DE GRUYTER

2025 · VOLUME 22 · ISSUE 3
ISSN 1613-2548 · e-ISSN 1613-2556

EUROPEAN COMPANY AND FINANCIAL LAW REVIEW

ONDERNEMINGSRECHT · RDS · RPS-TRV · REV. SOCIÉTÉS · RIV. SOCIETÀ · SZW · ZGR

ECFR

CONTENTS

Irene Mecatti
Introduction
309

Irene Mecatti
Early Intervention Measures and Shareholders' Rights
311

Christos V. Gortsos
Early Intervention Measures (EIMs): The EU Framework in Force and Its Proposed Amendment
340

Marco Lamandini and Vito Bevivino
Proportionality in Crisis Prevention and Resolution Planning: Institutional Protection Schemes and Banking
364

Vito Bevivino
Proportionality of MREL for Transfer Strategies in the Context of the CMDI. Initial Considerations
379

Concetta Brescia Morra
Deposit Guarantee Schemes: The Key Tool for Avoiding a Disorderly Exit from the Market for Small and Medium-Sized Banks in Difficulty
389

Cristiano Martinez
Deposit Guarantee Schemes and Bank Crises: Some Considerations on Proportionality
414

José Luis Colino Mediavilla
EU Regulatory Proposal on the Treatment of Liabilities of Uncertain Existence, Timing or Amount in a Bail-In Scenario
431

DE G

BRUYLANT · DOTT. A. GIUFFRÈ EDITORE · EDITIONS DALLOZ · KLUWER · SCHULTHESS · THOMSON ARANZADI

www.degruyterbrill.com/ecfr

EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR)
ESTABLISHED AND DIRECTED BY THE EDITORS OF
ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR)

PUBLISHED IN COOPERATION WITH
Ondernemingsrecht en Financieel recht
Revista de Derecho de Sociedades (RdS)
Revue des sociétés (Rev. soc.)
Revue pratique des sociétés – Tijdschrift voor rechtspersoon en vennootschap (RPS-TRV)
Rivista delle società (Riv. soc.)
Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW)

CHIEF MANAGEMENT
Pierre-Henri Conac, Université du Luxembourg
Christoph Teichmann, Julius-Maximilians-Universität Würzburg

MANAGERIAL BOARD
Claartje Bulten, Radboud Universiteit Nijmegen
Sofie Cools, Katholieke Universiteit Leuven
Holger Fleischer, Max Planck Institute for Comparative and International Private Law, Hamburg
Jesper Lau Hansen, Københavns Universitet
Hanno Merkt, Albert-Ludwigs-Universität Freiburg
Andrés Recalde Castells, Universidad Autónoma de Madrid
Edmund Schuster, London School of Economics and Political Science
Marco Ventoruzzo, Università commerciale Luigi Bocconi, Milano

ADVISORY BOARD
Paul Davies, University of Oxford
Yves De Cordt, Université catholique de Louvain
José M. Embid Irujo, Universidad de Valencia
Luis Fernández de la Gándara, Universidad de Alicante
Guido Ferrarini, Università di Genova
Peter Hommelhoff, Ruprecht-Karls-Universität Heidelberg
Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law, Hamburg
Susanne Kalss, Wirtschaftsuniversität Wien
Maarten J. Kroeze, Hoge Raad der Nederlanden / Erasmus Universiteit Rotterdam
Isabelle Urbain-Parleani, Université Paris V (René Descartes)
Hans Caspar von der Crone, Universität Zürich
Marieke Wyckaert, Katholieke Universiteit Leuven

SUBMISSION OF MANUSCRIPTS Christoph Teichmann, Julius-Maximilians-Universität Würzburg, Domerschulstraße 16, 97070 Würzburg, Germany, Fax: +49 (0) 931 31 835590, Email: ecfr@jura.uni-wuerzburg.de

PUBLISHER Walter de Gruyter GmbH, Berlin/Boston, Genthiner Straße 13, 10785 Berlin, Germany

JOURNAL COORDINATOR Jana Kuchta, De Gruyter, Genthiner Straße 13, 10785 Berlin, Germany, Tel.: +49 (0)30 260 05 – 228, Fax: +49 (0)30 260 05 – 250, Email: jana.kuchta@degruyterbrill.com

All rights reserved, including those of translation into foreign languages. No part of this journal may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage or retrieval system, without permission in writing from the publisher.

ISSN 1613-2548 · e-ISSN 1613-2556

All information regarding notes for contributors, subscriptions, Open access, back volumes and orders is available online at www.degruyterbrill.com/ecfr.

© 2025 Walter de Gruyter GmbH, Berlin/Boston, Germany

TYPESETTING jürgen ullrich typosatz, Nördlingen

PRINTING Franz X. Stückle Druck und Verlag e.K., Ettenheim

Questions about General Product Safety Regulation: productsafety@degruyterbrill.com

Proportionality in Crisis Prevention and Resolution Planning: Institutional Protection Schemes and Banking Groups. Some Preliminary Considerations

by

Marco Lamandini*
and
Vito Bevivino**

Although institutional protection schemes (IPS) and banking groups are different forms of legal networks, the reasons for maintaining excessive differences in banking legislation in favor of IPS do not seem entirely justified, or at least could be reconsidered in light of the principle of proportionality.

Table of Contents ECFR 2025, 364–378

1. IPSs and banking groups as networks 365
2. IPS as a (negative) condition for the adoption of the resolution 366
3. The normative framework for IPSs and banking groups: the need for further harmonization 367
4. The MREL setting and its methodological challenges 370
5. Implications for group-wide crisis prevention and resolution planning 374

* Full Professor of Law, Alma Mater Studiorum Università degli Studi di Bologna. Member of the SRB Appeal Panel. Opinions are expressed in personal capacity only and do not necessarily reflect those of the agency. All usual disclaimers apply.

** Assistant Professor of Law, Università degli Studi di Siena, DISAG – Dipartimento di studi aziendalistici e giuridici.

Note: The paper is fully co-authored. However, paras. 1 and 2 should be credited to Vito Bevivino, and paras 3 to 5 to Marco Lamandini and Vito Bevivino. A preliminary version of this paper was presented by Marco Lamandini at the International Workshop 'Proportionality in Bank Crises: The Case of Retail Banks', Siena 17–18 October 2024 – Certosa di Pontignano.

1. IPSs and banking groups as networks

Institutional protection schemes (IPSs) and banking groups are different forms of legal networks[1]. Credit institutions that are affiliated to an IPS or a group are entities connected in a common scheme; joining an IPS, or a banking group, has however a different meaning. As well as different reasons. Also, their legal link is different. For IPSs, it is solely an agreement between independent entities; for banking groups control, which is the power of a parent institution over one or more dependent subsidiaries and an expression of the organisation of the enterprise[2], although it may well be that also group affiliation is based or reinforced by contractual arrangements[3]. That's why, in the end, the term network is more suitable to characterise a IPS rather than a banking group[4].

To better understand the implications for bank resolution preparation being an IPS or a banking group, it is worth considering first the regulation that addresses both: the Capital Requirement Regulation No 575/2023 as amended (hereinafter "CRR"). To the effect of CRR banking groups and IPSs show some similarities. Both structurally refer to a (relatively closed) set of entities; however, they also present differences, because only the group is considered a unitary organised enterprise based on control[5], whereas the credit institutions associated with an IPS keep their autonomous entrepreneurial identity[6].

1 On IPS as network compare *Rainer Haselmann/Jan Pieter Krahnen/Tobias H. Tröger/ Mark Wahrenburg,* Institutional Protection Schemes: What are their differences, strengths, weaknesses, and track records?, IPOL Study PE 699.527 – April 2022, p. 9, https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/699527/IPOL_IDA(2022)699527_EN.pdf (last accessed: 22 July 2025); more broadly see *Günter Teubner*, Networks as Connected Contracts (eds. H Collins; tr. M. Everson), (Hart Publishing Ltd 2011 *passim*); *Christian A. Witting*, Liability of Corporate Groups and Networks (Cambridge University Press 2018), passim, p. 172 f. On network theory and financial regulation implications, *Luca Enriques/Alessandro Romano/Thom Wetzer*, "Network-Sensitive Financial Regulation" The Journal of Corporation Law, 45 2020, 351–397, 361 seqq.

2 *Linn Anker-Sørensen*, Corporate Groups and Shadow Business Practice (Cambridge University Press 2022), 75 et seqq.., 130 et seqq..; *Brian R. Cheffins*, Corporate Ownership and Control: British Business Transformed (Oxford University Press, 2008), 24.

3 On intra-group guarantees, in the Italian literature compare *Massimo Miola,* Le garanzie infragruppo (Jovene 1993), 1 et seqq.., 17 et seqq.

4 See *Witting* (fn. 1), 172 et seq.., 159 et seqq.., 174 et seqq..; *W. Mark Fruin*, Business Groups and Interfirm Networks, in: Geoffrey Jones and Jonathan Zeitlin (eds.), The Oxford Handbook of Business History, 2007 (Oxford University Press), p. 256 et seqq.

5 Articles 4(1)(138) CRR, 4(1)(132) CRR, 2(1)(83c) BRRD ; *Moritz Renner*, Bankkonzernrecht, 2019 (Mohr Siebeck), p. 143 et seqq.; *Katja Lagenbucher*, „Bausteine eines Bankengesellschaftsrecht. Zur Stellung des Aufsichtsrats in Finanzinstituten", ZHR, 2012, 652–668, 663.

6 See Article 113 (7), CRR.

2. *IPS as a (negative) condition for the adoption of the resolution*

In a going concern, pre-insolvency context, both groups and IPSs can be equally regarded as the perimeter of a resource transfer. Both identify the institutions that are under a common umbrella through a pre-arranged set of rules for the transfer of resources to avoid the insolvency, or illiquidity, of one of the member institutions[7]. However, in the resolution context, whilst groups are addressed at consolidated level, IPS are not, and they do work solely as a negative condition for the adoption of the resolution decision or, in the preparatory and MREL context, the public interest assessment decision when it needs to be established whether the institution is failing or likely to fail, or the resolution is in the public interest[8]. In other terms, the intervention of an IPS may work as a private sector alternative (and preferable) measure to resolution, the feasibility of which provides a reasonable prospect of avoiding the failure of the institution within a reasonable timeframe.

7 *Tobias H. Tröger*, "Why MREL won't help much: minimum requirements for bail-in capital as an insufficient remedy for defunct private sector involvement under the European bank resolution framework" Journal of Banking Regulation 21 (2020), 64–81, 65; Io*annis G. Asimakopoulos/Tobias H. Tröger*, Reform of the CMDI Framework – Driving Off With the Brakes On, European Company and Financial Law Review 2024, 531 et seqq., 534.

8 See Article 32(1)(b) BRRD. Compare the European Commission's Proposal to amend Article 32 (1)(b) and (2)(3) BRRD3 with that of the European Parliament and the Council of the European Union. The same for Article 18 (1)(b) SRMR3. See EC Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action, Strasbourg, 18.4.2023 COM(2023) 227 final 2023/0112 (COD), at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0227 (last accessed: 22 July 2025); EC Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding of resolution action, Strasbourg, 18.4.2023, COM(2023) 226 final, 2023/0111 (COD), at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52023PC0226 (last accessed: 22 July 2025).

3. The normative framework for IPSs and banking groups: the need for further harmonization

In the supervisory context, the most visible similarity between IPSs and banking groups is that their cross exposures (those among credit institutions associated with the same IPS, or by being part of the banking group, as set forth in Article 4(1)(138) CRR) are subject to the same risk-weights. There are however many other relevant regulatory differences which pose, in a policy-making perspective, a (quite visible) question of proportionality and equal treatment among these two organisational schemes[9].

From a regulatory perspective a IPS is an affiliation scheme primarily regulated, from a corporate law perspective, by national laws, aimed at establishing (mainly on a contractual basis) a common (risk) management, a common solvency and liquidity monitoring and a common guarantee for liabilities of the affiliated institutions. The different national legal regimes applicable to such a scheme have no unified structure; for instance, some national laws allow non-financial and even non-profit entities to be affiliated.

When the (fairly different, national) schemes satisfy some specific conditions provided under Article 10(1) CRR[10], the central body becomes subject to prudential requirements on a consolidated basis (see Article 11(5) CRR). In that case, the affiliated institutions (and, under certain additional conditions, the same central body) can be granted a waiver of their prudential requirements on an individual basis.

As noted, an IPS also operates as a scheme to safeguard the solvency and liquidity of its members (notably, the IPS displays a role of *ex-ante* risk monitoring for the affiliated members and of *ex- post* support in crisis management to prevent the failure of the affiliated members) within the meaning of Article 113(7) of the CRR. For this purpose, dedicated funds are prepositioned through *ex-ante* contributions of the members, which can be further complemented (if need be) by *ex-post* additional calls. These funds are established and managed centrally. IPS may also be recognised as a deposit guarantee scheme.

9 Compare *Filippo Ippolito/Peter Hope/Reinder Van Dijk*, Institutional Protection Schemes in the Banking Union, IPOL Study PE 699.514 – April 2022, 12, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/699514/IPOL_STU(2022)699514_EN.pdf (last accessed: 22 July 2025).

10 Namely: (a) the commitments of the central body and affiliated institutions are joint and several liabilities or the commitments of its affiliated institutions are entirely guaranteed by the central body; (b) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions; and (c) the management of the central body is empowered to issue instructions to the management of the affiliated institutions.

In such case, in the event of failure, the IPS uses the means of the recognised IPS fund to ensure that covered deposits are satisfied. However, the primary objective of an IPS is to prevent failure and to protect its member institutions, in particular to safeguard their liquidity and solvency by supporting timely recovery actions. To do this, the IPS may, in accordance with its rules, access the means of the recognised IPS fund. The means of the IPS are not public funds.

The prudential treatment of an IPS and its affiliated banks is set out Article 113 (7) CRR (and the other provisions of the CRR that refer to it). An IPS and its affiliated members present significant intra-network exposures, yet, in contrast to the central body, they are not treated in the prudential (and resolution) context as a consolidated banking group.[11] Thus, affiliated members are considered on a stand-alone basis *e.g.,* for (i) G-SII/O-SII designation (which in the end precludes such a designation, even where the entire network, if considered on a consolidated basis, would qualify for such designation), (ii) leverage buffers (pursuant to Article 92(1a) CRR), macroprudential buffers (pursuant to Article 131 CRD) and TLAC/MREL requirements, which are applied to individual institutions only, (iii) EBA stress testing and ECB oversight, including Pillar 2 SREP.

Conversely, however, the members of an IPS enjoy some of the privileges that are typical for consolidated banking groups, *e.g.,* (i) they do not need to deduct own funds holdings in other members affiliated to the same IPS, provided that IPS members meet on an extended aggregated basis, the own funds and leverage requirements pursuant to Article 49(3) CRR, (ii) they are exempted from minorities deduction under Article 84 (6) CRR and may recognise any minority interest arising within the cross-guarantee scheme in full; (iii) with the exception of CET1, AT1 and T2 capital holdings, a 0% risk weight applies to exposures to other members affiliated to the same IPS pursuant to Article 113 (7) CRR, possibly by means of the permanent partial use under Article 150(1a) CRR; (iv) they can calculate the service component of the business indicator for operational risk net of any income received from, or expenses paid to, institutions that are members of the same IPS; (v) large exposure limits do not apply to exposures to other members of the IPS pursuant to Article 400(1)(f) CRR; (vi) they enjoy some reliefs in the calculation of the LCR and NSFR; and

11 Harry Huizinga, *Institutional Protection Schemes – What are their differences, strengths, weaknesses, and track records?,* IPOL Study, PE 699.511 – March 2022, https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/699511/IPOL_IDA(2022)699511_EN.pdf (last accessed: 22 July 2025), p. 10; *Haselmann/Krahnen/Tröger/Wahrenburg* (fn. 1), p. 14 seqq.

(vii) the exposures that have been assigned a 0% risk weight are excluded from the total exposure measure for the leverage calculation[12].

The same approach applies to the resolution context, where affiliation to the IPS is considered only an element to be taken into account and allows for special reliefs in particular circumstances. Indeed, the specificities of the IPS translate into the resolution planning context[13], because MREL requirements apply on a stand-alone basis for members of the IPS, and yet in the assessment of whether resolution or liquidation should be the preferred crisis management strategy, a loaded question is how the public interest assessment of the failure of one or more banks affiliated to the IPS should take account of the role of the IPS, first, in preventing the failure and thus making it less likely, if not impossible and, if the failure nevertheless occurs, in preventing contagion effects to other members of the same IPS[14]. In many jurisdictions, and most notably in Germany, history offers a comforting track record of successful recovery actions promoted and supported in the past by IPS, which have so far prevented insolvency and contagion; yet also many examples of extraordinary fiscal costs

12 With regard to liquidity, the differences between IPSs and banking groups or networks in the prudential regulation of cash outflows and inflows are less pronounced. With respect to outflows related to liabilities other than cash, or retail deposits, in accordance with Article 422(3)(b) and (d) CRR, institutions multiply the liabilities arising from deposits that must be maintained, either in the context of common task sharing within the IPS (which meets the requirements of Article 113(7) CRR) or as a statutory or statutory minimum deposit by another entity that is a member of the same IPS either by the depositor in order to obtain cash clearing and central bank services and where the bank belongs to a network in accordance with legal or statutory provisions. In the context of liquidity inflows (Article 425(4) CRR), which are generally limited to 75% of liquidity outflows, institutions may waive the limit for deposits with other institutions and eligible for Article 113 treatment, both with respect to banking groups (para. 6) and IPS (para. 7). They also exempt the extent of liquidity inflows, relating to any undrawn credit or liquidity facilities and other commitments received, in respect of which, on a case-by-case basis, authorities may grant a higher inflow for either the banking group, the IPS, or the central institution.

13 SRB Appeal Panel, case 3/2024, decision of 30 October 2024, www.srb.europa.eu.

14 This issue, that was reiterated in case 3/2024 above, was first addressed by the SRB Appeal Panel in case 3/2022, which clarified in its decision of 13 February 2023 that, in the context of resolution planning, the existence of the IPS is not such as to make unplausible the assumption that a member of the IPS may fail, nonetheless. The Appeal Panel remitted however the SRB decision considering that the reasoning was insufficient in motivating how the failure of an important member of the IPS in a worst case scenario of system-wide events would credibly trigger contagion effects to the other members of the IPS which the IPS could not properly address via recovery actions and how this microsystemic effects would then translate into a financial stability crisis for Germany. The Board adopted an amended decision, but the issue was taken again to the Appeal Panel in case 3/2024.

in connection with the crisis of Landesbanken (West LB, HSH Nordbank, SachsenLB, LBBW, BayernLB)[15].

In this context, the most critical limitation to the use of those networks comes from the fact that the affiliation's prudential effects are recognised by EU law only if all affiliated members and the affiliation scheme itself (the central body or the IPSM this is however also true for individual capital, liquidity and iMREL requirements within the groups) belong to the same Member State. We surmise that time has come to harmonise the rules applicable to the different networks also on a cross-border basis, with the aim of ensuring that different legal structures are not used to gain access to preferential treatments that are not justified in terms of risk or impact on financial stability. Being subject to the same legal and prudential implications, also on a cross-border basis, supervised entities should be otherwise free to arrange their structure in accordance with their legitimate business strategies.

However, the compromise text of the CMDI recently reached does not seem to respond to these calls for reform.[16].

4. The MREL setting and its methodological challenges

To better clarify this point, we take a pause for thought on the rules concerning the MREL determination for credit institutions. The BRRD, as well as the SRMR[17], require credit institutions to have individually and at consolidated level loss-absorbing (and, if resolution is the crisis management strategy, recapita-

15 In this regard, see *Haselmann/Krahnen/Tröger/Wahrenburg* (fn. 1), p. 23 seqq.

16 See Version for Trilogue on June 25 2025, of Proposal 2023 0111(COD) and of Proposal 2023 0113(COD), where the various attempts to modify the regulatory framework of IPS are compared.

17 See Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (SRMR); and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council. Among other, see *Eddy Wymeersch*, The Single Supervisory Mechanism for Banking Supervision. Institutional Aspects, in *Danny Bush/Guido Ferrarini* (eds), European Banking Union, 2nd ed., 2020, p. 145 seqq.; *Danny Bush*, Governance of the Single Resolution Mechanism, ibid., p. 343 seqq.

lisation capacity), so that losses can be internalised in the event of a crisis, avoiding recourse to public funds[18]. This translates into a so called MREL requirement. The purpose is to enable the application of crisis resolution measures in the event of financial distress. Equity capital and certain types of liabilities (eligible liabilities) must be able to be written down or converted into equity capital. Two aspects are crucial to that end: the quality of the capital, or in other words the legal content of the financial assets taken into account by the framework for that purpose and the economic volume (quantity) of those assets required[19].

The problem is that the MREL determination requires a predictive exercise. And the MREL determination is complex within networks, because the legal framework requires in principle both external MREL (eMREL) and internal MREL (iMREL) and then the *upstream*, *downstream* and *cross-stream* transfer of assets within the network, all resolution-oriented[20].

On top of that, single point of entry resolution strategy, or multiple point of entry may have different implications for the determination of MREL[21].

The MREL is expressed as a percentage of two separate ratios, which must be assessed cumulatively, albeit in parallel (Article 12-bis (2) SRMR). The calculation of MREL must therefore take into account both the percentage resulting from the ratio of MREL to the Total Risk Exposure Amount (MREL-Total Risk Exposure Amount ratio, $MREL_{TREA}$) and the ratio of MREL to the Leverage Ratio Exposure Measure (MREL-Leverage Ratio Exposure Measure, $MREL_{LRE}$). The MREL-TREA is expressed as the percentage resulting from the amount of own funds and eligible liabilities divided by the total amount of risk exposure (Art. 12-bis (2) (a) SRMR). It is therefore calculated using risk as a reference point, by adopting a reference to risk-weighted assets. The MREL-LRE (Art. 12-bis(2)(b) SRMR) is expressed as the percentage resulting from the amount of own funds and eligible liabilities in relation to (divided by) the exposure measure of the leverage ratio (LRE). The LRE is further defined in Articles 429 and 429a CRR and is an unweighted risk measure.

18 See Article 45 BRRD and Article 12 SRMR. *Matthias Haentjens/Ilya Kokorin*, "Bank resolution and national insolvency law: the case of group financing", ZBB, 1/24, 8–15, 14; *Matthias Haentjens*, Arts. 12–12k; Minimum requirements, in: Jens-Hinrich Binder/ Christos C. Gortsos/Klauss Lackhoff/Christoph Ohler (eds.), European Banking Union. Brussels Commentary, 2022, p. 592 seqq.

19 See *Matthias Haentjens*, Arts. 12–12k. Minimum requirements (fn. 18), 596, 693 et seqq..

20 On the different orientation of intra-group financing flows, see. Philip I. Blumberg P., 'Intragroup (Upstream, Cross-Stream, and Downstream) Guarantees under the Uniform Fraudulent Transfer Act' Cardozo Law Review 9 (1987), 685–728.

21 Through the iMREL, losses can then be transferred upstream from non-resolution operating subsidiaries to a parent company, if designated as a resolution entity, or to another group company, designated for the same purpose.

This lends to few words of methodological approach. In fact, this is an area pervaded by the analysis of future scenarios. To ensure financial stability, authorities engage in supervisory, preparatory and preventative actions largely based on forward looking, speculative assumptions and in the resolution/liquidation context, those assumptions are (remote, yet still possible) worst case scenarios.

Although the General Court in *Tatiana Pérez de Guzmán* raised doubts about the applicability of the 'precautionary' principle in the banking sector, noting that Article 191(2) TFEU and existing case-law confine so far that principle to environmental policy and public health,[22] the logic seems to be the same. Upon a context filled with uncertainty and known unknowns, authorities should act when the risk of a 'false negative' clearly outweighs the risk of a 'false positive'; or, to put it simply, where it is better safe than sorry.[23]

Therefore, whether it is stated explicitly or not, resolution planning and resolution action require combining more 'familiar' assessments, e.g., the conclusion that a certain event will occur in the future in a binary probabilistic assessment, as in the likely failure of a FOLTF assessment based on the bank's deteriorating liquidity position,[24] with assessments that require making assumptions beyond a single probability distribution, to minimize the harmful consequences in each scenario e.g., "maximin with multiple priors",[25] or assessments that require weighing probabilities, but factoring in black swans and fat tail events.

Given the uncertainty and the economic stakes, these assessments become policy and legal battlegrounds. Two examples in the crisis prevention and resolution context may be helpful in clarifying this statement.

a) A credible resolution plan must forecast the business profile of the resolved entity at the time of resolution and after. Generally, a smaller balance sheet (so called 'balance sheet depletion at resolution') may justify lower post-resolution capital levels to operate; conversely, increased capital levels may be needed to sustain market confidence for an entity that was just subjected to

22 Case T-481/17, *Tatiana Perez*, paras 446–448.

23 *David Ramos Muñoz/Antonio Cabrales/Ángel Sanchez*, "Central Banks and Climate Change (Part 1): Does Climate Change Fit in Central Banks' Mandates?", Business & Finance Law Review , (2023), 213–259, and *David Ramos Muñoz/Antonio Cabrales/Ángel Sanchez*, "Central Banks and Climate Change (Part 2): Can Central Banks Intervene Now? And How?", Business & Finance Law Review6 (2023), 260–320.

24 EBA Guidelines on FOLTF assessments EBA/GL/2015/07; on its implication for the Banco Popular FOLTF see Eleveté Invest Group and Others v Commission and SRB, Case T-523/17, ECLI:EU:T:2022:313, paras 140–144, in particular at 143.

25 *Ramos Muñoz/Cabrales/Sanchez*, "Central Banks and Climate Change" (Part 2) (fn. 23), 269; *Itzhak Gilboa/David Schmeidler*, "Maxmin Expected Utility Theory with a Nonunique Prior",Journal of Mathematical Economics 18 (1989), 141.

resolution measures. This requires robust, yet hypothetical assumptions about the expected balance sheet depletion (i.e., how the reduction in the balance sheet size will impact the diminished credit risk), and the potential divestitures made before or at the point of resolution, which may be also envisaged in the recovery plan, agreed with the supervisory authority, as well as the capital levels needed to sustain market confidence. These matters were discussed e.g. in case 1/22 before the Appeal Panel and are currently before the General Court.

b) Another example is that, to subject an entity to resolution planning and MREL[26] levels the resolution authority must conclude that resolution objectives will be better served by deploying resolution tools, under a public interest assessment (PIA), which now simultaneously considers two hypothetical failure scenarios: one idiosyncratic and the other in the context of a system-wide crisis. However, the idea of system-wide 'events' now adopted by the SRB in its PIA starting from the 2021 MREL Addendum and taken a step further by the CMDI captures this logic of preventative decisions in uncertainty because in the end its justifies the most burdensome strategy of prepositioning of a MREL recapitalisation amount looking at the extreme cases of possible contagion effects which may trigger financial instability at a regional level in the midst of a systemic crisis, even plainly admitting that the idiosyncratic failure of the same bank outside of a system-wide crisis could be smoothly managed with insolvency and liquidation strategies.

In this context, a key question is what evidential burden the supervisory and resolution authority has to bear in order to support complex technical assessments based on alternative options on hypothetical future scenarios. In antitrust, where fundamental rights concerns trump over any other considerations, there has traditionally been a call to treat 'false positives' (e.g. erroneous antitrust convictions and over-deterrence) as costlier than 'false negatives' (i.e. erroneous acquittals and under-deterrence), and ask for a higher evidentiary burden for those alleging an antitrust violation,[27] through a 'preponderance of evidence' (in American terms) or 'balance of probability' in European terms (see, for a very good discussion of European Court's practice in the Opinions of

26 On MREL, with different approaches, *Tröger* (fn. 7); *Marco Lamandini/David Ramos Muñoz*, Minimum Requirement for Own Capital and Eligible Liabilities, in: Mario P. Chiti/Vittorio Santoro (eds.), The Palgrave Handbook of European Banking Union Law, 2019 (Palgrave Macmillan), p. 321 et seqq.

27 *Robert Bork*, The Antitrust Paradox (1978, reprinted 2021), 134–160; for a recent reconsideration, *Andrew I. Gavil/Steven C. Salop*, "Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct", Pennsylvania Law Review 168 (2020), 2107–2143 (Symposium: The Post-Chicago Antitrust Revolution).

AG Kokott in *Bertelsmann*[28] and in *CK Telecoms*[29]*)*. This cannot be extrapolated to supervision or resolution cases, where the financial stability implications of false negative are potentially catastrophic and financial stability concerns trump over any other considerations. Economic science cannot (at least cannot always) offer conclusive answers or full evidence of the shape and implications of potential future financial stability shocks, which may be used as input for resolution decisions. Thus, reasonableness and the 'plausibility' test used by European courts to review supervisory and resolution measures seem to be a warranted course of action in the analysis of future and uncertain scenarios (and this would deserve a clear-cut codification in the single rule book). In the end, as noted, precautionary considerations, as stated by the Court in, e.g., *Blaise*[30] fit well in this context: if the existence or extent of the alleged risk cannot be determined with certainty, but there is a likelihood of real harm should the risk materialize, the precautionary principle justifies the adoption of public intervention.

5. Implications for group-wide crisis prevention and resolution planning

Translating theory into practice is an interesting exercise here. In the real world, weighing the costs and benefits of action ("false positives") and inaction or insufficient preparation ("false negatives") is not easy. An example at point is group-wide crisis prevention and resolution planning and in particular the assessment of the preconditions for the grant of waivers from individual capital, liquidity and MREL requirement for subsidiaries.

Currently, there is a fairly limited use of waivers, and, due to misplaced limitations in the prudential rule book (as neatly shown by EBA already back in 2020)[31] only for domestic groups. The clear impression is that out of fear for the death, it is difficult for domestic banking groups, and almost impossible for cross border banking groups, to live their economic life at its full potential.

28 Case C-413/06 *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P ECLI:EU:C:2008:392, paras 207–208.

29 Case C-376/20, *European Commission v CK Telecoms UK Investments Ltd*., C-376/20, ECLI:EU:C:2022:817, paras 56–58. Consider in the literature, *Andriani Kalintiri*, Evidence Standards in EU Competition Enforcement – The EU Approach, 2019, (Oxford, Hart Publishing), p. 78 *passim* and *Joana Mendes* (ed.), EU Executive Discretion and the Limits of Law, Oxford, 2019, (OUP).

30 C-616/17, *Procureur de la République v Blaise* [2019] ECLI:EU:C:2019:190, para 43.

31 *Anna Gardella/Massimiliano Rimarchi/Davide Stroppa*, Potential regulatory obstacles to cross-border mergers and acquisitions in the banking sector, EBA Staff Paper Series no 7, February 2020, https://www.eba.europa.eu/sites/default/files/document_library/844126/Potential%20obstacles%20M&A.pdf (last accessed: 22 July 2025).

This is something clearly reflected also in the Technical Analysis of the Draghi Report, where it is correctly noted that:

> Last but not least, the fragmentation of European banking along national boundaries owes much to the incomplete implementation of the Banking Union. While the euro area has unified bank prudential supervision, it has so far failed to implement a common deposit insurance and the single resolution authority lacks a financial backstop, complicating the resolution of large systemic banks. Absent these reforms, European banks with cross-country operations risk facing regulatory ring-fencing at times of turmoil, which would fragment their internal capital markets along national lines as indeed was the case during the 2011 sovereign debt crisis. Banks have little incentive to engage in cross-border operations if the transfer of resources from healthy to impaired subsidiaries will be prevented in a crisis. Yet, enabling cross-border banks to engage in international risk-sharing on a sufficiently large scale is of crucial importance for the integration of European capital markets. Hence, completing the Banking Union would mitigate the current strong 'home bias' of EU banks, and the fragmentation of credit markets along national boundaries that so far has been a hallmark of the European financial system. A minimal reform in this direction might be limited to a small set of banks with cross-border operations, by creating a set of cross-border banking norms specifically suited only for these banks, intended to shield them from regulatory ring-fencing and entrusting their possible resolution to a European resolution authority. Banks with a truly continental span of operations would not only better support European companies that operate in multiple EU Member States, but they are also the necessary players on integrated capital markets, in underwriting securities, taking companies public, and assisting them in M&A operations. Hence, completion of the Banking Union would be complementary to making progress towards the Capital Markets Union in Europe[32].

The problem here is, however, that not only prudential, but also company and insolvency law obstacles prevent a meaningful group-wide capital and liquidity management, most notably cross-border. This is economically not desirable.[33] Individual capital and liquidity waivers for domestic subsidiaries are not available cross-border in accordance with the prudential rule book, due to the failure of the amendments that the European Commission had tabled in November 2016 to Articles 7 and 8 CRR. In addition, at domestic level, when capital waivers are granted by the supervisor, those waivers are hardly mirrored in the resolution context by parallel internal MREL (iMREL) waivers. This is so despite the very fact that, from a textual point of view, Articles 7 and 8 CRR in the prudential context and Articles 45(f)(3) BRRD and 12g and 12h SRMR in the resolution context make conditional the grant of the waiver upon the same finding that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities

32 *Mario Draghi*, The future of European competitiveness, Brussels, September 2024, passim, p. 289. See also *Ignazio Angeloni*, The next goal: Euro area banking integration. A single jurisdiction for cross-border banks, STUDY Requested by the ECON committee, PE 741.527 – February 2024, https://www.europarl.europa.eu/RegData/etudes/STUD/2024/741527/IPOL_STU(2024)741527_EN.pdf (last access: 22 July 2025).

33 See Minister of Economy of France Le Maire, EUROFI Conference, April 2019.

within the group". However, in practice, according to the resolution authorities, impediments to asset transferability in a going concern may play out differently than in a gone concern. A growing number of cases before the SRB's Appeal Panel and the General Court[34] has therefore shown that there are visible tensions here, which prevent groups from attaining the value-enhancing organizational gains of interstate group structures, albeit their clear recognition by the European Courts in connection with the objectives of the internal market[35] and their alignment with Principle 5 of the Basel Committee's Principles on Corporate Governance for banks[36].

The problem is further exacerbated by the serious ambiguities in national contract, company and insolvency laws: the latter are still mostly entity-centric and national safeguards necessary to minimize the risk of abuse of intragroup support are not sufficiently harmonized to unleash the potential of mutual recognition; in turn, due to differences in the judicial practice, the authorities are uncertain on the enforceability of intra-group support in the form of parent guarantees or similar arrangements under national contract and insolvency law. These uncertainties amplify tensions between home and host authorities and quite naturally translate into conservative supervisory approaches, ring fencing and in the end insufficient growth and geographical risk dispersion for European banking groups.

In the judicial context, this problem translates into difficult questions on the degree of scrutiny that can be reasonably expected vis-à-vis the denial of iMREL waivers. Broadly speaking, when addressing supervisory and resolution decisions, European courts have acknowledged a degree of technical discretion needed by supervisory and resolution authorities, most notably in the *Credit Lyonnais* and *Banco Popular* pilot cases, while providing a demanding scrutiny that the evidence relied on by the SRB is factually accurate, reliable and consistent, it constitutes *all* the relevant information which must be taken into account in order to asses a complex situation *and* is capable of supporting the conclusions drawn from it.[37] The administrative review of the SRB Appeal Pa-

34 Compare in particular SRB Appeal Panel decisions in cases 2/2021; 3/2021; 1/2022; 2/2022; 1/2023 and 5/2023 accessible at srb.europe.eu and pending Case T-540/22, France v SRB as well as cases before the SRB Appeal Panel.

35 C-528/12, *Mömax*, ECLI:EU:C:2014:51, para 21; C-292/16, *A Oy*, ECLI :EU : C :2017:888 ; C-386/14, *Groupe Steria*, ECLI :EU:C:2015:524; C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161; C-311/08, *Société de Gestion Industrielle*, ECLI:EU:C:2010:26; C-382/16, *Hornbach Baumarkt*, ECLI:EU:C:2018:366. For an insightful discussion, Schön (n 6), 343–378.

36 Basel Committe, *Guidelines on Corporate Governance Principles for Banks*, July 2015.

37 EGC 1 June 2022, *Fundación Tatiana Pérez v SRB*, T-481/17, ECLI:EU:T:2022:311, EGC 1 June 2022, *Del Valle Ruiz v SRB*, T-510/17, ECLI:EU:T:2022:312, EGC 1 June

nel is perhaps even more exacting on law and facts, and their technical assessment because this can be better appraised if the composition of administrative bodies ensures technical expertise beyond legal knowledge. Review, however, (i) cannot lead to a de novo evaluation and (ii) needs to respect a margin of appreciation conferred by the applicable rules.[38].

On this it must be pointed out that the margin of appreciation given to the SRB in deciding on whether to grant or not an iMREL waiver may be of a different nature. This is clearly exemplified by Article 12h SRMR, as amended by Regulation 877/2019, which provides that (emphasis added):

> The Board *may* waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where: […] *(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made* in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity.

The provision combines (1) the granting of *discretion* to the SRB "to grant or not the iMREL waiver even when all the conditions set out in Article 12h SRMR are met",[39] with (2) the condition that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities", which must be complied with before a waiver is considered by the Board, and, given its open-textured formulation, confers to the agency not full discretion, but a 'legally bounded' margin of appreciation to verify that the factual and legal elements of the condition are fulfilled, which, in turn, entails a complex, factual and legal assessment. The review of *both* assessments must ensure appropriate deference to the technical evaluation of the agency in both cases, yet the close scrutiny must ensure that the assessment is adequately substantiated, *and* that also the exercise of full discretion is sound in light of general principles like proportionality and equal treatment. This is an aspect that the Appeal Panel closely analysed in case 3/2021. In its judgment of 10 July 2024 in *France v. SRB*[40] the General Court upheld its approach and conducted a careful examination of the SRB's statement of reasons, considering it, as well as the review by the Appeal Panel, satisfactory.

2022, , *Eleveté Invest Group v SRB*, T-523/17, ECLI:EU:T:2022:313, EGC 1 June 2022, *Algebris v Commission*, T-570/17 ECLI:EU:T:2022:314 and EGC 1 June 2022, *Aeris Invest v Commission and SRB*, T-628/17 ECLI:EU:T:2022:315.

38 AP, X v SRB, 19 June 2019, Case 21/2019, para 39; see also AP decision in Case 1/21.

39 See to this effect *La Banque Postale v European Central Bank*, T-733/16 ECLI:EU:T:2018:477, at para 58; *BPCE v European Central Bank,* T-745/16 ECLI:EU:T:2018:476 and *Crédit Agricole v European Central Bank* T-758/16 ECLI:EU:T:2018:472; compare also Case *Crédit Lyonnais v European Central Bank*, T-504/19 ECLI:EU:T:2021:185.

40 Case T-540/22 *France v SRB* [2024] ECLI:EU:T:2024:459.

Proportionality in this context should also mean consistency. In our view, this implies that when both supervisory and resolution authorities must assess the feasibility of intra-group support and their implications for capital, liquidity and iMREL waivers, or the likelihood of timely execution of asset transfers in the context of recovery plans and of resolution plans (to the effect of the determination of the resolution entity's size and profile at the point of non viability), consistency should be the rule and different assessments – although they cannot be entirely ruled out, because what is likely or plausible in going concern scenario may not equally be such in a gone concern scenario – should be a duly motivated exception. In turn, European courts should carefully cross-examine those diverging assessments to see if the divergence responds to differences in the assumptions that the law requires the authorities to make, in which case the differences would be justified, or simply to methodological limitations on one side, or inconsistencies not based on the legal framework, which should be cured to ensure better consistency in the supervision-resolution continuum.