



**Legal Issues of Cross-border Bank Resolution in the EU Context :  
The desirability and feasibility of having an EU cross-border bank  
resolution framework**

*by*

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## **PREFACE / ACKNOWLEDGMENTS**

I wish to express my gratitude to Professor Dr Michel Tison who had professionally guided and assisted me in the beginning phase of the paper when I was admittedly in the dark with regard to the topic and the structure of this essay.

I arrived in Gent in September 2011 amidst the Dexia banking crisis (now known as Belfius), and with great anticipation to be part of the LLM in Advanced European Law program. This is an opportunity for me to write about what might happen next, it is either 'more Europe' or backtrack the progress that has been made towards deepening of the single market in banking. What makes this more interesting is that problems surrounding these EU banks is not an isolated problem in itself. In fact, as the banking business fuels and runs the economy so to speak, this will have an implication on the wider agenda of the single market dream. As it is the backbone of economy, it is pertinent that the right steps are taken.

The crisis presents the EU with an opportunity to take the lead in its leap of 'audacious faith' towards a more coherent, integrated crisis prevention and management standards that may be a catalyst of change for others in the world.

I am excited at the prospect of seeing many changes take place in the banking realm- it seems that there will be an overhaul in many areas- regulation, supervision and resolution which my essay will particularly focus on. This enthusiasm is notably not mine alone, as a plethora of articles have been written on this matter. Exactly what will happen in terms of cross-border banking resolution, we do not know, but an idea is there of what to expect and where they intend to move to. My intention is to draw the differences between the current system without a European Legal framework, the desirabilities of having it and the feasibilities of achieving that, without going too much and deeply into technical details due to my lack of technical expertise in this area.

Most importantly, much gratitude goes to my family especially my parents, who have always provided the much-needed love and moral support and great consideration and understanding for without which this essay would never have been completed as desired.

*Li Li Chong*

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## **ACRONYMS, ABBREVIATIONS AND DEFINITIONS**

AFC	Asian Financial Crisis
AMF	Asian Monetary Fund
BAFIA	Banking and Financial Institutions Act 1989
BIS	Bank of International Settlements
BCBS	Basel Committee of Banking Supervisors
BNM	Bank Negara Malaysia
Bridge Bank	temporary public solution/asset management companies/temporary special purpose vehicle
CEBS	Committee of European Banking Supervisors (now replaced by the EBA)
CBRG	Cross Border Resolution Group of the BCBS
EC	European Commission
EBA	European Banking Authority (previously known as the CEBS)
ECB	European Central Bank
ECHR	European Convention on Human Rights
Ex ante	Before the event/pre-existing
Ex post	After the event
EU	European Union
EMU	European Monetary Union
EMF	European Monetary Fund
ERA	European Resolution Authority
EFSF	European Financial Stability Facility
ESCB	European System of Central Banks
ESAs	European Supervisory Authorities
ESM	European Stability Mechanism
ESRB	European Systemic Risk Board
FSA	Financial Services Authority
FSB	Financial Stability Board
IMF	International Monetary Fund
Living Will	Recovery and resolution plan, contingency plan
MDIC	Malaysia Deposit Insurance Corporation
MoU	Memorandum of Understanding
NPL	Non-performing Loans
OECD	Organisation for Economic Cooperation and Development
SIFIs	systemically important financial institutions
SRR	Special Resolution Regime
UK	United Kingdom of Great Britain and Northern Ireland
US	United States

## **ABSTRACT**

This paper analyses how the European Union (EU) dealt with its banking crisis specifically in the aspect of cross-border banking resolution. The first part of the paper presents that currently, there is a mismatch between the level of financial integration amongst cross-border EU banks and the fragmented regulatory setting it adheres to. However, there were at the very least, some form of harmonisation in terms of regulation and supervision in the EU. What was completely missing from the picture was any form of harmonisation for a resolution framework. In a highly fragmented setting, it is hardly surprising that the response to the cross-border banks have been largely nationally dealt with as depicted by the case of Fortis. It looks at the problems that the EU is facing in the absence of a common framework for cross-border banking resolution and then studies the UK Banking Act which incorporates the Special Resolution Regime (SRR) which would allow it to take the necessary action in a swift manner in pursuance of maintaining financial stability. There are legal issues that have to be addressed especially since powers under the SRR would warrant an interference with shareholders' and creditors' right to property. To balance between the right to interfere and the protection of financial stability, this paper presents few safeguards which may counterbalance the nature of such intervention. For the second part, the paper will discuss the principles and designs of the framework taking into account experiences and relevant practical concerns. In the third part of the paper, the desirabilities of such a framework is discussed. Next, it moves on to the analysis of whether such a pan-European framework is feasible. This paper then attempts to address the practical and operational concerns (such as the institutional architecture, issues of funding and the concept of living will) for such a framework, taking into account the most recent development in the EU sphere. The fourth part of the paper addresses the possible steps to implementation and the cost of not having a pan-European framework. Lastly, before the paper is concluded, a short perspective on international experience is given, to discuss if any lessons maybe derived from the Asian Financial Crisis and in particular, the Malaysian experience. Finally, this paper concludes that the possibility of making this framework a reality will be highly dependable on political leadership and direction, as the concept of burden-sharing cannot work in the absence of discussing the issue on funding and an effective coordination mechanism.

**\*Keywords:** Bank resolutions, financial crisis, resolution funding, reforms, Article 6 of the ECHR, European Union, banking integration, political will

*Law is order, and good law is good order. –Aristotle*

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# Introduction – An overview

## Background

It is without doubt that the world economy had recently experienced one of the world worst global crises since the Great Depression. Recognising the scale of the crisis in the absence of an effective resolution regime, much discussions have taken place in the area of crisis management internationally, such as the Cross-Border Resolution Group (CBRG) of the Basel Committee of Banking Supervision (BCBS), the Financial Stability Board (FSB), the International Monetary Fund (IMF), think-tanks and leading policymakers around the world. While the problems faced in the United States (US) and Europe are similar –such as the lack of effective resolution tools<sup>1</sup>, the need for *ex ante* planning, unsuitability of the normal insolvency regime, to name a few –the problem in the European Union (EU) as compared to the rest of the world is slightly more peculiar and unique as we will soon see why.

In the US, in the aftermath of the crisis, we saw the enactment of the lengthy 2,000-plus pages ‘Dodd-Frank Act 2009’ providing for the biggest overhaul of the US financial regulatory arrangements which has been in place for almost 80 years. It is not perfect, but overall, it addresses the most important issues. Amongst the key proposed changes, it provides a framework for winding down the largest financial institutions if they fail<sup>2</sup>. Notably, the Resolution Authority (the Federal Deposit Insurance Corporation (FDIC)) in the US now has the discretion and flexibility to dissolve any financial institution in distress<sup>3</sup>.

Across the transatlantic ocean, we turn to the EU where we have just seen the latest casualty of the crisis, most recent in our eyes, one of the largest banks in Belgium, Dexia (now known as Belfius) with a significant presence of balance sheet in Netherlands, Luxembourg and France. However, unlike in the US, the problem in the EU, presents far-reaching consequences, and poses more issues at stake, as it involves cross-border countries involvement through the bank’s systemic presence in each of those states. As banks go nearly underwater, all eyes are on governments and authorities involved as to how they react to solve the problem. If the US came up with the Dodd-Frank Act, what in turn has the EU policymakers in store for themselves?

In terms of the speed of regulatory decision making in general, it is relatively slower in the EU in contrast to the decisive speed with which it proceeded in the US. However, this is understandable as unlike any other form of international cooperation in the world, **EU policymakers must craft an agreement among 27 sovereign governments** on issues relating to fiscal-related matters are often far too sensitive and strongly protected by national interests. The EU banking sector has an existing (albeit limited extent) of an integrated political and legal framework which explains its current degree of its integration in cross-border

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<sup>1</sup> Though it is not discussed in this paper, supervision/ regulator’s liability protection/depositors’ guarantee is also an equally important element for the banking integration to come out of the crisis.

<sup>2</sup> The US’s method is to attempt solving the ‘too-big-to-fail’ problem by ensuring that failing institutions can be taken into receivership by the Federal Deposit Insurance Corporation (FDIC), under which their business will be transferred or wound down and the failed institution be liquidated. (An EU Framework for crisis Management in the Financial Sector, FAQ, Internal Market page)

<sup>3</sup> Desai, P. (2011), From Financial Crisis to Global Recovery, Columbia University Press 10 Jun 2011



banking, compared to any other regions in the world. The peculiarity of the banking business in the EU compared to the US is exacerbated more given that in the EU, banks provide almost half the financing needs of the private sector in the smaller Eurozone and its concentration of banking assets is significantly higher than any other parts of the world<sup>4</sup>, whereas they only provide less than 20 % of financing needs in the US, where capital market has a more dominant presence.<sup>5</sup>

As we know it, the worst three years have passed since the crisis –but for now, there are works at various stages to be accomplished by policymakers in the EU; as it was clear that lack of uniform integration in terms of regulation, supervision and resolution was missing despite that the privileges of financial integration were already enjoyed by EU banks in the last two decades. Although there is a general consensus at the political level amongst the EU leaders, the details have not yet been finalised.

The good news and assurance for us is that the EU is not starting this exercise from ‘scratch’, as by now, we are blessed with an abundant of resources, recommendations, best practices and even proposed frameworks by the international fora in the aftermath of the crisis. The disorderly failure of Lehman Brothers in the US which led to major contagious disruption in the global financial markets highlighted to policymakers around the globe the missing link of a cross-border resolution framework, where the global banking sector (but more so in the EU context) is far more integrated than it used to be. Given the scale of seriousness and emphasis placed on having an effective cross-border resolution framework, the FSB and the BCBS have in fact been mandated to **“explore the feasibility of common standards and principles guidance for acceptable practices for cross-border resolution schemes thereby helping to reduce the negative effects of uncoordinated national responses, such as ring-fencing.”**<sup>6</sup>

**Eventhough many observers argue for an introduction of a resolution regime to handle cross-border banks, the attention of policymakers are observably more focused on the prevention of banking failures via the EU banking regulation and supervision regime.** While it is inherently pertinent for banking regulatory and supervisory reforms take place, this essay argues that crisis management through cross-border resolution deserves just as much attention, as even the best regulation and supervision cannot guarantee crisis and bank failures. This essay seeks to explore the desirabilities of establishing such a framework at the EU level, its potential legal and operational implications and most importantly, its feasibility and workability.

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<sup>4</sup> In Kenadjian, P. (2011), Cross-Border Resolution of Bank Failures, he sheds some light on this, where writes that the concentration of banking assets, in comparison to the GDP –UK’s top five banks alone constituted 446% of the GDP, 464% in the Netherlands and 334% in France as at end of 2009.

<sup>5</sup> Ibid.

<sup>6</sup> Report and Recommendations of the Cross-border Bank Resolution Group of the BCBS, March 2010

An effective resolution regime is needed as the banking business is peculiar to other types of business, in the sense that it is to a large extent a business of ‘trust and confidence’, which is an inherent and uncontrollable risk, as it can quickly become unviable as soon as their stakeholders (i.e. depositors, institutional investors, creditors) start losing confidence in its ability to meet their obligations. It was due to the vital need to keep the banks alive that authorities had no other choice but to put up taxpayers’ money to prevent a domino effect of failing banks, restore trust to ultimately prevent the casualty of a bank from seriously damaging and hurting the real economy out at large. This is precisely the scenario we had seen in several bank rescues in Europe –Royal Bank of Scotland, Dexia, ING, and Fortis –all shared a common problem, the absence of effective resolution regimes to deal with the problem in such a short period of notice. Hence, a resolution regime is important for authorities to utilise, a mechanism must be put in place to stop the contagion to other banks and cut the domino effect when it has to decide whether to intervene the bank or let the bank fail and enter the exit strategy. This should allow the resolution authorities to spread the losses on banks’ shareholders and unsecured creditors.

At the moment, **there is no legislation at the EU level governing banking resolution**. Apart from introducing minimum set of powers for supervisory authorities for crisis prevention situations, coupled with recent changes made to the Capital Requirements Directive (CRD)<sup>7</sup>, no EU framework for cross-border bank resolution exist which sets out how and under what conditions authorities should act in the event of a crisis arising in a cross-border bank.

## **Definitions and Scope of Paper – Focus on cross-border bank resolution**

Before delving in depth, various key important concepts will have to be defined first. In the context of this essay, bank resolution regime is a various ***set of legal and administrative rules that authorities may exercise to support restructuring of an ailing bank***, in order to ***maintain financial stability and ensure continuity of basic banking services***. As for the term ‘cross-border bank’, this is to be understood in a broad sense and to include any bank which is active either in multiple jurisdictions or is part of a group and through its various group members which maybe active in multiple jurisdictions<sup>8</sup>. This regime is crucial **especially for systemically important financial institutions** that provide essential public good functions such as credit provision, processing of payments and monetary transmission<sup>9</sup> as these essential functions

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<sup>7</sup> These includes rules on alerting other authorities on banking liquidity matters in emergency situations which maybe threatening to financial stability, coordination of supervisory activities and exchange of information in emergency situations- though these have clearly been imputed into the CRD, it is not exactly clear how this will materialise in practice, as there is no enforcement penalty or administrative penalty should these provisions are not followed.

<sup>8</sup> Definition provided by the Bank of International Settlements in the Report and Recommendations by the CBRG

<sup>9</sup> Kudrna, Z. (2011), Regulatory aftermath of banking rescues: More Europe or business as usual? EUSA Twelfth Biennial International Conference Boston, Massachusetts, 3-5 March, 2011, available online at [http://euce.org/eusa/2011/papers/12e\\_kudrna.pdf](http://euce.org/eusa/2011/papers/12e_kudrna.pdf)

must be preserved even in case of a bank insolvency in order **to prevent triggering systemic effects from spreading and avoid wider economic damage**<sup>10</sup>. Hence, the focus of the EU Cross-border resolution framework (also known as the 28<sup>th</sup> regime) should be placed on **systemic cross-border banks**<sup>11</sup>. In particular, it should apply to banks under the single banking passport that have cross-border activities which are of a magnitude and scope that raises legitimate concerns in the host or home country. When this ailing bank is systemically important in several countries and faces difficulties concurrently, then the resolution requires cross-border cooperation as it **cannot be solved by any single national authority in isolation of the other authorities** of the banks in the cross-bordering countries.

As for the word ‘banks’, this is made in reference to credit institutions and deposit-taking institutions from countries that adopt the EU banking *acquis communautaire* including the various non-EU, European Economic Area countries (EEA); Iceland, Liechtenstein and Norway<sup>12</sup>. In line with this scope of countries covered and to avoid confusion, I refer to ‘the EU cross-border bank resolution framework’ throughout this essay as the **‘pan-European framework’**.

As for the type of financial institution that would be covered, even though the Commission indicates its intention to cover deposit-taking banks and investment firms, when reference is made to the word ‘bank’ throughout this essay, it is only meant in reference to credit institutions and deposit-taking institutions. This is in line with the BIS reports that resolution regimes in most countries tend to **apply mainly only to commercial banks and other deposit-taking institutions**, and only to a certain extent, other classes of financial institutions such as insurance companies and investment firms<sup>13</sup>. As it still remains to be seen what the Commission will decide to include in the scope (July 2012), it is not in my intention to make a wild guess as to whether the framework may be extended to other classes of financial institution the failure of which is capable of having a systemic effect.

For the purposes of this essay, the term ‘resolution authorities’ commonly refers to any entities that may act as a ‘resolution authority’ in its Member State, as it is understood that ‘resolution authorities’ in different Member States may be different, as it could be under the competence of the central bank,

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<sup>10</sup> FSB 2010, Commission 2010, Cihak and Nier 2009

<sup>11</sup> In the response by the IMF to the public consultation carried out by the Commission in 2010, it was suggested that while the definition of “systemic” is debatable, the judgment of the host country prudential authorities should carry significant weight in the assessment.

<sup>12</sup> Even though the phrase ‘EU context’ is used throughout this essay, it is meant to also cover cross-border banks in the EEA countries that have signed up to the MoU in 2008 with the relevant national banking authorities in the EU. By virtue of the MoU, the parties have voluntarily committed themselves to cooperate with the relevant EU authorities with a view to develop common arrangements for financial stability and to deepen cooperation on cross border issues, both in normal times as well as in crisis situations. (Extension of the MoU 2008)

<sup>13</sup> BIS, Resolution policies and frameworks, progress so far, p.10, (July 2011), available at <http://www.bis.org/publ/bcbs200.pdf>

supervisor, deposit guarantee scheme, the Ministry of Finance or the national courts –depending on whether it is a judicial or administrative measure.

This paper heavily rely and takes into account the best practices and recommendations made in the international fora. At this outset, even though I acknowledge the importance of deposit guarantee scheme and risk mitigation process of a financial market participant (close-out netting provisions) as part of the bigger picture a resolution framework, this will not be covered in this paper.

As a starting point, it is pertinent to have a general appreciation of evolution that EU banks have undergone in the past two decades. During the *pre-crisis decade*, the EU witnessed an unprecedented a wave of cross-border mergers of large banks fueled by the internal dynamics of financial markets and the introduction of the euro<sup>14</sup> following the conclusion of the Treaty of Maastricht. Since the passage of the Second Banking Directive and the inception of the Single Banking License in 1989, cross-border financial flows have grown substantially, more so through wave of consolidation of banking groups through cross-border mergers and acquisitions<sup>15</sup>. At this juncture, it is noteworthy that the single banking license was in itself a conscious decisive step towards a unified European financial market. The increased level of financial integration was enthusiastically welcomed throughout the EU, as it allowed EU banks to hold more diversified portfolios, and allowed acceleration of economic prosperity in the EU<sup>16</sup>.

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## Chapter 1 Status quo/pre-crisis regime

### **Current situation/the status quo – The mismatch of the ‘Single Banking Passport’ privilege with fragmented EU winding up framework**

In the EU, the specific nature and function of EU harmonisation is that the banking directives are not aimed at creating a European Banking law. On the contrary, the **EU harmonisation is merely confined to setting the *minimum* standards to be observed by all credit institutions active in an EU Member State with a view to granting them the ‘single banking passport’ right vis-à-vis the privilege to expand their**

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<sup>14</sup> (Dermine 2000, Veron 2007) cited by Kudrna, Cross-border resolution of failed banks in the EU, November 2010

<sup>15</sup> Statistics showed 46 banking groups have been identified to have significant cross-border operations<sup>15</sup>. Although this figure represents only a small percentage of 8,300 of EU banks, they account for a significant 68 percent of EU banking assets in 2005. There was also a notable surge of growth in the number of branches and subsidiaries of cross-border EU banks: which shot up from 557 in 2003 to 766 in 2009. (See ECB 2009).

<sup>16</sup> Allen and others, Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies, CEPR Report, available online at [http://www.voxeu.org/sites/default/files/file/cross-border\\_banking.pdf](http://www.voxeu.org/sites/default/files/file/cross-border_banking.pdf)

**banking activities in other Member States**<sup>17</sup>. In the realm of banking sector, the EU chose to integrate via the minimum harmonisation method as explained below.

### ***Directive on Capital Requirements 2006 (CRD)***

In order to achieve the objective of the freedom to establish branches of credit institutions in the EU, the CRD established the authorisation of credit institutions along with the newly-introduced concept of single banking passport and home country control. This abolished the necessity for a foreign branch of a credit institution authorised in one Member State (the home country) to obtain authorisation in the Member State in which the branch is established<sup>18</sup>.

Following the crisis, amendments have been made to the CRD wherein authorities are now expected to take into consideration the potential externalities of their decision on the financial stability of other Member States concerned<sup>19</sup>. In addition to that, to improve cross-border cooperation in information sharing between supervisors, the notion of ‘significant branch’ was introduced in which the host country now have the opportunity to be more informed of any potential threat to its financial stability if the branch has a significant presence in the Member State<sup>20</sup>. While the explicit inclusion of a provision to foster joint accountability and cooperative action is laudable, as the crisis demonstrates, it is not necessarily easy to foster cooperative action in crisis situations, hence, it remains to be seen how effective this amendment would be, bearing in mind the lack of enforcement and remedy for the failure of complying with the provision. The essential problem remains that the ***principle of home country supervision, does not apply to subsidiaries of credit institutions***, which are a separate, independent entity on its own<sup>21</sup>. Nevertheless, the fact remains that although **these entities may be formally separate in entities** in its own right, **many of the operational processes are in fact centralised** in practice, as was the case with Fortis.

### ***Directive on Reorganisation and Winding up of Credit Institutions 2001***

This directive establishes that the home administrative or judicial authorities are the competent authorities to decide on reorganisation measures and winding-up proceedings for credit institutions that

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<sup>17</sup> According to Tison M., ‘the banking directives are based on Article 57, paragraph 2 of the EC Treaty, empowers the Council and the European Parliament only to adopt the directives which are *necessary* to realise the free movement of services and the freedom of establishment for economic actors.’ See more in Tison (1999), Harmonisation and legal transplantation of EU Banking supervisory Rules to transitional Economies. A legal Approach, Financial Law Institute Working Paper Series, July 1999

<sup>18</sup> This means that once a credit institution has obtained authorisation in one Member State, that automatically gives the credit institution the single banking passport to establish itself freely as a branch in other Member States vis-à-vis a notification procedure.

<sup>19</sup> Art 40(3) Capital Requirements Directive 2006/48

<sup>20</sup> Art 42a Capital Requirements Directive 2006/48

<sup>21</sup> A subsidiary has a legal existence independent of its parent, it requires separate authorization from the supervisory authority in the Member State in which it has its registered office, and therefore, its head office. (8<sup>th</sup> Recital of the Second Banking Directive)

operate **branches** in other Member States. The aim of this is to ensure the mutual recognition and coordination of procedures under home country control, and to impose a single-entity approach by which all the assets and liabilities of the parent bank and its foreign branches are reorganised or wound up as one legal entity under the law of the home country. The problem with this directive is, similarly as to the missing link in the CRD, **this directive does not provide for the consolidation of insolvency proceedings for separate legal entities**. i.e. subsidiaries within a banking group which are (again) considered a separate, independent entity on its own.

### ***Mismatch between single banking passport privilege, CRD and the winding up directive***

Based on the reading of the two directives above, we can deduce that at this moment, the single banking passport which allows banks to reap the benefits of a fully-integrated financial market across 27 countries (soon to be 28) is enjoyed in a **setting of a fragmented regulatory, supervisory, and winding-up harmonisation**. The closest available instrument to ensuring some sort of cooperation in financial crises is the Memorandum of Understanding 2008 which was signed between the resolution authorities in the EU. This did not work as we will soon read in the Fortis case study in which voluntary cooperation proved to be inadequate to enforce a binding duty to cooperate.

Between this mismatch, there is a gap that must be filled if banks are to be continuously allowed to enjoy the single banking passport privilege. To correct this mismatch, there are few pieces missing to the puzzle that must be fit in, such as a more harmonised regulatory, supervisory and lastly, resolution framework. As the case today is a minimum harmonisation scene, we will advocate for a maximum harmonisation for tomorrow. Nevertheless, the regulatory and supervisory dimensions are currently being dealt with, as it was clear even before the crisis that the EU intends to move towards a **single banking rulebook**<sup>22</sup>, an exercise led by the supranational authority, the European Banking Authority (EBA). Recent amendments to the CRD also now allow for the creation of colleges of supervisors established for branch-based cross-border groups. It is the resolution framework that is still fragmented, and is still missing from the picture.

### ***New basis for the Single Banking Passport***<sup>23</sup>

The resolution framework is fragmented since until the crisis, many felt that crisis management was best dealt with at national level especially if there was a risk that there would be budgetary implications. However, as the crisis highlighted there were no existing reliable mechanisms in place to deal with failing

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<sup>22</sup> Recital 22, EBA Regulation –There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.

<sup>23</sup> In the IMF Working Paper, Fonteyne explains the current mismatch in details, and recommends that the EU should work towards a new sound basis for the single passport of large, systemic cross-border banks which he suggests can best be provided through an EU-level cross-border crisis management and resolution framework combined with a deposit guarantee and resolution fund. See more in Fonteyne and others, Crisis Management and Resolution for a European Banking System, IMF Working Paper, March 2010

banks that operate in more than one Member State, this strengthens the case for harmonisation at the EU level, since it clearly demonstrated that the absence of European arrangements results in *ad hoc* national solutions, which might be less effective in resolving the situation and ultimately prove more costly for national taxpayers<sup>24</sup>, as depicted in the case study below.

### **Case study –the downfall of Fortis and the problem of territoriality vs universality approach**

***“To avoid the banana skin of protectionism and to ensure that domestic politics does not gain the upper and over European thinking.”*** –Michel Barnier, DG of Internal Market and Services, the Commission

Though there were other cross-border banks in the past that have undergone a cross-border resolution, the best example to describe the shortcomings of the current system is through the experience of Fortis<sup>25</sup>. Fortis had a systemic presence in all three Benelux countries, which have a strong tradition of policy coordination in the past. In 2007, just before the turbulences in the global financial market hit, Fortis had just acquired ABN AMRO in the largest banking takeover. Shortly after the global financial crisis, Fortis began experiencing difficulties in financing the takeover, which (subsequently) led to a dramatic plunge in its share price. However, situation got from bad to worse on a Friday, 26 September 2008 when bankruptcy rumours led to its major institutional clients to withdraw €20 billion in deposits. The expectation was a further €30 billion would be withdrawn when the bank reopens on Monday. At this juncture, Fortis no longer had access to the interbank market and was relying on an emergency liquidity scheme provided by the central banks of Belgium and the Netherlands.

Initially, the Benelux governments approached Fortis with an offer of assistance and negotiated a capital increase of €11.2 billion that would partially nationalise all Fortis banks. It boiled down to the ***governments agreeing in a Memorandum of Understanding (MoU)*** to invest to an agreed portion and amount respectively in exchange of shares in Fortis in the Benelux. The largest bill was to be footed by the Belgian authority, being the home country authority of Fortis at 49% share of Fortis, which controlled all three Fortis banks in the Benelux. Nevertheless, as the story further developed, the Dutch government at the last moment, backed out from the plan. The MoU, was after all, not legally binding and nothing prevented any of the parties from withdrawing from its agreed obligations.

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<sup>24</sup> Consultation on Technical Details of a Possible Crisis Management Framework for financial institutions - Frequently Asked Questions available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/6&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>25</sup> Earlier, before Fortis, there were other cross-border bank cases as well, such as ING in the Netherlands and KBC in Belgium. Both those cases opted for the home country approach, which Fortis in contrast, had a systemic presence in all three of the Benelux, and this was recognized by the governments as well.

On a side note, if it was a legally binding contract between the parties, this could have potentially raised the **doctrine of 'good faith'**<sup>26</sup> which maybe implied in the contract. If it was legally binding, the Dutch government owed an implied duty to act in good faith as acting otherwise would have been foreseeably detrimental in effect to the position of Fortis. However, as it was the case that MoU are not intended to be legally binding in nature, this argument is most likely not applicable here. Nevertheless, in my view, the Belgian government could have probably taken a shot with that argument especially because this is between the Benelux countries which have a long-standing solidarity relationship that dates back to many decades. Perhaps, this contractual element maybe considered to be one of the underlying aim behind increasing solidarity in the banking sector, especially in times of such crises, in the future. Though this element maybe embedded and imputed into the pan-European framework, the intention is not to delve too deeply in this issue, as no assessment on the practicality of doing this has been made.

Meanwhile back to Fortis, the run on the bank continued and it had to draw nearly €60 billion of the emergency liquidity<sup>27</sup>. The series of unfortunate incident continued to unfold and as Fortis was further weakening, it could not shoulder the final blow by the Dutch government which on 2 October 2008 announced their intention to impose forced administration on the banking and insurance activities of Fortis in the Netherlands. This placed the Belgian authorities and Fortis directors in a predicament of choice, as time was of a great essence. Thus, they agreed to sell the Dutch parts of Fortis after negotiating a price increase from the mere initial offer of €9 billion to €16.8 billion<sup>28</sup>. Alas, the Belgian government had to foot the largest bill of all, as evidenced by the Dutch Minister who publicly announced that they had managed to buy the better part of Fortis, leaving the worse one to the Belgians.

Eventually, what started off as an MoU between the Benelux **ended with splitting up of the assets according to the national borders**. The Belgian government was disproportionately treated as the Dutch got away with the better end of the deal at the former's expense. Kudrna presents a very good illustration on the prisoner's dilemma game to explain the outcome of such eventual behavior<sup>29</sup>. He explains that given the willingness of all three governments to lend its support to Fortis, multilateral action seemed to be the most likely option. Yet, the final resolution was unilateral. He attributes the answer to **this puzzling**

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<sup>26</sup> Lately, there is a trend towards imputing the concept of 'good faith' in contracts in the Netherlands, and discussed in several civil law countries. This trend is also reflected through the recently introduced in November 2011, the Common European Sales Law (CESL) in which the parties are obliged to observe the principles of good faith and fair dealing in their dealings throughout the contractual relationship, and this is made a mandatory duty, unavoidable or amended by the parties in their contract.

<sup>27</sup> Fortis' shareholder's report

<sup>28</sup> This figure was a far-cry from the estimated figure made by Morgan Stanley, hired by Fortis which valued the Dutch operations at €22 billion (Fortis 2008:18). Market participants questioned by the Financial Times speculated that the Dutch bought the Fortis assets at a discount of as much as €10 billion (FT Oct 4:2008). These estimates would suggest that the MoU which had broken down between the Benelux implied that Belgium was the biggest loser.

<sup>29</sup> Kudrna, 'Cross-border resolution of failed banks in the EU: A search for the second-best policies', November 2010



**outcome** to the **absence of an ex ante EU level rules on banking resolution** which would most probably be able to provide a clearer and fairer burden sharing mechanism.

The fall out of the MoU<sup>30</sup> happened despite a long standing cooperative and traditional relationship of the Benelux countries. This indicates, something must be done at the EU level to prevent any country having to be disproportionately treated or playing ‘survival of the fittest’ game. As it would turn out, two years later, we still do not have the ideal and desired framework, and another bank yet fell victim to the prey of the crisis which had further worsened and affected banks throughout the EU and certain countries. Nevertheless, this is inevitable –as in this situation, **countries have an incentive to understate their share of the problem** to have a smaller share in the costs. This merely confirms Mervyn King's view that "**banks are European in life and national in death.**"

On another side note, this resurrects Schoenmaker’s question 10 years ago, regarding which agency would provide liquidity support to Deutsche Bank’s branch in London (which is a quarter balance sheet in London) if the branch experienced liquidity problems because of its London wholesale business. Who would act as lender of last resort : (1) the Bank of England (BoE) on its own risk; (2) the BoE on behalf (and at the risk) of the Bundesbank; or (3) the Bundesbank? To date, the answer to this question is still unclear, at least not to outsiders and markets<sup>31</sup>. The time is certainly right to address this question as banks grow more integrated and interconnected than it ever was, 10 years ago.

### **Lessons learnt**

Overall, as demonstrated by the crisis, national interests are most likely to be influential in the absence of *ex ante* standards<sup>32</sup> for burden sharing losses from a cross-border insolvency. The Fortis case have demonstrated that the national resolution authorities are mostly concerned with minimising the losses to stakeholders in its jurisdiction and to minimise as much as possible, burden for their own taxpayers.

## **National (legislative) attempts – The UK Banking Act 2009**

Since the crisis, only several Member States (i.e. UK, Germany, Belgium to name a few) have adopted more effective resolution regimes, which leaves more Member States that are yet to do so<sup>33</sup>. Most case studies

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<sup>30</sup> Good will/fair dealing principles- can an MoU have the power of *pacta sunt servanda* and bind the countries in such a way- given that in Dutch courts, the notion of ‘good will’ is implied in the contracts now.

<sup>31</sup> \_\_\_\_\_, ‘Cross-border Resolution: Case studies’, 20\_\_

<sup>32</sup> Čihák, M. and Nier, E. (2009), The need for Special Resolution Regimes for Financial Institutions –The case of the European Union, IMF Working Paper, International Monetary Fund, September 2009

<sup>33</sup> In the UK Banking Act 2009 allows for early interventions with a wide array of tools to deal with failing banks. In Germany, a temporary regime has been replaced by a permanent resolution framework for systemically important banks. Several European countries (including Belgium) have extended resolution regimes to cover systemically important non-bank financial institutions. See more in Claessens and others, Lessons from the

focus on the UK and Germany's newly-adopted Special Resolution Regime (SRR), as both display in-depth and detailed coverage which serves as an excellent example for its other EU counterparts. Both countries<sup>34</sup> notably provide comprehensive SRR to allow authorities to intervene efficiently at an early stage of a banking crisis and to resolve the ailing institution. However, comparatively, as regards the tools available, since the UK Banking Act 2009 presents a clearer and more comprehensible structure, this paper will focus on the example set by the UK Banking Act which may pave the way for the establishment of SRR in other Member States and eventually a standard and common one at the EU level.

The need for an SRR became clear in the UK in the aftermath of the Northern Rock crisis in 2007, in which the British authorities had no other choice but to bail out the bank, on taxpayers' money. This piece of legislation introduced SRR for banks as well as some other processes- but for the first time ever, the British had a custom-made special bank insolvency law. The most significant aspect is that the SRR is an administrative procedure which allows the Bank of England (BoE), without the need for an order of the court, to transfer the property or shares in a bank to either a private purchaser or a bridge bank<sup>35</sup>.

***Why: A special regime with clearly defined objectives and triggers***

The Banking Act provides the scope of SRR in a broad way which consists of stabilisation options, bank insolvency procedure and bank administration procedure<sup>36</sup>. Section 1 of the Banking Act defines the purpose of the SRR as being "to **address the situation** where all or part of the business of a bank **has encountered, or is likely to encounter**, financial difficulties". Accordingly, this allows the resolution authority to take pre-emptive<sup>37</sup> action, as the language of this provision empowers the resolution authority to intervene at a point wherein it assesses to 'likely' (probable) face financial difficulties. Evidently, this indicates and sends out a signal that the resolution authority can intervene at an early stage.

The five SRR objectives are as illustrated below, according to which interest it predominantly aims to serve—

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Financial Crisis, Crisis Management and Resolution: Early Lessons from the Financial Crisis, IMF Staff Discussion Note, March 09, 2011 available online at <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1105.pdf>

<sup>34</sup> Comparatively, the German regime is more scattered, though in substance, it provides for clear resolution powers. The UK Banking Act is also clearer because even though both SRRs under the legislations offer the possibility to transfer assets and liabilities to a private sector purchaser or to a publicly owned bridge bank (transferee), only the UK legislation in fact expressly provide for a temporary public ownership option.

<sup>35</sup> According to Andrew Campbell, as corporate insolvency law in the UK has traditionally been a judicial process, this is a major shift in direction, which gives significant power to the FSA, the Bank of England and the Treasury.

<sup>36</sup> Section 1(2) of the Banking Act 2009. Accordingly, section 7 of the Act provides that the FSA will be the authority that decide if the general conditions are satisfied in order to place a credit institution under the SRR.

<sup>37</sup> Another term used is 'anticipatory' action that is elaborated more in the article written by Campbell and Lastra, Definition of bank insolvency and types of bank insolvency proceedings, in Lastra (ed.), *Cross-border Bank Insolvency*, Oxford 2011, p 53.

<i>Public interest</i>	<i>Private interest</i>
1) to protect and enhance the stability of the financial systems of the UK;	3) to protect depositors;
2) to protect and enhance the stability of the financial systems of the UK;	5) to avoid interfering with property rights in contravention of a right granted by the European Convention of Human Rights
4) to protect and enhance public confidence in the stability of the banking systems of the UK;	

*Table source: UK Banking Act*

The articulation of these explicit resolution objectives illustrates that the legislature has taken account of the particular characteristics of banking and recognises the need to protect the banking function as such and, in addition, to maintain public confidence in its financial system. These objectives would strengthen the case for the resolution authority to take anticipatory action before a financially troubled bank has actually crossed the insolvency threshold, in the name of safeguarding the financial stability.

***What: Legal aspect/issues- balancing public and private interests***

In identifying the five objectives, Dr Attinger divides the balance to be achieved between public and private interest which would further contribute towards the clarity of the SRR and to legal certainty. Further, the Banking Act also expressly refers to the **principle of ‘no worse-off than in liquidation’<sup>38</sup>**. This makes it clear that the ***SRR takes into account of the interests of the transferors and thus their shareholders and respects for their property rights***, but at the same time, ***leave no room for a bail-out at the expense of taxpayers***. The Act also dedicates a whole part to compensation and independent valuation<sup>39</sup>. Thus, it is no surprise that experts have praised the Act as exemplary due to its clarity and transparency in its valuation and compensation regime and its attempt at striking a balance between the two interests.

***How it works*** : Once the Financial Services Authority (the prudential authority in the UK) has notified the BoE (the central bank of the UK which controls monetary policies) of the triggering event, the BoE has two possible courses of action namely the private-sector purchaser and the bridge bank option as illustrated in a ‘step-by-step’ table below.

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<sup>38</sup> Section 60(2) Banking Act 2009

<sup>39</sup> Section 49-62 Banking Act 2009

**Possible courses of action under SRR**

<b>1) Private-sector purchaser</b>		
Most desirable optimal option –All assets of a troubled bank to be sold to a commercial purchaser		
<b>2) Bridge bank</b>		
Second best option –Splitting up the troubled bank into parts and transferring the parts either in whole or partial to another entity called the ‘bridge bank’ (In the UK, all or part of this assets will be transferred to a company wholly owned and managed by the BoE)		
Full-bridge bank	Partial bridge bank	Asset management
Transfer the entire assets to an entity that will be licensed to undertake a complete range of banking activities.	Removal of some unattractive parts (bad assets) <i>via</i> liquidation and sell the rest to the private sector.	Which exist only for the protection and maximisation of the value of the assets.
<b>3) Temporary public ownership /bail-out, nationalisation</b>		
Last case scenario –Government stepping in to pump in liquidity, bail the bank out and nationalise it.		
<b>4) Liquidation of the bridge bank</b>		

The above are the possible courses of action under the SRR. The most desirable and optimal course is to sell the entire troubled bank to a private-sector purchaser. Nevertheless, it is recognised<sup>40</sup> that it is not always possible to find and sell the entire bank to a purchaser which would have to willingly take the risk of taking over ‘bad assets’ such as sub-prime and non-performing loans which contains uncertainties and are therefore unattractive. Thus, there is a need to be able to split a troubled bank into parts. The idea behind this is to make the sale of the troubled bank as attractive as possible by getting rid of the unattractive parts. This attractive remaining ‘good assets’ will then be transferred to the bridge bank where it will be managed in a way which is intended to maximise the value and increases its attractiveness to potential private sector purchasers<sup>41</sup>. The use of a bridge bank is intended to be a short-term measure with the primary objective being the eventual sale the private sector<sup>42</sup>.

However, as the table illustrates, in some cases, it may also prove impossible to find a purchaser for the bridge bank and in such situation, there may be no other alternative but to resort to nationalisation or, in the most extreme scenario, liquidation of the bridge bank.

<sup>40</sup> In fact, in the DBS case, that demonstrated that is possible to find a purchaser that would buy a significant part of the asset, but not all, of the business of the troubled institution.

<sup>41</sup> Splitting up the good and bad assets of the bank and transferring the different parts of a bank are measures in which the relevant authorities need specific and extensive powers to do so. For purposes of reference, this model is broadly provided by the Deposit Insurance Corporations of the USA and Canada.

<sup>42</sup> Campbell A., *The Special Resolution regime, Financial Regulation in Crisis?, The role of law and the failure of Northern Rock*, Edward Elgar Publishing, [2011]

While the flexibility given to the relevant authorities vis-à-vis the Banking Act has been generally laudable, there are also *caveats* which must be kept in mind. Experience in some other countries has suggested that transferring assets to a bridge bank or an asset management company has simply resulted in the problem being removed to another place<sup>43</sup>. The success of the Banking Act will also depend on its implementation—whether the relevant authorities will use the powers appropriately and if the bridge bank tool can assist in the orderly and effective disposal of the good assets of a financially-troubled bank while, at the same time, allowing for the possibility that the remaining parts can be made more attractive to potential purchasers.

### ***Far-reaching legal mandates and powers***

The SRR would legally enable the banking authorities to take far-reaching and rapid action without the need to seek prior agreement of shareholders or creditors<sup>44</sup>. Outside Europe, similar power exist in Canada, Japan, and the US where the law provides for special rules for bank insolvency, administered by the supervisor or the deposit protection authority.

### **The UK SRR in action**

It wasn't long before the Act came into being that the provisions were put to action. The existence of the toolbox gave the authorities in the UK the flexibility to decide the best way forward with a troubled building society, Dunfermline Building Society (DBS). Upon weighing between injecting capital and splitting up the assets into parts and transferring the good assets to a bridge bank, the authorities decided to deploy the tools available and that proved to be a successful experience. However, on the other hand, it was also argued that the DBS scenario is not sufficient enough to give a full-impact assessment of the Banking Act as it was just a small and uncomplicated institution with no cross-border implications. Hence, it still remains to be seen how the Act will face a more complicated and systemically important bank in financial difficulties, such as perhaps Hong Kong and Shanghai Banking Corporation (HSBC) and Deutsche Bank. While there is a theoretical assumption that the SRR will apply to all UK banks and its branches out of the UK, the position may prove to be trickier with foreign branches in the UK.

## **Policy trilemma problem**

According to Schoemaker, there are three policy trilemmas in that there are three objectives that do not easily fit in together. As cross-border integration deepens, policymakers are faced with less scope for independent policy-making, including fiscal independence. The problem with the current system can be explained by the conflicting objectives which explains the diverging decisions made by relevant authorities, as explained by Schoemaker, the trilemma always boil down to the issue of sovereignty. Typically, national authorities are inclined to firstly safeguard its domestic financial system and to

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<sup>43</sup> *Ibid.* (Find fn 40)

<sup>44</sup> Çihak, M. and Nier, E. (2009), The need for Special Resolution Regimes for Financial Institutions –The case of the European Union, IMF Working Paper, International Monetary Fund, September 2009

minimise the costs incurred by their national taxpayers. This is best illustrated by the Fortis experience in which the Dutch authorities sought to ring-fence its assets at the last moment. Schoenmaker and Goodhart (2006) therefore suggest a **backward-solving approach** starting at resolution, with the guiding principle that ‘**he who pays the piper calls the tune**’, in which if the home authority pumps in the most for the SRR, then, the resolution should all follow the insolvency jurisdiction in that country. As we will see in turn, this backward-solving approach has already been practiced in reality as demonstrated by the more cooperative and coordinated solutions that were reached by the Belgian, French and Luxembourg authorities in the case of Dexia.

***The Options of Resolution Approaches***

Territoriality	Cooperative Territorial approach / Modified Universality ('Middle approach')	Universality
<p>Each national jurisdiction applies its own law which governs insolvency proceedings for the entities, operations, and assets of the insolvent firm located in that jurisdiction.</p> <p>This protects national sovereignty and authority, but is normally done so at the expense of its cross-border banking partners.</p>	<p>Recognises the strong possibility of ring fencing in a crisis and helps ensure that home and host countries and financial institutions focus on resiliency within national borders. (where they can try to align their toolbox vis-à-vis improving their legal systems)</p> <p>Such an approach may require certain discrete changes to national laws and resolution frameworks to create a more complementary legal framework that facilitates financial stability and continuity of key financial functions across borders. This approach aims at improving, inter alia, the ability of different national authorities to facilitate continuity in critical cross-border operations.</p>	<p>Resolutions of insolvencies based on the law of a single country where the home entity is established<sup>45</sup>. Under this option, the decisions of the resolution authority in the home country jurisdiction is extended to branches, other operations and assets of the insolvent firms in other jurisdictions.</p>

*Source of information: BCBS Report, March 2010*

In practice, with the exception of rare cases, the resolution of cross-border institutions is pragmatic and is not based exclusively on either of the universality or territoriality principles<sup>46</sup>. The CBRG recommends taking the ‘middle ground’ approach for now to head-start greater cross-border cooperation, which may lay the foundation for greater understanding<sup>47</sup>. A possible example of this middle ground approach in the

<sup>45</sup> the ability of the home resolution authority to apply and enforce its decisions in other jurisdictions is subject to recognition in foreign jurisdictions and the law and policy in those jurisdictions

<sup>46</sup> CBRG Reports and Recommendations, p. 23, BCBS, March 2010

<sup>47</sup> Ibid.

recent crisis was the Federal Deposit Insurance Company (FDIC)'s resolution of United Commercial Bank, which involved a 'purchase and assumption' that extended to the Chinese subsidiary and the Hong Kong branch following coordination amongst the authorities in the US, China and Hong Kong. With a more solidified cooperative relationship across border between the resolution authorities, this can lead to the much-desired increased convergence in national laws, better predictability and the possibility to develop a reliable EU legal framework for responsive actions.

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## **Chapter 2 Principle and design of an EU legal framework 28<sup>th</sup> regime – principles and design of the EU framework**

*"The cross-border aspects of bank resolution and recovery, together with its interconnectedness and contagion, are the most important issues that need to be dealt with if a future financial crisis is to avoid the depth, pervasiveness and taxpayer costs of the most recent financial crisis."<sup>48</sup>*

### **Principles and Objectives**

The ultimate goal for an integrated EU-level cross-border bank resolution framework is imperative to achieve and safeguard the financial stability in the EU as a whole, limit moral hazard, whilst moving closer to the integration of the internal market<sup>49</sup>. The creation of such a framework will be a stepping stone towards resolving the institutional mismatch between the European banks licensed on a single banking passport and on the other hand, a fragmented supervision and fragmented legal frameworks in different Member States which gives an overall picture of a fragmented resolution by national authorities, as discussed in Chapter 1.

Henceforth, clear legal mandate must be enshrined in the law to enable a platform for cooperation, information exchange and coordination domestically and with relevant foreign resolution authorities before and during resolution<sup>50</sup>. An effective pan-European framework should encompass these broad policy areas –

- 1) **The creation and the alignment of specific tools** and triggers for bank resolution
- 2) **Creating a platform to ensure cooperation of national resolution authorities** at the EU level

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<sup>48</sup> International Centre for Financial Regulation (ICFR) Response to Consultation Paper on Technical details of a Possible EU Framework for Bank Recovery and Resolution

<sup>49</sup> On the other side of the coin, even though the benefits of a full harmonisation is appreciated, it must be borne in mind that a full harmonisation is always a complex political process because it involves Member States amending their legislative framework. In view of the versatility of crisis management, full harmonisation of all aspects is probably not feasible: after all, it affects the foundations of a country's entire legal system. Priorities must therefore be determined. Achieving 'must have' is already a challenge and 'should have' and 'nice to have' are best left aside.

<sup>50</sup> Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, October 2011, p.3

- 3) Addressing **company and insolvency law issues pertaining to intervention** powers
- 4) The **financing** of cross-border resolution and
- 5) Ensuring the **continuity** of banking services.

In the first point, while establishing a dedicated resolution regime for cross-border banks in the EU would have clear benefits, this may take some time before the EU comes up with a common EU framework. Hence, what can be useful for the time being is that individual Member States start introducing SRRs in their national legal framework to allow for a smooth transition when there is eventually a legal framework at the EU level<sup>51</sup>. This would not only allow for a smooth transition, but also prepare individual Member States for the implementation of a pan-European framework.

Below is a mapping of the objectives and features identified by Cihak of what priorities it should focus on and what should be entailed in the design of the framework—

Objective	Feature
1) Reduce systemic impact of a potential failure;	Allow the authorities to take control of the financial institution at an early stage of its financial difficulties <i>to contain the systemic risk from further spreading and threatening financial stability</i>
2) Afford control to the authorities;	Empower the authorities to use a wide range of tools to deal with failing financial institution, without the prior consent of shareholders or creditors <i>for prompt and swift action</i>
3) Shift the financial burden away from the taxpayer;	Establish an affective and specialised framework for liquidation of the institution that assigns a central role to the authorities and <i>to engage responsible and accountable behavior through imposition of the concept of 'living will' by banks</i>
4) Let losses be borne by existing shareholders; and	Ensure <b>clarity of objectives</b> and the <b>scope of appeal or judicial review</b> as a safeguard for shareholder's right to property
5) <b>Reduce moral hazard</b> and increase market discipline.	Promote information sharing and coordination among all authorities involved in supervision and resolution, and to stop the moral hazard, that the authorities are there to safeguard the function of banking and not the banks. The <b>signal sent out should be that 'banks' can be allowed to fail.</b>

Source of information : IMF Report

In addition to qualitative or quantitative triggers, the Commission proposes to include a further **condition that resolution is necessary in the public interest**. The public interest test would be met, for example, if winding up the institution under ordinary insolvency proceedings did not ensure the stability of the

<sup>51</sup> Cihak, M. and Nier, E. (2009), The need for Special Resolution Regimes for Financial Institutions –The case of the European Union, IMF Working Paper, International Monetary Fund, September 2009



financial system or continuity of essential financial infrastructure services<sup>52</sup>. If the public interest condition is not satisfied, the institution should be wound up once the threshold for insolvent liquidation is reached<sup>53</sup>.

### **Legal set-up of establishing a European framework**

Based on a recommendation by the IMF<sup>54</sup>, establishing an integrated EU level framework for crisis resolution should follow a **two-pronged approach** –

- a) Regulation-based early intervention and resolution framework for all systemic cross-border EU banks (the 28<sup>th</sup> regime); and
- b) Directive-based framework for non-systemic cross-border banks and purely domestic banks<sup>55</sup>.

As the scope this paper is in the context of cross-border bank resolution, the focus will only be on the point a) Regulation-based resolution framework. At the moment, the law already provides for the possibility of the winding up of individual banks and its foreign branches according to its home-country’s regime, under the Winding up Directive. We also have seen that only several Member States have included SRR in their legal framework –which means that the current setting is still largely fragmented at the EU level. Hence, in order to elevate the progress up a notch, there should ideally be a Regulation-based instrument to ensure that each Member States have the necessary SRR-like tools to deal with **individual banks and its foreign branches cross-border operations** in an efficient and consistent manner.

#### **Broad outlook of change in the resolution system**

Pre-crisis regime	Criteria	EU level regime
National authorities in charge Restriction of single passport National financing only	Characteristics	Single EU regulator EU level SRR (the 28 <sup>th</sup> regime) EU funding mechanism
Depending on goodwill of Member States	Governance arrangements	An ERA makes binding decisions
Non-legally binding MoU	(Fiscal) Burden sharing mechanism	Legally binding <i>ex ante</i> burden-sharing mechanism

Source : Kudrna, 2010

<sup>52</sup> The Commission’s Communication Paper, An EU Framework for Crisis Management in the Financial Sector, COM(2010) 579 final

<sup>53</sup> Thorsten B., Radomir T., and Wolf W., Bank Supervision Going Global? A Cost-Benefit Analysis, available online at <http://www.hnb.hr/dub-konf/16-konferencija/beck-todorov-wagner.pdf> (Last accessed on 30 April 2012)

<sup>54</sup> Fonteyne and others, Crisis Management and Resolution for a European Banking System, IMF Working Paper, March 2010

<sup>55</sup> *Ibid.*

## **i. Robust Cross-Border Coordination Mechanism**

After the crisis, it became clear that though large and complex financial institutions operate and live at the global stage, their death is subject to its national legal framework. Close attention should be paid to the type of resolution for **banking groups which would allow dealing with its foreign-subidiaries in an integrated and coordinated manner**. The legal framework should include coordination mechanisms whereby a lead resolution authority coordinates resolution of all entities of the group, working together with national resolution authorities. In this regard, we may envisage a pro-active role of the European Banking Authority (EBA) as according to Art 31 of the EBA Regulation, the EBA **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. Indeed, if such a coordination can be facilitated by an independent supranational (the presumption is that this body is a neutral third party), we may foresee a smooth and enhance coordination mechanism in a future cross-border resolution faced by a complex financial institution.

## **ii. Developing a Common toolkit**

Previously, the crisis clearly showed that coordination for bank resolution was complicated by the clash and differences of tools available and the different objectives pursued by the national resolution authorities. There was indeed a clear visible gap in which the Commission found that although a number of national resolution authorities have tools available to intervene in a banking crisis, these tools maybe different between the Member State, or in some cases, may not exist at all. In the words of the Commission, if different authorities intervene at different points in time, pursue different objectives and use different tools and problem, the results are likely to be suboptimal<sup>56</sup>.

Hence, a pan-European framework which is intended to be applicable across the EU should take into account **what tools can suitably be commonly deployed** in all Member State. In line with this, efforts are now dedicated towards identifying and developing a minimum and common standard set of tools (or common toolkit) which can be harmonised and applicable across the EU. These minimum set of tools may be influenced by the excellent form and example set by the UK Banking Act, international recommendations and best practices alike.

A successful SRR should contain tools which can enable the resolution authorities to respond rapidly, flexibly and under conditions of legal certainty to a wide variety of circumstances. In my view, below are

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<sup>56</sup> Commission, Internal Market, Bank Crisis Management Impact Summary Report, 2012

several useful example of toolkits identified and recommended by the BCBS<sup>57</sup> which maybe transposed into the pan-European framework –

➤ Powers to operate and resolve the failing financial institution, including powers to terminate unnecessary contracts, continue needed contracts, sell assets and transfer liabilities, and take other actions necessary to the operation or winding up of the financial institution’s affairs
➤ Options to facilitate continuity for essential operations, including transfers of assets, liabilities, and contractual relationships to healthy private sector institutions or bridge financial institutions and measures to facilitate continuity of essential business with third parties
➤ Powers to remove the directors and senior management of a failing financial institution and hold them to account and, where appropriate, to recover monies from individuals or entities responsible for the institution’s failure
➤ A liquidation option for financial institutions whose failure would not have wider systemic consequences or if there is unlikely to be a bidder for any of the financial institution’s business
➤ Powers to put in place temporary funding and liability guarantees of part or all of a financial institution’s business and, as a last resort, to take financial institutions into temporary public ownership in systemic cases or to create and operate temporary bridge financial institutions

Importantly, the resolution authorities should be appropriately equipped with a **broad range of powers and options in order to be able to act flexibly** in the event the most cost-minimising method warrants that. As notably demonstrated by the UK and Germany through their legislation of SRR powers to legally empower its relevant authorities to be equipped with flexible tools to intervene in a banking resolution – this in itself is a positive evidence that although drafting and legislating such tools maybe a difficult exercise, it is nevertheless not impossible to identify it.

In this regard, the Commission is rightly taking its action through planned consultations and communications stages with experienced officials of regulatory authorities across the EU and industry experts. Although this process has been criticised as slow-moving and attacked as inambitious by various quarters, it is a necessary stage that must be undergone before the EU merely ‘copy and paste’ the design existing in the UK or Germany and deploy it without any prior impact assessment. Identifying what tools can be suitably used for the entire EU is a very delicate exercise especially the formulation of procedures and determination of the threshold to intervene. For instance, the option to split up between the good

<sup>57</sup> CBRG of the BCBS, Reports and recommendations, March 2010

and bad assets varies across the EU countries<sup>58</sup>. As such, the Commission has made it a point to make this the subject of its consultation paper<sup>59</sup>.

The **difficulty lies in balancing between the SRR regime boundaries, in that it does not go beyond what is necessary to preserve financial stability**. In this sense, EU legislators have an important mandate to carefully balance these competing considerations and it is more than likely that adjustments will need to be made to any regime in the light of further experience<sup>60</sup>. The overall intent is to **narrow down differences of tools across the EU as much as possible in order to have a more uniform-application across the EU**, without which, would lead to a ‘forum-shopping’ problem and possibly threaten the single-financial market dream we have built towards for. The implementation should be in accordance with the cardinal EU principle of **proportionality**,<sup>61</sup> which is embedded the founding treaties and the ECJ (the Court) tends to look at this element in case laws<sup>62</sup>.

### iii. Institutional Architecture

Depending on political will and consensus, there are chances of seeing a European Resolution Authority (ERA) in place in future. However, at the moment, there seem to be a **general agreement that the European Banking Authority (EBA)<sup>63</sup> is to play the key neutral third party role in refereeing a cross-border resolution situation between Member States and mediate<sup>64</sup> towards a semi-binding cooperative relationship**. Another supranational authority that is expected to be a key player in this picture is the

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<sup>58</sup> This is evidenced by the Commission’s findings which shows that eventhough a number of other countries in the EU have adapted their normal corporate insolvency regime for the special structure of banks, it does not all have the option to break up and transfer different parts of the business.

<sup>59</sup> Communication from the European Commission, *An EU Framework for Cross-Border Crisis Management in the Banking Sector*, 20 October 2009, accessible at [http://ec.europa.eu/internal\\_market/bank/crisis\\_management/index\\_en.htm#overview](http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm#overview).

<sup>60</sup> Tomasic, R., ‘The Emerging EU framework for Bank Recovery and Resolution’, Chair in Company Law, Durham University

<sup>61</sup> Article 5(4) of the Treaty of European Union stipulates that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary.

<sup>62</sup> De Burca views that the general principle in EU law of proportionality entails a three-part test: 1) is the measure **suitable to achieve a legitimate aim**, 2) is the **measure necessary to achieve that aim** or are less restrictive means available; and 3) **does the measure have an excessive effect** on the applicant’s interests. The general principle of proportionality therefore requires that a **measure is both appropriate and necessary**, and as such the ECJ review both the legality of a measure, but also to some extent the merit of legislative and administrative measures. Therefore the general principle of EU law of proportionality is often considered as the most far-reaching ground of judicial review and of particular importance in public law cases.

<sup>63</sup> The European Banking Authority was established by Regulation (EC) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010. The EBA has officially come into being as of 1 January 2011 and has taken over all existing and ongoing tasks and responsibilities from the Committee of European Banking Supervisors (CEBS).

<sup>64</sup> Regulation CRR/CRD IV 5.5.1 1There is an additional possibility for EBA to mediate in case of disagreement between the competent authorities.

**European Systemic Risk Board (ESRB)**, whose expertise and knowledge of the macro-prudential oversight of the financial system of the EU can be leveraged to benefit the EU in building a credible cross-border bank resolution framework.

All is not at loss if an ERA is not institutionally formed in the nearest future, as this role can be filled by the EBA. In fact, the EBA has already been empowered by the EBA Regulation with a number of extensive powers that are of particular relevance for the future resolution framework. These powers relate notably to action in emergency situation (Art 18), settlement of disagreements (Art 19), stress testing exercises (Art 21 and 32), and recovery and resolution plans (Art 25).

Additionally, in its 2012 work program<sup>65</sup>, quoting Art 25 of the EBA Regulation, the EBA announced that it will be expected to not only contribute, but to also participate actively in the development and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to minimise the systemic impact of any failure. Nevertheless, eventhough this task has been labeled top 1 priority for the EBA, the details stops short of when or what exactly will happen, as that is still left to be confirmed and determined.

Although there have been no disagreements referred to EBA for settlement yet, it is always possible that this will occur as home-host frustrations over issues like information exchange are not uncommon<sup>66</sup>. In the most recent management board meeting of the EBA in January 2012, it was acknowledged that despite that the EBA had not yet mediated any conflicts between banking authorities, the EBA implied that in view of the chance that contentious cases might rise, it would begin preparing itself for such a role through relevant workshops and trainings and putting appropriate procedures in place.

In terms of operability in the transitional period, it is potentially feasible to rely and leverage on the existing expertise of mainly the ESRB and the EBA; as these two supranational authorities at present have the best bird-eye view of systemic risk and supervision at the pan-European level.

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<sup>65</sup>In its work program for 2012, items 308-310 are dedicated to the field of resolution.

308) EBA to develop guidelines/technical standards to ensure consistency and convergence of supervisory practice concerning the development, review and assessment of the recovery and resolution plans 309) EBA to develop guidelines/regulatory standards to specify the operational functioning of resolution colleges 310) EBA to develop guidelines/technical standards to ensure consistent application of early intervention measures and resolution tools.

Annex (EBA Work Programme for 2012) 15 December 2011 - available online at <http://eba.europa.eu/cebs/media/aboutus/Work%20Programme/Annex-to-the-2012-Work-Programme.pdf>

<sup>66</sup> Minutes of the 26 January 2012 Meeting of the Management Board of the EBA, available online at <http://www.eba.europa.eu/cebs/media/aboutus/organisation/Management%20Board/EBA-MB-2012-010-PUBLIC--Minutes--26-Jan-meeting-.pdf?ext=.pdf>

**Long-term solution : The creation of a permanent body in the form of the European Resolution Authority (ERA)**

However important the role of the EBA can be as a ‘gap-filler’, the central body of a European banking resolution regime should be formalised in the long-run. This is because a specialised body focusing on resolution measures would not only be beneficial for the EU, but also to balance the workload that the EBA is already shouldering today. Hence, in the long-term, the central body of a European banking resolution regime should still be in the form of a European Resolution Authority (ERA) which can focus on resolving cross-border EU banks. Importantly, the ERA should be independent and impartial in nature, and champion European interest above national interests. **The ultimate decision (recapitalisation or (partly) liquidation) should be based on the impact on European financial stability.**

#### **iv. The Appropriate Legal Instrument**

The problem with the current situation in the EU is with minimum harmonisation vis-à-vis the use of directives, instead of regulation. Of the two, the best way to achieve the most maximum harmonisation and convergence is through the latter. According to EU law, EU regulations are binding in their entirety and directly applicable in all Member States. This means that, on the date of their entry into force, they become part of the national law of the Member States and their implementation into national law is not only unnecessary but also prohibited by EU law, except in so far as this is expressly required by them.

Shaping these rules in the form of a Regulation would **ensure a level-playing field by preventing diverging national requirements** and would ease the cross-border provision of services since each time an institution wishes to take up operations in another Member State it currently has to assess a different set of rules.

An SRR laid down in an EU regulation **would ensure a more consistent application to the European-wide operations of a bank.** Whilst approximation by directive has removed some of the more immediate variations between national laws, it has not created a clear and coherent single legal framework for banking in the internal market<sup>67</sup>. It is submitted that this is primarily the result of the use of directives for the approximation of national laws, rather than of regulations, **which could be directly applicable and would provide one single legal framework applicable throughout the EU.**

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<sup>67</sup> The *problem with directives is that the process of transposition gives considerable leeway* to the Member States because directives need not be implemented verbatim - *the form and method is left to the Member States* (Article 288 TFEU (ex Article 249 EC)).

## **Balancing competing interests between SRR and shareholders' rights**

At the moment, there is no EU law which deals with the rights of creditors in the context of bank insolvency. In the European context, the relevant sources of law are the European Convention on Human Rights (ECHR) and the applicable EU law<sup>68</sup>. Creditors' claims constitutes possessions (property) within the meaning of and as protected by Art 1 of the First Protocol to the ECHR. Creditors contribution may consist in applying 'haircut' to their claims in contributing towards restoring the balance sheet stability of the bank.

An effective bank resolution regime may require taking over the financial firm's business while the bank still has positive net worth and shareholder claims still have economic value. In the shareholder's capacity as owners of the troubled institution, shareholders would generally need to bear the losses before creditors are bailed-in.

### ***Amendment of company and insolvency law***

For shareholders of companies, by virtue of the **Shareholder Rights Directive**, on the exercise of certain rights of shareholders in listed companies establishes requirements for general meetings of shareholders and in particular the convocation periods and the form of the convocation. The **Second Company Law Directive** also contains a number of mandatory requirements that confer rights on shareholders including the rights to pre-emption, and the requirements that any increase or reduction of issued share capital is approved by the shareholders' general meeting.

However, the rights from the two directives is not workable in the situation of a company which is a bank, as such long convocation periods may slow down speedy actions of authorities aiming at resolving troubled banks. (as was in the experience of Fortis) It would also not be feasible to subject decision making prior to obtaining the approval of creditors and shareholders; for which intervention may then be too late to salvage the situation and minimise the cost of resolution. In order to develop an effective crisis management solution for banking, those general characteristics of a general insolvency law is inappropriate for the banking business. Unlike other corporate practices, ***banking business contains inherent risk which is peculiar to its type of business which warrants for swiftness and speed*** in decision making to prevent further damage to the bank, especially more so because bank assets can decline very rapidly in value. For instance, in terms of time variable, in the world of banking, as technology advances so does the speed of banking services in which it must also be matched by an equally speedy resolution. For instance, those days it was possible to try to resolve the bank over the weekend and declare a bank holiday to try to put a preventative measure, which is not possible in today's scenario, as electronic-banking now allows us to do banking 24 hours non-stop basis. This means clients and large institutional investors alike cannot effectively be prevented from withdrawing their deposits at any point in time in

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<sup>68</sup> Hüpkes, Eva H.G., Special Bank Resolution and Shareholders' Rights: Balancing Competing Interests (April 7, 2008). Journal of Financial Regulation and Compliance, Vol. 17 No. 3, pp. 277-301, 2009. Available at SSRN: <http://ssrn.com/abstract=1756102008>.

today's case. Appreciating **the need for time efficiency**, banking authorities must be necessarily legally empowered to make swift decisions and take speedy actions to safeguard financial stability<sup>69</sup>.

Alas, the interference with the rights of the owners of the shareholders and of its creditors will be an **unavoidable consequence of the aim of SRR** that is to possibly intervene in the bank's management to restructure and reorganise some of its assets as a going concern, whilst perhaps depriving them of their claims.

Hence, consideration must be given to whether the directives need to be amended in order to allow resolution authorities to override certain shareholder rights, subject to appropriate compensation and redress. There is also an issue of whether insolvency law might need to be amended to enable the resolution of an ailing bank take place under a special procedure, or if that can cater the resolution of the group as a whole. Thus, there maybe a need **to amend these directives in order to be compatible with the peculiar timeliness demands** of the banking world.

#### ***Avoiding moral hazard and increasing market discipline***

On the other hand, the possibility of the resolution authorities in having discretion (to intervene for resolution action) may in itself act as **incentives for banks to act in a prudent manner** by not taking excessive risk. Giving resolution authorities such a right may act as a deterrent against risk-taking behavior as this may send out a signal that **shareholders will not be compensated for losses when a bank gets into difficulty**. Concurrently, the aim is to encourage shareholders to employ good practices and consider the long-term goals of the company rather than focus merely on short-term and short sighted profitability. This will be very beneficial element to contain and limit the risk of moral hazard, eliminating the expectation that they will always be bailed-out and rescued should something goes terribly wrong with the bank.

#### **i. Safeguards to balance the interference with right to possession**

Given the potential intrusive nature of the powers, it is only fair if it is counterbalanced with appropriate procedural safeguards. In order for the SRR at the EU level to be lawful, it must satisfy the requirements of the First Protocol and Art 17 of the Charter of Fundamental Rights of the EU. In accordance with these provisions, an interference must be –

- a) Duly **justified by an overriding public interest and necessary measure**;
- b) **Provided by law** (to give foreseeability, transparency, predictability and legal certainty<sup>70</sup>); and

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<sup>69</sup> In this regard, as quoted by the Malaysian Central Bank governor, there is a need of creating the capacity to manage the increasing uncertainties generated by financial innovation, the increasing prominence of the non-regulated sector and the increasing interconnectedness between financial institutions and markets. Such developments have not only resulted in the emergence of new risks to the financial system but have also changed the dynamics of how risks in the financial system are transmitted to the real economy. In this environment, it is vital to have **a legal and regulatory framework that is robust and dynamic** enough to allow the relevant banking authorities to respond to these developments.



- c) Respect the **principle of proportionality** in which the measure should include fair compensation and respect the general principles of international law. (in that it must be proportionate and suitable for achieving the exclusive objective of removing the specific impediments to resolution)

In this line of thought, it is noteworthy that ECHR's view is that the right to **'peaceful enjoyment of possessions' is a right that can be constrained in the public interest**. This view dates all the way back to 1089 in the case of Mellacher vs Austria, whereby the ECHR's ruling suggest that an SRR framework whose objective was firmly grounded in the interest of preserving financial stability would not be in conflict with the ECHR and would be upheld by courts. Based on this case law, as long as *'an interference with the peaceful enjoyment of possessions strikes a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'*<sup>71</sup>, then it will not constitute an unlawful act. This reads that in general, **the Court respects the legislature's judgment as to what is in the general interest unless that judgment be manifestly without reasonable foundation**. Deducing from the above, in a nutshell, the **rights to property is not absolute** and hence, **does not pose an obstacle to prompt bank resolution**.

Banking authorities should also always be guided by the principle of **'no worse-off than in liquidation'** which is an important element of every resolution regime. Appropriate safeguards may include **compensation schemes** where creditors are left worse off than they would have been in liquidation. Coupled with **proportionate decision-making** in which excessive burden is minimised as much as possible, the Court shows tendency to be balanced against a very wide notion of the public interest, taking into account social justice elements, i.e. financial stability. Therefore, the legal stance is that the legislature normally have a wide discretion to interfere with creditor (and shareholder) rights in bank resolution and even the total absence of compensation may be justified by exceptional circumstances<sup>72</sup>.

## ii. Right to (Limited) Judicial Review<sup>73</sup>

When control over the resolution proceedings rests with the banking authorities through administrative procedure rather than with the judicial courts, natural rule of law principles provides the right to judicial review as a safeguard measure. Judicial review is a procedure whereby courts are able to determine the lawfulness of the exercise of executive power, in this case, the exercise of the resolution authorities. In

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<sup>70</sup> Legal certainty would allow the shareholders and creditors alike need to at least receive sufficient degree of clarity in order for them to make a well-informed decision through enabling them to assess the risks associated with their investments, prior to insolvency.

<sup>71</sup> Jahn and Others v Germany, (Applications No 46720/99, 72203/01) ECHR 2005-VI, para 93.

<sup>72</sup> Jahn and Others v Germany, (Applications No 46720/99, 72203/01) ECHR 2005-VI, para 117.

<sup>73</sup> Judicial review is a legal procedure, allowing individuals or groups to challenge in court the way that policymakers and other public bodies make decisions.

this regard, it must be clearly pointed out that judicial review operates within the distinct limits as a supervisory function rather than an appellate jurisdiction which reviews the merits of the case. In this context, the role of the courts is to supervise the exercise of discretionary power of the resolution authorities to ensure that it has been exercised lawfully.

Judicial review in itself is not part of the resolution proceedings, but a separate proceeding in which the court reviews *ex post*, actions taken by the banking authorities, should there be clear evidence of breach of principles of administrative law. In this regard, the right to judicial review is not to be allowed to undermine the effectiveness of the banking authorities actions in their efforts to safeguard the financial stability of its financial sector. The right to review can only be sought if proper procedures have not been followed by the banking authorities in carrying out the resolution proceedings.

Developed case law provides the stance that it is not within the court's jurisdiction to assess the banking authorities' exercise of discretion, but rather to focus on whether the banking authorities have acted legally and if there is a clear manifest error of fact or an abuse of power. To give a few clear examples of the grounds of judicial review<sup>74</sup>, it is **generally limited** to the context of reviewing decisions that are made as a result of 'fettering of discretion', improper purpose, bad faith, irrationality, proportionality and procedural impropriety. However, where the relevant actions of the banking authorities inflict damage on the shareholders of without proper justification, the remedy maybe in the form of monetary compensation, to which jurisdictions should have limited liability of the authorities<sup>75</sup> only to gross negligence or bad faith<sup>76</sup>, or only bad faith.

Notwithstanding the right to judicial review, case-laws suggests the reluctance of the Courts to "duplicate" the economic analysis and assessment made by i.e. the Commission (for example on compatibility or incompatibility of state aid with the internal market), consciously limiting their scope of judicial review to ensuring or to checking whether the i.e. the Commission has made "a manifest error of appreciation" in its economic assessments. Even though there is an element of subjectivity to the concept of "manifest error of appreciation", it is also clear that the Courts will not overturn i.e. the Commission's decisions in the banking sector lightly, especially where these have involved highly technical assessments, conducted in close cooperation with the Member State concerned and after having taken into account submissions by the private sector in response to Commission notices opening the investigation procedure.

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<sup>74</sup> This is as guided by British Administrative Law in which the principles of judicial review are regarded as practical, balanced and clear to illustrate.

<sup>75</sup> The Basel Committee on Banking Supervision has since 1997 recognised legal protection for supervisory activities as a core principle for effective banking supervision.

<sup>76</sup> Cihak and Nier, (2009), The Need for Special Resolution Regimes for Financial Institutions – the case of the European Union, p. 18-19, IMF, September 2009

## Drafting style of an EU Cross-Border Resolution Framework

In drafting the legislative framework, it is deemed desirable to incorporate the objective of maintaining financial stability as the primary goal of the ERA in the use of SRR. Policymakers and legislators have to decide **what should be spelt out in detail and what should be left open-ended**. There's a natural impulse to nail everything down, though that is often unrealistic, especially in a new or lengthy venture. This would also create the danger of over-regulating beyond what is necessary. At the same time, it is also pertinent to be realistic enough to provide for powers which can be enforced and not merely powers without 'teeth' that bites.

However, **because it is impossible to foresee every potential peril or opportunity, it is usually wiser to incorporate a flexible clause** in case something unexpected occurs. Subsequently, when the threshold to intervene is reached, exercising this powers under the SRR with the aim of preserving financial stability in the EU as a whole would be able to reduce furtherance of merely nationalistic interests. Member State will have to put differences aside and recall the principle of solidarity and creation of the internal market – in which it will have to be prepared to 'give and take' if it wants to continue the European dream. Respective competences between the EU and what is left for the Member State will have to be ironed out and clearly be demarcated and communicated effectively to the 27 Member State to avoid the danger of further disintegration through nationalistic means, or lack of awareness of what to do or not to do.

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## Chapter 3 Desirabilities of an EU Cross-border bank resolution framework

*“Financial services, like fire is hugely beneficial to us, but can be very dangerous as well. Because fire is so contagious and damaging, everyone have an interest in our neighbour’s fire safety arrangements. Like fire, **damage can best be contained when it is detected and extinguished early**”<sup>77</sup>*

### Table Overview of desirability factors

1)	Gives <b>legal certainty</b> through provision of clear <i>ex ante</i> rules under the SRR, such as through a clearly outlined upfront burden sharing mechanism
2)	<b>Economically efficient</b> through cost-minimisation objective
3)	<b>Fair and equal</b> treatment on –
	Cross-border banking authorities involved vis-à-vis/vide clear <i>ex ante</i> burden sharing rules
	Non-discriminatory treatment for shareholders and creditors of cross-border EU banks

<sup>77</sup> Strauss-Kahn, D. (2010), Crisis management arrangements for a European Banking System: Building a Crisis Management Framework for the Single Market”, Keynote speech, European Commission conference on Cross-border crisis management, Brussels, 19 March 2011

	Fairness to taxpayers as the authorities have other than bailing out options to contain the spread of systemic risk
4) Increase <b>trust and confidence</b> between –	▪ Depositors and banking sector
	▪ Banking sector and the banking authorities
	▪ Amongst banking authorities of EU banks
5) <b>Curb moral hazard</b> , impose discipline on the market participants through responsible behaviour	
<ul style="list-style-type: none"> <li>○ A well-designed and clear <i>ex ante</i> resolution regime will increase trust and confidence of market participants, investors and the people as a whole, for the advantage of EU banks.</li> <li>○ This would also lead to a more <b>enhanced cooperative relationship</b> between EU banking authorities involved in the cross-border resolution. This can be achieved vis-à-vis good information sharing system between supervisors and as the EBA matures as a supranational supervisor, coordination of supervisory practices can be better synchronized and improved at the EU level.</li> <li>○ Overall, this would ultimately lead to enhancement of the strength of EU banks in the single financial market.</li> </ul>	

Source of table: Personal compilation

### A. Increases legal certainty – clear objectives with clear line of command

Legal certainty is an important aspect to preserve the legitimate expectations of bank counterparties and stakeholders on a resolution. By stipulating upfront the details of the potential cross-border resolution framework and the public consultation carried out by the Commission, this reflects the significance placed on ensuring that all safeguards for stakeholders are taken into account. In identifying whose interests maybe affected, the Commission places great emphasis in achieving as much legal certainty as possible to allow the relevant authorities to take action as fast as possible, whilst respecting the appropriate safeguards in place for stakeholders. On the other hand, uncertainty carries a huge cost in economic and regulatory capital terms which could lead to a damaging effect on the banking industry in the EU as a whole, with ramifications for the economies of the EU.

There is an overriding need for clear leadership and command i.e. by the EBA to foster collaboration through the rebuilding of **trust** which then fosters collaboration, which contributes to **openly sharing information**, which then creates a solid team who supports each other.

## **B. Economically efficient through cost-minimisation measures**

An effective resolution regime should avoid unnecessary destruction of value, and therefore seek to minimise the overall costs of resolution in home and host jurisdictions and, where consistent with the other objectives, losses for creditors<sup>78</sup>.

According to Kudrna, an EU-level resolution regime would ‘allow for internalisation of positive externalities, such as efficiency gains from cross-border integration, as well as negative externalities, such as contagion in the case of financial instability’. It would permit resolution strategies that minimise the overall costs of bank resolution and prevent national responses that minimise national costs while increasing overall costs<sup>79</sup>. This can be achieved, for instance via the ‘bridge bank’ tool, the relevant authority will be required to manage the bridge bank in a way which maximises its value. For **creditors**, it is arguable that if an SRR operates effectively, it would provide a significantly increased level of protection for bank creditors than was previously the case. This is because the authorities are given power to act quickly and without court involvement and as intervention can take at a relatively early stage, that would most likely provide the opportunity to maximise the value of assets that will then be made available for distribution to the creditors.

## **C. Fairness and equality on governments and market participants**

### ***Fair and equal treatment on all quarters- banking authorities, market participants and taxpayers***

The centralised decision-making and fungible financing creates the credible commitment to multilateral cooperation, as it removes the distributive conflicts among national authorities (IMF 2010). As we have witnessed, the UK government bore full costs of stabilising interventions into global UK-based banks, despite that the benefits were spread across many of their cross-border counter-parties<sup>80</sup>. The Belgian government also had to carry the biggest share of burden in rescuing Dexia and Fortis, even though it was clear that the French and Dutch governments both benefited from the cost incurred. In simple comparative terms, this is not an equal bargain to the detriment of certain countries. The issue of unfair cost allocation between national authorities maybe resolved via this framework if a clear *ex ante* burden sharing mechanism allows for cost to be fairly spread out.

In terms of impact on the cross-border banks’ stakeholders, the Commission staff concluded that a pan-European framework would have an overall positive impact on all its stakeholders. Legally empowering

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<sup>78</sup> Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, October 2011, p.3

<sup>79</sup> Kudrna, ‘Cross-border resolution of failed banks in the EU: A search for the second-best policies’, November 2010.

<sup>80</sup> Kudrna, Z., Regulatory aftermath of banking rescues: More Europe or business as usual?, p.16 (2011)

the relevant authorities with the tools to be able to act swiftly and speedily can mitigate loss and prevent further inflicted wounds to the value of the troubled entities' assets (often attributable to the more time it loses on having to go through procedures which is time-consuming). Preserving and mitigating the potential loss through this route is arguably beneficial for the creditors as well at the end of the day.

In addition to the above, this measure will be desirable for the vast majority of innocent taxpayers and individual depositors, as it the cost of the shortfall should principally be borne by the owners or creditors of the banks, who do not even understand the complexities of the financial system. Consequently, banks will have an incentive to peer-monitor each other since they have to provide the funding. Additionally, this can curb moral hazard and reinforce voter's confidence in the system by reducing the existing distributional inequity associated with government handouts for the financial sector.

#### **D. Enhance cooperative relationship between resolution authorities**

The BCBS reports that enhancing cooperative relationship is one of the key recommendation to a cross-border resolution framework. Effective crisis management and resolution of cross-border financial institutions **require a clear understanding** by different national authorities of **their respective responsibilities** for regulation, supervision, liquidity provision, crisis management and resolution<sup>81</sup>. Key home and host authorities **should agree on arrangements that ensure the timely production and sharing of needed information** both for purposes of contingency planning during normal times and for crisis management and resolution during times of stress<sup>82</sup>.

The importance of close cooperation between the authorities is so crucial that it is explicitly expressed in Art 36 of the EBA Regulation, that the **EBA shall cooperate closely and on a regular basis with the ESRB**. The key to understanding the source of vulnerability of banks is critical as threats can emanate from the external sector. For this reason, it is key to establish a relationship between the EBA and the ESRB that supervises the financial system in the EU. Improvements in cooperation procedures should also address information exchange, assessment, fair implementation of crisis resolution plans and good time management. Bank resolution in itself is a highly complex matter, what more if it involves cross-border elements where inevitably different authorities are also involved and as we know it, without a clearly defined *ex ante* platform for proper information exchange and sharing for a smooth communication between the cross-border authorities, the differences inherent are understandably difficult to reconcile.

With a **closer convergence and harmonisation of resolution tools** and powers vis-à-vis the exercise of creating an EU-framework for cross border banking resolution, this would set the scene to increase

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<sup>81</sup> Recommendation 7, Cross-border Bank Resolution Group (CBRG) of the Basel Committee on Banking Supervision, Report and Recommendations, BCBS Paper (March, 2010)

<sup>82</sup> *Ibid.*

cooperative relationship which may act as a deterrent to pursue purely nationalistic interest to the detriment of the other national authorities.<sup>83</sup> An *ex ante* framework which clearly outlines upfront the respective rights and obligations between the national authorities and the criterias of information sharing could make a workable *ex ante* lead to a workable fair burden sharing mechanism albeit not straightforward and easy, a potentially realistic dream. The improvement in cooperation will undeniably not improve overnight, but through repetitious process of information exchange, this will also improve its consistency, honesty and determination amongst the Member States.

### **E. *Ex ante* Burden sharing mechanism**

Despite noble intentions, in the resolution of the banks, cross-border cooperation appears to have been limited in which the authorities may lack the incentives to cooperate in such situation. The challenge is thus finding ways to reconcile misaligned interests and divergent incentives through reliable burden-sharing mechanism. A special dimension in cross-border crisis management is the fact that the costs of the rescue may be borne by different authorities.

The issue of burden sharing in cases of crisis resolution especially where cross-border group are affected is an extremely complicated and delicate matter absent a pan-European framework or any burden-sharing agreement. As noted by the BCBS, national authorities tend to seek to ensure that their constituents, whether taxpayers or member institutions underwriting a deposit insurance or other fund, bear only those financial burdens that are necessary to mitigate the risks to their constituents. This leaves them no choice but to resolve the crisis at national entity level, or to agree on an *ad hoc* cross-border solutions. Furthermore, the lack of a financing mechanism gives little incentive for Member States to cooperate in the event of the failure of a bank or group which is systemic in multiple jurisdictions.

Henceforth, having an *ex ante* burden sharing mechanism would help alleviate the problems faced, as this would be achieved in parallel with an increased cooperative relationship and obligation to cooperate with each other.

### **F. Further enhance the internal market for banking**

The financial crisis has shaken the stability of the financial system and this to a certain extent, impacts on the functioning of the internal market. The current goal of the EU is to restore and maintain a stable and reliable financial system as it is believed that an important prerequisite to preserving trust, confidence and coherence in the internal market. Particularly, the aim is to preserve and improve the conditions for the

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<sup>83</sup> Cross-border Bank Resolution Group (CBRG) of the Basel Committee on Banking Supervision, Report and Recommendations, (2010), available at [www.bis.org/publ/bcbs169.pdf](http://www.bis.org/publ/bcbs169.pdf) - The CBRG observes in para 69 of its report that '*greater convergence in national laws, by promoting a common understanding, more predictability, and reliable frameworks for responsive actions, will likely improve cooperation. In particular, it should help to reduce the precipitous and perhaps unnecessary actions that could exacerbate a crisis*'.

establishment of a fully integrated and functioning internal market in the field of financial services<sup>84</sup>. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks<sup>85</sup>.

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## Chapter 4 Practical and operational concerns for Implementation

*“A well-devised framework is essential, but effective implementation is much more important. It is necessary to perform a crisis simulation regularly in order to increase readiness in managing crisis.”<sup>86</sup>*

The proposal to form a pan-European framework and potentially a supranational authority to oversee its implementation invites operational considerations which must be legally mandated as well. Without legally and clearly provided rules on its operability, and its source of financing, this would distort state aid rules<sup>87</sup> and will have a spillover effect on other legal provisions of the Lisbon treaty.

### Structural and institutional issues – The EBA and the Member States

The three commanders of the European banking fire brigade consist of the supranational bodies – the EBA, the ECB and in future, European Resolution Authority (ERA). As the ERA is still not in existence, for the moment, this role will be filled in by the EBA. Their fire-engine is to be fuelled by the European Monetary Fund (funded by national governments)<sup>88</sup>.

In an exercise where Schoenmaker examines fields where national and European agencies are cooperating, he suggests that the structure for cooperation for the banking authorities could mirror the competition model. For issues relating to competition, the Commission (under the DG Competition) and the national competition authorities (NCAs) in all Member States cooperate with each other through the

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<sup>84</sup> Recital 7 of the EBA Regulation

<sup>85</sup> Ibid.

<sup>86</sup> Batunanggar, S., Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries, The SEACEN Centre, July 2008, available online at [http://www.seacen.org/GUI/pdf/publications/research\\_proj/2008/rp73/rp73\\_complete.pdf](http://www.seacen.org/GUI/pdf/publications/research_proj/2008/rp73/rp73_complete.pdf)

<sup>87</sup> State support of financial institutions may conflict with Article 107(1) of the Treaty on European Union (consolidated version) which says, ‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form

*whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’* However, Article 107(3)(b) may provide an exception in sufficiently important cases as it allows aid ‘**to remedy a serious disturbance in the economy of a Member State**’. –EU Commission

<sup>88</sup> which is currently in the form of the **European Stability Mechanism (ESM)**, a permanent rescue funding programme.



**European Competition Network (ECN)<sup>89</sup>**. As European competition rules are applied by all members of the ECN, the ECN provides means to **ensure their effective and consistent application and provides the NCAs and the Commission a platform for information sharing and exchange**. In this fashion, the ECN enables the NCAs to pool their expertise and identify best practices<sup>90</sup>.

Based on this model, the relevant banking authorities in Member State and the supranational bodies will work on a close cooperation basis and when the need arises, there must be a clear line of command by the supranational authorities. In this regard, it is relevant to study the successful features of the ECB which may be imported into the ERA.

### **The creation of an ERA for crisis resolution<sup>91</sup>, borrowing from the successful elements of the ECB**

- clear line of command: president in centre crucial for timely resolution
- involvement of member states but not in driving seat (move away from national champions)
- recapitalising banks is a government task; so no financing from ECB
- ERA could issue bonds underwritten by participating member states or a loan from ESM
- European-wide mandate
- ERA established by Regulation (akin to EBA)

*Source: Schoenmaker's Presentation in London, November 2011*

## **Funding –Potential size and operation of bank resolution funds**

Discussing the operability of an EU Cross-border bank resolution cannot be done fully in the absence of discussing the issue of what funds can the resolution have access to. Eventhough establishing an EU resolution fund can ideally and easily be suggested, it is in fact, not a straightforward nor easy matter, as this concerns national budget and given the current setting that the EU is still in (a not fully-centralised and harmonised) nature of EU supervision owing to the home/host country divide. Secondly, setting up such a fund would necessitate a clear and comprehensive approach as to how much Member State should contribute and when can this pool of funds be used. It is for this reason that at this current stage, we adopt the most realistic approach forward, wherein to first coordinate the setting up of funds at national level to ensure that Member State are in a position to secure equivalent funds when the need arises. In this regard, the source of funding can be broken into two categories; private financing and public

<sup>89</sup> Schoenmaker, D, The European Banking Landscape After the Crisis (April 27, 2011). DSF Policy Paper No. 12. available online at SSRN: <http://ssrn.com/abstract=1824307> or <http://dx.doi.org/10.2139/ssrn.1824307>

<sup>90</sup> Overview of the European Competition Network (ECN) available online at [http://ec.europa.eu/competition/ecn/more\\_details.html](http://ec.europa.eu/competition/ecn/more_details.html)

<sup>91</sup> Shoenmaker, D., Cross-Border Resolution in Europe, London, 25 November 2011, available online at <http://www.icfr.org/assets/pdfs/November-2011/LSE-Conference/Dirk-Schoenmaker-Cross-Border-Resolution-in-Europe.aspx>

financing. With these two types of financing ironed out at the level of Member State, it maybe more viable to coordinate this funds amongst them.

### **i. Private – financial transaction levy on banks**

The EU has expressed its intention to raise private funds vis-à-vis taxing banks on *ex ante* basis. So far, nine European countries have already formally stated their support for a Financial Transaction Tax (FTT). A tax on transactions by these countries alone would be a very significant step and has the potential to raise €38 billion annually<sup>92</sup>. These nine countries is most likely to go ahead with an ‘enhanced co-operation’. The FTT which has been dubbed as the ‘true Robin Hood tax’ – have received mixed support, wherein France, Germany, Spain, Belgium and Finland spoke in favor of the EU proposal whereas those that oppose include the UK, Sweden, the Czech Republic and Bulgaria. From outside of the EU, it has received widespread support, including from leading international figures such as Bill Gates, George Soros and Jeffrey Sachs<sup>93</sup>. According to Joseph Stiglitz, with the current modern technology that we have, implementing the FTT would be more feasible in today’s setting.

Nevertheless, this would only be truly operable effectively across the EU countries if the tax levied is uniform on EU banks across the EU. Differences in level of tax may lead to regulatory arbitrage and may lead to an unintended consequence of creating another case of a ‘Delaware’ in the EU. At the moment, it remains to be seen if the FTT will be imposed on a standardised basis across the EU.

### **ii. Public – full/specific solidarity cooperation issuance of bonds**

This is currently the only most operationally plausible and legally feasible financing method that can be implemented at the EU level on all its Member States. However, to legally provide for such a commitment in the treaty, this decision must be unanimously agreed by the Member States. In turn, serious budgetary challenges have to be firstly addressed. In the long run, for the European Financial Stability Funds (EFSF) to be a sustainable and effective fund for the purpose of crisis management, it not only must be legally mandated on Member States, it must be properly apportioned according to ascertainable *ex ante* criterias.

The proposal for an establishment of a European Monetary Fund (EMF) is to create a mechanism capable of managing an orderly default and debt restructuring of a government within the European Monetary Union. Events so far have shown that the ‘no bail-out’ provision of the Maastricht Treaty had to be interpreted very generously when a crisis threatens the core of the financial markets in the euro area<sup>94</sup>. This proposal is necessary in order to make the ‘no bail-out’ rule credible again. Given the high level of

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Article 125 of the Consolidated EU Treaty (formerly Article 123 TEC).

interconnectedness of economies in the EU, any instability of its financial system from a banking crisis is bound to have a negative spill-over externality effect on other Member States; depending on how closely integrated they are. Following this reasoning, **Member States may feel responsible and accountable to avoid creating difficulties for each other.**

### **The concept of living will**

The creation of a new cross-border process for restructuring complex and transnational institutions will surely take time. However, there is a valuable tool which can be deployed now – where banks are required to prepare a well-designed proposal detailing how the bank should be legally resolved in the event of a distress.

For purposes of this paper, I use the term ‘living will’,<sup>95</sup> as it is presumably the most commonly-understood term which to a lesser extent, is also referred to as ‘business continuity plan’, ‘contingency plan’, ‘emergency checklist’ and ‘recovery and resolution plan’. To define ‘living will’ in its simplest terms, it is a ‘worst-case scenario’ contingency plan, to be imposed on all banks. The idea is to ensure that all banks should be prepared with a plan **to address the practical and concrete steps that could be taken in a crisis or wind-down to preserve functional resiliency of its essential business operations**<sup>96</sup>.

The main goal of a living will is to make contingency plans for times of stress by drawing up a will which could act as a catalyst for thinking and taking action<sup>97</sup>. This living will should then be ideally shared with the supervisory authority as well as the ESRB which will then identify if there is an alarming situation or if the need to set out the proposal of the living will arises. In terms of practicality, this would better enhance risk management within the banking industry itself, whereby they may be more prudent in risk-taking, driven by the desire to present a reliable and credible report. Knowing well aware that the whole idea behind the living will is to allow for an orderly exit for the bank, banks may be inspired to de-risk its operations, by shedding off positions, businesses or operations that are highly risky to the bank. By engaging banks in this way, this is hoped not only to improve accountability of banks, but also to gradually improve market discipline as the aim is to reduce banks’ expectation to be bailed out. The introduction of this concept will also potentially be able to improve its relationship with the relevant authorities via

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<sup>95</sup> The concept of living will is believed to be formally articulated in mid-2009 at the Financial Stability Forum when it proposed that relevant authorities should ensure that firms maintain contingency plans for use in a wind-down situation, and regularly update it to ensure its accuracy. In the paper written by Deloitte, it provides some information as to what it views should be included in a living will. See more in the paper entitled, Positioning for a new financial landscape: Rolling out a Recovery and Resolution Plan [http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Financial%20Services/dtt\\_fsi\\_Rolling%20out%20a%20Recovery%20and%20Resolution%20Plan\\_2010-06.pdf](http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Financial%20Services/dtt_fsi_Rolling%20out%20a%20Recovery%20and%20Resolution%20Plan_2010-06.pdf)

<sup>96</sup> Recommendation 5, Basel Committee on Banking Supervision (BCBS) Report and Recommendations of the cross-border Bank Resolution, March 2010

<sup>97</sup> Avgouleas, Goodhart, Schoemaker, Living Will as a Catalyst for Action, 2010

enabling a communicative method, whereby banks are expected to be able to explain the living will, and to update it from time to time to its supervisors and the resolution authorities. It is a useful tool, not only for the relevant authorities, but also for the banks themselves as this gives them awareness of where it stands should a resolution occur. According to Avgouleas, Goodhart and Shoenmaker (2010), burden sharing could also be incorporated as part of the plan in the living will. Banks should have an incentive to draw up a reliable living will, as this would also reduce uncertainty on their end should the bank goes underwater- the relevant authorities will take into account the living will in deciding whether to liquidate the institution or to provide support vis-à-vis tools such as the ‘bridge bank’.

Living wills aim at determining in normal times not only which actions large and complex financial institutions can take if they face a major crisis but also how the company can be wound up if these actions are not successful (see e.g. FSA, 2009)<sup>98</sup>.

‘Living Wills’- Recovery and Resolution Strategies	
Recovery strategy	Resolution strategy
The <b>management</b> of the firm take actions that are aimed at <b>preventing it from failing</b> , by <b>restoring its capital or liquidity position</b> (depending on the nature of the firm’s problems). In order to avert failure, <b>management may need to undertake radical options</b> (such as exiting particular lines of business, selling subsidiaries or raising fresh capital).	The <b>authorities</b> prepare for the failure of the firm and aim to <b>manage its demise in a controlled manner</b> that <b>limits the cost to creditors</b> , public funds and other systemic disruption. For firms that have a deposit-taking permission this will be managed using the SRR’s tools; other firms that are systemic but do not fall within the scope of the SRR will be treated under UK insolvency law in the absence of any alternative resolution regime.

Source of information: Financial Services Authority, UK

### Workability of Living Will

This concept is innovative on many grounds –it is a recovery and resolution action plan in itself which would give both the banks and the relevant authorities increased certainty as to how to approach the situation when the situation arises. As this living will are to be continuously and regularly updated and revised in line with discussions between the institutions and their national banking authority and ideally the ESRB, this should present a meaningful plan to both parties. The Squam Lake Report<sup>99</sup> observes that the introduction of living will maybe able to prevent the catastrophic nature and scale of disaster of the financial crisis which happened with very little warning, and under very tight deadlines, as **this plan would allow the relevant authorities to anticipate better the steps needed** in such period of stress. This is also desirable for market participants who may have increased confidence in the entire financial system if they comprehend that a carefully designed plan would be fundamental to an effective resolution.

<sup>98</sup> This would enable either a private sector solution to be found or to liquidate the ailing company in an orderly way.

<sup>99</sup> Squam Lake Report, Chapter 8, Improving Resolution Options

Having said the above, it is not my intention to present the concept of living will as a fool-proof, flawless and perfect concept. It is also recognised that in reality it will not be exactly that easy and straightforward for banks to comply with, as certain processes cannot possibly be documented let alone quantified, calculated and put on a plan. It is also appreciated that *'detailed living wills' that outline elaborate winding-down scenarios may be very theoretical, and may potentially also lead to inefficient corporate structures that may create trapped pools of capital.*<sup>100</sup> Nevertheless, as imperfect as this idea maybe, it is the best way to encourage a well-documented exercise of how the resolution should take place. It would not only lead to improve clarity in planning, it would also lead to a better management vis-à-vis having a wider picture of the risk faced which would allow bank managers to concentrate on key areas in its risk management practice. It would also be beneficial if all systemic bank practice this concept which would lead to a better enhanced governance, transparency and better risk management practice. Improved disclosure through living wills would also contribute to tackle the opacity of banks corporate structures, whose complexity might hamper effective supervision and resolution<sup>101</sup>. However, most importantly, this would ideally increase the accountability of banks as it should be clear through this exercise that banks, no matter how big or complicated are not immune to failure and this would in turn hopefully reduce the current moral hazard which we are facing today.

### **Simplification of corporate legal structure**

As living will are intended to truly reflect the corporate legal structure of banking groups, it would immediately be clear that the corporate structure of a bank can be extremely complex with a myriad of legal entities. In these plans, banks should develop different potential scenarios in which parts are least important enough which can certainly be sold, and which part are certainly systemic enough to be put aside to be rescued. However, the exercise of identifying and segregating this assets can only be feasibly done if the parts can easily be identified and separated. As banks develop their living wills further, this may potentially lead to a simplification of its corporate legal structure. In line with this thought, Hüpkes suggests that by making group structures less complex and easier to wind down amongst others, and reducing the number of legal entities through consolidation exercise and introducing structural separability of subsidiaries.

However, the process of simplifying corporate legal structure need not wait till the launch of living wills. In reality, it has already been rolled out by the Commission which required that Commerzbank, ING, the Royal Bank of Scotland, and Lloyds to downsize and decomplicate its structure in order to be able to receive state aid, which was imposed to compensate for the anticompetitive effects of the subsidies they

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<sup>100</sup> Ackermann (2009a)

<sup>101</sup> Carmassi and others, Overcoming Too-Big-To-Fail, Report of the CEPS-Assonime Task Force on Bank Crisis Resolution, (2010)

p.65, available online at [http://aei.pitt.edu/14484/1/TFR\\_Bank\\_Crisis\\_Resolution.pdf](http://aei.pitt.edu/14484/1/TFR_Bank_Crisis_Resolution.pdf)

have received. Nevertheless, these banks were forced to decomplicate due to the aid that it needed from the state. Living will can be a facilitative tool to encourage other banks to voluntarily begin decomplicating its structure even before it is told by the Commission to do so.

### **A. Roadmap to Implementation**

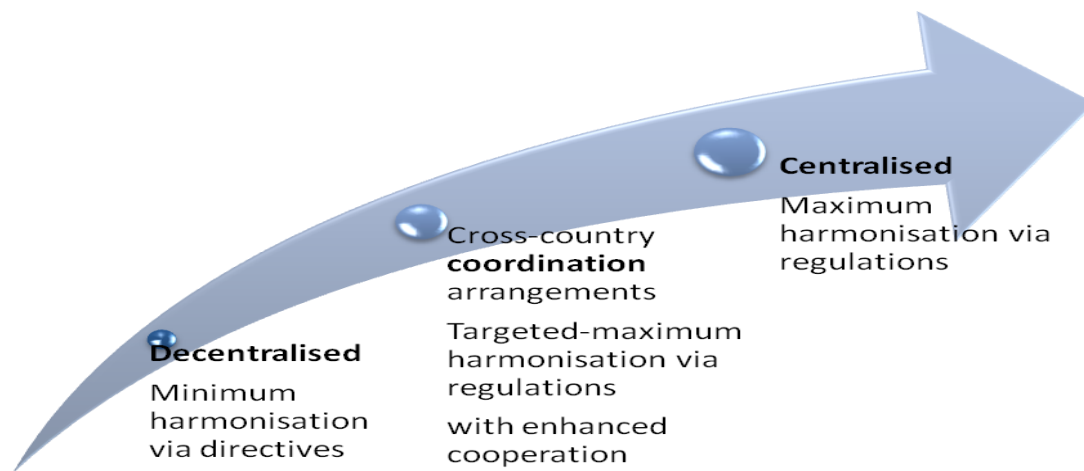
The introduction of a clear pan-European framework is not a matter taken lightly by the Commission. In fact, recognising the gravity of the wider the power to override private rights, the greater the discretion to exercise them, that is the reason why the Commission is taking its time to carefully and cautiously plan its way forward through engagement and consultations with key industry players, representatives, experts and so on to formulate the future of the EU in this arena. Great haste in regulating complex matters is not wise, but at the same time, political will to reform must also not lose momentum. Given the importance of scope and scale of such a proposal, the Commission **carefully planned** to progress in **three steps and clearly stipulates them** :

- 1) First, it intends to adopt a legislative proposal for a harmonised EU regime for crisis prevention and bank recovery and resolution.
- 2) Second, by the end of 2012, it *will examine the need for further harmonisation of bank insolvency regimes, with the aim of resolving and liquidating them under the same substantive and procedural rules, and will publish a report, accompanied if appropriate, by a legislative proposal.*
- 3) And finally, when things are in better shape, it will then consider *a third step [which] should include the **creation of an integrated resolution regime**, possibly based on a single European Resolution Authority, by 2014<sup>102</sup>.*

This is most certainly a very welcome development. Such a crucial planning need sufficient time for impact assessment, consultation processes and high-level research and study before it can be safely deployed. By being clear about the way forward, the Commission is allowing for ample studies to be carried out, in line with the expectation it has set through these clear three-steps approach laid upfront for all.

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<sup>102</sup> European Commission (2011) p.7.



The current stage of the integration in the banking sector is somewhere between the second and the third stage in the illustration above. As explained in Chapter 1, there is still a mismatch between the ability to enjoy the single banking passport across borders with the current regulatory, supervisory and (lack of) resolution framework which places the EU in a fragmented position. However, as seen by the developments that have taken place in the EU ever since the crisis –i.e. with the establishment of the supranational bodies ESRB and the EBA to name a few (in line with the recommendations that were made by the High Level Group De Larosiere), and the goal to move towards a single banking rule book (CRR/DRD IV Regulation) the EU is well on its way to move towards the centralised stage. At the moment, there is a High Level Report which is on its way to publication in July 2012. Depending on what its findings and recommendations will be, this will be a determining point as to where the EU is heading towards in crisis-management and resolution.

We have seen in earlier course of event that the attempt to achieve a better coordination of national resolution schemes between different Member States with differences in national interests- is in reality ideal as an aim, but not easy to reconcile in reality without any clear framework. At the same time, however, it is also understandably not practical to jump straight into the sea of uncertainty by binding themselves to a framework which is still not known clearly how it will look exactly.

Hence, the first best step that should be taken is to firstly try to harmonise national resolution instruments, which is the first step that needs to be taken with a view to building a crisis management framework. Over this medium term, in the transitional period of waiting for how a framework would materialise, efforts should be made towards achieving closer institutional convergence, with an enhanced role for the authorities within the resolution process.

## **Cost Benefit Analysis of an EU cross border bank resolution framework**

In this section, I wish to put forward my view that sticking to the status quo and not adopting a pan-European framework will only be costly for the EU in the long-run. Based on my reasoning below, I try to suggest that the benefits of having such a framework will be higher than the costs from the perspective of how it will affect the stakeholders of banks.

1. The current system, with fragmented resolution frameworks across the EU, as each MS have different or no resolution regimes. In turn, this causes disparities and creates an uneven playing field for market players, in this case – the banks. Consequently, this problem raises **legal uncertainties** for all quarters, especially the shareholders and investors of banks.
2. As a result of legal uncertainties, the key stakeholders now realises the high-risk of potentially losing their investments vis-à-vis haircuts, also potentially owing to delay which may exacerbate their loss in a crisis situation. These key stakeholders now will be discouraged to continue taking such risks in cross-border dimension, and advises the bank to reduce its scale of integration in other MS. As a consequence of legal uncertainties, it **creates disincentives for further integration** of banks in the single market.
3. In turn, this causes a reversal in the internal market process for banking, where banks return to their local businesses, and directly this **reduces competition** in the MS. Subsequently, the next domino effect is citizens and businesses in the EU have **lesser choice** in the market.
4. As banks plays a very significant role as a driving force of the economy –such a reduction in the scale of integration will be followed by a **slow-down in economic growth**.

It is without a doubt and as evidenced by worldwide experience that cross-border banking brings manifold benefits, not only to the economies, but to the people, as it provides more choices in financial services. Conversely, with the benefits that comes along with it, there are also risks and challenges that must be overcome. Cross-border banking in Europe, in particular is more prevalent than ever than its counterparts in the world. Yet, despite the high-level of cross-border banking integration in Europe, the overall system for its banking regulation, supervision and resolution is still ‘decentralised’, whereby they adhere to a ‘minimum harmonisation’ concept vis-à-vis Banking Directives, in which implementation is largely left to the freedom of Member States.

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## Chapter 5 Some Perspective from the International Sphere

### The East Asia Region after the Asian Financial Crisis (AFC)

In the aftermath of the AFC, crisis-hit countries such as Indonesia, Malaysia and Thailand and countries experiencing banking system distresses such as Philippines, China and Taiwan appeared to have a more developed and clear legal framework in dealing with crisis management and problematic banks<sup>103</sup>. These crisis-hit countries adopted measures to deal with the financial turmoil and strengthened their financial systems by enhancing the effectiveness of their banking supervision along with post-crisis bank restructuring program. However, on the other spectrum, non-crisis-affected country such as Cambodia has a relatively less comprehensive crisis management framework.

Case study evidence suggests that prompt intervention reduces the costs of intervention and promotes efficiency [OECD (2002a)]. Conversely, the inability to take rapid and decisive actions in restructuring the banking system, combined with political intervention, makes the resolution of the banking crisis more ineffective and costly [De Luna-Martinez (2000), Batunanggar (2002 and 2004)]. Hence, it became apparent in East Asia that it was crucial to have in place a clear and comprehensive framework for dealing with problem banks which would allow intervention, management and restoration of the health of the financial system to be addressed rapidly.

Consequently, the crisis-affected countries in the East Asian region implemented strategies to incorporate best recommended practices from international organisations (such as Basel Core Principles, FSB and IMF reports and guidelines) and experiences from other crises in other regions which led to an overhaul in their national institutional framework and legal framework to be able to deal more effectively with the crisis and resolution measures for crisis management, including management of non-performing assets and restructuring of banks.

#### ***The Asian Monetary Fund***<sup>104</sup>

Flash to the present day in East Asia, the Asian Monetary Fund<sup>105</sup> is on its way, a successor of the Chiang Mai Initiative Multilateralisation (CMIM)<sup>106</sup> **with the aim of providing short-term liquidity to a partner**

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<sup>103</sup> Batunanggar, S., Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries, The SEACEN Centre, July 2008, available online at [http://www.seacen.org/GUI/pdf/publications/research\\_proj/2008/rp73/rp73\\_complete.pdf](http://www.seacen.org/GUI/pdf/publications/research_proj/2008/rp73/rp73_complete.pdf)

<sup>104</sup> To see the comparison between the European Monetary Fund and the Asian Monetary Fund, Yonghyup Oh provides a table of comparison in his CEPS Policy Brief available online at [http://aei.pitt.edu/14547/1/PB208\\_Yonghyup\\_Oh\\_EMF\\_and\\_AMF.pdf](http://aei.pitt.edu/14547/1/PB208_Yonghyup_Oh_EMF_and_AMF.pdf)

<sup>105</sup> Observers argue that this is a major step forward for the East Asian Countries, which is an initiative fully autonomous from the involvement of the IMF. This initially started with the Chiang Mai Initiative (CMI), which was the only initiative that materialised in the East Asian region following the AFC in 1997-1998.

<sup>106</sup> The CMIM was agreed in the ASEAN +3 finance ministers' meeting held in Bali, Indonesia, on 3 May 2009. With a total contribution of \$120 billion (about €82 billion at an average 2008 annual euro/dollar rate), the CMIM is an establishment of a fund from which a member nation can swap its national currency for US dollars within a pre-determined maximum.

**country in serious financial distress.** The legal documents of agreement and a regulatory framework have been circulated and signed and so the entity came into effect in 24 March 2010. Following this, it is expected that a surveillance body of the CMIM will soon be set up in one of the ASEAN cities. When the CMIM has such an institutional structure in place, it will effectively become an Asian Monetary Fund<sup>107</sup>.

Many lessons have been drawn from the AFC in the East Asian region that may be applicable to the current European development. These **include the need to introduce preventive measures and the need to reform its crisis management framework to better equip itself in order to be able to deal with future financial crises through an enabling comprehensive legal framework** which would empower the **relevant resolution authorities to take prompt and decisive actions.**

In a nutshell, as a response to the AFC, East Asian countries took measures to improve their banking regulation and supervision and encouraged banks to adopt the internationally recommended best practices, including risk management, corporate governance, and internal control. These countries also **improved the resolution methods for their implementation effectiveness**<sup>108</sup>. To be effective, the resolution process has to be **speedy, objective, transparent, and consistent** in order to restore the health of the financial system and the economy<sup>109</sup>. Clear crisis-management frameworks were put in place, including policies to deal with systemic banking crises, clear division of roles and responsibilities (to avoid duplication of roles), clear coordination mechanisms between the relevant authorities and agencies in dealing with systemic crisis, and provision of liquidity assistance for banks in emergency condition.

### **Malaysia after the AFC**

In the aftermath of the Asian Financial Crisis (AFC) in the period beginning 1997, Malaysia, together with its South-East Asian counterparts, underwent a process of financial liberalisation. Although Malaysia was already in the process of embarking on various financial and prudential reforms since the early 1990s, the AFC quickened the pace for the implementation of various changes to the law which would enable the relevant authorities to address the vulnerabilities that had manifested in the banking system at that point<sup>110</sup>.

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<sup>107</sup> Yonghyup Oh, Lessons from the Asian Monetary Fund for the European Monetary Fund, CEPS Policy Brief No. 208, April 2010, CEPS Policy Brief.

<sup>108</sup> Batunanggar, S., Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries, p.29, The SEACEN Centre, July 2008, available online at [http://www.seacen.org/GUI/pdf/publications/research\\_proj/2008/rp73/rp73\\_complete.pdf](http://www.seacen.org/GUI/pdf/publications/research_proj/2008/rp73/rp73_complete.pdf)

<sup>109</sup> Ibid.

<sup>110</sup> Rajoo, U., Problem Bank Identification, Intervention and Resolution in Malaysia, SEACEN Paper, 2008

Prior to the AFC, Malaysia did not have a Deposit Guarantee Scheme in place, as that only came into being in 2005 when Malaysia established its Malaysian Deposit Insurance Corporation (MDIC) for the first time. (which was inspired and influenced by the Canadian Deposit Insurance Corporation's model). The AFC which began as a currency crisis quickly escalated into a full-blown crisis which severely impaired the domestic economy and affected the ability of the corporate sector to honor its debts obligations –which resulted in the sharp rise of Non-Performing Loans (NPLs) weakening the balance sheets of the banks, and the threat of insolvency loomed in the air.

Henceforth, in July 1998, the government urgently (in a short span of time) initiated a comprehensive infrastructure (the National Economic Recovery Plan (NERP)) to expedite the process of restructuring to banking and corporate sectors to take place. This *ad-hoc* measure was implemented to save the country from the brink of an economic downturn and to revive financial stability and economic recovery. The strategy employed by the NERP involved<sup>111</sup>:

- 1) the setting up of an asset management company (Danaharta),
- 2) the setting up of a bank recapitalisation agency (Danamodal); and
- 3) the establishment of a Committee to restructure corporate debt (the Corporate Debt Restructuring Committee (CDRC)) which acts like a mediator between debtor and creditor to workout an orderly solution.

The Malaysian experience in dealing with problem bank resolutions are today institutionalised in the form of the current MDIC. This idea of establishing this insurance is to **represent a financial safety net for the promotion of financial stability**. However this is arguable as the element of 'insurance' may invite the element of moral hazard as banks may think it will always be buffered by the pool of funds, and hence, unafraid of failure.

If a bank's viability appears to be doubtful, Bank Negara Malaysia (BNM) (the central bank as the lead authority)<sup>112</sup> must consider and prepare to implement 'bank-failure-contingency' scenarios. As BNM is also the responsible authority for supervision, it is also expected to supervise the resolution of critically problematic banks vis-à-vis rehabilitation or orderly resolution management. Once BNM passes the baton to the MDIC, it can use its extensive resolution powers including asset-management powers allowing for the institution to purchase, appoint receivers, or even assume control of the bank to tackle the problem.

The AFC which hit Malaysia in an unanticipated manner taught the Malaysians a few valuable lessons and resulted in the implementation of several important initiatives and measures that would strengthen the

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<sup>111</sup> Conference on Insolvency Systems in Asia: An efficiency Perspective, presented by C. Rajandram in Sydney, Australia, November 1999

<sup>112</sup> In Malaysia, Bank Negara Malaysia (BNM) is statutorily mandated to determine monetary policy, issue licenses, regulation, and carry out supervision on commercial banking institutions, insurance companies and development financial institutions.

resilience of the financial system as a whole. This includes bank restructuring strategies such as the removal of existing owners from insolvent institutions, encouragement of new private capital contributions, and liberalisation of foreign ownership rules. At this crucial point in time, Malaysia also strengthened its regional corporation ties with its neighbouring countries<sup>113</sup>.

However, it is only so much that lessons can be learnt from the East-Asian perspective, as it is acknowledged that the European integration is the first of its kind, which makes it incomparable with any other regional experiences. The only lesson that can be derived from the experiences is the need and urgency to have in place the appropriate legal framework in order to deal with banking resolution in an expeditious manner.

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## Concluding remarks

*“Circumstances are beyond human control, but our conduct is in our own power”* Benjamin Disraeli

The crisis presents the EU with an opportunity to tackle a future crisis of such dimensions. Unlike the rest of the world, the EU have a depth of integration in its banking business and legal framework at the European level which can allow Europe to further integrate and deepen its solidarity ties. This, however, maybe a blessing or curse both at the same time for the EU, because if the EU does not resolve to further integrate in its banking sector vis-à-vis regulation, supervision, and resolution, Europe is indicating a move away from deepening its ties. In an era where the EU has seen a sudden jolt of increase in its membership, and it is widening its membership as this paper is written, a move away from integration will only make the EU **‘widening, without deepening’**.

Europe has to move towards deeper integration and progress in the internal market, and to do so, policies should be focused towards a way forward **for the single internal market**. During the crisis, several Member States had to resort to its own state aid to rescue banks. Coupled with this, we witnessed several austerity measures being exercised, (as government revenue depletes, spending had to be cut somewhere else), and most unfortunately, led to increase in unemployment. The ‘this too shall pass’ mentality cannot be done with. Even the IMF has challenged the **gradualist assumption** and **argued for more radical reforms** that do **not shy away from institutional changes**. Two problems became very clear when the EU

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<sup>113</sup> When Asia was hit by the AFC, Malaysia was the only odd country left out, as it refused to accept the IMF loan package, and instead relied more on loans from Japan. Similarly, when the crisis first started in Thailand (when it was hit by a capital accounts crisis as a result of globalisation), it was the neighbouring countries and Australia that agreed to assist Thailand. The United States and European countries did not participate in this financial support package. This reality made those countries acutely aware that regional cooperation was critical in order to protect themselves from future financial crises. See more in Tadahiro Asami, Chiang Mai Initiative as the Foundation of Financial Stability in East Asia, IIMA March 1, 2005, available online at <http://www.aseansec.org/17905.pdf>

had to wrestle with the complexity of the crisis – effective resolution was hampered by **limited information** and **limited tools** to address systemic and cross-border entities<sup>114</sup>. A change should be directed towards addressing these problems, and it is argued in this paper that this can be best achieved through an EU legal framework that can be consistently applied by all its Member States.

Schoenmaker writes that after the financial crisis, some cross-border banks have come back to where they originally came from<sup>115</sup> – which means **banks are acting more cautiously and nationalistic than ever**. This is not the right response to the crisis. Instead, this only leads to disintegration of the internal market which have the capability of hampering Europe's competition with Asia and weakening of the banks. Policymakers are now at the frontline of deciding the way ahead for Europe where they must now pave the way to facilitate a come-back to move away from nationalistic measures, dividing the EU. What it decides to do or not will have a bearing on how banks; investors; market players, depositors and consumers behave in the market. It is clear that we need a solid and clear resolution framework in Europe.

However, one should not rely solely on the formal pan-European framework. It is inadequate for us to merely propose and enact such a framework. More focus and effort is also needed to study on how this framework can be made feasible and operationable across the EU<sup>116</sup>. In order for legal rules to be truly effective, it has to be shaped to be operable and most importantly, not remain static, and allow it to be dynamic as and when amendments and adjustments need to be made to the framework. Lastly, whilst it is important to study the practical concerns, it is much more important to examine later –on how the formal rules are effectively applied, and how this is reflected in the implementation of the SRR in times of banking resolution periods. Where will crisis hit us from in future? Should Europe develop an econometric model for stress-testing the workability of such a framework? In the words of Niels Bohr, prediction is very difficult, especially about the future and it is certainly not my intention to make estimations. **However, being prepared is important as each crisis is a surprise for which there is no tailor-made script**<sup>117</sup>.

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<sup>114</sup> As a result of these problems, governments had to engage rapidly in measures, first with ad-hoc measures and then more systematic measures, in order to stem contagion and restore market stability. Available online at <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1105.pdf>

<sup>115</sup> i.e. With the demise of Fortis, cross-border penetration from EU countries fell back from 16 percent to 7 percent in the Netherlands. See more in Schoenmaker, D, *The European Banking Landscape After the Crisis* (April 27, 2011). DSF Policy Paper No. 12. Available at SSRN: <http://ssrn.com/abstract=1824307> or <http://dx.doi.org/10.2139/ssrn.1824307>

<sup>116</sup> It is widely accepted in legal theory of comparative law that legal rules are not purely abstract normative instruments, but should always be seen as they operate within their specific legal, economic and sociological environment.

<sup>117</sup> Quote from a CEPS research paper

## **Quo Vadis, Europe? Political Leadership and Communication key to More Europe**

*“The crisis is not over because we have only been addressing the symptoms and only with half measures. EU leaders may well repeat to each other that the worst of the crisis is over but they should take a reality check. Stocks are falling across Europe and Spanish bond yields are on the rise again. Most of the measures taken so far are showing once again their short term nature, including the fake firewall”*  
Guy Verhofstadt, Member of the European Parliament

The worst period of crisis is over, but this is not the end to problems, as the crisis is not over yet. The crisis showed that the presence of systemically important banks cannot be overlooked, as we have also witnessed that cross-border EU banks which are so highly integrated at the EU level has gotten far too complex, too intertwined that we need to find a counterbalance to prevent a domino effect of a chain of failure of one bank contaminating and affecting an entire national, or even global banks.

However, as explained above, before jumping into an EU bandwagon for crisis management, **special resolution regimes must be addressed first at national levels**, as is exemplified by the UK and German government thus far. In this regard, the UK has set out an example for the rest of Europe, in identifying clearly the objectives of special resolution and explicitly addresses the protection of property rights and also commits a chapter on compensation. However, neither the UK nor the German examples offer a solution to cross-border context. (as we cannot force Member States to be ‘inspired’ on its own accord to amend its laws to include SRR, as desirable as it is).

At the end of the day, the answer of the very essence of cross-border problems may lie only in a quantum leap to a comprehensive effort at the European cross-border level in which **such a scale of reform requires political leadership**.

### **The current climate in the political scene –Two Speed Europe (?)**

Much greater fiscal union, at least in the eurozone, is seen by some as either the natural next step in European integration or as a necessary solution to the 2010 European sovereign debt crisis. Eventhough most EU Member States participate in the EMU, based on the common euro currency, fiscal-related issues such as taxation still remain at the national level.

Decision-making relating to tax and fiscal issues are traditionally thought to be central to national prerogative –and as such, any decisions in the EU relating to those issues must be unanimously approved by the MS. Thus, when the UK and the Czech Republic exercised its veto not to join the fiscal compact at the European summit in Brussels early this year, the 25 other Member States carried on with “enhanced-cooperation<sup>118</sup>”, a new creature of the Lisbon Treaty. Under the framework of an “enhanced cooperation”,

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<sup>118</sup> Enhanced cooperation allows those countries of the Union that wish to continue to work more closely together to do so, while respecting the legal framework of the Union. The Member States concerned can thus move forward at different speeds and/or towards different goals.

only the participating Member State would assume the obligations of putting in place strict limits on respective Member State's power of spending and borrowing, which will be enforced by the Commission and the Court. However, as we have seen after the crisis, a monetary union without a fiscal union would be an incomplete economic integration. Hence, the decision to continue under the guise of another framework, instead of the EU as a whole –only reflect a division in the paths taken by the Member State, between those participating Member State and the non-participating Member State, giving a divided image of the EU, a 'two-speed' Europe. It is clear that without the full commitment of the UK, the possibility of effectively applying the Financial Transaction Tax to raise funds from private financing will not be fully realised, as the City of London<sup>119</sup> is one of the biggest financial hubs in the world and it refuses to cooperate.

For the financial services to work, an effective political arrangement can only work optimally if the UK collaborates and not exercise its veto. In the short term space, Europe has no choice but to continue moving on with the agenda vis-à-vis a coalition only amongst the 'willing Member State'. For the timebeing, the UK may wish to stay 'opted-out', but this has large consequences in creating a divided internal market for banking, and has the potential harm of creating disintegration in the cross-border banking arena.

That was early this year in the European summit. For the most recent indication of political direction, we turn to the recent meeting on May 4, where the EU once again came into limelight this time –when the EU finance ministers **failed to reach an agreement to toughen bank capital rules** in the face of British resistance and now aim for a deal at their next meeting on May 15.

The final political end-game **should remain focused not merely on maintaining the Internal Market on Financial Services, but to deepen the integration** further. Efforts must be channeled towards enabling the financial system to carry on its job – supporting the real economy and thus foster economic growth<sup>120</sup> which is much needed in Europe at this rate. By contrast, a different treatment of the euro-area in financial services would force a split in the EU's financial system. This may end up in an internationally competitive financial centre outside the "European" framework and a more traditional financial system inside the "European" framework<sup>121</sup>. This is clearly a lose-lose situation: London may lose some business from its European neighbours, while the remaining European countries face a less dynamic financial system<sup>122</sup>.

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<sup>119</sup> Like it or not, there is a huge presence of cross-border banks in the UK, such as Deutsche Banks that have one third of its operations and business in London.

<sup>120</sup> Goodhart, C., and Schoemaker, D., The political endgame for the euro crisis, Vox Research Paper, 14 December 2011, available online at <http://www.voxeu.org/index.php?q=node/7420>

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

Notably, efforts to deepen financial cooperation in Asia did not suffer a setback in the 2008/9 financial crisis, while European cooperation suffered a setback<sup>123</sup>. As Asian policymakers have remarkably continued and expanded their cooperation<sup>124</sup>, the more imminent the need for EU policymakers to integrate deeper and closer for the best outcomes and to continue towards the dreams of the EU's forefounding fathers. The answer lies in **deepening political integration** at this stage. Mere modest reforms that maintain a mere pretense of progress but continue business as usual are no longer sufficient<sup>125</sup>. Europe needs to take a bold step forward and fundamentally overhaul its financial stability architecture that would allow the EU to reap from the benefits of financial integration and protects them by an equally integrated EU crisis management and resolution framework. Having identified the potential pros and cons of the desirabilities as well as the feasibilities for such crisis management would help towards better understanding the necessity of having **'more Europe, and not less of Europe'**.

As a quick recap of the earlier discussion – we cannot continue with the current model of the internal market in banking –where legislation allows cross-border banking at the European level, while supervision and resolution remains primarily in the hands of Member States, with minimum harmonisation, or as termed by Schoenmaker, **'loose coordination'**. Besides, the home –host country principle divide of responsibility is not sustainable to shoulder such large cross-border banks in Europe should a crisis of this nature unfolds again. The crisis had demonstrated how authorities of Member States were more driven by its nationalistic agenda rather than a **European-wide interest** agenda. In this line of thought, the only way to settle this is **to align banking supervision and resolution** that should be put European cross-border banks on a **level playing field**.

***"Finally, history teaches us that financial crises are often repeated, though no two crises are alike. They are also difficult to predict and, thus, to avoid. Hence, both crisis prevention and crisis resolution are crucial for ensuring the resilience of the financial system. The key is to 'be well prepared' – to always expect the unexpected.***<sup>126</sup>

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<sup>123</sup> Heribert Dieter, Monetary and financial cooperation in Asia, p.247, Global Financial Integration Thirty Years On, available online at <http://www2.warwick.ac.uk/fac/soc/garnet/workingpapers/1607.pdf>

<sup>124</sup> Creation of a European Monetary Fund to deal more effectively with this type of situation is gaining support. On the Far East, the Asian Monetary Fund is on its way, a successor of the Chiang Mai Initiative Multilateralisation (CMIM)<sup>124</sup> with the aim of providing short-term liquidity to a partner country in serious financial distress. The CMIM is a commitment with no actual submission of money, and therefore not a physical establishment like an ordinary fund.

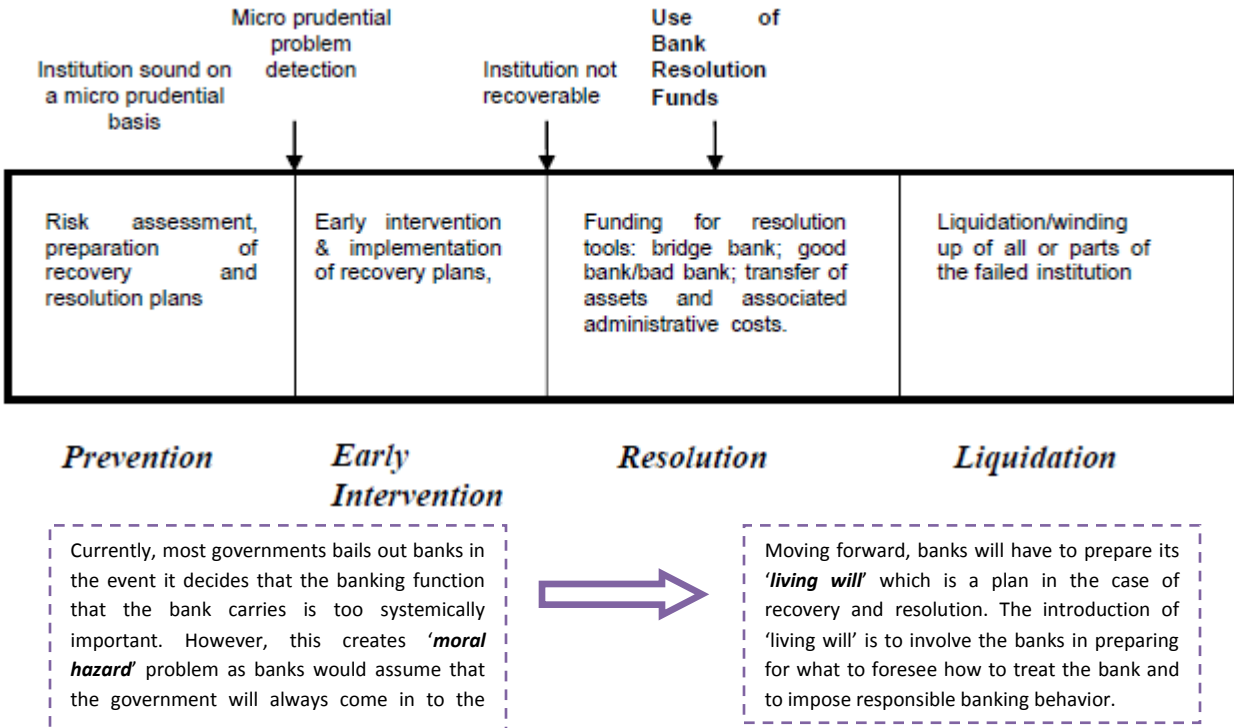
<sup>125</sup> Banking in Europe, Europe needs authority to deal with failing banks, says IMF Chief, IMF Survey Online, 19 March 2010, available online at <http://www.imf.org/external/pubs/ft/survey/so/2010/new031910a.htm>

<sup>126</sup> Batunanggar, S., in Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries, available online at [http://www.seacen.org/GUI/pdf/publications/research\\_proj/2008/rp73/rp73\\_complete.pdf](http://www.seacen.org/GUI/pdf/publications/research_proj/2008/rp73/rp73_complete.pdf)



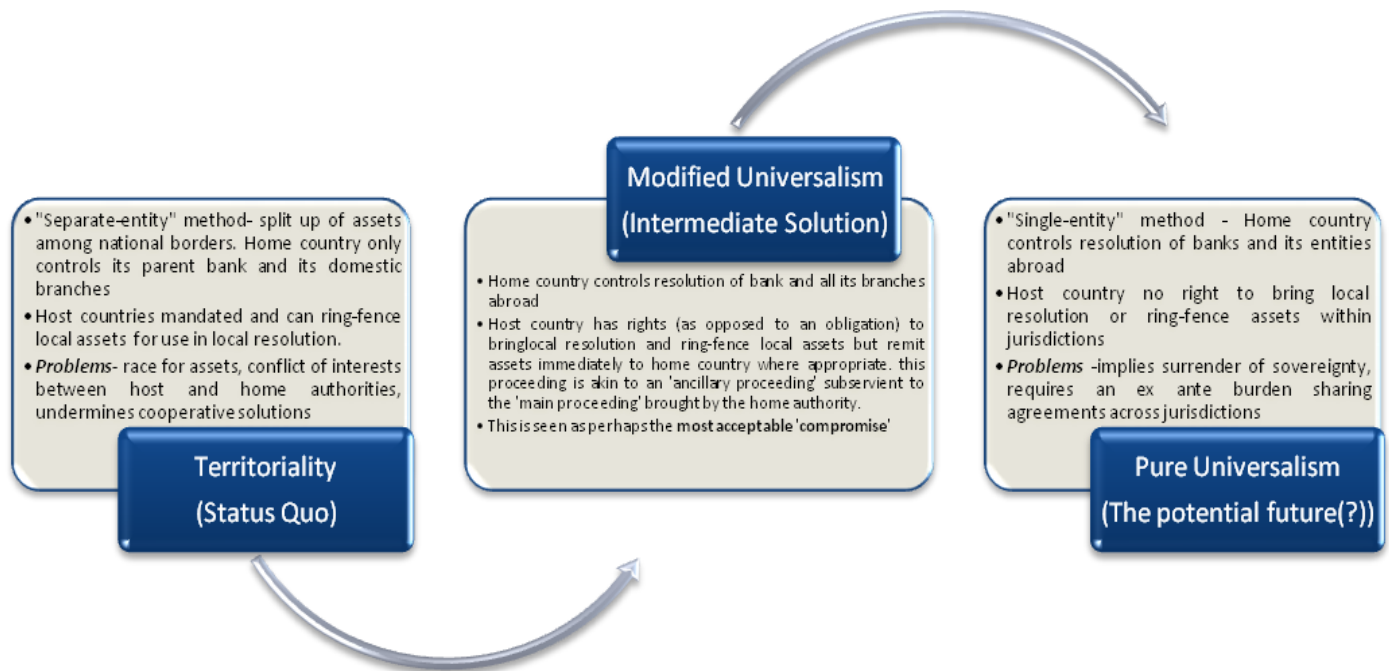
## Annex

### Annex 1 Where the resolution framework fits in the big picture



Source of illustration : the Commission

## Annex 2 Illustration of the different integration models



## Annex 3 Epilogue: Flash to the present

The Commission is addressing the problem posed by systemically important financial institutions with the goal of ensuring that these firms can be allowed to fail without threatening the health of financial stability or impose unnecessary burden on taxpayers. In relation to this, the Commission recently on 22 February 2012, appointed a High-level Expert Group on the proposal to reform the structure of the EU banking sector. In this regard, the Group has been mandated to consider in depth whether there is a need for structural reforms of the EU banking sector, and to make relevant and appropriate proposals in line with the aim of restoration of confidence in the system as a whole by improving the health of the banks. Amongst others, the Group will also look at resolution aspect, however, how the final report will look like and what it seeks to propose- remains to be seen, at least till July 2012.

### Annex 4 The relevant EU law and the possible changes

	Going concern supervision/Crisis prevention	↔ Scope of the Crisis Management Communication ↔		
		Early intervention	Bank resolution	Insolvency framework
Current situation	Capital Requirements Directive 3 pillar approach (CRD) Colleges National authorities Committee of European Banking Supervisors (CEBS) Stress testing	CRD (Art. 130 + 136) Colleges Emergency Liquidity Assistance by National Central Banks (NCBs) 2008 MoU	2008 MoU – determines who (e.g. finance ministries, NCBs) coordinates actions with other competent authorities (coordination via cross-border stability groups)	Winding up Directive: Winding-up of a cross-border branches takes place under insolvency procedures of country of parent bank.  Winding up of cross-border subsidiaries takes place according to procedures where subsidiary is licensed.
Possible changes for consideration	Establish European Systemic Risk Board (ESRB) and European Banking Authority (EBA) Leverage ratio Management of risks (remuneration structures) Quantity and Quality of capital Enhanced capital requirements Supervision of liquidity Preparation of Wind-down plans	European Banking Authority New powers towards bank management Joint assessment framework Restoration plans Asset transferability framework Expanded common tools for supervisors (CEBS) Clarify home/host branch supervision (Art. 33 CRD)	New bank resolution tools New framework for cooperation Broader changes to the legal framework in support of new bank resolution tools Mechanisms to finance cross-border resolutions (including possible role for DGS) Application of wind-down plans	Facilitate integrated winding up of a group: – Coordination framework for insolvency proceedings – Lead insolvency administrator – Integrated resolution by a single authority – Asset transfers under post commencement financing

Source of table : the Commission<sup>127</sup>

### Annex 5 Resolution Approaches, Restructuring and Moral Hazard<sup>128</sup>

Type of Resolution	Costs Borne by	Implications for Moral Hazard	Comments
<b>Liquidation</b> of the whole bank and insured depositors paid out	Shareholders, uninsured creditors and the Deposit Guarantee Fund (DGF)	No moral hazard	This tool has been rarely used in recent (and in past) crises) and only for small banks due to concerns

<sup>127</sup> Source of table: <http://www.asymptotix.eu/content/eu-debt-office-authority-bank-resolution-funds-european-financial-stabilisation-mechanism>

<sup>128</sup> Crisis Management and Resolution: Early Lessons from the Financial Crisis, Prepared by Stijn Claessens, Ceyla Pazarbasioglu, Luc Laeven, Marc Dobler, Fabian Valencia, Oana Nedelcescu, and Katharine Seal, IMF, March 2011, available online at <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1105.pdf>

Type of Resolution	Costs Borne by	Implications for Moral Hazard	Comments
<p><b>Good/bad bank split</b> of the firm into liabilities which are protected to prevent contagion/ preserve financial stability plus good assets; and other liabilities and ‘bad assets.’ The former are sold to another firm and the latter go into liquidation</p>	<p>Shareholders, creditors, the DGF, and the authorities if significant wider liabilities are rescued</p>	<p>To the extent that all (or most) uninsured creditors are left behind in the liquidation, the effect on moral hazard will be zero (or low). Shareholders and creditors left behind will receive what they would have earned in whole company liquidation (typically zero for shareholders). But if significant noninsured creditors are rescued, e.g. wholesale deposits, then moral hazard will rise.</p>	<p>about contagion. This transaction is called a purchase and assumption in the United States. The rescued liabilities and the good assets are sold to a third party perhaps via the intermediate step of a bridge bank. This tool has mainly been used for small banks in the recent crisis with some exceptions.</p>
<p><b>Recapitalization</b> by the government / <b>nationalization</b> of a failing bank</p>	<p>Shareholders and the authorities. It is very unlikely that the creditors incur losses, unless the recapitalization fails and the firm is subsequently put into insolvency.</p>	<p>Creditors are bailed out, creating significant moral hazard. If shareholders are only diluted or receive compensation this will further exacerbate moral hazard.</p>	<p>This tool has been used extensively in the recent crisis (as in past crises).</p>
<p><b>Open bank assistance</b> which allows a failed firm to survive under original ownership. Assistance can take the form of: -Subsidized funding -Subsidized asset guarantees or asset purchases -Liability guarantees</p>	<p>The authorities and shareholders depending upon the terms of the assistance. E.g. if assets are purchased at less than book value, or asset guarantees include a first loss piece for the firm, shareholders incur losses.</p>	<p>Significant moral hazard. Creditors will only incur losses if not guaranteed and the firm is subsequently placed into liquidation. Worse still, shareholders remain owners of the firm and may not face significant losses depending upon the degree of subsidy in the government assistance.</p>	<p>These measures have been extensively deployed in the recent crisis. Typically these measures have been deployed in conjunction with recapitalization by the authorities.</p>

Source of table: IMF Staff Discussion Note

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