THE TRANSNATIONAL GOVERNANCE OF BANK RESOLUTION AND THE TREATMENT OF NATIONAL REGULATORY VARIATION IN THE EU

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I. INTRODUCTION

The collapse of large banks and other financial firms comes with devastating consequences to the financial system and the real economy. The 2008 financial crisis made plain that insolvency law regimes are not fit to address failures of such magnitude. While in some cases public money was eventually used to bail out 'too big to fail' banks (e.g. Citigroup, RBS, HBOS, Lloyds TSB), in other cases (e.g. Lehman Brothers) financial firms were left to go into administration.[1] None of these solutions were optimal. The former incentivized systemic banks and other financial firms to take greater risks than they otherwise would, because it harboured the belief that an implicit government subsidy would always be there to shield them from the negative consequences of their excessive risk taking (moral hazard).[2] The later

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[1] A.E. Wilmarth, "Citigroup's unfortunate history of managerial and regulatory failures" (2014) 47(1) Indiana Law Review 69; R. Tomasic, "Establishing a UK rescue regime for failed investment banks" (2010) 3(2) Corporate Rescue and Insolvency Journal 60, 61-62; A. Campbell and P. Moffatt, "Dealing with financially distressed banks: the new "rescue" proposals" (2011) 26(1) Journal of International Banking and Financial Law 34, 34-35; I. MacNeil, "The trajectory of regulatory reform in the UK in the wake of the financial crisis" (2010) 11(4) European Business Organisation Law Review 483, 509.

[2] The characterization of a bank (or any other financial firm) as 'systemic' implies that, if this bank were to fail, it would trigger a financial crisis and destabilise the real economy. For a comprehensive

became complicit to the worsening of the financial turmoil of the time. These challenges were more acute in the case of global systemic banks. In the absence of a harmonised regulatory approach to coordinate action and to lift concerns over operational or macro-prudential risks, the treatment of their failure was a formidable task.

Bank resolution law was born out of the ashes of the global financial crisis of 2008 as a response to those perennial problems. It provides a series of tools to manage the failure of a systemic bank so that the impact of its collapse is reduced significantly. It works roughly as follows: When the designated resolution authority determines that a failing bank cannot go through the normal insolvency proceedings, it activates its resolution. This ensures that the provision of critical functions (e.g. payments) will continue, that financial stability will be preserved and that there will not be any disruptions in the real economy. The healthy part of the bank under resolution is then restructured, while the part of the bank that cannot be made viable is led to its 'death' and is eventually left to go down the path of normal insolvency proceedings.

In 2014, the Financial Stability Board (FSB) published the latest version of a set of recommendations on the resolution of banks, the so-called *Key Attributes of Effective Resolution Regimes for Financial Institutions* (henceforth, the FSB Key Attributes).[3] Being widely perceived as the international 'golden standard' of best practice in the

discussion of the nature of systemic risk see I. Anabtawi and S. Schwarcz, "Regulating Systemic Risk: Towards an Analytical Framework" (2011) 86 Notre Dame Law Review 1349. The problem of moral hazard is further discussed in 'III. National Variation as a Symptom of Incentive Misalignment and How It Drives Bank Resolution Away from Its Original Objectives: A Case Study'.

[3] Financial Stability Board (FSB), "Key Attributes of Effective Resolution Regimes for Financial Institutions" (15 October 2014), available at http://www.fsb.org/wp-content/uploads/r_141015.pdf (last accessed 1 May 2020).

field of bank resolution, their publication precipitated a wave of legal reforms around the globe but in a recent consultation report the FSB finds that there are still gaps that need to be addressed.[4] The transnational governance of bank resolution must be well-designed to provide credible solutions to financial crisis management. While at policy level there is a broad consensus on best practice, the implementation stage often leaves something to be desired. This article examines this issue and proposes a series of solutions without, however, advocating an 'one-size fits all' approach. Specifically, it asks what else might be done to promote convergence, not at the global level (given the scale and complexity of the task), but regionally focusing on the EU.

I argue that the broad consistency of the EU legal framework with the FSB template is not a reason for complacency. EU law allows different approaches but the balancing between attentiveness to local conditions and the desirability of a robust transnational approach is a complex and contentious matter. On the one hand, the abiding bank-sovereign nexus hints that relevant decisions are often the outcome of misaligned incentives. On the other hand, any assessment of the actual impact of local conditions on the transnational governance of bank resolution is bound to be an imprecise science. Strictly speaking, EU-wide stress tests do not directly address questions about the effectiveness of responses under the harmonised framework. [5] All they do is to provide a useful source of information about the current and projected financial

[4] FSB, "Evaluation of the effects of too-big-to-fail reforms" Consultation Report (28 June 2020), available at https://www.fsb.org/wp-content/uploads/P280620-1.pdf (last accessed 30 November 2020), 8. The same point is also echoed in IMF, "Euro Area Policies: Financial Stability Assessment" (July 2018) IMF Country Report No 18/226, available at https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-System-Stability-Assessment-46100 (last accessed 1 May 2020).

[5] Art. 100 of European Parliament and Council Directive 2013/36/EU (OJ 2013 L 176 p. 338) ('Capital Requirements Directive IV'). F. Niepmann and V. Stebunovs, "How EU banks modelled their stress away in the 2016 EBA stress tests" (30 July 2018), available at https://voxeu.org/article/how-eu-banks-modelled-their-stress-away-2016-stress-tests (last accessed 1 November 2020) focusing on EBA stress tests and industry gaming.

health of a bank or the banking sector as a whole. Accordingly, any evidence-based insights on the matter are indirectly inferred and derive from statistical models that are subject to their own limitations.[6] In this environment of relative uncertainty, it is imperative to bring national decision making under closer control and scrutiny. This article examines this issue and proposes a series of reforms. It further shows that improving the convergence capabilities of the EU resolution authorities need not involve a massive (and for that reason most probably unpopular) shake-up of the existing institutional architecture nor indeed come at the expense of the distinctive attention of EU law to local conditions.

The literature on bank resolution investigates its regulation from an international, comparative and national law perspective.[7] It often goes side by side with scholarly work on real-life illustrations of problems of cross-border bank resolution in the EU, on legal and institutional aspects of EU financial markets governance and the development of mechanisms of financial crisis management in the EU. As these themes have already attracted substantial attention, this article considers them only to the extent that it befits the subject matter of its inquiry.[8]

[6] Niepmann and Stebunovs, "How EU Banks modelled their stress away".

[7] World Bank Group Financial Sector Advisory Centre, "Bank resolution and "bail in" in the EU: Selected case studies pre and post BRRD" (12 December 2016; disclosure date 18 April 2017), available at http://documents.worldbank.org/curated/en/731351485375133455/pdf/112265-REVISED-PUBLIC-FinSAC-BRRD-CaseStudies.pdf (last accessed 1 May 2020); E. Ferran, "Understanding the New Institutional Architecture of EU Financial Markets Supervision" in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), *Financial Regulation and Supervision: A Post Crisis Analysis* (Oxford 2012); N. Moloney, "International Financial Governance, the EU and Brexit: The Agentification of EU Financial Governance and the Implications" (2016) 17 European Business Organisation Law Review 451; R. Lastra, "Banking Union and the single market: Conflict or companionship?" (2013) 36(5) Fordham International Law Journal 1190; K. Alexander, "European Banking Union: A legal and institutional analysis of the single supervisory mechanism and the single resolution mechanism" (2015) 40(2) European Law Review 154.

[8] A comprehensive comparative analysis between the FSB Key Attributes and the EU legal framework of bank resolution in the EU also falls beyond the scope of this article as this matter has been discussed in detail elsewhere. See N. Coleman, A. Georgosouli and T. Rice, "Measuring the Implementation of

After this introduction, the article examines the implementation of the FSB Key Attributes in the EU. It explores the complexity of national decision-making as well as the impact of incentives and, then, it recommends a series of reforms. The analysis seeks to contribute to contemporary scholarly and public policy debates about the future of the transnational governance of bank resolution in anticipation of the likely EU response to the final conclusions of the post-implementation evaluation of the FSB Key Attributes, which is currently in progress.

II. THE FSB ATTRIBUTES AND THEIR IMPLEMENTATION IN THE EU

(A) The Case for a Holistic Approach to the Study of the Transnational Governance of Bank Resolution

The theme of bank resolution law as an aspect of transnational governance falls within a voluminous scholarship on the emergence of transnational regulatory networks, such as the FSB, and their role in the regulation of global financial markets.[9] A distinctive branch of this literature approaches the transnational governance of bank resolution either as an exclusive matter of EU law or as an exclusive matter of international soft law harmonization.[10]

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the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in the European Union", 1238 International Finance Discussion Paper (US Federal Reserve Board; November 2018), available at https://www.federalreserve.gov/econres/ifdp/measuring-the-implementation-of-the-fsb-key-attributes-of-effective-resolution-regimes.htm (last accessed 12 December 2020).

[9] A.M. Slaughter, *A New World Order* (Princeton 2004) (providing perhaps the most influential account); D. Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations" (1998) 33 Texas International Law Journal 281; P.H. Verdier, "Transnational Regulatory Networks and Their Limits" (2009) 34 Yale Journal of International Law 113.

[10] R. Lastra (ed.), *Cross-Border Bank Insolvency* (Oxford 2011); S. Gadinis, "The Financial Stability Board: The new politics of international financial regulation" (2013) 48(2) Texas International Law Journal 157; E. Hupkes, "Resolving systemically important financial institutions (SIFIs): The Financial

One problem with this bifurcated approach is that it downplays the complementarity of EU law and international soft law standards. Indeed, for the establishment of a transnational approach to bank resolution in a particular region, it is not enough for the domestic laws of individual states to converge with international soft law standards (vertical convergence). They also need to converge between and amongst themselves (horizontal convergence). As this is unlikely to happen spontaneously, a regional scheme of governance is required to set this into motion. Attentiveness to the complementarity of EU law and international soft law is also appropriate for present purposes because it helps interrogate current assumptions about the impact of Brexit on bank resolution law in the UK.[11] For example, it hints that the British Parliament may not be completely unleashed to legislate as it pleases in view of the UK's continuous commitment to international standards of bank resolution and its ambition to retain its position as a world-leading jurisdiction in financial services.

With these considerations in mind, in the remainder, the article takes a holistic approach. It adopts a definition of transnational regulatory networks that covers all cross-border purposeful regulatory relations that aim to promote transnational convergence, both informal (eg the FSB) as well as formal (eg the Single Resolution Board (SRB) and the European Banking Authority (EBA) in the EU).[12]

Stability Board key attributes of effective resolution regimes", ch. 4 in J.R. LaBrosse, R.O. Caminal and D. Singh (eds.), *Financial Crisis Containment and Government Guarantees* (Cheltenham 2013); J.H. Binder and D. Singh (eds.), *Bank Resolution: The European Regime* (Oxford 2016); M. Lehmann, "Bail-in and Private International Law: How to Make Bank Resolution Measures Effective across Borders" (January 2017) 66(1) ICLQ 107.

[11] Article 50 of the Treaty of the European Union (TEU) provides the legal basis for the UK withdrawal from the EU. The UK withdrew from the EU on 31 January 2020. Council Decision (EU) 2020/135 (OJ 2020 L 29 p. 1). See also discussion below '(F) Reflections'.

[12] My working definition of Transnational regulatory networks broadly follows Slaughter's definition. Slaughter, *A New World Order*, 14.

(B) A Brief Overview of the FSB Key Attributes

The overarching objective of the FSB Key Attributes is to enable regulators handle the failure of (potentially) systemic financial firms like banks at a minimum cost for taxpayers while maintaining the continuity of their vital economic functions such as the provision of payment services.[13] The FSB Key Attributes envisage a legal framework of bank resolution that consists of two components. On the one hand, a cluster of measures for the recovery of financially distressed firms or –where recovery is no longer possible- their entry into resolution. On the other hand, a series of mechanisms that seek to eliminate moral hazard and foster market discipline. Specifically, these mechanisms require shareholders and, to a lesser extent, unsecured creditors to internalise the cost of financial default according to a sequence of financing arrangements that in priority rely on private funding.

Several Key Attributes regulate general matters such as the scope of bank resolution, the resolution authority and its powers, while others focus on more specific issues: Notably, the provision of safeguards such as the 'no-creditor-worse-off' principle, and the funding of firms in resolution.[14] A separate set of Key Attributes is dedicated to cross-border cooperation and coordination.[15] Finally, there are special provisions on preparatory steps for the resolvability of systemic financial firms. Examples include the conduct of resolvability assessments, recovery and resolution planning and access to information and information sharing.[16]

[13] FSB, "Key Attributes", 1.
[14] FSB, "Key Attributes", Key Attributes ('KAs') 1-6.
[15] FSB, "Key Attributes", KAs 7, 8, and 9.
[16] FSB, "Key Attributes", KAs 10, 11, and 12.

Being non-binding in nature, the FSB recommendations do not seek to attain absolute uniformity but the progressive convergence of regulatory approaches around the globe. In the EU, several Member States had in place some version of national financial resolution law even before 2014, which is the year when the latest and more comprehensive version of the Key Attributes was published.[17] This notwithstanding, the decisive step towards transnational regulatory convergence was taken with the entry into force of the Bank Recovery and Resolution Directive (BRRD).[18] The impact of the BRRD is considered below.

(C) The BRRD and the Approximation of Domestic Legislations in the EU Single Market

The objectives of the BRRD echo the overarching aims of the FSB Key Attributes but they have a clear EU focus. Specifically, the Directive seeks to strengthen the EU internal market through the maintenance of financial stability and confidence in the banking sector, and through the reduction of the damage caused to society by banking crises. Being broadly consistent with the FSB Key Attributes, the BRRD introduces a harmonised legal framework of bank resolution for all Member States.[19] The BRRD regulates the recovery and resolution of banks and large investment firms.[20] Holding companies of EU banks and investment firms, their subsidiaries as well as EU branches of non-EU banks and investment firms are also included within the scope of the Directive.

[17] World Bank Group Financial Sector Advisory Centre, "Bank Resolution and "bail in" in the EU".
[18] Directive 2014/59/EU (OJ 2014 L 173 p. 190) (thereafter BRRD). In June 2019, Directive (EU) 2019/879 (OJ 2019 L 150 p. 296) (BRRD II) amended the BRRD to bring it in line with the FSB Total Loss Absorbing Capacity (TLAC) requirements.
[19] Coleman, Georgosouli and Rice, "Measuring the Implementation of the FSB Key Attributes".
[20] BRRD, art 1(1).

The Directive provides for administrative (as opposed to court-based) proceedings, early intervention, recovery measures and resolution tools, and a common set of powers for national resolution authorities. The legal provisions of the BRRD cover the following thematic categories: (a) general provisions on the subject matter, scope definitions, and designation of national resolution authorities; (b) preparation (recovery and resolution planning); (c) early intervention; (d) resolution (conditions of resolution, objectives of resolution, resolution tools, resolution powers, and safeguards); (e) cross-border resolution and relations with third countries; (f) financing arrangements; (g) penalties and other miscellaneous provisions. [21]

As noted earlier, there was nothing to stop individual Member States from incorporating into their domestic laws some aspects of the FSB Key Attributes in their final 2014 and earlier 2011 version that is, even before the entry into force of the BRRD on 2 July 2014.[22] Furthermore, the UK had laid down its own bank resolution law even earlier with the Banking (Special Provisions) Act 2008 namely at a time that preceded the 2011 publication of the Key Attributes.[23] Nevertheless, the election of those countries to transpose earlier versions of the FSB recommendations into their domestic law or lay down with their own bank resolution laws does not render the BRRD and other relevant EU legal instruments less important.

[21] The Directive is further supplemented with more detailed implementing and regulatory standards as well as non-binding recommendations and guidance.

[22] World Bank Group Financial Sector Advisory Centre, "Bank resolution and "bail in" in the EU".

[23] C. Bates, "UK implementation of the EU Bank Recovery and Resolution Directive: What you need to know" *Clifford Chance: Client Briefing* available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2015/01/uk-implementation-of-the-eu-bank-recovery-and-resolution-directive-what-you-need-to-know.pdf (last accessed 1 May 2020).

Domestic law may be seen to perform a transnational function, but it is not tailor-made to bring about horizontal convergence. Any transnational horizontal effect of domestic law springs from party autonomy and the wish of contractual parties to be bound by the law of a particular country and/or to have their disputes heard at the courts of a country of their choice. The transnational function of EU law is not conditional on the volition of contractual parties. Perhaps most importantly, it is only in the case of EU law that sovereign states have the legal obligation to amend their domestic laws to the extent to which they fall short of fully complying with EU law and this, of course, applies to the proactive ones as, for instance, the UK which eventually had to reform its domestic legislation to comply fully with the EU framework. [24] To be sure, with the withdrawal of the UK from the EU as of the 31st of January 2020, the country is no longer under the legal obligation to comply with EU law but, as I explain in 'E. Reflections' below, a dramatic departure from the existing UK bank resolution law is unlikely to occur.[25]

(D) The Institutional Design of EU Financial Markets Governance and the Impact of the Single Resolution Mechanism Regulation

EU law creates a transnational system of governance of financial markets with varying degrees of integration. Being the byproduct of the tension between supra-nationalism and inter-governmentalism in the EU, this institutional architecture consists of two partially overlapping spheres of public governance.[26] The first one is

[24] Treaty of the European Union, art. 4(3); and Treaty on the Functioning of the European Union [thereafter TFEU], art. 291(1).

[25] This is further discussed in 'II. (E) Reflections' below.

[26] W. Sandholtz and A. Stone Sweet (eds.), *European Integration and Supranational Governance* (Oxford 1998; online 2004). For a critical appraisal see, A. Schout and S. Wolff, "The 'paradox of Lisbon': Supranationalism – Intergovernmentalism as an administrative concept" in F. Laursen (ed.), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (2016), ch. 2.

the European System of Financial Supervision (ESFS). It is quasi-intergovernmental in nature and applies to all Members States that participate in the single market. The ESFS consists of the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) -known as the three European Supervisory Authorities (ESAs), the ESAs' Joint Committee, the European Systemic Risk Board (ESRB) and the national 'Competent Authorities'.[27] The second sphere of public governance is the Banking Union for participating Eurozone countries and exhibits a far more integrated institutional typology.[28]

Outside the Banking Union, bank resolution is decentered. National resolution authorities (the 'Competent Authorities') remain directly responsible for the resolution of banks, but their actions are under the oversight of the EBA within the confines of its mandate.[29] Being an independent EU agency, the EBA concentrates all the features of a transnational regulatory network with a region-specific mission. Its main task is to ensure effective and consistent prudential regulation and supervision, and the promotion of financial stability, market integrity and the efficient and orderly functioning of the European banking sector. To perform this function, the EBA deploys a range of quasi-regulatory and supervisory powers. It coordinates action, settles disputes between national authorities, and investigates alleged breaches of

[27] See Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (OJ 2010 L 331 p. 12) (thereafter EBAR); Regulation 1095/2010 establishing a European Supervisory Authority (ESMA) (OJ 2010 L 331 p. 84); and Regulation 1094/2010 establishing a European Supervisory Authority (EIOPA) (OJ 2010 L 331 p. 48). Regulation 1092/2010 on the European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ 2010 L 331 p. 1); and Council Regulation 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ 2010 L 331 p. 162).

[28] Lastra, "Banking Union and the single market".

[29] BRRD, art. 125(1) brings national resolution authorities within the definition of 'competent authority' of the EBA Regulation and, hence within the EBA's remit.

relevant EU law that may implicate the European Commission or even lead to the initiation of enforcement proceedings.[30]

Thanks to those powers, the EBA acts as the guardian of the approximation of domestic legislations and concomitant converge of regulatory practices. The role of the EBA in the governance of bank resolution is laid down in Article 8(1)(i) of the EBAR and further articulated in Articles 25 and 27 of the same Regulation. Article 25 underscores, amongst other things, the contribution of EBA in identifying best practices and setting technical and implementing standards. In its turn, Article 27 describes the role of the EBA in promoting a coherent and robust scheme of funding arrangements and consistent methods for the resolution of failing banks.

The creation of the Banking Union was informed by the need to break-up the notoriously high correlation between bank and sovereign risk in the Eurozone, which is known to breed a vicious cycle of major problems in the banking sector and fiscal distress (the 'bank-sovereign nexus'). [31] Compared to the ESFS, the institutional design of the Banking Union is far more unified in nature and, thanks to the shifting of decision-making from the national level to the EU level, national regulatory variations are not permitted among participating Member States.

The entry into force of the Single Resolution Mechanism Regulation (SRMR), which is of particular interest here, has been a milestone development in the creation of the

[30] EBAR, art. 8(1) and arts. 10-19. Certain of the EBA powers are discussed below in section 'IV. Reshaping the Architecture of Choice of National Authorities: Some Recommendations.'

[31] G. Dell'Ariccia et al, "Managing the sovereign-bank nexus", *IMF Departmental Paper No 18/16* (Washington DC 7 September 2018), available at https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2018/09/14/Managing-the-Sovereign-Bank-Nexus-45133 (last accessed 1 May 2020).

Banking Union. The SRMR lays down uniform rules and procedures for the resolution of banks and certain investment firms in the Eurozone through the establishment of the Single Resolution Mechanism (SRM) as a quasi-centralised system of decision making.[32] The SRM stands alongside the Single Supervisory Mechanism (SSM) for the supervision of Eurozone banks, and in due course, a European Deposit Insurance Scheme (EDIS) for the protection of depositors.[33] The scope of SRM is set out in Article 2 of the SRMR. It corresponds with the scope of the SSM given the inter-connected nature of supervisory tasks and resolution action. Specifically, it applies to banks that fall under the direct supervision of the ECB (as their 'home supervisor') or of a national competent authority of a Eurozone Member State. Furthermore, it expands to non-Eurozone banks as long as they are supervised by a national authority that has established a close cooperation with the ECB in accordance with Article 7 of the SSMR.

The SRM runs under the leadership of the SRB, which is responsible for the effective and consistent functioning of the SRM.[34] Its operations do not extend beyond the Eurozone. According to Article 42 (1) of the SRMR, "[t]he Board shall be a Union agency with a specific structure corresponding to its tasks." As such, it bears all the characteristics of a region-specific TRN like the EBA. Decision-making is complex in the context of the SRM. The Meroni doctrine limits the discretionary powers of the

[32] Regulation 806/2014 (OJ 2014 L 225 p. 1) (thereafter SRMR). In June 2019, Regulation (EU) 2019/877 (OJ 2019 L 150 p. 226) (SRMR II) amended SRMR to bring it in line with the TLAC requirements of the FSB.

[33] Council Regulation (EU) No 1024/2013 (OJ 2013 L 287 p. 63) (thereafter SSMR). On EDIS, see European Commission, 'A Stronger Banking Union: New Measures to Reinforce Deposit Protection and Further Reduce Banking Crisis' European Commission Press Release IP/15/6152 (24 November 2015), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6152 (last accessed 1 May 2020).

[34] SRMR, art. 7(1).

SRB. [35] As a result, the ultimate decision-making authority rests with the Commission and the Council, while "[t]he assessment of the discretionary aspects of the resolution decisions taken by the Board are exercised by the Commission."[36] To perform its role, the SRB works closely with national resolution authorities and EU institutions like the European Central Bank (ECB) and the European Commission. While the ECB acts as a macroprudential regulator, [37] the European Commission has control over the provision of state aid in bank restructuring.[38]

The SRB takes leadership over issues of resolution planning, adopts the resolution scheme, decides the application of resolution tools, manages the Single Resolution Fund (SRF) and takes decisions about its use. [39] The purpose of the SRF is to give financial aid such as a guarantee or a loan for the short and medium term to ensure the viability of the restructured bank. An Intergovernmental Agreement (IGA) regulates the transfer of contributions by participating Member States to the Fund and the mutualization of the financial resources. In pursuit of its functions, the SRB is endowed with a wide range of nuanced powers. For example, it has the power to (a)

[35] Case 9/56, *Meroni & Co Industrie Metallurgiche* SpA v *High Authority of the European Coal and Steel Community* [1957-58] E.C.R. 133. See further Judgment of 22 January 2014, *United Kingdom*, C-270/12, EU:C:2014:18 (for a more flexible interpretation of the Meroni doctrine as regards the delegation of certain powers to ESMA); and M. Bozina Beros, "Some reflections on the governance framework of the Single Resolution Board" (2018) 56(3) Journal of Common Market Studies, 646.

[36] Preamble to the SRMR at [24].

[37] TFEU, art. 127 (1) (2) (6).

[38] TFEU, arts. 107-109 constitute the core Treaty provisions on state aid. The special rules on the use of state aid in response to the financial and economic crisis can be found in Commission Communication (OJ 2009 C10 p. 2).

[39] SRMR, art. 8, art. 10, art. 18, art. 22 (1). On the Single Resolution Fund (SRF), see SRMR, art. 1 and arts. 67-79, and Council Press Release (2014) 10088/1 available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010088%202014%20INIT (last accessed 1 November 2020) (about the intergovernmental agreement on the transfer and mutualisation of contributions to a single resolution fund that will be established as part of Europe's banking union). See further, F. Fabbrini, "On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context" (2014) 21 Maastricht Journal of European & Comparative Law 444 (taking a sceptical stance on the wisdom to rely on international law).

monitor the execution of resolution schemes, (b) issue instructions, warning notices and orders when a national resolution authority fails to comply with an SRB decision, (c) conduct investigations, and (d) impose fines and periodic penalties.[40]

Eurozone-authorised banks are resolved through the operation of the SRM.[41] Broadly speaking, the SRB, the Commission and the Council are in charge of the resolution procedure for systemically important financial institutions in accordance with Article 18 of the SRM Regulation.[42] National resolution authorities remain directly responsible for the resolution of medium and small size entities. Prima facie, these local banks are deemed as less systemic in that their systemic implications are considered to be of national interest. This rule is subject to exceptions with the use of the SRF being a case in point.[43] A chief, but by no means the sole, justification of these exceptions is the need to have in place a scheme of bank resolution in the Banking Union that takes into account the possibility that on certain occasions ''the failure of even relatively small banks may cause cross-border systemic damage.''[44]

(E) National Administrative Discretions and their Meta-regulation

The EU system of governance of financial markets frequently affords national authorities with a degree of discretion in the application of the harmonised law.[45] EU soft law instruments regulate the exercise of national administrative discretion, but

[40] SRMR, art. 28, art. 29 (2), art. 31 (1), arts. 34-37, and arts. 38-39. I examine some of those powers below in section 'IV. Reshaping the Architecture of Choice of National Authorities: Some Recommendations'.
[41] SRMR, art. 2 (scope).
[42] SRMR, art. 7(2).
[43] The exceptions are set out in SRMR, art. 7(3), art. 7(4) (b) and art. 7(5).
[44] Commission Communication (COM/2012/0510), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0510 (last accessed 1 May 2020).
[45] For a classic discussion, see G. Majone, *Regulating Europe* (London 2004).

they are attached to hard law standards and, as a result, they exert legal effects which circumscribe the autonomy of national regulators.[46] Other EU law processes and techniques of meta-regulation include (a) procedures facilitating constant engagement with national regulators as early as the pre-legislative stage (e.g. consultation), (b) supervision of national regulators, (c) peer reviews, (d) reporting and, (e) quasi-investigations and quasi-enforcement procedures to ensure that national regulators take action in compliance with EU law.

The EU system of meta-regulation makes its appearance in several aspects of the EU bank resolution law. A good number of otherwise permissive rules in the BRRD come with a uniform set of legal principles that national resolution authorities must take into account each time they exercise discretion in the execution of their functions. Examples include (a) the statement of five resolution objectives in the BRRD, (b) the conditions for resolution, (c) the provision of general principles governing resolution, and (d) a description of a set of conditions and policy considerations that a national resolution authority must observe to be allowed to exclude certain liabilities from the scope of the bail-in tool.[47] These legal principles, descriptions of criteria and conditions are there to guide the evaluative judgments of national resolution authorities and, in this manner, to align them with EU public interest.

The meta-regulation of national administrative discretion is particularly crucial outside the Banking Union, given the less integrated nature of the ESFS. Several

[46] The types of the legal acts of the EU, see TFEU, art. 288. For a critical analysis of EU soft law, see E. Krokea-Aho, "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?" (2009) 16(3) Maastricht Journal of European & Comparative Law 271, 273-278. On the ECJ recognition of the legal effect of EU soft law see notably Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] E.C.R. 4407.

[47] BRRD, arts. 31(2), 32(2), 34(1), and 44(3) respectively.

provisions in the BRRD equip the EBA with a nuanced range of powers to draft implementing and technical standards and to issue guidelines: For example, they require the EBA to draft technical standards for the specification of the exact content of resolution plans and to issue guidelines in respect of procedural requirements applicable to the sale of business tool amongst other technical matters.[48] This quasi-rulemaking function enables the EBA to fulfil its mission as the guardian of the consistent application of the EU single rulebook in all Member States including those participating in the Banking Union for matters falling beyond the remit of the SRB. In addition to standard-setting, as mentioned-above, the EBA also oversees and coordinates action, mediates in case of disputes, and it can initiate investigations that may implicate the European Commission.[49]

(F) Reflections

The implementation of the FSB Key Attributes in the EU shows that the transnational convergence of bank resolution in the region neither happens naturally nor spontaneously. It is the outcome of the workings of international as well as regional TRNs operating in a multi-level scheme of transnational governance.[50] The latter manifests itself in three domains of standard-setting.[51] The first one occurs at the international level with the FSB taking leadership over the development of soft law standards of bank resolution. The second one makes its presence felt at domestic level where national rulemakers reform domestic laws to bring them in line with the FSB

[48] BRRD, art. 10(9) and art. 39(4) respectively.

[49] Lastra, "Banking Union and the single market".

[50] M.S. Kuo, "From administrative law to administrative legitimation: Transnational law and the process of European integration" (2012) 61(4) ICLQ 855, 855-856; and L.S. Finkelstein, "What is global governance" (1995) 1 Global Governance 367, 369-370.

[51] Finkelstein "What is global governance", 367 (noting that global governance often includes information sharing and consensus building).

recommendations albeit with varying degrees of adherence. Finally, the third domain of standard-setting comes into play at a regional level with EU organisations and agencies working together to promote regional convergence.

Due to global and regional market heterogeneity, the international and European domains of standard setting promote the convergence of bank resolution practices while being attentive to local conditions. They are purposeful in that they involve a coordinated steering of actors towards the implementation of measures that serve the attainment of a shared set of goals for the effective resolution of banks and other systemic financial firms. They are inter-connected in that they propel transnational convergence by not being utterly autonomous from each other. For example, we see that international harmonisation is contingent on sovereign states reforming their domestic legislations, but we also note that this is not enough. Taking into account that the content of the FSB Key Attributes is subject to different interpretations –in theory, as many interpretations as the number of the countries of the EU- regional convergence also hinges on the capabilities of EU law to promote a common understanding of bank resolution principles, objectives, and policy priorities in the region.[52]

The synergy and complementarity of the FSB, the EBA and the SRB are profound in this transnational operating environment. Once the FSB sets international soft law rules, the focus turns on their consistent cross-border implementation while the preemption of the de facto renegotiation of those standards becomes a key priority. This is where the EBA and the SRB enter the picture to provide what the FSB lacks,

[52] Verdier, "Transnational Regulatory Networks and Their Limits", 130.

given its informal status, namely a series of mechanisms of credible commitment through the exercise of their respective powers.[53]

It would be wrong to think that the impact of the harmonised EU bank resolution law is confined within the European Union. In fact, it is already transforming the domestic legislations of neighbouring third countries ('Brussels effect').[54] The EU model has been recently exported in countries like Serbia and Albania as part of their accession preparation, while trade agreements with Georgia, Moldova and Ukraine envisage progressive convergence with EU standards of financial regulation.[55] Of course, things are different in the case of the UK. Being a former EU member state, the UK is in the unique position of having in place a legal framework of bank resolution which is fully compliant with EU law. Accordingly, the question to be asked is whether the UK will retain the implemented EU model of bank resolution post-Brexit.

During this period of transition, it is hard to predict the future UK-EU relationship, but it is fair to say that neither hard nor soft Brexit will liberate the UK from the EU's regulatory reach for mainly the following reasons.[56] First, the UK will continue to occupy the same space in global financial governance alongside the EU and both of them will continue to influence and be influenced by the workings of TRNs like the FSB. Second, market interconnections and interdependence will not disappear but, as EU law arrangements are no longer in place to facilitate cross-border oversight and coordination, mutual commitment to international standards will be required to fill in

[53] Verdier, "Transnational Regulatory Networks and Their Limits", 130.
[54] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford 2020).
[55] A. Lehmann, "Bank regulation in the European Union neighbourhood: limits of the 'Brussels effect'" *Bruegel Blogpost*, available at https://www.bruegel.org/2019/11/bank-regulation-in-the-european-union-neighbourhood-limits-of-the-brussels-effect/ (last accessed 1 November 2020).
[56] Bradford, *The Brussels Effect*, ch. 9.

the gap. On its part, the UK will also have an incentive to remain as close as possible to EU law to increase the chances of a favourable and stable equivalence deal in its attempt to ameliorate the damaging impact of Brexit on the banking industry due to the loss of passporting rights.

To conclude, EU law creates favourable conditions for the penetration of the FSB Key Attributes in the region, but its permissiveness is potentially concerning. This issue is explored by way of a case study in the next section.

III. NATIONAL VARIATION AS A SYMPTOM OF INCENTIVE MISALIGNMENT AND HOW IT DRIVES BANK RESOLUTION AWAY FROM ITS ORIGINAL OBJECTIVES: A CASE STUDY

Policy coherence is one of the salient features of transnational governance. Thanks to the relative permissiveness of EU law, local responses need not match the typology of what might be considered as an "appropriate" response according to the letter of the harmonised framework. That being said, local responses must always remain attuned to the original imperatives of bank resolution as these are enshrined in the objectives of the relevant EU legislation, which in their turn echo those of the FSB Key Attributes.

Consider the policy imperatives behind the sequence of financing arrangements in the existing harmonised framework of bank resolution. Moral hazard is historically associated with the availability of public bailouts in financial crisis management for

'too big to fail' banks of cross-border as well as national systemic significance.[57] Being attentive to this problem, the architects of the FSB Key Attributes envisage a specific sequence of financing arrangements in the context of financial resolution. They recommend that countries should resort to sources of private financing in priority to and in preclusion of public funding.[58] Exceptionally, resort to public funding may be allowed as a temporary measure for the preservation of financial stability on condition that all private sources of funding have been exhausted or orderly resolution can no longer be guaranteed.[59] Temporary public ownership and control is also permitted for the continuation of critical operations until resolution authorities arrange a permanent solution, such as a sale or a merger with a private sector purchaser.[60]

The BRRD rules on the funding of financial firms in resolution are broadly consistent with the FSB recommendations.[61] Two aspects of the Directive are of particular interest here. The first one is Article 31 (2) of the BRRD. This provision identifies the protection of public funds as one of the resolution objectives. The recognition of the need to protect public funds in resolution is of particular importance in the case under examination because it makes clear that the reduction of moral hazard is no less embedded in the logic of the EU legal framework than it is in the FSB recommendations albeit with the following caveat. As I explain shortly, the protection

[57] S.T. Omarova, "The Too Big to Fail Problem" (2019) 103 Minnesota Law Review 2495, 2500; A.E. Wilmarth Jr, "Reforming Financial Regulation to Address the Too-Big-to-Fail Problem" (2010) 35 Brooklyn Journal of International Law 707, 739-742.
[58] FSB, "Key Attributes" KA 6.1.
[59] FSB, "Key Attributes" KAs 6.4, 6.2.
[60] FSB, "Key Attributes" KA 6.5.
[61] Coleman, Georgosouli and Rice, "Measuring the Implementation of the FSB Key Attributes".

only covers the provision of 'extra ordinary public support' (as the provision of public funds is termed in the Directive); it does not extend to precautionary recapitalization.

The second aspect of interest is the resolution tools specified in the Directive. Specifically, the Directive lays down four mandatory privately financed resolution tools.[62] These are the sale of business tool, the bridge institution, the asset separation tool and the bail-in tool. In addition, the Directive introduces two optional government financial stabilisation tools: the public equity support tool and the temporary public ownership tool.[63] As they involve the use of public funds, and in consistency with the FSB recommendations, these resolution tools are to be used rarely and never in place of any of the privately financed resolution tools.[64] Specifically, extraordinary public financial support can be provided when a government stabilisation tool is used and always in accordance with the resolution objectives of Article 31(2) of the BRRD.[65] Furthermore, public financial support should be in accordance with State aid rules and Article 37(10) of the BRRD.[66] The latter stipulates that a government stabilisation tool cannot be used unless it is conditional and provided that at least 8% of loss absorption and recapitalisation has been covered already through contributions by shareholders and certain creditors. Public funds are available as long as a bank is failing or likely to fail, there is no reasonable prospect of preventing failure, and a resolution action is in the public interest.[67]

[62] BRRD, arts., 38-39, arts. 40-41, art. 42 and arts. 43-55.
[63] BRRD, arts. 56-58.
[64] BRRD, art. 56(3).
[65] BRRD, art. 56(1).
[66] Extraordinary public financial support should not be confused with emergency liquidity assistance. See BRRD, art. 2(1)(28) and (29) respectively; and TFEU, art. 107(1) and (3)(b).
[67] BRRD, art. 32(1).

Despite the overall consistency of the BRRD with the FSB Key Attributes, an interesting aspect of EU law is that it goes beyond the recommendations of the FSB. In addition to the provision of public funding *post-entry into* resolution, public funding may also become available *pre-entry*. Specifically, precautionary recapitalisation may be allowed where a solvent bank fails to raise capital privately following a stress test due to temporary liquidity shortage.[68] This sort of pre-resolution public financial support can take various forms as, for instance, a State guarantee to back liquidity facilities provided by central banks. It is a temporary measure, and it is not to be used to offset existing or future losses of the troubled financial firm.[69] Furthermore, it must be approved under the Union State Aid framework, and it must be proportionate and apt to remedy a serious disturbance in the economy of a Member State and to preserve financial stability.[70]

This arrangement provides legal certainty about the interaction of EU bank resolution law with EU State aid rules and a layer of flexibility as local conditions among Member States often differ. At the same time, however, it opens a window of opportunity for national authorities to try to reverse the sequence of financing arrangements in the hope of avoiding the trigger of resolution each time they have an incentive to do so. To be sure, the FSB Key Attributes are silent on the availability of

[68] B. Mesnard, A. Margerit and M. Magnus, "Precautionary recapitalisations under the Bank Recovery and Resolution Directive: conditionality and case practice" European Parliament Briefing PE 602.084 (5 July 2017) 2, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602084/IPOL_BRI(2017)602084_EN.pdf (last accessed 1 May 2020) (clarifying when an institution is deemed to be solvent and, hence, falling outside the scope of BRRD, art. 32 (4) (a), (b) and (c)).

[69] Ibid.

[70] Ibid (noting that the responsibility for assessing the conditions for requesting precautionary recapitalisation lies primarily with the European Commission).

public funding pre-resolution, but a teleological interpretation of their content suggests that this is most probably because the default position ought to be the one that sees public funding as a last resort option so that the risk of moral hazard is eliminated from the outset. Accordingly, this otherwise permissible course of action under EU law is nevertheless problematic because, in effect, it diverts the practice of bank resolution away from one of its original targets namely the elimination of moral hazard in financial crisis management as this is enshrined in the FSB Key Attributes and further articulated in the resolution objectives of the BRRD.[71]

Consider the case of Italy. Italian authorities made a consistent effort to block the resolution and eventual application of the bail-in tool, a type of mandatory debt restructuring tool, to several of the country's financially distressed banks.[72] They had strong incentives to do so. On the one hand, they found themselves in the unenviable position of having to manage a crisis in a highly inter-connected financial system. On the other hand, it was felt at the time that in the circumstances it would have been unwise to force shareholders and unsecured creditors to bear losses, because the majority of them were unsophisticated retail investors of limited financial means.[73]

[71] This part of the analysis is not concerned with the soundness of the FSB Key Attributes and its aim is not to defend it. It only outlines an interesting point of deviation.

[72] BRRD, art. 1 (1) (57). Italy is not unique. Other countries include Portugal, Spain and Cyprus. T. Philippon and A. Salord, "Bail-ins and Bank Resolution in Europe: A Progress Report", *Geneva Reports on the World Economy Special Report 4*, Centre for Monetary and Banking Studies, CEPR (March 2017) 25.

[73] These local conditions were hardly unique to Italy. See ibid. and further, W. Bossu and D. Chew, ""But we are different!" 12 Common Weaknesses in Banking Laws, and What to Do about Them" IMF Working Paper Legal Department (September 2015) 4 (questioning the alleged uniqueness of local problems and conditions), available at https://www.imf.org/en/Publications/WP/Issues/2016/12/31/But-we-are-different-12-Common-Weaknesses-in-Banking-Laws-and-What-to-Do-About-Them-43274 (last accessed 30 November 2020).

Two strategies are of particular interest for present purposes. The first strategy treats the financial difficulties of a systemic bank as a temporary liquidity shortage of a solvent bank to unlock access to public funding. This strategy was successfully albeit controversially deployed in Monte Dei Paschi di Siena.[74] The second strategy is more subtle. It involves the creation of a private fund to act as a shareholder of last resort for banks that are not able to raise capital in the market. Even though the immediate objective of the creation of a private fund is not to reverse the sequence of financing arrangements per se, such an approach is not without controversy. When deliberately deployed to delay the entry of a financially distressed bank into resolution, it can be seen to perpetuate expectations that public funds shall be made available eventually, once all the relevant legal conditions for precautionary recapitalisation obtain.

The setup of Atlante fund – a private fund financed by other Italian banks – is a recent example of this second strategy.[75] The Atlante fund was set up for the recapitalisation of Banca Popolare di Vincenza and Veneto Banca and the purchase of Non-Performing Loans (NPL) portfolios.[76] As they had failed to raise capital from the market, the two banks were planning to merge, and an application was submitted for a

[74] N. Veron, "Precautionary recapitalisation: time for a review?" (July 2017) Issue 21 Bruegel Policy Contribution 7. Precautionary recapitalisation was also used in the cases of Piraeus Bank and National Bank of Greece, but this was done before the full entry into force of the BRRD on 1 January 2016. European Commission, Press Release IP/15/6193 (29 November 2015) available at http://europa.eu/rapid/press-release_IP-15-6193_en.htm (last accessed 1 May 2020).

[75] Ministero dell' Economia e delle Finanze, Italian Banking Sector: Recent Developments and Reform available at http://www.mef.gov.it/focus/sistema_bancario/ITALIAN_BANKING_SECTOR.pdf (last accessed 1 May 2020) 15; Ministero dell' Economia e delle Finanze, "Scheme introduced to facilitate the disposal of banks' bad loans" Press Release No 20 (1/27/2016), available at http://www.mef.gov.it/en/ufficio-stampa/comunicati/2016/Scheme-introduced-to-facilitate-the-disposal-of-banks-bad-loans-00001/ (last accessed 1 May 2020).

[76] N. Veron, "In depth analysis - Precautionary Recapitalisation: Time for Review" European Parliament In-Depth Analysis PE 602.090 (July 2017) 5, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602090/IPOL_IDA(2017)602090_EN.pdf; and W.P. de Groen, "In depth analysis –Precautionary Recapitalisation: Time for Review" European Parliament In-Depth Analysis PE 602.091 (July 2017) 6, available at https://www.ceps.eu/system/files/PrecautionaryRecapitalisations.pdf (last accessed 1 May 2020).

precautionary recapitalisation; however, this application was unsuccessful, and eventually, both banks were liquidated under Italian insolvency law.[77] Even though no public funds were used in the specific cases of Banca Popolare Di Vincenza and Veneto Banca in the form of precautionary recapitalisation, the decision of the Italian authorities to submit an application suggests that every effort was made to secure public funding in preclusion of entry into resolution. This is not to say that there was nothing good to come out of the setting up of a private fund like Atlante at least in the short time, but to show that, as far as the elimination of moral hazard is concerned, such strategy of procrastination does little to cement market discipline and to eschew expectations that public financial support shall be made available at some later point in the future.[78]

The Italian experience testifies to the complexity of the issues that need to be factored in before a decision about the resolution of a bank is taken. It shows how the nexus between national fiscal interests and bank solvency often impels national resolution authorities to attune their actions with the preferences of their domestic constituencies when the latter conflict with the original imperatives of bank resolution.[79] These

[77] "ECB deemed Veneto Banca and Banca Popolare di Vicenza failing or likely to fail' ECB Press Release (23/6/2017), available at https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170623.en.html; SRB, "Notice summarising the effects of the decision taken in respect of Banca Popolare di Vicenza S.p.A" (23/6/2017), available at https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_banca_popolare_di_vicenza_s.p.a._20.00.pdf; SRB, "Notice summarising the effects of the decision taken in respect of Veneto Banca S.p.A" (23/6/2017), available at https://srb.europa.eu/sites/srbsite/files/23.6.2017_summary_notice_veneto_banca_s.p.a_20.00.pdf. All webpages last accessed on 1 November 2020.

[78] There are concerns that Atlante is conducive to the accumulation of systemic risk. See S. Merler, "An Italian take on banking crisis", *Bruegel Opinion*, available at http://bruegel.org/2016/10/an-italian-take-on-banking-crisis/ (last accessed 1 May 2020); and S. Merler, "A tangled tale of Bank liquidation in Venice" *Bruegel Blog Post*, available at http://bruegel.org/2017/06/a-tangled-tale-of-bank-liquidation-in-venice/ (last accessed 1 May 2020).

[79] Dell'Ariccia et al, "Managing the sovereign-bank nexus".

deeply embedded misaligned incentives in the EU system of financial regulation further make plain that the broad consistency of EU law with the FSB template is not a reason for one to be complacent and that further action is required to bring national decision-making under closer EU control and scrutiny.

IV. RESHAPING THE ARCHITECTURE OF CHOICE ON NATIONAL AUTHORITIES: SOME RECOMMENDATIONS

(A) Introductory Remarks

One might be tempted to posit that, if EU law were more rigid, the transnational governance of bank resolution in the region would be more robust because national authorities would have less administrative discretion at their disposal.[80] Despite its plausibility, this position is problematic. It underestimates the heterogeneity of the EU financial system and the fact that the flexibility of the EU legal framework of bank resolution is firmly grounded on the principles of subsidiarity, proportionality as well as other imperatives of the EU administrative law.[81] Moreover, it diverts attention from what seems to be an important blind-spot in the existing architecture of EU governance. This is the need for more rigorous EU control and scrutiny of national decision-making through the implementation of a more comprehensive strategy of incentive alignment.

[80] N. Veron and J. Zettelmeyer, "A European Perspective to Overindebtedness" (September 2017) Issue 25 *Bruegel Policy Contribution*, available at https://bruegel.org/wp-content/uploads/2017/09/PC-25-2017.pdf (last accessed 1 May 2020), 9 (arguing for harmonisation "to phase out all existing options and national discretions that create distortions").

[81] TFEU, art. 5 (3) and (4). D. Chalmers, G. Davies and G. Monti, *European Law*, 3rd ed. (Cambridge 2014) 393, 394-395 and 400-404; T.I. Harbo, "The function of the proportionality principle in EU law" (2010) 16(2) European Law Journal 158, 171-180. On the application of the principle of proportionality by the ECJ see notably, Case C-380/03 *Germany v Parliament and Council* [2006] E.C.R. I-11573 and Case C-310/04 *Spain v Council* [2006] E.C.R. I-7285.

The EBA and the SRB could perform a complementary role here but further measures will be required to improve their capabilities. The SRB has an exclusive bank resolution mandate, and it takes leadership over the function of the Single Resolution Mechanism in the Banking Union, but its mission is confined in the Eurozone. [82] The chief mission of the EBA is to act as the guardian of the approximation of national legislations and the consistent implementation of EU law within the context of the less integrated ESFS.[83] In the remainder of this section, I consider certain measures that could be taken to improve the capabilities of the EBA and the SRB. The proposed recommendations do not require a massive shake up of the existing institutional architecture for their implementation. Rather their aim is to harness the existing processes and techniques of the EU regulatory State and, hence, complement larger-scale policy and legal reform for the completion of the Banking Union and the Capital Markets Union which is currently work in progress.[84]

(B) Enhancing the Capabilities of the EBA

Typically, the EBA promotes convergence in the context of its supervisory function.[85] Specifically, it cultivates a common understanding of key objectives and priorities through the conduct of peer reviews, the issuance of standards and guidance of best practice. These mechanisms are helpful but not enough. For example, the EBA can exchange views with national authorities about the measures that need to be taken at

[82] SRMR, art. 7(1).
[83] EBAR, art. 1(5) and art. 8(1).
[84] V.V. Acharya and S. Steffen, "The Importance of a Banking Union and Fiscal Unions for Capital Markets Union", Discussion Paper 062/July 2017 (European Commission Fellowship Initiative "Challenges to Integrated Markets"), available at https://ec.europa.eu/info/sites/info/files/dp_062_en.pdf (last accessed 1 May 2020).
[85] EBAR, art. 1(5) and art. 8(1).

national level, but it cannot make specific requests in light of the content of these discussions. Similarly, it cannot propose a targeted course of action -save, perhaps, for the different and very specific purposes of settling disagreements between national authorities in cross-border situations according to the mediation procedure of Article 19 of the EBA Regulation or in emergency situations as per the conditions of Article 18 of the same Regulation.

Despite the consistency of the current arrangement with the quasi-intergovernmental nature of the ESFS, the recent experience with the Danske Bank scandals has called its adequacy into question and triggered wide-ranging reforms in the field of EU Anti-Money Laundering Regulation. These reforms are of interest here because they show how the strengthening of the position of the EBA need not be done in a way that upsets the delicate institutional balance of the ESFS. [86] An interesting aspect of these reforms is that under the new EU AML framework, national authorities remain the decision-makers for the banks that fall under their direct supervision but this time the EBA can amongst other things request a national authority to investigate potential breaches of law and to consider taking targeted actions (eg, sanctions). [87] This arrangement does not eviscerate the discretions of national authorities nor indeed deprive national authorities from the opportunity to share their valuable local

[86] E. Bjerregaard and T. Kirchmaier, "The Danske Bank money laundering scandal: A case study" (10 September 2019; Copenhagen Business School) 1, 36-37. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446636 (last accessed 30 November 2020).

[87] See new art. 9b of the Omnibus Regulation (EU) 2019/2175; and further, EBA "Anti-money laundering and countering the financing of terrorism" EBA Factsheet (February 2020) 10-11; available at https://eba.europa.eu/sites/default/documents/files/document_library/News%20and%20Press/Communication%20materials/Factsheets/883592/Anti-money%20laundering%20and%20countering%20the%20financing%20of%20terrorism_EBA%20Factsheet.pdf (last accessed 30 November 2020).

knowledge and experience with the EBA. As a result, its application seems to be also appropriate in the context of bank resolution.

The EBA is also endowed with quasi-investigatory powers which may lead to enforcement proceedings. These powers or rather the threat of their deployment could be instrumental to the harnessing of convergent practices. According to Article 17 of the EBAR, the EBA has the power to investigate alleged breaches of EU law. The EBA cannot impose sanctions but, depending on the outcome of its investigations, a quasi-enforcement process may follow. This process may lead to the issuance of a formal recommendation by the European Commission and even exceptionally open the way for the EBA to take direct action, hence, bypassing national authorities.[88]

Since its birth, the EBA made use of this power very rarely.[89] The governance structure of the EBA may explain its reluctance to go down that path.[90] A distinctive feature of the EBA governance is the strong representation of national authorities. Even though representatives of EU institutions sit on the Supervisory Board, only representatives of national authorities are vested with a right to vote.[91] This also holds true for the special independent panel for decisions relevant to Article 17.[92] This being the case, there is an inherent risk that EBA decisions to refrain from taking any

[88] P. Schammo, "Actions and inactions in the investigations of breaches of Union Law by the European Supervisory Authorities" (2018) 55 (5) Common Market Law Review 1423, 1431-1437.

[89] See "European Commission Public Consultation on Regulation (EU) No 1093/2010 (EBAR) Regulation (EU) No 1094/2010 (EIOPA Regulation) and Regulation (EU) No 1095/2010 (ESMA Regulation) – The Operations of the European Supervisory Authorities" ('A. Optimising existing tasks and powers; 4. Enforcement Powers – breach of EU law investigations' in particular footnote 26), available at https://ec.europa.eu/info/sites/info/files/2017-esas-operations-consultation-document_en.pdf (last accessed 1 May 2020).

[90] Ibid European Commission Public Consultation, "A. Optimizing existing tasks and powers; 1 Supervisory convergence". Other factors include the nuanced nature of the quasi-enforcement power and the risk of legal contestation.

[91] EBAR, art. 40 (1).

[92] "European Commission Public Consultation", "II. Governance of the ESAs".

further action are informed by national interest at the expense of EU interest when the two are found in conflict.[93] Opacity is a further issue of concern. Although Article 44 (3) of the EBAR introduces a general obligation to make public the rules on procedure, there is no specific obligation to disclose information about decisions to refrain from launching a breach of Union law investigations or from on-site inspections.[94]

Changing the governance structure of the EBA with the view of enhancing its supranational elements would arguably better attune the EBA's decision-making with the interests of the EU taken as a whole rather than those of its constituent Member States taken individually.[95] This could be done, for example, by the appointment of independent voting members and the creation of permanent Board members. Nevertheless, the weakening of the representation of national interests in the decision-making process of the EBA would deprive the EBA of a vital source of legitimacy and, for this reason, it is not recommended at present.[96] By contrast, a more realistic option seems to be the introduction of a legal obligation for the EBA to account for acts and omissions about alleged breaches of EU law within its existing accountability arrangements. Such a legal obligation could go a long way in making the EBA more

[93] "European Commission Public Consultation", "II. Governance of the ESAs".

[94] International Monetary Fund, "Financial Assessment of the European Union – Issues in Transparency and Accountability" IMF Country Report No 13/65 (March 2013), available at https://www.imf.org/external/pubs/ft/scr/2013/cr1365.pdf (last accessed 1 May 2020); "Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017" (20 June 2017) 6, 8-9, available at https://ec.europa.eu/info/sites/info/files/2017-esas-operations-summary-of-responses_en.pdf (last accessed 1 May 2020).

[95] EBAR, art, 1(5) (connecting the pursuit of public interest with the economy, citizens and business of the EU instead of those of the Member States).

[96] International Monetary Fund, "Financial Assessment of the European Union" 15-16. On the ability of national actors to control the outcome of the decisions of EU agencies see further, S. Griller and A. Orator, "Everything under Control? A Way Forward for European Agencies in the Footsteps of the Meroni Doctrine" (2010) 35 European Law Review 3.

willing to use (the threat of) its investigatory powers as an incentive alignment strategy, because the result of this requirement would be the EBA suddenly finding itself under greater pressure to defend its reasons for inaction.[97]

The EBA could also engage with national authorities more constructively. The purpose of constructive engagement is to challenge long-standing perceptions that inform how national authorities choose to exercise their discretions and where possible to expose reasons for national variation that cannot stand public scrutiny at quasi- intergovernmental level. Non-binding EU guidelines and recommendations already serve as conduits of constructive contestation. Specifically, they embed a 'comply or explain' procedure which creates the necessary space for national perceptions to be challenged and in which reasons for national deviations can be accounted for to a *forum* (here the EBA) that is supposed to represent intergovernmental interests as it befits the transnational character of its mandate and functions. [98]

However, the existing 'comply or explain' mechanism exhibits certain limitations. Perhaps the most significant relates to the limited duties of the EBA in cases of non-compliance. Although national authorities must declare whether they intend to comply or not and to communicate the reasons for deviation in the case of non-

[97] International Monetary Fund, "Financial Assessment of the European Union" 6 (calling for greater transparency). See further Schammo, "Actions and inactions in the investigations of breaches of Union Law by the European Supervisory Authorities" 1451 (whose recommendations embed a similar logic).

[98] In the EU Regulatory State, the forums form vertical, horizontal and diagonal relationships often transcending jurisdictional boundaries. An implication of this is that actors (e.g. national resolution authorities) may be accountable to forums, which are not their democratic 'principals' in the strict sense of the term. Y. Papadopoulos, "Problems of democratic accountability in network and multilevel governance" (2007) 13(4) European Law Journal 469, 472. See further M. Bovens, "Analysing and assessing accountability: A conceptual framework" (2007) 13(4) European Law Journal 447, 450, 455-457, 460.

compliance,[99] the only obligation imposed on the EBA is to publicise whether a national authority complies or not.[100] It is not legally mandatory for the EBA to disclose the reasons that a national authority provides to explain any deviation nor to comment on the validity of those reasons. This is troubling for mainly two reasons. The first concern is that the EBA may simply not have the incentive to voluntarily publicise this information given the influential presence of national authorities in its decision-making processes. The second worry is that national authorities feel no actual pressure to think twice before deciding to follow a different approach to the recommended one, because they know that in all likelihood the credibility of their reasons for divergence will not be seriously called into question. Making the disclosure of those reasons mandatory could potentially address this problem, but such disclosures should be subject to certain exceptions in the public interest as, for example, when non-disclosure or delay in disclosing relevant information is justified on the grounds of preventing the spreading of systemic risk.

Constructive challenge also requires an ex-ante set of criteria to allow assessments of the impact of national variation on the promotion of convergent practices in bank resolution and financial crisis management more generally. The articulation of those criteria will not be an easy task but nevertheless it will not require re-inventing the wheel. In fact, a concrete specification of criteria could be drawn on the principal objectives of bank resolution as these are enshrined in the Preface of the FSB Key Attributes and further laid down in the resolution objectives of Article 31 (2) BRRD. Furthermore, once in place, this cluster of criteria could form the basis of what could

[99] EBAR, art, 16(3).

[100] The publication of reasons of non-compliance is left to the discretion of ESAs. EBAR art. 16(3) and (4).

be described as an EU outcome-based approach to the oversight of convergent practices and, in due course, even lead to the development of a performance index as discussed in the next section.

Outcomes-based regulation works within its own limitations, but it comes with several advantages. [101] Quite apart from being focused on the delivery of a set of tangible outcomes (as opposed to blind compliance with the letter of the law or, alternatively, adherence with unhelpfully vague principles), it is averse to a 'one-size-fits-all' approach to regulation.[102] Furthermore, its attentiveness to outcomes carries the promise of a regulatory strategy that can do a better job in unveiling unjustifiable reasons for departure from the original imperatives of bank resolution, as it would be difficult for those reasons to hide under the shadow of creative compliance. [103]

(C) Enhancing the Capabilities of the SRB

Strictly speaking, the consistent implementation of the EU single rulebook is not part of the general job description of the SRB as it is laid down in Article 7 (1) of the SRMR. That being said, one should not be oblivious of the potent role of the SRB and how the exercise of its powers impacts on the promotion of convergent bank resolution practices in the Eurozone.

[101] C. Coglianese and D. Laser, "Management-Based Regulation: Prescribing Private Management to Achieve Public Goals" (2003) 37 Law & Society Review 691. For a critical analysis of embedded limitations, see C. Coglianese, "The Limits of Performance-Based Regulation" (2017) 50 University of Michigan Journal of Law Reform 525.

[102] "Feedback statement on public consultation", 6.

[103] D. McBarnet and C. Whelan, "The elusive spirit of the law: Formalism and the struggle of legal control" (1991) 54(6) M.L.R. 848.

The SRB working ultimately under the direction of the Commission and the Council are the European decision-makers (no longer national) of the resolution of those systemically significant banks that fall under its responsibility and is empowered to give directions and instructions to the relevant national authorities for the implementation of its decisions.[104] The SRB can also request information, conduct investigations and on-site inspections and, unlike the EBA, it can even impose fines and periodic penalties when a national resolution authority fails to comply with any of its decisions.[105] These brief observations make plain that the SRB is at least as well equipped as the EBA to use the threat of investigations and enforcement as an incentive alignment tool in the course of its functions. Consequently, all the points, that were made above regarding the usefulness of that strategy in the context of the ESFS, also apply in the case of the SRB albeit in adapted form as befits the different missions and operating environments of the SRB and the EBA.

In addition, the SRB could adopt an outcome-based approach in the course of its interaction with national resolution authorities. Here as well, the aim would be to place the interrogation of long-standing perceptions that inform how national resolution authorities choose to exercise their discretion on matters that continue to fall within the sphere of their powers at quasi-supranational level. This on-going reason-giving exercise could be embedded into the SRB's monitoring of the execution of the resolution schemes by the relevant national resolution authority. [106]

[104] SRMR, art. 2 and art. 7. The resolution of the Banco Popular Espanol SA offers a classic example of the leadership and approach of the SRB and its interaction with national resolution authorities. R. Peruyevo, "Spain: The Single Resolution Mechanism and the resolution of Banco Popular Espanol SA" (2018) 33(1) Butterworths Journal of International Banking & Financial Law 63-64.

[105] SRMR, arts. 34-37, art. 38 and art. 39. These powers may also be exercised against private parties when an SRB decision is directed to them. SRMR, art. 85 provides a right to appeal. See further Preamble to the SRMR at [24].

[106] SRMR, art. 28.

Furthermore, it would be beneficial for the SRM more generally, because a fundamental prerequisite for its effective operation is to ensure that resolution rules work ‘‘in the best interest not only of the Member States in which banks operate but also of all Member States in general as means of ensuring a level competitive field and improving the functioning of the internal market.’’ [107]

Greater clarity is also required on the terms of coordination and engagement between the SRB and the EBA. In theory, the role of the EBA in financial resolution is confined in the execution of “regulation and mediation tasks”. [108] In practice, the strong regulatory element of the powers of the SRB means that it is difficult to draw a sharp line between what belongs exclusively in the sphere of the SRB and what is left to be addressed by the EBA. In view of the complementary and potentially overlapping role of both of them in promoting the convergence of banking practice, it is further recommended that the SRB uses its powers in close cooperation with the EBA to avoid overlaps, gaps and inconsistencies.[109] Currently, the EBA attends the SRB meetings as an observer, while the SRB is a member of the EBA Resolution Committee. These steps are in the right direction but not enough. On the one hand, the EBA attends the SRB meeting on ad hoc basis on the invitation of the SRB. [110] On the other hand, the EBA Resolution Committee has a narrowly focused purpose: the development and coordination of resolution plans and the development of methods for the resolution of failing institutions. [111]

[107] SRMR, Preamble [12].
[108] SRMR, Preamble [10].
[109] A. Georgosouli, ‘Regulatory Incentive Realignment and the EU Legal Framework of Bank Resolution’ (2016) 10(2) Brooklyn Journal of Corporate Financial & Commercial Law 343, 356-366 (discussing the complementarity and potential conflict between the SRB and the EBA).
[110] Articles 51(3) and 53(3) of the SRMR respectively.
[111] The appointment of the SRB representative in the EBA Resolution Committee is set out in SRMR, art. 30(5). Furthermore, all members can vote (EBAR, art. 127).

Therefore, it is recommended that the SRB and the EBA are also asked to enter into a Memorandum of Understanding (MOU) for the coherent coordination of any convergence initiatives that they are proposing to take within the confines of their distinctive mandates. The MOU could further describe amongst other things the terms of their cooperation and a reviewing process to assess progress and next steps. The introduction of a MOU would not amount to a radical departure from the existing practice in field of EU financial markets governance. Being non-binding in nature, the proposed measure would facilitate coordination while avoiding any potential political and constitutional tensions that might otherwise arise due to the strengthening of the interaction between the SRB and the EBA.[112] The use of MOUs is already reflected in the SRMR. Specifically, Article 30 (7) of the SRMR mandates SRB to enter into MOUs with the ECB and national resolution authorities and, as such, it provides the prototype for the introduction of a similar obligation vis a vis the EBA.

A fundamental aspect of the SRM is that tasks are allocated between national resolution authorities and the SRB on the basis of a classification of banks between 'systemic' and 'less-systemic' subject to certain exceptions.[113] Dropping this distinction and making the SRB directly responsible for all (potentially) systemic banks would immediately deprive any remaining national administrative discretions

[112] In relation to the SSM and the supervisory function of the EBA vis a vis the ECB, E. Ferran argues that within this new convoluted architecture the EBA's role is likely to be that of managing "co-existence". A similar observation could be made about the EBA's role in the SRM. E. Ferran, "The existential search of the European Banking Authority" (2016) 17 European Business Organisation Law Review 285–317, 291, 308. On constitutional tensions that arise due to the institutionally ambivalent nature of the ESAs including the EBA, see P.P. Craig, "Comitology, rulemaking and the Lisbon Treaty: Tensions and Strains", 173-202 in C.F. Bergstrom and D. Ritleng (eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford 2016).
[113] SRMR, art. 7(2).

of their content. Furthermore, it would undermine the original intention of the architects of the Banking Union to ensure that the design of the SRM mirrors that of the SSM. As long as one is prepared to accept that the aim here should not be to turn national administrative discretions devoid of purpose as much as to make it difficult for national resolution authorities to depart on grounds that do not stand up to EU public scrutiny, a different course of action is here recommended.

In particular, it is proposed that the national authorities keep direct control over the resolution of the less systemic banks but as a reward on condition that they score sufficiently high in terms of their contribution to the convergence of bank resolution practices. The relevant decision could be taken by the SRB following a similar procedure that is currently provided for the adoption of the resolution scheme in Article 18 of the SRMR. Specifically, the SRB would be given the power to decide this matter after consulting with the EBA with the national resolution authority in question retaining its right to appeal within a strictly defined timeframe. The decision of the SRB would be further subject to periodic review (e.g. every four years), while the ECB, the Commission and the Council would have the power to object the SRB's decision within a strictly defined period of time after the passing of which the decision would become binding.

Transferring direct control over the resolution of less systemic banks to the SRB when certain conditions obtain is hardly novel. In fact, it is already embedded in Article 7 (4) SRMR. According to this provision, the SRB can issue a warning notice or even ''at any time decide'' to exercise directly all relevant powers to less systemic banks, where such a measure is deemed necessary in order ''to ensure the consistent

application of high resolution standards under this Regulation.'' Consequently, the only thing that it would be required in terms of legal reform is the modification of this legal provision so that, as a follow up to that one-off SRB intervention, national resolution authorities face the prospect of a more long-term loss of direct control over systemic banks of local interest under certain circumstances and according to a more transparent decision-making procedure as described in the preceding paragraph.

In due course, assessments of the performance of national authorities could be based on a transparent and regularly updated performance index to provide measurable proof of delivery of one or more predetermined outcomes. Such an outcome might be, for example, the reduction of moral hazard as a result of a specific set of measures that were taken at national level to address the failure of a financially distressed bank. Furthermore, this measure could be also complemented with incentive-audits.[114]

Incentive-audits come in various forms, however, at a minimum, they involve checking the effectiveness of accountability mechanisms, the level of operational independence of regulators, conflicts of interest, liability and funding sources, culture and incentive compatibility among agencies found in vertical and horizontal relationships of public governance. The overall responsibility of coordinating, guiding and overseeing the organisation and execution of incentive-audits could be entrusted with the EU Ombudsman but, given the focus of its mandate on the enhancement of openness and accountability of EU institutions, bodies, offices and agencies, this

[114] M. Cihak, A. Demirguc-Kunt and R. Barry Johnston, "Incentive Audits: A New Approach to Financial Regulation" *Policy Research Working Paper* (No. 6308, 2013) 4, available at https://openknowledge.worldbank.org/handle/10986/12199 (last accessed 1 May 2020); R. Levine, "The Sentinel: Improving the Governance of Financial Regulation" (2 November 2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1498757 (last accessed 1 May 2020).

function needs to be exercised in close collaboration with the national Ombudsmen of Member States.[115]

Incentive audits could start in the Banking Union and eventually expand to the ESFS. Participation in incentive audits need not be made legally mandatory. The running of this auditing exercise combined with peer pressure seems to be more than enough to motivate voluntary participation granted that national resolution authorities are expected to perceive this process as the first decisive step for them to build a profile of high performance in converging with EU policy in exchange for less intrusive EU oversight and interventions as a reward.

V. CONCLUSION

EU law has been profoundly important to the consistent implementation of the FSB Key Attributes amongst its Member States. It established a harmonised legal framework for bank resolution and it is already exporting it beyond its periphery through accession preparations, trade agreements and the granting of equivalence status. It set up mechanisms for the meta-regulation of the administrative discretions of national authorities, hence, going beyond the reputational considerations that the FSB typically relies on to counteract domestic pressures that give rise to variation. It erected an institutional architecture of varying degrees of integration, and it delegated a nuanced range of powers to the EBA and the SRB, namely region-specific transnational regulatory networks, to promote the convergence of regulatory practices.

[115] TFEU, art. 228 and Charter of Fundamental Rights of the European Union, art. 43. The main task of the European Ombudsman is to conduct inquiries into cases of EU maladministration.

The broad consistency of the EU legal framework with the FSB recommendations is not a reason for complacency. National variations may be permitted under EU law, but the abiding bank-sovereign nexus hints that the frequency of national variation is a potential source of concern. As argued, the answer to this problem is not to turn a blind eye to the heterogeneity of the EU economic landscape and to switch to an 'one-size-fits-all' approach. Rather, a more balanced response seems to be a cluster of measures which would enhance the existing capabilities of the EBA and the SRB to bring national decision-making under closer EU control and scrutiny.

Starting first with the EBA, this article recommended a series of legal reforms which serve mainly two purposes. On the one hand, to bolster the effectiveness of supervisory cooperation and, on the other hand, to impel the EBA to be more willing to use the (threat of) its investigatory powers as an incentive alignment technique. It made the case for an outcomes-based approach to constructive engagement with national authorities, and further identified changes that will be needed to implement a more transparent 'comply or explain' procedure in the course of monitoring the consistent implementation of the relevant EU law.

Moving to the SRB, this article argued amongst other things for the modification of the exceptions of Article 7 of the SRMR so that national resolution authorities retain direct responsibility and control over the resolution of less systemic banks as a reward for their good performance in promoting convergent practices according to a performance index. It outlined steps to improve coordination between the SRB and the EBA for the avoidance of unnecessary overlaps, gaps and inconsistencies. Lastly,

it put forward the idea of formalised incentive-audits under the leadership of the EU Ombudsman.

The recommendations of this article do not provide all the answers. For example, structural reform for the rationalisation of national public administrations could also reduce instances of national variation that could be attributed to regulatory capture or corruption. Nevertheless, as the transnational convergence of regulatory practices in bank resolution will continue to be on the agenda, the proposed recommendations are put forward with the hope that they could serve as the building blocks of future debates on the potency of EU law as a region-specific instrument of transnational governance. At the very least, they could help get a better sense of the nature of the issue at hand as well as the menu of available options.