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Title	An emergency of banking and of law: The resolution of Anglo Irish Bank
Authors	Lefeuvre, Élise;McCarthy, Jonathan
Publication date	2023
Original Citation	Lefeuvre, E. and McCarthy, J. (2023) 'An emergency of banking and of law: The resolution of Anglo Irish Bank', Irish Judicial Studies Journal, 7(1), pp. 1-25. Available at: https://www.ijsj.ie/editions/2023-edition-1/ (Accessed: 4 April 2023)
Type of publication	Article (peer-reviewed)
Link to publisher's version	https://www.ijsj.ie/editions/2023-edition-1/
Rights	© 2023, Irish Judicial Studies Journal.
Download date	2026-11-14 15:18:40
Item downloaded from	https://hdl.handle.net/10468/14359



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AN EMERGENCY OF BANKING AND OF LAW: THE RESOLUTION OF ANGLO IRISH BANK

Abstract: The bank guarantee night and the fall of Anglo Irish Bank are landmarks of modern Irish history. The impact goes beyond Irish politics and economy. The example of Anglo Irish Bank represents a unique case of banking resolution with wide financial and legal implications which still resonate at EU level. In order to demonstrate the effects of the resolution, this article investigates the recapitalisation, the nationalisation, the merger, and the liquidation of Anglo Irish Bank. The analysis of debates, legislation, judgments, and banks' financial statements allows for an understanding of how the resolution worked and why it was controversial. A central argument of this article is that recapitalisation succeeded in containing the scale of the Irish banking crisis, despite the significant costs, and that recapitalisation should therefore be treated as a relevant option for future banking resolution. The nationalisation, merger, and liquidation measures were equally necessary in restructuring the Irish banking sector. The article argues the merits of public resolution, especially as the State is able to impose measures swiftly in the best interests of the economy.

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Introduction

The resolution of Anglo Irish Bank, which may be all too familiar to Irish readers, was one of the most politically and legally controversial consequences of the 2008 financial crisis. Anglo Irish Bank was emblematic to the Celtic Tiger period that preceded the crisis,[1] insofar as it was a highly profitable bank, it had a rapid growth, and it was almost exclusively dedicated to financing the property sector, which was the booming sector at the time. Anglo Irish Bank also became emblematic of the financial crisis, as the markets fell due to a loss of confidence in banks and the property bubble exploding. As a result, Anglo Irish Bank benefited from the largest resolution plan of the 2008 financial crisis in Europe. Although it occurred over a decade ago, the Anglo Irish Bank resolution remains relevant. Anglo Irish Bank's resolution used all of the tools that are now present in the Single Resolution Mechanism (SRM) in a worst-case scenario context (i.e., a systemic financial crisis diminishing the creditworthiness of banks and governments).[2] Anglo Irish Bank continues to be the only example by which there can be an evaluation of the full range of European banking resolution tools.

This article argues that the Irish Government's resolution strategy for Anglo Irish Bank was pragmatic, expedient, and flexible in responding to an emergency situation. The article analyses the legal implications of the Anglo Irish Bank resolution by considering how the resolution was legally established, how the resolution legislation interacted with – and disrupted – the existing legal environment, and how the legislation withstood legal challenges raised in the courts. Furthermore, the article adds an analytical layer by assessing the financial position of Anglo Irish Bank. This analysis helps to convey the practical motives for, and the consequences of, the legal measures.

[1] For the purposes of this article, the Celtic Tiger denotes a period of economic growth in Ireland from the 1990s to the 2008 financial crisis. The exact timeframe of the Celtic Tiger is debatable: see Seán Ó Riain, *The Rise and Fall of Ireland's Celtic Tiger: Liberalism, Boom and Bust* (Cambridge: Cambridge University Press 2014), and Peadar Kirby, *Celtic Tiger in Collapse: Explaining the Weaknesses of the Irish Model* (Basingstoke: Palgrave Macmillan 2010).

[2] The creation of a permanent and harmonised EU banking resolution regime began in 2014 with the enactment of the Bank Recovery and Resolution Directive (BRRD) 2014/59/EU. This was followed by Regulation (EU) No 806/2014, which created the SRM, the Single Resolution Board (the EU agency in charge of resolution), and the Single Resolution Fund (i.e., the fund in charge of collecting and managing money to finance future resolution plans).

This analysis is chronological since Anglo Irish Bank's complex resolution involved a succession of legislation and court decisions in a short period of time. The first section sets the scene with a financial analysis of Anglo Irish Bank. The section explains what Anglo Irish Bank was, where it stood in relation to the domestic banking sector, and the financial implications of its resolution. The second section focuses on recapitalisation by setting out the procedural aspects of the Credit Institutions (Credit Support) Act 2008 and by explicating how issues relating to the legislation were addressed in case law. The third section concentrates on Anglo Irish Bank's nationalisation, through the procedural aspects of the Anglo Irish Bank Act 2009 and the related legal concerns. In order to tell the full story of the resolution and to show how different methods can be included within a bank resolution, the fourth section explains the merger of Anglo Irish Bank with Irish Nationwide Building Society (INBS), through the Credit Institutions (Stabilisation) Act 2010, and the ultimate liquidation of the bank, through the Irish Bank Resolution Corporation Act 2013. The article concludes by reflecting on the lasting legal significance of Anglo Irish Bank's resolution.

The fall of Anglo Irish Bank: from best case scenario to worst case scenario

The first section consists of a financial analysis of Anglo Irish Bank, based on its annual reports. This section allows for an understanding of where Anglo Irish Bank stood in the Irish banking landscape until the late 2000s. Anglo Irish Bank was the third-largest Irish bank. The bank was characterised by an almost-sole focus on property lending, which rendered it unusual compared to its peers, which operated as universal banks.[3] This section proceeds to show what the financial effects of the resolution measures were. Public resolution was expedient in downsizing Anglo Irish Bank within a few years (from 2009 to 2013) and allowing its safe withdrawal when its liquidation was commenced in 2013. The most striking point is how quickly Anglo Irish Bank moved from the best case scenario, being the *Wunderkind* of the Celtic Tiger, to the worst case scenario of the financial crisis in the EU.

The financial analysis in this section relies on annual reports of the Irish banks, all of which are publicly available. The statistics which are presented in the tables in this section are from the externally audited consolidated financial statements, which are contained within the annual reports of each bank. Anglo Irish Bank's official website was removed, yet the bank's publications (including annual reports) are accessible online.[4]

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[3] A universal bank can be considered as combining commercial banking and investment banking within the same group. The post-crisis Liikanen Report recommended that these activities be separated and that the universal banking model be renounced. However, this has not happened, as EU banks did not subsequently change their business models. See Erkki Liikanen, *High-level expert group on reforming the structure of the EU banking sector* (2012), 89 and 97 <https://ec.europa.eu/info/publications/liikanen-report_en> accessed 1 October 2022.

[4] The tables are compiled using financial data from the consolidated financial statements in the banks' annual reports. The financials presented in the tables are the same as those presented in the annual reports, as audited by external auditors. Allied Irish Banks Annual Report 2007 (31 December 2007), Annual Report 2010 (11 April 2011), and Annual Report 2021 (31 December 2021) <https://aib.ie/investorrelations/financial-information/results-centre/annual-financial-results-archive> accessed 1 October 2022; Bank of Ireland Annual Report 2007 (14 November 2007), Annual Report 2010 (14 April 2011), and Annual Report 2021 (28 February 2022) <https://investorrelations.bankofireland.com/results-centre/> accessed 1 October 2022; Educational Building Society Annual Report 2007 (28 February 2008), and Annual Report 2010 (15 April 2011) <https://www.ebs.ie/annual-reports-and-results> accessed: 1 October 2022); and Permanent TSB Annual Report 2007 (27 March 2008) <http://www.irishlifeandpermanent.ie/~/media/Files/I/Irish-Life-And-Permanent/Attachments/pdf/annual-and-interim-reports/2007/arep07.pdf> accessed 1 October 2022 and Annual Report 2010 (31 December 2010) <http://www.irishlifepermanent.ie/en/~/media/Files/I/Irish-Life-And-Permanent/Attachments/pdf/2010/annualreport2010.pdf> accessed 1 October 2022. As made available by IBRC, the Anglo Irish Bank annual reports are accessible through the following online sources: Anglo Irish Bank Annual Report & Accounts 2006 (5 December 2006) <https://www.yumpu.com/en/document/view/3989057/annual-report-accounts-

Best case scenario: a fast-growing niche player

As of 2008, the Irish banking sector was composed of six main banks, comprised of three 'tier-1' banks – Allied Irish Banks, Bank of Ireland, and Anglo Irish bank – and three 'tier-2' banks – Educational Building Society (EBS), Permanent TSB, and Irish Nationwide Building Society (INBS). In finance, the term 'tier' defines the ranking of a company or financial institution, the highest rank being tier-1. This article focuses specifically on the Irish-headquartered and -incorporated banks at the time of the crisis.

All of the six banks were covered by the public resolution plan. The 2008 financial crisis and the public resolution profoundly reshaped the Irish banking sector and led to a shrinking of the banking landscape. Indeed, Anglo Irish Bank and INBS did not survive the crisis, and the Government decided on their joint liquidation in 2013 after their merger in 2011. In addition, Allied Irish Banks acquired EBS in 2011, which was a private acquisition politically backed by the Government as it acted in favour of the banking sector's restructuring and of the resolution's rationalisation.[5] At the time of writing, the public resolution still has a tangible impact with the Irish State being the shareholder in Allied Irish Banks (63%), and Permanent TSB (75%), while the State has recently exited from Bank of Ireland. In other words, the Irish State has remained the main owner of the Irish banking sector, but this has started to fade away as the State has recently commenced the sale of its shares.[6] Table 1 below provides three snapshots of the Irish banking sector to show this reshaping: before the crisis (2007), in the midst of resolution during the crisis (2010), and at the time of writing. In summary, the Irish banking sector moved from six privately-owned banks to three publicly-owned banks,[7] and the three active banks have been recovering and have started to become profitable again. The Irish financial crisis had a V-shape, that is to say a sharp drop

2006-anglo-irish-bank> accessed 1 October 2022, Anglo Irish Bank Annual Report & Accounts 2008 (19 February 2009) <https://www.yumpu.com/en/document/view/36182731/annual-report-irish-bank-resolution-corporation-limited-in-> accessed 1 October 2022, Annual Report & Accounts 2009 (31 March 2010) <https://www.yumpu.com/en/document/view/3989058/annual-report-accounts-2009-anglo-irish-bank> accessed 1 October 2022), and Anglo Irish Bank Annual Report & Accounts 2010 (30 March 2011) <https://www.yumpu.com/en/document/view/3989100/annual-report-31-december-2010-anglo-irish-bank> accessed: 1 October 2022). IBRC's annual report for 2011 is available at <https://www.yumpu.com/en/document/view/50715829/ibrc-annual-report-for-2011-irish-bank-resolution-corporation-> accessed 1 October 2022). The 2007 details for Anglo Irish Bank are based on the figures provided in the 2008 report. The 2012 IBRC interim report is available at: <https://www.yumpu.com/en/document/view/50188160/interim-report-irish-bank-resolution-corporation-limited-in-> accessed 1 October 2022. Similar to the Anglo Irish Bank website, the website of INBS was also removed. However, extracts of the INBS Annual Report & Accounts 2007 are available in Houses of Oireachtas, *Report of the Joint Committee of Inquiry into the Banking Crisis* (2016) <http://opac.oireachtas.ie/AWData/Library3/Banking/BIINBSCoreBook40.pdf > accessed 1 October 2022.

[5] Allied Irish Bank 'AIB and EBS come together to form one of two Irish pillar banks' AIB Press Release (1 July 2011), and Commission, 'Commission Decision of 07.05.2014 on the State Aid Nos SA.29786 (ex N 633/2009), SA.33296 (2011/N), SA.31891 (ex N553/2010), N 241/2009, N 160/2010 and C 25/2010 (ex N 212/2010) implemented by Ireland for the restructuring of Allied Irish Banks plc and EBS Building Society' C(2014) 2638 (7 May 2014).

[6] The Government of Ireland has provided frequent updates on its shareholdings in Irish banks, see Government of Ireland, 'State's Shareholding in Banks' (14 January 2022) <https://www.gov.ie/ga/foilsiuchan/066a28-banks/> accessed 7 October 2022. Changes of shareholding are also covered by public press releases and newspapers. See Department of Finance, 'Minister Donohoe welcomes the successful disposal of part of State's shareholding in AIB Group plc' (28 June 2022) <https://www.gov.ie/en/press-release/ec9aa-minister-donohoe-welcomes-the-successful-disposal-of-part-of-states-shareholding-in-aib-group-plc/> accessed 05 October 2022, and Joe Brennan 'Bank of Ireland returns €2bn above bailout bill as State exits' *The Irish Times* 23 September 2022 <https://www.irishtimes.com/business/financial-services/2022/09/23/bank-of-ireland-returns-2bn-above-bailout-bill-as-state-exits/> accessed 28 September 2022.

[7] EBS was a building society. It had no shareholders and was owned by its clients. EBS benefited also from extensive public recapitalisation and guarantees but it did not turn into State ownership like the other banks due to its mutualist ownership. For more details on the EBS, see Commission, 'Commission Decision of 07.05.2014 on the State Aid Nos SA.29786 (ex N 633/2009), SA.33296 (2011/N), SA.31891 (ex N553/2010), N 241/2009, N 160/2010 and C 25/2010 (ex N 212/2010) implemented by Ireland for the restructuring of Allied Irish Banks plc and EBS Building Society' C(2014) 2638 (7 May 2014).

in 2009/2010, mainly illustrated by the dramatic losses of Allied Irish Banks (-€12 billion), and Anglo Irish Bank (-€17.7 billion) in 2010, followed by a gradual recovery.

Table 1: Profit and public ownership of recapitalised banks

In EUR bn	2007	2010	2021	2022e
Allied Irish Banks				
Profit/(Loss) before taxation	2.5	(12.0)	0.6	1.1
Government of Ireland's share	0%	99%	75%	63%
Bank of Ireland				
Profit/(Loss) before taxation	1.8	0.7	1.4	0.8
Government of Ireland's share	0%	36%	14%	0%
Anglo Irish Bank				
Profit/(Loss) before taxation	1.2	(17.7)	*Liquidated*	*Liquidated*
Government of Ireland's share	0%	100%	*Liquidated*	*Liquidated*
Educational Building Society				
Profit/(Loss) before taxation	0.7	0.5	*Merged with AIB*	*Merged with AIB*
Government of Ireland's share	N.A.	N.A.	*Merged with AIB*	*Merged with AIB*
Irish Life & Permanent (later Permanent TSB)				
Profit/(Loss) before taxation	0.4	0.2	(0.2)	(0.4)
Government of Ireland's share	0%	75%	75%	75%
INBS				
Profit/(Loss) before taxation	0.4	N.A.	*Liquidated*	*Liquidated*
Government of Ireland's share	0%	90%	*Liquidated*	*Liquidated*

Sources: Banks' annual reports

Anglo Irish Bank (created in 1964 and headquartered in Dublin) was described by the Government-established Commission of Investigation into the Banking Crisis as a 'monoline bank'.[8] Anglo Irish Bank's business was very much focused on property lending and poorly diversified, with c. 70% of revenues originating from lending activity. This lack of diversification rendered Anglo Irish Bank unusual, compared to its national peers, and operating in a niche market. For this reason, the qualification, 'too big to fail', which commonly refers to universal banks, cannot apply to Anglo Irish Bank. As per its 2008 annual report, Anglo Irish Bank displayed a dramatic growth year-on-year during the Celtic Tiger, with a sharp decrease in 2008 as the crisis burst in the last semester (see financials below). Anglo Irish Bank participated in herding practices, similar to its peers, to rapidly increase its lending activity.[9] The 2008 crisis was therefore 'an old fashioned "plain vanilla" property bubble'[10] due to 'over attractive and unreal prices for property'.[11] The Central Bank and the Financial Regulator were criticised after the 2008 crisis for their misjudgement of the health of the banking sector, notably regarding property exposure. [12] This misjudgement led the public authorities to underestimate the crisis at its beginning, insofar as they overestimated the banks' capacity to absorb the shock.[13]

[8] Commission of Investigation into the Banking Sector in Ireland, 'Misjudging risk: Causes of the systemic banking crisis in Ireland' (March 2011) (Nyberg Report), para 2.7.5.

[9] ibid, para. 1.6.3. As defined in the Nyberg Report, the herding practice is 'the willingness of investors and banks to simultaneously invest in, lend to and own the same type of assets, accompanied by insufficient information gathering and processing'. As well as the Nyberg Report, the leading Irish reports on the banking crisis are Governor of the Central Bank, *The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003–2008* (2010) (Honohan Report), Klaus Regling and Max Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Government Publications 2010), and Joint Oireachtas Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee into the Banking Crisis* (Houses of the Oireachtas 2016) (Oireachtas Banking Inquiry Report).

[10] *Dellway Investments Ltd v National Asset Management Agency (NAMA) and Others* [2011] 4 IR 1.

[11] *Mero-Schmidlin (UK) Plc v Michael McNamara and Company & Ors* [2011] IEHC 490.

[12] Nyberg Report (n 8) para 5.3.1.

[13] ibid.

Most of Anglo Irish Bank's activity was in Ireland (as of 2008, 58% of its borrowers were Irish), and the rest was primarily in the United Kingdom. The fact that this exposure was concentrated on the domestic market facilitated the subsequent resolution measures, notably in terms of certainty as to applicable contract law and law enforcement. This aspect contributed to the expediency of the resolution measures, not only for Anglo Irish Bank, but also for the entire Irish banking system, which was predominantly active on the local market. Table 2 below evinces two features of Anglo Irish Bank that impacted on its reaction to the financial crisis. The first is its high lending activity (reaching 72% in 2007). Anglo Irish Bank's business model was not sufficiently diversified. The lending business was essentially directed towards property, and, consequently, the impact of the bursting of the property bubble was severe on Anglo Irish Bank. The second feature is the portion of Irish business, as the wide majority of borrowers were Irish. This kept the crisis of Anglo Irish Bank relatively localised, which played in favour of a smooth resolution.

Table 2: Anglo Irish Bank's key financials

In EUR bn	**2006**	**2007**	**2008**	**2009**	**2010**
Net income	1.1	1.5	1.8	1.5	0.7
Profit/(Loss) before taxation	0.9	1.2	0.8	(12.7)	(17.7)
Revenues	3	5	9	1.5	0.7
Lending (in % of revenues)	*73%*	*72%*	*52%*	-	-
Treasury (in % of revenues)	*21%*	*21%*	*46%*	-	-
Wealth management (in % of revenues)	*7%*	*7%*	*3%*	-	-
Customer lending	50.2	67.1	73.2	56.3	24.3
Loans to Irish customers	28.2	37.8	42.8	17.2	16.2
Total assets	73.3	96.7	101.3	85.2	72.1
Total equity	2.7	4.1	4.1	4.1	3.5

Sources: Anglo Irish Bank Annual Report & Accounts 2006 (5 December 2006), Annual Report & Accounts 2008 (19 February 2009), Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011).

Although weaknesses can be ascertained from a post-crisis reading of the figures, this was not the reading of bankers, investors, and supervisors before the crisis, who understood Anglo Irish Bank to be an Irish success story. Anglo Irish Bank strongly believed in its business model, as underlined by the Nyberg report: 'The bank felt confident that a good knowledge of its customers, asset security and personal recourse, combined with geographic diversification of its loan book, would reduce the risks inherent in its property lending model.'[14] Furthermore, the enthusiasm of investors was reflected in the sharp increase of Anglo Irish Bank's market capitalisation, from €0.3 billion, as in 2000, to €10 billion in 2007.[15] Regarding its shareholding structure, Anglo Irish Bank was held at 40% by private shareholders and free-floated at 60%.[16] The largest private shareholder was the Quinn family (15%),[17] who were involved in several court cases and financial scandals with Anglo Irish Bank after its failure. As this article is focused on the resolution approach, the analysis does not cover the Quinn legal proceedings.

[14] ibid, para 2.4.2.

[15] The precise market capitalisation data for Anglo Irish Bank was removed from the Irish Stock Exchange's website, therefore these figures are based on media reports and journalistic sources. Fintan O'Toole, 'The Anglo Irish Bank sign, 2000-2011' *The Irish Times* (Dublin, 05 January 2013) <https://www.irishtimes.com/news/the-anglo-irish-bank-sign-2000-2011-1.954755?msclkid=d808794cd15111ec8b942ff68c588f65> accessed 1 October 2022.

[16] John Collins, 'Anglo Irish: the major shareholders' *The Irish Times* (Dublin, 17 January 2009) <https://www.irishtimes.com/news/anglo-irish-the-major-shareholders-1.1234758?msclkid=379465dad15411ec8653b155e982af03> accessed 1 October 2022. See also Anglo Irish Banks's annual reports.

[17] The other shareholders were Invesco and Janus Capital, both U.S. investment management companies. Dresdner and UBS are institutional investors, respectively German and Swiss.

Worst case scenario: the most expensive resolution

The weaknesses of Anglo Irish Bank started to be partly revealed in 2008 at the very beginning of the crisis.[18] Hence, the bank's fall was sudden and its resolution was equally drastic and expensive. Table 3 below shows the financial data of Anglo Irish Bank, which became the Irish Bank Resolution Corporation (IBRC) in 2011 after its merger with INBS, from its entry into resolution in September 2009 with the first recapitalisation plan, to the beginning of its liquidation in February 2013.[19] Anglo Irish Bank was a sizeable bank with a €56 billion loan book as of 2009. Its loan portfolio decreased by 72% from 2009 to 2013 (see Table 3 below), primarily due to the transfers to the National Asset Management Agency (NAMA), which took over the impaired loans from the Irish banks.[20] Anglo Irish Bank worked out its portfolio by exiting impaired loans, on its own initiative, when loans were not transferred to NAMA.[21] The merger with INBS had a limited impact on the loan book, representing 10% of the merged loan book. INBS also benefited from the transfers to NAMA prior to the merger, amounting to €8.7 billion.[22] These financial statistics show the expediency of the resolution, and NAMA's role in dramatically reducing the size of Anglo Irish Bank/INBS, which then ensured a safe liquidation.

Table 3: Anglo Irish Bank's loans and deposits

In EUR m	2009	2010	2011	2012 (HY)
Net income	1,525	742	944	538
Profit/(Loss) before taxation	(12,717)	(17,619)	873	(743)
Total loans	56,334	25,987	17,951	15,882
Loans and advances to customers	30,852	24,364	17,689	15,565
Loans held for sale (NAMA)	25,482	1,623	262	317
Loans from INBS (2011 One-Off)	-	-	1,806	-
Total assets	85,212	72,182	55,541	53,165
Customer accounts	2,669	2,460	2,249	1,497
Total equity	4,169	3,535	3,238	2,734

Sources: Anglo Irish Bank Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011); Irish Bank Resolutions Corporation Limited Annual Report & Accounts 2011 (28 March 2012), and Interim Report, Six Months Ended 30 June 2012 (23 August 2012).

The losses of Anglo Irish Bank were enormous (€12.7 billion in 2009 and €17.6 billion in 2010). The losses triggered public recapitalisation in the form of promissory notes in 2009 and 2010 (tranches in Table 4 below). The promissory notes managed to temporarily limit the fall of Anglo Irish Bank, which even displayed a positive profit before taxation in 2011 (€873 billion). The main benefit of recapitalisation was for the Government to gain time to assess the situation and to implement appropriate resolution measures, including allowing time for legislative processes. Recapitalisation also limited the disturbance to the markets, as the sudden exit of a tier-1 bank would have been perceived as a further indicator of a highly distressed market and could have resulted in deeper losses of market confidence (leading to further falls in ISEQ share prices).

Table 4: Anglo Irish Banks's promissory notes

In EUR bn	Promissory notes
Tranche 1 (31.12.2009)	8.3
Tranche 2 (28.05.2010)	2.0

[18] Honohan Report (n 9), para 5.33.
[19] The data is based on the 2012 interim (half-year) report which is sufficient in providing a snapshot of IBRC before its liquidation.
[20] See (n 164) and (n 165).
[21] Anglo Irish Bank, *2010 Annual Report* (30 March 2011), 5.
[22] National Asset Management Agency 'Loan Acquisition' <https://www.nama.ie/our-work/loan-acquisition> accessed 1 October 2022.

Tranche 3 (23.08.2010)	8.6
Tranche 4 (31.12.2010)	6.4
Total	25.3

Source: Anglo Irish Bank Annual Report & Accounts 2010 (30 March 2011)

Anglo Irish Bank's recapitalisation represented €42.3 billion of the total recapitalisation cost of €64.2 billion for the six Irish banks.[23] Most of it was in the form of promissory notes (€25.3 billion, see details of tranches in Table 4 above), and there was also a one-off direct injection of capital by the Government in 2010 (€17 billion). From the nationalisation in 2009, the new board of directors worked on the 'planned and controlled downsizing'[24] of Anglo Irish Bank, which was accelerated after its merger with INBS in 2011 with a view to liquidating the merged entity (which was being described as a wind-down organisation).[25] The full public ownership of Anglo Irish Bank allowed the plan to be quickly carried out, insofar as no negotiation with other shareholders was needed. The benefit of nationalisation was therefore to enable immediate stringent restructuring measures. As shown in Table 5 below, when Anglo Irish Bank/IBRC entered into liquidation in February 2013, the Irish Government was the sole shareholder, the main counterparty with an exposure of €36 billion, and the main funder with 52% of assets being promissory notes.

Table 5: Anglo Irish Bank's capitalisation

In EUR bn	**2010**	**2011**	**2012 (HY)**
Capital support	17.0	0	0
Promissory notes (carrying value)	25.3	29.9	27.8
Promissory notes share in Total assets	46.8%	53.8%	52.3%
Exposure to the Irish Government	39.0	35.0	36.0
Total capital support provided by the shareholder	29.3	29.3	29.3
Total Tier 1 capital	4.0	3.8	3.1
Total Capital	4.6	4.1	3.4
Risk weighted assets	36.7	25.1	22.8
Tier 1 capital ratio	12.4%	15.1%	13.6%
Total capital ratio	10.9%	16.3%	14.8%

Sources: Anglo Irish Bank Annual Report & Accounts 2009 (31 March 2010), and Annual Report & Accounts 2010 (30 March 2011); Irish Bank Resolutions Corporation Limited Annual Report & Accounts 2011 (28 March 2012), and Interim Report, Six Months Ended 30 June 2012 (23 August 2012).

The readiness and flexibility of the Irish Government in managing the resolution of Anglo Irish Bank turned what was a worst case scenario in September 2009 into an exemplary resolution, as from 2010. Recapitalisation, nationalisation, work-out of assets (through NAMA and through standalone measures), and merger facilitated a controlled exit of Anglo Irish Bank, without exacerbating panic on the recovering Irish market.

The financial analysis of Anglo Irish Bank's resolution shows very positive findings, as, in effect, the public resolution worked. However, the next sections will demonstrate that the resolution, in its legal aspects, was controversial. A final assessment of Anglo Irish Bank's resolution should therefore be balanced between its financial expediency and the legal issues which arose.

[23] This resolution represented an enormous expenditure to the State. The journalist Simon Carswell declared that the resolution of Anglo Irish Bank '[…] dragged an entire country to the brink of bankruptcy', Simon Carswell, *Anglo Republic Inside the Bank that Broke Ireland* (Penguin Books 2011), Prologue. The total cost of resolution, which primarily involves the cost of recapitalisation, is given in Oireachtas Banking Inquiry Report (n 9) Volume 1, 287.
[24] IBRC, *2012 Interim Report* (23 August 2012), 4.
[25] ibid, 6.

Recapitalisation

This section examines, firstly, the procedural aspects of Anglo Irish Bank's recapitalisation and, secondly, the case law arising from the recapitalisation decision. Recapitalisation necessitated legislation in an emergency context, which involved an exception to EU state aid law, and new pieces of legislation, since recapitalisation was not covered before 2008 in most EU Member States' legislation (including Ireland). The EU exceptional regime and the new legislation (Credit Institutions (Financial Support) Act 2008) triggered several court cases in Ireland, but not in other EU countries. This makes Ireland a uniquely instructive example. The case law reveals the legal grounds on which recapitalisation was challenged, and how the courts upheld the legality of recapitalisation. On top of explaining what happened at the time in Ireland, analysing the case law remains relevant to understanding how recapitalisation decisions could potentially be challenged in future.

Procedural aspects

The immediate background to Anglo Irish Bank's recapitalisation lay in the panic on Irish financial markets on 29 September 2008, due to dramatic decreases in banks' share prices and in the ISEQ generally. On the night of 29 September and the morning of 30 September, the Government decided to financially support Irish tier-1 (Allied Irish Banks, Anglo Irish Bank, Bank of Ireland) and tier-2 banks (Irish Nationwide Building Society, EBS, and Irish Life & Permanent). Because the Government, regulators, and bankers did not anticipate the crisis, an emergency solution needed to be found by submitting a Bill before the Oireachtas and by voting on the proposed legislation.

The decision to guarantee the banks was legally enacted by the Oireachtas on 2 October through the Credit Institutions (Financial Support) Act 2008.[26] The Oireachtas was urged by the Government to vote rapidly.[27] This exigency raised stormy debates in the Dáil.[28] The Joint Oireachtas Committee of Inquiry into the Banking Crisis subsequently found that it was a mistake to decide on a guarantee without restructuring measures also being in place.[29] The restructuring measures came later and were eventually enacted in the Credit Institutions (Stabilisation) Act 2010.

From October 2008, the Government decided to impose a range of restructuring conditions on the covered banks in order to ensure a return to normal activity and business continuity.[30] Within the framework of the Credit Institutions (Financial Support) Scheme 2008,[31] covered banks were bound to limit their business and their exposure, such as 'expansion of capital and lending activity'.[32] To do so, the Minister for Finance was entitled to oversee commercial

[26] See further Oireachtas Banking Inquiry Report, (n 9) Volume 1, 272.
[27] Some TDs complained that the vote was abnormally rapid as the Bill 'passed all legislative stages in less than 24 hours.' See Gavin Barrett, *The Evolving Role of National Parliaments in the European Union Ireland as a Case Study* (Manchester University Press 2018) 150.
[28] Some TDs claimed that recapitalisation was a 'straitjacket' imposed on the Irish nation (per Deputy Pat Rabbitte in Dáil Deb 01 December 2010, vol 723 no. 4, and that '[t]he one major defect in the Credit Institutions (Financial Support) Bill is its democratic deficit. The Oireachtas has been asked to write a blank cheque for the Government and Ireland's financial institutions' (per Deputy Jim O'Keeffe in Dáil Deb 01 October 2008, vol, 662, no. 2).
[29] Oireachtas Banking Inquiry Report, (n 9) Volume 1, 282.
[30] In order to ensure a return, the Government required the banks to give an 8% fixed dividend on the preference shares. The Government also intervened in the banks' management by taking the right to appoint 25% of directors, by imposing commercial decisions regarding lending to SMEs and individuals, and by imposing reductions in compensation. See Oireachtas Banking Inquiry Report, (n 9) Volume 1, 293.
[31] As introduced through SI 2008/411, the Credit Institutions (Financial Support) Scheme 2008 provided details on the application of the Credit Institutions (Financial Support) Act 2008.
[32] SI 2008/411, Reg 11.

decisions of covered banks,[33] and the management of balance sheets.[34] The issue of information provision also needed to be addressed, as the covered banks were bound to disclose information on their financial positions to the Central Bank of Ireland.[35] The Central Bank was given the power to issue commercial conduct rules for covered banks.[36] Furthermore, there were EU-originated business and accounting conditions imposed on the covered banks.[37]

Covered banks' depositors also required a guarantee. From December 2008 to March 2013, the Government protected depositors under the Eligible Liability Guarantee Scheme.[38] The guarantee was created under s. 6(4) of the Credit Institutions (Financial Support) Act 2008 and it was 'unconditional and irrevocable'. [39] In 2009, the Central Bank implemented the Deposit Guarantee Scheme, which aimed at protecting all covered banks' depositors holding less than €100,000 in deposits.[40] Under this Scheme, the Central Bank was liable to repay the deposits. This was supposed to be an advance payment as a covered bank would be liable to reimburse the Central Bank.[41] Capital injections in the covered banks were regular and happened as soon as financial weaknesses were found. There were four capital injections between 2008 and 2010. [42] All capital injections were subject to approval by the European Commission (Commission).[43] The Commission required the Government to limit the guarantee schemes to only what was necessary in the interests of recapitalising the covered banks.[44] The Commission approved the guarantee as described in the Credit Institutions (Financial Support) Act 2008 and it imposed an obligation that the guarantee comply with the three requirements of Article 4(2) of the European Communities Treaty (EC Treaty):appropriateness, necessity and proportionality.[45]

Recapitalisation converted private debt into sovereign debt.[46] This accordingly increased the levels of public debt. Consequently, the Government bore the responsibility for budgetary restrictions in order to deleverage the cumulative debt. The Government planned substantial

[33] SI 2008/411, Regs 38 and 39.
[34] SI 2008/411, Reg 37.1.
[35] SI 2008/411, Reg 24.
[36] SI 2008/411, Reg 36.
[37] The covered banks were required to have balance sheet growth, to comply with rules on balance sheet management, to meet liquidity and solvency requirements, to have control over acquisition of shares, to comply with targets on asset and liabilities, to comply with solvency, liquidity and capital ratios, to maintain a limitation on dividend payments, controls on remuneration, and control on representation and executive management. See generally Mark Kennedy, Máire Whelan, and Feargus Ó Raghallaigh, *The National Asset Management Agency Act 2009* (Gill & McMillan 2011).
[38] Deposit guarantee schemes were created at the EU level in 1994 under the Directive 94/19/EC, and it was transposed to Irish law under European Communities (Deposit Guarantee Schemes) Regulations, SI 1999/468. On 20 September 2008, the Irish Government committed to deposit protection and ensured that 'all deposits in Irish financial institutions are safe': Simon Carswell, 'The big gamble: The inside story of the bank guarantee' *The Irish Times* (Dublin, 25 September 2010) <https://www.irishtimes.com/news/the-big-gamble-the-inside-story-of-the-bank-guarantee-1.655629> accessed 1 October 2022. On 30 September 2008, the Irish Government announced the deposit protection for the deposits which were not covered by the Directive 94/19/EC Scheme: see European Central Bank, 'National Rescue Measures in Response to the Current Financial Crisis' (2009), ECB Legal Working Paper Series No 8, Appendix 1, 90.
[39] Credit Institutions (Eligible Liabilities Guarantee) Scheme 2009, para 6.
[40] European Communities (Deposit Guarantee Schemes) (Amendment) Regulations 2009, SI 2009/228, Reg 10.
[41] Financial Services (Deposit Guarantee Scheme) Act 2009, s. 8. This condition was also linked with the belief that the covered banks were solvent and had capacity to recover: see Oireachtas Banking Inquiry Report, (n 9) Volume 1, 260-263.
[42] See Oireachtas Banking Inquiry Report, (n 9) Volume 1, 290–293.
[43] Commission, 'Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' (2008) OJ C 270/2.
[44] ibid para 25.
[45] Commission Decision, Guarantee Scheme for Banks in Ireland, N 48/2008, OJ C 312/2.
[46] Irene Lynch Fannon, 'The End of the Celtic Tiger: An Irish Case Study on the Failure of Corporate Governance' (2015) 66(1) Northern Ireland Legal Quarterly 1.

cuts in public spending to maintain a balanced budget and to preserve credibility in the eyes of the EU.[47] All of these measures proved to be very unpopular with the public.[48]

Permitting recapitalisation programmes required important modifications to EU law. The starting point was the removal of the State Aid prohibition in EU law. In EU law,[49] the default position is for the prohibition of State Aid.[50] This regime can be disapplied in exceptional circumstances, such as a 'serious disturbance of the economy'.[51] The 2008 financial crisis was deemed to have fallen within this category.[52] In October 2008, the Commission gave formal legal approval for this exception.[53] All Member States could benefit from this exception, subject to prior Commission approval. [54] In 2010, the EU's recapitalisation programmes were the European Financial Stability Facility,[55] and the European Financial Stabilisation Mechanism.[56] In 2011, the eurozone Member States merged these two programmes and created, by treaty, the European Stability Mechanism (ESM). [57] The European Stability Mechanism was approved in Ireland by referendum in 2012 and transposed under the European Stability Mechanism Act 2012. [58]

Aside from the contentious legal questions discussed in the next sub-section, there was some political controversy around the role of the Minister for Finance. In the Credit Institutions (Financial Support) Act 2008, the Minister for Finance was placed in charge of implementing financial support.[59] This granting of powers was heavily criticised during the Oireachtas debates.[60] Following the enactment of the Credit Institutions (Financial Support) Act 2008,

[47] For example, the Financial Emergency Measures in the Public Interest Act 2009 decreased civil servants' salaries. The Financial Emergency Measures in the Public Interest Act 2010 reduced pensions and the pensions continued to be cut under the Financial Emergency Measures in the Public Interest Act 2013.

[48] For example, Deputy Maureen O'Sullivan declared: 'I am reminded of the lines Mercutio spoke […]: "A plague o' both your houses! They have made worms' meat of me." That is the feeling of many people in this country': Dáil Deb 01 December 2010, vol 723, no. 4. The conversion of private debt to sovereign debt was one of the most controversial events of the 2008 financial crisis, and it was largely commented by official institutions and academics. See, for examples, Samba Mbaye, Marialuz Moreno Badia, and Kyungla Chae, 'Bailing out the people? When private debt becomes public' (2018) IMF Working Paper 18/141, Anton Brender, Florence Pisani and Emile Gagna, *The Sovereign Debt Crisis, Placing a Curb on Growth* (Centre for European Policy Studies 2012), and Adrian Blundell-Wignall, 'Solving the Financial and Sovereign Debt Crisis in Europe' (2012) 2011 OECD Journal Financial Market Trends 2.

[49] EU State Aid Law is based on Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU), formerly Articles 87 to 89 of the European Community (EC) Treaty. See Andrea Biondi and Elisabetta Righini, *An Evolutionary Theory of State Aid Control* (Oxford University Press 2015).

[50] Article 107 (1) TFEU. The Commission gives the following definition: 'State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.' See Commission, 'State aid overview' (2019) <https://ec.europa.eu/competition/state_aid/overview/index_en.html> accessed 1 October 2022.

[51] EC Treaty Article 87(3)(b), now Article 107(3)(b) TFEU.

[52] Commission (n 43).

[53] ibid 8.

[54] ibid general principles in paras 6 to 16.

[55] The European Financial Stability Facility was created in June 2010 by the Eurozone Member States to provide Ireland, Portugal, and Greece with temporary and emergency financial assistance. See European Stability Mechanism, 'Before the ESM – EFSF – the temporary fiscal backstop' <https://www.esm.europa.eu/efsf-overview> accessed 1 October 2022.

[56] The European Financial Stabilisation Mechanism was created under the Council Regulation (EU) No 407/2010 of 11 May 2010 to provide Ireland, Portugal, and Greece with temporary and emergency financial assistance. See Commission, 'European Financial Stabilisation Mechanism (EFSM) – Pre-2015 support' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en> accessed 1 October 2022.

[57] The European Stability Mechanism was created to provide any Eurozone Member State with financial assistance in order to help it to maintain its financial stability: see European Stability Mechanism Treaty, Article 3.

[58] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [1].

[59] Credit Institutions (Financial Support) Act 2008, s. 2(1).

[60] Deputy Kenny declared: 'The House has placed an enormous amount of trust in the Minister of Finance, on behalf of the people' Dáil Deb 02 October 2008, vol 662, no. 3. Ireland was not an exception, as Ministers for Finance of other EU Member States were also granted powers to roll out the resolution programmes. For example, in Germany, the Financial Market Stabilisation Act 2009 allowed 'the German state to gain unlimited control over banks of systemic importance'. See Klaus J. Hopt, Christoph Kumpan and Felix Steffek, 'Preventing Bank Insolvencies in the Financial Crisis: The German Financial Market Stabilisation Acts' (2009) 10(4) European Business Organization Law Review 515. The British Parliament

the Minister for Finance issued the Credit Institutions (Financial Support) Scheme 2008, by which the Minister designed the framework for guarantee. [61]

The Credit Institutions (Financial Support) Act 2008 designated the Minister for Finance as responsible for recapitalisation.[62] The Minister was granted extended powers in doing 'anything that appears necessary or expedient'[63] to ensure the Act's implementation. The Minister was able to design and grant financial support.[64] The guarantee was principally on the equity side, by the purchase of shares and securities,[65] as well as creation and issuance of securities.[66] The Minister had significant discretionary power for allocating financial support, and financial support could be withdrawn at any time.[67]

While the Credit Institutions (Financial Support) Act 2008 settled the recapitalisation framework, the Minister specified the exact form of recapitalisation in the Credit Institutions (Financial Support) Scheme 2008. The Minister designed the whole recapitalisation process and its conditions himself through the design of the reimbursement scheme,[68] its amendment,[69] and its revocation. [70]

There were political concerns regarding the role of the Minister for Finance in the Oireachtas debates on the Credit Institutions (Financial Support) Bill, specifically as to whether the Minister for Finance was acting in an unreasonable way and granting undue amounts of support. As it transpired, there were no subsequent problems surrounding the extent of the Ministerial powers and there is no trace of a negative assessment on the Minister for Finance's decisions or conduct in the post-crisis official reports. Indeed, the Nyberg, Honohan, and Regling and Watson reports opted to concentrate on how the statutory framework applied, rather than on the Minister's discretion as to its design. [71] However, the extent of Ministerial discretion was certainly unusual by the standards of Irish legislation and within a context of democratic institutions. The powers provided for through the legislation indicate the level of trust which was placed in the Minister individually (and the departmental civil service). Three politicians (two Fianna Fáil and one Fine Gael) successively occupied the position of Minister for Finance throughout the crisis. The conduct of recapitalisation and resolution progressed without difficulties during their terms of office, and without any major complaint as to Ministerial proficiency and probity during the resolution process.

Case law

Recapitalisation was challenged in four legal proceedings (*Pringle*, *Doherty*, *Hall*, and *Collins*) whereby the plaintiffs (all Oireachtas members) sought to have the legislation rendered void

granted important powers to the Treasury to bailout Northern Rock: see Roman Tomasic, 'The Rescue of Northern Rock: Nationalization in the Shadow of Insolvency' (2008) 1(4) Corporate Rescue and Insolvency 109-111.

[61] SI 2008/411. This scheme by the Minister for Finance was a requirement under the Credit Institutions (Financial Support) Act 2008 s. 6(5)

[62] Credit Institutions (Financial Support) Act 2008, s. 2(1).

[63] ibid, s. 5(1).

[64] ibid, ss. 6(1) and (4).

[65] ibid, s. 6(9).

[66] ibid, s. 6(11).

[67] ibid, ss. 6(10) and s. 6(14)

[68] SI 2008/411, Regs 16 to 23.

[69] ibid, Reg 7.

[70] ibid, Reg 13.

[71] (n 9).

and to stop the recapitalisation programmes.[72] These four legal actions signified the transfer of political disputes from the Oireachtas, where the TDs disagreed with the final recapitalisation decisions, to the courts, where the TDs objected to recapitalisation on grounds of EU and Irish law. Above all, the courts were satisfied that recapitalisation was legal and favourable to the financial stability of Ireland. To that extent, the Government was found to have acted in the common interest and that its actions were therefore constitutional.[73] Ireland was the only EU Member State where recapitalisation was challenged on several occasions in courts, as there was only one other occurrence in Germany with the *Gauweiler* case.[74]

Two court cases (*Pringle* and *Doherty*) were founded on arguments of EU law. Recapitalisation was a new measure in 2008 and had no prior legal existence. Its legal creation was therefore a disruption, or, at the very least, an exception, in EU State Aid law,[75] where the normal regime is the prohibition of State Aid.[76] As per the existing State Aid rules, state aid is possible in exceptional circumstances, such as a 'serious disturbance of the economy'.[77] The European Commission decided that the 2008 financial crisis fell within this category and thereby legalised recapitalisation.[78] In *Pringle v Government of Ireland & Others*,[79] the plaintiff, Thomas Pringle TD, challenged the validity of the ESM Treaty.[80] This challenge was based on EU law (the Treaty on the Functioning of the European Union (TFEU) and Decision 2011/199/EU),[81] and on Irish constitutional law.[82] Pringle asked for a legal assessment as to whether the ESM Treaty complied with the rule of law, as understood in the EU and in Ireland,[83] and claimed that the ESM Treaty fell outside of the economic and monetary competencies of the EU.[84]

[72] The relevant cases are: *Pringle v The Government of Ireland & Ors* [2012] IEHC 296; *Pringle v The Government of Ireland & Ors* [2012] IESC 47; and C370/12 *Pringle v Government of Ireland* [2013] OJ C26/15, *Doherty v The Referendum Commission* [2012] IEHC 211 *David Hall v Minister for Finance & Ors* [2013] IEHC 39 and *Collins v Minister for Finance & ors* [2013] IEHC 530.

[73] This was the conclusion of the High Court in *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [119], and the Supreme Court in *Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47 [8.13]. Indeed, the judiciary assessed that the Government was free to enter the ESM Treaty as part of its policies.

[74] C62/14 *Peter Gauweiler and Others v Deutscher Bundestag* [2015]. Peter Gauweiler, a German MP, challenged an ECB decision regarding sovereign debt purchase on secondary markets. Gauweiler was opposed to this decision because it would financially support EU countries other than Germany, and especially Greece. The European Court of Justice confirmed the validity of the ECB's decision.

[75] EU State Aid Law is based on Articles 87 to 89 of the EC Treaty. For further analysis, see particularly Andrea Biondi and Elisabetta Righini, *An Evolutionary Theory of State Aid Control* (Oxford University Press 2015).

[76] EC Treaty Article 87(1). The Commission gives the following definition: 'State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.' See Commission, 'State aid control' (2019) <https://ec.europa.eu/competition/state_aid/overview/index_en.html> accessed 1 October 2022.

[77] Article 107 (3)(b) TFEU.

[78] Commission (n 43).

[79] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296; *Pringle v The Government of Ireland & Ors* [2012] IESC 47; and C370/12 *Pringle v Government of Ireland* [2013] OJ C26/15.

[80] The European Stability Mechanism was created to provide any Eurozone Member State with financial assistance in order to help it to maintain its financial stability. See European Stability Mechanism Treaty, Article 3.

[81] Decision 2011/199/EU amended Article 136 of the TFEU to allow the creation of stability mechanism by the Member States, ie, recapitalisation and public support programmes. The amendment is: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality' (Article 1).

[82] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, Section I.

[83] Joe Noonan and Mary Linehan, 'Thomas Pringle v The Government of Ireland, Ireland and the Attorney General' (2014) 17 *Irish Journal of European Law* 129-138. Noonan and Linehan use the work of Tom Bingham to define the rule of law: see Tom Bingham, *The Rule of Law* (Penguin Books 2011).

[84] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [18].

As it concerned EU matters, the *Pringle* case was referred to the Court of Justice of the European Union (CJEU).[85] The CJEU confirmed the lawfulness of the ESM Treaty, as part of the EU economic and monetary policy established in the Treaty on the European Union (TEU) and the TFEU.[86] The Court recognised the decision of the European Commission to take a united approach to crisis resolution, and the Court did not find any legal ground to prevent the EU from financially assisting a Member State in distress.[87] Additionally, the Court emphasised the principle of solidarity between the Member States, even in a time of crisis.[88]

In *Doherty v Referendum Commission*,[89] the plaintiff, Pearse Doherty TD, challenged the Treaty on Stability, Coordination and Governance in the European and Monetary Union (Fiscal Treaty).[90] Doherty asked the High Court, firstly, whether the Irish Government would have been in a position to veto the Article 136 TFEU amendment on public deficit limit;[91] and, secondly, whether the Article 136 TFEU amendment complied with Article 48(6) TEU on the revision and amendment of the TFEU.[92] The High Court concluded that the EU law-related questions should be directed to the CJEU.[93] Doherty eventually did not request that the Court send the case to the CJEU. The questions of EU law therefore remained unanswered.

Three court cases (*Pringle*, *Hall*, and *Collins*) challenged recapitalisation based on Irish law. In *Pringle*,[94] the plaintiff argued that the ESM Treaty was incompatible with the Irish Constitution,[95] because it involved a transfer of sovereignty,[96] or in his own words an 'abdication of sovereignty by allowing majority decision-making by the ESM institutions'.[97] The Court concluded that the Government was free to enter into the ESM Treaty as part of foreign and economic policies,[98] and that the Court had 'absolutely no role in commenting

[85] ibid, Section VI. Pringle requested a reference to the CJEU regarding three questions: '(a) The plaintiff challenges the compatibility of the ESM Treaty both with the Constitution and with Union law. (b) The determination of certain of the constitutional aspects of the case is dependent on the interpretation of the Union Treaties and "General Principles of Union law", as developed in the case law of the CJEU. (c) Questions of law ought to be referred to the CJEU for preliminary ruling pursuant to Article 267 TFEU.' *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [24].
[86] C370/12 *Pringl*e v *Government of Ireland* [2012] [93] – [100].
[87] Roderick O'Gorman, 'Thomas Pringle v Government of Ireland, Ireland and the Attorney General' (2013) 50 Irish Jurist 221.
[88] C370/12 *Pringl*e v *Government of Ireland* [2012] [115].
[89] *Doherty v The Referendum Commission* [2012] IEHC 211.
[90] This Treaty aimed at enshrining the obligation for all the Member States to maintain a balanced budget. The rule was to limit the public debt deficit between 0.5 and 1% of the GDP: see Tony Costello, 'The Fiscal Stability Treaty Referendum 2012' (2014) 29 Irish Political Studies 459.
[91] *Doherty v The Referendum Commission* [2012] IEHC 211 [49].
[92] ibid [50] – [54].
[93] ibid [66].
[94] [2012] IEHC 296 and [2012] IESC 47.
[95] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [1]. The High Court based the constitutional analysis on Article 5, Articles 29(4)(1) and (2), and Article 29(5)(1) of the Constitution: see *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [97] – [99].
[96] ibid [111]. Precisely, the claim was based on Articles 5, 6, 28, and 29 of the Constitution. These Articles refer to the independence and the sovereignty of the State, to the separation of powers, to the definition of executive power: see *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [97] to [99].
[97] Jan-Herman Reestman, 'Legitimacy through adjudication: the ESM Treaty and the fiscal compact before the national Courts' in
Thomas Beukers, Bruno de Witte and Claire Kilpatrick, *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 258.
[98] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, [119]. To reach this conclusion, the Court applied the *Crotty* test. See *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, [30]. Crotty was an Irish citizen, and he was an opponent to the Ireland's membership to then European Economic Community. He challenged the constitutionality of the Single European Act 1986 in *Crotty v An Taoiseach* [1987] IESC 4. He claimed that the Oireachtas and the Government could not constitutionally surrender a part of sovereignty. Gerard Hogan, 'The Supreme Court and the Single European Act' (1987) 22(1) Irish Jurist 55-70, and Maria Cahill, 'Crotty after Pringle: The Revival of the Doctrine of Implied Amendment' (2014) 17(1) Irish Journal of European Law 1.

as to whether participation is a good or bad strategy for Ireland'.[99] Moreover, the Court concluded that the ESM Treaty would not involve 'any transfer or diminution of sovereignty by Ireland to the European Stability Mechanism (ESM) or other Members of the ESM'.[100] The Court therefore confirmed that both the ESM Treaty and the ESM Act 2012 were compatible with the Constitution.[101]

Pringle appealed the High Court's decision to the Supreme Court.[102] The Chief Justice and three judges out of four were satisfied that the ESM Treaty was constitutional. The three judges who acknowledged the constitutionality found that there was no impingement on economic and monetary sovereignty, that there was no unlawful transfer of sovereignty, that entering the ESM Treaty was a policy decision, that the ESM Treaty was limited in time, and that the ESM Treaty benefited Ireland.[103] The dissenting judgment deemed the ESM Treaty to be unconstitutional, as it involved a transfer of sovereignty incompatible with the Constitution,[104] and that a referendum would be needed for ratification.[105] The Supreme Court dismissed the appeal and confirmed the constitutional validity of the ESM Treaty.

In *David Hall v Minister for Finance & Others*,[106] the plaintiff, David Hall TD, challenged the constitutionality of section 6 of the Credit Institutions (Financial Support) Act 2008, which permitted the Minister for Finance to guarantee the banks.[107] The High Court did not answer the legality question, but instead focused its judgment on the *locus standi* of Hall, that is, his capacity to bring a constitutional challenge to Court.[108] The High Court concluded that Hall was not entitled to raise a constitutional challenge, on the basis that his claim did not concern 'any actual breach or threatened breach of his rights'.[109]

In *Collins v Minister for Finance & Others*,[110] same as in *Hall*, the plaintiff, Joan Collins TD, challenged the constitutionality of the Credit Institutions (Financial Support) Act 2008. Collins claimed that 'the Minister had acted wrongfully or in an unconstitutional fashion'[111] and 'without further recourse to Oireachtas the Minister for Finance appropriated enormous sums of public funds in favour of the banks'.[112] Her challenge was broken down into two questions: (i) whether the €30bn financial support[113] exceeded the time limit under the Credit Institutions (Financial Support) Act 2008 s. 6(3);[114] and (ii) whether the Credit Institutions (Financial Support) Act 2008 s. 6(1)[115] implied an approval by the Oireachtas to release financial support.[116]

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99 *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 [124].
100 *Pringle v The Government of Ireland & Ors* [2012] IEHC 296 s. VIII(a)(2).
101 ibid s. VIII.
102 *Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47
103 ibid [17.vii], [26], [4.22], [8.13], [10.1], [38-40] and [43-44].
104 ibid 47.
105 ibid.
106 [2013] IEHC 39 and [2013] IESC 10.
107 This power was granted under s. 6(4): 'Financial support may be provided under this section in a form and manner determined by the Minister and on such commercial or other terms and conditions as the Minister thinks fit.'
108 *David Hall v Minister for Finance & Ors* [2013] IEHC 39.
109 Since *Cahill v Sutton* [1980] IR 269, the plaintiff must evidence that his 'rights have either been infringed or are threatened' to be granted the possibility to bring a constitutional challenge to Court. See *David Hall v Minister for Finance & Ors* [2013] IEHC 39.
110 [2013] IEHC 530 and [2016] IESC 73.
111 *Collins v Minister for Finance & ors* [2013] IEHC 530 [31].
112 ibid [34].
113 ibid [1].
114 Credit Institutions (Financial Support) Act 2008 s. 6(3) provided 29/09/2010 as a deadline for any financial support.
115 Credit Institutions (Financial Support) Act 2008 s. 6(1) provided that the Minister for Finance could decide the form and the amount of the financial support.
116 *Collins v Minister for Finance & ors* [2013] IEHC 530 [59].

On the first question, the High Court concluded that the Minister for Finance acted *intra vires,*[117] and issued the €30bn financial support before the deadline.[118] On the second question, the Credit Institutions (Financial Support) Act 2008 s. 6(12) provided that the financial support fell within the category of non-voted expenditure,[119] which does not need parliamentary approval.[120] The High Court concluded that, although the Minister of Finance was in a position to use significant amounts of money, his power was limited in a satisfactory manner, [121] as he was allowed to grant financial support under strict conditions.[122] With the strict limitations to certain conditions, the High Court concluded that, in this instance, the Minister could grant support without further parliamentary approval.[123]

Collins appealed the High Court's decision to the Supreme Court,[124] and asked the Court whether the Oireachtas was constitutionally allowed to grant the Minister for Finance powers to make important financial commitments for the guarantee.[125] The core of Collins' argument was based on the absence of a limit to the guarantee.[126] The Supreme Court held that the Credit Institutions (Financial Support) Act 2008 was an exceptional solution to exceptional circumstances.[127] The Supreme Court was satisfied that the powers of the Minister were limited, in providing a guarantee only for ailing banks and in limiting the time.[128] The Supreme Court was therefore satisfied that 'the powers of the Minister to provide financial support are significantly constrained by the legislation.'[129] Based on the exceptional circumstances of the crisis and on the limited powers granted to the Minister, the Supreme Court confirmed the lawfulness of the guarantee under the Credit Institutions (Financial Support) Act 2008.

In all of the above cases, the courts dismissed the claims, although the courts were occasionally ambivalent in expressly endorsing the recapitalisation decision, as in *Pringle* and

[117] ibid [2013] IEHC 530 [59].
[118] Credit Institutions (Financial Support) Act 2008 s. 6(3) settled that no financial support could be issued after 29/09/2010. See also *Collins v Minister for Finance & ors* [2013] IEHC 530, [60] – [62]. The payments to Anglo Irish Bank and EBS were released on 31December 2015. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [64]. This was allowed by an amendment of Credit Institutions (Financial Support) Act 2008, s. 6(3), which permits financial support after 29 September 2010. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [134].
[119] *Collins v Minister for Finance & ors* [2013] IEHC 530 [89]. There are two kinds of expenditure: voted and non-voted. As explained in the Supreme Court: 'Non -Voted expenditure is "money which a specified Act has authorised to be paid from the Central Fund (or Exchequer), indefinitely, so that this expenditure does not have to come under the annual review of the Dáil". Voted expenditure is the expenditure involved in the annual exercise of determining the votes for each Department of State and other heads of expenditure, which each have their "votes".' See *Collins v Minister for Finance & ors* [2016] IESC 73 [59].
[120] *Collins v Minister for Finance & ors* [2013] IEHC 530 [97]. To answer this question, the High Court used the *Cityview* test. This test was defined in *Cityview Press* [1980] I.R. 381, 399 and aims at assessing the delegation of powers. See *Collins v Minister for Finance & ors* [2013] IEHC 530 [98].
[121] ibid [109], and the judgment stated that 'we consider that the 2008 Act satisfies the principles and policies test and that it did not confer on the Minister an unfettered and unreviewable discretionary power with regard to the provision of financial assistance': *Collins v Minister for Finance & ors* [2013] IEHC 530 [115].
[122] ie, '(i) a serious threat to the stability of the banking sector; (ii) the giving of such support is necessary to maintain the stability of the State's financial system and (iii) this is also necessary to restore equilibrium in the wider economy.' *Collins v Minister for Finance & ors* [2013] IEHC 530 [111].
[123] *Collins v Minister for Finance & ors* [2013] IEHC 530 [130].
[124] *Collins v Minister for Finance & ors* [2016] IESC 73. All of the Supreme Court judges participated, and this underlined the importance of this case: see *Collins v Minister for Finance & ors* [2016] IESC 73 [1].
[125] ibid [6]. The question was later rephrased by the Supreme Court as to whether the Credit Institutions (Financial Support) Act 2008, s. 6, involved 'an impermissible delegation or transfer by the Oireachtas to the Government of the power of expenditure and consequently an impermissible abdication by the Oireachtas': *Collins v Minister for Finance & ors* [2016] IESC 73 [63].
[126] ibid [65].
[127] ibid [70] – [71].
[128] ibid [77] – [78].
[129] ibid [81].

Hall. The cases evidence the propensity of some politicians to use the courts to oppose recapitalisation, but, since this happened only in Ireland, it is difficult to draw conclusions as to similar trends and tendencies at EU level. Nevertheless, the cases indicate the grounds on which there can be attempts to obstruct recapitalisation, ie, constitutional and sovereignty concerns. Sovereignty, as addressed in *Pringle* and *Doherty*, is perhaps particularly interesting because it relates to the legitimacy of the EU to coordinate and centralise bank resolution. Such challenges on recapitalisation would be more difficult now as it is a measure provided for in the Single Resolution Mechanism, which also reinforces the authority of the EU. This does not preclude cases being brought to the courts, but courts do have more grounds to support the legal validity of recapitalisation.

Nationalisation

This section investigates, firstly, the procedural aspects of Anglo Irish Bank's nationalisation, and, secondly, the legal implications of the nationalisation. While nationalisation did not cause court challenges, the Oireachtas debates and the content of the nationalisation legislation are informative as to the potential legal challenges which could arise. Nationalisation primarily affects shareholders. As the Irish State was already the major shareholder of Anglo Irish Bank after the recapitalisation, the shareholders in these circumstances did not impede the nationalisation.

Procedural aspects

In early January 2009, the Government decided to nationalise Anglo Irish Bank, for which it was already the de facto major shareholder (75%) as a result of the 2008 recapitalisation programmes.[130] Nationalisation was legally enabled under the Anglo Irish Bank Act 2009, and it was based on three processes: transfer of shares to the Minister for Finance; valuation of shares; and compensation of shares. This Act raised several controversies during the parliamentary debates, which indicated the level of policy-based apprehension about the decision. However, these concerns did not materialise in case law once the Act was in force, most probably because the State was already the major shareholder, the shares were close to a nil value, and the bank had already entered an advanced phase of a resolution programme.[131] Nevertheless, these controversies remain of interest in highlighting aspects of nationalisation that can potentially generate case law.

The policy process for nationalisation happened in two steps. The first step happened in 2007 when the NTMA, the Financial Regulator, and the Central Bank identified nationalisation as an option for banking resolution.[132] This anticipation led to the advance preparation of nationalisation legislation. Nationalisation was not to be a project in particular for Anglo Irish Bank,[133] but rather a precautionary measure as the Irish financial situation was worsening.[134] Nationalisation legislation was consequently available prior to the 'Guarantee Night' in September 2008.[135] At that time, nationalisation was categorised as a non-favoured option because of uncertainty as to its efficiency,[136] and its reputational risk

[130] Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland.
[131] At the last trading date, the value of an Anglo Irish Bank share was €0.22. See MarketScreener, 'Anglo Irish Bank' <https://www.marketscreener.com/quote/stock/ANGLO-IRISH-BANK-1412358/> accessed 1 October 2022.
[132] Oireachtas Banking Inquiry Report (n 9) Volume 1, 202 and 207. It is interesting to note that liquidation was not part of these recommendations.
[133] ibid 232.
[134] ibid 216.
[135] ibid 242.
[136] '[The Options paper] ruled nationalisation out as an option if it would take a long time to enact the legislation or the announcement of intent to nationalise would be insufficient to round up' (n 9) Volume 1, 217.

for Ireland.[137] The second step happened in late 2008, when the Government eventually preferred a nationalisation by transfer of shares to further recapitalisation. Further recapitalisation would effectively have been the equivalent of a nationalisation by purchase of shares.

The choice of legislation for nationalisation did not raise questions during the legislative process, but it was subsequently questioned by the Joint Oireachtas Committee into the Banking Crisis. The Committee questioned why the Anglo Irish Bank Act 2009 was needed to nationalise Anglo Irish Bank, insofar as the Credit Institutions (Financial Support) Act 2008 already provided the State with the possibility to be the major, or sole, shareholder.[138] Indeed, the only substantive difference between these two Acts is the method for nationalisation: transfer of shares under the Anglo Irish Bank Act 2009, and purchase of shares under the Credit Institutions (Financial Support) Act 2008. Taoiseach Brian Cowen told the Committee that nationalisation legislation was ready and, in such a time of confusion, an arbitration between the two legislative Acts was not conducted. Therefore, the Credit Institutions (Financial Support) Act 2008 was not used to nationalise Anglo Irish Bank,[139] but instead the Oireachtas passed a special Act.

During the parliamentary debates on the Anglo Irish Bank Act 2009, there were concerns expressed by TDs, which eventually did not materialise. As with the Credit Institutions (Financial Support) Act 2008, the legislative process for voting on the Anglo Irish Bank Act 2009 happened in a very short amount of time, less than three weeks.[140] The Government based its submission of the Bill on two justifications. For the first justification, the Government explained that Anglo Irish Bank was of systemic importance, considering the number of customers and employees.[141] Some TDs challenged this justification.[142] In light of the financial analysis in the first section of this article, Anglo Irish Bank could not be categorised as a systemic bank, insofar as it was not a universal bank, such as Allied Irish Banks and Bank of Ireland. Nevertheless, Anglo Irish Bank had a sizeable portfolio, and from this perspective, an orderly resolution was necessary to avoid market disturbance. For the second justification, the bank recapitalisation signified that the Government had to progress with its high exposure to Anglo Irish Bank.[143] The Government was also confident that nationalisation was possible because Anglo Irish Bank might become solvent again, and this view was shared by some TDs.[144] Nationalisation was thus presented as a further step in recapitalisation and reorganisation. Several TDs indicated that there might be an inability to deal with Anglo Irish Bank, due to a severe lack of information on the financial state of the

[137] '[…] the long term reputational damage to Ireland as a financial centre if an institution was nationalised' (n 9) Volume 1 217.
[138] ibid 271-272.
[139] ibid.
[140] ibid Chapter 8. See also The Houses of the Oireachtas Official Website 'Anglo Irish Bank Corporation Act 2009 – History of this Act' (21 Jaunary 2009) <https://www.oireachtas.ie/en/bills/bill/2009/1/> accessed: 1 October 2022).
[141] In the presentation of the Anglo Irish Bank Bill to the Dáil, the Minister for Finance indicated that Anglo Irish Bank had 7,000 customers with loans, where 5,000 were Irish. The retail depositors were 300,000 and 72,000 of them were Irish. Among the 12,000 depositors, 3,500 were Irish. Anglo Irish Bank had approximately €70 billion in loans and advances to customers. The Minister for Finance started his presentation of the Bill by showing that the national importance of nationalisation was undeniable: Dáil Deb 20 November 2009, vol 672, no 1. Besides, the bank employed a significant number of persons and the Government guaranteed that all employees would keep their job after nationalisation. Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland.
[142] Deputy Kieran O'Donnell in Dáil Deb 16 December 2009, vol 689, no 4.
[143] Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill (2009), Department of Finance, Government of Ireland. See also the financial analysis in the first part of the article.
[144] Deputy Joan Burton in Dáil Deb 20 November 2009, vol 672, no 1.

bank and uncertainty as to whether nationalisation could bring the bank back to business.[145] The Oireachtas eventually passed the Anglo Irish Bank Act 2009 because it was the only plan of the Government to rescue Anglo Irish Bank.

Another controversial aspect of Anglo Irish Bank Act 2009 was the granting of powers to the Minister for Finance, which were substantive and therefore problematic for some TDs. Similar to the Credit Institutions (Financial Support) Act 2008 and the Credit Institutions (Stabilisation) Act 2010, the Anglo Irish Bank Act 2009 granted important powers to the Minister for Finance,[146] who was in charge of the management of nationalised Anglo Irish Bank.[147] Additionally, the Act made the Minister the sole shareholder of Anglo Irish Bank,[148] benefiting from the usual rights accorded to shareholders.[149] These objections remained limited to the parliamentary debates and no major issue relating to the Minister's role in the governance of Anglo Irish Bank was reported during the period of nationalisation.

Legal implications

There were no examples of case law that challenged the nationalisation, and the main measures of the Anglo Irish Bank Act 2009 (transfer,[150] valuation,[151] and compensation)[152] were generally accepted by the shareholders. Anglo Irish Bank's shareholders did not publicly object to the transfer,[153] which was very probably due to the negligible value of the shares and to the major public shareholding. Nevertheless, TDs warned that several shareholders were actually Anglo Irish Bank's employees and some of them had invested most of their savings in Anglo Irish Bank.[154] This was also observed by the High Court in *Anglo Irish Bank Corporation Ltd v Companies Acts* [155] when identifying the mismanagement of Anglo Irish Bank ahead of nationalisation: 'The collapse of Anglo Irish Bank […] has caused much hardship to many small shareholders who invested in it in good faith.'[156] Again, these concerns remained at a political level and did not ultimately materialise in legal proceedings. As a point of comparison with the Irish approach, seven nationalisations happened in the EU during

[145] 'The major shortcoming is we are debating under a shadow of ignorance because we do not know the facts, as a result, we must exercise great caution, as legislators, in the manner in which we deal with this issue', Deputy Charles Flanagan in Dáil Deb 20 November 2009, vol 672, no 1.

[146] Among others, issuing shares (Anglo Irish Bank Act 2009, s. 34), performance of management tasks (Anglo Irish Bank Act 2009, s. 17), design of business plan (see Department of Finance, 'Relationship framework specified by the Minister for Finance pursuant to Section 3 of the Anglo Irish Corporation Act 2009 in respect of the Relationship between the Minister for Finance and IBRC Ltd' (Department of Finance 2012)), staff management (Anglo Irish Bank Act 2009, ss. 19 and 20).

[147] '[…] the powers of the Minister for Finance are almost completely limitless. In law, he is a tsar of the covered institutions. He is even more of a tsar in terms of his control and power over Anglo Irish Bank' Deputy Joan Burton in Dáil Deb 16 December 2009, vol 698, no 4. Anglo Irish Bank Act 2009, s. 7.

[148] Anglo Irish Bank Act 2009, s. 6(1)(b).

[149] Anglo Irish Bank Act 2009, s. 7(1).

[150] ibid,s. 6(1)(b).

[151] ibid, s. 28.

[152] ibid, s. 28.

[153] The only notable exception is the Quinn Group.

[154] Dáil Éireann Deb 16 December 2009, vol 698, no 4.

[155] [2011] IEHC 164.

[156] *Anglo Irish Bank Corporation Ltd v Companies Acts* [2011] IEHC 164 Introduction,. This is the opening sentence of a case brought to the High Court by the Director of Corporate Enforcement and the Garda Bureau of Fraud Investigation. The High Court was requested to legally review actions taken by Anglo Irish Bank, namely the 2008 financial assistance to purchase its shares, loans granted to directors, and misleading information in its public statements. From the applicants' point of view, these actions might be contrary to Companies Acts 1963 – 1990. The High Court concluded that there was insufficient evidence to prove the breach of Companies Acts by Anglo Irish Bank. The investigations carried out by the Director of Corporate Enforcement and the Garda Bureau of Fraud Investigation failed to find substantial evidence.

the 2008 financial crisis.[157] Nationalisation was challenged only once by a shareholder claiming an expropriation, in the *Heilbronn* case, which led to a plaintiff's dismissal.[158]

Even though the procedures were slow, Anglo Irish Bank's shareholders did not publicly object to the valuation and compensation procedures. The conclusions of the assessor were not published until 2020.[159] The Anglo Irish Bank Act did not impose an immediate valuation, and referred to the discretion of the Minister for Finance by specifying that the valuation could be 'as soon as [the Minister] considers it appropriate in the circumstances'.[160] In 2020, the assessor concluded that Anglo Irish Bank's shares had a nil value, and, consequently, that there was to be no compensation.[161] As recognised in above when describing the features of the Credit Institutions (Financial Support) Act 2008, the Minister's discretion in specifying when the valuation could be conducted goes to demonstrate the significant degree of authority which was placed in the Minister. Although it was a significant delegation of powers, there were no controversies which materialised as regards the arrangements for valuation.

Despite an absence of case law, the parliamentary debates on the Anglo Irish Bank Act 2009 allowed for an identification of potentially controversial parts of the nationalisation legislation. An aspect of controversy concerns the powers granted to the Minister for Finance, which were assessed by some TDs as being *ultra vires*.[162] A major potential for contention lay with shareholders, who could have challenged the nationalisation processes by arguing particularly on the basis of property rights. As a *chose in action*, a share confers a right to sue, in addition to a variety of bundled rights.[163] Such legal actions can hamper nationalisation as some processes may be delayed or frozen until the cases are ruled on. This did not happen for the Anglo Irish Bank nationalisation. The State was already the main shareholder after the recapitalisation, which immediately reduced any probability of a legal action. Moreover, since the valuation concluded that Anglo Irish Bank's shares were at close to a nil value, there was very little incentive for a shareholder to even contemplate instituting legal proceedings.

Later in 2009, the Oireachtas passed the National Asset Management Agency Act 2009, which created the first Irish work-out agency.[164] NAMA took over the impaired loans from

[157] Together with Anglo Irish Bank in Ireland, there were Hypo Real Estate in Germany, Banco Financiero y de Ahorros in Spain, Northern Rock in the United Kingdom, SNS Reaal and ABN Amro in the Netherlands, and Dexia in Belgium.
[158] In 2014, a SNS Reaal shareholder sued the Dutch Government at the Heilbronn Court, as he claimed that the transfer of his shares was an expropriation. He claimed compensation under § 826 of the German Civil Code, where damages can be granted in case of unintentional injury. The first line of defence of the Netherlands was State immunity as protected by Article 25 of the Fundamental Law, and the fact that the German Courts had no jurisdiction for this case under Article 15 and 16 of the EU Civil Procedure. The Court was satisfied by the line of defence of the Netherlands and the claimant was dismissed. LG Heilbronn (28/02/2014) 4 O 69/13 Ko. The case was heard at the Court of Heilbronn, as the shareholder was a German citizen.
[159] Department of Finance, 'Determination of Value of Shares Transferred to the Minister for Finance and Rights Extinguished under the Anglo Irish Bank Corporation Act 2009, Report prepared by David Tynan, Assessor under the Anglo Irish Bank Corporation Act 2009' (2020) <https://www.gov.ie/en/publication/cdb19a-anglo-irish-bank-assessor-report/> accessed 1 October 2022) [6.7] and [6.8].
[160] Anglo Irish Bank Act 2009, s. 22(1).
[161] Department of Finance, (n 160) [6.7] and [6.8].
[162] '[…] the powers of the Minister for Finance are almost completely limitless. In law, he is a tsar of the covered institutions. He is even more of a tsar in terms of his control and power over Anglo Irish Bank' per Deputy Joan Burton in Dáil Deb 16 December 2009, vol 698, no 4.
[163] See analysis of the legal nature of shares in Thomas Courtney, *The Law of Companies* (4th edn, Dublin: Bloomsbury Professional 2016) [8.005] – [8.012].
[164] Detailed analyses of the NAMA Act can be found in the academic literature, in particular Kennedy et al (n 37) and Noel Mc Grath and Morgan Shelley, *National Asset Management Agency Act 2009* (Round Hall 2009). See also Elise Lefeuvre and Jonathan McCarthy 'Lessons for a model of work-out agency in the EU: the Irish example of NAMA' (2022) 37(5) Journal of International Banking Law and Regulation 177-186. The article also investigates two main court cases involving NAMA:

five Irish banks, and Anglo Irish Bank was the main beneficiary.[165] This measure contributed to downsizing the loans portfolio of both Anglo Irish Bank and INBS, which subsequently facilitated their merger and liquidation.

Merger and liquidation

So as to provide a comprehensive account of the resolution of Anglo Irish Bank, from start to finish, this section examines, firstly, the merger of Anglo Irish Bank and INBS, and, secondly, the ultimate liquidation of both banks as IBRC. Although an overview of these actions is specific to the story of Anglo Irish Bank's resolution, the merger and the liquidation are instructive for banking resolution cases generally. This section highlights that there are different methods and tools which can be involved in resolution, including mergers. It is necessary to understand how liquidation in a national or domestic setting could be used when a resolution does not succeed. As demonstrated in each of the sub-sections, the merger and the liquidation were ensured by legal procedures which helped to reduce the amount of litigation arising from the actions.

Merger with INBS

The merger between Anglo Irish Bank and INBS proceeded in 2011, leading to the creation of IBRC. The merger was a preparatory measure for the joint liquidation of the two ailing banks. As the State was the sole shareholder of Anglo Irish Bank, there was no indication of legal or political controversy associated with the merger.[166] This article argues that the relative absence of controversy can be attributed to the preparations made by the Government for the merger. Firstly, NAMA operated a dramatic downsize of portfolios, and, in effect, the merger involved a limited number of assets and clients. Secondly, as the Government was the sole owner of Anglo Irish Bank after its nationalisation, the Government was in an opportune position to make a decision on a merger.

The merger was legally initiated by the Credit Institutions (Stabilisation) Act 2010. The purpose of this Act was to address the disruption caused to the Irish banking sector and the threat to the stability of certain credit institutions, as well as implementing reorganisation and restructuring measures for those institutions. [167] The legislation applied to four of the six banks covered by recapitalisation.[168] Although the Act was intrusive for banking business and involved important public intervention, there was no trace of major legal or political controversy. As regards criticisms of the Credit Institutions (Stabilisation) Act 2010 in the press,[169] in the banking sector,[170] and in the political field, [171] these arguments were primarily

Dellway Investments & Ors v NAMA & Ors [2011] IESC 4, [2011] IESC 13, and [2011] IESC 14 and *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86, [2013] IEHC 166, and [2015] IESC 51.

[165] NAMA received in total a €74 billion portfolio, as per the breakdown: Allied Irish Banks (€20.4 billion), Anglo Irish Bank (€34.1 billion), Bank of Ireland (€9.9 billion), EBS (€0.9 billion), and INBS (€8.7 billion). National Asset Management Agency 'Loan Acquisition' <https://www.nama.ie/our-work/loan-acquisition> accessed 1 October 2022).

[166] The causal relationship between Anglo Irish Bank's nationalisation and a smooth merger with INBS is not extensively analysed in official reports or in academic literature. However, the lack of controversy concerning the INBS merger can be contrasted with the example of the merger of Fortis Belgium and BNP Paribas in Belgium during the 2008 crisis. Fortis Belgium's shareholders legally challenged the merger decided by the Government. See RTBF Reporters, 'Actionnaires Fortis au tribunal de commerce de Bruxelles' RTBF (Brussels, 29 September 2019).

[167] Credit Institutions (Stabilisation) Act 2010, s. 2.

[168] Allied Irish Banks, Anglo Irish Bank, Bank of Ireland, and INBS.

[169] Carswell (n 23).

[170] Maarteen van Eden, the former CFO of Anglo Irish Bank, claimed that the Government potentially owed and ruled the financial sector: Carswell (n 23).

[171] The Labour Party considered that the Act settled a 'one man legislature'. See Suzanne Lynch, 'Putting the squeeze on the banks' *The Irish Times* (Dublin, 17 January 2010) <https://www.irishtimes.com/business/putting-the-squeeze-on-the-banks-1.687758?msclkid=f471071ad15811ecbfd0177606346b56> accessed 1 October 2022.

based on the text of the Act. The arguments were based on what was legally and theoretically possible, but not in the way in which the Act operated in practice.

Under the Act, four restructuring tools could be used by the Minister for Finance: direction order, special manager order, subordinated liabilities order, and transfer order. A direction order proposes to direct a bank to take, or refrain from taking, an action. A special manager order appoints special managers for the reorganisation of a bank. A subordinated liabilities order is a recapitalisation measure through the issuance of subordinated liabilities. The transfer order is the transfer of assets and liabilities from a bank to another. Each order can be implemented by a similar procedure in requiring the Minister to apply to court for an order issuance. In relation to determining the legal validity of any order, the court is empowered by the legislation to decide 'on the hearing of the judicial review as it thinks fit, including an order remitting the matter back to the Minister with such directions as the Court thinks appropriate or necessary'.[172] There were no reported instances of judicial dismissal, or modification, of a Ministerial application.

On 1 July 2011, upon an *ex parte* application of the Minister for Finance, the High Court ordered the merger of Anglo Irish Bank and INBS under a transfer order pursuant to the Credit Institutions (Stabilisation) Act 2010.[173] The merger was operated by the transfer of INBS' portfolio to Anglo Irish Bank.[174] With this Act, the Government and the Oireachtas made it clear that public intervention in the banking sector was possible for resolution purposes. Five orders were issued under the Credit Institutions (Stabilisation) Act 2010, and only one was challenged by shareholders.[175] The positive impact of the Credit Institutions (Stabilisation) Act 2010 on the merger was enhanced by the limited number of shareholders and clients left in Anglo Irish Bank and INBS.

The first factor for a smooth merger was the decrease of the portfolios of Anglo Irish Bank and INBS. In March 2010, the 'bad' portfolios of Anglo Irish Bank and INBS were transferred to NAMA, which significantly reduced their sizes. The 'good' portfolios were transferred to Allied Irish Banks in the case of Anglo Irish Bank, and to Irish Life and Permanent for INBS.[176] Transfers also extended beyond loans as the Government moved 238 employees to Irish Permanent and 210 employees to Allied Irish Banks. This downsizing was also an important element in the feasibility of the merger.

As the product of the merger, IBRC possessed the status of a State-owned bank.[177] IBRC was 'a resolution company, which does not lend, does not accept deposits and is devoted solely to collecting whatever it can from those borrowers still on its books'.[178] IBRC's core activity was to work out the loan book,[179] and, prior to its liquidation, it began the process of

[172] Credit Institutions (Stabilisation) Act 2010, s. 63(2).
[173] This was specifically based on the procedure for a transfer order in s. 34 of the Credit Institutions (Stabilisation) Act 2010.
[174] The High Court 2011 No. 29 MCA para. A. The transfer also concerned the material goods of INBS (such as IT devices). See also High Court 2011 No. 29 MCA para. B.
[175] For a shares purchase by the Minister for Finance: *Irish Life Permanent Group Holding PLC v Credit Institution Stabilisation Act 2010* [2012] IEHC 89, [2012] IESC 32, and the CJEU decision in *Dowling v Minister for Finance* C-41/15 [2016] ECR I-836.
[176] High Court 2011 No. 29 MCA.
[177] This status was discussed in *Citywide Leisure Ltd v Irish Bank Resolution Corporation Ltd* [2012] IEHC 220, where the plaintiffs claimed that IBRC was comparable to NAMA, and that the plaintiffs should therefore benefit from the same advantages as NAMA's borrowers.
[178] Colm McCarthy, 'Ireland's European Crisis: Staying Solvent in the Eurozone' (2012) WP12/02, University College Dublin 7 <https://www.ucd.ie/economics/t4media/WP12_02.pdf > accessed 7 October 2022.
[179] Christophe Galand and Minke Gort, 'The Resolution of Anglo Irish Bank and Irish Nationwide Building Society' (2011) EC Competition Policy Newsletter No. 3.

managing the portfolio inherited from Anglo Irish Bank and INBS.[180] IBRC was active from 1 July 2011 to 7 February 2013, when its winding-up was decided by the Oireachtas under the IBRC Act 2013.

Liquidation

The joint liquidation of Anglo Irish Bank and INBS, as IBRC, was legally enabled by the IBRC Act 2013. The liquidation is ongoing, and it is expected to end in 2024.[181] The Oireachtas created specific legislation for the IBRC liquidation, as existing liquidation proceedings in Irish statute were considered to be inappropriate for the winding up of a bank.[182]

Under the IBRC Act 2013, the Minister for Finance and the Special Liquidators administered the proceedings, instead of a liquidator and the High Court, as would have been provided for in the Companies Act 1963. The Minister for Finance initiated the liquidation by appointing the Special Liquidators – Messrs Kieran Wallace and Eamonn Richardson of KPMG Ireland – in the Special Liquidation Order.[183] The liquidation process of the loan book started with a valuation.[184] Afterwards, the loan book was divided into six parts, and the Special Liquidators worked on their transfer and sale. The loans were essentially sold to international funds, and this measure was unpopular among some TDs.[185] The Government tried to mitigate this concern by stating that the same regulatory regime would be maintained after the sale.[186] Furthermore, the Special Liquidators had to ensure that the contractual terms in respect of individual loan contracts remained the same after the sale. It should also be noted that the sale of loans was principally used to reimburse IBRC's creditors.[187] It allowed

[180] Along with portfolio management, INBS also inherited the disputes of Anglo Irish Bank. As an example, in *Assénagon Asset Management S.A. v Irish Resolution Corporation Limited (Formerly Anglo Irish Bank Corporation Limited)* [2012] EWHC 2090 (Ch) and [2013] 1 All E.R. 495, an Anglo Irish Bank bondholder challenged the validity of the bond contracts of some transactions. This case is significant in that the Court tested for the first time the legality of exit consent. Exit consent is a technique used by corporate bondholders when the issuer (here, IBRC) offered a replacement for bonds in different terms. The bondholders vote for the amendment of the existing bonds and this vote may damage the rights attached to the existing bonds. That is why it is called 'exit consent'. Logically, the bondholder who refuses to vote may undergo a devaluation of its bond, inasmuch as there is no *locus poenitentiae*. With this procedure, the bondholders are bound to accept the change. Litigation also continued with Anglo Irish Bank's major shareholder, ie, in *Quinn & Ors v Irish Bank Resolution Corporation & Ors* [2015] IEHC 313. The High Court declared the transactions unlawful and unenforceable.

[181] Joe Brennan, 'IBRC liquidation extended to avert 30% assets hit amid Covid' *The Irish Times* (1 July 2021).

[182] The Oireachtas created a special regime *vis-à-vis* the Companies Act 1963 and some EU regulations. Section 10 of the IBRC Act listed numerous sections of the Companies Act 1963 that were disapplied. The aim of the disapplication clauses was primarily to replace the Court with the Special Liquidators, and therefore the Act largely decreased the powers and role of the Court as settled under the Companies Act 1963. Also, the disapplication clauses modified some liquidation procedures to hasten and facilitate the removal of IBRC. In general, insolvency proceedings in company law are not considered as being adapted to banks' constraints regarding time, continuity of functions and risk of contagion. See Peter Brierley, 'The UK Special Regime for failing banks in an international context' (2009) Financial Stability Paper No. 4, Bank of England, London. As an exceptional regime to EU State Aid, the winding-up of a bank was considered either as a first measure or as a last resort measure when recapitalisation turned out to be unsuccessful. See [2008] OJ C270 and [2009] OJ C195.

[183] Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order, SI 2013/36, Reg 3.

[184] '[…] independent advice in developing a robust and credible sales strategy for the sale of the residential mortgage portfolio which would ensure that maximum value was achieved for the benefit of all creditors of IBRC', Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014. The Special Liquidators appointed PricewaterhouseCoopers for this task. See E Richardson, 'Opening Statement Joint Committee Meeting' (2014).

[185] '[…] thousands of IBRC mortgage holders now feel they will be at the mercy of an unregulated, unsympathetic, potentially foreign-owned fund which is out to maximise the profit it can make from the mortgages those people took out in good faith from an Irish financial institution, regulated by the Irish Central Bank. They will find themselves completely exposed, isolated and vulnerable to whatever that particular fund decides to do with their mortgages', per Deputy Michael McGrath in Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014.

[186] Department of Finance, *Consumer Protection on the Sale of Loan Books* (2014). This decision required legislation to later be introduced in the interests of protecting borrowers whose loans were subject to sale from principal lenders: the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 and the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act 2018.

[187] Discussion Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014.

for repayment of the State support, and, as of 2020, the total reimbursement was €1.57 billion.[188] Legal controversies around the liquidation proceedings were limited,[189] insofar as the main creditors were the Irish Government,[190] the Central Bank of Ireland, and the ECB.[191] However, some court cases arose during the sale process.[192] The case *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* dealt with the use of interlocutory injunction in a special context.[193] The plaintiff based a claim on two other resolution-related cases, *Dellway Investments & Ors v NAMA & Ors*[194] and *Treasury Holdings and Ors v The National Asset Management Agency and Ors.*[195]

The plaintiff, a former borrower of Anglo Irish Bank, was asked by the Special Liquidators to make representations regarding the sale process of his loans.[196] His submissions were all rejected,[197] and the plaintiff applied to the High Court for 'an interlocutory injunction order that the [Special Liquidators] not divest, sell or transfer […] any of the loans […]'.[198] He based his litigation on s. 6 of the IBRC Act 2013,[199] which settled the rules for proceedings and claims against IBRC.[200] The plaintiff claimed that the IBRC liquidation fell 'within the realm of public law'[201] and he was therefore entitled to have 'a right to a fair hearing'[202] and 'a corollary right to have sufficient reasons',[203] ie a right to be informed.[204] The plaintiff's counsel based their arguments on two cases involving NAMA:[205] *Dellway Investments & Ors v NAMA & Ors,*[206] for the right to be heard and the right of be informed,[207] and *Treasury Holdings and Ors v The National Asset Management Agency and Ors,*[208] for the 'duty to act in a fair and reasonable manner'.[209]

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188 Department of Finance, 'Seventh Progress Update Report on the Special Liquidation of IBRC' (2020) 15 <https://www.gov.ie/en/publication/014a6-seventh-progress-update-report-on-the-special-liquidation-of-ibrc/> accessed 7 October 2022.

189 By 'controversy', it is meant as to whether a major litigation brought to court. IBRC faced several claims during its liquidation, but many were settled out of court. See Department of Finance, 'IBRC Sixth Progress Update Report' (2019) 8 <https://www.gov.ie/en/publication/365bc5-t/>accessed 7 October 2022.

190 It was the biggest creditor with a €1.2 billion portfolio: see Joe Brennan, 'State eyes €100m of backdated interest from IBRC liquidation' *The Irish Times* (Dublin, 11 May 2019) <https://www.irishtimes.com/business/financial-services/state-eyes-100m-of-backdated-interest-from-ibrc-liquidation-1.3888190?msclkid=58d48e70d15a11ec816e970ff8ccd20a> accessed 7 October 202.

191 Discussion of Joint Committee on Finance, Public Expenditure and Reform Debate 26 February 2014. The first objective was to waive the exposure of the Government, the Central Bank, and the ECB. The main tasks of the Special Liquidators were to remove the promissory notes programme, which was one of the 2008 emergency recapitalisation programmes.

192 The other notable case is *Irish Bank Resolution Corporation (In Special Liquidation) v Morrissey* [2013] IEHC 208, [2013] IEHC 506, [2014] IEHC 527, and [2014] IEHC 469, and its related case *Morrissey & Anor v National Asset Management Agency & Ors* [2014] IEHC 343. The *Morrissey* case concerned litigation on the nature of the relationship between Morrissey and IBRC.

193 [2014] IEHC 192.

194 [2011] IESC 13.

195 [2012] IEHC 297.

196 Namely to 'make representations on the manner in which their loans would be sold' and to 'make any submission […] in relation to the sale process and […] in how their loans would be offered for sale […]': *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 19 [5].

197 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [9].

198 ibid [1].

199 ibid 192 [12].

200 s. 6 of the Irish Bank Resolution Corporation Act 2013 is extensive on the method for conducting proceedings and claims against IBRC, as well as on the effects on liquidation.

201 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [19].

202 ibid.

203 ibid.

204 Mr. Brendan McCabe's counsel claimed that the Special Liquidators should give a more detailed background for their decision: *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [23].

205 See analysis of these two cases in Lefeuvre and McCarthy (n 164).

206 [2011] IESC 13.

207 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [22] and [45].

208 [2012] IEHC 297.

209 *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [27] and [45].

The High Court acknowledged that the concerns based on *Dellway Investments & Ors v NAMA & Ors*[210] and on *Treasury Holdings and Ors v The National Asset Management Agency and Ors*[211] were fair.[212] Nevertheless, the High Court dismissed the plaintiff, based on a timing issue,[213] that the claim was brought too late,[214] and because a fair solution for the loans was available.[215] Moreover, based on s. 3 of the IBRC Act 2013 stating that a rapid liquidation is in the public interest, [216] the High Court acknowledged the importance of the liquidation and of its speed.[217]

In the *Dagenham Yank* case, the High Court favoured public interest over private interest, particularly because only minor damages could have been foreseen for the borrower. In this instance, the reasoning of the High Court differed from the decisions of the Supreme Court in *Dellway Investments & Ors v NAMA & Ors*[218] and of the High Court in *Treasury Holdings and Ors v The National Asset Management Agency and Ors*.[219] In these cases, the Courts recognised the obligation of NAMA to comply with the right to be heard and the duty to act fairly as the actions of NAMA fell under the public law's realm. The *Dagenham Yank* case is still relevant today because it provided an endorsement of the approach taken towards liquidation as a banking resolution tool.

Conclusion

The analysis of Anglo Irish Bank's resolution, both in terms of its legal and financial implications, allows for conclusions to be drawn on the efficacy of banking resolution approaches. The analysis of Anglo Irish Bank's resolution is therefore relevant for understanding the current SRM because of the range of resolution tools provided for within the SRM framework.

As demonstrated in this article, the Anglo Irish Bank crisis necessitated urgent and extraordinary legal actions. The most controversial tool was recapitalisation, for which EU banking resolution has had a changing approach. Within the Bank Recovery and Resolution Directive (BRRD) in 2014, recapitalisation (as a public resolution tool) was ranked as a last resort measure,[220] essentially because of its unpopularity during the 2008 financial crisis. Recapitalisation was rehabilitated in 2017 with the decision of the Commission to recognise the possibility to use precautionary recapitalisation.[221] This is a positive development as it incorporates recapitalisation within the EU resolution toolbox. As recognised in this article, it is necessary to have such a recapitalisation tool for addressing solvency crisis. Even if recapitalisation is an expedient action, it does not prevent political and legal debates around its legitimacy, mainly regarding its cost for the State. In the case of Ireland, notwithstanding

[210] [2011] IESC 13.
[211] [2012] IEHC 297.
[212] *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [58].
[213] ibid [61].
[214] 'In consideration of the balance of convenience, as was emphasised by counsel for the defendants, the plaintiffs have delayed in bringing the within claim': *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[215] A buying out of the loans. See *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[216] Irish Bank Resolution Corporation Act 2013 s. 3(b): 'to provide for the winding up of IBRC in an orderly and efficient manner in the public interest'.
[217] The High Court referred also to s. 8(1) (the Court shall consider the public interest). See *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192 [60].
[218] [2011] IESC 13.
[219] [2012] IEHC 297.
[220] Directive 2014/59/EU, Article 56.
[221] Directorate General for Internal Policies, 'Precautionary recapitalisations under the Bank Recovery and Resolution Directive: conditionality and case practice' (European Parliament 2017).

the court challenges, recapitalisation survived because the courts confirmed its legality. These court cases show that recapitalisation must be legally sound in order to be able to withstand legal challenges.

Nationalisation, merger, and liquidation have also been successful as they did not trigger significant business disruption or legal issues. Two causes can be found to explain these absences. Firstly, these solutions use the existing market conditions – for example, by transfers to other established players.[222] Secondly, these solutions were publicly driven, so the State bore the risk and was in a position to pass stringent restructuring decisions.

The Irish resolution example allows for an identification of the parameters of a good banking resolution. A good resolution regime must have a panel of tools that can address different kinds of financial distress, and that can be used alone, combined, and/or successively. All resolution tools must have a sound legal basis in order to be predictable and easily implemented. In light of this assessment, it can be concluded that the Irish Government managed the resolution of Anglo Irish Bank very well, along with rescuing the entire Irish banking sector. The Irish Government succeeded in using different resolution tools together or consecutively, while also maintaining a coherent resolution strategy and trying to limit the cost as much as possible.

Een vinger in de dijk steken[223] is a Dutch expression that originates from the heroic action of Hans Brinker, a fabled character who saved his village's polder by plugging a hole in the dike.[224] Banking resolution acts in the same way, insofar as it fixes flaws to safeguard the banking sector and the wider economic system which is financed by banks. In that respect, all of the resolution tools pursue the same ultimate objective to ensure the continuity of banking services for companies and individuals during downturns and crises.

[222] Assets of Anglo Irish Bank (tier-1 Irish bank) and INBS (tier-2 Irish banks) were transferred to Allied Irish Banks and Bank of Ireland (tier-1 Irish banks).
[223] Put the finger in the dike.
[224] Gérald de Hemptinne, *Pays-Bas, les pieds sur terre* (Nevicata 2014) [19].