

Seraina Gruenewald, *The Resolution of Cross-Border Banking Crises in the EU. A Legal Study from the Perspective of Burden Sharing*. Alphen aan de Rijn: Kluwer, 2014. 344 pages. ISBN: 9789041149091. EUR 145.

This book constitutes an excellent and comprehensive examination of the legal regime applicable to banking resolution in the European Union. It has the quality of being released at the very birth of the Banking Union, permitting thus to satisfy the increasing interest among academia and practitioners on this field of EU law that one could still qualify as uncharted waters. And the author does so in an exhaustive manner, where conciseness is not to the detriment of accuracy. A good part of the book is written on a *de lege ferenda* basis, i.e. by reference to the proposals on a Banking Resolution Regime Directive and a Banking Resolution Mechanism that were the object of discussion at time of publication of the monograph, and that became respectively Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the BRR Directive) and Regulation 806/2014 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 (the SRM Regulation).

The book is in three parts. First, it sets the framework and fundamentals of resolution as a special insolvency procedure susceptible of affecting a wide range of public or common goods (such as financial stability, the continuity of the basic banking functions and the avoidance of

competition distortions) and private interests (notably that of depositors). A second part deals with the material law and financial aspects of resolution and burden sharing (Chs. 2 to 4). It examines the different resolution tools, the general parameters of burden sharing, the EU general framework for bank resolution (or the passage from national rules to harmonized resolution through the means of the Bank Resolution Directive) and the functioning of the deposit guarantee scheme in situations of resolution (whilst clearly explaining the *Icesave* judgment by the EFTA Court and its implications). A third part (Ch. 5) provides an institutional insight of resolution, reviewing the competences and roles of different institutions and bodies (the European Central Bank and its monetary policy operations, the Commission and the budget of the Union, the European Banking Authority, the European Stability Mechanism) in respect of resolution and burden sharing.

The following qualities of the book should be underlined. To start with, it is far from being a mere descriptive manual on banking resolution. It is a critical work, where the shortcomings of the process of harmonizing resolution, in course during the drafting of the book, are diagnosed and a number of proposals for further integration are formulated. The book explains how the diversity – in substance and in procedure – of national resolution regimes puts into question the financial stability of the Member States and of the Union. The pitfalls of diversity are illustrated by case study examples: those of Fortis, Dexia and Royal Bank of Scotland. The strength of the facts leads to the conclusion: the harmonization of resolution rules and procedures is then a must.

Although the harmonization proposed by the Commission in June 2012 (which eventually led to the adoption of the BRR Directive and of the SRM Regulation) is a substantial step forward, it is not yet sufficient, as it leaves some fundamental aspects of resolution, such as the treatment and ranking of individual creditors, within the discretion of the national legislatures. Moreover, under the Directive, the resolution of cross-border group cases still depends on the pre-eminent home Member State. Resolution colleges are not instruments of integration of centralized decision-making, but coordination fora where the competent authorities of Member States can break free from the decisions taken by the college.

The book then advocates a model based on full integration, and not on “loose” harmonization, in order to better achieve the objective of avoiding systemic bank disruptions in the internal market. That model of integration, which relies on uniform substantial and procedural rules as well as a centralized power of decision, is embodied in the Single Resolution Mechanism. As the book was published in the first half of 2014, when the discussions on the proposal for a Regulation on the Single Resolution Mechanism were still being held between the co-legislators, the examination of the Single Resolution Mechanism is unavoidably cautious and preliminary.

It is probably for that reason that a fundamental question is not addressed in the book, or at least not addressed in depth, namely the reasons why the single resolution regime applies only to institutions located in the banking union (thus, in principle, only the euro area Member States) and not to the whole internal market. Why is the maximum degree of harmonization – which aims at substituting national resolution regimes by a central EU one – required for the euro area? At the core of this question lies the fact that the banking union, of which the single supervision and resolution mechanisms are the two pillars, is not only relevant for the internal market but is also, and preponderantly, necessary to keep the stability of the euro area as a whole. The banking union is the crossroad where two key European policies, internal market and monetary policy, meet.

Second, the book contains an extensive explanation of some of the institutional challenges accompanying the Single Resolution Mechanism, such as the difficulties to find an adequate legal basis for its establishment under the current Treaties, the limitations stemming from the so-called *Meroni* case law (which prevents agencies and bodies of the Union, such as the new resolution authority, from taking decisions entailing policy choices), or the possible conflict that may arise from the fact that the same institution (the Commission) will be the guardian of different competing interests, such as competition concerns and financial stability. Subsequent facts have confirmed the importance of the institutional conundrums anticipated in the book,

notably those related to the adequate legal basis to establish the SRM. Actually, it has been remarkable (and uncommon) to see how the SRM negotiation in the Council – Ecofin – were so focused on EU law and national constitutional issues. No doubt, this is the reason why finance ministers were prompted to look for hybrid solutions, namely the combination of the SRM Regulation (an act of EU law) with an international agreement where the conditions to transfer the bank contributions towards the Single Resolution Fund as well as their mutualization, were laid down.

Third, resolution is examined from a very original perspective, that of burden-sharing or the very basic question of who supports a bank failure. This question becomes the thread throughout the whole of the book: who, within the stakeholders of a bank, is to support a bank failure? Which Member State – home or host – in case of cross-border resolution, is to support a bank failure? How are the liabilities for a bank failure allocated between the official sector and the private stakeholders of a bank?

Fourth, resolution is analysed as if with one of those “street view 360 degrees” cameras describing its context in a global manner. By way of example, the book puts resolution in relation with the ECB functions within the Single Supervision Mechanism and with the possible role of the ECSB in the field of resolution; with the intergovernmental mechanisms of assistance (the European Stability Mechanism and its operations of bank recapitalization); with the competition policy aspects relevant for resolution (merger and State aid); with the role of the European Banking Authority in the field of resolution.

Fifth, the author clearly explains the related financial aspects of resolution: effective bank resolution crucially depends on the creation of financial arrangements able to provide liquidity to the bank resolved. In this particular context, the book examines thoroughly the establishment of national financial arrangements (in the BRR Directive) and of a Single Resolution Fund (in the SRM) fully financed by contributions to be paid by banks themselves, that operate like insurance schemes, hence activated in case banks’ creditors and shareholders are not able to absorb the losses. In any event an uncomfortable truth is explained by the book: however powerful resolution funds may become, the trustworthiness of the system depends on the establishment of an adequate backstop able to supply liquidity to the fund when it does not have immediate access to its resources and, ultimately, of the provision of guarantees or cash by the sovereign itself. The financing backstop of resolution is probably the only issue that remains open for the full completion of the banking union (and not actually the easiest of questions, as it may directly affect the budgets of Member States). Although the provision by the ESCB of Emergency Liquidity Assistance (ELA) has played an essential role in restoring financial stability in some of the countries affected by banking crisis, this mechanism (the overall ELA amount outstanding in early 2012 totalled 120–130 billion) is no more than an instrument of monetary policy that cannot satisfy the need for fiscal arrangements to finance cases of resolution.

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