

THE SINGLE RESOLUTION MECHANISM

THE SINGLE RESOLUTION
MECHANISM

Robby HOUBEN
Werner VANDENBRUWAENE
(eds.)



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

The Single Resolution Mechanism

© Robby Houben en Werner Vandenbruwaene (eds.) 2017

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: Kandinsky Vassily (1866-1944), *Dégagement ralenti (Langsam heraus)*, © RMN-Grand Palais / Gérard Blot

ISBN 978-94-000-0778-9
D/2017/7849/95
NUR 827



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

PREFACE

On 7 October 2016, the research groups Business & Law and Government & Law of the University of Antwerp organised a study event on the Single Resolution Mechanism or SRM. This study event's aim was to take stock of this new regime relating to the resolution of banks in the Eurozone after the first months of application. This book is the direct result of that study event.

The SRM constitutes the second pillar of the so-called Banking Union; the first pillar being the Single Supervisory Mechanism or SSM.¹ The SRM is complementary to the SSM. While the SSM aims to reduce the risk of bank failure, by unifying the supervision of banks, the SRM increases the likelihood that a bank has been made “safe to fail”, if it is likely to fail, and reduces the risk that governments might have to bail out a bank, were it to actually fail.

The SRM is built around the Single Resolution Board, or SRB, a newly established independent European agency with legal personality. The SRB is responsible for the SRM's effective and consistent functioning. This involves the responsibility to draw up resolution plans and to adopt all of the decisions relating to resolution for the institutions that are within its purview. The actual execution of the resolution scheme adopted must be closely monitored by the SRB, but it is carried out by the national resolution authorities. The SRB is also in charge of the so-called Single Resolution Fund, which comprises a European pool of money that is transferred from domestic resolution funds, financed by the banking sector and is set up to ensure that medium-term funding support is available while a credit institution is being restructured.

As of 1 January 2016, both the SSM and the SRM function alongside each other; there are various interrelations between both mechanisms. One example of this is the assessment of the conditions for resolution of a significant bank or banking group, in which both the ECB (as a key actor in the SSM) and the SRB have roles to play. Three conditions apply here. Firstly, a bank should be failing or likely to fail. This assessment is made by the ECB, although the SRB can take the decision as well under certain circumstances. In both events, the other authority will be

¹ On the SSM, we organised a study event in 2015, resulting in the book R. Houben and W. Vandenbruwaene (ed.), *Het nieuwe banktoezicht – The New Banking Supervision*, Antwerp-Cambridge, Intersentia, 2016, 261p.

consulted. Secondly, there should be no reasonable prospect that private sector measures would prevent the bank's failure within a reasonable timeframe; this is assessed by the SRB only. Thirdly, the resolution action must be necessary in the public interest, as determined by the SRB.

At the time of writing of this introduction, the SRB just adopted its first major resolution decision, which also illustrates the aforementioned close collaboration between the ECB and the SRB. On 7 June 2016, the Single Resolution Board (SRB), making use of the sale of business tool to transfer shares, decided to transfer all shares and capital instruments of Banco Popular Español S.A. (Banco Popular) to Banco Santander S.A (Santander) for the amount of 1 Euro. As a result, Banco Popular operates under normal business conditions as a solvent and liquid member of the Santander Group, as of 7 June 2017. The SRB's intervention was deemed necessary to save Banco Popular's business. Due to its stressed liquidity situation, the European Central Bank (ECB) had decided, on 6 June 2017, that Banco Popular was "failing or likely to fail" and notified the SRB accordingly. Immediately thereafter, the SRB and the Spanish national resolution authority decided that the sale was in the public interest, given that it protects all depositors of Banco Popular and ensures financial stability in Spain and Portugal, in which Banco Popular owns a subsidiary. The resolution scheme entered into force on 7 June 2017, following the endorsement by the European Commission. Elke König, Chair of the SRB, stated that the decision taken "*safeguards the depositors and critical functions of Banco Popular. This shows that the tools given to resolution authorities after the crisis are effective to protect taxpayers' money from bailing out banks*".

In view of these recent developments, the publication of this book, offering the first analysis and insights into the SRM, could not have been more timely. We wish the reader a good read and hope they discover a lot of inspiration.

Prof. Dr. Robby HOUBEN

Dr. Werner VANDENBRUWAENE

CONTENTS

Introduction

Recovery and Resolution, Future Solutions for Dealing with Insolvency

Eddy WYMEERSCH 1

The Single Resolution Mechanism. Institutional and Financing Arrangements for Bank Resolution in the European Banking Union

Pierre E. BERGER and David VANDERSTRAETEN 7

I.	Introduction	7
II.	Scope of the SRM Regulation	11
	A. Scope <i>ratione personae</i>	11
	B. Scope <i>ratione materiae</i>	13
	C. Scope <i>ratione temporis</i>	15
III.	Institutional framework of the Single Resolution Board	15
	A. Legal status and composition	15
	B. Governance	16
	C. Accountability of the SRB	18
IV.	Division of tasks between the Single Resolution Board and NRAs	19
V.	Cooperation and information exchange within the SRM	22
	A. Cooperation between the Single Resolution Board and NRAs	22
	B. Cooperation between several actors within the Eurozone	23
	C. Cooperation with national authorities of non-participating Member States	24
VI.	Resolution process	25
	A. Resolution planning	25
	B. Early intervention	29
	C. Resolution	31
	1. General principles governing resolution and resolution principles	31
	2. Conditions for resolution	34
	3. Resolution procedure	36
	4. Resolution tools	37
VII.	The Single Resolution Fund	41
VIII.	What will the future bring for banking resolution within the European Banking Union?	45

Resolution from the Belgian Resolution Authority’s Perspective

EVY DE BATSELIER	49
I. Introduction	49
II. Resolution from an institutional perspective	52
A. The origin of national resolution authorities as first line of defence	52
B. The subsequent creation of a European line of defence by the SRMR	53
III. Division of tasks	56
A. Division of tasks between the SRB and the Belgian Resolution Board	56
1. <i>Ratione personae</i>	56
2. <i>Ratione materiae</i>	56
B. Division of tasks within the NBB in its capacity of both supervisory authority and resolution authority	57
IV. Two phases of resolution – Preparation and actual resolution	58
A. The preparation phase – Drafting of resolution plans	59
1. The difference between recovery and resolution plans	59
2. Resolution strategy for groups: single point of entry (SPE) vs multiple point of entry (MPE)	61
3. Determining the level of liabilities eligible for bail-in: MREL	64
4. Resolvability assessment	66
5. Some practical observations	67
B. The phase of actual resolution	68
1. Conditions before entering into resolution	68
2. Resolution tools	69
3. Bail-in and the principle of no creditor worse off	70
V. Resolution financing	73
VI. Conclusion	74

Judicial Protection in the Single Resolution Mechanism

YVES HERINCKX	77
I. Introduction	77
II. The Appeal Panel	78
A. Boards of Appeal at European agencies	78
B. Composition and status	80
C. Jurisdiction	84
D. Procedure	85
E. A quasi-judicial body	90
F. Standard of review	94

III.	The Court of Justice of the European Union	98
	A. Appeals against decisions of the Appeal Panel	99
	B. Actions for annulment	101
	C. Actions for damages	109
IV.	National courts	111
	A. Preliminary references	112
	B. <i>Ex-ante</i> judicial approval of crisis management measures	114
	C. Valuations	115
V.	Conclusion	118

The Rules on State Aid and the Framework for Bank Resolution:

Foreplay and Interplay

	Hans GILLIAMS and Stijn GOOVAERTS	121
I.	Foreplay: State aid rules as precursor and inspiration for the Single Resolution Mechanism	121
	A. Precursor: From bail-out by the State to bail-in of shareholders and creditors	122
	B. Inspiration: the SRM & the BRRD's rules on the prevention of moral hazard	124
II.	Interplay: The possibility of authorizing R&R aid within the Single Resolution Mechanism	126
	A. When does a measure qualify as State aid?	127
	B. Prior to clearance of State aid: Standstill Obligation	129
	C. Assessment of State aid for the resolution of credit institutions	130

Concluding Remarks on Resolution and Resolvability Challenges

	Rudi BONTE	135
I.	The move from policy design to implementation	135
II.	The complex process of pulling the resolution trigger	136
III.	The comprehensive menu for the resolution authorities	138
IV.	The drivers to achieve resolvability	139
V.	The learning points from crisis management	140

