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The Rule of Law: Protection of property

I. Introduction

Combining the subject of 'Crisis Management in the Banking Sector' with the rule of law is no easy feat: not for lack of substance, but for the choices that have to be made to fit everything that could be said on the matter into a chapter of limited length. We have chosen to build this chapter on three - in our view important - issues concerning the rule of law in relation to a situation of banks in crisis. First, we will take a look at the supranational framework of - especially - the European Convention on Human Rights that - as we shall see - mainly via article 1 of the First Protocol may offer (legal) protection to those parties that are likely to suffer in case of government intervention to save a bank in crisis. Secondly, we turn to two specific and well-known cases where government did intervene - the cases of Northern Rock and notably SNS - to analyze the effect of the rule of law in those cases studies at a national level. Third, we take a look at the near future, in which (at least within the European Union) national instruments aimed at containing any banking crisis will have to conform to the European Banks Recovery and Resolution Directive.

The thin red line connecting these three chapters already becomes obvious. In our vision and interpretation it is first and foremost by providing (minimum) rules regarding the protection of property - taken in a broad sense - that the rule of law plays an important part in situations where banks are (on the brink of) a crisis.

II. The Human Rights Perspective

II.1 Introduction

The protection of property¹ is guaranteed by article 1 of the First Protocol ("article 1 FP") of the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe ("ECHR") and article 17 of the Charter of Fundamental Rights of the European Union ("the Charter"). The scope of the term 'possession' in article 1 of the first protocol ECHR has expanded enormously since the first case about its scope *Marckx v. Belgium*² in 1979 - 25 years after its

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¹ The article speaks of 'possessions'. However, because article 1 FP in substance guarantees the right of property, we will use the terms 'property' and 'possession' interchangeably.

² ECtHR 13 June 1979, appl. no. 6833/74.

coming into force in 1954³ - about Belgian law which led to an unmarried mother not being free to dispose of her property in favour of her child. Where in the *Marckx* case it was held that article 1 FP only applies to a person's existing possessions and does not guarantee the right to acquire possessions, currently a claim can constitute a possession if it is sufficiently established to be enforceable (for example by virtue of a court judgment, an arbitration award or an administrative decision)⁴ or if there are legitimate expectations to acquire ownership (those expectations need to be of a nature more concrete than a mere hope and be based on a legal provision or legal act such as a judicial decision)⁵.

The Charter has come into force on December 1 2009. Article 6 section 1 of the Treaty on the European Union ("TEU") states that 'the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental rights'. In the future the European Union ("EU") as a whole will accede to the ECHR (article 6 section 2 TEU) but for now all member states of the EU are also member states of the Council of Europe.⁶ This means however that institutions of the European Union currently are not bound to the ECHR. As can be read in section 1 of article 51, the Charter has a limited scope: it only applies to 'the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union Law'. Furthermore, as stated by section 3 of article 52 of the Charter, insofar as the Charter 'contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by said Convention. This provision shall not prevent Union law providing more extensive protection'. This provision also applies to the protocols of the ECHR.⁷

So although the Charter is generally regarded as an updated version of the ECHR with more emphasis on economic, social and cultural rights, its current importance should not be overstated: it only applies to member states when they are implementing European Union law - thereby significantly reducing the opportunity to invoke the article⁸ - and the interpretation of article 17 is based on the case law of the European Court of Human Rights ("ECtHR/the Court") regarding article 1 FP. However, as we shall see, the importance of the Charter can certainly grow in the future with

³ The right to possession was a tricky problem during the realization of the ECHR: states were afraid such a right would mean that nationalization of companies for socio-economic reasons would not be allowed. The right was therefore not included in the ECHR itself in 1950.

⁴ See for example ECtHR 10 December 2013, appl. no. 45394/06 (*Krstić v. Serbia*), § 76.

⁵ See for example ECtHR 10 July 2002, appl. no. 39794/98 (*Gratzinger and Gratzingerova v. Czech Republic*), § 73.

⁶ The accession will still take at least a couple of years, F.D. Schild, 'Hoe een koe een haas vangt. De toetreding van de EU tot het EVRM en de gevolgen voor de praktijk', *NtER* 2013/7, p. 253.

⁷ T. Barkhuysen & A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht', *Jurisprudentie Bestuursrecht plus* 2011/1, p. 17.

⁸ See C.D.J. Bulten, 'De invloed van fundamentele rechten op het rechtspersonenrecht', in: J.H. Gerards and C.H. Sieburgh (ed.), *De invloed van fundamentele rechten op het materiële recht*, Deventer: Kluwer 2013, p. 326 in which she states that almost always only article 1 FP is invoked.

the formation of the Single Resolution Authority. Nevertheless, in the following we will only look at case law of the ECtHR.⁹

II.2 General overview Article 1 First Protocol

First of all it is important to state that member states (of the Council of Europe) generally have a margin of appreciation when they want to intervene in someone's property rights. For that, we need to look at the text of article 1 FP from which this margin of appreciation can be deduced:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Since *Sporrong and Lönnroth v. Sweden*¹⁰ it has been clear that the article contains three distinct rules. The first rule is the most general one and states the principle of peaceful enjoyment of property (first sentence of the first paragraph). The second rule applies to deprivation of possessions by subjecting it to certain conditions (second sentence of the first paragraph). The third rule is that states are entitled to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose (second paragraph). These three rules are however connected to each other in the sense that ‘the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle in the first rule’.¹¹ The article does not only include a positive guarantee to the peaceful enjoyment of possessions, but also a negative obligation that no one - except in certain cases - shall be deprived of their possessions by the state.¹²

II.3 Invoking Article 1 First Protocol

To successfully invoke the article, the applicant first has to establish that there is an interest that can be classified as a possession, which as we have seen can be an existing possession, a possession that is sufficiently enforceable or a legitimate expectation about a possession. Once it is established

⁹ For more information on how both European courts can influence each other mutually and how the Charter can have additional value to the protection of human rights see Barkhuysen & Bos 2011, p. 17-34 and Schild 2013, p. 247-254.

¹⁰ ECtHR 23 September 1982, appl. no. 7151/75.

¹¹ ECtHR 30 June 2005, appl. no. 46720/99, 72203/01 and 7252will /01 (*Jahn and others v. Germany*), § 78.

¹² J.C. van Apeldoorn, *Human Rights in Insolvency Proceedings*, Amsterdam: Kluwer Legal Publishers 2012, p. 294.

there is a possession, the approach of the Court is as follows. First, it considers whether there has been a deprivation of possessions after which it will look if there has been a control of the use of possessions. When there is neither a deprivation nor a control of the use of property, the ECtHR will consider whether there has been some other interference with the peaceful enjoyment of possessions, the third - remaining - category.

Deprivation is defined as the extinction of legal rights of the owner, normally by transferring the ownership of the property.¹³ Regardless of whether there has been a formal transfer of property, the test is whether the situation amounted to a de facto expropriation: the Court looks behind the appearances and investigates the realities of the situation complained about.¹⁴ However, when the purpose of a measure is simply regulation and not expropriation, a de facto expropriation is not easily assumed despite having heavy consequences.¹⁵ As we shall see, the way the ECtHR qualifies interference decides for a large part the amount of compensation a state has to pay: expropriation warrants a full compensation, whereas regulation does not. As such, generally states do not want their interference in possessions qualified as an expropriation. There is however no clear dividing line between expropriation and regulation.¹⁶

II.4 Test Article 1 First Protocol

When an interference of a property right is established, three conditions need to be met for government interference to be allowed. First, the measure that constitutes the interference must be in accordance with the conditions provided by national law. The required legal certainty must meet the criteria of precision, foreseeability and accessibility.¹⁷ The *lawfulness* or *legal certainty* constitutes the most important requirement of article 1 FP.¹⁸ This requirement is the manifestation of the rule of law, of which the Court has repeatedly stated that it is one of the most fundamental principles of a democratic society.¹⁹ Secondly, the interference must be in the *public interest*.²⁰ Generally the Court will respect the legislature's judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation.²¹ Finally, there has to be a *fair*

¹³ C. Ovey and R.C.A. White, *Jacobs & White: The European Convention on Human Rights*, Oxford: Oxford University Press 2010, p. 488.

¹⁴ See for example ECtHR 29 March 2010, appl. no. 34044/02 (*Depalle v. France*), § 78.

¹⁵ See for example ECtHR 7 July 1989, appl. no. 10873/84 (*Tre Traktörer Aktiebolag v. Sweden*) and Commission 21 October 1998, appl. no. 33298/96 (*Pinnacle Meat Processors v. the United Kingdom*). From 1954 until 1998 the European Commission of Human Rights (the Commission) was a special tribunal to which individuals had to apply to get their case to the ECtHR.

¹⁶ Ovey and White 2010, p. 359.

¹⁷ See for example ECtHR 8 November 2005, appl. no. 4251/02 (*Saliba v. Malta*), § 37.

¹⁸ See for example ECtHR 20 May 2010, appl. no. 55555/08 (*Lelas v. Croatia*), § 71.

¹⁹ See for example ECtHR 6 September 1978, appl. no. 5029/71 (*Klass and others v. Germany*), § 55 and ECtHR 8 November 2005, appl. no. 4251/02 (*Saliba v. Malta*), § 37.

²⁰ Although both the terms 'public interest' and 'general interest' can be found in article 1 FP, they both have the same aim, namely that the interference is in pursuance of a legitimate aim that benefits the entire community (Van Apeldoorn 2012, p. 301).

²¹ See for example ECtHR 15 November 2005, appl. no. 44302/02 (*J.A. Pye Ltd. v. the United Kingdom*), § 44 and ECtHR 15 March 2007, appl. no. 4327/98 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02 (*Velikovi and others v. Bulgaria*), § 169.

balance between the public interest and the individual rights.²² This means that there cannot be an individual and excessive burden, there must be proportionality between purpose and the effects of the measure and last of all compensation terms are taken into account to assess whether a fair balance was struck.²³ In case of a (de facto) expropriation, the ECtHR requires a procedure that guarantees a complete evaluation of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation.²⁴ As a principle deprivation of property without full compensation does not constitute a fair balance.²⁵ Starting point for the compensation is the market value of the expropriated asset, which is regarded as a full compensation. For the calculation of the market value, member states are given a wide margin of appreciation.²⁶ When there is no expropriation of property, member states do not have an obligation to pay (full) compensation.²⁷ The Court only intervenes when the margin is crossed.²⁸ The margin of appreciation regarding reasonable compensation is much wider in case of control of property than with deprivation of property.²⁹ To decide whether there has been enough compensation, the Court looks at the importance of the public interest for which the interference took place:

*“While it is true that Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances, the Court takes the view that in similar matters there is a direct link between the importance or compelling nature of the public interest pursued and the compensation which should be provided in order for the guarantees of Article 1 of Protocol No. 1 to be complied with. A sliding scale should be applied in this respect, balancing the scope and degree of importance of the public interest against the nature and amount of compensation provided to the persons concerned.”*³⁰

²² See for example ECtHR 29 April 1999, appl. no. 25088/94, 28331/95 and 28443/95 (*Chassagnou and others v. France*).

²³ A.J.P. Schild, *De invloed van het EVRM op het ondernemingsrecht*, Deventer: Kluwer 2012, p. 136-137.

²⁴ ECtHR 10 July 2003, appl. no. 55794/00 (*Efstathiou en Michailidis & Co. Motel Amerika v. Greece*), § 29.

²⁵ ECtHR 27 November 2007, appl. no. 74258/01 (*Urbárska Obec Trenčianske Biskupice v. Slovakia*), ECtHR 8 July 2008, appl. no. 1411/03 (*Turgut and others v. Turkey*), ECtHR 8 December 2011, appl. no. 5631/05 (*Althoff and others v. Germany*).

²⁶ ECtHR 9 December 1994, appl. no. 13092/87 (*The Holy Monasteries v. Greece*), ECtHR 21 February 1986, appl. no. 8793/79 (*James and others v. the United Kingdom*), ECtHR 22 December 2009, appl. no. 58858/00 (*Guiso-Gallisay/Italy*). See also J.A.M.A. Sluysmans, S. Verbist and R.L. de Graaf, ‘Compensation for Expropriation: How Compensation Reflects a Vision on Property’, *European Property Law Journal* 2014/3 who conclude after a comparison between the Netherlands, Belgium, Germany and South Africa that questions regarding determining market value are not legal but political questions. The answers to these questions are decided by how property is valued and therefore reflect the status of property in the society concerned.

²⁷ Commission 9 March 1989, appl. no. 11763/85 (*Banér v. Sweden*) and Commission 21 October 1998, appl. no. 33298/96 (*Pinnacle Meat Processors Company and others v. the United Kingdom*).

²⁸ ECtHR 5 September 2001, appl. no. 38460/97 (*Platakou v. Greece*) and ECtHR 4 November 2010, appl. no. 40975/07 (*Dervaux v. France*).

²⁹ Bulten 2013, p. 327.

³⁰ ECtHR 27 November 2007, appl. no. 74258/01 (*Urbárska Obec Trenčianske Biskupice v. Slovakia*), §115.

So, the compensation terms play a large role in determining whether the contested measure respects the requisite fair balance and in particular if it does not impose a disproportionate burden on the applicant.

A notable exception to the rule of full compensation in case of expropriation are the so called 'transition cases', cases in which the expropriation is an element of a process of political and economic transition from a communist to a different form of government such as the reunification of Germany. Most illustrative of this is the *Jahn v. Germany* case³¹ in which the applicants were the heirs of farmers to whom expropriated land was distributed in 1945. After the fall of the Berlin Wall, a law was enacted which permitted those to whom land had been distributed to acquire full title to it and to be able to dispose of it. However, amendments were made to the law which required the applicants to assign the property they had inherited to the German tax authorities without compensation. The reason for this was that the applicants had not carried on an activity in the agriculture, forestry or food-industry sector. The Grand Chamber - different from the decision of the Chamber - concluded that 'given the 'windfall' from which the applicants undeniably benefited as a result of the law applicable to the heirs to land acquired under the land reform, the fact that this correction was made without paying any compensation was not disproportionate'.³² Transition cases should be judged according to the logic behind the *Jahn* case: (i) in the transition process, a State may inevitably make mistakes and has a right to take corrective action, (ii) in such a context the State's margin of appreciation becomes wider and the corrective action may interfere with acquired rights and expectations and (iii) the width of the margin of appreciation narrows with the passage of time. This kind of cases - as emphasised in the *Jahn* case - cannot be applied outside the scope of transition cases: it was due to the unique nature of the general political and legal context - and not simply the exceptional nature of the circumstances - that secured its acceptance of expropriation without compensation.³³

II.5 Article 1 First Protocol and the financial sector

So how does all this connect to crisis management in the financial sector? As stated by the text of the article, it applies to 'every natural or legal person'. Even more, article 1 FP is the only article of the ECHR in which legal entities are specifically mentioned.³⁴ This means that banks themselves are also protected. As we shall see however, it is mostly shareholders who invoke the article. To be able to do this, the applicant has to be a real 'victim'. This means it must be decided if the rights of the corporation are being effected, or if the rights of the shareholders have been interfered with: the

³¹ 30 June 2005, appl. no. 46720/99, 72203/01 and 7252/01.

³² § 116 (c).

³³ See the dissenting opinions of the judges Bratza, Garlicki, Lorenzen, Tsotsoria and Pardalos in ECtHR 25 October 2012, appl. no. 71243/01 (*Vistiņš en Perepjolkins v. Latvia*) in which a violation of article 1 FP was concluded due to a lack of compensation.

³⁴ Bulten 2013, p. 318.

rights and obligations of the corporate identity are separate from those of its shareholders.³⁵ It is agreed on that article 1 FP plays a large role in company law due to the wide scope of what constitutes a possession and the positive obligations the ECtHR reads in the article. Due to these positive obligations article 1 FP can also be a relevant norm in horizontal relation between two private parties (see e.g. the *Bramelid and Malmstrom* case discussed below).³⁶

As mentioned in the introduction the scope of article 1 FP is very wide. In the admissibility decision in the *Bramelid and Malmstrom* case (1982) the European Commission of Human Rights (“the Commission”) for the first time applied article 1 FP to private law relations by holding that the provisions of the Swedish law that allowed for the compulsory surrender of the minority shares to the company’s majority of stakeholders for a price below the market value could not be said to create inequality such as to constitute a violation of the right to peaceful enjoyment of possessions. For the Commission the legal provisions governing private law relations between individuals, which compel a person to surrender possession to another, do not interfere with the right to peaceful enjoyment of possessions, unless these provisions arbitrarily or unjustly deprive that person of property in favour of another. However this was not demonstrated in the case at hand. Another important contribution made by the Commission to the interpretation of article 1 FP, was to regard company shares as possessions giving rise to a right of ownership.³⁷ Protection against dilution of shares also falls under the peaceful enjoyment of possession.³⁸ The Court however does not make explicit whether this is a deprivation or a regulation of property rights, because of the special character of a share.³⁹ So not only ‘actually’ taking away shares from shareholders is protected under article 1 FP, but also making shares de facto useless (especially in terms of control over the company) by dilution of shares.

A more recent case that gained a lot of attention was the Northern Rock case,⁴⁰ following the nationalization of the bank Northern Rock made possible by legislation which also provided the

³⁵ J.C. van Apeldoorn 2012, p. 296 and 328.

³⁶ Schild 2012, p. 225.

³⁷ Commission 12 October 1982, appl. no. 8588/79 and 8589/79 (*Bramelid and Malmström v. Sweden*).

³⁸ The Court has not explicitly held whether this constitutes a deprivation or control of property. See for example ECtHR 7 November 2002, appl. no. 30417/96, *Jurisprudentie Onderneming & Recht 2003/112 (Olczak v. Poland)*. In § 60 the Court calls a share in a company ‘a complex object’. “It certifies that the holder possesses a share in a company together with the corresponding rights. This encompasses the right to a share to the company’s assets in the event of its being wound up, but other unconditioned rights, especially voting rights and the right to influence the company’s conduct ... The Court finally recalls its recent case-law according to which shares in a public company have an economic value and, therefore, are to be regarded as “possessions” within the meaning of Article 1 of Protocol No. 1 to the Convention. ... The Court finally recalls a decision given in another case, in which the applicants, who were shareholders in a public company, complained that as a result of a merger of the latter with another company, they were obliged to exchange the shares in the old company against shares in the new one at an unfavourable rate. In that case the Court considered that the applicants as shareholders could claim to be victims of a violation of Article 1 of Protocol No. 1...”

³⁹ ECtHR 25 July 2002, appl. no. 48553/99 (*Sovtransavto Holding v. Ukraine*), § 92.

⁴⁰ ECtHR 10 July 2012, appl. no. 34940/10 (*Dennis Grainger v. the United Kingdom*).

assessment by an independent assessor for the compensation payable to the former shareholders.⁴¹ The nationalization of the company was effectuated through the Northern Rock plc Transfer Order 2008 which came into force on 22 February 2008. It transferred the shares in the company to the Treasury Solicitor as nominee of the Treasury at the beginning of 22 February 2008. The compensation of the former shareholders was set to zero by an independent assessor and was based on the requirement that ‘the amount of compensation payable to a person [to] be an amount equal to the value immediately before the transfer time of all shares in Northern Rock held immediately before the transfer time by that person’.⁴² The assessor came to this conclusion on the basis of the following assumptions; (i) all financial assistance provided by the Bank of England or the Treasury to the deposit-taker in question has been withdrawn (whether by the making of a demand for repayment or otherwise), (ii) in the future no financial assistance would be provided by the Bank of England or the Treasury to the deposit-taker in question (apart from ordinary market assistance offered by the Bank of England subject to its usual terms), (iii) Northern Rock is unable to continue as a going concern and (iv) Northern Rock is in administration.⁴³ The question was whether the lack of compensation was proportional. Due to the exceptional circumstances in the financial sector, the Court held that the government had a wide margin of appreciation regarding the measures it takes to protect the financial sector. Firstly, the purpose of the nationalization was to protect the financial sector in the United Kingdom against the consequences a liquidation of the bank would have had, as a last resort.⁴⁴ Furthermore, the government had not been negligent in supervising the bank. Lastly, article 1 FP does not give member states an obligation to vouch for the debts of private institutions. The Court must respect the decisions of the national authorities unless it finds them to be ‘manifestly without reasonable foundation’.⁴⁵ So despite the lack of compensation there was no violation of article 1 FP:

“In the Court’s view, the decision taken in the legislation that the former shareholders of Northern Rock should not be entitled to take the value which had been created by the Bank of England’s loan was far from being “manifestly without reasonable foundation”. Instead, it was clearly founded on the policy of avoiding “moral hazard”, which is at the heart of the principles which regulate the provision of LOLR⁴⁶. In the Court’s view, it was entirely legitimate for the State authorities to decide that, had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only

⁴¹ The nationalization of Northern Rock was effected by the Northern Rock plc Transfer Order 2008 made under the 2008 Act. It came into force on 22 February 2008, and transferred all the shares in Northern Rock to the Treasury Solicitor as nominee of the Treasury with effect from the beginning of that date.

⁴² § 26.

⁴³ § 24-27.

⁴⁴ § 39.

⁴⁵ § 39.

⁴⁶ Lending of Last Resort: the support the Government had given to Northern Rock from September 2007 onwards had constituted a Lending of last Resort operation, carried out in the context of macro-economic policy, strictly and exclusively for the protection of the banking system as a whole and not in the interests of Northern Rock or its shareholders (§ 21).

*through the provision of State support, this would encourage the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy.*⁴⁷

In the Dutch SNS-case - which will also be discussed in paragraph III.2 - shareholders and subordinated debt holders of SNS REAAL N.V. and SNS Bank N.V. were expropriated under more or less the same circumstances: SNS Bank was considered a systemically important institution which means that threat of insolvency of SNS Bank might put the stability of the financial system in serious and immediate danger.⁴⁸ On 1 February 2013 the Minister of Finance issued the expropriation decree⁴⁹ which stated that SNS REAAL N.V. 'shall be expropriated for the benefit of the State of the Netherlands'. The expropriation was deemed necessary by the extreme situation SNS Bank and SNS REAAL found themselves in and the serious and immediate threat posed by that situation to the stability of the financial system.⁵⁰ Parties suffering expropriation are entitled to compensation under article 6:3 of the Financial Supervision Act (*Wet Financieel Toezicht*). The Minister of Finance also decided - based on his advisers' analysis and given the expected losses and state support still to be repaid - that the value of the expropriated securities and assets of SNS REAAL and SNS Bank would be negative in the event of bankruptcy therefore leading to the conclusion that the compensation should amount to EUR 0 per expropriated share and EUR 0 per expropriated loan. The decision of the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State/ABRvS*, the highest administrative court in the Netherlands) on 25 February 2013 stated that the expropriation itself did not amount to a violation of article 1 First Protocol. The compensation proceedings are currently pending before the Supreme Court (*Hoge Raad*). Although the decision to nationalize has become final and binding, the ECtHR considered in its admissibility decision that it would be artificial to divorce the decision as to the compensation terms from the actual decision to expropriate, since the factors influencing the latter will also influence the former.⁵¹ This means we will have to wait the outcome of the compensation proceedings in the Netherlands and a possible suit before the ECtHR before we know whether the (lack of) compensation will amount to a violation of article 1 FP.

Deposits are also protected under article 1 FP. In *Zlotas v. Greece Republic*⁵² the applicant had put money in an account in 1981 and did not perform any transactions on the account (cash withdrawals or deposits or entering of interest in the booklet provided for that purpose) until 2003. Because of this lack of transactions, all his claims in respect of the account had - on the basis of national law -

⁴⁷ § 42.

⁴⁸ ECtHR 14 January 2014, appl. no. 47315/13 (*Stefania Adorisio and others v, the Netherlands*), § 7: The Netherlands central bank's (*De Nederlandsche Bank N.V./ DNB*) letter to the Minister of Finance dated 24 January 2013.

⁴⁹ Official Gazette (*Staatscourant*), 1 February 2013, no. 2018.

⁵⁰ § 11.

⁵¹ § 49.

⁵² 29 January 2013 appl. no. 66610/09.

been time-barred. The Court held that this constituted an interference with his property rights, namely an interference that had to be dealt with under the first sentence of the first paragraph of article 1: the remaining category of an interference in the enjoyment of possessions, not being deprivation or regulation of property.⁵³ The question was therefore whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Court considered that the time-barring measure was drastic to such an extent, that it puts citizens at a disadvantage *vis-à-vis* the bank.⁵⁴ Furthermore, the principle of legal certainty puts a positive obligation on the state to protect citizens and to require that banks should inform the holders of dormant accounts when the limitation period is due to expire and thereby providing citizens the opportunity to stop the limitation period running. In this case the absence of such information placed an excessive and disproportionate burden on the applicant 'which cannot be justified either by the need to terminate legal relationships whose existence has become uncertain or in order to ensure the proper functioning of the banking system'.⁵⁵

II.6 Conclusion on the human rights perspective

Article 1 FP protects three kinds of interference in the enjoyment of possessions: deprivation, regulation and a remaining category. For an interference to be legitimate, the measure that provides for the interference must be in accordance with the condition provided by national law, in the public interest and there has to be a fair balance between the public interest and the individual rights. This fair balance can differ very much per case depending on the specific circumstances. An individual burden is for example less easily assumed (and so the margin of appreciation for states grows) when the case is a transition case. Given the case law regarding the financial sector on the member state level and the Court level, one can deduce that courts are reluctant in putting too much pressure on member states by concluding a violation of article 1 First Protocol under the current financial circumstances. As was shown in the transition cases, extraordinary circumstances call for extraordinary measures, although some limitations still apply. The circumstances of the *Jahn* case cannot be applied outside the scope of transition cases but we think that the general direction the Court follows, might be transposed to cases with equally exceptional, but different circumstances - like the possible collapse of a country's financial sector. The fact that states have little or no previous experience with expropriating or otherwise limiting the right to possession of banks, and the pressure to act swiftly, might provide them with some leeway. This leeway of course will - and has to - shrink with the passing of time and the experience gained. The scope of the term 'possession' is very wide and it can be assumed that all parts of the bank, from the bank itself to the shareholders and account holders can seek the protection of article 1 FP. One could argue that

⁵³ § 47.

⁵⁴ § 51.

⁵⁵ § 53-54.

a different type of protection should be provided to deposit holders and shareholders who take more risks with their money: deposit holders may have a greater claim to more (or: full) compensation than shareholders. In the paragraph on compensation during bail-ins, we will expand on this point.

III. The National Perspective

III.1 Introduction

Several member states have adopted legislation in order to take measures against (system relevant) banks as to prevent undesired effects of economic crises, such as bank runs and bankruptcy. Among these member states are France, the United Kingdom, Denmark, France, Ireland, Germany, Sweden and the Netherlands.

The United Kingdom was the first member state to adopt a permanent statutory regime with the sole purpose to intervene in the banking sector, which was drafted especially to take measures against a failing bank. Inspired by the British efforts, the Dutch adopted such legislation as well, which was recently used to nationalize the Dutch SNS Bank. The Dutch legislation is discussed below.

III.2 The Netherlands

III.2.1 Introduction

In the Netherlands, the Special Remedies Financial Institutions Act (*Wet bijzondere maatregelen financiële ondernemingen*), the Intervention Act (*Interventiewet*) for short, was adopted on June 13, 2012. Before this date, no permanent statutory regime to intervene (exclusively) in the banking sector existed within the Netherlands, even though situations have arisen in which legislation to deal with failing banks may have come at hand, such as the takeover by the Dutch State of ABN AMRO bank.

III.2.2 Intervention Act

The Intervention Act has amended the Financial Supervision Act (*Wet financieel toezicht*) by, inter alia, the introduction of a new Chapter 6, that makes it possible for the Minister of Finance to nationalize banks and other financial undertakings that have their corporate seat in the Netherlands,⁵⁶ by expropriating its assets or the effects that have been issued by or in cooperation with the financial undertaking. The criterion for expropriation is that, in the opinion of the Minister, the situation of a financial undertaking leads to a severe and immediate threat for the stability of the financial system in the Netherlands.

⁵⁶ Article 1:1 of the Act includes a limited list of institutions that are considered to be financial undertakings.

Section 4 of article 6:2 gives the Minister of Finance the authority to order that expropriated assets will fall to a private entity, thus making it possible to transfer assets to a private entity (e.g. a bridge bank).

Soon after the Intervention Act came into force, the expropriation instrument set forth therein was used to deal with SNS Bank on February 1st 2013. Remarkable was that not only assets and effects were expropriated, but also debts and (future) claims against the Bank. Whilst the Administrative Jurisdiction Division of the Council of State ruled that appeals raised against the expropriation of debts were inadmissible and ill-founded, the decision of the Minister was annulled as far as it ordered the expropriation of (future) claims.⁵⁷ This opened the door for (future) claims against the bank. The expropriated debts and bad parts of the bank have been transferred to a private entity that has been enacted with the sole purpose to go bankrupt after the expropriation procedure ended.

One should note that the expropriation order of February 1st 2013 was not solely directed to SNS Bank, but also to SNS Reaal, an insurance company, of which SNS bank is a subsidiary, because of the (financial) interrelatedness between the bank and the insurer. This was reason enough for the Administrative Jurisdiction Division of the Council of State to reject appeals directed against this decision.

Similar to the Northern Rock case, the compensation offered for the expropriation of effects and assets was nil, based on the presumption that SNS Bank would immediately cease its business activities (and go bankrupt), in the event that the Minister of Finance would not have intervened.⁵⁸ This standpoint was appealed against before the Commercial Chamber of the Regional Court of Appeal in Amsterdam (*Ondernemingskamer*). In its decision of July 11th 2013, the Court of Appeal considered that, whereas this standpoint for compensation may be right, this not necessarily meant that the compensation should be nil. The Court then decided to appoint a committee of valuers to estimate the value of the expropriated assets and effects. This decision was appealed against before the Supreme Court by the Minister of Finance. At the time of writing, the Supreme Court has not decided on this appeal.

Some expropriated parties have - as already mentioned in paragraph II.5 - appealed against the decision of the Administrative Jurisdiction Division of the Council of State before the European Court of Human Rights. These appeals primary concern an alleged violation of article 6 (due process) of the ECHR and article 1 FP.

IV. The BRRD and the right to possessions

⁵⁷ ABRvS 25 February 2013, ECLI:NL:RVS:2013:BZ2265.

⁵⁸ Pursuant to article 6:9 sub 1 of the Financial Supervision Act, the value of expropriated assets or effects should be estimated based on the expected future scenario of the financial undertaking concerned, in the situation that no expropriation would have taken place and the price that, given that future scenario, would have been paid in a hypothesized sale on the economic market between the expropriated party as a reasonable acting seller and the expropriating party as a reasonable acting buyer.

IV.1 Introduction

Most of these specific, national recovery and resolution instruments will soon (partially) be relegated to the past. Instead, those instruments will have to conform to the European Banks Recovery and Resolution Directive (“BRRD”)⁵⁹ and may be overruled entirely via the Single Resolution Mechanism (“SRM”)⁶⁰. Both these instruments are part of the European ‘Integrated Financial Framework for the Banking Union’, or in short: the banking union.⁶¹ It should be noted that the BRRD concerns minimum harmonisation; national ‘gold plating’ is allowed, so states have the option to keep using their own recovery and resolution instruments, insofar they do not conflict with the BRRD and the underlying principles.

The banking union will bring about a shift in both powers and competency of the various national supervising authorities. In this section, we will discuss the BRRD in conjunction with the rule of law and the related issues that might arise.

We will not expand on the SRM, but the SRM includes the creation of a Single Resolution Board (“SRB”). The SRB is the European equivalent of the different national resolution authorities, and has access to all the BRRD resolution tools. With regard to the right to possessions, the SRB is bound to article 17 of the Charter of fundamental rights of the European Union (through article 51 of the Charter), as long as the European Union has not acceded to the ECHR.

Although the BRRD is applicable to different kinds of financial institutions, we will focus on the effects of the BRRD on banks.

IV.2 BRRD, the instruments

IV.2.1 Introduction

The BRRD consists, broadly speaking, of three parts: resolution planning to be able to quickly resolve a bank if need be (Title II), recovery instruments to prevent bank failure (Title III) and resolution instruments to cut out the bad parts of a financial institution (Title IV). Noteworthy is that there are no instruments to *integrally* save a bank on the verge of failing. The BRRD instruments aim to save the systemically important parts of a bank, but the ‘bad’ parts (i.e. failing parts without systemic relevance) will suffer for it. By doing so, the usage of public funds can be

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

⁶⁰ Proposal text European Commission, 10 July 2013, 2013/0253 (COD), on which a provisional agreement was reached between Parliament and Council on 15 April 2014.

⁶¹ Consisting of the Single Supervisory Mechanism (supervisory powers over European banks for the European Central Bank), the Single Rule Book (harmonised prudential rules for banks throughout the European Union) and the Single Resolution Mechanism. See European Commission, ‘Banking union: restoring financial stability in the Eurozone’, Brussels 2014 and B. Bierens, ‘De Bankenunie: een nieuw huis voor het Europees banktoezicht’, *Ondernemingsrecht* 2014/59.

limited as much as possible (see consideration 31 BRRD), though the usage of public funds might be unavoidable, in which case the SRM and the so-called Single Resolution Fund may be called upon.

The fundamental idea behind the BRRD is that *every bank should be able to fail*, regardless its size or systemic importance, without dislodging the financial system.⁶² The BRRD provides the tools to protect the stability of the financial system as a whole, while the failed bank is (partially) liquidated. These tools will be used by the national resolution authorities, which are appointed by way of article 3 BRRD.

IV.2.2 Resolution planning

Not only failed banks or banks at risk of failing will be confronted with the BRRD. Besides the obligation to have a recovery and resolution plan ready, banks will need to be ‘resolvable’, which is to say a bank can be liquidated without adversely affecting the financial system as much as possible. A bank deemed unresolvable by the authorities, can be forced to take measures. Not only do these measures involve divulging information to the authorities, but they also encompass restructuring the company in such a way that systemically vital parts can be separated and insulated from more precarious endeavours, the divesting of assets, and ceasing specific activities (see article 17 BRRD).

IV.2.3 Recovery

Before resolution is in order, the application of the BRRD’s recovery (or: early intervention) instruments might nurse the failing bank back to health. As soon as a bank breaches the requirements of Directive 2006/48/EC, 2006/49/EC or Title II of 2004/39/EC (i.e. capital requirements and investment firm authorisations), or if a bank’s rapidly deteriorating liquidity situation makes such a breach likely, Member States must intervene. The early intervention measures enable the competent authority - among others - to enforce a change of management, to require changes in business strategies and to require changes in the legal or operational structures of a bank. It should be noted that if the competent authority is not satisfied with the management change as undertaken by the bank, the authority itself can appoint a ‘temporary administrator’ instead, to either replace or work alongside the management body of the bank. The competent authority specifies the powers, role and function of the temporary administrator, and only the competent authority can remove the temporary administrator from his function.

IV.2.4 Resolution

The BRRD provides four different resolution tools: (i) sale of business, (ii) bridge institution, (iii) asset separation, and (iv) bail-in. The application of one tool does not exclude the others from being used as well in one resolution. All these resolution tools adhere to the same basic principles:

⁶² European Commission, ‘EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions’, MEMO/14/297, 15 April 2014. The BRRD aims to end the issue of banks being ‘too big to fail’.

shareholders bear first losses, before the creditors. Secondly, creditors shall not be worse off than in case the bank would have been wound up under normal insolvency proceedings ('no creditor worse off' principle). Finally, the state shall not (financially) aid banks in crisis, unless specific circumstances are met (article 34 and 56 - 58 BRRD). As a matter of principle, losses should be shouldered by the stakeholders, not the taxpayer.

The power to resolve a bank only exists if and when a bank is failing or likely to fail. Parameters to determine if a bank is or will be failing, are given in article 32 BRRD.

Instruments (i) through (iii) are mainly aimed at the failing banks themselves and their operations. Stakeholders might, of course, suffer substantial losses if their investments, debts or (uncovered) deposits happen to be part of a separated 'bad' part of the bank which will be allowed to fail, so the systemically more vital parts can survive (though it should be noted that the asset separation is a blessing for most stakeholders, as the divested assets are used to invigorate the remaining bank). These stakeholders however derive their interest from the measures that are primarily aimed at the bank. The bail-in however, directly targets shares and *uncovered* deposits. In essence, claims of creditors are either written down (or written off) or converted into equity. First go the shareholder claims (tier 1 and tier 2 capital), followed by subordinated debts and finally uncovered deposits (article 48 BRRD). Some liabilities cannot be bailed in, e.g. claims from employees regarding their salaries, social security claims and the guaranteed EUR 100,000,- from the Deposit Guarantee Scheme ("DGS"; the so-called 'covered deposits', see article 44 section 2 subsection a and article 2 section 94 BRRD in conjunction with article 2 section 1 subsection 4 Directive 2014/49/EU⁶³). Conversion can mean the bank is required to issue extra shares, thereby diluting the shares of the existing shareholders. As we have seen in paragraph II.5, protection against dilution falls under the peaceful enjoyment of possession⁶⁴.

Besides forced bail-in, the BRRD also creates the contractual bail-in, by allowing banks to retain a certain amount of liabilities, that can be bailed-in before any other liability, and rank lower than any other liability in insolvency (article 45 sections 13 and 14 BRRD). Remarkable is that if the contractual bail-in leads to conversion, the converted equity can be bailed-in again in a forced bail-in.

IV.3 BRRD, respecting the right to possessions

The BRRD grants some sweeping powers to the resolution authorities. But how well do these powers hold up with regard to the right to possessions? We will test the BRRD against article 1 FP, as this article applies to all parties involved. National resolution authorities are directly bound to article 1 FP, whereas the EU resolution authorities adhere to article 17 of the Charter which in turn aligns

⁶³ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

⁶⁴ ECtHR 25 July 2002, appl. no. 48553/99 (*Sovtransavto Holding v. Ukraine*).

with article 1 FP (cf. article 52 section 3 Charter). In addition, when the EU accedes to the ECHR, those EU authorities are directly bound to article 1 FP.

IV.3.1 Resolution plans

Resolution plans might not directly affect the rights of customers, they do however constitute a regulation of the property of the banks involved. As already mentioned, article 1 FP not only applies to natural persons, but to legal persons as well. Therefore such regulation should adhere to the conditions article 1 FP sets out. Compensation might especially be an issue when a change in business strategy is demanded. The capacity to be (and stay) profitable can be hurt due to such a change.⁶⁵ Moreover, one can question the proportionality of such measures. These measures are meant to improve the resolvability of a bank, should the need arise - the bank does not *actually* need to be in harm's way when its resolvability has to be secured. A fair balance needs to be struck between the need to resolve a bank without it dislodging the financial system and the interests of the bank involved. And as long as there is no risk of a (difficult to resolve) bank failing, imposing measures could put the authorities at risk of violating the right to possessions due to an unfair balance.

For example, revoking a license *after* financial irregularities (and thereby forcing the license holder out of business) was deemed a proportional measure by the Court, falling within the national margin of appreciation, even though the Swedish government could have merely given a warning as well.⁶⁶ However, does a forced shutdown of an entire activity of a bank for the sole reason that the activity *might* harm resolvability *if* the bank fails which *might* harm the financial system stack up against the losses the bank most certainly will incur? Whether this constitutes an individual and excessive burden, has to be decided on a case-by-case basis. It is however an issue resolution authorities might want to take into account, when ordering measures to improve resolvability. The proportionality of the measures will be hard to assess and easy to lose sight of. Overstepping the boundaries of proportionality will nevertheless lead to a violation of article 1 FP, which in turn will force the resolution authorities to undo the (or: some) measures and leaves the resolution authorities open to claims for damages, incurred by the disproportional resolvability measures.

IV.3.2 Recovery

Arguments can be made for and against the applicability of the right to possessions during the recovery measures. Do the measures constitute an interference with *possessions*? A change of management measure does not directly limit the usage of bank-related property (e.g. shares), nor does a change in business strategy. However, both changes can harm the profitability of a bank, and in both cases control over the bank's activities is wrested away from the shareholders. The ECtHR

⁶⁵ Future profits do not qualify as property; goodwill, however, does: ECtHR 26 September 2000, appl. no. 37660/97 (*Denimark Ltd. a.o. v. the United Kingdom*). The forced abandonment of a business strategy likely squanders goodwill as well.

⁶⁶ ECtHR 7 July 1989, appl. no. 10873/84 (*Tre Traktörer Aktiebolag v. Sweden*).

holds that control over a company through shares is a possession.⁶⁷ The inability to exert this control due to early intervention measures might be seen as an interference with property. On the other hand, the urgency and need to avoid contamination most likely strikes a fair balance with the (temporary) lack of shareholder control. Because unlike during the recovery and resolution planning phases, during the recovery phase it is quite evident that a bank and its clients - and perhaps the financial system - will face grave consequences if the recovery measures are not implemented. The public interests and time pressure will be a factor when deciding if a fair balance is still maintained.

IV.3.3 Resolution

Somewhat exaggerated, any shares and debt apart from the exemptions mentioned above, are fair game in a bail-in. With regard to the right to possessions, this raises some questions, mainly in terms of compensation. Limitations to the right of property need to be prescribed by law (here: the national codification of the BRRD or the BRRD itself after the implementation period⁶⁸ has expired⁶⁹), pursue a legitimate aim (here: stability of the financial sector - the ECtHR allows for a wide margin of appreciation⁷⁰), and strike a fair balance between the public and private interests at stake (proportionality). Depending on the circumstances, there are different ways to achieve a fair balance: for example using the least invasive methods, *terms de grace*, compensation. When a bank is about to fail, there will be no time for any grace period and the bail-in already is a last resort measure. So to right any unfair balance, compensation should be key. Yet compensating the bailed-in creditors goes directly against the aims of the BRRD: resolution without state contribution. The BRRD is not fully without provisions in this regard, though compensation is offered in only two circumstances: damages and a creditor being 'worse off'.

If a lack of compensation harms the legality of a write-down after judicial review, subsequent damages can be awarded (article 60 BRRD). In effect this boils down to the duty for states to adhere to a judicial verdict that the write-down in question without compensation is unlawful, and that the state should offer compensation. In addition, consideration 92 mentions that judicial review of a resolution measure should have no effect on transactions that were the result of the measure and *only* be able to lead to damages. Irregularities during a bail-in procedure will not be undone, maybe

⁶⁷ Commission 11 December 1986, appl. no. 11198/84 (*S-S., I. AB and B.T. v. Sweden*); ECtHR 25 July 2002, appl. no. 48553/99 (*Sovtransavto Holding v. Ukraine*); ECtHR 20 September 2011, appl. no. 17854/04 (*Shesti Mai Engineering OOD a.o. v. Bulgaria*).

⁶⁸ The implementation period for the BRRD expires on 31 December 2014. Measures taken in accordance with the (national codification of the) BRRD shall be applied from 1 January 2015. Provisions adopted to comply Title IV, Chapter IV, Section 5 of the BRRD, regarding bail-ins, however, shall be applied from 1 January 2016 (article 130 BRRD).

⁶⁹ A non-implemented directive itself will not form enough of a legal base to limit the right to property. However, (only) after the expiration of the implementation period, private parties can call upon a sufficiently clear and precise provision if it is meant to confer rights to them (Court of Justice of the EU 5 April 1979, case no. 148/78 (*Ratti*)). This aspect might come into play if a Member State fails to implement the BRRD and tries to limit property rights to a degree the BRRD will not allow for.

⁷⁰ Especially in general measures of economic or social strategy, e.g. ECtHR 12 July 1984, appl. no. 8793/79 (*James and others v. the United Kingdom*), §42.

to the detriment of creditors and shareholders. Third parties however can trust in the fact that a resolution measure will be upheld.

Some compensation can be received through the ‘no creditor worse off’ principle, stating that a bail-in should not bring a creditor in a worse position than regular insolvency proceedings. To this purpose, resolution authorities undertake *ex ante* evaluations to ensure no excessive bail-ins occur (article 36 BRRD) and *ex post* evaluations, comparing the bail-in with the fiction of a normal insolvency proceeding (article 74 BRRD). If this *ex post* evaluation determines that a shareholder or creditor has incurred a greater loss than under normal insolvency proceedings, he is entitled to compensation for the difference (article 75 BRRD).

Conversion offers slightly more foothold, since the claim is not ‘erased’ without compensation but instead swapped for equity. The conversion rate however is rather vague, as it ‘shall represent appropriate compensation to the affected creditor for the loss incurred by virtue of the exercise of the write down and conversion power’ (article 50 section 2 BRRD). The conversion rate may differ per creditor, depending on the priority of their claim. By 3 January 2016, the European Banking Authority will give guidelines on the setting of conversion rates.

IV.4. Compensation

Will limited compensation suffice in the first place (i.e. merely the difference between the position of a creditor and shareholder under bail-in and normal insolvency proceedings)? Under article 1 FP, the *deprivation* (as opposed to the regulation) of property demands full compensation.⁷¹ The question is how a forced resolution qualifies. In the case of Northern Rock, the British government could just pull out and let the bank fail, without any obligation to compensate for the subsequent losses. A government is not responsible for debts of private entities, even if government interference did manage to prolong the life of the entity involved.⁷² If a governmental authority however actively contributes to the resolution, through bail-in or otherwise, the dynamic shifts as the authority interferes in the possessions involved: the resolution authority orders, for example, the write-down of debts of and claims on the bank. One might argue that this is merely a form of property regulation, as the authority does not actually expropriate the claim, but merely devaluates it.

We would argue that this qualifies as (de facto) expropriation; through government interference an existing claim is made worthless. The International Centre for Settlement of Investment Disputes holds that in general, a substantial deprivation of rights for a meaningful amount of time, constitutes expropriation.⁷³ A bail-in seems to fulfill these conditions. In expropriation cases, the authority is obliged to fully compensate the expropriated party. A lack of compensation cannot be

⁷¹ Unless truly unique circumstances arise, e.g. the German reunification, ECtHR 30 June 2005, appl. no. 47620/99, 72203/01 and 72552/01 (*Jahn and others v. Germany*).

⁷² ECtHR 10 July 2012, appl. no. 34940/10 (*Granger a.o. v. the United Kingdom*), §42.

⁷³ ICSID Case no ARB/09/02, Award, 31 oktober 2012, § 503 (*Deutsche Bank AG v. Sri Lanka*).

categorically explained with the notion that any bailed-in claims or claims now belonging to a separate entity destined to fail, were worthless either way because of their lack of recoverability: ‘if the bank went under because it was not bailed-in, there would be no compensation as well’. Such assessments have to be made on a case-by-case basis.⁷⁴ Even shareholders have the right to a payment ‘reasonably related’ to the value of a share, when taken away.⁷⁵ It is not unimaginable that even shares in a bank on the brink of failing, still possess *some* value. The ECtHR regards an independent assessment as a crucial element in any expropriation procedure. A situation, in which the expropriated party himself needs to pursue compensation or even an individual evaluation of claim through a civil court procedure, is held to be contrary to the protection of the right to possession.⁷⁶ The BRRD provides this assessment through the mandatory *ex post* evaluation of a bail-in.

However, this approach through the ‘no creditor worse off’ principle under an expropriation seems to clash with the rights of especially creditors and uncovered depositors. The usage of an *ex post* evaluation implies that the value of an uncovered deposit and other debts is not found in the contractual obligation between the bank and the depositor, but instead is found in the ability of the bank to fulfil this obligation. In that case, the less able a bank is to refund a deposit, the less valuable it becomes - the only assessment for creditors and uncovered depositors under the *ex post* evaluation is the chance of getting back at least some money under insolvency proceedings. And if the bank is on the brink of failing, those chances will be slim. However, a deposit is no investment, which indeed can fluctuate in value based on the prospects of the bank, and should not be treated as such. A debt has an inherent value, regardless of the debtor’s financial position. One could argue that - if a bail-in indeed qualifies as (de facto) expropriation - the entirety of the bailed-in deposits should be compensated; not just its value at the time of the bank’s failing.⁷⁷

The same issue arises in the case of conversion. The tier 1 capital gained after conversion is - seeing how the bank is in bad financial shape - of little value, and in case of insolvency proceedings, the owner of the converted claims is the last in line. He is therefore likely to recoup very little, if anything, after resolution or insolvency of the bank. This seems to be at odds with the fact that

⁷⁴ ECtHR 10 July 2003, appl. no. 55794/00 (*Efstathiou en Michailidis & Co. Motel Amerika v. Greece*), § 29: “The Court considers that, where an individual’s property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation.”

⁷⁵ See also ECtHR 16 January 2001, appl. no. 35730/97 (*Offerhaus and Offerhaus v. the Netherlands*).

⁷⁶ ECtHR 10 July 2003, appl. no. 55794/00 (*Efstathiou en Michailidis & Co. Motel Amerika v. Greece*), § 33: “In the light of the foregoing, the Court considers that, in maintaining the “self-compensation” presumption and requiring the owners concerned to bring several sets of proceedings in order to be entitled to an amount of compensation reasonably in line with the value of the expropriated property, the authorities upset the fair balance that should be struck between the protection of individual rights and the requirements of the general interest.”

⁷⁷ Cf. M. Mendelson and M. Paparinskis, ‘Bail-ins and the international investment law of expropriation: in and beyond Cyprus’, *Buttersworth Journal of International Banking and Financial Law*, September 2013, p. 479.

before the conversion, there was a debt with ‘absolute’ value, whereas after the conversion there is just equity which - in case of a bail-in - will be almost worthless.

Though if market conditions are taken into account when determining the value of an uncovered deposit or debt, the compensation needs to be related to the ‘full market value’⁷⁸, whereas the BRRD uses the liquidation value (i.e. the value of the assets in case of insolvency). The BRRD approach seems to be at odds with the so-called ‘Pointe Gourde principle’⁷⁹ that is applied in regular expropriation law, under which the (threat of) expropriation needs to be ignored in the valuation of an object. The value of objects on the free market plummets, as soon as it becomes clear that the object is (economically) doomed due to the expropriation. Valuation under the BRRD has to contend with the same issue. The valuation takes place on the basis of a comparison between two ‘culminations’ of the worst case scenario for a bank, either expropriation or insolvency. But both culminations might diminish the full market value of a bank’s assets if they are not eliminated from the valuation, thereby not guaranteeing that a creditor or uncovered depositor receives full compensation for his loss. The compensation after expropriation under the Pointe Gourde principle should not be determined against the situation of bankruptcy. Instead, the compensation should be determined against the market value of the expropriated assets at the time of expropriation, after eliminating the drop in value of the expropriated object due to the mere fact that it was about to be expropriated.

Hence, the ‘no creditor worse off’ principle might not in all cases provide the compensation that a party is entitled to in case of expropriation, now that the value of a debt or uncovered deposit should be determined by its full market value, which at the very least requires the elimination of the expropriation from the valuation. It will be interesting to see how this issue will play out in practice, and what states and the various tribunals (national judges, ECtHR, European Court of Justice et cetera) will deem sufficient compensation after application of (the tools provided by) the BRRD. The European Commission deems the compensation of the liquidation value of the assets to suffice.⁸⁰ At the time of writing, this very matter - the application of the Pointe Gourde principle after the expropriation of claims on a failing bank - is subject of litigation in front of the Dutch Supreme Court, as we have pointed out under II.5 and III.2.

We have also pointed to the transition cases such as *Jahn*⁸¹ as situations in which truly exceptional circumstances allowed for the deprivation of possessions without compensation. Due to the introduction of a market economy and an associated (steep) learning curve, the Court allowed the German state some room to make ‘mistakes’. The Court however explicitly stated that the allotted margin of appreciation would shrink over time. One could argue that the direct circumstances that

⁷⁸ ECtHR 26 November 2009, appl. no. 22186/03 (*Pešková v. Czech Republic*).

⁷⁹ Named after Pointe Gourde Quarrying & Transport Co Ltd vs. Sub-intendent of Crown Lands (Trinidad) [1947] AC 565.

⁸⁰ European Commission, ‘Impact assessment accompanying the [BRRD]’, Brussels 2012, Annex XVI.

⁸¹ ECtHR 22 January 2004, appl. no. 46720/99, 72203/01 and 72552/01 (*Jahn and others v. Germany*).

call for a bail-in and a lack of experience with bail-ins, might allow governments to forego (full) compensation to bailed-in parties, while still acting in accordance with article 1 FP. But several issues arise when holding on to this logic. First, the transition exception is limited in time. After the necessary experience has been gained, (full) compensation in case of deprivation of possession is yet again expected; a consequent lack of compensation - either no compensation or not enough of it - cannot be founded on the transition cases. Second, the outcome of those cases is *highly* intertwined with the factual circumstances of the newly unified Germany. The Court is not eager in granting the same exceptionally wide margin of appreciation to 'stable' governments.⁸² Third, the applicants in the *Jahn* case had just a tenuous claim on their expropriated land, by way of the Modrow act which was deemed unlawful. Shareholders of banks, and creditors and (uncovered) depositors even more so, are generally held to have legally sound claims to their possessions - making deprivation without full compensation that much harder. There is however one circumstance of the transition cases that might prove useful: the fact that society as a whole greatly benefitted from the (uncompensated) deprivation. The same reasoning might be applied when bailing in a bank is needed to prevent the collapse of the financial system - but if this single fact might be enough to warrant a lack of compensation, is at this moment still uncertain.

IV.5. Conclusion on the BRRD

The BRRD provides several instruments to recover or resolve banks in crisis. These instruments however will bring about a burden on stakeholders. The BRRD seems to provide for little compensation by the resolution authorities - instead, as little taxpayer money as possible should be spent on saving failing banks. The pressing need to take measures however does not preclude the states from providing just compensation if either the fair balance would require this or simply in the case of (de facto) expropriation. Especially the character of deposits may even warrant compensation for their full value. However, as of now it is unclear if the BRRD actually provides at least the full market value for (*de facto*) expropriated claims. The adherence to the liquidation value might turn out to be too meager. Under thoroughly unusual circumstances, the Court might allow states to forego (full) compensation. If the stability of the financial system is enough reason to resolve banks without compensating the interested parties, remains to be seen.

V. Conclusion

It is evident that state intervention to rescue banks in crisis is governed by the rule of law. The law in question is (at least within the European Union) to be found at three levels: the ECHR, the BRRD and the national legislation. These three levels are not separated from each other. The ECHR may put a limit to the BRRD and the national legislation has to conform to the minimum requirements of the BRRD. The rule of law is here a triple entente of which each part is not static, but in constant

⁸² ECtHR 25 October 2012, appl. no. 71243/01 (*Vistiņš and Perepjolkins v. Latvia*).

development. This contribution is therefore not made from marble, but constructed from clay, not a monument but a snapshot, not the end of a journey, but a stopping place besides the road.