Law and governance of EU cross-border bank groups after the Great Financial Crisis

Agnieszka Smoleńska

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 25 February 2020

European University Institute
Department of Law

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Thesis summary

The monograph explores the new crisis prevention and risk management regime for EU cross-border bank groups established after the Great Financial Crisis (GFC). The absence of a such a framework over the course of GFC resulted in renationalisation and fragmentation in the internal banking market. Though the new EU resolution law now regulates cross-border bank groups specifically, it does not explicitly lay down their organisational law. The thesis reconstructs the principles of cross-border bank group governance drawing on common legal traditions of EU Member States, corporate group theory and European Commission's state aid control of bailouts to cross-border bank groups during the crisis. The scope of the EU cross-border bank group is shown to be determined through the transnational interplay between prudential regulation, crisis prevention measures and internal risk management procedures provided for in EU resolution law. The bespoke cross-border governance regime for EU bank groups is analysed through the building blocks of inter-institutional cooperation, group de-partitioning, corporate governance innovations and specific regulatory objectives. Group governance entails a mechanism for balancing the enabling and the protective elements, i.e. legal strategies which either enable a group-wide perspective or protect local markets and entities. The monograph concludes with considerations of the possible implications of such a bespoke law of EU cross-border bank groups and their function of providing critical functions across borders.

Acknowledgements

This monograph is the result of a rather long journey which started in the final year of my undergraduate degree at University College London, where – back in 2008 – I witnessed the financial meltdown. Banks and their instability have followed me. My Master Thesis at the College of Europe in 2010 explored the very core of this monograph – the early control of bank bailouts by the European Commission. This work is a culmination of an attempt to figure out – what – if anything EU law can do to help stabilise an unstable economy and to capture the forces which appear elusive in an ever more global and financialized reality. I am very grateful to all the scholars, my family and friends who have encouraged me in the exploration of this rather complex theme.

The EUI and Florence provide the most beautiful backdrop for any journey. It is a singular privilege to pursue a PhD project in such an facilitative and kind environment. I am very grateful to the Real Estate and Facilities Service, the Library and the Academic Services for creating such a space uniquely conducive to scholarly explorations.

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Che avventura.

List of Abbreviations

BCBS	Basel Committee on Banking Supervision
BRRD	Bank Recovery and Resolution Directive
BU/EBU	Banking Union/European Banking Union
CEE	Central and Eastern Europe
CMG	Crisis Management Group
CRD IV	Capital Requirements Directive IV
CRR	Capital Requirements Regulation
D-SIFI	Domestic Systemic Financial Institutions
DGF	Deposit Guarantee Fund
DGS	Deposit Guarantee Scheme
EBA	European Banking Authority
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECB	European Central Bank
EDGS	European Deposit Guarantee Scheme
EIOPA	European Insurance and Occupational Pensions Authority
ESA	European Supervisory Authorities
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	The European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
FSB	Financial Stability Board
G-SIFI	Global Systemic Financial Institutions
G-SII	Global Systemically Important Institutions
IMF	International Monetary Fund
KP	Key Principles
LAC	Loss Absorbing Capacity
MoU	Memorandum of Understanding
MPE	Multiple Point of Entry
MREL	Minimum Requirement of Own Funds &Eligible Liabilities
NCA	National Competent Authority
NRA	National Resolution Authority
O-SII	Other Systemically Important Institutions
SPE	Single Point of Entry
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
SSR	Single Supervisory Rulebook
TLAC	Total Loss Absorption Capacity
VI	Vienna Initiative

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Part 1

Cross-border banking in Europe – the phenomenon, the law and recent developments

Setting the scene – a word of introduction

The Great Financial Crisis (GFC) drove home the mismatch between global financialisation processes and the national jurisdictional governance of banking activity, and its troubling consequences. A flurry of bank regulation reforms aimed at rectifying this problem followed. In the EU, the mismatch between the scope of rules and business activity was tackled in a twofold manner: by attempts to break the deadly embrace between sovereigns and banks and by establishing a bank crisis management system in the internal market.

The first pillar tackled the vicious doom loop between the state of the sovereign finances and the banks: over the course of the crisis "bad banks" brought down states (if the necessary bailouts were too burdensome for the public purse) and "bad states" brought down their banks (especially if these held substantial public debt). The EU solution to the problem had been a combination of institutional and substantive reforms aimed at realigning risk-taking incentives and redistributing *ex ante* loss-absorption

through new substantive prudential rules operationalised through institutional arrangements such as the Banking Union for the participating Member States of the EU.

The second pillar of reform redesigned the coordination of action by the public authorities in dealing with cross-border banking activity crises. Such efforts were driven by the realisation that the absence of such a framework led to the fragmentation of the EU's internal market in banking, economic destabilisation and destruction of value. The new EU resolution law seeks to address this problem through a combination of harmonised substantive rules and formalised interaction between prudential and other authorities.

The negative consequences of the doom loop in the absence of a cross-border crisis mechanism are reinforced in the context of cross-border bank groups: a widespread phenomenon in the EU's internal market, even if there appears to be somewhat less integration of this sort within the Eurozone only. Cross-border bank groups accentuate the negative externalities of the "doom loop" in the absence of coordination to the extent the former by creating a special relationship between the state and the bank (e.g. leading to regulatory forbearance), is an obstacle to the latter. Where the nexus between the banks and the sovereign is strong, this prevents successful cross-border coordination of any public intervention to ensure financial stability.

The EU banking regulation reform that took place after the crisis establishes a governance regime for EU cross-border bank groups denoted as such for the first time in EU law. This monograph studies this novel concept and its operationalisation in EU law. The central puzzle of the exploration is how can a cross-border bank exist as an object of EU law, in the light of the prevailing (national) jurisdictional lens and the absence of a general law of groups in the EU. Methodologically, the question of how an EU cross-border bank group can exist is addressed by studying the legal mechanisms and strategies established by the post-crisis reforms which govern a bank's intra-group situation, in particular the new risk management framework for cross-border banks. The puzzle is placed in the context of the evolution of EU organisational law, that is the law governing the organisation of corporates, where the approach of the European Commission in the state aid decisions approving the bail-outs of 29 cross-border bank groups between 2008-2017 is analysed.

The thesis thus identifies the legal strategies in EU law which make an enterprise

(group-wide) approach possible. The findings moreover suggest that a strict distinction between public and private risk-sharing for cross-border EU banks is inadequate, when the applicable EU legal provisions are interpreted functionally. Even if banks – like any other company – are creatures of national law, the new crisis regulations extend across the jurisdictions where the group is active. Prior to the crisis EU laws already provided for and facilitated cross-border banking activity in the organisational form of groups. Under the new regime a specific governance of EU cross-border bank groups is created, which includes a balancing between the rights and obligations of the parent and subsidiary entities.

It has already been broadly recognised that EU banking law since the financial crisis has been at the avant-garde area of EU integration, creating templates for other areas of law in terms of administrative solutions to cross-border governance as well as for more controversial areas such as differentiated integration,[1] though recent scholarship has considered it predominantly from the perspective of its relation to the Economic and Monetary Union. This monograph provides evidence of such a transformational shift arising out of the internal market principles. It is shown that it is in the area of substantive (internal market) EU-wide law regulating banks' cross-border behaviour where we can observe the full extent of how EU law governs cross-border organisations. This monograph provides evidence of how EU law enables an enterprise approach to cross-border banks group governance, even in the absence of general EU group law.

[1] See Philipp Genschel and Markus Jachtenfuchs, 'More Integration, Less Federation: The European Integration of Core State Powers' (2016) 23 Journal of European Public Policy 42 for an analysis as to how in the areas of migration and economic integration EU rules begin to regulate the core state powers.

Structure of the monograph

This monograph is structured as follows. Part 1 (Chapters 1-3) is concerned with the overall context of the inquiry. That is the phenomenon of cross-border bank groups, their regulation in EU law and the gaps which persist in this area. Part 2 (Chapter 4) explores the treatment of cross-border bank groups under the EU rules for state aid control – the only tool at the disposal of EU authorities for the purpose of crisis management over the course of the Great Financial Crisis. Part 3 (Chapters 5-7) analyses the enterprise approach to cross-border bank group governance developed in the new framework for crisis prevention and management of banks, that is the EU resolution law (BRRD).

Chapter 1 lays out the puzzle of cross-border bank group organisation. It is shown how the banking market disintegrated over the course of the GFC. The tension between the integration of cross-border activities within cross-border banks and the resistance to full unification as a result of national contingencies is explained. The chapter sets out the question, the answer to which is pursued in this monograph, namely whether and, if so how, is a group (enterprise) approach to cross-border banks made possible under EU law.

Chapter 2 analyses the pre-crisis law governing cross-border bank groups in the EU. Section 2.1 explains why national law continued to be the primary law governing distinct legal entities within cross-border bank groups active across the EU market. Section 2.2 explains how EU law influences the specific organisational choice of banks as cross-border groups. Section 2.3 describes the lacunae in regulation of such entities in EU law prior to the Great Financial Crisis. Section 2.4 explains why the lack of a common framework for cross-border banks was a problem looking for a solution.

Chapter 3 explains how the bank regulation reform introduced in the EU after the Great Financial Crisis led to the emergence of a "cross-border bank group" concept in EU law. It outlines the analytical approach developed in this monograph for the purpose of studying the regulation of EU cross-border bank group governance, including by identifying the specific legal mechanisms which are the defining features of this approach. Section 3.1 outlines the main pillars of new EU laws which regulate the activity of credit institutions. Section 3.2 focuses on bank resolution law, that is the novel regime for crisis prevention and management, identifying its main features and

regulatory innovations vis-à-vis the pre-crisis status quo. Section 3.3, drawing on law and economics literature concerning the function of internal partitioning in corporate groups which allows for the maintenance of distinct legal entities, provides evidence that the notion of group as it appeared now in EU law corresponds to what is predicted by industrial organisation theory. Section 3.4, drawing on corporate governance and comparative company law, outlines the main features of the common principles of group law in European jurisdictions, specifically considering the balance achieved in different legal systems between provisions which enable a holistic regulation of groups and those which protect distinct entities within them. Section 3.5 explains why cross-border groups are uniquely important legal constructs in the EU context, even in the absence of general harmonisation in this area of law and why the specific crisis prevention procedures (that is recovery and resolution planning under BRRD) yield to analysis from such a vantage point.

Chapter 4 explores the treatment of cross-border bank groups in EU state aid law during the Great Financial Crisis, i.e. to what extent organisational features of the aid beneficiary were relevant and consequential in the application of EU law. To this end, 112 decisions concerning bailouts of 29 cross-border EU bank groups approved by the European Commission between 2008 and 2017 are analysed. Specifically cases the European Commission adopted an individual entity approach or an enterprise group interest approach are identified, to determine the balance (if any) of group governance achieved. Section 4.1 explains the relevance of EU state aid control as a tool for coordinating crisis management of cross-border banks in the EU since 2009 and identifies the relevant cases for further analysis. Section 4.2 provides evidence that the European Commission considered the cross-border reach of the aid beneficiary important for the purposes of assessing the aid measure. Section 4.3 explores the balance achieved in EC's decisional practice between the enterprise and the entity approach with regard to the four building blocks of cross-border bank group approach identified, that is: the intra-group partitioning, the policy objectives pursued, the procedural cooperation between authorities and the bank's corporate governance.

Chapter 5 identifies the specific features of the new institutional (public cooperation) design of BRRD which allow for overcoming territorial constraints. In so doing, I draw on the findings of Chapter 4 which relate to the lack of a formalised procedure capable of instilling predictability and trust between group entity supervisors as well as a lack of

formal input and voice. I revisit the design of the pre-crisis framework to identify the conceptual problems in thinking about cross-border coordination which acted as a constraint for the design of a regulatory structure suitable for a (cross-border) enterprise approach (Section 5.1). I then analyse the jurisdictional integration for the cross-border group in the context of the following characteristics of the regulatory structure: (a) membership and constitution of the main institutions; (b) mandates of the institutions (Section 5.2) and (c) their specific tasks and powers vis-à-vis supervised cross-border banks (Section 5.3). Section 5.4 identifies the legal strategies which allow for such a composite form of administration to overcome jurisdictional constraints in the context of the specific mandates of the institutions and the Treaty objectives of resolution law.

Chapter 6 identifies the legal strategies which allow for an expanded (enterprise) scope of duties of directors and management in the context of crisis prevention measures and general risk management required by EU resolution law. I explain how the new EU group-wide duties imposed on management are a part of the risk governance framework of the BRRD. To this end, I focus on the recovery planning procedures, which are a distinct regulatory requirement imposed on cross-border bank groups – as opposed to integrated credit institutions. This chapter provides evidence that the EU cross-border bank group scope is mirrored by the scope of risk management and crisis prevention measures as a necessary condition for meeting the objectives of the EU regulatory prudential framework. To this end, first, I expand on the risk management turn in EU financial regulation (Section 6.1). Second, I show how this had resulted in an increased scope of duties of banks in general via a new form of bank governance required (Section 6.2). Thirdly, Section 6.3 explains how such duties expand cross-border in the context of the specific "general risk management" requirements of the BRRD. Section 6.4 studies the risk management requirements imposed as a matter of group law – that is I identify the legal strategies which enable an enterprise approach, as well as those which provide the protective (entity) safeguards.

Chapter 7 draws conclusions (Section 7.1) and implications for future scholarship on EU cross-border bank groups. With the legal concept of cross-border bank group confirmed to have specific operational implications, this final chapter explores the interests which determine intra-group governance. I focus on three elements – the altered scope of shareholder rights (Section 7.3), the new debt governance regime (Section 7.4) and the significance of stakeholder protection qua regulatory objectives

(Section 7.5). I conclude by identifying the prevailing lacunae as well as new accountability concerns as a path for further research on the organisation of EU cross-border bank groups (Section 7.6).

Chapter 1

1. The phenomenon of EU cross-border banking

This monograph deals with cross-border bank groups operating across the EU, and how these are regulated in EU law which has been put in place after the Great Financial Crisis. This chapter outlines the phenomenon of cross-border banking drawing on empirical economic scholarship in order to prove the relevance of the question posed for the reality of the operation of cross-border banks in Europe, but as well to frame the theoretical puzzle explored from a legal perspective in the subsequent chapters. In light of the empirical evidence on the break-up of cross-border banking activity in the EU over the course of the Great Financial Crises, the specific deficiencies of the fragmented legal framework applicable to cross-border bank groups before – and for the most part during the crisis – may be one explanatory factor for the disintegration.

To this end, Section 1.1 gives a sense of the scale of the phenomenon of cross-border banking in the EU. Section 1.2 explores cross-border bank groups as organisational structures of commercial activity. It outlines the features of cross-border bank groups which suggest that they are integrated hierarchies (1.2.1) and those which point in the opposite direction, namely that cross-border banks are in fact composed of distinct, separable entitles which enter into transactions with each other (1.2.2). Section 1.3 explains why the puzzle of a cross-border bank's organisational structure can be solved by reference to law, and EU law in particular.

1.1. Multinational banks – the empirical phenomenon

Cross-border banks are a ubiquitous global phenomenon – the increasing openness of national markets, the internationalisation of global capital flows, and technological advances all amplify trends in cross-border financial activity consolidation.[2] In the European Economic Area alone, there were over 112 cross-border bank groups in 2018 according to EU institutions.[3] Such cross-border groups are complex corporate structures composed of numerous legal entities.[4] The largest credit institutions worldwide deemed to be Global Systemically Important Banks (G-SIBs) by the Financial Stability Board (FSB) are part of this number, but not all nor by any means the most critical. Following the departure of the United Kingdom from the EU on 31 January 2020 only 8 of the 30 G-SIBs active in the EU are large credit institutions headquartered in the EU. Importantly, however, it is not necessarily the largest banks which cause the most instability, nor are they the most likely to collapse and need the state support measures. In fact from the over 100 banks which were bailout directly by EU Member States over the course of the Great Financial Crisis more than two thirds were domestic institutions and just 30 were cross-border institutions with a material international presence. Further, only one G-SIB is on that list – the Dutch ING.[5] This suggests that the cross-border banks most affected by the new rules of cross-border bank group governance which are discussed in this monograph may not necessarily be

[2]For a study of the general trends in EU financial market consolidation, suggesting that bank M&As are fuelled by liberalisation, dismantling of boundries between commercial and investment banking, see: Franklin Allen, Xian Gu and Oskar Kowalewski, 'Corporate Governance and Intra-Group Transactions in European Bank Holding Companies during the Crisis' *Global Banking* (2013) 14 *Financial Markets and Crises* 365, 371.

[3] European Banking Authority, EBA Report on Supervisory Colleges in 2018 (2019). Though the ECB in its 2017 Financial Integration Report in fact considers there to be an "underrepresentation of pan-European banks", by which it presumably means cross-border bank groups operating within the Eurozone.

[4]Jacopo Carmassi and Richard Herring, 'The Corporate Complexity of Global Systemically Important Banks' (2016) 49 Journal of Financial Services Research 175.

[5] Of course this is not to say that the largest banks are the least problematic from the point of view of financial stability – quite the opposite. However, following the argument of Katharina Pistor in her Legal Theory of Finance that the law appears to be most flexible and malleable at the core of the financial system (i.e. with regard to the largest market players), in order to determine the "hard" provisions of law, I focus on the actors "on the periphery" of the system with regard to which the lawactually appears to have been applied in the sense that the state intervention in favour of the bailout of the beneficiary was controlled by the European Commission as a matter of state aid control.

the largest global banks, but rather those 100-odd credit institutions which are active in multiple Member States.

Such EU cross-border bank groups operate across the EU's internal market. For the most part, the parent entity is established in a Eurozone country with multiple subsidiaries across Central and Eastern Europe. Some large Swedish banks are also active in Eurozone Member States (this is the case especially for the Baltic region).[6] In 2014 around 80% of banks in Central and Eastern Europe were fully or partially owned by parents from other EU countries, although this number substantially decreased as a result of renationalisation policies pursued by a number of governments, in particular in Poland and Hungary.[7] Still, the largest EU Banking Union banks had on average 10% of their assets in non-Eurozone EU countries in 2013, with the largest banks with non-EA/EU presence being Santander, UniCredit, Erste Group and KBC.[8] However, even where the subsidiaries of foreign banks may form a significant part of the host banking market in countries such as Bulgaria (63 %) or Czechia (86 % in 2017), the subsidiaries' assets are typically a small part of the overall operations of the cross-border bank groups, given the disparities in economic size across the EU.[9] At the same time, such cross-border financial institutions provide functions critical to the various Member State economies: regardless of their materiality to the parent they are material to the host economy, where they operate *inter alia* as deposit-takers, financiers of the real economy and operators of the payment systems in increasingly financialised and digitalised reality.

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[6]see Chapter 2 in: Rachel A Epstein, *Banking on Markets: The Transformation of Bank-State Ties in Europe and Beyond* (Oxford University Press 2017) explaining the phenomenon of internationalisation and denationalisation across those EU Member States, which underwent an economic transformation in the 1990s, comparing as well the process to that occuring currently in the Banking Union countries.

[7]Allen N Berger, Philip Molyneux and John OS Wilson (eds), *The Oxford Handbook of Banking, Second Edition* (Oxford University Press 2014)showing that the world's 28 largest banks on average (median) have 964 (782) subsidiaries, 60% (61%) of which are registered in foreign jurisdictions. On the social benefits of cross-border banking in general see Gerard Caprio, Douglas D Evanoff and George G Kaufman, *Cross-Border Banking*, vol 1 (World Scientific 2006); Dirk Schoenmaker, *Governance of International Banking* (Oxford University Press 2013).

[8] For an overview of scope of activity of EU cross-border bank groups see e.g. Zsolt Darvas and Guntram B Wolff, 'Should Non-Euro Area Countries Join the Single Supervisory Mechanism?' Bruegel Policy Contribution (2013). For a discussion of the impact of levels of foreign ownership in e.g. Poland see: Filip Novokmet, Entre communisme et capitalisme : essais sur l'évolution des inégalités de revenus et de patrimoines en Europe de l'Est 1890-2015 (2017), PhD Thesis, École des Hautes Études en Sciences Sociales.

[9] Alexander Lehmann, 'Crisis management for euro-area banks in central Europe', Bruegel Policy Contribution, November 2019.

Since and over the course of the Great Financial Crisis widespread retrenchment had taken place. Banks became more national, and cross-border banking activity became to be treated more as a threat – in particular in countries hosting banks – than as an opportunity.[10] One of the reasons for such retrenchment was effectively the inability of regulation to capture holistically the activity of a cross-border group, as an organisational structure. Another, and a likely flipside of the governance failures, is the rise of "banking nationalism" in the host Member States.

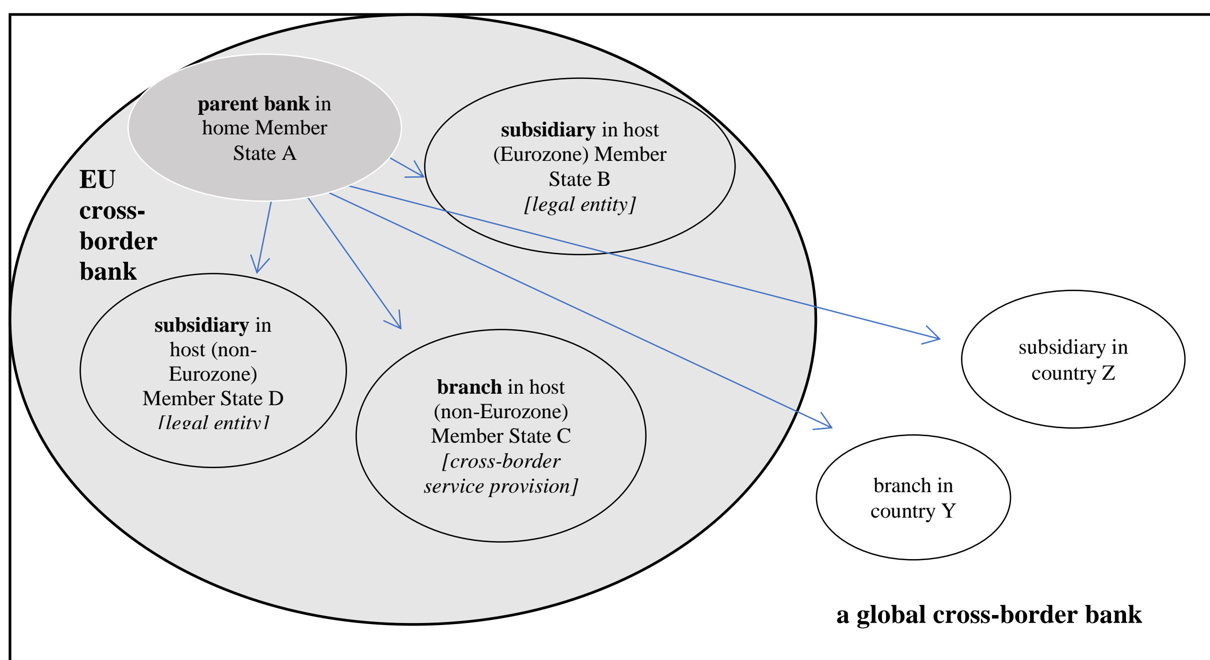

Figure 1. The organisation of an (EU) cross-border bank group organisation

The figure shows the structure of a cross-border bank with the parent entity established in Member State A (the "home" Member State). Its entities operate in Member States across the EU, both Eurozone (MS B) and non-Eurozone (MS C,D). The "hosts" host either incorporated legal entities (subsidiaries in MS B and D) or cross-border service providers (branch in MS C). In addition the bank may have activities in third countries (Y, Z).

[10] Robert N McCauley and others, 'Financial Deglobalisation in Banking?' (2019) 94 Journal of International Money and Finance 116; in the Eurozone specific context: Mario Draghi, Risk-reducing and risk-sharing in our Monetary Union, Speech by President of the ECB at the European University Institute, Florence, 11 May 2018. In a broader EU context: Andrea Enria, Fragmentation in banking markets: crisis legacy and the challenge of Brexit, Speech BCBS-FSI High Level Meeting for Europe on Banking Supervision 17 September 2018.

1.2. Internal organisation of cross-border banks

The problem of regulating cross-border bank groups is a long-standing issue which also preoccupied regulators prior to the Great Financial Crisis. A holistic approach, that is a universal approach to cross-border bank groups, was prevented by the reluctance of authorities to act jointly, but as well by the lack of clarity (including conceptually) on the organisational structure of a cross-border corporation. The issue at hand was not only how to design an effective oversight system given the complexity of multinational companies but also how such a regulatory structure should take into account the fact that the regulated entities operate as groups, a hybrid form of organisation combining elements of an integrated hierarchy and a decentralised market.[11] A cross-border group is a legal structure composed of a parent undertaking and distinct legal entities (branches or subsidiaries), which allows multinationals to combine relationships of ownership and control with respect for jurisdictional legal boundaries, in cases where the distinct legal entities operate in a number of countries (See Figure 1).[12]The entities within the group remain distinct for the purposes of transactions with each other, however, the structural links within the organisation result in integration in governance terms *inter alia* via an extended time horizon for the interaction between various legal entities within the group, their repeated engagement which fosters and facilitates cross-border trust and understanding facilitating the development of mutually compatible strategies and synergies within a diverse group, including – but not only – via economies of scale. Cross-border bank integration in this sense is a risk-sharing mechanism. The legal concept of a group is somewhat different from the way that most scholars of banking are now accustomed to using it: global bank groups are not – legally – fully integrated companies merging the various legal entities they comprise

[11] I follow here the definitions of markets and hierarchies adopted in the industrial organisation literature, see Oliver E Wiliamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22 The Journal of Law & Economics 233, 235.

[12] Such a requirement is imposed for reasons related to the specific functions which banks perform in the real economy in order to reassure the domestic (host) supervisors. See further Section 2.2 below on this point. For an overview and discussion of contemporary scholarship on multinational corporate forms see Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007); Mats Forsgren, *Theories of the Multinational Firm: A Multidimensional Creature in the Global Economy* (Edward Elgar 2009). For an overview of EU specific forms of internationalisation of cross-border bank activity see Rym Ayadi and others, *Banking Business Models Monitor 2015 Europe* (IRCCF HEC Montreal 2016).

into one, but rather hybrid structures marrying independence (of entities) and interdependence (within the enterprise).[13]

1.2.1. Cross-border bank groups as an integrated enterprise

Economic empirical literature on cross-border banking - and it is in that literature where we find most empirical evidence on how cross-border groups operate in practice - treats cross-border groups as fully integrated enterprises characterised by top-down control. We find very little evidence of consideration of the subtle balance between the independence of distinct legal entities and the interdependence within the group. Exceptions are crisis events of ring-fencing, imposed by supervisors which are described - by such literature - as a nuisance impeding the effective operation of the entity.[14]

Economic scholarship provides ample empirical evidence of how decisions within a cross-border groups are centralised and therefore fully integrated. Ownership links between the parent and the subsidiary are supported by cross-membership of various governing boards.[15] There is ample evidence of centralised management with regard to the allocation of specific tasks (e.g. centralised treasury or back office functions), exchange of know-how and knowledge, use of single and integrated IT systems. Such empirically proven "hard" operational integration is further strengthened by "soft" intra-group links such as brand recognition, reputational factors and related communication strategies.[16] An alignment of risk management strategies of the bank parent and subsidiaries has been observed, proving also that the risk profile of distinct

[13] The subsequent chapters of this work will explain how EU law establishes a regime for their governance. For a general introduction Klaus J Hopt, 'Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2015). The legal construction of a cross-border bank group will be further developed in Chapter 2.

[14] Though see: European Commission, Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis (2009).

[15] For example Franklin Allen and others (eds), *Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies* (Centre for Economic Policy Research 2011) find ample evidence of large representation of parent bank board members on supervisory boards of bank subsidiaries in CEE.

[16] Jana Grittersová, 'Transfer of Reputation: Multinational Banks and Perceived Creditworthiness of Transition Countries' (2014) 21 Review of International Political Economy 878; Ingo Walter 'Reputational Risks and Large International Banks' in: A Demirgüç-Kunt, D D Evanoff and G G Kaufman, *The Future of Large, Internationally Active Banks*, vol 55 (World Scientific 2016) 29.

entities aligns within groups.[17] Such links between the parent and the subsidiary can be so strong, that even when regulators seek to separate distinct parts of the group this becomes nigh impossible in light of the array of intra-group links and functions. Empirical evidence and scholarship in fact talks of global banks as if they operated above and beyond jurisdictions.[18]Crucially such evidence concerns bank behaviour not only in normal times, but also in crises when many especially political economy scholars claim banks become national by default.

Though constitutive legal entities remain distinct within groups, and as such enter into transactions with one another, economists have observed the existence of specific internal capital markets within a cross-border groups, which allow for intra-group arrangements such as cash pooling and internal liquidity management.[19] Such internal capital markets allow for intra-group claims in the form of deposits and loans, and also off-balance sheet transactions. Intra-group transactions are different however from those with third parties and include transactions which are unique to group form of organisation and include distribution of income and up-streaming dividends.

Empirical evidence shows than in crisis cross-border groups are more durable than other forms of internationalisation of banking activity, which also means that they are a distinct channel of interconnection between various economies, including as transmitters of shocks from one economy to another. As a result cross-border bank groups impact on the financial stability of the distinct markets where they are active. The relative durability of cross-border bank groups implies they can act as channels of shock transmission through intra-group linkages such as FX markets and intra-group financing.[20]

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[17]Allen, Gu and Kowalewski (n 2) 47–53 reviewing in this context the literature regarding the effect of cross-border banking on financial stability and stating that cross-border banking "reduces the risk of bank failures" but, at the same time, exposes a country to "foreign shocks"; Luca Gattini and Angeliki Zagorisiou, 'Cross Border Banking: Pull-Push Effects of Parent Banks on Subsidiaries' Credit Extensions' (2016) 2016/07 13.

[18]Allen, Gu and Kowalewski (n 2) review intra-group transactions in Europe which were taken over the course of the crisis showing as well that on occassion transactions required by the parents posed seriousthreat to stability of host countries. They explain this by weak governance of foreign subsidiaries.

[19] International financial organisations study such intra-group links given that they effectively become subsequently channels for crisis contagion, see e.g. Basel Committee on Banking Supervision, *Report on Intra-Group Support Measures* (2012).

[20] For a discussion of intra-group channels of cross-border shock transmission see Caroline Bradley, 'Breaking Up Is Hard to Do: The Interconnection Problem in Financial Markets and Financial

1.2.2. Cross-border bank groups as a sum of independent entities

The absence of full integration of cross-border banks is explained by efficiency benefits of partitioning assets as predicted by organisational theory, but as well specific jurisdictional requirements.[21] Cross-border groups operate across multiple legal regimes and therefore are regulated by multiple tax and corporate regimes which prevent full unification (they act as centripetal forces). Further, there are multiple economic and business reasons arising from the heterogeneity of markets where the cross-border bank group is active as well as the materiality of entities within cross-border bank groups for the stability and performance of the distinct economies in which they are active which result in different business models being adopted within one cross-border bank group.[22] Such differences also explain the heterogeneity of banks' businesses also from the point of view of their systemic importance and materiality to the national financial system.

The local market specificities differentiate a given legal entity from others within the group. These include different market conditions such as depth, structure, size of private debt relative to GDP,[23] even if some increase in the synchronicity of financial cycles is observed globally.[24] Such differences affect the behaviour of entities within a single cross-border bank group across different markets.[25] Cultural factors further

Regulation, a European (Banking) Union Perspective' (2013) 29 Texas International Law Journal 269; PD Karam and others, 'The Transmission of Liquidity Shocks: The Role of Internal Capital Markets and Bank Funding Strategies' [2014] IMF Working Papers; Claudia M Buch, 'The International Transmission of Monetary Policy' (2018).

[21] See Chapter 2 for the overview of the limits of harmonization of EU corporate law, and Chapter 3 for the new post-crisis regime which establishes a EU cross-border bank group regime.

[22] see Ayadi and others (n 12) for an overview of the main differences in European bank business models.

[23] For one example of the ample literature on comparative financial systems see: Daniel Detzner and others, 'Financial Systems in Financial Crisis – An Analysis of Banking Systems in the EU' (2014) 49 Intereconomics 70. Specific differences may be identified as well with regard to structural factors such as debt market distribution by issuers, total bank lending, state aid to the financial sector in crisis, bank returns on equity and assets, level of non-performing loans, bank capitalisation and ownership structure (following Willem Pieter de Groen, Regional Differences in Financial Intermediation: the Eastern and Western EU, Presentation at European Banking Institute Seminar, Warsaw, 16 November 2018).

[24] Hélène Rey, 'Dilemma Not Trilemma: The Global Financial Cycle and Monetary Policy Independence' (2013) Jackson Hole Symposium 1.

[25] However, the economic literature is somewhat inconsistent however when it comes to gauging the precise causal relationships between bank lending behaviour and domestic or foreign ownership. Stijn Claessens and Neeltje Van Horen, 'Foreign Banks: Trends and Impact' (2014) 46 Journal of Money, Credit and Banking 295 show that foreign banks reduce credit more in crisis compared to domestic banks in countries where they had a small role, but not so when dominant or funded locally. Luca Gattini and Angeliki Zagorisiou, 'Cross Border Banking: Pull-Push Effects of Parent Banks on Subsidiaries' Credit Extensions' (2016) EIB Working Paper 2016/07 show that though before the crisis credit growth of foreign-owned subsidiaries exceeded that of domestically-owned banks, over the course of the financial crisis since 2008 both curbed credit similarly. Martin Brown and Ralph De Haas, 'Foreign Banks and Foreign Currency Lending in Emerging Europe' (2012) however counter the

contribute to a degree of separateness within the group, where they affect the different preferences of customers which must be accounted for in bank business decisions. Historic trajectories can help explain the specific relation between the banks and the state in distinct countries, especially different levels of private indebtedness.[26] Such differences explain why the European Commission generally considers the relevant geographic market in bank mergers to be the national one.[27] Scholars have argued that the nationality of the bank affects their lending behaviour in crises, for example some suggest there is evidence of home bias in bank lending.[28] In the end, even if the framework for bank governance becomes more uniform, different entities within the group may have different risk exposures and risk profiles if they are subject to different funding costs[29] and adapt to the local contingencies inter alia by implementing different business models within the cross-border bank group.[30]

argument showing there is no significant difference in bank lending behaviour depending on their ownership.

[26] Sist, *Internationalization of Banks: European Cross-Border Deals* (Palgrave Macmillan 2018) provides an overview of various cultural factors affecting consumer and creditor behaviour, esp. in chapter 2.4 on cultural fit in internationalisation decisions of cross-border banks at p. 22.

[27] See e.g. European Commission Decision Case M.8414 *DNB / Nordea / Luminor Group* of 14 September 2017, para. 21 where "the Commission has considered that, with regard to retail banking services, the relevant geographic market is national in scope due to the different competitive conditions within individual Member States and the importance of a network of branches."

[28] Philipp Schaz, 'The Real Effects of Financial Protectionism' (2019), on file with author, showing that banks which received bailouts by the parent's states increased home bias in lending by 24.6% than non-bailout banks.

[29] for an overview of such different behaviours see: Schoenmaker, n. 7, 66.

[30] see Ayadi and others (n 12) for an overview of the main differences in European bank business models.

1.3. The sovereign-bank "doom-loop" and cross-border bank groups

It is not just that various entities within cross-border bank groups are affected by the different markets where they are active. The business choices of banks within individual markets determine the conditions for growth and development of the real economy in those very Member States, in particular where these are less financially developed or are bank-based systems. Via the "link to the real economy"[31]banks play a role in determining the macroeconomic conditions for the performance of local economies via the functions they perform and the role they play in the transmission of monetary policy within a currency area. Banks also play a role in money creation.[32] This feature explains the "specialness" of banks, which warranted that over the course of the financial crisis enormous bailouts were needed to prevent their failure and the spectre of dramatic consequences for the real economy. To the extent banking provides the infrastructure for the rest of the economy via the payment system, it is not a business that ends in itself. Rather banking plays a dual role, also enabling other commercial activity by allowing capital to be saved and invested, thus improving the allocation of resources within the economy. Through their business choices banks can amplify or absorb financial shocks, that is they can allow for greater risk-sharing within the economy in crises.[33] Economic scholars have studied whether the fact that a bank active in a given market is domestically or foreign owned changes its impact on macroeconomic stability. The results are inconclusive: though the presence of foreign subsidiaries in the market can increase financial stability as it increases market size and leads to greater diversification, accelerated deleveraging by foreign-owned banks over the course of the financial crisis in some countries proved destabilising where it

[31]for an overview of literature on varieties of capitalism in European finance see: H. Zimmermann 'Varieties of Global Financial Governance? British and German Approaches to Financial Market Regulation' in: Eric Helleiner, Stefano Pagliari and Hubert Zimmermann, *Global Finance in Crisis : The Politics of International Regulatory Change* (Routledge 2010).

[32] For the legal perspective on the role of commercial banks in money creation see and the impact thereof on public law and regulation see: Isabel Feichtner, 'Legal Perspectives Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become ?' (2016) 17 German Law Journal 875.

[33] For the argument that financial markets perform a risk-smoothing function see: Robert J Shiller, *Macro Markets: Creating Institutions for Managing Society's Largest Economic Risks* (Oxford University Press 1998).

negatively affected the ability of SMEs to access credit and affected many households.[34]

The macroeconomic significance of banking activity follows further from the prevailing monetary theory, which treats banks as the primary channel through which the central bank can exercise its tasks related to keeping prices stable. Where cross-border bank groups operate across multiple currency areas they affect and are affected by the monetary policy decisions of different central banks: their operation determines the conditions for achieving macroeconomic stability in different economies.[35] Further, an EU cross-border bank group (where it operates in countries other than the Eurozone only) is subject to the jurisdiction of distinct central banks, including with regard to their function as lender of last resort. The destabilising cross-border effects of banking activity – even in only partially structurally integrated banking markets[36] - has been one of the principal arguments for putting in place centralised supervision of the EU's banking sector as part of the Banking Union.[37] The intimate link between currency and

[34]Demirgüç-Kunt, Evanoff and Kaufman (n 16) 156; Ralph De Haas and others, 'Taming the Herd? Foreign Banks, the Vienna Initiative and Crisis Transmission' (2015) 24 Journal of Financial Intermediation 325; Jakob de Haan, Sander Oosterloo and Dirk Schoenmaker, *Financial Markets and Institutions: A European Perspective* (Third Edit, Cambridge University Press 2015). Other scholars have identified foreign bank presence as a destabilising factor in crises, see: Małgorzata Pawłowska, 'Determinants of Profitability of Polish Banks: The Role of Foreign Banks' (2016) 1 Econometric Research in Finance 23. Małgorzata Pawłowska, Determinants of Profitability of Polish Banks: The Role of Foreign Banks, Econometric Research in Finance, 2016, vol. 1, issue 1, 23-46. Such scholarship emphasises especially the vulnerability of countries with a high degree of penetration of foreign capital Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 7) 15. Concerns about intra-group shock transmission underpinned the establishment of the Vienna Initiative in 2009, which prevented the outflow of capital from subsidiaries in CEE/SEE region see Katharina Pistor, 'Governing Interdependent Financial Systems: Lessons from the Vienna Initiative' 2 *Journal of Globalisation and Development* 4; Daniela Gabor, 'The IMF's Rethink of Global Banks: Critical in Theory, Orthodox in Practice' (2015) 28 *Governance* 199. Se further section 2.4.4 on the Vienna Initiative.

[35] For an explanation of the interplay between cross-border bank activity and singledness of monetary policy in the European Union see: Daniel Gros, 'One Market, One Money – A Mistaken Argument (Post Factum)?' (2017) CEPS Policy Insight (arguing there is a weak link between monetary integration and real bank sector intergation); Fabian Ambtenbrink 'Denationalizing monetary policy : reflections on 60 years of European monetary integration' in: Niamh Nic Shuibhne, Laurence Gormley *From Single Market to Economic Union : Essays in Memory of John A. Usher* (Oxford University Press 2012).

[36] However see also Jens Hagendorff, Kevin Keasey and Francesco Vallascas, 'When Banks Grow Too Big for Their National Economies: Tail Risks, Risk Channels, and Government Guarantees' (2018) 53 Journal of Financial and Quantitative Analysis 2041 who claim that euro membership has led to little changes in the long-term dynamics of bank volatility and its components.

[37] For the ECB perspective see: Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer 2017) Pedro Gustavo Teixeira, 'The Legal History of the Banking Union' (2017) 18 European Business Organization Law Review 535.Though there was no consensus in the early days of EMU on the best repartitioning of competences for banking oversight see:Christos Hadjemmanuil and Mads Andenas, 'Banking Supervision, the Lnternal Market and EMU' (1998) May/June European

the banking system, and the extent to which the history of the EU's economic and financial integration were linked,[38] provide further evidence that where cross-border banks do exist, their activity is determined by the specificities of the local market, among which the local monetary policy is particularly important.[39]

In the context of the close link between the banks and the real economy, cross-border bank activity also has implications for the notorious "doom loop" which couples the state of finances of banks and sovereigns. This mechanism materialises when banks operating within a particular jurisdiction hold large amounts of domestic public debt, potentially allowing for a vicious spiral of financial instability and deteriorating sovereign indebtedness. Such a doom loop is reinforced – as was made clear over the course of the financial crisis since 2008 – as banks operate under the benevolent glow of public guarantees.[40] The loop has been identified as the capacity of banks to bring down public finances even in Member States prudent in their fiscal capacity (this was one of the factors contributing to the crisis in Ireland), as well as the reverse – where the state of public finances weighed on the performance of the banking sector (i.e. the Greek crisis scenario),[41] locking the two in a vicious value-destroying cycle, with negative implications for the real economy. If a doom loop indeed exists only in such a

Business Law Review 153; Tommaso Padoa-Schioppa, *Regulating Finance: Balancing Freedom and Risk* (2005).

[38]Emmanuel Mourlon-Druol, 'Banking Union in Historical Perspective: The Initiative of the European Commission in the 1960s–1970s' (2016) 54 Journal of Common Market Studies 913.

[39] This is even where, as some EU legal scholars claim, EU regulation of cross-border market activity of private actors (micro-level constitution) can be distinguished from the economic governance regime for the Eurozone (macro-level constitution). See Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) and further discussion of this argument in Chapters 2 and 3 analysing the regime applicable to EU cross-border bank groups.

[40] For an overview of the implicit subsidies (that is the expectation of bailout in case of crisis) see IMF work, e.g. Tryggvi Gudmundsson, 'Whose Credit Line Is It Anyway: An Update on Banks' Implicit Subsidies' (2017) 16 IMF Working Papers 1; For regulatory implications such state of affairs has see e.g. Robert C Hockett and Saule T Omarova, 'The Finance Franchise' (2017) 102 Cornell Law Review 1144. The bank-sovereign loop and its implications are explored further in Agnès Bénassy-Quéré and others, 'Reconciling Risk Sharing with Market Discipline: A Constructive Approach to Euro Area Reform' [2018] CEPR Policy insight No. 91; Ashoka Mody, 'From Bear Stearns to Anglo Irish: How Eurozone Sovereign Spreads Related to Financial Sector Vulnerability' (2009) 09 IMF Working Papers 1; Stefan Gerlach, Alexander Schulz and Guntram B Wolff, 'Banking and Sovereign Risk in the Euro Area' (2010); Viral Acharya, Itamar Drechsler and Philipp Schnabl, 'A Pyrrhic Victory? Bank Bailouts and Sovereign Credit Risk' (2011); Emmanuel Farhi and Jean Tirole, 'Deadly Embrace: Sovereign and Financial Balance Sheets Doom Loops' (2018) 85 Review of Economic Studies 1781. Financialisation and globalisation somewhat alters the historical state-bank loops, as political economy insight suggest, however this debate is beyond the scope of this research, see e.g. Milan Babic, Jan Fichtner and Eelke M Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52 International Spectator 20.

[41]Martin Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt* (Princeton University Press 2017).

form, the question of bank ownership becomes highly pertinent, as it could be assumed that foreign-owned banks would be less prone to take decisions which result in the vicious circle materialising, since the moral hazard associated with implicit guarantees would be smaller. On the other hand, given the real economy impact of banking activity, the state might be under greater pressure to support a bank in trouble operating within its territory, regardless of the ultimate ownership.

As a consequence of the link between the real economy and banking activity, over the course of the crisis, ring-fencing was deployed in many jurisdictions to curtail intra-group shock transmission. Such ring-fencing took the form of a variety of regulatory requirements imposed by regulators both in the home and host Member States, and in essence constitutes the legal renationalisation of banks which had been international in "good times." In line with the "international in life, national in death" adage, scholars and practitioners have claimed that during periods of instability, in light of the real economy importance of banking and the "sovereign-bank loop", the interests of domestic stakeholders, e.g. maintaining the supply of credit, may, however, be best served exactly through such ring-fencing.[42] Further, the crisis "ring-fencing" phenomenon has been defined by some scholars as "legally deconstructing a firm in order to more optimally reallocate and reduce risk"[43]. In the context of EU cross-border bank groups however, it appears that such ring-fencing in fact implies prevalence of entity (protective) approaches which were creatively employed in the early phases of the crisis.

The widespread use of ring-fencing suggests, however, that a renationalisation strategy was adopted as a response to what are effectively – in the light of bank's public (interest) functions – problems of cross-border bank group governance, including suboptimal risk management and risk-sharing within the bank group. In this monograph I therefore seek to investigate whether EU law, by introducing a "cross-border bank

[42] Katia D'Hulster and Inci Ötker-Robe, 'Ring-Fencing Cross-Border Banks: An Effective Supervisory Response' (2015) 16 Journal of Banking Regulation 169, 171. See however Draghi (n 10) highly critical of such retrenchment, where: *"[f]inancial markets then began to fragment along national lines and cross-border funding dried up, exacerbated by defensive risk management by banks and ring-fencing of liquidity by supervisors in the core countries. Lack of liquidity, coupled with capital depletion from domestic losses, precipitated a renewed credit crunch."* On ring-fencing in crisis see further Section 2.4.3.

[43] Steven L Schwarcz, 'Ring-Fencing' (2013) 87 Southern California Law Review 69.

group concept”, does not partially solve this problem by creating such a governance regime as was found lacking over the course of the crisis.

1.4. The legal account of EU cross-border bank groups

There is ample evidence in economic literature and in the markets themselves of cross-border bank groups which operate as integrated enterprises and independent entities within a loosely-centralised group with (national) ring-fencing preserving intra-group distinctiveness. Such empirical approaches do not explain, however, how the decisions within the cross-border group are taken, that is what rules govern their internal governance mechanisms, of which the interplay between interdependence and independence may be the consequence. In other words, to understand how cross-border bank groups are governed we need to ask the question of whether there is an organisational law applicable to such situations.

The assumption made in this monograph is in fact that the puzzle of cross-border bank groups can be solved by a thorough analysis of the governance mechanisms put in place by EU law, and specifically the law which governs their risk management as has been introduced after the Great Financial Crisis. In other words, rather than focusing on the structure and scope of cross-border bank group purely, I will study the *going concern* regulation of groups under the new EU resolution law. There are two premises to such an approach. First, law determines cross-border bank group organisation. Second, cross-border banking has a special role for EU integration.

First, the applicable law determines bank structure. The defining characteristic of cross-border banks groups identified by empirical economic scholarship is their complexity. Complexity – as understood by this literature – is defined by the multiplicity of legal entities and opaque internal organisation. The legal dimension of organisation is sometimes overlooked or deemed irrelevant – the legal structure is considered by economists to be an *ex post* consequence, rather than an *ex ante* organisational requirement determining the overall operation of the cross-border bank group.[44] And yet this impact is evident. Carmassi and Herrig in their empirical review of cross-border

[44] Some more recent work has been more concerned with the structure and organisation of cross-border banks in this respect see: Cedeño Brea Víctor, 'The Legal Structure of Commercial Banks and Financial Regulation – Does Organizational Form Matter for the Design of Bank Regulation?', PhD Thesis, (2017).

banks' organisation list specific regulatory constraints which determine the corporate structure, such as authorisation requirements.[45]

The legal form of entities within the cross-border bank is determined by legal regimes applicable, as a matter of specific legal requirements (e.g. for establishment), which are particularly important in the case of banking given the ever-increasing granularity of regulation. This applies both within the EU and the Banking Union, notwithstanding the highly harmonised regime. Specific areas of law adjacent to bank regulation may further determine the organisational choices of banks, to the extent they seek to reduce their compliance costs (tax optimisation or other regulatory arbitrage).[46] In the US, the emergence of complex holding companies has been explained by reference to restrictions on interstate commerce.[47] In Poland, for example, bank supervisors during the transition from communism to capitalism in the early 1990s encouraged strategic and ownership partnerships by foreign banks (up to 50%) in local entities as a means of facilitating knowledge-transfer to the newly capitalist economies.[48] The path dependency of such initial set-up of the banking sector influences the ownership structure till this day, where subsidiaries of foreign banks are generally majority, not fully owned.

Increasingly, however, banks' internal organisation is a matter of regulation and supervision – that is the group's internal structure is not a consequence of other regulatory requirements, but very much the object of regulation.[49] With the shift towards more risk-oriented regulation of financial markets, internal organisation choices of credit institutions and their implications (for example for risk profile of the bank) are assessed as a matter of micro and macroprudential stability.

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[45] J Carmassi and RJ Herring, 'Corporate Structures, Transparency and Resolvability of Global Systemically Important Banks', Working Papers 15-10, University of Pennsylvania, Wharton School, Weiss Center.

[46] Edward J Kane, 'Regulatory Arbitrage in Cross-Border Banking Mergers within the EU' (2012) 44 Journal of Money, Credit and Banking 1609.

[47] Bruce G Carruthers and Naomi R Lamoreaux, 'Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards' (2016) 54 Journal of Economic Literature 52, 84.

[48] For an account of the emergence of the Polish banking sector and the role therein of foreign „strategic partners" see: Piotr Aleksandrowicz and Aleksandra Fandrejewska-Tomczyk, *Reforma Polskiego Systemu Bankowego w Latach 1987-2004 We Wspomnieniach Jej Twórców* (Wydawnictwo Uniwersytetu Warszawskiego 2016).

[49] Tobias H Tröger, 'Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions' (2012) 48 Texas International Law Journal; Jonathan Fiechter and others, 'Subsidiaries or Branches: Does One Size Fit All? By Jonathan Fiechter, İnci Ötker-Robe, Anna Ilyina, Michael Hsu, André Santos, and Jay Surti; IMF Staff Discussion Notes SDN/11/04; March 7, 2011'.

If a bank's organisation is a matter of risk management, this means it may also be a channel for risk distribution and risk-sharing. This implies that there is a redistributional aspect to banking integration via cross-border bank groups, which concerns not only the allocation of capital, but also the allocation of the decision-making power and protection of distinct stakeholders in different markets where the bank is active.[50] Such considerations are especially important where in integrated markets the cross-border banking channel is a mechanism for risk-absorption and therefore an alternative to public *ex post* fiscal transfers.[51]Therefore, though the economic literature on cross-border banking, which is the literature which predominantly deals with the organisation of cross-border bank groups, does not explicitly consider the legal framework,[52] there is an argument to be made that, under the new post-crisis regime, the resolution of cross-border banks is the realisation of *ex ante* risk distribution determined through crisis prevention measures which are the new cross-border regulatory requirement in EU law. Related governance requirements meanwhile determine the interconnection within cross-border bank groups as a risk-absorbing or a risk-amplifying (risk-shifting) mechanism in an EU specific context.[53]

Second, cross-border banking historically played a very special role in the EU context as a structural form of integration.[54] In fact, EU directives since the early 1990s referred

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[50]Erik Jones, 'Financial Markets Matter More than Fiscal Institutions for the Success of the Euro' (2016) 51 International Spectator 29.

[51]Davide Furceri and Aleksandra Zdzienicka, 'The Euro Area Crisis: Need for a Supranational Fiscal Risk Sharing Mechanism? The Euro Area Crisis: Need for a Supranational Fiscal Risk Sharing Mechanism? 1 Prepared by Davide Furceri (RES) and Aleksandra Zdzienicka (AFR)' (2013); Alessandro Ferrari and Anna Rogantini Picco, 'International Risk Sharing in the EMU' (2016).

[52]Claudia M Buch and Gayle L Delong, 'Banking Globalization' in Allen Berger, Philip Molyneux and John Wilson (eds), *Oxford Handbook of Banking* (2nd edn, OUP 2014), 770; Gerard Caprio and others, *Handbook of Safeguarding Global Financial Stability : Political, Social, Cultural, and Economic Theories and Models*(Elsevier 2012)*287*.

[53]Deniz Anginer, Eugenio Cerutti and Maria Soledad Martinez Peria, 'Foreign Bank Subsidiaries' Default Risk during the Global Crisis: What Factors Help Insulate Affiliates from Their Parents?' (2016).On internal market as a site of diversity Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017). On the link between cross-border risk-sharing and organisation of banks, the main theme of this monograph see already Dirk Schoenmaker, 'The Impact of the Legal and Operational Structures of Euro-Area Banks on Their Resolvability' (2016) Bruegel Policy Contribution.

[54] In this vein see also Kalypso Nicolaïdis and Max Watson 'Sharing the Eurocrats' dream: a demoicratic approach to EMU governance in the post-crisis era' in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges, *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 55, E Hüpkes 'The Last Frontier: Protecting Critical Functions Across Borders' in Eddy Wymeersch, Klaus J Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press 2012). Economic scholars measure integration by other means, e.g. by considering different lending rates for non-financial corporations: Dariusz Rosati, 'Czy

to the "harmonious development" of banking as a matter of EU integration.[55] Banking underpins the freedom of movement, that is the EU's internal market where capital, workers but also companies, can move freely. Banking lies at the intersection of all fundamental EU freedoms, as it allows for cross-border trade to take place (e.g. via the payment systems). In the CEE the preparation for EU integration processes in the 1990s led some countries to invite EU-based banks to act as strategic investors in the newly created banking sector, which facilitated the transition to market economies.[56]

Given the role of law for determining cross-border banks' internal organisation and the EU-specific importance of the banking sector, it is argued in the following pages that EU law can fill the specific lacunae in thinking about how a cross-border group's internal organisation marries market free-contracting principles with control exercised within an integrated hierarchical structure, which prevents the development of a holistic approach to group governance, and therefore – in the light of the systemic function of banks – may lead to fragmentation and renationalisation when risks materialise. EU law is a tool particularly well placed to solving such problems since reconciling irreconcilable differences is its *raison d'être*.[57]

Polska Powinna Przystąpić Do Strefy Euro?' (2013) 10 Gospodarka Narodowa 5. In its annual "European Integration Stability and Integration Report" the European Commission assesses integration as a measure of the level of gross external assets and liabilities divided by GDP at current market prices, excluding reserves and financial derivatives, at 4.8% in 2015 following a slowdown driven by the financial crisis. see European Commission, EFSIR 2017, p. 18. A more rule-oriented definition in ECB's 2017 *Financial Integration Report* considers integration as a situation where "all potential market participants [are faced] with the same relevant characteristics: (1) face a single set of rules (…); (2) have equal access to those financial instruments and/or services; (3) are treated equally when they are active on the market."

[55] Preamble to 1994 Deposit Guarantee Directive states "the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers." On the constitutional dimension of EU financial integration see T Tridimas, 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform' in: Paul Craig and Grainne De Burca, *The Evolution of EU Law* (OUP 2011).

[56] Aleksandrowicz and Fandrejewska-Tomczyk (n 47); Jacek Rostowski, *Banking Reform in Central Europe and the Former Soviet Union* (Central European University Press 1995); Klaus J Hopt and Katharina Pistor, 'Company Groups in Transition Economies: A Case for Regulatory Intervention ?' (2001) 2 European Business Organization Law Review 1.

[57] Grainne De Burca, 'Europe's Raison d'être' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2013); already in the context of cross-border banking in the EU: Almudena De La Mata Muñoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11 European Business Organization Law Review 575, 591.

1.5. The question to be answered

To the extent that the internal organisation of cross-border banks has important implications in terms of risk-shifting or risk-sharing in a financial crisis context, the relative ambiguity surrounding their legal status (internal organisation) is a matter of concern. Increasingly, this matter is becoming the object of EU regulation and supervision – that is the group's internal structure is not just a consequence of other regulatory requirements, but very much what is being regulated in the public interest.[58] With the shift towards more risk-oriented regulation of financial markets, internal organisation choices of credit institutions and their implications (for example for the risk profile of the bank) are assessed as a matter of micro and macroprudential stability of multiple EU jurisdictions. This is particularly the case of EU cross-border bank groups which have been identified in new EU regulations (EU resolution law). In this monograph I explore how EU law has created the new instruments which allow an EU cross-border bank group to be treated as an enterprise. The question I seek to answer is: whether and, if so, how is a group (enterprise) approach to cross-border banks made possible under EU law?

[58] Tobias H Tröger, 'Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions' (2012) 48 Texas International Law Journal; Jonathan Fiechter and others, 'Subsidiaries or Branches: Does One Size Fit All? By Jonathan Fiechter, İnci Ötker-Robe, Anna Ilyina, Michael Hsu, André Santos, and Jay Surti; IMF Staff Discussion Notes SDN/11/04; March 7, 2011'.

1.5.1. Research design and relevance

To address this question I draw on rich and varied scholarship, as it is only by bringing together a number of literature standards – from comparative corporate and organisational law, financial regulation scholarship and EU law – that I am able to develop an analytical approach which allows me to identify the cross-border bank group structure, determine its characteristics and governing principles and to use such a framework for the purposes of analysing EU post-crisis bank regulation in terms of legal strategies enabling an enterprise approach to cross-border bank groups.

First, group law scholarship – as a branch of corporate legal scholarship and informed by law and economics – is concerned with the organisation of groups as a hybrid structure characterised by interdependence (common membership of a group and ownership links) and independence (to the extent that individual entities within the group remain functionally separate). Though no EU group law exists, the normative debate calling for its introduction has accelerated in recent years as a result of an increase in cross-border activity. Such literature has focused on developing an analytical toolbox for defining the scope of group law (as comparative literature) which can be applied in EU legal contexts, in particular in the German scholarship.[59] An obstacle to the creation of group law has been the prevailing legal protectionism across Member State jurisdictions. The monograph engages with this literature in the bank specific context, which is a developing branch of group law literature which bridges such scholarship with that concerning financial regulation, where we can no longer purely claim that "companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning."[60] Though the fragmentation of the banking markets over the course of the crisis, taking the form of national retrenchment, is held as empirical proof supporting the argument that banks

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[59]Forum Europaeum, 'Corporate Group Law for Europe' (2000) 1 European Business Organization Law Review 165 for an authortiative launching of the debate which has however stalled thereafter. See more recently: Katja Lagenbucher, 'Do We Need a Law of Corporate Groups?', vol 147 (2016); Edoardo Martino, 'Crisi Del Gruppo Bancario e Prospettive Europee Sul Riconoscimento Dell ' Interesse Di Gruppo' 1; Informal Company Law Expert Group (ICLEG), 'Report on the Recognition of the Interest of the Group' (2016).

[60] Case-210/06, *CARTESIO Oktató és Szolgáltató bt., Case C-210/06, ECLI:EU:C:2008:723*, para. 104,for a comparative overview of legal forms of banking activity see Víctor (n 47), see also: KJ Hopt, 'Corporate Governance of Banks and Other Financial Institutions after the Financial Crisis' (2013) 13 Journal of Corporate Law Studies 219.

are international in life and national in death,[61] the new regime – in particular via the crisis prevention governance mechanisms in place – changes the nature of cross-border bank groups and treats them as distinct object of EU regulation. Group law and organisational law scholarship therefore provides the language to capture the governance of EU cross-border groups, and in particular the differentiation between enterprise (enabling) and entity (protective) approaches to intra-group relationships, as well as concepts of asset partitioning as the rationale underpinning group emergence.

Second, I draw on the rich financial regulation literature which has sought to make sense but also reconstruct theoretically the regime which has emerged from the flurry of reforms. I focus the inquiry on the regulation of banks – that is the credit institutions which are as well covered by the deposit insurance, and in particular the EU special rules for bank crisis prevention and management, namely EU resolution law and – to the extent relevant in the context of specific resolution law procedures – microprudential regulation and supervision. With regard to new requirements of risk management, ample interdisciplinary literature on governance of banking emerged in the aftermath of the Great Financial Crisis. Scholars show the extent to which inadequate regulation of banking, and in particular cross-border banking activity, has played a role in amplifying the crisis.[62] Drawing on such legal and economic literatures makes it possible to draw a connection between the regulated internal governance within the group and the economic impact of cross-border banking. An assumption made in this thesis is that the financial stability implications of cross-border banking which are inconclusive in economic literature, depend on the internal governance of such a banking group and how (and in whose interest) decisions within a cross-border group are taken and how any internal conflicts of interest are resolved. An analysis of the governance of cross-border banking is therefore relevant for the discussions concerning the causes of the financial crisis, including the amplifying role which law can have in international financial relations.[63]

[61] Andrea Enria, Fragmentation in banking markets: crisis legacy and the challenge of Brexit, Speech BCBS-FSI High Level Meeting for Europe on Banking Supervision 17 September 2018.

[62] Sandbu (n 41).

[63] For an account of how law structures financial relationships and therefore is the foundation of capitalism see: Katharina Pistor, *Code of Capital* (Princeton University Press 2019).

Third, institutional literature has sought to address the problem of inadequate cross-border bank oversight.[64] In this respect, the GFC has drawn attention to the limited capacity of public authorities to adequately regulate and monitor the behaviour of global financial institutions, also in developed countries.[65] Over the course of the financial crisis, according to numerous analyses it was the lack of a supranational institutional oversight which not merely aggravated the crisis, but also caused it where lack of centralisation begets instability.[66] A number of theories – such as the 'financial trilemma' – suggest that it is impossible to reconcile financial stability, national supervision and cross-border financial integration.[67] Solving this problem has been the objective of the post-crisis reform of the banking sector at the global level,[68] but especially at the EU level where the objective of integration and the internal market – and therefore cross-border activity – is laid down in the EU Treaties.[69] Economic literature which underpins such approaches assumes that geography and jurisdiction are irrelevant (often treating cross-border entities as pure hierarchies), while the legal approaches overstate – from the perspective of ongoing governance – the role of jurisdiction (in particular where in the context of banks the debate ranges over the questions of jurisdictional responsibility in crisis).[70] Likewise administrative governance literature – even where EU composite administration is studied – assumes

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[64]Brigitte Haar, *Organizing Regional Systems*in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015).

[65] For an account of the interconnections in the financial crisis see: Adam Tooze, *Crashed* (Penguin 2018).

[66] For interpretations suggesting the GFC was a crisis of regulation see: Erik J Pan, 'Four Challenges to Financial Regulatory Reform' (2010) 55 Villanova Law Review 743. For the view that the crises resulted from deregulation see e.g. John Goddard, Philip Molyneux and John OS Wilson, 'Banking in The European Union: Deregulation, Crisis, and Renewal' in Allen N Berger, Philip Molyneux and John O.S. Wilson (eds), *The Oxford Handbook of Banking* (2014). For a cyclical view of regulation see e.g. Simon Deakin, 'The Evolution of Theory and Method in Law and Finance' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015). More generally on the underlying economic theory of instability inherent in the banking sector activity see Heyman Minsky, *Stablizing an Unstable Economy* (McGraw-Hill 2008).

[67]Schoenmaker, *Governance of International Banking* (n 7).

[68] Especially with the creation of the Financial Stability Board after the G20 summit in London in 2009.

[69] Though the international developments are an important context for the analysis presented in this thesis, the focus is squarely placed on EU implementation of such reform, for a legal and political analysis of the interplay between international and EU regulation, on the example of capital markets, see: Adrienne Héritier and Magnus Schoeller (eds), *Governing and Regulating Finance in Europe: A Centralisation of Rulemaking?* (Edward Elgar 2020).

[70] The legal debate concerning cross-border bank activity has focused in particular on cross-border issues of insolvency, esp. in the context of the 2001 Winding-Up Directive. See e.g. Gabriel Moss, Bob Wessels and Matthias Haentjens, *EU Banking and Insurance Insolvency* (Oxford University Press 2017). The Winding-Up Directive provides for a universalist approach, where the home institution would be responsible for the winding-up for the whole entity, without however addressing the failures and conflicts between various parts of the group in a cross-border context.

the exclusive competence of relevant national authorities over their jurisdiction. Where a study of cross-border reach of governance reveals that effectively governance of EU bank groups is transnational and operates cross-border, the monograph clarifies the scope of governance within a cross-border bank group, including the reapportioning of responsibilities between national and EU institutions. It does so by exploring specific supranational governance techniques employed for cross-border bank groups including risk management which cover the cross-border dimension. I focus on such transnational governance techniques which blur the jurisdictional lines rather than supervision purely, because it is in the context of the resolution regime that the concept of the "cross-border bank group" has been initially introduced with the 2014 BRRD rulebook.

The transnational governance of cross-border bank groups in the EU identified by drawing on such diverse scholarship, has implications for the prevailing understanding of the doom-loop between banks and their states. Over the course of the crisis the doom loop extended cross-border in an example of "privatising benefits and socialising costs" (which for the most part happened across the EU – including both within the Eurozone and the EU (also facilitated by coordinated policies of "renationalisation"). This is why the funding and burden-sharing aspect has been well-explored however as well in EU literature.[71] Such literature focuses predominantly on crisis management. Here I study the antecedent to the doom loop – namely the risk management and *ex ante* crisis prevention of banks – as equally important for the purpose of determining the scope of the doom loop. I show how the transnational element is enabled and facilitated by fundamental principles of EU law: integrity of the internal market (legal basis), the framing of policy objectives (state aid), mandates of the distinct institutions (European Commission) as well as duties of loyal cooperation. Principles such as proportionality calibrate the transnational reach of cross-border bank group governance. The extension of the transnational reach, however, goes hand in hand with demarcation of an EU jurisdiction, to the extent that differentiated requirements exists within the EU and externally, in addition to specific corporate requirements such as the introduction on an EU Single Undertaking requirement.[72]

[71]Seraina Neva Grünewald, *The Resolution of Cross-Border Banking Crises in the European Union : A Legal Study from the Perspective of Burden Sharing* (Kluwer Law International 2014).

[72]Katarzyna M Parchimowicz, 'Missed Targets and Misplaced Incentives? The Case of Parent Undertaking Requirement in the USA and in the EU' (2019) Journal of Banking Regulation.

In pursuing the answer to the research question this thesis equally studies the evolution of EU law, namely how existing provisions of EU law are used to adjust to the new challenges and how new concepts can be given meaning and operationalised. On the example of the cross-border bank groups I study such phenomena in a twofold manner. First, through the study of the European Commission's practice in the only area of EU law which was effectively applied to cross-border bank groups over the course of the financial crisis, that is the EU state aid law (Chapter 4). Secondly, in the context of the new rules which have been created to govern cross-border bank groups, that is the EU resolution law (Chapter 5 and 6). The units of analysis are drawn from comparative insights, that is the common legal traditions of Member States.

The monograph therefore also shed light on the force of EU law. I explore not merely the specific question of whether and how a group (enterprise) approach is made possible under EU law, but also at a more general level, how EU law can circumvent constraints of jurisdictions in an area as close to the core state functions as banking.[73] In this sense the monograph explores the question of how EU rules facilitate the process of institutionalisation of (EU-specific) transnational capitalism.

The analysis in this monograph is therefore relevant for practitioners and scholars of EU law and EU cross-border banking in particular. It contributes to the rich literature on cross-border banking, which is focused however, on crisis management,[74] insolvency[75] and – most recently – on resolution of cross-border bank groups.[76] Further, the monograph's findings by answering the question of *how* an EU cross-border bank group is governed, provide insight into what kind of corporation a cross-border bank group is (that is in whose interest it operates). The extent to which the EU's bank resolution framework determines the scope and internal structuring of the interrelationships between certain classes of stakeholders (bondholders, shareholders), raises the question of types of duties which exist at various levels of internal group

[73] For the political science perspective see: Genschel and Jachtenfuchs, n 1.

[74] Caprio and others (n 52); Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 7).

[75] Baxter, Hansen and Sommer (n 107); Wolf (n 214); Eva Hüpkes, 'Rivalry in Resolution. How to Reconcile Local Responsibilities and Global Interests?' (2010) 7 European Company & Financial Law Review 216.

[76] See Section 3.2 and Paul Davies, 'Resolution of Cross-Border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Jens Hinrich Binder, 'Cross-Border Coordination of Bank Resolution in the EU: All Problems Resolved?' (2016) 13 European Company and Financial Law Review 575.

governance with important implications in particular from the point of view of cross-border risk-sharing via the public-private (hybrid) governance of cross-border banking. Such legal analysis is also valuable to the extent – as argued by Pistor and Awrey - legal rights and obligations structure financial regulations.[77] The implications of the findings have a bearing on what is understood to be the "bank-sovereign" doom loop, but also on the crucial question of accountability for the performance and delivery of specific functions by the banking sector. The design of the group law becomes all the more important in the context of incomplete ownership – that is in situations where the group is linked by relationships of control, but not full ownership. This is the case in most of the EU cross-border bank groups, where the parent holds a controlling share of the credit institution in another Member State and the rest of the shares typically float on the market.

[77]Dan Awrey, 'Law, Financial Instability, and the Instittuional Structure of Financial Regulation' in Anita Adnad (ed), *Systemic Risk, Institutional Design, and the Regulation of Financial Markets* (Oxford University Press 2016) 69, Pistor n 63.

Chapter 2

2. The law of EU cross-border banking

This chapter explains the lacunae of pre-crisis cross-border bank group regulation, where cross-border bank activity was predominantly regulated though principles of cooperation between authorities and mutual recognition of substantive rules. Had a cross-border group law existed at EU level, disintegration of EU markets after the GFC would not only have been avoided, but also that the costs would have been better allocated. This chapter explains that EU regulation of cross-border banks prior to the GFC has been fragmented for two reasons. First, there were lacunae and distorted incentives in the framework for prudential regulation of banks, and cross-border banks in particular. Second, there was very little in terms of common legal principles governing corporate cross-border groups. Section 2.1 explains why national law continued to be the primary law governing distinct legal entities within EU cross-border bank groups. Section 2.2. explains how EU law influences specific organisational choice of banks as cross-border groups. Section 2.3 describes the lacunae in regulation of such entities in EU law prior to reform. Section 2.4 explains why the lack of a common framework for cross-border banks was an important contributing factor to the GFC.

2.1. National law as the foundation

Banks are companies, and companies are creatures of the national legal systems and responsibility of the state.[78] Even if EU law increasingly governs companies and their mobility as well,[79] banks as legal entities have a nationality determined by the place where they are established and as well – given the specific legal requirements of banking – where they are formally authorised by the competent supervisors to carry out their activity. In some jurisdictions, banks further have to operate under specific legal form in the light of the function they deliver.EU law offers one avenue of a bespoke supranational company regime, that is the so-called *Societae Europeae*(the European Company).[80] However, there is little evidence that financial institutions have in fact adopted such a legal form – even if there appears to have been some interest initially from banks such as Nordea and further calls for a broader adoption of the regime by banks specifically have been made since.[81] Some evidence of the tide changing can be observed in the aftermath of Brexit, with a number of banks relocating to the EU as SE companies. Though scholars have pointed to a degree of convergence in national company laws, important differences prevail in Member States' approaches to the

[78] D Milman, *National Corporate Law in a Globalised Market: The UK Experience in Perspective* (Edward Elgar 2009) 75.

[79] On the nationality and free movement of companies in the EU, see the discussion following the CJEU judgment in C-106/16 *Polbud* (2017) ECLI:EU:C:2017:804, Gitte Soegaard, 'Cross-Border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country' (2018) 15 European Company Law 21; Ariel Mucha, 'New Chapter in the Corporate Mobility in Europe – Some Remarks on the Polish Supreme Court Request for a Preliminary Ruling on the Outbound Limited Company Seat Transfer in the Case C-106/16 Polbud-Wykonastwo' (2017). At the time of finalising this thesis a new law governing the mobility of cross-border mobility of companies is due to be published in the Official Journal (Directive of the European Parliament and the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions).

[80] SE is also known as the 28th regime. For an overview of the forms of supranational companies in EU law see: Stefan Grundmann, *European Company Law: Organization, Finance and Capital Markets* (Intersentia 2011) 803; for a study explainign the dilemmas of EU company law, including SE legal forms see: Carsten Gerner-Beuerle and others, *Study on the Law Applicable to Companies* (2016); Noëlle Lenoir, 'The Societas Europaea (SE) in Europe: A Promising Start and an Option with Good Prospects' (2008) 4 Utrecht Law Review 13. For an overview of the rationale behind the adoption of the SE regime see: Opinion of the European Economic and Social Committee on 'The 28th regime — an alternative allowing less lawmaking at Community level' (own-initiative opinion) OJ C 21, 21.1.2011, p. 26–32.

[81] Jean Dermine, 'European Banking Integration: Don't Put the Cart before the Horse' (2006) 15 Financial Markets, Institutions & Instruments 57; Adrienne Coleton, 'Banking Insolvency Regimes and Cross-Border Banks - Complexities and Conflicts: Is the Current European Insolvency Framework Efficient and Robust Enough to Effectively Resolve Cross-Border Banks, Can There Be a One Size Fits All Solution?' (2012) 27 Journal of International Banking Law and Regulation 63.

governance of companies, the rights of stakeholders and even the purpose with which the company is to operate.[82]

Cross-border banks operating in the EU therefore are generally companies established in a specific jurisdiction under national company law. Notwithstanding the general requirements of EU law which allow for company mobility and cross-border provision of services, national law then imposes specific requirements on the legal entities operating within their territory, regardless of whether they form part of a larger cross-border group or not. Since national laws continue to apply, corporate governance of legal entities established in different Member – that is their management, accounts, board of directors and capital, intra-group liability – is regulated by national laws. As a result cross-border banks have different forms and may operate e.g. fully integrated or through a holding company.[83]Specific requirements include barriers to intra-group asset transfers, that is the competence of national supervisors to ring-fence legal entities operating within their jurisdiction.[84] Enforcement powers for failing to comply with the company law requirements, including those which are criminal in nature can be imposed as well by the national authorities. [85]

EU law requires that such rules must not restrict with the freedom of movement principles in a discriminatory manner. Further, national law is restricted by the EU harmonisation of banking as a deposit-taking activity. Regardless of the precise legal form a given bank has, it can only engage in the regulated banking activity (that is the business of taking deposits from the public), only if it meets the specific conditions for authorisation as per Art. 8 CRD IV.[86] Such authorisation is obtained by the credit institutions in the individual Member State on the basis of the national laws

[82]Reinier H Kraakman (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd ed, Oxford University Press 2009); for a review of persisting obstacles to full harmonisation and persisting divergencies Jeffrey N (Jeffrey Neil) Gordon and Mark J Roe, *Convergence and Persistence in Corporate Governance* (Cambridge University Press 2004).

[83]Carmassi and Herring (n 45) 126.

[84] See above, Section 1.3 on sovereign-bank loop and ring-fencing in the crisis. See fn 11 for evidence of crisis retrenchment of national banking markets in the EU.

[85] For a comparative overview of sanctions for intra-group asset transfer in the vicinity of insolvency/crisis scenarios stemming from insolvency law, civil law, company law, banking law and criminal law see Part 5 DBB Law, 'Study on the Feasibility of Reducing Obstacles to the Transfer of Assets within a Cross Border Banking Group during a Financial Crisis' (2008).

[86] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC OJ L 176, 27.6.2013, p. 338–436 ("CRD IV").

implementing the directive.[87]EU conditions for authorisation are not merely prudential in nature (i.e. meeting the minimum capital requirements), but have an organisational dimension as well. To obtain authorisation a bank-to-be has to meet the organisational requirements (Art. 10 CRD IV), minimum own capital requirements (set at 5 million euro per Art. 12(1) CRD IV)), management requirements (Art. 13 CRD IV) and disclosure the shareholders which have qualifying holdings (Art. 14 CRD IV). Though the specific legal form is not regulated, Art. 13 CRD IV demands that a credit institution must have its registered head office in the same Member State (point 2(a)) and carry out its business in there as well (point 2(b)), which is already unique in terms of regulating company organisation in EU law. Thus though legal form continues to be regulated at national level, EU law increasingly regulates the actual operation of the bank via prudential rules. Common rules which govern the access to banking business (authorisation) meanwhile act as a minimum harmonisation regime, which underpins the internal market in banking. They enable the mutual recognition of activities and cross-border provision of services.

[87] The procedure is somewhat different in the case of the Banking Union countries – where the Single Supervisory Board sitting within the SSM is the deciding institution. Formally, however, the credit institution applies to the national supervisor for authorisation, and it is the national rules which are applied (see Art. 4 SSM Regulation).

2.2. Passporting foundations of cross-border banking

EU law facilitates the emergence of cross-border bank group structures in a number of ways, where banking services fall within the scope of multiple fundamental freedoms and areas of EU law.[88] In this section I review the relevant EU rules which allow for cross-border bank activity, that is I show how EU law opens up the banking market across the Member States.EU law which allows for cross-border activity of banks grew in the context of global trends towards liberalisation of finance since the 1970s. The road towards internal market in banking was not quick however, and scholars explain the reluctance of Member States to integration in this area (and the concomitant complexity of the regime) by protectionism. Such protectionism results *inter alia* from the public role of banking, that is the mutual dependence of state economies and banks (i.e. the doom loop discussed).[89] Progress in introducing measures allowing for the integration of banking markets was the result of a trade-off achieved between nationalist conception of sovereignty and economically driven arguments for free market across the EU. Banking integration measures struck a balance between domestic protectionism (with an emphasis on national direct control of markets and resistance to integration), and single-market making via a transfer of competences to the European level (to improve the market's efficiency and therefore to assure the delivery private and public benefits of that business activity).[90]

Movements of capital, that is cross-border payments, underpin market integration, and consequently rules governing integration of banking activity across the Member States were foreseen already in the Treaty of Rome of 1957.[91] Initially, however, they remained only partially activated, as the early days of European integration coincided

[88] Art. 58(2) TFEU, one of the few articles of the EU Treaties which directly references banking activity states: "The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital."

[89] See Section 1.3.

[90] For a historical perspective explaining as well the role of the Basel Committee in shaping the European Communities approach in the early phases see: Alexis Drach, 'A Globalization Laboratory: European Banking Regulation and Global Capitalism in the 1970s and Early 1980s' (2019) 26 European Review of History: Revue européenne d'histoire 658; for a historic account of the the different ways through which European law addressed these tensions (e.g. via legislation, competition and governance) see Teixeira (n 37).

[91] On the origins of financial market liberalisation in the EU see: Mourlon-Druol (n 38) 918; Ivo Maes, 'On the Origins of the BIS Macro-Prudential Approach to Financial Stability: Alexandre Lamfalussy and Financial Fragility' (2010) 63 PSL Quarterly Review 265; Sideek M. Seyad 'Free Movement of Capital' in: Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons, Inc 2016).

with a period of financial repression, that is strict state regulation and control of the banking sector as well as the capital flows. The importance of capital movements from the perspective of facilitating an efficient allocation of capital and optimal investment levels across the Community was however acknowledged, and was an object of work of European Communities, in particular in the 1966 Segré report which called for removing of barriers in the area.[92] Practically, capital movements in the EU became more liberalised only in the light of the broader transformations of the global financial system, and in particular the changes brought about by the capital account liberalisation following the collapse of the Bretton Woods system. It was only the 1986 Single European Act that made significant progress in liberalising area of free movement of capital by introducing a requirement of capital flow liberalisation within the EU (and vis-à-vis third countries per current Art. 63 TFEU).

Progressive establishment of an internal market in banking as a business activity was meanwhile enabled though other areas of the internal market law, including the Court's jurisprudence which reaffirmed the application of competition rules to banking as any other financial activity. In the 1981 *Züchner* case the Court confirmed that notwithstanding the special features of the banking sector, the horizontal rules of EU law applied to it nonetheless.[93]

Notwithstanding the sectoral specificity of banking and its macroeconomic importance discussed above, there is no distinct legal basis for EU policy in the area.[94] Consequently, the primary area of EU law which allowed for greater integration in cross-border banking activity was the freedom to provide services – and it is the competence of the European Community in this area which was the legal basis for the first directives liberalising and harmonising Member State law relating to banking activity. Thus, though banking triggers multiple areas of EU law, pursuant to the doctrine of the CJEU, the "centre of gravity" test applied determines freedom to provide cross-border services to be the primary set of rules applicable.[95] The first Banking

[92]Report of a Group of experts appointed by the EEC ('Segré Report'), 'The Development of a European Capital Market'.

[93] C-172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* (1981) ECLI:EU:C:1981:178.

[94] Notable exception being Art. 127(6) TFEU which creates a legal basis for the conferral of competence for supervision of credit institution onto the ECB. This was the legal basis which allowed to create in 2012 the Banking Union.

[95]David Ramos Muñoz and Marco Lamandini, *EU Financial Law: An Introduction* (Wolters Kluwer Italia 2016) 434.

Directive in 1977 laid the foundations for basic freedom of movement in the area.[96]This approach changed significantly since. Today, most of the new EU regulation measures are grounded on the legal basis of Art. 114 TFEU. Scholars of the history of banking regulation suggest that in the initial phase the focus was placed on basic rule harmonisation which allowed for some tenants of cross-border activity and provision of services and established the fundamental principle of EU banking, namely the so-called "single passport."[97] Single passporting allows for cross-border provision of services through branches, that is it does not require that the entity providing the services be legally established in the host Member State. In such cases, the cross-border activity would take place within one integrated entity, rather than a cross-border group (see Figure 1).

The focus of the initial regulations for cross-border banking was a cautious enabling of free movement of services, in particular with regard to branches. The approach was underpinned by the fundamental principle of EU law, namely mutual recognition developed by the EU Courts in seminal cases from *Cassis de Dijon*[98] through *Centros*[99] which determines that rules applicable in one country should be enough to carry out activity in another Member State. Banking is exempted, however, from the general mutual recognition regime which applies in the internal market. Such an exemption is warranted by the specific regime in place for banking which establishes basic common rules on prudential supervision and regulation.[100]

Since the first Banking Directive in 1977, harmonisation of rules governing banking activity allowed for a progressing integration of EU banking markets. The EU wide-scope of these directives has important implications for cross-border groups. The capital requirements regulations – revised in 2000, 2009, 2014 and most recently in 2019 – refine the regime applicable to cross-border banks. The regulatory focus slowly shifts

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[96] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions OJ L 322, 17.12.1977, p. 30–37.

[97]Ellen Vos and Maria Weimer 'Differentiated integration or uniform regime? national derogations from EU internal market measures' in: Andrea Ott and Bruno de Witte (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 304.

[98] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (1979) ECLI:EU:C:1979:42.

[99] Case C-212/97, *Centros*, (1999) ECLI:EU:C:1999:126.

[100] See Recital 18, Art. 39 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68.

from establishing mutual recognition rules for cross-border provision of services, towards regulation of the activity itself (via prudential requirements) and – most recently – towards governance of cross-border activity in a way which marries the requirements imposed on the individual basis with governance arrangements concerning the cooperation between competent authorities responsible for consolidated oversight. Consequently for the banks which operate cross-border in the EU and worldwide, different EU-specific rules apply to the EU part of the overall global bank (recall Figure 1).

2.2.1. The “single passport” and the limits of branching

Through the Banking Directives, and the subsequent Capital Requirements Directives, the EU implements rules on global banking activity which are developed at the level of the Basel Committee (with states implementing rules to this effect).These mandatory prudential rules allow that “credit institutions authorised in their home Member States should be allowed to carry out throughout the Union any or all of the activities referred to in the list of activities subject to mutual recognition by establishing branches or by providing services.”[101]

From the point of view of the impact on bank organisation, the “single passport” regime allows for cross-border provision of services via branches, yet it does not specifically regulate cross-border relationships within a group of separate legal entities established in different member states (i.e. subsidiaries). And it is in such a form that cross-border banks generally operate. The distinction between subsidiaries and branches is however very important under the current regime. Bank branches are distinguished from subsidiaries[102] by their structural links to the parent company and by their connection to the financial system in the host country. Subsidiaries are distinct legal entities, established in host Member State and subject to the local supervision and regulation. Branches do not require separate authorisation or the establishment (incorporation) with the “home” supervisor remaining responsible – this is the effect of the “single passport”; subsidiaries are required to incorporate and request authorisation as a credit

[101] CRD IV, recital 19.

[102] The applicable definition of subsidiaries is to be found in the 1981 Directive on consolidated accounts, Art. 1 Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts OJ L 193, 18.7.1983, p. 1–17.

institution. Though in times of normal economic activity such a distinction may appear irrelevant (in fact prior to the financial crisis many banks operated cross-border as branches), in crisis the relevance of the backstop and applicable deposit guarantees increases (see further Section 2.4.4). Subsidiaries – being established and authorised as distinct legal entities in the host member states - rely on the host country "safety net" such as deposit guarantee schemes, while in accordance with the provisions concerning pre-crisis insolvency (winding-up) regime, branches fall within the scope of the home Member State proceedings.[103] The principles of EU bank passporting regime make the branch-subsidiary distinction very EU specific. US, for example, requires that all "foreign" branches become parts of the federal deposit insurance system.[104]

A further distinction between subsidiaries and branches concerns ring-fencing (i.e. the legal barriers to intra-group transfers) allowed under EU law, even if the experience of crisis conversions and (regulatory) ring-fencing suggests that differences there are less determined by the legal form, and rather by the supervisory governance/oversight.[105] For example, supervisory ring-fencing prevented free-flows of capital between subsidiary and the parent or branches were converted to subsidiaries to maintain access to local (host) central bank liquidity.

Reforms introduced over the course of the crisis complicate the branch/subsidiary distinction. First, prudential law introduces a number of new competences for host authorities with regard to branches (e.g. "significant" branches, checks of "materiality", OSII designation), while risk management of subsidiaries becomes more integrated within the new safety and soundness orientation of the regulatory framework.[106] Secondly, the institution of joint supervisory bodies (such as colleges, and in the Banking Union specific case – the Single Supervisory and Resolution Mechanisms), has further rendered the distinction between subsidiaries and branches obsolete, given that

[103]Valia SG Babis, 'Banks in Crisis: Rethinking the Role of Intra-Group Transactions' (2013) 24 King's Law Journal 85, 87. Although this partitioning has not effectively worked over the course of the financial crisis, esp. in the case of the failed Icelandic branches in the UK, which eventually were given access to the domestic Deposit Guarantee Scheme in 2008.

[104]Caprio and others (n 52) 287.

[105] See Section 1.3 and footnote 14 for the European Commission study on the obstacles to intra-group asset transfer.

[106]Babis (n 103) 88.

the bank structure is a function of governance established by corporate law, but as well oversight.[107]

Prior to the reforms, the basic tenant of EU law governing cross-border bank activity was the subsidiary-branch distinction which distinguished between the territorial and universal scope of responsibility of the parent entity and the respective competent authority. Such general principles, while perhaps viable in a more loosely integrated economic context, proved untenable in over the course of the crisis in the EU as they failed to capture adequately the whole scope of the bank activity concerned. This effect was reinforced by the shortcomings of the institutional arrangements for cooperation between competent authorities.

2.2.2. Cooperation in law making, less in oversight

The principles which allowed cross-border banks to internationalise in the EU underpinned as well the design of oversight. Specifically, home-state control meant that the supervisor in the place of establishment of the bank bore the ultimate responsibility for the bank and related branches. To facilitate greater exchange of information between the authorities (to mirror the integration occurring within the cross-border bank), the EU regime complemented increasingly the free movement provisions with an institutional framework for cooperation between the supervisors in the exercise of their competences and increasingly via more law-making at EU level. Special arrangements were developed to this end, and in particular the Lamfalussy process foresaw a distinct law-making regime for the banking sector, with a role for scrutiny of legislation by national supervisors.[108]Stronger institutional cooperation was to facilitate integration of the markets.[109]

[107] Such arguments are increasingly made in the context of the Banking Union in particular, e.g. European Parliament, 'Banking Union : Defusing the "Home / Host" Debate' [2019] Briefing Paper, note however that this thesis focuses on the distibution of risk as a result of general risk management requirements as a matter of EU resolution law, rather than supervision.

[108]Larisa Dragomir, *European Prudential Banking Regulation and Supervision : The Legal Dimension* (Routledge 2010); Despina Chatzimanoli and European University Institute Law Department., *Law and Governance in the Institutional Organisation of EU Financial Services : The Lamfalussy Procedure and the Single Supervisor Revisited* (European University Institute 2008).

[109]Philipp Hartmann, Angela Maddaloni and Simone Manganelli, 'The Euro Area Financial System: Structure, Integration and Policy Initatives' [2003] ECB Working Paper Series 230.

However, under the pre-crisis framework, the competent authorities had prerogatives only with regard to the entities operating within their territory – that is a strict (formal) territorial approach was foreseen. Despite attempts by the European Commission to allow for a more holistic approach to the group that is to grant wider competences to home supervisors of cross-border bank groups, in addition to objections founded on arguments concerning competence and subsidiarity, advocates of territorial governance for cross-border groups argued that preserving the competences of national authorities in a decentralised manner within the group made early intervention more likely as forbearance risks otherwise would increase given the authorities' lower accountability to constituents in other countries. Ensuring that rights are only locally enforceable further was held to reduce moral hazard of banks operating and improved asset recovery.[110]

2.2.3. How the framework determines banks internationalise as groups

The EU legal framework for the four fundamental freedoms facilitated the emergence of cross-border bank structures.[111] Principles of the single banking passport determine bank structures to be cross-border groups to the extent they require that the cross-border services can be provided via branches or subsidiaries. The practice of the GFC has shown that even where banks provided services via branches (as a single entity) in crisis they became ring-fenced and therefore became treated as subsidiaries for regulatory purposes in the absence of an integrated (single) governance framework. EU-scope of a global cross-border bank group was enabled by the distinct set of rules stemming from the freedom of establishment and freedom to provide cross-border services. The significance of the legal distinction between EU-based and third country banks was confirmed empirically when, in the context of Brexit, many international banks have re-established in other EU Member States. Since the financial crisis, with the rise of the prudential rules and a reduction in risk-taking attitudes among the banks, the

[110] This argument can be found in particular in Thomas Baxter, Joyce Hansen and Joseph Sommer, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57. Ample crisis evidence however appears to suggest the opposite to be the case, namely that national supervisors are more vulnerable to capture.

[111] Tröger TH, 'Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions' (2012) 48 Texas International Law Journal. On the point of how EU law determines the internationalisation choices of EU companies more broadly see: Stefan Grundmann, *European Company Law Organization,* n 80.

significance of the national safety nets (i.e. the deposit guarantee scheme) being available at the level of the individual member states became paramount and explains why most cross-border bank groups now are establish separate subsidiaries, rather than branches. New generations of prudential rules have had to come to grips with this by introducing specific rules governing consolidation and group structures, as I discuss below.

2.3. Incomplete regulation of cross-border groups pre-crisis

Even as they contribute to the emergence of cross-border group structures, EU rules governing banking activity, and in particular EU rules which allow for internationalisation of banking activity were founded on the concept of an integrated firm. That is they assumed all cross-border activity would be provided via branching and consequently provide for oversight of a single legal entity – this was the case also for the basic Winding Up regime applicable since 2001 which provided for mutual recognition of insolvency (reorganisation) rules for international banks. EU law did not have a dedicated governance regime which would regulate how the decisions within the group are taken, including decisions with consequences for economies across a number of Member States. This section takes stock of the ways in which bank group law was absent in the EU legal framework prior to the BRRD. First, there was no general group EU law. Second, bank-specific consideration of group law was limited primarily to accounting rules. Third, while the principle of home-country control was well-established, the provisions on cooperation between authorities were limited.

2.3.1. Absence of general EU group law

Corporate groups – to recall – are corporate structures which integrate distinct legal entities into one organisation combining features of independence and control. Group law in various jurisdictions of EU Member States governs the relationships and transactions between entities in such a semi-hierarchical and semi-independent structure: that is the form of business activity which is organised as a corporate group.[112]Comparative insights suggest there are common principles of group law, which govern legal strategies to determine the group interest (enterprise approach) and protective measures (entity approach) to shield and protect the interest of distinct entities, including the minority shareholders in subsidiaries. Such principles – further discussed in Section 3.3 below – are essential in organising decision-making within group structures, in particular where such groups are established through partial ownership of subsidiaries (that is there are minority shareholders whose interests need to be protected). The crux of group law is the combination of the enterprise and the

[112] See further Chapter 3 for the theoretical approaches to corporate groups.

entity approach – that is whether the group is regulated as a whole or whether the focus is placed on the interest of individual legal entities within it. Given the particularities of banking as a business activity, in some Member States – e.g. Spain, Estonia, Portugal – a distinct bank group law is in place. Where bank group concerns are particularly pertinent in the case of cross-border banking where they can act influence the real economy and act as channels of crisis and risk transmission, introducing group law in Poland was considered specifically in the context of the dominance of foreign subsidiaries in the domestic banking sector.[113]

At the EU level, however, there has been a persistent failure to develop a specific regime for corporate groups, despite multiple attempts at launching such an initiative.[114] In 1974 the European Commission proposed the first draft of the Ninth Company Law Directive, which sought to introduce some tenants of group governance in particular with regard to the reporting obligations of the parent company and the subsidiary vis-à-vis their shareholders and third parties.[115]The proposal was however doomed to fail and no other general horizontal regime resurfaced since. In 2000 a group of European scholars published a manifesto calling for a group law regime in the EU, with such calls resurfacing since.[116] The primary reason why progress in the area of group law has been slow is that EU company law has been slow to harmonise in general. Notwithstanding the significance of companies in driving the integration of the internal market, the

[113]DBB Law (n 82) 42. On the Polish approach to group law see Krzysztof Postrach, 'Działanie Na Szkodę Spółki Zależnej – Aspekty Prawne' (2013) 11 Zarządzanie i Fianse 371.See also in the context of the absence of group law in post-communist countries: Hopt and Pistor (n 56).

[114]Martin Gelter, 'EU Company Law Harmonization Between Convergence and Varieties of Capitalism' in Harwell Wells (ed), *Research handbook on the history of corporate and company law* (Edward Elgar Publishing).

[115]Klaus Bohlhoff and Julius Budde, 'Company Groups The EEC Proposal for a Ninth Directive in the Light of the Legal Situaiton in the Federal Republic of Germany' (1984) 6 Journal of Comparative Business and Capital Market Law 163; Grundmann, *European Company Law: Organization, Finance and Capital Markets* (n 77) 762–766.Mads Andenas and Frank Wooldridge, 'Groups of Companies', *European Comparative Company Law* (Cambridge University Press 2009).

[116] For the manifesto of the group outlining the rationale see: Forum Europaeum (n 59); for couterarguments see: Christine Windbichler, '"Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law' (2000) 1 European Business Organization Law Review 265; for the specific crisis management related rationale for group law see e.g. Christoph Teichmann, 'Towards a European Framework for Cross-Border Group Management' (2016) 13 European Company Law 150; for a recent take on the argument see Lagenbucher, n 59. Though the question of group law has been particularly taken up by German scholarship, it has as well been seriously considered in French scholarship e.g. Le club des Juristes, 'Vers Une Reconnaissance de l'intérêt de Groupe Dans l'union Européenne ?'; and in Italy with regard to bank groups specifically Marco Lamandini, 'Il Gruppo Bancario Alla Luce Delle Recenti Reforme' (2016) 78 Banca Borsa Titoli di Credito.

national (and corporate) interests in this area have been strong, and so has the pushback against any efforts at harmonising EU law.[117] The attempt to bypass this resistance by creating a distinct European legal form (European Company, Societas Europaea), has met with limited success.[118]Although some European banks, notably Nordea and some banks relocating to the EU following Brexit (e.g. Goldman Sachs SE), have indeed considered adopting the SE form, however, this legal form is of little assistance, as the regulation is concerned only with integrated companies, and with regard to group situations it refers directly back to the law of the state where the SE has its registered office.

To the extent that groups arise partially as a combination of freedom of movement and incomplete harmonisation of substantive areas of law relating to companies, EU institutions have had to grapple with this phenomenon in applying Union rules. In the context of EU competition law, a control-centric notion of groups has been and founded on definitions of 'control' and of 'undertakings concerned', which are intended to cover groups of companies.[119]The control concept employed to this end focuses on decisive influence of the group undertaking on the subsidiary.[120] The purpose of such a concept

[117] On the significance of the subsidiarity test in company law see: Jaap Winter, 'Ius Audacibus. The future of EU company laws' in Donald C Langevoort, 'Perspectives in Company Law and Financial Regulation', *Perspectives in Company Law and Financial Regulation: Essays in Honour of Eddy Wymeersch* (2009) 46.

[118] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L 294, 10.11.2001, p. 1–21. According to a publicly available register of SE (Societas Europaea) as of 1 September 2018 there was one significant EU bank which used the SE legal form (DNZ Bank in Germany) and two smaller banks Wiener Privatebank SE in Austria and UBS SE in Germany, which are subsidiaries of larger entities. See: http://ecdb.worker-participation.eu/ ("ETUI European Company (SE) Database") (last accessed 10 August 2019). Further on Societas Europaea see: Víctor (n 43).

[119] See Art. 2(a) of Merger Regulation specifies that control "shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking." Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Merger Regulation"), OJ L 24, 29.1.2004, p. 1–22 and as well Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43–47.

[120]Bernardo Cortese, 'Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability', *in Competition Law. Between Public and Private Enforcement* (Wolters Kluwer 2014); Carsten Koenig, 'An Economic Analysis of the Single Economic Entity Doctrine in Eu Competition Law' (2017) 13 Journal of Competition Law and Economics 281; Andriani Kalintiri, 'Revisiting Parental Liability in EU Competition Law' (2018) 43 European Law Review 145 including on limits of such liability in the case of state aid law for example.

of a group however has been limited to extending (or limiting) intra-group liability for antitrust breaches.

Recognition of the existence of cross-border groups was likewise to be found in the EU accounting rules, which provide the basis for the consolidation rules which define relationship between the parent and the subsidiary. EU directives on consolidated accounts define the relationship between the parent company and the subsidiaries as a matter of freedom of establishment established under Art. 50 TFEU.[121] The primary relationship of interest – for the purpose of determining the consolidation level – is that of control of the parent over the subsidiary. Specifically, the subsidiary entity is identified by the extent of control exercised by the parent (shareholder) through ownership (majority of the shareholders' or members' votes), specific powers (e.g. the right to appoint or remove a majority of the members of the administrative, management or supervisory body) or dominant influence.[122] Accounting principles on consolidation provide the essential methodology through which the scope of the cross-border group in EU law is identified. In other words, consolidation rules allow EU law to "see" corporate groups as a matter of going concern, every day operation of the entity. However, they focus on the aspect of control and not governance, internal organisation and decision-making.

There is quite some jurisprudence of the Court with regard to cross-border groups. In addition to competition law questions concerning the limits of control and liability for cross-border groups, legal studies have identified case law in the area of procurement, insolvency law, labour law among others. The jurisprudence of the Court has not been fully consistent – no single definition of a "group" has been adopted and the rulings are contingent on the specific regulatory context underpinned by a teleologically driven reasoning.[123] The Court was reluctant for example to accept, in the context of

[121] Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, OJ L 193, 18.7.1983, p. 1–17 and subsequent amendments, most recently Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19–76 ('Consolidated Accounts Directive 1983').

[122] Art. 1 Consolidated Account Directive 1983.

[123] Karsten Engsig Sørensen, 'Groups of Companies in the Case Law of the Court of Justice' (2016) 766 European Business Law Review 762; for a criticism of th Court jurisprudence see: Grundmann, *European Company Law: Organization, Finance and Capital Markets* (n 77) 767.

procurement law that the capacity for knowledge and resource exchange within the group affected the capacity of individual entities in the context of public contracts. Likewise, in the context of labour law the Court held that just by the virtue of a given entity owning the employer of the affected party that parent entity cannot become their employer (i.e. labour relationships do not piece the corporate veil). On the other hand, the Court was more willing to "pierce the veil" in the context of tax arbitrage, such as using the group organisational form to optimise structure for lower VAT.[124]

Taken together, these rules – as they were in place prior to the reform of EU banking regulations in the aftermath of the GFC - had little to say about the governance within the cross-border bank group. The harmonised company law aspects, which were relevant from the perspective of group law, were limited predominantly to the formal accounting rules, rather than corporate governance aspects. It is the latter, however, which are the heart of group law which exists in common legal traditions of Member States.[125]

To the extent that prudential regulations had an incidental impact on regulating bank groups, this arose from – on the substantive side – a set of EU laws governing the taking up the pursuit of activity in banking, including through establishment and structural internationalisation and – on the institutional side – rules stemming from consolidated supervision.

2.3.2. Fragmented substantive regulation of EU bank groups

Scope of the prudential rules applicable specifically to cross-border groups prior to the financial crisis was very limited. Specific prudential requirements were imposed on individual entities within the group, subject to enforcement by the relevant authority. Rules on financial conglomerates, which allowed supervisors, to "map" the financial conglomerate were in place since 2002, however they entailed a rather complicated exercise in mapping and covered provisions related supplementary supervision (such as stress testing), rather than rules which would have features of group law per se as

[124] Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* (2008) ECR: 2008 I-00897, ECLI:EU:C:2008:108.
[125] See below Section 3.3.

analysed in this monograph.[126] There was no framework for risk-sharing or risk-distribution within the groups' risk management requirements. There was no *ex ante* group crisis management framework. The prudential regulations did not generally differentiate between intra-group exposures and those between group entities and third parties.

In fact, any attempts by the European Commission to create a differentiated regime for the intra-group exposures, including by granting more powers to the consolidated supervisor were met with resistance by Member States and failed. While the host countries feared their concerns would not be taken into account, those which housed the parent entity did not want the responsibility that extraterritorial supervision this would entail. For example, in 2004 the European Commission proposed to introduce waivers for regulatory requirements concerning risk management and control procedures at the individual entity level if such requirements were fulfilled at the consolidated level – the proposal was swiftly rejected.[127]

2.3.3. Fragmented institutional oversight of EU bank groups

As in the case of substantive rules, the framework for supervisor cooperation in oversight over the distinct entities within the cross-border group was limited before the GFC. Though the first directive on consolidated supervision dates from 1983, it nonetheless reaffirmed that notwithstanding links within the multinational bank, supervision and compliance with regulatory requirements must be ensured at individual entity level.[128] Some consolidated supervision was introduced for cross-border bank groups – on the basis of the consolidation calculations – by the consolidated supervision

[126] See Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, OJ L 35, 11.2.2003, p. 1–27 as amended. For commentary see: Christos Gortsos, 'Identifying Groups as 'Financial Conglomerates' Under European Financial Law (Directive 2002/87/EC): A Not So Straightforward Exercise', (2017) Working Paper.

[127] Art. 69 Proposal for Directives of the European Parliament and of the Council Re-casting 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 and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions, COM/2004/0486 final. ('CRD III').

[128] Art. 3 Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis, OJ L 193 , 18.07.1983, p. 18-20.

directive in 1990.[129] The directive allowed, inter alia, for supervision over individual subsidiaries to be delegated to the parent supervisor, however this provision was not applied in practice. The directive introduced some semblance of exchange of information, but it was limited, there were no formalised procedures for oversight and joint enforcement of rules via-à-vis cross-border bank groups. The pre-crisis regime was founded on principle of shared responsibility with purely with "embryonic peer review arrangements being developed within the level 3 committees."[130] The authorities could not effectively coordinate their decisions. However, regional arrangements emerged. The Nordic countries signed a Memorandum of Understanding which provided a framework for crisis liquidity provision on the basis of "extended home markets" of the parent banks concerned.[131] To the extent that the MoU was a result of the anticipated banking crisis in Scandinavia which took place in the 1990s, it provides evidence that the shortcomings in the pre-existing framework had negative externalities on financial stability in the internal market.

[129] Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis OJ L 110, 28.4.1992, p. 52–58.

[130] For an account of the architecture see Daniel K. Tarullo 'Shared Responsibility for the Regulation of International Banks' in: Demirgüç-Kunt, Evanoff and Kaufman (n 16) 6. For early evaluations of how the regime operated in crisis and how it could have been improved Jacques De Larosière, 'The High-Level Group on Financial Supervision in the EU' (2009) 40.

[131] European Commission, 'Coping With the International Financial Crisis At the National Level in a European Context Impact and Financial Sector Policy Responses in 2008 – 2015' 97. The countries concerned were Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden.

2.4. Why the lack of a cross-border group regime caused (legal) trouble

In the aftermath of the Great Financial Crisis disintegration in banking was observed. Some scholars have attributed this to the ineptness of the regime founded on passporting and cross-border supervisory cooperation to govern – that is direct and manage – cross-border banks.[132] Rather, the crisis appears to have resuscitated domestic protectionism with emphasis on national direct control of markets and resistance to integration.[133] We have already seen that prior to the Great Financial Crisis there were very few EU rules governing specifically the decisions-making within cross-border bank groups, both in terms of substantive (governance) requirements and fragmented cooperation between authorities. Where cross-border activity of banks was considered – as in the case of the bank specific Winding-Up Directive of 2001 – the rules were applicable only to single entities rather cross-border groups, for which there were no specific insolvency rules at EU level. Post-crisis retrenchment of the banking sectors in Europe, including through sale of subsidiaries of cross-border banks to domestic actors (as was the case in multiple countries, for example in Greece), could be partially attributed to this specific lacunae.[134] In other words, lack of rules governing the phenomenon of cross-border banks contributed to fragmentation. There are a number of premises behind this claim, which have already been touched upon but it is useful to recall.

2.4.1. Insolvency law

First, the crisis context meant that primary paradigm employed for dealing with cross-border bank groups was that of insolvency law, that is the regime founded on private international law principles whose primary objective is allocation of materialised losses and protection of creditors.[135] EU did not have bank group specific rules in this regard

[132]Teixeira (n 37).
[133]Klaus J Hopt, 'European Company and Financial Law: Observations on European Politics, Protectionism, and the Financial Crisis' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (2010).
[134]see Sandbu for an account of the role which inadequate governance of cross-border banking played over the course of the financial crisis in particular in Ireland: (n 41).
[135] For a case study of litigation spurred by the failure of cross-border banks in Iceland see: Már Guðmundsson, 'The Fault Lines in Cross-Border Banking: Lessons from the Icelandic Case' (2011) 2011 OECD Journal. Financial Market Trends 85; Moss, Wessels and Haentjens (n 70); for a general

before the GFC, merely a minimum harmonisation regime for winding down of integrated banks, that is the Winding-Up Directive of 2001,[136] which dealt with foreign branches but not with subsidiaries. Lack of a group crisis management law proved contentious as a result of the destabilising effect this had on host Member States, where the subsidiaries of banks experiencing difficulties were active. [137] In fact, in this respect, the 2009 de Larosière Report, the first comprehensive attempt at explaining what had caused the financial crisis in Europe and whether – and if so to what extent – EU law was a contributing factor, suggests that it was the inconsistencies between national insolvency legislation which prevented an orderly and efficient handling of banks in difficulty.[138] Related differences in insolvency rules' triggers (failing or likely to fail) which prior to the reform were considered a distinct obstacle to cross-border transfer of funds.[139]

2.4.2. Company law

Second, company law rules were identified as another obstacle to a group-wide approach, and in particular those rules which prevented intra-group flow of assets, where such flows would allow for the restoration of the viability of the group as a whole.[140] In the absence of an EU group law, where banks operated as cross-border groups (that is distinct subsidiaries were established in various Member States, other than that of the parent bank) such entities are regulated by the company law of the host Member States (recall Figure 1 for bank's organisational structure). As a result, multiple group laws applied vis-à-vis entities within one group, resulting in a lack of clarity as to whether subsidiaries should subordinate themselves to the interest of the

account of the cross-border bank insolevency framework: Rosa Maria Lastra, *Cross-Border Bank Insolvency* (Oxford University Press 2011).

[136] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions OJ L 125, 5.5.2001, p. 15–23 (Winding-Up Directive).

[137] On the Winding-Up Directive see further: Moss, Wessels and Haentjens (n 70); Dermine (n 78); Jean-pierre Deguée, 'The Winding Up Directive Finally Establishes Uniform Private International Law for Banking Insolvency Proceedings' 99. On the contentious exclusion of bank subsidiaries from the scope of the directive see Anna Gardella, 'Cross-Border Banking Insolvency: Private International Law and State Aid Rules' (2009) 1 EUREDIA 127, 135.

[138] Larosière (n 129) 129–130.

[139] European Commission, *An EU Framework for Cross-Border Crisis Management in the Banking Secto*r (2009).

[140] DBB Law (n 82); European Commission Report n. 14.

group or what was the scope of responsibility at the parent level for the enterprise as a whole.[141] Specifically strict corporate governance rules relating to the scope of permissible action by the managers of distinct entities within the group prevented intra-group transfers in some jurisdictions (vide insolvency rules, discussed above). Consequently, this meant that in crisis for all intents and purposes the cross-border group (in crisis) was treated as a market, not as an integrated company.[142]As a result, already in 2008 the European Commission argued that financial stability may justify carve-outs from company law subject to a banking reorganisation regime, while a notion of group interest would allow for an adequate banking reorganisation regime. The IMF meanwhile called for an adoption of the Societas Europeae form by all EU cross-border banks.[143]

2.4.3. Prevalence of home-host conflicts and ring-fencing

In the absence of a credible framework predictably reapportioning the costs and creating incentives for joint action, the distrust between the supervisors of distinct entities within the group thwarted cooperation over the course of the financial crisis in Europe. In the first phase specifically, there were no fixed arrangements for authorities responsible for oversight over the banking sector to cooperate.[144]In particular the supervisors in countries where bank branches were active lacked the instruments to ensure financial stability in their market, absent a formal framework for cooperation with the home supervisor (such as exchange of information). Consequently, ring-fencing was applied, such as a mandatory conversion of branches to subsidiaries[145] or limits on intra-group support, on the grounds of national company law in particular, but as well on the basis of internal group procedures, the contingent impact of insolvency

[141]Dániel Gergely Szabó and Karsten Engsig Sørensen, ‘Corporate Governance Codes and Groups: In Search of Best Practices for Group Governance’ (2018) 4 European Company and Financial Law Review 23.
[142]Babis (n 103).
[143]Wim Fonteyne and others, ‘Crisis Management and Resolution for a European Banking System’ [2010] IMF Working Paper 50. See Section 2.1.
[144] See to this end European Commission, *Review of the Lamfalussy process Strengthening supervisory convergence* Communication, 20.11.2007, COM(2007) 727 final.
[145]for an empirical study see: Katia D’Hulster, ‘Cross-Border Banking Supervision : Three Papers on International Supervisory Cooperation and Ring-Fencing’ (Faculty of Economic and Social Sciences & Solvay Business School Cross-border 2015); D’Hulster and Ötker-Robe (n 42); for a political economy analysis see: Zdenek Kudrna, ‘Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual’ (2012) 50 Journal of Common Market Studies 283.

ranking of intra-group claims or the specific disclosure requirements.[146]Such limitations may have been warranted in the absence of a general group level regime – due to potential abuses such as inappropriate use of capital, use of intra-group support as a substitute for own financial resources, implementing such measures on terms unacceptable to third parties irrespective of the potential adverse impact on solvency or liquidity or parent or the subsidiary, or even broader systemic concerns such as a risk of contagion.[147]As a general rule, such intra-group constraints imposed by national supervisors need not be crisis specific.[148]As damaging as ring-fencing could be from the point of view of managing a cross-border group, equally worrisome is evidence that over the course of the crisis numerous banks found ways to circumvent restrictions through conversions of branches to subsidiaries, off-balance sheet transactions or distribution of profits and dividends.[149]

Further, even for single integrated banks, the principle of home country control proved defective. Specifically it was criticised for the assumption that home supervisor is responsible for the risks undertaken by its branches, and that this led to an "excessive reliance on the judgements and decisions of the home supervisor", which was particularly burdensome for small member states.[150] As Pistor shows, although the home supervisor may have had specific powers vis-à-vis the parent entity, it was often incapable of monitoring and regulating the risks affecting the host country. On the other hand, the host supervisor did not have any specific tools to address potential risks emerging from lending practices of the parent.[151] Empirical evidence of break-down of coordination between authorities over the course of the financial crisis further suggests that in any case an oversight approach based on cooperation between authorities did not

[146] BIS defines "intra-group support" as legally enforceable commitments for financial assistance or assurance made by one group entity (usually a parent) in favour of another group entity (usually a subsidiary) to be made available in times of stress or unexpected loss. See Basel Committee on Banking Supervision (n 17).

[147]Lamandini (n 95) 4.

[148] A study commissioned by the European Commission suggests that the legal triggers for using intra-group measures are rather the financial capacities of the legal entity in question DBB Law (n 82) 69.

[149]Allen, Gu and Kowalewski (n 2) 22.

[150]Larosière (n 129) para 157. Also see: Dermine claiming such small countries would prove incapable of bearing the responsibility (n 86); for an updated approach to distribution of tasks between home and host authorities on the example of Austrialia and New Zeland, see: Dirk Schoenmaker, 'A Trans-Tasman Banking Union ?' (2018) Journal of Banking Regulation.

[151]Katharina Pistor, *Host's Dilemma: Rethinking EU Banking Regulation in Light of the Global Crisis* (2010).

bring about the expected results, nor was it credible.[152]As Goodhart and Schoenmaker suggest, at fault was not only the absence of general frameworks for cooperation, but also specifically a lack of a framework for *ex ante* burden sharing.[153]

Lack of cooperation also meant that different standards were applied by supervisors in different countries to parts of a single cross-border bank group, including with regard to protection of depositors.[154]As a result, the macroeconomic consequences of retrenchment of cross-border bank as a result of "backstop arbitrage" (i.e. placing the assets within jurisdiction most likely to guarantee their value), would have been particularly disastrous for the economies predominantly hosting foreign subsidiaries. In CEESE – where this is the case as discussed in Chapter 1 – to prevent such scenarios from materialising, a dedicated framework for negotiating a mutually beneficial outcome for all public and private entities involved was developed under the auspices of the International Monetary Fund (IMF) and the European Bank for Reconstruction and Development (EBRD). The Vienna Initiative (VI) was created as an *ad hoc* arrangement to prevent destabilising capital outflows from host Member States in Central and Eastern Europe (CEE) and the Balkan countries when uncertainty related to the early stages of the crisis suggested that the parent banks could indeed withdraw (sell their assets) in the region,[155]intended as a soft law arrangement between cross-border banks and governments facilitated by the World Bank, European Commission and IMF. Under the Initiative, bank groups committed to ensure "adequate capitalisation" and sufficient liquidity of their subsidiaries in crisis. Specifically, they were not to divest their CEE assets and maintain their exposure, including outstanding balances on all loans, parent's deposits in those countries and all forms of capital by the parent to the subsidiary including subordinated debt and hybrid instruments, while host countries' governments committed to provide liquidity and deposit insurance and not to ring-fence

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[152]Dirk Schoenmaker, *Governance of International Banking* (Oxford University Press 2013) ch Chapter 4: Failing the Financial Trilemma; for general account of the role of the banking in crisis see Sandbu (n 41). For an account of the crisis disintegration of Dexia due to inadequate cooperation between authorities see Pierre-Henri Thomas, *Dexia: Vie et Mort d'un Monstre Bancaire* (Les Petits matins 2012).

[153]Charles Goodhart and Dirk Schoenmaker, 'Fiscal Burden Sharing in Cross-Border Banking Crises' (2009) 5 International Journal of Central Banking 141, 19.

[154]De La Mata Muñoz (n 57).

[155]Pistor, 'Governing Interdependent Financial Systems: Lessons from the Vienna Initiative' (n 34); De Haas and others (n 34).European Commission, 'Coping With the International Financial Crisis At the National Level in a European Context Impact and Financial Sector Policy Responses in 2008 – 2015' 92-98 for a discussion on the European Commission's invovlement in the Vienna Iniative.

assets. The overall coordination and monitoring provided by the International Finance Corporation.

Scholars, most notably Katherina Pistor, have subsequently praised the Vienna Initiatives an exemplary success of public-private cooperation.[156]As a "multi-stakeholder governance regime" VI allowed for a coordinated governance of legal entities of banks in the CEE and SEE markets, whose parent banks were established predominantly in Western EU countries. Such negotiated governance (reflected in the decisions concerning exposure, market presence and corporate organisation)resulted in bank groups engaging in commitments which extended going beyond their "narrow self-interest."

Yet from an EU law perspective, there is much to be criticised in the Vienna Initiative which (continues to be) a highly intransparent multilateral coordinated regime, an informal and non-binding arrangement outside of the scope of EU law and therefore review. It could be argued that the mere necessity of such an initiative to be put in place shows the deficiencies of EU law, namely the inability to govern its own creations. In other words prior to the crisis, EU law did govern cross-border structures of systemic importance in multiple Member States, which are a result – that is they are enabled by – freedom of movement provisions.[157] Absence of a governance regime for such structures amplifies what Gabor refers to as "fragile complementarities" of financial integration, between capital-rich and capital-short economies. These amplify in crisis any existing asymmetries and increase the externalities for the real economy.[158] Further, as a solution for market failure (the prospect of sudden stops in the banking market), Vienna Initiative was only developed with regard to Central and Eastern European subsidiaries, even though the problem tackled concerned the EU as a whole. It could in fact be asked, whether if a similar initiative was implemented in Ireland, the cost of the financial crisis in those countries would have not been curtailed.

[156]Pistor, 'Governing Interdependent Financial Systems: Lessons from the Vienna Initiative' (n 33).
[157] See Sections 2.1 and 2.2.
[158]Gabor (n 34); for the general narrative account of the interpendencies of the European banking system over the course of the crisis see: Adam Tooze, *Crashed* (Penguin 2018).

2.4.4. The absence of a common backstop

Banks, which are the commercial activities studied in this monograph, are unique because they take our deposits. As banking becomes ever more ubiquitous with the progressing financialization of our economies, rising popularity of cashless payments and the sector taking on ever new roles in the operation of the society (e.g. identity verification for the purpose of access to online public services) the number of critical services banking provides increases. However, it is deposit taking – that is the provision of the service which enables so many other types of financial interaction in our societies which lies at its core. This function is one of the reasons why deposits are highly protected – EU law requires guarantees to cover deposits up to 100,000 euro. Even if the relative share of deposits in banks funding model decreased for a while, they still form the core of the banking activity. Consequently, the absence of a common deposit guarantee scheme nor any form of cross-border assistance, even as – within cross-border bank groups – flows would have been possible which would potentially trigger bank failure and therefore the deposit guarantee funds – was a significant factor creating mutual distrust among public authorities. Such distrust was only exasperated where deposit guarantee funds in some Member States were more reliable than others.

There was only one tool at the disposal of the European authorities which had a significant cross-border bank group dimension: that is the EU state aid law, which was applied in the context of bank bailouts granted to over 100 banks, nearly half of which were large cross-border bank groups active across a number of Member States (these decisions of the European Commission will be analysed in detail in Chapter 4). State aid control is a special type of competition law developed within the EU in order to create a level-playing field between different countries through a general prohibition of bailouts of inefficient and failing institutions. Over the course of the GFC – in the absence of a bespoke regime for dealing with bank crises in the EU – it was the primary tool which enabled coordination across borders through an alignment of the terms of crisis management and exchange and mediating between national authorities. And yet, if the parent or the subsidiary had to be bail-ed out there were significant repercussions for all the other parts of the group. Inability to coordinate – even via state aid rules – contributed to the disintegration of large cross-border bank groups such as the Belgian-French-Luxembourgish bank *Dexia*.

Though the state aid regime developed by the European Commission over the course of the financial crisis has been broadly analysed, and likewise on cross-border bank crisis management prior to the financial crisis, there is very little scholarship available exactly on how EU law had treated cross-border bank groups under state aid control. Chapter 4 fills this lacunae with the aim of building an understanding of how EU law in action treated cross-border groups, even in the absence of the formal regime and notwithstanding the obstacles to group governance stemming from the factors described in the preceding sections.

2.5. Failure to govern EU cross-border bank groups as a failure of EU law

Since the EU is not a single jurisdiction, a cross-border bank group operates in a complex jurisdictional regime subject to both EU rules and those of distinct states. Consequences of the multi-jurisdictional scope of bank activity became evident over the course of the crisis when separate national safety nets were implemented for banks operating cross-border as a single grouping previously, with little appetite for transnational burden-sharing on the part of EU Member States.[159] After 2008 many cross-border bank groups disintegrated as a result of the unclear rules governing cross-border situations and ring-fencing interventions by distinct public authorities. Banks were proven to be international in life, national in death – not only at global level but in fact – and counterintuitively perhaps for EU law scholars – in particular in the EU. As a result, the consequences of the crisis were exasperated by the lack of a holistic group perspective – cross-border financial institutions reaped the benefits of cross-border activity in the good times, yet the costs of their failure were distributed across different public purses, contributing to disenchantment with politics in many Member States, but also creating distrust within the EU. The uncertainty about crisis management discouraged cross-border activity at the same time increasing the costs of banks breaking-up. The EU legal framework proved incapable of preventing free riding of EU rules. Further, EU rules seemed incapable of ensuring that crisis governance for cross-border bank groups was fair – that is that their governance would take into account the interests of stakeholders at different levels of the bank group's organisation. Such empirical findings, corroborated by the fragmented legal framework applicable to cross-border bank groups before – and for the most part during – the crisis, raise important general questions regarding governance of cross-border corporate structures. Had a group law existed at EU level, arguably the problems outlined above would have been avoided, or at least their costs minimised. An EU cross-border group law would have allowed for better allocation of risk and cost of that risk as well as have allowed for more transparency across the EU.

This chapter had explained why – in the context of freedom of movement provisions which enable EU banks to operate across the internal market and incentivise banks to operate as cross-border groups, the absence of EU group law has amplified the

[159] Grünewald (n 71).

instability over the course of the financial crisis.[160] We have further seen how the specific features of the crisis regime employed at the time – insolvency law focus, absence of a formal corporate governance for groups capable of guiding group interest and the array of home-host authority conflicts have contributed to fragmentation of the EU banking via disintegration of cross-border bank groups since the GFC. The next chapter explains how the new EU bank regulations, and resolution law in particular, remedy this problem by introducing the concept of a "cross border group."

[160]Jean Pisani-Ferry and Andre Sapir, 'Banking Crisis Management in the EU: An Early Assessment' (2010) April Economic Policy 341.

Chapter 3

3. EU banking reform and the discovery of the EU cross-border bank group

The chapter explains how the EU bank regulation reform introduced the "cross-border bank group" as a concept. It outlines the analytical approach developed in this monograph to study the regulation of EU cross-border bank groups, including the specific governance implications. Section 3.1 outlines the main tenants of the new EU laws which regulate the activity of credit institutions. Section 3.2 focuses on bank resolution law, that is the novel regime for crisis prevention and management, identifying its main features and regulatory innovations vis-à-vis the pre-crisis status quo. Section 3.3 drawing on law and economics literature concerning the function of internal partitioning in groups, provides evidence that the notion of groups as it appears now in EU law corresponds to the term in organisational theory. Section 3.4 drawing on corporate governance and comparative company law discusses the common principles of group law in European jurisdictions. Section 3.5 explains, drawing on the findings of the previous chapter, why a group approach is needed in the EU specific context – even in the absence of general harmonisation in this area of law and why this concept was developed specially in EU resolution law, analysed in the following parts of the monograph. In so doing the Chapter presents the building blocks of EU regulation of cross-border bank groups which inform the analytical approach deployed in subsequent chapters, i.e. its holistic EU internal market objectives, intra-group risk sharing through de-partitioning, proceduralised cooperation and corporate governance (Section 3.6).

3.1. Main features of the new banking regime

In the aftermath of the GFC, the EU introduced a number of reforms with view to regulate cross-border banking. They entailed an EU-specific calibration of the globally enacted reform efforts led by the Financial Stability Board (G20) and the Basel Committee rules on prudential supervision. Their depth reflects the special role which banks play in the economy and underpinning EU integration (Chapter 1) as well as the specific regulatory shortcomings which were made evident during the financial crisis (Section 2.4).

Though narratives and explanations of the causes of the GFC abound, there has been little contention that the inability to govern and manage crises in cross-border banking activity was an element exasperating the crisis itself – amplifying its consequences (see Section 2.4). Thus, even as some suggest that the global, disembodied nature of banking precludes governability of credit institutions,[161] global initiatives oriented at ensuring financial stability – and especially EU regulation – have made important strides in terms of how we regulate banks.

The financial crisis has discredited the pre-existing EU regulatory framework given the narrowness of its objectives and the cracks in institutional design. Five stages of reform in EU bank regulation thereafter can be identified: (a) calibration of EU state aid rules to the banking sector (2008-2010), (b) first EU institutional reform (i.a. establishing European Banking Authority) (2010), (c) first substantive bank regulation reform (Capital Requirements Package IV / Bank Resolution and Recovery Directive) (2010-2014), (d) Banking Union and second institutional reform (2013-2018) and (e) second substantive bank regulation reform (CRD V / CRR 2 / BRRD 2) (2016-2019).[162]

The ensemble of EU crisis reform in the banking sector is well explored – even if the sheer scope of reform and the (continuing) refinement of the framework makes this a daunting task.[163] EU's regulatory efforts after the financial crisis have focused

[161]on the global reach of banking see: Ross P Buckley, Emilios Avgouleas and Douglas W Arner, *Reconceptualising Global Finance and Its Regulation*, vol 2013 (Cambridge University Press 2016) ch R Buckley 'The Changing Nature of Banking and Why It Matters'.

[162] See for overviews of EU bank regulation reforms after the GFC e.g. Matthias Haentjens, *European Banking and Financial Law* (Routledge 2015); David Ramos Muñoz and Marco Lamandini, n 95; John Armour and others, *Principles of Financial Regulation* (Oxford University Press 2016).

[163]for a pre-crisis account: Dragomir (n 113); Matthias Haentjens and B Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015).

predominantly on restoring stability, safety and soundness of the banking system (the macro-dimension) and individual institutions (the micro-dimension). The centrepieces of the substantive regulation reform were – on the prudential supervision side – the CRD IV package,[164] which introduced more granular regulatory standards of capital requirements and – on the crisis prevention and management side – BRRD, which created a new bank crisis prevention (risk governance) and management regime for banks.[165] This monograph focuses on the BRRD since it is in the context of the resolution regime, that the cross-border bank group concept first entered EU law. Microprudential regulation (i.e. CRD) which covers the supervision regime is relevant to the research question to the extent that some of the BRRD requirements rely on supervisors for implementation (i.e. the group level recovery plans discussed in Chapter 6).

3.1.1. Regulatory instruments

The main objectives of prudential rules (CRD and CRR) are to improve the stability and resilience of the banking system and individual institutions, thus creating a level playing field across countries, by strengthening capital regulation, liquidity regulation and activity restrictions. Further these laws seek to strengthen banks' corporate governance arrangements, better align incentives of the bank management as well as regulate bank conduct. These regulations are coupled with strengthened microprudential supervision, that is the powers of authorities to oversee and direct individual bank behaviour, thus addressing idiosyncratic risks. In addition, the new tool of macroprudential policy introduces rules to ensure the stability of the banking sector as whole, the logic being that tools to tackle failures and risk of individual institutions might differ from those required when the system as a whole is considered (e.g. in the context of build-up of bubbles). To this end, macroprudential policy is tasked with

[164] CRD IV and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 OJ L 176, 27.6.2013, p. 1–337 ("CRR").

[165] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council OJ L 173, 12.6.2014, p. 190–348 ("BRRD").

identifying, monitoring and addressing systemic risk, taking into account the financial cycle as well as the direction and scale of cross-border capital flows. In many jurisdictions these tasks are delegated to the central bank empowered with specific tools such as the power to require banks to implement countercyclical buffers or set loan-to-value ratios for mortgages.[166]

BRRD is a completely novel set of rules and procedures for dealing with failing banks. Such rules are needed as an uncontrolled market exit of a bank due to – for example – insolvency, is linked with significant damage to the financial system as a whole and comes at a high social cost and with a significant destruction of value. Resolution laws aim to enable restructuring or liquidation of financial institutions in an orderly manner, limiting contagion effects on the financial system, and decreasing taxpayers' exposure to losses from bailouts, while maintaining continuity of banks' critical economic functions. They work, therefore, to make bank exit "safe." To this end, new loss-absorption requirements have been imposed on financial institutions (such as bail-in), which require that creditors of the bank, including in some cases subordinated creditors, contribute to the costs of bank resolution before other safety nets – including public funds – are resorted to. This is intended to bolster the monitoring of the bank by creditors, in addition to the shareholders. Resolution laws also create specific tools which seek to build up *ex ante* resilience of credit institutions through resolution planning – that is preparation of so-called "living wills" detailing the course of action should a bank be faced with a deteriorating financial situation.[167]

The BRRD is partially a transposition of FSB's principles for effective resolution, which establish rules to ensure: the continuity of bank's critical functions, the protection of insured depositors and a rapid return of segregated clients' assets, an allocation of losses in a way which is not more costly to shareholders and creditors than the alternative of insolvency, that moral hazard related to implicit subsidies is limited, that an unnecessary destruction of value is avoided, that the rules allow for speed,

[166] These include measures such as the countercyclical buffer (Art. 160 CRD IV) and designating a given entity as an "other systemically important institution" (Art. 131 CRD IV) for the purpose of applying more stringent regulatory measures.

[167] Article 2(1)(101) BRRD defines these as 'crisis prevention measures', enabling the "the exercise of powers to direct removal of deficiencies or impediments to recoverability under Article 6(6), the exercise of powers to address or remove impediments to resolvability under Article 17 or 18, the application of an early intervention measure under Article 27, the appointment of a temporary administrator under Article 29 or the exercise of the write down or conversion powers under Article 59."

transparency and predictability of the resolution process. As a result the regime is intended to allow exit of non-viable firms from the market in a way which enhances market discipline and provides incentives for market solutions to be adopted rather than for taxpayer bailouts. Specific requirements are foreseen with regard to cooperation, information exchange and cooperation with competent authorities in other Member States and third countries.[168]

In addition to the substantive law reform, the Banking Union (BU) further provides for new institutional arrangements for their implementation in the "participating Member States" (for now only the Eurozone countries), by creating the Single Supervisory Mechanism (SSM) within the ECB and the Single Resolution Mechanism (SRM) under the helm of a new 'specific' EU agency – the Single Resolution Board (SRB).[169] The Banking Union introduces a distinct institutional regime for the largest and most important banks in the EU, which – for reasons of their systemic importance – must be supervised at a supranational level. Though national authorities still continue to exist in the BU countries, and – equally – where there are no directly applicable regulations, the Single Supervisory Board and the Single Resolution Board must apply the relevant national law, the novelty lies in a new – centralised – system of supervision and enforcement of the rules.[170]

A second round of reforms was adopted in the spring of 2019. This reform of prudential rules (CRR 2 and CRD IV[171]) and resolution law (BRRD 2 and SRM 2[172]) further

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[168] Financial Stability Board, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (2014).

[169] 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, 29.10.2013, p. 63–89 ("SSM Regulation") 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 L 225, 30.7.2014, p. 1–90 ("SRM Regulation").

[170] See Section 2.1 on national prudential regimes for EU banks. For the rich Banking Union literature see on the far-reaching constitutional consequences of the new institutional regime: Stefan Grundmann and Hans-W Micklitz, *The European Banking Union and Constitution: Beacon for Advanced Integration or Death-Knell for Democracy* (Hart Publishing 2019); Danny Busch and Guido Ferrarini, *European Banking Union* (OUP 2015); Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) 51 Common Market Law Review 1609.

[171] 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, 7.6.2019, p. 1–225 ("CRR 2"),

strengths resilience and reduces risk in EU banks by introducing a net stable funding ratio and a leverage ratio (in line with international Basel standards for credit institutions), while reintroducing some proportionality (and discretion) in the application of the rules so as to reduce the regulatory burden on small banks. The new prudential regulations strengthen the Environmental and Social Governance (ESG) aspects of bank activity, including as a measure of supervisory assessment.

3.1.2. Regulatory objectives

The overall reform has introduced greater heterogeneity of objectives of public intervention in the banking sector as well as greater granularity of rules, further detailed harmonisation and strengthening of institutional cooperation in bank oversight both for the Eurozone (with the creation of the Banking Union) and internal market as a whole (with new powers of EU agencies).[173] However, a number of specific features of the reform suggest that a deeper transformation of EU bank regulation is at play, in particular to the extent that the new rules increase the scope of aims of regulation and enhance the bank-specific sectoral approach thereby establishing a distinct bank regime.[174] This in turn has created a valid justification for the regulations to reach beyond the regulatory and administrative domain purely, and touch directly upon the private relationships within the bank as well (e.g. via the duties and obligations imposed

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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, 7.6.2019, p. 253–295 ("CRD 5").

[172] 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, 7.6.2019, p. 226–252 ("SRM 2"), 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, 7.6.2019, p. 296–344 ("BRRD 2").

[173] Christos V. Gortsos, 'The Crisis-Based European Union Financial Regulatory Intervention: Are We on the Top of the Prudential Wave?' (2015) 16 ERA Forum 89; Armour and others (n 162); Qaiser Munir (ed), *Handbook of Research on Financial and Banking Crisis Prediction through Early Warning Systems* (IGI Global 2016); Niamh Moloney, *Financial Markets Regulation* (2015); Christos Gortsos, *The Evolution of European (EU) Banking Law under the Influence of (Public) International Banking Law: A Comprehensive Overview* (2019) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334493).

[174] Eric Posner and Adrian Vermeule, 'Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008' (2009) The University of Chicago Law Review, 1613–1682.

on banks and their management, intra-group governance).[175] The novel elements of the regulatory and supervisory framework appear to interfere with the autonomy of banks to such an extent and with such specific purpose,[176] so as to blur the lines traditionally drawn between regulation and corporate governance.[177]Such governance focus differentiates the post-crisis regime from the previous regime, which relied primarily on authorisation and basic monitoring of compliance by supervisors, supplemented by a deposit guarantee. The regime in place currently is preventive, governance oriented and highly granular, marking a cognitive shift from the pre-crisis regime.[178]

The objectives of the new regulations play a much more prominent under the new rules than previously, specifically with regard to the function of banking they seek to protect. EU resolution law is uniquely broad in this respect when compared to other areas of banking law, and specifies the functions of banking which warrant protection in the interest of the public through regulatory means, namely the critical functions, to the extent these are essential to the proper operation of the real economy (e.g. financing the real economy, financing SMEs).[179] Previously, the prudential regulations were predominantly concerned with safety and soundness and generic depositor protection, with an arms-length approach of the authorities. Now it is reference to the specific functions of banking as underpinning the economy that warrants banking be treated and regulated under a distinct regime.[180] Disruption of such services (in addition to possible bank bailouts) comes at a too high societal cost, and hence direct intervention is needed at all stages of bank management. The protection of such critical functions becomes

[175]Stefan Grundmann, 'The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook' (2015) 16 European Business Organization Law Review 357.

[176] Business choice of banks are assessed as a matter of EU law also in the context of state aid cases, e.g. Case-526/14, *Tadej Kotnik and Others v Državni zbor Republike Slovenije* (2016) ECLI:EU:C:2016:570.

[177]On the distinction and regualatory dimension of corporate governance'see: Ruth V. Aguilera, Michel Goyer, Luiz Ricardo Kabbach de Castro, 'Regulation and Corporate Governance' in: Mike Wright and others, *Oxford Handbook of Corporate Governance* (Oxford University Press 2013).

[178]Wymeersch, Hopt and Ferrarini (n 54).

[179] Such critical functions emerged over the course of the financial crisis, where in a number of countries bank bailouts were made conditional on specific assurances from the bank regarding its lending behaviour Eugenio Cerutti and Stijn Claessens, 'The Great Cross-Border Bank Deleveraging: Supply Constraints and Intra-Group Frictions' (2017) 21 Review of Finance 201, 5. For earlier accounts of public externalities of bank failure B Bernanke, 'Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression' (1983) 73 The American Economic Review 257.

[180] For a more critical view of the role of finance and economics see e.g. Luigi Zingales, 'Does Finance Benefit Society?' (2015).

therefore a crucial component of the mandate of the resolution authorities[181] as well as by the banks themselves in the context of their contingency (recovery) planning exercises[182] in particular in cross-border contexts.

Concerns about financial stability are of course not new for regulators in the financial sector, while the design of oversight was underpinned by the protection of one stakeholder group – the depositors – since the Great Depression.[183] However, the growing financialisation of developed economies as well as the increasing role of private debt in creating value has accentuated the need to refine the thinking about financial regulation, beyond concerns about means of payment and (internal) stability of the financial system purely.[184] While some functions have remained fairly stable over time, as financialisation of our economies progresses, new functions will be added to this list – including relating to data protection, roles related to promotion of sustainability, which is increasingly a transversal concern in EU regulation.[185] Such a broad and socially embedded functional interpretation of EU resolution law can be contrasted with the arguments of those scholars, who see the primary function of the regime as merely ensuring efficiency of public intervention in crisis management, that is swift administrative action and minimisation of losses and contagion effects.[186]Within such a conception, the practical relevance of resolution law becomes limited, where resolution is treated as an exception, and the national insolvency

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[181] See Section 5.2.1 for a discussion on how critical functions should be protected by resolution colleges and 5.3.1 for how they are a key component of group resolution plans.

[182] See Section 6.1.3 for the critical function protection in recovery planning.

[183] For the financial stability concerns in pre-GFC regulation see: Padoa-Schioppa (n 36); Alexander K Swoboda and Richard Portes (eds), *Threats to International Financial Stability* (Cambridge University Press 1987). On the role of deposit guarantees in ensuring stability and preventing crises see seminal work Douglas W Diamond and Philip H Dybvig, 'Bank Runs, Deposit Insurance, and Liquidity Douglas' (1983) 24 Journal of Political Economy 14; for a catalogue of types of bank runs and explanatory models see Franklin Allen and Douglas Gale, 'Optimal Financial Crises' (1998) 53 The Journal of Finance 1245.

[184]Robert C Hockett and Saule T Omarova, 'Public Actors in Private Markets: Toward a Developmental Finance State' (2015) 93 Washington University Law Review 103; for a critical view of financialisation: Wolfgang Streeck, 'The Crises of Democratic Capitalism' [2011] New Left Review 5; Douglas W Arner, *Financial Stability, Economic Growth, and the Role of Law* (Cambridge University Press).

[185]for the growing body of literature dealing with the climate change obligations of financial regulators and central banks see e.g. Javier Solana, 'The Power of the Eurosystem to Promote Environmental Protection' (2018) 4 SSRN Electronic Journal 547; Emanuele Campiglio and others, 'Climate Change Challenges for Central Banks and Financial Regulators' (2018) 8 Nature Climate Change 462.

[186]Steven L Schwarcz, 'Regulating Financial Change: A Functional Approach' (2016) 100 Minnesota Law Review; Ramos Muñoz and Lamandini (n 95) 807.

procedures are considered to be the primary tool of crisis management.[187]The argument I put forward is that the regardless of whether ultimately resolution tools or insolvency law are used in crisis, the realignment of regulatory objectives already significantly alters the going concern governance of the bank and such is the primary aim of the resolution regime.

In addition to greater integration of public interest concerns by the new regulatory framework, the re-alignment of distribution of losses in the case of failure is another area of innovation with a significant going concern impact. Where the implicit subsidies distorted banks' risk-taking behaviour before the GFC, the post-crisis framework seeks to *ex ante* redistribute losses in a more equitable way, thus solving the perennial problem of crisis regulation in striking the right balance between private benefits of banking and shifting costs related to risks when they materialise onto the public purse.[188] Such risk-redistribution effects are particularly important in the context of cross-border banks. To this end, the bail-in – discussed further below – requirement allows for losses of bank failure to be imposed on creditors – incentivising them to monitor bank behaviour and price the related risk accordingly. Such regulatory interference with the incentives of various stakeholders is present in the other pillars of the regulatory reform, however the primary tool through which such re-alignment is achieved is the risk management regulation.[189]

A broadening of regulatory objectives under EU law has allowed for a more invasive role to be played by the authorities including with regard to the power of direction they enjoy vis-à-vis the supervised entity and its management. The overriding public interest allows for interference with the general right to freedom of business. The post-crisis

[187] For this argument see: Dalvinder Singh, 'European Bank Insolvency and Liquidation Proceedings' in *European Cross-Border Banking and Supervision* (Oxford University Press 2020).

[188] For a discussion of the moral hazard related to pre-crisis framework, and in particular the implicit subsidies for excessive risk-taking see: Kenichi Ueda and B Weder di Mauro, 'Quantifying Structural Subsidy Values for Systemically Important Financial Institutions' (2013) 37 Journal of Banking and Finance 3830;F Allen and others, 'Moral Hazard and Government Guarantees in the Banking Industry' (2015) 1 Journal of Financial Regulation 30.On the post-crisis shift in allocation of risk see: Ramos Muñoz and Lamandini (n 95) 805; Haentjens and Wessels (n 76) ch Conclusions.

[189] E.g. caps on dividends, regulations on remuneration and bonuses. On risk regulation in EU law in general see: Hans-W Micklitz and Takis Tridimas, *Risk and EU Law* (Edward Elgar Publishing); Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015).Stefan Grundmann, Christy-Ann Petit and Agnieszka Smoleńska, 'Bank Governance' in François Barrière (ed), *Le traitement des difficultés des établissements bancaires et institutions financières: approche croisée* (LexisNexis 2017); Haentjens and Wessels (n 76) ch Bart P.M. Joosen 'Regulatory capital requirements and bail in mechanisms'.

regulatory framework strengthens prudential rules, that is the solvency regulations in particular, with the aim of increasing bank stability, as well as to re-align their risk-taking approaches, correcting for the perverse incentives arising from time inconsistencies in pre-crisis regulation which have resulted in excessive risk-taking. New microprudential regulations introduce new prudential requirements in the form of quantitative requirements (capital, liquidity, MREL) and specific governance processes (recovery planning, SREP) which affect bank behaviour and introduce reflexivity between public authority action and bank behaviour. Supervisors and resolution authorities at EU and national levels after the reform have acquired special discretion to calibrate the requirements to fully take into account the specific banking model and bank structure of the supervised entity.[190]

The multi-pronged regime further sets different roles for distinct authorities, locking them together in a number of joint procedures. The impact of their powers on bank operations differs, given the different time horizons (ongoing supervision, early intervention, crisis prevention or management), but as well the scope of their mandates, that is whether their function relates to the financial sector only (e.g. stability of the financial system as aim of supervision) or to the broader economy (e.g. public interest in financial stability as the aim of resolution).

Given the depth of the public objectives pursued and the invasiveness of the procedures, new EU regulations effectively establish new bank governance procedures which will be explored in subsequent chapters, and Chapters 5 and 6 in particular. First, it must further be explained how such requirements acquire a specific cross-border dimension, in the light of the constraints identified in the pre-crisis framework in Chapter 2.

3.1.3. Regulatory cross-border reach

EU banking regulation is increasingly concerned with the internal organisation of bank's – including their cross-border activity – as a matter of prudential concern. The primary focus of scholarly debate with regard to the organisation of banks, has been structural separation, that is requiring that banks do not simultaneously carry out

[190]Grundmann and Micklitz (n 170) ch Hans-W. Micklitz 'The Internal Market and the Banking Union'.

proprietary trading activities and traditional credit intermediation.[191]The so-called Volcker rule – in the EU known as the Liikanen proposal – sought in this sense to further contribute to reducing risk in the banking sector. The reform gained little traction, and did not make it past the legislators' scrutiny, predominantly in the light of ubiquity of the universal bank model in the EU.[192]

Structure and internal organisation, however, increasingly became the object of detailed bank regulation, albeit in a nuanced way, specifically via a new focus on bank complexity. Since GFC complexity came to be considered as a new risk factor, in particular where insufficient information was available to adequately assess and manage bank's activities.[193] Academic scholarship supported this approach - Carmassi and Herring consider that complexity impedes proper governance of banks' activities where it prevents adequate capitalisation, makes supervisory action ineffective in constraining risk-taking (in particular where there are no specific international arrangements), while the lack of congruence between business and legal lines prevents salvaging of going-concern value once crisis materialises.[194] Bank regulation increasingly treats opaqueness in banks' organisation as a matter of supervisory concern, and respond to this risk *inter alia* by increasing the transparency of internal organisation through specific reporting requirements. Complexity in banking is not only just a matter of informational asymmetries between parties, but a regulatory concern. Crisis prevention requirements under EU resolution law increasingly differentiate between integrated (single bank) and (cross-border) bank group situations, prescribing different procedures, and it is those cross-border-specific requirements which are studied in subsequent chapters.

To this end, the reform strengthened cooperation at EU level by creating new EU agencies (European Supervisory Authorities) and establishing a dedicated structure for cooperation between national authorities ("colleges") for the oversight of cross-border

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[191]Danny Busch and Guido Ferrarini, *European Banking Union* (OUP 2015), ch Jeffrey N. Gordon and Wolf-Georg Ringe, 'Bank resolution in Europe : the unfinished agenda of structural reform'.Haentjens and Wessels (n 76) ch Alexandria Carr, 'Bank structural reform: Too big to fail, too big to save and too complex to manage, supervise and resolve?'.

[192] European Commission withdrew the proposal for structural reform in July 2018.

[193]Arguing that organisational complexity can even undermine the objectives of financial regulation: Thomas Philippon and Aude Salord, 'Bail-Ins and Bank Resolution in Europe: A Progress Report' (2017) 26.

[194]Carmassi and Herring (n 45).

bank groups operating within the EU.[195] Though the colleges have maintained the principle of home country control, as discussed above, the reforms have as well strengthened "host control"[196] – also by giving more powers to the local authorities, and creating new categories of "significant branches", which alter the traditional model of home country control (where supervision of branches was deemed to be the responsibility of the authority responsible for the parent bank). Host countries also acquired new prerogatives towards the parent level authority, for example to the extent they can now inquire about the capacity of the deposit guarantee scheme which insures the branch active in their jurisdiction.[197] The new regime therefore above all nuanced the terms of cooperation between relevant competent authorities substantially proceduralising their cooperation. In so doing it laid the foundations for a model of cooperation between authorities which seeks to preclude the benefits of ring-fencing within cross-border groups.[198]

3.1.4. Regulatory reforms in adjacent areas of EU law

Even as the EU banking reform entailed a paradigmatic change in approach, important changes – which have a bearing as well on cross-border banks – marked a greater openness and a will to engage with principles of company law on a cross-border basis in order to ensure the effectiveness (*effet utile*) of EU law. The revision of the Shareholder Rights Directive,[199] imposed new transparency requirements with regard to related party transactions within listed groups of companies.[200] Furthermore, in 2019

[195] See recital 6 Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management, OJ L 302, 17.11.2009, p. 97–119 ("CRD III").

[196] Demirgüç-Kunt, Evanoff and Kaufman (n 16) chs 7 Juan A. Marchetti 'The International Banking Landscape: Developments, Drivers, and Potential Implications' 105. FinSAC World Bank Group, 'Banking Supervision and Resolution in the EU: Effects on Small Host Countries in CEE and SEE' (2019).

[197] Pamela Lintner, 'De/Centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) 18 European Business Organization Law Review 591; Larosière (n 129), 138.

[198] See on this Chapter 5.

[199] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, p. 1–25 ("SRD II").

[200] Piotr Moskala, 'Zatwierdzanie Transakcji Wewnątrzgrupowych w Zmienionej Dyrektywie 2007/36/WE – Perspektywy Implementacji' *Przegląd Prawa Unijnego* (2018) 19; Luca Enriques, 'Related Party Transactions' in Gordon and Ringe n .

the European Union adopted the Intermediated EU Parent Undertaking requirement which requires that every foreign (non-EU) banking institution exceeding a prescribed size of assets in given jurisdiction should set up a parent undertaking in within the EU territory (i.e. in one Member State).[201]

Prudential reform was also coupled with a reform of accounting rules. Already prior to the financial crisis special international accounting rules applied to the financial sector, since then further consolidation rules were developed for the banking sector to account for Under such accounting rules, EU law provides for various methods which determine how entities within a group can be connected both through capital ties (control, joint control, significant influence) and in their absence (unified management, "other situation", step-in risk and significant influence).[202]

3.1.5. A new regulatory paradigm?

In the aftermath of the financial crisis, a new way of thinking about banks' inherent stability developed. It was no longer only exogenous risk, but as well internal endogenous organisation of the bank which had destabilising effects.[203] Such risks warrant that the new regulations interfere and guide the internal organisation of the large banks and impose new public-like obligations on the bank's management. At the same time, a functional approach focused on critical bank functions, requires sensitivity to specific concerns of discrete jurisdictions where a cross-border bank may be

[201] 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, 7.6.2019, p. 253–295. for a timely comment see: Parchimowicz (n 72).

[202] IFRS 10 – Consolidated Financial Statements, see also Art. 18 CRR. See also EBA Consultation, Draft Regulatory Technical Standards on the methods of prudential consolidation under Article 18 of Regulation (EU) No 575/2013 (Capital Requirements Regulation - CRR), 9 November 2017. For discussion see e.g. Demirgüç-Kunt, Evanoff and Kaufman (n 16) ch 7 Juan A. Marchetti 'The International Banking Landscape: Developments, Drivers, and Potential Implications'.

[203] On the shift of attention from exogenous to endogenous risk see: Michel Aglietta and Laurence Scialom, 'For a Renewal of Financial Regulation' in Eric Brousseau and Michel Glachant (eds), *The Manufacturing of Markets: Legal, Political and Economic Dynamics* (Cambridge University Press 2019). Compare with pre-crisis accounts, e.g. Swoboda and Portes (n 185) where the focus remains macroeconomic underpinnings of banks' stability. For the overview of the evolution in economic thinking about financial regulation see: Jon Danielsson (ed), *Post-Crisis Banking Regulation: Evolution of Economic Thinking as It Happened on Vox* (CEPR).

active,[204] especially since the new regulations are expressly concerned with regulating the sovereign-bank loop. [205] The new paradigm explains the increased discretionary powers of authorities, the public-like duties imposed on bank management as well as the differentiation between various stakeholders of banking activity.[206] The protective and functional perspective on bank regulation has meant that more emphasis was placed by regulators on the *ex ante* risk-preparedness and resilience, but also resulted in greater precision as to why banking warrants special treatment. The new crisis prevention instruments designed to this end and implemented by the new resolution authorities are oriented at creating transparency and organisational preparedness in crisis. The new regulatory framework makes inroads into areas traditionally conceived of as within the purview of private autonomy of the banks. This is particularly the case for EU resolution law, which I analyse in detail in the following chapters of this monograph.

[204]Eva Hüpkes, 'Form Follows Function - A New Architecture for Regulating and Resolving Global Financial Institutions' (2009) 10 European Business Organization Law Review 369, 385.
[205] Section 1.3.
[206]Grundmann, Petit and Smoleńska (n 188).

3.2. Bank Resolution and Recovery Directive (BRRD)

BRRD was introduced in the context of a broader global change in thinking about bank regulation, with EU specific caveats discussed above.[207] At the global level, regulators took note of the reforms introduced in Asia in the aftermath of the crisis in the 1990s, and developed principles for effective bank crisis management at the level of Financial Stability Board.[208] The Key Principles for Effective Resolution (KP) were developed to cover banks only and required to this end the establishment of a new authority with distinct powers since the optics of public intervention differed from those of ongoing supervision. Substantive rules established covered courses of action in crisis, including provisions on set-off, netting, collateralisation, segregation of client assets as well as safeguards for creditors and other investors. New procedures were established, that is resolvability assessments and recovery and resolution planning, as well as common principles of funding of banks in resolution. Cross-border coordination was central: FSB created framework conditions for cross-border cooperation in the form of Crisis Management Groups (CMGs) and institution-specific cross-border agreements allowing for access to information and information-sharing. FSB principles were implemented in the EU via the Bank Recovery and Resolution Directive (BRRD) which lays down the substantive law and basic institutional requirements and the Single Resolution Mechanism Regulation (SRM), which is the second centralized pillar of the Banking Union.

3.2.1. Resolution differs from insolvency

EU resolution law lays down provisions for administratively managed reorganisation procedures for banks, which can lead either to restoration of viability or liquidation, as well as for crisis prevention tools that is *ex ante* recovery and resolution planning. Resolution proper occurs when the resolution authority takes over the management of the bank once it is deemed failing or likely to fail with view of using resolution tools to

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[207] John Armour, 'Making Bank Resolution Credible' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015). For an overview see: Jens-Hinrich Binder and Dalvinder Singh (eds), *Bank Resolution: The European Regime* (OUP 2016).

[208] For an overview of the approach in the context of the Asian financial crisis in the 1990s see: Patrick Honohan, Luc Laeven (eds), *Systemic Financial Crises* (Cambridge University Press 2005).

achieve resolution objectives.[209] Such authorities – once specific triggers of failure are met - have the power to take control of an institution and exercise all the rights and powers of shareholders. Special bank-funded funds are created to ensure there are sufficient resources available to finance this process, in the case of Single Resolution Mechanism – that being the Single Resolution Fund.[210] By introducing an explicit limitation on public support in cases of crisis, the regime seeks to limit the reliance of banks on any implicit public subsidies, thus improving incentives in bank management. This is a step with quite some 'revolutionary' potential as implicit public guarantees were understood in the aftermath of the crisis to have contributed to risk-taking due to moral hazard implications of banks externalising their downside risk to the taxpayers' purse.[211]

Though resolution is most often described as an alternative insolvency procedure and insolvency law is by far the most common benchmark of comparison for BRRD,[212] there are premises which suggest that it is a framework governed by quite a different set of considerations. BRRD interacts with national insolvency regimes[213]and draws on the pre-existing 2001 Winding-Up Directive,[214]however resolution law procedures depart in important ways from key aspects insolvency, in particular with regard to the specific objectives pursued and the institutional dimension clearly demarcating the line between public and private decision-making.

First, resolution is not a *lex specialis* of general law (as is the case of cross-border insolvency) but a bespoke regime for bank risk governance. Its scope is defined by the function which the business enterprise performs (that is it takes deposits), rather than by

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[209] See Art. 31(2) BRRD.

[210] Art. 67(3) SRM.

[211]Xavier Vives, *Competition and Stability in Banking: The Role of Regulation and Competition Policy* (Princeton University Press 2016); Gudmundsson (n 39); Frederic J Lambert and others, 'How Big Is the Implicit Subsidy for Banks Considered Too Important to Fail?', *Chapter 3, Global Financial Stability Report* (2014). see also recital 1 BBRD.

[212] Scholars argue that resolution law was needed to establish a *de facto* dedicated insolvency regime for banking and thus a tailored mechanism for management of bank exit from the market. See: RM Lastra, *International Financial and Monetary Law* (Oxford University Press 2015) 166; Ramos Muñoz and Lamandini (n 95); Moss, Wessels and Haentjens (n 70). Consequently, insolvency law principles are then applied to evaluate the efficiency of the resolution regime Jens Hinrich Binder, n. 76.

[213] Especially to the extent that No-Creditor-Worse-Off principle determines that no creditor can be facing greater losses under resolution than in insolvency thereby limiting the scope of resolution authorities' action in resolution.

[214]Coleton (n 78).

its legal form. It applies to entities which are authorised to carry out specific functions in the market, that is deposit taking institutions as per prudential regulations.[215]

Second, resolution is an administrative not a judicial procedure. The resolution authority takes over management of the bank once it is deemed failing or likely to fail - judicial involvement (as in insolvency) is not required – and even prevented by the limitations on the judicial review process.[216] As one of the first orders of business, bank's management is then to be replaced[217] and the resolution scheme implemented by the resolution authority.[218] Rights of shareholders are suppressed. Equally, other important tools of insolvency are also not replicated by the resolution law regime.[219]

Thirdly, the objectives resolution law pursues, including the stakeholders which it protects, are different than in the case of insolvency laws.[220] Resolution is to be implemented only when the presence of public interest in financial stability warrants it as it significantly interferes with the rights of parties which insolvency law is typically held to protect – namely creditors.[221] Further, whereas insolvency is generally concerned with market exit – and to this end is oriented at value preservation and cost limitation - resolution law foresees that the enterprise in question reorganises and continues its activities.[222] In any case the critical functions must be preserved and the restoration of viability is possible. In fact as resolution law in the EU distinctly governs cross-border banking activity, this suggests that cross-border banking provides a distinct critical function which is to be protected. This is quite different from insolvency, where the importance of reorganisation is marginalised.[223]

EU resolution law comprises not only crisis management, but also crisis prevention measures – that is the going concern (good times) regulation, where already the

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[215] See Section 2.2.
[216] Article 32(1) BRRD.
[217] Article 34(1)(c) BRRD.
[218] Recital 52 BRRD, for an introduction on the institutional arrangements under the SRM see Chapter 4.
[219]e.g. on the question of insolvency stay see: Annika Wolf, 'A Global Cross-Border Insolvency Framework for Financial Institutions'.
[220] Though insolvency regimes differ greatly in this regard. While mostly oriented at creditor protection, in some EU member states, this can include employment considerations, Horst Eidenmüller, 'Comparative Corporate Insolvency Law' in Jeffrey Gordon and Wolf-Georg Ringe n 13.
[221] Art. 18(1)(c) SRM Regulation.
[222] This is feature of the BRRD regime is notably different from the US transposition of FSB's Key Attributes of Effective Resolution, that is the Orderly Liquidation Authority (OLA), which allows only for the resolved bank's exit from the market.
[223]Baxter, Hansen and Sommer (n 107)., 82 on reorganisation as being irrelevant from the point of view of bank insolvency regimes

resolution authorities ensure far-reaching powers of intervention into bank's business decisions. BRRD therefore affects the governance of banks directly, whereas the insolvency does so indirectly. Such a differentiation further explains the relevance of going concern resolution law requirements, even if resolution were to be the exception, and insolvency the rule. This is as BRRD establishes a tailored, bank-specific regime for crisis management (that is resolution proper), but seeks also to improve risk management and pre-crisis contingency planning *ex ante*, by introducing the requirement of preparation of 'living wills' on the banks (recovery plans[224]) and on the resolution authorities (resolution plans)[225] for each credit institution. Resolution laws seek to protect the system in the future, under specific contingency conditions. To this end, *ex ante* resolution planning is simultaneously a crisis prevention and management tool, striving to overcome time inconsistency problems and increasing certainty for the actors.[226] Timing is what distinguishes proactive and counteractive regulation, argues Steven Schwarcz.[227] Still, notwithstanding the granularity of rules and intensity of supervisory relationship, remains a form of *internal* governance. Its governance implications include the incorporation of public interest considerations into daily bank management – it is this impact on daily governance processes that marks differentiates the regime from insolvency.[228]

3.2.2. Resolution toolbox

Resolution is defined by the BRRD as the application of resolution tools to a failing or likely to fail bank. These instruments allow for a reorganisation of property claims related to the bank by the resolution authority so as to restore the bank's capital position (and therefore – by enabling it to continue to meet the threshold regulatory requirements – preserve its operations on the market). Four resolution tools are foreseen

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[224] Article 5 BRRD.
[225] Article 10 BRRD.
[226] This is in contrast with the preventive framework prior to the crisis which was contingent on the crisis scenario materializing. See Guido Ferrarini, *Prudential Regulation of Banks and Securities Firms* (Kluwer Law International 1995) already discussing preventive and protective aspects.
[227] Steven Schwarcz, 'Resolution as a Macroprudential Regulatory Tool' (2018) Notre Dame 1.
[228] For a public management perspective on such a turn see: Cary Coglianese, David Lazer and Stable Url, 'Management-Based Regulation : Prescribing Private Management to Achieve Public Goals' (2003) 37 Law and Society Review 691.

in the regulation: sale of business tool, bridge institution tool, asset separation tool and bail-in tool.[229]

The tool which has attracted most attention from scholars and practitioners is the bail-in tool that is the power of the resolution authorities to convert or write-down certain classes of debt with view of restoring the bank's capital position. Such a far-reaching power is warranted in the light of the public interest in financial stability.[230] Though similar instruments have pre-dated the crisis (notably as CoCos – contingent convertibles[231]), the additional novelty introduced by the regulation is an obligation to issue sufficient amounts of bail-inable debt, should the need to employ this tool arise. This is the so-called Minimum Requirement for Own Funds and Eligible Liabilities (MREL)[232] The MREL requirement is calculated on the basis of a detailed procedure outlined in the regulation. Issuing MREL is to ensure that bank has sufficient loss absorption cushion to enable return to viability in a crisis scenario.[233]

The immediate objective of the bail-in tool and the MREL is to ensure the bank has sufficient loss absorption capacity (i.e. resilience) to withstand either an endogenously caused crisis, or one materialising as a result of external factors. Bank's loss absorption guaranteed by the bail-in instrument should thus limit the implicit subsidisation of banks' activities by the taxpayer[234] and better align the former's risk-taking appetite with loss absorption capabilities, also by incentivising additional risk-monitoring (and pricing) by creditors.[235] As a result it has been described as a hybrid public-private governance instrument.

[229] See further on the resolution toolbox drawing parallels with insolvency law: Michael Schillig, 'The EU Resolution Toolbox' in Matthias Haentjens (ed), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015).

[230] ECtHR case law see esp. ECtHR, *Grainger and others v. United Kingdom*, Appl. No. 34940/10, Decision of 10 July 2012 for the Strasbourg Courts' doctrine on proportional limitation of private property rights by public interest aims, such as the pursuit of financial stability.

[231] Biljana Biljanovska, 'Aligning Market Discipline and Financial Stability: A More Gradual Shift from Contingent Convertible Capital to Bail-in Measures' (2016) 17 European Business Organization Law Review 105.

[232] Art. 45 BRRD and amendments pursuant to BRRD to, now Art. 45c. Art. 12 SRM.

[233] See further on MREL determination Chapter 6.

[234] This is effect is reinforced for the Banking Union countries, where a minimum threshold of 8 % bail-in is required in order for the bank to be able to access the Single Resolution Fund, see Recitals 78 and 80 SRM, Article 27(7)(a) SRM Regulation.

[235] for a discussion of how bail-in limit may limit moral hazard as a disciplining device: Alexander Kern and Steven Schwarcz 'The Macroprudential Quandary: Unsystematic Efforts to Reform Financial Regulation' p. 153; and Emilios Avgouleas 'Large Systemic Banks and Fractional Reserve Banking', p.301 for a critical view of bail-in in: Buckley, Avgouleas and Arner (n 171); for a critical approach to

3.2.3. Resolution authorities

Resolution procedures are implemented by the new authorities created in individual Member States. For the Banking Union countries the Single Resolution Mechanism (SRM) has been established as an additional partially centralised authority. Such institutions are distinct from all supervisors, given their specific tasks. BRRD allows for these to be delegated to central banks, other public authorities, and - in some cases - also supervisors, though there must be adequate structural arrangements in place to ensure "operational independence" and prevent conflicts of interest.[236] Many different models were opted for in this regard in individual Member States.[237] In the Banking Union, Single Resolution Board, a specific EU agency was created to that end.[238]

Resolution authorities are crisis managers but also responsible for improving bank's resilience. They have the powers to impose sanctions for non-compliance with the requirements they impose on the banks, such as a prohibition on distributions such as dividends.[239] The governance implications of resolution authority activities differ from those of supervisors. The latter may influence bank management, even require it be replaced in the case of early intervention. Resolution law, however, in the light of its public interest and wide stakeholder protection (as opposed to intra-sectoral considerations of supervisors) objectives, to the extent specific requirements are

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bail-in, including how it may cause systemic instability see: Stefano Micossi, Ginevra Bruzzone and Miriam Cassella, 'Bail-in Provisions in State Aid and Resolution Procedures : Are They Consistent with Systemic Stability ?' 1; for an economic cost-benefit evaluation of bail-ins: Mr Giovanni Dell'Ariccia and others, 'Trade-Offs in Bank Resolution' (2018). For a criticism of bail-in approach from a systemic point of view see Roberta Romano, 'For Diversity in the International Regulation of Financial Institutions: Redesigning the Basel Architecture' (2014) 31 Yale Journal on Regulation 1; for a legal critique see: Chris Bates and Simon Gleeson, 'Legal Aspects of Bank Bail-Ins' (2011) 5 Law and Financial Markets Review 264; Emilios Avgouleas and Charles Goodhart, 'Critical Reflections on Bank Bail-Ins' (2015) 1 Journal of Financial Regulation 3, Tobias H Tröger , 'Why MREL Won't Help Much' (2017) 180 SAFE Working Paper 3.

[236] Art. 3(3) BRRD.

[237] See list of resolution authorities published online by the EBA pursuant to Art. 3 (11) of Directive (2014/59/EU): https://www.eba.europa.eu/-/eba-publishes-list-of-designated-resolution-authorities (last accessed 15 February 2017).

[238] Note however the role of European Commission and the Council in resolution (Art. 18 SRM): this is the consequences of the limits on the decision-making powers of the SRB resulting from the Meroni doctrine, as well as the possible fiscal implications of implementation of resolution scheme. On the SRB see: Agnieszka Smoleńska, 'Single Resolution Board: Lost and Found in the Thicket of EU Bank Regulation' in Grundmann and Micklitz (n 170).

[239] The so-called M-MDA, see recital 24 and new BRRD Article 16a (BRRD 2) Resolution authorities may "to restrict or prohibit distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution."

implemented in the shadow of full take-over of bank management by the resolution authority should a crisis materialise, has stronger bank governance implications.

This is as though resolution authorities have most powers in the context of crisis management measures (that is in resolution), already the crisis prevention measures (that is in recovery and resolution planning) grant them significant powers. Since the incisiveness of powers of the authorities is governed by the principle of proportionality and a function of the state of the bank, financial system considerations and the pursuit of the BRRD objectives such reflexivity creates a reflexive relationship with the bank – including in areas specifically within the sphere of autonomy of the private entity.[240] As a result, a transnational regime is established which operates on a sliding scale of hybrid (public-private) governance between autonomous corporate governance and governance imposed by resolution authorities (resolution). In the middle part of the scale we find the *going concern* crisis prevention phases which lock the authorities and the bank management in joint procedures. This is particularly the case for cross-border bank groups, which are a distinct object of BRRD regulations.

3.2.4. Regulatory objectives

Resolution is defined by reference to the specific objectives outlined in legislation. These are: (a) to ensure the continuity of critical functions of the supervised institutions; (b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; (c) to protect public funds by minimising reliance on extraordinary public financial support; (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; (e) to protect client funds and client assets.[241] These objectives have a different time scale and a different scope than the objectives of prudential regulation and supervision. As has already been mentioned in Section 3.1.3 the uniqueness of EU resolution law lies in the new conception of a public interest in financial stability and a functional orientation towards protecting the critical functions, that is the infrastructure which banking provides across EU economies. Even if defined

[240]Cristie Ford, 'Financial Innovation and Flexible Regulation: Destabilising the Regulatory State' (2013) 18 North Carolina Banking Institute 27.
[241] Article 32(1) BRRD.

in the context of crisis measures, these objectives inform as well the non-resolution activities of the authorities, and in particular the extensive crisis prevention measures (risk management measures) under the BRRD.

Crisis management so conceived is a key objective of resolution proper. However, bulk of resolution law deals with *safeguarding* financial stability through *ex ante* preparation of resolution and recovery plans, which are inter alia oriented at ensuring the bank's resolvability[242] as well as adequate loss-absorbing capacity (through MREL, that is a minimum level of own funds and eligible liabilities which can be used to restore the bank's capital position). The specific measures oriented at instilling such resilience into banks' operations must be interpreted with the general objectives of EU resolution law in mind, as well as those which stem from the legal basis of BRRD, that is the objective of establishing the internal market as per Art. 114 TFEU, understood as an area without internal frontiers, in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaty (Art. 26 TFEU).

[242] I.e. resolution authorities have the power to require banks to remove impediments to resolvability: such as unclear separation of business lines or unsustainable funding models.

3.3. The appearance of an EU cross-border group

Among the many novelties introduced by the BRRD into the EU regulatory regime for the financial sector, the appearance of the concept of an "cross-border group" in BRRD presents *a priori* a particular puzzle, in the light of difficulties which EU group law has faced prior to the GFC.[243]Hitherto, there was no such concept in EU law – the primary notion which allowed EU regulations to see cross-border bank activity was that of a "consolidated situation."[244] Whereas previously it was EU law on accounting, which specified the rules determining what "group situations" were, now we are presented with a legal term which implies specific regulatory and governance requirements: groups which operate cross-border are a distinct category of supervised credit institutions.[245]Even further, such cross-border groups – defined structurally by the fact they have "a parent undertaking and subsidiaries" and geographically whereas "group entities established in more than one Member State"[246] – may not necessarily encompass the entire multinational bank, but only its EU parts. Consequently, an EU cross-border bank group is a concept quite different in terms of the function it serves than a Global Systemically Important Bank under the global financial stability regime, in particular since there is now an obligation in EU law for the bank to have an intermediate parent undertaking established in the EU. The concept has so quickly meanwhile taken root in EU law that in 2019 the CRR 2 referred breezily to "European groups."[247]

On the surface such references may appear too general in nature to be operationalised in a meaningful way and this is the main puzzle explored in this monograph. Some scholars have indeed criticised the original BRRD legislation in this vein, by pointing to the absence of definition of the concept.[248] However, by 2019, the new concept has

[243] See Section 2.3.
[244] See Art. 11 CRR.
[245] See also to this end Art. 7(2)(b) SRM Regulation, which specifically delegates to the Single Resolution Board tasks related to resolution of significant banks, but as well cross-border groups identified in accordance with the 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).For an up to date list of cross-border bank groups see: https://srb.europa.eu/sites/srbsite/files/7_august_2019_list_of_other_cross-border_groups.pdf (last updated: 7 August 2019, last accessed: 16 August 2019).
[246] Art. 2(1)(26) and (27) BRRD.
[247] See Section 3.1.4 on IPU requirement and Recital 52 of CRR 2 for reference to "European groups."
[248]Grünewald (n 71) 114.

been supplemented by specific regulatory requirements to be implemented in respect of the “Union parent undertaking”, that is the parent entity established in one of the EU’s Member States.[249] A closer look at the specific procedures foreseen for cross-border groups under the risk management and crisis prevention and management procedures introduced under the BRRD reveals that not only a new organisational structure has been created by EU law, but also that it has been complemented with a distinct governance mechanism. How could such a legal innovation, in the light of the obstacles discussed in the previous sections, be possible? How can the BRRD regulation specifically surmount the problems outlined in previous sections?

3.3.1. BRRD changes the nature of bank group corporation

The BRRD uniquely in the EU regulatory framework introduced the concept of a “cross-border bank group” in 2014 and coupled it with various procedures and requirements to be followed by cross-border groups.[250] The BRRD even foresees specific frameworks for intra-group support to be *ex ante* put in place.[251] Such innovations raise the question of the specific legal strategies employed by EU law which operationalise such a bespoke governance regime for EU cross-border bank groups, notwithstanding obstacles stemming from the multiple jurisdictions where the cross-border group operates. The following sections will explain the organisational principles of the EU cross-border bank group, drawing on legal theories of groups drawing on the Law and Economics and corporate governance literatures.

[249] Art. 2(1)(49) BRRD and Art. 4(1)(48) CRR. The latter reads: ·parent institution in a Member State· means an institution in a Member State which has an institution or a financial institution as a subsidiary or which holds a participation in such an institution or financial institution, and which is not itself a subsidiary of another institution authorised in the same Member State, or of a financial holding company or mixed financial holding company set up in the same Member State.”

[250] See Art. 4(1)(1) CRR “credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.”

[251] Art. 19 BRRD, critically see: Lamandini (n 113).

3.3.2. Group theory – setting the boundaries

Groups are corporate structures composed of multiple legal entities. Scholarship spanning economic, business and legal literatures has been devoted to the subject of the multinational company in order to explain their origins, internal organisation and governance.[252] What unifies such theories is the concept of partition, which these organisational forms to combine control and ownership links intra-group with distinct corporate identities.[253] Are the "cross-border groups" identified by Article 2 BRRD indeed such organisational forms? This question is not trivial, given the implications of a "group" status on internal organisation and governance of the enterprise in terms of balancing of various stakeholders' interest in their operation, explored below in Section 3.4 in legal terms.

Jurisdiction is one factor which explains partitioning in the group, but it is not the only one – and it is the economic explanations of group partitioning, which allow to draw normative conclusions with regard to when a group enterprise should be treated in an integrated way. Law and Economics approach to corporate governance defines partitioning as the legal device which shields the assets of a given legal entity from its owners or creditors, tracing the emergence of internal partitioning[254] to a set of economic benefits which arise when such an organisational form is employed. Hansmann and Squire argue that the benefits of *internal* partitioning relate predominantly to greater efficiency of transfer of control (that is sale and purchase of subsidiaries), but these are in their view limited in time. They show further that provision of intra-group guarantees nullifies the limited economic benefits of internal partitioning as an argument for why the courts should be more willing to apply de-partitioning remedies in cases where such intra-group exposures are in place. De-partitioning remedies which enable external claims on the subsidiary entity to be vindicated vis-à-vis the owners are well known in corporate law and include devices

[252]Muchlinski (n 12); Forsgren (n 12); for bank specific considerations: Sist (n 26).

[253]for an overview of economic theories of the corporation see: Lynn Stout, 'The Economic Nature of the Corporation' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law*, vol 2 (Oxford University Press 2017); for a primer on the main features of groups of companies in European jurisdictions see: Hopt, 'Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups' (n 11).

[254] As opposed to external partitioning which concerns the boundaries of the corporation vis-à-vis unrelated third parties.

such as enterprise liability or piercing of the corporate veil.[255] This theoretical approach suggests therefore that where partitioning serves a number of economic and legal functions,[256] there are a number of specific types of intra-group transactions which have the effect of nullifying the economic function of partitioning. Why is this of such interest in the context of cross-border bank groups? Because one of the pillars of the new bank regulation reform is precisely the regulation of such intra-group exposures for EU cross-border banks, and also creating an intra-group loss-absorption regime – known as the *internal* Minimum Requirement for Own Funds and Liabilities (MREL).[257]

3.3.3. De-partitioning impact of new bank regulations and internal MREL

Prior to the GFC, there was insurmountable reluctance to differentiate – in EU regulation – between regulating transactions within cross-border bank groups and ordinary market transactions on a cross-border basis (Section 2.3). Since then a number of reforms introduced specifically allow for a differentiated approach to intra-group situations. Already CRDIV/CRR in 2013 allowed for differentiation of intra-group exposures from transactions with third parties. CRD IV enables a group perspective by foreseeing that intra-group exposures may be exempt from large exposure limits imposed by the CRR – thereby distinguishing intra-group exposures from those vis-à-vis external counterparties (Art. 84 CRD IV). Entity interests are protected by the power of the national authority to grant such waiver.[258] EBA's overview of the use of

[255] For an explanation of how such devices serve creditor protection in groups specifically see: Hopt, 'Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups' (n 11); on the significance of partitioning from the perspective of theory of the firm see: Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale Law Journal 386; for the application of the concept of internal and external partioning see: Henry Hansmann and Richard Squire, 'External and Internal Asset Partitioning: Corporations and Their Subsidiaries', Jeffrey Gordon and Wolf-Georg Ringe, *The Oxford Handbook of Corporate Law and Governance* (OUP 2018); for an empirical study of asset partitioning in group enterprises across major global jurisdictions see: Sharon Belenzon, Honggi Lee and Andrea Patacconi, 'Towards a Legal Theory of the Firm: The Effects of Enterprise Liability on Asset Partitioning, Decentralization and Corporate Group Growth' (2018) No. 24720 National Bureau of Economic Research Working Paper Series.

[256] Hansmann and Spire equally show that non-economic functions of subsidiaries may relate to jurisdictional internationalisation of corporate activity, see Section 2.2.

[257] See Section 3.2.2 on the bail-in tool and the MREL requirement.

[258] Art. 400(2)(c) CRR, such an exemption applies as well to covered bonds for example.

this option suggests uneven approaches throughout the EU.[259] Where the original wording of the article suggested a possibility for this waiver to be exercised at EU level (Art. 507 CRR) in the light efficiency of central "group risk management", the CRR 2 review does away with this possibility suggesting a continuing resistance to group governance approaches regardless of the advances described in this section.[260] On the other hand, the 2019 CRD V/CRR 2 framework allows for centralised liquidity management via preferential treatment of requirements concerning net stable funding ratio (NSFR).[261] At the same time new rules concerning authorisation provide that for holding companies, authorisation to conduct banking business may only be granted if the group has specific measures in place to deal with intragroup conflicts.[262] Even a partial move towards recognising group dynamics in such a way warrants further exploration, especially since the 2019 CRR 2 / BRRD 2 reform provides scope for effective departitioning of cross-border groups in EU law.

As was already outlined above, one of the principal innovations of the new EU resolution law was the introduction of the minimum bailable liabilities requirement, that is the requirement that the bank must hold a certain amount of debt issued internally with that amount set precisely by the resolution authority.[263] BRRD required that MREL be set at the group or consolidated level (a "top down" approach), but as well on individual levels.[264] BRRD 2, which is already in force, and must be fully transposed by 28 December 2020, takes this requirement further by introducing the *internal* MREL – whereby a certain part of loss absorption capacity is to be satisfied on an intra-group basis. The concept that improved external loss absorption should – given the complex group structure of modern banks – be complemented with a mechanism of intra-group distribution of losses, emerged in the context of global reform of financial regulation

[259] For an overview of the exercise of national options and discretions available under CRDIV/CRR to national authorities see database maintained by EBA at: https://www.eba.europa.eu/supervisory-convergence/supervisory-disclosure/options-and-national-discretions (last accessed 11 August 2019).
[260] Art. 1 (136) CRR 2 revising Art. 507.
[261] See Recital 52 and new Art.428h CRR, where "Where the application of the NSFR requirement on an individual basis has not been waived, transactions between two institutions belonging to the same group or to the same institutional protection scheme should in principle receive symmetrical available and required stable funding factors to avoid a loss of funding in the internal market and to not impede the effective liquidity management in European groups where liquidity is centrally managed."
[262] Art. 21a(3) CRD V.
[263] See Section 5.3.3 for the explanation of the complex procedure of setting this requirement in a cross-border context.
[264] Recital 80 BRRD.

after the GFC spurred by the Financial Stability Board. There it was conceived as the *internal* TLAC (Total Loss Absorption Capacity), a mechanism for upstreaming of losses to material subsidiaries or sub-groups in cross-border scenarios.[265] TLAC however applies only to the globally systemic institutions (G-SIBs), which are less than a quarter of the cross-border bank groups active across the EU.[266]*Internal* TLAC is meant to enable (via *ex ante* alignment of expectations) a Single Point of Entry Resolution (SPOE, that is treating the cross-border bank as one integrated firm), as opposedto Multiple Point of Entry Resolution (MPOE, that is resolution conducted separately at the level of distinct entities). Under the SPE strategy, only one group entity, usually the parent undertaking, is resolved whereas other group entities, usually operating subsidiaries, are not put in resolution, but upstream their losses and recapitalisation needs to the entity to be resolved. Under the MPE strategy, more than one group entity may be resolved.[267] BRRD 2 transposed the TLAC requirement as the *internal* MREL requirement into the EU legal framework, albeit with EU-law specific caveats.[268]

The first EU obstacle which had to be surmounted in order to implement internal TLAC was jurisdiction – that is how to overcome ensure that any cross-border loss absorption within the group could be legally enforceable in case of a crisis, the question concerned specifically to what extent such loss absorption was to be pre-positioned. In its legal opinion on the BRRD 2 proposal, the Legal Service of the Council of the EU helpfully clarifies in this context that the EU is a "single jurisdiction *sui generis*"[269] and consequently argued that guarantees should also be allowed as measures to satisfy the

[265]Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution: Total Loss-absorbing Capacity (TLAC) Term Sheet 2015; Guiding Principles on the Internal Total Loss- absorbing Capacity of G-SIBs ('Internal TLAC') 2017 1; Daniel K. Tarullo, 'Shared Responsibility for the Regulation of International Banks' in Demirgüç-Kunt, Evanoff and Kaufman (n 16).

[266] That is the 29 banks indicated by the FSB (as of 16 November 2018). See list available at: https://www.fsb.org/wp-content/uploads/P161118-1.pdf.

[267]for a economic analysis of the MPOE and SPOE resolutions in an EU context see: Ester Faia and Beatrice Weder, 'Cross-Border Resolution of Global Banks' (2015).

[268]Explaining the EU transposition of TLAC requirement see: Tröger (n 235).

[269]Specifically, the Council's LS argue: "When groups comprise entities established in different EU Member States, in order to set the MREL they are bound to follow the decision making process provided for the adoption of resolution plans within resolution colleges. This process implies that resolution authorities responsible for the various entities of the group should strive to reach consensus on a joint decision, including on fixing the MREL at both consolidated level and solo level. If consensus is not reached, separate decisions are taken but each resolution authority has the right to activate the EBA mediation role. The EBA decision on the dispute is binding for all the resolution authorities involved and replaces the joint decision. Moreover, the BRRD already requires that MREL is set at the legal entity level regardless of its materiality." See also 2016 EBA Report on MREL.

MREL requirement internally. BRRD originally foresaw that cooperation between the supervisors,[270] and procedures for supervisors to approve intra-group support guarantees, were sufficient conditions for sufficient trust to be created to overcome the needed for pre-positioning to accompany such liabilities.[271] With the BRRD 2, the European Commission has argued that the institutional cooperation between authorities (including joint decision-making system, EBA mediation, control of the CJEU), has been strengthened to such an extent, the EU should be treated as a single jurisdiction and therefore pre-positioning requirements on intra-group guarantees could be waived.[272] The final version of the BRRD adopted did not allow for cross-border guarantees within groups to satisfy the internal MREL requirement, with full prepositioning required of the bail-inable liabilities by the subsidiary. This was explained by the distrust between host and home countries within the EU – intra-group collateralised guarantees are only allowed within one Member State.[273]

Though cross-border guarantees were resisted, new MREL rules still allow for cross-border bank groups to be treated in a universal manner in resolution, that is to allow for the Single-Point-of-Entry (SPOE) resolution. The trick was to create a device in EU law capable of implementing internal loss absorption without the whole cross-border group to be placed in resolution. This was done by differentiating between resolution *groups* and resolution *entities*. The latter being defined as: “(a) an entity established in the Union, which is identified by the resolution authority in accordance with Article 12 [group resolution plans] as an entity in respect of which the resolution plan provides for resolution action; or (b) an institution that is not part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, in respect of which the resolution plan drawn pursuant to Article 10 provides for resolution action.” Such a definition of the concept creates a distinct category of a subject of resolution law, the scope of which is determined through a process of identification (mapping)

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[270] See Chapter 5.

[271] Art. 19 BRRD.

[272] ACPR, ‘Treating the EU as a Single Jurisdiction for the Implementation of TLAC’ (2017).

[273] See recital 21, art. 45f BRRD2. On collateralised guarantees specifically see: European Banking Authority, Report on MREL, pp. 16-17 For guarantees to be acceptable as MREL there must be no legal, regulatory or operational barriers to the transfer of the collateral from the resolution entity to the relevant subsidiary, including where resolution action is necessary.

conducted by the resolution authority for the purpose of applying the specific resolution law instrument.[274]

A resolution entity – where a Single Point of Entry resolution can be applied – can be an entity which operates cross-border and composed of multiple legal entities. Even if it operates across multiple Member States – for the purposes of resolution law – it operates in a single jurisdiction. Internal MREL is then issued by the resolution entity within resolution groups.The definition of resolution entity replaces the requirement that a resolution plan is to be drawn at the level of Union parent undertaking (cf. Art. 12(1) BRRD) – suggesting the for the purposes of resolution law supersedes that of "cross-border group" (also as numerous resolution entities can be identified within a group – see 12(3)(1a) BRRD). The effect of the new rules is creating a two-tier structure for cross-border banks by function of their cross-border organisation, and by terms of their internal liabilities.[275]

As a result, the internal MREL can be issued to a resolution entity within a cross-border group; it is an inherently cross-border (cross-jurisdictional) instrument: it does not to apply where resolution entity and relevant subsidiary are subject to authorisation/supervision by the same Member State (see waiver conditions under Art. 45f(5)). A waiver from the need to pre-position certain funds within a resolution entity is possible only when "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary" or when the resolution entity satisfies the competent authority regarding the prudent management of the subsidiary, risk evaluation, management and control procedures cover the subsidiary, the resolution entity controls the subsidiary (powers to appoint/remove members of the management board, MREL requirement is waived at the level of subsidiary). Internal MREL would come into play in cases where the parent (or holding company) will absorb the losses of the subsidiary

[274] On this, see further Chapter 5. A "resolution group" is further defined as: "(a) a resolution entity and its subsidiaries that are not: (i) resolution entities themselves; or (ii) subsidiaries of other resolution entities; or (iii) entities established in a third country that are not included in the resolution group in accordance with the resolution plan and their subsidiaries; (b) credit institutions affiliated to a central body, the central body and any institution under the control of the central body when one of those entities is a resolution entity." Consequently, a second category created, which creates a subject of EU law, which exceeds in scope the resolution entity, to include legal entities which are not subject to implementation of EU resolution law instruments.

[275] Arts. 12g SRM 2 and 45f BRRD covering the application of MREL to entities which are not themselves part of resolution entities (i.e. other parts of the group).

by writing down or converting its internal liabilities to the amount equal loss. By reducing the liabilities of the subsidiary, its solvency will be restored.

Within resolution entities, the internal MREL requirement is to be met by issuance of liabilities, which can be different financial instruments from those eligible for external MREL: that is BRRD2 differentiates between liabilities eligible for internal and external MREL which can count towards the requirement, e.g. structural subordination is required of the internal MREL.[276] Such a differentiation of obligations internally and externally defines the scope of an (EU) cross-border group, by creating a distinction between intra-group and external risk. With the introduction of the "resolution entity" and "internal MREL" concepts, de-partitioning tools find their way into EU law. These concepts subvert the jurisdictional constraints and allow for the internal boundaries within the group to be broken – even if the innovations such as cross-border collateralised guarantees were finally excluded from the scope of the BRRD. In so doing, they provide further specific evidence of the recognition by EU law of cross-border bank groups as organisational forms foreseen and governed by law.[277]

[276] Arts. 45f BRRD 2.

[277]For an institutional account of this amendment explaining the reluctance of host Member States who required rather pre-positioning of any loss absorption mechanisms see: European Parliament (n 104).

3.4. Function and legal strategies of group law in European legal systems

Corporate groups are a particular type of company arrangement which allows to combine the principles of interdependence (within the enterprise) and independence (of the entities). Different legal strategies of pursuing this aim are employed in various EU jurisdictions and through different regulatory means. What is common in the EU legal traditions is that they seek to address the specific challenges which arise in a group context – including those relating to complexity and agency problems. With regard to the former, information asymmetry between various entities within the group and the authorities arises from the ever increasing complexity within the organisation, i.e. divergent types of business activity in which the bank engages and the number of geographic markets where it is active.[278] In the absence of pure hierarchy (full integration in the corporate law sense) coordination and control problems may arise, if there is no full alignment of interest within the group.[279] The function of group law is to solve agency conflicts within the group and vide its specific stakeholders (such as creditors and minority shareholders).[280]

3.4.1. Group law in a comparative perspective

These problems are addressed through very different instruments in the national legal systems of EU Member States. Some jurisdictions have a distinct group law (most notably Germany), in other jurisdictions such principles have been developed through court jurisprudence (e.g. in France).[281] In others still there is no specific regulation – though these problems may be addressed through self-regulation, and specifically group corporate codes.[282] Another option is that groups are regulated only within a particular area of law – as in the case of EU's accounting rules.[283]

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[278] Nicola Cetorelli and Linda S Goldberg, 'Organizational Complexity and Balance Sheet Management in Global Banks' (2016) Federal Reserve Bank of New York Staff Report No 722.

[279] see: Daphne W. Yiu, Xing Chen, and Yuehua Xu 'Corporate Governance in Business Groups' in: Wright and others (n 177).

[280] Paweł Błaszczyk, 'Pojęcie Interesu Grupy Spółek Jako Kategoria Wyjściowa Dla Polskiego Prawa Holdingowego' (2011) 19 Monitor Prawniczy 2 1029; critically on the absence of a corporate group interest from an economic point of view see: Postrach (n 113).

[281] See Hüpkes, n. 203, p. 377 on jurisprudence employing specific legal doctrines such as contractual and extra-contractual obligations, fraudulent conveyance (*action pauliana*), mismanagement and fake dividend claims as well as piercing the corporate veil ('*Durchgriff*').

[282] Szabó and Sørensen (n 140).

[283] See Section 2.3.1 above.

Group law has specific common features across EU jurisdictions (see Table 1). First, it entails a concept of control – a concept whereby the link between the parent entity and the subsidiaries is established. Such control test may be substantive or formal, and may have different implications – for example with regard to possibilities for the interests of sub-group entities to be subjugated to the interest of the group. Most importantly control does not require full ownership of subsidiaries – very often much less is required, just enough to enable the parent to exact control over the subsidiary. Second, group law seeks to establish a regime of protection of minority shareholder and creditors at various levels of the group structure including via obligations to make good on the losses at the end of the year imposed by the parent on the subsidiary, or to allow for an enterprise contract which allows the parent to instruct the subsidiary not to act in its own interest, but in the interest of the group as a whole (that being the case in Germany), in addition to various fiduciary principles.[284] Through the mix between recognising control and protection of third parties, group law addresses the specific problems of corporate groups by either pursuing an enterprise (enabling) or an entity (protective) approach. Enabling (enterprise) components of group law concern e.g. specific duties of mangers or waivers on disclosure, while protective (entity) components are oriented towards minority shareholders and outside creditors.[285]

Scholars have identified specific legal strategies which are employed in various European legal systems and include disclosure (that is how information concerning the activity of the parent and subsidiary entities is shared, whether information concerning specific intra-group transactions is to be shared externally), specific provisions limiting third party transactions, scope of director's duties and standards for balancing of interests and takeover rules. These strategies provide an essential benchmark for identifying a group approach.

[284] see Klaus Hopt 'Common Principles of Corporate Governance in Europe?' Basil Markesinis (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart Publishing 2000), p. 124 on group law specifically; on comparative approaches to group law in European countries see Pierre-Henri Conac, 'Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level' in Hanne Birkmose, Mette Neville and Karsten Sørensen Engsig (eds), *Board of directors in European com- panies – reshaping and harmonising organisation and duties* (Kluwer Law International 2013).

[285] Hopt, 'Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups' (n 11); Lagenbucher (n 59); Virginia E Harper Ho, 'Theories of Corporate Groups: Corporate Identity Reconceived' (2012) 42 Seton Hall Law Review.

To this end, the Informal Company Law Expert Group[286] identifies two types group laws across European jurisdictions employing such legal strategies with view of resolving the specific problems of groups. In the first model, the interest of creditors and shareholders of individual entities within the group is prioritised. The second, focuses on the interest of the group as a whole. Under the first model, specific rules are put in place to protect distinct entities, under the second specific governance, transparency and supervisory arrangements underpin the notion of group interest.[287]

The first approach (adopted for example in Germany) is to disperse duties and rights with the parent company, while providing for specific protection for minority shareholders of subsidiaries and bondholders. This approach is further characterised by the scope of fiduciary duties established within *Konzernrecht*. Specifically, the management (e.g. managing directors) have different duties towards the corporation, that is they have to act in compliance with the law, second they can control that the employers and organs comply with the law, and third they have to take due care and act loyal towards the firm and as an agent towards the owners of the firm. The duty approach is a precondition for adopting an enterprise approach in this sense, which is quite different from the French doctrine which – in the French tradition – presupposes a centralised (common interest) approach, albeit with some qualifications against centralisation.

This enabling "group interest" approach follows the*Rozenblum* doctrine, which prescribes that:*"the financial aid consented by the managers of the company which is part of a group in which they are directly or indirectly interested, should be motivated by the common economic interest in relation with the global policy of the group, should not be devoid of counterpart and should not provoke imbalance of the mutual obligations, nor exceed the financial capacity of the solicited company"*.

Table 1 provides an overview of the concepts of group interest present in EU legal jurisdictions as a matter of legal traditions common to all Member States. It provides evidence that there is no common approach to the balance between enterprise and entity

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[286]Forum Europaeum (n 59).

[287]Grundmann, *European Company Law: Organization, Finance and Capital Markets* (n 56) para 772; Informal Company Law Expert Group (ICLEG), 'Report on the Recognition of the Interest of the Group' (2016) 3.

interests, as well as the various origins and operationalisations of group laws, though there are common building blocks.

Table 1. Notion of bank group in national legislation

State	Group Law	Group Interest
Austria	Y	N
Belgium	Y	(Case Law)
Czechia	Y	Y
Germany	Y	Y
Denmark	Y	N
Estonia	Y	N
Spain	Y	N
France	Y	(Case Law)
Hungary	Y	Y
Italy	Y	(Indirect)
Luxembourg	Y	N
Netherlands	Y	(Case Law)
Poland	Y	N
Portugal	Y	(Indirectly)
Romania	Y	(N)
Sweden	Y	N
UK	Y	N

(Source, European Commission, 2018)

3.4.2. The entity and enterprise approach – a summary

What emerges from such a comparative overview is that in the EU there are essentially two approaches in group law. First, the enterprise approach which treats the corporate groups as one whole, via an array of enabling provisions – such as a holistic notion of group interest. Second, the entity approach focuses on the protection of distinct interest of the individual legal entities within the cross-border groups (protective provisions). The balance between the two results in a distinct group governance regime which balances interdependence of the enterprise with independence of its individual parts.

3.5. Why a group law approach is helpful in a multijurisdictional context

In the first two Chapters of this monograph I have explained why the EU pre-crisis regime was incomplete with regard to cross-border bank groups and why this has facilitated disintegration. This chapter has shown how the new EU banking regulations, and in particular the BRRD, through a combined effect of new institutional arrangements, redefined policy objectives, a new focus on corporate governance and de-partitioning of the group, effectively lead to a emergence of a bespoke cross-border bank group regime. In this Section, I explain why using comparative law-informed group lens is particularly helpful in defining the characteristics of such a regime in a multijurisdictional context and why the specific crisis prevention procedures (that is recovery and resolution planning under BRRD) yield themselves to an analysis on the basis of the framework designed in such a way.

3.5.1. Overcoming the jurisdictional constraints

Though – as the previous sections have shown – an increasing number of EU institutions and scholars has argued that EU should be considered a single jurisdiction for the purposes of EU resolution law (and setting of MREL specifically), formally there have been objections to such an approach, most notably given the continued presence of different national competent authorities or the prevailing differences in national approaches in relevant areas of law adjacent to resolution (e.g. insolvency).If we see however, EU resolution law as marrying features of a single jurisdiction (universality) with multiple jurisdictions (i.e. where various conflict of laws rules are necessary), the value of a group law approach becomes all the more clear, as it focuses the attention of various methods through which both alternatives are respected.

This is different from a strict jurisdictional approach. Cranston *et al* suggest that such clashes of jurisdictions stemming from application of a territorial approach in insolvency can be *ex ante* avoided by introducing specific blocking legislations to extraterritorial claims. Otherwise, specific judicial approaches (comity and balancing of interests) or international cooperation (unilateral, bilateral or multilateral) can be used to solve inter-jurisdictional conflicts which may arise within a cross-border corporate group. Full international harmonisation is assumed to deal away with conflicts

altogether.[288]Even where modern conceptions of territoriality allow for cooperation, harmonisation of choice of law rules and some cross-border recognition, the alternative to territoriality appears to be universalism. Universalism meanwhile apparently requires that "the host country give up its national sovereignty over the crisis resolution process"[289] either via ex ante rules (e.g. an international Treaty or organisation) or court adjudication on a case-by-case basis. When the question of possible loss distribution is added to the picture (in particular the eventuality of a bail-out with the specific fiscal implications this entails[290]), the untenability of a universalist approach is apparent: that is when phrased in a sovereigntist terms, territoriality and therefore disintegration of governance of cross-border groups becomes inevitable – even in the most integrated of cross-border frameworks – unless there is full centralisation and harmonisation of laws.[291]

The alternative is that is any universalist provisions without full centralisation of authority would lead to arbitrage, but also create incentives for beggar-thy-neighbour and free-riding policies. Harmonisation means that differences in rules are superseded by reinstating one common set of rules and uniformity then removes obstacles to centralisation as comparability allows for more adequate pricing across markets, competitive distortions in favour domestic incumbents are removed.[292] For cross-border groups this seems to imply that only a fully centralised regime would allow for large cross-border entities to be treated as a single entity and therefore effective in attaining

[288] Chapter 11 'Cross-border Banking' in: Ross Cranston and others, *Principles of Banking Law* (Oxford University Press 2018).

[289]Federico Lupo-Pasini and Ross P Buckley, 'International Coordination in Cross-Border Bank Bail-Ins: Problems and Prospects' (2015) 16 European Business Organization Law Review 203, 217.

[290]Agnès Bénassy-Quéré and others, 'Reconciling Risk Sharing with Market Discipline: A Constructive Approach to Euro Area Reform' [2018] CEPR Policy insight No. 91; Jones (n 74).

[291] To this effect see the judgement of the EFTA court concerning the extension of the coverage of the Deposit Guarantee in Iceland to subsidiaries located in EU Member States. Case E-16/11, *EFTA Surveillance Authority v Iceland*, OJ C 132, 9.5.2013. Though note the subsequent amendments of the Deposit Guarantee Scheme Directive in 2014.

[292] There may well be as well costs to harmonisation such as forgone innovation or the very cost of finding the right rule. On the costs and benefits of harmonisation in a cross-border bank context see Lucia Quaglia and Aneta Spendzharova, 'Regulators and the Quest for Coherence in Finance: The Case of Loss Absorbing Capacity for Banks' [2018] Public Administration 1; Luca Enriques and Matteo Gatti, 'The Uneasy Case for Top-down Corporate Law Harmonization in the European Union' [2006] University of Pennsylvania Journal of International Law, 953 arguing that only rules oriented at removal of barriers should be harmonised.

the regulatory objectives, even if this means losing the benefits of diversity.[293]A group approach allows to partially escape such dichotomy of territoriality and universalism.

A group approach – focused on the entity vs enterprise alternatives – gives greater clarity as to who takes the decision within the group. Under the regulatory design approaches which focus on territoriality, scholars assume that supervisors (or other competent authorities) have full jurisdiction over the entity operating within their jurisdiction. However, supervisors vary greatly, there are important asymmetries among them – not least due to asymmetries arising from the reciprocal relationships between the legal entities they oversee. Further asymmetries arise from differences in access to information and resources, the quality of supervision and rules (accounting, judicial system) as well as exposures (that is the materiality of a given entity to financial stability).[294] Such asymmetry – as political economy literature suggests – means that decisions of different national authorities may effectively have different extraterritorial effects.[295]Analysing provisions of EU resolution law as a matter of enterprise-enabling and entity-protection with respect to the group, allows to overcome the approach which focuses on the territorial limitations, such as those arising from the continuing risk of non-recognition of proceedings.[296]Specifically the Chapters which follow analyse those provisions of new EU resolution law which appear to supersede jurisdictional concerns by adopting a group-wide approach. The puzzle to be solved is to identify precisely those legal strategies – in particular those which resemble strategies known from comparative group law such as duties, disclosure, mandatory protective instruments – under the assumption that they hold the answer to the question of how EU law could have allowed for such a turn.

[293]Haan, Oosterloo and Schoenmaker (n 25) explaining that to attain fair burden-sharing in a cross-border context either centralisation (capable of internalizing all European externalities) is necessary or – in the alternative – a credible *ex ante* mechanism.

[294]Carmassi and Herring (n 45) 24; Allen, Gu and Kowalewski (n 2) 16.

[295]Schoenmaker, *Governance of International Banking* (n 7) 69.

[296]Andromachi Georgosouli, 'Improving the Enforceability of Cross-Border Resolution Action in the EU: Critical Reflections on the Mutual Recognition Rules of the BRRD' (2017) 24 Columbia Journal of European Law 1.

3.5.2. A going concern governance focus

Group law is generally concerned with going concern governance within the group, therefore I focus on such procedural requirements established by the resolution law which affect the EU cross-border bank group as a matter of going concern (recall Sections 3.1 and 3.2). In those procedures I shall look for the specific legal strategies which operationalise either an enterprise (group-wide) or an entity approach focus. Specifically, I treat as a matter of group governance the general risk management standards[297] which are foreseen specifically for cross-border groups under BRRD, namely: group resolution planning, assessment of resolvability in groups, the determination of MREL requirement by the resolution authorities and recovery planning to be conducted by the regulated entity. That is different from the approach typically adopted by the EU scholarship on cross-border banking, which focuses on resolution proper (i.e. the procedure once the bank is deemed failing or likely to fail). I rather study the *ex ante* resilience-inbuilding provisions,[298] that is how EU law regulates cross-border groups in good times – and not just in crisis, assuming that going concern governance has equally an impact on intra-group risk-distribution and hence risk-sharing.

Though governance has been sometimes used in particular in a transnational governance context, as a means to bypass the inability to design a regime capable of addressing collective action problems, transnational group governance here is not used as a term to escape a holistic approach – quite the opposite.[299] In fact, a group *risk* governance approach focuses precisely on the implementation of concrete regulatory risk management requirements within bank groups. Governance is here understood as the set of rules which determine how decisions within the group are made, including the

[297] Art. 312 CRR refers to „general risk management standards" as „internal governance and recovery and resolution plans" (Art. 74 CRD IV) and operational risk (Art. 85 CRD IV).

[298] See Section 3.2 explaining how BRRD is equally concerned with going concern regulation of EU bank groups.

[299] For application see: Beate Kohler-Koch and Berthold Rittberger, 'Review Article: The "governance Turn" in EU Studies' (2006) 44 Journal of Common Market Studies 27; Burkard Eberlein and Abraham L Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 21 Governance 25; Keith Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance' (2011) 64 Current Legal Problems 179; Markus Jachtenfuchs, 'The Governance Approach to European Integration' (2001) 39 Journal of Common Market Studies 245; for a specific application in the context of financial regulation see: Giuliano Castellano, Alain Jeunemaitre and Bettina Lange, 'Reforming European Union Financial Regulation: Thinking through Governance Models' (2012) 23 European Business Law Review 409.

legal strategies and mechanisms which extend across borders either through soft (e.g. geographical scope considerations introduced in decision-making practice) or hard (e.g. mandatory requirements) substantive requirements as well as dedicated procedures (cross-border bank governance procedures).[300]

A wider (corporate) governance lens is warranted, since – as was already outlined above – the rules of EU bank group law studied not only regulate bank behaviour – as is the prerogative of legislation – but as well interfere with the traditional areas of private autonomy with regard to the choices relating to banks' internal organisation and their risk management at various levels. Thus, while company law is harmonized only in important corner-stone solutions and specifically so with respect to issues relating to investors and other partners from outside,[301] EU banking regulation law is becoming an increasingly uniform EU law area with transnational implications. In the group specific context, such regulatory tools lead to centralisation risk management at the group level, as they impose specific group-level obligations.[302] Consequently, Chapters 5 and 6will explore the going concern EU resolution law, focusing on such procedures outlined by the BRRD to the extent they establish a distinct group law regime – the below Table 2 summarises relevant procedures and regulatory requirements, which arise from the EU resolution law primarily (BRRD), with the exception of operational risk regulated as well under the prudential rules (CRD).

[300]For an overview of such an approached used for the transational enviornmental regulation regimes, including the theory underpinning such an approach see: Veerle Heyvaert, *Transnational Environmental Regulation and Governance* (Cambridge University Press 2018).

[301] See Stefan Grundmann, 'The Structure of European Company Law: From Crisis to Boom' (2004) 5 European Business Organization Law Review 601.

[302] Similar regimes have emerged in other deeply financially integrated regions, e.g. in Australia and New Zealand, where specific new obligations have been imposed on the boards with regard to functions which are outsourced as part of group management Eva Huepkes 'The Last Frontier: Protecting Critical Functions Across Borders' in: Wymeersch, Hopt and Ferrarini (n 54), 382.

Table 2: EU cross-border bank group law procedures in BRRD

Article	**Procedure**	**Decision-maker**	**Chapter**
Art. 12 BRRD	Group resolution plans	Resolution authorities, resolution college, EBA	5
Art. 18 BRRD	Impediments to resolvability	Resolution authorities, resolution college, EBA	5
Art. 45 BRRD[303]	MREL and internal MREL	Resolution authorities, resolution college, EBA	5
Art. 7 BRRD	Group recovery planning	Group management	6
[Art. 85 CRD IV	Operational risk	Group management	6]

[303] As amended by BRRD 2 in 2019.

3.5.3. Analytical approach: the building blocks of cross-border bank group governance

The following Chapters of this monograph study the operationalization of law of EU bank groups before the "Big Bang" GFC reform.[304] Chapter 4 focuses on the crisis framework, that is application of state aid control rules to cross-border banks in the EU. Chapters 5 and 6 study the new general risk management requirements for cross-border banks to determine the balance between the entity and the enterprise approach as well as to identified the legal strategies employed to this end. Chapter 5 focuses on the hybrid public-private governance procedures and in particular on the strengthened cooperation between competent authorities under the shadow of reinforced mandate of centralised EU agencies (resolution planning procedures). Chapter 6 shifts the focus to the new requirements which have been introduced vis-à-vis the group-level management with regard to risk management requirements with a distinct internal group organisation perspective (recovery planning and operational risk). Given that the rules in question were approved as recently as May 2019, the analysis focuses on the EU secondary law level requirements,[305] supplemented by the technical standards designed by the European Banking Authority and adopted by the European Commission.[306] The approach adopted focuses on the analysis of those provisions of EU resolution law which appear to supersede jurisdictional concerns by adopting a group-wide approach.

To answer the research question of this monograph, namely how EU law allows for such a group-wide approach I will focus on the legal strategies which provide for either an enterprise or an entity approach. To the extent that the thesis draws on various literatures concerning internal organisation of groups discussed in this Chapter. Table 3 provides a reference "equivalence" table. Group-wide approaches treat the enterprise

[304] Procedures studied are both the original BRRD provisions and the 2019 amendment.

[305] Undoubtedly however, the differences in national implementation of the BRRD directive will further complicate the operationalisation of group level bank governance, as was the case for the question of subordination of the MREL-eligible debt across EU jurisdictions. For the practical difficulties stemming from such divergent implementation of the directive see: European Central Bank, 'ECB Legal Conference 2017: Shaping a New Legal Order for Europe: A Tale of Crises and Opportunities' (2017).

[306] New EU prudential rules foresee almost 500 acts to be developed by the European agencies on the technical level, on the role of standard-setting as a regultary technique in EU financial regulation and the Banking Union see: Hans Micklitz 'Internal Market and the Banking Union' in: Grundmann and Micklitz (n 170).

holistically, via a set of enabling provisions. Under EU law, we have already identified a single point of entry resolution strategy as example of such a group approach. On the entity-protective side, there are the entity approaches which are oriented towards protecting the interest of the individual legal entities. They result in an aggregate approach where (under resolution law) a multiple point of entry strategy is adopted and the cross-border group decomposed into distinct resolution entities.

Table 3: Cross-border bank groups approaches (equivalence table)

	Group-wide	**Individual entity**
Group law	Enterprise	Entity
Corporate governance perspective	Enabling	Protective
Insolvency law	Single point of entry (SPOE)	Multiple point of entry (MPOE)
L&E (Organisational law)	De-partitioning	Partitioning

In analysing the identified going concern group-wide resolution procedures in such a way, I focus on four specific blocks within which the ensemble of the EU resolution (crisis prevention) rules which give rise to an enterprise approach (Table 4).[307] The first two relate to the nature of the cross-border group, that is the scope for risk-sharing (i.e. departitioning which allows for intra-group loss sharing) and the enabling EU-level policy objective which is served by the regulation of the enterprise via EU resolution law. The further two relate to the substantive and institutional arrangements which on the one hand serve to enable an enterprise approach, and on the other provide for the distinct (group law like) protective legal strategies which equally then define the nature of the cross-border group created. Chapter 5 in looking at the group-wide resolution planning procedures will focus on the regulatory mandates and the proceduralisation of cooperation between public authorities in particular.[308] Chapter 6, turning to risk governance within the cross-border bank group, will provide further evidence of de-partitioning within the group and the group-wide corporate governance.

[307] For a building block approach to governance see: Elinor Ostrom, "Beyond Markets and States: Polycentric Governance of Complex Economic Systems." (2010) *The American Economic Review* 100, 641–672.

[308] See Black reflecting the specific importance which procedures play in EU regulation and governance (n 187); Julia Black, 'Restructuring Global and EU Financial Regulation' Wymeersch, Hopt and Ferrarini (n 54).

Table 4: Building blocks of cross-border enterprise-enabling approach

Risk-sharing (de-partitioning)	**Holistic** (EU internal market) **objective**
Proceduralisation of **cooperation** (public)	**Corporate governance** (reach of management decisions) (private)

3.6. Resolution law as bank group *lex specialis*

The post-crisis regulatory framework and the BRRD and SRM in particular, make references to the "cross-border bank groups," and introduce the notion of an interest of a group "as a whole." EU resolution law thus creates a bank group *lex specialis* at EU level as a necessary condition for its proper implementation in line with the designated regulatory objectives. The EU cross-border bank group is defined not only by relationship of control and ownership, but also by de-partitioning of the group via requirements such as internal MREL requirement at EU level.

EU resolution law (and related provisions of CRD IV concerning general group risk management) is therefore studied in this monograph as a *lex specialis* of EU company law. Such an approach is well funded. Although some scholars have identified the lack of horizontal harmonisation EU group law as the obstacle to the operability of certain elements of the resolution framework,[309] others have already suggested prudential regulation of cross-border banks has resulted in a distinct bank governance regime being created.[310] Further, the concept of bank *Konzernrecht* with a specific-EU twist has already emerged in some jurisdictions.[311]

Prudential rules in banking have been already analysed as a matter of company law.[312] The methodological innovation proposed in this monograph is to draw on common principles of group law across Member States to study cross-border bank group risk management, as if these rules were company law. Such an approach is not uncommon – US Courts have been more willing to pierce the corporate veil in order to fulfil the objectives of the legislative act.[313] The challenge is to understand the operation of such a regime for cross-border banks in the light of resistance to creating transnational governance regimes for multinational entities. The starting point to this end is an exploration of the governance of cross-border bank groups in the EU as developed during the GFC via state aid control exercised by the European Commission vide cross-border banks. This will be the object on inquiry in Chapter 4.

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[309] Lamandini (n 116).

[310] Grundmann, Petit and Smoleńska (n 188); John Armour, 'Bank Governance' in Jeffrey Neil Gordon and Wolf-Georg Ringe n 13.

[311] Moritz Renner, *Bankkonzernrecht* (Mohr Siebeck 2019).

[312] Tridimas n. 55, 784; Eddy Wymeersch, 'Financial Institutions as Members of Company Groups in the Law of the European Union' (2001) 2 European Business Organization Law Review (EBOR) 81.

[313] Sørensen (n 120) 395.

Part 2

Cross-border EU bank groups during the Gloval Financial Crisis

Chapter 4

4. State aid during the Great Financial Crisis and the emergence of transnational regime for EU cross-border banks

A claim put forward in this thesis is that the notion of a European cross-border bank group has been introduced into EU law by resolution law.[314] Further, in the light of the specific cross-border bank group risk management requirements under the BRRD, the concept is accompanied by a distinct group governance framework. Within its scope, distinct legal strategies are employed to give effect to either an enterprise (group-level) or entity (individual companies, e.g. subsidiaries) approach.[315]This reform was, however, only introduced after the GFC, even if cross-border bank groups were at the

[314] See Chapter 3, and Section 3.3 in particular.
[315] See Section 3.5 for the approach adopted in the monograph and Chapters 5 and 6 for the analysis of the substantive risk management framework for cross-border bank groups.

very heart of financial instability concerns since 2008. Chapter 2 already explained that the EU legal framework which was in place then did not adequately provide for cross-border bank group governance as a matter of risk-sharing in particular.[316] There was one instrument, however, which was broadly used as a first line of defence and a crisis management coordination tool in the EU – that is state aid control. Since 2008 the European Commission has approved over 500 decisions lifting the general Treaty prohibition of state aid to private undertakings to allow for bank bailouts. The focus of legal scholarship analysing this decision-making practice has been predominantly placed on the operationalisation of the state aid control rules. The structure and the scope of activity the beneficiaries did not attract significant scholarly attention, other than from economists studying the impact of bank restructuring on the EU markets and bank behaviour.[317] In this chapter, I look specifically at how the European Commission treated cross-border bank groups in order to fill this specific gap in knowledge. In the context of the overall inquiry of this thesis, which is to identify the legal strategies constituting bank group governance in EU law, I seek to provide the answer to the question of whether from the decision-making practice of the European Commission during the GFC we can derive the answer to the question of whether any elements of a cross-border bank group governance approach pre-dated their official recognition under the BRRD.[318] In the light of the progressive amendments to the state aid framework as well as the complex interplay between the state aid and resolution law regimes which has since emerged, this chapter is not concerned – or rather does not seek to – draw conclusions as to how state aid control might be applied to cross-border bank groups in the future[319] – given also European Commission's discretion in this area.[320]

[316] See Section 2.4.

[317] Christian Ahlborn and Daniel Piccinin, 'The Application of the Principles of Restructuring Aid to Banks during the Financial Crisis' (2010) 1 European State Aid Law Quarterly 47.

[318] See Section 2.5.

[319] This is not least as there is no monitoring report of compliance available and a number of cases are still on-going, or seem to have stopped mid-track. In addition the precedent value of the crisis decision-making practice of the European Commission is affected by the new resolution rules in the light of the "indissolubly linked" provisions doctrine in EU law, whereby state aid control must be implemented in a manner consistent with the relevant provisions of other areas of substantive law (e.g.: Case *T-289/03 BUPA and others v Commission* (2005) EU:T:2005:78. See also: Agnieszka Smoleńska, 'Overview of State Aid in the Financial Sector and Bank Resolution', *Understanding BRRD in the EU: a Guidebook to the BRRD* (World Bank Group 2017); Ioannis Kokkoris and Rodrigo Olivares-Caminal, *Antitrust Law amidst Financial Crises* (Cambridge University Press 2010); Micossi, Bruzzone and Cassella (n 230).

This chapter confirms that EU state aid law was concerned with cross-border bank groups during the GFC (Section 4.2) and explains how this occurred (Sections 4.3-4.5)– that is to what extent structural factors were relevant and consequential in application of EU law over the course of the crisis. This entails differentiating between the contexts where in its assessment the European Commission adopted an individual entity or an enterprise group interest approach when assessing aid granted to a cross-border bank. To this end, the chapter proceeds as follows. Section 4.1 explains the relevance of EU state aid control as a tool for coordinating crisis management of cross-border banks in the EU since 2009 and identifies the cases relevant for further analysis. Section 4.2 provides evidence that the European Commission considered the cross-border reach of the aid beneficiary a relevant factor for the purposes of assessing the aid measure. Section 4.3 explores the balance between enterprise and entity approach in the four building blocks of cross-border bank group approach identified, that is: intra-group partitioning, policy objectives, procedural cooperation between authorities and corporate governance. To this end the Chapter analyses 112 decisions taken by the European Commission between 2008 and 2017 with regard to 29 European bank groups (See Annex I for full list).

[320] On European Commission's discretion and its limits see judgement in C-526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenije* (2016) ECLI:EU:C:2016:570.

4.1. Role of state aid control in the EU legal order

State aid control plays a unique role within the EU constitutional framework, often being "the first at the scene" of new areas of EU integration – from banking to taxation to digital markets.[321] To establish a level-playing field across the EU for all companies, Art. 107 TFEU forbids Member State measures favouring domestic champions. Bank bailouts which have proliferated during the GFC, fell within the scope of EU state aid control. Since 2009 the European Commission adopted almost 500 *ad hoc* decisions allowing for aid to over 100 individual banks.[322] In the absence of specialised set of crisis management rules, such as a resolution regime,[323] the European Commission's exercise of state aid control – progressively codified under subsequent "crisis communications" – was the primary tool of EU crisis response co-ordination at the time.[324] The compatibility with the Treaty was ensured by reference to Art. 107(3)(b) TFEU which was hardly ever used before, and which allows for state aid to be granted when it is absolutely necessary to remedy an "remedy a serious disturbance in the economy of a Member State." As a result, crisis state aid control provides a unique source for analysis of how EU law treated largest cross-border bank groups (such as Dexia, ING or Commerzbank) prior to the BRRD reform. In the bank specific context, state aid is a regime for control of the size and modalities of employment of the national backstops – that is implicit subsidies and the explicit guarantees – in the banking sector.[325]

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[321]Francesco De Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013). For a critical assessment of this entrepreneurial use of state aid see Michael Blauberger, 'Of "good" and "Bad" Subsidies: European State Aid Control through Soft and Hard Law' (2009) 32 West European Politics 719.

[322] Between 2007-2015 the European Commission took over 400 individual decisions in the cases of 112 banks. Only between 2007-2016 DG Competition approved over 450 decisions in the area of State aid. These included €671 billion in capital and repayable loans and €1 288 billion in guarantees. The decisions included restructuring and orderly resolution of 112 European banks, see: Guillaume Adamczyk and Bernhard Windisch, 'State Aid to European Banks: Returning to Viability' [2015] Competition State Aid Brief 1.

[323]François-Charles Laprévote, Joanna Gray and Francesco De Cecco, *Research Handbook on State Aid in the Banking Sector* (Edward Elgar Publishing 2017).

[324] See speech of the European Commissioner at the time on how state aid law operated as the EU resolution law regime: Joaquín Almunia, Presentation of the Annual Competition Report for 2011 in the European Parliament, 19 June 2012.

[325] See Section 1.2.2 on the implications of implicit subsidies in the banking sector in the context of (one) state – bank doom loop.

4.1.1. State aid law under the Treaties

State aid control as a policy instrument seeks to enable and protect the competitive process and to maintain a level-playing field by preventing asymmetries in the national public support to industries and national champions. Specifically, Article 107 TFEU lays down a general prohibition on granting state aid to undertakings by Member States where this results in distortions of competition and affects trade between Member States; as well as grounds on which any such aid may be considered compatible with the internal market at the discretion of the European Commission. EC may make its approval conditional on fulfilment by the Member State and/or aid beneficiary of commitments oriented at reducing distortions to competition, including of structural (e.g. divestments) and behavioural (e.g. bans on price leadership) nature. Procedural aspects of state aid are detailed in the Procedural Regulation, pursuant to which one Member State is generally the principal interlocutor for the European Commission in the procedure.[326] While what is aid is a malleable concept, the *state* element is essential – even when interpreted broadly.[327]

Over the course of the financial crisis a distinct approach was developed in Brussels towards bank bailouts via the dedicated Communications, that is non-binding documents which outlined how the European Commission intended to assess bank bailouts notified by Member States. Starting in 2008 with Banking Communication,[328] the Commission subsequently detailed its requirements for necessary compensatory measures in the 2009 Restructuring Communication[329] and 2009 Impaired Assets Communication (dealing with bad banks being created to clear banks' balance

[326] Art. 108(2) TFEU, Art. 22 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9–29.; Council Regulation No 659/1999 of March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, OJ L 83/1, 27.3.1999 was applicable during the duration of the crisis.

[327] The application of state aid control to aid granted by the Single Resolution Fund or European Stability Mechanism and other supranational funds is not considered here. What is important to point out nonetheless is that these funds are essentially governed by procedure parallel to state aid, where there is no specific state or emanation of the state involved. In this vein for a critical approach on the scope of the notion of aid see: Andrea Biondi and others, 'Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107 (1) TFEU'.

[328] European Commission, Communication *The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis,* OJ C 270, 25.10.2008, p. 8–14 ("Banking Communication 2008").

[329] European Commission, Communication *on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (Text with EEA relevance), OJ C 195, 19.8.2009* ("Restructuring Communication").

sheets).[330] The European Commission cyclically extended the application of these rules, which were consolidated in the 2013 Banking Communication.[331] The 2013 Banking Communication emphatically confirmed that the purpose of state aid control was to ensure that financial stability was restored in the European Union with the control and conditionality of bank bailouts exercised by DG COMP being the tool which would allow to attain this objective.

Within such a legal framework of general rules and a bespoke bank regime, how did the European Commission deal with the fact that some of the bailouts concerned multiple Member States? Did it acknowledge the group scope of aid beneficiary in its decisions, and if so – how did the law "see" the cross-border bank group? When approving the aid granted in favour of the parent bank in one Member State, was an enterprise approach adopted, meaning that the decision was concerned with the impact of financial stability on all the EU markets where the bank's subsidiaries were active? Or rather, did the procedure focus on the individual entities as if they were standalone companies?[332]

4.1.2. Cross-border bank groups in crisis state aid law

Nothing in Art. 107 TFEU expressly provides for a case where the beneficiary undertaking operates cross-border as a group. However, EU law is not entirely blind to the existence of cross-border groups: antitrust rules operationalise for this purpose the concept of a "single undertaking" which allows to break through – also in cross-border scenarios – the corporate veil in cases of liability for breaches of competition law. The approach is not consistent - state aid jurisprudence allows for preserving the corporate veil within the corporate structure for the purpose of determining aid beneficiary.[333]Such discrepancies warrant an in-depth investigation of the approach pursued by the European Commission over the GFC.

[330] European Commission, Communication on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1–22 ("Impaired Assets Communication").

[331] European Commission, Communication *on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis,* OJ C 216, 30.7.2013, p. 1–15 ("2013 Banking Communication").

[332]for the argument concerning crisis fragmentation of the banking sector see:

[333] See Section 2.3.1 and further on case law limiting the reach of state aid doctrine into the cross-border group structure: Carsten Koenig, 'An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law' (2017) 13 Journal of Competition Law & Economics 281.

Notwithstanding the absence of a general horizontal approach to groups in state aid law, European Commission's concern with cross-border banking activity was evident in the Crisis Communications. The scope of state aid control expressly covered to cross-border banks, due to concerns about arbitrage.[334] This is as in the absence of a coordinated approach to bank bailouts, in the case of cross-border bank groups this may lead to shifting of assets and liabilities across borders to choose between different national measures.[335] Such regulatory arbitrage may arise also when different methodologies for valuation are used.[336] With ease of asset transfer within the group the result is reduced effectiveness of asset relief measures.[337] Emphasis on intra-group arbitrage in general terms suggests that the European Commission may have treated cross-border banks as internal *internal* markets - rather than cross-border organisations governed by a set of rights and obligations, as groups are.[338]At the same time, the European Commission was concerned with a possible re-nationalisation of banking markets, including through the disintegration of cross-border groups and sought to prevent "retrenchment within national borders and a fragmentation of the single market."[339] The Restructuring Communication expresses concern for the integrity of the internal market, whereby "the Commission will pay attention to the risk that restructuring measures may undermine internal market and will view positively measures that help to ensure that national markets remain open and contestable." Express concerns for durability of cross-border activity gave way to the overarching aim of ensuring financial stability under the Banking Communication 2013.[340] "Market fragmentation" – understood here not only as the decrease in transactional volume, but also break-down of cross-border structures and ring-fencing of cross-border activity of bank groups in 2013 was relegated to a secondary concern. Such a shift indirectly suggests an approach assuming that excess concern with preserving cross-border activity would have impeded recovery.[341] The early concern with market fragmentation

[334] Para. 17 Impaired Assets Communication defines the scope of the rules contained as applying to both "national" banks and "cross-border" banks.
[335] Para. 33 Impaired Assets Communication.
[336] Para. 37 Impaired Assets Communication.
[337] Para. 37 Impaired Assets Communication.
[338] See Section 3.3.2.
[339] Para. 36 Restructuring Communication.
[340] as opposed to considering "financial stability" as the objective of *aid* granted in the context of Art. 107(3)(b) TFEU, see: Adamczyk and Windisch (n 321).
[341] Para. 11 Banking Communication.

(renationalisation of cross-border activity) gave way to crisis fire-fighting as financial stability took the centre stage, with such a shift underpinned by European Commission's focus on destabilising consequences of arbitrage. This even if, the final of the crisis communications, the 2013 Banking Communication, still covers expressly the group scope: "all aid to such institutions incorporated in a Member State, including subsidiaries of such institutions, and having significant activities in a Member State will be examined under this Communication."

Notwithstanding the lack of a consistent general approach, stabilisation of cross-border groups was identified as the primary challenge of crisis management early on by financial economists assessing the impact of the GFC.[342] State aid control was then in fact lauded as the principal instrument of coordination of rescue of cross-border institutions, even where such efforts were not always successful[343] and some commentators in fact suggested that the application of state aid control has led to fragmentation of cross-border banks along national lines, via required divestments of "foreign" assets. The above doubts suggest that though no distinct Treaty requirement for consideration of cross-border activity of aid beneficiaries is in place, these nonetheless occupied the European Commission as a reflection of the phenomenon of cross-border bank groups.

4.1.3. State aid decisions concerning cross-border bank groups

European Commission's crisis state aid decisions provide rich material for analysis,[344] which has been drawn on by lawyers[345] and economists alike.[346] Little systematic analysis has been done which would seek to analyse the like cases with the like. To answer specific questions regarding the treatment of cross-border bank groups by the European Commission, the relevant state aid decisions were identified first – that is those cases where aid was approved in favour of an entity constituting part of a cross-border group since it is this category which – under BRRD – later gave rise to a distinct

[342]Allen and others (n 4) 6.
[343]Thomas (n 151).
[344]Laprévote, Gray and De Cecco (n 322).
[345] From a legal perspective, individual cases have been analysed on an *ad hoc* rather than systematic basis.
[346] See esp. Małgorzata Iwanicz-Drozdowska, *European Bank Restructuring during the Crises* (Palgrave Macmillan 2015).

set of new rules. To this end, relevant banks were identified from a complete list of cases published online (and regularly updated) as the "overview of decisions and on-going in-depth investigations of Financial Institutions in Difficulty."[347] The caselist was verified using the State aid register tool on the European Commission website[348] with the following search criteria: (a) the crisis legal basis for aid compatibility (i.e. Art. 107(3)(b) TFEU) and (b) case type (only *ad hoc* cases).[349] Only period until May 2017 was considered. Such search criteria ensure the comparability of the decisions analysed[350]to the extent the European Commission developed a crisis-specific framework for state aid to banks during the GFC, finding compatibility on the basis of the serious economic disturbance derogation.[351]

The search yielded 134 separate cases. Since only cases of cross-border banks are of interest,[352] significant cross-border presence of beneficiaries was identified following the list compiled by Iwanicz-Drozdrowska *et al* (for cases approved prior to 2013)[353] and S&P Bank Database for the cases approved after 2013.[354] Banks operating locally have been excluded from the sample, as well as banks with only representative branches

[347] List is available at: http://ec.europa.eu/competition/recovery/banking_case_list_public.pdf (last updated 31 December 2017).

[348] State aid register is available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3 (last accessed 20 August 2019). The availability of state aid information contrasts with the shroud of secrecy which covers supervisory action. Very few decisions of the European Commission were not made publicly available, e.g. 2012 decision approving aid to the German bank *BayernLB*.

[349] Although only individual state aid cases were considered, it should be emphasised that in a number of Member States the use of schemes was the primary channel through which aid was granted to the largest and most significant European banks (e.g. BNP Paribas in France and Nordea in Sweden). See Iwanicz-Drozdowska (n 345) 121.

[350]Even if the *idiosyncrasies of particular cases must be borne in mind, where they would have constituted an additional factor influencing the assessment by the European Commission.* For example on the history of the Belgian-French group *Dexia* and its origins as a bank funding local government activity see: Thomas (n 149). Other idiosyncrasies in the banks studied include cases of corruption leading up to the crisis of the Latvian Parex or the financial management of Banco Espirito Santo.

[351] Bank bailouts approved prior to the 2008 Banking Communication were approved on the basis of Art. 107(3)(c) allowing for aid for restructuring. On state aid rules applicable in a given situation see CJEU judgement Case C-334/07 *Commission v Freistaat Sachsen* (2008) ECLI:EU:C:2008:709.

[352] Using cross-border activity to identify relevant cases already anticipates that they will be addressed by the European Commission in its decisions, in a case of selection bias. The objective however is not to show that cross-border banks were treated differently from local banks – which may have very well been the case, but rather to identify specific features (enterprise or entity) of European Commission's approach to cross-border bank groups.

[353]Iwanicz-Drozdowska (n 345).

[354] Standard & Poor's Global Market Intelligence, SNL Financial Database, access via European University Institute.

abroad.[355] Further, where background review of literature on the economic crisis revealed relevant cases were omitted from this list, such decisions were added to the sample. This was the case of the MKB Bank – a bank bailed out by Hungary in 2013 – formerly owned by another significant aid beneficiary - the German Bayern LB.[356] The resulting sample of state aid cases to be analysed covered 29 cross-border banks and 112 decisions, spanning almost 2750 pages, taken by the European Commission between 12 November 2008 and 11 May 2017 (Table 5 provides a list of the bank cases, see Annex I for the list of cases as well as the references of case abbreviations used for citation).[357]

As a second step, an initial keyword search allowed to develop a framework which would allow to verify whether the cross-border scope of the beneficiary bank was indeed consequential in the assessment of the European Commission. The search for specific key words ("cross-border", "international", "foreign", "subsidiary" and "branch") allowed to verify whether[358]the cross-border activity of the bank was relevant and in what part of the decision text (i.e. at what stage of the procedural assessment, e.g. in the description of relevant facts of the case or the evaluation of compatibility).[359] This initial search allowed to determine how the cross-border group activity of the beneficiary was relevant, and – in the next step – to determine in what contexts the European Commission adopted either the enterprise or the entity approach to the cross-

[355] Although such a choice precludes potentially interesting lines of comparison of the decision-making practice of the European Commission, it also reflects the growing supervisory and regulatory recognition of the need to differentiate the treatment of financial institutions, not only to ensure the proportionality of regulatory requirements and therefore to tailor the regulatory burden so as not to unduly favour the large institutions with more capacity but given the different markets and the different functions which these institutions perform (Elena Carletti and Agnieszka Smoleńska, '10 Years on from the Financial Crisis : Co-Operation between Competition Agencies and Regulators in the Financial Sector' (2017).

[356] In some cases where the cross-border structure was politically and economically significant, this is not acknowledged (even in terms of description of the beneficiary) in the relevant European Commission decision. This would be the case in particular of Cypriot *Laiki.* For an account of this case see e.g. Laprévote, Gray and De Cecco (n 322); Panicos Demetriades, *A Diary of the Euro Crisis in Cyprus* (Palgrave Macmillan 2017).

[357] For further background information on Anglo Irish Bank, Dexia, SNS Reaal, Laiki Bank and Alpha Bank, see: HJ Dübel, 'The Capital Structure of Banks and Practice of Bank Restructuring' (2013).

[358] The state aid procedure as was already mentioned does not foresee specifically the relevance of cross-border activity of the aid beneficiary.

[359] Typically, decisions of the European Commission are composed of four sections: (i) procedure, (ii) description of the measure, (iii) assessment, (iv) decision. The second section - description of the measure - includes (a) description of the beneficiary, (b) events triggering the measure), (c) decision to intervene (d) position of member state. The third section – assessment - includes: (a) existence of aid; (b) compatibility with internal market (derogation); (c) conclusion).

border bank group. The detail of European Commission's decisions, which include an assessment of compatibility of the aid measure with the Treaties and of the beneficiary bank itself, allows to determine the scope of EU cross-border bank group governance prior to the introduction of the concept in EU law (Section 4.3).

Table 5: List of beneficiary cross-border bank groups (2008-2017)

	BANK NAME	BANK ABBREVIATION	GRANTING MEMBER STATE(S)
1	ABN AMRO	**ABN AMRO**	Netherlands
2	Allied Irish Bank	**ALLIED IRISH**	Ireland
3	Alpha Bank	**ALPHA**	Greece
4	Anglo-Irish Bank	**ANGLO-IRISH**	Ireland
5	Banco Comercial Português	**BCP (MILENIUM)**	Portugal
6	Banco Espirito Santo	**BES**	Portugal
7	Banco Internacional do Funchal	**BANIF**	Portugal
8	Bank of Ireland	**BOI**	Ireland
9	BayernLB	**BAYERNLB**	Germany
	BayernLB, Germany and Hypo Group Alpe Adria, Austria	**BAYERNLB, GERMANY AND HYPO GROUP ALPE ADRIA, AUSTRIA**	Germany/Austria
10	Caixa Geral de Depósitos	**CGD**	Portugal
11	Cajatres	**CAJATRES**	Spain
12	Carnegie	**CARNEGIE**	Sweden
13	Commerzbank	**COMMERZBANK**	Germany
14	Cyprus Popular Bank (Laiki)	**LAIKI**	Cyprus
15	Dexia	**DEXIA**	Belgium/France/Luxembourg
16	Eurobank	**EUROBANK**	Greece
17	Hypo Group Alpe Adria	**HGAA**	Austria
18	Internationale Nederlanden Groep	**ING**	Netherlands
19	Kaputhing	**KAUPTHING**	Finland
	Kaupthing		Belgium/Luxembourg
20	KBC	**KBC**	Belgium
21	Kommunalkredit	**KOMMUNALKREDIT**	Austria
22	Landesbank Baden-Württemberg	**LBBW**	Germany
23	Magyar Külkereskedelmi Bank	**MKB**	Hungary
24	Monte dei Paschi	**MPS**	Italy
25	National Bank of Greece	**NBG**	Greece
26	Nova Kreditna banka Maribor	**NKBM**	Slovenia
27	Nova Ljubljanska banka	**NLB**	Slovenia
28	Parex	**PAREX**	Latvia
29	Piraeus	**PIRAEUS**	Greece

4.2. Cross-border bank groups as aid beneficiaries

The analysis of the decision-making practice of the European Commission suggests that where the aid beneficiary was a cross-border bank, this was consequential from the point of view of determining the compatibility of aid with EU Treaties. To this end, this section considers first how the European Commission referred to cross-border scope of the aid beneficiary in the statement of facts (i.e. whether it referred to specific consolidation rules, intra-group links, whether it differentiated between EU and non-EU group entities) (Sections 4.2.1).[360] Second, I provide evidence that such cross-border scope affected the assessment of the aid measure, i.e. was consequential under the state aid rules as applied. Section 4.2.2 shows how cross-border activity of the bank influenced the determination that the state measure fell within the scope of Art. 107 TFEU. Section 4.2.3 provides evidence that the European Commission considered the cross-border dimension in assessing whether and under what conditions the aid measure was compatible EU Treaties.

4.2.1. Legal form and ownership of beneficiaries

The legal form of the beneficiary bank (i.a. incorporation) and its organisation (i.a. its internal business line structure and links to subsidiaries) were relevant from the point of view of the European Commission. However, there was no uniform approach.

In most cases analysed, the ownership and legal form of the beneficiary were made explicit: however there was little consistency which suggests the precise legal form was however irrelevant. For example, when approving state aid to two Portuguese banks, the European Commission refered to their incorporation and domiciliation.[361] In five cases, the place and number of stock exchanges on which the bank was listed was

[360] In considering the findings of this survey a word of caution is necessary with regard to the completeness of the information provided by the European Commission. In some cases, information concerning particular market activity was omitted due to ongoing controversies or aggregated (e.g. regional activity was emphasised rather than individual legal entities – even where the aid beneficiaries – pursuant to news reports – had a material presence in particular Member States). See further on in this context, also mentioning the temporary shutdown of the Romanian branch of Cypriot *Laiki* as evidence of internal market contagion, European Commission (n 127) 98–100.

[361] European Commission Decision on State Aid to Banco Espirito Santo, 3 August 2014, para. 13, European Commission Decision on State Aid to Banif, 21 January 2013, para. 6.

mentioned (five cases mentioned one exchange, seven cases – two). However, for the Italian bank *Monte dei Paschi*, we learn that its shares floated, yet the specific stock exchange was not mentioned.[362] Place of establishment in most cases was implicit – by function of the state granting aid. Only in a few cases specific information concerning the location of the company's seat was provided. In the *Allied Irish* decisions, the European Commission made a further explicit reference to the supervisor as a matter of group-level supervision, and indicated the location of the head office.[363]

In most cases bank's ownership structure was made explicit– including cases where banks were privately owned. In the case of privately owned (non-listed) *NLB*, the European Commission provided the ownership structure.[364] Such detailed information, however, was not consistently given. In fact even in a case, where aid was granted directly to a subsidiary of another bank, we did not learn what share of ownership that parent held (i.e. 100% shares or less).[365] Further, there was no correlation between the size and significance of the bank and the level of detail in bank's description – for example *ING* decisions only refer to the general structure of the group ("ING is composed of ING Groep N.V., a mother holding company that controls ING's banking activities via ING Bank N.V. ("ING Bank") and its insurance activities via ING Verzekeringen N.V. ("ING Insurance").[366] Very often the information of the structure was patchy: e.g. descriptions of the Belgian *KBC* cases covered the market share, but not the ownership structure.

With regard to the group's internal organisation, there was much variance in how it was described. The language used ranged from known categories such as "subsidiary" and "branch", to generic "legal entity" or "presence" – which did not distinguish the form of cross-border activity.[367] In the case of *Bank of Ireland* and *Anglo Irish* for example,

[362] European Commission Decision on State Aid to Monte dei Paschi, 17 December 2012.
[363] European Commission Decision on State Aid to Allied Irish Bank, 12 May 2009, para. 4.
[364] European Commission Decision on State Aid to NLB, 07 March 2011, para. 5 listing (in addition to 48,8 % owned by the Slovenian state "with persons acting in concert", the Belgian KBC (another aid beneficiary) holding 30.6%.
[365] European Commission Decision on State Aid to Kaupthing, 09 July 2009. It is worth recalling, that full 100% ownership of bank subsidiaries is not common, in particular in the Central and Eastern Europe.
[366] See e.g. European Commission Decision on State Aid to ING, 16 November 2012, para. 20.
[367] See Section 2.2 for rules which govern cross-border bank activity.

only the fact that the banks "have locations" in the UK was mentioned.[368] Otherwise the European Commission would merely state the markets where the entity "operates."[369]

The European Commission did reference, however, specific consolidation and competition rules, which prior to the GFC, provided the basic framework for cross-border bank group governance. For example, indirect reference to consolidation of accounts was made in 2009 *Hypo Group* decision, where the continued consolidation of accounts with parent *BayernLB* was mentioned.[370] Other cases cover the concept of control when referring to the scope of the beneficiary, e.g. in the case of *BANIF S.A.* where there were "entities falling under its control." [371]Merger Regulation was mentioned only in the context of the description of the beneficiary in one case of all the banks analysed.[372]

Other specific aspects of the cross-border bank's organisation which were relevant for determining the relationship between distinct parts of the group were the funding links. The European Commission considered the specific funding links which meant that the parent entity was "far more involved in the structure of FSA and its various activities than simply through its shareholding in FSA", which suggests that such funding links are critical in a group structure. Intra-group links were relevant from the point of view of the European Commission since they resulted in the provision of liquidity assistance in the form of non-covered bonds, underwriting of assets, valuation in consolidated accounts.[373]

Finally, the description of the aid beneficiary included the geographical scope of activities, in addition to the different business lines. Since it is the European group

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[368] European Commission Decision on State Aid to Bank of Ireland, 11 July 2011, para. 9, European Commission Decision on State Aid to Anglo Irish, 14 January 2009, para. 3.

[369] e.g. European Commission Decision on State Aid to NKMB, 20 December 2012, para. 5.

[370] European Commission Decision on State Aid to BayernLB (Germany) and Hypo Group Alpe Adria, 23 December 2009, para. 67.

[371] European Commission Decision on State Aid to BANIF, 21 December 2015, para. 2

[372] See European Commission Decision on State Aid to ABN AMRO 05 April 2011, Art. 2(a), where: "ABN AMRO Group" means ABN AMRO Group and its wholly owned direct or indirect subsidiaries, including the entities in which ABN AMRO Group has sole control within the meaning of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Merger Regulation")." The Merger Regulation was referred to in the context of specific restrictions on mergers and acquisitions imposed on the beneficiary – see European Commission Decision on State Aid to KBC, 18 November 2009, para. 66.

[373] Notably such an assessment was not necessarily made in the context of cross-border subsidiaries in the EU only. The cited reference concerns the subsidiary of Dexia active in the US, see: European Commission Decision on State Aid to Dexia, 13 March 2009 In the context of the US subsidiary of Dexia, para. 31.

which is the object of study in this monograph, the question posed was also whether the European Commission treated differently – when describing the aid beneficiary – those entities within the group which operated in other Member States than that of the beneficiary entity and third country entities. In some cases a very national-territorial approach was adopted: e.g. in the Greek banks' cases the European Commission referred to the "foreign" activities, distinguishing by those which were "Greek" and "non-Greek."[374]

In describing the scope of bank activity, the European Commission would follow rather the business model nomenclature and regional presence (e.g. Central and Eastern Europe[375] or Nordic region[376]) or OECD rather than EU membership when listing the relevant markets.[377] Alternatively, the alphabetical order of countries where the bank was active[378] or the decreasing market share order were followed. In few cases differentiations of the EU scope were made however: e.g. in the Portuguese *BCP* case, first EU countries are listed, then the EEA, to conclude with third countries.[379]

Most importantly from the perspective of group law and the principles of cross-border bank activity in the EU – the description of the geographical scope of a cross-border bank groups in some cases did not differentiate between "foreign" subsidiaries and branches.[380] Likewise, the relative size of "home" entity and foreign entities, was not made explicit, with the exception of the *Cyprus Popular Bank*, where it is evident that

[374] See e.g. European Commission Decision on State Aid to Alpha Bank, 9 July 2014, Annex, Chapter 1.

[375] European Commission Decision on State Aid to Kommunalcredit, 31 March 2011, para. 8 ; European Commission Decision on State Aid to Commerzbank, 7 May 2009, para. 19.

[376] European Commission Decision on State Aid to to Carnegie, 12 May 2010, para 4. Note that "Nordics" here include non-EU Member State Norway as well.

[377] European Commission Decision on State Aid to Parex, 24 November 2008, para. 4.

[378] European Commission Decision on State Aid to ING, 11 May 2012, para. 30.

[379] European Commission Decision on State Aid to BCP, 30 August 2013, para. 9, where: "BCP Group has the following stakes in the international operations (% held; total assets at the end of 2012): in Poland (65.5%; EUR 12.9 billion), Romania (100%; EUR 0.6 billion), Switzerland (100%; EUR 0.5 billion), Mozambique (66.7%; EUR 1.87 billion), Angola (50.1%; EUR 1.37 billion) and the Cayman Islands (100%; EUR 2.62 billion), all of which operate under the Millennium Brand."

[380] See European Commission Decision on State Aid to Eurobank, 29 April 2014, Annex, Chapter I, where the "Bank" comprises "the entire Eurobank Group with all its Greek and non-Greek subsidiaries and branches, both banking and non-banking." See Section 2.2 for the importance of the distinction between subsidiary and branch from the perspective of EU law.

the Greek branches are larger asset-wise, than the Cypriot parent.[381] In other cases, the geographical and organisational structure of the bank was treated separately.[382]

The level of inconsistency in the descriptions of aid beneficiaries may suggest that the group structure was irrelevant for the purposes of assessment of the aid and its compatibility with EU rules, however, as the following sections will show, this was not the case. In fact, the analysis revealed there is little doubt that the cross-border activity of aid beneficiaries was not only relevant in European Commission's assessment of aid, but consequential for the subsequent analysis of compatibility of the aid and proposed commitments with the Treaty.

However, there is already an important insight to be drawn from the inconsistencies identified in the way the European Commission described cross-border groups, namely the relative importance of certain features over others: business scope mattered more than technicalities of the legal form. This applied as well to the geographical scope, where the European Commission did not specifically pay attention to the EU-wide activity of the cross-border bank group as a feature to be distinguished from its overall global activity. On the other hand, the reference to the rudimentary EU group law features (accounting, competition law) in the context of the descriptions of cross-border aid beneficiaries, suggests such organisational law served as points of reference where needed.

[381] European Commission Decision on State Aid to Cyprus Popular Bank (*Laiki*), 13 September 2012, para. 16, where "Greek activities accounted for 50% of the assets of the Bank."

[382] E.g. European Commission Decision on State Aid to Piraeus, 28 December 2011.

4.2.2. Cross-border activity of beneficiary confirms the existence of aid

Cross-border activity of the beneficiary bank was consequential for the factual determination of whether the aid measure fell within the scope of Art. 107 TFEU. This determination had four distinct components, that is: (a) the aid beneficiary being an undertaking, (b) the measure being extended by a Member State; (c) in a manner capable of distorting competition and (d) affecting intra-EU trade.

There can be little doubt that aid to banks is aid granted to entities carrying out commercial activities (first condition).[383] Where the cross-border activity of the aid beneficiary was most consequential under Art. 107 TFEU was the determination of the distortive effect of aid on competition and intra-EU trade (third and fourth conditions). Even given the generally low standard of proof required to confirm this criterion is met,[384] from the point of view of building an understanding of an "EU cross-border bank group", the manner in which the European Commission adapted this test to cross-border activity, is telling.

In five cases merely the fact that the financial sector was open to "(intense), international competition"[385] was sufficient to satisfy the competition and intra-EU trade effect conditions – with no direct mention of the scope of activity of the beneficiary.[386] In one case an explicit two-step assessment was developed: the intensity

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[383] The landmark *Gerhard Züchner v Bayerische Vereinsbank* case (n. 88) which confirmed that banking was regulated by competition rules, rejected the argument made at the time that banking should be considered a Service of General Economic Interest (SGEI).

[384] Kelyn Bacon, *EU Law of State Aid* (2nd edn, Oxford University Press 2013) s 2.144.

[385] European Commission Decision on State Aid to HGAA and Bayern 19 July 2011, para. 25, European Commission Decision on State Aid to ING 17 November 2009, para. 38, European Commission Decision on State Aid to Kaupthing (Luxembourg), 9 July 2009, para. 35, European Commission Decision on State Aid to KBC, 18 December 2008, para. 41, European Commission Decision on State Aid to Parex, 24 November 2008. The case of the Finnish Kaupthing branch is a special case in this regard (European Commission Decision on State Aid to Kaupthing (Finland), 21 January 2009), where the beneficiaries of the aid were identified by the European Commission as all the banks in Finland except the Icelandic branch whose deposits were being replenished by the measure; the European Commission considered nonetheless the scope of its activity as evidence of effect on trade and competition distortion (para. 24).

[386] This was in fact the line taken in most cases. E.g. European Commission Decision on State Aid to Carnegie 12 May 2010, mentioning also the bank's presence in four Nordic countries (para. 27); European Commission Decision on State Aid to Kommunalcredit, 31 March 2011, para. 43, European Commission Decision on State Aid to LBBW 30 June 2009, para. 43, European Commission Decision on State Aid to Monte dei Paschi, 27 November 2013, para. 106, European Commission Decision on State Aid to NLB, 18 December 2013, para. 40, European Commission Decision on State Aid to Cyprus Popular Bank, 13 September 2012, para. 38, European Commission Decision on State Aid to Eurobank, 27 July 2012, para. 49, European Commission Decision on State Aid to BayernLB, 5 February 2013, para. 13.

of international competition criterion was supported by the cross-border activity of the beneficiary to meet the cumulative criteria of effect on intra-Community trade and competition.[387] In the *BCP Millenium* case the international activity of the bank was sufficient to attest the impact on trade and distortion of competition.[388] In the joint case of *Dexia*, the effect of the uncontrolled bank exit on the markets in the three countries was further mentioned as affecting intra-community competition.[389] The cross-border trade effect was not considered explicitly in all cases,[390] with merely "conferring an advantage and strengthening the position vis-à-vis competitors" being sufficient for both criteria to be fulfilled.[391] This generic formula also incorporated considerations of specific types of competitors in the domestic market – namely subsidiaries and branches[392]- and a consideration of specific markets where the bank was active,[393] even if these markets were not necessarily EU/EEA markets.[394] European Commission further made reference to aid allowing the beneficiary to continue to be active in *foreign* markets as having a distortive effect on competition.[395] Thus though generally in competition law banking was typically considered to have a "national" geographic scope, the European Commission in assessing the impact of the aid on competition also considered effects in "foreign" markets.[396]

In cases where the considerations of impact on competition and trade were treated separately, that is different scope of considerations was used to verify the two criteria, it was the strengthened position of the aid beneficiary or prevention of market exit which proved the distortive effect of aid on competition, while the international activity of the beneficiary and presence of foreign subsidiaries (or branches) in the domestic market

[387] European Commission Decision on State Aid to Bank of Ireland, 26 March 2011, para. 44.
[388] European Commission Decision on State Aid to BCP, 30 August 2013, para. 73.
[389] European Commission Decision on State Aid to Dexia, 19 November 2008, para. 24.
[390] European Commission Decision on State Aid to BayernLB, 18 December 2008, para. 42.
[391] See e.g. European Commission Decision on State Aid to Commerzbank, 7 May 2009.
[392] European Commission Decision on State Aid to Caixa Geral de Depositors (CGD), 18 July 2012, para. 41.
[393] European Commission Decision on State Aid to NKBM 20 December 2012, para. 26.
[394] European Commission Decision on State Aid to Bank of Ireland, 26 March 2009, para. 44 mentioning US, Australian and Canadian markets.
[395] European Commission Decision on State Aid to Piraeus, 27 July 2012, para. 354, European Commission Decision on State Aid to National Bank of Greece, 23 July 2014, para. 405.
[396] European Commission Decision on State Aid to Allied Irish Bank, 21 December 2010, para. 64, European Commission Decision on State Aid to Anglo Irish Bank, 31 march 2010, para. 92.

which provided evidence of distortion to trade.[397] This could include a specification that the entity was active in the "European" markets.[398] Alternatively, only the presence of foreign subsidiaries in the country was enough to show the competition impact, while international activity provided evidence of trade being affected.[399]

In a number of cases a more nuanced approach was developed. In the Hungarian *MKB* case aid was held to strengthen the position of the bank on the domestic market, where foreign branches were also present, the European Commission also emphasised that global financial markets "by their very nature" affect trade.[400] In other words, financial markets underpin global trade, and therefore any state measure which affects an actor in these markets, must affect international economic flows. In similar vein, the *BANIF* decision suggested aid "prevents the normal outcome of market forces" and affects trade "given the liberalised nature of financial services."[401]

That cross-border activity of the banks, as well as the presence in the domestic market of "European financial institutions" or of subsidiaries and branches from "other Member States" served to confirm the existence of aid reveals the European Commission's understanding of how competition functions in the financial sector and of the role of finance in intra-EU trade. Under the state aid rules as applied, aid to cross-border scope of beneficiary bank as if by definition affects intra-EU trade and competition.

[397] European Commission Decision on State Aid to Alpha Bank, 27 July 2012, para. 49, European Commission Decision on State Aid to Piraeus Bank, 27 July 2012, para. 54, European Commission Decision on State Aid to Cajatres, 20 December 2012, paras. 87-88.
[398] European Commission Decision on State Aid to NBG, 4 December 2015, paras. 97-98, European Commission Decision on State Aid to Allied Irish Bank, 12 May 2009, para. 44.
[399] European Commission Decision on State Aid to ABN AMRO, 5 April 2011, para. 219.
[400] European Commission Decision on State Aid to MKB, 16 December 2015, para. 85.
[401] European Commission Decision on State Aid to BANIF, 21 December 2015, para. 97.

4.2.3. Consequences of cross-border scope for aid compatibility

Once the aid was deemed to fall within the scope of Art. 107 TFEU and the application of derogation allowing for aid under Art. 107(3)(b) TFEU was confirmed, the next step of the assessment was to determine whether the aid complied the specific conditions as developed by the European Commission in the Crisis Communications. In other words, under the distinct legal basis of Article 107(3)(b) TFEU a separate doctrine of *bank* state aid control was developed: a version of the general state aid principles of aid appropriateness, necessity and proportionality calibrated to the needs of the GFC.[402] In general terms, appropriateness requires aid to be well-targeted in order to achieve its objective (e.g. financial stability). The state measure is necessary when it aid is limited to the minimum necessary in both form and amount. Finally, aid measure is proportionate when it balances against any distortions to competition. These general principles were translated into specific requirements to be fulfilled by the banks as part of their restructuring plans accompanying the notification of aid by the Member State.[403]

To be deemed compatible with EU state aid rules, restructuring plans presented to the European Commission by the notifying Member State on behalf of the failing bank, were to demonstrate: the return to long-term viability, equitable burden-sharing and correction of excessive distortions to competition.[404] Specific principles governing the approach of the European Commission were consolidated in the 2013 New Banking Communication and required that:

a) aid be limited to minimum necessary;

[402] Point 15 of 2008 Banking Communication lists the principles as "appropriateness (to be well targeted to its objective, e.g. to remedy a serious disturbance in the economy, and take the most appropriate form for that purpose to remedy the disturbance); necessity (to be necessary to achieve the objective, and remain at the minimum necessary to do that); proportionality (the positive effects of the aid must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives)." For the detailed application see e.g. European Commission Decision on State Aid to Parex, 16 April 2014.

[403] This requirement was not a general requirement in the first phases of the financial crisis. From 2008 only credit institutions receiving aid over 2% RWA, a threshold beyond which institutions were deemed to be fundamentally unsound, were required to submit restructuring plans with the aid notification. The requirement of submission of restructuring plans was extended to all institutions with 2011 Prolongation Communication (European Commission, *Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis*, OJ C 356, 6.12.2011, p. 7).

[404] Point 31 Restructuring Communication, for the operationalisation of the requirement see European Commission Decision on State Aid to Bank of Ireland, 20 December 2011, para. 12, European Commission Decision on State Aid to KBC, 18 November 2009, para. 141.

b) distortions to competition be limited;
c) sufficient own contribution and burden-sharing be assured; and
d) aid measure ensured the restoration long-term viability of the beneficiary.

The European Commission assessed the design of the aid measure through these lens. The restructuring plans presented by the banks had to ensure that these principles were satisfied by a set of specific measures to be implemented, known as commitments, to which the Member State (as the addressee of the European Commission's decisions) commits itself or the beneficiary undertaking.[405]

Cross-border activity was consequential in the assessment of restructuring plans in the following way. Plans were composed of an assessment of the bank business model and a verification that the aid measure and the restructuring plan ensure the return to viability of the beneficiary banks. European Commission considered – in a number of cases – that the cross-border activity was a defining element of the bank business plan and therefore had to be addressed as part of the necessary restructuring.[406] The number of observations here suggests the European Commission considered cross-border activity to be a contributing factor to the (systemic dimension of) the crisis.

The cross-border scope of the activity of the aid beneficiary was an important part of the analysis "underlying problems with bank business model" as determined by the European Commission. In half of the cases considered, specific reference was made to cross-border activity as one of underlying business problems of the bank and a source of risk in the bank's activity. Three scenarios could be distinguished: (a) bank was exposed to risks in the host Member State economy (general considerations), (b) there were funding problems within the group (specific intra-group considerations), (c) the domestic market had an international dimension.

In the first set of cases, the European Commission considered the exposure of the bank beneficiary to specific geographic markets (such as in CEE and SEE) via the general

[405] For the compensatory measures adopted as commitments by banks over the course of the crisis see more generally: Sahar Shamsi, Pantelis Solomon and Nicole Robins, 'Compensatory Measures in the Banking Sector' in François-Charles Laprévote, Joanna Gray and Francesco De Cecco (eds), *Research Handbook on State Aid in the Banking Sector* (2016).

[406] Adamczyk and Windisch (n 321).

business links and any exposures to specific products.[407] Somewhat more generally, the European Commission considered "an aggressive" bank growth strategy abroad, as a business strategy with implications from the point of view of state aid law.[408]

In the second set of cases, the risks arising specifically from cross-border structures were identified by the European Commission, e.g. intra-group funding and liquidity.[409] International subsidiaries were considered a drain on liquidity: either with their location specified[410] or not.[411] Problems faced by the subsidiaries contributed to problems at the parent level, e.g. exposures to foreign currency loans[412] (a well-known problem throughout the CEE region in the aftermath of the financial crisis) and specific regulatory measures adopted by regulators in the host markets in that context.[413] The *Cyprus Popular Bank* decision meanwhile pointed to the runs on the Greek branch as one of the causes of the bank's troubles.[414]

The extent to which group aspects were relevant in this context sheds light on the approach and reflects the prevailing concepts of centralised group management and the specific ways in which the position of legal entities within the group structure is affected by virtue of being part of the group. Such interconnectedness and dependence was seen as problematic in the eyes of the European Commission. In the case of the Luxembourgish subsidiary of *Dexia*, the decision emphasised that though it was not the entity at the heart of the problem of the group, nonetheless the situation of the group as a whole affected its position.[415] The complexity and heterogeneity of the group, was considered one of the underlying problems of *HGAA/Bayern*.[416] Intra-group funding issues were raised also in the case *Bank of Ireland*, where the European Commission

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[407] European Commission Decision on State Aid to HGAA/Bayern, 22 June 2010, para. 26, European Commission Decision on State Aid to BCP, 30 August 2013, para. 14 on Greek exposures of BCP Millennium European Commission Decision on State Aid to LBBW, 30 June 2009, para. 71.
[408] e.g. European Commission Decision on State Aid to HGAA, 22 June 2010, para. 13.
[409] Notably, intra-group financing was considered to distort competition in markets other than in the state where the aid was granted, see below.
[410] European Commission Decision on State Aid to Pireus, 23 July 2014, para. 323.
[411] Loss making Romanian and Bulgarian subsidiaries identified as a drain on liquidity in Greek NBG case: European Commission Decision on State Aid to NBG, 23 July 2014, para. 372.
[412] European Commission Decision on State Aid to HGAA, 3 September 2013, where at para. 49 "by granting a significant part of its retail and small and medium-sized enterprises ("SME") loans in SEE countries in Euros or Swiss Francs, the bank exposed itself to additional repayment risks."
[413] European Commission Decision on State Aid to BayernLB, 5 February 2013, paras. 96-98.
[414] European Commission Decision on State Aid to Cyprus Popular Bank, 13 September 2012, para. 16.
[415] European Commission Decision on State Aid to Dexia (Luxembourg), 25 July 2012, para. 28.
[416] European Commission Decision on State Aid to BayernLB, 5 February 2013, para. 51.

required the UK branch be incorporated and self-funding, since its prior inability to do so was considered an underlying problem of the bank.[417]

Finally, in the third set of cases, the European Commission referenced the specific international aspects of the "home" market as contributing to underlying business problem of the bank. In the Latvian *Parex* cases for example, the loss of trust in the bank – leading to the bank run – was attributed to the fact that "Parex is the largest Latvian bank without a strong foreign parent,"[418] and that further meant the bank "chose an inadequate business strategy and made some high-risk decisions in the face of intense competition from more sophisticated subsidiaries of foreign banks."[419] Though the European Commission did not differentiate between EU and non-EU markets in this case (barring the specific case of exposures to particular crisis hotspots such as the US), the cross-border activity of the bank was treated as risky internationalisation, also in the EU-specific context. Specific intra-group cross-border exposures were considered to be a distinct source of bank problems – in this case the specific entity to which aid was granted, rather than the bank group as a whole.

With no enterprise approach to cross-border bank groups in sight, the cross-border activity of the bank played a significant role in determining that the aid measure fell within the scope of the Treaty (i.e. that it distorted competition in particular) and was the cause of the beneficiaries need for aid (that is the bank's underlying business model problems). In such cases the required commitments, structural and behavioural, were cross-border as well. In fact, in all the cases studied, the cross-border scope of activity of the aid beneficiary was affected in one way or another by European Commission's exercise of state aid control.

[417] European Commission Decision on State Aid to Bank of Ireland, 15 July 2010, para. 64-65.
[418] European Commission Decision on State Aid to Parex, 29 July 2009, para. 7.
[419] European Commission Decision on State Aid to Parex, 15 September 2010, para. 13.

4.3. State aid and cross-border groups – an entity or and enterprise approach?

The previous section has shown – in general terms – that cross-border activity of the beneficiary banks was relevant and consequential from the point of view of assessing the compatibility of state aid with the EU Treaties.The inconsistencies in the description of aid beneficiaries show, however, that though the cross-border activity of the beneficiary was formally relevant, the precise legal form was not. This finding in itself suggests – as was already emphasised in previous sections – that from the point of view of application of EU rules to cross-border banks it is the function (defined by authorisation procedure and the overall regulatory framework) which is relevant rather than the precise (non-harmonised) legal form. [420]

The next step of the analysis is therefore to determine whether the European Commission adopted an enterprise (group-wide) or an entity (single state) in the context of the specific building blocks corresponding to the main features of group law as identified above.[421] I suggest that in the context of state aid law as applied by the European Commission over the course of the GFC, these building blocks consist in:

a) de-partitioning within the cross-border group which enables risk-sharing;
b) policy objectives pursued which enable an enterprise approach;
c) procedure of cross-border cooperation between authorities;
d) (intra-group) corporate governance.

The first building block tests the durability of intra-group partitioning across geographic borders and legal entities. Specifically this concerns the question of *where* aid was granted as a measure of intra-group risk-sharing allowed, foreseen and acknowledged by the rules. The "where" has two dimensions: it entails both the possibility for the aid to be granted *across borders* (and forms such cross-border extension of aid could take) as well as the *location of the beneficiary within the group structure* (i.e. whether the aid is granted to the parent, the subsidiary or the branch). The location of aid dimension is concerned with risk-sharing within the group, understood both as the distribution of

[420] Compare with Section 4.2 and see Section 3.5.
[421] See Section 3.5.3.

risks, but also intra-group solidarity arrangements, to the extent these are covered by the decisions of the European Commission.

The second block concerns the scope of the policy objectives of state aid control, that is the question of whether the European Commission implemented the state aid rules by reference to policy objectives related to the specific state where the beneficiary was active (given the “state” dimension of the EU policy) or whether in some contexts it rather referred to the broader EU market concerns. In other words, this building block concerns the specific policy aims which allowed for an enterprise approach to be pursued by the European Commission.

The third block concerns the form of public institutional coordination. It covers the terms of the interaction between the national authorities with and via the European Commission. Though the Procedural Regulation limits the scope for bilateral exchanges between the beneficiary of aid and the European Commission, effectively new forms of coordination of cross-border cases where established over the course of the European Commission’s crisis decision making practice.[422]

The fourth building block is concerned with the principles of corporate governance within the cross-border group specifically, that is whether – and if so, in what way – the European Commission referred to specific elements of group governance in its decisions. Was top-down decision-making by the parent assumed (e.g. via commitments on other legal entities within the group, which assumes their enforceability intra-group)? Did the European Commission refer to specific stakeholders of the bank in this regard, shareholders or others?

[422] See Recital 11 Procedural Regulation, also above Section 4.1.1..

Table 6 summarises these building blocks.

Table 6: Building blocks of an enterprise approach in state aid

	ENTITY APPROACH	ENTERPRISE APPROACH
DE-PARTITIONING	AID GRANTED WITHIN ONE STATE	AID GRANTED CROSS-BORDER
	AID GRANTED TO PARENT	AID GRANTED TO SUBSIDIARY/BRANCH
POLICY OBJECTIVES	ONE STATE ECONOMY	EU WIDE ECONOMY
TERMS OF INTERACTION (PROCEDURE)	DISJOINT CASES	COORDINATION IMPLICIT EXTENSION TO STATES NOT PART OF PROCEDURE
CORPORATE GOVERNANCE	NO CROSS-BORDER COMMITMENTS	CROSS-BORDER COMMITMENTS / RING-FENCING

4.3.1. Intra-group partitioning

The corporate veil – that is the legal device which insolates one entity within the group from the others – impedes mutual liability and therefore risk-sharing. Where bank bailouts were oriented precisely at reducing risk of failure (by restoring the viability of the bail-ed out banks), questions of intra-group exposures arose in the context of cross-border groups.[423] Was de-partitioning observed or were the juridical and geographical jurisdictions preserved? In the first case, this would mean that regardless of the cross-border group structure, an enterprise approach prevailed. In the second case, a fragmented approach to a cross-border group would suggest the prevalence of an entity approach. On a doctrinal level, no single answer is to be found – though general competition policy develops a holistic approach to "single" undertakings for the purposes of enforcement of liability for breaches of antitrust in particular, state aid control has remained more deferential to the corporate veil, specifically allowing for aid to be granted only to a part of a cross-border group. In the latter case, this means that intra-group partitioning is preserved – the mere fact that a state provides assistance to one entity within the group – in the light of limitations of intra-group transfers for example – does not mean that the whole corporate group benefited from such aid.[424] Understanding whether bailouts allowed for de-partitioning allows to understand whether there is scope for cross-border risk-sharing under EU law.

In the context of bailouts, two approaches to aiding cross-border banks could be identified. As a rule, each country bailed-out it "its" part of the bank. In a few unique cases a form of cross-border and intra-group aid was identified by the European Commission. The first situation – where state aid cases were either coordinated across a number of Member States (*Dexia*), joined procedurally (*BayernLB/Hypo*) or not (*BayernLB* and *MKB*) - reflected the "entity" approach. Alternatively, accepting that aid could be granted across the border and legal entity boundaries (e.g. Austrian guarantee to *BayernLB*) reflected the enterprise approach (i.e. cross-border risk-sharing was allowed).

[423] See Section 2.4.3.

[424] Case T-324/00 *CDA Datentraeger Albrecht v Commission* (2005) ELCI:EU:T:2005:364, para. 93, where: "*European Commission cannot presume that just because an undertaking belongs to a group of undertakings, it benefits from aid received by the latter, where the transfer mechanisms within the group have been used only to the undertaking's detriment and not for its profit"*. More recently on the transfer of aid within the group when the beneficiary was acquired subsequently to the granting of the aid see: Case C-357/14 *Dunamenti Erőmű/Electrabel v* Commission (2015) ECLI:EU:C:2015:642.

As a rule each Member State bail-ed out the legal entity which was operating in its territory, i.e. a strictly entity approach to cross-border bank group bail-outs prevailed.[425] Even when a joint procedure of coordination between the measures implemented by different Member States was put in place - the European Commission meticulously set down the proportions of respective exposures to the aid measure (e.g. in the case of *Dexia's* joint and several liability guarantee Belgium was exposed 60.5%, France 36.5% and Luxembourg 3%).[426] Such an approach suggests that even where implicitly the scope of the group and internal group arrangements was recognised, a cross-border bank group was treated in aggregate terms – as a sum of parts demarcated by the national borders.

The is also a reverse enterprise approach to be identified, namely explicit ring-fencing and limits on intra-group financing. Most of the cases in fact specifically required a limitation of intra-group exposures in quantitative terms be introduced by the aid beneficiaries. Specific ring-fencing requirements can be identified in the state aid decisions by searching for cross-border structural commitments imposed on beneficiaries (other than outright divestments). Such requirements were imposed to ensure that the aid was compatible with the internal market, that is that the aid was limited to the minimum necessary.[427] They as well provide evidence that the European Commission considered such forms of intra-group transfers of aid (and therefore risk-sharing) possible. Specific ring-fencing commitments:[428] included obligations to decrease exposure to intra-group funding,[429] caps on equity and/or subordinated debt injections over a set percentage of risk-weighted assets to subsidiaries unless European Commission's approval was granted[430] or even an outright prohibition of financing of foreign subsidiaries.[431] These were not only individual targeted measures oriented – for example – at limiting distortions to competition of a particular case,[432] but also general horizontal measures prescribed by the terms of the Programme in the case of Greece for

[425] Often disregarding as well the distinction between subsidiaries and branches so cherished by the formal design of EU banking law. See Section 2.2.1.
[426] European Commission Decision on State Aid to Dexia, 19 November 2008, p. 38.
[427] See Section 4.2.3.
[428] European Commission Decision on State Aid to Dexia, 28 December 2012, paras. 114,122.
[429] European Commission Decision on State Aid to CGD, 18 July 2012, Annex 2012.
[430] European Commission Decision on State Aid to Eurobank, 29 April 2014, paras. 115-117.
[431] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 71 for a prohibition of financing of the Turkish subsidiary.
[432] European Commission Decision on State Aid to Parex, 15 September 2010, para. 154 for a specific cap imposed on cross-border activity considered as limitations of distortions to competition

example.[433] There ring-fencing was required by the relevant agreements and institutions created pursuant to the Memoranda of Understanding and subsequently in the individual cases of bank bailouts.[434] Such ring-fencing seeks to prevent "aid" from travelling within the group. It therefore assumes that this is possible, namely that aid granted to the parent company can be transferred to other parts of the group, such as cross-border subsidiaries.

In a few of cases however, the European Commission made a leap over the fence – allowing for aid to be granted across borders, adopting a fully-fledged enterprise approach. Two such cases were identified – the Belgian contribution to the bailout of the Luxembourgish subsidiary of the Icelandic *Kaupthing* bank, and aid granted by Austria to the German bank *BayernLB*.

In the first case, the Belgian state extended a loan to the Luxembourg state specifically for the purpose of recapitalising the Belgian branch of the Luxembourgish subsidiary of *Kaupthing*. The EC's decision in a joint case addressed to both Belgium and Luxembourg, stated that "the loan of EUR 160 million from the Belgian State to the Luxembourg State (…) is *simply a transfer of funds between States.* Irrespective of how the States intend to use them, the fact is that those funds are being paid not to the Bank but to the Luxembourg State, which is responsible for how they will ultimately be used" [emphasis added].[435] The loan granted by one Member State to another for the specific purpose of recapitalising the branch operating on its territory was not considered aid. With the bank operating as a branch in Belgium not converted into a subsidiary, the extension of the loan to Luxembourg was the only way for Belgium to recapitalise the branch operating on its territory (as the legal entity was in Luxembourg). In this case, it appears the European Commission wished to avoid finding cross-border aid as such (namely Belgian state granting aid to the Luxembourgish subsidiary of *Kaupthing*).

This is however, precisely what happened four years later, when the European Commission found that the Austrian state had granted aid to the parent bank (the German *BayernLB*) of a subsidiary established on its territory (that is *Hypo Group Alpe*

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[433] European Commission Decision on State Aid to Piraeus, 27 July 2012 quoting the Hellenic Financial Stability Fund in the context of the aid conditionality.

[434] European Commission Decision on State Aid to Bank of Ireland, 26 March 2009, para. 12 for a reference to the Irish Bailout to this end.

[435] European Commission Decision on State Aid to Kaupthing, 21 January 2009, para. 31.

Adria).[436] Specifically, in a 2013 decision concerning *BayernLB*, EC found aid to have been granted by *both* Germany and Austria to the bank.[437] Concretely, Vienna had bailed out the Bavarian Bank by guaranteeing the intra-group exposure of *HGAA* to *BayernLB*. As a consequence Austria was liable for losses incurred by *BayernLB* as a result of its ownership of *Hypo*.[438] Commission argued further that if it had not found aid to have been granted to the German bank by Austria, the recapitalisation of *HGAA* would have entailed aid granted by *BayernLB*. This would be tantamount to accepting that (state) aid can be provided not only by a state, but also by the parent undertaking in another Member State. In a challenge brought subsequently by Austria before the CJEU,[439] the Court confirmed that the guarantee extended by Austria put *BayernLB* in a more favourable position than other creditors of *HGAA*, and a result constituted (cross-border) aid.[440] The Court rejected the Austrian government's argument that cross-border aid amounts to violation of Art. 125 TFEU.

Specifically, Austria argued that it had never intended to provide cross-border aid to the parent bank, and that moreover there is no provision in the Treaties which would allow for such a "generous" aid to be granted by one Member State to another, and further that – in any case – any such aid – given *BayernLB* was state-owned – would be a violation of Art. 125 TFEU.[441] While such argumentation is clearly strenuous, it presented the Court with a quandary to resolve. How to allow for cross-border aid without violating the notorious Treaty prohibition of monetary financing? Solution was found in the *aims* of Art. 125 TFEU, namely that the provision has as its objective "sound budgetary policies" of Member States.[442] Even if the aid granted by Austria in favour of *BayernLB* were to benefit Bavaria and German Republic, the Court argued, Austria had not demonstrated that this would have an impact on the sound budgetary policies of Germany.[443] Notwithstanding the particular circumstances, what is of most relevance here, are the doors which the Court leaves open, rather than the (somewhat strenuous) argument it makes to this end. In particular, aid in cross-border scenarios

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[436] James Shotter, 'Austria Shifts Hypo Winding-down Burden to Investors' *Financial Times* (11 June 2014).
[437] European Commission Decision on State Aid to BayernLB, 5 February 2013.
[438] See to this end also European Commission Decision on State Aid to HGAA/BayernLB, 12 May 2009.
[439] Case T-427/16 *Austria v European Commission*, ECLI:EU:T:2016:41.
[440] *Austria v European Commission,* para. 79
[441] Ibid, para. 97.
[442] Ibid, para. 100.
[443] Ibid, para. 101.

does not only arise out of the cross-border coordination of all the countries concerned (*Dexia*), but can also involve cross-border extensions of aid and solidarity measures within cross-border bank groups. While the case concerned a publicly owned German bank, with the legal form specificities this entails, one could imagine such an argument being rejected also in the case of a privately-owned bank which eventually relies on a public backstop as well in crisis scenarios. Therefore, as long as soundness of budgetary policies of the relevant Member States is not impacted, cross-border aid which is operationalised via intra-group exposures is compatible with the Treaties.

The sovereign-bank nexus theory assumes that the link between the public and the private entity occurs within one Member State – even if state aid now allows for coordinated and supranational funds, always perceiving these however in terms of cross-border coordination and aggregation. This would mean that cross-border groups must necessarily disintegrate in crisis – rendering any concept of cross-border group governance unworkable. The empirical evidence would suggest that this is indeed what happened with banks such as *Dexia*. This would mean, however, that cross-border aid by a Member State to a legal entity forming part of the group structure in another Member State would not be possible. And yet this is not what happened – in two of the cases studied, cross-border aid was granted either directly to the beneficiary (*BayernLB*), alternatively a loan granted to the state of establishment of the parent entity did not amount to aid (*Kaupthing*).[444] These two cases, suggest alternative routes of enabling an enterprise approach to risk-sharing within cross-border bank groups under EU state aid law – via the state and via intra-group exposures.

As far as intra-group risk sharing and departitioning is concerned, though the general approach appears to have been an entity one under EU state aid law in crisis, in the analysed decisional practice of the European Commission there is evidence of both an enterprise and a "reverse" enterprise approach. That is, the European Commission recognised there is scope for intra-group risk-sharing both by forbidding it (via ring-fencing) and recognising it (via allowing for aid to travel across border).

[444]European Commission Decision on State Aid to Kaupthing, 21 January 2009, para. 31.

4.3.2. Policy objectives

The conventional approach to state aid focuses on the role of the control exercised by the European Commission as a tool for ensuring a level-playing field in the internal market, both between companies and between the Member States. Over the course of the crisis a distinct teleological approach was developed to the role of state aid control as securing financial stability across the Union via the process of assessing each and individual bank bailout granted.[445] Significant resources were invested to this end as well – new dedicated teams were put in place as part of the 100-strong task force within DG Competition, often composed of state aid experts but as well experts from the industry. In their exercise of control over the bailout measures, they may have pursued the general aims of state aid law, but the sector specific – that is also beneficiary specific considerations – came into play as well. This was the case under the bank-specific Crisis Communications, which focused on cross-border banking as a factor which could amplify regulatory arbitrage.[446] In this section the findings of the analysis are presented with regard to the aims which the European Commission pursued.

4.3.2.1. Financial stability between the internal market and a hard plac*e*

The possibility that a distinct teleological approach was developed by the European Commission arose from the specific grounds on which state aid measures were deemed to be compatible with the Treaty – that is Article 107(3)(b) TFEU. Pursuant to its wording, aid used "to remedy a serious disturbance in the economy of *a* Member State" can be approved. The formulation of this article appears to suggest that only the disturbance of one Member State is to be considered.[447] This may pose a limitation to the cross-border scope of considerations which may be brought in in the case of large cross-border entities such as bank groups. The single-state centricity of state aid and the derogation imposes national lens, which favour ring-fencing and fragmentation, rather than holistic cross-border solutions.

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[445] François-Charles Laprévote and Sven Frisch, 'Preserving Cross-Border Banking in the Face of the Crisis: State Aid Policy under the Financial Trilemma' in François-Charles Laprévote, Joanna Gray and Francesco De Cecco n. 322.

[446] See Section 4.1.2.

[447] For the restrictive interpretation of this clause by the CJEU see in principle Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and Volkswagen AG v Commission (1999) ECLI:EU:C:2003:510, para. 167. European Commission Decision on State Aid to KBC, 30 June 2009, para. 58.

The national lens were reinforced by the means through which the European Commission determined that financial stability was threatened ("financial instability" was deemed to be the "exceptional disturbance" provided for in the Treaty).[448] Namely, The European Commission required that the national central bank confirm that without the aid being granted, the financial system would be threatened. Most central banks (even those part of the Eurosystem), then focused on the domestic market.[449] Some have, however, also considered the financial stability impact in other Member States. Notably, this was the case for Austrian Central Bank.[450] To the extent that the scope of what falls within the considerations required to prove the adverse impact on financial stability is relevant for the geographical dimension, the European Commission considered that the link between the individual state aid measure in favour of a bank was linked with the whole economy ("the system') via references to the 'lending to the real economy."[451] Consequently the European Commission prioritised the financial stability of the specific Member State where it was approving the aid.

However, such a restricted interpretation could be argued to be at odds with the overall aims of EU law, and state aid law in particular. The very objective of EU state aid law is after all preventing a dislevel playing field and a refragmentation of the internal market through national subsidies, where in the context of growing interdependence the effects of any such distortive actions are amplified.[452] Integration in the internal market does not occur only via regularised market transactions, but also via structures and organisations established by cross-border ownership and control – in the case of banks: bank groups, where the two defining dimensions of cross-border bank governance, that is geography (cross-border) and organisation (group) are intrinsically linked given that the internationalisation of EU banks occurs via cross-border structures such as subsidiaries and branches.[453] In other words, state aid control cannot only to be employed with view of securing a level-playing field between market actors, but

[448] Per 2008 Banking Communication the derogation could be applied in cases of a "genuinely exceptional circumstances where the entire functioning of financial markets is jeopardised."
[449] See e,g, European Commission Decision on State Aid to KBC, 30 June 2009, paras. 62-64, where "as confirmed by the letter of NBB, KBC plays a pivotal role within the Belgian financial system and the Belgian economy as a whole."
[450] European Commission Decision on State Aid to HGAA, 23 December 2009, para. 55. Also Decision of 3 September 2013, para. 101.
[451] European Commission Decision on State Aid to Bank of Ireland, 26 March 2009, para. 16.
[452]see De Cecco in: Joanna Gray and N Orkun Akseli (eds), *Financial Regulation in Crisis?: The Role of Law and the Failure of Northern Rock* (Edward Elgar 2011) 68.
[453]Sist (n 26).

likewise as a tool for establishing an internal market, an integrated common space. The Treaty of Lisbon in particular has reinforced the framing of the objectives of EU competition policy in terms of "integration" and the internal market.[454] As a consequence it could be argued that the European Commission should have in any case developed an enterprise approach to the operation of a cross-border bank groups, or at the very least incorporate considerations of the entirety of EU geographical markets where the bank is active.

In fact this was somewhat the case even within the national lens imposed by the wording of Art. 107(3)(b) TFEU the European Commission has sought to bring in an internal market perspective into its assessment. First, in a number of cases it considered the impact of aid or conditions of aid compatibility with reference to other national EU markets than that of the beneficiary bank. In other cases, the assessment extrapolated findings of the impact in one Member State to all other states where the group was active. Even if the European Commission was not always consistent in this regard,[455] there is evidence that the general pan-EU market aims of state aid control have led it to adopt a pan-group perspective. Again this was inconsistent, as even in cases which concerned coordinated aid by two Member States, the impact of the aid on financial stability of the economies was considered separately.[456]

Notwithstanding the limited wording of Art. 107(3)(b) TFEU in the few cases which were procedurally joint (i.e. they concerned a cross-border bank which was bailed out by multiple Member States), the European Commission considered that the occurrence of "the exceptional circumstance" in one Member State could allow for aid to be granted in the countries concerned. In the early *Dexia* cases, where the EC's decisions were addressed to three Member States jointly – the compatibility assessment referred

[454] The Treaty of Lisbon context is particularly important in this regard, namely the reframing of competition law objectives in terms of the internal market see: José Luis Buendia Sierra 'Writing straight with crooked lines: Competition Policy and Services of General Economic Interest in the Treaty of Lisbon' in: Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012) 350; Umut Aydin, 'Issue Framing in the European Commission: State Aid Policy and the Single Market' (2014) 12 Comparative European Politics 141; Kokkoris and Olivares-Caminal (n 320).

[455] In the Greek Eurobank case, the European Commission considered separately the impact of the aid on competiton in foreign markets, European Commission Decision on State Aid to Eurobank, 26 November 2015, para. 119.

[456] In the 2009 Hypo Alpe Adria/BayernLB decision the European Commission considered impact on the financial stability separately, European Commission Decision on State Aid to HGAA/BayernLB, 12 May 2009, paras. 83 and 85.

specifically to the Member State of establishment of the parent undertaking – that is Belgium – deeming the determination of whether the economies of 'hosts' are affected - that is of France and Luxembourg –unnecessary.[457] Similarly, the *Kaupthing* Luxembourg subsidiary was granted aid by both Belgium and Luxembourg, referenced the exceptional circumstance in Luxembourg only.[458]In these cases, the impact of the bank failure on the entity highest in the group structure within the EU borders, on the market were it was established, was sufficient to ensure compatibility of aid in other Member States. What follows, the aim pursued by Member State in granting the aid and the European Commission in state aid control extended to the whole enterprise.

In other cases, even though the European Commission was only assessing aid granted to entity in one Member State, it – of its own accord – considered as well the financial stability impact in other Member States. In the case of *KBC*, it took note of the "systemic importance [of the group's subsidiaries] to the economies of several Central and Eastern European countries", further the decision considered specific lending functions.[459] In the Latvian *Parex* case the share of non-resident (but extra EU) deposits was relevant to determine the scope of the external disturbance.[460] Similarly in the *NLB* case, market share in SEE region was relevant for assessing the systemic role of the bank (implying that the scope of considerations was not only EU). Aid to *Kaupthing's* Finnish branch case was authorised also in the context of potential impact on other Member States.[461]

[457] European Commission Decision on State Aid to Dexia, 19 November 2008, para. 54.
[458] European Commission Decision on State Aid to Kaupthing, 9 July 2009, para. 57.
[459] European Commission Decision on State Aid to KBC, 30 June 2009, paras. 62-64 consider the systemic importance of the bank's subsidiaries to the economies of in Central and Eastern Europe when they are active; para. 87 identifies the "significance of its lending activities for specific markets."
[460] European Commission Decision on State Aid to Parex, 29 July 2009, para. 50.
[461] European Commission Decision on State Aid to Kaupthing, 21 January 2009, para. 46.

4.3.2.2. Function over from

From the analysis of the European Commission decisions, it appears that geography (jurisdiction where the bank was active) was more relevant for the purpose of designing bail-out measures, rather than the legal form. In other words, aid was granted to protect concrete functions provided by the entity, including to depositors, rather than on the basis of the corporate structure of the bank. Such observation is further reinforced by the imprecise language used by the European Commission to describe cross-border activities of aid beneficiaries. Evidence from cross-border cases studied here suggests therefore that the distinction between subsidiaries and branches might be less relevant than the general legal framework suggests. Such a finding is supported by the market fragmentation which occurred over the course of the crisis, where the descent of borders on group structures materialised also in the form of instant conversion of branches into subsidiaries. Few state aid decisions explicitly cover the significance of cross-border conversion for compatibility of the aid measure with the Treaties, notwithstanding the burden-sharing dimensions such (voluntary or not) conversions may entail. For example, in the *Cyprus Popular Bank* case, the Greek branches were converted to subsidiaries to "limit contagion", however not before being recapitalised by Cyprus.[462] The converted branches were subsequently purchased by the Greek *Piraeus* bank "for reasons of financial stability" without any reference to the conversion procedure.[463] Where such instances of market fragmentation (that is national retrenchment via conversion of branches – which provide cross-border services – into subsidiaries – that is locally incorporated structures) was acknowledged by EU law, and only in a few cases specifically required in the context of application of state aid rules,[464] one case makes evident the legal fictions possible under state aid law to "nationalise" cross-border activity. This was the case of an Icelandic bank active in multiple Member States, where the bailout of the Finnish branch of the *Kaupthing* bank was approved as aid granted to all other retail banks in the country – alternatively acknowledging that aid was granted to the branch, would imply aid being granted to the parent entity in

[462] In this context note also the 2013 Eurogroup decision approving the Cyprus assistance programme, where it is emphasised that "the treatment of Greek branches of Cypriot banks" does not undermine financial stability nor does it "burden Greece." FinSAC (n 195) 32; on the details of the conversion of Laiki's Greek branch see also: Dübel (n 359) 43.

[463] European Commission Decision on State Aid to Piraeus, 23 July 2014, paras. 178-179.

[464] European Commission Decision on State Aid to Anglo Irish Bank, 16 February 2009.

Iceland.[465] The European Commission found that aid was granted to the parent *Kaupthing* only *indirectly*. Rather, it was the domestic banks which have received an advantage, since the measure restored trust in the financial system.[466] European Commission's cases studied from this angle reveal that it was the function which the given banking entity performed (including what we would now refer to as critical functions under the new EU resolution law framework), that was more relevant from the perspective of assessing compatibility of a state aid measure with EU law, than the precise legal form.

4.3.2.3. The interchangeable objectives of cross-border divestment: competition, viability and moral hazard

As described the European Commission's primary focus in exercising state aid control as levelling the playing field was subsequently overridden by a re-focusing on financial stability concerns - even if the European Commission indeed sought to bring in the "enterprise" perspective in as a matter of the internal market. What about the intermediate objectives however – that is those objectives which operationalize the rules, and via which the European Commission imposed specific conditions on the beneficiaries of the aid? Did they reflect an approach which considered the group as a whole, or rather was an entity approach pursued? The answer to this question can be found in the conditionality attached to the bank bailouts approved.

One specific type of a commitment required by the European Commission yields itself to an analysis from this vantage point, that is the structural commitment to divest a given activity (such as a subsidiary) required formally under the restructuring plan.[467] In

[465] European Commission Decision on State Aid to Kaputhing (Finland), 21 January 2009, para. 39. For an introduction on the Icelandic crisis see: Guðmundsson (n 132). Given Iceland's EEA membership, Kaupthing was freely operating under a branch in the Finnish market. For problems with enforceability of internal market regulations, including the Deposit Guarantee Scheme, vis-à-vis the Icelandic parent banks, see EFTA Judgement in the E-16/11 *ESA v Iceland* (2013).

[466] European Commission Decision on State Aid to Kaputhing (Finland), 21 January 2009, paras. 33-37, This case can be contrasted with the Luxembourg bailout of Kaupthing subsidiary, including the Belgian branch – for the assistance of which the Belgian authorities provided an intra-state loan, see above Section 4.3.1.

[467] To this end divestments could be defined in terms of "loss of control", e.g. European Commission Decision on State Aid to ING, 16 November 2012, para. 105, where: "*ING Divesting control of more than 50% of ING's interest (measured in shares) in a business qualifies as meeting the divestment requirement. In such a case, ING will lose the majority in the board and will deconsolidate the business (in line with International Financial Reporting Standards accounting rules)".* More broadly on

what contexts did the European Commission require such a measure, which inevitably leads to a disintegration of a cross-border group? Was the fact that a structural commitment affects the cross-border structure a relevant factor, and if so – how?

The general framework governing structural commitments (i.e. divestments) for cross-border banks was established by the 2009 Restructuring Communication. It referred to cross-border divestments and required they be tailor-made, take into account reasons why state aid was needed and the size, scale and scope of the bank's activities after the implementation of the restructuring plan.[468] In its assessment the Commission should consider the likely effects of the aid on the markets where the beneficiary bank, once it is viable, will operate. Should adverse consequences of divestments be identified, limitations to organic growth of the bank were to be preferred.[469] Though no express consideration was made as to the markets from which the bank would have to withdraw via divestments, the Commission considered that restructuring measures should ensure that national markets remain open and contestable.[470] Though the concern for internal market is evident in the Communication, such a concern focused on disincentives to cross-border activities (e.g. high barriers to entry) and scope for arbitrage. On the basis of the Communication it appears that the overall aim was to ensure that effective competition was preserved in the national market, though acknowledging that a balancing act may be necessary with regard to some divestments. The Restructuring Communication also stated that measures limiting distortions should not compromise bank's return to viability, which already seems to imply that priority was assigned to the latter, rather than competition across the entire internal market.[471]

Since the 2009 Restructuring Communication, the emphasis of the European Commission shifted increasingly towards financial stability concerns, even at the expense of market integration. In the decisions studied, that structural divestments were required in the context of: (a)limiting distortions to competition (competition aim); (b)

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remedies see: Sahar Shamsi, Pantelis Solomon and Nicole Robins, 'Compensatory measures in the banking sector' in: Laprévote, Gray and De Cecco (n 322).

[468] Point 30 Restructuring Communication.

[469] Point 32 Restructuring Communication.

[470] Point 33 Restructuring Communication. Also see e.g. European Commission Decision on State Aid to Bank of Ireland, 15 July 2010.

[471] This notably differs from the internal market focus adopted by the early Communications of the European Commission, where the internal market was prioritized, see e.g. points 53 and 57 of Impaired Assets Communication.

to ensure the beneficiary bank's return to viability (viability aim), and (c) to ensure adequate burden-sharing by all stakeholders (moral hazard aim).

A word of caution in need, however, when considering structural commitments from the point of view of the policy objective they serve. Specifically, in the few cases where the European Commission allowed for the beneficiary banks to amend – over the course of the process of its restructuring and already after the aid has been granted – the list of commitments made, cross-border divestments appear to be the fall-back option for meeting requirements of the state aid control. As Table 7 shows where the initial state aid decision relied on either corporate governance or local market divestment arrangements, cross-border divestments became the default conditionality of choice as the crisis continued.

Table 7: Commitment amendments considered equivalent

	Initial commitment	Amended commitment
Parex[472]	Annual caps on lending by Citadele	Carry-over of unused caps; wind-down of Swedish branch
KBC[473]	listing 40% of its Czech and Hungarian businesses (ČSOB and K&H)	Sale of Polish subsidiaries (Kredyt Bank / Warta)[474]; domestic price leadership bank linked to the final sale[475]
Bank of Ireland[476]	Sale of New Ireland Insurance	Sale of Great Britain Banking Business (banking, UK subsidiary)

Competition

Since state aid is (at least formally) a competition policy, the first objective which cross-border divestments were seeking to attain – per European Commission's decisions – was the restoration of competition. The question is, however, where the relevant competition conditions were assessed. Was only the national market considered, or did DG COMP look as well to the competition conditions in the host

[472] European Commission Decision on State Aid to Parex, 10 August 2012.
[473] European Commission Decision on State Aid to KBC, 27 July 2011.
[474] Where the sale to the Spanish bank Santander was made subject to the approval of national competent authority, it took place in 2012 and following a decision adopted pursuant to Art. 6(1)(b) of the Merger Regulation
[475] European Commission Decision on State Aid to KBC, 20 December 2012, para. 69.
[476] European Commission Decision on State Aid to Bank of Ireland, 9 July 2013, para. 45.

markets (i.e. where the cross-border divestments were to be made)? Was there a link made between the consideration of competition impact in the home and host Member State, and if so how was it made?

At first it appears there was little horizontal concern of such kind - in the *Dexia* case, the European Commission had argued that only selling off of profitable entities could be capable of reducing distortions to competition.[477] In the context of a "exceptional disturbance in a Member State", such an approach almost by definition meant that the divestment be made in another geographical market. Different approaches to delineating the relevant scope were adopted however: in some cases, the European Commission considered separately the impact on competition in distinct (major) geographical markets where (part of) the entity was active, prescribing different divestments in the individual markets. In the *Bank of Ireland* cases a very clear trend towards divestment of all types of business in the UK can be identified, coupled with the obligation of incorporation of branches abroad, transforming them into subsidiaries).[478] Generally the European Commission treated different national markets separately, and considered foreign markets following very general terms.[479] This had meant that the primary concern in the competition context was limiting arbitrage. Given that banking markets are national for the purposes of assessing the relevant geographical market per competition rules, this would imply that an entity approach prevailed.

However, the European Commission made an important distinction when identifying the divestitures required from the perspective of competition law, namely it differentiated between the historical markets – that is markets were the entity had a history of being active – and "other markets." Such a differentiation suggests the possibility for cross-border structures to be embedded to such an extent, that a dynamic perspective required divestments in markets other than those forming the core of the historical cross-border activity. This was specifically the case of *Dexia*, where the European Commission considered the main countries where the bank was active as

[477] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 115. European Commission Decision on State Aid to Kommunalkredit, 31 March 2011, para. 101.

[478] e.g. on the UK and Irish activities: European Commission Decision on State Aid to Bank of Ireland, 15 July 2010, para. 249 also 64-65.

[479] European Commission Decision on State Aid to HGAA, 3 September 2013, para. 18 2013 where a distinction between divestments in EU countries and non-EU is made.

"historical markets" (i.e. France, Belgium, Luxembourg) and others as "activities outside of its historical markets" (i.e. Ireland, Spain, Sweden – as well as non-EU states). The latter were the primary candidates for cross-border divestments.

Viability

A second objective which the Commission pursued in applying the entity approach in requiring divestments of cross-border banks was the restoration of their viability. From 2011 all beneficiaries were obliged to present a restructuring plan in order for the aid to be authorised. The plan was to indicate specific measures to address the underlying business model problems as a condition for aid to be compatible.[480] Where cross-border activity was considered part of the bank's underlying problems, the European Commission required cross-border divestments.[481] Alternatively, divestments allowed for recapitalisation of the parent in order for the entity to continue to meet regulatory requirements for authorisation[482] or to finance restructuring costs.[483]

There is little in the decisions studied which suggests the reasons behind one divestment being chosen over another with regard to the geographic location of the entities to be sold. The language of the decisions follows rather the business model: distinguishing between core and non-core markets or historical and non-historic markets.[484] However, in a few cases, the Commission seems to have distinguished between EU and non-EU markets in the viability context, prioritising divestments outside of the EU and retaining of profitable subsidiaries within the EU.[485]

An alternative to divestments was ring-fencing and restructuring of the subsidiaries, including specific benchmarking.[486] Funding and liquidity management within the group, was one specific area of concern, where the EC emphasised that the funding structure within the group should rely on sustainable local funding rather than central

[480] European Commission Decision on State Aid to Bank of Ireland, 20 December 2011, para. 124.
[481] See Section 4.2.3.
[482] European Commission Decision on State Aid to Allied Irish Bank, 7 May 2014, para. 107 in the context of the sale of a Polish subsidiary.
[483] European Commission Decision on State Aid to Monte dei Paschi, 27 November 2013, para. 144.
[484] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 173.
[485] The Latvian Parex for example was to divest its CIS (Commonwealth of Independent States, Russia) activities, while the Swedish and German subsidiaries were to be kept within the 'good bank.'
[486] European Commission Decision on State Aid to CGD, 18 July 2012, para. 71.

liquidity management.[487] Limitation of cross-border activity was in such cases considered essential for return to viability of the aid beneficiary.

There are notable exceptions. Although beneficiary's viability was typically improved by divestments,[488] in a number of cases, purchase of new entities was allowed even with a general acquisition bans in place. This was the case of purchases by Greek banks of subsidiaries of foreign subsidiaries active in Greece, e.g. the purchase of the *Credit Agricole* subsidiary allowed for "creation of meaningful synergies" with the local *Alpha Bank*.[489] Such renationalisation could also take place via purchases in other EU markets than the home market, e.g. the purchase by the *Alpha Bank* branch operating in Bulgaria of the *Eurobank* subsidiary[490] was to help *Alpha's* the viability.[491] Increased viability of the Greek *Piraeus Bank* was achieved *inter alia* by the purchase of Greek operations of Cypriot banks.[492] Further, as concerns about the return to viability of the banks and the sector as a whole grew, the finding of a "more favourable economic outlook" in certain host markets[493] or the role of "foreign" entities as the funding base[494] in particular where domestic funding base was depleted as a result of the financial crisis,[495] served as lines of defence against a possible cross-border divestment.

The assessment of viability of cross-border activity included also an evaluation of the ability of the group to manage diverse activities across the heterogeneous markets. In the *Hypo Group* cases, the European Commission considered the diversity of cross-border operations to be a distinct threat to viability: "in particular it remains unclear to which extent financial products, controlling devices and procedures (e.g. for risk management) can be used and applied to the Southern and Eastern European network in its entirety, given the different level of the development of the local banking

[487]European Commission Decision on State Aid to Dexia, 17 October 2011, para. 52, European Commission Decision on State Aid to National Bank Greece, 23 July 2014, para. 139 on divestments as ensuring that subsidiaries are not a threat to capital/liquidity position.

[488] European Commission Decision on State Aid to Anglo Irish Bank, 31 march 2010, para. 122.

[489] European Commission Decision on State Aid to Alpha Bank, 9 July 2014, para. 223. Similarly for Piraeus' purchase of (Swiss) Societe Generale subsidiary in Greece, European Commission Decision on State Aid to Piraeus, 23 July 2014, paras. 65-69.

[490] Note that per the branch versus subsidiary distinction the transaction effectively brings the subsidiary within the scope of Greek (home) supervision.

[491] European Commission Decision on State Aid to Eurobank, 26 November 2015, para. 3. Notably this transaction was taking place in a highly contentious context of a bank run on Alpha Bank in Romania and Bulgaria.

[492] European Commission Decision on State Aid to Piraeus, 23 July 2014, paras. 27, 307-309.

[493] European Commission Decision on State Aid to Anglo Irish Bank, 31 March 2010.

[494] European Commission Decision on State Aid to Parex, 15 September 2010, para. 36.

[495] European Commission Decision on State Aid to Parex, 15 September 2010, para.155.

markets."[496] From this point of view, bank's viability – as an objective of state aid control as applied – is threatened by an inadequate calibration of group strategies in specific markets across a heterogeneous space where the group was active.[497]

With regard to the objective of returning to viability, there was therefore no single approach adopted by the European Commission with regard to whether cross-border activity was stabilising or not. Such a finding is not of course in itself surprising given the diversity of EU bank business models. However since the monograph seeks to identify scope to which cross-border activity had been included in the European Commission's assessment of state aid measures, it is relevant that indeed in some cases cross-border activity was considered a factor affecting the success of the business model there was no specific presumption suggesting cross-border activity impedes it.

Moral hazard

Using state aid policy as a means to limit moral hazard to the realisation of implicit subsidies in banking is perhaps one of the most controversial aspects of European Commission's practice.[498] This approach was also adopted with regard to divestment of foreign subsidiaries – i.e. cross-border divestment was held by the European Commission to be – in addition to viability restoring and competition limiting – an own contribution of the beneficiary required to limit the aid to the minimum necessary. In a third of the cases studied, cross-border divestments were considered to be a form of burden-sharing, to the extent that the capital possessed in this way was counted towards "own contribution" of the beneficiary to the costs of return to viability.[499] However,

[496] European Commission Decision on State Aid to HGAA, 19 July 2011, para 40.

[497] Note however that this assumes as well an enterprise governance approach (see further Section 4.3.4), since it assumes centralised management, even as subsidiaries are typically governed at a local level in accordance as per host corporate laws.

[498]see e.g. Matija Vlahek, Ana, Damjan, 'European Commission's Banking Communication: Question of Validity in the Slovenian Banking Bail-in Puzzle' (2016) 3 European State Aid Law Quarterly 458; Valia Babis, 'State Helps Those Who Help Themselves: State Aid and Burden-Sharing' (2016) 10 Law and Financial Markets Review 167; Thomas bauer, 'Commission Decisions on Hypo Group Alpe Adria in the Light of Burden-Sharing' (2014) 3 European State Aid Law Quarterly 505; critically see: Ahlborn and Piccinin (n 316).

[499] e.g. European Commission Decision on State Aid to KBC, 18 November 2009, para. 163 on the treatment of Czech and Hungarian subsidiaries, European Commission Decision on State Aid to Eurobank, 29 April 2014, para. 385, European Commission Decision on State Aid to ING, 16 November 2012, para. 192, European Commission Decision on State Aid to Allied Irish 7 May 2014, para. 123, European Commission Decision on State Aid to Piraeus, 29 November 2015, para. 138.

imposing specific burden-sharing requirements on the shareholders and the subordinated debt holders[500] also allows us to see how the European Commission differentiated between intra-group relations and those between the bank and its other investors. Intra-group links implied greater moral hazard and higher burden-sharing requirements: parent companies had to take a higher cut than other shareholders for the purpose of meeting state aid control requirements.[501]

Renationalisation through state aid

On the surface, structural commitments involving disintegration of the group appear to provide evidence of an entity approach. The European Commission in the application of state aid rules prioritised cross-border divestments and this therefore provides proof that it prioritised the aid beneficiary's interests (and those of the specific market where it was active) over that of the group to which it belonged. The European Commission's approach has received much criticism in this context, especially for the effect it has had on restructuring the markets and as well the costs which the moral hazard-focused narrative entailed. It may also be that the EU's state aid control was nothing but a "fig leaf" as Member States pursued whatever policies they wished. What emerges from the above overview, however, suggests that the European Commission nevertheless sought to develop a rationale for any measures taken: in the case of cross-border divestments at even at the expense of coherence of state aid control and the integrity of the internal market.

European Commission's judgement raised many questions: can a cross-border divestment be considered to facilitate return to viability in one case, then undermine it in another? Can a sale of one subsidiary simultaneously be a measure of return to viability and ensure that aid is kept to minimum necessary? And, more generally, can an *a priori* assumption that cross-border activity is problematic from a viability point of

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[500] European Commission Decision on State Aid to Banif, 21 December2015.

[501] In the context of HGAA aid (aid granted to the subsidiary BayernLB), the European Commission explicitly and on a number of occasion requested specific burden-sharing from the parent (see also European Commission Decision on State Aid to HGAA 19 July 2011, para. 36 where *"a particular element contributing to ease burden-sharing concerns is that the previous shareholders already lost their stakes when Austria took over the bank in December 2009. Their elimination reduces the risk that the measure would benefit (former) shareholders without them fully contributing to the rescue of the bank."*; for criticism of the burden-sharing requirements imposed in the Bayern LB and HGAA decisions see: Waldbauer (n 501) 507, where it is highlighted in particular that the approach does not take account of impact of nationalization on shareholding.

view, ever be consistent with the idea of the internal market? Such normative questions inevitably arise in the context of the analysis of European Commission's practice.

The multipurpose role assigned to cross-border divestments might indeed suggest that the European Commission's assessment was a rubber-stamping exercise. There can be little doubt that – at the very least – the practice of the European Commission contributed to validating the renationalisation and retrenchment of the EU banking markets. Does this mean that the European Commission indeed disregarded the impact on the group as a whole of geographic retrenchment of the bank or the impact on host markets?

In a few cases indeed a consideration of the local (host) impact of the beneficiary bank's subsidiary commitments was included by the European Commission. In *HGAA* the "fragility" of the local markets is considered. For *Banco Espirito Santo* the cap on provision of additional equity or subordinated capital to the host entity is made conditional on the provision by the local authority of evidence that such assistance from the parent level is required for the entity to continue to meet the capital requirements.[502] Alternatively, the European Commission amended or postponed the divestment requirement considering the "fragile situation" on the local markets.[503]

However, systemic defences and considerations of the host market arose also from the specific positions taken by host authorities. In the case of the sale of *KBC* subsidiary in Poland, the commitments faced hurdles from the domestic financial supervisor.[504] In another case, a defence against divestment was established by reference to the "company interest." Specifically, in the light of the consideration of the impact and responsibility of the parent company vis-à-vis the ring-fenced subsidiary, the European Commission referred to a holistic "company interest" as a limitation of the possible scope of ring-fencing to two subsidiaries: a domestic (*DMA*, asset management) and a third-country subsidiary (*Dexia Israel*). The limitation arose from regulatory requirements incumbent upon *Dexia* as a shareholder, including obligations to keep the

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[502] European Commission Decision on State Aid to Banco Espirito Santo, 19 December 2015, Annex I, para. 13.

[503] See above. 4.3.2.3.

[504] The merger had been approved by the European Commission in a simplified procedure, was delayed by the domestic regulator, as per the state aid decision, see: European Commission Decision on State Aid to KBC, 20 December 2012, para. 40, on the cooperation between competition and supervisory authorities in mergers see: Carletti and Smoleńska (n 355).

subsidiaries viable.[505]This unique case suggests that a holistic approach to group governance over the course of the crisis could have been incorporated into the EU state aid rules, but however, remained contingent on the national frameworks applicable where the subsidiaries or branches were active. Such requirements further followed the structure of the group, rather than the EU scope of the bank. *Dexia's* introduction of a "company interest" is an outlier: holistic, interest group approach was not the standard of European Commission's framework when assessing structural commitments in the cases analysed. Consideration of impact on host market was a formal matter of consideration required by local supervisors.

There is therefore no clear answer to the question of whether the policy objectives pursued by the European Commission favoured an enterprise or an entity approach. However inconsistently, the scope of internal market was a concern and a consideration, even if for the most part the policy aims were pursued in the context of particular Member State which was bailing out "its" part of the cross-border bank.

[505] European Commission Decision on State Aid to Dexia, 28 December 2012, paras. 122, 129, where e.g. *Dexia* shall *"make every effort to preserve the viability, resaleability by their future purchaser and competitiveness of DAM and Dexia Israel, in accordance with sound commercial practice … limit any risk of loss of competitive potential … as far as possible provide DAM and Dexia Israel with sufficient resources for their operation in accordance with existing business plans and any subsequent plans."*

4.3.3. Institutional dimension

The third building-block covers the institutional dimension of dealing with cross-border bank group beneficiaries under EU law. In what ways in dealing with cases of bailouts of cross-border banks could an enterprise approach be possible procedurally? What forms of procedure allowed it, and what where there any specific changes introduced to the state aid procedure to this end?

As Chapter 2 has shown, the interaction between authorities bailing-out and supervising the banks in different Member States was enormously difficult during the GFC. The cooperation frameworks were rudimentary, there was no formalised procedure. State aid control became one of the few tools at the disposal of the EU (and hence Member States) to establish some sort of a coordinated approach. However, a number of procedural constraints existed even here.

First, the entry point for any form of coordination of state aid from different countries is state action. However there is resistance to developing any supranational approaches (i.e. EU-level action pre-empting national coordination) in this area (including risk-sharing within the group, rather than between public authorities) since it creates scope for burden-sharing.[506] The (single) state lens can be construed as the single obstacle to applying state aid rules to bank groups in a holistic fashion. A state perspective further reinforces the "sovereign-bank nexus"[507] in all bailout cases, but especially in those where the bailout measures resulted in the nationalisation of parts of the bank.

Further, coordination of state aid control can only be achieved if all states grant measures in favour of the undertaking at the same time. In such cases the Commission sought – especially at the beginning of the crisis – to treat them together as "measures that are adopted jointly by several Member States are imputable to all the Member States concerned pursuant to Article 107(1) of the Treaty" pursuant to the 2017 Notion of Aid.[508] This approach emerged in the specific crisis cases.

[506] On proposals to solve this problem by locking individual Member State into cooperative equilibria in particular Charles Goodhart and Dirk Schoenmaker, 'Burden Sharing in a Banking Crisis in Europe', vol 2 (2006)for a post-crisis perspective see: Grünewald (n 71).

[507] There is an additionally the question of ownership and nationalisation as a state aid measure, which – though relevant – is not explored in this thesis. See: T-319/11 *ABN Amro Group NV v European Commission* (2014) ECLI: ECLI:EU:T:2014:186, para. 57.

[508] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ C 262, 19.7.2016, p. 1–50, para. 66, specifically

Since at the beginning of the GFC no rules for joint state aid procedures under EU law existed, in a few cases the European Commission nonetheless attempted to join cases of multiple bailouts, either as one cross-border case or multiple cases joint in one procedure. Joint cases however were not fully integrated, but rather parallel procedures presented as one. For example, the *Dexia* early decisions were addressed cumulatively to all three Member States involved: France, Belgium and Luxembourg, but the European Commission considered separately the observations submitted by the individual countries concerned. Clear demarcation line was drawn between measures granted by individual Member States[509] – including by proportional calculation of the guarantees on the provision of emergency liquidity by the central banks involved[510] as having been taken separately by the Member States. The sole fact that the parallel measures were implemented formally as part of one formal procedure, and that there was an appearance of repartitioning of the burden-sharing as a result, meant, however, that the aid granted in such joint procedures was considered in terms of solidarity, as "*garantie solidaire*."[511]

Since there were no specific rules governing such joint procedural cases, there were equally no restrictions on the European Commission to follow specific rules or mandatory considerations. There was no specific guidance as to when the cases were joined and when not. For example, in the case of *BayernLB* and its subsidiaries, the European Commission considered the cases of bailouts of individual group entities (i.e. *Hypo Group* and *BayernLB*) separately, until the finding of a cross-border aid by Austria to *BayernLB* in 2013, which prompted the decision to be addressed both to Austria (where the bank was established) and to Germany.[512] There was also no rulebook for when previously joined procedures should be separated, although this appears to have been related to intragroup burden-sharing. In the *Dexia* case, the EC stressed that "it cannot presume that just because an undertaking belongs to a group of undertakings, it benefits from aid received by the latter, where the transfer mechanisms

referencing European Commission Decision on State Aid to Dexia, 26 February 2010. For critical comments see: Andrea Biondi, José Luis Buendia Sierra, Gian Marco Galletti, and Oana Andreea Stefan, *Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107 (1) TFEU* (2014).

[509] Thomas (n 149).

[510] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 45.

[511] European Commission Decision on State Aid to Dexia, 17 October 2011, para. 13.

[512] However the decisions concerning procedural change are not made available, see European Commission Decision on State Aid to Bayern LB, 5 February 2013.

within the group have been used only to the undertaking's detriment and not for its profit."[513]

Such joint decisions did not necessarily imply equal voice or consideration of the situation in each the Member States. For example, in the joint case concerning the Luxembourgish subsidiary of *Kaupthing* with a branch in Belgium, the European Commission "assumed" that Belgium "agrees" with the arguments put forward by Luxembourg.[514]A the most extreme, the procedural reservation of this kind were raised in the case of *BayernLB* already discussed above, where Austria challenged Commission's decision on the ground that it was not part of the procedure concerning the aid granted by Germany (the Court rejected the argument). Even further, since only Member States which granted (or had notified) aid were part of the procedure, such procedural coordination was limited in scope to only part of the cross-border group,[515] even if in some cases the Commission referred to cross-border supervisory arrangements, as in the case of *KBC* case where the repayment schedule was subject to a joint decision of the competent colleges of supervisors.[516]

In the light of such procedural uncertainty in a majority of cross-border cases studied aid to individual entities within the bank group was assessed separately, with the structural and ownership links with other beneficiaries rarely explicitly acknowledged. This was for example the case of Hungarian *MKB* bailout (a former subsidiary of German *Bayern LB*) and Slovene *NLB* (where Belgian *KBC* had a substantial stake which was required to be sold under the restructuring decisions). In others, the transactional link was acknowledged (e.g. *BCP Millenium's* recapitalisation of its Greek subsidiary before it had been sold to *Piraeus*), without explicit references to the concrete state aid procedure. In other cases a mixed approach was adopted where the bailouts of some legal entities within the group were assessed together, and others

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[513] European Commission Decision on State Aid to Dexia (Luxembourg), 3 April 2012. Recall case T-324/00 *CDA Datentraeger Albrecht v Commission* (2005) ELCI:EU:T:2005:364, where at para. 93: *"it is clear from the findings set out in the contested decision that, in this case, the transfer mechanisms existing within that group were used only to the detriment of that venture and not for its benefit. It cannot therefore be claimed that, on the ground that it belonged to that group, the joint venture actually benefited from aid of which it was not the recipient."*

[514] European Commission Decision on State Aid to Kaupthing (Luxembourg and Belgium), 9 July 2009.

[515] European Commission Decision on State Aid to Kommunalcredit, 19 July 2015. The bank prior to nationalisation in 2009, was 49% owned by Dexia. Despite the two bank bailouts being treated contemporaneously there is no cross-referencing between procedures.

[516] European Commission Decision on State Aid to KBC, 27 July 2011, Annex, Section B, para. 6.

separately. In the case of the Icelandic *Kaupthing* the Finnish branch was recapitalised separately from the Luxembourgish subsidiary. The latter, however, was a joint state aid decision concerned as well with measures in favour of the Belgian branch of the Luxembourgish subsidiary.

Cooperation between Member States was considered to be an important tool not just for burden-sharing, but as well for securing that failing banks' continue perform their functions to the real economy. In 2009 the Commission suggested that it would consider favourably cases where the beneficiary commits to cross-border lending targets as an "important additional positive effect of aid", in particular "where the achievement of such targets is subject to adequate monitoring and (for example, through cooperation between the home and host State supervisors) and where the banking system of the host state is dominated by banks with headquarters abroad and where such lending commitments have been coordinated at Community level (for example, in the framework of liquidity assistance negotiations)."[517] This provision suggests an aspiration to cross-border coordination, which however was not applied in any of the cases studied. One possible explanation is that such a cross-border burden-sharing approach was thwarted precisely by the lack of an adequate framework, evidenced by the inconsistencies outlined above.

Absence of rules on coordination of crisis management e.g. determining the scope of the cross-border bank and the voice for all the authorities involved was a major challenge faced by the European Commission. Such a lack of rules meant that even the best attempts to inbuilt some coordination, solidarity and burden-sharing were doomed to failure in the absence of binding commitments. Further, the representation is state aid cases was concerned only with the Member States granting aid, and not necessarily all the states where the aid (or specific conditionalities attached thereto, see above) might have had effect. Consequently, though an attempt at an enterprise approach to cross-border bank groups was made (esp. *Dexia*, *BayernLB*) in terms of public cooperation, such *ad hoc* formats did not prove durable.

[517] 2009 Restructuring Communication, para. 33.

4.3.4. Corporate governance

Did the state aid control decisions take account of the decision-making processes (governance) within the cross-border group (the fourth building block)? Or did the European Commission consider the decision-making processes within each entity to be completely independent, regardless of any control which may emerge from ownership link? As in the case of institutional (public) cooperation between state authorities there was no formalised approach to cross-border groups in state aid law which would provide for a coherent framework for the treatment of internal group governance under the state aid control procedure. Likewise, on the surface, it appears that no recognition of the cross-border group would be possible – distinct group entities were not even part of the procedure. Striking is the example of the Luxembourgish subsidiary of *Dexia* (*BIL*), where the (former) parent made observations as "a third party" to the procedure to the effect of providing evidence of the liquidity provision role of the subsidiary. [518]

The corporate governance building block of state aid to bank groups in the EU can be identified, however, via the behavioural commitments imposed on the beneficiary. Such measures restricted the (business) behaviour of banks which had received an advantage in the form of aid in the first phases of the crisis[519] in the interim period before the aid beneficiary was required to submit a substantive restructuring plan. To this end, behavioural commitments were rather general in nature and predominantly oriented at limiting moral hazard.[520] They included requirements which affected internal decision-making of the bank, e.g. bans on referring to state support in any advertising[521] or bans on dividends and coupons.[522]

Further insight on group corporate governance framework which was relevant, can be derived from the treatment of shareholders by the European Commission in the Crisis

[518] European Commission Decision on State Aid to Dexia, 3 April 2012, para. 63.

[519] In fact some of the early state aid cases, such as Bank of Ireland recapitalization in 2009, included only behavioural commitments, see: European Commission Decision on State Aid to Bank of Ireland, 26 march 2009.

[520] Highly critical on this point: see Ahlborn and Piccinin, n. 316.

[521] Where such advertising could exasperate beggar-thy-neighbour problems, the capacity of various Member States to support their financial systems differed significantly. An argument can be made however that such a ban exasperates information asymmetry problems making it difficult to discern between different banking institutions.

[522] European Commission Decision on State Aid to Parex, 15 September 2010, paras. 89-90. For a further discussion of the company law implications of state aid law see: Nikolai Badenhoop, 'Banking Communication Non-Binding and Burden-Sharing Approved: Kotnik' (2017) 13 European Review of Contract Law (ERCL) 299; Vlahek, Ana, Damjan (n 497).

Communication as well as the litigation which followed the state aid decision.[523] This is as the treatment of shareholders in crisis was particular controversial, with some scholars claiming that "corporate rights of shareholders were perceived as an impediment and source of uncertainty.[524] Where the rights of shareholders were affected in a variety of ways in particular as regards burden-sharing, it is the cross-border reach of these requirements which are most of interest here. A survey of the decisions suggests a number of specific governance commitments relevant to this end, for example self-limitation of voting rights in "foreign" subsidiaries[525] which implies an assumption of cross-border bank group governance reach. The most interesting aspect, however, from the perspective of building up an understanding of cross-border bank group governance is when *control* could be exercised from the parent vis-à-vis its cross-border subsidiaries, and when not. This aspect of cross-border group governance was made evident by the consideration of cross-border commitments within the group as applied in the decisions of the European Commissions on aid to cross-border banks. Through this practice we can identify when the state aid framework acknowledged cross-border control, and when it did not.

Evidence of cross-border bank group governance in the decision-making practice of the European Commission is found in the behavioural commitments imposed on the aid beneficiary. They may – as in the case of structural commitments discussed have been oriented at restoring viability or moral hazard – and consequently have had an impact on the behaviour of the beneficiary bank (i.e. they influence on its governance). Here however we are concerned with the reach of such commitments – did the European Commission impose commitments related to entities within the group operating in states other than that of the aid beneficiary?

Behavioural commitments which extend beyond the border of the granting Member State did so by explicitly differentiating between group entities – and therefore assuming control by the parent over the entities. They included explicit limits of guarantees to non-EU subsidiaries, caps or prohibitions of specific type of lending by

[523] For the case of Fortis' challenge of the BNP Paribas sale see: François-Charles Laprévote and Sven Frisch, 'Preserving Cross-Border Banking in the Face of the Crisis: State Aid Policy under the Financial Trilemma' in François-Charles Laprévote, Joanna Gray and Francesco De Cecco (n. 322) 200.

[524]Hüpkes (n 203) 385.

[525] European Commission Decision on State Aid to Allied Irish, 21 December 2010, paras. 44-45, referencing a „technical regulatory issue" as an obstacle to enforcing a cross-border commitment.

the foreign subsidiary,[526] or price leadership ban in "community markets"[527] – including differentiated and specific benchmarking provisions for different subsidiaries (e.g. for *ING* subsidiaries in Spain, France and Italy) and extending an acquisition ban specifically to some subsidiaries.[528] Group level requirements[529] were to reflect the supervisory arrangements, such as setting of capital requirements, including any prudential add-ons at the level of group and individual entities.[530] On the financing side, behavioural commitments required looked to the group as a whole, rather than purely the at the parent undertaking (the beneficiary), explicitly in the case of *Dexia*.[531] With regard to corporate governance requirements, cross-border extension of commitments occurred for example via variable dividend restrictions towards domestic and foreign shareholders.[532] Among such group level behavioural commitments, a distinction between EU and non-EU markets is visible – for example the behavioural commitments referred to bank's behaviour on the "Community markets." A specific perspective type of enterprise approach was adopted vis-à-vis subsidiaries which subsequently would be subject to sale: the European Commission required introducing an internal separation of the "foreign" subsidiary, "with view to" allow its sale in the future – such changes were to be implemented with regard to capital structure, IT and staffing.[533] Where such an enterprise scope to behavioural commitments was adopted, this was reflected in the scope of responsibility of the trustees responsible for monitoring the compliance of the beneficiary bank with the commitments imposed, i.e. they were to monitor the behaviour within the entire group.[534]

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[526] European Commission Decision on State Aid to Bank of Ireland, 11 July 2011, para. 10. European Commission Decision on State Aid to Parex 15 September 2010, paras. 77-78, Similarly foreign loan lending was forbidden to Hungarian MKN (European Commission Decision on State Aid to MKB, 16 December 2015) and originations of CDOs forbidden by both KBC and its subsidiaries (European Commission Decision on State Aid to KBC, 18 December 2009, para. 75).

[527] Notably in the ING case a specific complaint was submitted to the European Commission, which concerned a failure of the Italian ING subsidiary to comply with the commitment: European Commission Decision on State Aid to ING, 17 November 2009, para. 67.

[528] European Commission Decision on State Aid to ING, 16 November 2012, para. 110, European Commission Decision on State Aid to KBC, 18 November 2009, para. 75.

[529] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 63.

[530] European Commission Decision on State Aid to Parex, 15 April 2014.

[531] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 63.

[532] European Commission Decision on State Aid to 18 December 2013, para. 43.

[533] European Commission Decision on State Aid to BCP, 30 August 2013, Annex, point 3.14.

[534] European Commission Decision on State Aid to Dexia, 26 February 2010. Monitoring trustees were implemented in particularly complex cases in order to assist the European Commission in the process of monitoring the compliance of the beneficiary bank with state aid commitments.

Such enterprise approaches to behavioural commitments were not always successful – e.g. in the *HGAA* case, it was suggested that a number of behavioural commitments related to lending across subsidiaries could not have been implemented for "economic reasons." The European Commission acknowledged that it was not always fully possible for the "parent" undertaking to control all the subsidiaries, for example with regard to suspension of distribution of dividends,[535] even if there was an expectation that the obstacles to enforceability of the commitments could be overcome.[536]

In a number of cases therefore the entity approach to behavioural commitments was adopted: e.g. marketing and advertising ban referred only to the home market in the Allied Irish case,[537] provisions were made so that specific commitments (such as lending to SMEs in the case of Portuguese *BCP Millennium*[538] or provisions related to treatment of litigations for *Banco Espirito Santo*[539]) were applicable only to the market of parent Member State, or prohibitions were imposed on business other than with activities linked with the granting Member State.[540] In a number of cases corporate governance commitments – based in national corporate governance law - were specifically limited to home markets.[541]

As this section has made clear, the European Commission assumed cross-border bank group governance even before the "cross-border" bank group regime was put in place. Notwithstanding obstacles to enforceability which were identified in a number of cases, in their majority, there was a presumption of control of the parent over the subsidiaries relating to various aspects of operation of the cross-border subsidiaries. Such decisions were subsumed to the overall aim of state aid control, however, without a clear consideration of the impact on the host market, even when they touched on matters of prudential nature.

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[535] European Commission Decision on State Aid to Dexia, 26 February 2010, para. 201.
[536] European Commission Decision on State Aid to Dexia, 21 December 2011, para. 50.
[537] European Commission Decision on State Aid to Allied Irish, 7 May 2014, para. 5.
[538] European Commission Decision on State Aid to BCP Millennium, 30 August 2013, Annex, 4.14.
[539] European Commission Decision on State Aid to Banco Espirito Santo, 3 August 2014, Annex, para. 28.
[540] European Commission Decision on State Aid to LBBW, 9 December 2013.
[541] This was the case of the Greek banks, where internal organization requirements specifically exclude non-Greek subsidiaries, see: European Commission Decision on State Aid to NBG, 23 July 2014, Annex 3. European Commission Decision on State Aid to Piraeus, 23 July 2014, Annex A.

4.4. Chapter conclusions

The EU regulatory reform post-crisis has been often described in terms of breaking the sovereign-bank nexus which was a particularly omnipresent concern given the amounts associated with bank bailouts in the EU. An analysis of state aid decisions to cross-border bank groups sheds further light on this debate, by showing the fragmenting effects of the nexus, in the form of subsidies of governments to their financial sector. Insight of this section provides explanations for the "one state" – "one bank"/"international in life, national in death" narrative, to the extent that decisions of the European Commission provide evidence that each Member State was responsible for *their* bank, with any assessment of aid and conditionality of EC's approval determined by considerations of one particular Member State. State aid then acts to limit competition between Member States purely.

However, I have showed as well that an enterprise approach to group beneficiaries was made possible by the constitutional framing of EU state aid law in terms of the internal market, even if an analysis of EC's crisis communications initially suggests that integration and competition were relegated to secondary concern as crisis fire-fighting and financial stability took centre stage. Though in first phases of the crisis European Commission sought to prevent *"retrenchment within national borders and a fragmentation of the single market"* and expressed a distinct consideration for cross-border bank groups, by 2013 financial stability became the overarching aim of intervention as per the Banking Communication. In practice, however, the European Commission took account of the cross-border activity of bank beneficiaries and where the beneficiary was a cross-border bank group, this mattered from the point of view of EU state aid control, i.e. it was consequential for the assessment of the European Commission. With regard to internal partitioning, there is evidence of both enterprise and "reverse" enterprise approach. That is the European Commission recognised scope for intra-group risk-sharing both by forbidding it (via ring-fencing) and recognising it (via allowing for aid to travel across border).

Though there were clear deficiencies with regard to structuring of cooperation between authorities (4.3.4), the cross-border bank group scope of governance was recognised and used (4.3.5), even as novel ways of intra-group burden-sharing were allowed (4.3.1). Clear evidence is further found that were specific governance requirements in

place ("company interest", regulatory requirements) which solidified the cross-border bank group dimension. This chapter identifies the limits to the enterprise approach under state aid rules as applied through the analysis of the individual components of state aid control decisions over the course of the crisis. While the decision-making practice remains inconsistent, the findings allow to identify a transnational scope of state aid control to cross-border bank groups, suggesting but analogy, that under EU law such a transnational regime is likewise possible in the area of resolution. Given the inconsistencies, as well as the pace of change of the applicable prudential rules (in particular to the extent these are relevant to the European Commission in its state aid assessment), the analysis does not reveal a predictable set of rules which would govern cross-border banking in the future.

The key insight drawn from the cases, relates to the legal strategies of incorporating transnational and cross-border sensitives into the framework of a "statist" policy such as state aid control. The analysis drew on the framework developed from comparative group law and embedded in the scope of the post-crisis banking regulation regime. The four building-blocks identified in Section 3.5.3 proved well equipped to capture specific legal strategies enabling an enterprise approach under the European Commission's assessment, as well as those which served to protect the distinct entity parts. Legal strategies identified as employed in the decisions analysed included the incorporation of cross-border considerations in its assessment (e.g. considering the financial stability impact of bank's failure on another Member State), extrapolation of the impact of aid in one country on another, accepting aid to be granted cross-border (validated by CJEU judgement in *BayernLB*). At the most fundamental level, the recognition and distinct treatment of cross-border bank groups in EU law already allowed for the development of a distinct law of cross-border bank groups. From the perspective of a cross-border bank group, such findings suggest the scope for developing a transnational governance dimension, making it all the more important given the extent to which such restructuring had an impact as well on the host markets.[542]

[542]See for the CEE impact of the restructuring cases discussed: Sylwester Kozak, 'Consolidation of the Banking Sector in Poland in 1989-2013 in Comparison with the Structural Changes of the Banking Sector in the USA and the EU' [2013] NBP Working Paper No. 166, Ewald Nowotny, 'The Financial Crisis and the Role of Austrian Banks in Central, Eastern, and Southeastern Europe', (2010) 17 Econ and Fin Rev 3.

Part 3 Analysis of the Main Regime Elements of Risk Management in Cross-Border Bank Groups

Chapter 5

5. Cooperation between authorities and the institutions of cross-border bank group governance

The terms of interaction between authorities responsible for different parts of the cross-border bank group are one building block of cross-border bank group governance, as identified in this monograph.[543] Chapter 2 explained that prior to the GFC the institutional framework for cooperation between authorities responsible for distinct parts of a cross-border groups (i.e. the parent and subsidiaries) was deficient. There were few incentives for national authorities responsible for different parts of the cross-border bank group to cooperate or trust each other, i.e. conditions needed to encourage equitable burden-sharing.[544] Chapter 4 provided evidence of how the absence of a formalised framework thwarted the attempts by the European Commission to facilitate joint responses via the state aid rules with the result being a fragmented patchwork approach to crisis management of cross-border groups in the EU.[545] Cognisant of such constraints, legislators prioritised strengthening the formats for cross-border

[543] See Section 3.5.3 outlining the analytical approach and the four building blocks of cross-border bank group governance as relating to: partitioning, policy objectives, cross-border cooperation between authorities and corporate governance aspects.
[544] See Section 2.4.3 on the shortcomings of the pre-crisis regime.
[545] See Section 4.3.4 on procedures for cooperation between countries in cross-border bank group state aid cases over the course of the crisis.

coordination between authorities.[546] For the Banking Union countries this meant the creation of common institutions (the Single Supervisory Mechanism and the Single Resolution Mechanism), whereas for the EU special networked structures for cooperation were established ("colleges") and the tasks of the EU agency EBA were expanded. New institutional arrangements for cooperation, including joint procedures, went so far that – in the assessment of EU institutions but also national authorities – they effectively created a single jurisdiction for the purposes of applying the resolution rules specifically.[547] From the perspective of cross-border group governance, the question arises however is how do such jurisdiction-overcoming procedures balance the respective enterprise and entity interests. Since the monograph explores the governance of cross-border banks, as opposed to their regulation purely, the focus is placed on the composite administrative procedures which engage both public authorities and bank management and affect going concern operation of the bank, that is they have a direct impact on bank's organisation also in good times. Such procedures which are the new mechanisms of cross-border bank governance have been identified in particular under EU crisis prevention resolution law requirements as the requirement to produce a cross-border bank group resolution plan (see Table 2, Section 3.5.2).[548]

This chapter identifies the specific strategies which allow for overcoming of the territorial constraints in particular the preparation of resolution plans, including in their specific requirements such as the assessment of group resolvability and the process of setting of MREL. In so doing, I draw on the findings related to the shortcomings of the burden-sharing coordination framework identified in the building blocks of the crisis state aid control in Chapter 4, and specifically the aspects which relate to the lack of a formalised procedure capable of instilling predictability and trust as well as a lack of formal input and voice.[549] I revisit the design of the pre-crisis framework to identify the conceptual problems in thinking about cross-border coordination which acted as a

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[546] See Section 3.1.3 on the focus of the crisis reform on strengthening cross-border cooperation.

[547] As will be further explained below, the decision-making in resolution crisis prevention measures (risk management) for cross-border bank groups under EU rules is more fully integrated than in the case of supervisory authorities. Already for a comparison see: FinSAC (n 195). See also section 3.5.1 on the approaches which suggest the design of the new institutional framework allows to overcome the jurisdictional constraints.

[548] See Section 1.5.1 on the research design and Section 3.5 outlining the analytical approach in detail, specifically with regard to the governance (as opposed to supervisory regulation) focus on

[549] On the role of voice in the EU see: JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

constraint for the design of a regulatory structure suitable for a (cross-border) enterprise approach (Section 5.1). I then analyse the legal strategies used to enable jurisdictional integration for the cross-border group in the context of the following characteristics of the regulatory structure: (a) membership and constitution of the main institutions; (b) mandates of the institutions (Section 5.2)[550] and (c) their specific tasks and powers vis-à-vis supervised cross-border banks (Section 5.3). Finally, Section 5.4 identifies specific legal strategies employed which allow for such a composite form of administration to overcome the jurisdictional constraints in the context of the specific mandates of the institutions and the Treaty objectives pursued by resolution law.

[550] Institutions are used as a general category of public decision-makers capable of influencing and enforcing the rules vis-à-vis the cross-border group and its individual entities, i.e. national authorities, EU agencies and other bodies and composite EU administrative structures (i.e. resolution colleges, see below)

5.1. Pre-crisis architecture of oversight

Prior to the BRRD reforms, there was no specific coordination mechanism in the EU for crisis management measures for cross-border bank groups, much less a mechanism which would allow for an elaborate *ex ante* risk-sharing via ongoing bank governance. The principle of home-country governance applied only to integrated banks operating by branches, while subsidiaries formally remained within the remit of host supervisors. However, the crisis experience suggests that in the light of the specific public interest and critical functions provided in the host economies, activity allowed on the basis of cross-border service provision (i.e. a branch) effectively could be treated as a distinct legal entity for the purpose of ensuring financial stability.[551] Prior to the crisis, formalised cooperation between authorities responsible for distinct parts of the group was limited to rudimentary supervisory colleges (consolidated and financial conglomerate supervision) and *ad hoc* crisis arrangements (limited).[552]

Reform of coordination and repartitioning of competences between home and host authorities has met resistance by Member States in the past, in particular with regard to strengthening home country control for capital add-ons in subsidiaries in other Member States and strengthening host state branch's supervisor's access to information. The divergencies in national corporate laws were a further obstacle.[553]The de Larosière report explains that this resistance was due to a perceived lack of guarantees for subsidiaries, lack of a framework for burden-sharing in rescue operations and a lack of trust.[554]Distrust was exasperated by lax monetary policy and savings glut in some home countries, with potentially destabilizing consequences for the hosts. Key part of the problem, however, was the aggregate entity approach to cross-border groups, reinforced by the conception of strict jurisdictional control by the territorially competent authorities (most notably in the context of insolvency law principles).[555] Cross-border groups were not, for the purpose of EU law – treated as integrated entitles.

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[551] See Chapter 4, and especially section 4.3.1 for examples.
[552] Section 2.3.3 and in general Armour and others (n 162).
[553]Víctor (n 43).
[554]Larosière (n 129).
[555] See Section 2.4.1 on the cross-border bank group insolvency approach, and Section 3.2.1 on how resolution law differs from insolvency.

Rich literature discusses the obstacles and disincentives to cooperation between public authorities responsible for oversight of different parts of the cross-border bank group, even within integrated markets such as the European one.[556] Scholars of international organisation of such systems study how public authorities responsible for oversight of distinct entities of the group interact with each other, including their incentives for cooperation (assuming efficient outcomes can only be achieved when incentives of authorities are perfectly aligned)[557] and the legal mechanisms best suited to this end (e.g. MoUs or full centralisation).[558] The solution to cross-border bank group governance is then posed as an either strengthened coordination between authorities or full centralisation of authority. Below I briefly discuss why either of these approaches is at odds with the very idea of corporate groups.

5.1.1. Coordination prevents an enterprise approach

No matter how nuanced the framework, cooperation introduces a game-theoretical type of assessment of the framework.[559] Cooperation games, in particular those of repeated nature, assume that authorities will cooperate if they know that the alternative is a lose-lose outcome. However, different actors are characterised by different rationalities and value systems, from which emerge different probabilities of cooperative behaviour. Proceduralisation of cooperation – as introduced by the regulatory framework may however lead to a "spiral of reciprocal expectations" presumably acting as an incentive to cooperate. A cooperation model – such as that advocated for oversight, relies on meeting of the minds of different authorities on the one hand, and – on the other – an

[556]Fiechter and others (n 48); Pistor, *Host's Dilemma: Rethinking EU Banking Regulation in Light of the Global Crisis* (n 150); W Richard Frederick, 'Challenges in Group Governance: The Governance of Cross-Border Bank Subsidiaries' (2014).
[557]Lupo-Pasini and Buckley (n 286) 215 following Dell'Arccia and Marquez (2006); also D'Hulster (n 145).
[558] On the limited effectiveness of MoUs as an instrument for coordination see Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (Geneva Reports on the World Economy 2010); see: Costanza Russo 'BRRD and Third Countries Cooperation Mechanisms: Will They Be Effective?' Binder and Singh (n 207) 167; in the context of insolvency regimes specifically: Wolf (n 214).
[559]Dirk Schoenmaker, 'Post-Crisis Reversal in Banking and Insurance Integration: An Empiricl Survey' (European Commission 2013) European Economy: Economic Papers 296 arguing that resolution is non-cooperative.

assumption that the legal entities within the group are fully separable.[560] Cooperation remains a game, and any mutual accommodation requires a division of gains in accordance with comparative advantages. The primary analytical focus are the incentives of distinct authorities to work together, and an assumption than an absence of cooperation (framework) leads to ring-fencing, as coordination failures arise as a result of conflicting mandates and incentives.[561] Law – by setting the formality and direction/dimensions of cooperation law can influence the ability and incentives of public authorities to cooperate.[562]

Treating the interaction between public authorities as the determinant of governance outcomes for cross-border groups in terms of cooperation (and incentives thereto) lends itself to a particular cost-benefit analysis impervious to cross-border interest in particular – any interest is *common* to the authorities, but not a distinct group-encompassing interest. Limits of a cooperation approach are further made clear by a consideration of its implications as a benchmark for evaluating institutional design of cross-border oversight, especially to the extent it bars the incorporation of holistic objectives.

Studying cross-border bank governance in terms of cooperation between authorities purely does not account for the intra-group governance and decision-making, that is cooperation – conceived in strictly territorial terms – pre-empts an enterprise approach. Beck *et al* study the optimality of cross-border supervision as a function of the balance between externalities of cross-border banking activity and heterogeneity of the markets in question.[563] The study shows when cross-border externalities warrant cooperation, that is in cases of common systemic exposures, financial integration and a common currency. Coordinated solutions allow for a fairer distribution of costs should any risks related to these externalities materialise only if there is not too much heterogeneity among the markets. Too much difference between financial ecosystems, legal traditions

[560] Note that already in Chapter 1 it has been shown that this is not the case and practice of cross-border banking has been shown to override ring-fencing.

[561] C. Randell calls this a "prisoner's dilemma in" "Group Resolution under the EU Resolution" in Dombret, A. R. and Kenadjian, P. S. (eds) *The Bank Recovery and Resolution Directive: Europe's solution for "too big to fail"?* (De Gruyter 2013).

[562] Pablo Iglesias-Rodriguez, 'Supervisory Cooperation in the Single Market for Financial Services: United in Diversity' (2018) 41 Fordham International Law Journal 589.

[563] Thorsten Beck, Consuelo Silva Buston and Wolf Wagner, 'The Economics of Supranational Bank Supervision' (2018).

and regulatory frameworks, quantified as differences the competitive structures of banks, level of centralisation of government, legal origins, bank insolvency frameworks as well as physical (geographic) proximity and the level of government expenditure as a proxy for government interventionism, means that coordination can be inefficient.

Within such a framework, the trade-off between the negative externalities of cross-border action and heterogeneity determines the optimal level of cooperation, measured on a spectrum from non-cooperation (independent decision-making by authorities) to full cooperation (centralised decision-making). Common interest (enterprise) considerations remain fundamentally external: the primary unit of analysis remains the local jurisdiction, it is possible to distinguish between 'domestic' and 'foreign' banking activity and a full jurisdictional control is presupposed. As a consequence, such cost-benefit frameworks suggest that costs may be easily shifted across borders and as such no scope for risk-sharing (as a win-win scenario) is possible because coordination is a zero-sum game and cross-border banking entails (within the framework) easily separable activities.

5.1.2. Centralisation prevents an entity approach

Where coordination can hardly address the problem of the mismatch between the scope of authority of individual institutions and the geographical scope of the activity ("border problem"[564]), with the solution to any conflicts being generally uploading the competences to the "correct" level of oversight. In other words, within such frameworks the cross-border scope of activity must necessarily lead to centralisation of public authority as the most efficient solution. This is necessary to take full scope of the activity of the supervised banking activity and can be arranged as a supranational institution or in various collegiate forms (Crisis Management Groups at the level of the FSB, colleges). Alternatively, lack of centralisation leads to regulatory arbitrage, propelling potentially destabilising regulatory 'race to the bottom', or optimisation of tax obligations. Lack of centralisation via a joint framework further results in the externalities not being properly internalised and only global authorities would have the

[564] Charles Goodhart and Rosa Lastra, 'Border Problems' (2010) 13 Journal of International Economic Law 705; Hüpkes (n 203) 374.

monitoring capacity required.[565] Centralisation in the EU financial regulation is further warranted by reference to objectives read into the Treaties such as financial stability, which are accorded the status of a "global public good" or constitutional principles. Such centralisation was deemed to be required in the aftermath of the financial crisis – where multiple crisis narratives attributed the severity of the crisis to absence of joint cross-border crisis management frameworks and in fact has been partially realised through the Banking Union.[566] However, centralisation pre-empts the entity approach in cross-border bank group governance, i.e. it results in full hierarchisation, without due regard for the protective elements and strategies, which secure variability, contingency and proportionality, with view of protecting distinct entities within a group. Economic scholars have in fact suggested that excessive centralisation as a result of resolution strategies may facilitate disintegration of cross-border groups.[567] It is for this reason as well that this monograph focuses on the EU-wide arrangements predominantly rather than the Banking Union, arrangements where from the point of view of group law analysis, in the light of the centralised decision-making, such arrangements have an ever more distinct impact on cross-border banking structures.

5.1.3. Composite administrative structures in EU resolution law

An group governance approach in cross-border bank group governance would have to assume that there is scope for extraterritorial effects of decisions taken by authorities involved in the coordination of oversight, and that elements of the perceived trade-off between externalities (i.e. risks) and heterogeneity (between markets) is resolved within the group structures, by the very fact that they are *corporate groups,* that is their function is to enable interconnectedness (enterprise approach) while respecting

[565]though Calzolari et al also show how centralisation can contribute to retrenchement, see: Giacomo Calzolari, Jean-Edouard Colliard and Gyongyi Loranth, 'Multinational Banks and Supranational Supervision' Working Paper (2017) 24.

[566] See for example De Larosière (2009) as quoted and discussed in Thorsten Beck and others, *Bailing out the Bank: Reconciling Stability and Competition-an Analysis of State-Supported Schemes for Financial Institutions* (2010) CEPR.

[567] E.g. due to excessive burden being placed on the parent, e.g. via capital prepositioning – Ester Faia and Beatrice Weder di Mauro, 'Cross-Border Resolution of Global Banks∗ Bail in under Single Point of Entry versus Multiple Points of Entry' (2016).

independence of distinct legal entities (entity approach).[568] Coordination is not only a response to any perceived trade-off, especially where administrative structures have the power (or enable) concrete decisions to be taken vis-à-vis the bank which affect the scope of the markets where it operates (even if just the EU). In such cases it is no longer appropriate to speak of discrete jurisdictions aggregating to the scope of cross-border group, but rather of an integrated governance space, where the terms and the design of the administrative structure (rather than the degree of coordination/centralisation) determine the outcomes for the distinct economies where the cross-border bank group is active.

EU legal scholarship has identified such administrative structures as composite administration. Within such structures there is no full centralisation (because there is no vertical hierarchy) and any extraterritorial effects are exercised within a common institutional structure. Per Bogdandy and Dann these features allow such composite administrative structures to "reconcile autonomy, mutual considerateness and the ability to take common action,"[569] with EU agencies giving the structure an integrated umbrella for resolving conflicts. It is precisely such arrangements which have been created in the EU in the aftermath of the GFC.[570] Arguably they reach even further into the fabric of the distinct legal systems, to the extent the procedures of cross-border bank group governance engage as well bank management at enterprise and entity levels. In other words, they are not just administrative procedures, but transnational governance procedures. In the following sections I analyse the institutions of cross-border bank group governance established by EU banking regulations, and EU resolution law in particular, as examples of such composite administrative structures subsequently engaged in group governance procedures. An institutional analysis allows to identify specific strategies which operationalise such a governance mechanism via scope of mandates and regulatory deliverables.

[568] See Section 1.2 and 1.3 on cross-border bank groups described as integrated hierarchies and markets to this end.

[569] Armin Von Bogdandy and Philipp Dann, 'International Composite Administration: Conceptualizing Multi-Legal and Network Aspects in the Exercise of International Public Authority' (2008) 9 German Law Journal 2013.

[570] See Edoardo Chiti, 'In the Aftermath of the Crisis -The EU Administrative System between Impediments and Momentum' (2015) 17 Cambridge Yearbook of European Legal Studies 311.

5.2. Institutions of resolution – membership, constitution and mandates

Previous chapters have explained that the distinct resolution authorities which have been created post-crisis with view of being designated fire-fighters in crisis. Their distinctiveness – which differentiates resolution authorities from other financial regulators – lies in the scope of their mandates and the potential power to take over bank management in crisis.[571] Such specialness of resolution authorities extends also to the cross-border dimension, with new bodies for cross-border coordination created.[572] Three will be specifically discussed below: resolution colleges, Single Resolution Mechanism (for the Banking Union countries) and the EBA, with regard to their mandates, membership and constitution processes (to the extent relevant) to identify specific legal strategies enabling an enterprise approach to cross-border bank groups.[573] To the extent that the mandate (prescribed function) determined the membership of the bodies, I describe the former first.

5.2.1. Resolution colleges

BRRD requires that each cross-border bank in the EU is overseen – with regard to crisis prevention and management – by resolution colleges composed of all the EU resolution authorities where the bank in question has activity.[574] Formally, resolution colleges are not decision-making structures, but rather dedicated fora for the national authorities to work towards implementing a set of specific procedures relating to ex ante crisis prevention and management.[575]Their existence is to allow for an efficient, timely, clearly defined resolution, where due considerations are given to the economies of all states where the bank is active, and underpinned by "recognition that coordination and

[571] See Section 3.2.
[572] See Section 3.1.3.
[573] See Section 3.5.3 for the review of the analytical framework.
[574]Anna Gardella, 'La Risoluzione Dei Gruppi Finanziari Cross-Border Nell'Unione Europea', *Quaderni di ricerca giuridica 81: Scritti sull'Unione Bancaria* (2016); Edoardo Troiano ''Cross-border cooperation between resolution authorities in the BRRD' in Haentjens and Wessels (n 76); Grünewald (n 71) 110 et sq.
[575]According to recital (98) of the BRRD, 'The resolution college should not be a decision-making body, but a platform facilitating decision-making by national authorities. The joint decisions should be taken by the national authorities concerned'.

cooperation are most likely to achieve a result which lowers the overall costs of resolution."[576]

Resolution colleges are foreseen already by the BRRD and have a specific functions of cross-border nature mandated by the BRRD, namely they are to recreate trust between authorities, where trust between Member States in cooperation is fundamental to the credibility of the internal market (trust-building function).[577] Colleges are considered to be proportionate arrangements ("a less intrusive requirement") to ensure sufficient cross-border coordination than full centralisation (see on the SRM below), and render standardisation of institutional arrangements concerning the set-up of individual authorities redundant. EU resolution colleges are to be distinguished from the arrangements which exist at global level (e.g. the Crisis Management Groups which exists for the globally significant banks), to the extent that they supplement the specific objectives of resolution authorities (financial stability, preservation of critical functions) with EU-wide (internal market) objectives to achieve integration in the internal market.[578]

Further, there are specific cross-border critical functions which are preserved as part of the resolution colleges carrying out their tasks.[579] Protection of critical functions is a novel regulatory objective introduced by the BRRD. It has been operationalised in the context of the early resolution cases, where the SRB identified deposit-taking, lending activities and payment services as critical "since they are provided to a limited number of third parties and can be replaced in an acceptable manner and within a reasonable timeframe."[580] Protection of critical functions across borders was by no means a given prior and during the crisis. In fact, the logic underpinning state aid control in the banking sector in the cases of bank restructuring and liquidation was very much at odds with the idea – since economic continuity is generally not allowed under state aid rules

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[576] Art. 87(j) BRRD, not amended in 2018.
[577] Recitals 3 and 15 BRRD.
[578] Gardella (n 574) 165.
[579] The preservation of critical functions in cross-border group context has been explored for example by Eva Hüpkes, with a focus however predominantly on smooth operation of payment systems ("continued access to essential banking services" Hüpkes (n 54) 373.
[580] See SRB, Notice summarising the effects of the decision taken in respect of Banca Popolare di Vicenza S.p.A. 23 June 2017, available at: https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_banca_popolare_di_vicenza_s.p.a._20.00.pdf .

where it allows the survival of the failing company under another guise.[581] The concept however emerged as a parallel to public interest in financial stability, with the latter – arguably – being focused on the internal aspects of the sector, and the former more with the critical functions which the banking sector provides in the economy as a whole. Consequently, in the context of cross-border banking groups, preservation of critical functions is a particularly important aspect of the resolution college's mandate.

With regard to how resolution colleges are constituted, the "anchor" is the resolution authority of the Member State, where the parent is established, that is the group-level resolution authority. Resolution college is to be established for each bank established in the EU[582] with the specific membership determined through a (reflexive) process of delimiting scope of the group. They are not durable, but rather adaptable structures.[583]

Membership of resolution colleges is broader than that of the supervisory colleges – in another example of the critical difference in the design of oversight in this area of banking regulation. Supervision is the point of reference and the start of the mapping procedure, however. Resolution colleges are composed of (a) group-level resolution authorities and authorities of states where following entities are established: (b) subsidiaries "covered by consolidated supervision", (c) parent financial holding company, and (d) significant branches. In addition to this composition which mirrors that of supervision, the consolidated supervisors are to form part of resolution colleges, as well as the supervisors from those Member States where the resolution authority is included with the above criteria, possibly accompanied by the central bank. Finally, competent ministries are part of the resolution college as well as the deposit guarantee authorities. EBA shall also be represented in each college – with a specific role of promotion and monitoring of efficient, effective and consistent functioning of resolution. Such broad membership reflects the special design of resolution colleges as not merely executors of rules, but as well the strategists of crisis prevention, whose broad membership reflects the need to overcome siloed thinking prevalent during the

[581] Commission Decision on State Aid to Hypo Group Alpe Adria, 5 Feburary 2013, paras. 111-115.
[582] At global level so-called Crisis Management Groups (CMGs) are established for the largest global banks, EU level resolution colleges are to be established pursuant to Art. 89 (as amended by BRRD 2).
[583] Recital 58 BRRD.

financial crisis.[584] Furthermore, the membership also foresees the participation by authorities in countries where significant branches are located – that is even though the authorities of the host Member State in such cases do not have the full scope of powers vis-à-vis the bank, the post-crisis framework introduces a channel for the relative materiality of the cross-border banking activity also in the host Member State.[585]The membership of resolution colleges is diverse and allows for incorporation of host-market specific concerns (i.e. it allows for a "bottom up" perspective within the group structure to adjust the topography of the cross-border bank relative to local markets).

The BRRD provides for the membership of colleges at the general level, details are provided in the European Commissions Delegated Regulation No 2016/1075.[586]The delegated regulation details the process of constitution of the resolution college. In addition to specific rules determined in this regard by the EBA (which include e.g. the communication and information exchange requirements[587]), further written arrangements are to be developed by the group level authority as the practical implementation of the standards on a case-by-case basis. This level of proceduralisation of interaction within the resolution colleges was deemed necessary as a result of fragmentation which occurred in the absence of mutually agreed rules prior to the crisis. Granular rules set the detail of interaction, in addition to the regulatory objective (BRRD), technical rules are developed by the authorities and EBA (RTS) and tailor-made rules are further prepared for the individual college as "written arrangements."

In the light of the simple absence of full information about cross-border groups and the role which this lacunae had played in amplifying the crisis, the process of constitution

[584]Julia Black 'Restructuring global and EU Financial Regulation: Character, Capacities and Learning' in: Wymeersch, Hopt and Ferrarini (n 54); on tje specific role of resolution colleges as information building in the light of the crisis-exasparating lack of information see: Carmassi and Herring (n 45) 61.

[585] See Art. 55 for the procedure which allows host Member States to apply to the group-level supervisory authority for such a status to be applied to the branch. Subsequently this grants the host supervisor (and the resolution authority) privileged access to information about the cross-border bank group. See Dalvinder Singh, 'Should Non-participating Member States Join the Banking Union? A Legal Perspective' in Grundmann and Micklitz (n 170); FinSAC (n 195).

[586] 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, 8.7.2016, p. 1–71 "Resolution College RTS."

[587] Art. 50 Resolution College RTS. See below Section 5.3 on EBA tasks.

of the resolution college is crucially important, and why it has been recognised with a distinct term – "mapping."[588] This approach builds on the prudential supervisory law framework which establishes the supervisory (microprudential) colleges under the purview consolidated supervisor. The mapping process partially relies on elements of the micro-prudential framework, such as the authorisation process[589] and the definitions of consolidating supervisor, to identify the Member State where the group-level authority is established.[590] Likewise the definition of the parent undertaking relies on the prudential framework.[591] The specific procedures of the resolution colleges which determine the process of resolution college mapping are distinct from the procedure which leads to the determination and emergence of the supervisory college.[592] Resolution colleges differ from their microprudential (supervisory) equivalents in that they are more composite and variable, reflecting the distinct normative framework of BRRD (see above).[593] However, the cornerstone of the framework is the authorisation of the bank as a credit institution: any group governance is founded on bank function (deposit-taking) rather corporate form.[594]

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[588] Art. 50 Resolution College RTS, which provides that "[f]or the purposes of identifying the members and potential observers of the resolution college, the group-level resolution authority shall conduct the *mapping* of group entities referred to in Article 1(1) of Directive 2014/59/EU (…)." Art. 88 BRRD draws a distinction between general resolution colleges, which provide also for cooperation and exchange of information with third countries, as well as for European resolution collages for banks with head offices established in third countries. The present section is concerned only with resolution authority cooperation within the EU, that is where the cooperation is binding. See: Binder and Singh (n 207).

[589] That is home authority is where the bank was active, whereas the host authority is where the entity has a branch/provides services per Art. 2(1)(43)(44) CRR.

[590] "consolidating supervisor" means a competent authority responsible for the exercise of supervision on a consolidated basis of EU parent institutions and of institutions controlled by EU parent financial holding companies or EU parent mixed financial holding companies; Art. 4(1)(43) CRR.

[591] Definitions of parent institutions (i.e. "parent institution in a Member State" per Art. 4(1)(38) as amended by CRR 2 and "EU parent institution" per Art. 4(1)(29) CRR) are founded on the authorisation process (where entity is authorised to conduct deposit-taking banking activity) rather that its legal form (or incorporation, registered seat).

[592] For SSM specific supervisory colleges see recitals 38, 42 and Arts. 1(b) and 4(1) SSM.

[593] Compare articles on consolidated supervision in CRD IV under Arts. 111 and 112 CRD IV and Art. 50 BRRD, which suggests this process is to take into account the process of mapping out supervisory colleges outlined in Art. 2 Commission Delegated Regulation (EU) 2016/98 of 16 October 2015 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards for specifying the general conditions for the functioning of colleges of supervisors, OJ L 21, 28.1.2016, p. 2–20 and Art. 2 Commission Implementing Regulation (EU) 2016/99 of 16 October 2015 laying down implementing technical standards with regard to determining the operational functioning of the colleges of supervisors according to Directive 2013/36/EU of the European Parliament and of the Council, OJ L 21, 28.1.2016, p. 21–44.

[594] Art. 13 CRD IV, However, as a condition of authorisation, and continuing to meet these conditions, the entity shall have its a registered office and head office in the same Member State or has its head

The process of mapping imposes particular enterprise-wide obligations on the group-level resolution authority. Specifically, it must identify not only the relevant regulatory architecture for the financial sector in the countries where the given bank group is active,[595] but also the relative importance of the given entity (subsidiary or a branch, in accordance with the locally relevant criteria for importance.[596] Such an obligation is imposed on the group-level authorities by the Guidelines developed by the EBA – the agency with an internal market (and consequently an enterprise) mandate.[597]

The group-level resolution authority must identify and define the scope of the cross-border bank group – the knowledge building involved in that process is already a key innovation with respect to the pre-crisis framework. The group-level authority further enjoys significant discretion in determining the scope of the bank – in both setting the terms of the mapping process (via the "written arrangements") and the assessment of materiality of distinct parts of the group. From this point of view, where the group-level authority acts as a filter between the factual scope of the group and the scope of the group relevant for the implementation of the resolution crisis contingency planning, there is a clear and significant transnational consequence of its decision.[598] Thus even if the resolution colleges are not formally designated as decision-making fora, the process of their constitution places specific responsibilities on the group-level resolution authority.

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office in the Member State which granted it authorisation and in which it actually carries out its business

[595] See Art. 2(3)(c) Commission Delegated Regulation (EU) 2016/98 of 16 October 2015 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards for specifying the general conditions for the functioning of colleges of supervisors, OJ L 21, 28.1.2016, p. 2–20 "Supervisory Colleges RTS."

[596] Art. 2(3)(d)-(e) Supervisory Colleges RTS.

[597] Compare with attempts of the European Commission to incorporate EU group-wide consideration when assessing state aid measures over the course of the crisis, in particular Section 4.3.2.1)

[598] On the difficulties of implementing the materiality standard in the US see Carmassi and Herring (n 45) 74.

5.2.2. Single Resolution Mechanism (SRM)

SRM was established to ensure that an effective mechanism was in place for crisis prevention and management in the participating Member States by the Single Resolution Mechanism Regulation, as the second pillar of the Banking Union.[599] In addition to being responsible for the significant banks of the Banking Union, it is further responsible for specific cross-border groups not explicitly overseen by the Single Supervisory Board.[600] The mandate of the SRB (the agency at the heart of the Mechanism) is defined by the general aims of resolution law (see Section 3.2.4) and - as the regulation founded on Article 114 TFEU – the objective of integration in the internal market even if its actual remit is limited to the Eurozone.

By comparison with resolution colleges, the membership and constitution of the SRM is much more straightforward and direct in terms of distribution of decision-making powers – it is a more centralised structure. First of all, this is as Single Resolution Mechanism is established by a generally applicable regulation (unlike the BRRD), second because the very objective of the mechanism is to create an integrated institutional structure for crisis prevention measures of an EU cross-border bank group. This broader scope viz the Single Supervisory Mechanism further draws attention to the unique concern of EU resolution rules with cross-border bank groups and their crisis prevention/governance. The SRM is composed of national authorities of participating Member States and a new "specific" EU agency – the Single Resolution Board. SRM Regulation establishes a centralised power of resolution entrusted to the Single Resolution Board established in accordance with this Regulation (the Board) shared with the national resolution authorities for participating Member States of the Banking Union. SRB is a Union agency like the three ESAs established also based on Article 114 TFEU and unlike the "colleges" of national resolution authorities (as in the BRRD) it has legal personality, and decision-making capacity.[601]

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[599] Recital 11 SRM.

[600] These are identified pursuant to special arrangements with the national resolution authorities.

[601] Article 42(1) Single Resolution Mechanism Regulation. On SRB see inter alia Agnieszka Smoleńska 'Single Resolution Board: Lost and Found in the Thicket of EU Bank Regulation' in: Grundmann and Micklitz (n 170); George S Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism and the EU: Legal Foundation , Governance Structure and Financing By' in Matthias Haentjens and Bob Wessels n 76; critically on the internal organisation principles of the Single Resolution Mechanism in the context of resolution scheme implementation (i.e. when a bank is deemed failing or likely to fail) Danny Busch, Mirik Rijn and Marije Louisse, 'How Single Is the Single Resolution Mechanism?'

SRB is the core of the Mechanism. A key property of this EU agency is inbuilt variability: that it the composition of the Executive Board in charge of taking concrete decisions vis-à-vis the failing bank reflects the possible cross-border scope of the credit institutions it is responsible for. The Board is composed of five full-time Members,[602] but as well the resolution authorities of Member States where the bank in question of established, as well as those of Member States where subsidiaries.[603]Due to the limitations of the *Meroni* doctrine (whereby EU agencies cannot enjoy discretionary powers), the SRB relies exclusively on the national resolution authorities with regard to implementation of the crisis prevention measures – including the setting of MREL and removal of impediments to resolvability, although it has the power to determine a bank is failing or likely to fail.

This means that even when the degree of formal organisational centralisation of decision-making in the case of SRB is higher than in the case of the resolution colleges, the key difference lies in the legal personality accorded to the former rather than specific representation of national authorities in the decision-making structure. The second key difference is durability – the SRB is established as an EU agency and operates continuously, whereas the activity of resolution colleges is cyclical (at least two meeting per year).[604]

(2019) 30 European Business Law Review 577; Marta Božina Beroš, 'Some Reflections on the Governance Framework of the Single Resolution Board' (2018) 56 Journal of Common Market Studies 646; comparatively with EBA as another key actor in the EU banking landscape Marta Božina Beroš, *Agencies in European Banking: A Critical Pespective* (Springer International Publishing 2018) on EBA see also section below.

[602] Art. 43(1) SRM.

[603] Art. 53(3)-(4) SRM

[604] Note the voting procedures within the SRB have changed with the 2019 SRM 2 amendment, to further centralise powers within the permanent members of the Board.

5.2.3. European Banking Authority (EBA)

European Banking Authority is an EU networked agency established already after the start of the GFC, composed of representatives of national supervisory authorities (Board of Supervisors) as specified in the EBA Regulation. The main decision-making body of EBA consists therefore of 27 supervisors, who are to act independently and in the interest of the Union.[605] EBA's mandate is not specific to a particular credit institution (as in the case of the two above arrangements) but concerns the internal market as a whole – including its integrity. The mandate of EBA foresees specific tools of cross-border nature through which this aim is to be achieved. EBA's coordination function means it "shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union."[606] Further, EBA's participation in the colleges is oriented at improving convergence and consistency of their decisions. [607] EBA has a special cross-border role as an arbiter, but also as an enforcer of the EU interest, specifically in the context of colleges of authorities where a given cross-border bank is active. The scope of EBA's role extends beyond what can be purely understood as a facilitating role. In addition to contributing to the functioning of colleges by issuing good practice documents, guidelines to complement the single rulebook, leadership and action plans as well as IT platforms,[608] the EU authority is also to monitor the interaction and mediate for conflict resolution, with the power to issue binding decisions to this end. The jurisdictional (coordination and convergence) focused approach is reflected in the institutional design of the EU-wide agency responsible for fostering convergence through providing granularity of rules and conflict resolution.

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[605] Recitals 42 and 52 EBA Regulation.

[606] Art. 32 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, 15.12.2010, p. 12–47 "EBA Regulation". Such a function, includes – as provided for in the resolution planning procedure under Art. 13(4) BRRD "carrying out non-binding mediation upon a request from the competent authorities or on its own initiative."

[607] See Art. 88(4) BRRD, Ramos Muñoz and Lamandini (n 95) 130.

[608] European Court of Auditors, European Banking Supervision Taking Shape — EBA and Its Changing Context (2014), p. 48.

In terms of its composition, the EBA is an EU agency established as part of the European System of Financial Supervisors (ESFS) in 2010.[609] Of the three cross-border bodies studied in this chapter, it is the only one with fixed membership in exercising its resolution related tasks.[610] The specific mandate of the EBA with regard to resolution tasks, is exercised by the dedicated ResCo (Resolution Committee) is established within the agency. ResCo is composed of a Chairperson and the heads of the 27 EU National Resolution Authorities (NRAs), with observers from resolution authorities of the EEA EFTA countries represented in the EBA Board of Supervisors (BoS), representatives of the European Commission, the SRB, the European Systemic Risk Board, the European Central Bank (SSM), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pension Authority (EIOPA).[611] The ResCo is a permanent structure which – unlike resolution colleges or the variable Executive Board of SRB – has a permanent membership and is not concerned with a particular bank.

[609] 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, 15.12.2010, p. 12–47 ("EBA Regulation").

[610] Representatives of other EU financial agencies and the ECB are also represented, they are however non-voting (Art. 40 EBA Regulation).

[611] Article 127 BRRD requires the EBA to create a permanent internal committee for the purpose of preparing EBA decisions to be taken in accordance with Article 44 of the EBA Regulation, the relevant decisions of the EBA are still taken by the Board of Supervisors of the agency.

5.3. Tasks and powers

The BRRD reforms not only strengthen cooperation between authorities by creating the above mentioned fora and bodies, but also by requiring they deliver a number of cross-border bank group specific deliverables, that is: group resolution plans,[612]which must comprise assessment of group resolvability[613] and the setting of the MREL requirement, including – after the 2019 BRRD amendment – setting of the internal and external MREL target.[614] The role of the distinct authorities is different in respect of these functions. First, the resolution colleges are the executors of these specific cross-border bank procedures with regard to all EU banks. For those cross-border banks where the SRB is competent, resolution plans are developed within the scope of the Banking Union. EBA meanwhile is not the executor of any of the regulatory deliverables, but rather the guarantor of consistency across resolution college practice (recall the variability of resolution colleges) and a mediator should conflicts between authorities arise in the context of developing joint cross-border bank group deliverables. Below I outline the main principles and objectives of the specific cross-border bank group regulatory requirements. I then turn to the specific distribution of powers within the procedures foreseen as a matter of legal strategies enabling an enterprise (group-wide) approach to be taken.

5.3.1. Group resolution plans

Resolution plans outline possible courses of action if a bank is deemed failing or likely to fail under a variety of idiosyncratic and systemic scenarios,[615] and specifically to include: a demonstration of how critical functions[616] and core business lines could be legally and economically separated from other functions so as to ensure their continuity (“continuity of critical functions”), provisions for the financing of resolution without public support (including Emergency Liquidity Assistance facilities provided by central banks), a description of critical interdependencies of the bank as well as an external

[612] Art. 12-13 BRRD.
[613] Art. 17-18 BRRD.
[614] Art. 45 45h as amended by the BRRD 2.
[615] Art. 10(3) BRRD.
[616] for definitions see Article 2(1)(35) BRRD. For the protection of critical functions as a key regulatory objective see Section 3.1.2 and for discussion of cross-border critical functions as a specific mandate of resolution colleges Section 5.2.1.

communication plan.[617] Resolution plans for cross-border groups must include a procedural element, that is to outline of cooperation between authorities and specific principles relating to burden-sharing (*ex ante* financing arrangement planning here serves as a means to ensure cooperation).[618] To the extent that BRRD is an EU minimum harmonisation measure, BRRD differentiates between cooperation involving authorities from EU Member States and third countries, albeit with specific caveats. The SRM regulates separately the preparation of group resolution plans developed for bank groups in the Banking Union. The group-perspective enabling consequences of such a centralisation of powers are clearly relevant from the point of view of building an understanding how EU administrative procedures are a key building block of cross-border group governance. They prove the point that cross-border distribution of public authority is relevant for group governance. However, to the extent that the Banking Union covers only part of the internal market where EU cross-border groups operate, below the focus is placed on the EU-wide regulatory obligations.

An EU cross-border group resolution plan is to comprise:[619]

(a) a plan of decentralised implementation;

(b) a list of impediments to coordination;

(c) appropriate arrangements for coordination with third countries;

(d) measures which could facilitate resolution (e.g. separation)

(e) information on gold-plating by relevant authorities

(f) financing arrangements, without assuming state aid, ELA nor other forms of non-standard liquidity support.

[617] BRRD Annex furthermore outlines specifically the list of relevant considerations, and in particular the areas which the SRB should take into account when making the decision. The comprehensiveness of that list at the same time reinforced the proceduralisation of the assessment (with impact on review).

[618] Art. 20(2)(g) and Art. 22(5)(d) Resolution College RTS on mandatory elements of financing arrangements to be covered in the resolution plan (for groups, the description of any principles agreed for sharing responsibility for financing between sources of funding in different jurisdictions, including between sources of funding in different Member States pursuant to 12(3)(f) BRRD.

[619] Art. 12 BRRD 2, for the SRM specific group resolution plan see Art. 8 SRM Regulation.

A key aspect of resolution planning – which subsequently determines the two further deliverables – is the decision concerning the resolution strategy of the cross-border EU group – that is whether it is a single resolution entity (with a single point of entry) or a resolution group (with multiple resolution entities) (See Section 3.3.3). The subsequent stages of the assessment are conditional on the route chosen in this regard. The choice between the resolution strategies is made together with the Union parent undertaking.[620]

The most important innovation of resolution plans is that they are dry runs – that is they enable the cross-border authorities to coalesce around common solutions, and by being one step removed from everyday supervision (notwithstanding the concrete regulatory requirements which may be imposed as a result of resolvability impediments identified or the MREL determination). As such their function – in a cross-border context – is to facilitate trust among authorities and establish a predictable course of action should a crisis occur. Secondly, together the authorities responsible for the preparation of the plan have to prepare their further cooperation. Such a meta-approach should further reinforce trust among the authorities but also ensure joint ownership.

5.3.2. Group resolvability assessment

In the context of the resolution planning, the resolution authorities are to assess the resolvability of the group, including to possibly identify (and remove) impediments to resolvability.[621] Resolvability means that the group can be put in resolution without any extraordinary public financial support besides the use of the financing arrangements, any central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms. In addition to specific provisions relating to recovery and resolution planning, the BRRD foresees a distinct assessment for resolvability of groups. Such an assessment is carried out by the resolution authorities and consists of verification whether resolution is deemed feasible and credible without adverse effects on financial stability and "with a view to ensuring the continuity of critical functions carried out by the group entities, where they can be easily separated in a timely manner or by other means."

[620] Arts. 12 and 13 BRRD as amended in 2019 (BRRD 2).
[621] Art. 17 and 18 BRRD 2 (note the article has been fully amended in 2019), Art. 10(4) SRM provides for group resolvability assessment for Banking Union institutions.

There is a specific cross-border dimension to resolvability assessment for groups, which is different from that provided for (integrated) institutions. In assessing the resolvability of the bank, the group-level resolution authority makes the assessment for the group as a whole and to this end prepares a report, which subsequently must be communicated to all other authorities.[622] The final resolvability assessment is to be done by joint decision by the resolution authorities in the college, although there is a time limit after which alternative courses of action may be taken, should they not agree. The assessment of resolvability includes an assessment of any impediments to resolvability. There are specific cross-border impediments which are considered a distinct category and include means of coordination between authorities and any legal impediments (assuming legal issues of non-recognition must be overcome already as part of the resolution planning process).[623]At a general level, there is a clear cross-border dimension to resolvability assessment as far as the impact of bank's organisational structure and its stability/resilience to crises, or in other words the structural implications of crisis prevention prong of EU resolution law.[624]

Central to the assessment of bank's resolvability are its global activities, interconnectedness measured as intra-financial system assets, liabilities and securities outstanding. Additionally, cross-jurisdictional activity is treated as a specific obstacle since even "under the optimistic assumption that the agreements and protocols established by the FSB hold up under the pressure of a crisis, the larger the number of authorities that must be consulted, the greater the coordination costs and the more difficult the challenge of opening the bridge institution for business on Monday morning following a weekend resolution."[625] Carmassi and Herring have argued that multijurisdictional complexity is an obstacle to resolvability as complexities of intra-

[622] In fact, this assumption underpins the wording in the resolvability assessment RTS. See arts. 25-25 therein.
[623] Art. 26(3)(d) Resolution College RTS, Art. 30, Annex C, point 20 BRRD. Considering such measures controversial see: Ramos Muñoz and Lamandini (n 95) 808.
[624] Consider the role which cross-border bank activity had played in European Commission's assessment of bank business models in the context of state aid control, see section 4.2.2 Also consider the implications of imposing the regulatory requirement, i.e. "likely to produce the effect of legal restructuring based on supervisory results" per De La Mata Muñoz (n 57) 602.; on the specific issue of new rules seeking to simplify organizational structure see: Christine Cumming and Robert A Eisenbeis, 'Federal Reserve Bank of New York Staff Reports Resolving Troubled Systemically Important Cross-Border Financial Institutions : Is a New Corporate Organizational Form Required ?' [2010] New York 21 (for overview of the organisational and jurisdictional complexity of Lehman), Schoenmaker, n. 53.
[625]See: Carmassi and Herring (n 45) 141 for an overview of concerns from US supervisor's point of view showing why cross-border activity is a necessary consideration for resolvability assessment

group exposures might tie up funding necessary in resolution and impede oversight. EU resolution rules – and in particular the planning aspect – seek to anticipate such obstacles. Hence the determination of resolution strategy (that is a multiple or single point of entry[626]) is crucial. Schoenmaker suggests there are two factors which should guide the assessment of relative strengths and weaknesses of different resolution strategies, namely that there is a trade-off between the autonomy of the subsidiary (independence is a prerequisite for separability) and efficiency of the group as a whole (assuming economies of scale[627]). This is in addition to questions of certainty raised by the choice of distinct resolution strategies. The cross-border organisation of the resolution group is therefore an essential element of resolvability assessment. To this end banks are considered to be centralised banks when they have capital, liquidity services, risk management and treasury operations integrated (e.g. ING, Deutsche Bank). A decentralised bank (BBVA, Santander) is meanwhile one which operates via subsidiaries that have a certain degree of autonomy, via limited reliance on parent funding.[628]

As part of the resolvability assessment procedure, the group level authority is the authority tasked with communicating with the Union parent undertaking on any impediments which are to be removed (this is regardless of the resolution strategy chosen by the bank). At this stage resolution authorities of subsidiaries are to be consulted. Under BRRD 2, there are specific rules which treat as a matter of group resolvability requirements of internal loss absorption. Authorities of the resolution college shall make every effort pursuant to BRRD 2 to reach a joint decisions on the identification and assessment of the measures to remove impediments to resolvability. BRRD foresees that a common decision is not reached – however in such a case the process is subject to binding EBA mediation. If EBA does not take a decision, the decision of the group-level authority applies. In such a case where each resolution entity authority takes a separate decision concerning the resolvability assessment the decisions shall be duly substantiated.

[626] Recall Section 3.3.3 on the distinction between multiple and single point of entry, where the former assumes an individual legal entities are resolved separately, and the latter a centralized approach with upstreaming of losses.

[627] On the ambiguous answer economics gives to the question of economies of scale in cross-border banking see: Demirgüç-Kunt, Evanoff and Kaufman (n 16) ch 7: Joseph P. Hughes and Loretta J. Mester 'The Future of Large, Internationally Active Banks: Does Scale Define the Winners?'.

[628]Schoenmaker, n. 53, 4.

The operationalisation of the joint resolvability assessment has already been tested on the former BRRD rules. Specifically, there was a case of disagreement between the authorities within the resolution college concerning the resolvability assessment of a cross-border bank group whose parent entity was established within the Eurozone (and hence the SRB was the group level-resolution authority) and the resolution authority of the subsidiary established in Romania. The conflict of assessment as part of the 2018 Resolution Planning cycle, ended in binding mediation before the EBA. In its assessment the EBA emphasised the sequencing of the assessment and the procedure as a means to overcome the disaccord which is to enable a strict adherence to functional interpretation of consecutive stages.[629]

5.3.3. Setting of external and internal MREL in groups

The final deliverable of resolution planning process in a cross-border bank group context is the determination of the Minimum Requirement for Own Funds and Liabilities at individual entity and consolidated levels. Initially this requirement was in place on a consolidated basis (i.e. externally), but with the BRRD 2 amendment, the EU has transposed the internal TLAC (MREL) requirement into EU law, that is the internal loss absorption capacity of the bank.[630]

MREL is to be set by the resolution authorities – as opposed to other areas of bank governance under the BRRD, where it is still the supervisor who is the primary interlocutor of the banks.[631] In addition to individually set MREL amount, in the context of recovery planning, the resolution authority may require further issuance of eligible liabilities.[632] Through procedures within resolution colleges, the authorities may waive the requirement (it applies *a priori* to all banks in the EU).

MREL is calculated as a percentage of the total risk exposure amount calculated in accordance with the CRR rules. The new procedure prescribes that the amount should be calculated at the level of the resolution group with view to ensure that the entity can

[629] European Banking Authority, Decision on the settlement of a disagreement (Single Resolution Board and Banca Naţională a României) of 27 April 2018.
[630] Recall the significance of the requirement from the point of view of organization of the cross-border bank group, and departitioning specifically, Section 3.3.3 and more generally on the bail-in requirement Section 3.2.2.
[631] Article 45 BRRD with amendments critical of the process Tröger (n 235) 9.
[632] Article 17(5)(i) BRRD.

be resolved by the use of resolution tools with view to achieve the objectives of resolution, to allow resolution entity and its subsidiaries to continue to meet minimum prudential requirements if the bail-in is deployed. Bank's size, business model, funding model, risk profile as well as level of interconnectedness are necessary considerations in setting the amount.[633] The minimum amount of MREL set for banks with total assets exceeding 100 bn EUR the minimum amount is 13,5 % total risk exposure when calculated with Art. 45(2)(a) BRRD 2 and 5 % when calculated in accordance with Art. 45(2)(b).

With regard to internal MREL, BRRD 2 provides a structural solution to the internal MREL requirement by distinguishing between resolution entities (for multiple point of entry resolution) and resolution groups (for single point of entry resolution). Where a cross-border bank group comprises more than one "resolution group" a resolution plan is to outline the specific actions planned in relation to the resolution entities of each resolution group and the implications of those actions on: (i) other group entities that belong to the same resolution group; (ii) other resolution groups."[634] Group-level resolution authorities are tasked with the identification of resolution entities and resolution groups within the group and to consider the implications of any planned resolution action within the group appropriately. The choice of the resolution strategy depends on the bank structure, that is the extent to which it is ring-fenced. As has already been mentioned, internal MREL is differentiated from the external MREL by the type of eligible liabilities.

BRRD 2 requires the MREL for EU-cross border bank groups (as opposed to the Banking Union bank groups where the SRB is the authority in the lead) is to be set jointly by "the resolution authority of the resolution entity, the group-level resolution authority, that is the resolution authority of the ultimate parent undertaking, and resolution authorities of other entities of the resolution group", with EBA enjoying binding mediation.[635] The amendment reverses the "top down" approach of the original BRRD where the group-level MREL was set first, and allows for the individual MREL requirement to be imposed by the host supervisors ("daisy chain"). Authorities in the resolution college "shall do everything within their power to reach a joint decision."

[633] Art. 45c BRRD 2.
[634] Art. 12(3)(aa) BRRD 2.
[635] Recital 23 BRRD 2.

Otherwise the decisions of the subsidiaries' authorities shall apply[636] - rather than that of the group-level resolution authority. Differently than in the case of resolution plan overall, the MREL requirement must be met on the individual subsidiary stand-alone level in the absence of agreement within the resolution college. In such cases, binding mediation of EBA is only applicable in cases when the subsidiaries do not meet the minimum requirements on a standalone basis. Mediation is also preempted where the host authorities set the requirement within "safe harbour" of 2 % RWA at the consolidated level.[637]

[636] Art. 45h(5) penultimate sentence BRRD 2.
[637] Art. 45h(5).

5.4. Integrating legal strategies for a cross-border approach

Analyses of distribution of tasks and powers among authorities within administrative structures such as resolution colleges typically discuss responsibilities, that is the burden imposed on distinct authorities.[638] From the point of view of identifying group governance legal strategies which enable an enterprise approach, these include various ways in which powers of one resolution authority extend (have legal consequences) for other parts of the cross-border bank group as part of the procedure.[639] Such an extension can take place via specific powers granted to the group-level resolution authority or – as was already suggested – extraterritorial obligations imposed on the authorities relating to markets other than their strict jurisdiction when engaging in the process of preparation of the specific cross-border bank group deliverables required by the BRRD. These can as well contain specific means (protective elements) which act as local market's defence against such a boundary-crossing legal effects.[640] The overall group governance is established through the balance of the enabling-protective element.

Drawing on the common legal traditions of Member States in the area of group law, a number of distinct legal strategies can be identified when the EU-wide group-level resolution planning are analysed qua group law. These include: calibration of voice, exclusive (residual) competence, expanded scope of mandatory considerations, disclosure, obligation to give reasons and to inform, sanctions for non-cooperation, residual ring-fencing powers, duplication of tasks and symmetry of powers, cross-border scope of resolution tools, standards and rule-making, conflict resolution via mediation, EU legal principles (proportionality) and time variability. These legal strategies, and effects from the point of view of group governance (enabling or protective) are analysed below.

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[638] E.g. for such criticism of overburdening home supervisors see Hadjemmanuil and Andenas (n 34) 159.

[639] Notably such an extension only concerns EU-wide groups which operate across the internal market both within the Banking Union and in other Member States, where within the Banking Union the SRB became the resolution authority responsible creating an integrated bank group law space.

[640] I.e. even when in some areas cross-border reach of regulations is in place, other areas remain firmly within the distinct national authorities, and can act as a hindrance to cross-border group governance (vide ring-fencing, fragmentation).

5.4.1. Calibration of voice

Resolution colleges as the principal group-level decision making bodies (even if explicitly denied such status) are characterised by their broad membership. A strategy to make decision-making more manageable is procedurally by calibrating the voice of distinct entities in the procedure. For example, in the procedure of drafting resolution plans, not all authorities where legal entities of the cross-border bank group are present, are part of the procedure in equal measure. Specifically, differentiation is foreseen on the basis of legal form (branch vs subsidiary) and materiality of the subsidiary. The differentiated role is expressed as the authority being fully part of the procedure or being consulted only. Such limited involvement of the branch authorities in the procedure is underpinned by the assumption that branch entities in crisis would remain within the remit of responsibility of the home authority.[641]

5.4.2. Exclusive competences

Authorities within the resolution colleges may have exclusive competences (i.e. powers only they enjoy) with regard to the entire cross-border-group. Though technically resolution colleges are not decision-making structures, they confer a number of such functions on the group-level authority. For example, the group-level authority serves as the "first point of contact" and subsequently as a transmitter of information and has specific organisational functions such as convening and chairing the meetings.[642] Notwithstanding the formal membership requirements outlined above, the group-level authority further has discretion over the members and observers it wishes to invite to individual meetings.[643]The process of "mapping" the composition of the resolution college outlined in Section 5.2.1 is conferred on the group-level resolution authority. This authority is then required to transfer the outcome of this process to the full list of members and potential observers.

Though resolution planning relies on consensus, EU rules also foresee a possibility of an absence of agreement. The residual competence for developing a group-level approaches remain with group level resolution authority to take the decision on the

[641] Art 13(2) BRRD
[642] Art. 88(5)(a)-(c) BRRD.
[643] Art. 88(5)(e) BRRD.

resolution plan for the group, though safe harbours for hosts exists. Such scope for host competences is diminished in the context of the Banking Union, where fuller centralisation is not necessarily coupled with adequate protective mechanism, even ones such as review. In 2018 the SRM's Appeal Board ruled in a case where the SRB was accused to have failed to determine the MREL requirement at the level of individual entity within a cross-border group (it had done so only at the consolidated, group level). The Appeal Board stated it had no competence to hear actions for failure to act, suggesting full administrative integration comes at a cost of protective elements for the hosts.[644]

5.4.3. External competences

With regard to the information exchanges with third countries, the BRRD foresees the group-level authority responsible for the extra-EU part of the global bank (recall Figure 1) has the responsibility for assessing the information it receives also from third countries (e.g. the compliance of the candidate observer with confidentiality and professional secrecy requirements and assessment of significance of a branch) and for determining the terms and conditions of observers' participation in the college. [645] Specifically, the third country authority is granted the right to request to be part of the resolution college, once the relevant documents are duly submitted. Here though the information relating to the third-country subsidiaries is made available to the group level authority, it specifically shall not be obliged to transmit this information to the college without the consent of the third country authority, which in practice means it enjoys privileged access to information relating to the group in an extra-EU context.[646]

5.4.4. Expanded scope of mandatory considerations

[644] See Final Decision, Case 8/18 Appeal Panel of the Single Resolution Mechanism, 16 October 2018. The Appeal Panel held that the imposition of an MREL requirement at the consolidated rather than the individual level, it was held that the mere existence of a requirement that MREL be imposed on an individual level does not imply it may not be imposed on a consolidated level. Failure of the SRB to impose a requirement at an individual level amounts to a failure to act, for which the appeal board has no competence. See paras. 45-48. Notably, the CJEU has interpreter narrowly such actions - Case C-577/15 *SV Capital OÜ v European Banking Authority (EBA)* (2016) ECLI:EU:C:2016:947.

[645] The specific procedure for the inclusion of third country authorities in the resolution colleges is outlined in Arts. 88(3) BRRD and Art. 51 ITS.

[646] Art. 13(1) BRRD final paragraph, last sentence.

In cases where the group-level authority exercises a residual power such as that relating to cross-border resolution plans, any such decision must be duly reasoned and take into account views and reservations of other resolution authorities, in what has been called their "European mandate."[647] Though such an expanded scope may raise concerns in the light of the domestic (national) mandate of the NRAs (both at group level and subsidiary level), there is an argument to be made, that given the fact that resolution law was in most European jurisdictions created via EU law requirements, in the light of the specific role banking plays in EU integration, such an expanded EU mandate of national authorities is as well possible.

5.4.5. Disclosure

Procedures concerning information exchanges are to ensure that all authorities can make informed decisions concerning matters of common concern to the best of their ability. Secrecy and limited trust between institutions hindered interaction and cooperation of authorities overseeing the same cross-border bank prior to reform.[648] *Ex ante* procedures for planning seek to establish trust, inter alia by facilitating information exchange. In group law traditions disclosure and information exchange plays an essential role in aligning the interests of the stakeholders.

Delegated rules from the European Commission increase transparency to improve communication. Increased transparency then improves comparability of processes and outcomes, facilitating convergence.[649] In terms of cross-border cooperation in risk management planning procedures, the BRRD and the regulations establish procedures which are oriented at ensuring the development of the resolution plan on the basis of symmetric information, as specific information required for the purpose of preparation of the resolution plan is to be circulated between the EBA, NRAs of subsidiaries, subsidiaries and resolution authorities where the parent holding companies are established (i.e. both public authorities and bank entities).

However differentiation is made between which information is to be provided to which authority, namely information to be transmitted by the group-level resolution authority

[647] Art. 13(5) BRRD (article not amended in 2019), European Parliament (n 104). .
[648] Hadjemmanuil and Andenas (n 36) 153.
[649] Recital 66 Resolution College RTS.

to the subsidiaries' resolution authorities shall include "at a minimum all the information that is relevant to the subsidiary or significant branch", whilst the information to be transmitted to EBA is to be specifically relevant to the role of EBA in relation to the group resolution plans. As was mentioned above, group-level resolution authorities have special differentiated access to information.

5.4.6. Obligation to give reasons and inform

Increased transparency of conflict between authorities is one of the pillars of the administrative structure of resolution colleges. When the resolution authorities of subsidiaries do not agree with the proposed resolution plan – or one of its elements – they can defect from the cooperation mechanism, but in such a case "[e]ach of the individual decisions of disagreeing resolution authorities shall be fully substantiated, shall set out the reasons for the disagreement with the proposed group resolution plan and shall take into account the views and reservations of the other resolution authorities and competent authorities."[650]

Also the group-level authority, where it takes a decision on behalf of the entire college, is under obligation to inform, e.g. to inform authorities of meetings, where they may request to attend any meetings where matters pertaining to the financial stability of a given Member State are discussed.[651] Thus the second best option in the face of lack of an agreement is increasing transparency and requiring that the group-level authority take into account the specific viewpoints of other NRAs.

5.4.7. Sanctions for non-cooperation

If there is no agreement within the resolution college on a *joint* resolution plan, this does not imply that a collective decision by the other agreeing authorities cannot be made,[652] with "side-lining" the defecting authority, such a decision is deemed

[650] Art. 13(6) BRRD 2.
[651] Art. 88(5)(d) BRRD.
[652] Art. 13(7) BRRD.

"conclusive" just as much as that of all the members of the resolution college; it is to be applied as such.[653]

5.4.8. Residual ring-fencing powers

In addition to derogations specifically provided for under BRRD, national authorities (supervisors rather than resolution authorities), have at their disposal a number of extra-resolution law tools oriented at ring-fencing the entity they supervise: e.g. calibration of liquidity requirements. Though in the EU there are specific limitations on such ring-fencing arising from principles of internal market,[654]such national safeguards emerge equally from EU's own macroprudential regulations – a policy of apparently inherently "national" bias.[655] This includes procedures to denote individual entities as Other Systemically Important Institutions (O-SIIs) requiring extra capital requirements to be met, this being the case in particular where materiality tests and obligations on group-level authority are not considered to fully ensure that specific local concerns are taken into account.[656]

5.4.9. Duplication of tasks and symmetry of powers

Adopting an enterprise approach can be facilitated, if some powers formally still remain with the resolution authorities or if they are duplicated. In the case of the specific cross-border deliverables, in some particularly contentious procedures there is a duplication of tasks, for example resolvability is assessed at the level of individual entities and the group as a whole. Mirroring each other, the expanded scope of group-wide considerations affects as well the single-entity assessment carried out by the (national) resolution authorities, where they must assess specific intra-group links (resolution strategies, intra-group financing arrangements) on the resolvability of the bank at stand-alone[657] and group levels.[658]

[653] Art. 13(8) BRRD.
[654] E.g. specific requirements of incorporation for deposit taking institutions (Australia, Canada, US).
[655] Art. 458 CRD IV to this end acts as a safety valve.
[656] Another example, would be imposition of specific currency risk-weights (Art, 114 CRD IV).
[657] Art. 17 BRRD.
[658] Art. 18 BRRD.

The importance of such symmetry is evident in the context of the 2019 BRRD amendment concerning the content of group-resolution plans, where a provision which specified that gold-plating actions were specifically allowed for the group level authority, was amended to allow such gold-plating could be provided for by any relevant authority. Symmetry of powers in this sense is a group-wide enabling legal strategy.[659]

5.4.10. Cross-border scope of resolution tools (in planning)

In the exercise of their functions, resolution authorities are endowed with specific cross-border powers to be exercised in another Member State.[660] BRRD foresees there are four specific resolution tools which can be used by the resolution authorities.[661] Generally, their cross-border effects have been studied predominantly from the point of view of cross-border efficiency and enforceability already in resolution.[662] The BRRD establishes a dedicated EU recognition regime to this end, which is differentiated from the regime for third countries.[663] However, already at the resolution planning stage, there are a number of cross-border considerations required in the design of the resolution plan. As summarised in Table 8, these relate to provision of *ex ante* information about the possible exercise of a resolution tool in a cross-border context, as a matter of *effet utile* of EU resolution law.

Table 8: Planning for resolution tools in cross-border situations

	Resolution tool	Article
Information obligation (resolution and target law state) of intention	Sale of business, asset separation, bride bank	Art. 66(2) BRRD
Obligation to ensure effectiveness by target/applicable law Member State	Bail-in	Art. 66(4) BRRD

[659] Compare Art. 12(3)(e) in BRRD and BRRD 2.
[660] Art. 66 BRRD
[661] See Section 3.2.2.
[662] Critical on cross-border recognition of the resolution tools in a crisis context from a private law perspective Binder (n 207); M Lehmann, 'BRRD , the SRM-Regulation and Private International Law : How to Make Cross-Border Resolution Effective' (2016) Working Paper; Georgosouli (n 296). Notably here the resolution tools are discussed as *ex ante* governance mechanisms rather than in terms of their contractual implications.
[663] See Art. 66 BRRD on the power to enforce crisis management measures or crisis prevention measures by other Member States.

5.4.11. Standards and rule-making

BRRD directives delegate broad powers of technical rule-making to EBA. Experience thus far suggests that the EBA does not shy away from strengthening the enterprise approach via such delegated and implementing rules. For example, in some cases even where no specific group consideration is made at the level of the BRRD, a reference to cross-border scope of bank group activity is introduced in the delegated or implementing act. This suggests that such cross-border bank group rules are deemed necessary in the context of specific objectives pursued and interests protected at the level of primary rules (as in fact anticipated by the building blocks of the analytical approach adopted in this monograph, see Section 3.5.3).[664]

5.4.12. Conflict resolution via mediation

EBA has far reaching powers with regard to mediation, which even when non-binding introduces procedural and materiality into the process.[665] EBA's cross-border powers have two facets – the mediation and the residual power to adopt decisions vide the regulated cross-border EU entity. The cross-border effects of the powers of the EBA with regard to binding mediation, should members of an EU resolution college disagree are a crucial element of the framework.[666] These powers are intended to address a specific lacunae in the governance framework identified by the de Larosière report, whereby previously even for integrated banks, the host supervisors did not have means to challenge the home state supervision of a group and there was no binding mediation between home and host authorities, which aggravated governance problems in cross-

[664] This would be particularly the case of the detailed regulations laying down the operation of resolution colleges (Resolution College RTS).

[665] Decision of the European Banking Authority on the settlement of a disagreement (Single Resolution Board and Banca Naţională a României) of 27 April 2018, where the EBA indicated that the draft 2017 Resolution Plan does not establish that the potential impediments are – or are not – material impediments or substantive impediments to resolvability for the purposes of the BRRD. More generally, "it appear[ed] to the EBA that the various elements in the draft 2017 Resolution Plan do not individually or in combination satisfy the requirements for an assessment of impediments as required by the above legislative provisions."

[666] See: European Commission (n 127).c

border groups.[667] With the increase in powers and the scope of interaction between authorities, as did the powers of EBA.[668]

Formal mediation may be required of the EBA where any of the NRAs (although it is not specified whether forming part of the resolution college or not) refers the matter the EBA, but only during the four month consultation period and in the absence of a joint decision on the resolution plan – this applies to both separate decisions taken by the subsidiary authorities and the group-level authorities. The EBA shall then take a decision "requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law."[669] The NRA is then bound by this decision, however, in the absence of an EBA decision within the settled time-frame, the authority's shall prevail. Binding mediation is not to apply in cases where the reason for disagreement results from fiscal matters.[670] These powers are perceived as soft, in particular where the EBA is perceived as "lacking authority to make or enforce decisions,"[671] although there are cases of the mediation being used in the context of disputes concerning group resolvability assessment between distinct resolution authorities.[672] In any event, the very existence of such a mediation regime makes evident the shortcomings of a coordination oriented approach in terms of defining the joint interest characteristic of group structures. However, mediation acts as a distinct legal strategy to overcome the constraints of decision-making within bodies established under EU law for oversight over the cross-border group. The enterprise approach thus enabled, is limited to the extent EBA's role is limited in cases of 'fiscal impingement' – again recalling that the backstop responsibility is retained by the national level.[673] Such a mediation role was foreseen already by the de Larosière report, although there the

[667]Carmassi and Herring (n 45) 23.

[668]Larosière (n 129) 73. It must be pointed out, however, that even as the formal powers of mediation increased, at the same time conflicts within the Single Resolution Mechanism, that is between the SRB and the national resolution authorities are not dealt with by the EBA.

[669] Art. 19(3) EBA Regulation).

[670] Art. 13(9) BRRD.

[671]European Court of Auditors, *European Banking Supervision Taking Shape — EBA and Its Changing Context* (2014) para vi.

[672] See above.

[673] Art. 13(9) BRRD.

possibility of direct actions to be taken by the EBA where no agreement was found was likewise conceived.[674]

5.4.13. EU legal principles

The BRRD framework makes ample reference to known EU law principles including federalist notions of subsidiarity, but also proportionality (including variations adopted under the framework such as materiality), which introduce variability and contingency to the resolution procedures which subsequently enable an enterprise approach. A specific challenge related to operation of cross-border banks lies in the fact of the difference in relative importance of its constituent entities to different supervisors. In other words, an entity might be insignificant in the overall business of the bank, but of high importance for the local host economy, including in terms of the critical functions.[675] Though generally the BRRD imposes uniform rules without accounting for such differences in materiality, a number of strategies are employed as well to introduce an element of variability and contingency of intensity of supervision. This concerns specifically the rules concerning “significant branches” and “material subsidiaries”, which allow the authorities to calibrate the framework to relative (proportional) importance, e.g. through mechanisms which allow them to signal the relative importance of an entity.[676] Further, Art. 12(5) BRRD introduces a specific requirement whereby the effects of resolution plans shall not have a disproportionate impact on Member States.[677]

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[674] Larosière (n 129) 52; for an insightful discussion of existing limits in EBA’s mediation and conciliation see Anna Gardella, ‘Bail-in and the two dimensions of burden-sharing’, in particular at p. 222-223. European Central Bank, ‘From Monetary Union to Banking Union, on the Way to Capital Markets Union New Opportunities for European Integration’ (2015) ECB Legal Conference 2015.

[675] FinSAC (n 195); Dalvinder Singh in: Grundmann and Micklitz (n 170).

[676] Nieto in: Binder and Singh (n 207) at p. 44 criticises this approach for blurring the distinction between branches and subsidiaries. See also: Yannick Hausmann and Elisabeth Bechtold, ‘Corporate Governance of Groups in an Era of Regulatory Nationalism: A Focused Analysis of Financial Services Regulation’ (2015) 12 European Company and Financial Law Review 341.

[677] The proportionality requirement is also included in the BU group resolution plans, whereby these shall not impact on any Member State disproportionately (Art. 8(11) last sentence SRM Regulation).

5.4.14. Time-variance

The difference between the role of various authorities in resolution planning and resolution scheme implementation provides important evidence of another key tool employed to enable a cross-border bank group perspective – time-variance of the regime. Specifically, the institutional framework foresees that the interaction between authorities changes as a function of the state of the entity – cross-border reach is affected by the stage of cooperation[678] and goes the farthest in the case of emergency situations.[679]

Such legal strategies allow for an enterprise approach to group planning (including EU group-wide perspective and scope of decisions) are specific to the resolution planning process. As ample scholarship critical of the post-crisis regime has shown, the actual resolution scheme implementation is similarly to be founded on cross-border coordination, rather than centralisation (holistic) approach of the procedure,[680] there the group-level authority enjoys some unique powers under EU law.[681] Still, strong protections are in place for the host authorities: for example regardless of the resolution strategy chosen, pursuant to Art. 87 BRRD placing of one of the bank's entity in resolution does not imply automatic resolution of this entity in other countries. Specific grounds for non-cooperation are strong and defined as (national) financial stability (with the broad interpretation this term has acquired over the course of the financial crisis). However, there is a procedural obligation for any such Member State to duly justify defection from cooperation, as well as to include considerations of impact on financial stability in other Member States as well as other parts of the group. The home authority still must take into account the interest of all the other Member States where the entity is established, secondly the resolution requires cross-border recognition of resolution actions.[682]

[678]Günter Frankenberg, Jan Pieter Krahnen and Thomas von Lüpke, 'Effective Resolution of Banks: Problems and Solutions' (2014) 113 Zeitschrift für vergleichende Rechtswissenschaft : einschließlich der ethnologischen Rechts- und der Gesellschaftsforschung 556.
[679] For comparison, Art. 33, 42 CRD IV grants host supervisors powers to act in emergency situations with regard to a branch operating in its territory.
[680] See e.g. Recital 99 BRRD which refers to "best result for all institutions of a group."
[681] See Recital 100 on such specific powers relating to establishing a bridge tool at group level or powers relating to transfer of subsidiaries.
[682] See Art. 66, 117 BRRD and Gardella (n 137) 167.

Likewise, for the SRM, its powers become most centralised when *restoring* financial stability (crisis management through implementation of resolution plans), as opposed to *safeguarding* financial stability (*ex ante* planning and preparation). The extent to which the directions issued by the SRB vide national authorities within the Single Resolution Mechanism can be considered binding has been contested.

5.5. Chapter conclusions

The institutional analysis in this chapter has shown the extent to which new administrative structure for resolution policy implementation – as a building block of group governance – allows for a supra-jurisdictional enterprise approach with regard to specific tasks related to cross-border bank group resolution planning under the BRRD. Such a regime for EU cross-border bank groups is differentiated from the regime which emerges in the context of the Banking Union, where significant centralisation of administrative authority has taken place as part of the Single Resolution Mechanism.

The EU-wide framework for cross-border cooperation relies on "mutually assured coordination", or rather composite administrative structures, which take joint decisions through deliberation based on principles of exchange of information, discussion and debate.[683] Such procedures involve as well the cross-border regulated entity and its management, and therefore are transnational in nature. Such a framework is more complex than a centralised mechanism, and relies on the terms of interaction, including availability of resources, formal legal factors (clarity of mandates)[684] or soft factors such as mutual trust for success.[685]

Resolution planning procedures yield themselves to analysis from a group governance perspective, as they establish a regime for cross-border institutional interaction which has a direct impact on bank operation. At least the following legal strategies for achieving a balance between an enterprise and an entity approach can be identified in the studied procedures: calibration of voice, exclusive (residual) competence, expanded scope of mandatory considerations, disclosure, obligation to give reasons and to inform, sanctions for non-cooperation, residual ring-fencing powers, duplication of tasks and symmetry of powers, cross-border scope of resolution tools, standards and rule-making, conflict resolution via mediation, EU legal principles (proportionality) and time variability.

The enabling – group – perspective provisions are associated with the powers of the parent, group-level authority. The primary tools to achieve such an outcome is differentiation in the role, explicit external representation prerogatives or specific

[683]Gardella (n 574) 168.
[684]Madalina Busuioc, 'Friend or Foe? Inter-Agency Cooperation, Organizational Reputation, and Turf' (2016) 94 Public Administration 40.
[685]Tröger (n 235) 15.

group-wide considerations required. They are underpinned by the specific mandates as well as the legal basis (internal market) of the EU legal framework. Entity (protective) elements meanwhile reside predominantly in the specific defection rights accorded to the host authorities for public interest (financial stability) reasons. Such safeguards are partially explained by the burden-allocation/risk-sharing associated with internationalisation of bank activity, in particular where deposits of subsidiaries are guaranteed at national level.[686] Incentives to adopt a "group interest" position by all authorities play an important role. This is the case of information exchange enabled (encouraging) or the last resort role of EBA as binding mediator (deterrence).

The institutional regime as described is not necessarily stable as following Brexit on 31 January 2020, the Banking Union countries significantly outweigh the non-euro Member States. This reduces potentially the importance of the EBA within the Banking Union, where it has little powers. Conversely, the agency's importance increases viz the EU bank groups active across the whole of the EU market, in particular since most EU cross-border bank groups with significant cross-border activity are active in both EMU (i.e. within the SRM scope) and other Member States (i.e. within the BRRD scope). Some scholars suggest that increased supranational supervision will decrease banks' incentives for cross-border integration.[687] Such a fragmenting effect of centralisation could be reinforced as supervisors use tools from other areas of financial regulation to regulate entities which are part of cross-border groups (such as macro-prudential add-ons). In any case, a cross-border bank group scope determined via procedures described in this Chapter, has significant implications from the perspective of burden-sharing raises further questions of bank governance and management. The next chapter turns to intra-group side of the new risk management regime established by the BRRD, in particular the general risk management aspects of recovery planning.

[686] Recall Section 2.4.4 on the absence of a common backstop in the EU.
[687]Calzolari, Colliard and Loranth (n 565).

Chapter 6

6. Risk governance in cross-border bank groups

This chapter focuses on internal risk governance procedures established by the BRRD to the extent they affect corporate governance and result in de-partitioning, that is redistribution of risk within a cross border bank group.[688] In analysing specific regulatory requirements I identify the legal strategies employed under the BRRD which allow for an expanded (enterprise) scope of duties of directors and management in the context of crisis prevention measures and general risk management required. I focus on the recovery planning procedures – to the extent that distinct group recovery planning is imposed as a requirement on the parent entity of the cross-border bank group (as in the case of resolution planning discussed above). This chapter provides evidence that the EU cross-border bank group scope is mirrored by the scope risk management and crisis prevention measures as a necessary condition for meeting the objectives of the EU regulatory framework.

To this end, this Chapter is structured as follows. First, I expand on the risk management turn in EU financial regulation (Section 6.1).[689] Second, I show how this had resulted in an increased scope of duties of banks in general via a new form of bank governance (Section 6.2).Thirdly, Section 6.3 explains how such duties expand cross-border in the context of the specific general risk management requirements of the BRRD. Section 6.4 studies the requirements imposed as a matter of group law – that is I identify the legal strategies which enable an enterprise approach, as well as those which provide the protective (entity) safeguards.

6.1. Risk management in EU financial regulation

[688] Recall the analytical approach outlined in Section 3.5.3.

[689] Recall section 3.1.2 which explained how the objectives of the EU financial regulation strengthen the public interest orientation and have a strong protective element with regard to critical functions of banking for the real economy (see also – with regard to resolution law specifically) mandates of the new authorities created under the BRRD (Section 5.2).

6.1.1. Risk management prior to the crisis

Excessive risk-taking was considered one of the contributing factors to the GFC.[690] Implicit guarantees on banks' activities and misaligned incentives of the individual bankers meant that risk was not properly factored in the banks' activities, with the prevailing assumption that the sector could (as a whole) externalise any downside of their activities to the public purse. Specific regulatory shortcomings identified to this end included misaligned compensation incentives, insufficient board monitoring of risk-taking by the firm and overly complex organisational structures which impeded informed business management. Global reform in the aftermath of the crisis not only covered new prudential regulations oriented at reducing incentives for risk-taking (capital, liquidity, structural or disclosure requirements), but also focused on their implementation via an expanded scope of the of responsibility of the boards for risk management and a realigned general bank governance framework. [691]

6.1.2. Crisis prevention measures as risk management

With improved risk management at the core of global reform of the foundations of regulating financial activity, it was equally the centrepiece of the European reform efforts. Risk management was further one of the tools for achieving the objectives of the new regulatory framework: improved financial stability, better protection of critical functions and realignment of the incentives of both the regulated entities and the supervisors.[692]The basic rules for risk management are laid down in the prudential regulations (CRD and BRRD as amended) there is an important difference however between the various tools provided for. Risk is always forward-looking, however there are at least three different ways of treating it under the new prudential regulations. First, there are the standard supervisory tools such as capital requirements or – after the crisis – caps on bank bonuses which are to limit the riskiness in bank activity. Second, there

[690]Guido Ferrarini, 'Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda' (2017).

[691] See e.g. Basel Committee, "Principles for Enhancing Corporate Governance" (2010). for an overview of the focus on financial firms governance reform in the aftermath of the GFC see: Jeffrey N Gordon, 'Convergence and Persistence in Corporate Law and Governance' in Jeffrey N Gordon and Wolf-Georg Ringe, n 256. Gordon there emphasises the key post-crisis innovation is a strengthened mandatory role of the Board in risk management and assuring adequate controls. The governance dimension is as well included in the Key Attributes for Effective Resolution Financial Stability Board (n 165).

[692] See Section 3.1 for an overview of the main principles of the EU financial reform.

are the systemic macro-prudential requirements imposed by the designated authority in a countercyclical manner and horizontally across the sector. The specific instruments – such as the countercyclical buffer – are to ensure that should a risk materialise the bank has a sufficient cushion to absorb it. Finally, there are the crisis prevention measures of EU resolution law, that it those specific instruments which are oriented at building in resilience into banks' activity. Through the specific contingency planning procedures a forward-looking risk assessment is incorporated into the operation of the bank – this is in particular the case of recovery planning required by the BRRD.

Under the EU general risk management standard [693] banks "shall have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management."[694] The general risk management strategy includes specific provisions related to risk management in holding companies, including the requirement of establishment on the EU territory of an EU parent company, where no equivalence is found.[695] Such definition of risk management includes the preparation of living wills: the recovery plans, which as has already been established, form the core of the BRRD requirements. The operational governance component is a core element of recovery planning to the extent banks are to ensure "an institution's ability to operate on an ongoing basis and limit losses in the event of severe business disruption." [696]

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[693] Art. 312 CRR defines "general risk management standards" to cover: "Arts. 74 and 85 CRD IV", that is " Internal governance and recovery and resolution plans" (Art. 74 CRD V as amended to include e.g. a provision requiring gender neutral compensation) and "operational risk (Art. 85 CRD V as amended in 2019 to include in the scope of operational risk risks which may arise from outsourcing). See also Art. 5 BRRD defining "recovery plans" as a governance arrangement.

[694] Art. 74 CRD V.

[695] Art. 127 CRD IV, now for the general obligation to establish an intermediate EU parent undertaking for any cross-border group in the EU operating from a third country see: Art. 21b CRD V.

[696] Art. 85(2) CRD IV. The two approaches to operational risk provided for under the CRR: the Standard Approach and the Advanced Measurement Approach (though the latter might be removed by Basel IV reforms). See BCBS (2016), Standardised Measurement Approach for operational risk: Consultative document; BCBS (2017),

Finalising Basel III: An overview of post-crisis reforms; BCBS (2017), Basel III: Finalising post-crisis reforms.

6.1.3. Recovery planning as risk management[697]

Recovery planning is the *ex ante* counteractive policy instrument of EU resolution law which is developed by the bank under supervision, with the involvement of the resolution authorities as well.[698] The BRRD requires that recovery plans cover specific aspects: governance, a strategic analysis, a communication and disclosure plan and preparatory measures.[699] Outlined courses of action are to be taken when specific triggers for early intervention measures (Recovery Plan Indicators) are met.[700]

Recovery planning is a governance technique, which alters the decision-making within the credit institution by prescribing the preparation of a predictable contingency plan, a roadmap for when the crisis occurs. The aim being that the very impact of such planning on bank's internal organisation will make them *ex ante* less likely to fail. In any case, the exercise is also to make banks "resolvable", that is ensure the internal governance structure is commensurate with the nature, size, complexity and risk profile of its activities" – the operational dimension of recovery planning is inherently linked with its internal organisation and structure.

Central element of the exercise is the identification of bank's "critical functions", "criticality" being the role of financial institutions in providing payment infrastructure and underpinning the real economy, also in cross-border contexts. Such functions are the *services* (functions) which the entity provides, predominantly the 'traditional' banking activities – that is deposit-taking, mortgages as well as 'financing of the real economy' through loan provisioning. That protection of critical functions forms the core of recovery planning, suggests an increasing infusion of internal bank processes with public-like functions under EU law, even if the argument that banks are the providers of services of economic interest has been rejected in the past. To operationalise the concept of "critical functions" in the context of recovery planning, the FSB proposes that their identification occur via "an impact assessment", that is the bank is to consider the impact of a disruption of the specific function, in terms of direct and indirect effects and a "supply-side" analysis that is the substitutability of this

[697]this section draws substantially on: Grundmann, Petit and Smoleńska (n 188).
[698] See Section 5.3.2 on resolvability assessment as part of the resolution planning process.
[699] See Section A, Annex to BRRD, Articles 3-15 Resolution College RTS.
[700] Such 'indicators may be of a qualitative or quantitative nature relating to the institution's financial position and shall be capable of being monitored easily', see Article 9 BRRD.

function, followed by a "firm specific test." The EU approach – that is the approach which the banks are to follow in developing the recovery plans – is different and governance-oriented in the sense of allowing both for a bottom-up approach which is subsequently complemented with a top-down assessment of the relevant resolution authority. Schoenmaker has questioned this approach as inappropriate – how can it be the bank itself to make such a crucial assessment? [701] This element of the EU's approach provides evidence of the role of bank management in joint in the public-private governance procedures of EU regulation, that is its responsibilisation of the management to public considerations of financial stability and critical functions.

Recovery plans are therefore a unique instrument of bank governance where they are drafted by the bank itself,[702] with the possibility of being then the basis for implementation of early intervention measures by the competent authority (supervisor) when particular recovery triggers are met, but before the institution is failing or likely to fail.[703] Their preparation already has significant corporate governance implications,[704] which explains why the legislators recognised that their mandatory nature may affect the freedom to conduct business protected under the EU Charter of Fundamental Rights.[705]

Recovery plans' impact on bank governance is both direct and indirect. In direct terms, recovery planning is to outline specific measures which the management of the bank is to take in cases of significant deterioration of bank's position. The indirect impact on director's duties is a consequence of the process itself - recovery plans are approved by supervisors, who may impose specific amendments to the plan, but their very formulation requires new compliance and recovery planning units to be created within the bank. As a result, in terms of impact on the mandatory internal organisation of the bank, recovery planning is more like an (independent) audit requirement, than a

[701]Schoenmaker, n. 53, 8. EBA, Technical advice on the delegated acts on critical functions and core business lines, EBA/Op/2015/0 6 March 2015.

[702] Art. 5 BRRD, see for an overview Sven Schelo, *BRRD* (Wolters Kluwer 2015) 59; Delvinder Singh, 'Recovery and Resolution Planning: Reconfiguring Financial Regulation and Supervision' in: Binder and Singh (n 207).

[703] Arts. 27-28 BRRD, for specific arrangements under the Banking Union see Article 13 SRM Regulation; see, however, Schelo, n. 702 for a consideration of the possibility for such measures to trigger a self-fulfilling prophecy (at para. 4.04)

[704]Thomas F Huertas, *Safe to Fail: How Resolution Will Revolutionise Banking* (Palgrave Macmillan 2014) 134–150.

[705] Recital 24 BRRD.

prudential requirement purely. Such internal governance consequence differentiates recovery planning from resolution plans, where the impact on bank's organisation of the bank occurs via the potential of authorities to require the removal of impediments to resolvability, in particular where there is a public interest in such measures and where specifically cross-border resolvability is impeded otherwise.[706]

Recovery plans must be assessed bearing in mind the bank's distinct features, and are to assume that their implementation "is reasonably likely to maintain or restore the viability and financial position of the institution."[707] The supervisor must, however, also consider the implications of the plan in the context of the financial system as a whole, that is whether the plan is 'reasonably likely to be implemented quickly and effectively in situations of financial stress and avoiding to the maximum extent possible any significant adverse effect on the financial system, including in scenarios which would lead other institutions to implement recovery plans within the same period."[708] This implies that systemic context is an essential element that must be taken into account by the bank's management when drawing up the recovery plan.

Any shortcomings identified by the supervisor in the recovery plan, result in the first instance in a request for its resubmission. Where the bank in question fails to do so, or fails to remove indicated deficiencies, the supervisor may direct the institution, inter alia, to make changes to its funding strategy or to the governance structure. Furthermore, the resolution authority may require in its separate assessment of the recovery plan that the institution remove impediments to resolvability – that is impediments to the application of resolution tools with a view of attaining resolution objectives.[709] To this end, the resolution authority can request changes to the bank's operational structure and governance arrangements as well.[710]

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[706] Article 34 BRRD, on the public interest test see M. Haentjens, 'Conclusions' in: Haentjens and Wessels (n 76) 568.

[707] Article 6(2)(a) BRRD, see also Articles 16-21 Resolution College RTS.

[708] Art (6)(2)(b) BRRD.

[709] Article 15-17 BRRD, see Section 5.3.2.

[710] For an analysis of how resolution law could be used to require structural changes within banks see: Jeffrey Gordon and W. Ringe, 'Bank Resolution in Europe: The Unfinished Agenda of Structural Reform' and Victor de Seriere, 'Recovery and Resolution Plans of Banks in the Context of the BRRD and SRM', in: Busch and Ferrarini (n 169)..

Indirectly, recovery planning serves as a type of meta-regulation for bank governance.[711] In particular, by placing emphasis on an internal process for approval of recovery plans ("management body of the institution shall assess and approve the recovery plan before submitting it to the competent authority"[712]), the regime seeks to instil a culture of forward-planning and a consideration of systemic dimension of current bank risk profile. Not only is a substantive corporate governance requirement imposed by regulation in terms of new duties placed on the management, but also a corporate *ownership* of the plan is required.[713] Such ownership seems warranted also where the implementation of the plan, but also its preparation, is likely to already include measures which impact significantly on the bank's daily operations (such as employment cuts).[714] The relevant Regulatory Technical Standards further emphasise that a sound governance structure is a necessary prerequisite for effective implementation of recovery plans, implying new divisions need to be set up within the bank as well as new procedures to be put in place.[715]

General risk management measures are thus conceived as "arrangements, procedures and mechanisms of institutions" – and their direct impact on bank business choices affects the duties of management and rights of bank stakeholders has already been identified,[716] however the crux of the reform is not only the impact that the regulatory requirements have on bank's internal organisation (such is the function of regulation after all), but more broadly the enlarged scope of duties of the directors with regard to bank's internal organisation and the scope of due considerations in implementing these procedures, what are typically considered corporate governance aspects.

[711] Andrea Minto, 'Banking Crisis Management, Recovery and Resolution Planning, and New Governance Theory: Approaching Livingwills as a Public-Private Collaborative Form of Regulation' (2018) 15 European Company and Financial Law Review 772.

[712] Article 5(9) BRRD.

[713] This is notwithstanding the different impact which various bank arrangements for developing such recovery plans can have, e.g. outsourcing to consultancies.

[714] The BRRD recognises, however, various corporate governance models, including with regard to employee representation, see recital 35 BRRD.

[715] See in particular Art. 5 Resolution College RTS, which requires that governance arrangements be put in place such as integration of recovery planning within corporate governance and overall risk management framework, as well as specific procedures, e.g. a review of recovery planning by internal audit, external audit and risk committee, as well as a confirmation of assessment and approval by the management of the bank.

[716] Ample empirical evidence of organizational and business model impact of the regulatory framework is already available, with Nordea's cross-border rearrangements being a notable example (e.g. as a function of differences in RWA assessment), see on the Nordea case: FinSAC (n 195).

6.2. Bank governance

Recovery planning by affecting bank management and internal organisation affects corporate governance of credit institutions. This area of law is concerned with the conflicts of interest and distorted incentives of different actors within a company (i.e. directors, shareholders).[717]Since the seminal work of Jensen and Meckling, shareholder wealth maximisation has been heralded as the dominant paradigm of corporate governance and the guiding light for international organisation of companies.[718] Bank corporate governance, however, has always been somewhat particular in this respect, given the funding model (based on deposits from the public) and level of leverage (much higher than any other business). These core elements of bank business require that creditors be granted special protection given their limited control over the riskiness of the credit institution.[719] Some have gone as far as to suggest that the very nature of regulation of the banking sector has a function of a loan agreement, substituting for the lack of effective debt governance.[720]

If an account of the crisis is upheld where it grew out of failures of internal processes and governance of financial institutions, reform in this area has been most called for.[721] For the most part, bank corporate governance-oriented reforms seek to mitigate information asymmetries: they are oriented at improving disclosure requirements, thereby improving the position of the monitor. The reforms however, have not only expanded the transparency requirements, they have changed significantly the duties of management within the bank as a result of the new risk management measures already explained.

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[717]Grundmann (n 77); Klaus Hopt, 'Common Principles of Corporate Governance in Europe?'' in: 'Markesinis (n 281).

[718]Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305; Kraakman (n 82); Hans Hansmann and Richard Kraakman, 'The end of history of corporate law' in: Gordon and Roe (n 82).

[719]Armour (n 310); Hopt, 'Corporate Governance of Banks and Other Financial Institutions after the Financial Crisis' (n 59); Monika Marcinkowska, 'Zasady Ładu Korporacyjnego Dla Banków' (2014) 10 Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie 93; Jens Hinrich Binder, 'The Banking Union and the Governance of Credit Institutions: A Legal Perspective' (2015) 16 European Business Organization Law Review 467. Also on the reform of debt governance see Section 3.1 and already Chapter 8.

[720]Ferrarini (n 688).

[721]Jaap Winter, "The Financial Crisis: Does Good Corporate Governance Matter and How to Achieve It? in: Wymeersch, Hopt and Ferrarini (n 54).

EU regulations after the Great Financial Crisis expanded the scope of risk management in banks in general. Risk management became not only a matter of regulatory requirements but also a matter of governance, i.e. by shaping how the decisions within the organisation are taken. A key role in this regard is played by public authorities, via assessments and implications of the forward-looking contingency resolution plans discussed in the Chapter 5. As was there shown, bank governance increases the role of public authorities in the decision-making of the bank to the extent that the regulatory framework foresees the full takeover of powers over the bank and its management if a crisis materialises. Once a bank is deemed failing or likely to fail - the resolution authorities take over full control of the bank, and have the power to transfer shares or assets without the consent of shareholders where transfer liabilities out of the failing institution for reasons of protection of critical functions affects the equal treatment of creditors (in resolution).[722] BRRD expressly restricts the application of Directive 2007/36/EC which provides for procedural shareholders' rights relating to general meetings.[723] However, already in the context of the crisis prevention measures bank decisions are affected by the resolution authorities.[724] In enforcing the regulatory requirements the resolution authorities becomes a hybrid between a risk manager and an auditor. This effect was already visible in the context of resolution planning discussed in the previous Chapter. In the context of recovery planning – the parallel contingency planning procedure – this transnational governance aspect becomes even more pronounced.

Specifically, BRRD imposes new public duties on bank management and regulates private relationships within bank corporate governance.[725] Risk management implementation occurs via an array of internal controls which fall within the core duties of directors as stipulated by the CRD IV.[726] The scope of duties of management extends to risk management specifying the role of the directors in shaping the internal controls. As a result of such use of risk management as a governance technique, the *ex ante* allocation of risk is affected by planning and capital pre-positioning rules.

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[722] Recital 13, Art. 38(9) BRRD in the context of sale of business resolution tool; Art. 40-41 on the bridge institution resolution tool.
[723] Art. 121 BRRD.
[724] See Section 5.3.2.
[725] As has already been established: Grundmann, n. 175.
[726] Grundmann, Petit and Smoleńska (n 188); Armour (n 310) 115.

While public interest considerations are a natural component of any judicially administered procedure such as insolvency, a key component of bank governance lies in the incorporation of public interest considerations into daily bank management also.[727] Time variance and contingency planning requirements alter the operational and internal structures of the bank. Specific powers of the authorities increase the co-dependence with bank management, thereby making strict separation of governance processes difficult.[728] Hence any analysis of bank governance under EU law, must include the role played by the authorities not merely as the enforcers of the rules ("supervisors"), but also as co-principals of the bank to the extent it provides specific public like functions ("critical functions").

Therefore, though BRRD regime is distinguished from horizontal company rules, procedural rules with respect to directors' decision-making can be found in the new recovery procedures and include direct specifications to include public interest (i.e. the requirement for the recovery plans to include a reference to the systemic impact of banks operations).Under the general regime single types of directors' actions may have been addressed with only exceptional limits formulated, for instance for related parties' transactions,[729] and for the rest no mandatory restrictions would be imposed (with the exception of guidelines to be enforced on a "comply or explain" basis).[730] In addition, those transactions where mandatory limits are formulated are not part of the current administration of the company without which a company could not continue to do business.

EU reform meanwhile has increased the main scope of directors' action to encompass the pursuit and maintenance of (overall financial) stability, reaching beyond the one of

[727] See in this context, the application of the public interest test in the context of resolution of Banco Popular Espanol to ensure the continuity of critical functions, and to avoid adverse effects on financial stability (SRB, Notice summarising the effects of the resolution action taken in respect of Banco Popular Español pursuant to Article 29(5) SRMR, 7 June 2017). Coglianese, Lazer and Url (n 228).

[728] On time variance as a key innovation of post-crisis financial regulation see: I. Agur and S. Sharma, 'Rules, discretion and macro-prudential policy' in: Robin Hui Huang and Dirk Schoenmaker (eds), 'Institutional Structure of Financial Regulation: International Perspectives and Local Issues in Hong Kong and Mainland China' 40–65.

[729] see in general: Luca Enriques and Tobias H Tröger (eds), *The Law and Finance of Related Party Transactions* (Cambridge University Press 2019).

[730] Rosa Aquilera et al 'Regulation and Comparative Corporate Governance' in: Wright (n. 177) European Commission, Communication on Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward of 21 May 2003, COM(2003) 284 final, p. 11–13.

single credit institution.[731] Such a duty arguably interferes with the prevailing shareholder value paradigm to a substantial extent, and thus the scope of directors' action is radically changed from general company law and corporate governance. Conceptually such an interference by EU law into the private relationships by introducing into them duties of public (interest) nature, is different from reading social goals into the general shareholder value paradigms.[732] Bank governance as postulated here introduces duties of directors vide social/public/broader constituencies (public interest) in addition to those vide the shareholders. Such duties are established in particular via the extensive mandatory requirements formulated with respect to risk management, a core business in the very administration of the company – including the scope of risk which is to be covered for – to the extent it can include as well not easily quantifiable risks of public policy nature (environmental, political).

As a result of the BRRD reform, the distinctiveness of bank governance is thus reinforced. Already prior to the GFC, scholars have considered that the social and public role which banks play in the economies negate the assumptions behind the shareholder paradigm. Expanding the scope of bank governance – through greater involvement of public authorities and through expanding fiduciary-like duties of bank management – embeds banking in the real economy. Conceived in such a way, bank governance links the business decisions of banking directors with the impact that the functioning of the financial system has on all other economic activity. In a sense, the "bank governance" as a closer is to early theorisation of "corporate governance" by Ralph Nader who had in mind something much closer to a hybrid of corporate governance and corporate social responsibility.[733]

Such an understanding of bank governance, in the light of cross-border scope of some of the regulatory requirements introduced by the BRRD, has far-reaching implications from the perspective of risk-sharing which occurs via cross-border bank group activity. This is because – as Chapter 3 has explained (Section 3.3.2 in particular) corporate governance mechanisms are at the heart of group laws which exist across various European jurisdictions. Since EU resolution law on the one hand alters the scope of

[731] Read Art. 88 CRD IV as an effective and prudent management of the institutions put in a broader macroeconomic context.
[732]Zingales (n 177).
[733]Brian Cheffins, 'The History of Corporate Governance' in: Wright (n 177) 48.

bank (corporate) governance and on the other, extends the tools of such governance across the border, this suggests that the latter can indeed be analysed from the enterprise and enabling perspective of group law – as anticipated in Section 3.5.2, bearing in mind however, the distinctiveness of the governance model.

6.3. Cross-border scope of risk management

Recovery planning procedures have a distinct cross-border dimension, as a group recovery planning requirement is imposed on the parent entity (EU parent) of the cross-border bank group.[734]Though the possibility for the distinct subsidiaries to have to prepare recovery plans as well is allowed, the distinct requirement imposed on the parent bank is that it must draw up such a plan in the interest of the group as a whole – namely its stabilisation in a crisis scenario.[735] In the light of the governance function that recovery plans play, intra-group risk management is not only a channel for transmission of shocks but as well a channel private risk-sharing.[736] As risk methodologies increasingly incorporate "softer" risk measures, such as sustainability or political risks, this effect is bound to amplify.[737]

6.3.1. Cross-border trade-offs of risk management

In the context of implementing a cross-border resolution scheme, the BRRD recognises the extent to which a balancing act must be employed between the efficiency of centralised group management and concerns about local specificities (requiring that in implementing resolution law "efficiency of group risk management" is pursued "while ensuring that sufficient safeguards are in place to ensure financial stability in all Member States in which an entity belonging to a group is incorporated").[738]

The trade-off presented considers centralisation as the most efficient option assumed to serve the objectives of the overall regulatory framework, yet evidence that uniformity is a precondition for cross-border stability is mixed. Further arguments for centralisation –

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[734] Art. 7(1) BRRD where "group recovery plans shall consist of a recovery plan for the group headed by the Union parent undertaking as a whole."

[735] Art. 7(4) BRRD.

[736]on how this channel was impaired in the EU over the course of the crisis: Ferrari and Rogantini Picco (n 51). For a legal perspective on private risk-sharing see Dariusz Adamski, *Redefining European Economic Integration* (Cambridge University Press 2018) 17.

[737]Andreas Oehler, Tim Herberger and Andreas Höfer, 'Risk Assessment and Risk Management in Economics' in Tridimas and Micklitz n. 189.

[738] Art. 500 CRR concerning large exposures, which concerns a derogation, whereby „exposures, including participations or other kinds of holdings, incurred by an institution to its parent under-taking, to other subsidiaries of that parent undertaking or to its own subsidiaries*, in so far as those undertakings are covered by the supervision on a consolidated basis to which the institution itself is subject, in accordance with this Regulation, Directive 2002/87/EC or with equivalent standards in force in a third country*; exposures that do not meet these criteria, whether or not exempted from Article 395(1), shall be treated as exposures to a third party;"

in the case of EU laws implying also extraterritoriality (universality) across multiple jurisdictions where the group is active given partial harmonization of rules only – arise from the specific concerns of regulatory arbitrage, however this argument disregards that rule heterogeneity might actually arise out of market specificities. In other words it seem rather more warranted that the focused should be effects-based, oriented at meeting regulatory objectives rather than formal rule uniformity.

The safeguard against full centralization is phrased meanwhile as a concern for financial stability at national level: the (private interest) centralisation of risk management appears to be weighted against (public interest) decentralised financial stability concerns at the level of individual (EU) jurisdictions where the entity is active. Here it suffices to recall two elements to show that a dichotomous approach to centralisation and decentralisation is a false one for EU cross-border groups that is: (a) bank governance approach suggests that a dichotomy between private and public governance (and therefore risk-sharing) is inappropriate[739] (b) that EU framework foresees financial stability to be only one of the objectives pursued – therefore the balancing approach as presented is an incomplete cost-benefit analysis.[740] In the light of the multi-pronged nature of objectives of the regulatory framework as well as the heterogeneity of the stakeholder interests protected, it does not seem warranted to single out "financial stability" only as grounds for referencing increasing local sensitives: concerns for other policy objectives, such as protection of critical functions or depositor protection should be equally considered. Once again, a group approach, which focuses on the legal strategies of marrying independence and interdependence, seems well suited to address such concerns.

6.3.2. Expanded cross-border scope of directors' duties

Under recovery planning rules of the BRRD, a distinct group-wide requirement is imposed. Such an all-encompassing enterprise requirement may be explained by reference to the internal market since the BRRD is founded on EU competence for harmonisation (Art. 114 TFEU), which implies that the purpose of the framework extends beyond risk limitation and mitigation purely and should be oriented as well

[739] See above Section 6.2.
[740] Compare with the (public) institutional dimension discussed in Section 5.1.

towards f EU integration and levelling the playing field.[741] Such an EU-law specific rationalisation should not, however, detract from the significance of imposing an enabling (group interest) obligation on the parent bank as a matter of general risk management.

Practically, there are far-reaching consequences of an expanded scope of bank management duties for risk distribution within cross-border groups. This is due to the agency problems specific to cross-border groups,[742] including ones arising cross-representation between the parent and the subsidiary.[743] BRRD in establishing cross-border group level risk governance considerations, partially by-passes the local corporate laws which would otherwise (formally) govern the entity in question.[744] Furthermore, as part of recovery planning assessment, the internal organisation of a cross-border bank group is evaluated as a matter of risk management: size and complexity of cross-border groups are treated as a potential obstacle to resolvability, as an impediment to risk management or more generally as a contribution to systemic risk.

6.3.3. Cross-border bank recovery plan approval procedure

Procedurally, complex rules are put in place with regard to assessment of the group recovery plans by competent authorities – that is the consolidating supervisor and the group-level authority. The plans – prepared by the bank – are to include specific considerations of cross-border nature: (a) the extent to which the plan can stabilise the group as a whole; (b) the extent to which the plan provides solutions to overcome obstacles to implementation of recovery measures within the group; and (c) the extent to which the plan provides solutions to overcome any substantial practical or legal impediments to a prompt transfer of own funds or repayment of assets within a group. In line with principles of *bank governance* there is a reflexive element to the framework – the structure and scope of the bank determines the calibration of the regulatory

[741] Oehler, Herberger and Höfer (n 737).

[742] See Giannoula Karamichailidou and David G. Mayes 'Plausible recovery and resolution plans for cross-border financial institutions' in: Juan E Castañeda, David G Mayes and Geoffrey Wood (eds), 'European Banking Union: Prospects and Challenges'; Hausmann and Bechtold (n 676).

[743] Allen, Gu and Kowalewski (n 2) 20.

[744] See Section 2.4.2 on company law obstacles in crisis.

instrument. Such counteractive risk management measures further facilitate private risk-sharing within cross-border groups, as an alternative to ex post (public) burden-sharing.

Further provisions exist for coordination and approval of recovery plans by colleges of supervisors. Where the group parent bank may wish to develop an internal plan of assistance and liquidity provision towards branches and subsidiaries in other Member States, the relevant provisions on recovery planning incentivise the identification by the bank *ex ante* of potential obstacles to crisis coordination (such as limitations on transfer of assets within cross-border group structures).[745]

6.3.4. Intra-group financial support

The BRRD provides for specific bank crisis intra-group financial support agreements, authorised by the supervisors. Their objective is to enable burden-sharing within the group (vide: departitioning) by setting *ex ante* the terms of crisis course of action, in order to improve the decision-making and avoid costly negotiations at that stage. To ensure their enforceability, the BRRD requires a specific procedure for approval of such agreements by shareholders of every group entity[746] and that the management body of the bank reports each year to shareholders on the performance of the agreement.[747]

Lamandini emphasises the conditional nature of such an agreement, including the interest which is relevant and conditions applicable, such as that each party enters into agreement freely, with full disclosure of all relevant information, activating it in own best interest (which may nonetheless take into account any direct or indirect benefits including the interest of the group, and information privy to group members).[748]There can be little doubt, that the formulation of these provisions bestows ample discretionary powers in the hands of competent authorities[749] via a complicated procedure for approving any intra-group support contingent on joint approval – even if the *option* of entering into an *ex ante* intra-group support agreement – is to be exercised by the parent entity.[750]

[745] Schelo (n 702) 71.
[746] Article 21(1) BRRD.
[747] Article 21(3) BRRD.
[748] Lamandini (n 116).
[749] Though with EBA acting as coordinators (per 5(4) BRRD).
[750] Art. 19 BRRD.

Such an agreement is implemented only in cases of early intervention by the supervisor. The provision is therefore predominantly crisis-oriented – considerations other than crisis are not covered. Though undoubtedly important from the perspective of ex ante aligning of expectations, the provision does not cover current operations of the bank, that is "intra-group financial arrangements including funding arrangements and the operation of centralised funding arrangements."[751] Crucially, however, such support does not cover other forms of centralised funding arrangements, which are the norm in cross-border banking .

6.3.5. Group interest through recovery planning

Ex ante intra-group planning creates specific scope for group level interest.[752] The introduction of specific procedures is hardly surprising given the contentious nature of cross-border clams in crisis as well as the retrenchment which occurred via nationally-induced ring-fencing. Further, the settlement of intra-group claims, including contractual claims and non-contractual ones (such as tort, fraud and mismanagement) has proven costly in the absence of an adequate cross-border framework, raising claims that these have diverted the attention of regulators from the pursuit of overall efficiency and minimising the social cost of crisis.[753]

While the scholars of financial regulation focus on the limitations of intra-group financial support – notwithstanding the elaborate governance design, with a special role for shareholders,[754] arguably more promising in terms of an enterprise enabling group approach to EU bank groups is the expanded scope of duties of parent EU undertakings with regard to the EU market as a whole. Below I consider the specific legal strategies enabling and enterprise approach to recovery planning – including the formulation of the duties and specific roles conferred on the public authorities in the context of the regulatory requirements concerning recovery planning outlined in this chapter.

[751] Art. 19(2) BRRD, for further analysis of intragroup financing in crisis see: Babis (n 100).
[752] See Chapter 4 in Schelo (n 703).
[753] See Hüpkes recalling also in the insolvency specific context that claims can rank differently across jurisdictions, n. 203, 376.
[754] See Resolution College RTS as well as EBA Guidelines specifying the conditions for group financial support under Article 23 of Directive 2014/59/EU, 9 July 2015.

6.4. Legal strategies for a cross-border bank group risk management

As in the previous Chapter, the mere fact that a specific cross-border bank group duty or procedure is laid down in EU law, does not necessarily explain fully, what legal strategies – combining as ever the independence and interdependence within the bank group – made this possible. This section identifies the specific legal strategies which enabled an enterprise approach to cross-border bank recovery planning, drawing on comparative group law and the building blocks of EU cross-border bank group approach identified in Chapter 3. Specifically I explain the importance of: the reference to the group interest, the consideration of group interest as a fiduciary duty of bank management, including specific mandatory group-level considerations, disclosure requirements, conditionality deployed in the context of the enterprise approach, reflexivity of the recovery plan, scope of internal market objectives, protective role granted to the host supervisors, EBA Single Rulebook and consistency requirements.

6.4.1. Reference to group interest

The BRRD provisions which relate to recovery planning draw on basic concepts of group law (as identified in comparative scholarship), and in particular the concept of "group as a whole", that is group interest. The BRRD introduces a number of specific references to objectives relating to "group as a whole", for example: Art. 7(4) requires that "group recovery plan shall aim to achieve the stabilisation of the group as a whole." General objectives relating to cross-border group treatment can be found in the EBA Regulation, where Art. 25 emphasises the role of the EBA in facilitating effective resolution of a bank group in "an orderly, cost-efficient and timely manner."

6.4.2. Group interest as a fiduciary duty

The expanded scope of directors as discussed constitutes a distinct EU legal strategy to enable an enterprise approach, that is to design recovery (contingency plans) in such a way, that the group "as a whole" is stabilised. Notably this presupposes control – and

hence that recovery plans should include as well measures to ensure that control can be effectively exercised and the parents have a right of instruction in this regard.[755]

Specific duties regarding group interest are imposed on the management of group-level undertakings in drafting recovery plans. These shall draw up and submit recovery plans for the group as a whole (Art. 7 BRRD), while the resolution plans are to be drawn up by the "group level resolution authority, *together* with the resolution authorities of subsidiaries and after consulting the resolution authorities of significant branches" (Article 12 BRRD, emphasis added). The perspective from the Union group undertaking (as a whole) is to be present in both joint – the plan is to include actions taken at the level of the Union undertaking, and at the level of each individual subsidiary.

6.4.3. Disclosure

Increased disclosure requirements (in particular vide shareholders) are emphasised as part of the enterprise burden-sharing arrangements. Such disclosure requirements are detailed in the context of possible intra-group financial support arrangements discussed above.

Disclosure is required inter alia to enable monitoring by shareholders, especially since failure to comply with resolution law requirements may result in restriction of distribution of dividend.[756] BRRD regulates disclosure and reporting to shareholders in group-specific contexts for example with regard to intra-group support agreements, where shareholders shall be informed annually of the performance of the agreement and any implementation of its provisions.[757]

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[755]Conac (n 284).

[756] The so-called M-MDA, see recital 24 and new BRRD Article 16a (BRRD 2) Resolution authorities may "to restrict or prohibit distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution."

[757] Art. 21 BRRD.

6.4.4. Conditionality of an enterprise approach

Specific enterprise (group-wide) elements of recovery planning are conditional on specific requirements, related to the terms and conditions for any intra-group support to be put in place: that is a timeframe and list of the difficulties and terms on which support is granted, that there specific consideration was paid to impact on the resolvability assessment, that there is no threat to financial stability, that action is in the best interest of the guaranteeing entity and that such support does not result in breach of prudential rules.[758] Granularity as to specific conditions on which an enterprise may be adopted increases the predictability of the framework and therefore trust. Further, such conditionalities appear to combine elements of pre-existing common European traditions in group law in particular with regard to its protective elements.[759]

6.4.5. Reflexivity

The regulatory requirements are designed in such a way that they have an impact on the cross-border structure (namely if internal organisation and cross-border activity is assessed as a matter of risk management). In this way, the existence of EU cross-border bank groups is entrenched institutionally to the extent they are both the object and subject of risk governance rules in EU law. The organisation of the cross-border bank is therefore affected by the procedure.

6.4.6. Internal market objectives

The exercise of recovery planning has implications on the operation and structure of the bank. It is alike fire-proofing a building, that is ensuring that the relevant fire doors are put in place and fire sensors developed. Where the recovery plans become the basis for concrete action, however, that is their provisions are implemented under early crisis intervention measures by the supervisor or by the bank itself, they possess several characteristics from the point of view of corporate governance, which have a cross-border impact. While they impose specific duties of management (preparation of recovery plans), with a view of minimising risk for other stakeholders and increasing

[758] Arts. 33-36 Resolution College RTS.
[759]See Section 3.4.1 on comparative legal traditions in European group law.

predictability in crisis to the benefit of shareholders and creditors in crisis (minimising losses), they are prepared in a highly regulated and prescriptive setting.

Such an extended impact in terms of governance can be explained by the broad objectives of the BRRD. The CRD IV – which lays down the framework for micro-prudential risk management - specifies that the aims of the prudential regulatory framework are "[ensuring] the financial stability of the operators on [banking and financial] markets as well as a high level of protection of investors and depositors". [760] BRRD meanwhile protects multiple stakeholder groups protected (creditors, depositors, investors) as well as the explicit protection of taxpayers (state resources) and protection of critical functions of banks. Both CRD IV and BRRD have a specific cross-border dimension. CRD IV aims at "contributing in a determined manner to the smooth functioning of the internal market." The BRRD aims even further – it seeks specifically as building credibility of the regulatory instruments in a cross-border context in order to facilitate mutual trust between Member States.[761]

While smooth functioning of the internal market and trust-building (integration) both by definition introduce the cross-border dimension into the regulatory objectives, the two pieces of legislation explicitly cover cross-border institutions. CRD IV states that: "in order to ensure a well-functioning internal market, transparent, predictable and harmonised supervisory practices and decisions are necessary for conducting business and steering cross-border groups of credit institutions."[762] CRR emphasises the perspective of lowering transaction costs for cross-border operation of banks.[763] It is the BRRD, however, which emphasises the management of failure of cross-border bank groups as its specific objective, where such failure is potentially destabilising for all Member States concerned. The cross-border crisis management objective requires that a set of governance practices be as well implemented *ex ante*.[764]

[760] Following focuses on CRD IV Regulation, where the Directive has as its main purpose coordination of supervisory practices (with notable exceptions such as remuneration policy, relevant from the perspective of risk-taking incentives, thereby with an impact on systemic risk

[761] Rec 3 BRRD.

[762] Recital 13 CRD IV, recall that cross-border activity is one of the factors determining that an institution falls within specific requirements of a global systemically important institutions, Art. 131(2)(e) CRD IV.

[763] Recital 12 CRR.

[764] Recital 3 BRRD.

6.4.7. Protective role granted to the host supervisors

The role of host supervisors in assessing recovery plans is more limited than that of NRAs in the resolution planning procedures discussed in the previous Chapter. This also reflects the more integrated nature of decision-making resolution colleges than supervisory colleges. The former include more specific group-level deliverables, and are subject to binding mediation of EBA more often.[765]In the context of recovery plans drafted by the Union parent undertaking, they are nonetheless to be assessed *together* by the consolidating supervisor and the competent authorities of subsidiaries (Art. 8(1) BRRD), which ensures that the host authorities have protective tools at their disposal via participation in the process.

6.4.8. EBA Single Rulebook

Specific risk elements arising from group interconnectedness are defined in the granular Rule Book developed by the EBA. Such rules include for example measures of interconnectedness and specific guidelines on how entities should be covered on the basis of strategic analysis.[766] However, such detailed rule-making may also bring in internal market (or group level) specific elements via Level 3 EBA rulemaking – even when these are not explicitly referred to by the secondary legislation (see below).

6.4.9. Consistency requirements

Another legal strategy employed is the introduction of a consistency test for implementation of certain requirements at group level. To this end, the operational risk framework assumes centralised group-level risk management is required under this standard, and hence the AMA framework requires "that the operational risk measurement system is embedded within the various entities of the group and, where it is used at a consolidated level, that the parent institution's AMA framework is extended to the subsidiaries, and that those subsidiaries' operational risk and business environment and internal control factors (BEICF) referred to in Articles 322(1) and

[765] FinSAC (n 195).
[766] Art. 7 Resolution College RTS, EBA Final Report on Recommendation on the coverage of entities in a group recovery plan, 1 November 2017.

322(6) of Regulation (EU) No 575/2013 are incorporated in the group-wide AMA calculations."[767] A specific internal consistency requirement between the individual entity and group risk management is imposed by the Regulation, tested *inter alia* by appropriateness of the internal capital allocation mechanism, the cognisance of the internal differences in risk and quality of operational risk management within the group, any impediments to internal flow of funds or soundness of the "top down" systems for allocation of capital within the group.[768]

[767] Art. 11(b) Commission Delegated Regulation (EU) 2018/959 of 14 March 2018 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards of the specification of the assessment methodology under which competent authorities permit institutions to use Advanced Measurement Approaches for operational risk, OJ L 169, 6.7.2018, p. 1–26 "AMA RTS".

[768] Art. 35 AMA RTS.

6.5. Chapter conclusions

Generally – in the absence of group law – the distinct entities of the bank group operate in different Member States and are subject to distinct local laws and – in governance terms – subject to specific duties of management with regard to discrete (local) shareholders and other stakeholders. However, through proceduralisation of the implementation of the regulatory instruments and conferral of specific responsibilities with cross-border consequences on the group parent entity (EU parent) with regard to risk management (recovery planning), the reach of these regulatory instruments extends cross-border – at least within the EU's internal market.

An analysis of the general risk management under the EU prudential framework allows to identify a centralised and group law perspective – however one which is fragmented. Enterprise approach in recovery planning is the result of specific requirements imposed on the regulated cross-border banks in particular, however the protective measures rely predominantly on local supervision. A number of elements of group law can be identified in the general risk management framework, this is the case on the enabling side more on the intra-group risk governance, e.g. some operationalisation of a group interest concept at the group parent level. The protective element lies with the public (host) authority, however, rather than the subsidiary legal entity – as is the case for group law generally. Such entity protecting legal strategies generally include rather third-party transaction limitations or specific minority shareholder protection. No such rules are to be found in the BRRD. Nevertheless, the scope for an enterprise approach allows for an intra-group risk re-distribution.

Chapter 7

7. The purpose of an EU cross-border bank group

This monograph sought – primarily – to answer the question whether, and how, EU law had enabled an enterprise, holistic approach to cross-border bank groups in the internal market in the aftermath of the GFC. In a sense, this was a question of how EU circumvents its own limitations in the pursuit of integration. I have shown, on the example of crisis prevention measures required under the BRRD, how post-crisis banking regulation established the building blocks for a cross-border bank group governance regime, namely via intra-group de-partitioning, policy objectives, procedural cooperation between authorities and corporate governance. Drawing on comparative group law traditions, I was able to analyse such building blocks as a matter of group law, that is to identify legal strategies which enable a group wide (enterprise) approach to governance of the bank or those which serve to protect distinct entities. The findings confirm that a cross-border bank group has emerged as a distinct object of EU law – this notwithstanding its relative complexity, and restrictions imposed.[769]

Since a bespoke cross-border bank group regime established in EU law has implications for cross-border risk-distribution via the banking sector. The next question to be asked therefore how – within a complex regime of transnational bank governance – accountability is to be ensured, and how the specific interests which the bank pursues are to be identified and enforced. This final chapter sketches the answers to such questions, first recalling briefly the findings.

[769] Here in particular the reluctance of Member States to allow for cross-border intra-group guarantees should be acknowledged as an example of prevailing distrust and prevalence of sovereigntist approaches to banks.

7.1. The findings of the monograph

Since the EU is not a single jurisdiction as conventionally understood, a cross-border bank group operates in a complex jurisdictional regime subject to both EU rules and those determined by the distinct states where it is active. Disintegrating effects of the multi-jurisdictional scope of bank activity became evident over the course of the crisis, when separate national safety nets were implemented for banks operating cross-border as a group previously, especially given the lack of appetite of national competent authorities to engage in transnational burden-sharing.[770] After 2008 many cross-border bank groups disintegrated as a result of unclear rules governing cross-border situations and ring-fencing interventions by distinct public authorities. Banks were proven to be international in life, national in death – not only at global level but in fact – and counterintuitively perhaps for EU law scholars – *in particular* in the EU. The cause of such disintegration of cross-border structures can be attributed – I argued in Chapter 1 – not only to the absence of a public safety net at EU level, but as well to the absence of a holistic group regulation. Uncertainty about crisis management, or rather the incentives which led distinct parts of the group to pursue their interest only rather than the group (integrated) interest, increased the costs of bank bail-outs as they prevented better risk-sharing. The EU legal framework proved incapable of ensuring a fair crisis governance for cross-border bank groups, in the absence of governance rules which would take into account the interests of stakeholders at different levels of the bank's organisation.

Though cross-border financial institutions reaped the benefits of cross-border activity in normal times, the costs of their failure were distributed across different public purses, contributing to disenchantment with politics in many countries, but also creating distrust between Member States within the EU. In the light of the perceived complexities of EU banking regulation the attention of the public focused on the bailouts of countries in Europe – both in the Eurozone (Ireland, Greece, Portugal) and outside (Latvia at the time). The connection between the cross-border bank governance (financial integration) received only more attention with the institution of the European Banking Union. However, the link between going concern governance of cross-border bank groups as *ex ante* risk distribution – and therefore a channel for (private) risk-sharing – has not been tackled extensively by scholarship, which has focused rather on

[770] Grünewald (n 71).

the gone concern crisis management, insolvency and resolution. The argument made in this monograph is that it is the regulation of going concern – good times – bank operation which holds the key for understanding the mechanism of private risk-sharing across an integrating EU banking market.

It is in this context that EU resolution law (BRRD) introduced the concept of an "cross-border group." Hitherto, there was no such concept in EU law. Such cross-border groups – defined *structurally* by the fact they have "a parent undertaking and subsidiaries" and *geographically* where "group entities established in more than one Member State,"[771] may not necessarily encompass the entire multinational (global) bank. Initially scholars have criticised the original BRRD legislation in this vein, by pointing to the absence of definition of the concept.[772] However, by 2019, the new concept has been supplemented by specific regulatory requirements to be implemented in respect of the "Union parent undertaking", that is the parent entity established in one of the EU's Member States. The existence of EU group law as a term was further confirmed by the introduction of further de-partitioning tools (internal MREL, i.e. loss absorption mechanisms) under BRRD 2, as anticipated by corporate group theory. As a result, the existence of an "EU cross-border bank group" – as predicted by corporate group law – was confirmed in EU law. The question then tackled was what kind of a group an EU cross-border bank group is. The answer was found drawing on common traditions of EU Member States.

Even though group law does not exist at EU level, many Member States provide for such rules. Their common feature is a balance which is struck between protective (entity) and enabling (enterprise) approaches to group interests. The former encompasses legal strategies which serve to preserve the independence of distinct legal entities within the group. The latter meanwhile enables a holistic group interest approach. Where the cross-border bank group concept is introduced in the EU rulebook in the context of risk management and crisis prevention and management procedures, the thesis analysed these procedures qua group law. In other words, I investigated how institutional and risk governance procedures for cross-border bank groups under the BRRD encompassed entity and enterprise legal strategies.

[771] Art. 2(1)(26) and (27) BRRD.
[772] Grünewald (n 71) 114.

First however, Chapter 4 showed how already over the course of the GFC some tenants of a transnational governance regime for cross-border banking were to be found in the state aid practice of the European Commission. Supporting such a claim, I present the findings of an analysis of 29 bail-ed out banks in 18 countries, with regard to which the European Commission had taken 112 decisions authorising state assistance. The chapter shows, that the constraints of jurisdictions could have been overcome in some specific contexts, where the European Commission was more concerned with the business scope of bank beneficiaries, than the technicalities of the legal form. However, there no evidence was found that the European Commission specifically paid attention to the EU-wide activity of the cross-border bank group as a feature to be distinguished from its overall global activity. On the other hand, the reference to rudimentary EU group law features (accounting, competition law) in the context of the descriptions of cross-border aid beneficiaries in crisis state aid decisions, suggested that such organisational law points of reference were needed.

Turning to the new regulations introduced in the aftermath of the GFC, in Chapters 5 and 6, showed how the new procedures for risk management in banks defy jurisdictional constraints and allow for an enterprise approach to cross-border bank groups (in the EU). Through engagement in new administrative structures authorities at different levels are invited to adopt a European perspective. Institutional coordination is not only a response to a perceived trade-off between cross-border externalities and costs of cooperation, but an EU-mandate enabling framework, where specific administrative structures have the power (or enable) decisions to be taken vis-à-vis the cross-border bank which affects the scope of the markets where it operates (even if just the EU).It is therefore no longer appropriate to speak of concrete jurisdictions aggregating to the scope of cross-border group, but rather an integrated governance space, where the terms and the design of the administrative structure (rather than the degree of coordination-centralisation) determine the outcomes for the distinct economies where the cross-border bank group is active. To the extent that resolution planning has a bearing on going concern governance of the bank, such reinforced institutional cooperation is reflected in the internal organisation of the cross-border bank group. Legal strategies identified in this context included: calibration of voice of distinct actors, exclusive (residual) competence, expanded scope of mandatory considerations, disclosure, obligation to give reasons and to inform, sanctions for non-cooperation, residual ring-

fencing powers, duplication of tasks and symmetry of powers, cross-border scope of resolution tools, standards and rule-making, conflict resolution via mediation, EU legal principles (proportionality) and time variability.

Turning to the internal dimension of cross-border bank group governance, I analysed BRRD provisions related to group recovery planning using the same group law framework, however focusing on the risk management procedures as a matter of private risk-sharing. The new BRRD procedures have a distinct cross-border dimension, as a group recovery planning requirement is imposed on the parent entity (EU parent) of the cross-border bank group. In the light of the governance function that recovery plans play, intra-group risk management is not only a channel for transmission of shocks but as well a channel private risk-sharing. As risk methodologies increasingly incorporate "softer" risk measures, such as sustainability or political risks, this effect is bound to amplify. Legal strategies enabling either an entity or enterprise-wide approach in this context include: reference to the group interest, the consideration of group interest as a fiduciary duty of bank management, specific mandatory group-level considerations, disclosure requirements, conditionality deployed in the context of the enterprise approach, reflexivity of the recovery plan, scope of internal market objectives, protective role granted to the host supervisors, EBA Single Rulebook and consistency requirements.

Such an identification of a cross-border bank group regime further provides evidence of denationalisation of banking occurring in the EU – both as a result of EBU driven institutional integration and – for CEE – as a result of significant degree of foreign ownership in the banking sector. Consequently, as the sovereign-debt loop loosens as a result of European regulations, within the cross-border bank group governance the enterprise-enabling legal strategies may come to outweigh the entity-protective dimension. With cross-border bank group governance in the EU identified in this way, the question which must be then posed is a foundational corporate governance question, namely that of the interest to be pursued by the cross-border enterprise. A cursory exploration below suggests that it must be explored from the perspective of the changing corporate paradigm generally, specifically – in the context of banking – in the context of new public duties (critical functions, public interest considerations) which define the EU cross-border bank group regime.

7.2. A reflection on methodology

The monograph investigated the concept and operationalisation of cross-border bank group in EU law. For analysis it drew primarily on the specific rules (BRRD) in the context of which the studied concept was introduced. The building blocks framework and the governance strategies analysed from the perspective of enabling/enterprise or protective/entity approaches derived primarily from comparative group law supplemented by findings related to the cross-border treatment of cross-border bank groups in state aid control.

With hindsight such an approach could be improved in a number of respects, and such improvements constitute in themselves an interesting direction for further exploration. First, drawing further comparisons between the EU-wide scope of cross-border bank group and the Banking Union scope could further flesh out the significance of institutional centralisation as a determinant of cross-border bank group governance. Such an approach would then also contribute specifically to the study of differentiated integration in the EU.

Secondly, an analytical framework derived from national legal traditions, though attractive in terms of parallels with the management of interdependence and independence with the overall scheme of EU regulation, could be supplemented by further normative exploration of the desirable balance in an integrated – albeit heterogenous – economic space. Whereas an important finding of this monograph was the applicability of group law concepts to cross-border bank group governance procedures established at EU law, further work could investigate areas where "EU cross-border bank group" governance was particularly lacking, namely in the area of third-party transaction or minority shareholder right's protection.

Thirdly, this monograph explored a cross-border *bank* group, which has emerged as a result of a confluence of a number of elements, in particular the distinctiveness of the bank regulation regime (i.e. director's duties and the scope of regulatory objectives) and the post-crisis sense of urgency which carried the regulatory wave. The findings and the methods employed are therefore not easily transferrable to other corporate activities across the EU. Therein lies the strength (greater enforceability) and the weakness (restricted application) of this monograph's findings. However, it is not to be excluded that further work on the concept of an EU group – as discussed above – may open up

avenues in this regard. With EU law entering increasingly into other “core state” areas (e.g. for tax purposes) strategies for capturing cross-border group organisational forms are an important area for further research.

The primary area however, which this monograph suggests as warranting further exploration is the study of the corporate governance in EU bank groups, including mechanisms of monitoring and controlling of agency conflicts. Since a cross-border bank group is found to exist in EU law, the question then to be asked is in whose interest it exists as a corporate entity.

7.3. The implications of an EU cross-border bank group

The concept "cross-border group" in EU law is found to be not a vacuous term deployed in the absence of an overarching horizontal framework, but rather associated with a rich bespoke crisis prevention tools (resolution planning) and risk management framework. The monograph provided evidence of the private-public group governance strategies which pierce the jurisdictional corporate veil within the EU cross-border bank groups active in the internal market. Cross-border bank group requirements enable an enterprise approach. Protective legal strategies are employed to assuage the concerns of the distinct authorities and combine protective and enabling elements. Further, EU cross-border bank group scope is determined through an interaction between the private and the public governance and regulation, and specifically the transversal intermingling between prudential regulation and internal risk management procedures.

Since a bank group exists in EU law, it must be determined what is the interest such s corporate structure is pursuing and what are the rights of specific stakeholders across various levels and parts of the group. Below I sketch some avenues of such a cross-border governance, already tangentially touched upon in the monograph, drawing on the altered scope of shareholder rights (Section 7.3.1), the new debt governance regime (Section 7.3.2) and the significance of critical function / public stakeholder protection qua regulatory objective (Section 7.3.3).

7.3.1. Restricted shareholder governance

The limited use of a pure shareholder wealth maximisation model in the context of banking has already been discussed in this thesis.[773] Though shareholder protection is listed among the objectives of banking regulation, there is ample evidence that the new regulations consider financial stability concerns (including as *ex ante* resilience) and critical functions at least as important. Examples of limitation on the scope (if not outright expropriation) of rights of bank shareholders in crisis are many.[774] Such case law cannot be fully extrapolated to the going concern operation of the bank, but there

[773] See Section 6.2.

[774] E.g. CJEU the stability of the financial system (including the Eurosystem) can justify limitations of the scope of shareholder rights, for a commentary on the *Kotnik* case see: Badenhoop (n 524); Ramos Muñoz and Lamandini (n 95) 811.

can be little doubt that where the supervisors can exercise direct powers vis-à-vis the management (e.g. replacement of management as an early intervention measure, or fit and proper tests for members thereof[775]), this qualifies already shareholder rights, thereby rendering any model of "shareholder wealth maximisation" – either at the level of the parent undertaking or at the level of subsidiary entities in a cross-border context – if not ineffective, only one function of the banking enterprise – among others.

Where even before the crisis reforms, bank governance was conceived of somewhat distinctly,[776] the crisis reforms further underpin the transformation of the approach. Now scholars go as far as to claim that "efficiency" was superseded by "stability" and "critical function protection" as objectives pursed by governance mechanisms.[777] Such paradigm shifting should be taken with caution, even if arguably what is meant by stability here is not just a static condition of the financial system operating smoothly, but rather an expanded stakeholder and time-horizon model of governance.

7.3.2. Enabled debt governance

While on the one hand EU resolution law studied in this monograph restricts the role of shareholders already in going concern management of the cross-border bank, other stakeholders are enabled. This is the case in particular of the bank's creditors. As has already been explained, in order to increase the loss absorption within banks new requirements have been introduced for banks to hold not only capital, but also to issue sufficient debt which – in crisis scenarios – can be converted to equity and further written down to restore the capital position to meet the regulatory requirements. Through requirements such as the MREL, creditor control is to be initially exercised only through the debt contract and pricing, since prior to conversion in the case of bail-in tool being employed, they have no direct decision-making powers with respect to the bank's decisions.[778] In any case, however, MREL constitutes additional regulatory

[775] For the going concern impact on management of supervisory requirements see: Grundmann, Petit and Smoleńska (n 188). On the impact of the composition of the boards on bank management see: Paul Davies and Klaus J Hopt, 'Non-Shareholder Voice in Bank Governance: Board Composition , Performance and Liability' (2018) 413/2018.
[776] Recall the discussion of bank governance in this context in Section 6.2.
[777] Gordon (n 689) 54.
[778] Abhishek Srivastav and Jens Hagendorff, 'Corporate Governance and Bank Risk-Taking' (2016) 24 Corporate Governance: An International Review 334, 338. This is notwithstanding the extent to which creditors are made good on their claims in insolvency proceedings.

limitation on the corporate financing choices, strengthening the debt governance side with an impact on risk profile of the institutions.[779] In this way, the governance impact may well prevail over the loss absorption – as can be observed in the light of thresholds imposed in some jurisdictions as conditions for finding control.[780] The new regime has therefore two implications: in terms of the role of creditors and, in terms of new mandatory regulation of bank funding models, especially in a group context.

The strengthening of the role of creditors in bank governance due to the mandatory requirement of bail-in affects the relative rights of shareholders (the primary owners of the legal entity) and the creditors. Such a turn is not fully surprising - some scholars claimed shareholder expropriation of value from creditors in bank crises become an important issue in corporate law, surpassing traditional concerns about conflicts of interest between managers and shareholders.[781] These considerations place governance questions, including the specific aims pursued by the group management and – in the context of the going concern procedures discussed in this monograph – the regulatory authorities in the exercise of their tasks (protection of creditors and depositors in addition to pursuing public interest), at the heart of the change in bank group governance effected by the new regime. In a cross-border group context, however, many of these questions remain open, namely what is the distinct protection and the distinct role of intra-group and external creditors.

7.3.3. Discovering critical functions across borders

Given the transnational nature of some of the resolution law procedures, enabled by the management-like functions of the resolution authorities and the public-like duties of directors, it seems reasonable to explore whether some of the other regulatory objectives – financial stability and protection of critical functions – do not equally become a function of the bank as a corporate entity. There are naturally difficulties to such an approach. By some standards public interest might be the antithesis to party autonomy, and – in the context of regulation – only a safety valve to restrict freedom of

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[779] See X. Vives, (above n. 116), p. 119.

[780] Consider the thresholds applied in the Novo Banco case, discussed in: Luís Silva Morais, 'Lessons from the First Resolution Experiences in the Context of Banking Recovery and Resolution Directive', *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019).

[781] David Skeel, 'Rediscovering Corporate Governance in Bankruptcy' (2016) 87 Temple Law Review.

conduct of business and autonomous business choices of the banks.[782] The difficulty of transposing financial stability as a principle guiding regulation of financial markets has been raised,[783] however the SRM Regulation provides one of the few definitions of what is meant by financial stability under the scope of EU law, namely that it is threatened, where "financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardise the *orderly functioning, efficiency and integrity of the internal market* or *the economy* or the financial system of *one or more Member States*."[784] A number of points are immediately evident, in particular the embeddedness of financial stability objectives in the internal market. Secondly, the definition takes a broader view than purely intra-sector, that is it looks to the impact of financial stability on the real economy, also in cross-border situations. The broad scope of financial stability definition is reflected in the relevant BRRD provisions, where the objectives of the regulation are explicitly defined as: ensuring the continuity of critical functions, avoiding adverse effects on the financial system, protecting public funds by minimising reliance on extraordinary public financial support, protecting insured depositors and protecting client funds and client assets.[785] Clearly the objectives pursued are therefore much broader than intra-sector considerations of systemic stability. Financial stability is not an end in itself as a regulatory objective but rather an intermediate goal which is to enable a certain functioning of the economy and the internal market.

When the three elements: limitation of the rights of the residual right holders, emboldening of a new constituency and a functional interpretation of the regulatory objectives infusing daily management are considered together in a cross-border bank group context, they create scope for risk-sharing as a matter of governance. If the cross-border bank is to integrate public duties related to financial stability and critical function protection into its objectives, surely this must extend to measures which limit – and if not limit then do not amplify – instability – as a matter of *bank* governance rather

[782] See in this context, the application of the public interest test in the context of resolution of Banco Popular Espanol to ensure the continuity of critical functions, and to avoid adverse effects on financial stability (SRB, Notice summarising the effects of the resolution action taken in respect of Banco Popular Español pursuant to Article 29(5) SRMR, 7 June 2017).
[783] Hilary J Allen, 'What Is' Financial Stability'? The Need for Some Common Language in International Financial Regulation' (2014) 45 Georgetown Journal of International Law 929.
[784] Art. 10(5) SRM Regulation.
[785] Art. 31(2) BRRD

than *regulatory* responsibility. Arguably, had the horizon of business decisions been calibrated in such a way during the GFC, the crisis in countries affected by sudden stops in particular could have had quite a different course.

EU resolution law defines its own objectives in terms of protection of specific stakeholders in a much more granular and detailed way than was the case before. Unpacking the cross-border implications of such an approach adopted by the legislator, required first building an understanding of how the new cross-border bank group governance mechanisms operate. The implications are far-reaching. The admission of a transnational scope of cross-border bank groups in the EU undermines the prevailing conception of sovereign bank doom loop and jurisdictional notions of the conflict between home and hosts states in the oversight of the cross-border bank groups. Reconceptualising the discussion of banking as a matter of cross-border bank group governance reveals the need to better capture – in scholarly work and in practice – the bargain struck by the governance rules repartitioning the roles among debtors, creditors, regulators and customers of banks in multiple jurisdictions. Further exposure and analysis of these governance mechanisms to democratic scrutiny is likely to produce more equitable burden-sharing, but also a better understanding of EU economic integration.[786]

[786]Anna Gelpern, 'Common Capital: A Thought Experiment in Cross-Border Resolution' (2014) 49 Tex. Int'l LJ 355, 383.

Annex I

List of European Commission's decisions concerning state aid to cross-border bank groups taken between 1 December 2008 and 30 March 2017

	BANK NAME	BANK ABBREVIATION	GRANTING MEMBER STATE	EUROPEAN COMMISSION DECISION	DATE
1	ABN AMRO	ABN AMRO	Netherlands	Commission Decision in case C 11/2009 (ex NN 53/B/2008) on Alleged aid to Fortis Bank Nederland and the ABN earmarked activities (Netherlands),	08 April 2009
2	ABN AMRO		Netherlands	Commission Decision in cae C 11/09 (related to NN 2/10 (ex N 429/09) and N 19/10) on Recapitalisation measures in favour of FBN and ABN Amro Group, Invitation to submit comments pursuant to Article 108(2) TFEU	05 February 2010
3	ABN AMRO		Netherlands	Commission Decision in case C11/2009 on Prolongation of the temporary approval of additional State support to Fortis Bank Nederland and ABN Amro (Netherlands),	30 July 2010
4	ABN AMRO		Netherlands	Commission Decision in case 11/2009 (ex NN 53b/2008, NN 2/2010 and N 19/2010) on State aid to ABN AMRO Group NV (created following the merger between Fortis Bank Nederland and ABN AMRO N) (Netherlands),	05 April 2011
5	Allied Irish Bank	ALLIED IRISH	Ireland	Commission Decision in case N241/2009 on Recapitalisation of Allied Irish Bank (Ireland),	12 May 2009
6	Allied Irish Bank		Ireland	Commission Decision in case N 553/2010 on Second emergency recapitalisation in favour of Allied Irish Banks plc (Ireland),	21 December 2010
7	Allied Irish Bank		Ireland	Commission Decision in case SA.33296 (2011/N) on Emergency recapitalisation in favour of the merged entity Educational Building Society / Allied Irish Banks plc (Ireland),	15 July 2011
8	Allied Irish Bank		Ireland	Commission Decision in cases SA.29786 (ex N 633/2009), SA.33296 (2011/N), SA.31891 (ex N553/2010), N 241/2009, N 160/2010 and C 25/2010 (ex N 212/2010) on State aid for the restructuring of Allied Irish Banks plc and EBS Building Society (Ireland),	07 May 2014
9	Alpha Bank	ALPHA	Greece	Commission Decision in case SA.34823 (2012/C, ex 2012/NN) on Recapitalisation of Alpha Bank by the Hellenic Financial Stability Fund (Greece),	27 July 2012
10	Alpha Bank		Greece	Commission Decision in cases SA.34823 (2012/C), SA.36004 (2013/NN), SA.37965 (2013/N), SA.37966 (2013/N), SA.37967 (2013/N) on State aid to Alpha Bank Group (Greece),	09 July 2014
11	Alpha Bank		Greece	Commission Decision in cases SA.43366 (2015/N) on Amendment of the restructuring plan approved in 2014 and granting of new aid to Alpha Bank (Greece),	26 November 2015
12	Anglo-Irish Bank	ANGLO-IRISH	Ireland	Commission Decision in case N 9/ 2009 on Recapitalisation of the Anglo-Irish Bank (Ireland),	14 January 2009
13	Anglo-Irish Bank		Ireland	Commission Decision in case N61/2009 on Change of ownership of Anglo-Irish Bank (Ireland),	16 February 2009
14	Anglo-Irish Bank		Ireland	Commission Decision in case N356/2009 on Recapitalisation of Anglo-Irish Bank (Ireland),	26 June 2009
15	Anglo-Irish Bank		Ireland	Commission Decision in cases NN12/2010 and C11/2010 (ex N667/2009) on Second recapitalisation of Anglo Irish Bank and restructuring of Anglo Irish Bank (Ireland),	31 March 2010
16	Anglo-Irish Bank		Ireland	Commission Decision in case NN 35/2010 (ex N 279/2010) on Temporary approval of the third recapitalisation in favour of Anglo Irish Bank (Ireland),	10 August 2010

17	Anglo-Irish Bank		Ireland	Commission Decision in case SA.32057 (2010/NN) on Temporary approval of the fourth recapitalisation and guarantee in respect of certain liabilities in favour of Anglo Irish Bank (Ireland),	21 December 2010
18	Anglo-Irish Bank		Ireland	Commission Decision in cases SA.32504 (2011/N) and C 11/2010 (ex N 667/2009) on State aid to Anglo Irish Bank and Irish Nationwide Building Society (Ireland),	29 June 2011
19	Banco Comercial Português	**BCP (MILENIUM)**	Portugal	Commission Decision in case SA.34724 (2013/N) – Portugal	30 August 2013
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