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THE SINGLE RESOLUTION MECHANISM IN ACTION. AN ANALYSIS OF THE DECISION-MAKING PRACTICE OF THE SINGLE RESOLUTION BOARD

Abstract:

The article provides an overview of the supranational bank resolution regime established under the Single Resolution Mechanism framework. Both the substantive rules governing the resolution process and its procedural requirements are explained. The main focus of the article is the decision-making practice of the Single Resolution Board (SRB), an EU agency responsible for the execution of the resolution framework, which has already intervened in a number of cases in which banks were considered “failing or likely to fail” by the European Central Bank. The article analyses the existing decisions on resolution action in order to establish how the substantive rules on resolution are interpreted by the SRB in its decision-making practice.

Keywords: European Union, Banking Union, SRM, SRB, ECB, bank failure, resolution

INTRODUCTION

The year 2019 marks the third anniversary of the Single Resolution Board (SRB) – an agency of the European Union responsible for the execution of the new supranational bank resolution regime established by the European Union. Since it became fully operational on 1 January 2016, the Board has carried out the assessment of the conditions for resolution with respect to five credit institutions deemed failing or likely to fail by the European Central Bank (ECB). However, a resolution action was deemed necessary by the SRB in only one case.

Despite the relatively short history of the Single Resolution Mechanism, there already exists a broad literature on the issues relating to the institutional and legal structure of the resolution framework and its legitimacy and accountability.¹ This article

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¹ See D. Bush, *Governance of the European Banking Union's Single Resolution Mechanism*, 9 European Banking Institute Working Paper Series 447 (2017); A. Kern, *European Banking Union – a legal and institutional analysis of the SSM and the SRM*, 40 European Law Review 154 (2015); P.G. Teixeira, *The Legal*

focuses on the operational aspects of the resolution mechanism, namely on the SRB's decision-making with respect to credit institutions deemed "failing or likely to fail". Its main goal is to provide an overview of the existing decisions of the Board in order to determine what factors constitute key drivers for triggering a resolution action. The first chapter provides a summary of the substantive rules on resolution, in particular the conditions for resolution and resolution objectives, established in the Bank Recovery and Resolution Directive² (BRRD) and the procedural framework of the Single Resolution Mechanism laid out in the SRM Regulation.³ The second part of the article analyses the existing decisions on resolution in order to establish how these substantive rules are interpreted by the SRB in its decision-making practice. Finally, the article outlines the potential risk for the effectiveness of the resolution regime resulting from the lack of harmonization of national frameworks governing the winding-up of credit institutions, which was most evident in the cases of Italian banks.

1. THE SUBSTANTIVE RULES ON RESOLUTION

The idea of a supranational bank resolution framework originated shortly after the financial crisis of 2008.⁴ Before the crisis no common European regulatory framework for dealing with failing credit institutions had been established.⁵ The resolution was conceived as a specialised regime for bank failures, the main objective of which is the preservation of financial stability, the protection of depositors, and the minimisation of resort to bail-outs using public funds.⁶ Thus, a resolution covers all:

measures taken to resolve problems arising from the exposure to insolvency of (mainly, but not exclusively, systemically important) financial firms [...] and avoid an initiation

History of the Banking Union, 18(3) *European Business Organization Law Review* 535 (2017); G.S. Zavvos, S. Kaltsouni, *The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, in: M. Haentjens, B. Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, Edward Elgar Publishing, Cheltenham: 2015.

² Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, [2014] OJ L 173 (BRRD).

³ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, [2014] OJ L 225 (SRM Regulation).

⁴ European Council, *Towards a Genuine Economic and Monetary Union*, 5 December 2012, p. 4, available at: <https://www.consilium.europa.eu/media/23818/134069.pdf> (accessed 30 May 2019).

⁵ G. Lo Schiavo, *The development of a new bank resolution regime in Europe – fit for purpose?*, 29(11) *Journal of International Banking Law & Regulation* 689 (2014), p. 690.

⁶ C.V. Gortsos, *The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF): A Comprehensive Overview of the second main pillar of the European Banking Union* (3rd ed.), 2668653 SSRN Electronic Journal (2017), p. 30.

of liquidation proceedings (thus preventing spillover effects of a bank's failure on the economy) or resort to bail-out measures through public financial assistance facilities.⁷

The BRRD sets out an EU-wide framework for the resolution of financial institutions, which forms the backbone of the SRM Regulation.⁸ The BRRD provides for substantive rules on resolution, which are implemented on the EU level by the institutional framework of the Single Resolution Mechanism (SRM). The resolution can be defined, by reference to the resolution objectives set out in Art. 31(2) of the BRRD, as:

the restructuring of one or more financial institutions with the resolution tools implemented under the BRRD with the aim to ensure the continuity of critical functions, to avoid adverse impact on financial stability, to minimise reliance on public funds, to protect depositors; and to protect client funds and client assets.⁹

While all those objectives are of equal significance,¹⁰ nevertheless recital 71 in the preamble to the BRRD provides that "the protection of covered depositors is one of the most important objectives of resolution." Art. 32 of the BRRD establishes three cumulative conditions for the initiation of a resolution. First, the institution must be deemed by the competent authority to be failing or likely to fail; second, there are no alternative measures that would prevent the failure of the institution within a reasonable time frame; and third, the resolution action is necessary in the public interest.

The first criterion, the failure or the likelihood of failure is defined under Art. 32(4) of the BRRD as a situation whereby one or more of the following circumstances are met: the institution infringes or is likely to infringe the requirements for the continuing authorisation and licensing of its activity; the assets of the institution are or will be, in the near future, less than its liabilities; the institution is or will be, in the near future, unable to pay its debts or other liabilities as they fall due; an extraordinary public financial support is required for the institution. It should be underlined that a resolution is considered to be a special measure of last resort, which is reflected by the second criterion. A resolution can only be initiated when "there is no reasonable prospect that any alternative private sector measures (...), or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments (...) taken in respect of the institution, would prevent the failure of the institution."¹¹ With regard to the public interest criterion, it should be stressed that a failing institution "should in principle be liquidated under normal insolvency proceedings."¹² However, a situation may occur in which normal insolvency proceedings could "jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors."¹³ In such a

⁷ *Ibidem*, p. 29.

⁸ European Commission, *Finalising the Banking Union: European Parliament backs Commission's proposals*, Statement/14/119, 15 April 2014.

⁹ Lo Schiavo, *supra* note 5, p. 693.

¹⁰ BRRD, Art. 31(3).

¹¹ *Ibidem*, Art. 32(1)(b).

¹² *Ibidem*, Recital 45.

¹³ *Ibidem*.

situation there would be a public interest in placing the institution under resolution instead of resorting to a normal insolvency proceeding. In any case, it is clear that “the winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied.”¹⁴

The conditions for resolution established in the BRRD grant the national resolution authorities much discretion in assessing whether an institution should be placed under resolution. It can be argued that this level of discretion may generate regulatory competition between resolution authorities,¹⁵ and indeed the diverging regulatory practices in the Member States were one of the reasons cited as a justification for the SRM Regulation.¹⁶

The resolution criteria formulated in the BRRD are, in substance, identical to the criteria for the initiation of the resolution procedure under the Single Resolution Mechanism, although their procedural aspects differ¹⁷ – in the case of the SRM, the national supervisory authorities are not competent to carry out the assessment of the criteria. When it comes to the first criterion, under Art. 18(1) of the SRM Regulation, in principle only the ECB, after consulting the Single Resolution Board, is competent to determine whether the entity is failing or likely to fail. As an exception to this rule the SRB may, in its executive session, make such an assessment only after informing the ECB of its intention to do so and only if the ECB, within three calendar days of receipt of that information, does not provide its own assessment.¹⁸ With regard to the second criterion – the lack of a reasonable prospect for effective alternative private sector measures or supervisory action taken in respect of the entity – in the context of the SRM an assessment of this condition must be made by the SRB in its executive session, as well as, where applicable, by the national resolution authorities in close cooperation with the ECB.¹⁹ The ECB may also inform the Board or the national resolution authorities concerned that it considers this criterion fulfilled.²⁰ Finally, in regard to the third criterion for resolution, i.e. the public interest criterion, such an assessment can be made by the SRB, but only:

if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.²¹

It should be noted that formally the SRB is not the ultimate arbiter of the public interest criterion, as other institutions participating in the decision-making process under the Single Resolution Mechanism are competent to object to the assessment of public interest made by the Board. Nevertheless, the practicalities of the review procedure do not exactly foster inter-institutional cooperation, in particular due to the very short

¹⁴ *Ibidem*, Recital 46.

¹⁵ Lo Schiavo, *supra* note 5, p. 694.

¹⁶ SRM Regulation, Recital 21.

¹⁷ Gortsos, *supra* note 6, p. 123.

¹⁸ SRM Regulation, Art. 18(1).

¹⁹ *Ibidem*, Art. 18(1).

²⁰ *Ibidem*.

²¹ *Ibidem*, Art. 18(5).

time frame for the assessment to be made by both the Commission and the Council,²² but also due to the highly technical nature of the resolution decision.²³

The resolution objectives set out in Art. 14 of the SRM Regulation are, in essence, indistinguishable from those specified in Art. 31(2) of the BRRD – to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures by maintaining market discipline; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors covered by Directive 2014/49/EU²⁴ and investors covered by Directive 97/9/EC;²⁵ and finally, to protect client funds and client assets. The fact that the resolution objectives set out in the BRRD were reproduced in the SRM Regulation clearly shows that the BRRD indeed constitutes a Single Rulebook of the second pillar of the Banking Union. The procedural changes introduced in the SRM Regulation, such as the involvement of the ECB in the assessment of the criteria for resolution, are merely a reflection of the supranational character of the Single Resolution Mechanism.²⁶

The guidelines adopted by the European Banking Authority²⁷ on the basis of Art. 32(6) of the BRRD and in accordance with Art. 16 of the Regulation 1093/2010²⁸ are also relevant to the assessment of the resolution criteria. Although the guidelines are addressed to the competent national authorities “when they assess whether an institution is failing or likely to fail, according to Article 32(1)(a) of Directive 2014/59/EU, or to Article 32(2) respectively”²⁹ or “to institutions where they determine themselves to be failing or likely to fail, in accordance with Article 81(1) of Directive 2014/59/EU,”³⁰ they also provide an important input for the assessment of the resolution criteria carried out under Art. 18(1) of the SRM Regulation, given that pursuant to Art. 5(2) of the SRM Regulation the Single Resolution Board, the Council, and the Commission are subject to any guidelines and recommendations issued by the European Banking Authority under Art. 16 of its statutory regulation.

Besides the criteria and the objectives for the resolution explained above, the BRRD also constitutes the substantive backbone for the legal instruments available under the

²² For a detailed account of this procedure, see Section 2 of this article.

²³ See M.B. Beroš, *Agencies in European Banking: A Critical Perspective*, Palgrave Macmillan, Cham: 2018, p. 75.

²⁴ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, text with EEA relevance [2014] OJ L 173.

²⁵ Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes [1997] OJ L 84.

²⁶ Lo Schiavo, *supra* note 5, p. 699.

²⁷ European Banking Authority, *Final report: Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU*, EBA/GL/2015/07.

²⁸ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331.

²⁹ European Banking Authority, *supra* note 27, p. 11.

³⁰ *Ibidem*.

Single Resolution Mechanism,³¹ in particular for the resolution tools which may be deployed by the SRB in the process of resolution. The resolution tools are included in the SRM Regulation mainly to confer directly to the Single Resolution Board the power to apply them in accordance with the procedure set out in the Art. 18 of the SRM Regulation, and their substantive content corresponds to the resolution tools introduced in the BRRD.³² The resolution tools include the sale of a business, the creation of bridge institutions, asset separation, and the bail-in tool.³³

The sale of business tool is the mechanism for effecting a transfer by a resolution authority of the instruments of ownership, such as the shares, assets, and the rights or liabilities to a purchaser that is not a bridge institution.³⁴ Such transfer may be made without the prior consent of the shareholders,³⁵ the institution, or any other third parties, but it must be made on “the commercial terms, having regard to the circumstances and the costs and expenses incurred in the resolution process.”³⁶

The bridge institution tool is the “mechanism for transferring instruments of ownership issued by an institution under resolution, or assets, rights or liabilities of an institution under resolution, to a bridge institution,”³⁷ which is a legal person/entity that meets the requirements laid down in Art. 41(2) of the BRRD.³⁸ The bridge institution must be wholly or partially owned by one or more public authorities and is controlled by the resolution authority.³⁹ Furthermore, it can only be created for the purpose of receiving and holding the shares or the other instruments of ownership, with a view to maintaining access to critical functions and, eventually, selling the institution to a private sector buyer.⁴⁰ The bridge institution tool can be used by the resolution authorities only when the sale of business tool could not be deployed.⁴¹

The asset separation tool is a special resolution tool which can be used “only in conjunction with other tools to prevent an undue competitive advantage for the failing entity.”⁴² It enables the resolution authorities to transfer the “assets, rights or liabilities of an institution under resolution to an asset management vehicle,”⁴³ i.e. a special purpose vehicle wholly owned by public authorities, created to manage the transferred assets with a view toward maximising their value through an eventual sale or an orderly wind down.⁴⁴

³¹ Lo Schiavo, *supra* note 5, p. 699.

³² *Ibidem*, p. 700.

³³ SRM Regulation, Art. 22(2).

³⁴ BRRD, Art. 2(58) and identical Art. 3(30) of the SRM Regulation.

³⁵ SRM Regulation, Recital 70.

³⁶ *Ibidem*, Art. 24(2)(b).

³⁷ BRRD, Art. 2(60) and identical Art. 3(31) of the SRM Regulation.

³⁸ SRM Regulation, Art. 25(2).

³⁹ BRRD, Art. 40(2)(a).

⁴⁰ *Ibidem*, Art. 40(2)(b).

⁴¹ Lo Schiavo, *supra* note 5, p. 694.

⁴² SRM Regulation, Recital 72.

⁴³ BRRD, Art. 2(55) and identical Art. 3(32) of the SRM Regulation.

⁴⁴ *Ibidem*, Art. 42(3).

Contrary to the resolution tools described above, the asset separation tool is not designed to continue the activities of the institution under resolution.

The harshest resolution tool for an institution placed under resolution is the bail-in tool, the introduction of which was justified by the need to “minimise the costs of the resolution of a failing institution borne by the taxpayers.”⁴⁵ It aims to resolve the systemically important institutions without jeopardizing the financial stability, by ensuring that “shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the institution,”⁴⁶ which in turn is supposed to incentivize them to better monitor the health of the institution. The bail-in tool is defined as “the mechanism for effecting the exercise of the write-down and conversion powers in relation to liabilities of an institution under resolution.”⁴⁷ Art. 27(1) of the SRM Regulation provides that the bail-in may be applied in two cases – either to recapitalise a credit institution established in a participating Member State that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorization (sufficient capital requirements) and to continue to carry out its normal activities in order to sustain sufficient market confidence in the entity; or to convert to equity or reduce the principal amount of claims or debt instruments that are transferred to a bridge institution with a view toward providing capital for that bridge institution or under the sale of business tool or the asset separation tool. In the first case, the bail-in may be applied only if there is a reasonable prospect that the application of that tool, together with other relevant measures, will restore the entity in question to financial soundness and long-term viability.⁴⁸ Through the conversion of debt to equity the exercise of the bail-in tool allows for the recapitalization of the credit institution, simultaneously binding the institution, the affected creditors, and the shareholders.⁴⁹ This makes the bail-in tool the strongest regulatory instrument, which can help to avoid granting public support to systemically important credit institutions by restructuring their balance sheets, effectively solving the “too-big-to-fail” problem.⁵⁰

2. PROCEDURAL RULES ON RESOLUTION

Having reviewed the substantive rules of the resolution process, the procedural aspects of the EU-wide resolution framework established under the SRM Regulation are now examined. The SRM Regulation follows the distinction between “significant” and “less significant” entities, which was introduced in the SSM Regulation.⁵¹ Similarly to

⁴⁵ *Ibidem*, Recital 67 and identical Recital 73 in the preamble to SRM Regulation.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*, Art. 2(57) and identical Art. 3(33) of the SRM Regulation.

⁴⁸ SRM Regulation, Art. 27(2).

⁴⁹ Lo Schiavo, *supra* note 5, p. 696.

⁵⁰ *Ibidem*.

⁵¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287 (SSM Regulation).

the division of tasks adopted for the purposes of the Single Resolution Mechanism, only the significant credit institutions are under the remit of the supranational resolution authority – the Single Resolution Board – which is responsible for drawing up the resolution plans and adopting all decisions relating to resolution of those institutions.⁵² The SRB's competence is also reserved for those institutions in relation to which the ECB has decided to itself directly exercise its supervisory powers⁵³ as well as for other cross-border groups.⁵⁴ Resolution tasks towards the remaining “less significant” institutions are performed by the national resolution authorities.⁵⁵ The only exception to this rule is the situation in which the resolution action requires the use of the Single Resolution Fund – then the SRB is exclusively competent to adopt the resolution scheme, regardless of the significance of the entity under resolution.⁵⁶

The resolution procedure is set out in Art. 18 of the SRM Regulation. The first phase of the resolution is triggered once the European Central Bank, acting within its supervisory mandate, signals that a significant credit institution is failing or likely to fail, thus fulfilling the first of the conditions for resolution described above. As was explained, this assessment can also be carried out by the SRB in its executive session, but only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make its own assessment.⁵⁷ In the second phase, the assessment of the remaining two criteria for resolution is performed by the SRB, which in its executive session must establish whether there are no alternative measures that would prevent the failure of the institution within a reasonable time frame and whether the resolution action is necessary in the public interest. It should be noted here that the Board operates in plenary and executive sessions.⁵⁸ The latter are responsible for preparing all decisions concerning the resolution procedure and adopting those decisions.⁵⁹

If the resolution conditions are met, the SRB adopts a resolution scheme.⁶⁰ The resolution scheme determines the details of the resolution tools to be applied to the institution under resolution, in particular any exclusions from the application of the bail-in tool,⁶¹ and defines the specific amounts and purposes of the Single Resolution Fund to be used in support of the resolution action.⁶² The Board enjoys a broad discretion when deciding on the resolution tools to be applied in the process of resolution. In the next step, immediately after the adoption of the resolution scheme, the

⁵² SRM Regulation, Art. 7(2)(a).

⁵³ *Ibidem*, Art. 7(2)(a).

⁵⁴ *Ibidem*, Art. 7(2)(b).

⁵⁵ *Ibidem*, Art. 7(3).

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*, Art. 18(1).

⁵⁸ *Ibidem*, Art. 43(5).

⁵⁹ *Ibidem*, Recital 33.

⁶⁰ *Ibidem*, Art. 18(6).

⁶¹ *Ibidem*, Art. 18(6)(b).

⁶² *Ibidem*, Art. 18(6)(c).

Board must transmit it to the Commission,⁶³ which must review it in a limited time frame.

Within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the scheme.⁶⁴ It follows that under the SRM Regulation, the ultimate assessment of SRB's discretion is the responsibility of the Commission. In addition, the Commission may decide, within 12 hours from the transmission of the resolution scheme by the SRB, to involve the Council in the resolution process. The scope of the involvement of the Council is limited – it may object to the resolution scheme on the grounds that the resolution scheme adopted by the Board does not fulfil the criterion of public interest, but only on a proposal from the Commission;⁶⁵ or it can be asked by the Commission to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.⁶⁶ The entire assessment, regardless of the involvement of the Council or the lack thereof, may take no more than 24 hours from the transmission of the resolution scheme by the Board. The resolution scheme proposed by the SRB enters into force if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board.

If, within 24 hours from the transmission of the resolution scheme by the Board, the Council has approved a proposal of the Commission for modification of the resolution scheme or the Commission has exercised its powers of objection, the Single Resolution Board must, within eight hours, modify the resolution scheme in accordance with the reasons provided for in the objection.⁶⁷ It thus follows that the entire procedure may take no more than 32 hours from the moment of transmission of the resolution scheme. If the Council objects to the placing of an institution under resolution on the grounds that the public interest criterion is not fulfilled, the relevant entity is wound up in an orderly manner in accordance with the applicable national law.⁶⁸ Once the resolution scheme enters into force, the SRB is responsible for ensuring that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities.⁶⁹ The resolution scheme is addressed to the relevant national resolution authorities and provides them with instructions on further resolution actions.⁷⁰ The national resolution authorities are obliged to take all necessary measures to implement the resolution scheme, acting in accordance with the national law transposing the BRRD.⁷¹ The Board is also competent to issue instructions to the national resolution authorities

⁶³ *Ibidem*, Art. 18(7).

⁶⁴ *Ibidem*.

⁶⁵ *Ibidem*.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*.

⁶⁸ *Ibidem*, Art. 18(8).

⁶⁹ *Ibidem*, Art. 18(9).

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*, Art. 29(1).

as to any aspect of the execution of the resolution scheme.⁷² Moreover, should the national resolution authority fail to implement the resolution scheme, the SRB may give instructions in the form of decision directly to the institution under the resolution, which override any previous decision(s) adopted by the national resolution authority on the same matter.⁷³

3. AN ANALYSIS OF THE EXISTING DECISIONS ON RESOLUTION ACTION TAKEN BY THE SINGLE RESOLUTION BOARD

The resolution framework discussed above was tested for first time in 2017, when the situation in three banks was assessed by the Single Resolution Board pursuant to Art. 18 of the SRM Regulation. Another case was considered by the SRB in early 2018. The decisions taken by the Board in respect to these credit institutions varied and are considered below.

3.1. Banco Popular Español, S.A.

On 7 June 2017, the Single Resolution Board decided to adopt a resolution scheme in respect of Banco Popular Español, S.A.,⁷⁴ a Spanish banking group consisting of four credit institutions within the participating Member States: (1) Banco Popular Español, S.A. – the parent undertaking of the group, established in Spain; (2) Banco Pastor, S.A. – established in Spain; (3) Popular Banca Privada, S.A. – established in Spain; and (4) Banco Popular Portugal, S.A. – established in Portugal. The last three credit institutions mentioned were wholly-owned subsidiaries of Banco Popular Español. The Banco Popular group also had a presence in third countries through subsidiaries, branches, and representative offices and participated in a number of joint ventures.

The reason for the Banco Popular's difficulties was "the liquidity situation of the institution, which has deteriorated significantly since October 2016, due to the material cash outflow across all customer segments."⁷⁵ As a result, the ECB, in its "failing or likely to fail" assessment transmitted to the SRB on 6 June 2017,⁷⁶ decided that the institution "has insufficient options to restore its liquidity position in order to ensure that it will be in a stable position to meet its liabilities as they fall due."⁷⁷ Considering

⁷² *Ibidem*, Art. 28(2).

⁷³ *Ibidem*, Art. 29(3).

⁷⁴ Single Resolution Board, Decision to take resolution action in respect of Banco Popular Español, S.A. (2017/C 222/05) [2017] OJ C 222.

⁷⁵ Decision of the Single Resolution Board in its executive session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (the "Institution") with a Legal Entity Identifier: 80H66LPTVDLMO P28XF25, Addressed to FROB (SRB/EES/2017/08), Non-confidential version, p. 5.

⁷⁶ *Ibidem*, p. 10.

⁷⁷ *Ibidem*, p. 5.

the ECB's assessment of the "failing or likely to fail" criterion, the SRB determined that "there are objective elements indicating that the Institution is likely in the near future to be unable to pay its debts or other liabilities as they fall due",⁷⁸ and hence that the first condition for resolution was satisfied in respect of Banco Popular.

Regarding the second criterion for resolution, the SRB, in close cooperation with the ECB, concluded that there was no reasonable prospect that any alternative private sector measures could prevent the failure of the institution, as the private sales process had not led to a positive outcome within a timeframe that would allow the institution to be able to pay its liabilities as they fall due.⁷⁹ Moreover, it was determined that given the fact that the institution itself recognized that it met the conditions to be deemed "failing or likely to fail", it was unlikely that it would be able to "mobilise sufficient additional liquidity through regular market transactions or central bank operations"⁸⁰ or through other contingency funding measures within the necessary timeframe. Furthermore, it was established by the ECB in its "failing or likely to fail" assessment that there were no available supervisory or early intervention measures that could restore the liquidity position of the Banco Popular in an immediate fashion, given the extent and pace of the liquidity deterioration observed.⁸¹ Considering the arguments referred to above, the SRB concluded that the second condition for resolution was satisfied in this case.

With regard to the public interest criterion, the Board carried out its assessment of the circumstances of this case in light of resolution objectives specified in Art. 14(2) of the SRM Regulation. The SRB established that the resolution action carried out through use of the resolution powers was necessary for the achievement of, and was proportionate to, the following two resolution objectives: ensuring the continuity of critical functions and avoiding significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline.⁸² It was determined by the Board that Banco Popular performs activities, services or operations the discontinuance of which would, due to its size, likely lead to the disruption of services that are essential to the real economy of Spain and disrupt the financial stability in Spain.⁸³ The Banco Popular Group was at that time the sixth largest banking group in Spain, with a network of 1664 branches and 2368 ATMs providing services to around 1.6 million clients.⁸⁴ Its market share in the national market for deposit-taking in Spain was estimated to be between 5 and 10 per cent.⁸⁵ Given the national reach and size of the institution, any disruption to its

⁷⁸ *Ibidem*, p. 10.

⁷⁹ *Ibidem*, p. 11.

⁸⁰ *Ibidem*.

⁸¹ *Ibidem*.

⁸² *Ibidem*, p. 12.

⁸³ *Ibidem*.

⁸⁴ *Ibidem*, p. 13.

⁸⁵ *Ibidem*, p. 14.

deposit services could have a material negative impact on its clients and have indirect adverse effects on other stakeholders, in particular through an increase in the costs of funding of comparable banks due to the uncertainty regarding the validity of the Spanish banking sector.⁸⁶

In addition to the adverse effects of a disruption of the deposit-taking function, the SRB also underlined the potential negative impact of any disruption in lending to small and medium-sized enterprises on the Spanish real economy.⁸⁷ Banco Popular was a leading bank in lending to this group, with a market share in the range of between 15 and 20 per cent of the total.⁸⁸ The SRB also took into consideration the fact that Banco Popular, due to its large number of clients, was intervening in a significant volume of payments. Considering the central role that the payment services function plays in the economy, the Board established, that the interruption of this function could generate financial stability problems.⁸⁹ Neither of the market functions of Banco Popular were considered by the SRB to be substitutable,⁹⁰ as it found that they “cannot be replaced in an acceptable manner and within a reasonable time frame thereby avoiding systemic problems for the real economy and financial markets.”⁹¹

As regards the objective of avoiding significant adverse effects on financial stability, the Board argued that the size and relevance of Banco Popular, which constituted the parent undertaking of the sixth largest banking group in Spain with total assets amounting to 147 billion euros, made it one of the main market participants in Spain.⁹² Thus swift resolution action was necessary and proportionate to avoid the adverse effects that the failure of the institution would have on financial stability.⁹³ Moreover, it was determined by the SRB that winding up Banco Popular under normal insolvency proceedings would not achieve the above-mentioned resolution objectives to the same extent as the resolution action.⁹⁴

After the assessment of the resolution criteria, the SRB decided that the application of the sale of business tool pursuant to Art. 24 of the SRM Regulation would provide an appropriate, necessary, and proportionate way to meet the resolution objectives.⁹⁵ While deciding on the application of the sale of business tool, the SRB took into account the interests of Portugal, where one of the subsidiaries of the institution under resolution operated. The Board noted that the sale of business tool with the purpose of transferring shares to a private purchaser “has as a result that there will be no impact on the Portuguese subsidiary. On the contrary, in the case of insolvency proceedings of

⁸⁶ *Ibidem.*

⁸⁷ *Ibidem.*

⁸⁸ *Ibidem.*

⁸⁹ *Ibidem*, p. 16.

⁹⁰ *Ibidem*, pp. 14-16.

⁹¹ *Ibidem*, p. 16.

⁹² *Ibidem*, p. 17.

⁹³ *Ibidem*, p. 18.

⁹⁴ *Ibidem*, p. 12.

⁹⁵ *Ibidem*, p. 19.

the Institution, it is likely that the Portuguese subsidiary would have been negatively impacted.”⁹⁶ The Board also determined that the application of other resolution tools would not meet the resolution objectives to the same extent in the case at stake. In particular, the SRB considered that the application of the bail-in tool of Article 27(1) of the SRM Regulation (even if combined with the asset separation tool) could not immediately and effectively address the liquidity situation of the institution and that the application of the bridge institution tool would not be proportionate, as the asset separation tool could achieve the same result within a shorter time frame.⁹⁷

In the execution of the resolution scheme, the SRB instructed the Fondo de Resolución Ordenada Bancaria (FROB), which is the Spanish executive resolution authority, to write-down and convert existing capital instruments of Banco Popular pursuant to Art. 21 of the SRM Regulation prior to the transfer of ownership in order to address the shortfall in the market value of the institution. Pursuant to Art. 24(1)(a) of the SRM Regulation, the SRB ordered the newly created shares, including the entire business of Banco Popular and its subsidiaries, to be transferred to Banco Santander S.A. for a purchase price of 1 euro⁹⁸ in order to ensure the continuity of the critical functions of the banking group. The resolution scheme for Banco Popular Español S.A. proposed by the Board was transmitted to the Commission on 7 June 2017 in accordance with Art. 18(7) of the SRM Regulation and endorsed by the Commission on the same day.⁹⁹ The resolution scheme was duly implemented by FROB by virtue of a Resolution of the FROB Governing Committee.¹⁰⁰

3.2. Veneto Banca S.p.A.

On 23 June 2017, the Single Resolution Board assessed the conditions for resolution in respect of Veneto Banca S.p.A.,¹⁰¹ a parent undertaking of the Italian banking group Gruppo Veneto Banca, consisting of four main subsidiaries established in Italy: (1) Banca Apulia S.p.A. – a regional commercial bank, operating in the South-East of Italy; (2) Banca Intermobiliare di Investimento e Gestioni S.p.A. – an institution specialised in private banking, wealth management, and corporate finance; (3) Claris Factor S.p.A.; and (4) Claris Leasing S.p.A. The Group comprised a Croatian subsidiary – Veneto Banka d.d.; an Albanian subsidiary – Veneto Banca sh.a.; and a Moldavian subsidiary – Eximbank d.d. It also operated through branches in Romania.

⁹⁶ *Ibidem*, pp. 18-19.

⁹⁷ *Ibidem*, p. 19.

⁹⁸ *Ibidem*, p. 22.

⁹⁹ Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (notified under document C(2017)4038) [2017] OJ L 178.

¹⁰⁰ Resolution of the FROB Governing Committee adopting the measures required to implement the Decision of the Single Resolution Board in its Extended Executive Session of 7 June 2017 concerning the adoption of the resolution scheme in respect of Banco Popular Español, available at: <https://bit.ly/2IbmIBB> (accessed 30 May 2019).

¹⁰¹ Single Resolution Board, Decision concerning the assessment of the conditions for resolution in respect of Veneto Banca SpA (2017/C 242/02) [2017] OJ C 242.

Similar to the case of the Banco Popular, the difficulties of the Italian bank were caused by a substantial deterioration of its liquidity position.¹⁰² On 23 June 2017, the ECB communicated to the SRB its “failing or likely to fail” assessment of Veneto Banca, wherein it noted that the institution “has experienced material capital depletions”¹⁰³ and repeatedly breached supervisory capital requirements. Consequently, the ECB concluded that “there is material evidence to conclude that the Institution infringes the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority.”¹⁰⁴ Following the ECB’s “failing or likely to fail” assessment, the Board determined that the first condition for resolution was satisfied in respect of Veneto Banca.¹⁰⁵

With regard to the second criterion for resolution – the lack of alternative measures that would prevent the failure of the institution within a reasonable time frame – the SRB established that there was no reasonable prospect that any alternative private sector measures could prevent the failure of the institution.¹⁰⁶ Moreover, the Board decided that there was “no reasonable prospect that any supervisory action, including early intervention measures could prevent the failure of the Institution,”¹⁰⁷ which was confirmed by the ECB in its “failing or likely to fail” assessment. Accordingly, the SRB concluded that the second condition for resolution was satisfied in the case of Veneto Banca.

Regarding the third condition for resolution, i.e. the public interest criterion, the Board determined that the circumstances of this case did not meet the resolution objectives set out in Art. 14(2) of the SRM Regulation. Firstly, the Board found that the institution did not provide critical functions within the meaning of Art. 2(1)(35) of the BRRD,¹⁰⁸ as “the functions identified by the Institution as critical, i.e. deposit-taking, lending activities and payment services, are provided to a limited number of third parties and can be replaced in an acceptable manner and within a reasonable timeframe by such parties.”¹⁰⁹ The SRB explained that a sudden disruption of the deposit-taking function would not have a material negative impact on third parties, as the institution’s deteriorating market position resulted partly from reputational damages

¹⁰² Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A. (the “Institution”), with the Legal Entity Identifier 549300W9STRUCJ2DLU64, Addressed to Banca d’Italia in its capacity as National Resolution Authority (SRB/EES/2017/11), Non-confidential version, p. 5.

¹⁰³ *Ibidem*.

¹⁰⁴ *Ibidem*, p. 10.

¹⁰⁵ *Ibidem*.

¹⁰⁶ *Ibidem*.

¹⁰⁷ *Ibidem*, p. 11.

¹⁰⁸ According to Art. 2(1)(35) of the BRRD “critical functions” means activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations.

¹⁰⁹ Decision of the Single Resolution Board, *supra* note 102, p. 12.

following allegations of mis-selling.¹¹⁰ This led to a significant decline of Veneto Banca's systemic relevance, as measured by the group's market share in the national market for deposit-taking, which declined from 1.24 per cent at the end of 2014 to 0.91 per cent at the end of 2016.¹¹¹ Moreover, the market had proven itself capable of absorbing the significant deposit outflows from the institution.¹¹² As regards the lending function of the bank, the Board found that its sudden disruption would not have a material negative impact on the market, due to the declining relevance of the institution, which at the end of 2016 provided lending services to 98,738 households (out of 25.4 million households in Italy), to 42,387 small and medium-sized enterprises (out of 4.4 million small and medium-sized enterprises in Italy), and to 1,276 other enterprises.¹¹³ In any case, the institution had only a limited capacity for granting new loans, so potential clients already needed to find different loan providers.¹¹⁴ As far as the payments function was concerned, the SRB argued that "market share developments for the deposit-taking function can be regarded as a proxy for the declining relevance of the Institution with regard to payment and cash services."¹¹⁵ The Board decided that due to the specific circumstances of the case, as presented above, and given the fact that the institution does not provide indirect access to market infrastructures to institutions that are not part of Gruppo Veneto Banca, the payment and cash services provided by Veneto Banca should not be considered to constitute a critical function.¹¹⁶ The SRB also established that all of the functions identified above should be considered to be substitutable,¹¹⁷ as they "can be replaced in an acceptable manner and within a reasonable time frame, thereby limiting the potential impact on the real economy and financial markets."¹¹⁸ Consequently, the resolution objective set out in Art. 14(2)(a) of the SRM Regulation was not satisfied.

Secondly, the Board found that the failure of the institution, on a stand-alone basis, was not likely to result in significant adverse effects on financial stability in Italy.¹¹⁹ The SRB argued that the institution had been classified by the ECB as a "significant institution" solely on the basis of its size. However, the size of the total assets of Gruppo Veneto Banca declined rapidly and as of December 2016 they measured at 27.9 billion euros,¹²⁰ which was already below the 30 billion euros threshold set out in Art. 5(4)

¹¹⁰ For details of mis-selling allegations see: R. Sanderson, *Once-thriving Veneto becomes heart of Italy's bank crisis*, Financial Times, available at: <https://www.ft.com/content/04869eca-b15e-11e6-9c37-5787335499a0> (accessed 30 May 2019).

¹¹¹ Decision of the Single Resolution Board, *supra* note 102, p. 12.

¹¹² *Ibidem*.

¹¹³ *Ibidem*, p. 13.

¹¹⁴ *Ibidem*.

¹¹⁵ *Ibidem*, p. 14.

¹¹⁶ *Ibidem*.

¹¹⁷ *Ibidem*, pp. 13-14.

¹¹⁸ *Ibidem*, pp. 14-15.

¹¹⁹ *Ibidem*, p. 15.

¹²⁰ *Ibidem*.

of the SSM Regulation for a credit institution to be qualified as “significant”. This decline continued in 2017. Furthermore, Veneto Banca had not been classified as systemically important by Banca d’Italia, which is the national resolution authority of Italy, in either 2015 or 2016.¹²¹ Considering the relatively low financial and operational interconnections with other financial institutions, the Board deemed the probability of both direct and indirect contagion on other financial institutions as highly unlikely.¹²² The SRB also determined that although a potential adverse impact on retail customers and small and medium-sized enterprises in certain regions could not be excluded in the case of failure of Veneto Banca, there would be no significant impact at the national level.¹²³ Consequently, the resolution objective set out in Art. 14(2)(b) of the SRM Regulation was not satisfied.

Thirdly, the SRB found that any pay-out by the deposit guarantee scheme to the covered depositors under the ordinary insolvency proceedings provided for under Italian law (Compulsory Administrative Liquidation) would not qualify as extraordinary public financial support¹²⁴ in light of the Commission’s Banking Communication.¹²⁵ Therefore, the resolution objective of protecting public funds by minimising reliance on extraordinary public financial support set out in Art. 14(2)(c) of the SRM Regulation was not satisfied.

Fourthly, the Board found that the Compulsory Administrative Liquidation proceedings could achieve the resolution objective set out in Art. 14(2)(d) of the SRM Regulation to the same extent as resolution¹²⁶ with regard to protecting both depositors covered by the BRRD and investors covered by Directive 97/9/EC. Consequently, the resolution objective set out in Art. 14(2)(c) of the SRM Regulation was not satisfied.

Finally, the Board found that the Italian financial law (Legislative Decree 58/1998) provides specific rules which sufficiently protect client funds and client assets by separating them from the credit institution’s own assets, as well as from the assets of other clients.¹²⁷ Moreover, the Italian Banking Act (Legislative Decree 385/1993) protects financial instruments belonging to clients in the context of the Compulsory Administrative Liquidation proceedings.¹²⁸ Thus, the SRB concluded that given the above, the ordinary insolvency proceedings provided for under Italian law could protect client funds and client assets to the same extent as a resolution action, and therefore the resolution objective set out in Art. 14(2)(e) of the SRM Regulation was not satisfied.

¹²¹ *Ibidem*.

¹²² *Ibidem*, pp. 15-16.

¹²³ *Ibidem*, p. 16.

¹²⁴ *Ibidem*, p. 18.

¹²⁵ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013/C 216/01) [2013] OJ C 216.

¹²⁶ Decision of the Single Resolution Board, *supra* note 102, pp. 18-19.

¹²⁷ *Ibidem*, p. 20.

¹²⁸ *Ibidem*, p. 21.

Since none of the resolution objectives specified in Art. 14(2) of the SRM Regulation were fulfilled, the Board concluded that although the first two conditions for resolution were satisfied, resolution action in respect of the institution was not necessary in the public interest within the meaning of Art. 18(1)(c) and (5) of the SRM Regulation.¹²⁹ Therefore, the SRB decided not to place Veneto Banca under resolution.¹³⁰ The decision entered into force on 23 June 2017 at 18:15 CET. As a consequence, the winding up of the bank was carried out under ordinary liquidation proceedings launched by the Italian authorities.

3.3. Banca Popolare di Vicenza S.p.A.

The decision concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A.¹³¹ was also issued on 23 June 2017 and entered into force just 30 minutes after the decision concerning Veneto Banca S.p.A.¹³² As the matter of fact, the ECB's "failing or likely to fail" assessment was transmitted simultaneously for both Veneto Banca and Banca Popolare di Vicenza.¹³³ Due to the similar situation of both banks, the decision taken in respect of Banca Popolare di Vicenza should be considered in the context of the decision taken in respect of Veneto Banca.

Banca Popolare di Vicenza S.p.A. was a parent undertaking of the Italian banking group Gruppo Banca Popolare di Vicenza, consisting of the following main subsidiaries established in Italy: (1) Banca Nuova S.p.A.; (2) Farbanca S.p.A.; (3) Prestinuova S.p.A.; (4) NEM SGR S.p.A.; (5) BPVi Multicredito, (6) Servizi Bancari S.c.p.A. and (7) Immobiliare Stampa S.c.p.A. The group had a subsidiary in Ireland – BPV Finance International Plc, and a limited presence in third countries only through representative offices (i.e. China, India, Brazil and Russia).

The assessment of the conditions for resolution in respect of Banca Popolare di Vicenza was substantially the same as in the case of Veneto Banca. There was literally no difference in the Board's considerations regarding the first and the second conditions for resolution.¹³⁴ Even in the assessment of the public interest criterion there was very little difference, due to the fact that the market functions provided by both institutions were identical and their market shares were comparable. Nevertheless, some slight discrepancies between both cases existed and are highlighted below.

¹²⁹ *Ibidem*, p. 11.

¹³⁰ *Ibidem*, p. 10.

¹³¹ Single Resolution Board, Decision concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza SpA (2017/C 242/03) [2017] OJ C 242.

¹³² Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A. (the "Institution"), with the Legal Entity Identifier V3AFM0G2D3A6E0QWDG59, Addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/12), Non-confidential version, p. 21.

¹³³ European Central Bank, Press release "ECB deemed Veneto Banca and Banca Popolare di Vicenza failing or likely to fail", 23 June 2017, available at: <https://bit.ly/2s5ZLpi> (accessed 30 May 2019).

¹³⁴ Decision of the Single Resolution Board, *supra* note 102, pp. 10-11.

Firstly, it should be noted that there was a minor difference in the market share of both institutions. Due to the allegations of mis-selling which plagued both banks, by the end of 2016 the market share in the national market for deposit-taking of Gruppo Banca Popolare di Vicenza had fallen to 0.9 per cent¹³⁵ compared to 0.91 per cent in the case of Gruppo Veneto Banca. A similar decline was also visible in the market share of Gruppo Banca Popolare di Vicenza in the national market for lending, which measured 1.4 per cent at the end of 2016¹³⁶ compared to 1.15 per cent in the case of Gruppo Veneto Banca. Regardless of these differences, the analysis of the Board was identical in both cases and hence the SRB established that Banca Popolare di Vicenza did not perform activities, services or operations, the discontinuance of which would be likely to lead to the disruption of services that are essential to the real economy of Italy or the disruption of financial stability in Italy,¹³⁷ since all the functions performed by the institution are substitutable.¹³⁸ Consequently, the resolution objective set out in Art. 14(2)(a) of the SRM Regulation was not satisfied.

Secondly, the argumentation of the SRB differed in respect of the objective of avoiding significant adverse effects on financial stability. In the case of Banca Popolare di Vicenza, the size of the total assets of its banking group measured at 34.4 billion euros, so it clearly exceeded the size threshold to be considered as a “significant institution”. Nevertheless, the Board argued that the total assets of the group “were only slightly above the size threshold (EUR 30 billion)”¹³⁹ and that “the business volume of the Institution is rapidly decreasing.”¹⁴⁰ Based on these arguments, and on the fact that Banca Popolare di Vicenza had not been classified as systemically important by Banca d’Italia in either 2015 or 2016,¹⁴¹ the SRB concluded that the failure of the institution, on a stand-alone basis, was not likely to result in significant adverse effects on financial stability in Italy.¹⁴²

It should be pointed out that the Board also considered any potential adverse effects resulting from the simultaneous failure of Banca Popolare di Vicenza and of Veneto Banca. The Board established that “[i]f the Banks were assumed to be perceived by the market as a single entity, the latter would result in Italy’s eighth largest bank in terms of total assets”¹⁴³ and would score well below the systemic relevance threshold, in particular due to the interconnectedness and complexity of such an entity.¹⁴⁴ The SRB considered that a simultaneous failure of both banks might have an impact on financial stability, but it argued that such impact would likely not be significant.¹⁴⁵ The

¹³⁵ *Ibidem*, p. 12.

¹³⁶ *Ibidem*, p. 13.

¹³⁷ *Ibidem*, p. 12.

¹³⁸ *Ibidem*.

¹³⁹ *Ibidem*, p. 15.

¹⁴⁰ *Ibidem*.

¹⁴¹ *Ibidem*.

¹⁴² *Ibidem*.

¹⁴³ *Ibidem*, p. 17.

¹⁴⁴ *Ibidem*.

¹⁴⁵ *Ibidem*.

Board argued that due to the low interconnectedness of both banks with other financial institutions, the risk of contagion within the financial system was low.¹⁴⁶ Moreover, it contended that both banks had a highly diversified funding structure and they were of minor importance to the national funding market.¹⁴⁷ Furthermore, the Board stated that the impact of a simultaneous failure of both banks on the real economy would be limited, as a result of their insignificant market share for both lending and deposit-taking, and diminishing credit supply caused by the capital constraints resulting from insufficient operating profitability and low asset quality.¹⁴⁸ The SRB also noted that even in the core region of Veneto, which was the primary venue of both banks' operations, their market had deteriorated without having a measurable impact as evidenced by key economic indicators.¹⁴⁹ Finally, the Board examined the impact of the alleged wide-spread mis-selling of bank bonds to retail customers on the market perception of both banks, finding that it had already contributed to a severe loss of confidence which had already resulted in significant reductions of holdings in bank bonds and massive deposit withdrawals in both banks.¹⁵⁰ Consequently, the Board decided that even in the case of the simultaneous failure of Banca Popolare di Vicenza and of Veneto Banca there would be no significant adverse effects on financial stability, and therefore the resolution objective set out in Art. 14(2)(b) of the SRM Regulation was not satisfied.

The SRB's considerations in respect of the resolution objectives set out in Art. 14(2)(c), 14(2)(d) and 14(2)(e) of the SRM Regulation constituted an exact copy of those included in the decision concerning the assessment of the conditions for resolution in respect of Veneto Banca,¹⁵¹ so they will not be repeated here. The SRB concluded that none of the resolution objectives specified in Art. 14(2) of the SRM Regulation were fulfilled and thus resolution action was not warranted in the public interest.¹⁵² Thus the SRB decided not to place Banca Popolare di Vicenza under resolution.¹⁵³

3.4. ABLV Bank, AS and ABLV Bank Luxembourg S.A.

On 23 February 2018, the Single Resolution Board assessed the conditions for resolution in respect of ABLV Bank, AS – a credit institution established in Latvia – and its subsidiary ABLV Bank Luxembourg S.A., established in Luxembourg. The resolution proceedings were initiated by the ECB, which determined that “ABLV Bank was failing or likely to fail in accordance with the Single Resolution Mechanism Regulation.”¹⁵⁴

¹⁴⁶ *Ibidem*.

¹⁴⁷ *Ibidem*.

¹⁴⁸ *Ibidem*.

¹⁴⁹ *Ibidem*.

¹⁵⁰ *Ibidem*, p. 18.

¹⁵¹ *Ibidem*, pp. 18-21.

¹⁵² *Ibidem*, p. 11.

¹⁵³ *Ibidem*, p. 10.

¹⁵⁴ European Central Bank, *Press release “ECB determined ABLV Bank was failing or likely to fail”*, 23 February 2018, available at: <https://bit.ly/2YRZrLv> (accessed 30 May 2019).

The same determination was also made in respect of ABLV Bank Luxembourg.¹⁵⁵ The reason cited by the ECB in both cases was a significant deterioration of liquidity, due to which the banks were likely to be unable to pay their debts or other liabilities as they fall due.¹⁵⁶ Moreover, the ECB established that the ABLV Bank “did not have sufficient funds which are immediately available to withstand stressed outflows of deposits before the payout procedure of the Latvian deposit guarantee fund starts.”¹⁵⁷ The abrupt wave of withdrawal of deposits was caused by the announcement by the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) of a draft measure to name ABLV Bank an institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act.¹⁵⁸ As a result, the bank lost access to US dollar funding. In order to stabilise the outflows from ABLV Bank, on 19 February 2018 the ECB instructed the Latvian supervisory authority, the Financial and Capital Markets Commission (FCMC), to impose a moratorium on the bank,¹⁵⁹ which introduced a prohibition of all payments by ABLV Bank on its financial liabilities.¹⁶⁰ The measure was not sufficient to restore the liquidity position of the bank, which prompted the ECB’s “failing or likely to fail” assessment.

Following the “failing or likely to fail” determination, the ECB duly informed the Single Resolution Board, which carried out the assessment of the resolution criteria set out in Art. 18 of the SRM Regulation in respect of both institutions. Since as of time of writing resolution decisions have not been published by the SRB, the analysis of the Board’s assessment will be based on the notices summarising the decision taken in respect of both banks.¹⁶¹ The notices published by the SRB are almost identical, therefore the cases of both the Latvian bank and its subsidiary are considered together.

In both cases the Board did not question the assessment of the ‘failing or likely to fail’ criterion made by the ECB.¹⁶² With regard to the second condition for resolution, the Board concluded that in both cases there were no alternative private and supervisory actions that could prevent the failure of the bank within a reasonable time frame, although the justification for this conclusion was different in each case. In the case of ABLV Bank, the SRB quoted the bank’s inability to implement any available liquidity recovery

¹⁵⁵ *Ibidem.*

¹⁵⁶ *Ibidem.*

¹⁵⁷ *Ibidem.*

¹⁵⁸ Financial Crimes Enforcement Network, *Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution of Primary Money Laundering Concern*, 31 CFR Part 1010, RIN 1506–AB39, available at: <https://bit.ly/2HEmKCD> (accessed 30 May 2019).

¹⁵⁹ European Central Bank, *Press release “ECB instructs national supervisor to impose moratorium on ABLV Bank”*, 19 February 2018, available at: <https://bit.ly/2I28gvD> (accessed 30 May 2019).

¹⁶⁰ A memorandum was also imposed on ABLV Bank Luxembourg by the Luxembourg supervisory authority – Commission de Surveillance du Secteur Financier.

¹⁶¹ Notice summarising the decision taken in respect of ABLV Bank, AS, available at: https://srb.europa.eu/sites/srbsite/files/20180223-summary_decision_-_latvia.pdf, and Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A., available at: https://srb.europa.eu/sites/srbsite/files/20180223_summary-decision_-_luxembourg.pdf (both accessed 30 May 2019).

¹⁶² *Ibidem.*

options from its 2017 Recovery Plan that could effectively address its situation,¹⁶³ while in the case of its Luxembourg subsidiary it cited the bank's inability to obtain financial support from the parent company and the lack of other implementable measures in the group recovery plan.¹⁶⁴ In both cases the absence of available supervisory or early intervention measures that could restore the liquidity position of the Bank and the inability of a write-down and conversion of capital instruments to prevent the failure of the bank were invoked.¹⁶⁵

The Board's assessment of the third condition for resolution was literally identical in both cases. The SRB concluded that, given the particular characteristics of the banks and their specific financial and economic situation, resolution action was not necessary in the public interest.¹⁶⁶ The Board established that the functions performed by both banks were not critical, since their discontinuance would lead neither to the disruption of services that are essential to the real economy of, respectively, Latvia or Luxembourg; nor to the disruption of financial stability therein or in other Member States.¹⁶⁷ Furthermore, the SRB determined that the failure of either bank was not likely to result in significant adverse effects on financial stability in, respectively, Latvia or Luxembourg, or in other Member States, taking into account, in particular, the low financial and operational interconnections with other financial institutions.¹⁶⁸

Consequently, the Board concluded that while the conditions for resolution action of Art. 18(1)(a) and (b) of SRM Regulation were met in both cases, the condition of Art. 18(1)(c) was not satisfied in respect of either bank.¹⁶⁹ Therefore it was decided that ABLV Bank and ABLV Bank Luxembourg would not be placed under resolution.¹⁷⁰ As a consequence, the winding up of the banks took place under the laws of Latvia and Luxembourg, respectively.

CONCLUSIONS

While the relatively short history of the operation of the Single Resolution Mechanism – consisting so far of only five decisions of the Single Resolution Board – does not allow for drawing any definitive conclusions regarding the functioning of the supranational resolution framework, so far the Mechanism seems to be operating efficiently. The SRB has proven to be capable of carrying out, in a very short time frame, the assessment of the conditions for resolution in respect of credit institutions deemed failing or likely to fail

¹⁶³ Notice summarising the decision taken in respect of ABLV Bank, AS.

¹⁶⁴ Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A.

¹⁶⁵ Notice summarising the decision taken in respect of ABLV Bank, AS and Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A.

¹⁶⁶ *Ibidem.*

¹⁶⁷ *Ibidem.*

¹⁶⁸ *Ibidem.*

¹⁶⁹ *Ibidem.*

¹⁷⁰ *Ibidem.*

by the ECB – each decision was adopted on the same day as the “failing or likely to fail” assessment was transmitted. Moreover, in the case of Banco Popular Español, which so far is the only instance where a resolution scheme was adopted by the Board, the Commission managed to review the resolution scheme within the 24-hour period provided for in Art. 18(7) of the SRM Regulation. However, it should be noted that the Council has not yet been involved by the Commission in the decision-making process regarding a resolution, so the efficiency of this aspect of the framework remains to be tested.

From the cases discussed above it is clear that the public interest criterion enshrined in Art. 18(1)(c) of the SRM Regulation is key to enabling any resolution action. In its assessment the SRB focuses on the resolution objectives set out in Art. 14(2) of the SRM Regulation, in particular on the objectives of ensuring the continuity of critical functions and avoiding significant adverse effects on financial stability. The impact of the disruption of market functions provided by a bank on financial stability is considered by the Board in terms of the size and relevance of the institution, as measured by its market share. For instance, in the case of Banco Popular, the market share in the national market for deposit-taking was estimated at between 5 and 10 per cent, combined with a market share in the national market for lending to small and medium-sized enterprises ranging between 15 and 20 per cent, which was considered sufficient to qualify the bank as big enough to significantly impact the financial stability of Spain should the market functions of the bank be disrupted. On the other hand, in the cases of the Italian banks, their combined national market shares of 2.55 per cent for lending and 1.81 per cent for deposit-taking were not considered by the Board to be sufficient to significantly impact the financial stability of Italy in the case of a simultaneous failure of both credit institutions.¹⁷¹ The precise share of the market captured by the bank in order to deem the classification of its functions as critical for ensuring the financial stability is unclear from the existing body of SRB’s decision, although some threshold may be established in the subsequent cases.

Finally, it should be noted that regardless of the effectiveness of the Single Resolution Mechanism framework when it comes to the objective of protection of public funds once the resolution scheme is adopted, in the cases where the Board takes no resolution action the national insolvency regimes often allow for the bail-out of a failing institution. The case of Italian banks – where the SRB left the winding up of the banks to Banca d’Italia under the insolvency proceedings of Italian law, which does not prevent the bail-out of senior creditors – it ended up in a pay-out of almost 17 billion euro in cash injections and state guarantees from the Italian State to Intesa Sanpaolo, Italy’s largest retail bank, which offered to buy the healthy assets of the two Veneto banks for the symbolic sum of 1 euro. The measures were meant “to enable the sale of parts of the two banks’ activities to Intesa, including the transfer of employees”¹⁷² and “to enable the wind down of the remaining liquidation mass, financed by loans provided by Intesa.”¹⁷³ The state aid

¹⁷¹ Decision of the Single Resolution Board, *supra* note 132, p. 17.

¹⁷² European Commission, *Press Release IP/17/1791*, 25 June 2017.

¹⁷³ *Ibidem*.

provided by Italy was approved by the Commission, which found the measures to be in line with EU State aid rules, in particular the 2013 Banking Communication.¹⁷⁴ In the press release concerning the Commission's decision, Commissioner Vestager was quoted saying that "Italy considers that State aid is necessary to avoid an economic disturbance in the Veneto region as a result of the liquidation of BPVI and Veneto Banca, who are exiting the market after a long period of serious financial difficulties."¹⁷⁵ It should be noted that the assessment of Italian authorities in this respect runs contrary to the assessment provided by the SRB, which deemed the impact of a simultaneous failure of Veneto Banca and Banca Popolare di Vicenza on financial stability, even in the Veneto region, to be insignificant. The decision of Italian government to shield senior creditors was motivated by political considerations,¹⁷⁶ which trumped over economic concerns. Since a significant amount of the Veneto bank's debt had been mis-sold to retail investors, the government feared a public backlash resulting from the imposition of losses on retail bondholders.¹⁷⁷ As a result, a heavy burden was placed on the Italian taxpayers. The outcome of the cases of Veneto Banca and Banca Popolare di Vicenza provide a compelling argument in favour of harmonising the national frameworks governing the winding-up of credit institutions in a manner which would prevent the national authorities from bailing-out failing banks with taxpayers' money.¹⁷⁸ Indeed, it could be argued that such harmonization is necessary in order to complete the European Banking Union agenda.¹⁷⁹ As long as bank insolvency laws remain unharmonized across the European Union, the national insolvency frameworks can be used by Member States as a door to escape the resolution regime introduced by the BRRD.¹⁸⁰

Although it can be argued that the establishment of the Single Resolution Board is one of the most significant European banking reforms of recent years,¹⁸¹ it remains doubtful whether the current state of the Single Resolution Mechanism framework can

¹⁷⁴ European Commission, *Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca - Liquidation aid* (SA.45664), available at: <https://bit.ly/2I0P3tX> (accessed 30 May 2019).

¹⁷⁵ European Commission *supra* note 172.

¹⁷⁶ It should be noted here that the potential for political interference from national governments in individual resolution cases settled within the framework of the SRM is somewhat limited in comparison, since the Council may be involved in the decision making-process only at the request of the Commission. Moreover, Art. 18(4) of the SRM Regulation provides that when making decisions within the SRM framework the Council shall act by simple majority, which additionally mitigates the influence of individual Member States. For a broader account of the problem of political interference within the SRM, see D. Busch, M. Louisse, M. Rijn, *How Single is the Single Resolution Mechanism?*, European Banking Institute Working Paper Series 30/2019, pp. 11-15; and A. Baglioni, *The European Banking Union: A Critical Assessment*, Palgrave Macmillan, London: 2016, pp. 81-109.

¹⁷⁷ FT Reporters, *Why Italy's €17bn bank rescue deal is making waves across Europe*, Financial Times, available at: <https://www.ft.com/content/03a1c7d0-5a61-11e7-b553-e2df1b0c3220> (accessed 30 May 2019).

¹⁷⁸ Gortsos, *supra* note 6, p. 184.

¹⁷⁹ *Ibidem*.

¹⁸⁰ See S. Merler, *A tangled tale of bank liquidation in Venice*, Bruegel, available at: <http://bruegel.org/2017/06/a-tangled-tale-of-bank-liquidation-in-venice> (accessed 30 May 2019).

¹⁸¹ N. Véron, *Bad News and Good News for the Single Resolution Board*, Bruegel, available at: <http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board> (accessed 30 May 2019).

deliver the objective of breaking the vicious cycle between banks and sovereigns that nearly destroyed the Eurozone during the banking crisis of 2011-2012. From the cases reviewed above, it is clear that the SRB is capable of ensuring swift and effective resolution proceedings once it deems the institution in question to satisfy the conditions for such a resolution, but problems may arise when the Board considers the bank to be unfit for a resolution action under the SRM framework. In such a case the bank's difficulties are left to be resolved at the national level. The cases of Italy's Veneto Banca and Banca Popolare di Vicenza show that when it comes to a bail-in, i.e. forcing losses on bank's claimants, the priorities of national authorities may diverge from the principles underlying the BRRD framework. The impact this problem on the financial stability of the entire Eurozone is limited, since only relatively insignificant credit institutions will be left by the SRB to the discretion of the national authorities. However, in the current state of the common resolution framework, the bank-sovereign vicious circle will not be broken in every case.