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Judicial Review and Banking Resolution Regime - The Evolving Landscape and Future Prospects

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I – Introductory Remarks and Key Issues - Setting the Scene

- **STARTING POINT & LEIT MOTIF when discussing the Review of Resolution Measures or – more widely - the Review of *Measures Adopted by Resolution Authorities* (hereinafter, *brevitatis causae* – 'Resolution measures'/ 'R.Measures')**
- **Considering here different forms of review – (i) judicial review stricto sensu and (2) administrative/quasi judicial review (= *sui generis form of review* and of ensuring accountability of such decisions – as discussed infra…)**
- **** The incentives to challenge these R.Measures are fundamentally different from the incentives to challenge Administrative Measures, Administrative Sanctions or Early Intervention Measures in the field of Banking Supervision***

I – Introductory Remarks and Key Issues – Setting the Scene

- Why this ***particularity*** of the **Review of R.Measures** within the overall **architecture of accountability** of the bodies participating in the **System of Financial Supervision lato sensu (including resolution)?**
- ***In a nutshell - Because*** **–** ***R.Measures have the widest implications for a vast range of legal rights and interests***
- **There is an inherently contradictory feature in R.Measures –** At the same time **(i) these are envisaged and conceived towards the safeguard of the stability of the financial system as whole and, conversely, (ii)** ***these measures, by their very nature, have a significant potential for disruption that has to be duly contained and monitored.***

I - Introductory Remarks and Key Issues - Setting the Scene

- *Hence, a **higher incentive** – for various investors and also for Banks – to **challenge** actively/sometimes aggressively/ R.Measures…*
- *How do we set the legal pendulum for a proper **balancing exercise** between these **two contradictory features of R.Measures**, **maximizing the positive, prevailing/stabilizing effects intended with resolution regimes?***
- (1) Due process in the adoption and implementation of R.Measures involving adequate procedural safeguards and a (2) **proper system of review of R.Measures are an essential part of the Answer – *focus here on Review of R.Measures*…**

I – Introductory Remarks and Key Issues – Setting the Scene

- **As regards these TWO ESSENTIAL CONDITIONS for a successful resolution regime – (1) Due process in the adoption and implementation of resolution measures involving adequate procedural safeguards and a (2) proper system of review of resolution measures, National experiences of EU Member States provide interesting lessons**
- **Accordingly, in the complex legal fabric of banking resolution in the EU, with a complex architecture, attention should be paid, for a critical assessment and consolidation of the regime, not only to the Single Resolution Board (SRB) and the Appeal Panel of SRB (AP-SRB) and the Court of Justice of the EU (CJEU) but also to National Resolution Authorities and National Courts**

I - Introductory Remarks and Key Issues - Setting the Scene

- The importance of this **multilevel judicial review/multilevel review of R.Measures** derives from various causes:
- **1) – Complexity of the architecture of the Single Resolution Mechanism** ('MUR') involving interventions of SRB typically scrutinised by CJEU and of National Resolution Authorities ('NRAs') typically scrutinised by National Courts ('N.Courts').
- **2) – Case law on SRB at CJEU** (particularly settled case law) **will take time to develop** – currently ongoing process... No current settled case law – although some extrapolations (*mutatis mutandis*) allowed from case law already developed on EU/SSM banking supervision and related areas...

I - Introductory Remarks and Key Issues - Setting the Scene

- The importance of this **multilevel judicial review/multilevel review of R.Measures** derives from various causes (CONT):
- **3)** – Accordingly, within this context – as part of the evolving legal landscape – **judicial review** of enforcement of **National second generation resolution regimes** (Pre-BRRD or Post-BRRD) at **national level** *will probably produce* ***much sooner*** *an* ***importante body of relevant case law***…
- **4)** - Also, **in multiple instances, challenges may be brought before the Courts of Multiple States** – including Non-Euro Member States – Will refer to a **landmark resolution case in Portugal** that **(i)** illustrates point (3) and **(ii)** point (4)

I - Introductory Remarks and Key Issues - Setting the Scene

- **4)** - (cont.) This **landmark reference case** *also* **(iii)** illustrates - given its long-term evolution – **litigation on "post-resolution issues"** (so, *the fullest range of litigation arising from resolution*) – e.g. concerning the management and aftermath of a bridge bank already sold to third parties after restructuring and the admissible time span and domains to allocate resources of resolution funds after selling a bridge bank (arising from resolution).
- **5) – Also, differently from review of supervision measures** – relying on a considerable body of law which may be (to some extent) transposed from national jurisdictions to EU jurisdiction (CJEU) – ***review of R.Measures tends to raise entirely new legal issues*** – accordingly, entirely new precedents in these 'uncharted waters' at national level may have accrued added value for building CJEU case law….

II - Key Issues and AGENDA

- Bearing in mind these fundamental issues and particularities of review of R.Measures – the **AGENDA for discussion** comprehends:
- **1. –** Overall picture – Types and levels of review – judicial/non-judicial - EU level/national level
- **2.** – Typical/paradigmatic areas/measures challenged
- **3.** – Focusing on EU level – spheres of judicial review (CJEU) and review through Appeal Panel/AP (SRB) – articulation betwewen the two spheres
- **4.** – EU level – Nature of review through AP
- **5.** – EU level – Standard of review (of AP and CJEU/GC)
- **6.** – National level of review – **6.1.** – General overview/ **6.2.** – Corollaries of landmark national cases – Portuguese experience with BES case from 2014 [a) first wave of cases in Portuguese courts/b) interplay with cases in other EU Member State Courts/c) Litigation on 'post-resolution issues' after sale of bridge bank (Novo Banco)

III - Overall picture - Types and levels of review

- Layers of review – SRM Regulation (Regulation N.º 806/2014 of 15 July 2014) – considering entitities which are part of SRM – **(a)** the SRB; **(b)** Single Resolution Fund ('SRF') (managed by SRB); National Resolution Authorities of each of 19 Eurozone States (also players, Commission and Council):
- Appeals against R.Measures adopted within SRM – *depending on the entity adopting measure/type of measure* – handled by **(i)** AP of SRB/**(ii)** CJEU/Leuxembourg/**(iii)** National Courts

IV-Typical/paradigmatic areas/measures challenged

- **Most significant potential areas of litigation** (judicial review and review through SRB AP) cover:
- 1 – Decisions placing banks under resolution and correspondent adoption of Resolution Schemes – 18.º, 6 SRM Regulation (4 types of resolution tools contemplated in arts 22.º to 28.º SRM Regulation and BRRD – arts 39.º to 43.º) and Bail in measures associated – rights of property affected and pondering of alternative interventions/proportionality (**executive dimension of resolution**)
- 2 – Decisions on MREL (Minimum requirement for own funds and eligible liabilities – art 12, 1 SRM Regulation)/ and on Removal of impediments to Resolvability – art 10.º, 1 SRM Regulation (**preventive dimension of resultation**)

IV-Typical/paradigmatic areas/measures challenged

- 3 - Transparency – decisions on access to file/documents (art 90.º, 3 SRM Regulation)
- 4 - Hypothetical damages arising from adoption of resolution schemes (see infra) (art 87.º, 5 SRM Regulation – claims for non contractual liability of SRB under art 87.º, 3 and claims for national resolution authorities for an indemnification by SRB under art 87.º, 4 of SRM Regulation)
- 5 - Decisions on ex ante and ex post contributions to the SRF (arts 70.º and 71.º of SRB Regulation)
- 6 – Decisions on contributions to administrative expenditures of SRB and on penalties (respectivley, arts 65.º, 3) and 38.º to 41.º of SRM Regulation)

V - EU level - spheres of review through AP and through CJEU

- **Two types of situations**:
- **(a)** cases in which AP-SRB has jurisdiction – direct appeal to CJEU not possible – initial appeal to AP required and possible subsequent action for annulment of AP decisions to General Court – art 86.º, 1 SRM Regulation - and possible subsequent appeal to CJ/Lux (on points of law only).
- **(b)** Cases in which AP-SRB has no jurisdiction – direct appeal to CJ/Lux

V - EU level – spheres of review through AP and through CJEU

- So decisive articulation between **spheres of review** throughh AP-SRB and CJ/Lux – and decisive to aprehend **categories of decisions subject to review by AP** (in a context in which **AP does not have general appelate jurisdiction**)

In a nutshell and on a systematic perspective:

- **(A)** On the whole, a **prevailing area of more intense intervention of AP – preventive dimension of resolution** (on the **executive dimension of resolution** – residual intervention – AP no powers to review adoption of resolution schemes and decisions to place banks under resolution (*lack of awareness of this lead to a significant number of inadmissibility decisions by AP concerning appeals agains the resolution of Banco Popular addressed to AP in July-August 2017*);
- **(B) More analytically – THREE key areas of intervention of AP**

V - EU level – spheres of review through AP and through CJEU

THREE key areas of intervention of AP (categories of decisions subject to review by AP listed in art **85.º, 3 SRM Regulation** – vis a vis cross references to provisions which serve as basis of reviewable decisions)

- **1 –** Intervention concerning decisions of SRB on MREL (art 12.º, 1 SRM Regulation) and decisions on removal of impediments to resolvability (art 10.º, 10 SRM Regulation) – **potential area for appreciable workload of AP in course of 2018-2019**
- **2 –**Access to file/access to documents (art 90.º, 3 SRM Regulation) – Decisive area of transparency vs protection of public interests requiring safeguard of highly sensitive information – importance enhanced after adoption of first resolution tools –**current string of cases on access to file arising from June 2017 Banco Popular resolution**
- **3** – Interventions concerning penalties and financial issues – ex post contributions to SRF (art 71.º SRM Reg – but not ex ante contributions); contributions to administrative expenditures of SRB (art 65.º, 3 SRM Reg); penalties (arts 38.º - 41-º) – *First year of activity of AP (2016) AP essentially called to intervene in this area* – although again, also, with various inadmissbility decisions (on ex ante contributions), due to lack of awareness of specific areas of competence of AP (*learning curve here*)
- (residual areas – simplified obligations – art 11.º SRM Reg)

VI - Nature of Review through AP-SRB

- AP – SRB – integrated by 5 effective members and 2 alternates (fully functioning as from January 2016) – **mixed/interdisciplinary composition** - *lawyers and economists* (expertise in financial regulation and supervision – selected through a transparente/public call of interest) – this mixed composition not only a formal atribute but has **possible substantive corollaries** for the overall perception of AP and its standard of review on the medium term
- Mandate to act *independently* from SRB and in the *public interest* – art 85.º, 3 and 5 SRM Reg

VI - Nature of Review through AP-SRB

- AP – similarities but also diferences with Bodies of Appeal of other European Agencies (pertinent to single out for paralells the Board of Appeal of the EU Intellectual Property Office/EUIPO – as one of the most actives – and, in the financial area, ESAs (EBA/ESMA/EIOPA) Joint Board of Appeal and SSM/ECB Administrative Board of Review (Abor)
- Probably the greatest resemblance with ESAs Joint Board of Appeal – *as it happens with AP SRB, it may confirm or set aside decisions, then remitting the case to the Board – which is binded by such ruling and has to adopt new decision (differently from Abord whose rulings/opinions are not binding)*

VI - Nature of Review through AP-SRB

- But – conversely – major difference of ESAs Joint Board of Appel vis a vis AP SRB – in the case of ESAs the Board of Appeal deals chifly with **Regulation issues** (**not so much supervision and related issues**) – differently, AP involved in **core issues of resolution** – greatest incentives to challenge decisions (*as illustrated in the more than 50 cases of AP – starting in 2016 and accelerating in 2017…*)
- Within this context – <u>what is the nature of review by AP SRB in view of its powers and status?</u> **(a)** administrative body; **(b)** quasi-judicial body; **(c)** or a body to be placed – *in balancing exercise* – towards a more 'judicial' or 'administrative' end of the spectrum

VI - Nature of Review through AP-SRB

- Possibly (*athough with some oversimplification here, brevitatis causae*) that may be a rather 'futile' quest (regardless of an overall dogmatic elaboration in the future) – Instead of **graduating** a body more towards the 'administrative' or 'judicial' end of the spectrum, **acknowledging as such** the **'sui generis'/hybrid nature of this body** – its particularity lies in its **mixed attributes**/not a tribunal – but *general attributes of a legal adjudicative body* (art 85.º SRM Reg) more flexible – operating under different requirements (whose mandate is limited to confirm decision or remitting it to SRB to adopt new decision – art 85.º, 8 SRM Reg)
- Relevant to ponder appreciable case law on these bodies of appeal (e.g. "*Procter and Gamble*" case T-63/01; "*Henkel v OHIM*" case T-308/01 or "*Schräder v CPVO*" cases T-133/08 and C-546/12) – *but debatable if these actually capture* **'sui generis'/hybrid nature** *of AP SRB…*

VII- EU level - Standard of review (of AP and CJEU)

- CJEU – standard of legality (not opportunity or appropriateness) – beside lack of competence, infringement of essential procedural requirements, misuse of powers and – *of great importance* – **infringement of a rule of law (comprehending *manifest error of assessment* and *breach of proportionality***)
- AP – also basically standard of legality (assess if appeals 'admissible' and 'well founded' – art 85.º, 7 SRM Reg) and also decisions of AP cannot replicate the participation of national resolution authorities (NRAs) in SRB decision-making (determined per art 53.º, 3 and 4 SRM Reg – *hence problematic for AP to produce **alternative assessments** of situations without such involvement of NRAs*

VII- EU level - Standard of review (of AP and CJEU)

- **But do the particularities of AP SRB** – *due to its mixed composition and practical and technical expertise of its members* – **have any corollaries on standard of review of AP? (especial expertise** acknowledged as **particular factor** in Boards of Appeal of agencies in some case law – e.g. again "*Schräder v CPVO*" case T-133/08)?
- **Too soon to tell** – Potential corollaries on gradual finetuning of a *qualitatively more demanding/technical evaluation* of *sufficiency of technical/economic assessments* of SRB?/although not replacing as such the decisions of SRB…

VII- EU level - Standard of review (of AP and CJEU)

- Thus – in the medium term (?) – *more intrusive/proactive economic assessment* (?) - mirroring or amplifying what already happens in some competition law Court cases involving *complex economic assessments* - see e.g. very recent example of General Court ruling of 26 October 2017 ("***Liberty Global/Ziggo***" case T-394/15) in which GC annulled a merger approval decision by Commission – due to *lack of investigation of some effects of the merger or at least lack of explanation of choice of not looking into certain effects…*

VII- EU level – Standard of review (of AP and CJEU)

- Within that context – *De iure condendo* if competence of AP SRB expanded (future reforms of SRM Reg) and **if trend continues**, *also in other cases of more complex economic assessment*, towards *more vigorous/intrusive review* - may the AP SRB (and other bodies of appeal) become in the future the **embryo** of ***Specialised Chambers of Appeal of a sui generis nature?*** – more than purely administrative while definitely not judicial?
- *Too soon to tell – prudence required*...- but **future trends to be followed**...

VIII - National level of review

- **General overview** – decisions of NRAs can be challenged before national courts on the basis of national procedural rules
- Apparently – Recital 89 of BRRD pressuposes that *national courts also conduct a* ***limited review (of legality)*** *when dealing with decisions of NRAs*
- Case law of national courts on R.Measures adopted by NRAs before SRB/SRM were operating fully (January 2016) – importante indicators for consolidation of EU case law…
- **ALSO** (*not to be overlooked*) – Relevant area of **review by national courts of decisions of NRAs** in domains in which (*even within SRM*) these **keep residual own competence on some less significant institutions** (*namely in case these institutions do not have cross border activities in the area of the Banking Union*)

VIII - National level of review

- **Fundamental references and indicators ('Law in action')** from major **national case law** arising from key national resolution cases occuring before SRM was fully operative **BUT *under BRRD-style national provisions*** **so, to a large extent/*mutatis mutandis*, applicable in BRRD legal environment – BES case and precedent in Portugal**
- **Why so important a precedent? -** Dozens of cases pending in **Portuguese Administrative Courts** on BES resolution, raising *inter alia* issues of constitutionality of the measures adopted and of the underlying regime and - *without entering here into undue details (for reasons of professional secrecy and others, involving cases not closed*) – such cases also try to approach/assimilate RESOLUTION to some traditional forms of **curtailing property rights**, such as **(i)** Expropriation, **(ii)** Nationalization and **(iii)** Confiscation – with the corresponding specific procedural safeguards…

VIII - National level of review

- **In a nutshell** – and not disclosing here details – at the very core of such discussion of RESOLUTION vis a vis Expropriation, Nationalization and Confiscation in the context of the Economic Constitution are problems related with the **compression of property rights** and **patterns** to deal with these rights *vis a vis* the overriding requirements of **public interest** that justify **intervention** in banks.

- **...And, largely underlying such discussion on property rights is the pondering of the Proportionality Principle and the corresponding procedural safeguards attached to it....**

VIII - National level of review

- The final judicial outcome of these multiple cases which will end forseeably at the **Portuguese Supreme Administrative Court** (and **Constitutional Court**?) will form in years to come a **fundamental body of law** to **discuss** …
- … the **contents/patterns/limits of exercise** of **public powers of resolution** *with a relevance that will very largely transcend the Portuguese jurisdiction….*

VIII - National level of review

- Furthermore – this case also illustrates **interplay with case law of Courts in non-Euro States** – since Goldman Sachs International and a group of Investors attempted to bring claims worth around $850 million against Novo Banco (the **Bridge bank** established within the Resolution of BES) - **related to obligations of BES under a** facility agreement with Oak Finance, which included an **English jurisdiction clause**

VIII - National level of review

- This originated a **landmark precedent** in terms of resolution cases with impact on various EU Member States jurisdictions and with key **corollaries for standards of JUDICIAL REVIEW.**
- In fact, while in August 2015, the UK High Court ruled in favour of Goldman Sachs and the investors in matters of **jurisdiction**
- **In November 2016 -** the **UK Court of Appeal** unanimously decided that the High Court judge should not have done so. As a matter of Portuguese law, Novo Banco (**Bridge Bank** arising from resolution) is not a party to the Oak Finance facility agreement and does not owe any money. So, ***any challenge to this position therefore had to be brought in the Portuguese courts***…

VIII - National level of review

- At a diferente level this BES case finally **illustrates litigation on 'post-resolution' issues**…
- Appeal to Administrative Court of Lisbon – August 2017 – brough by a bank operating in Portugal (Millenium) against the National Resolution Fund and the Bank of Portugal (as NRA) challenging one of the **clauses** of the **sale agreement of Novo Banco** (bridge bank arising from BES) **to Lone Star** – and challenging, to the extent these approve such clause, the acts of NRF and the NRA

VIII - National level of review

- **Clause** challenged on **mechanism of contingent capitalization** – resolution fund may inject funds (up to a maximum extent) in case of *underperformance of certain assets of Novo Banco* and *underperformance of levels of capitalization of Novo Banco* – Millenium, participating in the Portuguese resolution fund, challenged this mechanism arguing, *inter alia*, non proportionality of further financial efforts of resolution fund and its participating banks after the sale of bridge bank (= **"post resolution issues"**...)

CLOSING

- Let me close with **GROUCHO MARX** (*whom I have been re-discovering and quoting in Conferences on financial regulation*):
- As resolution is such a sensitive and politically charged matter, quoting G MARX, on Politics:
- "***Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies***…"
- Let's hope that on building resolution regimes we are – on the contrary – able to develop **correct diagnoses** and to apply the **right remedies** – also through **appropriate standards of review** that we have been discussing…

Thank you for your attention