over both the final act and

---

[251] Annunziata, F. Developing Judicial Dialogue Between EU Courts: The Role of EU Banking Legislation – San Diego International Law Journal 2021/23 (1), Bocconi Legal Studies Research Paper No. 3895229.

[252] Annunziata, F. Fostering Centralization of EU Banking Supervision Through Case-Law. The European Court of Justice and the Role of the European Central Bank – Bocconi Legal Studies Research Paper No 3372346, 2019, p 13–14; *op cit* 8, Demkova, p 210–211.

[253] Opinion of Advocate General Campos Sánchez-Bordona delivered on 27 June 2018 in Case C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS), ECLI:EU:C:2018:502, para 64–79; Judgment of the Court (Fifth Chamber) of 3 December 1992 in Case C-97/91, Oleificio Borelli SpA v Commission, ECLI:EU:C:1992:491.

[254] *op cit* 253, General Manuel *Berlusconi*, para 64–79; Judgment of the Court of 11 November 1981 in Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264.

[255] *op cit* 253, General Manuel *Berlusconi*, para 115, 126.

[256] Petit, C. A. The SSM and the ECB Decision-making governance, in Schiavo, G. L. (Ed), The European Banking Union and the Role of Law, Edward Elgar Publishing Limited 2019, p 114.

preparatory acts influencing the final decision.[257] If it is bound by the national decision, then the national act is reviewable and the national courts have jurisdiction in this case.[258] In combination with additional previous judgements,[259] the reverse situation should be interpreted in a way that if the national authority is bound by acts of EU authorities, the jurisdiction over legality of the final act lies with the national courts, but only to the extent to the discretion available to the national authority.

4.1.2. The three-stage jurisdiction test

Based on subchapter 4.1.1, a three-step test can be developed for finding out the EU-national court jurisdiction over acts in composite procedures. Stage 1 is to determine the formal final decision-making authority (EU vs national authority). Stage 2 is to determine if the formal decider has full or limited discretion in making the decision in relation to preparatory acts by the national or EU authorities, respectively. Stage 3 is to combine stages 1 and 2 as follows, making clear the asymmetric CJEU-inclined jurisdictional division (full jurisdiction unless indicated otherwise):

Decision by:	EU authority		National authority	
Discretion limited:	Yes	No	Yes	No
Jurisdiction over final act:	CJEU	CJEU	National courts (limited only to national discretion)	National courts
Jurisdiction over preparatory act:	National courts	CJEU (limited only to extent it affected)	CJEU	CJEU

4.2. Applicability of the three-stage jurisdiction test for the SRM

Articles 4(1)(i) and 6(6) of the SSMR explicitly cover the concept of recovery making these powers of the ECB and NCAs clearly covered by the ECJ judgements covered in previous subchapter. However, application of the relevant rules on SRM has been less clear.

---

[257] *op cit* 12, *Berlusconi*, para 41–45.

[258] *Ibid*, para 45–46.

[259] Judgment of the Court of 22 October 1987 in Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, para 11–20; Judgment of the Court (Fourth Chamber) of 3 July 2019 in Case C-644/17, *Eurobolt BV*, ECLI:EU:C:2019:555, para 27–30; Judgment of the Court of 16 June 1981 in Case C-126/80, *Salonia v Poidomani e Giglio*, ECLI:EU:C:1981:136, para 7 and 22; Judgment of the Court (Grand Chamber) of 6 December 2005 in Case C-461/03, *Gaston Schul Douane-expediteur*, ECLI:EU:C:2005:742, para 17.

On conceptual basis, SSM and SRM are very similar. As covered in chapter 2, the SSM and the SRM are both integral structures of the Banking Union.[260] SSM is for applying supervisory and recovery measures while SRM is for applying resolution measures. While the specific aims differ, the general aims of organising the application of the Banking Union is shared. Structurally, both compose of a centralising EU authority (ECB for SSM and SRB for SRM), and national authorities (national competent authorities for SSM and national resolution authorities for SRM) conducting composite procedures and applying measures under unified cooperative framework. Functionally, both apply harmonised EU banking regulation of the eurozone and voluntarily joined other Member States. The basic compositional idea and legal structure of the SRM closely mirrors the SSM.

General division of powers in SRM is similar to the SSM, but includes additional parties and a distinct political dimension. Firstly, for effective application of the resolution and resolution measures, a Single Resolution Fund as a separate entity financed by the banks and owned by the Board was founded.[261] This means the banking sector itself funds the resolution procedures in line with the principle of limiting usage of tax-payers money and in contrast to the bail-out by Member States. Secondly, although the national resolution authorities and SRB adopt resolution schemes when a bank is (likely) failing,[262] initiating the resolution depends on the European Commission endorsing or objecting it, and the European Union Council objecting or approving it according to Article 18(7) of the SRMR. Such political oversight may clearly impact the end result, but should not be considered a cause for not applying the same rules on jurisdiction as in the SSM.

Post-Publication III, the CJEU has upheld its standpoints for SSM[263] and indeed applied the principles of C-219/17, *Berlusconi and Fininvest*, on the acts of SRM,[264] as well as further applied the same rules for non-banking sectors.[265]

---

[260] See also: Moloney, N. European Banking Union: assessing its risks and resilience – Common Market Law Review 2014/51 (6), p 1611.

[261] SRMR, art 67.

[262] SRMR, art 7(3), 18(1) and 18(6).

[263] Judgment of the General Court (Ninth Chamber, Extended Composition) of 2 February 2022 in Case T-27/19, *Pilatus Bank and Pilatus Holding v ECB*, ECLI:EU:T:2022:46, para 243; Judgment of the General Court (Ninth Chamber, Extended Composition) of 6 October 2021 in Cases T-351/18 and T-584/18, *Ukrselhosprom PCF and Versobank v ECB*, ECLI:EU:T:2021:669, para 223.

[264] Judgment of the Court (Grand Chamber) of 3 December 2019 in Case C-414/18, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia*, ECLI:EU:C:2019:1036, para 38–54.

[265] For application in electronic communications sector, see: Order of the General Court (First Chamber) of 9 July 2019 in Case T-660/18, *VodafoneZiggo Group v Commission*, ECLI:EU:T:2019:546, para 110–112 (upheld by: Judgment of the Court (Tenth Chamber) 25 February 2021 in Case C-689/19 P, *VodafoneZiggo Group v Commission*¸ ECLI:EU:C:2021:142).

4.3. Application of the three-stage jurisdiction test for acts under SRMR

4.3.1. Acts by the European Union institutions

SRMR provides the composite procedure for application of the resolution measures. To investigate how the test developed in subchapter 4.2 would work in practice, the test has been applied for certain decisions of the SRMR applying or related to the core recovery measures. Clauses for cooperation, information sharing or consultation[266] are disregarded as these are intended for bolstering the efficiency of the resolution process and do not legally restrict or limit the discretion in any way.[267] Grouping by the final decision-making authority, the first set of acts are the SRB's decisions concerning the resolution measures.

According to Article 8 of the SRMR, the SRB is the final decision maker regarding drawing up and adopting resolution plans for entities under its authority. Main impact on the discretion lies in Article 8(2), according to which the SRB may require the NRAs to prepare and submit to the Board draft resolution plans. These are preparatory non-binding drafts prepared under full SRB control.[268] No other meaningful influence on SRB's discretion can be detected. The result of stage 2 of the test is therefore full discretion for the SRB and stage 3 concludes that EU courts have jurisdiction to rule on the legality of both the final decision as well as of drafts prepared by national authorities if these affect the validity of the final decision.

According to Article 8(12) of the SRMR the SRB is the final decision maker on the date by which the first resolution plans shall be drawn up by the entities under its authority. SRB has full discretion and the EU courts have the jurisdiction over such decision. The same is true for determining the MREL under Article 12 of the SRMR, and for post-Publication III addition of Article 10a, under which the SRB may prohibit certain distributions. The same applies also for imposing penalties according to Articles 38 to 41 of the SRMR, but these are not in the scope of this dissertation.

Article 10 of the SRMR covers the procedure of assessment of resolvability, largely mirroring the BRRD as covered under resolution planning in subchapter 2.2.2. The SRB's discretion may be limited by the obligation to take into account the relevant warnings and recommendations of the European Systemic Risk Board and the relevant criteria developed by EBA in considering the identification and measurement of systemic risk pursuant to Article 10(5) of the SRMR. Both are EU institutions and therefore cannot alter the jurisdiction between EU courts and national courts. SRB has full discretion and the EU courts have the jurisdiction over such decision, as well as on any defects of acts by national authorities affecting the validity of the final decision, if any.

---

[266] For example, SRMR, art 8(4), 8(13), 11(10), 12(15), 13(3)(3), 30 and 31.

[267] SRMR, Recitals 10, 12, 15, 18 and 26.

[268] SRMR, art 8(3) and 31(1).

According to Article 11 of the SRMR, the SRB has the final decision-making power to apply simplified obligations in relation to the drafting of resolution plans and waiving the obligation of drafting resolution plans regarding the entities under its authority. This decision may be reached via two procedures – either directly by the SRB or based on a proposal by the national resolution authority. The end decision by the SRB is under EU court jurisdiction, while the proposals by the national resolution authority are reviewable by the EU courts only if they affected the end decision by the SRB.

Most importantly, according to Article 16 of the SRMR, the SRB is responsible for deciding the resolution actions, which according to Article 3(1)(10) means application of any resolution tool or power. However, the resolution actions are subject to approval of resolution scheme by the Commission and the Council according to the process stipulated in Article 18 of the SRMR. Additional restrictions are set for using state aid and Single Resolution Fund aid. However, impacts of other EU institutions cannot alter EU-national court distinction. As covered above, applying specific recovery measures is very complex and may involve preparatory acts from the national authorities. Therefore, EU courts have jurisdiction to rule on the legality of these types of decisions by the SRB, as well as on any defects of acts by national authorities affecting the validity of the final decision.

Article 18(7) provides exclusive powers for the Commission and the Council for endorsing, demanding modification or objecting the resolution schemes within limited timeframes. There are no restrictions to the discretion of the Commission. The Council's discretion is limited to the Commission's proposals to the Council. As both are EU institutions, the EU courts have jurisdiction to rule on the legality of the final decisions as well as on any defects of acts by national authorities affecting the validity of the final decision.

4.3.2. Acts by the national resolution authorities

The powers for final decisions of National resolution authorities are limited to only entities not under SRB's general or *ad hoc* authority. Although formally independent, procedures and decisions of national resolution authorities may ultimately be heavily dependent on SRB's consultations, general guidelines and instructions. The legal nature of such general guidelines and instructions is unclear, but as there is a lack of clear obligation to follow these by the national resolution authorities, these should be considered not legally binding and not limiting national resolution authorities' discretion. As covered before, if the SRB is not satisfied with any national resolution authority's decisions, the SRB has the right to exercise all its powers directly with surpassing the national resolution authority or override its decisions.

For adopting resolution plans covered in Article 9 of the SRMR and deciding to apply simplified obligations for resolution plans,[269] there are no legally binding decisions by the SRB that would limit the national resolution authority's discretion, which means according to steps 2 and 3 of the test national courts have the jurisdiction to rule on the legality and defects of these acts.

However, the majority of national resolution authorities' decisions are or might be affected by European authorities' binding decisions. For deciding the resolvability of an institution, the national resolution authority is, like the SRB, bound to warnings and recommendations of the European Systemic Risk Board the relevant criteria developed by EBA in considering the identification and measurement of the systemic risk pursuant to Article 10(5) of the SRMR. For deciding the MREL of an institution, the SRB has been given a specific power with Article 12(7) to issue guidelines in this procedure and considering specific institution. Comparing to the right of issuing general guidelines, these specific guidelines may have a more binding effect, but this is unclear.

When deciding resolution actions and adopting resolution schemes, national resolution authorities depend, like the SRB, on approvals by Commission and Council.[270] The procedures also provide for implementing and carrying out by the national resolution authorities, the SRB decisions on assessments of resolvability as covered in Article 10(12), MREL as covered in Article 12(5), resolution schemes as covered in Article 18(9), write-down or conversion of capital instruments as covered in Article 21(11), in which case the latter is bound to the SRB's decisions.[271] In all of these cases, NRA has the final decision-making power, but its discretion is limited to acts by the European authorities, mainly the SRB. According to stages 2 and 3 of the test, this results in the national court's jurisdiction to rule on the legality and defects of acts by NRAs that is limited to the discretion available to the national authority, and EU courts have jurisdiction to rule on the legality of the guidelines and instructions by the European Authorities.

[269] SRMR, art 11(1) and 7(3); According to SRMR, art 7(3) fourth paragraph, for a series of Articles of the SRMR, any reference to the SRB is to be read as references to the national resolution authorities with regard to groups and entities under their authority. In this chapter, this is taken into account and from here on not referred to individually.

[270] SRMR, art 18(1), 18(6), 18(7) and 19(1).

[271] SRMR, Articles 10(12), 12(5), 18(9), 21(11) and 29(1).

5. Conclusions

In conclusion, all of the research questions have been answered and all objectives in relation to limiting the credit institutions' rights regarding appealing the BRRD measures were achieved – to prove that recovery of credit institutions is a distinct concept, to identify the negative effects of recovery and resolution measures for appealing those measures, and to develop a universal test for finding out the court jurisdiction division between the EU and Member State courts for appealing against measures in Banking Union. Recovery should be considered a separate concept with its own set of regulations and principles. It also became evident that the underlying general problem of diminishing credit institutions' legal rights, and even more so limiting their ability to enforce their rights in challenging relevant measures, is the reality. It may be impossible for the credit institution to appeal against application of certain recovery and resolution measures. Even if it is possible, then the jurisdiction of court proceedings is asymmetrically EU-inclined.

The specific research questions were investigated in the first chapter of the dissertation with the following findings:

(i) How to define the scope, functions and measures of the supervisory framework?

The general functions of the supervisory framework are financial market stability and smooth functioning of the internal market. To achieve this, the main areas of the EU prudential supervision system addresses can be grouped by the following more specific topics: general access to the market for a bank, access to the market for bank's shareholders, internal governance, capital requirements, reporting and disclosure requirements, and supervisory system and supervisory powers. The measures available to the competent authorities for achieving these goals can be consolidated as 19 core measures. The relevant substantive law is applicable through the EEA, but the Banking Union execution mechanism for prudential supervision – the SSM – applies only in eurozone and voluntarily joined Member States whose currency is not the euro (currently only Croatia and Bulgaria). The general logic of supervision is continuous supervision over all credit institutions and intervention with compulsory measures that do not directly affect third persons.

(ii) How to define the scope, functions and measures of the resolution framework?

The scope of the resolution framework is identical to the supervisory framework – substantive law applicable through the EEA, but the execution mechanism – the SRM – only in eurozone and joined Member States. The aim and functions of the resolution framework are to resolve a failing credit institution if conditions for resolution are met and to ensure the continuity of its critical functions; to avoid a significant adverse effect on the financial

system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; and to protect clients' funds and clients' assets. To achieve this, the resolution authorities have been provided with 14 preparatory measures, 4 general 'umbrella' resolution tools and 21 other significant core measures. The general logic of resolution is to plan for the possible resolution during the normal operations of a credit institution and to intervene with measures with direct effect, also for third parties, and take the active role in operating and restructuring of the target credit institution, its business, its contracts, and its assets.

(iii) Which characteristics enable to consider the bank recovery be considered a distinguishable concept next to the supervision and resolution?

The recovery of credit institutions is distinguishable from prudential supervision and resolution in EU law based on a number of characteristics:

1. It has its own objectives that are clearly distinct from the other two concepts: to save a failing bank from failure, and therefore from resolution or insolvency.
2. There is a distinct set of measures available in the recovery proceedings.
3. The conditions for applying recovery measures are different to the other two phases.
4. The nature of the measures is in between the supervisory and resolution measures: most have similar indirect effect as supervisory measures, but some also have characteristics of direct involvement by the authority.
5. The substantive law on one hand and empowered authorities and application systems on the other hand are a mix of supervisory and resolution systems: authorities and application mechanism for recovery measures are identical to supervisory measures, but the substantive law is consolidated with the resolution laws.
6. Recovery is timeline-wise 'between' the ever-present prudential supervision and the resolution phase, which active phase starts after recovery (if recovery and/or resolution is not skipped, which is also possible).

(iv) How to define the substance of bank recovery, i.e., its dedicated procedures and measures?

The recovery consists of recovery planning with its own applicable principles, of early intervention measures, and of two additional measures of removal of senior management and management body and appointing temporary administrator. Some of these measures are entirely recovery-specific, some greatly resemble other measures in supervision or resolution, and some are (almost) identical to those.

(v) How to define the probable interests for a bank to challenge the unlawful administrative acts?

For the purposes of this dissertation, the absolute legal order is considered desirable and the presumption is that a credit institution would, or at least would have the ability to freely decide to, contest and appeal application of any unlawful acts, including in recovery and resolution proceedings.

(vi) What are the relevant impediments for challenging the unlawful administrative acts?

Credit institution as a legal person is represented by its higher management. According to the applicable laws and guidelines, the managers must adhere to specific requirements, including, *inter alia*, loyalty towards the credit institution and avoiding conflicts of manager's and credit institution's interests. Bank recovery and resolution measures can primarily affect the loyalty and create conflicts of interest in two ways. First, the most serious implication – the authority takes over the management of the credit institution, which results in obvious conflict of being in control of appealing against its own (unlawful) administrative act. Secondly, the measures may also have indirect effects via (unlawful) measure being beneficial to individual managers on personal level, which deters them from starting appeal procedures.

(vii) Which main recovery measures entail such impediments because of their inherent effects?

Most of the recovery measures do not entail any relevant significantly negative effects. Some of them may theoretically benefit individual managers and therefore have some effect, but this can be considered irrelevant. The managers retain their powers and position and continue representing the credit institution.

However, the measure of appointing a temporary administrator according to BRRD Article 29 puts the credit institution under competent authority's (immediate) full indirect control even if relevant decision is made unlawfully. Credit institution's managers only retain as much of their powers as the competent authority decides, the temporary administrator is obviously not interested in contesting the decision naming him/her into the position, but even if he/she would want to do it, doing so is also under competent authority's full control.

(viii) Which main resolution measures entail such impediments because of their inherent effects?

Alarmingly, also several resolution measures may make it impossible to appeal these measures by the target credit institution even if the measure has

been applied unlawfully. This may theoretically mean losing all oversight by the courts for application of these measures, including if the application conditions are met, if the procedures have been correctly followed, if relevant decisions have been proportional, the authorities have stayed within their competence, and if the authorities have correctly used their discretion. In case of one recovery measure and several resolution measures the credit institutions' right of appeal against applying this measure may become fictious.

Resolution measure of appointing special manager according to BRRD Article 35 has exactly the same implications to the appealing by credit institution as the recovery measure of appointing a temporary administrator covered above. In addition, target credit institution may also have no possibility to appeal against removing of its managers via application of measure of BRRD Article 63(1)(l), which enables instant removal of all managers, even if it is applied unlawfully. In addition, it may be similarly impossible for target credit institution to challenge any resolution measures of taking control of an institution under resolution and exercising all the rights and powers conferred upon the shareholders, other owners and the management body according to BRRD Article 63(1)(b), and appointment of resolution authority's agents for exercising resolution powers according to BRRD Articles 72(1) and 51(2).

(ix) What are the rules and reasoning of the CJEU for differentiating between EU and national court jurisdiction in SSM-related and other composite procedures?

The CJEU has, especially in judgement in Case C-219/17, *Berlusconi and Fininvest*, but also others, provided enough guidance to construct the rules for the test in all relevant scenarios in Banking Union composite procedures. The underlying trend has been extending the CJEU jurisdictional scope. Prominently, the CJEU has decided against two of its previous positions – it extended CJEU jurisdiction over decisions by EU authorities where these are based on previous decisions by Member State authorities, and it agreed that preparatory nonbinding acts are also covered by judicial review. The author does not agree with the first position as there are no reasons significant enough to change the general rule of subsidiarity, and agrees with the second position as previously the preparatory acts were individually not covered by court review at all even if strongly influencing the end decision.

(x) Are application mechanisms SSM and SRM similar enough to apply the CJEU practice regarding SSM on SRM?

The same rules should apply for SRM as for SSM when finding out court jurisdiction over decisions that have been approved via corresponding mechanisms. The analysis and comparison provide that the SSM and SRM

are similar in all aspects relevant to appealing against decisions of applying corresponding measures. The objectives of these mechanisms are obviously different, but the structures are virtual reflections with national authorities and centralising EU authorities in similar roles. SRM does include a political level in its decision making, but it is irrelevant in the context of differentiating EU and national court jurisdiction. The decision-making procedures, division of competences between the EU and national authorities are very similar, as are the set of subject credit institutions.

(xi) What would be the construction of the a universal test be developed for finding out EU and member state court jurisdiction for both SSM and SRM?

Based on the previous analysis, an universal test for providing EU and member state court jurisdiction over all acts approved in the Banking Union could be constructed as follows. Stage 1 is to determine the formal final decision-making authority (EU vs national authority). Stage 2 is to determine if the formal decision maker has full or limited discretion in making the decision in relation to preparatory acts by the national or EU authorities, respectively. Stage 3 is to combine stages 1 and 2 as follows, making clear the asymmetric CJEU-inclined jurisdictional division (full jurisdiction unless indicated otherwise):

Decision by:	EU authority		National authority	
Discretion limited:	Yes	No	Yes	No
Jurisdiction over final act:	CJEU	CJEU	National courts (limited only to national discretion)	National courts
Jurisdiction over preparatory act:	National courts	CJEU (limited only to extent it affected)	CJEU	CJEU

(xii) How such test would work in practice? i.e., application of the test on acts implementing main resolution measures.

Application of the test on key decisions in SRMR for application of resolution measures proved that the rules can easily be applied and relevant subchapter provides answers about court jurisdictions for specific decisions under the SRMR.

Conclusive remarks on possible remedies and propositions for legislative changes regarding all three subtopics covered in this dissertation. Firstly, the research warrants heavy revision of BRRD which would fix tremendous inconsistencies with terminology, particularly defining the recovery of credit institutions as proposed in conclusions of this dissertation, but also amend the excessively complicated system and definitions regarding subgrouping of recovery and resolution measures and procedures. Legal clarity would also hugely benefit if the BRRD would be restructured based on two clear concepts and relevant procedures of recovery and resolution instead of current unclear arbitrary chronological(?) order. These measures would probably warrant a new directive repealing the current BRRD, which would be further justified if different mistakes and relatively excessive critique would be addressed.

Secondly, addressing the right to appeal declared for the credit institutions as the addressees of resolution or recovery measures might be fictitious for a range of recovery and resolution measures, the possible harmonised guarantees could target primarily two areas to be effective. One option would be to guarantee *ex ante* appealing right regarding application of all recovery and resolution measures. Taking into account presumably excessive impact of a collapse of a credit institution on the financial market, but also the institution itself and its customers and shareholders, the concern regarding possible urgency of the situation could be mitigated with a combination of several targeted legal instruments: the appealing period could be relatively short before the measure takes effect (e.g., a couple of days); creating special court proceedings with immediate priority outside the regular queue of court cases and simplified procedural requirements which would provide an initial judgment at least regarding interim relief; providing a status quo (moratorium) for the duration of these special court proceedings; and above all, universally extending the representation rights of the credit institution foremost to shareholders in cases of appealing against recovery and resolution measures.

Thirdly, an underlying reason for legal and practical problems, uncertainties and obscurity is the peculiar setup of composite proceedings in the Banking Union. The composite proceedings and the obscure mixture of EU and national level legislation should be eliminated and replaced with a clear uniform legislation for all three stages of prudential supervision, recovery and resolution of credit institutions and for both mechanisms of SSM and SRM. Clear and fixed responsibilities as well as clear and uniform procedural rules across the EU would help to assure both equal competition as well as address the obscurity regarding court jurisdiction. However, precise ways of rebuilding the legal basics of SSM and SRM and relevant material legislation is an extensive subject matter for future research and continuing academic and political debate.

REFERENCES

Literature and Publications

Adelwald, P. H. From bailout to bail-in: Making banking a legitimate part of the market economy – Economic Affairs 2021/ 41 (3).

Alexander, K. European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism – European Law Review, 2015/40 (2).

Altunbas, Y., *et al.* European Banking Union and bank risk disclosure: the effects of the Single Supervisory Mechanism' – Review of Quantitative Finance and Accounting 2022/58.

Annunziata, F. Developing Judicial Dialogue Between EU Courts: The Role of EU Banking Legislation – San Diego International Law Journal 2021/23 (1), Bocconi Legal Studies Research Paper No. 3895229.

Annunziata, F. European Banking Supervision in the Age of the ECB. Landeskreditbank Baden-Wüttenburg v. ECB – European Business Organization Law Review 2020/21.

Annunziata, F. Fostering Centralization of EU Banking Supervision Through Case-Law. The European Court of Justice and the Role of the European Central Bank – Bocconi Legal Studies Research Paper No 3372346, 2019.

Annunziata, F. The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni – European Banking Institute Working Paper Series No. 106, 2021.

Anzini, M. What Role is left for National Authorities within the Single Supervisory Mechanism? – A Critical Assessment of the L-Bank Case – Centrum für Europäische Politik 2019, available at https://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/cepAdhoc_L-Bank/cepAdhoc_What_Role_is_left_for_National_Authorities_within_the_Single_Supervisory_Mechanism_.pdf (19 March 2022).

Asimakopoulos I., Howarth D. Stillborn Banking Union: Explaining Ineffective European Union Bank Resolution Rules – Journal of Common Market Studies 2022/60 (2).

Avignone, G., *et al*. Centralised or decentralised banking supervision? Evidence from European banks – Journal of International Money and Finance 2021/110.

Basel Committee on Banking Supervision. Basel Committee membership – available at: https://www.bis.org/bcbs/membership.htm (11 November 2021).

Basel Committee on Banking Supervision. Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework – 10 June 2004 (Basel II), available at https://www.bis.org/publ/bcbs107.pdf (consolidated text, 11 November 2021).

Basel Committee on Banking Supervision. Basel III: A global regulatory framework for more resilient banks and banking systems – 16 December 2010, revised 01 June 2011 (Basel III), available at https://www.bis.org/publ/bcbs189.pdf (consolidated text, 11 November 2021).

Basel Committee on Banking Supervision. G10 – available at https://www.bis.org/list/g10publications/ (11 November 2021).

Basel Committee on Banking Supervision. International convergence of capital measurement and capital standards – 15 July 1988 (Basel I), available at https://www.bis.org/publ/bcbs04a.pdf (11 November 2021).

Basel Committee on Banking Supervision. Progress report on adoption of the Basel regulatory framework – 14 October 2021, available at: https://www.bis.org/bcbs/publ/d525.pdf (11 November 2021).
Bastos, F. B. Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi – Common Market Law Review 2019/56 (5).
Binder, J.-H. Proportionality at the Resolution Stage: Calibration of Resolution Measures and the Public Interest Test – European Business Organization Law Review 2020/21, EBI Working Paper Paper No. 12, 2017, SAFE Working Paper No. 179, Goethe University Frankfurt 2017.
Binder, J.-H. The next step: Towards harmonised frameworks for the liquidation of non-systematically relevant credit institutions in the EU? A discussion of policy choices and potential impediments – European Company and Financial Law Review 2021/18 (4).
Bodellini, M. To Bail-In, or to Bail-Out, that is the Question – European Business Organization Law Review 2018/19 (2).
Boissay, F., Cappiello, L. Micro- versus Macro-prudential supervision: potential differences, tensions and complementarities – Financial Stability Review, European Central Bank May 2014.
Busch, D., *et al*. How Single is the Single Resolution Mechanism? – European Banking Institute Working Paper no 30, 2019, European Business Law Review 2019/30 (4).
Chiaramonte, L., *et al*. Deposit insurance schemes and bank stability in Europe: how much does design matter? – The European Journal of Finance 2020/26 (7–8).
Council of the European Union. Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC, Presidency compromise, ST 6202 2018 INIT – 2016/0362 (COD).
Cucinelli, D., *et al*. Do bond yields follow the hierarchy of risk post BRRD? – European Financial Management 2021/27 (3).
Cutura, J. A. Debt holder monitoring and implicit guarantees: Did the BRRD improve market discipline? – Journal of Financial Stability 2021/54.
Davies, P., Hopt, K. J. Non-Shareholder Voice in Bank Governance: Board Composition, Performance and Liability – ECGI Working Paper Series in Law No. 413, 2018.
de Gioia Carabellese, P., Zhang, D. Bail-in Tool and Bank Insolvency: Theoretical and Empirical Discourses around a New Legal (or Illegal) Concept – European Business Law Review 2019/30 (3) via https://repository.canterbury.ac.uk/download/bf8f74a916e446f9d8d574d0bec54af104896df7b39cdfb2a541a9db49a99c21/293144/Bail-in%20Paper%20Pierre%20and%20Daoning%2024022019%20rev%20mark-up.pdf (08 June 2022).
Demkova, S. The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism – Review of European Administrative Law, 2019/12 (1).
European Central Bank. ECB establishes close cooperation with Bulgaria's central bank – Press Release 10 July 2020, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200710~ae2abe1f23.en.html (11 November 2021).
European Central Bank. ECB establishes close cooperation with Croatia's central bank – Press Release 10 July 2020, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200710_1~ead3942902.en.html (11 November 2021).

European Central Bank. List of supervised entities – 1 October 2021, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities202111.en.pdf?3cc68294ea26e5820547f77d05886b26 (11 November 2021).
European Central Bank. Risk report on less significant institutions – available at: https://www.bankingsupervision.europa.eu/ecb/pub/html/ssm.lsiriskreport202001~48ecda4549.en.html (11 November 2021).
European Central Bank. Single Supervisory Mechanism – available at: https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html (18 May 2022).
European Commission. A rulebook for all financial actors in the EU – available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/what-banking-union_en#deeper-integration-of-the-euro-area-banking-system (18 May 2022).
European Commission. Commission Staff working document: Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, SWD (2012) 166 final.
European Commission. Commission Staff working document: Impact Assessment Accompanying the document Proposal amending: – Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; – Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; – Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; – Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, SWD (2016) 377 final.
European Commission. Documents in procedure 2016/0362/COD – available at https://eur-lex.europa.eu/procedure/EN/2016_362 (22.01.2022).
European Commission. Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM (2012) 511 final.
European Commission. Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM (2012) 280 final.
European Commission. Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC, COM (2016) 852 final.
European Commission. Proposal for a Regulation of the European Parliament and of 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM (2013) 520 final.

Financial Action Task Force. FARF Report: Professional Money Laundering – 2018, available at: https://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf (19 January 2022).
Financial Times. A German bail-out tests EU bank rules to the limit – Editorial, 10 December 2019, available at: https://www.ft.com/content/8024e7dc-1b62-11ea-97df-cc63de1d73f4 (22 January 2022).
Fiordelisi, F., *et al*. On the nexus between sovereign risk and banking crises – Journal of Corporate Finance 2020/65.
García-Olalla, M., Luna, M. Market reaction to supranational banking supervision in Europe: Do firm- and country-specific factors matter? – Empirica 2021/48.
Georgosouli A. The transnational governance of bank resolution and the treatment of national regulatory variation in the EU – Cambridge Law Journal, 2021/80 (1).
Gordon, J. N., Ringe, W.-G. Bank Resolution in the European Banking Union: a Transatlantic Perspective On What It Would Take – Columbia Law Review, 2015/115 (5).
Gortsos, C. V. Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM) – European Business Organization Law Review 2015/16 (3).
International Finance Corporation. A Guide to Corporate Governance Practices in the European Union – 2015, available at: https://www.ifc.org/wps/wcm/connect/506d49a2-3763-4fe4-a783-5d58e37b8906/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES&CVID=kNmxTtG (11 November 2021).
Jones, E., Zeitz, A. O. The Limits of Globalizing Basel Banking Standards – Journal of Financial Regulation 2017/3 (1).
Leanza, L, et al. Bail In vs Bail-Out: Bank Resolution and Liability Structure – International Review of Financial Analysis 2021/73.
Martino, E., Parchimowicz, K. Go Preventive or Go Home – a New Role of MREL – European Company and Financial Law Review 2021/18 (4).
Matanky-Becker, R., Cockbain, E. Behind the criminal economy: using UK tax fraud investigations to understand money laundering myths and models' (2021), Crime, Law and Social Change 2022/77.
Moloney, N. European Banking Union: assessing its risks and resilience – Common Market Law Review 2014/51 (6).
Nicolaides, P. State aid after the Banking Union: serious disturbance and public interest – Journal of Banking Regulation 2021/23.
Oliveira, V., Raposo, C. The Determinants of European Banks' Capital Structure: Is There a Difference Between Public and Private Banks? – International Journal of Central Banking Volume 2021/17 (3).
Petit, C. A. The SSM and the ECB Decision-making governance, in Schiavo, G. L. (Ed), The European Banking Union and the Role of Law, Edward Elgar Publishing Limited 2019.
Philippon, T., Salord, A. Bail-ins and bank resolution in Europe: A progress report – Geneva Reports on the World Economy Special Report 4, International Center for Monetary and Banking Studies 2017.
Russo, C. A. Resolution Plans and Resolution Strategies: Do They Make G-SIBs Resolvable and Avoid Ring Fence? – European Business Organization Law Review 2019/20.
Schelo, S. Bank Recovery and Resolution, 2nd edn, Kluwer Law International B.V. 2020.
Schemmel, J. The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market – Capturing the Administrative Influence – Indiana Journal of Global Legal Studies, 2016/23 (2).

Schillig, M. EU bank insolvency law harmonisation: What next? – International Insolvency Review 2021/30 (2).
Single Resolution Board. List of public Q&As on MREL – available at https://www.srb.europa.eu/en/system/files?file=media/document/list_of_public_qas_on_mrel_-_clean.pdf (12 December 2021).
Single Resolution Board. Minimum Requirement for Own Funds and Eligible Liabilities (MREL): SRB Policy under the Banking Package – May 2021, https://www.srb.europa.eu/system/files/media/document/mrel_policy_may_2021_final_web.pdf (22 January 2022).
Standard & Poor's. Continued Bank Bail-Outs Stretch the Credibility of Europe's Resolution Framework – 2020, available at: https://www.spglobal.com/ratings/en/research/articles/200226-continued-bank-bail-outs-stretch-the-credibility-of-europe-s-resolution-framework-11364018 (20 January 2022).
Stephanou, C., Mendoza, J. C. Credit Risk Measurement Under Basel II: An Overview and Implementation Issues for Developing Countries – World Bank Policy Research Working Paper No. 3556, 2005.
Teichmann, F. M., Falker, M.-C. Money laundering through consulting companies – Journal of Financial Regulation and Compliance 2020/28 (3).
Tölö, E., *et al*. Have Too-Big-to-Fail Expectations Diminished? Evidence from the European Overnight Interbank Market – Journal of Financial Services Research, 2021/60 (1).
Tröger, T. H. How not to do banking law in the 21st century – SAFE Policy Letter No. 56, Goethe University Frankfurt 2017.
Tröger, T. H. Too Complex to Work: A Critical Assessment of the Bail-In Tool Under the European Bank Recovery and Resolution Regime – Journal of Financial Regulation 2018/4 (1).
Tröger, T. H. Why MREL Won't Help Much: Minimum requirements for bail-in capital as insufficient remedy for defunct private sector involvement under the European bank resolution framework – SAFE Working Paper No. 180, Goethe University Frankfurt 2017.
Wissink, L. Challenges to an Efficient European Centralised Banking Supervision (SSM): Single Rulebook, Joint Supervisory Teams and Split Supervisory Tasks – European Business Organization Law Review 2017/18 (4).
Wissink, L., *et al*. Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection – Utrecht Law Review 2014/10 (5).
Witte, A. The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law? – Maastricht Journal of European and Comparative Law 2014/21 (1).
Zavvos, G. S., Kaltsouni, S. The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing – published as a separate chapter in: Matthias Haentjens & Bob Wessels (eds.), Research Handbook on Crisis Management in the Banking Sector, Edward Elgar Publishing Ltd 2015.

Legislation and Normative Documents

Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, 24 May 2014 – available at: https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf (18 May 2022).

Charter of Fundamental Rights of the European Union – OJ C 326/391, 26.10.2012.

Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. – OJ L 178/15, 11.7.2017.

Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges – OJ L 184/1, 8.7.2016.

Commission Delegated Regulation (EU) 2019/348 of 25 October 2018 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions – OJ L 63/1, 4.3.2019.

Commission Implementing Regulation (EU) 2018/1624 of 23 October 2018 laying down implementing technical standards with regard to procedures and standard forms and templates for the provision of information for the purposes of resolution plans for credit institutions and investment firms pursuant to Directive 2014/59/EU of the European Parliament and of the Council, and repealing Commission Implementing Regulation (EU) 2016/1066 – OJ L 277/1, 7.11.2018.

Commission Implementing Regulation (EU) 2021/622 of 15 April 2021 laying down implementing technical standards for the application of Directive 2014/59/EU of the European Parliament and of the Council with regard to uniform reporting templates, instructions and methodology for reporting on the minimum requirement for own funds and eligible liabilities – OJ L 131/123, 16.4.2021.

Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47, 26.10.2012.

Consolidated version of the Treaty on the Functioning of the European Union – Protocol (No. 2) on the application of the principles of subsidiarity and proportionality – OJ C 326/206.

Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions – OJ L 287/63, 29.10.2013.

Council Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 – OJ L225/1, 30.7.2014.

Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5) (2014/434/EU) – OJ L 198/7, 5.7.2014.

Decision of the Single Resolution Board in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., SRB/EES/2017/08, non-confidential version available at: https://www.srb.europa.eu/en/system/files?file=media/document/srb_decision_srb_ees_2017_08_non-confidential_scanned.pdf (15.02.2022).

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC – OJ L 337/35 23.12.2015.

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law – OJ L 169/46, 30.6.2017.

Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures – OJ L 150/253, 7.6.2019.

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 – OJ L 150/296, 7.6.2019.

Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions – OJ L 126/1, 26.5.2000.

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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC – OJ L 176/338, 27.6.2013.

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes – OJ L 173, 12.6.2014.

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 L173/190, 12.6.2014.

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments – OJ L173/349, 12.6.2014.

Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features – OJ L 257/214, 28.8.2014.

Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes – OJ L 84/22, 26.03.1997.

Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems – OJ L 166/45, 11.6.1998.

European Banking Authority. Guidelines on internal governance under Directive 2013/36/EU, 2 July 2021, EBA/GL/2021/05.

European Banking Authority. Guidelines on recovery plan indicators, 09 November 2021, EBA/GL/2021/11.

European Banking Authority. Guidelines on the application of simplified obligations under Article 4(5) of Directive 2014/59/EU, 16 October 2016, EBA/GL/2015/16, (repealed).
European Banking Authority. 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, 06 August 2015, EBA/GL/2015/07.
European Banking Authority. Guidelines on the range of scenarios to be used in recovery plans, 18 July 2014, EBA/GL/2014/06.
European Banking Authority. Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU, 29 July 2015, EBA/GL/2015/03.
European Banking Authority. Recommendation on the coverage of entities in a group recovery plan, 26 January 2018, EBA/REC/2017/02.
European Banking Authority. Recommendation on the development of recovery plans, 23 January 2013, EBA/REC/2013/02.
European Central Bank. Guide to Fit and Proper Assessments, December 2021 – available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit_and_proper_guide_update202112~d66f230eca.en.pdf (16 February 2022).
European Securities and Markets Authority, European Banking Authority. Guidelines on the assessment of the suitability of members of the management body and key function holders, 2 July 2021, ESMA35-36-2319, EBA/GL/2021/06.
European Securities and Markets Authority, European Banking Authority. Final report on joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive, 2 July 2021, 2014/65/EU, ESMA35-36-2319, EBA/GL/2021/06.
Finantsinspektsiooni seadus – RT I 2001, 48, 267.
Finantskriisi ennetamise ja lahendamise seadus – RT I, 19.03.2015, 3, 52.
Makseasutuste ja e-raha asutuste seadus – RT I 2010, 2, 3.
Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 – OJ L 150/1, 7.6.2019.
Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms – OJ L 150/226, 7.6.2019.
Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC – OJ L 331/12, 15.12.2010.
Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14.5.2014.
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 176/1, 27.6.2013.

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84, 12.6.2014.
Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, 27.7.2012.
Single Resolution Board. Decision of the Single Resolution Board of 17 March 2020 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected (SRB/EES/2020/52) – available at https://www.srb.europa.eu/system/files/media/document/srb_ees_2020_52_final_decision_en.pdf (15 February 2022).
Single Resolution Board. Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15) – available at https://www.srb.europa.eu/system/files/media/document/decision_of_the_srb_on_cofra.pdf (30 January 2022).
Tarbijakaitseseadus – RT I, 31.12.2015, 1.

Case law

Judgement of the Court (Grand Chamber) of 5 November 2019 in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *ECB v Trasta Komercbanka and Others*, ECLI:EU:C:2019:923.
Judgment of the Court (Eighth Chamber) of 4 March 2021 in In Case C-947/19 P, *Liaño Reig v SRB*, ECLI:EU:C:2021:172.
Judgment of the Court (Fifth Chamber) of 3 December 1992 in Case C-97/91, *Oleificio Borelli SpA v Commission*, ECLI:EU:C:1992:491.
Judgment of the Court (First Chamber) of 8 May 2019 in Case C-450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank*, ECLI:EU:C:2019:372.
Judgment of the Court (Fourth Chamber) of 3 July 2019 in Case C-644/17, *Eurobolt BV*, ECLI:EU:C:2019:555.
Judgment of the Court (Grand Chamber) of 15 July 2021 in Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:599.
Judgment of the Court (Grand Chamber) of 19 December 2018 in Case C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, ECLI:EU:C:2018:1023.
Judgment of the Court (Grand Chamber) of 3 December 2019 in Case C-414/18, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia*, ECLI:EU:C:2019:1036.
Judgment of the Court (Grand Chamber) of 6 December 2005 in Case C-461/03, *Gaston Schul Douane-expediteur*, ECLI:EU:C:2005:742.
Judgment of the Court (Tenth Chamber) 25 February 2021 in Case C-689/19 P, *VodafoneZiggo Group v Commission*¸ ECLI:EU:C:2021:142.
Judgment of the Court (Third Chamber) of 21 December 2021 in Case C-874/19 P, *Aeris Invest Sàrl v SRB*, ECLI:EU:C:2021:1040.

Judgment of the Court (Third Chamber) of 21 December 2021 in Case C-934/19 P, *Algebris (UK) Ltd and Anchorage Capital Group LLC v SRB*, ECLI:EU:C:2021:1042.
Judgment of the Court of 11 November 1981 in Case C-60/81, *IBM v Commission*, ECLI: EU:C:1981:264.
Judgment of the Court of 16 June 1981 in Case C-126/80, *Salonia v Poidomani e Giglio*, ECLI:EU:C:1981:136.
Judgment of the Court of 22 October 1987 in Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.
Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank*, ECLI:EU:T:2017:337.
Judgment of the General Court (Ninth Chamber, Extended Composition) of 2 February 2022 in Case T-27/19, *Pilatus Bank and Pilatus Holding v ECB*, ECLI:EU:T:2022:46.
Judgment of the General Court (Ninth Chamber, Extended Composition) of 6 October 2021 in Cases T-351/18 and T-584/18, Ukrselhosprom PCF and Versobank v ECB, ECLI:EU:T:2021:669.
Judgment of the General Court (Third Chamber, Extended Composition) in Case T-827/17 of 6 October 2021, *Aeris Invest Sàrl v European Central Bank*, ECLI:EU: T:2021:660.
Opinion of Advocate General Campos Sánchez-Bordona delivered on 27 June 2018 in Case C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, ECLI:EU:C:2018:502.
Order of the Court (Eighth Chamber) of 30 September 2021 in Case C-27/21 P, *Ramón González Calvet v Single Resolution Boar*d, ECLI:EU:C:2021:789.
Order of the General Court (First Chamber) of 9 July 2019 in Case T-660/18, *VodafoneZiggo Group v Commission*, ECLI:EU:T:2019:546.

ABBREVIATIONS

BRRD	–	Bank Recovery and Resolution Directive
BRRD II	–	Bank Recovery and Resolution Directive II
CJEU	–	Court of Justice of the European Union
CRD IV	–	Capital Requirements Directive IV
CRD V	–	Capital Requirements Directive V
CRR	–	Capital Requirements Regulation
CRR II	–	Capital Requirements Regulation II
EBA	–	European Banking Authority
ECB	–	European Central Bank
EU	–	European Union
MiFID II	–	Markets in Financial Instruments Directive II
MiFIR	–	Markets in Financial Instruments Regulation
SRB	–	Single Resolution Board
SRM	–	Single Resolution Mechanism
SRMR	–	SRM Regulation
SRMR II	–	SRM II Regulation
SSM	–	Single Supervisory Mechanism
SSMR	–	SSM Regulation

ACKNOWLEDGEMENTS

I would like to thank my supervisor prof. Irene Kull for fruitful discussions, support and guidance throughout my PhD studies. I would like to acknowledge the wonderful staff at School of Law, University of Tartu for their contagious positive mentality and continuous support. Big thank you to the School of Law for enabling me to finish my studies as junior research fellow, and benefit from several programs.

My special thanks go to my family for allowing me to find the time needed for my studies.

SUMMARY IN ESTONIAN

Krediidiasutuse piiratud võimalused finantsseisundi taastamise ja kriisilahendusmeetmete vaidlustamiseks EL õiguses

1. Probleemid, eesmärgid ja uurimisküsimused

Euroopa Liidus (EL) on Pangandusliidu osana lisaks seni eksisteerinud krediidiasutuste[272] usaldatavusnõuete õigusraamistikule (finantsjärelevalve)[273] loodud finantsseisundi taastamise ja kriisilahenduse õigusraamistik.[274] Nimetatud uued õigusraamistikud loodi peaasjalikult kahe õigust loova aktiga: vastavat materiaal- ja menetlusõigust katva EL direktiiviga nr 2014/59/EL[275] (BRRD) ning EL üleseid rakendamismehhanisme hõlmava EL määrusega nr 806/2014[276] (SRM Määrus). Nimetatud õigusaktidega kehtestati rida täiendavaid kohustusi nii krediidiasutustele kui avalikele organitele, samuti mitmeid uut tüüpi (haldus)-menetlusi, mille eesmärgiks on tagada krediidiasutuse päästmine finantsseisundi olulisel halvenemisel ning krediidiasutuse korrapärane lõpetamine või ümberorganiseerimine eesmärgiga vältida pankrotti ja riigi kapitali kulutamist krediidiasutuste päästmisele. Pangandusliidu osadeks olevate õigusraamistike rakendamiseks on loodud avaliku võimu teostamise süsteem, kus liikmesriigi ja EL vastavad asutused teostavad avaliku võimu ülesandeid ja rakendavad vastavaid

---

[272] Samuti investeerimisühingute, kuid käesolev töö fookus on krediidiasutustel.

[273] Usaldatavusnõuete ja finantsjärelevalve all on doktoritöös silmas peetud kitsalt määruse (EL) nr 575/2013 (CRR) ja direktiivi 2013/36/EL (CRD IV) nõudeid ja režiimi.

[274] „Finantsseisundi taastamine“ (ingl *recovery*) ning „finantskriisi lahendamine“ (ingl *resolution*) on ilmselt EL õiguse tõlkimisel eesti keelde tekkinud eksitavad ja ebaõnnestunud mõisted. Esimese osas ei taastata ainult finantsseisundit, vaid krediidiasutuse vastavust nõuetele laiemalt ja usaldusväärsust kõigis aspektides, mistõttu on eestikeelne mõiste ekslikult kitsendav. Teise osas ei ole tegemist finantskriisi lahendamisega, vaid kollapsi äärel või selle läbi teinud krediidiasutuse kui isiku ning selle varade ja äri ümberorganiseerimisega, mistõttu on eestikeelne mõiste otseselt eksitav. Sarnaselt on oluliselt eksitav finantskriisi lahendamise üks kesksete põhitingimuste tõlge (ingl *failing or likely to fail*), mille eesti keelne tõlge „maksejõetu või tõenäoliselt maksejõuetuks jääv“ on kitsendatud jällegi ekslikult maksejõuetusele, kuigi termini sisu on tegelikult oluliselt laiem hõlmates kõik olulised finantsregulatsioonide rikkumised. Viimane on niivõrd eksitav, et käesolevas resümees on finantskriisi lahendamise tingimuse kontekstis kasutatud termini „maksejõuetus“ asemel terminit „kollaps“.

[275] Euroopa Parlamendi ja nõukogu direktiiv 2014/59/EL, 15. mai 2014, millega luuakse krediidiasutuste ja investeerimisühingute finantsseisundi taastamise ja kriisilahenduse õigusraamistik ning muudetakse nõukogu direktiivi 82/891/EMÜ ning Euroopa Parlamendi ja nõukogu direktiive 2001/24/EÜ, 2002/47/EÜ, 2004/25/EÜ, 2005/56/EÜ, 2007/36/EÜ, 2011/35/EL, 2012/30/EL ja 2013/36/EL ning määruseid (EL) nr 1093/2010 ja (EL) nr 648/2012, ELT L 173, OJ L 173, 12.6.2014, lk 190–348.

[276] Euroopa Parlamendi ja nõukogu määrus (EL) nr 806/2014, 15. juuli 2014 , millega kehtestatakse ühtsed eeskirjad ja ühtne menetlus krediidiasutuste ja teatavate investeerimisühingute kriisilahenduseks ühtse kriisilahenduskorra ja ühtse kriisilahendusfondi raames ning millega muudetakse määrust (EL) nr 1093/2010, OJ L 225, 30.7.2014, lk 1–90.

meetmeid ühiselt, üksteise asemel või üksteisest mõjutatuna krediidiasustuste jaoks paljuski läbipaistmatutes komposiitmenetlustes. Avaliku võimu asutustele on seejuures antud lai diskretsiooniõigus ja nad võivad rakendada suure mõjuga haldusmeetmeid. Sellega on kaasnenud ebaselgus menetluste erinevates faasides ja menetluse läbiviijate vastutuses ning krediidiasutuste õiguste oluline piiramine nii vastavate haldusmeetmete rakendamisel kui vaidlustamisel.

Kõigil kolmel Pangandusliidu õigusraamistikega reguleeritud menetluste grupil – finantsjärelevalvel, finantsseisundi taastamisel ja kriisilahendusel – on erinevad eesmärgid, rakendamise eeldused ning haldusmeetmed. Ebaselgus nimetatud kolme menetluse piiritlemisel võib kaasa tuua olukorra, kus kasutatakse ebakohaseid meetmeid, tehakse seda valel ajal või selleks tegelikult võimu mitte omava asutuse poolt. Eelkõige ei ole selge finantsseisundi taastamise kontseptsiooni piirid ja sisu. Finantsseisundi taastamise piiride tuvastamine võimaldab vastavatele menetlustele kohaldada finantsseisundi taastamise spetsiifilisi reegleid ja printsiipe ning kontrollida neist kinni pidamist. Kuna finantsjärelevalve on suunatud just nimelt usaldusväärsuse tagamisele ja probleemide vältimisele, siis võib krediidiasutuse probleemide tekkimises näha otsesemalt või kaudsemalt ka finantsjärelevalve ebaõnnestumist. Selgepiiriline menetluste eraldamine tagab võimaluse vajadusel määrata kogu finantsseisundi taastamise kontseptsiooni rakendajaks väga lihtsasti mõne teise asutuse, kui selleks hetkel olev finantsjärelevalve ehk pädev asutus.

BRRD-ga loodi uued krediidiasutustele suunatud väga intensiivsed haldusmeetmed. Kuigi uute finantsseisundi taastamise ning finantskriisi lahendamise meetmete rakendamine peab olema BRRD kohaselt vaidlustatav, võib teatud meetmete rakendamine tuua kaasa olukorra, kus adressaadil on võimatu nimetatud meedet vaidlustada ning seda isegi siis, kui tegemist on õigusvastase rakendamisega. Ilmne on vaidlustamise võimatus näiteks olukorras, kus kõik selleks pädevust omavad juhtorganite liikmed on kõnealuste meetmete rakendamisega eemaldatud või nende sellist pädevust piiratud vastava otsuse kohese jõustumisega. Teiseks võivad vastavad meetmed isegi juhi ametikoha ja pädevuse formaalsel säilimisel teda mõjutada mitte seadusvastast meedet vaidlustama. Selliste meetmete mõju tuvastamine võimaldab tulevikus selliste mõjude vähendamist või kõrvaldamist, et vältida nii ekslikku seadusvastasust kui sihilikku võimu kuritarvidust. Praktikas on taolised probleemid jõudnud ka Euroopa Liidu Kohtu menetlustesse. Selles osas on doktoritöö teoreetiliseks eelduseks adressaadi huvi õigusvastase haldusmeetme vaidlustamiseks olenemata kahju tekkimisest.

Vaidlustamisõiguse kasutamine on piiratud ka kohtumenetlustes. BRRD rakendamiseks loodud keerulistes komposiitmenetlustes ei ole selge EL ja liikmesriikide kohtute vaheline pädevuse jaotus. Eelkõige tekib ebaselgus meetmete otsustus- ja rakendamismehhanismi keerukusest, mistõttu näiliselt liikmesriigi asutuse poolt tehtud otsus võib osutuda hoopis vaidlustatavaks EL kohtusüsteemis. Vaidlustamisõigust omava isiku jaoks tähendab ebaselgus kohtute pädevuses ka ebaselgust kuludes, mida õiguse kasutamine kaasa toob ja seega vaidlustamisõiguse piirangut. Eelduslikult on riigisisene ja tuttav kohtusüsteem oluliselt odavam kui menetlus EL kohtusüsteemis. Teatud reeglid on kohtumenet-

lustes seatud eelkõige finantsjärelevalve ühtse rakendusmehhanismi ehk SSM menetlustega seoses. Selgete piiride loomine EL ja liikmesriikide kohtute pädevuse jaotuse osas võimaldab vaidluste vältimist kohtumenetluses kohtute pädevuse üle ja kaasnevat arvestatavat aja- ja ressursikulu kokkuhoidu kohtumenetlustes. Menetlus erinevates kohtutes võib omada mõju ka krediidiasusutse nimel tegutseva isiku esindusõiguse olemasolu lahendamist. Euroopa Kohtu selgitused kohtualluvuse küsimuses võimaldavad koostada tervikliku reeglistiku komposiitmenetluste jaoks.

Eelnevat arvestades on doktoritöö põhiprobleem krediidiasutuste piiratud vaidlustamisõigus BRRD-ga loodud haldusmeetmete rakendamisel. Doktoritöö eesmärk on lahendada kolm spetsiifilisemat probleemide ringi seoses krediidiasutusele suunatud BRRD-ga loodud haldusmeetmete vaidlustamise õiguse piiramisega.

Esimene uurimisprobleem on krediidiasutuse finantsseisundi taastamise kui iseseisva menetluse piiritlemine finantsjärelevalvest ja kriisilahendusest. Menetluste piiritlemise ebaselgus võib kaasa tuua finantsseisundi taastamise kui menetluse spetsiifiliste eelduste, reeglite, tingimuste ja printsiipide eiramiseni vastavate meetmete rakendamisel. Doktoritöö eesmärk on tõestada, et krediidiasutuse finantsseisundi taastamine on käsitletav iseseisva kontseptsioonina, mis koosneb spetsiifilistest menetlustest ja avaliku võimu haldusmeetmetest, ning defineerida finantsseisundi taastamise kontseptsiooni piirid ja sisu.

Uurimisküsimused eeltoodud eesmärgi saavutamiseks on järgmised: (i) kuidas määratleda finantsjärelevalve raamistiku ulatust, funktsioone ja meetmeid?, (ii) kuidas määratleda finantskriisi lahendamise raamistiku ulatust, funktsioone ja meetmeid?, (iii) millised erisused võimaldavad väita, et krediidiasutuse finantsseisundi taastamine on finantsjärelevalvest ja finantskriisi lahendamisest eraldiseisev kontseptsioon?, ning (iv) kuidas määratleda krediidiasutuse finantsseisundi taastamise spetsiifilisi protseduure ja meetmeid?

Teine uurimisprobleem on konflikt finantsseisundi taastamise ja finantskriisi lahendamise meetmete vaidlustamisõiguse kui üldise nõude ning meetmete rakendamispõhimõtete ja toime vahel. Nimelt ei võimalda mitmed meetmed oma olemuse ning kohese jõustumise ja jõustamise tõttu vaidlustamisõiguse kasutamist või muudavad selle raskes. Doktoritöö eesmärgiks on tuvastada ja kirjeldada finantsseisundi taastamise meetmete ja finantskriisi lahendamise meetmete olemuslikke negatiivseid mõjusid adressaadi (st krediidiasutuse) vaidlustamisvõimekusele ja pakkuda võimalikke lahendusi konflikti lahendamiseks.

Uurimisküsimused eeltoodud eesmärgi saavutamiseks on järgmised: (v) kuidas määratleda krediidiasutuse huvi õigusvastaste haldusaktide vaidlustamiseks?, (vi) millised on asjassepuutuvad takistused õigusvastaste haldusmeetmete vaidlustamiseks?, (vii) millised kesksetest finantsseisundi taastamise meetmetest omavad olemuslikult takistavat mõju vaidlustamisõigusele?, (viii) millised kesksetest finantskriisi lahendamise meetmetest omavad olemuslikku takistavat mõju vaidlustamisõigusele?

Kolmas spetsiifiline uurimisprobleem seisneb EL ja liikmesriigi vahelise kohtualluvuse ebaselguses. Ebaselguse kõrvaldamiseks on doktoritöö eesmärgiks

on välja töötada ja pakkuda välja universaalne test, mille kaudu on võimalik leida kohtualluvus EL ja liikmesriikide kohtute vahel kõigi Pangandusliidu asjasse puutuvate haldusaktide osas ja mis kehtiks nii krediidiasutuste finantsjärelevalve, finantsseisundi taastamise kui ka finantskriisi taastamise otsustele.

Uurimisküsimused kolmanda eesmärgi saavutamiseks on järgmised: (ix) millised on Euroopa Kohtu praktika kohaselt reeglid ja põhjendused, mis võimaldavad eristada SSM-i ja muude komposiitmenetluste kohtualluvust EL ja liikmesriigi kohtute vahel? (x) kas rakendamismehhanismid SSM ja SRM on piisavalt sarnased, et rakendada SSM-i kohta käivat Euroopa Kohtu praktikat SRM-ile? (xi) milline võiks olla universaalne test EL ja liikmesriikide kohtute jurisdiktsioonide eristamiseks nii SSM kui SRM jaoks? (xii) kuidas vastav test töötaks tegelikkuses ehk testi rakendamine peamiste finantskriisi lahendamise meetmeid rakendatavate otsuste näitel.

Senised uurimused on peaasjalikult keskendunud finantsseisundi taastamise ja kriisilahenduse üldise õigusraamistiku või konkreetsete meetmete analüüsimisele, nende positiivsete ja negatiivsete aspektide analüüsile, jättes krediidiasutuse kui vastava õigusraamistiku subjekti ja adressaadi õiguste kaitse piisavalt põhjaliku tähelepanuta. Doktoritöös esitatud küsimusi ei ole autorile teadaolevalt antud teemaga seoses varem analüüsitud ning on seega originaalsed.

2. Meetodid, allikad

Doktoritöö põhineb positiivse õiguse, selle kontseptsioonide, mõistete ja teooriate süstemaatilisel kriitilisel analüüsil. Peamised meetodid on dogmaatiline, süstemaatiline, analüütiline, sünteetiline ja teleoloogiline meetod. Töö keskendub õigusliku probleemi fookusest tulenevalt eelkõige EL õigusele ning allikateks on peamiselt asjakohased õigustloovad aktid ja õigusloome menetlusega kaasnevad materjalid, teoreetiline kirjandus ning Euroopa Kohtu praktika. Piiratud ulatuses on doktoritöö eri teemade juures EL õiguse ülevõtmise näitena kasutatud ka Eesti siseriiklikku õigust. Seadusandlikke ja teoreetilisi allikaid on kasutatud eesmärgiga tuvastada vastavate õigusnormistike kui süsteemide sisemisi ja omavahelisi seoseid ja mõjutusi, spetsiifiliste õigusnormide sisu ja tegelikke eesmärke. Nii on töös kasutatud ka valdkonna õiguslikku reguleerimist põhistavaid varasemaid asjakohaseid teooriaid. Olulisematest õigustloovatest aktidest on doktoritöös kasutatud BRRD, ühtse järelevalvemehhanismi ning ühtse kriisilahendusmehhanismi aluseks olevaid EL määrusi ja krediidiasutuste tegevuse alustamist reguleerivaid ja usaldusnõudeid kehtestavaid EL õigusakte. Teoreetilisteks allikateks olid peamiselt eelretsenseeritud teadusajakirjades avaldatud artiklid ning teised usaldusväärsed publikatsioonid.

Doktoritöö on koostatud tervikliku teaduspublikatsioonide kogumikuna ning põhineb kolmel teadusartiklil, mis on kõik avaldatud rahvusvahelise toimetuskolleegiumiga valdkonna teadusajakirjades. Kõik teadusartiklid on heaks kiidetud anonüümse eelretsenseerimise teel. Autor on kõikide teadusartiklite ainuautor. Doktoritöö põhineb järgmistel teadusartiklitel:

Publikatsioon I Maarand, M. The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive – Juridica International 28/2019, DOI: https://doi.org/10.12697/JI.2019.28.12.

Publikatsioon II Maarand, M. Bank recovery and resolution measures' restrictive effects on appealing against them – Juridica International 30/2021, DOI: https://doi.org/10.12697/JI.2021.30.18.

Publikatsioon III Maarand, M. The Impact of The Judgement in Case C-219/17, Berlusconi and Fininvest, on Court Jurisdiction Regarding Legality of Acts by Institutions of Single Resolution Mechanism – International Comparative Jurisprudence 2019, 5(2), DOI: https://doi.org/10.13165/j.icj.2019.12.004.

Doktoritöö kokkuvõtva ülevaateartikliga ehk doktoritöö terviktekstiga on publikatsioonid kokku seotud ühtseks tervikuks, täiendatud teoreetilist tausta ja lisatud hilisemat olulisemat kohtupraktikat. Töö koosneb loogiliselt kolmest uurimisprobleemidest ja uurimisküsimustest lähtuvast põhipeatükist. Publikatsioon I sisaldab esimese põhipeatüki analüütilist osa ja järeldusi krediidiasutuse finantsseisundi taastamise käsitlemisest eraldiseisva kontseptsioonina, mida on doktoritöö terviktekstis olulisel määral täiendatud analüüsiga, mis keskendub piirnevatele kontseptsioonidele. Teises peatükis on tehtud kokkuvõte publikatsioonist II, mis käsitleb doktoritöö teist spetsiifilist probleemi, milleks on krediidiasutuse finantsseisundi taastamise meetmete ja finantskriisi lahendamise meetmete negatiivne mõju meetmete vaidlustamise võimalikkusele ja subjektide võimekusele. Publikatsiooni III kokkuvõte koos lisatud täiendava analüüsiga moodustab doktoritöö kolmanda põhipeatüki, milles uuritakse EL ja liikmesriigi kohtualluvust Pangandusliidu komposiitmenetlustes.

3. Järeldused

Kokkuvõttes on autor andnud vastused kõigile doktoritöös esitatud uurimisküsimustele ning sellega ka seatud eesmärgid täitnud. Tõestatud on kriisilahenduse kontseptsiooni eraldiseisvus, on tuvastatud BRRD-ga loodud meetmete negatiivsed mõjud nende meetmete vaidlustamisele ning välja on töötud universaalne test EL ja liikmesriigi kohtute pädevuse tuvastamiseks Pangandusliidu komposiitmenetlustes.

Leitud vastused uurimisküsimustele on kokkuvõtvalt järgmised.

(i) Kuidas määratleda finantsjärelevalve raamistiku ulatust, funktsioone ja meetmeid?

Finantsjärelevalve funktsiooniks on luua ja tagada usaldus pangandussektori ja konkreetse krediidiasutuse suhtes selle tavapärase toimimise ajal. Finantsjärelevalve poolt kaetud valdkonnad saab grupeerida järgmiselt: krediidiasutuse ning selle omanike turule lubamine ja eemaldamine, sisejuhtimine, kapitalinõuded, raporteerimine ja avalikustamine ning finantsjärelevalve süsteem ja -õigused. Eesmärkide saavutamiseks on finantsjärelevalve raamistikus loodud 19 keskset haldusmeedet. Kuigi vastav materiaalõigus kohaldub kogu Euroopa Majanduspiirkonnas, siis Pangandusliidu vastava valdkonna rakendusmehhanism ehk SSM kohaldub vaid euroalal ning sellega vabatahtlikult liitunud riikides (hetkel Horvaatia ja Bulgaaria). Üldine finantsjärelevalve teostamise loogika ja meetmete iseloom on pidev järelevalve ning kolmandatele isikute õigusi otseselt mitte puudutavate kohustuste seadmine.

(ii) Kuidas määratleda finantskriisi lahendamise raamistiku ulatust, funktsioone ja meetmeid?

Finantskriisi lahendamise adressaadid kattuvad finantsjärelevalve ulatusega ning ka rakendusmehhanismi SRM rakendumise ala on piiratud finantsjärelevalve ulatusega identselt. Finantskriisi lahendamise eesmärk on kollapsi äärel või selle läbi teinud krediidiasutuse ümberorganiseerimine minimaalsete negatiivsete välismõjudega, sh kaitstes hoiustajate hoiuseid ja vältides avalike vahendite kaasamist. Selle saavutamiseks on kriisilahendusasutustele loodud 14 ettevalmistavat meedet (13 kriisilahenduskõlblikkust tagavat meedet ning omavahendite ja kõlblike kohustuste miinimumnõue), 4 üldist nn katusmeedet (kriisilahenduse vahendid) ning neid katusmeetmeid rakendavad ja täiendavad 21 spetsiifilist meedet. Finantskriisi lahendamise üldine loogika ja meetmete iseloom on krediidiasutuse tavapärase tegevuse ajal kriisilahenduse planeerimine kriisilahendusasutuste poolt ning finantskriisi lahendamise menetluses intensiivne otsene sekkumine krediidiasutuse tegevusse, sh otseselt mõjutades kolmandate isikute õigusi, ja krediidiasutuse juhtimise üle võtmine kriisilahendusasutuse poolt selle tegevuse, lepingute ja varade omandisuhete ümberkujundamiseks.

(iii) Millised erisused võimaldavad väita, et krediidiasutuse finantsseisundi taastamine on finantsjärelevalvest ja finantskriisi lahendamisest eraldiseisev kontseptsioon?

Finantsseisundi taastamist saab finantsjärelevalvest ja finantskriisi lahendamisest eraldiseisva kontseptsioonina eristada mitmete tunnuste kaudu:

1. Finantsseisundi taastamisel on oma selgelt eristuv eesmärk – krediidiasutuse päästmine enne kollapsi ning finantskriisi lahendamise menetluse ja maksejõuetuse vältimine.
2. Finantsseisundi taastamise menetluse jaoks on loodud selgelt eristuv haldusmeetmete komplekt.
3. Finantsseisundi taastamise meetmete rakendamise eeldused on teisest kahest faasist – finantsjärelevalvest ja kriisilahendusest – eristuvad.
4. Finantsseisundi taastamise meetmed sisaldavad nii finantsjärelevalve kui ka kriisilahenduse elemente – enamikel meetmetel on pigem finantsjärelevalvele omane kaudne mõju, kuid teatud meetmetel on ka otsese sekkumise omadused.
5. Finantsesisundi taastamise meetmeid reguleerivad materiaalõiguse normid ning nende normide ning rakendusraamistik on kombinatsioon finantsjärelevalve ja kriisilahenduse õigusaktidest – kui rakendusraamistik ja õigustatud asutused kattuvad finantsjärelevalve raamistikuga, siis materiaalõiguse normid on sätestatud koos kriisilahendust reguleerivate õigusaktidega.
6. Finantsseisundi taastamine asub ajalises järjestuses ühest küljest pidevalt toimuva finantsjärelevalve ja teisest küljest pärast finantsseisundi taastamist rakenduva kriisilahenduse vahel (sh võivad nii finantsseisundi taastamine kui kriisilahendus konkreetsel juhul ka mitte rakenduda).

(iv) kuidas määratleda krediidiasutuse finantsseisundi taastamise spetsiifilisi protseduure ja meetmeid?

Finantsseisundi taastamise jaoks on kehtiva õigusraamistikuga loodud konkreetsed meetmed: finantsseisundi taastamise kavandamise meetmed, varajase sekkumise meetmed ning kõrgema juhtkonna ja juhtorgani tagasikutsumise ning ajutise halduri nimetamise meetmed. Mõningad neist meetmetest on täielikult finantsseisundi taastamise spetsiifilised, mõned sarnanevad olulises ulatuses finantsjärelevalve või finantskriisi lahendamise meetmetega ning mõningad on viimastega (peaaegu) identsed. Vastavate meetmete rakendamiseks on loodud haldusmenetluste raamistik.

(v) kuidas määratleda krediidiasutuse huvi õigusvastaste haldusaktide vaidlustamiseks?

Käesoleva doktoritöö põhineb eeldusel, et enda õiguste kaitsmine on igal juhul soovitav ning vaba otsustamise tingimustes krediidiasutus ka enda õigusi kaitseb, sh soovib vaidlustada õigusvastaselt rakendatud finantsseisundi taastamise ja kriisilahenduse meetmeid.

(vi) millised on asjassepuutuvad takistused õigusvastaste haldusmeetmete vaidlustamiseks?

Peamiseks takistuseks on võimalik huvide konflikt. Krediidiasutust kui juriidilist isikut esindavad juhtkonna liikmed peavad vastavalt kohalduvale õigusele järgima teatud nõudeid, muu hulgas olema krediidiasutusele lojaalsed ning vältima huvide konflikte enda ja krediidiasutuste huvide vahel. Finantsseisundi taastamise ja kriisilahenduse meetmed võivad mõjutada seda lojaalsuskohustuse täitmist ja kaasa tuua huvide konflikti olukorra tekkimise. Esiteks võib huvide konflikt tekkida olukorras, kus avaliku võimu asutus võtab (õigusvastase) meetme rakendamise tulemusel krediidiasutuse juhtimise üle. Sellisel juhul tekib ilmselge huvide konflikt iseenda (õigusvastaselt) rakendatud meetme kohaldamise ja meetme vaidlustamise vahel. Teiseks võivad meetmed omada kaudset mõju konkreetse juhi vaidlustamisvalmidusele olukorras, kus vaidlustamine ei ole personaalselt kasulik.

(vii) millised kesksetest finantsseisundi taastamise meetmetest omavad olemuslikult takistavat mõju vaidlustamisõigusele?

Doktoritöös jõuti järeldusele, et olemuslikult omab takistavat mõju ainult ajutise halduri nimetamine BRRD artikli 29 kohaselt. Vastav meede võimaldab pädeval asutusel haarata ajutise halduri läbi koheselt kaudne kontroll krediidiasutuse ja seega ka sama meetme vaidlustamise üle isegi juhul, kui vastav otsus oli õigusvastane. Senistele krediidiasutuse juhtidele jääb vaid nii palju võimu, kui pädev asutus otsustab. Ajutine haldur ei hakka ilmselgelt krediidiasutuse nimel iseenda määramist vaidlustama, kuid isegi kui seda soovib teha, allub see pädeva asutuse kontrollile. Mõned meetmed võivad teoreetiliselt omada negatiivset mõju individuaalsel tasandil, kuid need mõjud on pigem ebaolulised.

(viii) millised kesksetest finantskriisi lahendamise meetmetest omavad olemuslikku takistavat mõju vaidlustamisõigusele?

Mitmed finantskriisi lahendamise meetmed võivad muuta oma mõju tõttu nende rakendamisele vastu vaidlemise võimatuks ja seda isegi juhul, kui nende meetmete rakendamine oli õigusvastane. See võib viia vastavate meetmete rakendamise õiguspärasuse kohtuliku kontrolli kaotamiseni. Koos eelmises punktis nimetatud finantsseisundi taastamise meetmega võib mitmete finantskriisi lahendamise meetmete apellatsiooniõigus osutuda fiktiivseks.

Doktoritöös jõuti järeldusele, et olemuslikult takistavat mõju omavateks meetmeteks on BRRD artikli 35 kohaselt erihalduri nimetamine, mis omab samasugust mõju eelmises punktis nimetatud ajutise halduri nimetamisega. Lisaks ei ole teatud juhtudel võimalik krediidiasutusel apelleerida BRRD artiklis 63 lõike 1 punktis l sätestatud juhtorgani ja kõrgema juhtkonna tagasi kutsumise või välja vahetamise meetmele, kontrolli omandamise

meetmele BRRD artiklis 63 lõike 1 punkti b kohaselt ning kriisilahendusasutuse agentide määramisele BRRD artikli 72 lõike 1 või artikli 51 lõike 2 kohaselt.

(ix) millised on Euroopa Kohtu praktika kohaselt reeglid ja põhjendused, mis võimaldavad eristada SSM-i ja muude komposiitmenetluste kohtualluvust EL ja liikmesriigi kohtute vahel?

Euroopa Kohus on oma kohtuasjades, eriti kohtuasjas C-219/17, *Berlusconi ja Fininvest*, andnud juhised konstrueerimaks reeglid Pangandusliidu kõigi komposiitmenetluste EL-liikmesriigi kohtualluvuse tuvastamiseks. EL kohtute pädevusi on laiendatud. Eelkõige otsustas Euroopa Kohus eelnimetatud lahendis EL kohtute pädevust laiendada ka vaidlustele, kus EL asutus teeb küll lõpliku otsuse, kuid on selle tegemisel õiguslikult seotud liikmesriigi asutuse varasema aktiga. Samuti otsustas Euroopa Kohus hõlmata kohtuliku järelevalvega varasemalt kohtuliku järelevalve alla mitte kuulunud menetlust algatavad või ettevalmistavad aktid ja mittesiduvad ettepanekud. Autor ei nõustu esimese osaga ehk EL kohtute pädevuse laiendamisega, kuna autori hinnangul ei ole piisavalt põhjust subsidiaarsuspõhimõtte murdmiseks. Teise osaga ehk komposiitmenetluses tehtavate mitte lõplike otsuste ja aktide vaidlustamisõigusega katmine on aga igati põhjendatud.

(x) kas rakendamismehhanismid SSM ja SRM on piisavalt sarnased, et rakendada SSM-i kohta käivat Euroopa Kohtu praktikat SRM-ile?

SSM ja SRM raames tehtud otsustele kohalduvad samad kohtualluvuse reeglid. Doktoritöös läbi viidud analüüsist nähtub, et SSM ja SRM on sarnased kõigis olulistes aspektides. Erisused seisnevad eesmärkides ja SRM-i lisatud poliitilise otsustuse mõõtmes, kuid antud kontekstis ei oma need erisused olulist rolli. Otsuste vastuvõtmise protseduurid ning EL ja liikmesriikide asutuste vaheline pädevuse jaotus on äärmiselt sarnased, nagu on identne ka subjektide ehk adressaatideks olevate krediidiasutuste ring.

(xi) milline võiks olla universaalne test EL ja liikmesriikide kohtute jurisdiktsioonide eristamiseks nii SSM kui SRM jaoks?

Euroopa Kohtu praktika võimaldab koostada kolmeastmelise testi EL ja liikmesriigi kohtute vahelise pädevuse tuvastamiseks komposiitmenetlustes. Esimese sammuna tuleb tuvastada kas formaalse lõppotsuse vastuvõtja on EL või liikmesriigi asutus. Teise sammuna tuleb tuvastada kas vastav astus oli oma diskretsioonis piiratud teise vastavalt kas liikmesriigi või EL asutuse varasema mistahes otsuse või aktiga. Kolmanda sammuna tuleb vastuste kombinatsioonis leida õige vastus. Universaalse testi kolm astet on väljendatav järgmise kokkuvõtva tabelina:

Otsustaja:	EL asutus		Liikmesriigi asutus	
Kas diskretsioon on piiratud?	Jah	Ei	Jah	Ei
Pädev kohtusüsteem lõppakti osas:	Euroopa Kohus	Euroopa Kohus	Liikmesriigi kohus (piiratud ainult liikmesriigi asutuse diskretsiooniga)	Liikmesriigi kohus
Pädev kohtusüsteem mõjutava akti osas:	Liikmesriigi kohus	Euroopa Kohus (piiratud ainult mõjutava osaga)	Euroopa Kohus	Euroopa Kohus

(xii) kuidas vastav test töötaks tegelikkuses ehk testi rakendamine peamiste finantskriisi lahendamise meetmeid rakendatavate otsuste näitel.

Doktoritöös rakendati testi olulisemate SRM Määruses sätestatud otsustustele ning see võimaldas edukalt tuvastada konkreetsete otsustuste kohtualluvuse EL ja liikmesriigi kohtute vahel.

Doktoritöös on tehtud ka ettepanekuid õigusaktide muutmiseks. Esiteks tuleks likvideerida ebaselgus, mille on põhjustanud BRRD-s kasutatud terminoloogia ja kontseptsioonide käsitlemise ebajärjekindlus. Võttes arvesse doktoritöös tehtud järeldusi peaks BRRD reorganiseerimine hõlmama finantsseisundi taastamise kui eraldiseisva kontseptsiooni selget defineerimist ning BRRD struktuuri reformimist selliselt, et see lähtuks finantsseisundi taastamisest ning finantskriisi lahendamisest kui kahest eraldiseisvast menetlusest.

Teiseks tuleks kõrvaldada olukord, kus BRRD-s sätestatud mitmeid meetmeid ei ole võimalik sisuliselt ja praktiliselt vaidlustada. Arvestades kõrgendatud avalikku huvi ühelt poolt ja potentsiaalset suurt kahju teiselt poolt, oleks võimalik lahendus kombinatsioon erandlikult lühikesest esmasest garanteeritud vaidlustamisperioodist (nt mõned päevad), kiirest lihtsustatud kohtulikust erimenetlusest esialgse otsuse tegemiseks (vähemalt esialgse õiguskaitse osas), automaatse *status quo* (moratoorium) rakendumisest esialgse vaidluse ajaks ning EL ülesest esindusõiguse laiendamisest krediidiasutuste aktsionäridele finantsseisundi taastamise ja kriisilahenduse meetmete vaidlustamise protsessides. Kolmandaks tuleks kaaluda EL Pangandusliidu alusaktide muutmist, mis tagaks EL ja liikmesriikide õiguslikult ja menetluslikult äärmiselt ebaselge ja läbipaistmatute komposiitmenetluste kaotamise. Ühtsed ja arusaadavad materiaalõigus- ja menetlusnormid aitaksid tagada võrdset kohtlemist ja ausat konkurentsi, lahendaksid ebaselgused vastutuse kohaldamises ning kohtualluvuse määramises. Millised peaksid olema reformi täpsed elemendid, võiks olla tulevaste õiguslike ja poliitiliste debattide ja uurimuste teemaks.

PUBLICATIONS

CURRICULUM VITAE

Name: Märt Maarand
Date of birth: 15 November 1988
E-mail: mart.maarand@gmail.com

Education

2018–present	University of Tartu, PhD Studies in Law
2014	University of Tartu, MA in Law, *cum laude*
2013	International Law Summer School: Banking & Finance Law, ELSA Bucharest, Romania
2011	University of Tartu, BA in Social Sciences (Law)

Professional career

2021–present	University of Tartu, Junior Research Fellow
2019–present	AS Pocopay, Member of the Management Board, Head of Risk and Compliance
2013–2019	Finantsinspektsioon (Estonian Financial Supervision and Resolution Authority), Lawyer
2010–2011	Nordea Bank Finland Plc Estonia Branch, Legal Counsel
2010–2013	Various shorter-term apprenticeships: a law firm, Ministry of Justice, Tallinn Circuit Court

Main fields of research: Financial Regulation

List of publications

Maarand, M. The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive – Juridica International 28/2019.

Maarand, M. The Impact of The Judgement in Case C-219/17, Berlusconi and Fininvest, on Court Jurisdiction Regarding Legality of Acts by Institutions of Single Resolution Mechanism – International Comparative Jurisprudence 2019, 5(2).

Maarand, M. Bank recovery and resolution measures' restrictive effects on appealing against them – Juridica International 30/2021.

Maarand, M. Euroopa Liidu finantsjärelevalve: kas ühtne ebaühtlus? – Juridica 1/2021.

ELULOOKIRJELDUS

Nimi: Märt Maarand
Sünniaeg: 15 November 1988
E-mail: mart.maarand@gmail.com

Hariduskäik

2018–praegu	Tartu Ülikool, doktoriõpe, õigusteadus
2014	Tartu Ülikool, õigusteaduse magister, *cum laude*
2013	Suveülikool: International Law Summer School: Banking & Finance Law, ELSA Bukarest, Rumeenia
2011	Tartu Ülikool, sotsiaalteaduste bakalaureus (õigusteadus)

Teenistuskäik

2021–praegu	Tartu Ülikool, nooremteadur
2019–praegu	AS Pocopay, juhatuse liige, riski ja vastavuskontrolli juht
2013–2019	Finantsinspektsioon, jurist
2010–2011	Nordea Bank Finland Plc Estonia Branch, juristi abi
2010–2013	Erinevad lühemaajalised praktikakohad: advokaadibüroo, Justiitsministeerium, Tallinna Ringkonnakohus

Peamised uurmisvaldkonnad: Finantsõigus

Publikatsioonide loetelu

Maarand, M. The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive – Juridica International 28/2019.

Maarand, M. The Impact of The Judgement in Case C-219/17, Berlusconi and Fininvest, on Court Jurisdiction Regarding Legality of Acts by Institutions of Single Resolution Mechanism – International Comparative Jurisprudence 2019, 5(2).

Maarand, M. Bank recovery and resolution measures' restrictive effects on appealing against them – Juridica International 30/2021.

Maarand, M. Euroopa Liidu finantsjärelevalve: kas ühtne ebaühtlus? – Juridica 1/2021.

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

1. **Херберт Линдмяэ**. Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks**. Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
3 **Marju Luts**. Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits**. Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
5. **Merle Muda**. Töötajate õiguste kaitse tööandja tegevuse ümberkorraldamisel. Tartu, 2001.
6. **Margus Kingisepp**. Kahjuhüvitis postmodernses deliktiõiguses. Tartu, 2002.
7. **Vallo Olle**. Kohaliku omavalitsuse teostamine vahetu demokraatia vormis: kohalik rahvaalgatus ja rahvahääletus. Tartu, 2002.
8. **Irene Kull**. Hea usu põhimõte kaasaegses lepinguõiguses. Tartu, 2002.
9. **Jüri Saar**. Õigusvastane käitumine alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimuse andmetel). Tartu, 2003.
10. **Julia Laffranque**. Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus. Tartu, 2003.
11. **Hannes Veinla**. Ettevaatusprintsiip keskkonnaõiguses. Tartu, 2004.
12. **Kalev Saare**. Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Tartu, 2004.
13. **Meris Sillaots**. Kokkuleppemenetlus kriminaalmenetluses. Tartu, 2004.
14. **Mario Rosentau**. Õiguse olemus: sotsiaalse käitumise funktsionaalne programm. Tartu, 2004.
15. **Ants Nõmper**. Open consent – a new form of informed consent for population genetic databases. Tartu, 2005.
16. **Janno Lahe**. Süü deliktiõiguses. Tartu, 2005.
17. **Priit Pikamäe**. Tahtluse struktuur. Tahtlus kui koosseisupäraste asjaolude teadmine. Tartu, 2006.
18. **Ivo Pilving**. Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel. Tartu, 2006.
19. **Karin Sein**. Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused. Tartu, 2007.
20. **Mart Susi**. Õigus tõhusale menetlusele enda kaitseks – Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsiooni artikkel 13 Euroopa Inimõiguste Kohtu dünaamilises käsitluses. Tartu, 2008.
21. **Carri Ginter**. Application of principles of European Law in the supreme court of Estonia. Tartu, 2008.
22. **Villu Kõve**. Varaliste tehingute süsteem Eestis. Tartu, 2009.

23. **Katri Paas**. Implications of Smallness of an Economy on Merger Control. Tartu, 2009.
24. **Anneli Alekand**. Proportsionaalsuse printsiip põhiõiguste riive mõõdupuuna täitemenetluses. Tartu, 2009.
25. **Aleksei Kelli**. Developments of the Estonian Intellectual Property System to Meet the Challenges of the Knowledge-based Economy. Tartu, 2009.
26. **Merike Ristikivi**. Latin terms in the Estonian legal language: form, meaning and influences. Tartu, 2009.
27. **Mari Ann Simovart**. Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele. Tartu, 2010.
28. **Priidu Pärna**. Korteriomanike ühisus: piiritlemine, õigusvõime, vastutus. Tartu, 2010.
29. **René Värk**. Riikide enesekaitse ja kollektiivse julgeolekusüsteemi võimalikkusest mitteriiklike terroristlike rühmituste kontekstis. Tartu, 2011.
30. **Paavo Randma**. Organisatsiooniline teovalitsemine – *täideviija täideviija taga* kontseptsioon teoorias ja selle rakendamine praktikas. Tartu, 2011.
31. **Urmas Volens**. Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu, 2011.
32. **Margit Vutt**. Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu. Tartu, 2011.
33. **Hesi Siimets-Gross**. Das „Liv-, Est- und Curlaendische Privatrecht" (1864/65) und das römische Recht im Baltikum. Tartu, 2011.
34. **Andres Vutt**. Legal capital rules as a measure for creditor and shareholder protection. Tartu, 2011.
35. **Eneken Tikk**. Comprehensive legal approach to cyber security. Tartu, 2011.
36. **Silvia Kaugia**. Õigusteadvuse olemus ja arengudeterminandid. Tartu, 2011.
37. **Kadri Siibak**. Pangandussüsteemi usaldusväärsuse tagamine ja teabekohustuste määratlemine finantsteenuste lepingutes. Tartu, 2011.
38. **Signe Viimsalu**. The meaning and functioning of secondary insolvency proceedings. Tartu, 2011.
39. **Ingrid Ulst**. Balancing the rights of consumers and service providers in electronic retail lending in Estonia. Tartu, 2011.
40. **Priit Manavald**. Maksejõuetusõigusliku regulatsiooni valikuvõimaluste majanduslik põhjendamine. Tartu, 2011, 193 lk.
41. **Anneli Soo**. Remedies against ineffectiveness of defense counsel. Judicial supervision over the performance of defense counsel in Estonian criminal proceedings. Tartu, 2011, 282 p.
42. **Arnold Sinisalu**. Mõjutustegevuse piirid rahvusvahelises õiguses. Tartu, 2012, 277 lk.
43. **Kaspar Lind**. Käibemaksupettused ja nende tõkestamine. Tartu, 2012, 155 lk.
44. **Berit Aaviksoo**. Riigi otsustusruumi ahenemine: kodakondsus nüüdisaegses Euroopas. Tartu, 2013, 368 lk.
45. **Kai Kullerkupp**. Vallasomandi üleandmine. Õigusdogmaatiline raamistik ja kujundusvõimalused. Tartu, 2013, 398 lk.

46. **Iko Nõmm**. Käibekohustuse rikkumisel põhinev deliktiõiguslik vastutus. Tartu, 2013, 212 lk.
47. **Piia Kalamees**. Hinna alandamine õiguskaitsevahendite süsteemis. Tartu, 2013, 232 lk.
48. **Irina Nossova**. Russia's international legal claims in its adjacent seas: the realm of sea as extension of Sovereignty. Tartu, 2013, 205 p.
49. **Age Värv**. Kulutuste kondiktsioon: teise isiku esemele tehtud kulutuste hüvitamine alusetu rikastumise õiguses. Tartu, 2013, 273 lk.
50. **Elise Vasamäe**. Autoriõiguste ja autoriõigusega kaasnevate õiguste jätkusuutlik kollektiivne teostamine. Tartu, 2014, 308 lk.
51. **Marko Kairjak**. Keerukuse redutseerimine Eesti õiguses karistusseadustiku § 217^2 objektiivse koosseisu relatiivsete õigusmõistete sisustamise näitel. Tartu, 2015, 179 lk.
52. **Kadi Pärnits**. Kollektiivlepingu roll ja regulatsioon nüüdisaegsetes töösuhetes. Tartu, 2015, 179 lk.
53. **Leonid Tolstov**. Tort liability of the director to company's creditors. Tartu, 2015, 169 p.
54. **Janar Jäätma**. Ohutõrjeõigus politsei- ja korrakaitseõiguses: kooskõla põhiseadusega. Tartu, 2015, 242 lk.
55. **Katre Luhamaa**. Universal Human Rights in National Contexts: Application of International Rights of the Child in Estonia, Finland and Russia. Tartu, 2015, 217 p.
56. **Mait Laaring**. Eesti korrakaitseõigus ohuennetusõigusena. Tartu, 2015, 267 lk.
57. **Priit Kama**. Valduse ja kohtuliku registri kande publitsiteet Eesti eraõiguses. Tartu, 2016, 194 lk.
58. **Kristel Degener**. Abikaasade vara juurdekasvu tasaarvestuse varasuhe. Tartu, 2016, 242 lk.
59. **Olavi-Jüri Luik**. The application of principles of European insurance contract law to policyholders of the Baltic states: A measure for the protection of policyholders. Tartu, 2016, 228 p.
60. **Kaido Künnapas**. Maksukohustuse täitmise preventiivne tagamine enne maksukohustuse tuvastamist: ettevaatuspõhimõte maksumenetluses.Tartu, 2016, 388 lk.
61. **Eve Fink**. Õiguspärase ootuse kaitse põhimõtte eeldused ja piirid Euroopa liidu õiguses. Tartu, 2016, 245 lk.
62. **Arsi Pavelts**. Kahju hüvitamise nõue täitmise asemel ostja õiguste näitel. Tartu, 2017, 414 lk.
63. **Anna-Maria Osula**. Remote search and seizure of extraterritorial data. Tartu, 2017, 219 p.
64. **Alexander Lott**. The Estonian straits. Exceptions to the strait regime of innocent or transit passage. Tartu, 2017, 259 p.
65. **Dina Sõritsa**. The Health-care Provider's Civil Liability in Cases of Prenatal Damages. Tartu, 2017, 365 p.

66. **Einar Vene**. Ajaline faktor halduskohtumenetluses tühistamis- ja kohustamiskaebuse lahendamist ning rahuldamist mõjutava tegurina. Tartu, 2017, 294 lk.
67. **Laura Feldmanis**. Süüteokatsest loobumise instituudi põhjendus ja kohaldatavuse piirid kuritegelikule eeltegevusele. Tartu, 2017, 292 lk.
68. **Margit Piirman**. Inimese pluripotentsete tüvirakkudega seotud leiutiste patentimise piirangud vastuolu tõttu avaliku korra ja moraaliga (Eesti patendiõiguse näitel). Tartu, 2018, 246 lk.
69. **Kerttu Mäger**. The Taming of the Shrew: Understanding the Impact of the Council of Europe's Human Rights Standards on the State Practice of Russia. Tartu, 2018, 305 p.
70. **Tambet Grauberg**. Õiguse kuritarvitamise keelamise põhimõte: Euroopa Kohtu seisukohtade mõju liikmesriigi maksuõigusele. Tartu, 2018, 277 lk.
71. **Maarja Torga**. The Conflict of Conflict Rules – the Relationship between European Regulations on Private International Law and Estonian Legal Assistance Treaties Concluded with Third States. Tartu, 2019, 252 p.
72. **Liina Reisberg**. Semiotic model for the interpretation of undefined legal concepts and filling legal gaps. Tartu, 2019, 232 p.
73. **Mari Schihalejev**. Debtor-Related Creditors' Claims in Insolvency Proceedings. Tartu, 2019, 137 p.
74. **Ragne Piir**. Mandatory Norms in the Context of Estonian and European International Contract Law: The Examples of Consumers and Posted Workers. Tartu, 2019, 117 p.
75. **Madis Ernits**. Constitution as a system. Tartu, 2019, 201 p.
76. **Kärt Pormeister**. Transparency in relation to the data subject in genetic research – an analysis on the example of Estonia. Tartu, 2019, 184 p.
77. **Annika Talmar**. Ensuring respect for International Humanitarian Law 70 years after the adoption of the Geneva Conventions of 1949. Tartu, 2020, 286 p.
78. **Liliia Oprysk**. Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright *Acquis*. Tartu, 2020, 397 p.
79. **Katrin Sepp**. Legal Arrangements in Estonian Law Similar to Family Trusts. Tartu, 2020, 163 p.
80. **Taivo Liivak**. Tort Liability for Damage Caused by Self-driving Vehicles under Estonian Law. Tartu, 2020, 206 p.
81. **Anne Veerpalu**. Regulatory challenges to the use of distributed ledger technology: Analysis of the compliance of existing regulation with the principles of technology neutrality and functional equivalence. Tartu, 2021, 365 p.
82. **Maren Krimmer**. Protecting Property Rights through International Treaties but With Constitutional Brakes: The Case of Contemporary Russia. Tartu, 2021, 153 p.
83. **Seili Suder**. Protection of employee privacy in the digital workplace. Tartu, 2021, 247 p.
84. **Tiina Mikk**. Päritavuse kriteeriumid ja päritavuse välistamise võimalused digitaalse pärandi kontekstis e-konto näitel. Tartu, 2021, 387 lk.