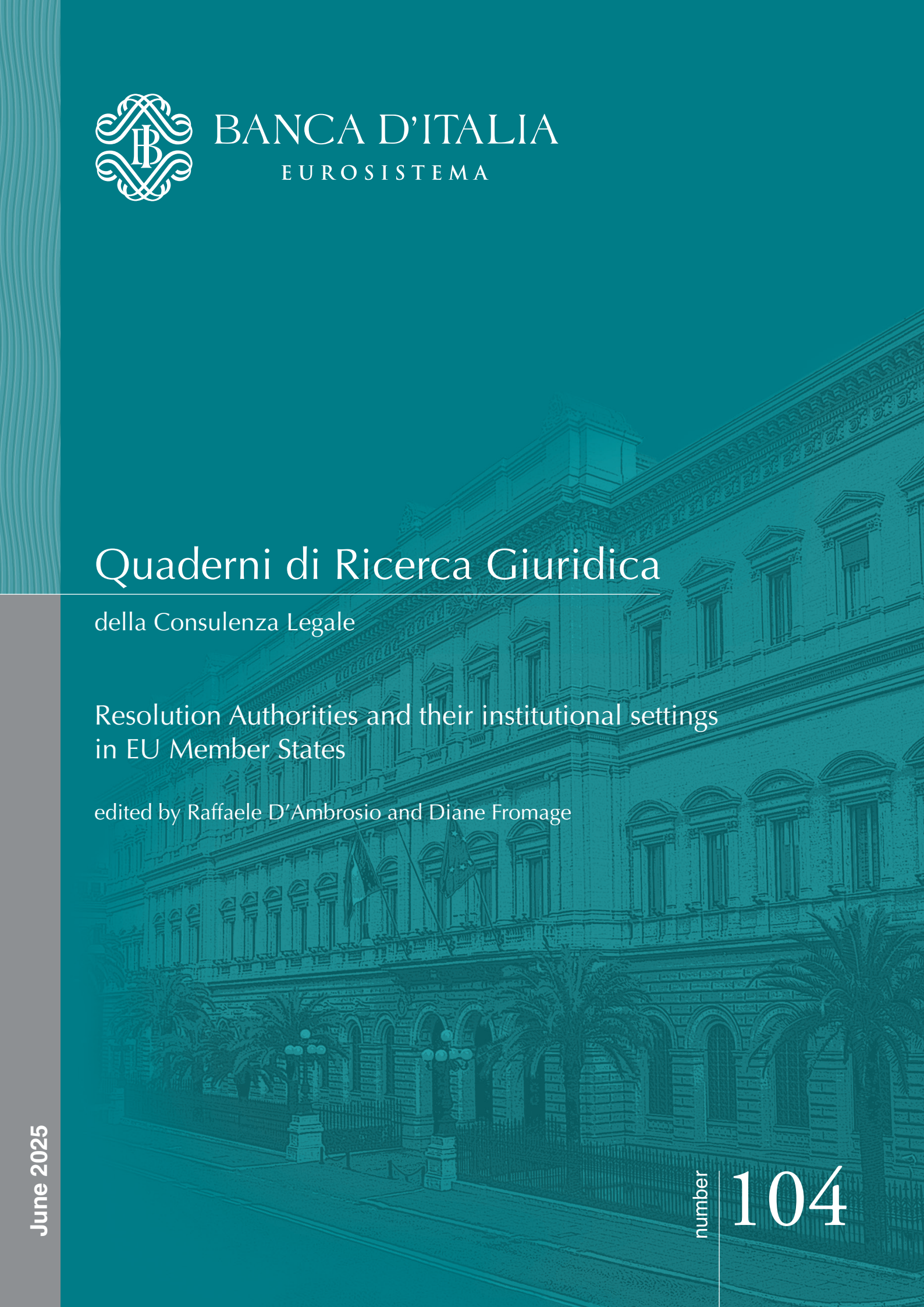
BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Resolution Authorities and their institutional settings in EU Member States

edited by Raffaele D'Ambrosio and Diane Fromage



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Member States' institutional arrangements for banking resolution compared

Raffaele D'Ambrosio and Diane Fromage[*]

[*] The editors are grateful to Vanessa Aichstill and Thibault Martinelli for their precious help in preparing this study, and this introduction. The editors are also grateful to the Italian Resolution Unit, Jonathan Overett Somnier (EBA), Katalin Zakhar (ACPR), Paul Weissmann (University of Salzburg) and the late Luís Silva Morais (University of Lisbon) for their precious suggestions provided in the discussion of some of the main contributions. All websites were last visited in November 2024.

1. Introduction

When the resolution of credit institutions was first regulated within the European Union (EU) by means of the Banking Recovery and Resolution Directive (BRRD),[1] most EU Member States (MSs) did not have strictly speaking any resolution authority, although some of them had authorities tasked with solving banking crises[2] and others had already adopted some of the instruments provided for in the draft BRRD.[3]

Under Article 3 BRRD, MSs were required to designate one or more resolution authorities "*empowered to apply the resolution tools and exercise the resolution powers*". This thus demanded on many occasions that MSs create a new *ad hoc* institution, or confer the resolution powers to an already existing one, choosing between different organisational models. Not surprisingly, said Article 3 BRRD foresees that *"[r]esolution authorities may be national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers*",[4] provided that the choice falls to a public administrative authority, or an authority endowed with public administrative powers.[5]

The choice not "*to prescribe the type of authority or authorities that Member States should appoint as a resolution authority*" is grounded on the need not to "*interfere with the constitutional and administrative systems of Member States*".[6]

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1 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, consolidated text *here*.

2 For instance, in Belgium the Belgian Rediscount and Guarantee Institute (Herdisconterings- and Waarborgsinstituut/Institut de Réescompte et de Garantie) had been in charge of mobilising claims and satisfy special credit needs of Belgian banks and certain other enterprises when desirable in the public interest (1935-1999). In Italy, the central bank already was responsible for solving banking crises.

3 In Portugal, the Decree-Law No. 31-A/2012 of February 10, 2012, introduced into Portuguese law and, specifically, into the *Regime Geral das Instituições de Crédito e Sociedades Financeiras* (hereinafter RGICSF) the legislation on the resolution of credit institutions. The legislation – which preceded the BRRD – was adopted to implement and fulfil Portugal's commitments in the May 17, 2011, Memorandum of Understanding on Economic Policy Conditions between the Portuguese state and the Commission, the European Central Bank and the International Monetary Fund. Similarly, in Spain, on 31 August 2012, in the context of the MoU on Financial-Sector Policy Conditionality, signed on 25 July 2012, the RDL 24/2012 on restructuring and resolution of credit entities was approved, which was subsequently replaced by Law 9/2012. A bank crisis management framework was set up anticipating many of the measures then provided for in the draft BRRD.

4 Article 3(3) BRRD.

5 Article 3(2) BRRD according to which "*The resolution authority shall be a public administrative authority or authorities entrusted with public administrative powers*".

6 See recital 15 of BRRD: "*[i]n order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform the functions and tasks in relation to resolution pursuant to this Directive. Member States should ensure that appropriate resources are allocated to those resolution authorities. The designation of public*

It is true that Article 3 BRRD also specifically stipulates that the functions of the National Resolution Authority (NRA) and the National Competent Authority (NCA) may only '*exceptionally*' be exercised by one and the same institution, but, as we will see shortly, this provision remained largely disregarded in the different organisational models adopted in the MSs.

The choice of not interfering with the constitutional and administrative systems of the different MSs has also been maintained in the regulation establishing the SRM (SRMR),[7] which places a resolution authority, namely the Single Resolution Board (SRB), separate from the EU supervisory authority (i.e. the European Central Bank (ECB)), at the apex of this mechanism but stops short of prescribing such a model for the NRAs partaking in said mechanism.

In light of these constraints, Article 3 BRRD has rather sought to avoid conflicts of interest between the supervisory and resolution functions, stipulating that *"[a]dequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU (i.e., NCAs) or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive, without prejudice to the exchange of information and cooperation obligations*".

In particular, MSs are required to "*ensure that, within the competent authorities, national central banks, competent ministries or other authorities there is operational independence between the resolution function and the supervisory or other functions of the relevant authority*"; that "*[t]he staff involved in carrying out the functions of the resolution authority pursuant to* […the BRRD] *shall be structurally separated from, and subject to, separate reporting lines from the staff involved in carrying out the tasks pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU (i.e. NCAs) or with regard to the other functions of the relevant authority*"; and that, in light of the above, "*the Member States or the resolution authority shall adopt and make public any necessary relevant internal rules including rules regarding professional secrecy and information exchanges between the different functional areas*".[8]

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authorities should not exclude delegation under the responsibility of a resolution authority. However, it is not necessary to prescribe the type of authority or authorities that Member States should appoint as a resolution authority. While harmonisation of that aspect may facilitate coordination, it would considerably interfere with the constitutional and administrative systems of Member States…".

7 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.

8 See again recital No 15 of BRRD, according to which "*Member States should therefore be free to choose which authorities should be responsible for applying the resolution tools and exercising the powers laid down in this Directive. Where a Member State designates the authority responsible for the prudential supervision of institutions (competent authority) as a resolution authority, adequate structural arrangements should be put in place to separate the supervisory and resolution functions.*

These EU obligations echo the recommendation adopted at the global level by the Financial Stability Board in the Key Attributes No 2.1 of Effective Resolution Regimes for Financial Institutions, according to which "*each jurisdiction should have a designated administrative authority or authorities responsible for exercising the resolution powers over firms within the scope of the resolution regime ('resolution authority')*". It is nonetheless not crystal clear whether the aforementioned *Key attribute* merely requires that the authority with resolution powers be a public authority or whether it does not further demand that it be an ad hoc authority.

* * *

This study sets forth to draw conclusions on how EU MSs have transposed these EU obligations 10 years after the adoption of the BRRD. To this end, it examines both the situation in all the 27 MSs, and the point of view of the three main relevant EU authorities involved in the EU's resolution regime: the European Banking Authority (EBA), the SRB and the ECB.

This study is meant to be an attempt to give an overview of the reality within EU's MSs, a goal which is valuable *per se*, but also to evaluate the correspondence *de facto* between that reality and the requirements set in the BRRD. This will pave the ground to the appraisal of the suitability of the criteria anchored in the BRRD. As regards said EU authorities, they play a role in the EU's resolution regime, and to some extent in the implementation of Article 3 BRRD, as shown by their reports included in this study.

Next to the national and EU authorities' reports, the study provides a series of summary tables at the end, which present an overall comparison of the main characteristics of the different national regimes.

In preparation for this study, national and European experts from both academia and practice received a questionnaire asking them to detail how their MSs had implemented their EU obligations.

The questionnaire – which is included at the end of this study – covered four main themes: institutional arrangements; independence, accountability and liability. Specific questions were addressed to the EBA, the SRB and the ECB, and inquired about both their (potential) role in monitoring MSs' implementation of their EU obligations, and their own respective role in the EU's resolution regime more generally.

Some of the contributions, appropriately chosen on the basis of the diversity of the adopted organisational model, on whether or not the MS belonged to the SRM or, again, on the particular reasons that led to the choice of a specific model or that suggested its subsequent modification, were

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That separation should not prevent the resolution function from having access to any information available to the supervisory function".

previously discussed at two separate meetings held respectively at the Bank of Italy's Legal Department on 17 April 2023[9] and the University of Salzburg on 19 June 2023.[10]

All contributions were in any case the subject of regular discussions and exchanges of views between the editors and the authors. Lastly, a study day was held at the University of Salzburg in July 2023 on the lessons to be learned from the results of the research, which were then summarised in two *ad hoc* reports, one of a general character (reproduced at the end of the volume) and the other specifically dedicated to the French experience and reproduced in the section dedicated to that country in addition to the relevant contribution.

In the following, we highlight the main takeaways of the reports included in this study. However, it does not have the ambition to be exhaustive of the existing arrangements and practices, for which we refer the reader to the reports themselves.

2. Institutional arrangements

2.1. Institutional embodiment

Although the embodiment of the resolution functions within the National Central Banks (NCBs) has been found prevailing in the EU's MSs, resolution functions are less often conferred to NCBs than the supervisory ones. It is not clear whether this is potentially related to the prohibition of monetary financing applicable to NCBs, as the ECB's stance on that point changed over time, as further examined below.[11]

NCBs exercise the resolution function in 15 MSs, whereby those NCBs also act as NCAs in supervision, whereas NRAs exist as stand-alone institutions in 6 MSs. In the remaining 6 MSs, the supervisory authority exercises resolution function.[12] It is worth noting that in Poland it is the Bank Guarantee Fund which exercises the function of resolution authority, whereas in Sweden it is the National Debt Office.

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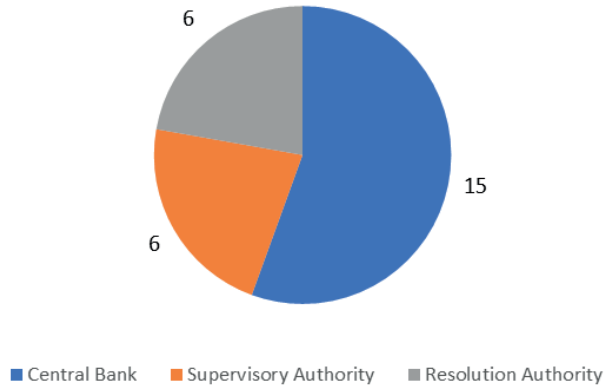
9 Selected cases: Croatia, Italy, Latvia and Portugal.

10 Selected cases: Autria, France, Greece, Malta and Spain.

11 The ECB adopted 24 opinions on national bank resolution frameworks established in 12 Member States prior to the adoption of the BRRD and expressed its stance on this matter in its opinion on the BRRD proposal (CON/2012/99) and on the SRM Regulation (CON/2013/76). It also examined this issue on several occasions post-BRRD as shown in the contribution on the ECB included in this collection.

12 This information is based on the national reports included in this study and on the list available on the *SRB's website*.



In some cases, 'special arrangements' exist. For instance, France's *Autorité de Contrôle Prudentiel et de Résolution* (ACPR) is 'leaning against' *Banque de France*. Moreover, within the ACPR there are two distinguishable decision-making bodies, one in charge of supervisory tasks, the other of resolution tasks. In Estonia, the NRA is formally part of the NCB, but it acts in the name of the State, has autonomous competence and a separate budget, and its decision-making bodies are separated from those of the NCB. In Slovakia, the Resolution Council is a stand-alone authority whose functioning (staff and operations) is enabled by the NCB. In other Member States, a division of responsibilities exists between two institutions in charge of going and gone concerns respectively. Such is currently the case in Denmark and Spain,[13] although a reform of the institutional set up has been envisaged in the latter case, and was the case of Croatia prior to 1 January 2021, where the CNB became the sole NRA.

Although it is perhaps too early to make a definite assessment only a decade after the creation of the EU's resolution regime, a tendency in favour of the centralization of resolution functions at the NCB appears to emerge despite the fact that the BRRD calls for the model of a resolution authority separate from other authorities.

Two MSs (Croatia and Latvia) recently opted for conferring resolution functions to their NCB. In Latvia, this meant going back to previous arrangements, whereas in Croatia this resulted from the conferral to the NCB of functions previously split between various institutions. Croatia's accession to the Banking Union was the trigger for this change which aims at fostering a swifter procedure and was inspired by institutional practice in other MSs.

[13] A collaboration agreement was entered into by the two authorities, the BdE and the FROB, to define the terms of their cooperation.

Article 3(6) BRRD demands that where the NRA is not the responsible ministry of finance, it be duly informed and asked for approval of certain decisions,[14] which comes as no surprise given the overriding public interests involved in resolution. A similar procedure was, in fact, established at the EU level where the European Commission has to endorse the SRB's decisions.

2.2. Reasons for creation or reform of NRAs

For what concerns specifically the reasons for the creation of NRAs, it comes as no surprise that, in most cases, it is the adoption of the BRRD that caused it.

In some MSs such as Belgium, the BRRD was even implemented before it was adopted at the EU level, while in some other (Portugal, Spain), the resolution function had to be adopted as a result of the crises those MSs suffered and may thus be viewed as a sort of external 'imposition'.

However, the fact that no resolution regime existed prior to the adoption of the BRRD does not mean that MSs did not have any administrative arrangements in place for banks in difficulties (those existed for instance in Belgium, in Estonia, in Italy, in the Netherlands, in Lithuania and in Romania).

Additionally, reforms have not been few since the adoption of the BRRD and its transposition in the MSs, but triggers have differed. On occasions, such as in Germany and in Latvia, internal factors were the cause of these changes, whereas in other cases (Bulgaria, Croatia) it is the accession to the Banking Union/Euro area, which demanded that adaptations be made.

Legal basis of the Authority designated as NRA	**Number of Member States**	**Member States**
Constitutional law[1]	5	AT, HR, CZ, HU, LT
Act of Parliament	20	BE, BG, CY, DK, EE, DE, EL, IE, IT, LV, LU, MT, NL, PL, PT, RO, SK, SI, ES, SE
Executive Decree ratified by an Act of Parliament	1	FR

1 This encompasses both constitutions and law of constitutional rank like in Austria.

2.3. Legal basis underpinning the NRAs

As regards the legal bases in which NRAs are anchored, some variety exists as shown by the below table and diagram.[15]

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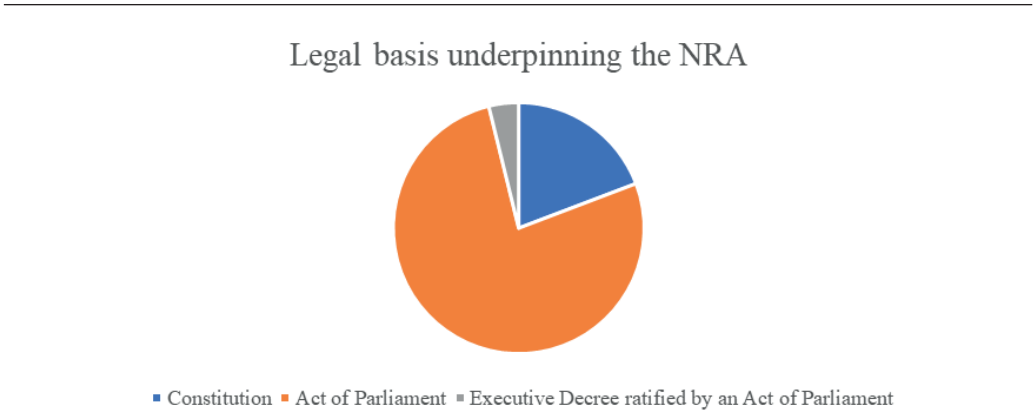
14 Interestingly enough, this obligation has been implemented in the form of a non-objection procedure in Belgium whereby the minister may oppose within 48 hours every decision he or she deems to have a direct fiscal impact or systemic implication.

15 See also n. 1 della tabella.

In most MSs, an Act of Parliament establishes the authority exercising the functions of NRA, albeit with varying specificities depending on the national legal context. For example, in Italy and in Ireland, an executive decree adopted



upon delegation by the legislature – called '*decreto legislativo*' in Italy and '*secondary legislation*' in Ireland – designates the NCB as NRA. The French ACPR is established by an '*ordonnance*', an act of the executive that must be subsequently ratified by an Act of Parliament. In several cases, such as Poland and Spain for example, the Act of Parliament establishing and organising the NRA leave it to the executive to adopt implementing measures to regulate further the resolution powers exercised by the NRA.

The authority assigned with the role of NRA is anchored in the Constitution or in norms of constitutional rank only in five cases. In four MSs (Croatia, Czech Republic, Hungary and Lithuania)), the Constitution establishes the NCB, and an Act of Parliament assigns to it the function of NRA. In Austria, the NRA is an authority separate from the NCB and is primarily organised by an Act of Parliament, but its independence is protected by a norm of constitutional rank.

As per the Article 3 BRRD, there must be arrangements in place to ensure an adequate separation of the resolution and supervision functions where those are assumed by one single authority. There are variations across MSs as regards the legal nature of such arrangements. In many MSs (such as Cyprus, Greece, Hungary for example), it is internal rules or rules of procedure adopted by the NRA that ensure the operational independence of its resolution functions from its other missions. But this is not the case in all MSs. In Belgium, for example, an act of the executive – a Royal Decree – guarantees the operational independence of the Resolution College organized within the NCB. In the Netherlands, the Act of Parliament organising and establishing the NCB directly guarantees the separation of its resolution function from its other missions. The German *Bundesanstalt für Finanzdienstleistungsaufsicht (BaFIN)* assumes both the tasks

of NCA and NRA. The separation of these two functions is enshrined in the BaFIN's rules of procedure by way of an Act of Parliament.

2.4. Separation of NCA and NRA functions

As noted, the BRRD prescribes that "*Member States may exceptionally provide for the resolution authority to be the competent authorities for supervision […]*" and that "*adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision […] or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive, without prejudice to the exchange of information and cooperation obligations […]*".

The reports included in this study confirm that, indeed, resolution functions have been attributed to separate organs with separate lines of management, sometimes as separate committees or colleges (France, Latvia, Malta, The Netherlands). On occasions, different vice-governors (or Council members) are in charge of the two functions (Croatia, France, Greece, Latvia, Lithuania, Romania, Slovenia).

This notwithstanding, the fact that the supervisory and the resolution functions are located in the same entity is sometimes viewed as problematic, like in Portugal, where reform proposals were made to separate them and avoid conflicts of interest.[16] Actually, in Portugal, it is even the same member of the board of directors who is responsible for both supervision and resolution, and a risk of conflict of interests appears to exist.

In Poland, issues of separation exist as well, although not between the NRA and the NCA, but rather between the NRA and the DGS. This is because the NRA function is assumed by the DGS.[17]

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[16] See Banco de Portugal, *White paper on the regulation and supervision of the financial system*, 2016, 141, § 200: "In light of the above, *two solutions* may be put forward for ensuring such *representation of the resolution function in that CNSF pillar*: • either through the chairman of a future separate national resolution authority, in case of adoption of a solution similar to the Spain one; • or through a representative of a new specific resolution council within Banco de Portugal, with more autonomy and institutional differentiation from the Bank – to be more specific, such representative should correspond to a member of such council not involved in the supervisory arm of the Bank; this, in case a solution similar to the one adopted in France is contemplated, this representative *should be included in the General Board of a restructured CNSF (as described infra, e.g. 203.),when this Council acts within its particular composition that should correspond to its second pillar of financial stability and macroprudential supervision*".

[17] Pending the finalisation of this introduction, by its judgment of 12 December 2024, in case C-118/23, delivered in response to a request for a preliminary ruling from the Regional Administrative Court of Warsaw, the ECJ addresses, among others, the question concerning the operational independence of the Polish NRA. More to the point, the Polish Court referred to the ECJ the issue concerning the potential conflict of interest stemming from the fact that the Polish Bank Guarantee Fund combines resolution functions with those of DGS and also performed functions as temporary administrator of a Polish credit institution prior to its failure, thus potentially putting at risk the operational independence required by Article 3(3) BRRD. Under the Court view, said Article 3(3) BRRD does not mean "that decisions relating to resolution functions and those relating to the other functions of that authority

2.5. *Appointment of the members of the organs in charge of resolution tasks and decision-making procedures*

The members of the organ in charge of resolution tasks are often appointed by the Executive, with or without the involvement of the parliament. On occasions, restrictions based on nationality exist (as is the case in Cyprus, Estonia, Lithuania, Poland). Generally, members are appointed on the ground of their expertise and possibilities of renewal of mandates are common. Removability is most often possible on grounds of serious misconduct, which contributes to guaranteeing personal independence. Mandates tend to be shorter where the NCB does not act as the NRA.

Decisions are largely made by simple majority of the responsible organ, although here, too, some exceptions exist, such as for example in Croatia where a two thirds majority of the members present at the meeting is required. In Poland there is the possibility to have dissenting opinions.

2.6. *Exchange of information*

Overall, the national reports reveal that the exchange of information between NCAs and NRAs operates rather efficiently. In Finland, these exchanges of information are regulated in the acts establishing the NRA and the NCA as well as in a memorandum of understanding.[18]

The Memorandum of Understanding between the ECB and the SRB allows those European authorities to share the information they exchange with the relevant NCAs and NRAs.[19]

Also, informal exchanges exist by virtue of the fact that some members of the organs in charge of resolution are also members of the organs in charge of supervision. Such is, for instance, the case in Belgium or France. In Lithuania, regular meetings as well as common workshops bringing together representatives from the supervisory and the resolution departments exist.

Despite these overall positive practices, some improvements are sometimes necessary. For example, in Belgium, when dealing with a significant institution, the information flow between the Resolution College and the prudential supervisor will transit via the ECB and the SRB.

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must be made by different decision-making bodies, or that internal functional areas of the same authority are prevented from providing support services both to staff assigned to resolution functions and to staff assigned to other functions, without prejudice to rules on professional secrecy".

18 Act on Financial Stability Authority (*Laki rahoitusvakausviranomaisesta*) (2014); Act on Financial Supervisory Authority (*Laki Finanssivalvonnasta*) (2008); Memorandum of understanding between the FIN-FSA and the FFSA (*Finanssivalvonnan ja rahoitusvakausviraston v.linen yhteistoiminta-asiakirja*) (2021).

19 Recital (10), *Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange*.

2.7. Management of Resolution Fund and Deposit Guarantee Scheme

It is not uncommon for the NRA to be also responsible for managing the Resolution Fund and the Deposit Guarantee Schemes (DGS). Such is the case in Denmark, Finland and Ireland. But practices vary from MS to MS. For example, in Lithuania, it is a separate state-owned company called "Deposit and Investment Insurance" that is responsible for the administration of the resolution fund and the DGS. In Romania, the Resolution Fund is administrated by Bank Deposit Guarantee Fund. In Luxembourg, the resolution fund is placed under the supervision of the Ministry of Finance while the DGS is a separate public body managed by an internal executive body within the NRA.

In Poland, as already mentioned, there is even no formal separation between the NRA and the DGS, such that the compatibility of the existing system with Article 3 BRRD may be questioned under this specific respect.[20]

In Luxembourg, the Fund is a public establishment with legal personality placed under the supervision of the Ministry of Finance. Interestingly enough, in Hungary, while this MS is not part of the Banking Union, an agreement was concluded for the transfer of the funds from its Resolution Fund to the Single Resolution Fund, in order "to achieve the establishment of an integrated financial framework in the European Union of which the Banking Union is a fundamental part".[21]

3. Independence

3.1. In general

The Key Attribute No 2.5. stipulates that "*the resolution authority should have operational independence consistent with its statutory responsibilities, … sound governance and adequate resources…*" and that "*it should have the expertise, resources and the operational capacity to implement resolution measures with respect to large and complex firms*".

A general requirement of independence is not provided for under the BRRD, although recital 15 links the compliance with the requirement of independence from industry to the public nature of the resolution authority.[22] As already noted, it is not surprising, however, that the BRRD does not expressly provide

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[20] The polish NCA is in fact a separated and independent public body so that in this respect Article 3 of BRRD is complied with.

[21] Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, *Preamble*, 2.

[22] See recital 15 BRRD: "*In order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform the functions and tasks in relation to resolution pursuant to this Directive. Member States should ensure that appropriate resources are allocated to those resolution authorities…*".

for independence from national governments, due to the strong public interests involved in bank crisis management.

Rather, the BRRD is concerned with the need to ensure the independence of resolution functions with respect to other functions that may be exercised by the authority vested with such powers, on the assumption that the latter may also be an NCB or an NCA.

In light of the above, Article 3 of BRRD establishes a twofold set of requirements that must be observed when assessing the options available when defining the administrative set-up of the resolution function: (i) close coordination and functional interaction between supervision and resolution; and (ii) operational independence and avoidance of conflicts of interest between the supervisory and other functions on the one hand and the resolution ones on the other.

A further step seems to have been taken by the SRMR, where it provides that (Article 47(1)) "*When performing the tasks conferred on them*" by the said regulation, the SRB and the national resolution authorities "*act in full independence and in the general interest*". However, it should be noted that only the Union representatives of the SRB are bound to the pursuit of the Union interest (Article 47(2) SRMR), but not the national ones, marking a relevant difference with respect to what is provided for all the members of the ECB's Supervisory Board by Article 19(1) SSMR, probably due to the greater national relevance of bank resolution if compared to bank supervision.[23]

Independence is mostly guaranteed by law, although it is questionable in a few cases, as highlighted below.

3.2. Functional independence

Functional independence is guaranteed – as mentioned above – by the public nature of the resolution authority or by the fact that a separate responsible organ is in charge of resolution tasks within an NCA or an NCB.

The involvement of the government is justified on the strong public interests involved in bank crisis management. Moreover, in light of Article 3(6) BRRD "*where the resolution authority in a Member State is not the competent ministry it shall inform the competent ministry of the decisions pursuant to this Directive and, unless otherwise laid down in national law, have its approval before implementing decisions that have a direct fiscal impact or systemic implications*".

The preventive involvement of Courts may be required in some cases (e.g. Ireland), as is further examined in the relevant report. A question here arises as to

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[23] M. Di Pietropaolo, *Meccanismo di Risoluzione Unico*, in *Enciclopedia del Diritto*, *Annali IX* (Giuffrè 2016), 556 ff.

whether such involvement may also apply to the NRA's decisions implementing SRB's resolution schemes, which should be excluded in light of the CJEU's doctrine in the *Iccrea* case.[24]

3.3. Personal independence

Personal independence is ensured through guarantees against removability, and on occasion, ethical duties (France). The issue of personal independence has raised some controversy in Romania. The Board members and staff of the Romanian NCB (NRA) do not qualify as public officials under Romanian law and their employment is, in principle, subject to the common labour law. The NCB Statute does not provide explicit derogations from common labour law to guarantee the personal independence of the NCB's staff and board members. On several occasions, the Romanian NCB had to issue legal opinions to clarify that EU law and Romanian law protects its staff autonomy and to ensure that labour legislation would not be applied to it in ways that would impede its personal independence.

3.4. Financial independence

NRAs are predominantly financed by fees paid by credit institutions. Sometimes, there is also a contribution from the federal budget (Austria) or the NCB budget (France). In Poland, it is mainly the investment profits from previous years, which finance the Bank Guarantee Fund, which acts as NRA.

NRAs may have their own separate budget as is the case in France, in Estonia or in Luxembourg. In the Netherlands, two separate budgets exist at the NCB: one for monetary policy-related tasks, and one for other tasks including resolution.

3.5. Specific issues related to the SRM

Within the SRM some specific questions arise.

(i) A first one pertains to the relationship between the requirement of operational independence and avoidance of conflicts of interest between the supervisory and other functions on the one hand and the resolution ones on the other, laid down in Article 3 of BRRD, and provided for under Article 47 SRMR. Under this respect the role of the SRB as the authority responsible for the proper functioning of the SRM (Article 7(1) of the SRMR) has to be taken into account.

It is, in fact, clear that the independence of the resolution authority cannot disregard, in the event of its embedding in an NCA or in an NCB, the

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[24] Case C-414/18, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia* ("Iccrea"), EU:C:2019:1036.

verification of the compliance with organisational and functional separation of the resolution tasks from the supervisory or monetary policy ones, since the joint exercise of these tasks could compromise the independent exercise of the former.

More to the point the question is whether the SRB, by the fact of being "*responsible for the effective and consistent functioning of the SRM*" (Article 7(1) SRMR) can ask the NRAs to comply with the principle of operational separation, with a view of ensuring their independence when the latter are incardinated in an NCB or an NCA.

In other words, the issue is whether there is a margin of discretion for the SRB in this regard, in order to ensure the proper functioning of the SRM, or whether it should not instead be considered, as it seems preferable, to be a matter left to the MSs, under the general control of the Commission, in its capacity as guardian of the Treaties and of its implementing role of the Union's secondary legislation.

In fact, the SRB has so far acted very cautiously, because it has limited itself to requiring, in its code of ethics,[25] the national representatives within it to undertake to respect of the operational independence set out in Article 3 BRRD.[26]

(ii) A second question concerns the subjection of the NRAs to forms of coordination under the SRB, which might, at first sight, appear to be in conflict with the protection of the independence of the NRAs, particularly where guaranteed by constitutional provisions.[27]

It is, however, a spurious issue. The reason is twofold. First because the rationale of the rule guaranteeing the independence of the NRAs is to remove them from the interference of the industry and is, therefore, compatible with forms of technical coordination aimed at ensuring the consistency of the supervisory action within a mechanism not by chance described by the Union legislature as 'single'. Second because such forms of coordination are provided for, precisely, by Union law, which prevails over any conflicting national law, even if of constitutional level.

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25 RB Decision of 24 June 2020 adopting the SRB Code of Ethics (SRB/PS/2020/16).

26 Indeed, Article 3 of the Code, entitled "Separation of the resolution function from other functions of the relevant authorities", provides that "in the performance of their tasks, Members of the Board and their alternates shall take into account the objectives set by Regulation (EU) No 806/2014 and perform their tasks respecting the operational independence and the avoidance of conflicts of interest between any other functions of the relevant authorities and the functions of the NRAs in accordance with Article 3(3) of Directive (EU) 2014/59/EU".

27 This is the case with the constitutional provision in § 1(1) of the Austrian *Bundesgesetz über die Errichtung und Organisation der Finanzmarktaufsichtsbehörde (Finanzmarktaufsichtsbehördengesetz* - FMABG), according to which the the *Finanzmarktaufsichtsbehörde* (FMA), which is both a supervisory and a resolution authority, "*ist in Ausübung ihres Amtes an keine Weisungen gebunden*".

4. Accountability

4.1. A priori accountability

Both the Key attributes (No 2.3) and the European and national legislators identify the purposes of resolution, which can be regarded as form of a priori accountability.

The BRRD, in its Article 31, identifies the purposes of resolution in the protection of banks' essential functions, financial stability, the safeguarding of public funds, and the protection of depositors, funds and clients' assets. Article 14 SRMR, in turn, follows said Article 31 BRRD. Although it does not indicate any hierarchy among the resolution objectives, the entire SRMR finds its ultimate *rationale* in financial stability concerns.

4.2. Accountability mechanisms

Besides the requirement of independence, Key Attributes No 2.5 prescribes that "*the resolution authority should have… transparent processes… and be subject to rigorous evaluation and accountability mechanisms to assess the effectiveness of any resolution measures*", which will be described in the following paragraphs as regards the EU context.

4.3. Democratic accountability

Democratic accountability mechanisms may exist both *ex ante* and *ex post*.

Ex ante democratic accountability may take the form of parliaments' involvement in or the nomination of (some of) the members in charge (for instance: Croatia, Latvia, Romania, Slovakia, Slovenia).

Ex post democratic accountability mechanisms include the presentation of reports, the (possible) submission to hearings (ex: Austria, Bulgaria, Belgium, Croatia, Estonia, France, Italy, Luxembourg, Poland, Spain (FROB), Sweden), parliamentary enquiries (ex: France, Latvia, Portugal), and parliamentary questions (Latvia). Informal mechanisms in the form of 'round table conversations' (Netherlands) exist as well.

Accountability may also be indirect. In Austria and Germany, the BaFin and the FMA are under functional authority of ministry (Germany) or supervised by it (Austria). The minister is, in turn, accountable to parliament. Following the *Wirecard* scandal, the German government's role however shifted from legal supervision to the monitoring of target achievement.

In Poland, the government (the Minister of Finance) controls the Deposit Guarantee Fund (the NRA), which is still an independent agency; in fact, its institutional connection to the Minister of Finance is generally tight. The government, in turn, is accountable to parliament. This control is exercised by

the faculty the Minister of Finance enjoys to appoint the majority of the members of the NRA's Supervisory Council, and its casting vote in that procedure.

Accountability may also be towards the government. Such is, for instance, the case in the Netherlands, where the minister of finance is still responsible for the fulfilment of the supervisory and resolution tasks assigned to the NCB. As such s/he carries out a remote supervision of the NCB and sends every five years a report to parliament on the NCB's supervisory and resolution functions. However, s/he cannot give instructions to the NCB, nor can s/he annul any of its decisions. Similarly, the Finish NRA operates within the administrative scope of the ministry of finance, which remains responsible for the control of its activities. In Spain and in Ireland, the NRA must submit periodically a report on their activities to the government, which must, in turn, pass this report on to parliament. The government may be in charge of approving the yearly financial account, like in Luxembourg.

In France, the accountability system is dual: the ACPR is accountable towards the President of the Republic and towards parliament. The president of ACPR must submit a yearly report to both instances. Besides this yearly reporting, parliament may hear the ACPR president so that s/he can report on the NRA's activities and expenditures. The ACPR may also be investigated as part of parliamentary inquiries. Moreover, since a government representative is involved in the Resolution Board of the ACPR, its relationship to the government is tight.

4.4. Administrative accountability

In some cases, administrative accountability is guaranteed by the court of auditors (for instance, Austria, Estonia, Latvia, Luxembourg, The Netherlands, Portugal, Spain (FROB)). Limitations may be specified, as the Estonian State Audit Office may not review resolution decisions while the Romanian Court of Auditors may only review the management of the NCB (NRA) resources. In other cases, NRAs' actions are actually excluded from the scope of competence of the Court of auditors (ex: Bulgaria, Poland whereby such exclusion is in place because these NRAs does not use state or local government assets, or funds in the latter case). Also, an Internal Audit unit or Council internal to the NRA may contribute to administrative accountability (Austria, Bulgaria, Portugal, whereby the NCB (NRA) may also establish *ad hoc* internal audit commissions in Portugal), and audits by external auditors may take place as well (Poland).

4.5. Judicial accountability

Overall, (administrative) courts are in charge of guaranteeing judicial accountability. General procedures may have been adapted as regards resolution: in the Netherlands, for instance, special rules exist according to which the timeline is significantly shortened. The EU's resolution regime's complexity combined with the national rules applicable to administrative procedures could prove

challenging in some instances. For instance, in Croatia a one-month deadline exists within which the NRA's (i.e. the NCB's) decision implementing an SRB decision should be appealed.

On the other hand, the NCB itself may be called to act as an instance of administrative appeal (Czech Republic, Latvia where this first internal appeal is mandatory), or an independent appeal body may be provided (Denmark).

4.6. Specific issues related to the SRM

Some specific problems arise again with regard to the SRM.

(i) First of all, the division of tasks and powers within the SRM has an impact on the distribution of accountability obligations, in particular vis-à-vis national parliaments. This is, of course, taken into account in the SRM founding regulation, which devotes an ad hoc rule to it, namely Article 46.

In the context of the SRM, accountability obligations are fulfilled, as a rule, at the level where resolution decisions are taken. But, like it is the case within the SSM, the SRB is accountable not only to the political institutions of the Union, but also to the national parliaments.[28]

The accountability of the SRB vis-à-vis the national parliaments is without prejudice to the accountability of the NRAs for the performance of the resolution tasks not entrusted to the SRB and for the performance of the activities carried out by them under Article 7(3) SRMR (Article 46 SRMR).

The provision is indeed not crystal clear. One possible reading is that the NRAs are responsible to national parliaments, not only for resolution tasks concerning less significant credit institutions, but also for tasks outside the scope of the SRM, but closely related to it.[29]

(ii) A further problem in the SRM area arises with regard to the possible extension of the ECA's audit of the NRAs' implementation of the SRB's resolution decisions, as it impacts on the efficiency of the SRB's action. Such an audit is, however, to be excluded, due to the lack of legal basis, since the ECA's powers are limited to the institutions and bodies of the Union. However, the ECA retains

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[28] According to the BVerfG judgment of 30 July 2019, due to the accountability obligations explained in the text, the SRMR does not affect the German constitutional identity protected by Article 20(1) and (2) in conjunction with Article 79(3) GG. See general on this issue: D. Fromage, R. Ibrido, *Accountability and Democratic Oversight in the European Banking Union*, in G. lo Schiavo (ed), *The European Banking Union and the role of law* (Edward Elgar, 2019), 66-86.

[29] An example would be the Banca d'Italia's decision to propose to the Ministry of Economy and Finance to submit a significant bank to compulsory liquidation under national law, following the ECB's FOLTF declaration and the SRB's declaration that the public interest for the purposes of Article 18 SRMR does not exist (M. Cossa, R. D'Ambrosio, A. Vignini, *Allocation of tasks and powers between the SRB and the NRAs and organisational issues*, in R. D'Ambrosio (ed), *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, Quaderni di ricerca giuridica della Consulenza Legale della Banca d'Italia, No. 88, April 2020, 328).

the power to request from the SRB any information useful for the performance of its tasks, including information concerning the national implementation phase of the SRB decisions, which the latter may, in turn, request from the NRAs, using its powers under Article 28 SRMR.

(iii) Last but not least, an issue arises with regard to the accountability of NRAs partaking in the SRM towards the EBA.

Indeed, it is worth noting that the NRAs are bound togheter with the SRB by the soft law instruments adopted by the EBA. This clearly poses a problem of coordination of roles within the SRM. More to the point, the SRB is subject, under Article 5(2) SRM, to the guidelines and recommendations of the EBA, a rule which also applies to the NRAs by virtue of Article 7(3), fourth sub-paragraph, of the same regulation.[30] The same Article 7(3), fifth sub-paragraph, then clarifies that the NRAs shall inform the SRB "*about the measures referred to in this paragraph to be taken and shall coordinate closely with the Committee when adopting such measures*".

This implies, at the very least, an obligation for the NRAs to coordinate with the SRB also for the implementation of EBA recommendations and guidelines that have an impact on the exercise of the resolution tasks and powers. The general rule in Article 31(1), second sub-paragraph (a), of the SRMR can also be invoked, according to which the SRB "*issues guidelines and general instructions to the NRAs, which carry out the tasks and take the resolution decisions in accordance with them*".

5. Liability

The liability rules of the NRAs can be regarded as forms of judicial accountability, while the limits that some jurisdictions place on their scope turn them into instruments to ensure the NRAs' independence.

The link between limitation of liability and safeguarding of independence is apparent, for resolution authorities, from *Key Attribute* No 2.6 (which, not by chance, immediately follows *Key Attribute* No 2.5, expressly devoted to independence).

Limitations of liability are, not by chance, permitted by Article 3(12) BRRD, according to which "*Member States may limit the liability of the resolution authority, the competent authority and their staff in accordance with national law for acts and omissions committed in the exercise of their functions under this directive*". The provision concerns, therefore, both resolution authorities and supervisors, limited, the latter, to the supervisory tasks provided for by the BRRD, basically those of early intervention.

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[30] Admittedly redundant provision, since the NRAs are already included among the competent authorities under the EBA Reg.

Limitations of liability are provided for in various national laws, both for supervisory authorities and for the resolution ones. These limitations vary from the complete exemption of liability towards savers (this is the case in Germany and in the legal systems that refer to the German model, in application of the so-called *Schutznormtheorie*), to liability only for wilful misconduct (*common law* systems) or to liability for wilful misconduct and gross negligence (France in application of the *Conseil d'Etat* jurisprudence and French-inspired regulatory models).

Limitations on liability may be foreseen for all functions exercised by the NCBs/NCAs including the resolution ones or for the NRAs as separated authorities and may apply to the members and staff of the authorities. In other cases there may be (*de facto*) no restriction of liability. In Spain, there is formally no restriction due to constitutional constraints, but under certain circumstances following an established case law the damage cannot be considered unlawful.

On these regimes, the SRMR, which does not lay down rules concerning the liability of national authorities, has only an indirect effect, related to the distribution of powers between EU and national authorities. Indeed, under Article 87(4) SRM, the SRB holds the NRA harmless, if and to the extent that the NRA has complied with its instructions in carrying out the resolution decisions.[31]

6. The role played by EU institutions and bodies: EBA, SRB and ECB

A special section of this study is devoted to the role played by the EBA, the SRB and the ECB, either because they might have been affected by the establishment of the SRM, or because they might play a role in the monitoring of the provision under Article 3 BRRD.

Whereas the SRB's role in the implementation of Article 3 BRRD is limited, the EBA has the obligation to foster and monitor the independence of the national

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[31] Under Article 87(4) SRMR, "*the Board shall compensate a national resolution authority for the damages which it has been ordered to pay by a national court, or which it has, in agreement with the Board, undertaken to pay pursuant to an amicable settlement, which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under this Regulation of entities and groups referred to in Article 7(2), and of entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met or pursuant to the second subparagraph of Article 7(3). That obligation shall not apply where that act or omission constituted an infringement of this Regulation, of another provision of Union law, of a decision of the Board, of the Council, or of the Commission, committed intentionally or with manifest and serious error of judgement*". National laws do not dictate ad hoc rules for such specific cases. An exception is Austrian law, in which the Federation's liability for the activities of the Finanzmarktaufsichtsbehörde (FMA) and the Oesterreichische Nationalbank (OeCB), in its capacity as both supervisory authority and resolution authority, is excluded if the latter carries out in addition to carrying out an enforcement activity of the instructions of the Union authority (a situation which already falls under the aforementioned principles developed by the CJEU), also a preparatory activity of the decisions taken by the latter or merely cooperates with them (see, with regard to the Austrian FMA/OeCB, the limitations of liability contained in Articles 3(6) and (7) FMBAG and 79(7) and (8) BWG).

authorities encompassed within its field of action (including the NRAs) in order to ensure a level playing field across the EU27. However, the very existence of the SRB, as well as its governance which is very heavily reliant on NRAs, arguably call for stronger requirements to be imposed on the MSs partaking in the Banking Union.

As already noted, the SRB hence has not developed any guidelines, even though the principle of separation of functions is sometimes mentioned in SRB documents, such as the Interinstitutional Agreement with the European Parliament on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism,[32] later reflected in the SRB code of conduct.

Level 1 legislation leaves a wide margin of discretion to the MSs, and the EBA monitors their institutional framework.

The ECB's role has been in turn mainly focused on the compliance with the monetary financing prohibition. It comes as no surprise that where the resolution authority is an NCB, a problem of monetary financing prohibition may arise (Article 123 TFEU), as underlined in some opinions of the ECB.

Indeed, the ECB opinion 21.1.2015, CON/2015/2, § 3.3, stated that "*Resolution in the financial market is neither a Eurosystem related task, nor a traditional central banking task. Rather, it is a Government task and, as such, it is performed in the interest of the […] State. Therefore, if the [NCB] is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition*".

In the same vein, the ECB Opinion 21.1.2015, CON/2015/3, § 2.3, underlined that "*The new task entrusted to NBS under the draft law is neither an ESCB-related task, nor a traditional central banking task. Rather, the new task is linked to a task for government, i.e. resolution in the financial market. Therefore, if NBS is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition*".

However, under the assumption that resolution tasks contribute to ensure financial stability (Article 127(5) TFEU), the ECB has subsequently changed its view as one may read in the opinion 1.7.2015, CON/2015/22, § 2.3.2, stating as follows: "*resolution tasks discharged by central banks are considered central banking tasks provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks*".[33]

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32 See litt. O) of the preamble and point IV of the Agreement.

33 The same conclusions are presented by ECB's Opinions 20.7.2015, CON/2015/25, § 2.5 and 2.9.2015, CON/2015/33, § 2.2.2.

This Court of Justice's ruling in *Banka Slovenije* of 2023 has altered the ways in which the ECB assesses the compliance of national resolution frameworks with the Treaties' requirements.[34] In that case, the Court examined for the first time the conditions under which NCBs may be liable for fulfilling resolution functions in line with the requirements of the prohibition of monetary financing (Article 123 TFEU) and the principle of central bank independence (Article 130 TFEU). According to the Court, under Article 123 TFEU, an NCB may be held financially liable under national law for the execution of the resolution function assigned to it, but, "*in view of the high degree of complexity and urgency*" characterising the resolution function, its liability must be limited to breaches "*of a serious nature*" of its duty of care.[35] This is so, the Court found, because there are financial uncertainties inherent in any bank resolution. Those uncertainties derive from the economic policy choices of the public authorities that designed the resolution framework and assigned its implementation to the NCB. If the NCB could be found liable for a mere breach of its duty of care, it would, in effect, be responsible, instead of those public authorities, for the financing of a public sector's obligation, in breach of the prohibition of monetary financing.[36]

The Court also found that, under Article 130 TFEU, the national law, while establishing the NCB's liability regime for its resolution function, cannot put it in a position in which its ability to carry out its monetary policy mission independently is constrained. In particular, central bank financial independence would be compromised if, to cover the compensation costs for third parties damaged by a resolution action, the national law imposed "*a levy on the general reserves of* [the] *national central bank, in an amount likely to affect its ability to carry out its tasks effectively under the ESCB, combined with an inability to restore those reserves independently, because all its profits are systematically allocated to reimbursement of damage which it has caused*". The NCB's finances would be put under such stress that it may potentially run out of the necessary funds to carry out its monetary policy mission and may, as a result, depend on additional funding from political authorities.[37] A liability regime such as the one described would, nonetheless, not breach Article 130 TFEU if the Member State concerned ensured in advance that that central bank would have the funds necessary to be able to pay the compensation resulting from the liability regime, while retaining its ability to carry out its tasks falling within the scope of the ESCB effectively and completely independently.[38]

Opinion CON/2023/17 published post-*Banka Slovejine* shows that the ECB has adjusted its reading of Articles 123 and 130 TFEU to account for the Court's judgement, first and foremost by abandoning its well-established doctrine according to which, as a general rule, tasks conferred by Member States to NCBs

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34 Case C 45/21, *Banka Slovenije v. Državni zbor Republike Slovenije*, EU:C:2022:670.

35 *Ibidem*, para. 79.

36 *Ibidem,* para. 75.

37 *Ibidem,* paras. 101-103.

38 *Ibidem,* para. 105.

are to be distinguished between "*central banking tasks*" and "*Government tasks*", the latter being incompatible with Article 123 TFEU unless specific arrangements are in place to put the financial burden stemming from the exercise of those tasks on the Government rather than on the NCB.

In the pre-cited opinion, the ECB argued, rather, that the liability of NCBs should be restricted to serious breaches of their duty of care when they are designated as the authority responsible for the resolution of central clearing counterparties (CCPs). Furthermore, Member States, the ECB found, should also put in place "*adequate mechanisms*" in order to ensure that, in the remote scenario in which a CCP fails and resolution actions are taken by the NCB by seriously breaching its duty of care, the costs of compensating third parties damaged by those action the NCB is not precluded from building up adequate financial resources in the form of reserves or buffers so at to be able to fulfil its monetary policy independently.[39] A similar stance was held by the ECB in its Opinion CON/2024/31 on CCP resolution functions being conferred upon the Portuguese NCB. Going forward, those findings of the ECB as regards CCP resolution should in principle extend, *mutatis mutandis,* to bank resolution and beyond.

It can be noted that the ECB's stance appears to go beyond the *Banka Slovenije* ruling. Indeed, in the latter, the Court of Justice prescribed that Member States must ensure in advance that the NCB would have the funds necessary to be able to pay the compensation resulting from the liability regime concerning their resolution function, on the explicitly stated condition that that liability regime actually precluded that NCB from building up adequate financial resources to carry out its ESCB tasks, as was the case of Banka Slovenije.[40] The ECB clearly expanded that condition, considering that, in its view, even the extremely remote (and almost only hypothetical) risk of losses for the NCB[41] would require that the Member State put in place the above recalled "*adequate mechanisms*" (the specific meaning of which is, by the way, unclear).

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39 See CON/2023/17, § 2.2.4.

40 See Banka Slovenije, paras. 105 and 106. Under the Slovenian law under the CJEU's review, Banka Slovenije was legally required to use its general and special reserves and even its future profits to pay the compensation resulting from its (very wide and, in a part, objective) liability for its resolution function. The national law went so far as to impose on Banka Slovenije the obligation to seek financing from other public authorities to pay that compensation, if the other resources were to be found insufficient.

41 See ECB Opinion CON/2023/17: "[T]*he possibility cannot be entirely excluded that extreme and exceptional situations might arise at some point in the future and result in the exposure of the NBB to such liability. In this respect, a significant amount of the financial risk of the Union financial system is processed by and concentrated in central counterparties on behalf of clearing members and their clients19.The possibility cannot be entirely excluded that the NBB's exercise of its function as a resolution authority of central counterparties might lead to substantial losses and that the magnitude of such losses might constrain the NBB's ability to build up adequate financial resources to carry out its ESCB tasks*".

As happens at the national level, information exchanges also takes place at the EU level between supervisory (ECB) and resolution authorities (SRB) thanks to an ad hoc Memorandum of Understanding.

Although Article 30(7) SRMR stipulates that the SRB shall conclude an MoU with the ECB, the NCAs and the NRAs describing how they will cooperate in the exercise of their respective responsibilities (particularly in resolution planning, early intervention and resolution phases), up until now a MoU has been concluded only between the ECB and the SRB.

The MoU is aimed at avoiding an unnecessary increase in the reporting burden of the institutions, as clearly laid down under its recital 8: "*the ECB and the SRB should collaborate to avoid an unnecessary increase in the reporting burden of the institutions. Any duplication in the collection of data should be avoided. Therefore, the SRB may require institutions to provide all information necessary for the performance of its tasks after making full use of all the information available to the ECB or to National Competent Authorities. For example, the SRB should be able to obtain, including on a continuous basis, any information necessary for the exercise of its functions, in particular information on capital, liquidity, assets and liabilities*".

Information exchange happens on an automatic basis, as well as through a simplified procedure triggered by a simple request in as far as the request falls within pre-established categories, or via a standard request procedure where that is not the case. Coordination and information sharing naturally also happens between the SRB and NRAs (as well as other relevant authorities including the Council, the European Commission, the NCAs etc), between the SRB and the EBA as well as between the ECB and the ECB.

Based on the assumption that within the SSM and the SRM there is no need of additional MoUs, Recital 10 of said MoU provides that "*this MoU does not prevent the exchange of information within the SSM and SRM. Information received from the SRB by the ECB can be shared with the national competent authorities involved in the respective joint supervisory team and information received from the ECB by the SRB can be shared with the national resolution authorities involved in the respective internal resolution team*".

However, this very possibility tends to disintermediate the national authorities, which are also entitled under their respective national laws to exchange information necessary for the exercise of their respective functions.

Another aspect worth mentioning pertains to the internal organization of the EBA.

Indeed, the European Commission has suggested to consider whether the EBA's resolution and the prudential competences should not be more strictly separated within the EBA governance arrangements. However, one may object that such a further separation mirrors issues visible in a minority of MSs and does not appropriately consider that the situation differs because the EBA is neither

the prudential supervisor nor the resolution authority at the EU level but rather a quasi-regulatory one.

7. Conclusions

The present study allows to draw a series of conclusions with regard to MSs' institutional framework for resolution, whilst it also allows evaluating the existing EU legal requirements in this regard. It also sheds light on the EU's institutional framework, and the role of the EBA, the SRB and the ECB in monitoring national institutional frameworks (or the absence thereof). No clear distinction between Banking Union and non-Banking Union MSs is visible. This does not, however, mean that the introduction of the SRM (and the SSM) have not had any impact on non-Banking Union Member States.

The present study also underlines the existence of various types or categories of NRAs within MSs, as recalled above. Although NRAs may seem similar where they have, for instance, been established at the NCBs, and although some common features naturally exist, only a reading of the individual contributions can do justice to the variety visible across the EU27.

A further conclusion of the present study is that the separation between the NCA and the NRA strongly called for by the BRRD is, in practice, the exception rather than the rule. Actually, a concentration of functions of EU financial authorities may be observed, as also evidenced by the 2021 EBA's study on the supervisory independence of competent authorities.[42]

Perhaps this concentration is to be welcomed to some extent, at least for the EBA, as fragmentation among the various types of NCAs and NRAs involved within the EBA (competent in the areas of supervision and resolution, but also DGS, consumer protection and Anti-Money Laundering and Counterfeiting Terrorism) may have an impact on the efficiency and the effectiveness of distribution of input and information for the authorities that are not duly represented at the level of the Board of Supervisors.[43]

It is to be noted that arrangements to ensure functional separation between supervisory and resolution functions are largely in place. They could perhaps be viewed as too strict, unduly complex or costly on occasions.

In any event, the question of the adequacy of the EU requirements on the preferred institutional separation between the NRA and the NCA in place must be raised. It is indeed most probable that since most MSs did not opt for the strict

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42 *EBA report on supervisory independence of competent authorities*.

43 Under Article 40(6), second subparagraph, "For the purpose of acting within the scope of Directive 2014/59/EU, the member of the Board of Supervisors referred to in point (b) of paragraph 1 may, *where appropriate*, be accompanied by a representative from the resolution authority in each Member State, who shall be non-voting".

separation called for by the BRRD, it is rather the EU favoured institutional set up that is not adequate rather than the one most MSs have opted for.

This also begs the question of the adequacy or the necessity of the strict separation of functions *per se*. It was originally introduced to prevent conflicts of interest, but is it really necessary in view of the strong intertwinement between the supervision and the resolution functions?

One element that arguably must be taken into account in this regard is the fact that the required level of independence from political authorities varies between supervisory and resolution functions: while supervision requires independence from political actors, resolution demands the close involvement of governments, as also acknowledged by the BRRD itself (recitals 16[44]).

Hence, one needs to reconcile the need for close cooperation between NCAs and NRAs where NCAs and NRAs have different requirements of independence. This situation is further complicated where it is the NCB that is also the NCA and the NRA because of the additional layer of EU requirements regarding NCBs, and because of the complexity this engenders.

It is also interesting to see that existing limited liability regimes sometimes diverge depending on the different functions exercised by the unique authority charged with supervisory, early intervention and resolution tasks (Austria), which may have an impact on the choice of said authority in selecting the solution to be followed in a specific case.

It is also interesting to note that EU institutions and bodies' possibility to check and influence NRAs' institutional set up is limited.

One is here arguably yet again confronted with one limitation of the EU's legal framework whereby for instance the SRB needs NRAs' institutional frameworks to be adequate but does not have the power to launch an infringement procedure where this is not the case and, instead, depends on the Commission in this regard.

The ECB's position is arguably slightly different because it is consulted with regard all the national draft legislation impinging in its field of action (at least where an NCB assumes supervisory or resolution functions), and it may launch infringement proceedings against a NCB should the exercise of the resolution functions by that NCB threaten the NCB's capacity to fulfil its Eurosystem tasks (Article 35.6 ESCB Statute).

This situation is arguably unsatisfactory for a variety of reasons. As shown, some dependence on external actors exists within the EU. Perhaps the leeway left to the MSs in the choice of their institutional set ups could be more limited, as

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44 In light of the consequences that the failure of an institution may have on the financial system and the economy of a Member State as well as the possible need to use public funds to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of crisis management and resolution.

criteria regarding for instance accountability and liability could, too, have been included at the EU level without encroaching upon MSs' constitutional identity. Considering that resolution authorities are largely anchored in ordinary law, it might be feasible for some of these issues to be remedied, a step that should arguably be taken at the very least for Banking Union NRAs in view of the considerable role they play within the SRM (i.e. their membership in the SRB, and the execution of its decisions).

As regards the division of competences and cooperation between the EU supervisory and resolution authorities, one cannot fail to notice that two authorities of different institutional standing, competences and means to influence exist (the ECB and the SRB). The EBA too plays an important role, which further complicates the institutional framework in place. This separation of roles between said authorities stands in contrast (although agreements exist to guarantee the smooth and efficient exchange of information) to the organisational arrangements in place in the majority of MSs where, as a rule, supervisory and resolution functions (often including the regulatory ones) are exercised by the same authority.

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We are grateful to all the authors of the reports for their making this comparative study possible.

PART I.

Countries reports

Austria

Paul Weismann

1. Introduction

As a member of the Eurozone, Austria has been part of the Banking Union ever since its initiation with the establishment of the Single Supervisory Mechanism. At the national level, the main banking supervisor in this country is the Financial Market Authority (FMA). Apart from that, also the Austrian National Bank (OeNB) and the Federal Minister/Ministry of Finance (BMF) are involved in banking supervision. When the implementation of the Bank Recovery and Resolution Directive[1] (BRRD) was due, the Austrian legislator decided not to create one or more new authorities, but to lay the resolution tasks in the hands of the bodies already in place in the field of banking supervision. Thus, the FMA also has become the main (national) resolution authority in Austria, with specific competences being delegated to the OeNB and the BMF.

By January 2023, the FMA was in charge of resolution planning for 345 banks. 10 banking groups in Austria, as significant institutions/groups, fell within the main competence of the SRB,[2] with the FMA and also the OeNB supporting it. From among the banks for which the FMA has direct responsibility, in a Failing-Or-Likely-to-Fail (FOLF) situation, 18 would probably be resolved in accordance with the federal act transposing the BRRD (BaSAG) due to their significance for the Austrian market and its stability. The remaining banks would presumably be liquidated according to (regular) Austrian insolvency law.[3] In order to ensure the due application of the BaSAG and the SRM-Regulation by the FMA,[4] within this authority a new department was established which is solely in charge of bank resolution and which should operate separately from its other departments (which are again mainly concerned with banking supervision).

In this contribution, the national institutional set-up in Austria in the field of bank resolution shall be addressed. Following an overview of the three most important authorities FMA, OeNB and BMF, three important aspects shall be discussed: firstly, the FMA's independence, as challenged both by EU law and by national law; secondly, the organisational separation of banking supervision and bank resolution within the FMA as well as the FMA's cooperation with the OeNB and the BMF in bank resolution matters; thirdly, the accountability regime applying to the FMA.

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1 Regulation 2014/59/EU.

2 See Article 7 para. 2 Regulation 806/2014 in conjunction with Article 6 para. 4 Council Regulation 1024/2013.

3 See FMA, *Annual Report 2023*, 2024, 103. For a short overview of the material resolution framework in Austria see W. Wild, *Wenn Banken in Schieflage geraten*, (2022) 3 Aufsichtsrat aktuell, 90; for the FMA's exclusive right to request insolvency proceedings over an institution (even after the ECB has withdrawn its authorisation) see § 82 para. 3 of the Banking Code (BWG); see also Austrian Supreme Court, case 8 Ob 27/20h, judgment of 19 June 2020; for a strong tendency towards insolvency procedures (and thus a 'narrow interpretation' of public interest) see I. Asimakopoulos, D. Howarth, *Stillborn Banking Union: Explaining Ineffective European Union Bank Resolution Rules*, (2022) Journal of Common Market Studies, 264.

4 Also other federal acts may be relevant in the context of bank resolution, e.g. the BWG or the act on the creation of a "bad bank" (GSA).

2. The Institutional Set-up in general

2.1. The FMA

2.1.1. Overview

The FMA is a federal "institution under public law" (as opposed to bodies established under private law, e.g. a *GesmbH*, i.e. a limited company), disposing of legal personality.[5] It was established on the basis of Article 10 para. 1 no. 5 of the Federal Constitutional Act (B-VG), according to which the Federation (not: Austria's nine *Länder*) has the powers of legislation and execution in matters of the monetary, credit, stock exchange and banking system. In order to keep pace with international standards,[6] the legislator stipulated that in the performance of its duties the FMA shall not be bound by any instructions. This requirement is laid down in § 1 para. 1 of the Federal Act on the Institution and Organisation of the Financial Market Authority (FMABG).[7] This independence deviates from the constitutional principle that administrative authorities be bound by instructions of higher-ranking authorities (e.g. the minister in charge),[8] for which reason § 1 para. 1 FMABG was adopted as a provision of constitutional law. Thereby the two opposing requirements have equal rank and, *qua* being *lex specialis*, § 1 para. 1 FMABG prevails.

The FMA's head office is situated in Vienna and its field of activity extends to the entire territory of Austria.[9] The authority took up operations in 2002, inheriting most of its tasks from the BMF and, as regards securities supervision, from an independent securities authority established only some years earlier.[10] The FMA is essentially financed by the institutions falling within the remit of the FMA.[11] Prior to the adoption of the second pillar of the Banking Union, it

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5 For the importance of the FMA's legal personality in the field of bank resolution see B. Raschauer, *Finanzmarktaufsichtsrecht* (Verlag Österreich, 2015), 92.

6 See in particular the Basel Committee's Core Principle No. 2 for effective banking supervision on independence, accountability, resourcing and legal protection for supervisors; see also E.L. Camilli, *Basel-Brussels One Way? The EU in the Legalization Process of Basel Soft Law*, in E. Chiti, B.G. Mattarella (eds), *Global Administrative Law and EU Administrative Law* (Springer, 2011), 323, 347.

7 For the genesis of the FMABG und subsequent reforms up until today see C. Johler, *§ 69 BWG*, in M. Dellinger (ed), *Bankwesengesetz. Kommentar* (11th edn, LexisNexis, 2022), paras 59 ff. The FMABG act is available in an English translation. When this act is quoted in the following, the respective text is taken from this translation; see *here*.

8 In comparison to other EU-Member States, the Austrian system for a long time has been particularly restrictive when it came to the creation of independent authorities; see T. Gross, *Ist die Wirtschaftskrise ein Katalysator für das Entstehen unabhängiger Behörden? Reformen der Bankenaufsicht im Vergleich*, (2014) Die Verwaltung, 197 (217).

9 § 1 para. 2 FMABG.

10 See M. Oppitz, *Kapitalmarktaufsicht* (Linde, 2017), 115.

11 See § 19 FMABG. This principle applies also with regard to the FMA's bank resolution remit; see § 160 BaSAG; for the reimbursement of the FMA by an individual institution under resolution see § 74 para. 5 BaSAG.

was only Austria's financial market supervisory authority, including AML/CFT supervision of financial institutions.[12] As regards banking supervision, it is in charge of the microprudential supervision, but is also – together with the BMF, the OeNB and the Fiscal Advisory Council[13] – strongly involved in macroprudential oversight.[14] It is also the 'designated authority' and the 'relevant administrative authority' pursuant to Directive 2014/49/EU.[15] In the former role, it supervises the Austrian deposit guarantee schemes, as established by the Austrian Chamber of Commerce pursuant to § 1 para. 2 of the Federal Act on Deposit Guarantee and Investor Compensation (ESAEG) and a protection scheme each of two banking groups.[16]

The BRRD requires the establishment of a bank resolution authority in each EU-Member State. Since there was no pre-existing bank resolution authority in Austria, the federal legislator decided to make use of the possibility Article 3 para. 3 BRRD provides for, that is to entrust the (existing) banking supervisory authority also with resolution tasks. Thus, the FMA does not only qualify as "competent authority" pursuant to Article 4 para. 1 no. 40 Capital Requirements Regulation, but also as "(relevant) national resolution authority" within the meaning of Article 3 para. 1 no. 3 and 4 SRM-Regulation.[17] Within the FMA, 24 officials (out of about 460 employees of the FMA overall) are preoccupied exclusively with bank resolution.[18]

The relevant provisions for the FMA as a resolution authority are essentially enshrined in the FMABG and the BaSAG.[19] While cooperation between them is allowed,[20] the two branches within the FMA – banking supervision and bank resolution – shall operate in full independence from each other, so that no conflicts of interest occur.[21] This separation is *inter alia* illustrated by the fact that, in spite of their institutional identity, in the BaSAG – somewhat misleadingly – the banking supervisory authority is referred to as "FMA" while the bank resolution authority is referred to as "resolution authority" (*Abwicklungsbehörde*).[22]

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12 For the EBA Guidelines on AML/CFT, EBA/GL/2021/15, and the FMA's role in this context see S. Riesenfelder, B. Romstorfer, *Integrierte Aufsicht der FMA erfüllt ex ante die Anforderungen der neuen EBA Leitlinien im Bereich der Zusammenarbeit bei der Prävention von Geldwäsche und Terrorismusfinanzierung*, (2022) Österreichisches Bankarchiv, 441.

13 For the tasks of this body see *here*; see also 4 below.

14 See further *here*.

15 See § 5 para. 1 ESAEG.

16 See *here*; see also Article 2 para. 1 no. 2 Directive 2014/49/EU.

17 See § 3 para. 1 BaSAG.

18 See FMA, *Annual Report 2023*, cit., 110; for the details of the FMA's power to employ workers see § 14 FMABG.

19 The FMA is also in charge of the resolution powers laid down in Regulation (EU) 2021/23.

20 The BaSAG explicitly provides for an involvement of the FMA as a banking supervisor; for the respective work load of the resolution branch and the supervisory branch of the FMA under the BaSAG see Rechnungshof, *Bankenabwicklung in Österreich*, 2020, para. 44.1.

21 For these principles of separation see § 3 para. 3 BaSAG; for the internal organisation of the FMA in more detail see 4 below.

22 See in particular § 3 paras 1 and 1a BaSAG.

In its role as resolution authority, the FMA also was in charge of establishing and managing the national resolution financing arrangement, until it was replaced by the SRF pursuant to Article 96 SRM-Regulation.[23] Prior to the transposition of the BRRD, Austria did not have any such arrangement.[24] The FMA is in charge of prescribing the institutions' contributions to the SRF, collecting them and forwarding them to the SRF. For that purpose, it has created a bank account with the OeNB.[25]

At the EU level, the FMA is represented in the Boards of Supervisors of all ESAs (financial market supervision), in the Supervisory Board of the ECB (banking supervision) and in the plenary session of the SRB (bank resolution). For the time being, one of the two chairpersons of the FMA is elected member of the ESMA's Management Board.

2.1.2. Internal organisation

The FMA's main bodies are the Executive Board and the Supervisory Board. The Executive Board is composed of two full-time chairpersons which are appointed by the Federal President of Austria for a term of five years (which may be renewed) on a proposal by the Federal Government (following the nomination of one candidate each by the BMF and the OeNB).[26] The appointed persons must be "experts in at least one of the [branches of the FMA: banking supervision, insurance supervision, securities supervision and supervision of pension funds] and [must] not [be] excluded from the right to be elected to the Austrian National Assembly [one of the two chambers of Austria's Federal Parliament]".[27] The chairpersons the FMA has seen so far have worked in the pertinent bureaucracy (BMF, OeNB), before joining the FMA. A chairperson may be dismissed by the BMF "if an important reason exists" (e.g. gross breach of duty or infirmity).[28] The centre-right government in office between 2017 and 2019 planned a reduction to one chairperson (with the OeNB losing its right to nominate) as well as the introduction of a new management layer below the chair – one executive director

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23 For the details see Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 40. The national resolution financing arrangement continues to apply with regard to certain securities undertakings and EU branches; see § 123 BaSAG; see also ErlRV 898 BlgNR XXV. GP, 2.

24 For the sake of completeness, it should be stated that shortly before the adoption of the BRRD, federal legislation in Austria adopted a law on bank intervention and restructuring (BIRG) which in its § 20 vested the FMA with the task to execute this law. The BIRG which was meant to partially take over the contents of the Commission proposal for what eventually became the BRRD was in force for the entirety of the year 2014 only. It was revoked and replaced by the BaSAG by which the legislator intended to transform the BRRD; see N. Raschauer, C. Völkl, *Überlegungen zum neuen Bankeninterventionsregime*, (2014) Österreichisches Bankarchiv, 573.

25 For the details see Rechnungshof, *Bankenabwicklung in Österreich*, cit., paras 42.1 and 43.1.

26 For further details see § 5 FMABG.

27 § 5 para. 4 FMABG. The cumulative requirements for an exclusion of the right to be elected to the National Assembly are 1) a conviction to more than six months or, if on remand, more than one year of imprisonment by a criminal court, 2) for an intentionally committed crime 3) which is to be pursued *ex officio*; § 41 Election Rules for the National Assembly (NRWO); for the current incumbents see *here*.

28 See § 7 FMABG, in particular its para. 3, containing further details.

each for banking, insurance and securities.[29] Due to early elections in 2019, these plans came to a halt. In the work programme of the subsequent centre-green government no reform plans concerning the FMA were mentioned.[30] The Executive Board is the lead organ of the FMA and "responsible for managing the overall operation and affairs of the FMA".[31] It represents the FMA in and out of court. It normally meets biweekly and takes its decisions unanimously.[32]

The Executive Board is controlled by the Supervisory Board, which is composed of the chairperson, the deputy to the chairperson, six additional members and two co-opted members. Apart from the co-opted members, they are appointed by the BMF (partly upon nomination by the OeNB). The co-opted members have no voting right and are nominated by the Austrian Federal Chamber of Commerce. Only "suitable and reliable persons who are not excluded from the right to be elected to the Austrian National Assembly may be appointed or co-opted" as members of the Supervisory Board.[33] The current incumbents are high-ranking bureaucrats from the BMF (chairperson and three regular members) and from the OeNB (deputy chairperson, namely the Governor of the OeNB, and three regular members). The co-opted members are a tax-consultant and a representative of the banking and insurance branch of the Federal Chamber of Commerce.[34] The BMF can dismiss a member of the Supervisory Board, e.g. for gross breach of duties.[35] The Executive Board has to submit quarterly reports to the Supervisory Board.[36] What is more, important acts of the Executive Board, e.g. decisions on certain investments of the FMA, the adoption or amendment of its Rules of Procedure or of the Compliance Code for members of the Supervisory and the Executive Board and for employees of the FMA, require approval by the Supervisory Board in order to become effective.[37] The Supervisory Board convenes at least once every three months. It can take decisions when at least four members with a voting right (including the chairperson or his/her deputy, who sets up the agenda) are present. Decisions are taken by a simple majority.[38]

The FMA's administrative apparatus is divided in six departments: one for *Banking Supervision* (Department I), one for *Insurance and Pension Supervision* (II), one for *Securities Supervision* (III), one for *Integrated Supervision* (IV), one for *Services* (V; e.g. HR, controlling and IT) and the most recently

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29 See *here*; and *here*; for the implemented parts of the reform see *here*.

30 See *here*.

31 § 6 para. 1 FMABG.

32 § 4 of the FMA's Rules of Procedure. A four-eyes principle applies, meaning that in general there is no division of responsibility (like, for example, in the OeNB's Executive Board; see 2.2 below) between the two chairpersons (§ 8 para. 2 of the FMA's Rules of Procedure).

33 § 8 para. 1 (last sentence) FMABG.

34 See *here*.

35 § 8 para. 4 FMABG; other reasons leading to an end of the function are expiry of the term of office and resignation.

36 § 6 para. 5 FMABG.

37 § 10 para. 2 FMABG.

38 § 9 FMABG.

established department for *Banking Resolution* (VI).[39] These departments are again structured in up to five divisions each, e.g. *Horizontal Banking Supervision* (mainly preoccupied with macroprudential banking supervision) and *Supervision of Significant Banks* in Department I or *Resolution Execution* and *Resolution Planning* in Department VI. Department IV deserves special attention. It is in charge of ensuring the "homogeneity of financial market supervision" and to avoid supervisory arbitrage[40] which results in a wide range of different tasks. In this context, its responsibility for the tasks and competences of the FMA as a public authority (e.g. in the field of AML/CFT) and for the representation of the FMA in national (e.g. the Financial Market Stability Board[41]) and international fora (e.g. the ECB's Supervisory Board or the SRB's plenary session) are to be mentioned. Thus, Department IV plays a cross-cutting role, cooperating closely with the specialised Departments I-III and VI.

Outside the FMA's departmental structure, there are two so-called *Stabsabteilungen* (staff divisions) which are in charge of *Enforcement and Law* and *Internal Audit*.[42] The latter staff division is directly subordinated to the Executive Board; both staff divisions need to report directly to the Executive Board.[43]

The departments and (staff) divisions are led by their respective head.[44] They have the power of signature for their respective organisational unit. In agreement with the Executive Board, the heads of department and the heads of staff division may delegate this power to employees of their department or staff division.[45] Competences of the FMA which are not, by law, reserved to the Executive Board are, *qua* general delegation by the FMA's Rules of Procedure, assumed by the heads of department or (staff) division.[46] However, the Executive Board may attract these competences at any time.[47] Decisions of "fundamental importance" always have to be submitted to the Executive Board for approval.[48]

2.2. The OeNB

Another important actor involved in the supervision and resolution of banks is the OeNB.[49] Its general financial market-related task is to monitor, in the public

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39 For further details see § 11 of the FMA's Rules of Procedure.

40 § 11 para. 5 of the FMA's Rules of Procedure; translation by the author.

41 See *here*; see also 4. below.

42 See *here*.

43 § 11 para. 1 of the FMA's Rules of Procedure.

44 For their respective deputies and their respective competences see §§ 5 f. of the FMA's Rules of Procedure.

45 § 7 of the FMA's Rules of Procedure.

46 § 8 of the FMA's Rules of Procedure.

47 § 9 of the FMA's Rules of Procedure.

48 § 9 of the FMA's Rules of Procedure; translation by the author.

49 For the reinforcement of the OeNB's role in banking supervision in 2008 see Federal Law Gazette I No. 2007/108; see also FMA/OeNB, *Bankenaufsicht in Österreich*, unknown year of publication,

interest, the stability of the financial market as a whole.[50] While the FMA acts as public authority in this field, the OeNB supports the FMA with its expertise. In this context, the OeNB considers itself "in charge of fact finding".[51] This "fact finding" essentially takes the form of expert opinions (based on a wide range of relevant information[52] which is processed on a regular basis) which the OeNB is required to provide in a variety of cases, e.g. on the assessment of banks[53] or on measures to be taken by the FMA.[54] It is also involved in the drafting of resolution plans for individual banks.[55] The OeNB may also act in other form, e.g. by performing on-site inspections upon request by the FMA.[56]

According to the Federal Act on the OeNB (NBG), the OeNB is organised as an incorporated company (*Aktiengesellschaft*), seated in Vienna[57] and owned by the Federation.[58] Apart from the shareholder meeting (General Meeting) which regularly takes place once a year and encompasses receiving annual reports (including a financial report) or determining the remuneration for the President and the Vice-President,[59] the main organs are the Governing Board and the General Council.

The Governing Board, composed of the Governor, the Vice-Governor and two further members, is in charge of everyday decision-making of the OeNB.[60] These officials are appointed by the Federal President upon a proposal by the Federal Government for six years.[61] A reappointment is possible.[62] They must

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7 and *passim*; O. Schütz, *Bankenaufsicht neu – Die Zusammenarbeit von FMA und OeNB aus Sicht der Praxis*, in C. Jabloner, O. Lucius, A. Schramm (eds), *Theorie und Praxis des Wirtschaftsrechts. Festschrift für H. René Laurer* (Springer, 2009), 497 (500 ff.); for the (failed) plans of 2019 to shift all supervisory powers of the OeNB to the FMA see *here*.

50 § 44b para. 1 NBG; see also para. 3 for the relations with the BMF and the FMA.

51 See *here*.

52 For the common data base of OeNB and FMA under the BWG see its § 79 paras 3, 4, and 4a.

53 See § 3 para. 4 BaSAG; see also e.g. § 4 para. 3 or § 105c para. 7 BaSAG.

54 See § 115 para. 2 BaSAG; see also § 79 BWG on the tasks and powers of the OeNB which, *qua* § 3 para. 5 BaSAG, with some reservations also applies in the resolution context.

55 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 10.

56 § 113a para. 2 BaSAG. In practice, on-site inspections are regularly performed by the OeNB. Even so, participation of the FMA and the SRB is possible; see *Memorandum of Understanding (MoU) über die Zusammenarbeit zwischen der Finanzmarktaufsicht (FMA) und der Oesterreichischen Nationalbank (OeNB)*, 2020, 10. Recommending the introduction of reinforced powers of the OeNB when it comes to on-site inspections: Working Group on Banking Supervision, Empfehlungen für eine Weiterentwicklung in der Bankenaufsicht, 2021, 8; see *here*.

57 The OeNB also has a subsidiary branch in the west of Austria, namely in Innsbruck, the capital of the *Land* Tyrol (so-called *OeNB West*).

58 For the ownership of the Federation and the BMF's competence to exercise the ownership rights see § 9 NBG.

59 For these and further tasks see § 16 NBG.

60 It is the Governor, not the OeNB's President, which represents the OeNB in the ECB's Governing Council and General Council; see § 34 para. 1 NBG.

61 For the practice of early job postings by the Federal Government in view of approaching parliamentary elections see *here*; see also Corporate Governance Code of the OeNB, para. 5.3.2.

62 See § 33 NBG. It is questionable whether a reappointment is possible only once, as the passage "eine Wiederernennung ist zulässig" can be read as either "one renewal is possible" or "a renewal is

be Austrian citizens, must not be excluded from the right to be elected to the Austrian National Assembly and must not engage in (professional) activities which impede their independence.[63] The members of the Governing Board can be dismissed only if they do not any more meet one of the above qualifications (which includes being prevented from pursuing their job for more than one year) or for gross breach of duty.[64] Each of the four members of the Governing Board is responsible for one branch: *Central Bank Policy* (Governor), *Financial Stability, Banking Supervision and Statistics* (Vice-Governor), *Payment Systems, Financial Literacy, IT and Infrastructure* (third member), *Treasury, Human Resources and Accounting* (fourth member).[65] For the analyses made in the context of bank resolution, it is the branch *Financial Stability, Banking Supervision and Statistics* which is in charge.[66] In order to meet its tasks under the BaSAG, the OeNB hired eight new employees.[67]

The General Council is composed of the President, the Vice-President and eight further members.[68] They must have Austrian citizenship, must not be excluded from the right to be elected to the Austrian National Assembly, and should be lawyers or economists which are leading figures of economic practice.[69] All of them are appointed by the Federal Government for five years. A renewal of the term of office is possible.[70] The General Council monitors the Governing Board about whose activities it is informed regularly.[71] Some decisions of the Governing Board, such as the acquisition or sale of shares or real estate, require

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possible". But as this provision was amended in 1998, partly in order to implement requirements under the E(S)CB-Statute, and as the repeated renewal was clearly possible before this amendment, the better arguments speak in favour of interpreting this provision as allowing only for a one-time renewal. Also the general *telos* of the 1998 reform of the NBG, that is (also) to increase the degree of the OeNB's independence, underpins this restrictive interpretation; for the background to this reform see also M. Selmayr, B. Sauerzopf, *Das Europäische System der Zentralbanken als Hüter eines stabilen Euro*, (1998) Wirtschaftstreuhänder-Fachjournal, 12. In 2011, the term of office was increased from five to six years; Federal Law Gazette I No. 50/2011.

63 For further requirements see § 33 para. 3 NBG; for the current incumbents see *here*.

64 § 33 para. 4 NBG. This provision is intended to implement what today is Article 11 para. 4 E(S)CB-Statute; see ErlRV 1080 BlgNR XX. GP, 27. Thus, the term "gross breach of duty" is to be interpreted in accordance with the E(S)CB-Statute. It encompasses committing a crime, but also a gross breach of official duties (e.g. unauthorised – additional – professional activities); see C. Zilioli, G. Gruber, *Article 11 Satzung EZB/ESZB*, in H. von der Groeben, J. Schwarze, A. Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos, 2015), para. 9, with further references. It is clear also from the FMABG (§ 11 para. 2) that not any impingement upon relevant rules constitutes a "gross breach of duty".

65 See *here*.

66 The OeNB has recently reorganised the allocation of its bank resolution competences. It is now the *Off-Site Supervision Division* (expert opinions to be submitted to the FMA), the *On-Site Supervision Division* (on-site inspections) and the *Division Statistics – Master Data, Data Governance and Analysis Systems* (statistical reporting system) which are in charge. For the previous allocation of competences see Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 10.

67 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 47.1.

68 § 22 NBG.

69 § 22 para. 3 NBG.

70 See § 23 NBG.

71 § 32 para. 2 NBG.

the General Council's approval.[72] Particularly important decisions of the OeNB are taken by the General Council itself, e.g. the (non-binding) nomination to the Federal Government of members of the Governing Board or the adoption of the Rules of Procedure for the General Council and the Governing Board.[73] The BMF appoints a state commissioner (*Staatskommissär*) who is entitled to participate, in an advisory capacity, in the meetings of the General Council.[74]

2.3. The BMF

In the context of bank resolution, the main task of the BMF is the preparation of relevant legislation.[75] Content-wise this legislation is mostly predetermined by EU legal acts. Within the BMF, these tasks belong to the portfolio of Directorate General III *Economic Policy and Financial Markets*.[76] As opposed to the FMA and to the OeNB, no new organisational unit within the BMF was created to deal specifically with bank resolution matters.[77] Apart from its competence in the field of rule-making, the BMF – as the "competent ministry" pursuant to Article 3 para. 5 BRRD – shall be involved in particular in politically sensitive cases, e.g. when public financial support (state aid) for banks or the handling of questions regarding financial transfers in the context of the Single Resolution Fund are at issue.[78] Furthermore, the BMF is entitled to receive or provide certain relevant information, e.g. from the FMA or to third country authorities.[79] Also the conclusion of cooperation agreements with third country resolution authorities falls within the remit of the BMF.[80]

The BMF's direct responsibility *vis-à-vis* the National Assembly – in particular *qua* the Assembly's examination right, interrogation right and its right to address resolutions to the Federal Government (including the BMF)[81] –, providing for a high degree of democratic accountability, is to be borne in mind

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72 § 21 para. 1 NBG.

73 § 21 para. 2 NBG.

74 § 40 NBG. The state commissioner is also entitled to take part in the OeNB's shareholder meeting (General Meeting).

75 The BMF may – like the FMA – adopt administrative regulations in order to implement federal laws; see e.g. § 2 para. 5 of the Federal Act on Financial Market Stability (*Finanzmarktstabilitätsgesetz*); for the right of the OeNB to adopt an opinion on draft legislation relating to financial market policy or otherwise concerning the interests of the OeNB see § 7 para. 3 NBG.

76 See *here*.

77 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 10.

78 § 99 BaSAG (cf. Article 56 BRRD); § 123b BaSAG; see also § 123c BaSAG on public bridging loans for the financing of resolution measures and § 129 BaSAG on borrowing between resolution financial arrangements.

79 § 114 para. 3 no. 9; § 116 para. 5 no. 8; § 122; § 123 para. 7 (pointing at room for improvement of the FMA's information policy in this context: Rechnungshof, *Bankenabwicklung in Österreich*, cit., paras 26.2, 43.2 and 43.3); § 123a para. 8; § 123b para. 1; § 138 para. 4 BaSAG.

80 § 147 BaSAG; for further provisions to be considered in this context see in A. Schramm, § 147 BaSAG, in A. Kammel, M. Schütz (eds), *BaSAG. Kommentar des Bankensanierungs- und -abwicklungsgesetzes* (Manz, 2022), para. 5.

81 See Article 52 B-VG.

when considering the relationship between the BMF and the FMA (see 5. below). After all, it is not only a relationship which challenges the independence of the FMA, but it also increases the democratic accountability of its activities. The latter, in the understanding of state powers underlying the B-VG, has been at the core of the executive's legitimacy. The competing concept of independence of (selected branches of) the executive – which has become international mainstream in the past 35 years or so[82] – has been introduced to the B-VG only recently. The institutional set-up of the FMA is to be seen as a compromise between these two very different *desiderata*. This explanation, prefixed to a more in-depth analysis of the institutional particularities of the FMA in bank resolution, is not intended to justify the apparent drawbacks of this institutional regime, but it may facilitate a more comprehensive understanding of its historical genesis.

3. The FMA's Independence

Article 47 para. 1 SRM-Regulation requires national resolution authorities to act "independently and in the general interest". Where the resolution tasks are delegated to an already existing (supervisory) authority, it is required that "there is operational independence between the resolution function and the supervisory or other functions of the relevant authority".[83] Thus, with regard to the FMA there are at least two dimensions of its institutional independence: the external dimension, requiring protection from external influence, and the internal dimension, addressing the separation between the FMA's resolution tasks and its other tasks. The latter dimension will be discussed in section 4. below.

The external dimension is fleshed out by § 1 para. 1 FMABG, a provision ranking as federal constitutional law. According to this provision, the FMA is an entity under public law with legal personality which shall not be bound by instructions (from third parties) when performing its duties. Since § 3a BaSAG at the same time prescribes the FMA's cooperation with and submission to the SRB, there does not seem to be a conflict with the SRB's power (under the SRM-Regulation) to give instructions to the FMA. § 3a BaSAG does not rank as constitutional law, it is true, but – with a view to § 1 para. 1 FMABG – it may be interpreted as nuancing the FMA's independence in light of requirements under EU law (in particular the SRM-Regulation and the BRRD). In other words, it makes a concrete proposal as to how § 1 para. 1 FMABG can be interpreted in accordance with EU law.[84] Whoever denies this reading – claiming there to be a conflict between the constitutional norm of § 1 para. 1 FMABG and the

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82 For a graphic representation of the spread of independent regulators in Western Europe see F. Gilardi, *Delegation in the Regulatory State. Independent Regulatory Agencies in Western Europe* (Edward Elgar, 2008), 2.

83 Article 3 para. 3 BRRD.

84 The requirement under EU law to interpret Member States' national (constitutional) law, as far as possible (no *contra legem* interpretation), in accordance with EU law has been repeatedly confirmed by the Court of Justice of the European Union; see e.g. CJEU, case C-282/10 *Dominguez*, ECLI:EU:C:2012:33, para. 24, with further references.

lower-ranking provision of § 3a BaSAG – would then reach a similar outcome by invoking the supremacy of EU law over national (constitutional) law in general and the instruction powers of the SRB stipulated in the SRM-Regulation over the constitutional requirement of the FMA's freedom from third party-instructions in particular. Similar questions have arisen, in the context of banking supervision, with regard to the FMA's role under the SSM and, already before that, with regard to the comprehensive mutual cooperation between the FMA and the EBA.[85] Also under the BaSAG, the FMA is related to the EBA *qua* notification duties *vis-à-vis* and (other) support of or even domination by the EBA.[86]

In spite of its normatively declared freedom from instructions, also national bodies have a strong influence on the FMA. Here we need to mention in particular the BMF and the OeNB which have an important say in the selection of leading FMA officials. Not only do they nominate one of the two chairpersons of the FMA each (which are then to be appointed by the Federal President upon a proposal from the Federal Government), they also decide on the composition of the FMA's Supervisory Board (see 2.1.2 above). All eight members of the Supervisory Board are appointed by the BMF. Half of them are to be nominated by the OeNB.[87] The BMF can, e.g. in case of a gross breach of duty, dismiss a chairperson or a member of the Supervisory Board.[88] This dismissal can be reviewed by the *Bundesverwaltungsgericht* (see 5. below). With regard to the EU level, the BMF determines, upon the FMA's proposal, the FMA's representative in the SRB's plenary session.[89] For further aspects of the interplay between FMA, OeNB and BMF in bank resolution see 4. below.

In financial terms, the FMA disposes of a large measure of independence. Apart from a comparatively small contribution (EUR 4.6 million plus EUR 500,000 pursuant to § 23a para. 8 FMABG) of the federal budget,[90] it is financed by the supervised entities. This system has been extended from banking supervision to the field of bank resolution.[91] In 2023, the accounting group "banking supervision" disposed of three sub-groups, one for supervision in the narrow sense (costs: EUR 33.6 million), one for resolution (costs: EUR 7.8 million) and one for the national deposit guarantee scheme (costs: EUR 860,000).[92]

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85 See § 21a FMABG. Since the FMA is also in charge of insurance supervision, the supervision of pension funds and securities supervision, it has as well maintained relations with the EIOPA and the ESMA.

86 See e.g. §§ 4 para. 4, 24 para. 2, 27 para. 1, 28 para. 1 BaSAG; §§ 17 f., 25 f. BaSAG.

87 See § 8 para. 1 FMABG, also with regard to the two additional (non-voting) members nominated by the Federal Chamber of Commerce (so-called co-opted members); critical of the "structural weakness" [*strukturelle Schwäche*] of the appointment procedure: M. Oppitz, *Kapitalmarktaufsicht*, cit., 126 f.

88 § 7 para. 3 and § 8 para. 4 FMABG.

89 § 3 para. 13 BaSAG.

90 § 19 para. 4 FMABG.

91 See § 19 FMABG and, specifically with regard to bank resolution, § 160 BaSAG which requires the analogous application of § 69a BWG. For the constitutionality of this system see the VfGH's decision of 30 September 2002, B891/02 and others.

92 FMA, *Jahresabschluss 2023*.

4. The Separation of banking supervision and bank resolution within the FMA and its Cooperation within the SRM, on the one hand, and the OeNB and the BMF, on the other hand

In transposition of a requirement laid down in the BRRD,[93] § 3 para. 3 BaSAG prescribes that the FMA's bank resolution tasks shall be performed "in full operative independence" from the FMA's other competences.[94] FMA officials may thus either work in bank resolution or in banking supervision (or other areas of activity), not in both branches at once, and also otherwise the FMA shall ensure that no conflicts of interest occur between the different areas of activity. In addition to that, the BaSAG requires that the head of the organisational unit in charge of bank resolution be subordinated and obliged to report directly to the Executive Board. In its Rules of Procedures the FMA eventually, after various provisional solutions,[95] decided not to attach a new division for bank resolution to one of the existing departments of the FMA, but to put a newly established department in charge of bank resolution. Heads of department by their very nature rank immediately below the Executive Board. The designated Department VI is divided in two divisions, one on "resolution execution" and one on "resolution planning".[96]

In spite of this strict separation, officials in charge of bank resolution and officials in charge of banking supervision ought to cooperate closely with each other. This cooperation is also prescribed by the SRM-Regulation and the BRRD,[97] e.g. in the context of the assessment of recovery plans or of early intervention measures.[98] The exchange of information, if necessary in order to meet the tasks laid down in the BaSAG, is – in accordance with Article 84 para. 4 BRRD[99] – not bound by confidentiality requirements.[100] So far, this cooperation seems to have worked reasonably well. The FMA as a supervisory authority does not only have competences laid down in the pertinent rules on banking supervision, but partly also under the resolution regime. Early intervention measures according to Articles 27 ff. BRRD (including the competence to install a temporary administrator)[101] are a good example for competences which are essentially

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93 Article 3 para. 3 BRRD; see also Article 3 of the SRB's Code of Conduct, SRB/PS/2020/16.

94 Author's translation of *operativ gänzlich unabhängig*. Note in this context the pending case C-118/23 *Getin Holding and Others*.

95 See overview in Rechnungshof, *Bankenabwicklung in Österreich*, cit., 31 f.

96 See *here*; for the distribution of labour between these two divisions see Rechnungshof, *Bankenabwicklung in Österreich*, cit., 33.

97 See Article 3 para. 4 BRRD.

98 See e.g. Article 5 para. 1 and Article 27 para. 1 BRRD; see also M. Cossa, R. D'Ambrosio, *Recovery plans, early intervention measures and structural measures*, in R. D'Ambrosio (ed), *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, No. 88, April 2020, 287.

99 See also EBA, Guidelines on the provision of information in summary or collective form for the purposes of Article 84(3) of Directive 2014/59/EU, EBA/GL/2016/03.

100 See § 121 para. 1 BaSAG.

101 §§ 44 ff. BaSAG.

assigned to the FMA as a supervisory authority.[102] Within the SRM, the FMA (as a resolution authority) is obliged to cooperate with the SRB, the Commission and the ECB. This explicitly includes the submission of relevant information, the implementation of SRB decisions, compliance with the SRB's guidelines and general instructions. The FMA has to follow the SRB's recommendations or to provide the reasons why it refuses to follow them.[103] More generally, § 3a para. 5 BaSAG stipulates, the FMA shall support the SRB pursuant to the provisions of the SRM-Regulation. The FMA's comprehensive cooperation in supervisory matters – within the ESFS and the SSM – is provided for in § 21a FMABG and § 77d BWG.

In addition to that, the FMA shall cooperate with the other national bodies in bank resolution, namely the OeNB and the BMF.[104] Cases illustrating this cooperation are the provision of state aid for banks (as an *ultima ratio* stabilisation measure; cooperation of FMA, OeNB and BMF),[105] exercising the rights under the Intergovernmental Agreement on the SRF (cooperation of FMA and BMF)[106] or the preparation of a resolution decision (cooperation of FMA and OeNB).[107] The OeNB's part in this cooperation regularly is that it has to be informed by the FMA[108] and/or that it submits its assessment of a certain case (e.g. on whether in a FOLF situation the resolution of the institution concerned lies in the public interest[109]) to the FMA. § 3 para. 5 BaSAG is the general clause on the cooperation between the FMA and the OeNB in bank resolution matters. It is frequently invoked in practice.[110] In a report of the Federal Court of Auditors it was criticised that the opinions of the OeNB, as requested by the FMA, have

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102 The distinction between supervision and recovery/resolution may sometimes pose a challenge. Note the misleading provision of Article 32 para. 1 lit. b BRRD which may be read to mean that not only early intervention measures but also the write down or conversion of relevant capital instruments belong to supervision – an understanding which Article 59 para. 2 BRRD contradicts; see also case T-510/17 *Del Valle Ruíz*, ECLI:EU:T:2022:312, para. 60, where the Court speaks of "supervisory *or* early intervention measures" (emphasis added); see also M. Maarand, *The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive*, (2019) Juridica International, 103 (108-110), with regard to the distinction between recovery and resolution in general (and early intervention measures in particular).

103 § 3a para. 2 BaSAG. For specific rules relating to the ESAs' or the Commission's (soft) ouput see § 21b FMABG.

104 § 3 paras 4 and 5 BaSAG; see also *Memorandum of Understanding (MoU) über die Zusammenarbeit zwischen der Finanzmarktaufsicht (FMA) und der Oesterreichischen Nationalbank (OeNB)*, cit., 9 f.; see *here*.

105 § 99 BaSAG.

106 § 123b BaSAG.

107 § 115 BaSAG.

108 See the general provision of § 121 para. 1 no. 4 BaSAG; for specific provisions see e.g. § 114 para. 3 no. 5 BaSAG.

109 See *Memorandum of Understanding (MoU) über die Zusammenarbeit zwischen der Finanzmarktaufsicht (FMA) und der Oesterreichischen Nationalbank (OeNB)*, cit., 9.

110 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., para. 39.1. Sometimes the FMA and the OeNB cooperate even where the law does not explicitly require this, e.g. with regard to the public interest test pursuant to § 49 para. 1 no. 3 BaSAG; see *ibidem*, paras 23.1-23.4.

not always been delivered in due time and that on the part of the FMA sometimes there was too strong a dependence on the OeNB's input.[111]

The BMF needs to be informed in various ways, as well. In addition to specific provisions to that effect, the BaSAG contains the rather general norm of § 3 para. 6, pursuant to which the FMA has to inform the BMF of decisions it or the SRB has taken. In matters regarding the SRF, practice has shown that there is still room for improvement concerning the information flow from the FMA to the BMF.[112] Politically delicate decisions of the FMA (as set out in the BaSAG) even require the BMF's consent, e.g. decisions which have immediate fiscal effects or systemic effects. In comparison to banking supervision where the requirement of the BMF's consent to FMA action is a rare exception,[113] this means a significant increase of the BMF's influence on the FMA.

Institutionalised consultations between the FMA, the OeNB and the BMF took place in the Financial Market Committee (established with the BMF). It was a joint forum composed of one representative of each of these three institutions, which met at least quarterly and in which matters relating to financial markets and financial market stability more generally were discussed.[114] This group ought to "enhance preparedness in normal times and facilitate the management and resolution of a financial crisis".[115] The committee was replaced by the "domestic standing group" and partly lost its function due to the implementation of the resolution colleges under the BRRD/BaSAG.[116]

Another important forum aimed at "encouraging co-operation and the exchange of opinions" between the FMA, the OeNB, the BMF and experts in public finance is a body called Financial Market Stability Board.[117] It was established in 2014 and is mostly concerned with macroprudential questions, such as systemic risks.[118] Established in accordance with § 13 FMABG, it is situated with the BMF and composed of two representatives of the BMF (from the field of economic policy and financial market supervision legislation) – who are chair and deputy chair of the Board –, one representative each of the FMA and the OeNB, the chairperson and one additional member of the Fiscal Advisory Council. The Fiscal Advisory Council again describes itself as "an independent

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111 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., paras 23.1-23.4.

112 *Ibidem*, paras 43.1 and 43.2.

113 See e.g. § 13b para. 2 FMABG, § 39 para. 5 BWG or § 26 para. 5 of the Federal Act on Payment Services (ZaDIG).

114 See FMA/OeNB, *Bankenaufsicht in Österreich*, cit., 25 f.

115 See definition in *Memorandum of Understanding on cooperation between the financial supervisory authorities, central banks, and finance ministries of the European Union on cross-border financial stability*, ECFIN/CEFCPE(2008)REP/53106 REV REV.

116 See International Monetary Fund, *Austria*, IMF Country Report No. 20/62, March 2020, 40.

117 § 13 para. 3 no. 2 FMABG.

118 See § 13 para. 3 FMABG; see *here*.

body responsible for monitoring the fiscal discipline of government entities in Austria"[119] and is composed of 15 public finance experts.

5. The FMA's Accountability

According to § 16 FMABG, the FMA – as a whole, not only its resolution branch – is supervised by the BMF "to ensure that the FMA fulfils its statutory tasks, that it does not violate laws and regulations when carrying out its tasks and that it does not overstep its scope of duties". This kind of supervisory power is known from municipalities which are supervised by the Federation and the respective *Land* in which they are located.[120] The BMF's supervision is seen as a partial compensation for the guarantee enshrined in § 1 para. 1 FMABG that the FMA may not be subject to instructions (in particular from the BMF).[121] It is limited to questions of law. In the legislative proceedings leading to the adoption of the FMABG, the Federal Government argued that, in spite of the FMA's relative independence, the BMF's supervision rights were necessary to ensure the ministry's political responsibility for the system of financial market supervision and its competence to initiate legislative projects in this field.[122] The BMF may request from the FMA all the information necessary to carry out this supervision, which the FMA has to deliver "without unnecessary delay, at the latest within two weeks".[123] Before the FMA adopts administrative regulations (general-abstract rules), it has to consult the OeNB and to notify the BMF, thereby forwarding to it both the (draft) regulation and the OeNB's assessment.[124]

The FMA shall deliver a report, including in particular an overview of its supervisory activities[125] and the status of the financial sector, to the Finance Committee of the National Assembly and the BMF on an annual basis. The Finance Committee – among other things in charge of negotiating legislative proposals related to taxes and the financial market – may summon the members of the Executive Board to attend committee meetings and it may request information from them, unless statutory duties require secrecy.[126]

The representative of the FMA (also in its function as Austria's resolution authority) has to inform the Financial Market Stability Board on a regular basis

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119 See *here*.

120 See Article 119a B-VG.

121 See N. Raschauer, *§ 16 FMABG*, in M. Gruber, N. Raschauer (eds), *Wertpapieraufsichtsgesetz*, cit., para. 1.

122 See ErlRV 641 BlgNR XXI. GP, 67.

123 § 16 para. 2 (first and second sentence) FMABG.

124 § 16 para. 2 (third sentence) FMABG; for the transfer of information and data see para. 2a; for a list of the administrative regulations adopted by the FMA see *here*.

125 It appears that, given the broad understanding of banking supervision enshrined in § 2 FMABG, the term shall be understood to include resolution activities.

126 § 16 para. 3 FMABG; for a more limited summoning right of the competent committees of both chambers of the Federal Parliament see Article 52 para. 1a B-VG; for the relationship between these two provisions see N. Raschauer, § 16 FMABG, cit., para. 11.

about resolutions and other decisions which are relevant for financial market stability, for the identification of systemic and procyclical risks and indications of material effects on financial stability.

The BMF's power laid down in § 16 para. 4 FMABG is remarkable. This provision allows the BMF to order the FMA to carry out audits pursuant to material financial market law (including the BaSAG).[127] Subsequently, the FMA (Executive Board) has to report accordingly to the BMF and to the FMA's Supervisory Board.

In the *travaux préparatoires* for what became § 16 FMABG, the Federal Government (which proposed the adoption of this act) purported that this provision would not touch upon the FMA's independence, but would simply ensure control of the legality of the FMA's actions. Judicial review, to which the FMA is exposed, as well, would apply only *ex post* and would take a lot of time, the Federal Government argued in defence of the BMF's supervision power.[128] Like judicial review, the BMF's power laid down in para. 4 would serve the purpose of ensuring legality, and as the BMF could not influence the outcome of these audits, this regime would not interfere with the FMA's independence.[129]

In order to discuss the BMF's competences laid down in § 16 FMABG at once, also the regime of para. 4 is discussed in the chapter on accountability. However, it can be doubted whether the right to ask for specific administrative action, i.e. an interference with the FMA's core tasks, still belongs to what is commonly understood as accountability.[130]

The financial administration of the FMA is examined by the Federal Court of Auditors.[131] This examination extends to 'arithmetical correctness, compliance with existing regulations, and the employment of thrift, efficiency and expediency'.[132] The Court of Auditors delivers its reports to the National Assembly,[133] to which it is directly subordinate,[134] and notifies them to the Federal

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127 § 16 para. 4 FMABG refers to § 2 of this act which lists all financial market law which the FMA ought to apply. § 2 para. 1 determines the rules belonging to "banking supervision", listing, among others, the BaSAG and the ESAEG.

128 For the sake of completeness, it ought to be mentioned that these statements refer to the situation 20 years ago. In 2014, judicial review in Austrian administrative law has been reformed comprehensively, also by the creation of new administrative courts.

129 ErlRV 641 BlgNR XXI. GP.

130 See M. Oppitz, *Kapitalmarktaufsicht*, cit., 129 f., examining the compliance of § 16 para. 4 with § 1 para. 1 FMABG. Accountability is a contested term, it is true, but there seems to be common ground in that it is normally used to describe legitimate forms of monitoring, as opposed to acts of control which are impeding the independence of the body subject to control; see e.g. M. Busuioc, *Accountability, Control and Independence: The Case of European Agencies*, (2009) European Law Journal, 599.

131 Article 126b B-VG.

132 Article 126b para. 4 B-VG.

133 Since in the above quotations of the English version of the FMABG the translation "National Assembly" is used, this terminology is stuck to here. Note, however, that the English version of the B-VG applies the translation "National Council".

134 Article 122 para. 1 B-VG.

Chancellor. In 2020, the Court of Auditors has submitted a comprehensive report on bank resolution in Austria.[135]

What is more, the FMA's actions are subject to FMA-internal supervision. The material scope of this supervision includes, but also goes beyond the legality control provided for in § 16 FMABG. § 16a para. 1 FMABG prescribes that an FMA-internal audit unit shall be established whose purpose shall be "exclusively to continuously and comprehensively review the legality, appropriateness and expedience of the activities of the FMA". The internal audit unit shall report directly to the Executive Board. It shall also report to the (deputy) chair of the Supervisory Board who again shall keep the Supervisory Board informed. It shall act according to an annual internal audit plan drawn up in advance, but may also conduct *ad hoc* audit activites.[136] According to the FMA's Rules of Procedure, this unit is organised as a staff division (see 2.1.2 above). Some of the duties the Executive Board has *vis-à-vis* the Supervisory Board, e.g. the submission of quarterly reports pursuant to § 6 para. 5 FMABG (see 2.1.2 above), form part of FMA-internal accountability, as well.

With respect to financial (internal) accountability, the financial plan is to be mentioned. The Executive Board has to draw up such plan for each financial year and submit it to the Supervisory Board. Once approved by the Supervisory Board, it serves as a binding basis for budget and staff management within the FMA.[137] After each financial year (which for the FMA is the calendar year[138]), the FMA shall provide an annual financial statement according to § 18 and a report on the supervision costs according to § 19 FMABG. These reports shall be audited by an external auditor or an external auditing firm. The audited reports shall then be sent by the Executive Board to the Supervisory Board for approval. Eventually, they shall be published.[139]

In terms of public law judicial review, the FMA's decisions can be reviewed by the *Bundesverwaltungsgericht* (one of the two lower administrative courts of the Federation) whose judgments may again be reviewed by the (supreme) Administrative Court (VwGH) and/or the Constitutional Court (VfGH). By now a considerable body of case law on various questions of constitutional and administrative law has emerged in the context of bank resolution. Another form of review are judicial decisions on public liability. Here it is the civil law courts which are in charge. In matters of public liability, the *Landesgerichte* in their capacity as regional civil law courts are the courts of first instance.[140] Claims for damages caused by the FMA are to be brought against the Federation – both with

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135 Rechnungshof, *Bankenabwicklung in Österreich*, cit.

136 See § 16a paras 2-4 FMABG.

137 § 17 para. 1 FMABG; for further details on the procedure and the contents of the financial plan see paras 2-7.

138 § 18 para. 5 FMABG.

139 See § 18 FMABG.

140 § 9 para. 1 of the Public Liability Act (AHG).

regard to supervision and resolution.[141] For public liability in the field of bank resolution, the Austrian legislator has set up rules which are more restrictive than the general public liability regime. Pursuant to § 3 para. 9 BaSAG, the FMA or the OeNB,[142] when performing tasks on the basis of the BaSAG, the SRM-Regulation or a delegated act adopted on the basis of the BRRD,[143] may be held liable for damages only if the underlying violation of the law was committed intentionally.[144] This intention must encompass both the occurrence and the size of the damage. It includes the so-called conditional intention (*dolus eventualis*).[145] Further restrictions apply when the FMA or the OeNB act within the framework of the SRM. Claims against the Federation are excluded where the FMA acts upon instruction by the SRB, where it acts in preparation or implementation of decisions of the SRB or where it acts within the framework of the cooperation or exchange of information with the SRB, or of other forms of support to the SRB.[146] An equivalent regime applies to claims against the OeNB.[147]

6. Conclusion

In this contribution bank resolution in Austria has been addressed from an institutional perspective. In order to conclude, two important components of this institutional set-up shall be reiterated: the division of tasks and powers between the three main bodies at the national level and the uneasy position of the FMA between a constitutionally guaranteed freedom from third party instructions on

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141 § 3 para. 1 FMABG.

142 In the context of banking supervision – where the distribution of powers between OeNB and FMA is similar – the OeNB usually acts for the FMA, so that a liability claim is to be addressed to the Federation; see Austrian Supreme Court, case 1 Ob 91/22x, judgment of 14 July 2022; for the relationship between the independence of a national central bank of a (Euro-)Member State and its liability in bank resolution matters see CJEU, case C-45/21 *Banka Slovenije*, ECLI:EU:C:2022:670; for different independence requirements under Union law applying in the context of monetary policy tasks, on the one hand, and other tasks assigned to national central banks, on the other hand, see *ibidem*, para. 95.

143 This applies irrespective of whether these are, materially speaking, supervisory or recovery/resolution tasks; for the temporary administrator see V. Pagowski, *§ 46 BaSAG*, in A. Kammel, M. Schütz (eds), *BaSAG*, cit., para. 3; see also 4 above.

144 Article 3 para. 12 BRRD only applies to powers laid down in the BRRD itself. In the SRM-Regulation a similar provision applicable to national resolution authorities seems to be missing; for the public liability regimes in other Member States see J. Schürger, *Unionsrechtskonformität nationaler Beschränkungen der Staatshaftung im Bank- und Kapitalmarktrecht*, (2021) Zeitschrift für Bank- und Kapitalmarktrecht, 601 (602 f.); for a more specific reimbursement regime for unlawful actions of the FMA see § 118 para. 5 BaSAG which was adopted to transpose Article 85 para. 4 subpara. 2 (2nd sentence) BRRD; see K. Zartl, *§ 118 BaSAG*, in A. Kammel, M. Schütz (eds), *BaSAG*, cit., paras 23-28; see also Article 87 para. 4 SRM-Regulation for the SRB's duty to compensate national resolution authorities for damages they are required to pay (under certain conditions); for the different approach chosen in the context of banking supervision see references to the legislative negotiations in VfGH, case G224/2021, decision of 16 December 2021, para. 2.1.5.

145 For a definition of the *dolus eventualis* see Article 5 para. 1 of the Austrian Criminal Code (StGB): the actor deems certain effects of his/her action possible and accepts this possibility.

146 § 3 para. 7 FMABG.

147 § 79 para. 8 BWG.

the one hand, and, on the other hand, its supervision by the BMF at the national level and its embeddedness within the SRM at the EU level. Eventually, we shall take a brief look at the FMA's recovery/resolution experience so far, laying emphasis on the cases *HETA* and *Sberbank Europe AG*.

The FMA, Austria's supervisory authority for the banking sector and other branches of the financial market, was chosen by the legislator to also be the main bank resolution authority. A newly created department within the FMA is in charge of the authority's bank resolution tasks. The OeNB is involved, as well. It is essentially related to the FMA in two ways: It receives information from the FMA and it supports the FMA by providing expert assessments on various questions (e.g. with regard to the drafting of resolution plans) and exceptionally by taking administrative action (on-site inspections). The BMF, apart from being in charge of preparing most of the legislation in this policy field, does not only monitor the FMA as an institution (irrespective of whether it is engaged in supervisory or resolution activities), it is also involved in particularly delicate resolution decisions.

As a matter of federal constitutional law, the FMA must not receive instructions from third parties. At the same time, the legislator, in order to ensure a certain degree of democratic legitimacy with regard to the FMA's activities, has empowered the BMF to monitor the FMA in order to ensure that, when taking action, it stays within the limits drawn by the law. While this regime also applies to the FMA as a supervisory authority, in addition to that the BaSAG provides for a say of the BMF on certain aspects of resolution procedures. Thus, the overall influence of the BMF to which the FMA is exposed in bank resolution is stronger than in banking supervision.

When it comes to the FMA's practice in bank recovery/resolution, we have seen a number of cases in which resolution was at least discussed. Two of them deserve a mention here. The *HETA* case involved the resolution of the *Heta Asset Resolution AG*, a 'bad bank' of the former *Hypo Alpe Adria* group which had become nationalised during the Global Financial Crisis.[148] The resolution of *HETA* was initiated in March 2015.[149] It involved a 100% haircut on all subordinated liabilities and haircuts on other liabilities. Eventually, the fulfillment quota for eligible liabilities amounted to 86,32%. The bank is now fully resolved. The Executive Board of the FMA concluded in 2019: 'As hurtful and expensive the collapse of the Hypo Alpe Adria was as a banking group, the regulated resolution as HETA following the new European regime has kept

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148 This case has given rise to numerous court proceedings, in particular before the *Bundesverwaltungsgericht*, but also before the VfGH; see, for example, VfGH, case G248/2017 and others, decision of 14 March 2018, on the constitutionality of a law limiting the liability of the *Land* Carinthia.

149 *HETA* was not a resolution body pursuant to § 83 BaSAG, but pursuant to § 2 GSA. The legislator explicitly required that *HETA* shall fall within the remit of the BaSAG (which it would not otherwise have); see D. Choma, *§ 162 BaSAG*, in A. Kammel, M. Schütz (eds), *BaSAG*, cit., para. 21; see also VfGH, cases G315/2015 and others, V100/2015, decision of 7 October 2015.

the taxpayer's burden as little as possible.'[150] An examination according to the No-creditor-worse-off principle[151] (§ 107 BaSAG) testified that no creditor was worse off under the resolution procedure performed than under a (hypothetical) insolvency procedure.[152]

In case of *Sberbank Europe AG*, whose liquidity situation has deteriorated drastically after the Russian attack on Ukraine, a FOLF situation was stated by the ECB in late February 2022. In March 2022 the SRB decided that, for lack of public interest, it shall not be placed under resolution.[153] The FMA as a banking supervisor (and upon instruction by the ECB) prohibited *Sberbank Europe AG* to continue business/transactions. This triggered the application of the deposit guarantee scheme.[154] For the Croatian and Slovenian subsidiaries of the *Sberbank Europe AG*, on the contrary, the SRB decided in favour of resolution.[155] The insolvency of the bank could be averted and the FMA oversaw its winding down which was completed in December 2022.[156]

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150 See *here*.

151 For an analysis of this principle in the context of Article 17 CFR see CJEU, case C-83/20 *BPC Lux 2 Sàrl and others*, ECLI:EU:C:2022:346, paras 57-61.

152 See Rechnungshof, *Bankenabwicklung in Österreich*, cit., paras 32 f.

153 SRB, Decision of 1 March 2022, SRB/EES/2022/19.

154 The expenditure of the Austrian deposit guarantee scheme was eventually reimbursed by *Sberbank Europe AG*; see OeNB, Geschäftsbericht 2022, 54.

155 See *here*.

156 See *here*.

Belgium

Veerle Colaert and Florence De Houwer

1. Overview

In Belgium, there is one national resolution authority. The Belgian Bank Law[1] and the Organic Law on the National Bank of Belgium (Organic Law NBB)[2] assign the National Bank of Belgium as the institution responsible for exercising the duties of the resolution authority as imposed by Bank Resolution and Recovery Directive 2014/59/EU (BRRD) and Singe Resolution Mechanism Regulation 806/2014/EU (SRMR).[3]

Within the National Bank of Belgium, a specific organ, the 'Resolution College' (*Afwikkelingscollege / Collège de résolution*) has been created to deliberate on and take all decisions in respect of the National Bank's resolution competences.[4]

Since Belgium is a member of the Eurozone, the Resolution College is closely cooperating with the other National Resolution Authorities (NRAs) and the Single Resolution Board (SRB) in the Single Resolution Mechanism (SRM).[5]

This contribution will first discuss how the Belgian national resolution authority is institutionally organised, with a special focus on the separation of – and cooperation between – the resolution and prudential oversight functions within the National Bank of Belgium (Part II). A second part will then focus on how the independence, transparency and accountability of the resolution function are ensured. The final part concludes.

2. Institutional framework for bank recovery and resolution in Belgium

In this part, we will first provide a historic overview of the resolution function in Belgium (section 1). We will then discuss how the Resolution College is organised (section 2), how the resolution and prudential oversight functions of the National Bank of Belgium are separate but cooperate (section 3), as well as what the role of the Ministry of Finance is (section 4) and of the Belgian Resolution and Deposit Guarantee Fund in regard of the resolution function (section 5).

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1 Wet van 25 april 2014 op het statuut van en het toezicht op de kredietinstellingen en beursvennootschappen, *Belgian Official Journal* 7 May 2014, hereinafter: Bank Law.

2 Wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, *Belgian Official Journal* 28 March 1998, hereinafter: Organic Law NBB.

3 Article 12ter Organic Law NBB; Article 3, 52 Bank Law.

4 Article 17 Organic Law NBB.

5 Article 4 §1 SRMR *j.* Article 2 (1) Council Regulation 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 L287/63, hereinafter: SSM Regulation. See also the definition of "resolution authority" in Article 3, 52° Bank Law, as the National Bank of Belgium or the SRB, in accordance with the division of competences of the SRMR.

2.1. Historic overview

The Resolution College has been established in 2014 (entry into force in 2015) and is anchored in article 3 52° of the Belgian Bank Law and article 21ter of the Organic Law NBB. Since its introduction, it has been subject to two reforms: the composition of the Resolution College has been slightly changed[6] (see 2.2. below), and the prior judicial control of certain decisions has been abolished (see 3.3. below).

Before the resolution college was established, other mechanisms had been in place to deal with credit institutions that were failing or likely to fail.

From 1935 to 1999, the Belgian Rediscount and Guarantee Institute (*Herdisconterings- en Waarborgsinstituut / Institut de Réescompte et de Garantie*, hereafter: HWI) had certain competences reminiscent of some of the competences of the Resolution College. The HWI was an institution of public utility the purpose of which was to mobilise claims and satisfy special credit needs of Belgian banks and certain other enterprises, when desirable in the public interest. It was created in the aftermath of the financial crisis of the 1930s to prevent future crises and to protect the deposits of small savers.[7] The Belgian government felt that banks had become too lenient in providing credit to industrial, commercial and agricultural enterprises, thus "mobilising" savings of depositors for lending purposes, which had resulted in the government having to step in to pay back depositors at multiple occasions during the crisis of the 1930s. On the other hand, the government felt that the economy had evolved to a point where such credits to enterprises had become indispensable. The HWI was meant to realise three objectives: ensuring the mobilisation of claims of credit institutions; satisfying the credit needs of enterprises, and respecting the traditional rules on the emission of fiduciary money. It should moreover ensure that the Belgian State would no longer need to bail out credit institutions (even if that term was not yet used at the time). The HWI was established by law, under public supervision, but with a high level of autonomy. Its solvency was based on capital contributions of the banks and a state guarantee.[8] Its first task was to coordinate and progressively liquidate the former state interventions in regard of bank credits.[9] After that it

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6 Article 56 Wet 18 december 2015 houdende diverse financiële bepalingen, houdende de oprichting van een administratieve dienst met boekhoudkundige autonomie "Sociale activiteiten", houdende wijziging van de wet van 11 mei 1995 inzake de tenuitvoerlegging van de besluiten van de Veiligheidsraad van de Organisatie van de Verenigde Naties en houdende een bepaling inzake de gelijkheid van vrouwen en mannen, *Belgian Official Journal* 29 December 2015, hereinafter: Law of 18 December 2015 (Eng.: Law of 18 December containing various financial provisions, establishing an administrative department with accounting autonomy "Social Activities", amending the Law of 11 May 1995 on het implementation of the decision of the Security Council of the United Nations and containing a provision on gender equality).

7 Koninklijk besluit nr. 175 13 juni 1935 houdende instelling van het 'Herdiscontering en Waarborginstituut, Verslag aan de Koning, *Belgian Official Journal* 14 June 1935, 3856, hereinafter: Royal Decree HWI.

8 *Ibidem*, 3854 and Article 7, last para. Royal Decree HWI.

9 Article 3 para. 3 Royal Decree HWI.

would ensure the mobilisation of claims of Belgian banks as well as industrial, commercial and agricultural enterprises and ensure that the credit needs of the latter would be adequately covered.[10] The HWI could, to that end, amongst other things, buy securities on the capital markets, get subrogated to any claim relating to industrial or commercial operations, and transfer or pledge them; guarantee the good outcome of securities or of discount and deposit operations; provide credits or loans; and acquire and transfer government securities and debt securities traded on financial markets.[11] The deposit guarantee function of the HWI was formalised in 1984.[12] The HWI was abolished by law of 17 December 1998.[13] Its competences were transferred to the National Bank of Belgium, except for its competences in relation to deposit guarantee which were transferred to the Protection Fund for Deposits and Financial Instruments (*Beschermingsfonds voor Deposito's en Financiële Instrumenten / Fonds de Protection des Dépôts et des Instruments Financiers*) which was established by the same law.[14]

In practice, difficult situations envisaged by banks would be solved by unofficial ad hoc committees, led by the former Belgian banking supervisor, the Banking Commission (later Commission for Banking, Insurance and Finance (CBFA). The Banking Commission would intervene during banking crises in order to ensure reinforcement of the bank's own funds, to ensure additional guarantees of the shareholders, or to organise the takeover of banks in difficulties by other credit institutions. As the case may be, those interventions were supported by the HWI which could grant financial support (by way of mobilisations) to banks facing a liquidity crisis.[15] After the HWI had been dismantled and the Belgian supervisory landscape was reformed, similar ad hoc committees (*comités de pilotage*) were composed in case of banking crises, involving experts of the National Bank of Belgium, the CBFA and members of government. For example, such a committee was set up to dismantle Fortis Bank[16] and Dexia Bank in 2008.[17]

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10 Article 1 Royal Decree HWI.

11 Article 4 KB 22 juni 1935 (Herdiscontering- en Waarborgsinstituut, Statuten), *Belgian Official Journal* 26 June 1935 (Eng.: Royal Decree of 22 June 1935 (Rediscounting and Guarantee Institute, Statutes)).

12 Bericht van het HWI van 28 december 1984 over de beschermingsregeling voor de deposito's bij banken en privé-spaarkassen, *Belgian Official Journal*, 16166.

13 Wet van 17 December 1998 tot oprichting van een beschermingsfonds voor deposito's en financiële instrumenten en tot reorganisatie van de bescherminsregelingen voor deposito's en financiële instrumenten, *Belgian Official Journal* 31 December 1998, 42104 (Eng.: Law of 17 December 1998 establishing a protection fund for deposits and financial instruments and reorganising protection schemes for deposits and financial instruments).

14 Articles 31-32 of the law of 17 December 1998.

15 In 1979 Le Brun found that. See J. Le Brun, *La protection de l'épargne publique et la commission bancaire* (Bruylant, 1979), 184.

16 S. Samyn, *Arrogante bank in crisis*, De Standaard, 15 November 2008.

17 As explained in respect of Dexia by Didier Reynders, Minister of Finance at the time, in the Special Commission tasked with investigating the circumstances that led to the dismantling of Dexia SA. See the report of the discussions of the Chamber of representatives, 25 januari 2012, nr. CRIV 53 NO31, (1) 4. See also the report of the special commission charged with the investigation of the circumstances that led to the dismantling of Dexia SA, 23 March 2012, DOC 53 1862/002.

In June 2010 the government installed an informal monitoring committee, which succeeded the *comité de pilotage*, and was active until august 2011, when a new comité de pilotage was set up to deal with the new Dexia crisis.[18]

In 2010, Article 57bis was inserted in the former Bank Law[19], which granted the Belgian government the power to perform acts of disposal (*daden van beschikking / actes de disposition)* concerning the assets, liabilities and shares of credit institutions threatening to destabilise the financial system. The government could, for example, sell the assets of a credit institution or transfer its liabilities. The article was introduced after a recommendation from the International Monetary Fund in reaction to the financial crisis of 2008[20] and was inspired by similar mechanisms in the U.K. and Germany.[21] Its purpose was "*to provide for a number of prerogatives – exceptional in terms of their content and the circumstances in which they may be exercised – which the State will be entitled to use in critical situations involving a serious risk of discontinuity which could undermine financial stability*".[22] Although much more limited in scope, this article can be seen as a precursor to the powers granted to the Resolution College today.

In the aftermath of the crisis, a Special Commission was tasked with investigating the circumstances that led to the dismantling of Dexia SA. After an in-depth investigation, the Special Commission wondered whether a permanent *comité de pilotage* would not have been able to act faster, so that a bank run could have been avoided. One of the recommendations of the Commission was therefore to institutionalise a strategic committee that would have the competences that had been exercised by the ad hoc *comité de pilotage* during the crisis. Such a strategic committee would have to draft, within a year of its installation, a crisis scenario or plan – which would need to be regularly updated – and which should allow it to act swiftly in case of a new financial crisis.[23]

On 14 April 2014, the Belgian Parliament adopted a new Bank Law. Even though the BRRD was only adopted by the European Parliament on 15 May 2014, the Belgian Bank Law had already anticipatively implemented the BRRD

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18 Discussion in the Chamber of Representatives on the follow-up of the financial crisis, 18 July 2012, DOC 53 2372/001, 37.

19 Article 57bis Wet van 22 maart 1993 op het statuut en het toezicht op de kredietinstellingen, *Belgian Official Journal* 19 April 1993 (Eng.: Law of 22 March 1993 on the status and supervision of credit institutions), inserted by Article 5 Wet van 2 juni 2010 tot uitbreiding van de herstelmaatregelen voor de ondernemingen uit de bank- en financiële sector, *Belgian Official Journal* 14 June 2010 (Eng.: Law of 2 June 2010 extending the recovery measures for banking and financial sector companies).

20 Wetsontwerp tot uitbreiding van de herstelmaatregelen voor de ondernemingen uit de bank- en financiële sector, *Parl. St. Kamer* 2009-2010, nr. 2406/001, 6 (Eng.: Draft Law on the extension of recovery measures for banking and financial sector companies).

21 *Ibidem*, 6-7.

22 *Ibidem*, 14 (free translation of the original Dutch version).

23 Report of the special commission charged with the investigation of the circumstances that led to the dismantling of Dexia SA, 23 March 2012, DOC 53 1862/002, 149 and 179; discussion in the Chamber of Representatives on the follow-up of the financial crisis, 18 July 2012, DOC 53 2372/001, 316.

in the Bank Law, particularly in view of the IMF's 2013 Financial Assessment Programme, which recommended to draft recovery and resolution plans for Belgian systemic banks in the short term.[24] It defined the resolution authority as the Resolution College of the National Bank of Belgium.[25]

In March 2018 the IMF issued a technical note on the financial safety net and crisis management for Belgium, with several recommendations to improve the resolution framework.[26] The report has triggered several amendments which are discussed in this contribution.

No other reforms are under discussion at present, except for the implementation of changes at EU level.

2.2. Organisation of the Bank and its resolution authority functions

2.2.1. Competences of the Resolution College

As mentioned above, the National Bank of Belgium is the institution responsible for exercising the duties of the resolution authority. The organ of the National Bank of Belgium responsible for deliberating on and taking all decisions in respect of the Bank's resolution competences as defined in the BRRD is the Resolution College.

The Resolution College is also in charge of the powers under Article 33(a) BRRD and is therefore authorised to suspend payment or delivery obligations (Article 244/2 Bank Law).[27]

The Resolution College is not in charge of the management of specific national insolvency proceedings nor has it any functions other than its resolution-related functions.

No other authorities are involved in resolution planning and/or execution than those provided for in the BRRD, i.e. the SRB and the National Bank of Belgium. Their respective roles are defined by law. The resolution authority does however closely cooperate with the supervisor in the prevention and early intervention phase[28] (see section 2.4.2. below). Moreover, the chair of the

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24 D. Cools, *De omzetting van de herstel- en afwikkelingsrichtijn in de nieuwe bankwet*, in V. Colaert (ed), *De nieuwe bankwet* (Roularta, 2015), 214; Wetsontwerp op het statuut van en het toezicht op de kredietinstellingen, Deel 1, DOC 53 3406/001, 12 (Eng.: Draft law on the status and supervision of credit institutions); IMF, *Belgium: Financial System Stability Assessment*, IMF Country Report No. 13/124, May 2013, 3.

25 Article 3, 52° Belgian Bank Law.

26 IMF, *Belgium: Financial sector assessment program. Technical note – Financial safety net and crisis management*, IMF Country Report No 18/68, hereinafter: IMF Country Report No 18/68.

27 The supervisor can also suspend or prohibit the exercise of the operation of the business, even if this leads to the suspension of the delivery of ongoing obligations. See Article 236 §1 4° j. 224/2 §9 Bank Law (implementation of Article 33(a) §9 BRRD).

28 In the prevention phase, the supervisory authority reviews the recovery plans of credit institutions and can impose a revision of those plans if necessary (Article 114 of the Belgian Bank Law, implementing

Management Committee of the Federal Public Service Finance and the official in charge of the Resolution Fund are voting members of the Resolution College (see section 2.2.2. below; on the cooperation with the Minister of Finance and the Resolution Fund, see also sections 2.5. and 2.6. below).

2.2.2. Composition of the Resolution College

The Resolution College is currently composed of 11 members. Certain members are appointed *ex officio,* because of their position in the National Bank or the civil service. The other members are appointed by Royal Decree (i.e. the federal government) based on their expertise, for a renewable term of four years. The composition of the resolution college is therefore an executive decision, with no *ex-ante* involvement of the Parliament.[29]

The Organic Law NBB provides that the Resolution College consists of the following members:[30]

(1) the Governor of the National Bank;

(2) the Deputy Governor of the National Bank;

(3) the director in charge of the department of prudential supervision of banks and stockbroking firms ("beursvennootschappen");

(4) the director in charge of the department of prudential policy and financial stability;

(5) the director designated by the National Bank as the person responsible for resolution of credit institutions;[31]

(6) the chair of the Management Committee of the Federal Public Service Finance;

(7) the official in charge of the resolution fund;

(8) four members appointed by way of a Royal Decree deliberated on in the Council of Ministers on the basis of their specific expertise in banking and financial analysis;

(9) a magistrate appointed by Royal Decree.

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article 6 BRRD). The Resolution College draws up a resolution plan for each credit institution under its responsibility, after consulting the supervisory authority (Article 226 Bank Law, implementing Article 10 §1 BRRD). In the early intervention phase the supervisory authority can intervene and take measures to ensure the stability of the credit institution (Article 234 and following Bank Law, implementing Articles 37-30 BRRD). If this intervention fails to sufficiently improve the financial situation, the credit institution enters the resolution phase. Both the Resolution College and the supervisory authority, after having consulted one another, can establish that a credit institution is in default and that the resolution procedure should be initiated (Article 243 Bank Law, implementing Article 32§1 BRRD). However, the Resolution College is the only authority that can decide to use resolution instruments (Article 244§1 Bank Law).

29 The Governor, Deputy Governor and the directors are appointed by federal government as well (*infra*).

30 *Ibidem*, Article 21ter §2 Organic Law NBB.

31 This is currently the Deputy Governor of the National Bank.

Originally, the chair of the Financial Services and Markets Authority (FSMA) was also a member of the Resolution College, but this was changed in 2015.[32] The Chair of the FSMA currently attends the meetings of the Resolution College in an advisory capacity.[33] The reason to include the Chairman of the FSMA in the Resolution College was to ensure that the impact of resolution measures on retail investors and the functioning of the financial markets would be adequately considered when resolution measures were decided upon.[34] When the law was changed in 2015, the legislator considered that this objective would also be achieved if the Chairman participates in the meetings in an advisory capacity.[35]

The members referred to in points 8) and 9) are appointed for a renewable term of four years.[36] The four members appointed by Royal Decree based on their specific expertise currently are a retired banker, a Judge in the Court of Appeal with expertise in insolvency procedures, and two professors with expertise in financial regulation. The magistrate appointed by Royal Decree is a Judge of the Belgian Supreme Court (Hof van Cassatie / Cour de Cassation) who is also an emeritus-professor in insolvency law.

The members can only be removed from office by Royal Decree if they no longer meet all requirements for the exercise of their functions or in case of gross misconduct.[37]

2.3. Organisation of the Resolution College within the National Bank of Belgium

The internal organisation of the Resolution College should be developed in rules of internal order (*huishoudelijk reglement* / *règlement d'ordre intérieur*) of the Resolution College.[38] The Royal Decree on the Resolution College provides that these rules should provide the procedure for the preparation of meetings and the organisation of the Resolution College's secretariat.[39] They should moreover set out under which conditions employees of the National Bank or external experts can be heard by the Resolution College and under which conditions signature

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32 Article 21ter §2 6° Organic Law NBB revoked by Article 56 2° Law of 18 December 2018.

33 *Ibidem*, Article 21ter §2/1.

34 Wetsontwerp van 17 november 2015 houdende diverse financiële bepalingen, houdende de oprichting van een administratieve dienst met boekhoudkundige autonomie "Sociale activiteiten", en houdende een bepaling inzake de gelijkheid van vrouwen en mannen, *Parl. St. Kamer* 2015-16, nr. 1459/001, 23 (Draft law of 17 November 2015 containing various financial provisions, establishing an administrative department with accounting autonomy "Social Activities", and containing a provision on gender equality).

35 *Ibidem*.

36 Article 21ter §3 para. 2 Organic Law NBB.

37 *Ibidem*, Article 21ter §3.

38 Konlinklijk Besluit van 22 februari 2015 tot vaststelling van de regels voor de organisatie en de werking van het Afwikkelingscollege, de voorwaarden voor de uitwisseling van informatie tussen het Afwikkelingscollege en derden en de maatregelen die moeten worden genomen om belangenconflicten te voorkomen, *Belgian Official Journal* 6 March 2015, hereinafter: Royal Decree Resolution College.

39 Article 7 Royal Decree Resolution College.

competences or any other competences can be delegated.[40] The rules of internal order should be developed by the Council of Regents[41] (*Regentenraad / Conseil de Régence*) upon the proposal of the Board of Directors of the National Bank[42] (*Directiecomité / Comité de Direction*).[43] The rules of internal order have not yet been adopted.

The Resolution College meets at least four times a year. In addition, the Resolution College meets 'when the circumstances so demand' or when at least three of its members request a meeting.[44] In the latter two cases, the chair of the Resolution College invites the members of the College at least one week before the meeting is scheduled. This period can be reduced to one hour in case of urgency.[45]

The agenda is set by the chair. In practice, the staff of the "Resolution Cell" at the National Bank prepares the agenda in cooperation with the governor and director of the National Bank responsible for resolution. At least three working days before the meeting (except in case of urgency), the members receive a draft agenda. The members can request that certain points be added to the agenda. The final agenda is communicated one day before the meeting. No decisions can be made on points that were not included in the agenda, except in case of urgency or with the unanimous consent of the members present in the meeting.[46]

Decisions are taken by simple majority. Each member has one vote. The president has a decisive vote.[47] The Resolution College cannot take decisions when a majority of its members are absent.[48]

In accordance with the BRRD, ad hoc special resolution colleges (*afwikkelingscolleges / collèges d'autorité de resolution*[49]) can be established. The Belgian legislator did not use the possibility in article 1 paragraph 2 BRRD

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40 *Ibidem*.

41 For its composition see Article 20 §1 Organic Law NBB: The Council of Regents consists of the governor, the directors and fourteen regents. There must be an equal number of French-speaking and Dutch-speaking regents. At least one third of the members of the Council of Regents must be of different gender than the remaining members.

42 For its composition see Article 19 §1 Organic Law NBB: The Board of Directors consists of the governor and maximum five directors. One of the directors is appointed as vice-governor by Royal Decree. There must be an equal number of French-speaking and Dutch-speaking members.

43 Article 20 §2 Organic Law NBB.

44 Article 5, para. 1 Royal Decree Resolution College.

45 *Ibidem*, Article 5 para. 2.

46 *Ibidem*, Article 5 para. 3.

47 *Ibidem*, Article 6 para. 1.

48 *Ibidem*, Article 6 para. 2.

49 The Dutch terminology is quite confusing since the organ at the National Bank of Belgium responsible for resolution is also named "Afwikkelingscollege". In French, the distinction is more clear: Collège de Resolution *versus* collèges d'autorités de resolution.

to issue stricter rules in this respect.[50] As provided by Article 88 and following BRRD, ad hoc special resolution colleges need to be established to execute the resolution of cross-border groups and coordinate the cooperation with resolution authorities of third countries.[51] The Belgian Resolution College is only involved if one of the subsidiaries of a banking group, is established in Belgium.[52] The Belgian Resolution College is currently involved in five special resolution colleges. One of those special colleges is led by the Belgian Resolution College;[53] in the other four colleges the SRB takes the lead.[54] Those colleges meet once or twice a year with the aim to prepare 'joint decisions'.

2.4. Separation of, and cooperation between the resolution and prudential oversight functions within the National bank of Belgium

2.4.1. Level of separation between the resolution and prudential competences of the National Bank of Belgium

Apart from resolution, the National Bank of Belgium is also competent for (i) monetary policy in the context of the European System of Central Banks, (ii) micro-prudential supervision in the framework of the Single Supervisory Mechanism (SSM); and (iii) macro-prudential supervision.

Although a single institution is responsible for both prudential supervision and resolution (the National Bank of Belgium), internally separate bodies of the National Bank are responsible for those tasks, which cooperate, however, where needed.

Whereas the Resolution College deliberates on and takes all decisions in respect of the resolution competences of the National Bank, the Board of Directors of the National Bank adopts the decisions concerning micro- and macro-prudential supervision.[55]

In respect of microprudential banking supervision the National Bank of Belgium is part of the SSM.[56] Under the SSM Regulation, the ECB supervises

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50 See the explanatory memorandum (report to the King) relating to Koninklijk Besluit 26 december 2015 tot wijziging van de wet van 25 april 2014 op het statuut van en het toezicht op kredietinstellingen wat het herstel en de afwikkeling van groepen betreft, *Belgian Official Journal* 31 December 2015, 81534, hereinafter: Royal Decree of 26 december 2015 (Eng.: Royal Decree of 26 December 2015 amending the Law of 25 April 2014 on the status and supervision of credit institutions as regards the recovery and resolution of groups).

51 Article 468 §1 Bank Law.

52 Article 468 §1 Bankwet; Royal Decree of 26 december 2015, 81534.

53 Article 36b §1 of the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities, SRB/PS/2018/15 (hereinafter: COFRA).

54 Article 36a §2 COFRA.

55 Article 4 §1 para. 9 j. Article 4 §1 para. 8 Huishoudelijk Reglement van de Nationale Bank van België (Eng: Rules of internal order of the National Bank of Belgium), 14 september 2022, see *here*.

56 Article 3 4° Bank Law; Article 6 (4) SSM Regulation.

the significant credit institutions in cooperation with the National Bank, while the National Bank is responsible for the day-to-day supervision of the Less Significant Institutions (LSIs).[57] The powers of the SSM regarding prudential banking supervision in Belgium are set out in Title 3, Chapter 2 of Book 2 of the Bank Law. The National Bank's policy is further defined in its circulars.[58] The primary responsibility for macro-prudential supervision, on the other hand, lies with the National Bank (Article 12bis Organic Law NBB, Article 3, 4° and Article 134 Bank Law). Nevertheless, the ECB has limited powers in macroprudential supervision as well. The ECB can, for instance, object to the National Bank's decisions on capital buffers, as set out in Article 4 (1) (d) SSM Regulation.[59] Within the National Bank, the Board of Directors adopts the decisions concerning macroprudential supervision.

The organisation chart on the website of the National Bank of Belgium sets out how different cells with dedicated staff underpin the workstreams related to resolution on the one hand and supervision on the other hand. They each have a different line of reporting and different directors of the National Bank are responsible for those functions.[60]

A separate resolution cell with a limited number of highly specialised, dedicated staff indeed underpins and prepares the work of the Resolution College. Even though the staff of this cell is dedicated to resolution tasks and competences, they are sometimes also involved in horizontal tasks of the National Bank. For example, for reporting or the calculation of ratios or other values, staff of the resolution cell obviously communicates with staff members of other cells. In case of emergency and urgent need of extra staff, staff members of other cells can assist the resolution cell. In its 2018 Country Report on the financial safety net and crisis management in Belgium, the IMF found that, compared to supervision, resolution indeed requires a smaller number of permanent staff, which should be expanded with internal and external resources as needed. The IMF recommended that this expansion should be formalised in an explicit framework to ensure the resolution unit's operational autonomy and functional effectiveness.[61] Such a framework has not yet been established.

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57 The National Bank of Belgium supervises the less significant credit institutions in accordance with the guidelines of the ECB and is subject to the oversight of the ECB (Article 6 (5) (a) and (c) SSM Regulation). The ECB can decide to take over the supervision of the less significant institution from the NBB (Article 6 (5) (b)). Moreover, the ECB has exclusive supervisory tasks that it exercises in relation to both significant and less significant institutions, such as the grant and withdrawal of the authorisation of a credit institution and the assessment of notifications of acquisitions and disposals of qualifying holdings in credit institutions (Article 6 (6) para. 1; Article 4 (1) (a) and (c)).

58 For example: NBB, *Circular on periodic qualitative and quantitative reporting requirements concerning proprietary trading activity for its own account*, 14 September 2022, NBB_2022_20.

59 Article 5 (1) SSM Regulation.

60 See *here*.

61 IMF Country Report No 18/68, (1) 5, 6, 16.

2.4.2. Confidentiality obligations and information flows between resolution and supervisory functions, and with other stakeholders more generally

The National Bank, the members and former members of its organs and its staff and experts are bound by an obligation of professional secrecy and should not disclose confidential data of which they have been informed on the basis of their function at the National Bank.[62] However, the Bank may share confidential information if it is authorised by or under the law, as well as in the context of reporting criminal offences to the judicial authorities or in the context of judicial or administrative proceedings against the bank's actions or decisions or wherein the bank is a party.[63] Additionally, information can be shared in a concise form if natural or legal persons cannot be identified.[64] The Bank can also use confidential information within the framework of its statutory mission to carry out the following tasks: (i) monitor the proper functioning of clearing, settlement and payment services, (ii) contribute to the stability of the financial system, (iii) carry out its duties as resolution authority, (iv) exercise prudential supervision on financial institutions and (v) its tasks within the ESCB.[65]

Furthermore, there are certain more specific exceptions provided by law.

First, the National Bank can share confidential information in the context of and with a view to the performance of its resolution competences to the following persons and institutions: (i) resolution authorities of the European Union and the other Member States of the EEA, as well as to third-country authorities with comparable competences; (ii) the Minister of Finance; (iii) any other person, when this is necessary to plan or execute a resolution measure; and (iv) to any person or authority competent for tasks referred to in the BRRD (subject to certain conditions).[66]

Moreover, with a view to the performance of its resolution competences, but beyond this framework as well, the National Bank can also share confidential information (i) to the ECB and other central banks with similar tasks in their capacity of monetary authority, if the information is important for the exercise of their legal competences;[67] (ii) to the competent authorities of the EU and the other Member States of the EEA that perform microprudential taks, including to the ECB in respect of its competences in the SSM; (iii) to prudential authorities in third countries if the National bank has made a cooperation agreement for the exchange of information with those authorities; (iv) with the Belgian Financial Services and Markets Authority; (iv) with the deposit guarantee schemes of Belgium and other EEA Member States, and to the institution competent for

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62 Article 35 §1 Organic Law NBB.

63 Article 35 §2 1°-3° Organic Law NBB.

64 *Ibidem*, 4°.

65 Article 35 §3 Organic Law NBB.

66 Article 35/1 §1 Organic Law NBB.

67 Article 35/1 §1, 2° iuncto Article 36/14 Organic Law NBB. In crisis situations information sharing with those authorities is even more flexible.

resolution financing; (v) to the authorities and judicial mandataries involved in insolvency procedures, except for confidential information on the share of third parties in rescue attempts before the insolvency procedure started; (vi) to the Belgian college of supervision of auditors and the authorities of Members States or third countries competent for the supervision of auditors of annual accounts of the institutions under the supervision of the National Bank; (vii) to macro-prudential authorities of Member States of the European Union and to the ESRB; (viii) to EBA, ESMA and EIOPA on the basis of the European regulations and directives.[68]

The Royal Decree on the Resolution College develops the cooperation and exchange of information between the Resolution College and the supervisor in more detail. Article 9 of the Royal Decree states that the Resolution College should cooperate with the supervisor. The Resolution College should, on its own initiative or upon request of the supervisory authority, share any information necessary for the execution of the supervisor's tasks with the latter. Conversely, the Resolution College may ask the same from the supervisory authority.[69] The rules of internal order of the Resolution College should determine the procedures to be followed for this information exchange and identify which information must be exchanged as a minimum and via which communication channels.[70] As mentioned above, such rules are still in the drafting process.

Moreover, the staff of the resolution cell can be questioned by the Board of Directors of the Bank (competent for prudential supervision) at the latter's request. The Resolution College can, at its request, also question staff of the cell competent for prudential supervision and prudential policy. Such requests for questioning of staff should be preceded by prior approval of the bodies (Resolution College c.q Board of Directors) which those cells support.[71]

Specifically, in respect of the transition from early intervention to resolution, the Bank Law requires that the prudential supervisor should notify the resolution authority of any measures taken in the context of early intervention as well as the fact that circumstances apply that may give rise to such early intervention.[72] In its 2018 report, the IMF recommended that the National Bank should ensure a smooth and decisive transition from early intervention to resolution for LSIs, with ample time for resolution preparation. The IMF found that prudential supervisor should inform the Resolution College when early intervention measures are not met. To allow more advanced resolution preparation, the IMF recommended that the Resolution College should be involved at an earlier stage when a bank has a medium risk assessment score under the SREP methodology (rather than having to wait for a high risk score). The IMF recommended that a protocol should detail

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68 *Ibidem*.

69 Article 9 para. 2 Royal Decree Resolution College.

70 *Ibidem*, Article 9 para. 3.

71 *Ibidem*, Article 9 para. 4.

72 Article 237 §2 Bank Law.

the cooperation and information sharing between supervisory and resolution staff.[73] This protocol has not yet been adopted.

Apart from those formal information flows, there are also more informal information flows. As mentioned above, the governor and four directors of the National Bank, including the director in charge of prudential supervision of banks and stockbroking firms and the director in charge of prudential policy and financial stability, are members of both the Resolution College and the Board of Directors, which decides on matters of prudential supervision. Therefore, information exchange can take place quite naturally in the Resolution College.

As of yet, no tensions have arisen due to the separation, even though separate work streams between the prudential tasks in the context of the SSM and the resolution tasks in the context of the SRM sometimes create inefficiencies. Indeed, even though information flows between the Resolution College and the Belgian prudential supervisor generally work quite well, the Banking Union's structures also create certain inefficiencies, especially in relation to Significant Institutions (SIs). Information concerning SIs flows from the National Bank to the ECB, which will share the information with the SRB if necessary. The SRB will send the information back to the NRA (the Resolution College) in case of need. Information concerning Less LSIs can be sent directly from the micro-prudential supervisor (Board of Directors) to the Resolution College on a need-to-know basis.

2.5. Role of the Ministry of Finance

The BRRD requires that each Member State designates a single ministry which is responsible for exercising the functions of the competent ministry under that Directive.[74] For Belgium, Article 423, 20° Bank Law has designated the Ministry of Finance as the competent ministry.

Article 3 §6 BRRD provides that the competent minister should be informed of every decision taken by the resolution authority and that the minister should give their approval before implementing decisions that can have a direct fiscal impact or systemic implications unless national law states otherwise. The Bank Law has implemented article 3 §6 by requiring the resolution authority to inform the minister of every disposal decision which it intends to take.[75] Disposal decisions[76] (*beschikkingsbeslissingen / décisions de disposition*) are defined as decisions concerning, for example, the transfer of shares, decisions regarding other instruments of ownership, assets, rights or obligations, decisions to depreciate or convert liabilities by applying a resolution or the decision to execute certain other

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73 IMF Country Report No 18/68, (1) 4 and 6.

74 Article 3 §5 *j.* 2 §1 (22) BRRD.

75 Article 268 §2 Bank Law.

76 As defined in Article 242 17° Bank Law.

competences.[77] The Bank Law does not require the minister's explicit approval for decisions which could have a direct fiscal impact or systemic implications. Rather, the minister can oppose, within 48 hours, every disposal decision which they deem to have a direct fiscal impact or systemic implications.[78]

In respect of other decisions, no prior approval of the Minister of Finance is required. However the Minister must be notified of the fact that the Resolution College has determined – or has received notification from another resolution authority – that a credit institution is failing or likely to fail and that there is no reasonable prospect that other measures would prevent the failure.[79] The minister must also be notified if the Resolution College takes resolution measures.[80] Furthermore, the Resolution College should share information with the Minister of Finance on the resolution of cross-border groups, if it is related to a disposal decision, a credit institution being failing or likely to fail, or a decision which may have implications for public funds.[81]

More generally, the Minister of Finance has the right to exercise control over the operations of the National Bank (and thus the Resolution College) and oppose any measure deemed contrary to the law, statutes or national interests.[82] However, this right does not extend to the operations of the National Bank that depend on the ESCB, nor to its operations in the context of its micro-prudential supervision competences or its macro-prudential financial stability competentences.[83] The exemptions have not been extended to the resolution competences of the NBB. It is not clear whether this was a deliberate choice or whether this was due to oblivion.

2.6. Roles of the Belgian Resolution Fund and Deposit Guarantee Fund

The Belgian resolution fund (*Afwikkelingsfonds* / *le Fonds de Résolution*) was first established in 2011 in the wake of the crisis, a few years before the introduction of the BRRD, by the law of 28 December 2011.[84] It was created to

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77 Article 10 Royal Decree Resolution College *j.* Article 242, 17° and Article 268, §2 Article Bank Law.

78 Article 268 §2 Bank Law. The wording of article 3 §6 BRRD ("*unless otherwise laid down in national law*") leaves room for a deviation from receiving the minister's approval.

79 Article 292 5° *j.* 244 §1 1°-2° and 464 3° Bank Law, which is a transposition of Article 81 §3 i) *j.* Article 32 §1 a)-b) BRRD.

80 Article 294 §1 Bank Law, which is a transposition of Article 83 §2 g) BRRD.

81 Article 471 §2 Bank Law, which is a transposition of Article 90 §4 BRRD.

82 Article 22 para. 1 Organic Law NBB.

83 *Ibidem*.

84 Wet 28 december 2011 tot invoering van een bijdrage voor de financiële stabiliteit en tot wijziging van het koninklijk besluit van 14 november 2008 tot uitvoering van de wet van 15 oktober 2008 houdende maatregelen ter bevordering van de financiële stabiliteit en inzonderheid tot instelling van een staatsgarantie voor verstrekte kredieten en andere verrichtingen in het kader van de financiële stabiliteit, voor wat betreft de bescherming van de deposito's, de levensverzekeringen en het kapitaal van erkende coöperatieve vennootschappen, en tot wijziging van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, *Belgian Official Journal* 30 December 2011, hereinafter: Law on the Resolution Fund.

finance the measures taken to reduce the impact of a failing credit institution on Belgium's financial system and economic and social welfare.[85]

When it was first established, the resolution fund was part of the Belgian deposit and consignment office (*Deposito- en Consignatiekas / Caisse des Dépôts et Consignations*). When the BRRD was implemented in 2016, the name of the law was changed to "Law on the resolution fund" (*Wet op het afwikkelingsfonds / Loi sur le fonds de resolution*), and its provisions were amended in line with the BRRD.[86] Its tasks were also reformulated in line with the BRRD.[87]

In 2018, the IMF noted that both the Belgian deposit guarantee fund and the national resolution fund are notional funds, meaning that fees collected from the industry are transferred to the government. In return, the Ministry of Finance can be drawn on by the deposit guarantee fund up to the amounts accumulated for both funds. To ensure consistency with international standards and ready access to these funds, also in times of fiscal constraints, the IMF recommended that these funds should be segregated from government funds. Moreover, the deposit guarantee fund should have standing credit lines with the ministry of finance, over and above the accumulated amounts.[88]

In 2021, the structural embedding of the fund has been changed. The legislator found that the resolution fund was not involved in the main mission of the deposit and consignment office, i.e. safekeeping of funds for third-party accounts,[89] but served a totally different objective, to maintain the stability of the financial markets.[90] The fund became part of the General Administration of the Treasury of the Federal Public Service Finance (*Algemene Administratie van de Thesaurie van de Federale Overheidsdienst Financiën / Administration Générale*

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85 Original version of Article 2 Law on the Resolution Fund: at its introduction in 2011, the original version of article 2 Law on the Resolution Fund referred to the funds task. The current version of article 2, introduced in 2021, no longer explicitely refers to this general task.

86 Wet 27 juni 2016 tot omzetting van diverse bepalingen van Richtlijn 2014/59/EU van het Europees Parlement en de Raad van 15 mei 2014 betreffende de totstandbrenging van een kader voor het herstel en de afwikkeling van kredietinstellingen en beleggings-ondernemingen en tot wijziging van Richtlijn 82/891/EEG van de Raad en de Richtlijnen 2001/24/EG, 2002/47/EG, 2004/25/EG, 2005/56/EG, 2007/36/EG, 2011/35/EU, 2012/30/EU en 2013/36/EU en de Verordeningen (EU) nr. 1093/2010 en (EU) nr. 648/2012, van het Europees Parlement en de Raad, *Belgian Official Journal* 6 July 2016 (Eng.: Law of 27 June 2016 transposing various provisions of Directive 2014/59/EU of the European Parliamant 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/EG, 2004/25/EG, 2005/56/EG, 2007/36/EG, 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).

87 Article 6/1 Law of 28 December 2011.

88 IMF Country Report No 18/68, (1) 6.

89 Wetsontwerp 19 april 2021 houdende diverse financiële bepalingen, *Parl. St. Kamer* 2020-21, nr. 1887/001, 101 (Draft law of 19 April 2021 containing various financial provisions).

90 Article 357 Wet 27 juni 2021 houdende diverse financiële bepalingen, *Belgian Official Journal* 9 July 2021 (Eng.: Law of 19 April 2021 containing various financial provisions).

de la Trésorie du Service public fédéral Finances).[91] The system denounced by the IMF, however, still applies: credit institutions and investment firms that are not required to contribute to the Single Resolution Fund,[92] have to contribute to the Belgian resolution fund, that collects the contributions and transfers them to the Treasury.[93] Those contributions are therefore considered to be fiscal income for the Belgian budget, in line with Eurostat rules providing that the levies paid by financial institutions to the protection funds are classified as taxes. The reason is that the protection funds do not render services exclusively to financial institutions, but rather to 'the whole community'.[94] The nominal amounts of those contributions are kept in a ledger, and, when the legal conditions are fulfilled, the treasury will make the required payments in the context of the resolution scheme.

Under certain conditions, the Belgian deposit guarantee fund (*Garantiefonds / Fonds de Garantie*) can also be called upon to financially contribute to the resolution of credit institutions under the responsibility of the Resolution College.[95] The Belgian deposit guarantee fund has also been transferred to the General Administration of the Treasury of the Federal Public Service Finance. Contributions from credit institutions to the Belgian deposit guarantee fund are transferred to the Treasury.[96] Parliament is however discussing how to ensure to keep contributions on a segregated account within the Treasury in the future.

3. Independence and accountability

3.1. Independence of resolution function

In section 2.4. above, we set out how structural arrangements ensure that the resolution function and the prudential supervision and policy function can operate independently. In the next sections, we will discuss how the independence of

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91 *Ibidem*.

92 See Article 1/1 §1 2° Law on the Resolution Fund: these credit institutions include branches located in Belgium of credit institutions or investements firms from third countries and Belgian investment firms that are not subject to ECB supervision on a consolidated basis, as set out in the SRM Regulation (see also: NBB, *Report 2016 – Economic and financial developments*, 2016, 190).

93 Article 3 para. 2 last sentence Law on the Resolution Fund.

94 See Eurostat, *Manual on Government Deficit and Debt. Implementation of ESA 2010*, 2019 (retrieved on 9 February 2023), 58, para. 27.

95 Article 384/1 Bank Law (transposition of Article 109 BRRD) and Article 380 Bank Law.

96 Article 8 §4 KB 14 november 2008 tot uitvoering van de wet van 15 oktober 2008 houdende maatregelen ter bevordering van de financiële stabiliteit en inzonderheid tot instelling van een staatsgarantie voor verstrekte kredieten en andere verrichtingen in het kader van de financiële stabiliteit, voor wat betreft de bescherming van de deposito's en de levensverzekeringen, en tot wijziging van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, *Belgian Official Journal* 17 November 2008 (Eng.: Royal Decree of 14 November 2008 implementing the law of 15 October 2008 on measures to promote financial stability and, in particular, establishing a state guarantee for credits granted and other operations carried out within the framework of financial stability, as regards protection of deposits and life insurance, and amending the law of 2 August 2002 on the supervision of het financial sector and financial services).

(members of) the Resolution College is ensured by law, and what happens in case of conflicts of interest.

3.1.1. Independence of members of the Resolution College / conflicts of interests

A majority of the members of the Resolution College are not involved in any other competences of the National Bank (see section 2.4.1.). Members of the Resolution College face several incompatibilities with certain other functions.[97]

Article 3 §3 BRRD requires that structural arrangements should be in place to ensure operational independence and to avoid conflicts of interest between the resolution function and other functions of the relevant authority. This requirement has been implemented by the Royal Decree on the Resolution College.[98]

Article 13 of the Royal Decree provides that "*when carrying out the tasks of the resolution college, its members shall act independently and objectively and in the general interest. They shall seek nor take instructions from any government body or any other public or private body*".[99] During their mandate and for a year after they have withdrawn from their positions, members of the NRA, moreover, cannot accept any assignments from an institution under the supervision of the National Bank of Belgium or under the supervision of the European Central Bank.[100]

At the start of every meeting, any member whose participation in that meeting could give rise to a conflict of interest regarding one or more points on the agenda must notify this conflict to the chair. This member should then refrain from participating in the deliberations and the vote on those points.[101]

3.1.2. Financial independence of the Resolution College

As a member of the ESCB, the National Bank of Belgium, including the Resolution College, must be financially independent.[102] An expression of this financial independence is the fact that the budget of the National Bank does

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97 See Articles 25-26 Organic Law NBB.

98 See Articles 13-14 Royal Decree Resolution College.

99 *Ibidem*, Article 13 para. 1; see Royal Decree Resolution College, Report to the King, (15435) 15441: The provision is inspired by Article 19 SSM Regulation and Article 47 Regulation 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 1093/2010 [2013] OJ L225/1.

100 *Ibidem*, Article 13 para. 2.

101 *Ibidem*, Article 14.

102 Article 130 TFEU; ECB, *Convergence report May 2018*, 2018, 25-26.

not need to be approved by the Ministry of Finance.[103] Instead the Council of Regents[104] is the competent authority to endorse the National Bank's budget.[105]

To ensure the financial independence of the Resolution College specifically, article 12ter §2 of the Organic Law NBB provides that the operating costs of the Resolution College are borne by the institutions which fall under its authority. Moreover, in a specific resolution case, the resolution costs can be recovered from the entity which is subject to the resolution.[106] The Resolution College will then deduct its costs from the compensations paid to the entity subject to the resolution by, for instance, the transferee, the bridge institution or asset management vehicle.[107]

3.2. Transparency and Accountability

Transparency and democratic accountability of the Resolution College are guaranteed in various ways.

In order to allow accountability, transparency is key. Therefore, every measure taken in the context of a resolution procedure must be announced on the website of both the Resolution College and the affected credit institution and must be published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur Belge*). In addition, if the shares or other securities of a credit institution against whom certain resolution measures are taken are traded on a regulated market, those measures must also be announced on the website of the FSMA (Belgian Financial Services and Markets Authority). If the shares or other securities of the credit institution are not traded on a regulated market, the resolution authority should ensure that the documents evidencing the resolution measure are sent to the shareholders and creditors of the credit institution which are known in the registers or databases of the credit institution at the disposal of the Resolution College.[108]

The Bank Law provided that the Resolution College had to send a report to the Minister of Finance, one year after its establishment, which it did.[109] The Minister of Finance is moreover informed of certain decisions taken by the Resolution College, as explained above and can oppose to certain disposal decisions. More generally, the Minister of Finance has the power to exercise

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103 The ECB argues that any influence on the national bank's budget by a third party, in this case, the Ministry of Finance, would be incompatible with the requirement of financial independence. See ECB, *Convergence report May 2018*, cit., 26.

104 For its composition see *supra*.

105 Article 20 §4 Organic Law NBB; ECB, *Convergence report May 2018*, cit., 26.

106 Article 247 §1 para. 2 1° j. 272 §1 1° Bank Law.

107 Article 272 §1 2°-3° Bank Law; F. Parrein, *Article 272 Bankwet*, in R. Steennot *et al.* (eds), *Financieel recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer, 2016), 149.

108 Article 295 Bank Law.

109 Article 417 Bank Law. This report is not publicly available.

control over the National Bank (and thus the Resolution College) and to oppose any measure deemed contrary to the law, statutes or national interests.[110] A representative of the Minister of Finance attends certain meetings and can suspend decisions of the Bank.[111] As set out above, the chair of the Management Committee of the Federal Public Service Finance is also a formal member of the Resolution College.

In terms of accountability, the Governor of the National Bank of Belgium can be held accountable before the Belgian federal parliament. The Governor has to send the annual report on the functioning of the Bank to the federal Chamber of Representatives ('Kamer van Volksvertegenwoordigers / Chambre des resprésentants') and can be questioned by the competent committees of the Chamber, either at their request or on the Governor's own initiative.[112] To date, this has not yet happened in respect of resolution matters. Pre-resolution, a parliamentary committee was established to discuss the causes of the failing Optima Bank and the possible conflicts of interests between the Optima Group and public administrations, during which the governor and the former governor of the National Bank were questioned.[113]

The government appoints the Governor and the members of the Board of Directors of the National Bank of Belgium.[114] Dismissal is only possible in exceptional circumstances when a member is no longer fulfilling the requirements for the performance of his duties or has been seriously deficient.[115] The Belgian federal parliament is neither involved in the appointment nor the dismissal of the Governor and the members of the Board of Directors.

The SRB is subject to European rules concerning the accountability of the SRM. The SRB is accountable to the European Parliament, the Council and the Commission.[116] The Chair of the SRB must participate in hearings of the competent committee in the European Parliament and can be heard by the Council as well.[117] In addition to its accountability towards European institutions, the SRB is also accountable towards the Member States. The Chair of the SRB is obliged to respond to invitations from member states' national parliaments to exchange views on the resolution of entities.[118]

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110 Article 22 para. 1 Organic Law NBB.

111 *Ibidem*, Article 22 para. 2.

112 *Ibidem*, Article 28, this report contains information on the working of the Resolution College (on average, 5 pages are spent explaining the work of the Resolution College).

113 Verslag van 13 juli 2017 van de parlementaire onderzoekscommissie belast met het onderzoek over de oorzaken van het faillissement van Optima Bank en de eventuele belangenvermenging tussen de Optima Groep en haar componenten enerzijds en openbare besturen anderzijds, Kamer 2016-17, nr. CRABV 54 PLEN 180, 18.

114 Article 23 para. 1 and 2 Organic Law NBB.

115 *Ibidem*.

116 Article 45 §1 SRM Regulation.

117 *Ibidem*, Article 45 §§4-5.

118 *Ibidem*, Article 46 §3.

3.3. Judicial review

Each disposal decision or resolution measure can be challenged before the Court of Appeal of Brussels.[119] The Court will examine the legality of the decision or measure, the adequacy of the compensation for affected owners and the distribution key amongst affected owners.[120]

The Bank, the members of its organs and its staff cannot be held civilly liable for their decisions, omissions, acts or conduct in the execution of their tasks, except in the event of fraud or gross negligence.[121] As the Resolution College (and the supervisory authority as well) is a part of the National Bank, this limitation of liability has been made explicitly applicable to them as well. Whether or not there has been gross negligence should be judged based on the concrete circumstances of the case, taking into account the urgency of the case, market practice on the financial markets, the complexity of the case, the need to protect deposits and of the risk of damage to the national economy.[122]

In the past, disposal decisions were also subject to prior judicial control. No decision could take effect until a court had established that it was in accordance with the law and that the compensation for transfers of property was equitable.[123] However, the relevant provisions have been abolished in July 2021.[124] The *travaux préparatoires* explain that the IMF had assessed the stability of the Belgian financial system and had come to the conclusion that prior judicial control could hinder the swift and efficient resolution of Belgian credit institutions. As judicial control would take at least 7 working days, a lot of time would be lost before a decision could be put into practice, whereas financial crises require quick reactions. Thus, the IMF advised to eliminate or expedite ex ante judicial review of resolution measures to ensure a decisive resolution.[125] The Belgian Parliament decided to abolish the ex ante judicial review.

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119 *Ibidem*, Article 305.

120 *Ibidem*, Article 307.

121 Article 8 §3 Organic Law NBB.

122 *Ibidem*, Article 12ter §3 *j.* Article 12bis §3.

123 Former Articles 296-304 Bank Law.

124 Article 215 Wet van 11 juli 2021 tot omzetting van richtlijn 2019/878 van het Europees Parlement en de Raad van 20 mei 2019, van richtlijn 2019/879 van het Europees Parlement en de Raad van 20 mei 2019, van richtlijn 2019/2034 van het Europees Parlement en de Raad van 27 november 2019, van richtlijn 2019/2177 van het Europees Parlement en de Raad van 19 december 2019, van richtlijn 2021/338 van het Europees Parlement en de Raad van 16 februari 2021 en houdende diverse bepalingen, *Belgian Official Journal* 23 July 2021 (Eng.: Law of 11 July 2021 transposing Directive 2019/878 of the European Parliament and of the Council of 20 May 2019, Directive 2019/879 of the European Parliament and of the Council of 20 May 2019, Directive 2019/2034 of the European Parliament and of the Council of 27 November 2019, Directive 2019/2177 of the European Parliament and of the Council of 19 December 2019, Directive 2021/338 of the European Parliament and of the Council of 16 February 2021 and miscellaneous provisions).

125 *Parl. St. Kamer* 2020-21, nr. 1999/01, 108; IMF Country Report No 18/68, (1) 5 and 6.

3.4. National law on the implementation of soft law

There is no national legislation setting out how the National Bank should react to soft law from relevant EU bodies, such as the ECB, EBA or the SRB.

In practice, the National Bank of Belgium typically implements the guidelines issued by the ECB and the EBA in its circulars. In respect of the EBA guidelines, the National Bank indicates whether it will comply – in which case the guidelines are implemented in national circulars – or explains why it does not comply. In the vast majority of cases, the National Bank complies.[126]

4. Summary

The National Bank of Belgium is the Belgian national resolution authority. The organ of the National Bank of Belgium responsible for deliberating on and taking all decisions in respect of the Bank's resolution competences, is the Resolution College.

Although the National Bank of Belgium is also in charge of several other tasks, including micro- and macro-prudential supervision, an internal separation of competences, supported by an extensive regulatory framework should ensure that the resolution functions are exercised separately and independently from the prudential oversight functions. Indeed, a separate organ of the National Bank, the Resolution Colleges, takes the decisions concerning resolution, supported by a resolution cell with a limited number of highly specialized, dedicated staff. In a 2018 report, the IMF was of the opinion that compared to supervision, resolution indeed requires a smaller number of permanent staff, which should be expanded with internal and external resources as needed. The IMF had recommended formalizing this in an explicit framework to ensure the resolution unit's operational autonomy and functional effectiveness. Even though staff from other cells of the National Bank can indeed assist the resolution cell in case of emergencies, an explicit framework in this respect has not yet been developed.

Specific rules also ensure the independence of the individual members of the Resolution Authority, the transparency of resolution decisions and the accountability of the National Bank of Belgium in this respect. The Governor of the National Bank (who also chairs the Resolution College) can be questioned by the competent committees of the Belgian Chamber of Representatives, and the Minister of Finance can oppose certain decisions of the Resolution College. Even though the civil liability of members of the Resolution College is limited to cases of fraud or gross negligence, every disposal decision or resolution measure of the Resolution College is subject to judicial review by the Court of Appeal of Brussels.

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126 See for instance NBB, *Circulaire: EBA-richtsnoeren inzake crisis management*, 29 March 2022.

Bulgaria

Neli Madanska and Elitsa Halacheva

1. Introduction

The Bulgarian National Bank (BNB) is one of the oldest national institutions established on January 25, 1879, right after the restoration of the Bulgarian state. Being the Central Bank of the Republic of Bulgaria the BNB plays a key role in the economy and maintains price stability by ensuring the stability of the national currency. The BNB regulates and supervises the activities of credit institutions in the country for the purpose of ensuring soundness of the banking system and protecting depositors' interests, assists in the establishment and operation of efficient payment systems and supervises them. The BNB is the only issuing institute in Bulgaria and maintains the cash circulation available.

Since 1 January 2007 (with the accession of Bulgaria to the European Union) the BNB has been participating in the European System of Central Banks.

The BNB has been entrusted with public administrative powers to perform the functions and tasks in relation to resolution of credit institutions by the Law on the Recovery and Resolution of Credit Institutions and Investment Firms (LRRCIIF).[1]

Since October 2020 following the accession to the Single Resolution Mechanism (SRM), as a result of the establishment of close cooperation with the European Central Bank (ECB), the BNB also performs functions of national resolution authority under Regulation (EU) No 806/2014.[2]

In the course of preparations for the adoption of the euro as the official currency of the Republic of Bulgaria, on 1 February 2024 the National Assembly adopted a new Law on the BNB which reiterates the BNB independence and sets the framework for the BNB full membership in Eurosystem. The new law will enter into force as of the date specified in the Decision of the Council of the European Union on the adoption of the euro by the Republic of Bulgaria.[3]

2. Resolution framework at national level – establishment and reforms

The first legislative act regulating resolution of credit institutions and investment firms in Bulgaria – LRRCIIF, is effective as of 14 August 2015. The LRRCIIF transposes the requirements of Directive 2014/59/EU[4] into Bulgarian

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1 Article 2(1) of the LRRCIIF.

2 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 (SRMR)

3 With the exception of §6, para. 1, §9 and §11 of the Transitional and Final Provisions of the Law, which took effect as of the day on which this Law was promulgated namely 13 February 2024.

4 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,

legislation. There was no special national resolution regime before the introduction of harmonized EU Resolution Legislation into Bulgarian legal framework.

Resolution of a credit institution, investment firm or other entity under the BRRD is undertaken where the respective competent authority determines that the entity is failing or likely to fail, there are no supervisory or private sector measures that can restore it to viability within a short timeframe, and the winding up of the entity under normal insolvency proceedings would endanger financial stability and pose a risk to the real economy. The resolution actions are taken if resolution is necessary in the public interest and aim to achieve the following key resolution objectives:

- to ensure the continuity of institution's critical functions;
- to avoid significant adverse effects on financial stability;
- to protect public funds by minimising reliance on extraordinary public financial support and the amount thereof;
- to protect depositors whose deposits are guaranteed and investors whose claims are subject to compensation under the applicable legal framework;
- to protect client funds and assets.

The two major reforms of the LRRCIIF were conducted in 2019 and 2021. The 2019 amendments of the LRRCIIF were triggered by the preparation for the accession to the SRM and aimed to ensure smooth cooperation between the BNB and the Single Resolution Board (SRB).

The 2021 reform transposes the requirements of Directive (EU) 2019/879[5] (BRRD2) into Bulgarian legislation. The most important part of the amendments and supplements is dedicated to determination, application and supervision of the minimum requirement for own funds and eligible liabilities (MREL).

As a result of the accession to the SRM, national resolution legal framework has been enriched with the direct application of Regulation (EU) No 806/2014.

3. Bulgarian National Bank as resolution authority for credit institutions, other involved authorities and collaboration thereto

The resolution powers in Bulgaria are exercised by two separate authorities depending on the type of the entity. The BNB is the resolution authority in

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 (BRRD).

[5] Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

relation to the credit institutions and entities which are subject to supervision or consolidated supervision by BNB, in its capacity of supervisory authority. The Financial Supervision Commission is the resolution authority for investment firms.

Within the SRM, the BNB as national resolution authority and the SRB as centralized resolution body share resolution responsibilities. The BNB is represented in the SRB decision-making bodies in the form of the Plenary Session and the Extended Executive Session by the Deputy Governor in charge of the Banking Department. Credit institutions established in Bulgaria and certain cross-border groups, subject to ECB supervisory powers, are within the direct remit of the SRB powers. As regards these credit institutions, the BNB is represented in Internal Resolution Teams, which are set up by the SRB for each entity or group within the scope of the SRB direct powers and perform tasks on drawing up resolution plans and other activities related to resolution. The rest of the credit institutions and groups fall under the BNB direct resolution competences. In respect of these banks and groups the BNB performs tasks and takes decisions related to their resolvability assessment, preparation and update of resolution plans and application of measures to remove impediments to the resolvability, application of simplified obligations, and determination of MREL. If the conditions referred to in the LRRCIIF are met, the BNB takes decisions to implement resolution actions, exercises the resolution powers and applies resolution tools which are most appropriate for achieving the resolution objectives. The requirements of Article 33a BRRD are fully transposed into Bulgarian legislation and the BNB in its function as resolution authority for credit institutions is in charge of the powers to suspend certain payment obligations of credit institutions under the said provision. Where necessary, the BNB conducts consultations, exchanges information and coordinates its actions with the SRB and resolution authorities of other countries.

In terms of resolution planning and execution for credit institutions and groups, involvement of another national authorities is envisaged: the BNB as competent (supervisory) authority; the Ministry of Finance of the Republic of Bulgaria as competent ministry for government financial stabilization tools and situations of systemic crisis; the Bulgarian Deposit Insurance Fund (BDIF) exercising the functions of national deposit guarantee scheme.

In terms of resolution execution, the European Commission, whose positive or conditional decision is needed when resolution actions include provision of state aid, is also involved. The Council of the European Union also has its role as specified in the BRRD.

At EU level the BNB, as a member of resolution colleges established under BRRD and Delegated Regulation (EU) 2016/1075,[6] closely collaborates with

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[6] Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum

the national resolution authorities and national competent authorities of the EU Member States that are members of the respective resolution colleges.

At cross border level cooperation and coordination with resolution authorities and competent authorities from third countries under the provisions of non-binding cooperation agreements, is envisaged to be further developed.

The roles of the abovementioned authorities in resolution are defined in accordance with the respective provisions of the BRRD, transposed into Bulgarian legislation with LRRCIIF, the SRMR as well as with other directly applicable EU Law.

In terms of cooperation between the BNB as resolution authority and the local authority in charge of the DGS (the BDIF), a bilateral Cooperation agreement is in place.

4. Internal structure and organization of the BNB

The management of the BNB is carried out by the Governing Council, the Governor and the three Deputy Governors responsible for the management of the basic departments that are established at the BNB – the Issue Department, the Banking Department and the Banking Supervision Department.[7]

The Banking Supervision Department is in charge of the supervisory function. Following the accession of the Single Supervisory Mechanism (SSM) as of October 2020, the BNB performs functions of prudential supervision authority in close cooperation with the European Central Bank (ECB). The legal basis of the said function of the BNB includes Council Regulation (EU) No 1024/2013,[8] Regulation (EU) No 575/2013,[9] the Law on the Bulgarian National Bank and the Law on Credit Institutions which transposes the requirements of Directive 2013/36/EU[10] into Bulgarian legislation. The BNB as competent authority is in charge of specific function in terms of bank bankruptcy proceedings and liquidation as provided for in the Law on Bank Bankruptcy and the Law on Credit Institutions.

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criteria that the competent authoritye is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges.

7 Article 19(1) of the Law on the Bulgarian National Bank.

8 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.

9 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012.

10 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

The main function of the Issue Department is to maintain full foreign exchange cover of the total amount of monetary liabilities of the BNB, by taking actions needed for the efficient management of the BNB's gross international reserves.

The Banking Department is in charge of supervising payment system operators, payment services providers and electronic money issuers. Within the Banking Department are allocated also activities related to the functioning and development of efficient centralized payment systems, as well as tasks related to a fiscal agency function and depository of the state function.

The resolution function of the BNB is allocated to the the Deputy Governor in charge of the Issue Banking Department. A special internal organization is established within the BNB in relation to the implementation of resolution function as follows:

– the decision-making body of the BNB in its capacity as a resolution authority for credit institutions is the Governing Council of the BNB;[11]

– the Deputy Governor in charge of the Banking Department is responsible for planning, preparation and execution of the decisions of the Governing Council of the BNB as resolution authority and as national resolution authority under Regulation (EU) No 806/2014;

– individual structural unit – Resolution of Credit Institutions Directorate (RCI Directorate) is established. RCI Directorate is envisaged in LRRCIIF to support the Governing Council in exercising resolution functions and to conduct operative activities in this regard. Resolution function and the RCI Directorate itself are separate and apart from the structural units involved in carrying out tasks for implementation of banking supervision and the other functions of the BNB. The RCI Directorate is an individual structural unit which assists the Governing Council of the BNB in exercising its functions as resolution authority of credit institutions and as national resolution authority under Regulation (EU) No 806/2014. In terms of operative activity the RCI Directorate is directly subordinated to the Deputy Governor in charge of the Banking Department. The RCI Directorate is structured in five units namely – Methodology and Reporting Division; Resolution Planning, Coordination and Execution of Resolution Actions Division; Legal Services Division; Resolution of Credit Institutions within the Scope of the Single Resolution Board Division and Administration of the Banks Resolution Fund Division.

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[11] Article 2(1) of the LRRCIIF.

5. Resolution funds and DGS

The BNB in its function as resolution authority for credit institutions is entitled with the management of the Banks Resolution Fund (BRF).[12] The BRF was established in 2015 as a national resolution financing scheme under LRRCIIF. As of its establishment, the BRF was managed by the Management Board of the BDIF. The BNB has been authorised to determine the contributions to the BRF and to use its financial means for achieving the resolution objectives. With the accession to the SRM, the role of the BNB has changed. The BNB is responsible for the management of the BRF, and the financial means accumulated in it are distributed into two dedicated sub-funds with different purpose and scope:

– a sub-fund to finance the application of resolution tools and powers in relation to branches of third-country credit institutions;[13]

– a sub-fund to raise contributions from the credit institutions under Articles 69 – 71 of Regulation (EU) No 806/2014 and their transfer to the Single Resolution Fund.[14]

The BNB performs this function as of July 2020 following the entry into force of amendments of the LRRCIIF.

The Financial Supervision Commission in its function as resolution authority for investment firms is in charge of the management of the Investment Firms Resolution Fund[15] as of August 2015 (when the LRRCIIF entered into force) to date.

The institution in charge of the DGS is the BDIF. The BDIF is established under the Law on Bank Deposit Guarantee[16] and it is a separate legal entity,[17] managed by a Management Board.

6. Independence, separation, accountability

6.1. Decision-making body of the BNB as resolution authority for credit institutions – meetings, appointment and dismissal

The decision-making body of the BNB as resolution authority and as national resolution authority for credit institutions is the Governing Council of the BNB.[18]

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12 Article 134(1) of the LRRCIIF.

13 Article 134, paragraph 1, item 1 of the LRRCIIF.

14 Article 134, paragraph 1, item 2 of the LRRCIIF.

15 Article 135(4) of the LRRCIIF.

16 Article 1(1) of the Law on Bank Deposit Guarantee.

17 Article 2(1) of the Law on Bank Deposit Guarantee.

18 Article 2(1) of the LRRCIIF.

1. The meetings of the Governing Council of the BNB are called by the Governor. In the absence of the Governor the meetings of the Governing Council of the BNB are called by a Deputy Governor designated by the Governor. A meeting of the Governing Council of the BNB may also be called at the request of at least three of its members.[19]

The meetings of the Governing Council of the BNB take place at least once a month.[20]

In case the Governor calls the meeting, he/she decides on the agenda based on the proposals of the members of the Governing Council of the BNB for the topics to be discussed. In case the meeting of the Governing Council of the BNB is called at the request of at least three of its members, these members decide on the agenda.

2. The Governing Council of the BNB consists of seven members – the Governor, the three Deputy Governors, and three other members.[21] The Governor of the BNB is elected by the National Assembly.[22] The National Assembly also elects the Deputy Governors, on a motion by the Governor.[23] The other three members of the Governing Council of the BNB are appointed by the President of the Republic of Bulgaria.[24]

According to the legal requirements persons who are eligible and appointable as members of the Governing Council of the BNB should be prominent professionals in the areas of economics, finance and banking.[25]

The term of office of the members of the Governing Council of the BNB is six years.[26] The said Law does not limit the possibility for re-election of a members of the Governing Council of the BNB for another mandate.

Every member of the Governing Council of the BNB has a voting right. The governing Council of the BNB adopts its decisions by a majority of the members present but not fewer than four votes.[27]

3. The powers of a member of the Governing Council may be terminated before expiry of the term of office only if the said member does not satisfy the

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19 Article 15(1) of the Law on the Bulgarian National Bank.

20 *Ibidem*.

21 Article 11(1) of the Law on the Bulgarian National Bank.

22 Article 12(1) of the Law on the Bulgarian National Bank.

23 Article 12(2) of the Law on the Bulgarian National Bank.

24 Article 12(3) of the Law on the Bulgarian National Bank.

25 Article 11(3) of the Law on the Bulgarian National Bank.

26 Article 12(4) of the Law on the Bulgarian National Bank.

27 Article 17(2) of the Law on the Bulgarian National Bank.

requirements necessary for the performance of his/her duties or if he/she has been found guilty of serious misconduct.[28,29]

6.2. Operational independence of the resolution functions and avoidance of conflicts of interest with other functions

The operational independence of the resolution function of the BNB is guaranteed by a rule with a rank of law.[30] In addition, based on the legal requirements[31] the Governing Council of the BNB has designated an individual structural unit (the RCI Directorate), which supports it in exercising its function as resolution authority for credit institutions. The RCI Directorate is separate and apart from the structural units involved in carrying out tasks for implementation of banking supervision and other functions of the BNB. The RCI Directorate is directly subordinated to the Deputy Governor in charge of the Banking Department which guarantees the effective division between resolution function, supervisory function and other functions of the BNB as Central Bank.

In accordance with the requirements of the law,[32] the Governing Council of the BNB adopts and publishes on its website internal rules of operation of the RCI Directorate. The internal rules of operation of the RCI Directorate are based on separation of supervision and resolution functions of the BNB.

No tensions have arisen as a result of or regarding the separation of the supervisory and the resolution function of the BNB.

6.3. Financial independence

The BNB has a separate and independent budget. The annual budget of the BNB is adopted by the Governing Council of the BNB and it is promulgated in the State Gazette.[33] The BNB collects annual fees to cover the administrative costs arising from the supervisory and resolution functions. The fees are payable by the relevant regulated entities.

6.4. Early intervention powers and appointment of temporary administrator

The early intervention powers and the power to appoint temporary administrator provided for by the BRRD are powers of the BNB as competent authority.[34] These powers of the BNB are operationally supported by the units

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28 Article 14(1) of the Law on the Bulgarian National Bank.

29 Serious misconduct within the meaning given by Article 14 (2) of the Statute of the European System of Central Banks and the European Central Bank.

30 Article 2(2) of the LRRCIIF.

31 *Ibidem*.

32 Article 2(3) of the LRRCIIF.

33 Article 48(1) of the Law on the Bulgarian National Bank.

34 Chapter Five of the LRRCIIF.

within the Banking Supervision Department of the BNB. The RCI Directorate, which supports operationally the resolution function of the BNB, is not involved in this regard directly.

6.5. Information exchanged between the different functions

The Governor of the BNB adopted dedicated internal rules for the exchange of information between the RCI Directorate and other structural units in the BNB. The adopted internal framework guarantees that the separate units in charge of supervisory and resolution functions exchange information when it is applicable and required, including when it comes from/is addressed to Union authorities. The specific way of exchange of information (i.e. formal letter, correspondence by email, shared folders, secured internal server platform, etc.) may be different depending on the circumstances. Additionally internal rules for the protection of the confidentiality of the information adopted by the Governing Council of BNB are in place. They are applicable also in this case of exchange of information, along with the confidentiality requirements under the national legislation transposing BRRD.[35]

Within the Single Resolution Mechanism exchange of information is facilitated by the MoU between the ECB and the SRB. Direct impact of the said MoU on the process of information sharing amongst structural units in the BNB, which are involved in execution of separate functions of the BNB as competent authority and resolution authority, has not been identified until now.

6.6. Accountability

There are several mechanisms which guarantee the democratic accountability of the activity of the BNB including in terms of its resolution function.

In accordance with its obligations under the Law on the Bulgarian National Bank, the BNB submits to the National Assembly an annual report on the Bank's activity, a consolidated financial statement, an auditor's report and a budget report not later than the 30th day of April of the next succeeding year.[36] Under the provisions of the said Law, the BNB also publishes information on the decisions of the Governing Council of the BNB, including in terms of its resolution function, on the BNB's website, except where the decisions contain professional, bank, commercial or other legally protected secret.[37]

In accordance with its obligations under the LRRCIIF, the BNB publishes on its website the annual financial statement of the BRF. The BNB also publishes information as regards the decisions of the Governing Council of the BNB in terms of the management of the Fund.

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35 Article 116 of the LRRCIIF.

36 Article 51 of the Law on the Bulgarian National Bank.

37 Article 17(5) of the Law on the Bulgarian National Bank.

In addition, the internal rules of operation of the RCI Directorate, which is the unit supporting the Governing Council of BNB in exercising its resolution functions, are public and published on the BNB's website.

The resolution function of BNB as resolution authority for credit institutions does not fall within the scope of the powers of the Court of Auditors in Bulgaria. Control by the European Court of Auditors (ECA) does not seem conceivable.

The activity of the separate structural unit in the BNB responsible for the resolution function (RCI Directorate) could be subject of internal audit carried out by the Internal Audit Unit at the BNB.

6.7. Judicial review

The judicial review is guaranteed under the Bulgarian Code of Administrative Procedure for all the decisions of the BNB as resolution authority for credit institutions when such decisions create rights or obligations or affect rights, freedoms or legitimate interests. Particularly, resolution decisions are subject of appeal before the Supreme Administrative Court on the grounds of Article 117 of the LRRCIIF.

6.8. Soft law

Bulgarian national law does not provide for specific rules in terms of national authorities` reaction to soft law. Therefore in this regard the BNB observes the applicable rules under the EU legislation, if any. Nevertheless the BNB's reaction to soft law is on a case by case basis and it is applied in the most appropriate way depending on the specific situation.

In the field of resolution of credit institutions, the BNB complies with the guidelines adopted by the European Banking Authority and the SRB general guidelines, if applicable.

6.9. Rules restricting the BNB's liability in application of Article 3 of the BRRD

According to the national law transposing BRRD into Bulgarian legislation[38] the BNB, the members of its Governing Council and the employees of the BNB do not incur liability for any detriment caused as a result of actions or omissions to act in the exercise of their duties under the LRRCIIF, save as where they have acted wilfully. This restricting rule applies both for resolution and supervisory functions deriving from the BRRD.

Bulgarian national law does not provide for specific provisions which restrict the general rules on public liability where the BNB acts in the context of the SRM.

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[38] Article 5(4) of the LRRCIIF.

7. Concluding remarks

The resolution function of the BNB, being the Bulgarian Central Bank, is one of its various functions under the law. The BNB is designated as a resolution authority of credit institutions (banks) by the LRRCIIF. The decisions of the BNB as resolution authority are taken by the Governing Council of the BNB. In exercising the resolution function, the BNB's Governing Council is assisted by the RCI Directorate, which is structurally separated and independent from the structural units involved in carrying out banking supervision and the other functions of the BNB. Accountability of the activity of the BNB including in terms of its resolution function is guaranteed by several mechanisms under the Law on the Bulgarian National Bank.

As of 1 October 2020, the date of the establishment of close cooperation with the ECB, the BNB performs its functions and tasks as resolution authority within the SRM in compliance with the direct application in the Republic of Bulgaria of Regulation (EU) No 806/2014.

Croatia

Ivana Parać, Ivana Bajakić and Marta Božina Beroš

Summary. 1. The Croatian National Bank – national resolution authority for credit institutions in Croatia – 2. Historical background and current setup: CNB's relation with the Croatian Agency for Deposit Insurance and Ministry of Finance – 3. Internal organisation of the CNB – 3.1. Separation of resolution and supervisory function and limitation of liability of the CNB – 3.2. Resolution function and decision making of the NRA

1. The Croatian National Bank – national resolution authority for credit institutions in Croatia

In Croatia, as of 1 January 2021, the Croatian National Bank (cro. "Hrvatska narodna banka"; hereinafter, "the CNB") is the only national resolution authority (hereinafter, "the NRA") for credit institutions. On 1 October 2020 the CNB established a close cooperation with the ECB,[1] which made Croatia "a participating Member State" within the meaning of the Regulation (EU) No 806/2014[2] (hereinafter, "the SRM Regulation") and the CNB part of the Single Resolution Mechanism (hereinafter, "the SRM"). Therefore, since the onset of this close cooperation, responsibility over credit institutions in Croatia has been divided between the Single Resolution Board (hereinafter, "the SRB") and the CNB in accordance with the SRM Regulation. On the other hand, with regard to investment firms, the CNB has no resolution powers since such powers in Croatia are vested to the Croatian Financial Services Supervisory Agency (cro. "Hrvatska agencija za nadzor financijskih usluga" or "HANFA"), which is the NRA for investment firms. Both NRAs (the CNB as well as Croatian Financial Services Supervisory Agency) have been notified as such[3] to the European Banking Authority (hereinafter, 'the EBA').

As a result, albeit there are other resolution authorities whose work complements the work of the CNB, this text focuses solely on the CNB in its role as NRA for credit institutions.

As the name suggests, the CNB is the Croatian central bank and as such is mentioned in the Croatian Constitution[4] (Article 53). Details of its legal setup and its tasks are further regulated in the Act on the Croatian National Bank (hereinafter, "Act on the CNB")[5], which to an extent mirrors the provisions of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (hereinafter, "Statute of the ESCB and of the ECB")[6].

Currently (October 2022, prior to the adoption of the euro), tasks of the CNB are regulated by Article 4 of the Act on the CNB, which explicitly mentions "the exercise of resolution powers in accordance with the laws governing the

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1 Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska narodna banka (ECB/2020/31), OJ L 224I, 13.7.2020, 4-6.

2 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 (OJ L 225, 30.7.2014, 1-90).

3 See *here*.

4 Croatian Constitution (Official Gazette No 56/90., 135/97., 8/98. – official consolidated version, 113/00., 124/00. – official consolidated version, 28/01., 41/01. – official consolidated version, 76/10., 85/10. – official consolidated version, 5/14.).

5 Act on the Croatian National Bank (Official Gazette No 75/08., 54/13., 47/20.).

6 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, OJ C 202, 7.6.2016, 230-250.

resolution of credit institutions" as one of the CNB's tasks. After the adoption of the euro Article 4 will be derogated and replaced by Article 88 and Article 89 of the same Act.

The modalities of CNB's performance of its NRA function are further elaborated in the SRM Regulation and the Act on Resolution of Credit Institutions and Investment Firms[7] (hereinafter, "the Resolution Act") which represents national transposition of the Directive 2014/59/EU[8] (thereinafter, "the BRRD").

In parallel with performing its resolution tasks, the CNB is also in charge of banking supervision. Article 4 of the Act on the CNB (already mentioned above) also refers to the tasks of the CNB in banking supervision. The details of the CNB's supervisory function are further elaborated in the Credit Institution Act, which represents a national transposition of the Directive 2013/36/EU (the Credits Requirements Directive; hereinafter, "the CRD"). According to the Credit Institution Act, the CNB is also the national competent authority (hereinafter, "the NCA") for banking supervision in Croatia, which will be explained in more detail later on in this text, together with the details about organisational separation of resolution and supervisory function.

2. Historical background and current setup: CNB's relation with the Croatian Agency for Deposit Insurance and Ministry of Finance

In explaining the CNB's role in resolution of credit institutions it is important to note that the CNB became the sole NRA for credit institutions in Croatia fairly recently, i.e., on 1 January 2021. Prior to that date Croatia had two NRAs for credit institutions: the CNB and the State Agency for Deposit Insurance and Bank Resolution (hereinafter, "the State Agency"), during which time the CNB was primarily responsible for tasks related to resolution planning, whereas the State Agency was responsible for tasks pertaining to the execution of resolution.

One of the reasons why the CNB became the only NRA is the fact that entering the SRM added complexity and enhanced the need of cooperation and coordination between the SRB and NRA(s). Having more than one NRA made things even more complex, since it entails coordination not only within the SRM but also at the national level. Since in resolution matters time is of the essence and efficiency is extremely important, the consensus among relevant institutions has been reached to introduce novelty in the new Resolution Act by declaring the CNB the only NRA in Croatia for credit institutions.

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7 Act on Resolution of Credit Institutions and Investment Firms (Official Gazette No 146/20., 21/22.).

8 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 Text with EEA relevance (OJ L 173, 12.6.2014, 190-348).

Having only one NRA for credit institutions is common in other EU Member States, therefore the establishment of close cooperation with the ECB contributed to the harmonisation of the Croatian institutional setup with the institutional setup in other EU Member States.

The State agency was established in 1994 (fairly soon after declaring Croatia's independence) pursuant to the then valid State Agency for Deposit Insurance and Bank Resolution Act. At that point in time the State Agency also carried out tasks related to banking resolution. The banking resolution in Croatia during the 1990s has been regulated on a national level and did not (and could not) follow the resolution framework as it was later regulated by the BRRD. After the 1990s when several cases of banking resolution were connected with many controversies and litigation, the legal institute of resolution was removed from the Croatian legal framework. This lasted until the adoption of the BRRD and introduction of the new, EU-wide resolution framework. When the BRRD was first introduced, Croatia was not a participating Member State and thus the SRM Regulation did not apply in Croatia, so it made sense to assign the role in banking resolution to the State Agency that had previous experience in similar matters.

Following a reorganisation of resolution powers, the State Agency changed its name and today operates under the name Croatian Agency for Deposit Insurance (cro. "Hrvatska agencija za osiguranje depozita" or "HAOD"; hereinafter, "the Agency"). The name of the institution and its alteration clearly demonstrate the revision of the institution's powers. However, further to its powers related to deposit insurance, the Agency currently also performs important tasks related to specific national insolvency proceedings, in so-called compulsory liquidation of credit institutions regulated by the Act on Compulsory Liquidation of Credit Institutions. The Agency obtained those tasks on 1 January 2021 simultaneously with losing its role as an NRA in Croatia. Compulsory liquidation could be described as related to the insolvency of a credit institution, however this need not always be the case. Compulsory liquidation is sometimes related to situations where a credit institution is solvent, but does not meet other regulatory requirements. At the time of writing this paper (October 2022) there has been only one case of compulsory liquidation, as is visible from the website of the Agency.[9]

Notwithstanding the fact that the CNB is currently the only NRA for credit institutions in Croatia and that the Agency no longer performs that role, the Resolution Act still foresees its involvement in banking resolution. For instance, the national resolution fund is managed by the Agency.[10] This has been the case since the introduction of the BRRD in Croatia.

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9 See *here*.

10 Article 130(2) of the Resolution Act.

Another relevant stakeholder in banking resolution and the "competent ministry" within the meaning of the BRRD in Croatia, is the Ministry of Finance. Both the Agency and Ministry of Finance support the CNB in its role of an NRA. Therefore, an adequate exchange of information needs to be in place and relevant stakeholders are to be adequately informed on all facts and decisions relevant in the resolution context. The Resolution Act foresees other specific tasks for these stakeholders, which does not, however, alter the fact that the CNB is currently the only resolution authority for credit institutions in Croatia. These specific tasks include, for instance, management of the (national) resolution fund by the Agency (Article 130(3) of the Resolution Act) and notification of the European Commission of the resolution authorities in the Republic of Croatia, including a detailed description of their powers, which is done by the Ministry of Finance (Article 8(12) of the Resolution Act).

3. Internal organisation of the CNB

3.1. Separation of resolution and supervisory function and limitation of liability of the CNB

As already mentioned above, the CNB performs not only the function of the NRA, but also the function of the NCA for banking supervision. Therefore, the CNB is a single apical institution for banking supervision and resolution, with an internal organizational set up, ensuring the practical separation of these two functions in its everyday performance.

As is visible from the organisational chart of the CNB published on its website,[11] the resolution function of the CNB is supported by the CNB's Credit Institutions Resolution Office (hereinafter, "CNB's Resolution Office"). However, decisions in the CNB's capacity of the NRA are adopted by CNB's two decision making bodies – either by the CNB's Council, which is the CNB's collegial decision-making body, or the Governor – and not by the CNB's Credit Institutions Resolution Office. The functioning of the CNB's decision making bodies will be explained in detail later on in this text. At this point, only few general remarks are given.

The Council is comprised of the governor, deputy governor and six vicegovernors. As can be concluded from publicly available sources (e.g., the CNB's website), each vicegovernor coordinates and manages different central bank function(s). Therefore, apart from participating in the collegial decision-making body, each vicegovernor performs a managerial function in the CNB as well and is included in everyday performance of the CNB's tasks.

The separation of resolution and supervisory function is ensured *inter alia* through the fact that different vicegovernors are in charge of coordinating and

[11] See *here*.

managing organisational units in charge of supervisory and resolution tasks. Therefore, the staff involved in carrying out the functions of the resolution authority pursuant to the relevant resolution framework is structurally separated from, and subject to, separate reporting lines from the staff involved in carrying out the supervisory tasks, which is in line with Article 3(3) of the BRRD. The same principle applies to the separation of other tasks performed by the CNB, for instance, to the separation of monetary policy function or consumer protection function from the supervisory function.

Albeit all vicegovernors (including the vicegovernors in charge of prudential supervision and resolution of credit institutions) participate in the same collegial decision-making body (the CNB's Council), which is in charge of adopting many decisions related to resolution and supervisory tasks, the preparation of such decisions is always done by a specific organisational unit within the CNB and the draft decision needs to be affirmed by its vicegovernor, while the affirmation of the vicegovernor in charge of the other function (resolution/supervision) is not needed. Namely, draft resolution decisions do not need to be confirmed by the vicegovernor in charge of banking supervision, and *vice versa* draft supervisory decisions do not need to be confirmed by the vicegovernor in charge of banking resolution.

Although organisational measures are in place in the CNB to ensure the separation of its supervisory and resolution function, these tasks inevitably have some points of contact. For instance, one of pre-requirements for opening the resolution procedure is making the *Failing-or-Likely-to-Fail* Assessment, which assessment is in practice (at least for the less significant credit institutions) made by the supervisory function of the CNB. Another good example is adopting early intervention measures and instigating special administration, both of which is (for less significant credit institutions) prepared by the CNB's supervisory function.

Finally, it bears noting that the option envisaged in Article 3(12) of the BRRD[12] has been exercised in Croatia. Article 11 of the Resolution Act states that the CNB, employees of the CNB and other persons authorised by the CNB are not liable for damage that may arise in the course of discharging their duties in accordance with the Resolution Act, SRM Regulation or other regulations governing recovery and resolution, unless it is proven that they acted or failed to act intentionally or as a result of gross negligence.

Similar limitations of liability apply to the CNB when performing its supervisory function. Namely, in accordance with Article 325 of the Credit Institutions Act, the CNB, employees of the CNB and persons authorised by the CNB are not liable for damage that may arise in the course of the performance of their duties under the Credit Institutions Act, the Act on the CNB, Regulation

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[12] Article 3(12) of the BRRD states: "Without prejudice to Article 85, Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive".

(EU) No 575/2013 or regulations adopted under these acts and Regulation, unless it is proven that they acted or failed to act intentionally or as a result of gross negligence.

Said principles are further affirmed in the Act on the CNB[13] which also states that the CNB, the members of its Council and its employees cannot be held liable for any damage that may arise in the course of exercising supervision, oversight and resolution unless the damage has been caused intentionally or by gross negligence.

3.2. Resolution function and decision making of the NRA

As already mentioned above, all of the tasks related to the resolution of credit institutions within the CNB are performed by CNB's Resolution Office, which is directly subordinated to its vicegovernor. The Resolution Office is currently not further divided into smaller organisational units (e.g., departments, sections or divisions), which differs from the organisational structure of prudential supervision in the CNB. Namely, prudential supervision in the CNB is organised within the Prudential Supervision Area, which is (at the time of writing this paper, October 2022) further divided into three departments whereby each department supervises credit institution of similar characteristics. Two departments of Prudential Supervision Area supervise significant institutions and one supervises less significant institutions.

Normally, CNB and its Resolution Office are mostly engaged with the tasks related to resolution planning and other similar everyday tasks, including (but not limited to) preparing draft legislation, collecting relevant reports, developing methodologies etc. However, due to the crisis caused by the Russian-Ukrainian war in 2022, the CNB also had to make use of its resolution powers in the context of resolution of the Sberbank d.d. (hereinafter, "Sberbank Croatia") and open resolution proceedings against Sberbank Croatia.

Resolution of entities belonging to the Sberbank Group was also the first case in the SRB's practice to trigger the introduction of a moratorium under Article 33a of the BRRD before adopting the resolution scheme.[14] The CNB as the NRA, for the first time in its practice, implemented the moratorium by adopting a decision on moratorium based on its powers under national provisions implementing Article 33a of the BRRD.[15]

Since Sberbank Croatia has been under direct competence of the SRB, the CNB adopted both the moratorium decision and the decision on the opening of the resolution proceedings against Sberbank Croatia on the basis of the SRB's acts.[16]

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[13] Article 8(2) of the Act on the CNB.

[14] Moratorium was introduced not only with regards to the Croatian entity, but in respect of Slovenian entity as well.

[15] See *here*.

[16] See *here*.

As previously mentioned, decisions in the CNB's capacity of the NRA are adopted by CNB's two decision making bodies – either be by the CNB's Council, which is the CNB's collegial decision-making body, or the Governor – and not by the CNB's Credit Institutions Resolution Office

Most important CNB decisions connected to the opening of resolution proceedings need to be adopted by its Council. For instance, CNB's Council is competent for adopting decisions on opening of resolution proceedings and decisions on the appointment of resolution administration. These two decisions are to be adopted by the CNB's Council almost simultaneously.[17] Resolution administration is to be comprised of minimum two persons, one of which is to be appointed as chair.[18] As a consequence of appointing resolution administration, credit institution's management board loses its powers.[19] Since credit institutions in Croatia are to be established as joint stock companies[20] and are also required by law to have two-tier board structure,[21] ultimately this means that they have three decision-making bodies: management board, supervisory board and general assembly.

While the management board loses its powers because of the appointment of resolution administration, the supervisory board and the general assembly are deprived of their powers even sooner i.e. as soon as the resolution proceedings are initiated.[22] However, this distinction becomes effectively indiscernible in practice, since the decision on the appointment of the resolution administration is adopted almost simultaneously with the decision on initiating resolution proceedings.

In addition to the aforementioned decisions adopted by the CNB's Council, there are decisions adopted in the resolution context, for which the CNB Council's competence is not explicitly provided for by law. Consequently, such decisions are adopted by the CNB's Governor and as an example of this type of decisions the introduction of the moratorium under Article 33a of the BRRD could be mentioned.

The CNB's Council (which – as already stated above – adopts most relevant resolution decisions) meets in principle every month[23] and at least ten times per calendar year.[24] However, not all of the Council's meetings are dedicated to resolution topics, since the Council has fairly wide-ranging competences. The Council's competences are currently defined by Article 42 of the Act on the CNB and upon the introduction of the euro they will be defined by Article 104 of the same Act.

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17 Article 59(1) of the Resolution Act.

18 Article 59(2) of the Resolution Act.

19 Article 61(2) of the Resolution Act.

20 Article 20(1) of the Credit Institutions Act.

21 Article 35(1) of the Credit Institutions Act.

22 Article 46(8) of the Resolution Act.

23 Article 8(7) of the Statute of the Croatian National Bank.

24 Article 47(6) of the Act on the Croatian National Bank.

Members of the CNB's Council are appointed by the Croatian Parliament, based on the proposal/opinion of a parliamentary committee.[25] The term of office is six years (potentially renewable) and they can be removed from the office only if the member himself/herself asks to be removed from the office or where the circumstances arise referred to in Article 14.2 of the Statute of the ESCB and of the ECB.[26] The mechanisms of the CNB's accountability vis-à-vis parliament are described in Article 62 of the Act on the CNB. They are limited to the semi-annual information given to the Croatian Parliament about financial condition, the level of price stability achieved and monetary policy implementation. Additionally, the CNB submits its summary balance sheet to the Ministry of Finance on a monthly basis as of the last day of the month concerned. Finally, the CNB regularly publishes the said financial and other statements, and it also publishes other such reports and studies on financial and economic issues as it deems appropriate.

In Croatia, the protections granted to the governor by Article 14.2 of the Statute of the ESCB and of the ECB are extended to all members of the CNB's Council. This means that all members of the CNB's Council can be removed from the office only: a) upon their own request, b) if they no longer fulfil the conditions required for the performance of their duties or c) if they have been guilty of serious misconduct. The only difference is that the governor can appeal against the decision on the removal from office before the European Court of Justice (which is in line with Article 14.2 of the Statute of the ESCB and the ECB), while other members of the Council may institute an administrative dispute against the decision on the removal before a competent (national) administrative court.[27]

Concerning the reason for the removal from the office listed under b) above ("if they no longer fulfil the conditions required for the performance of their duties"), the Act on the CNB prescribes only that the members of the Council of the CNB must be citizens of the Republic of Croatia of high personal reputation and professional experience in monetary, financial, banking and/or legal matters.[28] Information about professional background of members of the CNB's Council is made publicly available on CNB's website.

The meetings of the Council of the CN B are valid if two-thirds of all the members of the Council of the CNB participate in the meeting.[29] Participation can be ensured through physical presence or via video and/or audio conference.[30] Decisions are taken with a two-thirds majority of the members present at the

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25 Article 80(1) and Article 80(2) of the Act on the Croatian National Bank: Governor, deputy governor and vicegovernors are appointed by the Croatian Parliament on the proposal of the Elections, Appointments and Administration Committee, taking into accounts the opinion of the Finance and Central Budget Committee.

26 Article 81(1) of the Act on the Croatian National Bank.

27 Article 81(4) of the Act on the Croatian National Bank.

28 Article 80(3) of the Act on the Croatian National Bank.

29 Article 47(4) of the Act on the Croatian National Bank and Article 8(2) of the Statute of the Croatian National Bank.

30 Article 8(3) of the Statute of the Croatian National Bank.

meeting.[31] These rules apply to all meetings and decisions taken by the Council of the CNB, not only to the ones related to the banking resolution.

All decisions taken by the CNB on matters within its competence may not be appealed, but an administrative dispute may be instituted against such decisions.[32] Administrative disputes in Croatia are regulated by the Administrative Disputes Act[33] which foresees that the administrative disputes are to be resolved within the two-stage process. Administrative dispute in the first instance is resolved by the territorially competent administrative court.[34] In the second instance, an appeal can be instituted before the High Administrative Court of the Republic of Croatia.[35] However, for the decisions adopted within the SRM such judicial review is limited to appropriate implementation of the SRB's decision. The national court is not allowed to question the legality of the SRB's decision, and needs to narrow the scope of its review only to the assessment if the national decision correctly implements the SRB's decision.

This follows from Article 263 of the Treaty on the functioning of the European Union[36] (hereinafter, "the TFEU") as well as from the relevant jurisprudence of the CJEU[37] which clearly states that "Court of Justice of the European Union has exclusive jurisdiction to review the legality of acts adopted by the EU bodies, offices or agencies, one of which is the Single Resolution Board" and that "in order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone".

The task of a national court i.e., reviewing if the national decision correctly implements the SRB decision has a potential to be very challenging. Namely, the statutory deadline for initiating administrative dispute against the CNB's decisions is fairly short i.e., one month after the delivery of the contested decision[38] and it is conceivable that within such a short timeframe a non-confidential version of the SRB's decision might not be available.

Article 339 of the TFEU, Article 2 of its Protocol (No 7)[39], as well as Article 88 of the SSMR provide specific rules for disclosing SRB's confidential information. However, the essential part of the SRB's decision is sometimes made public via press releases etc. Even if this is the case, the remaining part of the decision i.e., sensitive factual elements and legal reasoning are not made public.

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31 Article 47(5) and Article 8(4) of the Statute of the Croatian National Bank.

32 Article 69(1) of the Act on the Croatian National Bank.

33 Administrative Disputes Act (Official Gazette, No 20/2010, 143/2012, 152/2014, 94/2016, 29/2017, 110/2021).

34 Article 13 of the Administrative Disputes Act.

35 Article 12(3)(1) of the Administrative Disputes Act.

36 Treaty on the functioning of the European Union, OJ C 326/47, 26.10.2012.

37 Case C-414/18, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia* [2019], paras. 37-48.

38 Article 141(1) and 141(2) of the Resolution Act.

39 Protocol (No 7) on the privileges and immunities of the European Union OJ C 326/266, 26.10.2012.

Regulation (EC) No 1049/2001[40] is to be applied to the documents held by the SRB. This follows from Article 90 of the SSMR. In accordance with Article 5(2) of the said Regulation documents originating from the SRB can only be disclosed upon consultation with the SRB or the request to access documents can be referred to the SRB.

The same options are confirmed by the Decision SRB/ES/2017/01,[41] whose Article 5 states: "Documents that are in the possession of an NRA and have been drawn up by the SRB may be disclosed by the NRA only subject to prior consultation of the SRB concerning the scope of access, unless it is clear from a past consultation of the SRB that the document shall or shall not be disclosed. Alternatively, the NRA may refer the request to the SRB".

Furthermore, recent case law[42] concludes that the "*concept of 'archives of the Union' within the meaning of Article 2 of the Protocol on privileges and immunities must be understood as meaning all those documents of whatever date, of whatever type and in whatever medium which have originated in or been received by the institutions, bodies, offices or agencies of the European Union or by their representatives or servants in the performance of their duties, and which relate to the activities of or the performance of the tasks of those entities*".

In accordance with the cited jurisprudence, SRB documents would fall under the definition of the "archives of the Union".

It follows from the above cited provisions that the SRB could deny access to its documents, even for the purpose of court proceedings. Therefore, it could potentially be challenging for national courts to render their decision, given that their knowledge of the SRB decisions is not necessarily comprehensive.

Another interesting legal issue whose unfolding remains to be seen in relation to both national proceedings and proceedings before the CJEU initiated in connection to the resolution of Sberbank Croatia is if national courts will deem the legality of the SRB's resolution programme a preliminary issue and decide to stay the proceedings initiated before them against NRA implementing decisions, until the CJEU renders decision on the legality of the SRB decision which gave rise to adopting contested national decisions. Taking into account the nature of national implementing resolution decisions and their unquestionable dependence on the SRB decisions, such unfolding might not come as a surprise.

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40 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, 31.5.2001, 43-48.

41 Decision of the Executive Session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01).

42 C-316/19, *European Commission v. Republic of Slovenia*, Archives de la BCE, para. 75.

Cyprus

Margarita Anastasiou

Summary. 1. Institutional structure – 1.1. The Central Bank of Cyprus as the National Resolution Authority – 1.2. Internal structure of the NRA and cooperation with other national authorities – 1.3. The Resolution Fund – 2. Practical aspects – 2.1. Separation between resolution and supervisory activities – 2.2. Composition of NRA – 2.3. Judicial review of NRA decisions – 2.4. Accountability aspects

1. Institutional structure

1.1. The Central Bank of Cyprus as the National Resolution Authority

The Central Bank of Cyprus (CBC) is the designated national resolution authority (NRA) and the Board of Directors of the CBC is the decision-making body, pursuant to Law 22(I)/2016 (hereinafter 'the Resolution Law'). In particular, Article 4 of the said Law provides that the Board of Directors of the CBC is responsible for exercising the tasks and powers of the resolution authority in accordance with the Law and Council Regulation (EU) 806/2014 (SRM Regulation).[1]

The Resolution Law repealed and replaced the first Resolution of Credit Institutions Law of 2013 (Law 17(I)/2013) which was enacted in 2013, prior to the adoption of the 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. Since its adoption, the Resolution Law has been amended four times mainly for the purpose of transposing EU legislation into the Cypriot legal framework as well as for better implementation of EU law.

Under the Cypriot legal framework, the NRA is only responsible for exercising the powers and tasks conferred to in under the Resolution Law and it does not fulfil any functions other than resolution functions. The NRA nonetheless has the power to suspend certain obligations under Article 43A of the Resolution Law, transposing Article 33a BRRD into Cypriot law. Pursuant to the provisions of Article 43A of the Resolution Law, the NRA, after consulting the national competent authority, may suspend any payment or delivery obligations pursuant to any contract to which an institution or an entity is a party provided that specific conditions under the same legal provision are met.

1.2. Internal structure of the NRA and cooperation with other national authorities

The Resolution Law provides for the establishment of a resolution unit.[2] The resolution unit reports directly to the Governor of the CBC and it is composed by members of staff of the CBC; the main responsibility of the resolution unit is to provide support to the Governor of the CBC, in relation to the exercise of the responsibilities and powers of the resolution authority. The tasks and responsibilities of the resolution unit include inter alia, the drawing up and update of resolution plans, the assessments of resolvability, the provision of technical and administrative

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1 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.

2 Article 6 of the Resolution Law.

support for the (i) determination whether an entity meets the conditions for resolution, (ii) adoption of a decision on the extent of the write-down or conversion of capital instruments, where the conditions for write-down and conversion of capital instruments of an institution or relevant person are fulfilled, (iii) the adoption of a decision for the choice of the resolution action to be applied, where the conditions for resolution are fulfilled. The resolution unit is also responsible for carrying out provisional valuations, monitoring the implementation of resolution measures in an entity as well as the participation in working groups/committees and board set up at European level on issues relating to the resolution of entities.

Even though the final decisions under the Cypriot resolution framework are adopted by the NRA in consultation with the SRB as regards Cypriot credit institutions that are not directly supervised by the ECB, other authorities, such as the national competent authority, the national macroprudential authority and the Ministry of Finance are also involved in planning and executing resolution of relevant entities. For example, pursuant to Article 10 of the Resolution Law, the NRA, after consulting the competent authority and the resolution authorities of the jurisdictions in which any significant branches are located insofar as this is relevant to the significant branch shall draw up a resolution plan for each institution that is not part of a group subject to consolidated supervision. The competent authorities shall also promptly communicate to the resolution authorities any change that necessitates a revision or update of the resolution plan and shall give access to the NRA to all information necessary for the purposes of resolution planning. It is further provided that the macroprudential authority, the Deposit Guarantee Scheme, the Investors Compensation Fund and the Central Bank of Cyprus provide all the necessary data and information that are required for the preparation and updating of resolution plans.[3]

The national macroprudential authority is also consulted by the NRA when assessing whether to apply a simplified obligation to a credit institution concerning resolution plans.[4]

The NRA shall consult other authorities not only in the preparation of resolution plans but also in the assessment of resolvability of an institution. For example, under Article 18 of the Resolution Law, the NRA shall assess the extent to which an institution (which is not part of a group) is resolvable, after consulting the national competent authority.

Furthermore, resolution action in relation to an institution shall be taken by the NRA, if it considers, inter alia, that the national competent authority had determined, after consulting the NRA, that the institution is failing or likely to fail.[5]

It is noted that, as regards Cypriot credit institutions that are directly supervised by the European Central Bank as well as credit institutions with

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3 Article 13 of the Resolution Law.

4 Article 12(2) of the Resolution Law.

5 Article 42 of the Resolution Law.

cross-border activities, decisions on resolution matters are adopted directly by the Single Resolution Board and implemented by the CBC, as per the provisions of Regulation (EU) No 806/2014 (Article 29).

1.3. The Resolution Fund

The effective application of resolution measures can be supported through the use of the Resolution Fund in specific cases and only to the extent necessary. The management and administration of the resolution fund (as well as the deposit guarantee fund) is entrusted to a Committee, pursuant to the provisions of the Deposit Guarantee and Resolution of Credit and other Institutions Scheme Laws of 2016 to 2021. The Committee shall consist of five members, including the Chairman. The Governor of the Central Bank of Cyprus is ex officio the Chairman of the Committee; in case of the chairman's absence or impediment, the Governor shall indicate a member of the Central Bank of Cyprus' staff as his alternate. The four other members of the Committee shall be appointed by decision of the Central Bank of Cyprus' Governor and shall be two employees of the Central Bank of Cyprus and two employees of the Ministry of Finance, upon recommendation by the Minister of Finance. The Governor shall appoint four alternate members for the members of the Committee.

The Committee shall have full authority for the management and administration of the Resolution Fund and, specifically, shall ensure that the Fund has sufficient financial resources. It shall also calculate and collect the contributions that shall be paid by credit institutions to the Fund in consultation with the Resolution Authority.

2. Practical aspects

2.1. Separation between resolution and supervisory activities

Under the Cypriot legal framework the CBC is the designated NRA as well as the designated national competent authority (NCA). With due respect to the exclusive competences granted to the ECB under the SSM legal framework, the CBC acting as national competent authority is responsible for the supervision of less significant credit institutions and cooperates closely with the ECB in order to exercise this task. Without prejudice to the ECB's exclusive competences under the SSM legal framework, the CBC in exercising its powers allocated to national competent authorities under the SSM shall carry out the functions and responsibilities provided for under the said law and CRR pursuant to Article 2B of the Business of Credit Institutions Law; it shall monitor the activities of credit institutions and where applicable, of financial holding companies and mixed financial holding companies so as to assess compliance with the requirements of this Law and CRR.

Despite the dual role of the CBC, the two different functions of NRA and NCA within the same authority are divided and act independently in exercising their tasks and powers. This is specifically addressed in Article 6(3)(b) of the Resolution Law, which provides that the CBC adopts and publishes necessary relevant internal regulations, in order to avoid conflicts of interest between the resolution unit and the supervisory functions of the CBC, including rules which concern the professional secrecy and the exchange of information between the different functions. The internal regulations are currently being drafted by the Central Bank of Cyprus and once adopted will be published on the CBC's website.

In addition to the NRA's operational independence, the Resolution Law[6] provides also for the NRA's financial independence. In particular, pursuant to the Law, the NRA may require that the institutions repay all operating expenditure and costs incurred during the performance of the NRA's responsibilities and powers under the Law, such as (a) administrative and operating expenditure, (b) the costs of legal and consultancy services and (c) the cost of outsourcing to third parties.

2.2. Composition of NRA

The meeting[7] of the NRA is convened by the Governor of the CBC (who acts as Chairman[8]) or the two executive members of the Board of Directors of the CBC in case of temporary absence of the Governor or impediment; an invitation for a meeting is sent in writing at least two days prior to the scheduled time of the meeting, nonetheless, in exceptional cases and at the discretion of the Governor, a meeting may be convened by oral or written invitation notified to the members of the NRA as soon as possible and in any case prior to the scheduled time of the meeting.

A meeting of the NRA may also be convened by two members of the NRA by sending a reasoned request to the Governor or to the two executive members of the Board of Directors of the CBC in case of the Governor's temporary absence or temporary impediment; the request should include the suggested topics for discussion.

The meetings of the NRA may be conducted via electronic means such as through teleconference or other electronic or audiovisual means. The presence of five members of the NRA is required in order to have a quorum. The NRA's decisions are adopted by simple majority and in case of a tie, the vote of the Chairman of the meeting prevails.

As already stated, the Board of Directors of the CBC is responsible to exercise the tasks and responsibilities of the NRA. The members of the Board of Directors (except from the Governor, who is appointed by the President of the

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6 Article 8 of the Resolution Law.

7 Article 5(2) of the Resolution Law.

8 In the Governor's absence or other incapacity, a member chosen by the present members of the NRA chairs the NRA's meeting.

Republic[9]) are appointed by the Council of Ministers of the Republic of Cyprus and shall be Cypriot citizens of recognised professional qualifications and/or recognized economic and business experience.[10]

Each Director shall be appointed for a term of office of five years which may be renewed and shall be removed from office by a decision of the Council of Ministers, on a recommendation from the Minister of Finance and after hearing the views of the Governor of CBC. This is provided that the Director no longer fulfils the conditions required for the performance of his duties or is guilty of serious misconduct.[11]

As to the professional background of the members of the Board of Directors of the CBC, it is noted they have many years of experience in accounting and banking as well as academic background in economics.

2.3. Judicial review of NRA decisions

Decisions of the NRA are subject to judicial review. Under Article 146 of the Constitution of the Republic of Cyprus, 'the Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, act or omission of any organ, authority or person exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person'.

Any decisions of the Central Bank of Cyprus as an authority exercising functions assigned to it under the Resolution Law are thus subject to judicial review under the said provisions of the Constitution.

It should be noted that, one of the criteria to be fulfilled in order to meet the requirements for a judicial review under Article 146 of the Constitution is that the decision, act or failure of the administrative authority should emanate from an administrative organ, authority or person and should relate to the domain of the public law; the nature and character of the administrative act in order to discover whether the act relates to the domain of public law or private law should contain the element of imperium and what is its immediate executive effect.

In addition, in order to bring a recourse in front of the Cypriot Supreme Court, the applicant must demonstrate that he/she has an existing legitimate interest which is adversely and directly affected by a decision or act or omission of the administrative authority.

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9 Article 18 of the Central Bank of Cyprus Laws.

10 Article 13 of the Central Bank of Cyprus Laws.

11 Pursuant to Article 18(4) of the Central Bank of Cyprus Laws, subject to paragraph 1 of Article 118 of the Constitution, the Governor may be removed from office, only if in the opinion of the Council established under the eighth paragraph of Article 153 of the Constitution, no longer fulfils the conditions required for the performance of the Governor's duties or is guilty of serious misconduct.

In March 2013 and following the signing of a Memorandum of Understanding between the Republic of Cyprus and the European Commission, the European Central Bank and the International Monetary Fund on the economic adjustment programme for the Republic of Cyprus, the NRA adopted resolution measures concerning two credit institutions established in Cyprus, Bank of Cyprus Ltd and Laiki Bank. In particular, the resolution measures concerned, inter alia, the sale of operation of both credit institutions in Greece, the sale of operations in Great Britain of Laiki Bank, the sale of operations of Bank of Cyprus Ltd in Romania and the bail-in measure in Bank of Cyprus.

This led to the submission of a significant number of judicial review recourses under Article 146 of the Constitution by depositors of Bank of Cyprus and Laiki Bank before the Supreme Court of Cyprus. Because of the high number of recourses, these were consolidated and heard together by the Supreme Court in April 2013.

The majority of the applicants claimed that the resolution measures adopted by the NRA concerning the Bank of Cyprus and Laiki Bank were contrary to the provisions of the Constitution protecting in particular the property rights of the applicants and equal protection before the law.

These recourses were dismissed by the Full Bench of the Supreme Court, by majority. The Court ruled that the applicants failed to demonstrate their legitimate interest to challenge the resolution measures adopted by the NRA. It was also held that the cases were not a matter of public law but of private law since the measures did not affect the applicants directly.

The Court explained in further detail, as regards the depositors of Bank of Cyprus and the bail-in measures that they do not have a legitimate interest for appeal purposes and that this matter concerns the private law and not the public law. This is because their deposits were 'affected' indirectly from the application of the resolution measure which was taken for the benefit of the bank itself which also caused the bank's actions and its failure to meet its contractual obligations towards the depositors. The depositor should thus primarily turn against the bank in a civil procedure, for having violated its contractual obligations for the payment of the depositors, with a possible further extension of the civil procedure against the Republic for causing, through the resolution measure the conventional debt of the bank towards the depositor to be affected.

Regarding the scope of the civil procedure, the Court clarified:

'It should not be forgotten that the object of civil proceedings cannot be anything else but that the financial loss sustained by depositors was the result of actions of the banks, the State or the European Union institutions and others. And the issue in case, in the final analysis, is what section 3(2)(d) of the Resolution Law itself provides, expressing, as we have said, standing legal principles, i.e. whether the loss of the depositors is greater than the loss they would have sustained if the decrees were not issued and banks were left to follow their course. The depositors could not be in a worse position than that, and also

they could not be in a more favourable position – and this should be kept always in mind, because it is the facts concerning the condition of the banks at the time of the issue of the decrees that determine the true value of deposits at that time, with the dominant element being that depositors are nothing else but creditors of the bank.'

Following the judgment of the Supreme Court, depositors, shareholders and bondholders of Bank of Cyprus and Laiki Bank have initiated several hundreds of civil actions before the Cypriot district courts against the banks as well as the CBC as NRA. The plaintiffs in these civil actions alleged that the measures adopted by the NRA were contrary to the Constitution of the Republic, the European Convention of Human Rights and its Additional Protocol I and the Charter of Fundamental Rights of the EU concerning the protection of property rights, equal protection and non-discrimination.

The District Courts have issued their judgements, some of which have become final; based on these judgments the plaintiffs' claims were rejected. The Court, in judgment in Civil Action No 3563/13 in which the plaintiff was a depositor of Laiki Bank and brought claims against the Bank of Cyprus (as Laiki's successor) Laiki Bank (in its own capacity), the Bank of Cyprus' special administrator, the Central Bank of Cyprus and the Republic of Cyprus for alleged damages relating to the application of the resolution measures, rejected the application:

– The Court dismissed the claims relating to the unconstitutionality of the Resolution Law and the measures adopted under it because the plaintiffs failed to provide details as to how specific provisions of the said law were contrary to Constitution. The Court further ruled that even if the claims had been properly pleaded, the plaintiffs were only creditors of the credit institutions and, therefore, could there was no violation of the alleged property rights;

– The Court additionally, adopted the findings of the CJEU with respect to the emergency conditions existing at the time of the adoption of the resolution measures. In the Court's view, the measures taken by the authorities were necessary to prevent the collapse of the entire financial sector, which would have had devastating consequences for the economy and the society of the country and were proportional to the situation that had to be addressed.

The NRA decided, in July 2014 to put also FBME Bank Ltd, the Cypriot branch of a financial institution established in Tanzania into resolution; the NRA's decision followed the US Financial Crimes Enforcement Network announcement which declared FBME Bank Ltd as a financial institution of primary money laundering concern; this announcement caused the freezing of the bank's accounts in USD with corresponding banks and the suspension of transfers in USD. These consequences raised serious concerns as to the viability of the entity and potential negative consequences to the stability of the financial system in Cyprus. In light of this, the NRA decided to adopt resolution measures for the sale of the branch's business and the appointment of a special administrator.

FBME Bank Ltd has filed, inter alia, a recourse under Article 146 of the Constitution claiming that the decision of the NRA is void, unconstitutional and illegal. The depositors of FBME have also filed an action with regards to the amount maintained under their name with FBME; they have also filed an application for summary judgment based on breach of contract; this application has been rejected by the court. It is noted that, the NRA decided to suspend the resolution measures and decided to withdraw the branch's license and applied to the Court for the branch's liquidation, under the provisions of the Business of Credit Institutions Laws.

As regards the recourse under Article 146 of the Constitution, it is noted that the Court has delivered its judgment in February 2022 and ruled that the process followed for the adoption of the resolution measures concerning the FBME Bank Ltd was not done in compliance with the national legal framework. The NRA has filed an appeal which is still pending.

2.4. Accountability aspects

Notwithstanding the above, it should be noted that based on the Resolution Law,[12] the Minister, the Governor of the CBC, the members of the Board of Directors of the CBC as well as employees of the CBC shall not be held liable in relation to any act or omission during the executing of their competences and responsibilities provided for in the said law, unless it has been proven that the act or omission was not bona fide or is the result of fraud or gross negligence on their part.

The special administrator, the management body and/or senior management officers of a bridge institution and/or asset management company and any other person, legal or natural, appointed or authorised by the resolution authority to perform actions under this Law, shall not be held liable in relation to any act or omission during the execution of their competences and responsibilities provided for in the law, unless it has been proven that the act or omission was not bona fide or is the result of fraud or gross negligence on their part. It is provided that the aforementioned have the same degree of protection after the end of their appointment or authorisation and/or completion of their actions or the tasks assigned to them. The above restriction of liabilities under the Resolution Law apply only to resolution functions and do not extend to superviso ry functions.[13]

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12 Article 111 of the Resolution Law.

13 Pursuant to the provisions of the Business of Credit Institutions Laws (Article 32), the Central Bank of Cyprus and any person who is a director or an officer of the Central Bank, shall not be liable for any action suit or other legal proceedings for damages for anything done or omitted in the discharge of the functions and responsibilities of the Central Bank under the Law or under any of the regulations issued thereunder unless it is shown that the act or omission was not in good faith or was the result of gross negligence.

Czech Republic

Dominik Králik

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1. Overview

The Czech National Bank (hereinafter referred to as the "CNB") is an important and independent institution of the state with a key position in the financial sector. The CNB also wishes to be a respected partner in its activities in European and international structures, as well as in cross-border cooperation.[1] The public in Czech Republic has long trusted the Czech National Bank more than nationally elected bodies, and it has even long been one of the most trusted institutions in the country.[2]

According to Article 98 para. 1 of the Constitution of the Czech Republic, the Czech National Bank is the central bank of the state. Its main objective is to ensure price stability. According to Article 98 para. 2, its activities may be interfered with only on the basis of a law, and its status, powers and other details are laid down by law.

The Czech National Bank is not only endowed with control powers but is also entrusted with policymaking – monetary and macroprudential – under Section 2 para. 2 of the CNB Act. Despite the lack of legitimacy derived from elections, the decisions of the Board can have a greater impact on the lives of citizens than those of the Prime Minister. The Bank's resolution authority functions are in addition to the Bank's wide range of other functions.

This article on the one hand focuses on the resolution framework in Czech law and the organisation of the Czech National Bank and its resolution authority functions. On the other hand, the article outlines how independence and separation of resolution authority functions is maintained in Czech law and summarises the accountability mechanisms to which the Bank is subject.

2. Organisation of the Czech National Bank

2.1. Czech National Bank

The issue of effective resolution gained in importance during the recent financial crisis of 2008-2009 when many countries and central banks were forced to minimize adverse impacts of bank failures using, among other measures, also taxpayers' money. The main objective of the new credible recovery and resolution framework is to avoid the resort to taxpayers' money to the greatest extent possible and to transfer the costs of a potential failure of an institution to its owners and, if necessary, its creditors.[3]

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1 The code of ethics of the Czech National Bank approved by the Bank Board on 27 October 2021, full text after Amendment No. 1. Amendment No. 1, approved by the Bank Board on 10 November 2022, effective from 15 November 2022.

2 Majerčík In: P. Rychetský, T. Langášek, T. Herc, P. Mlsna (eds), *Ústava České republiky. Zákon o bezpečnosti České republiky. Komentář* (Wolters Kluwer, 2015), 1034.

3 See *here*.

In the context of the Czech legal framework, resolution means the restructuring of a credit institution by a resolution authority, through the use of resolution tools, to ensure the continuity of its critical functions, preservation of financial stability and restoration of the viability of all or part of that institution, while the remaining parts are put into normal insolvency proceedings. Hence, resolution is a process by which the authorities can intervene to manage the failure of an institution in an orderly fashion.[4]

The Czech National Bank (Financial Markets Supervision Department I) enacted by Act No. 6/1993 Coll., on the Czech National Bank, as amended[5], is the organ in charge of banking prudential supervision. Above that the Czech National Bank (CNB) is pursuant to Act No. 374/2015 Coll., the Act on Recovery and Resolution in the Financial Market, the only resolution authority for banks, credit unions and certain investment firms (hereinafter "institutions") in the Czech Republic.

There was no resolution authority in the Czech Republic before the 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 (hereinafter referred to as the "BRRD") was adopted. This Directive (2014/59/EU) is a centre-piece of the regulatory framework that was put in place to create a safer and sounder financial sector in the wake of the financial crisis. It is also important for the EU's Banking Union. The BRRD rules equip national authorities with the necessary tools and powers to mitigate and manage the distress or failure of banks or large investment firms in all EU Member States, including Czech Republic.[6] This directive was implemented by The Act on Recovery and Resolution in the Financial Market in the Czech Republic.

The Act on Recovery and Resolution in the Financial Market provides the CNB with more comprehensive and effective arrangements to deal with failing institutions at national level, as well as cooperation arrangements to deal with cross-border banking failures as of 1 January 2016.[7] The CNB as the resolution authority performs its tasks in accordance with the legislation in force and its activities are internally governed by its Organisational Statute.

The main roles and powers of the CNB as the resolution authority include the following.

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4 *Ibidem*.

5 Act No. 6/1993 Coll. on the Czech National Bank, as amended.

6 See *here*.

7 See *here*.

2.2. The Bank Board

The supreme governing body of the Czech National Bank shall be the Bank Board of the Czech National Bank (hereinafter referred to as the "Bank Board"). The Bank Board shall set monetary and macroprudential policy and the instruments for implementing these policies. It shall decide upon the fundamental monetary and macroprudential policy measures of the Czech National Bank and measures in the area of financial market supervision.[8] The Bank Board shall consist of seven members, comprising the Governor of the Czech National Bank, two Deputy Governors of the Czech National Bank and four other members of the Bank Board of the Czech National Bank.[9] The Governor, Deputy Governors and other members shall be appointed and relieved from office by the President of the Republic.[10] The members of the Bank Board shall be appointed for a term of six years.[11]

Membership of the Bank Board shall be incompatible with the position of member of a legislative body, member of the Government and membership of the governing, supervisory or inspection bodies of other banks or commercial undertakings, and the performance of any independent gainful occupation.[12]

Firstly, the Bank Board shall decide upon fundamental measures in the area of monetary and macroprudential policy, financial market supervision and resolution.

Secondly, it shall issue first-instance decisions and, where relevant, approve provisions of a general nature on the application of resolution measures or the write-down and conversion of capital instruments where such procedure requires the *approval of the Ministry of Finance*, and also in cases of a significant systemic impact.

Thirdly, the Bank Board shall decide in administrative proceedings on appeals and other legal remedies in respect of which it is a competent superior administrative authority pursuant to the Act No. 500/2004 Coll., the Administrative Procedure Act.[13]

Fourthly, it shall propose to the Minister of Finance CNB employees to be appointed members of the administrative board of the Financial Market Guarantee System.

2.3. Organisation of the Bank regarding its resolution authority functions

In the CNB structure, the Resolution Department (in following also as NRA) is responsible for resolving bank crises. The Resolution Department is a separate organizational unit within the Czech National Bank. The Resolution Department

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8 Article 5(1) of the Act No. 6/1993 Coll. on the Czech National Bank, as amended.

9 Article 6(1) of the Act No. 6/1993 Coll. on the Czech National Bank, as amended.

10 Article 6(2) of the Act No. 6/1993 Coll. on the Czech National Bank, as amended.

11 Article 6(4) of the Act No. 6/1993 Coll. on the Czech National Bank, as amended.

12 Article 6(5) of the Act No. 6/1993 Coll. on the Czech National Bank, as amended.

13 Act No. 500/2004 Coll., the Administrative Procedure Act.

is an independent organizational unit of the Czech National Bank. It exercises the powers of a resolution authority under the Act on Recovery and Resolution in the Financial Market, except in cases where the Bank Board makes decisions (i.e. in cases where the approval of the Ministry of Finance is required and in cases of significant systemic impact). The NRA co-operates with other organizational units within the CNB, as per the Organizational Rules of the Czech National Bank.[14]

The head of the NRA is its Executive Director, who is appointed by the Bank Board. In addition to the Executive Director, there are 10 resolution experts (all employees of the CNB) with legal, financial or combined background. Each resolution expert serves as a "single point of contact" for one or more institutions and is responsible for their resolution planning and day-to-day contact with the institutions. Specific tasks (administrative proceedings, Recovery Fund contribution calculation, MREL calculations, etc.) are assigned to the expert(s) best suited for such task due to their background and experience. Complex tasks (e.g. policy development) are handled by ad hoc teams and discussed with other organizational units of the CNB, if necessary.

The respective roles and responsibilities are set out in Act No. 374/2015 Sb., on Recovery and Resolution in the Financial Market, as amended.[15]

2.4. Regulations for cooperation between the CNB's organisational units when carrying out resolution-related activities[16]

Resolution-related activities under the Recovery and Resolution Act shall be performed within the areas of competence of the Resolution Department and carried out separately from other CNB activities, especially from financial market supervision. This shall be without prejudice to the areas of competence of the Bank Board.

In discharging its responsibilities, the Resolution Department shall work in cooperation with the Financial Market Supervision Department, the Licensing and Enforcement Department, the Financial Stability Department and, where relevant, other CNB organisational units. This cooperation shall be performed so as to ensure separate execution of the powers of the Resolution Department, including compliance with the confidentiality duty pursuant to special legal rules.

Where the seriousness of the situation so requires, especially with respect to a possible systemic impact of a failure of an obliged entity under the Recovery and Resolution Act, the Bank Board shall establish, at the proposal of the Resolution Department, a project team comprising representatives of relevant CNB organisational units.

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14 Organizational Regulations.

15 Zákon č. 374/2015 Sb., o ozdravných postupech a řešení krize na finančním trhu (ZOPRK).

16 See *here*.

At the joint decision of the Executive Director of the Resolution Department and the Executive Director of the Financial Market Supervision Department, and, where relevant, directors of other organisational units of the CNB, issues relating to the execution of powers of relevant CNB organisational units in the area of resolution may be regulated in more detail.

The Statistics and Data Support Department shall provide CNB organisational units with relevant data and information from statistical information systems and databases in the areas of competence of the Department. The Resolution Department shall be provided with limited- access data relating exclusively to the areas of competence of this CNB organisational unit at its request.

Depending on the extent and seriousness of the finding, especially where a Bank Board decision is necessary, the Bank Board shall be informed in a document produced by the CNB organisational unit which identified the finding.

2.5. Competencies of the Financial Market Regulation and International Cooperation Department

The Executive Director of the Financial Market Regulation and International Cooperation Department shall be responsible for the next five competences. First, for proposing the strategy and principles for regulation, supervision and resolution. Second, for working in active cooperation with the European Supervisory Authorities and coordinating with them. Third, for international cooperation in the area of financial market supervision and resolution. Fourth, for deciding, together with the Executive Director of the Financial Market Supervision Department in the area of supervision or with the Executive Director of the Resolution Department in the area of resolution, on whether the CNB will comply with the guidelines. And lastly, for recommendations of the European Supervisory Authorities.

The Financial Market Regulation and International Cooperation Department shall be in the legislative and legal area responsible for preparing legislation in the area of supervision of financial market entities and resolution. This Department is also responsible for preparing reference documents for opinions and positions on materials produced by selected institutions and bodies of the EU, the ESCB, the ECB, the European Supervisory Authorities and other international organisations and institutions in the areas of regulation, supervision and resolution.

2.6. Competencies of the Resolution Department

The Resolution Department shall exercise powers of a resolution authority under the Recovery and Resolution Act, except in cases where the Bank Board makes decisions.

The Executive Director of the Resolution Department shall be responsible for the following tasks.

First, he/she shall be responsible, within the scope of the powers delegated to him/her, for performing resolution-related activities. This resolution-related activities means resolving failures of obliged entities under the Recovery and Resolution Act, planning resolution, removing obstacles to resolution eligibility, writing down and converting capital instruments, applying resolution measures, performing group resolution, carrying on activities or participating in resolution colleges and planning and managing resolution financing.

Second, he/she shall provide for cooperation by the CNB at resolution-related meetings with the Ministry of Finance and the government.

Third, he/she shall appoint and dismiss special managers, appoint and dismiss valuers for resolution purposes, be responsible for provisional valuations and approve resolution-related provisions of a general nature under the Recovery and Resolution Act in respect of obliged entities under the Recovery and Resolution Act, except in cases where the Bank Board makes decisions.

Fourth, he/she shall issue first-instance decisions in administrative proceedings conducted in respect of resolution-related activities, except in cases where the Bank Board makes decisions.

Lastly, the Executive Director of the Resolution Department shall decide together with the Executive Director of the Financial Market Regulation and International Cooperation Department whether the CNB will proceed in accordance with the resolution-related guidelines and recommendations of the European Supervisory Authorities and also inform the Financial Market Supervision Department in cases where it identifies that resolution measures taken in respect of individual entities have a major impact on activities carried out by the Financial Market Supervision Department.

The Resolution Department shall be in the legislative, legal and administrative area responsible for working with the Financial Market Regulation and International Cooperation Department on the preparation of legislation relating to resolution-related activities.

The Resolution Department shall be in the legislative, legal and administrative area responsible for conducting resolution-related administrative proceedings and issuing decisions in such proceedings, setting the annual target level of contributions to the Resolution Fund and deciding on payment commitments to the Resolution Fund and publishing the amount of the contributions in an Official Information document.

The Resolution Department in the resolution area shall be responsible for deciding on the application of resolution measures, in the event of application of a bridge institution or asset management vehicle, working with the Ministry of Finance on establishing the bridge institution or asset management vehicle and assessing information obtained from a special manager in the execution of special Management.

2.7. Competencies of Financial Market Supervision Department

The Financial Market Supervision Department shall be responsible for executing powers of a competent supervisory authority under the Recovery and Resolution Act specifically in the area of recovery and resolution.

More to the point, firstly, in cooperation with the Resolution Department, assessing the scope of limitation of requirements for recovery and resolution plans; it shall submit the resulting proposal to the Licensing and Enforcement Department for the issuance of a decision.

Secondly, assessing part of a recovery plan in cooperation with a competent supervisory authority of a Member State in which an institution carries on activities through a significant branch.

Thirdly, assessing whether an obliged entity under the Recovery and Resolution Act is failing or likely to fail, notifying the Resolution Department of the failure or likely failure of that entity and providing an opinion regarding the existence or non-existence of measures other than resolution measures which might avert the failure of that entity and for other tasks.

3. Czech resolution framework

3.1. Resolution planning

As the resolution authority, the CNB is required to draw up resolution plans on how to deal with situations which might lead to financial stress of institutions within CNB´s remit or their failure. During the planning process, the CNB defines the most suitable resolution strategy for the institutions and groups, identifies and assesses potential obstacles to their resolvability, it may require the institutions to take appropriate measures to ensure that they can be resolved with the available tools in a way that does not threaten financial stability and does not involve costs to taxpayers, and it specifies the minimum requirement for own funds and eligible liabilities (MREL)[17] of those institutions. Resolution plans need to be distinguished from recovery plans which are prepared by institutions themselves as part of their internal control.

As many institutions operating in the Czech Republic are members of cross-border banking groups, the CNB cooperates with foreign resolution authorities within resolution colleges. CNB´s most important partner is the Single Resolution Board (SRB) located in Brussels, which is the resolution authority for most

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[17] Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities.

significant and cross border banking groups established within participating Member States of the Banking union.[18]

3.2. Resolution execution

CNB may only take a resolution action in relation to an institution if all the following conditions are met.

First, the institution is failing or likely to fail (i.e. can reasonably be expected to fail).

Second, there is no reasonable prospect that any supervisory action (e.g. removal of the management body or senior management, required implementation of one or more measures set out in the recovery plan) or private sector measures would prevent the failure in a reasonable timeframe.

And third, resolution action is necessary in the public interest.

To resolve an institution, the CNB may use one of the tools or powers available under the Recovery and Resolution Act, or a combination thereof (information on the use of resolution tools pursuant to Article 176(1) of the Recovery and Resolution Act). The chosen resolution strategy and the subsequent application of the selected resolution tools and powers should result in achievement of the resolution objectives with minimum use of public funds.[19]

3.3. Contributions to resolution financing arrangement

The resolution financing arrangement for the Czech Republic is the Resolution Fund. The assets in the Resolution Fund should reach at least 1% of covered deposits by 2024. This level should be achieved by regular contributions paid by institutions. The amount of an institution's individual contribution to the Resolution Fund depends on its size and risk profile and is specified in the Commission Delegated Regulation EU 2015/63. The CNB is responsible for calculating, prescribing and, where necessary, enforcing these contributions.

The funds in the Resolution Fund are managed by the Financial Market Guarantee System. In exceptional cases, the Resolution Fund can also be tapped in the resolution of an institution to finance resolution (e.g. to top up capital of the failed institution or a bridge institution, to purchase its assets, or to provide a loan or a guarantee in the sale of its business or assets to a selected acquirer) and to pay compensation according to the "no-creditor-worse-off" principle if the results of the application of resolution tools lead to the institution's owner (or creditor) being entitled to lower payment compared to liquidation or insolvency. As the funds are

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[18] See *here*.

[19] See *here*.

public, their use is subject to prior approval by the European Commission under the public support rules.[20]

3.4. Resolution planning and execution, and financing of resolution authority functions

Resolution means the restructuring of an institution by a resolution authority, through the use of resolution tools, to ensure the continuity of its critical functions, preservation of financial stability and restoration of the viability of all or part of that institution, while the remaining parts are put into normal insolvency proceedings. Hence, resolution is a process by which the authorities can intervene to manage the failure of an institution in an orderly fashion.[21]

The NRA (Resolution Department) does not fulfil functions other than its resolution functions. However, the CNB centralizes other functions as well, i.e. financial market supervision, licensing, market oversight, financial stability oversight and traditional central bank functions (payment settlement, monetary policy, etc.).

3.5. Management and oversight of liquidations

The CNB is not in charge of insolvency proceedings; however, in case of a bank's liquidation, it proposes the liquidator appointed by the court and generally oversees the liquidation process. Furthermore, the CNB is authorized to file an insolvency petition in case of insolvency of an institution as stated in Articles 367 to 378 of Act no. 182/2006 Sb., Insolvency Act.[22] Trigger for such decision is primarily the withdrawal of the institution's license/authorization and/or its failure and absence of public interest of its resolution. This authorisations is granted by the CNB.

The CNB is in charge of powers under Article 33a BRRD (Resolution Departments after consulting the Financial Markets Supervision Department).

3.6. Resolution funds

The Financial Market Guarantee System (in Czech: Garanční systém finančního trhu; hereinafter "GSFT") is in charge of the national Crisis Resolution Fund (hereinafter "CRF"). It was established by the Act No. 374/2015 Coll., Act on Recovery Procedures and Crisis Resolution in the Financial Market[23], with effect from January 1, 2016. GSFT is in charge of DGS (Deposit Insurance Fund; hereinafter "DIF") as well. CRF and DIF are internal units of the GSFT.

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20 See *here*.

21 See *here*.

22 Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon).

23 Zákon č. 374/2015 Sb., zákon o ozdravných postupech a řešení krize na finančním trhu.

The existing arrangements concerning CRF are in place since January 1, 2016.

From January 1, 2016, GSFT, as a result of the adoption of DGSD and BRRD, overtook the responsibilities of the DIF, which was originally established in 1994. Since this date, DIF has become an internal unit of the GSFT similarly to the CRF. Apart from this, DIF has not undergone any substantial reforms since its creation; partial clarification of the governance of GSFT have been undertaken throughout its existence, mostly of technical nature, addressing specific questions or ambiguities of the law.

The creation of the SSM and/or the SRM had not any impact for the direct relationship between NRAs/NCAs and the EBA.

3.7. Political or judicial tension in relation to the current resolution authority institutional framework

No political or judicial tension or dispute have arisen in relation to the framework in place.

3.8. Reform of the resolution framework at national level

No reform is under discussion at the moment.

3.9. Other authorities involved

No other authorities are involved in resolution planning concerning an institution (i.e. credit institution pursuant to Article 4(1)(1) of the Regulation No 575/2013 and investment firm pursuant to Article 4(1)(22) of the Regulation No 2019/2033, which is required to have a minimum initial capital of at least EUR 750,000). However, in the execution of resolution, the Ministry of Finance is involved if the bridge institution tool or asset management vehicle is used, as well as in cases of governmental stabilisation tools. Furthermore, if the application of resolution tools may result in the provision of State Aid, the Czech National Bank co-operates with the Ministry of Finance, as well as with the Competition Protection Office and European Commission.

4. Independence, separation, accountability

4.1. Meetings

The NRA (Resolution Department) has regular weekly staff meetings. In case an ad-hoc meeting is required, any employee can propose and organize its agenda. Meetings with other units in the Czech National Bank are co-ordinated either by the Executive Director of the Resolution Department with the heads of other involved departments or directly between the involved staff.

4.2. Appointment and Dismissal

The employees are subject to standard employment contracts, which may be terminated according to the provisions of the Act No 262/2006 Coll., Labor Code, as amended. Appointment for internal roles (i.e. head of the team) are done by the Executive Director of the Resolution Department. The Executive Director is appointed and recalled by the Bank Board of the Czech National Bank. The Resolution Department is staffed by employees with economic and legal background (in some cases both). Most of the employees also have previous experience in private or commercial practice or both.

4.3. Decision making process

The Executive Director of Resolution Department is ultimately responsible for the decision (except in cases where the Bank Board of the CNB is involved, in which case the decision is taken by the majority of its members). Both may be aided in their decision-making process by internal and external experts and/or advisors.

4.4. Operational independence of resolution functions and avoidance of conflicts of interest with other functions

The Resolution Department is by law independent from other departments within the CNB (see above). The operational independence is assured by the internal regulations of CNB, namely Organizational Rules of the CNB, Overview of the powers of organizational units of CNB, and by the Ethical Code of the CNB, which are binding for all CNB employees (hereinafter "Internal Regulations"). The budget of the Resolution Department is a part of the budget of the CNB. The rules governing the independence and separation of the NRA are published on the CNB's webpage.

4.5. Exercise of BRRD early intervention powers, including powers to appoint temporary administrators

The early intervention measures should be primarily undertaken by the competent supervisory authority. The appointment of the administrator can be undertaken by either the NCA or NRA, depending on the time/stage of the resolution. CNB is both, NCA and NRA.

The exchange of information and co-operation mechanisms between the different functions (supervisory and resolution) and also when it comes from/is addressed to Union authorities (ECB or SRB) are set out in the CNB's Organizational Rules and may be further specified and/or refined by the agreement of the heads of the respective units. There is no impact of the MoU between the ECB and the SRB on the exchange of information between the NCAs and the NRAs.

4.6. Accountability

The activity of the CNB, as a public administrative body acting within its resolution competences, is carried out on the basis of the law and within the relevant legal mandate. The CNB's decisions may be subjected to review as stated further. CNB's sanction and other decisions are, where such publication is required by the relevant sectoral laws, published on its *websites*, where such publication is required by the relevant sectoral laws. There are no other forms of accountability, e.g. in relation to the Court of auditors or other bodies.

4.7. Decision-making by the Czech National Bank on how to resolve the crisis

Firstly, according to Paragraph 2 Article 7 of Act on recovery and resolution procedures in the financial market the Czech National Bank makes decisions on the basis of information available at the time of assessing the need to take such decision, if taking into account of such information is evidently well founded and on the basis of a level of assessment of information that can be reasonably requested under the circumstances.

Secondly, when taking a decision on a resolution tool the Czech National Bank shall take into account the possible effects of such a decision in other Member States in which the person to whom the decision is addressed operates or in which other members of the group of which that person is a member operate, and shall also seek to limit the negative effects of the decision on financial stability and the negative economic and social effects in those other Member States (Paragraph 1).

Thirdly, the Czech National Bank may request from anyone information necessary for its decision-making under this Act, including updates and additional information provided in the resolution plan, and obtain information on the basis of on-site inspections of the obliged person. The provision of information to the Czech National Bank shall not constitute a breach of a contractual or statutory obligation of confidentiality. The Czech National Bank is entitled to invite an auditor, an auditing company, experts or other persons to carry out an inspection (Paragraph 3).

Fourthly, if it is reasonable, the Czech National Bank may impose on the obliged person the obligation to keep detailed lists of financial contracts to which it is a party, including specifying the data format and other particulars of such records. The time limit for delivery of such records shall be the same in relation to all obliged persons. If it is expedient to ensure the resolution capacity of the obliged person, the Czech National Bank is entitled to impose on the obliged person the obligation to maintain and update the set of documents and information necessary for the preparation of the valuation. The specific scope and detailed specification of the documents shall be determined by decision. This provision is without prejudice to the powers of the Czech National Bank to require information or cooperation from obliged persons (Paragraph 4).

It is also worth mentioning that the information shall be provided free of charge. If the information is not provided by public authorities, the person who provided the assistance shall be entitled to compensation for the costs reasonably incurred. Persons and authorities which are obliged to provide information to the Czech National Bank shall be liable for damage or other harm caused by them in the event that they fail to provide such information in a proper and timely manner. The obliged person shall designate a member of the governing body or a senior employee directly subordinate to the governing body who shall be responsible for providing information to the Czech National Bank.

4.8. Administrative and judicial review

A resolution decision may be appealed and is subject to review by the Bank Board of the CNB (subject to provisions of the Act No 500/2004 Coll., Administrative Code, as amended). Furthermore, the final CNB decision may be challenged in court. In cases where the CNB is bound by a joint decision according to BRRD, there is no administrative appeal and such decision may be challenged in court directly.

In cases where the CNB is bound by a joint decision according to BRRD, the decision of the CNB may be challenged directly in court, within 2 months from the delivery of such decision. For the proceeding in court, the provisions of the Administrative Rules of Procedure (Act No. 150/2002 Coll.) apply. The accountability of the NRA remains confined at the national level.

In case of court proceedings, the court shall take into account the economic assessment performed by the Czech National Bank, in its assessment (Article 225). The liability of the CNB for damage caused by exercising or refraining from exercising any such voting rights is waived in cases where a consent of the CNB is required to exercise such rights (Article 99) and both the bridge bank and asset management vehicle have no liability for damages caused by its activity to the liable entity, owners of the instruments of ownership in the liable entity or creditors of the liable entity (Articles 108 and 118). There are no other liability waivers or restrictions for the CNB in the resolution process.

Thre are no rules restricting the NRA's liability in application of Article 3 BRRD. There are neither restrictions applied to resolution functions, nor which are extended to supervisory functions provided for under the BRRD (recovery plans, early interventions measures). National law does not restrict its general rules on public liability where the NRAs acts in the context of the SRM.

4.9. Soft law

The competent national authority to which the general guidelines and recommendations of the European Supervisory Authorities are formally addressed is the Czech National Bank. If the CNB decides to opt-in, it shall state this in a notice published on the official notice board. In such a communication, the CNB

usually announces that it will follow the guidelines in question and that it expects supervised entities to make every effort to comply with the guidelines. The CNB may also decide to follow specific guidelines only partially. On a theoretical level, a complete opt-out is perhaps not out of the question.

The question is what legal nature such CNB communications have. It is not clear whether such a communication is a normative or merely informative act. Pursuant to Section 49a(3) of the CNB Act, the CNB issues official communications to inform. However, the Supreme Administrative Court of the Czech Republic has stated that it is not the formal features of the act that are decisive, but its specific content and its impact on the rights and obligations of the addressees.[24]

It is also important to say that by publishing it, the CNB commits itself that it intends to follow the guidelines and that it intends to enforce them.[25] Following the CNB's communication, the EU guidelines remain a legally non-binding document, but the content of the guidelines becomes an obligation for financial institutions as a result of the CNB's supervisory activities.

Some Czech laws therefore adopt the rule set out in the founding regulations, namely that the CNB, as a national supervisory authority, has the option to opt-out and justify it in relation to specific EU soft law acts. Otherwise, however, the CNB has a legal obligation to rely on such acts.

It is not clear whether the CNB is bound by all of its communications, or whether it is bound only if specific instructions from the European Supervisory Authority fall within the area covered by Czech law requiring the CNB to rely on EU guidelines.

The CNB has an internal process in place for dealing with the '*comply or explain*' procedure regarding ESAs guidelines. At the end of this process, CNB duly notifies its compliance or justification of non-compliance along with relevant reasons.

4.10. Administrative and judicial review of soft law under Czech law

The obligations of the individuals to comply with EU guidelines may also be explicitly stated in CNB regulations.

A situation where the CNB explicitly enforces the implementation of EU soft law is not unusual in practice.[26] Although the guidelines in question are an EU act, which, pursuant to Article 288 TFEU, is not legally binding, they become binding through their implementation in the Czech legal system. Such a provision is subsequently also enforced at national level.

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[24] Resolution of the Supreme Administrative Court of 21 November 2006 No. 2 Ao 1/2006-47, No. 740/2006 Sb. Rozh. NSS, 10/2008.

[25] V. Šemora, *K některým aspektům právně nevynutitelných nástrojů (soft law) vydávaných správními orgány*, (2011) 2 Právní rozhledy, 48.

[26] For example, CNB Decision of 18 September 2019, No 2019/99456/570, File No Sp/2019/53/573.

In such a case, the Czech National Bank, by a free opt-in made under its discretionary powers and subsequent enforcement, converts a legally non-binding EU act into a legally binding and enforceable act. In doing so, the CNB is only doing what Article 16 of the ESAs founding Regulation requires it to do.

This process transforms a non-legally binding act into a legally binding act.[27] An act with legally binding effects should be subject to direct judicial review by the Court of Justice of EU.

In my opinion, given that, according to the ESA's founding rules, the guidelines are intended to specify binding Union legislation, the CNB may regard non-compliance with them as a breach of that binding legislation. Alternatively, if the CNB identifies failings in the internal management of a financial institution that are inconsistent with the guidelines, it will invite the financial institution to take corrective action. Failure to comply with the invitation may lead to the initiation of sanction proceedings against the person concerned.

Effective enforcement of EU guidelines can also take place in the context of licensing procedures. The CNB may require that the documents submitted by the licence applicant comply with the EU guidelines, otherwise it will not grant the licence. In all these cases, the CNB mediates the actual impact of EU soft law on national financial institutions.

4.11. Enforcement phase and role of Licensing and Enforcement Department

When the CNB is in the position of a first-instance administrative authority, the Executive Director of the Licensing and Enforcement Department shall enforce the following tasks. Firstly, he/she shall appoint and dismiss the liquidator, temporary administrator or conservator of a financial market entity and set his remuneration. Secondly, he/she shall issue decisions in administrative proceedings conducted against financial market entities under special legislative acts in the area of licensing, approval and authorisation activities and in proceedings to refuse (partly) applications for the provision of information pursuant to Act on Freedom of Information, where decision-making power does not lie with another CNB organisational unit, the Resolution Department in particular. Third, he/she shall decide on penalties against financial market entities and other entities, where decision-making power does not lie with another CNB organisational unit.

The Licensing and Enforcement Department shall be in the enforcement area responsible for conducting administrative proceedings in matters regarding shortcomings or administrative offences identified in the financial market, including proceedings on the imposition of temporary administration or

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[27] M. van Rijsbergen, *On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority*, (2014) Utrecht Law Review 5, 116-131; N. Moloney, *The European Supervisory Authorities and Discretion. Can the Functional and Constitutional Circles be Squared?*, in J. Mendes (ed), *EU executive discretion and the limits of law* (Oxford University Press, 2019).

conservatorship and on the appointment, dismissal or remuneration of temporary administrators or conservators, or on the imposition of early intervention measures under the Recovery and Resolution Act.

4.12. The impossibility of forcing the CNB to apply soft law

On the one hand, according to Article 16 of the founding Regulation, in order to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, consistent and uniform application of Union law, the Authority shall issue general guidelines and recommendations addressed to competent authorities or financial institutions. Competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations. Therefore, irrespective of the decision of the CNB, financial institutions shall make every effort to comply with the guidelines and recommendations.

On the other hand, there is no mechanism within the public administration that would force the Czech National Bank to live up to its own statement made in an official communication. The willingness of the CNB to actually enforce compliance with the guidelines and recommendations of the European Supervisory Authorities is obviously a key aspect that has an impact on the actual operation of EU soft law in the national context.

The difficulty is that there are virtually no cases where a refusal to comply with and enforce EU guidelines has been legally challenged. Unless the CNB interferes with an individual's public rights, there is no entity with standing to bring legal proceedings.

5. Summary

In summary, Czech resolution legislation houses resolution authority functions within the Czech National Bank. The resolution authority function is one of a number of functions conferred on the Czech National Bank by law.

On the basis of the above, it can be said that the independence of the Czech National Bank is at a high level. Moreover, the Czech National Bank enjoys a high reputation in the Czech Republic and no doubts have arisen about its proper functioning since its establishment.

In order to maintain the separation of the resolution authority functions from other functions, resolution authority functions are specifically conferred by internal law on the Resolution Department. The Resolution Department of the Bank is responsible for day-to-day resolution-related tasks while relevant supervisory departments carry out supervisory tasks.

The Czech National Bank is also willing to apply EU soft law and no administrative or court disputes concerning the implementation of EU law in the event of a bank crisis have arisen in practice. No forthcoming regulatory reform in this context is known to the author at this time.

Denmark

Josephine Svane Low and Lene Kjær[*]

Summary. 1. Resolution Authorities and their institutional settings in Denmark – 2. The FSA – 2.1. The executive board – 2.2. The governing board – 2.3. Early intervention – 2.4. Resolution planning and MREL-requirements – 2.5. Exchange of information – 2.6. Funding of the FSA – 3. The FSC – 3.1. Management structure – 3.2. The governing board – 3.3. The executive board – 3.4. The Resolution Fund – 3.5. Other functions than resolution functions – 4. The appeals and court system – 4.1. Compliance to soft law – 5. International and national cooperation – 5.1. Exchange of confidential information

[*] The author would like to thank other colleagues at the Danish FSA and the FSC for their valuable contributions to this report.

1. Resolution Authorities and their institutional settings in Denmark

In Denmark the resolution authority is divided between two authorities: The Danish Financial Supervisory Authority (FSA) and The Financial Stability Company (FSC).

The FSA is the resolution authority for a financial institution while it is a *going concern* and the FSC is the resolution authority for a financial institution when it is a *gone concern*.

Financial institutions transition from *going concern* to *gone concern* when the FSA, after consulting the FSC, assesses that a company is failing or likely to fail, and when the FSA has notified the FSC that there is no prospect that other measures, including measures initiated by the private sector or the FSA, within an appropriate time horizon, will be able to prevent the company from having to be wound up. The FSC then initiates resolution measures against the company if the FSC assesses that the public interest necessitates the initiation of one or more resolution measures.

The resolution planning is carried out by the FSA and FSC in coordination, and meetings are called if one of the authorities deems it relevant. The National Bank participates in the resolution planning when the resolution planning concerns SIFI-institutions. The resolution execution itself is carried out by the FSC. There is also an ongoing cooperation between the Ministry of Industry, Business and Financial Affairs, the Ministry of Finance, the National Bank, the FSA and the FSC in the Coordination Committee for Financial Stability. The purpose of the cooperation is to maintain financial stability and to coordinate the parties' handling of financial crises if they arise. The committee has the option of inviting other relevant authorities to participate in the collaboration and meetings. The Permanent Secretary of State for Industry, Business and Financial Affairs chairs the Coordinating Committee for Financial Stability.

The legal basis for the NRA (which covers the FSA and the FSC) is anchored in the Financial Business Act[1] and the Act on Restructuring and Resolution of Certain Financial Enterprises.[2] The set of rules follows the EU directive BRRD. The Eurogroup is currently working on improving the framework for crisis management. For more information, see this article: *Eurogroup statement on the future of the Banking Union of 16 June 2022 - Consilium (europa.eu)*. Besides the acts of parliament this regulation there are issued supplementing executive orders regarding resolution planning and preparedness as well as the calculation of the MREL requirement etc.

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1 LBK nr 1013 af 21/08/2024 (the Financial Business Act).

2 LBK nr 24 af 04/01/2019 (the Act on Restructuring and Resolution of Certain Financial Enterprises).

2. The FSA

The primary task of the Danish FSA is supervision and the FSA monitors compliance with a number of listed regulations, among others CRR and BRRD.[3] The resolution authority responsible for the institutions "going concern" is located in the FSA. The FSA is among others responsible for the adoption of resolution plans and setting of MREL-requirements in coordination with the FSC etc.

The division between the FSA as a supervisory authority and as a resolution authority is stated in the Financial Business Act. According to section 344 d, the FSA exercise the powers delegated in chapter 17 and 17a in the Financial Business Act (concerning resolution) with an appropriate operational independence from the supervisory part of the FSA regarding financial institutions and mortgage credit institutions. In practice this is ensured by placing the part of the FSA which performs supervisory tasks in other divisions under a different deputy Director General than the part of the FSA which perform tasks in the capacity as resolution authority.

2.1. The executive board

The FSA is organised with an executive board, which consists of a director general and four deputy Director Generals. Each deputy Director General is responsible for one of the four divisions in the FSA. The four divisions consist of Prudential Supervision of Credit Institutions, Financial Crime and Conduct Supervision, Insurance and Pension Funds Supervision and Captal Markets Supervision. The Rresolution Unitauthority in of the FSA is placed centered within the Capital Markets Supervision division. The Danish FSC and the Danish FSA has joint resolution authority in Denmark.

2.2. The governing board

In addition to that, the Danish FSA has a governing board. The members of the governing board are appointed by the Minister of Industry, Business and Financial Affairs, cf. section 345 in the Financial Business act. The minister of Industry, Business and Financial Affairs also appoint one observer from the Ministry of Business of Industry, Business and Financial Affairs to join the board.[4]

The governing board is tasked with, among other tasks, approving the organisation of supervisory activities and laying down the strategic targets for the FSA's supervisory activities and activities regarding resolution planning and the write-down and conversion of capital instruments and eligible liabilities as well as with assisting in the treatment of matters relating to resolution planning. Furthermore, the board approves executive orders and guidelines in areas where the FSA is authorised to issue regulations. For example the FSA has issued an executive order on MREL requirements, which elaborates the sections on MREL

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[3] Cf. section 344 in the Financial Business Act.

[4] Cf. section 345, subsection 9, in the Financial Business Act.

in the Financial Business Act as well as an executive order on resolution planning and preparedness etc. moreover, the board provides technical, organisational and managerial assistance to the management team of the FSA and approves the annual report of the FSA. The tasks of the governing board are listed in the Financial Business Act under paragraphsection 345, subsection 12 and in paragraphsection 4 of the executive order of the rules of procedure of the governing board of the FSA. Moreover, the board provides technical, organisational and managerial assistance to the management team of the FSA and approves the annual report of the FSA.

The board and the director of the FSA is appointed by the minister of business, cf. paragraph section 345, subsection 1 in the Ffinancial Bbusiness Aact. The director of the FSA is appointed by the minister of business after ais appointed after a hearing of the board, cf. paragraphsection 345, subsection 1, in the Financial Business Act. The minister of business can after recommendation from a majority in the board of the FSA remove a member of the board, who does n'ot fulfil the conditions set in subsection 4, cf. paragraph section 345, subsection 6 in the Financial Business Act.

(1) Paragraph section 345, subsection 4, in the Ffinancial Bbusiness Aact states, that a member of the governing board of the FSA may not have been charged with criminal liability for violating the Criminal Code, the Money Laundering Act, the Financial Business Act or the financial regulation or rules issued pursuant thereof,

(2) have participated in the management of a company which is charged or imposed penalty for violation of the Criminal Code, the Money Laundering Act, Financial Business Act or other financial regulation or rules issued pursuant thereto for matters committed during a period in which the member participated in the management of the company,

(3) be covered by a supervisory case on management responsibility, where the board of directors must make a decision or decision pursuant to section 12, no. 4 and 6,

(4) have applied for or be under restructuring treatment, bankruptcy or debt restructuring,

(5) be subject to bankruptcy quarantine,

(6) be deprived of the right to run a business or

(7) be under guardianship.

The board in the FSA consists of up till 9 board members, which as a whole should possess legal, economic and financial insight, as well as insight in data analysis and cyber risks and insight in prevention and fighting against financial crime[5] A. Section 345, subsection 2 in the financial business act contains further information on the composition of the members of the board.

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[5] Cf. section 245, subsection 2, in the Financial Business Act.

The board of the FSA makes a decision using a simple majority vote. In case of voting equality, the vote of the chairman is decisive.[6]

2.3. Early intervention

The FSA is responsible for the undertaking when "going concern" and has powers in the legislation (chapter 15a in the Financial Business Act) to do an early intervention when it comes to financial institutions and mortgage credit institutions. The powers can be used if the undertaking violates or it is predominately likely to violate the requirements laid out in the financial legislation due to a rapid or significant deterioration of the institution's financial situation.

2.4. Resolution planning and MREL-requirements

The FSC submits a draft for the resolution plan to the FSA for the institutions in scope of the requirement laid out in the financial business act. The FSA has the competence to develop, adopt and maintain the resolution plan submitted by the FSC. The resolution plan is finally adopted by the FSA. Furthermore, the FSA is responsible for setting a minimum requirement for eligible liabilities for the institutions. The requirement is set after a hearing of the FSC (and a hearing of the National Bank when the MREL requirement concerns a SIFI-institution).

2.5. Exchange of information

The information between the FSA as a resolution authority and as a supervision authority is exchanged to the extent that it is necessary in order to perform the designated functions and tasks. Information between the FSA and the FSC can be shared under the condition that the information is necessary in order for perform the task at hand.[7]

2.6. Funding of the FSA

Undertakings under the supervision of the Danish FSA pay fees to cover the cost of the work of the Danish FSA. The fees are collected at the end of each year. In December undertakings will receive invoices covering the cost of supervision during the year.

3. The FSC

The FSC was established as a public limited company in October 2008 as part of an agreement between the Danish State and the Danish financial sector (the Private Contingency Association) in order to secure financial stability in Denmark as a consequence of the international crisis and the impact hereof

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6 Cf. section 345, subsection 17, in the Financial Business Act.

7 Cf. section 354, subsection 6, no. 15, in the Financial Business Act.

on the financial sector. On 1 June 2015, the FSC was converted into an independent public company. As a result of the FSC being an independent public company that is owned by the Danish state through the Ministry of Industry, Business and Financial Affairs, the FSC ensures an ongoing dialogue with the owner, so that the Minister of Industry, Business and Financial Affairs gets relevant insight into matters relating to the FSC. The conversion took place in connection with the adoption of the Act on Restructuring and Resolution of Certain Financial Enterprises, that implemented the BRRD, where the FSC together with the FSA were appointed as resolution authorities in Denmark. The set of rules follows the EU directive BRRD and provide the FSC a number of tasks and powers.

The FSC has 4 primary resolution tools: The sale of the business, a bridge institution, the separation of assets and bail-in. In addition, the FSC has a number of other powers, including the option of suspending payment and delivery obligations in a company in distress. The suspension powers follow from the Restructuring and Resolution of Certain Financial Enterprises, and the purpose of the suspension powers is to give the FSC the opportunity to get an overview of the current payments and delivery obligations when a company is in distress. It follows from section 65 of the Act on Restructuring and Resolution of Certain Financial Enterprises that the Minister of Industry, Business and Financial Affairs, on the recommendation from the governing board of the FSC, decides on the:

(1) choice of resolution tools, cf. section 12, for companies or entities with systemic importance,
(2) use of public stabilization instruments, cf. chapter 9,
(3) to request a loan from other countries' resolution financing schemes, cf. section 58, subsection 6, and
(4) to grant loans to other countries' resolution financing schemes, cf. section 59, subsection 5.

The Minister of Industry, Business and Financial Affairs exercises his powers under this provision vis-à-vis the FSC by means of written notices addressed to the governing board.

In addition, the FSC informs the Minister of Industry, Business and Financial Affairs about matters that are of significant financial or political importance to the company.[8]

The Minister of Industry, Business and Financial Affairs can at any time demand from the FSC any information that the Minister considers necessary,

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[8] Cf. section 66, subsection 1, in the Act on Restructuring and Resolution of Certain Financial Enterprises.

however the disclosure of information must take place in compliance with chapter 9 of the Financial Business Act, cf. section 61, subsection 5.[9]

As a resolution authority, the FSC must, among other things, prepare resolution plans for all Danish banks, mortgage credit institutions and some investment firms in cooperation with the FSA, as well as carry out a possible restructuring or liquidation of these companies. When the FSC decides on the resolution strategy, the starting point is the resolution plan that the FSA has adopted, but the FSC is not bound by the resolution plan.[10]

The object of the FSC is to contribute to ensuring financial stability in Denmark, including in particular by winding-up of distressed financial institutions, which cannot comply with the capital adequacy requirements pursuant to the Danish Financial Business Act.

3.1. Management structure

The FSC has a two-part management structure consisting of the governing board and the executive board. The governing board and the executive board are independent of each other, and there is no coincidence in the circle of people.

The FSC's subsidiaries are managed by independent management boards and boards, which partly consist of the day-to-day management of the FSC. The structure implies that the FSC has representation on the boards of all subsidiaries.

3.2. The governing board

The FSC's governing board currently consists of 7 members. Neither the employees of the FSC nor of the FSC's subsidiaries have the right to elect members to the FSC's governing board. The board members are elected for one year at a time with the possibility of re-election.

The governing board handles the overall management of the FSC. The Minister of Industry, Business and Financial Affairs elects and dismisses the members of the board, including the chairman and deputy chairman of the board at "Virksomhedsmødet", which is the FSC's highest decision-making authority.

Board candidates must have relevant skills, and the board as a whole must have knowledge and experience within the central issues and challenges facing the FSC. Based on the company's business model and associated risks, the board annually identifies the areas in which it is assessed that the management and the board of the FSC need to have knowledge and experience. On the basis of

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[9] Cf. section 66, subsection 2, in the Act on Restructuring and Resolution of Certain Financial Enterprises.

[10] Cf. section 12, subsection 3, in the Act on Restructuring and Resolution of Certain Financial Enterprises.

these assessments, the conditions surrounding the company's management are adjusted as necessary.

The general guidelines for the board's work are laid down in the rules of procedure for the board. The board receives regular information about the company's situation. Orientation takes place both at meetings and through ongoing written and oral reporting.

3.3. The executive board

The executive board of the FSC consist of a CEO who, together with two Deputy CEO's, handles the day-to-day management of the FSC. The guidelines for the executive board's reporting and submission of decisions to the governing board, as well as for the division of competence and tasks between the governing board and the executive board, are laid down in an instruction to the executive board.

3.4. The Resolution Fund

The Resolution Fund has been under construction since 2015, and the FSC has handled the administration of the Resolution Fund since 2015.

The FSC is not liable for the Resolution Fund, and the Resolution Fund is only liable for its own obligations.[11]

3.5. Other functions than resolution functions

The Guarantee Scheme

On 1 June 2015, the Act on a Guarantee Fund for Depositors and Investors was amended, which meant, among other things, that the Guarantee Fund for Depositors and Investors (the Guarantee Fund) ceased to exist as an independent entity. With the change in the law in 2015, the Guarantee Scheme became an integral part of the FSC.

The FSC is not liable for the Guarantee Scheme, and the Guarantee Scheme is only liable for its own obligations.[12]

4. The appeals and court system

The Company Appeals Board is an appeal body within the legislation administered by the FSA. The Company Appeals Board is an independent board that takes an independent position on the cases brought forward. The stab consists of lawyers, as well as technicians, secretaries and varies types of administrative staff.

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11 Cf. section 71 in the Act on Restructuring and Resolution of Certain Financial Enterprises.

12 *Ibidem*.

When the board receives a complaint about a decision made by the FSA, the complaint is sent to the FSA. The FSA and complainants then have the opportunity to comment on the case and make submissions separately.

The Company Appeals Board's rulings cannot be appealed to other authorities. The parties to the case can, however, bring the case before the courts.

A number of violations of the rules administered by the FSA can be punished with a fine and in some cases also with imprisonment. A criminal case for violation of the rules falls under the jurisdiction of the courts. It is the State Attorney for Special Economic and International Crime that, as a rule, deals with cases in the area of the FSA.

The cases handled by the FSA can proceed to either SØIK or the Company Appeals Board. The cases can then be brought before the courts.

There is no appeal board for the FSC and complaints about final decisions made by the FSC must be brought before the courts.

4.1. Compliance to soft law

The FSA must notify EBA, EIOPA and ESMA whether it chooses to comply with all or part of the guidelines and recommendations and uses the Danish language version in the supervisory or resolution work.

The FSC must notify EBA whether it chooses to comply with all or part of the guidelines and recommendations and uses the Danish language version in the resolution work.

It depends on the specific guidelines whether there are any rules in the Danish legislation that can be used to enforce guidelines from relevant EU-bodies. For example, does section 261 in the Financial Business Act contain authority for the FSA to order an institute to contribute to the drafting of the resolution plan by giving relevant information, and in relation to that fulfil for example EBA's resolvability assessment guidelines. This provision can therefore be applied to enforce the guidelines in certain circumstances after a concrete assessment.

5. International and national cooperation

The creation of the SSM and SRM has introduced a new mechanism for working together among members of the banking union, since there is a joint supervisory authority (ECB) and a joint resolution authority (SRB) liaising with the NRAs and NCAs particularly for the significant banks. In terms of the Danish resolution authorities (and similarly for the supervisory authority) we have a close cooperation with both the SRB and the NRAs, for example in resolution colleges and in EBA.

The Danish NRAs are cooperating in different foras, i.e. a high level coordination committee hosted by the competent ministry, resolution colleges, and a steering committee for a project organisation where the resolution authorities and the central bank are represented and discusses issues related to SIFI banks. There is daily cooperation among the Danish resolution authorities. The foras mentioned meets 2-4 times a year. In addition, the FSC is also a member of the depositor guarantee organisations such as European Federation of Deposit Insurers and Internation Association of Deposit Insurers.

5.1. Exchange of confidential information

The FSA and the FSC can mutually share confidential information as well as between authorities etc., in other countries inside EU or in countries with which the Union has entered into an agreement for the financial area, which is responsible for resolution of financial institutions and mortgage credit institutions when the information is shared in relation to the resolution planning, and resolution authorities in countries outside the EU, with which the Union has not entered into an agreement for the financial area. The FSA is subject to Chapter 9 section 354, subsection 6, no. 15, 42 and 43 in the Financial Business Act. The FSC is subject to Chapter 9 of the Financial Business Act on the disclosure of confidential information, cf. section 61, subsection 5, in the Act on Restructuring and Resolution of Certain Financial Enterprises.

Estonia

Andres Tupits[*]

Summary. 1. Institutional issues – 2. Independence, separation, accountability

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1. Institutional issues

Estonia has only one resolution authority. Finantsinspektsioon (Estonian Financial Supervision and Resolution Authority) is a financial supervision and crisis resolution authority with autonomous responsibilities and budget that works on behalf of the Republic of Estonia and is independent in its decision-making. A trilateral memorandum of understanding between Finantsinspektsioon, the central bank (*Eesti Pank*) and the Ministry of Finance, signed on 24 March 2017[1], clarifies the roles of the participants in determining the policies towards the financial sector.

The legal basis for Finantsinspektsioon is the Financial Supervision Authority Act (*Finantsinspektsiooni seadus, FIS*),[2] which entered into force on 1 January 2002[3] and has been amended since then on numerous occasions. Finantsinspektsioon carries out state supervision over banks, insurance companies, insurance intermediaries, investment firms, fund managers, investment and pension funds, payment institutions, e-money institutions, creditors and credit intermediaries, and the securities market that all operate under activity licences granted by Finantsinspektsioon.

Finantsinspektsioon is part of the European Single Supervisory Mechanism (SSM). Finantsinspektsioon is also party to the European Single Resolution Mechanism (SRM) as well as the Single Resolution Board (SRB).

Institutionally, its status is rather complex and unique in the Estonian legal environment. Namely, Finantsinspektsioon acts in the name of the state, while being formally part of the central bank of Estonia, Eesti Pank. Acting as agency it has its autonomous competence and a separate budget[4], and its decision-making organs are different from those of Eesti Pank.

Internally at Finantsinspektsioon, the Resolution Department, subordinated directly under the Chairman of the Management Board, oversees resolutions. Further to the provisions of the Financial Supervision Authority Act, the activities of the Resolution Department are regulated by the Financial Crisis Prevention and Resolution Act (*Finantskriisi ennetamise ja lahendamise seadus*), which entered into force on 29 March 2015 in order to implement the BRRD.

Prior to the adoption of the Financial Crisis Prevention and Resolution Act, crisis resolution measures were regulated by various provisions of the Credit Institutions Act (*Krediidiasutuste seadus*), which authorised Finantsinspektsioon

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1 This trilateral memorandum of understanding superseded earlier trilateral agreements of 5 December 2005 and 21 December 2007. The text of the memorandum of understanding in Estonian is available *here*.

2 Available in English *here*.

3 Finantsinspektsioon joined the functions of Eesti Pank's Banking Supervision Authority and the Ministry of Finance's Insurance Supervision Authority and Securities Inspectorate. See also *here*.

4 Article 4 FIS.

to adopt measures either to prevent crisis regarding individual banks or to address them.

It is noteworthy to point out that the Head of the Resolution Department is simultaneously the Director of the Guarantee Fund, which is a legal person in public law operating under the Guarantee Fund Act (*Tagatisfondi seadus*). The Guarantee Fund is the institution in charge of the administration of the national resolution fund (the Resolution Sectoral Fund is one of the pools of assets managed by the Fund; the others are the Deposit Guarantee Sectoral Fund, the Investor Protection Sectoral Fund, Pension Protection Sectoral Fund and the Pension Contracts Sectoral Fund).

Given the relatively new structure and lack of reasons to execute the crisis resolution mechanism in Estonia there are neither political nor judicial tensions regarding the mechanism present now. Thus, there are also no initiatives to reform the mechanism.

From what could be observed, the creation of the SSM or SRM has not had any impact for the direct relationship between Finantsinspektsioon and the EBA.

2. Independence, separation, accountability

The work of Finantsinspektsioon is planned and monitored by the Supervisory Board of Finantsinspektsioon, which has six members and is chaired by the Minister of Finance of the Republic of Estonia (the other ex officio member is the Governor of Eesti Pank).[5] Decisions are made if at least four members are in favour, except in cases where unanimity is required.[6]

Two of the appointed members of the Supervisory Board are appointed and removed by the Government of the Republic on the proposal of the Minister of Finance and the other two by the Supervisory Board of Eesti Pank on the proposal of the Governor of Eesti Pank respectively.[7] The membership at the Supervisory Board presumes the person to be in an active legal capacity, in possession of an Estonian citizenship, an academic degree, an impeccable professional and business reputation[8] and the experience necessary to carry out one's tasks,[9]

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5 Articles 8(1) and (2) FIS.

6 Article 15(2) FIS. Both the minister and the central bank governor have a vote.

7 Article 8(3) FIS.

8 Which could be proven by absence of any of the grounds listed in Article 9(2) FIS: 1) being under preliminary investigation for or accused of a criminal offence for which the law prescribes imprisonment or persons with a criminal record for criminal official misconduct or any other intentionally committed criminal offence; 2) persons whose previous unlawful act or omission has resulted in the bankruptcy, compulsory dissolution or revocation of the activity licence of a company; or 3) bankrupts or persons who are subject to a prohibition on business or from whom the right to engage in economic activity has been taken away pursuant to law.

9 Article 9(1) FIS.

coupled with the consent to serve on the Supervisory Board,[10] the duty to avoid conflicts of interest[11] and the duty to maintain confidentiality in the office.[12] The term of office for the appointed members is three years.[13]

While the law foresees a meeting every three months,[14] in practice the Supervisory Board meets bimonthly,[15] and therefore has five to six meetings per year. The meeting agenda is usually determined by the Minister of Finance, but two members of the Supervisory Board or the Chairman of the Management Board may call for a meeting and propose an agenda in so doing.

Its day-to-day management is executed by a four-member Management Board,[16] that takes decisions by majority vote (in case of a tie in a body of four, the Chair's vote will be decisive).[17]

The Management Board is headed by the Chair of the Board.[18] Members of the Management Board are appointed by the Supervisory Board for four years for the Chair,[19] while the other members are appointed for three years.[20]

A candidate for the position in the Management Board shall have an active legal capacity, possess an Estonian citizenship, an academic degree, an impeccable professional and business reputation,[21] the professional expertise required for the field and minimum five-years' experience in the fields of finance, law, auditing,

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10 Under the Estonian administrative practice, a candidate usually provides his or her consent by declaring compliance with the provisions set for the office. Therefore an appointed member of the Supervisory Board can me removed from office under Article 11(2)4) FIS if he or she has submitted false information confirming one's compliance with the requirements set for the Supervisory Board membership, implicitly suggesting that the false information was provided in the consent letter.

11 Article 32(1) and (2) FIS.

12 Article 34 FIS.

13 Article 10(3) FIS. With the exception of the minister and the central bank governor, the term of office is in principle renewable (at least there is no limitation by law).

14 Article 13(1) FIS.

15 In 2021 there were five meetings (Finantsinspektsiooni aastaraamat 2021, lk. 12), in 2020 six (Finantsinspektsiooni aastaraamat, lk. 9), in 2019 five (Finantsinspektsiooni aastaraamat 2019, lk 12).

16 Article 19(1) establishes that the Management Board shall consist of three to five members, while in practice there are only four members serving. To have an even number of members in the governing bodies is a phenomenon that is present also in the Supervisory Board with six members. Similarly, the number of Eesti Pank Supervisory Board members decreased from nine to eight when the Governor of Eesti Pank ceased to be an ex officio member of the Eesti Pank Supervisory Board following the amendments of the Eesti Pank Act in 2006. This organisational set-up usually presumes that the chairman of the body has a casting vote (or higher weight) in case of tie in decision-making.

17 Article 26(2) FIS.

18 Article 23(1) FIS. In the absence of the Chair, his duties shall be performed by the eldest member of the Management Board, except in cases the Chair has decided to authorise any other Management Board member as his substitute and issued a decree thereof.

19 Article 21(2) FIS.

20 Article 21(1) FIS. In principle, the terms of office are renewable.

21 Article 20(2) 4), 5) and 6) list the grounds that are the same as Article 9(2)1), 2) and 3). See also footnote 8.

or information technology,[22] a willingness to serve on the Management Board[23] in good faith,[24] honouring the duty to avoid conflicts of interest[25] and the duty of confidentiality.[26]

While the legal minimum for the Management Board meetings is once per month,[27] in practice it meets every week, sometimes more.[28] The meetings are called, as a rule, by the Chairman.[29]

Both organs of Finantsinspektsioon apply the rule 'one member one vote'; there is no right to abstain from voting or to remain undecided.[30]

FIS has several provisions to ensure the operational independence of the resolution functions and to avoid conflicts of interest with other functions.[31] The existence of the crisis resolution unit, unlike any other unit, is foreseen in FIS, thus as long as the Finantsinspektsioon is in service, so does its Resolution Department.[32] The Resolution Department is subordinated organisationally to the Chairman, the Head of the Department as well as the employees are subject to employment contracts that are similar to the employees of other departments. However, as a rule an employee of the Resolution Department does not carry out any supervisory tasks and does not report to any supervisory departments.[33] While the law foresees that conflicts between the financial crisis resolution function and other functions shall be prevented,[34] there is also the obligation of close cooperation,[35] thus leaving the actual protection of the resolution function to be a matter of internal rules[36] and administrative practice. The rules applicable on

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22 Article 20(1) FIS.

23 Article 20(5) FIS.

24 Article 31 FIS.

25 Article 32(1) and (2) FIS. Membership of the Management Board is incompatible with that of the Supervisory Board (Article 20(2)1)), membership of the Eesti Pank Supervisory Board or Management Board (Article 20(2)2)), serving as auditor of Eesti Pank (Article 20(2)3)), being servant in the public service, or in employment contract or serve in any structural unit or independent division of Eesti Pank (Article 20(3) FIS).

26 Article 34 FIS.

27 Article 24(1) FIS.

28 In 2021 there were 53 meetings (Finantsinspektsiooni aastaraamat 2021, lk. 12), in 2020 it had 62 meetings (Finantsinspektsiooni aastaraamat, lk. 10), in 2019 there were 56 meetings (Finantsinspektsiooni aastaraamat 2019, lk 12).

29 Article 24(2) FIS.

30 Articles 15(1) and 26(1) FIS.

31 Articles 4(4) and 5^1 FIS

32 Article 5^1(1) and (2) FIS.

33 Section 6 of Decision No 1.1-1/2 of 10 July 2015 by the Supervisory Board on the separation of the crisis resolution and supervisory functions at Finantsinspektsioon and their exchange of information, available in Estonian *here*. However, Sections 7, 8 and 9 allow some flexibility for the Management Board to shift the staff temporarily between the functions in case of operational needs provided that this does not undermine the tasks of the Resolution Department.

34 Article 5^1(2) FIS.

35 Article 5^1(3) FIS.

36 Article 5^1(4) FIS as well as Decision No 1.1-1/2 of 10 July 2015 by the Supervisory Board.

the exchange of information[37] do not distinguish between information received or sent to Union authorities such as the ECB or SRB, the rules are universal with the aim of protecting the information in the possession of the Resolution Department, thus the Memorandum of Understanding (MoU) Between the SRB and the ECB covering, inter alia, information exchange and cooperation,[38] is deemed to work in harmony with the Decision No 1.1-1/2.

Regarding financial independence of the Resolution Department, its budget is part of the one of Finantsinspektsioon, which, unlike any other public authority in Estonia, is funded by the supervision fees and procedure fees paid by the subjects of financial supervision.[39]

The accountability of the Resolution Department forms part of the overall accountability and transparency duty of Finantsinspektsioon. As a rule, resolution proceedings are not public.[40] Measures adopted in the field of resolution fall within the competence of the Management Board,[41] and such decisions are made public to a limited extent on the Finantsinspektsioon website.[42] General information about the resolution function are published in the Finansinspektsioon yearbook,[43] both in paper copy as well as on the website[44] and its contents will be delivered by the Chairman to the Estonian Parliament (*Riigikogu*).[45] It is assumed that the same accountability framework would also be applicable where it is implementing SRB decisions.

The State Audit Office is authorised to audit the Finantsinspektsioon[46] for its book-keeping and IT systems[47] which entitles the State Audit Office to receive the relevant confidential information.[48] However, its audit powers are limited to review operational efficiency,[49] thereby one can argue the State Audit Office cannot review individual resolution decisions or its adoption procedure.

In broad terms, any action to annul the resolution decision adopted at the EU level in front of the national court would, in any case, be inadmissible to the extent that the national resolution decision merely implements, in accordance

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37 Sections 11 to 15 of Decision No 1.1-1/2 of 10 July 2015 by the Supervisory Board.

38 Available *here*.

39 The resolution mechanism itself, the Resolution Sectoral Fund, is also financed by the market participants but its finances are not foreseen for expenses of the Resolution Department.

40 Article 51 of the Financial Crisis Prevention and Resolution Act, Article 54^1 FIS.

41 Article 18 FIS.

42 Article $53(4)2^1$) FIS. Further specifications as to which information has to be public is specified by the Minister of Finance by its decree.

43 For example, Finantsionspektsiooni aastaraamat 2021, lk 39.

44 Available *here*.

45 Article 51(4) FIS.

46 Article 7(1) of the State Audit Office Act (*Riigikontrolli seadus*).

47 Articles 6(2)1), 2) and 4).

48 Article $54(4^5)$ FIS.

49 Articles 6(2)3) and 7(5) of the State Audit Office Act.

with Article 29 SRMR,[50] the relevant SRB decision. In other words, the national court has no jurisdiction to review the SRB decision.[51] Decisions by the Finantsinspektsioon implementing the relevant SRB decision, e.g. establishing deadlines, etc. could be subject to review under the Code of Administrative Court Procedure (*Halduskohtuminetluse seadustik*),[52] however there is no case law on resolution matters so far in Estonia.

Estonian administrative law recognises soft law instruments (e.g. Guidance of the Management Board,[53] Guidelines of Supervision Authority[54]), and in practice soft law instruments of relevant EU bodies are adopted as Guidelines by the Management Board.[55]

No restrictions exist for the liability in application of Article 3 of BRRD in Estonia. The liability for rights violated or damage caused in the performance of crisis resolution functions is regulated under the State Liability Act (*Riigivastutuse seadus*),[56] which assumes the liability for the state, and not for Finantsinspektsioon, for such situations. Thus, the budget of Finantsinspektsioon is not affected by such claims.[57]

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50 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, *ELI*.

51 The same principle has been applied, for example, in *Iccrea*, C-414/18, ECLI:EU:C:2019:1036, paragraph 39; *Berlusconi and Fininvest*, C-219/17, ECLI:EU:C:2018:1023, paragraph 44.

52 Estonia's court system consists of three instances: county and administrative courts are the first instance courts; circuit courts are the courts of the second instance, located in Tallinn and Tartu, and the Supreme Court, which is also the constitutional court, is the third instance. County courts and administrative courts adjudicate matters in first instance, such as civil, criminal and misdemeanour matters or administrative matters. Appeals against decisions of courts of first instance shall be heard by courts of second instance. Courts of appeal are courts of second instance (sometimes also called circuit courts or district courts).

53 Article 55^1 FIS.

54 Article 57 FIS. Guidelines are subject to publication at Finantsinspektsion's website.

55 For example, the *EBA guidelines on equivalence of confidentiality regimes* has been adopted on 26 July 2022 as Guidelines of Finantsinspektsioon, available *here*.

56 Article 58(1) FIS.

57 However, Finantsinspektsioon shall be liable for damage not related to the conduct of financial supervision and performance of crisis resolution functions pursuant to the provisions of private law, thus it may be liable directly (including the borrowing of such funds from Eesti Pank), see Article 58(2) FIS.

Finland

Virva Walo

Summary. 1. The Financial Stability Authority is an independent resolution authority of Finland – 2. The Financial Stability Authority was established in 2015 – 3. The management and organisation of the Financial Stability Authority – 4. Funding and operating costs – 5. Independence and accountability of the Financial Stability Authority – 6. Exchange of information between the Financial Stability Authority and the Financial Supervisory Authority

1. The Financial Stability Authority is an independent resolution authority of Finland

The Financial Stability Authority (hereinafter the "FFSA") serves as Finland's national resolution authority. The FFSA is an independent state authority. It is the only authority responsible for resolution planning and execution. Institutional set-up, governance, and duties of the FFSA are stipulated in the Act on Financial Stability Authority (1195/2014).[1] The powers of the FFSA are stipulated in the Act on the Resolution of Credit Institutions and Investment Firms (1194/2014, hereinafter the "Resolution Act").[2]

The FFSA's key tasks include drafting and maintaining resolution plans for credit institutions, investment firms and the central securities depository, preparing for the management of crises, and in time of crisis, taking resolution actions. If the institution is not subject to resolution action, the FFSA shall place the institution into liquidation or apply for the placing of the institution in bankruptcy. It is also in charge of powers under Article 33a of the EU's Bank Recovery and Resolution Directive (2014/59/EU, hereinafter the "BRRD").[3]

In addition, the FFSA maintains the deposit guarantee scheme and administers the national resolution fund and deposit guarantee fund (DGS fund), which together form the financial stability fund.[4] Since Summer 2022, its duties also cover development and maintenance of the national emergency account system securing daily payments in case of emergency and a serious long-term disruption.[5]

The Financial Supervisory Authority (hereinafter the "FIN-FSA") is in charge of banking prudential supervision and using the BRRD's early intervention measures including special administration functions. The FIN-FSA's duties, powers, and governance are stipulated in the Act on Financial Supervisory Authority (878/2008).[6]

The tasks of the FFSA and the FIN-FSA do overlap regarding the assessment of failing or likely to fail, i.e., FOLTF conditions. Both authorities can assess, on

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1 Act on Financial Stability Authority 2014. *Laki rahoitusvakausviranomaisesta (1195/2014)* (in Finnish).

2 Resolution Act 2014. *Laki luottolaitosten ja sijoituspalveluyritysten kriisinratkaisusta (1194/2014)* (in Finnish).

3 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.

4 Act on Financial Stability Authority 2014, cit., 1.

5 Ministry of Finance Finland, *press release on 16 June 2022*. The new Act on certain arrangements for securing the emergency supply in the financial sector entered into force on 11 July 2022: *Laki eräistä huoltovarmuuden turvaamisen järjestelyistä rahoitusalalla (666/2022)* (in Finnish).

6 Act on Financial Supervisory Authority 2008. *Laki Finanssivalvonnasta (878/2008)* (in Finnish). An unofficial translation of the Act can be found *here*.

its own initiative whether the institution is failing or likely to fail. If the FIN-FSA or the FFSA deems that the institution satisfies the FOLTF conditions, they must submit a notification of their assessment to each other in accordance with the Resolution Act. Although the authorities are independent from each other, close cooperation is and will be needed in many situations. For example, before taking a decision regarding adoption of a resolution plan and the minimum requirement for own funds and eligible liabilities (MREL), the FFSA must hear the FIN-FSA in accordance with the Resolution Act (see also section 6).

2. The Financial Stability Authority was established in 2015

The FFSA was established in 2015 after the transposition of the BRRD in Finland. Before the BRRD, there wasn't any specific resolution authority or resolution tools in Finland. The FIN-FSA was able to withdraw the licence and place the credit institution in liquidation. Operations of a deposit bank could also be interrupted temporarily by the Ministry of Finance. In general, the banking crisis management framework relied on private sector solutions and in the end, different state aid and state guarantee options.

In Finland, an industry-funded deposit fund has been in place since 1998. Nowadays the fund is known as "the old deposit guarantee fund", i.e., the "*VTS* Fund". The *VTS* Fund serves as buffer fund for deposit guarantee, and it no longer has tasks related to maintaining deposit guarantee scheme. It operates administratively in conjunction with Finance Finland (the Finnish financial sector lobbyist) but is independent in its decision-making. It's supervised by the FIN-FSA. The Fund's assets originate from member credit institutions' contributions collected between 1998 and 2014, along with returns accrued on the Fund's investments.

Since the BRRD and the EU's Deposit guarantee scheme directive (2014/49/EU)[7] were adopted, there was a need to establish nationally a totally new framework that could take into account the principles and provisions of the new directives. The FFSA was established. However, because it was seen that resolution decisions of the FFSA could have an effect on state finance, the administrative steering of the FFSA was maintained under the Government's parliamentary responsibility, and the FFSA was established within the administrative scope of the Ministry of Finance Finland. Regarding the national DGS fund, its administration is seen as a significant public task, and therefore the statutory task was appointed to the FFSA, and the new DGS fund was established instead of the *VTS* Fund continuing the DGS function.[8] After this, the old *VTS* Fund has served as a buffer fund for the DGS fund, i.e., it finances its member credit institutions' payment obligations towards the national deposit guarantee scheme. In fact, its assets may only be

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

8 *Government proposal for the Parliament on resolution of the credit institutions and investment firms 2014*, HE 175/2014 vp (in Finnish).

used for this purpose. According to the fund's rules, the fund shall be dissolved once its assets are fully depleted.[9] As of year-end 2022, the size of the fund's balance sheet was 508,2 million euro[10] while the DGS fund administered by the FFSA amounted to 1.071 billion euro in the end of 2023.[11]

Since the transposition of the BRRD and the establishment of the FFSA, the resolution and the DGS fund, the institutional framework has stayed the same. The FFSA hadn't had a relationship with the European Banking Authority (EBA) before the creation of the Single Supervision Mechanism (SSM) and the Single Resolution Mechanism (SRM) that occurred at the same time as the creation of the FFSA. In Finland, there hasn't been any legal or political tension or dispute in relation to the framework. Thus, there isn't any reform under discussion at the moment.

3. The management and organisation of the Financial Stability Authority

The FFSA is led by the Director General, appointed, and dismissed by the Government of Finland. The Government appoints the Director General for a five-year term.[12] Since January 2024 the FFSA's Director General has been Mr Jaakko Weuro, LLM.

The Director General decides on the matters within the remit of the FFSA unless otherwise regulated.[13] The FFSA has rules of procedure confirmed by the Director General, which include more detailed provisions on the authority's internal organisation and the management of its duties. The Director General's responsibilities include, for example: 1) Setting the Authority's objectives, achieving the objectives and monitoring their achievement, 2) Developing the FFSA as a workplace, developing its administration and the FFSA's human resource policy, 3) International cooperation and the FFSA's representation in European cooperative bodies, and 4) the FFSA's communications.[14]

The operations of the FFSA are guided by its strategy, the performance agreement concluded annually with the Ministry of Finance Finland and annual internal operating plans. The annual performance agreement includes efficiency and performance targets for the FFSA. Performance targets are qualitative as well as quantitative, such as contribution and costs (FTEs) per duty and number of resolution plans drawn up.[15]

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9 *VTS Fund's websites*.

10 *Ibidem*, 9.

11 The FFSA's Financial Statement and Annual Report, 2023. The Fund's target level is equivalent to 0.8% of the total amount of covered deposits, which corresponds to approximately EUR 1.22 billion based on the information valid at the end of 2023. The target level must be achieved by July 2024.

12 Act on Financial Stability Authority 2014, cit., 14.

13 *Ibidem*.

14 The FFSA's *Rules of Procedure 2022*, adopted on 29 August 2022 (in Finnish).

15 *Performance agreement between the Ministry of Finance and the FFSA for the years 2024-2027* (in Finnish).

The FFSA has a Management Group in accordance with the rules of procedure. The Management Group consists of the Director General and the Heads of the Units. The Management Group supports the Director General in the management and development of the authority and monitors the drafting and implementation of the matters within the authority's purview. Since September 2022, the FFSA has had three units: 1) Resolution Unit, 2) Deposit Guarantee and Emergency Supply Unit, and 3) Administrative Services and Resolution Fund Unit. Internal separation of the Resolution Unit and Deposit Guarantee and Emergency Supply Unit also supports the independence of the resolution function. The Management Group meets at least twice a month according to the rules of procedure. The Units have meetings at least once a month.[16]

In accordance with the Act on Financial Stability Authority, the FFSA also has an Advisory Board consisting of representatives appointed by the FFSA, the Ministry of Finance, the Bank of Finland, and the FIN-FSA. The task of the Advisory Board is to secure cooperation and communication between the above-mentioned authorities in matters falling within the competence of the authority. The Ministry of Finance appoints the Advisory Board for three years at a time.

In addition to the Director General, the FFSA employs around 30 experts. According to the Act on Financial Stability Authority, the Director General shall fulfil the same requirements as public officials as stipulated in the Act on Public Officials in Central Government (750/1994)[17] and have knowledge of financial markets required for the position. For officials serving as experts in the FFSA, the eligibility requirement is to have a suitable university degree and broad familiarity with the field.[18] General eligibility criteria for the state officials are stipulated in the Act on Public Officials in Central Government. Most of the experts in the FFSA have completed a master's degree. The most common educational backgrounds are business and economics, law, and social sciences. Apart of the Director General who is appointed and removed (if necessary) by the Government of Finland, according to the Act on Public Officials in Central Government, the state officials may be removed from the office for reason arising from the official him/herself only if there's a weighty reason for that.

The Financial Stability Fund, managed by the FFSA, has a board that decides on the risk management, investment planning and principles of the fund and directs the investment of the assets. The Ministry of Finance appoints the board for three years at a time. The board consists of a chair, a vice chair and a minimum of three and a maximum of five other members.[19]

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16 The FFSA's Rules of Procedure 2022, cit., 14.

17 Act on Public Officials in Central Government 1994. *Valtion virkamieslaki (750/1994)* (in Finnish).

18 Act on Financial Stability Authority 2014, cit., 14.

19 *Ibidem*.

4. Funding and operating costs

The costs arising from the FFSA's operations are covered by administrative fees collected from the institutions under its purview.[20] The fees are governed by the Act on the Financial Stability Authority's Administrative Fees (1197/2014).[21] Administrative fees are collected annually at an amount that, at most, equals the costs specified in the Financial Stability Authority's confirmed budget. The administrative fee is a basic fee, or a combination of a basic fee and a fee proportionate to the balance sheet total or annual revenue of the last adopted financial statements of the institution. The FFSA collected 5.96 million euro of fees in 2023,[22] which is expected to go up to 6.84 million euro in 2024.[23]

5. Independence and accountability of the Financial Stability Authority

The FFSA is an independent stand-alone state authority concentrating on resolution matters. The operational independence of its actions is guaranteed by national law. The activities of the FFSA shall be organised in a way that ensures its independence and impartiality when performing its duties. The officials shall be independent of the institutions under the FFSA's purview and of the undertakings belonging to the same group as the institutions. They are obliged to disclose a declaration of insider holdings, and of conflict of interests.[24]

The way the FFSA's financing has been organised – through fees collected from the institutions – also supports its operational independence. As mentioned above, the supervisory actions are carried out by the FIN-FSA. Consequently, because the supervisory and resolution authority are two independent, separate public authorities with different duties, they are operationally independent and no conflicts of interest between the authorities have arisen so far.

The FFSA is operating within the administrative scope of the Ministry of Finance Finland.[25] Therefore, the Ministry of Finance is responsible for the control of the FFSA. Parliament has a general power to overview the administration including the functioning of the Ministry of Finance and the FFSA. The key plans in the State's performance management include performance agreements and the budget confirmed by Parliament. An annual performance agreement is negotiated between the FFSA and the Ministry. The key monitoring information includes the financial statements and particularly the related annual report as well as the

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20 *Ibidem*.

21 Act on the Financial Stability Authority's Administrative Fees 2014. *Laki Rahoitusvakausviraston hallintomaksusta (1197/2014)* (in Finnish).

22 The FFSA's Financial Statement and Annual Report, 2023, cit., 11.

23 The FFSA's press release 28.11.2024. See *here*.

24 Act on Financial Stability Authority 2014, cit., 456.

25 *Ibidem*.

Ministry of Finance's statement on the financial statements and annual report. In accordance with the Act on Financial Stability Authority, separate financial statements are always drawn up for the FFSA and the Financial Stability Fund, which is external to the State budget.

The Director General is responsible for reaching the objectives of the FFSA, the development of its operations as well as profitability. The FFSA's liability in application of Article 3 of the BRRD or public liability in the context of the SRM is not restricted by Finnish law. The Director General may be dismissed by the Government of Finland[26] in accordance with the Act on Public Officials in Central Government. The Director General may be dismissed unilaterally where, taking into account the nature of the post, there is an acceptable and justifiable reason for doing so.[27]

The National Audit Office of Finland audits central government finances, monitors fiscal policy, and oversees political party and election campaign funding. According to the Act on the National Audit Office (676/2000),[28] the Office has a right to audit state authorities including the FFSA. The National Audit Office audits the financial statements and annual reports of the FFSA and can conduct special audits as well. However, the National Audit Office has only limited rights to obtain the SRB's documents for the audit. The internal policies and guidelines of the SRB that guide the functioning of the FFSA are only available at the FFSA's premises and they can't be given to the National Audit Office. This is based on the SRB's disclosure policy.

Based on the Resolution Act, a decision of the FFSA made by the virtue of the Act may be appealed to the Helsinki Administrative Court. The decision is accompanied with instruction for appeal. General provisions on judicial review of an administrative decision are laid down in the Administrative Judicial Procedure Act (808/2019).[29] However, the decision of the FFSA on taking resolution measures can be implemented regardless of the existence of an appeal procedure, unless otherwise imposed by the appeal court.[30]

In the case of the SRB's resolution decisions, the decisions are addressed to the FFSA, which then makes an implementing decision. The implementing decision recounts the actions under the SRB's decision and states in more detail the implementing actions required and their reasoning in accordance with the SRM regulation.[31] The SRB decision would be attached as an annex to the

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26 *Ibidem*.

27 Act on Public Officials in Central Government 1994. Valtion virkamieslaki (750/1994) (in Finnish).

28 Act on the National Audit Office 2000. *Laki valtiontalouden tarkastusvirastosta (676/2000)* (in Finnish).

29 Administrative Judicial Procedure Act 2019. *Laki oikeudenkäynnistä hallintoasioissa (808/2019)* (in Finnish). An unofficial translation of the Act can be found *here*.

30 Resolution Act 2014, cit., 24.

31 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

implementing decision. The implementing decision (measures) is publicly disclosed and can be appealed to the Helsinki Administrative Court as stated in the previous paragraph.[32] There isn't any special legislation regarding the FFSA's accountability in these cases, and there hasn't been any public discussion in Finland on the accountability to/control by the ECA and the EP regarding the implementation phase. As the implementation decision would be taken by the FFSA and as the FFSA then applies national law, it can be seen as accountable for the measures decided at the national level, as the SRB would be accountable for its own decision at the European level considering that the SRB could also take over the decision power of the national resolution authority if the latter hadn't applied or complied with a SRB decision. Therefore, it would be justifiable to say that the accountability of the FFSA would and should remain confined to the national level only.

In Finland, national law does not provide rules regarding the FFSA's stance on soft law from the SRB or the EBA. This is contrary to banking supervision. The Act on Financial Supervisory Authority stipulates that the FIN-FSA shall take into consideration the decisions, guidelines, and recommendations of the ECB, as referred to in the SSM Regulation, and the legal acts adopted by the ECB by virtue of the SSM Regulation, and the decisions, guidelines and recommendations issued by the European Supervisory Authorities (EBA, ESMA, EIOPA), as referred to in the ESA Regulations. If compliance with a guideline or recommendation of a European Supervisory Authority is not possible, the FIN-FSA shall specify the grounds for diverging from the guideline or recommendation and relate these to the appropriate European Supervisory Authority.

Even if the Finnish legislation doesn't stipulate the FFSA's stance regarding the EBA guidelines and recommendation, the FFSA follows the same comply or explain procedure as the FIN-FSA on the basis of Article 16 of the EBA regulation.[33] When the EBA guidelines include guidance for national supervisory and resolution authorities, the FIN-FSA and the FFSA both notify their (non-) compliance to the EBA.

Based on the Act on Financial Stability Authority, the FFSA has a duty to cooperate with the SRB. In 2022, based on the SRB's oversight functions for less significant institutions ("LSIs"), the SRB has launched a comply or explain procedure to national resolution authorities regarding the compliance with the SRB guidelines on LSI resolution planning. The FFSA complies with the guidelines.

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investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

32 However, the judicial review of the SRB/FFSA decisions can be a rather complex issue, see e.g., J. Timmermans, *Guess Who? The SRB as the Accountable Actor in Legal Review Procedures*, (2019) Review of European Administrative Law, 155-173, available *here*.

33 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.

6. Exchange of information between the Financial Stability Authority and the Financial Supervisory Authority

The supervisory tasks including early intervention measures and resolution tasks are clearly divided between the FIN-FSA and the FFSA. In national law, there are also clear requirements for cooperation and exchange of information between these authorities. In accordance with the Act on Financial Supervisory Authority and the Act on Financial Stability Authority, they shall cooperate with each other. The FIN-FSA has the right to disclose confidential information to the FFSA for the performance of its duties also including information identified in the enforcement of the Act on Preventing Money Laundering and Terrorist Financing (444/2017) which is relevant for the FFSA in relation to the payment of compensations out of the Deposit Guarantee Fund. The FIN-FSA shall also, without undue delay, disclose to the FFSA any information in its possession on matters that may have effects on financial stability or other significant effects on financial market developments or cause significant disruptions to the functioning of the financial system. The FFSA has a similar duty in accordance with the Act on Financial Stability Authority.

The development of the exchange of information between the two authorities have been one of the key issues the authorities have concentrated during recent years to foster smooth cooperation. As the requirements to exchange information are mainly in a general level, and only few consultation and notification duties are exactly stipulated by law, the authorities have found that there is a need to specify the documents to be exchanged between them. The FFSA and the FIN-FSA have had a memorandum of understanding (MoU) in place since June 2019. The latest version has been updated and signed in December 2021.[34] The MoU covers cooperation and exchange of information related to LSIs under normal times and in times of crises. It lists the documents or matters to be disclosed.

The FFSA has also access to supervisory data collected by the FIN-FSA related to the LSIs, and the FIN-FSA has access to resolution reporting data as well. The FIN-FSA LSI supervision and the FFSA also have quarterly meetings in place to address general as well institution-specific matters.

The cooperation framework between the FIN-FSA and the FFSA has been built to foster an exchange of information regarding the LSIs. Regarding the exchange of information that comes from/is addressed to the ECB or the SRB, sharing of information between the FIN-FSA and the FFSA is governed by regulations and policies of the respective EU institution. The general stance is that documents owned by the SRB, or the ECB can only be disclosed with their consent. In national law, there aren't any provisions related to this question, but the FFSA and the FIN-FSA follow the SRB's and the ECB's policy on the basis of the supremacy of the EU law.

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[34] Memorandum of understanding between the FIN-FSA and the FFSA, 2021. *Finanssivalvonnan ja rahoitusvakausviraston välinen yhteistoiminta-asiakirja* (in Finnish).

Regarding significant institutions, members of the national competent and resolution authorities in the joint supervisory teams (JSTs) and internal resolution teams (IRTs) are part of the ECB and the SRB in this respect. Institution-specific information is shared between the members of the JST and IRT of the significant institution, i.e., the ECB and the SRB, not between the FIN-FSA and the FFSA. Therefore, the memorandum of understanding between the ECB and the SRB (recital 10) hasn't had any impact on the exchange of information between the FIN-FSA and the FFSA. Information on significant institutions can't be shared directly between the FIN-FSA and the FFSA or with other competent or resolution authorities in cross-border cases without the ECB's or the SRB's consent.

Lastly, it must be mentioned that there are also other arrangements regarding the exchange of information between authorities the FFSA takes part in. For example, the FFSA has participated in preparing macroprudential policy decisions together with the FIN-FSA, Bank of Finland, and Ministry of Finance since 2021. The FFSA provides information and advice especially on the impact of MREL on macroprudential policy decisions and scenario analysis. The FFSA has also a memorandum of understanding in place with the Bank of Finland,[35] and it's one of the co-signers of the Memorandum of Understanding on the management of financial crises signed by the Ministry of Finance, the Ministry of Social Affairs and Health, the Bank of Finland, and the FIN-FSA.[36] These MoUs also concentrate on enhancing cooperation and exchange of information between the authorities.

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35 *Memorandum of understanding between the BoF and the FFSA*, 2021 (in Finnish).

36 Memorandum of Understanding on the management of financial crises, 2021. *Finanssivalvonnan, Rahoitusvakausviraston, sosiaali- ja terveysministeriön, Suomen Pankin ja valtiovarainministeriön välinen rahoitusjärjestelmän kriisinhallinnan yhteistoiminta-asiakirja* (in Finnish).

France: Institutional features

Diane Fromage

Summary. 1. Introduction – 2. Banque de France, the French NCB against which the ACPR is leaning – 3. Historical evolution – 4. The ACPR as an institution – 4.1. Financial supervision in France – 4.2. The ACPR's institutional set-up – 4.3. The evolution of ACP(R)'s legal status – 5. ACPR's prerogatives and sanctioning powers – 6. The ACPR's accountability and liability regimes – 7. Conclusion

1. Introduction

France has had one single resolution authority since 2013, when its supervisory authority, the *Autorité de Contrôle Prudentiel* (Prudential Control Authority, ACP) became the *Autorité de Contrôle Prudentiel et de Résolution* (Prudential Control and Resolution Authority, ACPR).[1]

The ACPR is an authority "leaning against" ("*adossée*") the French Central Bank (*Banque de France*, BdF, on which more below in section 2). It is both France's National Resolution Authority (NRA), and France's National Competent Authority (NCA). It supervises credit institutions and insurance companies,[2] whereas the *Autorité des Marchés Financiers* (Financial Market Authorities, AMF) is in charge of the supervision of financial market authorities. As such, France partially follows the sectoral model, although it only has two authorities instead of the three commonly existing authorities.[3] ACPR is tasked with guaranteeing financial stability, protecting customers and insured persons, and it is in charge of anti-money laundering and counterterrorist financing (AML-CFT). Its prerogatives have been progressively enlarged, for instance in 2013 when it received prerogatives in the area of banking resolution, and in 2019, when some service providers offering digital assets became part of its area of competence.[4] At present, it supervises 769 authorized entities covering credit institutions, finance companies, investment firms, payment institutions and electronic money institutions.[5] As detailed further below, it used to be an independent administrative authority, but it lost this status in 2017.

In the remaining of this report, the BdF as the institution against which ACPR is leaning against is examined (2). Then, the ACPR's historical evolution is presented (3), before the ACPR, its role as banking supervisor, its institutional set-up as well as its accountability and its liability regimes are considered (4). Its prerogatives and sanctioning powers are analyzed next (5), and a final section concludes (6).

Before turning to the ACPR however, a few words of introduction on the French banking system are in order. France's banking system is characterized by a high level of concentration, whereby (very) large credit institutions dominate

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1 *Loi n° 2013-672* du 26 juillet 2013 de séparation et de régulation des activités bancaires (Law No. 2013-672 of 26 July 2013 on the separation and the regulation of banking activities), Official journal no 0173 of 27 July 2013.

2 666 and 664 respectively in 2022. ACPR annual report 2022, 9.

3 See further on these models: E. Ferran in N. Moloney, E. Ferran, J. Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015), 129f and on D. Calvo *et al.*, *Financial supervisory architecture: what has changed after the crisis*, FSI insights on policy implementation No 8, Financial Stability Institute – Bank for international settlements, 2018; R. Holzmann, F. Restoy (ed), *Central banks and supervisory architecturs in Europe* (Edward Elgar, 2023), introduction.

4 Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (Loi PACTE) (Law on growth and the transformation of companies).

5 ACPR, *The French banking and insurance market in figures*, 2021, 10.

the market (the six largest banking groups possess 82% of the total assets of the sector).[6] The French banking sector is not only important for the French economy, but it is also significant for the EU's economy at large: the ten French Significant Institutions amount to 34% of the total balance sheets of banks directly supervised by the ECB.[7] Furthermore, 'out of thirty global systemically important banks (G-SIBs), four were French and seven French groups were classified as domestic systemically important bank (D-SIBs)'.[8] This is the result of historical evolution: after large credit institutions had been nationalised after the Second World War and after a socialist government came to power in 1981, this sector of the economy was liberalised in the 1980s and 1990s.[9] The emergence of the currently existing very large institutions results from the mergers that have intervened when (smaller) credit institutions entered in crisis:[10] subsequent crises were resolved by banks themselves as institutions in difficulty were absorbed by other credit institutions, hence why France did not have any resolution authority prior to 2013.

2. Banque de France, the French NCB against which the ACPR is leaning

Banque de France (BdF) was created by Napoléon Bonaparte in 1800. It was nationalised after Word War II, in 1945,[11] and became independent in 1993 following the creation of the European System of Central Banks.[12] It mainly has three functions: development of a monetary strategy; services to the economy and society and the guarantee of financial stability. Its headquarters are in Paris, but it also has 95 decentralized offices.

BdF is headed by a governor and two deputy governors. Its General Council brings together twelve members – whose nomination procedure is detailed below – and is in charge of deliberating on matters that are not related to Eurosystem activities. The Governor prepares and executes the General Council's decisions. The Executive Council, chaired by the Governor and composed of the Deputy Governors and the Directors General as well as of the chairs of the *Institut d'Émission des Départements d'Outremer* (IEDOM – Delegated central bank

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6 *Ibidem*, 4.

7 *Ibidem*.

8 *Ibidem*, 10f.

9 See further on this historical evolution: C. Blot *et al.*, *Financial regulation in France*, in R. Kattel *et al.*, *Financial regulation in the European Union* (Routledge, 2016), 11f.

10 For instance, France had 1.556 credit institutions in 1984. They were only 1.000 in 1998 and 403 in 2021. *Histoire des banques en France et dans le monde - La finance pour tous*, and ACPR, *The French banking and insurance market in figures*, cit., 10.

11 Article 1, Loi n° 45-15 du 2 décembre 1945 relative à la nationalisation de la Banque de France et des grandes banques et à l'organisation du crédit (Law on the nationalization of BdF and the large banks and credit institutions).

12 Loi n° 93-980 du 4 août 1993 relative au statut de la Banque de France et à l'activité et au contrôle des établissements de crédit (Law on BdF's statute and the activity and control of credit institutions). Several reforms had already reinforced its independence previously though. E. Keroyant, *La Banque de France: trente ans d'indépendance, deux siècles de crédibilité*, (2024) Revue Banque.

for the French overseas departments and territories using the euro) and of the *Institut d'Émission d'Outremer* (IEOM – the French note-issuing bank for overseas territories using the *Franc Pacifique*), is in charge of BdF's operational governance.

The Governor, as well as the two Deputy Governors, are appointed by decree by the Council of Ministers for a six-year term, renewable once. An age limit of 65 years old exists, but the Governor and the Deputy Governors may stay until the end of their mandate even where they have passed the age limit.[13] The Governor and the Deputy Governor may only be removed if they no longer are able to fulfil their duties, or in case of serious offence. The General Council is the organ, which may revoke their mandate by majority (the Governor or Deputy Governor object of the procedure being excluded from the vote). The Governor and the Deputy Governors may not have any other professional activity, unless it is related to teaching, or a function exercised in an international organisation. Consent by the General Council is required for them to be allowed to exercize those functions. A cooling off period of three years is also foreseen where the Governor or the Deputy Governors cease to exercize their function for a reason other than revocation. During that period, they may not exercize any professional activity (and receive their full salary) except if they are elected or become members of the government. Where the General Council has allowed them to exercize a professional activity, or where the elected function is not exercised at the national level, the General Council is to determine if and to what extent their salary continues to be paid to them.

Six Directorate Generals exist that answer to the Governor and the Deputy Governors: the Directorate General Human Resources, the Directorate General Information System, the Directorate General Financial Stability and Operations, the Directorate General Statistics, Economics and International, the Directorate General Services to the Economy and Branch Network Activities, and the Directorate General Cash – Retail Payments. Also, the Governor's office, and other functions such as the Chief ethics officer or the Chief representatives for the Americas and for the Asia-Pacific, as well as the General secretariat answer to them.

BdF's Governor is the chair of the General Council, of ACPR, of the *Observatoire de la Sécurité des Moyens de Paiement* (Observatory for the Security of Payment Means), and the *Observatoire de l'Inclusion Bancaire* (Observatory for Banking Inclusion). Within BdF, he is also the chair of the Assets-Liabilities Committee, whereas the Deputy Governors chair the Pension Plan Strategic Committee and the Risk Committee. He is a member of the *Haut Conseil de Stabilité Financière* (High Council for Financial Stability) as well, the

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[13] Article L142-8 *Code Monétaire et Financier* (Monetary and Financial Code (MFC)). The Monetary and Financial Code brings together legislative and regulatory provisions (*dispositions legislatives et réglementaires*) that concern the banking, the financial and the insurance sector. In France, the distinction between the areas in which parliament and government may legislate is operated in the Constitution (Article 34 Fr. Constitution).

French macroprudential authority, acting as designated authority in accordance with Article 136 of Directive 2013/36/EU (CRD IV).

The twelve members of the General Council stem from and are nominated by a variety of institutions.[14] It first consists of the Governor and the two Deputy Governors which, as noted, are nominated by the Council of ministers. Two additional members are designated by the President of the National Assembly, and two other members by the President of the Senate based on their competence and their professional experience in the financial or economic domain; half of those four members are nominated every three years. Two members are nominated by the Council of ministers on a proposal of the Minister of economy also based on their competence and their professional experience in the financial or economic domain. One person is the elected representative of BdF's employees. ACPR's Vice-president is member *ex ufficio*, and the twelve members' mandate lasts for six years. They are all bound by professional secrecy. Additionally, the members designated by Parliament, as well as those designated by the Council of ministers and ACPR's Vice-president may also exercize another professional activity, provided that the General Council authorizes said activity by majority (the person concerned may not take part in the vote). The General Council takes the absence of conflicts of interest and the respect of BdF's independence into account. For instance, they may not exercize any parliamentary mandate. The General Council's quorum lies at half of its members, decisions are made by majority of those present and in case of a tie, the Chairman (i.e. BdF's Governor) has a casting vote. The Minister of economy designates a censor (*censor*) as well as an alternate censor and one of them attends the meetings of the General Council. He or she may propose decisions for the Council to deliberate on them. Furthermore, the decisions adopted by the General Council are final, unless the censor or the alternate censor opposes to them.

3. Historical evolution

Contrary to BdF, ACPR is itself a relatively recent authority for it was created in 2010 by an ordinance, then without any prerogatives in the area of resolution (ACP).[15] Ordinances are acts adopted by the French government in areas normally reserved to the adoption of laws by Parliament, since the French legal order distinguishes between the 'area of the law' (*domaine de la loi*) and the domain reserved to acts of government. To adopt ordinances, the Government must have received a specific authorisation by Parliament beforehand, and

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14 This procedure is detailed in Article L142-3 MCF.

15 *Ordonnance n° 2010-76* du 21 janvier 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance prise sur le fondement de l'Article 152 de la loi n° 2008-776 du 5 août 2008 de modernisation de l'économie (Ordinance 2010-76 of 21 January 2010 on the fusion of the licencing and the supervisory authorities in the banking and the insurance sectors based on Article 152 of the Law no 2008-776 of 5 August 2008 on the modernisation of the economy).

Parliament must ratify the ordinance by a vote after it has been published.[16] It may amend the original ordinance on that occasion, a possibility it availed itself of as regards the ACP in 2010.[17]

The creation of the ACP(R) is the result of a series of reforms introduced in financial supervision at large since 2003, when AMF was created.[18] Prior to the introduction of the ACP, distinct authorities had been in charge of licencing and supervisory functions. Indeed, the ACP results from the merger between the Banking Commission (*commission bancaire*) and the Insurance Authority (*Autorité de contrôle des assurances et des mutuelles (ACAM)*). At the origins of the Banking Commission is the Banking Controlling Commission (*Commission de contrôle des banques*) created during the Vichy regime in 1941.[19] Interestingly, this is also where the possibility for the government to ask, up to the present day, for a second deliberation comes from as one of the three members of this Commission stemmed from the government. The idea of a merger between the two authorities that existed prior to the creation of the ACP, the Banking Commission and the Insurance Authority, had been floating for years when it happened.[20] France has some *bancassurances*, that is institutions that are both credit institutions and insurance companies,[21] and prior to the reforms introduced starting from the 2000s, it could indeed be the case that a financial entity would be regulated simultaneously by three authorities.[22] This is among the reasons why a series of reflections were conducted following the financial crisis, which concluded by the Law of the modernization of the Economy adopted in August 2008. This Law allowed the Government to adopt ordinances to modernize the legal framework applicable to the financial sector in France. As part of this reform trend, a report was commissioned by the Minister of Economy, Industry and Employment in 2008 with a view to offering some reflections and some proposals on the organisation and the functioning of the supervision of financial activities in France.[23] Among other recommendations, this report issued in January 2009 suggested the merger of licencing and supervisory activities

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16 Article 38 Fr. Constitution. Ordinances are on the rise, and their number is now larger than the number of ordinary laws adopted by Parliament on a yearly basis. Sénat, *Étude portant sur la période 2007-2022*, 6 (study covering the period 2007-2022).

17 *Loi n° 2010-1249* du 22 octobre 2010 de régulation bancaire et financière (Law 2010-1249 of banking and financial regulation). E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel* (Revue Banque, 2010), 18 and ACPR, Annual report 2010, 14. For instance, the ACP's participation in BdF's governance was increased on this occasion and the procedure before the Sanctions Committee amended.

18 This followed the approval of a Charter for cooperation and exchange of information in 2001.

19 Article 48ff. Loi n°41-2532 du 13 juin 1941 relative à la réglementation et à l'organisation de la profession bancaire (Law 41-2532 of June 13, 1941 on the regulation and organization of the banking profession).

20 Historical account: E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel*, cit., 14.

21 See on those: C. Blot *et al.*, *Financial regulation in France*, cit., 15.

22 E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel*, cit., 12.

23 B. Deletré, *Rapport de la mission de réflexion et de propositions sur l'organisation et le fonctionnement de la supervision des activités financières en France*, Janvier 2009 (Report of the committee to examine and make proposals on the organisation and operation of the supervision of financial activities in France).

in the banking and the insurance sector, which resulted in the creation of the ACP in 2010. Note that this merger is also beneficial within the structure of the Banking Union: Since ACPR is supervising both credit institutions and banking companies, via its participation in Joint Supervisory Teams (JSTs), it may alert the ECB of insurance risks that 'could potentially affect the banking activities of a financial conglomerate'.[24] Note also that the creation of the ACP was assessed positively by the International Monetary Fund (IMF) as it stated that '[t]he new supervisory structure responds to the need for systemic supervision'.[25] Following the adoption of Law 2013-671, the ACP became the ACPR as a result of its having been entrusted with resolution functions. As detailed below (4.2.), this change demanded that its institutional set up be also adapted.

ACPR's role was further amended in 2014, when France adapted its legislative framework to EU financial law,[26] and in 2020 when BRRD2 was transposed in France.[27] In 2016, it was also entrusted with resolution functions in the insurance domain.[28] Two reforms in 2016 and in 2020 affected its role in the domain of Anti-Money Laundering and Countering the Financing of Terrorism.

As mentioned previously, the ACP(R) "leans back" on BdF. This requires the existence of some institutional safeguards to guarantee the independence of the various functions, that is monetary policy, supervision and resolution. Thee benefits that may be yielded thanks to this concentration of functions in terms of resources and expertise was deemed to be superior to the potential threat to the BdF's independence as a central bank in charge of monetary policy.[29] Moreover, it should be noted that the Secretariat general of one of ACPR's predecessor, the Banking Committee, was already 'leaning back' on BdF; hence this institutional set up is not novel.

4. The ACPR as an institution

As explained in the introduction, the ACPR is now in charge of both banking supervision and banking resolution. This has demanded that it establishes specific structures in charge of both functions. In view of the

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24 ACPR, *The ACPR's domestic and European responsibilities*, 8. Interestingly, this publication sets emphasis on the ACPR's warning role.

25 IMF, Article IV Consultation, 2010, 21.

26 *Ordonnance n° 2014-158* du 20 février 2014 portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière financière (Ordinance 2014-158 of 20 February 2014 for the adaptation of the legislation to EU law in the financial domain).

27 *Ordonnance n° 2020-1636* du 21 décembre 2020 relative au régime de résolution dans le secteur bancaire (Ordinance 2020-1636 of 21 December 2020 on the resolution regime in the banking sector).

28 *Loi n° 2016-1691* du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life (Sapin II Law)).

29 Positive assessment inter alia by C. Blot *et al.*, *Financial regulation in France*, cit., 29. In a similarly positive note: Chap. 13, *L'Autorité de contrôle prudential et de résolution et la procédure devant la commission des sanctions*, para. 2250.

focus of the present contribution, the structures for banking resolution are examined more in depth (b). However, some elements on financial supervision in France in general are provided first to contextualise the overall framework in which ACPR operates (a). Also, the evolution of its legal status is commented on for it was originally created as an independent authority but later lost this status (c).

4.1. Financial supervision in France

France's system of financial supervision follows a two-entity model in so far as it is neither fully organised following a functional model (which would imply that three entities exist that are respectively in charge of the supervision of banks, financial markets and insurance companies) nor following a consolidated model (in which one single institution would be tasked with the supervision of all the financial institutions irrespective of their specific activity). Instead, in France, two authorities exist: the ACPR for credit institutions and insurance companies, and the *Autorité des Marchés Financiers* (Financial Market Authority, AMF).

Two resolution funds may be used with a view to resolve French credit institution. The (EU) Single Resolution Fund, and the National Resolution Fund (*Fonds de résolution national*) reserved to credit institutions established in French overseas territories (*Pays et territoires d'Outre mer*, PTOM), third-country branches, investment companies with a minimum capital of 730 000 € that are not submitted to the SRF, and monegasque credit institutions. The National Resolution Fund is managed by the Deposit Guarantee Fund. (*Fonds de guarantie des dépôts et de resolution, FGDR*), which is also in charge of collecting the funds later transferred to the SRF. Furthermore, the FGDR guarantees deposits up to 100 000€ in case of liquidation in accordance with applicable EU rules. Its President may also intervene preventively to avoid banks' failures. FGDR is governed by private law, although some of its litigation actions are governed by public law.

The FDGR – which was created in 1999[30] – manages the deposit guarantee scheme, the securities guarantee scheme, the investor compensation scheme and the performance bonds guarantee scheme. It fulfils a public service mission, and is financed by the subscribers to its various guarantees. Subscribers may be asked to contribute exceptional funds in addition to those paid in advance. Moreover, the FGDR has had an open credit line of 1 500 million € since 2021 to cover the deposits it guarantees (it is currently in standby). Also, it received contributions after the AMF imposed sanctions on investment services providers (securities guarantee) in 2022.

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30 *Loi n° 99-532* du 25 juin 1999 relative à l'épargne et à la sécurité financière (Law 99-532 of 25 June 1999 on savings and financial security).

4.2. The ACPR's institutional set-up

Ever since its creation, the ACPR follows the "*collège* model", which is quite common in France. It consists in entrusting a college (or board), whose members do not work full-time, with making relevant decisions, which are prepared by permanent staff members. Since it has been in charge of both banking supervision and banking resolution, the ACPR has been composed of three main organs: the Supervisory College (*collège de supervision*), the Resolution College *(collège de resolution*) and the Sanctions Committee (*commission de sanctions*),[31] supported by a (common) Secretariat general (see below). Unless otherwise specified, it is the Supervisory College that is in charge of the tasks attributed to ACPR.

Prior to its becoming in charge of resolution as well, it used to have only two organs, a *collège* and a Sanctions Committee. This was the consequence of case law by the Council of State and the European Court of Human Rights following which those sanctions should be considered as criminal sanctions in the sense of Article 6(1) ECHR.[32] Resultantly, inquiry, instruction and sanctioning functions had to be separated.

The Resolution College is composed of seven members:[33] the governor of the BdF (or his/her representative), who presides over the College; the General director of the Treasury (or his/her representative); the president of the AMF (or his/her representative); the vice-governor of BdF designated by the governor of the BdF (or his/her representative); the president of the chamber of the Court of cassation (highest court in the French judiciary) in charge of commercial, financial and economic matters;[34] the president of the board of the Deposit Guarantee Fund (*Fonds de Garantie des Dépôts et de Résolution - FGDR*) (or his/her representative); the vice-president of the Supervisory College. The president of the board of FGDR only participates where the issue at stake concerns one of the institutions or companies covered within the Fund's prerogatives. The College may only deliberate if at least half of its members are present. Decisions are made by majority. Should a tie occur, the chairman (i.e. BdF's Governor) has a casting vote. Where a decision may demand at that point in time or in the future the opening of State competitions whatever the form of said competitions, or where the decisions made may have significant consequences for the financial system or the real economy, a vote in favour of such decisions by the representative of the Treasury (or his/her representative) is required. Since the members of the Resolution College are designated ex officio, the rules applicable to their original function in terms of removability and duration of nomination apply. Furthermore, this also implies that this is an expert body, where the industry is not represented. The Resolution College meets four times per year. An expedited procedure exists

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31 Article L612-4 of the MFC.

32 *Conseil d'Etat*, 3 décembre 1999, n° 207434, *Didier*; *CEDH*, 11 septembre 2009, *Dubus contre France*, req. n°5242/04 (*ECHR*, Dubus S.A. v. France - 5242/04).

33 Article L612-8-1 MFC.

34 The Court of cassation has five chambers each specialised in a specific area of law. More information may be found on the *Court's official website*.

whereby if the chairman finds that a situation is urgent, the College may decide following a written procedure; no sanctionary decision may be taken following this procedure. Likewise, the College may adjudicate on pending issues by videoconference, except where sanctions are at stake.

By contrast, the Supervisory College is composed of 19 members.[35] Some members are members ex officio, whereas others are designated members. The four ex officio members are: the Governor of BdF, or his/her Vice-governor, who presides over the College; the President of the AMF, the president of the Authority of auditing norms, the Vice-President of ACPR (with expertise in the insurance domain). Other members (and their alternates) are nominated for five years, renewable once, by ministerial decision. They may not be older than 70 years old when they are nominated or renewed. They may only be removed in case of incapacity or serious failure, upon an opinion by a majority of the members of the College. These are three judges: one member of the Council of State; one member of the Court of Cassation; one judge from the Court of auditors. Two additional members are nominated by the presidents of the two parliamentary chambers based on their financial and legal expertise as well as their experience in the insurance and the banking domain. Finally, ten additional members are nominated based on their expertise. Gender equality should also be respected.

Both the members of the Supervisory and of the Resolution Colleges must submit a declaration of interests to the ACPR's President,[36] which contributes to transparency, accountability and independence (on which more below).

The Supervisory College may meet in plenary, or in reduced format (8 members). The President, the Vice-President, and six members delegated by the plenary session sit in the College when it meets in reduced format.

The plenary session is in charge of matters and risks analysis that affect both the banking and the insurance sectors.[37] The plenary sets the priorities of control decides on the principle guiding the organisation and the budget of ACPR's departments, its rules of procedures and the deontology standards applicable. The Supervisory College sitting in reduced format deals with individual matters. The Supervisory College is also sub-divided into two sectorial sub-colleges of eight members each, whereby one is in charge of the banking sector, whilst the other one is in charge of the insurance sector. The sectoral sub-colleges may, too, deal with individual matters, as well as with general matters relating to the area they specialise in (banks and insurance companies). Furthermore, the Supervisory College may delegate powers regarding individual decisions to a specialised committee constituted within it. This organisational model seeks to allow for the specificities of these two sectors to be considered, whilst also providing for a

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35 Its composition is similar to that of AMF.

36 L-612-10 MFC.

37 L-612-12 MCF.

sufficient overview and adequate management of the overall financial stability.[38] Note that the Supervisory, too, may take decisions following a written procedure.

In addition to these (sub-)colleges, ACPR may create one or more consultative committees composed of stakeholders from the banking and the insurance sectors.

The Director general or a representative of the Treasury always sits in the Colleges, although they no longer have the status of *commissaires du gouvernement* since 2010. Their prerogatives have remained unchanged though: they participate in all the decision-making procedures, and may require that a decision be submitted to a second deliberation (see more on this below).

The Resolution College is supported by the Resolution department, which is itself sub-divided into two units: One bank and insurance groups of national dimension and on resolution and guarantees financing mechanisms (R1), and one on bank and insurance groups of international dimension and regulatory issues (R2). Within the Resolution department, there are FTE that are in charge of the legal questions and internal affairs, although they rely on those of ACPR as well. Support functions are additionally shared with the supervisory functions, and at times with BdF (for example: Human resources, real estate, IT…). The Resolution department is tasked with organising and preparing the meetings of the Resolution college, and is in charge of the implementation of its decisions. It prepares resolution plans, follows up on resolution procedures decided by the Resolution college, and represents the General secretariat in European and international instances, where these deal with resolution matters. It is responsible for matters related to the Bank Guarantee Fund.

Separation between the supervisory and the resolution functions is guaranteed by the fact that it is the College of resolution that is in charge of defining the organisation of its supporting services, and ACPR's budget contains a part that is specifically reserved to the resolution services. The head of the department in charge of banking resolution is nominated by ministerial decree on a proposal by the Resolution College,[39] and the Director in charge of resolution organises and manages the units in charge of supporting the Resolution College (on which see below); this constitutes an exception to the general organisational rules within ACPR.

The members of the Resolution College, as well as its supporting services, may have access to the information detained by the ACPR in its capacity of supervisory authority for the exercise of their functions within the ACPR.[40] The Resolution department may also receive any document or preparatory document in the possession of other ACPR departments necessary to fulfil

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38 Chap. 13, *L'Autorité de contrôle prudentiel et de résolution et la procédure devant la commission des sanctions*, cit., para. 2250.

39 L-612-15-1, I, 1

40 Article L612-8-1 MFC.

their functions. ACPR, in turn, is granted access to BdF's databanks, which supports it in gaining of comprehensive view of the credit situation in France.[41] However, the information collected by the Resolution department specifically in its quality as resolution authority may not be shared. Furthermore, next to these formal information channels, also informal exchanges exist. For instance, if the resolution department organises informal meetings or official workshops with credit institutions, the supervisory department (JST) is invited as well.

On an administrative level, ACPR is organised in 12 departments (*directions*) – one of which is in charge of resolution –, as well as a service in charge of quality, one in charge of Fintech-innovation, and a communication unit. A General secretariat, which brings together the operational services of ACPR also exists. It is chaired by the Secretary general nominated by the Ministry of economy on a proposal by the President of ACPR, whereas other directors are directly nominated by BdF's Governor. The Secretary general reports and is accountable to the Supervisory College. Support units (Human resources, IT, and the finances and budgetary unit) support the General secretariat, alongside operational departments including for instance the licencing departments, or the legal department. Two departments – the resolution department, which supports the Resolution College and the secretariat to the Sanctions committee – are functionally independent from the General secretariat.

4.3. The evolution of ACP(R)'s legal status

When the ACP was first established in 2010, it was an independent administrative authority. In a nutshell, this means that the ACP was not placed under any (government) hierarchical relationship or below the authority of any government entity. However, it did engage the State's responsibility amid its lack of legal personality. The credentials of independence of the ACP(R) will be detailed in the following, considering that they have not been amended even though the ACPR lost its status as independent administrative authority. In fact, as detailed further below, this implies that its change of status has had few consequences in practice.

The ACPR's independence is guaranteed by means of the independence of the members of the Colleges. Indeed, they are submitted to strict rules detailed in the ACPR's rules of procedures (RoP), which prevent conflicts of interest. As noted, Article 22 RoP of the Superviory College foresees that each member of the Colleges and of the Sanctions Committee presents a declaration of interest, that should be duly updated where necessary (Article 23). Some rules are also applicable to the financial instruments they hold (Article 24), and they may have to avoid being involved in some procedures if conflicts of interest arise (Article 26). They are banned from accepting gifts or other benefits in nature from those submitted to their supervision (Article 27) and are bound to confidentiality (Article

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41 Chap. 13, *L'Autorité de contrôle prudentiel et de résolution et la procédure devant la commission des sanctions*, cit., para. 2249.

28). The President plays a key role in ensuring that these rules are applied: it may request information it deems necessary where it suspects that a breach may exist (Article 29), it may request the involvement of a deontologist and may adopt any measure he or she deems appropriate after the person incriminated has been given the opportunity to express his or her observations. Where the President is the person suspected of having breached his or her obligations, the oldest judge member of the affected College is in charge of examining the potential breach (Article 31). Next to these rules, the members of the College are also submitted to the Law on the transparency of public life[42] and the relevant provisions contained in the Monetary and Financial Code (L.612-10). Agents working for the Resolution department are, too, submitted to some obligations including a prohibition to make certain kinds of investments, the obligation to appear before BdF's ethics committee before any employment may be taken up in the private sector whereby some rules of incompatibility apply as well, or the preventive prohibition of professional contacts after having demitted from a position at ACPR.

ACPR's independence is further guaranteed by its financial independence. It is financed by the fees paid by its supervisees as well as any additional funding BdF may attribute to it.[43] Although the ACPR's budget is annexed to BdF's, it alone is in charge of its definition.[44] Its Secretary general makes a proposal, which is later approved by the College in plenary (the same procedure applies to any later amendments of the annual budget). If the budget is not spent in full, the remains are transferred to a specific account held by BdF, which is used to offset any future budgetary deficit. Its Secretary general has authority over the budget, and may conclude contracts, organise tenders in accordance with the conditions set by BdF for its own tenders. An Audit committee is in charge of ensuring that the ACPR's resources are well-spent. It is composed of four members designated among the Supervisory College's members. This Audit committee meets three times per year upon invitation by its president, who is designated by the College based on a proposal issued by the ACPR's President. It delivers a preliminary opinion on: the ACPR's budget forecast before it is adopted by the Supervisory College; the report on budgetary execution once the year is over; the agreements on rebilling and services provided by BdF prior to their approval.

Since ACPR is financially independent, it escapes Parliament's common control over the State's budget (even if Parliament may define a maximum number of FTEs for ACPR's staff). This is the reason why Parliament is tasked with guaranteeing ACPR's accountability (on which see 6. below).

ACPR's personnel is largely composed of agents covered by BdF's statute, including contract agents and civil servants stemming from the formerly existing

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42 *Loi n° 2013-907* du 11 octobre 2013 relative à la transparence de la vie publique (Law 2013-907 on transparency in public life).

43 As of 2018, this contribution was very limited. ACPR, *Rapport annuel 2022*, 76 ff.

44 L. 612-15 to L-612-20 MCF.

ACAM or seconded from other public authorities. It may, however, also hire its own agents, which are employed by BdF in any event.[45]

One element in particular distinguishes the French ACPR from other supervisory authorities within the EU. Indeed, as noted above, a representative of the Government is a member of both the Supervisory and the Resolution Colleges. Although this is justified as regards the resolution function since a banking crisis in France would have huge impacts on the French economy, it brings more questions as regards the supervisory function. While it is true that the government representative does not have any voting right and is not involved in the Sanctions committee, it remains the case that it may demand that decisions be deliberated anew. Some have deemed this to be sufficient to guarantee independence from the State,[46] but this is questionable.

As anticipated, following the adoption of Law no 2017-55 of 20 January 2017 on the General statute of Administrative independent authorities and Public independent authorities,[47] ACPR no longer is an independent administrative authority as only those authorities that are listed in this law have this status.[48] But its features have not been amended, such that it is still independent in practice.

ACPR furthermore lacks legal personality (like its predecessor the Banking Committee used to lack legal personality as well): in France, administrative independent authorities lack legal personality unless the law attributes it to them.[49] This notwithstanding, its President may act in front of courts, and the ACPR may be a party to criminal proceedings.[50] Because ACPR lacks legal personality, the State is liable for any damages it may cause.[51] Any judicial remedy must be sought against the Minister of Economy in front of administrative courts.[52]

5. ACPR's prerogatives and sanctioning powers

Contrary to the AMF, ACPR has no regulatory powers.[53] Instead, it is the Ministry of Economy that is in charge of approving the necessary norms. However, the ACPR does have quasi-regulatory powers, for instance as regards its capacity to organize the collection of information (so-called Instructions).

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45 ACPR, *The ACPR's domestic and European responsibilities*, 8.

46 Chap. 13, *L'Autorité de contrôle prudentiel et de résolution et la procédure devant la commission des sanctions*, cit., para. 2246.

47 *Loi n° 2017-55* du 20 janvier 2017 portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes.

48 As such, this law deleted this qualification for ACPR from Article L 612-1 MFC.

49 In this sense, the ACPR distinguishes itself from the AMF.

50 E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel*, cit., 27.

51 See for a precedent in relation to the Banking Committee: CE 30 Nov 2001, no 219562.

52 E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel*, cit., 27.

53 One exception exists as regards "pouvoirs d'instruction".

ACPR's prerogatives in resolution matters were first defined by Law 2013-672, but they were reinforced soon thereafter by Ordinance 2015-1024, which transposed the BRRD into the French legal order. ACPR is France's NRA. As such, it adopts any measure necessary to implement SRB decisions, warnings, orientations, instructions or any other legal act adopted by the SRB.[54] ACPR has also exercised resolution functions in the insurance sector since 2017.

The Director in charge of resolution may request from the supervised entities any information it requires from the preparation and the implementation of preventive and resolution plans in the banking and the insurance sectors.[55] It may require from ACPR's General secretary that this information be collected by means of on-site inspections The director for resolution and the General secretary shall agree on the applicable modalities of these inspections. The director may furthermore be delegated competences from the Resolution College within the limitations and according to the conditions defined by a decree of the Council of State.[56]

Apart from the institution itself, only the Governor of BdF, the Director General of the Treasury or the ECB where it is the responsible supervisor may request the Resolution College to examine the situation of a credit institution or an insurance company in difficulty so that it decides whether any resolution measure has to be implemented.[57] The Director General of the Treasury is the only one who may trigger this procedure where exceptional public support is required.

To fulfil its objectives, ACPR cooperates with foreign competent authorities and possesses a power of control, has the ability to take measures of administrative policy and has sanctioning powers. It may also publish any information it deems necessary to accomplish its tasks, and professional secrecy does not apply in those cases.[58]

Several authorities are involved in resolution planning and execution. These are the Credit Management Group for the G-SIB, the Resolution College, European resolution colleges where a credit has subsidiaries in several Member States, the Treasury, and the FGDR. AMF is also notified, but it is not involved in the decision-making process.

It should additionally be noted that, in France, no administrative liquidation procedure exists unless the licence is withdrawn in which case the credit institution must cease its activities within two years[59] (this possibility appears to have become quite remote since the creation of the SSM). Judicial liquidation

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54 L-612-1 MFC.

55 L-612-24 MFC.

56 L-612-15-1 MFC.

57 L613-49 MFC.

58 IV, L-612-1 MFC.

59 L511-10 ff. MFC.

must be decided upon by a judge. Before he or she may rule on the matter, he or she must however consult the Supervisory College, which shall deliver an opinion of conformity. Note that this procedure existed already before resolution was introduced. It is, however, first for the Resolution College to decide whether liquidation or resolution is in order. Then, the Supervisory College decides whether it issues an opinion of conformity or not. If it adopts a non-conformity opinion, the credit institution will not be liquidated, such that a non-viable credit institution may be maintained.

6. The ACPR's accountability and liability regimes

As noted above, the ACPR is independent, that is it is under no hierarchical relationship towards the Government. However, it is submitted to an accountability regime both towards the President of the Republic and towards Parliament. It submits a yearly report to both of these instances (this report is also published in the Official Journal),[60] and this report is presented to the press by its President.[61] Its President may be heard by Parliament to report on its activities and its expenditures, either on his or her request, or upon request by the finance committee of one of the two parliamentary chambers. These hearings commonly deal with topical issues, and are not organised on a regular, systematic basis. Interestingly, whereas the ACPR used to include the list of those parliamentary hearings in its annual reports, it ceased to do so as of 2017, which is regretful as it constituted a useful source of information and contributed to increased transparency. To guarantee the transparency of its activities, ACPR also publishes the sanctioning decisions it adopts on its website.

ACPR may be investigated upon in the framework of parliamentary inquiries, and it is submitted to control by the French Court of Auditors (although so far it has not been subject to a specific inquiry).

Accountability towards Parliament is also guaranteed by means of *ex ante* accountability since Parliament has been in charge of nominating two members of the Supervisory College since 2010.[62] Parliament is also consulted in the framework of the nomination of ACPR's Vice-president (its opinion is non-binding however).

ACPR liability may not be incurred for any of its action: in accordance with the interpretation adopted by the administrative judge (*Conseil d'Etat*), only serious offences will lead to the ACPR's and thus the State's liability to be engaged. Furthermore, the administrative judge will also have to assess whether the ACPR acted diligently.[63]

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60 L-612-12-I MFC.

61 This last happened on 31 May 2023. See *Rapport d'activité 2022*.

62 Loi n° 2010-1249 du 22 octobre 2010 de régulation bancaire et financière (Law 2010-1249 of October 22, 2010 on banking and financial regulation)

63 E. Bouretz, J.-L. Emery, *Autorité de Contrôle Prudentiel*, cit., 27.

7. Conclusion

The ACPR's institutional structure is peculiar in several respects. First, it is independent, yet it 'leans against' BdF: this is a construction, which is original if compared to the institutional structure existing in other Member States, but is not alien to the French tradition where other similar examples exist, for instance between the Fiscal Council (*Haut Conseil des Finances Publiques*) and the Court of Auditors. Moreover, ACPR's structure is also peculiar owing to the role attributed to both BdF and the Government in its functioning. However, as illustrated, sufficient safeguards appear to be in place to ensure that independence is guaranteed, although the Government's participation and ability to ask for a second deliberation raise some questions. This holds true despite the ACPR having lost its status as independent administrative authority.

The existing construction is the outcome of a series of reforms conducted at the national level since the 2000s. These reforms are, though, rather the result of institutional dynamics present at the national level than of requirements set at the EU or the international level. In fact, similar processes of reforms could be observed in numerous States across the world at approximately the same time. This notwithstanding, the attribution of resolution functions to the ACP in 2013 appears to have responded to other dynamics, which are indeed linked to developments at the EU level and most notably the creation of the Banking Union.

ACPR, like many other NRAs, is both France's supervisory and resolution authority for the banking sector, despite European norms providing that this only happens in exceptional circumstances. In fact, ACPR is much more than 'only' France's NCA and NRA as it also exercises prudential and resolution functions in the insurance domain, and is in charge of AML-CF as well. As illustrated by a survey conducted by the EBA in 2021, and as mentioned in the introduction to this collection of reports, this concentration of functions is not unusual at all. However, it raises the question of the adequacy of the rules in place at the European level and the necessary enhanced level of interaction/cooperation and exchange of information at the EU level. This is because contrary to (numerous) Member States authorities the EU bodies and institutions exercises these functions are separate from one another, institutionally and also physically.[64]

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[64] This admittedly presupposes that communication between the various function within one and the same authority is taking place on an effective, regular basis.

France: The Kaleidoscope of Resolution

Capturing and Analysing the Scope of Competence of the French Resolution Authority

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1. Borders, frontiers, and extensions: a diverse banking sector scope

The European law related to the resolution of financial crises is fragmented in sectorial texts, whose degree of maturity differs greatly. Banking resolution is undergoing its second review, rules on the resolution of central counterparties (CCP) have just entered into force and rules on the resolution of insurance undertaking are about to be agreed on by legislators. In contrast to this backdrop, the French legislator decided to centralise the resolution of financial entities in the hand of a single authority: the Autorité de contrôle prudentiel et de resolution (ACPR – the French Supervision and Resolution Authority), which had merged the functions of banking and insurance supervisor after the Global Financial Crisis.

The French legislator gave first competence to the ACPR over the banking sector as a resolution authority in 2013, shortly before resolution became harmonised by the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, the Banking Resolution and Recovery Directive "BRRD", and a component of the European Banking Union (EBU) in December 2015 with Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014, Single Resolution Mechanism Regulation "SRMR". The ACPR has subsequently been designated by the French legislator resolution authority for the insurance sector in 2017 and for central counterparties in 2023, following the entry into force of Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020, CCP Recovery and Resolution Regulation "CCPRRR". The ACPR is thus currently one of the national resolution authorities with the most diversified scope of competence.

Centralising crisis resolution powers is an effective approach to improve crisis management, especially when financial conglomerates dominate the financial landscape. Nevertheless, the sedimentation of EU and national rules and exceptions has resulted in a complex landscape. The purpose of this article is to document how the ACPR faces this complexity related to its scope of competence on resolution matters using coordination features and a centralised governance. It assesses first the complex delineation of the ACPR scope of competence for the banking sector, which is sometimes clear and sometimes blurred (I). It presents then how banking resolution interacts with insurance and CCP resolution within its governance framework (II).

1.1. The clear boarders of banking resolution within the EBU

Mainland France is part of the EBU; consequently, the ACPR competence for the banking sector is basically split over three different material fields based on SRMR:

– Significant credit institutions and cross-border less significant credit institutions[1] are primarily dealt with by the Single Resolution Board (SRB) with an involvement of the ACPR.

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[1] In the meaning of Article 6(4) SRMR.

– Other less significant credit institutions are primarily overseen at national level under the scrutiny of SRB.

– ACPR has a full competence on a residual field consisting of financial institutions that are in the scope of BRRD but not in the scope of SRMR.

SRMR scope is defined in Article 2 SRMR. It covers all banking groups headquartered in participating member states, which includes not only credit institutions but also parent undertakings, investment firms and financial institutions subject to consolidated supervision by the European Central Bank (ECB). The logic here is similar to the reasoning of the CJEU in paragraph 37 of its ruling on the Case C-450/17 Landeskreditbank Baden-Württemberg – Förderbank. The scope of competence of SRB as an EBU central authority is general no matter whether they are "directly supervised by the SSM", "cross-border less significant institutions" or none of these. The functioning of resolution planning and resolution actions for banks under SRB direct and indirect remit is largely documented.[2] SRB's scope of competence is clearly set in the regulation and publicly documented in listing available on-line and frequently updated.[3] However, the delineation may be less evident when banking groups take one of a few specific forms documented here under point I.b.

The residual part of ACPR field of competence is made of investment firms (including financial groups consolidating investment firms and financial institutions) and Union branches of third country institutions. Investment firms not consolidated in banking groups are explicitly covered by BRRD provisions on resolution planning and resolution measures. In contrast, Union branches are a specific case. By definition, Union branches have no proper legal personality and are incorporated under a third-country law. Resolution powers specific to these branches are described in dedicated provisions (Article 96 BRRD). The letter of BRRD does not clearly require resolution planning which is expected from each "institution" (Article 10(1) SRMR) and "group" (Article 12(1) BRRD) while branches are only a part of a third-country "institution". Concretely, in France, these branches are submitted to only three aspects of the resolution regime following the transposition of BRRD. They contribute to the national resolution fund (paragraph IV of article L.613-34 of the Monetary and Financial Code), the ACPR can take resolution measures to support or complement a resolution happening in a third country whose decisions are not automatically implemented (paragraph

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2 See, for instance, J.-H. Binder, Inter-agency Cooperation Within the SRM: Legal and Operational Challenges for the Cooperation Between Banking Supervision and Resolution Authorities in the EU and With Third-country Authorities", (2022) European Company and Financial Law Review 6, 900-916.

3 The SRB scope is composed on the one hand of the institutions referred as significant in the *List of supervised entities* that the ECB publishes and updates regularly on its website (and of the *List of other cross border groups* published and updated by the SRB).

V of Article L.613-62) or when (quasi-) resolution measures are required at the level of the branch (Article L.613-62-1).

Cooperation within the SRM is described in Article 31 SRMR, which provides for a leading role of the SRB to a "ensure effective and consistent" cooperation and give to the SRB the appropriate tools therefor (guidelines, general instructions, investigatory powers, access to information from NRAs, reception of the NRA draft decisions). While the setting prescribed by Article 31 is easy to summarise,[4] its implementation is somewhat more complex. The "cooperation framework" agreed by the SRB and the NRAs[5] introduces tools that complement the Regulation for a more dynamic cooperation. Guidance (Article 5b of the cooperation framework) offers the opportunity to the executive section of the SRB to provide Internal resolution teams in which SRB and NRAs experts cooperate for resolution planning of the entities and groups under the SRB's direct responsibility following a procedure that is significantly lighter than the one foreseen in article 5a of the cooperation framework for adopting the guidelines mentioned in Article 31 SRMR. Similarly, while Article 81 SRMR provides that "Council Regulation No 1 shall apply to the board" and foresees bilateral agreements with NRAs on the language used for their exchange of documents, the cooperation framework states that, without prejudice of these regulations, "the operational working language used in the internal communication between the SRB and the NRAs within the SRM is English, in its spoken and written form". Since the communications include the notification of their respective decisions, the cooperation framework requests NRAs to add to their decisions "provisional English executive summary for informative use only" and for the SRB to offer courtesy translations: "Legal acts of the SRB addressed to the NRAs for their implementation under national law shall be adopted in English, which will constitute the legally binding version of such a legal act of the SRB. The SRB will endeavour to provide a courtesy translation of its legal act into the national language chosen by that entity in accordance with Council Regulation No 1". This flexible framework makes it possible for the ACPR that is constitutionally required to work and communicate in French to operate smoothly in an English-language context. These examples of procedural simplification echo at a smaller scale the pragmatic approach that Daniel Gros anticipated in the dealing with effective resolution cases.[6]

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4 See § 9-15 and § 9-16 of Danny Busch's article, *Governance of the Single Resolution Mechanism*, in D. Busch, G. Ferrarini (eds), *European Banking Union* (Oxford University Press 2020).

5 Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15).

6 "The decision-making mechanism of the future Resolution Board is so complex that in practice it will work quite differently from what one would imagine by looking at the formal rules. In an emergency the people with the necessary information will decide and all the others who are formally also involved will probably just have to agree", D. Gros, *The Bank Resolution Compromise: Incomplete, but workable?*, CEPS Commentary, 2013.

1.2. The frontier of banking groups within the EBU

The definition of a group is an essential element for a comprehensive and effective resolution planning. The BRRD definition of "group" (which matters for instance to decide the scope of resolution planning) is particularly large. It quotes Regulation (EU) 575/2013 Capital Requirement Regulation "CRR" which builds on the definition of "subsidiary undertaking" from the financial statements Directive 83/349/EEC (now replaced by Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of businesses). This means that any kind of entity can be part of a group without any restriction from the EU banking law. Non-banking and even non-financial subsidiaries are within the remit of a resolution authority, if they are "subsidiaries" based on accounting principles. Similarly, once the financial holding is identified upstream from a credit institution or an investment firm, all subsidiaries downstream will be recognised as part of the group.

SRMR scope is restricted on the basis of the concept of "group".[7] SRMR applies only to groups which are subject to consolidated supervision carried out by the ECB in accordance with Article 4(1)(g) of Regulation (EU) 1024/2013 "SSMR" and stand-alone credit institutions in participating Member States. In addition, it is worth mentioning that when a group contains a credit institution, an investment form or a financial holding company that is established in another participating Member State than the parent company, it is deemed "cross-border" and falls into the SRB's direct remit as per Article 7 SRMR while the "cross-border" criterion for being submitted to direct ECB supervision requires holding subsidiaries in two distinct participating jurisdictions in addition to the one of the parent company.

In theory, lines are clear. In practice, resolution authorities rely on decision of supervisors for the delineation of the group and sometimes consequently for the cross-border nature of a group. In addition, the consequences of having non-banking entities within a group can vary.

A first example thereof is the recognition of a financial holding company based on CRR. This process is built to ensure proportionality and preserves room for supervisory judgement. According to Article 4(1)(20) CRR, financial holding company "means a financial institution, the subsidiaries of which are exclusively or mainly institutions or financial institutions, and which is not a mixed financial holding company", "mainly" being defined as "more than 50% of the financial institution's equity, consolidated assets, revenues, personnel or other indicator considered relevant by the competent authority". Similarly, mixed financial holding companies are recognised by supervisors on the basis of Articles 2(14) and 3 of Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial

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[7] Without prejudice of the provisions relative to the Single Resolution Fund that are applicable to all credit institutions in the EBU.

conglomerate "FICOD". Here again, proportionality is guaranteed, and room is left for supervisory judgement as "[i]f the group does not reach the threshold referred to in paragraph 2 of [Article 3],[8] the relevant competent authorities may decide by common agreement not to regard the group as a financial conglomerate". Similarly, the obligation for third-country groups to set an intermediate EU parent undertaking (IPU) introduced by Article 21b CRD in 2019 can be adjusted by supervisory decision under the conditions set in paragraph 2 of this article.

This can be made livelier by referring to concrete cases documented by public information. The first one is the insurance group AXA that has a limited banking activity. AXA does not appear in the list of financial conglomerates headquartered in France published by ACPR supervisory division in 2019[9] because its banking assets were then around 5% of the total assets and other pertinent metrics were under the 10% significance threshold from FICOD.[10] It would even less qualify for a "financial holding company". Consequently, even before Axa Bank Belgium and Axa Bank Germany were ceded, credit institutions from the group had to be dealt as several independent institutions, one being "significant" in the meaning of SSMR (Axa Bank Belgium) and the others "less significant". The second example is Bank of America, which has two subsidiaries in Europe: a credit institution in Ireland, part of the "designated activity" under 12 U.S. Code § 5463, and a French investment firm that is kept segregated from the Irish "designated activity" to comply with US law, which makes the group eligible to the exception of Article 21b(2) CRD consisting in keeping two separate IPUs instead of one for a group. As a consequence, both of the subsidiaries of the US group, deemed significant under SSMR, are handled in supervision, and thus in resolution, as distinct entities following a legitimate supervisory decision based on CRD rather than following the baseline definition of a group in Directive 2013/34/EU.[11] Furthermore, it should be noted that resolution colleges cannot be called for by national resolution authorities. On the one hand, this mirrors that cooperation within the SRM should happen in IRTs (which can only be called by the SRB when it has a direct competence on a group). On the other hand, Article 33 SRMR limits European resolution colleges to groups including entities in non-participating Member States. When neither an IRT not a European resolution college can be organised, cooperation relies on administrative pragmatism and general provisions allowing cooperation between authorities in BRRD and SRMR.

Actual groups captured by a resolution authority are thus not necessarily the full group reflected in the highest level of accounting consolidation. When supervisory circumstances divide a group inside a single jurisdiction, this

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8 These thresholds are 10% of the total assets of the potential conglomerate or 10 % of the solvency requirement of the potential conglomerate.

9 The list is published on the Internet, see *here*.

10 See for instance p. 21 and p. 312 of AXA Registration document for 2019 (figures of 2018 and 2019) to ensure consistency with the list.

11 Cf. the ECB *List of supervised entities* (consulted as of October 2023).

calls for appropriate internal management solution for ensuring an effective coordination between teams and projects. This happens daily at ACPR as well at the SRB. When the case crosses borders within the EU without qualifying as a "cross-border LSI" because of the presence of two distinct IPUs, this calls for an extensive use of provisions in BRRD and SRMR organising the cooperation of resolution authorities.

1.3. The material and territorial extensions of resolution beyond BRRD remit

A specificity of the ACPR compared to most other EBU authorities is that it is also the resolution authority for institutions of the banking sector that lie outside the scope of BRRD. Indeed, the national law transposing BRRD has been extended to a wider territorial and material scope.

Territorially, there are two kinds of extensions of the ACPR remit beyond the scope of BRRD. Both include credit institutions and some of these credit institutions may ensure critical functions. As a result, these territorial extensions are not anecdotal and represent an effective field of competence. On the one hand, certain French oversea territories, essentially islands in the Pacific Ocean, are not part of the European Union and are under a "principle of legislative speciality". Thus, EU law is never directly applicable and French laws adopted by mainland France institutions are not automatically implemented there. It takes a specific procedure described in the Article 74-1 of the French constitution consisting in extending explicitly a French law (or a directly applicable EU law rule) at a given reference date to these territories with the necessary adjustments. Thus, the French law transposing BRRD has been extended to these territories and matters dealt within delegated regulations have been extended too. Materially, BRRD is thus enforced in these territories. Procedurally, it is merely an extension of mainland French law. On the other hand, Monaco has handed over to France its regulation of banking activities (apart for anti-money laundering) by bilateral agreements and is committed to the EU to implement its banking law as part of the monetary agreements concluded by Monaco to be allowed to use the euro as its national currency. Franco-Monegasque agreements are in place since 1945 and their latest version was adopted on October, 10th 2010.[12] The monetary agreement[13] reflects this singularity. In its Article 9 and its annexes, it identifies which part of EU law is to be implemented in Monaco, not directly but through French law. This includes BRRD and CCPRR. Other monetary agreements simply list all the EU law provisions that Andorran San Marino and the Vatican should implement in their legal framework.

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[12] Its full name is "Accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement de la Principauté de Monaco en matière de réglementation bancaire applicable dans la Principauté de Monaco et portant abrogation de l'accord sous forme d'échange de lettres en date du 27 novembre 1987 modifiant l'échange de lettres du 18 mai 1963 relatif à la réglementation bancaire dans la Principauté de Monaco".

[13] Formally the "Monetary agreement between the European Union and the Principality of Monaco" whose latest version has entered into force in March 2023.

Therefore, the very same articles of French law transposing BRRD have a different status depending on the territory on which ACPR implements it and the perspective adopted. From a French law perspective, it is the very same law that has been extended (and for some minor aspects adapted) to French territories with a specific constitutional status and to another jurisdiction integrated in the ACPR territorial scope by international agreements. From an EU law perspective, things are more contrasted. It is a directive transposition in mainland France, it is a monetary-law-related requirement enshrined in an international agreement in Monaco. It is tantamount to a third-country law that happens to be materially identical to a directive in French Polynesia, New Caledonia and Wallis-and-Futuna.

Finally, some credit institutions in France enjoyed historically a simplified supervision against a limited license that restricted their activity (for instance, they could not take at-sight deposits). With the harmonisation of the definition of credit institutions resulting from CRR, France created a dedicated category of financial institutions: the *sociétés de financement* (financing companies). As any other financial institution, they are included in the scope of EBU only if they are under the consolidated supervision of the ECB. Otherwise, they fall under national law. Since this kind of institutions does exist in EU law only as part of the generic "financial institutions" category, the implementation of the resolution framework to them requires a material extension of the scope of the BRRD transposition. The French legislator has opted for a proportional approach concerning these institutions, which, generally, are small. They can be included in the resolution planning scope of ACPR based on paragraph II of Article L.613-34 of the Monetary and Financial Code by a supervisory decision if there is a specific risk of financial stability.

2. Resolution beyond the banking sector: conciliating national and European initiatives

2.1. Two additional material scopes: the insurance sector and CCPs

The French legislator created an insurance resolution regime in 2017, following FSB work on insurance resolution.[14] From an EU law perspective, this regime fits the definition of a *Reorganisation and Winding-Up of Insurance Undertakings* as per Title IV of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 "Solvency II".

Several factors influenced the choice of creating an insurance resolution regime in France. A large, diversified and mature insurance industry was a key explanation, especially given the integration of several French insurance groups within larger banking groups. Recent (near-) failures cases in the 2010ies and

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[14] Cf. Annex 2 of Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, 2014 and Financial Stability Board, *Developing Effective Resolution Strategies and Plans for Systemically Important Insurers*, 2016.

the (temporary) absence of a European framework were also drivers for change. The French insurance resolution framework has been conceived as a first step and does not aim at dealing with all crises in the insurance sector. It can rely neither on internal funding (write down of own funds or conversion of liabilities) nor on external funding (such as a resolution fund). This has been explicitly acknowledged by the legislator who inserted a clause to avoid "ineffective resolutions"[15] (4° of paragraph III of Article L311-18 of the Insurance Code) but it organises a large toolbox of transfer tools that are simplified and accelerated compared to the transfer tools in going concern.

Most of these provisions have been inspired by BRRD and adapted to the insurance sector, including resolution objectives and tools. However, the material and territorial scopes of insurance resolution follow a different logic from those of the banking sector. First, the insurance resolution regime scope is limited to insurance undertaking under Solvency II and institutions for occupational retirement provisions. This means that, instead of benefiting from simplified obligations as the smallest banks, the smallest insurers which remained under Solvency I are fully exempted from the scope. Additionally, the preventive arm of the recovery and resolution framework is limited to insurance undertakings and insurance groups above an asset size threshold (paragraph I of Article L.311-5 of the Insurance Code) or that have been designated because of their provision of critical functions (paragraph II of Article L.311-5 of the Insurance Code). The quantitative threshold has been set at €50bn by a ministerial decree on April 10th 2018. Furthermore, contrary to the banking law, insurance law in territories located in the Pacific Ocean and in Monaco is provided by local law[16]. Consequently, ACPR is not the resolution authority for the local insurers in these jurisdictions.

The key issue with the insurance resolution scope is its coordination with banking resolution for conglomerates, i.e. groups that are both inside the banking and the insurance resolution remit. This is illustrated by figure 1.

All large French banking group are financial conglomerates mixing banking and insurance activities. Provisions relative to groups in SRMR and BRRD give to the group resolution authority (the SRB) a general competence in terms of resolution planning that covers all the group. This means, for instance, that any consideration in the banking resolution plan on the group pre-crisis or post-crisis profitability or solvability should reflect the presence of the insurance business. However, the SRB will be able to decide autonomously on resolution measures only on financial entities under its direct scope. Moreover, these measures are expected to be concentrated at the level of the single (or, if applicable, multiple) point(s) of entry (PoE) identified during the resolution planning phase. The case of

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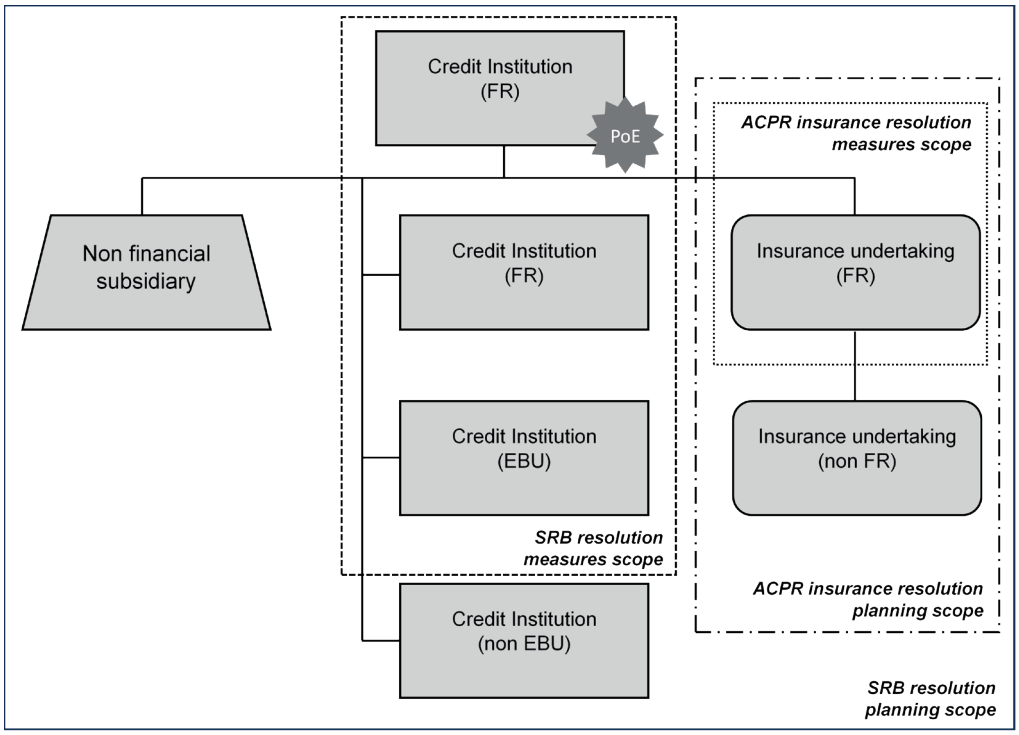
15 It states: "The value of the assets of the said undertaking (…) is larger than the value of its liabilities (…)".

16 Even though history or diplomatic agreements may have resulted in a large proportion of similar provisions.

Figure 1

Scopes of competence over a typical French financial conglomerate for resolution planning and resolution measures (own elaboration).



subsidiaries outside the EBU will require cooperation among authorities in which the SRB will represent NRAs of participating Member States (Article 32 and 33 SRMR). Non-financial subsidiaries of the group and insurance undertakings cannot undergo resolution measures from the SRB (apart from the sale of their shares that would be a sale of assets of the entity in resolution). Similarly, ACPR resolution planning competence covers the full insurance (sub-)group[17] and should include considerations regarding the balance of the full group. However, its resolution powers, as well as its policy mandate – the resolution objectives – are materially limited to the undertakings included in the insurance resolution framework and territorially circumscribed to France. Cooperation plays thus a similar role than for the banking sector but in a more challenging environment, since only a minority of EU Member States have created an insurance resolution framework. As a consequence, to allow exchange of information, Article L.311-57 of the Insurance code does not mention "other national resolution authorities in EU Member States" but uses a more open wording "authorities exercising similar functions in other EU Member States". A door is also open to cross-sectoral cooperation by quoting in the same article the ECB in its

[17] Article L.311-8 of the Insurance Code states that "The group preventive resolution plans covers the group as a whole".

supervisory capacity and the SRB as possible cooperation partners. The effective cooperation in resolution planning consists essentially, for the ACPR, to associate other authorities in charge of foreign subsidiaries or in a conglomerate context to the resolution planning and the resolvability assessment and to inform them if resolution actions are taken (Article L.311-58 of the Insurance Code). This cooperation can take place in a dedicated college (II of Article L.311-59 of the Insurance code).

The case of the CCP resolution framework is less complex. The only CCP headquartered in France is licenced as a credit institution. Consequently, it had been submitted to the BRRD resolution planning framework until CCPRRR entered into force, excluding this kind of entities from the scope of BRRD (Article 93 CCPRRR) and the ACPR has been subsequently designated as the French resolution authority for CCPs in August 2023. The new framework is significantly different from BRRD since it has been built on the specific needs of CCPs. This means that the resolution planning work has basically to start anew for CCPs whose resolution or liquidation had been planned under BRRD and SRMR. However, the CCP resolution framework remains closely linked to the banking resolution framework, since CCPs can be failing or likely to fail if several of their member (which are typically large credit institutions) are themselves failing. This is reflected in the composition of the CCP resolution colleges, which includes resolution authorities of CCP members (Article 4(1) (c) and (d) CCPRRR) but also resolution authorities of clients of these members (which are typically smaller credit institutions) in the form of a sort of catch-all clause that Member States can activate in case of concern for financial stability reasons (Article 4(1)(e) CCPRRR). This has allowed the ACPR to get involved in the nascent CCP resolution colleges even if SRB is the resolution authority of the major CCP members.

The articulation of these two new scopes of resolution with banking resolution has thus been thought of from their inception. The probable approval by the EU co-legislators of an insurance recovery and resolution directive will make coordination issues a shared concern among European authorities and may help to set more effective colleges and to build more standardised ways of exchanging between the SRB and national resolution authorities in charge of their own segments of financial conglomerates (essentially in the insurance business). The increasing expertise of national authorities and the SRB on CCPs will clearly be supporting the switch to a "phase two" of resolution planning within the SRMR framework which will be more focused on operational crisis-readiness.[18]

2.2. Governing resolution at the APCR

The *Loi n° 2013-672 de séparation et de régulation des activités bancaires* (Law on separation and regulation of banking activities "SRAB") introduced banking resolution in France and designated the ACPR as the national banking

[18] Cf. D. Laboureix, *Speech at the ECON Committee of the European Parliament*, 1st March 2023.

resolution authority,[19] just when BRRD negotiations were starting. The law set the main governance features of the ACPR as a resolution authority that were not significantly affected thereafter by BRRD and SRMR. SRMR only shifted responsibility for most important decisions and project management to the SRB.

SRAB created a resolution board, distinct from ACPR's supervisory board both by its membership and by the approach chosen to designate members. The supervisory board is composed of 19 members in the plenary session and 8 members in each sectorial session (banking and insurance). A large majority of these members are appointed by the Minister of Economy[20] or other authorities for their knowledge in the field. In addition, a representative of the French Treasury attends every session, and a representative of the Social Security directorate attends them when topics related to its field of competence are addressed. In contrast, the number of members of the resolution board is restricted to 6 and all of them participate *ex officio*: *Banque de France* governor chairs the resolution board, he or she is joined by the director general of the Treasury, the chairperson of the Securities Commission (Autorité des Marchés Financiers, AMF), the vice-governor designated for chairing the supervisory board, the president of the commercial chamber of the *Cour de Cassation* (Cassation court), the president of the supervisory board of the French deposit guarantee scheme (FGDR) and ACPR vice-president.

Legislative preparatory work proves that the Government and the Parliament have deliberately chosen to restrict the membership of the board.[21] The resolution board gathers the highest representative of the various authorities that would have been involved in the management of a banking crisis, even if resolution would not have been triggered. When insurance resolution was introduced by *Ordonnance n° 2017-1608 of 27 November 2017 relative à la création d'un régime de résolution pour le secteur de l'assurance*, a sixth member joined the resolution board: ACPR vice-president who should have knowledge in the field of insurance (Article L612-5 (6°) of the Monetary and Financial code). In parallel, the FGDR representative's presence has been limited to banking matters. With *Ordonnance n° 2023-836 of 30 August 2023*, ACPR gained competence on the resolution of central counterparties (CCP) without changing its governance.

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19 The ACPR is legally a branch of Banque de France, with a distinct governance and budget, but no legal personality. Its staff and operational resources are provided by Banque de France. Banque de France itself is a state-owned company with a unique status provided for by the Monetary and Financial Code. While case law has confirmed its status as a "public legal person" (Tribunal des Conflits, 16 June 1997, Société la Fontaine de Mars), it does enter neither of the two categories of French public legal person ("administrative public legal person" or "industrial and commercial public legal person"). Besides its French legal status, it functioning for monetary policy purposes (and thus its overall governance) complies with the Statute of the European System of Central Banks and of the ECB.

20 See for instance Arrêté du 13 mars 2020 portant nomination au collège de supervision de l'Autorité de contrôle prudentiel et de resolution.

21 Amendments presented to enlarge the board were finally rejected. The argumentation of the Government in this regard is best illustrated in the discussion at the French Senate: restricting the composition is a trade-off between cumulating knowledge and limiting the extent of conflicts of interests and keeping the number of members limited was a strong objective (see *here*).

Under the aegis of the resolution board, SRAB established a role of "director" appointed by the Minister of Economy upon proposal by the resolution board chairperson – the governor of the *Banque de France* – (Article L612-15-1(I) of the Monetary and Financial Code). The director "organises and leads" the services in charge of resolution, independently from other ACPR's services. Currently, the resolution directorate consists of a team of around 30 people.

3. Conclusion

The French legislator has thus opted for a governance model where the decision body and the teams are essentially multi-purposed. As a consequence, the kaleidoscopic aspect of ACPR fields of competence as a resolution authority can be subsumed by a limited number of people, for deciding as for preparing and implementing decisions. The pragmatism of this governance approach echoes the conclusion of Giuseppe Pennisi article on the SRM:[22] resolution is first a deterrent. Clarifying who is in charge matters thus more than having a uniform field of competence. This approach for the governance also offers the flexibility needed to adjust the structures and methods to mirror the new missions received with CCPRRR or to come with IRRD. It helps to build the increased cooperation with European agencies and other national resolution authorities that will be required to implement this new set of rules.

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[22] G. Pennisi, The impervious road to the Single Resolution Mechanism (Srm) of the European Banking Union (Ebu), (2015) Rivista di studi politici internazionali 2, 229-238.

Germany

Clemens Böhm and Alexander Thiele

1. Introduction

The Financial- and the following Euro-crisis obviously had a major impact on the organisation of financial supervision worldwide and especially in Europe and within the European Union. National legislators generally became aware of the fact that they would not be able to tackle systemic risks adequately by simply regulating and supervising their national financial institutions without taking the international dimensions of the modern banking world into account – that is the post Bretton-Woods era. What was needed therefore was the expansion of cooperation of national regulators and supervisors with their respective counterparts in other jurisdictions in order to be able to realise and analyse possible systemic and other risks resulting from the complex entanglements of the modern financial network.

Within the European Union this led to a general opening of the mostly national regulatory and supervisory systems for the European level. Despite the highly integrated markets for financial services within the common market and especially the Eurozone this specific area had until 2008 remained one of the last domains of national sovereignty – at least in terms of supervision. It was thus national authorities dealing with their national banks believing that everything would be fine as long as all national authorities did a sufficient good job. The Financial Crisis proved this concept wrong and initiated a paradigm shift creating European authorities competent to supervise and regulate European financial institutions together with existing and sometimes newly created national supervisors within a specific European supervisory network.

Germany was a major actor within this paradigm shift from the beginning, but was also aware of the fact that it would have to initiate fundamental institutional changes in order to make its competent authorities fit into this new European arrangement. Until today, therefore, the single national supervisor – the *Bundesanstalt für Finanzdienstleistungsaufsicht* ("BaFin") –, established in 2002 and seated in Frankfurt am Main and in Bonn, has been (internally) reformed several times in order to comply with the conditions set out in the Single Supervisory Mechanism Regulation (SSMR).[1] The task as National Resolution Authority ("NRA") within the Single Resolution Mechanism ("SRM") was at first assigned to the Financial Market Stabilisation Authority (*Bundesanstalt für Finanzmarktstabilisierung* – "FMSA"). As initially planned this task was, however, finally transferred to BaFin in 2018. Since then BaFin acts as the general authority for the supervision and the resolution of financial institutions in Germany. The following report intends to give a brief overview of the organisation and competences as well as the legal and judicial accountability of BaFin in its capacity as German NRA.

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[1] 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 (OJ L 287, 63).

2. Financial Market Authorities and Deposit Guarantee Schemes in Germany: An Overview

Within the Single Supervisory Mechanism ("SSM"), the supervision of less significant banks in Germany lies with BaFin as national supervisory authority according to Sec. 6(1) Banking Act.[2] It is supported by the Bundesbank, which under Section 7(1) sentence 1 of the Banking Act is obligated to cooperate with BaFin, and is in particular responsible for the ongoing supervision of credit institutions. This includes *inter alia* the evaluation of audit reports and annual financial statements as well as the assessment of capital adequacy and risk management procedures (Sec. 7(1) sentences 2 and 3 Banking Act). The Bundesbank acts within the guidelines agreed upon with BaFin (Sec. 7(2) Banking Act). This specific form of cooperation between the national supervisory authority and the national central bank appears reasonable from a supervisory perspective and is common to many other supervisory systems worldwide. Constitutionally it remains problematic nonetheless as BaFin was established according to Article 87(3) of the German Basic Law (*Grundgesetz*) that prohibits BaFin from having subordinate authorities.[3] The German Constitutional Court (*Bundesverfassungsgericht*) has, however, not never had to position itself in this question and will most likely not have to do so in the near future.

Within the SRM, BaFin also assumes the role of the NRA. In this capacity, it is responsible for the planning and implementation of resolution measures for altogether 1,334 institutions with most of them being less significant credit institutions.[4]

In addition, pursuant to Sec. 50(1) of the Deposit Guarantee Act,[5] BaFin acts as a supervisor of the Deposit Guarantee Schemes. This task is exercised by BaFin's banking supervision business unit, i.e. it does not fall within the remit of the resolution business unit. Deposit protection in Germany is organised along the lines of the so-called three pillars of the national banking system: the private banks, cooperative banks and savings banks. It is ensured by independently organised guarantee schemes which are authorised by BaFin under the Deposit Guarantee Act, implementing the Deposit Guarantee Schemes Directive ("DGSD").[6] The deposit guarantee scheme for the private banks, *Entschädigungseinrichtung*

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2 *Gesetz über das Kreditwesen (Kreditwesengesetz – KWG)* dated 1 July 1961 in the version of the announcement of 9 September 1998 (Federal Gazette I, 2776), last amended by Article 90 of the Law of 10 August 2021 (Federal Gazette I, 3436).

3 According to this provision autonomous federal higher authorities as well as new federal corporation and institutions under public law may be establishes by a federal law for matters on which the Federation has legislative power. Otherwise these administrative competences remain vested in the states (the „Bundesländer"). However in such a case, it is generally prohibited the respective federal higher authority having subordinate authorities.

4 BaFin, *Annual Report 2021*, 102.

5 *Einlagensicherungsgesetz (EinSiG)* dated 28 May 2015 (Federal Gazette I, 786), last amended by Article 7 paragraph 15 of the law of 12 May 2021 (Federal Gazette I, 990).

6 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 149).

deutscher Banken GmbH, is a 100% subsidiary of the industry association of the German private banks, *Bundesverband deutscher Banken e.V.* It functions as a typical deposit insurance, i.e. it compensates depositors in the event of a default. Contrary to that, the deposit guarantee schemes for the cooperative banks, *BVR Institutssicherung GmbH*, and the savings banks, *Institutsbezogenes Sicherungssystem der Sparkassen-Finanzgruppe*, primarily act as institutional protection schemes (cf. Article 2(1) no. 1 DGSD). They hence aim to recapitalise troubled banks while depositors may only be compensated as a last resort.

Since the Global Financial Crisis most changes of the institutional landscape in Germany have occurred in the field of crisis management and bank resolution. After BaFin's then-available intervention tools had quickly proven to be insufficient, the German legislator decided to establish an additional entity competent for bank crisis management, namely the FMSA. During this early phase, the FMSA was primarily focused on the support and recapitalisation of institutions with the core team being put together at short notice from experts from the Bundesbank and the private sector.[7]

In the further course of the Crisis, the German legislator enacted a variety of preventive as well as recapitalisation and reorganisation tools and often anticipated powers and obligations which were later harmonised in the BRRD.[8] This included in particular the obligation to prepare recovery plans (for systemically important institutions), and competences for BaFin to draw up resolution plans and to order the removal of resolution impediments. Prior to this, the Restructuring Act[9] had already provided for the possibility of special restructuring and reorganisation procedures and the transfer of critical business areas to other entities by way of an administrative decision.[10]

In 2015 the FMSA was established as the NRA due to its proven expertise in the restructuring and resolution of distressed credit institutions on the one hand and its experience in the quick establishment of an operational institution on the other. Apart from the obligation to implement the BRRD, this step was used to consolidate the different resolution powers – parts of which were kept in reserve for as long as the end of the year 2020[11] – within the competence of a single

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7 Federal Ministry of Finance, *Monthly Report June 2018*, 9.

8 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 (OJ L 173, 190).

9 *Gesetz zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung* dated 9 December 2010 (Federal Gazette I, 1900).

10 For a closer analysis see M. Lehmann, S. Hoffmann, *Die Übertragungsanordnung nach §§ 48a ff. KWG: Zur Behandlung im Ausland belegener Ausgliederungsgegenstände*, Working Papers on Global Financial Markets No. 46, June 2013.

11 With its credit institution reorganisation act, introduced by the reorganisation act (see supra note 8), the German legislator preserved the option to restructure distressed credit institutions under a purely

authority.[12] In the process, the existing employees were again assigned the task to build up a new part of an agency. However, it was already envisaged at this point to transfer the NRA function to BaFin at a later stage.[13] This transfer was adopted in 2016 and executed as of 1 January 2018. The remaining parts of the FMSA, which are competent for the management of a Special Financial Market Stabilisation Fund and the supervision of two bad banks, were transferred to the Federal Republic of Germany – Finance Agency GmbH.

The Financial Market Stabilisation Fund is a relic of interventions during the Global Financial Crisis. It should not be confused with the National Restructuring Fund which serves as a fund to enable the resolution of institutions not falling within the scope of the SRM. In addition, it collects the contributions to the Single Resolution Fund ("SRF").

3. BaFin's Function as National Resolution Authority

In its role as an integrated Financial Supervisory Authority BaFin hence performs the function of the German NRA. This is set out in Sec. 3(1) of the German Recovery and Resolution Act[14] (implementing Article 3(1) BRRD) and Sec. 4(1) Financial Services Supervision Act[15] (establishing and governing BaFin). The responsibility for this function lies with one of BaFin's six business units, *Geschäftsbereich Abwicklung und Geldwäscheprävention* ("Resolution and AML Unit").

3.1. Governance

Each of BaFin's business units is operationally independent – though supported by horizontal functions – and is managed by one Executive Director. Together with BaFin's President the Executive Directors form the Board of Directors, one of them acting as a Vice-President (Sec. 6(1) Financial Services Supervision Act. The Board Members (i.e. all Executive Directors and BaFin's President) are appointed by the Federal President on the proposal of the Federal Government. Their appointment thus requires a common decision of all Federal

national regime. However, this act was annulled on the occasion of the CRR II/CRD V implementation as it was deemed unfit for purpose and obsolete in light of the European recovery and resolution regime.

12 Explanatory memorandum on the federal government's draft law implementing Directive 2014/59/EU (*BRRD-Umsetzungsgesetz*), BT-Drs. 18/2575 dated 2 September 2014, 2.

13 *Ibidem*, 145.

14 *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen (Sanierungs- und Abwicklungsgesetz – SAG)* dated 10 December 2014 (Federal Gazette I, 2091), last amended by Article 16 of the Law of 3 June 2021 (Federal Gazette I, 1568).

15 *Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz – FinDAG)* dated 22 April 2002 (Federal Gazette I, 1310), last amended by Article 21 of the law of 3 June 2021 (Federal Gazette I, 1568).

Ministers, chaired by the Chancellor.[16] As a rule, the Board Members are appointed for five years. A re-appointment is possible. To prevent conflicts of interest, Sec 9(4) Financial Services Supervision Act provides that Board Members may not hold any other public office, trade or profession (including directorships and board memberships). Exemptions can be made following prior approval by the Federal Ministry of Finance ("BMF").

Under Sec. 6 of the Financial Services Supervision Act the Board of Directors assumes overall responsibility for BaFin's management. It decides on its Organisational Statute, thereby defining the responsibilities and tasks within the Board of Directors, but also on BaFin's internal organisation. The latter is set out in its Rules of Procedure (*Satzung* – "RoP"). The Organisational Statute, the RoP, and any amendments thereto are subject to approval of the BMF.

The President determines the overall strategy of BaFin both nationally and internationally. Within these guidelines all Executive Directors manage their respective business units under their own operational responsibility. Yet, under Sec. 2(3) No. 4 RoP the President, in principle, is entitled to issue instructions or to take over individual cases in any of BaFin's business units.

Notwithstanding these general principles, BaFin's governance relies on a far-reaching delegation of tasks and decision-making powers. Decisions of the Resolution and AML Business Unit are not taken by an internal board or similar competent body, but are rather allocated to the relevant departments. (Political) Responsibility for these decisions nonetheless lies with the competent Executive Director and finally the President of BaFin.

3.2. The Resolution and AML Business Unit: Internal Organisation and Operational Independence

Notwithstanding these reserve powers of the President, the operations of the NRA are generally performed separately from BaFin's ongoing supervisory tasks. In this regard Sec. 1a(1) RoP provides that all tasks entrusted to NRAs in the BRRD must be organisationally separated from other tasks performed by the Resolution and AML Unit. Therefore, and in line with Article 3(3) BRRD, the function of the NRA is not only separated from ongoing supervision but also from other tasks relating to the winding-up of licensable business operations in a broader sense. This is reflected both in BaFin's organisational chart and in the physical allocation of the relevant staff (as described in Section 3.2.4 below).

Although these principles of separation are based solely on a set of internal Rules of Procedure – notably in contrast to BaFin's designation as NRA –, it should be highlighted that these requirements have been implemented into BaFin's

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[16] Sec. 20 of the Rules of Procedure of the Federal Government (*Geschäftsordnung der Bundesregierung*) dated 11 May 1951 (GMBl., 137), last amended on 21 November 2002 (GMBl., 848).

RoP by way of a parliamentary law.[17] Such practice of amending inferior legal acts through higher ranking law is generally acknowledged in German legal doctrine.

3.2.1. Operational Independence

Sec. 1a(1) RoP expressly provides that tasks of the NRA shall be conducted operationally independent from tasks related to ongoing supervision. This requirement stands quite in contradiction to BaFin's previous organisation. Historically, BaFin's resolution division was integrated into its internal (general) administration business unit. A separate recovery and restructuring group and its AML division on the other hand were part of the banking supervision business unit.[18] To prepare BaFin for taking over the role as German NRA from the FMSA, (parts of) all three functions were thus merged into a newly established resolution business unit.[19] As a result of a preceding assessment it was noted that to achieve operational independence from supervisory functions, but also to provide the NRA with sufficient prominence in terms of supervisory policy, especially for its participation in international bodies, the NRA should be established not only as a separate operational unit but as an additional business unit.[20]

Against this backdrop, both the resolution division and certain functions of the AML division were assessed as being an appropriate addition to complement BaFin's role as NRA. This is mostly owed to the fact that they do not perform tasks of ongoing supervision and hence do not pose any risk of conflicts of interest.[21] As a result, both functions were included into the newly established business unit, entrusting the now-existing Resolution and AML Unit with tasks that clearly go beyond banking resolution in a narrow sense.

3.2.2. Initial Organisational Structure (2018-2022)

Organisationally, the Resolution and AML Unit was (and still is) sub-divided into five divisions. Of these, two divisions perform tasks relating to the prevention of money laundering and terrorist financing; a third division is entrusted with the prosecution of unlicensed business. These three divisions will be of no further interest for our purpose.

The remaining two divisions and a group – an organisational unit below division level but assuming a similar role – (hereinafter together the "NRA-

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17 Article 8 No. 2 of the Law on the Reorganization of the Tasks of the Federal Agency for Financial Market Stabilization (*Gesetz zur Neuordnung der Aufgaben der Bundesanstalt für Finanzmarktstabilisierung (FMSA-Neuordnungsgesetz – FMSANeuOG)*) dated 23 December 2016 (Federal Gazette I, 3171).

18 Organisational Chart available at BaFin, *Annual Report 2016*, 210 et seq.

19 Organisational Chart available at BaFin, *Annual Report 2017*, 167 et seq.

20 Explanatory memorandum on the federal government's draft law on the reorganization of the tasks of the federal agency for financial market stabilization (*Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Neuordnung der Aufgaben der Bundesanstalt für Finanzmarktstabilisierung (FMSA-Neuordnungsgesetz – FMSANeuOG)*), BT-Drs. 18/9530, dated 5 September 2016, 2; see also Federal Ministry of Finance, *Monthly Report June 2018*, 13.

21 BaFin, *Annual Report 2017*, 160.

divisions") initially formed what in essence constituted the German NRA. Of these NRA-divisions, one division conducted the ongoing resolution planning ("Division AP") and one acted as a cross sectional division, covering fundamental legal and economic questions and preparing the development of legal standards and committee work ("Division AG"). The group finally assumed responsibility for resolution measures and methods, the coordination of resolution planning, and crisis management ("Group AM"). This overall three-tier structure of the NRA was inherited from the FMSA.[22] While Group AM again consisted of three departments (mirroring the tasks mentioned above), both Division AP and Division AG were further sub-divided into five departments. For Division AG this resulted in a separation of substantive tasks (e.g. economic policy, legal affairs, committee work) whereas Division AP was sub-divided along the lines of national and EU competences. While two departments specialised on banks under the primary competence of the SRB, two further departments were responsible for the resolution planning for non-SRB banks. A fifth department took responsibility for banks BaFin supervised as a host supervisor.

Current Organisational StructureIn its latest re-organisation, BaFin has given up this competence-oriented set-up for the benefit of a more business model-oriented approach. As of 15 November 2022, the NRA function has been re-organised into two Divisions, Division ABF1 and Division ABF2.[23] Both divisions comprise departments exercising horizontal functions, such as legal affairs, data and analytics or crisis management, but also operational functions. While Division ABF1 specialises on private banks, banks with special business models and financial market infrastructures, Division ABF1 assumes responsibility for the savings banks and cooperative banks sectors.

With this new structure BaFin aims to strengthen the link between its operational resolution planning and methodological expertise.[24] In addition, the streamlining of coordination processes and reduction of contact points going along with this new set-up is intended to increase efficiency, in particular when dealing with acute crises.[25] In terms of substance, the new allocation of tasks should enable BaFin to better consider the characteristics of different banking sectors (in particular with a view to savings banks and cooperative banks) in resolution planning and to enhance intra-sector consistency. The allocation should also ensure a pooling of experience and expertise for the relevant sectors and thus enable a more efficient process.

3.2.3. Physical Arrangements

While the establishment of a separate business unit (and to a lesser extent the separation of the NRA-related tasks from other non-supervisory tasks)

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22 Federal Ministry of Finance, *Monthly Report June 2018*, 12 et seq.

23 See BaFin's current Organisation Chart, available *here*.

24 BaFin, *Ready for crisis? Abwicklungsfunktion der BaFin gibt sich neue Struktur*, press release dated 15 November 2022, available *here*.

25 *Ibidem*.

was deemed one key element to ensure the operational independence of the resolution function and any tasks performed by BaFin's supervisory functions,[26] the separation of these tasks goes beyond formal organisational structures. The organisational provisions described above are accompanied by a physical separation of the relevant business units. In applying the separation requirements set out in Article 3(3) BRRD, the staff assigned to the NRA-divisions is located in BaFin's Frankfurt am Main office (Sec. 1a(3) RoP) while the staff assigned to the remaining divisions of the Resolution and AML Unit is deployed in Bonn, the headquarter of BaFin's banking and insurance supervision lines.

While this setup constitutes a quite extensive implementation of the separation requirement provided for in the BRRD, one cannot help but notice that it is most likely owed to rather profane reasons. As many employees of the NRA-divisions were formerly deployed at the FMSA, the registered office of which was also located in Frankfurt am Main, one can assume that integrating the newly-formed NRA-divisions into BaFin's Frankfurt am Main office – the headquarter of the securities supervision and asset management supervision line – was the most pragmatic way of achieving a smooth transition into the freshly acquired powers.

In line with Article 3(3) BRRD this separation of functions also extends to the relevant staff's substantive activities. Pursuant to Sec. 1a(2) RoP BaFin shall ensure that the employees of the NRA-divisions do not at the same time perform any functions or tasks within the scope of other BaFin units. Conversely, the employees of units entrusted with supervisory activities shall not perform any functions or tasks within the NRA-divisions. Yet, this separation shall expressly not prevent employees of both functions from working in cross-divisional groups or projects.

3.3. Financial Independence

In addition to the organisational integration mentioned above, the Resolution and AML Unit was also included into BaFin's cost allocation scheme. This scheme is based on the principle that BaFin has to cover its own costs (Sec. 13(1) Financial Services Supervision Act).[27] The scheme ensures that BaFin remains independent of fund allocations by the federal budget and instead is fully financed by the supervised entities. Liquidity support from the federal budget can only be obtained in urgent cases and must take the form of a loan which is to be repaid within the relevant financial year (Sec. 13(2) Financial Services Supervision Act).

Pursuant to Sec. 16 Financial Services Supervision Act, all costs incurred by BaFin that are not covered by fees, reimbursements or other income can be allocated to the supervised entities on a pro-rata basis. Sec. 16b(1) Financial

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[26] BaFin, *Annual Report 2018*, 90.

[27] For an analysis from a constitutional law perspective see A. Thiele, *Finanzaufsicht* (Mohr Siebeck, 2014), 439 et seq.

Services Supervision Act specifies that these costs shall be determined for the individual areas of supervision. Consequently, allocable costs must be calculated separately for each business unit. For some types of institutions the calculation is waived in favour of a fixed amount.

BaFin's budget is prepared by its President and adopted by the Administrative Council (Sec. 12(2) Financial Services Supervision Act). The latter is a supervisory committee consisting of members appointed by the BMF, the Federal Ministry of Economic Affairs, the Federal Ministry of Justice, Parliament, and by industry associations (Sec. 7(3) Financial Services Supervision Act in connection with Sec. 3(6) RoP).

For the Resolution and AML Unit, Sec. 16k(1) Financial Services Supervision Act sets out that costs can be allocated to all licensed institutions within the meaning of Sec. 2 Restructuring Fund Act.[28] The allocation is determined according to the ratio of an institution's balance sheet total to the sum of all balance sheet totals in a given year.[29]

However, this allocation effectively only applies to credit institutions within the meaning of the CRR and to branches of third-country credit institutions. As far as the above-mentioned provisions were intended to mirror Articles 103(1) and 2(1) no. 3 BRRD in connection with Article 9(1) IFD,[30] i.e. to also require contributions by investment firms trading on own account or conducting underwriting business, the German implementation remains somewhat unsatisfactory. Sec. 2 Restructuring Fund Act only covers undertakings which are licensable under the Banking Act. What follows from that is that strict to the rule investment firms fall out of scope. This is owed to the fact that licensing requirements under the Banking Act only apply to investment firms where they are, in any event, treated as credit institutions pursuant to Article 4(1)(b) CRR.[31] It therefore remains questionable to what extent supervisory costs can be allocated to investment firms – keeping in mind that some of them certainly do fall within the scope of the BRRD and the German Recovery and Resolution Act.

3.4. Political Independence and Democratic Accountability

In principle administrative hierarchy and democratic accountability in German banking resolution do not differ from other areas of financial regulation, or more generally from other areas of public administration. Nonetheless, these

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28 *Gesetz zur Errichtung eines Restrukturierungsfonds für Kreditinstitute (Restrukturierungsfondsgesetz – RStruktFG)* dated 9 December 2010 (Federal Gazette I, 1900), last amended by Article 3 of the Law of 25 March 2022 (Federal Gazette I, 571).

29 Each adjusted by analogous application of Article 5 of Delegated Regulation (EU) 2015/63, see Sec. 16(2) Financial Services Supervision Act.

30 Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ L 314, 64).

31 See Sec. 32(1) sentence 2 German Banking Act.

points raise critical questions. First of all, one cannot help but notice that the idea of regulatory independence in Union law stands in stark contrast to expectations of democratic legitimacy in German constitutional and administrative law. Hence, and in comparison to other jurisdictions, independent authorities are a rare exception in German administration. The discussion associated with this issue is neither new nor has it spared the field of financial regulation.[32]

Under traditional German doctrine – shaped by a long-standing line of case law of the *Bundesverfassungsgericht* that can be summed up as follows – the democratic legitimacy demanded by the German Basic Law requires an uninterrupted chain of legitimisation from the people to the organs and officials entrusted with public duties. The decisive factor is not the form this legitimisation takes, but its effectiveness. What is needed is a sufficient level of legitimacy that can be achieved by adequately fulfilling the following two requirements: The appointment of public officials must be democratically legitimized in personal terms, and their actions must be democratically legitimised in substantive terms. Significant frictions with Union law for our purposes are especially created by the latter.

One core element of substantive legitimisation under this doctrine, apart from parliamentary law, is the so-called chain of command. What follows from this is that administrative actions are deemed to be democratically legitimised if they execute parliamentary laws and if they are subject to, in principle, the instructions of the democratically legitimised government – and hence to an entity directly responsible to parliament and indirectly to the people. As one can already observe from this summary, the aforementioned line of German case law has a distinct tendency towards input legitimisation. An important consequence of this construction is that ministers at all time bear full political responsibility for their subordinated authorities.

An implementation of these constitutional principles into ordinary law can be found in Sec. 2 Financial Services Supervision Act. Under this provision, BaFin is subject to direct expert and legal supervision by the BMF. This includes *inter alia* the competence to request reports and to issue instructions.[33] Thus, the ordinary law naturally assumes that BaFin is integrated into the national administrative hierarchy and therefore into the general chain of command with the Minister of Finance at the top. From a constitutional point of view, an

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[32] For the discussion in German literature (as far as it concerns financial regulation) see e.g. A.-K. Kaufhold, K. Langenbucher, P. Blank, J.P. Krahnen, *BaFin (in)dependence – A reform proposal*, SAFE White Paper No. 82, March 2021; A. Thiele, *Finanzaufsicht*, cit., 415 et seq.; A. Wellerdt, *Es ist Zeit, das Verwaltungsorganisationsrecht wiederzuentdecken – Ein Beitrag zur Reform der Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)*, (2021) NVwZ, 1101; F.A. Dechent, *Bundesanstalt für Finanzdienstleistungsaufsicht und Bundesanstalt für Finanzmarktstabilisierung – Unabhängige Behörden in der Bankenaufsicht?*, (2015) NVwZ, 767; H.-W. Forkel, *Für eine unabhängige Bankenaufsicht*, (2011) ZRP, 100.

[33] R. Laars, *Finanzdienstleistungsaufsichtsgesetz* (Nomos, 2017), § 2 Rn. 2.

– imaginable – institutional independence of BaFin was therefore deemed to be problematic.[34]

In practice however, these formal ministerial powers have been somewhat damped through specific agreements between BaFin and the BMF. In their "principles governing the exercise of legal and technical supervision of BaFin by the Federal Ministry of Finance" both authorities agreed on how this supervision should be exercised. Until very recently the agreement nevertheless provided for considerable obligations on BaFin's side. BaFin agreed to file written and ad hoc reports, to inform the BMF in technical discussions and meetings and in advance of its public relations work and to seek for prior authorisation where it intended to issue regulations, circulars or to change its administrative practice.[35]

As of 17 May 2022, these principles have been significantly shortened. Background to these changes is a re-evaluation of BaFin's independence following the developments around the default of the publicly listed payments processor *Wirecard AG* in mid-2020. A core idea of the new principles appears to be that the BMF remains involved primarily in the area of standard-setting and in international and political relations – hence in areas unrelated to individual administrative decisions. With a view to the core areas of financial supervision, the agreement seems to follow a more target-oriented approach highlighting BaFin's operational independence.

These principles can be summed up as follows: The core instrument of the BMF's legal and technical supervision should now be target dialogs with BaFin. To ensure operational independence, BaFin's supervisory measures will generally not be reviewed ex ante by the BMF. Reports will be more standardised and should follow a risk-based approach. Nonetheless, the BMF may request ad hoc reports or assessments from BaFin where there are concerns about broad effects on the financial market as a whole or on a sector; if critical infrastructure is affected; if there could be a threat of significant harm to investors or consumers or if there is an actual or potential public interest. BaFin informs the BMF of politically important supervisory decisions simultaneously with their publication. Further, there remains a regular exchange of information between the BMF and BaFin, especially on topics and results of discussions in European and international bodies and political developments. With a view to legal ordinances and other publications with a standard-setting character, BaFin will initiate coordination with the BMF in good time. Finally, BaFin retains sole responsibility for its public relations activities as far as they concern its supervisory mandate.

By this, the BMF's involvement is effectively shifted away from legal supervision to a monitoring of target achievement. Yet, the underlying rules of the Financial Services Supervision Act – and the administrative doctrine

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34 A. Thiele, *Finanzaufsicht*, cit., 415 et seq.

35 Principles governing the exercise of legal and technical supervision of BaFin by the Federal Ministry of Finance as of 6 June 2021, point III. and IV.

associated therewith – remain unchanged and so does the formal right of the BMF to intervene in individual cases. As the head of the BMF, the Finance Minister, is part of the federal government that is lead by the Chancellor who according to Article 65 of the Basic Law is responsible for the general guidelines of policy and may be voted out of office by the German parliament according to Article 67 of the Basic Law, we thus find a full chain of legitimation, ensuring that the Finance Minister may be held responsible for the individual actions he takes in this specific field. The German parliament therefore has the right to require the presence of the Finance Minister according to Article 43(1) of the Basic Law at any time.

The frictions this traditional German doctrine creates with Union law are evident at first glance: Article 47(1) SRMR requires all NRAs within the SRM to act independently and only in the public interest. The provision paints a picture of an authority fundamentally and formally independent from political interference, thus an autonomy which goes, without doubt, beyond what BaFin has agreed upon with the BMF.

Nevertheless, in its Judgment on the Banking Union the *Bundesverfassungsgericht* has deemed the restrictions on the chain of command within both the SSM and the SRM to be generally compatible with the German Basic Law.[36] This is particularly relevant as the Court reserves the right to review European legal acts against the standards of the Basic Law. It may declare them inapplicable in Germany if they violate, in a qualified manner, the boundaries of competences conferred on the Union (so-called ultra vires review) or fundamental constitutional principles, in this case for example the principle of popular sovereignty (so-called identity review).

By applying these standards, the Court held that the SRMR has considerably diminished the original level of BaFin's democratic legitimisation.[37] However, in the Court's view this does not violate the principle of popular sovereignty as there are sufficient factors legitimising BaFin's actions within the SRM. The Court lists different examples[38] for these factors – with a varying degree of persuasiveness – with the core of its reasoning being that missing political influence is compensated to a degree that rules out an infringement of popular sovereignty (although the decisions are deemed to lack appropriate legitimisation). Finally, the Court notes that apart from activities within the SSM and SRM, especially in BaFin's securities supervision business unit and AML divisions, the general rules apply.[39] The current status of these rules, as agreed upon by BaFin and the BMF, has been set out above.

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36 BVerfG, Judgment of 30 July 2019 - 2 BvR 1685/14.

37 *Ibidem*, para. 283.

38 *Ibidem*, paras. 285-292.

39 *Ibidem*, paras. 221 and 283.

3.5. Judicial Review and Legal Liability

Effective judicial review and legal liability are further elements that can help to justify the generally insufficient democratic legitimisation of BaFin when it comes to its functions within the SSM and SRM. In its core decision the *Bundesverfassungsgericht* explicitly found that judicial review of BaFin's measures taken according to Article 29(1) SRMR can serve as a supporting element of democratic legitimisation.[40] As financial institutions will usually be confronted with measures taken by the competent NRA – that is, for Germany, BaFin – judicial review will mostly be granted according to national legislation and by national courts, as already foreseen in the reasoning of the SRMR. It thereby makes no difference whether BaFin applies European Regulations with direct effect or European Directives transposed into national law in the individual case. National administrative courts will also be competent to decide if and as far BaFin was following a specific instruction of the SRB when taking the respective measure – though one might argue for a competence of the Court of Justice of the EU in such cases. If national courts are regarded as competent, however, these then might be obliged to initiate a preliminary procedure according to Article 267 TFEU in order to decide on the legality of the respective instruction.

According to these general rules laid down in Sec. 40(1) of the German Administration Procedural Law (*Verwaltungsgerichtsordnung*) it is the administrative courts that are competent to review the measures taken by BaFin in this respect. The claimant will thereby usually have to revert to the action for annulment (*Anfechtungsklage*) according to Sec. 42(1) of the German Administration Procedural Law. The competent administrative court will then either declare the legality of the respective measure or – where it finds the measure to be illegal – destroy its binding force (usually *ex ante*). It is then up to BaFin to decide how to react to such a decision, depending on the reasoning of the court's decision. If and as far as the decision was illegal only on formal grounds it thus may be permitted to retake the respective measure (now obviously respecting all formal requirements). The defeated party (either BaFin or the financial institution) has the right to appeal to higher administrative courts. Only the financial institution, however, finally has the possibility to file a constitutional complaint with the *Bundesverfassungsgericht* claiming a possible infringement of its fundamental rights.

The complexity of resolution-matters and the fact that these will mostly involve a certain amount of complicated predictions concerning the financial stability of the financial institutions involved would usually result in a high degree of discretion on the side of BaFin. National administrative courts would thus restrict themselves to reviewing the defensibleness of the measures taken but would refrain from going too far into the details as this would simply overburden the national courts – BaFin has several hundred competent employees whereas national judges will usually have no employees at all. How should these individual

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40 *Ibidem*, para. 289.

judges be able to reach a robust decision without reverting to the general factual findings of BaFin? However, though this discretion doctrine is mostly accepted in other fields of law, it is not yet clear how the administrative courts will act when reviewing measures taken within the SRM as the *Bundesverfassungsgericht* might demand a stricter form of scrutiny in this field. As mentioned above, judicial review is regarded as an element to justify BaFin's insufficient democratic legitimisation. Granting BaFin too much discretion might therefore be seen as undermining this specific function of effective judicial review. In its core decision the *Bundesverfassungsgericht* did indeed indicate the necessity of such strict scrutiny, although it is not yet clear how this will actually be resolved in practice.[41]

Apart from such formal judicial review BaFin remains politically accountable under the general national rules. According to Article 46(4) SRMR the SRMR shall explicitly be without prejudice to the accountability of national resolution authorities to national parliaments in accordance with national law for the performance of tasks not conferred on the Board, the Council or the Commission and for the performance of activities carried out by them in accordance with Article 7(3) SRMR. As BaFin is formally integrated into the BMF's field of competence it is also integrated in the formal accountability of the BMF towards the German Parliament (*Bundestag*). Members of Parliament can thus ask questions concerning the performance of BaFin, the German Government is obliged to answer. Parliament can also set up a committee of inquiry concerning BaFin according to Article 44 of the Basic Law and may, in this context, invite its President and its Executive Directors as witnesses.

Legal liability of BaFin for its decisions, however, is restricted according to Sec. 4(4) of the Financial Services Supervision Act. Under this provision BaFin fulfils its tasks in the public interest only. According to the German state liability doctrine, however, state liability is generally linked to the infringement of an official duty that at least partly serves the interests of the respective individual. An authority solely acting in the public interest will therefore usually not be liable for individual damages. Consequently, German courts already held that BaFin was not liable for damages that might have occurred due to the defective supervision of *Wirecard AG*.[42] As the relevant provision does not differentiate between measures taken as supervisory and as resolution authority this restriction should also apply to any measures BaFin takes as NRA. Whether such a restriction is compatible with European law requirements has not yet been decided by the Court of Justice. The Court of Justice has, however, found Sec. 4(4) of the Financial Services Supervision Act to be compatible with European law in 2004, that is before the SSM and the SRM were established.[43]

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41 *Ibidem*, para. 229.

42 Regional Court of Frankfurt a. M, Judgment of 19 January 2022, 2-04 O 65/21.

43 ECJ, Case C-222/02 (*Paul and others v. Germany*), para. 47: "In the light of the foregoing, the answer to the second question must be that Directives 77/780, 89/299 and 89/646 do not preclude a national rule to effect that the functions of the national authority responsible for supervising credit institutions

3.6. National Powers

Besides the resolution powers provided for in the SRMR and the BRRD, which are exercised by BaFin's NRA-divisions, the German legislator has equipped BaFin (in its capacity as supervisory authority) with further crisis prevention tools. In their nature these tools resemble early intervention measures as envisaged in Article 16 SSMR and Article 27 et seq. BRRD. This comes in a legal environment where the already considerable overlap of the latter powers with Article 104 CRD creates significant challenges for their practical implementation.[44] Nonetheless, the German legislator has opted to keep a separate set of national crisis prevention tools in the Banking Act. In legal literature it is assumed that these powers, in principle, are subsidiary to the early intervention measures under the BRRD.[45] This assumption is primarily based on the fact that early intervention measures under the BRRD do not necessarily have to be published and hence pose a smaller risk of reputational damages. In addition, the national rules are generally shaped to only apply at a later stage compared to those under the BRRD.

With a view to this set of national powers, previous cases of failing credit institutions (with the latest cases being *Greensill Bank AG*[46] in March 2021 and *Dero Bank AG*[47] in March 2018) have shaped a playbook for Less Significant Institution's ("LSI") crisis management which can be expected to be followed in similar cases. This development is supported by the fact that for most LSIs one can expect the initiation of an insolvency proceeding to be indicated in case of a crisis.

In 2018 BaFin determined that out of a batch of 604 LSIs, based on the then current risk assessment, for 603 institutions an ordinary insolvency proceeding was deemed to be a feasible resolution strategy.[48] This corresponds with the European legislator's expectation as expressed in recital 45 and 46 BRRD. Under these provisions, regular insolvency proceedings should be the default option to wind down failing institutions (cf. also Article 10(3) SRMR).

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are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part oft hat authority".

44 ECB, *Opinion on revisions to the Union crisis management framework* (CON/2017/47), dated 8 November 2017, para. 4.1.

45 D. Bauer-Weiler, J. Struckmann, *Frühzeitiges aufsichtsrechtliches Eingreifen*, in J.-H. Binder, A. Glos, J. Riepe (eds), *Handbuch Bankenaufsichtsrecht* (2nd edition, RWS Verlag, 2020), § 16 para. 135; D. Bauer, A. Hildner, *Die Sanierung, Abwicklung und Insolvenz von Banken – Ein vollendeter Dreiklang?* (2015) DZWiR, 151 (254).

46 See BaFin, *BaFin determines that compensation is payable to Greensill Bank AG's depositors*, press release dated 16 March 2021, available *here*.

47 See BaFin, *BaFin determines that compensation is payable to Dero Bank AG's depositors*, press release dated 14 March 2018, available *here*.

48 BaFin, *Annual Report 2018*, 96.

Where this default option applies, one can expect the deployment of at least three interlinking measures:[49] First, Sec. 46(1) Banking Act empowers BaFin to impose a moratorium. This comprises the powers to

- prohibit the acceptance of deposits, funds or securities of customers,
- prohibit the granting of loans, the acquisition of assets and any off-balance sheet transaction,
- prohibit partners and managers from carrying out their activities, or limit the performance of these activities,
- temporarily impose a ban on sales and payments by the institution,
- order that the institution shall be closed for business with customers,
- prohibit the acceptance of payments which are not intended to meet liabilities towards the institution, unless the competent compensation scheme or other protection scheme fully ensures the satisfaction of the entitled persons, or
- to ban or restrict payments to affiliated undertakings.

This moratorium under the Banking Act must be distinguished from the moratorium envisaged in Article 33a BRRD (as implemented in Sec. 66a Recovery and Resolution Act). While the former is enacted by BaFin's banking supervision business unit, the latter falls within the competence of BaFin's NRA-divisions. This distinction is mirrored by the applicable notification obligations. Pursuant to Sec. 46b(1) Banking Act, the management of a credit institution is obligated to report (imminent) insolvency or over-indebtedness to BaFin's banking supervision line. Separately, it has to inform both BaFin's banking supervision line (i.e. the competent supervisory division) and the competent NRA-division about (imminent) threats to its existence under Sec. 138(1) Recovery and Resolution Act.

Besides the different orders listed above, the moratorium under the Banking Act creates further effects by law. Pursuant to Sec. 46(2) sentence 6 Banking Act, execution procedures, seizures and interim injunctions against the assets of the institution are inadmissible during the moratorium. However, Sec. 46(2) sentence 7 Banking Act orders to apply *mutadis mutandis* the German implementation of the Finality Directive[50] and the Financial Collateral Directive[51]. Hence, transfer orders and netting operations in designated payment systems and securities settlement systems will be executed if they were entered into the system before

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49 For a detailed analysis see J.-H. Binder, *Insolvenzbewältigung bei nicht systemrelevanten Banken*, in J.-H. Binder, A. Glos, J. Riepe (eds), *Handbuch Bankenaufsichtsrecht*, cit., § 17 para. 1 et seq.

50 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 45).

51 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 43).

the moratorium entered into force. Likewise, the institution retains the power to post financial collateral. This also applies if a transaction is carried out and cleared or financial collateral is posted on the day of the order and the other party neither knew nor should have known of the moratorium (Sec. 21(2) sentence 3 Insolvency Code[52]).

With a view to positions in derivative contracts, there are good reasons to expect that a moratorium will trigger a close-out netting under the ISDA Master Agreement. Due to its legal effects described above, it should fall under the term of the bank having "instituted against it, by a […] supervisor […] in the jurisdiction of its incorporation […], a proceeding seeking [….] any other relief under any […] other similar law affecting creditors' rights" (Sec. 5(a)(vii)(4) ISDA Master Agreement).[53]

Under Sec. 46b(1) Banking Act BaFin has the exclusive right to file, as a second step, an insolvency application for all institutions or financial holding companies licensed in Germany. The insolvency proceeding itself is managed by an insolvency court (the local court in whose district the undertaking has its registered office) and is executed by a liquidator. Once the moratorium is imposed, filing for insolvency of the respective institution will hardly be avoided.

Finally, and as a third step, BaFin will usually without undue delay, but in any event no later than six weeks after imposing the moratorium, determine that a compensation event has occurred and inform the relevant deposit guarantee scheme, Sec. 10(2) and 11(2) Deposit Guarantee Act. This will also call into action the voluntary deposit protection schemes. This determination can be expected to be issued once the competent insolvency court has accepted BaFin's insolvency application for the relevant bank and has opened the insolvency proceeding.

Apart from the above, BaFin is eventually responsible for the management of the National Restructuring Fund (Sec. 1 Restructuring Fund Act). As specified in Article 100 et seq. BRRD, the fund can be used to wind down certain types of investment firms under individual supervision and third country branches (Sec. 3(2) Restructuring Fund Act). It thus covers potentially systemic institutions that do not fall within the scope of the SRMR. The questionable scope of the national implementation in Germany has already been discussed above.

As far as institutions within the scope of the SRM are concerned, the fund fulfills an additional role as a payment agent. While the SRB calculates the annual contributions, BaFin collects the necessary data, informs the banks of the payable amounts and collects them in the National Restructuring Fund (cf. Sec. 3(1) sentence 3 Restructuring Fund Act). These contributions are then in a final step transferred to the SRF (Sec. 11a Restructuring Fund Act).

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52 *Insolvenzordnung (InsO)* dated 5 October 1994 (Federal Gazette I, 2866), last amended by Article 11 of the Law of 20 July 2022 (Federal Gazette I, 1166).

53 See J-H. Binder, *Insolvenzbewältigung bei nicht systemrelevanten Banken*, cit., § 17 para. 37.

4. Cooperation

Sec. 6 Recovery and Resolution Act (implementing Article 84(4) BRRD) governs the exchange of information between the authorities and other entities acting within the scope of the Recovery and Resolution Act. Paragraph 1 clarifies that – even if certain tasks are performed separately due to the risk of a conflict of interest – BaFin's NRA-divisions and the supervisory authorities, i.e. the ECB, potential further NCAs within the SSM and BaFin's banking supervision business unit, are permitted to exchange information, to coordinate and to advise each other. The Bundesbank shall also be included in the exchange of information insofar as it concerns information that has emerged during the ongoing supervision of institutions by the Bundesbank or is necessary for this ongoing supervision.[54]

This is again addressed in Sec. 1a(4) of BaFin's RoP. Under this provision BaFin shall ensure close cooperation and mutual exchange of information between the NRA-divisions and all other business areas. Thereby it shall facilitate an effective and efficient preparation and implementation of resolution decisions and measures. In particular, it shall be ensured that the NRA-divisions have access to all information available to organisational units entrusted with (ongoing) supervisory activities.

Sec. 6(2) Recovery and Resolution Act further permits the exchange of information between all authorities and entities acting within the scope of the Recovery and Resolution Act. The latter include *inter alia* the BMF, deposit guarantee schemes, potential acquirers who were approached by the competent authorities, auditors, accountants and legal advisors. For reasons of confidentiality, the passing on of information is limited to cases in which the receipt of the information is necessary to fulfil the relevant duties of the entities involved. Thus, the conditions for sharing information with third parties are somewhat narrower than those for the exchange of information between BaFin's NRA-divisions and the supervisory authorities.

In recovery or resolution cases, banks will often have to seek coordination with BaFin's securities supervision line. This market supervisory role will be alarmed as numerous circumstances in the context of focused supervision, early intervention and crisis management will – in principle – trigger obligations to publish ad-hoc announcements under Market Abuse Regulation ("MAR").[55] While banks can in principle postpone disclosures to the public under Sec. 17(4) and (5) MAR, decisions resorting to the latter provision require regulatory ex-post approval. This provision specifically covers cases of banks or other financial institutions facing temporary liquidity issues. To preserve the stability

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54 Explanatory memorandum on the federal government's draft law on implementing Directive 2014/59/EU (*BRRD-Umsetzungsgesetz*), BT-Drs. 18/2575, dated 2 September 2014, 146.

55 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 1).

of the financial system, banks may therefore delay the public disclosure of such inside information if its disclosure entails a risk of undermining their financial stability and the stability of the financial system and where it is in the public interest to delay the disclosure. As this assessment needs to be approved by the competent authority, BaFin has specific guidelines on how to deal with ad-hoc announcements in cases of supervisory actions and resolution-related measures.[56]

5. The Federal Republic of Germany - Finance Agency GmbH, the Financial Market Stabilisation Authority and the Special Financial Market Stabilisation Fund

Some specific tasks related to banking resolution in a broader sense remained within the competence of the FMSA and the Federal Republic of Germany - Finance Agency GmbH ("Finance Agency"). Before its split-up in 2018, the FMSA acted as German NRA but was also responsible for the management of the Special Financial Market Stabilisation Fund (*Sonderfonds Finanzmarktstabilisierung* – "SoFFin"). After all NRA-related divisions were incorporated into BaFin, the remaining divisions of the FMSA, an entity organized under public law (*Anstalt öffentlichen Rechts*), were transferred into the ownership of the Finance Agency. This included all assets held in SoFFin. These assets were initially acquired during the Global Financial Crisis and comprise 100% of the shares of *Hypo Real Estate Holding GmbH*, a silent partnership contribution in *Portigon AG* and the federal republic's 15% stake in *Commerzbank AG*.

The Finance Agency is organised as a private limited company and is a 100% subsidiary of the Federal Republic of Germany, represented by the BMF. It is responsible for the borrowing and liability management of the federal republic and, meanwhile, the management of SoFFin. Although the Finance Agency is formally entrusted with the ownership of the FMSA, the latter was operationally – but not legally – integrated into the Finance Agency. As a result, the Finance Agency as a private company now de facto owns the publicly organised FMSA.

This somewhat unusual arrangement is owed to the FMSA's only remaining task. It is competent for the supervision of two bad banks under Sec. 8a Financial Market Stabilisation Fund Act,[57] namely *FMS Wertmanagement* (for *Hypo Real Estate Holding GmbH*) and *Erste Abwicklungsanstalt* (for former *WestLB AG*, now *Portigon AG*).[58] For these bad banks, regulatory relief for their operations abroad is – apparently in host country law – explicitly based on the existing supervisory structures. The set-up of an agency within a limited liability company

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56 BaFin, *Leitlinien zur Bestimmung allgemeiner Kriterien für Ad-hoc-Publizitätspflichten und Aufschubmöglichkeiten für Kredit- und Finanzinstitute betreffend bankaufsichtliches Handeln und Abwicklung*, available *here*.

57 *Gesetz zur Errichtung eines Finanzmarkt- und eines Wirtschaftsstabilisierungsfonds (Stabilisierungsfondsgesetz - StFG)* dated 17 October 2008 (Federal Gazette I, 1982), last amended by Article 1 of the Law of 20 December 2021 (Federal Gazette I, 5247).

58 Federal Ministry of Finance, *Monthly Report June 2018*, 10.

therefore leaves these structures formally in place and thus avoids legal risks that might arise in the event of changes.[59]

6. Concluding Remarks

For the past decade, national legislation concerning the recovery and resolution of financial institutions has seen major changes in practically all national jurisdictions – and Germany marks no exception. The regulatory landscape that could almost be described as "fluid" during the years following the Financial- and Euro-crisis, not only with a view to the tools available for crisis management but also to the authorities applying these tools, has now experienced a considerable solidification. This is not least a result of European legal harmonisation and the establishment of the SRM, both rendering previously existing fragmented national regulations obsolete.

Within the current institutional structure in Germany, BaFin now acts as the main NRA with Bundesbank and FSMA fulfilling only complementary functions. This structural centralisation is particularly important with a view to international coordination and collaboration with other national authorities. The internal reforms BaFin has seen in the last years and the specific resolution powers provided for in the respective national legislation should enable it to effectively perform its tasks within the SRM.

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[59] *Ibidem*.

Greece

Christos Hadjiemmanuil

Summary. 1. Greek financial system: structure and supervision – 2. Origins of the Greek supervisory and failure management framework – 2.1. Banking controls and failure management in the post-War period – 2.2. Bank failure management during the Greek public debt crisis – 3. Institutional framework – 3.1. Institutional set-up of the Bank of Greece – 3.2. Scope and organization of supervisory and resolution functions – 3.3. Independence and accountability – 3.4. Organizational and decision-making arrangements of the Greek DGS (TEKE) – 4. Toolbox of bank failure management – 4.1. General legal framework and procedural possibilities – 4.2. Supervisory measures and early intervention – 4.3. Resolution – 4.4. Special liquidation – 4.5. Transfer-based liquidation

1. Greek financial system: structure and supervision*

The Greek financial system is predominantly bank-based. At mid-2024, credit institutions controlled no less than 85,1% of the domestic financial system's total assets, with the rest being shared between insurance undertakings (5,9%), undertakings for collective investment in transferable securities (UCITSs) (5,9%) and a variety of other financial intermediaries. In nominal terms, the banking sector's domestic assets amounted to €295 billion, or 134% of 2023's GDP.[1]

As of 29 February 2024, the banking sector comprised 34 entities: 13 credit institutions incorporated and having their head office in Greece (ten commercial banks and four cooperatives) and 21 branches of foreign banks (19 EU credit institutions and two third-country banks).[2] Greek commercial banks play by far the most significant role in the market, controlling 97,8% of total banking assets,[3] as compared to 0,6% for the cooperative banks and 1,5% for the foreign bank branches, which despite their relatively large number have a very feeble market footprint.[4] Four of the Greek commercial banks[5] qualify as significant institutions (SIs) and are, accordingly, under the direct supervision of the ECB, while the rest are less significant institutions (LSIs)[6] supervised at national level by the Bank of Greece ('BoG'), Greece's central bank and banking supervisor.[7]

Greece's system of financial supervision is organized along institutional, rather than functional, lines. Its previous three-pillar structure, with separate legal frameworks and supervisory institutions for the banking industry, the capital market, and the insurance sector, was supplanted by a twin-peak architecture in December 2010, when a preexisting insurance supervisory agency sector was

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* The views expressed in the text are personal and do not necessarily reflect the institutional viewpoint of the Bank of Greece ('BoG'). An early version of the text was co-authored with Katerina Theodossiou (SRB, formerly senior resolution expert at the BoG). The author would like to thank Diane Fromage (Professor of European Law, University of Salzburg), Christos Gortsos (Professor of Public Economic Law, National Kapodistrian University of Athens), Anna Tsounia (Deputy Directore, BoG Banking Supervision Directorate), Vasilis Spiliotopoulos (Director, BoG Financial Operations Directorate), and Ioannis Tsikripis (BoG Director General for Prudential Supervision and Resolution) for valuable information and comments.

1 BoG, *Financial Stability Review* (Oct 2024), 74-75.

2 BoG, *List of credit institutions operating in Greece*. The branches of the EU credit institutions operate in Greece on the basis of their home-country authorization, in accordance with the European 'passport' regime, while the branches of the third-country banks hold local authorizations issued by the BoG; 4261/2014 (Government Gazette A'107/2014), Articles 4(1) and 18.

3 The Greek banking industry is characterized by significant concentration, with the four SIs holding between themselves around 95% of total banking assets; but as their individual market shares are roughly equal (ranging from 26% to 21%), the market remains competitive.

4 Unsurprisingly, Greece's ratio of assets of foreign-controlled branches and subsidiaries to GDP is by far the lowest in Europe. See ESRB and ECB, *ESRB Risk Dashboard* (14 Sep 2023), 36 (figure 7.1).

5 Namely, Alpha Bank SA, Eurobank SA, National Bank of Greece SA, and Piraeus Bank SA.

6 Namely, Aegean Baltic Bank SA, Attica Bank SA, Optima Bank SA, VivaBank Single Member Banking SA, Snapi SA, Cooperative Bank of Chania LLC, Cooperative Bank of Epirus LLC, Cooperative Bank of Karditsa LLC, and Cooperative Bank of Thessaly LLC.

7 See below, text to nn 122-133.

abolished and its functions were transferred to the BoG.[8] Despite the concentration of administrative responsibility in the hands of the BoG,[9] each sector continues to be regulated under a distinct legal framework.[10] Responsibility for the prudential and conduct-of-business supervision of the capital market and the securities intermediaries rests with a quasi-independent administrative agency, the Capital Market Commission,[11] with the caveat that the prudential supervision of the securities activities of credit institutions is reserved for the BoG.[12]

2. Origins of the Greek supervisory and failure management framework

2.1. Banking controls and failure management in the post-War period

With regard to banking, it is interesting to note that Greece's first fully-fledged prudential regime for credit institutions was not introduced until 1992, with the national implementation of the Second Banking Directive.[13] Prior to this, banks were undoubtedly subject to strict discretionary government controls; these, however, served general economic policy objectives. In contrast, a detailed and comprehensive system of prudential regulation was lacking.

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8 Law 3867/2010 (Government Gazette A'128/2010), Article 1.

9 It should be noted that, in addition to the two main sectors, the BoG is also vested with supervisory functions in relation to a variety of other financial institutions, including leasing, factoring and credit companies, residential credit intermediaries, payment institutions, electronic money institutions, account information service providers, bureaux de change, credit servicing firms, and microfinance institutions. See Statute of the BoG, Article 55A, as amended.

10 The regulatory framework for the insurance sector is now set out in three instruments implementing the relevant European norms: Law 4364/2016 (Government Gazette A'13/2016), as amended, transposing Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ 2009 L 335/1; Law 4537/2018 (Government Gazette A'84/2018), Articles 129-130, establishing administrative arrangements in relation to Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ 2014 L 352/1; and Law 4583/2018 (Government Gazette A'212/2018), Part II (Articles 2-50) and Annex XIII, as amended, transposing Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ 2016 L 26/19.

11 Law 1969/1991 (Government Gazette A'167/1991), Chapter IV (Articles 76-81), as amended.

12 Law 4514/2018 (Government Gazette A'14/2018), Article 67(1). Specifically, the BoG is responsible for those institutions' compliance with their authorization requirements and general obligations relating to continuous supervision, their corporate governance and organizational requirements, conflicts of interest, algorithmic trading, management of electronic systems through which securities are offered to clients, participation in multilateral trading facilities and organized trading facilities, appointment of tied agents, certification of professional suitability of staff and agents, participation in an investor compensation scheme, and exercise of freedom of movement. In contrast, conduct-of-business and transactional matters remain under the responsibility of the Capital Market Commission.

13 Law 2076/1992 (Government Gazette A'130/1992), transposing the Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ 1989 L 386/1 ('Second Banking Directive').

Specifically, in the wake of the Second World War, the sparse, laissez-faire legislative norms on the carrying on of banking business of the pre-War period[14] gave way to a highly interventionist regulatory regime, operated under the auspices of the Currency Committee (Νομισματική Επιτροπή), a committee composed of government ministers, with the participation of the Governor of the BoG.[15] From 1948[16] until 1982, when it was finally abolished and most of its tasks were transferred to the BoG,[17] the Currency Committee exercised wide and discretionary powers of control over the country's credit system.[18] In 1951, a formal system of prior licensing and continuous supervision of banks was introduced.[19] Under that system, the Currency Committee was vested with discretionary powers to approve the establishment of commercial banks and their individual local branches, as well as of branches of foreign banks,[20] and was further empowered to establish general licensing criteria.[21]

It was in this context that three characteristic elements of the Greek approach to bank failure management made their first appearance in the legislation: the mandatory recapitalization of weak banks on the initiative of the banking

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14 The pre-WWII provisions covered matters such as: the mandatory legal form of commercial banks, which should be set up as sociétés anonymes, the approval of banking names by the Minister of National Economy/Trade, the minimum corporate capital requirements for banks, the minimum liquid reserves that banks should keep against their deposit base, and the format of banks' financial reports and accounts; Law 5076/1931 (Government Gazette A'186/1931), Articles 10-18. Banks submitted monthly accounts to the Minister of Finance, who should publish them in summary form in the Government Gazette; Legislative Decree of 10 November 1927 (Government Gazette 246/1927), Article 13; and Decree of 7 August 1930 (Government Gazette A'279/1930). Until 1951, banks were not subject to a formal licensing regime.

15 The Currency Committee was originally set up as the governing body of a projected Greek currency board and counted amongst its five-member composition two foreign experts, one from the US and another from the UK; Emergency Law 1015/1946 (Government Gazette A'70/1946). With the abandonment of this plan, it soon became the primary governmental decision-making body in the field of monetary, credit and foreign-exchange policy. On the eventual composition of the Currency Committee, see Law 400/1976 (Government Gazette A'203/1976), Article 6(1). Secretarial and administrative facilities for the Currency Committee were provided by the BoG, which was also responsible for the monitoring of, and inspections in, commercial banks.

16 Legislative Decree 588/1948 (Government Gazette A'85/1948), placing the financial system's credit function under the direct control of the state and at the service of its economic policy objectives, including, in particular, the provision of financing support to specific productive sectors. The state's control was exercised through the Currency Committee, which was empowered to impose quantitative and qualitative constraints on bank lending, determine banks' interest rates and charges, set discriminatory interest rates for particular sectors and activities, set limits on individual transactions, and vary banks' hefty reserve requirements.

17 Law 1266/1982 (Government Gazette A'81/1982), Articles 1-3. The abolition of the Currency Committee did not result in an immediate abandonment of the intrusive controls over the operations of the banking system, which remained in place until the late 1980s.

18 Law 400/1976, Article 6(2), esp. point (f), specifying that the Currency Committee exercises control over the commercial banks through the relevant services of the BoG.

19 Emergency Law 1665/1951 (Government Gazette A'31/1951).

20 Emergency Law 1665/1951, Article 2.

21 Emergency Law 1665/1951, Article 12.

authorities (originally the Currency Committee,[22] and after its abolition, the BoG); the power of the authorities, if a bank had breached its legal or regulatory obligations, to withdraw its authorization or, as an alternative, to appoint a 'commissioner' (επίτροπος), i.e., an administrator mandated to act jointly with the bank's directors or even to replace them completely in the exercise of managerial control;[23] and the reliance on a purely administrative system of 'special liquidation' (ειδική εκκαθάριση) for banks whose authorization had been withdrawn or which were unable to honor their obligations to their creditors.[24]

In practice, the relevant provisions of the 1951 statute were rarely used as set out in its text. Instead, on two occasions (1953 and 1975) special legislative measures were used to forcibly nationalize large swathes of the banking system, eventually leading to an almost complete domination of the market by state-owned institutions.[25] While the banks targeted by these measures were not insolvent, in the 1980s the BoG (which by that time had taken over the functions formerly exercised by the Currency Committee) used the 1975 provisions on 'emergency' interventions to bring two patently insolvent privately-owned banks under official management, thus eschewing their placement in special liquidation.

The interventionist regulatory regime outlined above was finally dismantled in the early 1990s, when the banking system was liberalized and the gradual privatization of state-owned financial institutions commenced. The liberalization process coincided with the aforementioned[26] transposition of the Second Banking Directive's newly harmonized European system of prudential supervision.[27]

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22 The Currency Committee was empowered to demand the recapitalization of particular banks, if their capital had been depleted as a result of losses or if they appeared to the Currency Committee to be insufficient in view of the banks' business needs; Emergency Law 1665/1951, Article 6.

23 Emergency Law 1665/1951, Article 8.

24 Emergency Law 1665/1951, Article 9; and Currency Committee Decision of 12 July 1956 (Government Gazette A'168/1956).

25 In 1953, special legislation empowered the government to force banks to merge; Law 2292/1953 (Government Gazette A'31/1953), esp. Article 10; and Decree of 26 February 1953 (Government Gazette No A'39/1953). In 1975, yet another piece of legislation empowered the Currency Committee 'in cases of emergency' to replace with immediate effect all organs of the bank concerned, including the general meeting of shareholders, with a 'provisional commissioner'; Presidential Decree 861/1975 (Government Gazette A'275/1975); and Law 236/1975 (Government Gazette A'275/1975). On both occasions, the legislation provided for the mandatory recapitalization of the banks concerned with public funds, thus effectively abolishing the preference rights of existing shareholders; Law 2292/1953, Article 12; and Law 431/1976 (Government Gazette A'236/1976), respectively. While the Greek courts upheld the constitutionality of the provisional administration system, the ECJ eventually declared it incompatible with the provisions on shareholders' rights in the Second Company Law Directive (Council Directive 77/91/EEC, OJ 1977 L 26/1); Case C-441/93, *Panagis Pafitis v Trapeza Kentrikis Ellados AE*, ECLI:EU:C:1996:92.

26 See above, text to n 13.

27 Law 2076/1992. The substantive scope (scope *ratione materiae*) of prudential supervision was defined in Article 18 of that enactment. Following the 2006 recasting of the European prudential framework,

In so far as bank failure management was concerned, the reforms included the establishment for the first time of a national deposit guarantee scheme (DGS),[28] as well as the abolition of the 1975 system of interventions.[29] However, the nominally 'provisional' official administration of one institution (the scandal-ridden Bank of Crete) continued until 1995, at which point the bank was finally resolved by means of an *ad hoc* transfer-based scheme, entailing the establishment of a bridge bank, whose considerable funding gap was covered with public funds and which was then sold to one of the larger Greek banks, and the placement of the old bank's residual entity in special liquidation.[30] Significantly, the previous period's systems of special administration (appointment of commissioners) and special liquidation survived the reforms and were carried over in the post-liberalization prudential regime.[31]

2.2. Bank failure management during the Greek public debt crisis

In the years following Greece's entry in the single currency area, the Greek banking sector grew significantly. The larger banks also increased their cross-border presence through subsidiaries and branches in Greece's neighboring countries. However, the eruption in 2008 of the Global Financial Crisis ('GFC'), which in the case of Greece was followed by an exceptionally severe and long-lasting public debt crisis that only subsided in late 2015, put an abrupt end to the good times. The banking system was plunged into a deep and protracted downturn, whose potentially fatal consequences Greek credit institutions could only avoid with very large-scale public support.

To be more precise, from 2008 onwards the worsening macroeconomic evironment led to tighter liquidity conditions and a rapid increase of non-performing loans (NPLs) in banks' portfolios. In the early stage of the crisis, the banks' problems appeared to be manageable. In late 2008, an increase in the DGS's deposit cover[32] and a set of liquidity-support measures, encompassing the extension of government guarantees as well as an injection of cash through the issuance to the state of preference shares redeemable

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the 1992 statutory framework was replaced by a new statute; Law 3601/2007 (Government Gazette A'178/2007), transposing Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177/1 ('CRD').

28 Law 2114/1993 (Government Gazette A'4/1993), Articles 1-2. The rudimentary statutory provisions of 1993 was replaced before long by a more detailed framework, transposing the original Deposit Guarantee Directive; Law 2324/1995 (Government Gazette A'146/1995), Part Three (Articles 40-56), transposing Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ 1994 L 135/5 ('Deposit Guarantee Directive').

29 Law 2114/1993, Article 3.

30 Law 2330/1995 (Government Gazette A'172/1995).

31 Law 2076/1992, Article 25.

32 Law 3714/2008 (Government Gazette A'231/2008), Article 6.

within five years, in exchange for marketable government bonds,[33] helped to maintain confidence in the banking system and avert runs by depositors and interbank lenders.

Nonetheless, one year later, as the GFC appeared to be subsiding, international financial markets focused on the precarious state of Greece's public finances. Faced with a rapid loss of market access, the government was forced to seek official assistance from its European partners and the International Monetary Fund (IMF). In May 2010, the country thus entered into the first of three consecutive financial assistance programmes.[34]

As the situation deteriorated, the major credit rating agencies proceeded to steep downgrades of both the sovereign and the Greek banks. Not only were the latter cut off from the international wholesale money markets but they also experienced a massive outflow of deposits, as many Greek depositors sought to cover themselves from the consequences of a potential sovereign default and/or exit from the euro area by transferring their savings abroad. New waves of deposit outflows followed in early 2012 and, in particular, in the first half of 2015, during the prolonged and difficult negotiations that preceded, respectively, the second and the third financial assistance programmes. Overall, between 2010 and 2015 the Greek banking system lost almost half of its deposit base.[35] The resulting gap on the banks' liability side was addressed by means of massive refinancing from the Eurosystem and emergency liquidity assistance (ELA) extended by the BoG, acting with the authorization of the ECB's Governing Council but on its own account and risk.[36]

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33 Law 3723/2008 (Government Gazette A'250/2008), as amended. The statute was subsequently amended to extend the period for redemption and enable the conversion of the preference shares into contingent convertible bonds (CoCos); Law 4484/2017 (Government Gazette A'250/2017), Article 80.

34 On the three Greek programmes, see C. Hadjiemmanuil, *The Euro Area in Crisis, 2008-18*, in F. Amtenbrink, C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press, 2020), 1253-1362, at 1278-1286, 1311-1321, 1349-1357. On the measures taken during the crisis period to support and repair the banking system, see C.V. Gortsos, *Safeguarding the Stability of the Greek Banking System Amidst the Fiscal Crisis in the Euro Area: Arrangements Before and After the Establishment of the European Banking Union*, (2017) European Business Organization Law Review, 479-502.

35 At end-2009, the total domestic deposits by household and non-financial corporate stood at €234.55bn. At the start of the first financial assistance programme six months later, these had fallen to €214.14bn. By March 2012, when the Greek sovereign debt was restructured, opening the way to the activation of the second programme, they were down to €159.98bn. In August 2015, at the start of the third and final programme, they had reached a low of €116.14bn. In recent years, the stock of domestic deposits has grown steadily, rising to the level of €190,7bn at end-September 2023 (*Eurosystem statistical data*).

36 On ELA, see: C. Gortsos, *Last Resort Lending to Solvent Credit Institutions in the Euro Area Before and After the Establishment of the Single Supervisory Mechanism (SSM)*, in *ECB Legal Conference 2015: From Monetary Union to Banking Union, on the Way to Capital Markets Union, New Opportunities for European Integration* (ECB, 2015), 53-76; D. Murphy, P. Fisher, *Euro Area Policies: Financial Sector Assessment Program – Technical Note: Liquidity Management*, IMF Country Report No 18/229 (29 June 2018); S.E. Dietz, *The ECB as Lender of Last Resort in the Eurozone? An Analysis of an Optimal Institutional Design of Emergency Liquidity Assistance Competence within*

In addition to their liquidity problems, however, the Greek banks were soon hit by serious problems of solvency, as the deteriorating state of the Greek economy and, in particular, the unprecedented collapse of GDP caused NPLs to balloon. The system-wide NPL-to-total-loans ratio rose from 5% at end-2008 to 32.6% at end-2015.[37] Matters were made much worse with the restructuring in March 2012 of the Greek sovereign bonds held by the private sector (known as 'private sector involvement' or 'PSI'). This saddled the four systemically important Greek banks, which maintained very substantial positions in the relevant instruments, with €37.7bn of additional losses, thus wiping out their entire capital base. As a result, their bailout (recapitalization) by the state was unavoidable. The relevant corporate actions were conducted in December 2012 and resulted in the four banks' provisional nationalization.[38]

Two further rounds of recapitalization of the core institutions became necessary in the following years. First, the continued deterioration of the Greek economy and the rapid accumulation of further NPLs necessitated a second recapitalization in late 2013. By-mid 2014, the condition of the banking sector appeared to have stabilized. Nonetheless, in the first semester of 2015, the situation took another sharp turn for the worse because of a prolonged stalemate in the negotiations between the country and its partners on the terms of further financial assistance, which precipitated a massive flight of deposits, followed by a bank holiday and the imposition of strict capital controls. As a result, yet another recapitalization took place in November 2015. While both the second and the third recapitalizations were partly state-funded, private investors also contributed to a substantial extent.

The state's contribution to the recapitalizations was funded out of the financial assistance programmes' financial envelopes. That the public debt crisis would imperil the solvency of Greek banks was evident from day one. Thus, all three financial assistance programmes envisaged substantial support for the banking sector. In total, €75bn were earmarked for this purpose. A special purpose entity, the Hellenic Financial Stability Fund (Ταμείο Χρηματοπιστωτικής Σταθερότητας, or 'HFSF') was established in

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the Context of the Banking Union, (2019) Maastricht Journal of European and Comparative Law, 628-668; and E. Kostika, N.T. Laopodis, *Assessing the Effectiveness of the Emergency Liquidity Assistance Tool in the Euro Area*, (2022) International Journal of Finance and Economics, 4142-4153.

37 M. Mavridou, A. Theodossiou, T. Gklezakou, *The Greek Experience of Restructuring and Recapitalization of Problem Banks*, in *Bank Resolution and 'Bail-In' in the EU: Selected Case Studies Pre and Post BRRD* (World Bank Group, 2016), 32-37, at 34. At end-2015, non-performing exposures (NPEs) as defined by the EBA stood at 44.2% of total credit exposures; EBA, Final draft Implementing Technical Standards on supervisory reporting on forbearance and non-performing exposures under article 99(4) of Regulation (EU) No 575/2013 (EBA/ITS/2013/03/rev1, 24 July 2014) (see now CCR, Article 47a, as inserted by Regulation (EU) 2019/630, OJ 2019 L 111/4).

38 The old shareholders' stakes in the banks' capital were effectively eliminated through write down and dilution, while new private investors participated to the recapitalization only to a limited extent.

2010,[39] under the first assistance programme, to serve as the conduit for the channeling of the relevant resources. Separate from the Greek state and governed under special provisions guaranteeing that the members of its governing bodies (not all of which are Greek citizens) are appointed with the agreement of the country's official lenders (represented by the European Commission, the ECB, and the European Stability Mechanism [ESM]),[40] the HFSF was the main investor in the 2012 recapitalization of the four core banks, in which it injected €32.7bn of share capital, with the Greek government providing an additional €5.1bn in the form of preference shares.[41] This was the largest share of all public and private funds used for recapitalization purposes between 2011 and 2015, which totalled €63bn.

As a result of its interventions, the HFSF became the majority shareholder of Greece's four SIs and the largest LSI. Even though the second and third round of recapitalizations and corporate actions resulted in significant dilution of the HFSF's stakes from the first recapitalization, the HFSF continued until recently to participate in the five institutions as majority or qualifying shareholder. Following the enactment in 2022 of a clear mandate to disinvest,[42] however, the disposal of remaining assets has accelerated. In particular, between September 2023 and October 2024, the HFSF fully exited two SIs (Eurobank and Alpha Bank) by selling its minority stakes in them and reduced its largest position (a 40.4% stake at the National Bank of Greece) by more than three quarters through two public offers. As a result, as of end-2024 the HFSF portfolio came to consist of holdings in only one SIs and one LSI (8.39% at the National Bank of Greece and 72.54% in Attica Bank).[43] The HFSF's full exit from the market in the near future appears likely, allowing its final dissolution to take place as scheduled on 31 December 2025.[44]

Significantly, the 2012 recapitalization of the core banks was part of a wider plan for the restructuring of the banking sector.[45] Legally, this relied

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39 Law 3864/2010 (Government Gazette A'119/2010). In the 13 years since its enactment, HFSF's statute has been amended on no less than 29 occasions.

40 Law 3864/2010, Article 4a, as inserted by Law 4340/2015 (Government Gazette A'134/2015), Article 1(4).

41 In pursuance of Law 3723/2008.

42 Law 4941/2022 (Government Gazette A'113/2022), Article 3.

43 HFSF, *Our Portfolio*.

44 Law 3864/2010, Article 2(6), as amended by Law 4941/2022, Article 3.

45 See M. Mavridou, A. Theodossiou, T. Gklezakou, *The Greek Experience of Restructuring and Recapitalization of Problem Banks*, cit. The sector's drastic restructuring followed a strategic assessment that the BoG had conducted in March 2012. The viability of individual banks was assessed by reference to a set of quantitative and qualitative criteria. The four largest banks, which were identified as 'core banks' were deemed to be eligible for recapitalization with public moneys (bailout) if they proved unable to raise new capital from private sources. In contrast, smaller, non-core institutions would be resolved by mid-2013, if private capital were not forthcoming. BoG, *Report on the Recapitalisation and Restructuring of the Greek Banking Sector* (December 2012), 5-6.

on a set of novel resolution tools that had been enacted a year earlier. Indeed, the profound impairment of the Greek banks' balance sheets had incentivized the Greek authorities to adopt at a relatively early point some of the resolution tools that gained prominence in the wake of the GFC and would be eventually adopted at Union level as part of the harmonized resolution regime of the Bank Recovery and Resolution Directive ('BRRD').[46] Thus, in 2011, in the midst of a rapidly deteriorating economic situation and while the first financial assistance programme was faltering, new provisions on banking resolution were inserted in the main banking statute.[47] The new framework contained three resolution tools: the mandatory recapitalization of the failing bank by the BoG-appointed commissioner, always in accordance with the BoG's specific instructions; the transfer of portfolios of assets and liabilities to a suitable acquirer (i.e., the equivalent of the BRRD's sale of business tool) on the basis of a decision of the BoG; and the creation of a bridge bank, to which the business of the failing bank could be transferred in whole or in part, on the basis of a ministerial decision of the Minister of Finance, acting on a proposal from the BoG.[48]

Between 2011 and 2015, the new tools were used extensively, in combination with the preexisting provisions on special liquidation, to resolve, restructure and/or transfer the business of numerous smaller banks.[49] In total, thirteen non-core institutions (namely, six banking corporates, six cooperative banks, and the central institution of the cooperative sector) were placed in resolution on the basis of the 2011 provisions.[50] The resolution of another institution (a cooperative bank) was carried out in late 2015 under

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46 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 […], OJ 2014 L 173/190 ('Bank Recovery and Resolution Directive', or 'BRRD').

47 Law 3601/2007, Articles 63A-63G, as inserted by Law 4021/2011 (Government Gazette A'218/2011), Article 4. The 2011 legislation introducing an initial set of resolution tools, which, as we have seen, in addition to the sale of business and bridge bank tools also encompassed the mandatory recapitalization of failing banks. When a new banking statute was adopted in 2014, these provisions were reenacted in largely identical form; Law 4261/2014, Articles 139-144. A year later, however, they were repealed by the statute transposing the BRRD; Law 4335/2015 (Government Gazette A'87/2015), Article 2-130(1).

48 Law 3601/2007, Articles 63C, 63D, and 63E-63F, respectively. Presaging the BRRD's 'no creditor worse off' principle, the legislation provided that the Greek state should compensate any shareholders or creditors who, as a result of the application of a resolution option, were left with a financial outcome worse than what would have been the case in a putative special liquidation; Law 3601/2007, Article 63G.

49 On the legal tools available to the authorities at the time, see G. Kounadis, *The Tough Questions*, (2015) 7 International Financial Law Review, 46-48.

50 These included: Proton Bank, T Bank (2011), ATEbank, Achaiki Cooperative Bank, Cooperative Bank of Lamia, Cooperative Bank of Lesvos-Limnos (2012), TT (former Postbank), Cooperative Bank of Dodecanese, Probank, First Business Bank (FBB), Cooperative Bank of West Macedonia, Cooperative Bank of Evia (2013), and Panellinia Bank (2015). The resolution actions took place under the 2011 provisions as originally inserted in Law 3601/2007 or (in the last case) as reenacted in Law 4261/2014.

a newly-enacted statute transposing the BRRD.[51] In twelve cases, the sale of business tool was employed for the purpose of transferring the relevant institutions' deposits alongside the good part of the loan portfolio (in the case of banking corporates) or merely the deposits (in the case of cooperative banks, whose asset portfolios were deemed to be of particularly low quality), while the residual entities were placed in liquidation. In the remaining two cases, bridge banks were created to continue the business of the problem institutions.

In all cases, a primary objective of the BoG's resolution strategy was to ensure full protection of uncovered deposits, in order to maintain depositors' confidence and avoid further deposit outflows. In contrast, the shareholders' and cooperative members' shares in their institutions were fully written off, while in two cases subordinated debt was also wiped out. The application of a similar approach would be impossible under the BRRD's provisions on mandatory bail-in at a level of 8% of total liabilities, including own funds,[52] which came into force in 2016.[53] In many instances, reaching the 8% threshold would have required the bail-in of uncovered deposits. In the midst of a systemic crisis, however, this would have probably triggered further loss of confidence and mass deposit withdrawals, with grave consequences for the remaining banks.[54] Moreover, in all case it was legally possible to finance the costs of the resolution with state aid or resolution fund resources at a level that would not be permissible after the coming into effect in 2016 of the BRRD's provisions on bail-in (which set an upper limit of 5% of total liabilities, including own funds, for the contribution of resolution funds to the funding of resolution).[55] The total cost of these operations amounted to €15.19bn; the bulk (€13.48bn) came from the financial envelopes of the first and second financial assistance programmes and was channeled through the HFSF, while a lesser sum (€1.7bn) was covered by the Greek DGS, the Hellenic Deposit and Investment Guarantee Fund (TEKE),[56] acting in its capacity as national resolution fund on four occasions.

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51 Cooperative Bank of Peloponnese Coop Ltd (2015). The institution was the first to be resolved under Law 4335/2015, Article 2, which transposed the BRRD into Greek law. On that occasion, however, it was possible to avoid the harshest consequences of the new framework, because the resolution action took place immediately prior to the entry into force of the provisions on bail-in.

52 BRRD, Article 44(5)(a).

53 BRRD, Article 130(1); and Law 4335/2015, Article 3(1).

54 For the view that bail-in could be inappropriate in case of systemic crisis, see: C. Hadjiemmanuil, *Special Resolution Regimes for Banking Institutions: Objectives and Limitations*, in W.-G. Ringe, P.M. Huber (eds), *Legal Challenges in the Global Financial Crisis: Bail-Outs, the Euro and Regulation* (Hart Publishing, 2014), 209-235, at 223-228; and E. Avgouleas, C. Goodhart, *Critical Reflections on Bank Bail-ins*, (2015) Journal of Financial Regulation, 3-29, at 27-29.

55 BRRD, Article 44(5)(b).

56 On TEKE, see below, section 3.4.

Table 1

Resolution cost for the Greek credit institutions (Source: Bank of Greece)

Amounts in mn €	Credit Institution	Date of Resolution	Resolution Tool	Acquirer	Resolution Cost	Funded by HFSF	Funded by HIDGF
Resolved banks	Proton Bank	9/10/2011	Bridge Bank	-	1.122	260	862
	T-Bank	17/12/2011	Sale of Business	Hellenic Post Bank	677	227	450
	Cooperative Lesvos-Limnos	23/3/2012	Sale of Business	National Bank of Greece	56	56	
	Achaiki Cooperative	23/3/2012	Sale of Business	National Bank of Greece	209	209	
	Cooperative of Lamia	23/3/2012	Sale of Business	National Bank of Greece	55	55	
	ATE Bank	27/7/2012	Sale of Business	Piraeus Bank	7.471	7.471	
	Hellenic Post Bank	18/1/2013	Bridge Bank	-	3.733	3.733	
	First Business Bank	10/5/2013	Sale of Business	National Bank of Greece	457	457	
	Probank	26/7/2013	Sale of Business	National Bank of Greece	563	563	
	Cooperative of Western Macedonia	8/12/2013	Sale of Business	Alpha Bank	95	95	
	Cooperative of Evia	8/12/2013	Sale of Business	Alpha Bank	105	105	
	Cooperative of Dodecanisos	8/12/2013	Sale of Business	Alpha Bank	259	259	
	Panellinia Bank	17/4/2015	Sale of Business	Piraeus Bank	297		297
	Cooperative of Peloponnese	18/12/2015	Sale of Business	National Bank of Greece	93		93
TOTAL RESOLUTION COST:					15.191	13.489	1.702

The special liquidation proceedings relating to the residual estates of the fourteen credit institutions resolved during the crisis (plus that of another bank whose special liquidation had started as early as 1996[57]) were organizationally streamlined in 2016, when the BoG replaced the various special liquidators with a single liquidator (the newly formed, privately owned PQH Single Special Liquidation S.A.).[58] The concentration of responsibility for all proceedings in the hands of a single liquidator, however, did not affect the distinctiveness of each institution's liquidation nor did it result in any commingling of assets.[59]

The resolution actions of this period led to a drastic reduction in the number of Greek credit institutions (from 35 in 2009 to only fifteen in 2021). The consolidation of the domestic banking industry was accompanied by the exit of many foreign banks from the Greek market.[60] The sector's transformation was also evident in the attempts of the remaining banks to rationalize their operations

57 Bank of Crete. The institution had failed in 1988, as a result of extensive frauds committed by its main shareholder and CEO. After seven years of operation under a BoG-appointed commissioner, it was resolved by spinning off the good part into a bridge institution, which was sold to another bank, while leaving the residual estate for special liquidation. The operation was carried on under special legislation; Law 2330/1995 (Government Gazette A'172/1995).

58 BoG Credit and Insurance Committee Decision No 182/1/4.4.2016 (Government Gazette B'925/2016). By the same decision, PQH took over the special liquidation of the leasing subsidiary of ATEbank. More recently, it has been appointed by the BoG as special liquidator of three insolvent non-bank financial companies.

59 However, more recently the special liquidator was allowed to use temporarily available funds of one set of proceedings to provide liquidity to another.

60 Between 2010 and 2013, the Greek subsidiaries of three foreign banks were acquired by local institutions, while the branches of eight other foreign institutions suspended their operations. In addition, during the Cyprus crisis of March 2013, the Greek branches of three Cypriot banks were ring-fenced from the resolution of their respective institutions and transferred mandatorily to a Greek bank with the connivance of the BoG in order to prevent contagion.

and cut costs by downsizing their traditional distribution channels (branch networks and ATMs), reducing staff numbers, and promoting the digitalization of services (e-banking).

The transformation took place in the context of an impaired credit mechanism. The negative macroeconomic situation, ineffectual credit enforcement mechanism, and generalized uncertainty incentivized banks to significantly reduce their new lending, thus leading to large scale deleveraging.[61] At the same time, the accumulation of NPLs continued unabated, with the stock of NPLs reaching a peak of €107.2bn in March 2016.

Despite the more benign macroeconomic conditions prevailing from 2017 onwards, the enormous volume of NPLs continued to impede the repair of the credit mechanism. To cleanse the banks' balance sheets of NPLs, in lieu of establishing an asset management company, the Ministry of Finance launched the Hellenic Asset Protection Scheme, or 'Hercules' scheme. Modeled on the Italian GACS bad loan scheme ('Garanzia Cartolarizzazione Sofferenze'), Hercules involves the transfer of pools of NPLs to private securitization vehicles, which buy the NPLs from the banks with funds raised by selling notes to investors. The NPLs are thus removed from the banks' balance sheet and managed by credit servicers. The government provides credit enhancement for the relevant transactions in the form of a guarantee of repayment of the senior (more secure) notes issued by the securitization vehicles, and receives in return a commission at market terms. Following extensive discussions with the European Commission (DG Comp) to ensure the scheme's compatibility with the European state regime,[62] the statute authorizing Hercules was enacted in December 2019.[63] During Hercules' first phase, the four SIs utilized the scheme in order to securitize NPLs with a gross book value of €31.3bn. The original scheme has been prolonged three times, and is due to finally lapse on 30 June 2025.[64]

With the help of Hercules and the write down or curing of certain NPLs in the banks' portfolios, by end-June 2024, the total stock of NPLs (including NPLs that had been generated during or after the Covid-19 crisis) had shrunk to

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61 From 2011 through 2018, credit growth was invariably negative. In 2019, credit to non-financial enterprises started to expand, but credit to households continues to this day to move in negative territory. See BoG, *Financial Stability Review*, cit., 18, 27.

62 The Commission considered that the scheme in its final form did not constitute state aid; State Aid SA.53519 – Greece – Hellenic Asset Protection Scheme ("Hercules"), C(2019) 7309 final (10 October 2019).

63 Law 4649/2019 (Government Gazette A'206/2019). See also M. Andrianos, M. Karampotsiou, *Asset Protection Scheme in Greece (Hercules)* (Kyriakides Georgopoulos Law Firm 2019).

64 Law 4818/2021 (Government Gazette A'124/2021), Part B (Articles 19-33), and Law 5072/2023 (Government Gazette A'198/2023), Part E (Articles 106-112), amending Law 4649/2019; and Commission's clearances, State Aid SA.62242 (2021/N) – Greece – Prolongation of the Hercules Scheme, C(2021) 2545 final (9 April 2021); State Aid SA.109365 (2023/N) – Greece – Re-introduction of the Hercules Scheme, C(2023) 8034 final (28 November 2023); and State Aid SA.116229 (2024/N) – Greece – Prolongation and amendment of the reintroduced Hercules scheme, C(2024) 8749 final (13 December 2024).

€10.4bn, with their volume declining by 90.3% from its March 2016 peak and the NPL-to-total-loans ratio falling to 6.9%.[65]

It should be noted that Hercules is not operated by the Greek banking authorities but by the Ministry of Finance; and it constitutes by nature a special, time-limited response to the Greek banking sector's legacy problems. As such, it does not form part of the standing bank failure management framework. It is to the latter that we now turn.

3. Institutional framework

3.1. Institutional set-up of the Bank of Greece

The BoG was founded in 1927[66] and commenced operations in May 1928 as the country's central bank (bank of issue).[67] The Statute of the BoG,[68] which has the force of statutory law, has been repeatedly amended.[69] The most important amendments were made in 1998 and 2000, in preparation of Greece's entry to the single currency area; these amendments modernized the operational framework of the BoG and brought in it line with the provisions of the Treaty on European Union and the Statute of the European System of Central Banks (ESCB).[70]

Mandate. In particular, the 1998 amendment[71] established that the primary objective of the BoG is to pursue price stability as an integral part of the ESCB, and defined its main tasks, which would henceforth comprise:

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65 While this NPL ratio is the lowest in 13 years, it remains the highest in the EU. Moreover, the LSI's NPL ratio remains exceptionally high (36.4%). BoG, *Financial Stability Review*, cit., 38-40. In addition, while the bulk of NPLs have been moved out of the banks' balance sheets, their workout under the control of the credit services is progressing slowly. As a result, the wider economy is still burdened with debt overhang and a large number of debtors remain unable to access new bank credit; BoG, *Annual Report 2022* (Sep 2023), 30.

66 Law 3424/1927 (Government Gazette A'298/1927), Article 1(b), ratifying the original text of the Statute of the BoG, as set out in Annex IV of the Protocol of Geneva of 15 September 1927, whereby the League of Nation granted a sterling loan to Greece.

67 Law 3434/1927, Article 2.

68 For the latest amended text, see BoG, *Statute: Tenth Edition* (2016). All references to Statute of the BoG in the following footnotes are to this text.

69 Amendments of the Statute of the BoG, except for capital increases, can be made by simple decision of the General Meeting of Shareholders, which must be then be submitted to Parliament through the government for ratification in the form of statutory legislation; Statute of the BoG, Articles 7, 12 and 19(f). Exceptionally, amendments relating to capital increases are made by decision of the General Council, subject to the approval of the government; Statute of the BoG, Article 9.

70 Amendments approved by the General Meeting of Shareholders and ratified by Law 2609/1998 (Government Gazette A'101/1998), Article 1, and Law 2832/2000 (Government Gazette A'141/2000), Article 18, respectively. The amendments replaced similar statutory provisions enacted just a few months earlier; Law 2548/1997 (Government Gazette A'259/1997).

71 Decision of BoG General Meeting of Shareholders of 22 December 1997; and Law 2609/1998, Article 1(1)-(2).

a) the definition and implementation of monetary policy;

b) the conduct of policy on the exchange rate;

c) the holding and management of Greece's official foreign reserves;

d) the supervision of credit institutions and other financial institutions (and from 2011 onwards, insurance companies too[72]);

e) the promotion and oversight of the smooth operation and efficiency of payment systems and means of payment, as well as of trading, settlement and clearing systems for over-the-counter transactions in securities and other financial instruments;

f) the issuance of banknotes; and

g) the performance of the function of treasurer and fiscal agent for the Greek state.[73]

In anticipation of the introduction of the single currency, the new provision further specified that, as from the adoption of the euro as Greece's currency, the BoG would no longer perform tasks (a)-(c) and (e) autonomously, but would contribute to the performance of the equivalent tasks of the ESCB, in accordance with the guidelines and instructions of the ECB; and its issuance would be limited to banknotes having the status of legal tender in the euro area (in other words, euro banknotes issued under the authority of the ECB).[74] The BoG was also mandated to collect information and data, as necessary to fulfil its statistical duties under the Statute of the ESCB and the ECB.[75]

The wording of the amended text, which is still in force, would appear to suggest that the autonomous performance by the BoG of tasks (d) (relating to financial supervision) and (g) (concerning the BoG's role as fiscal agent) has not been affected by EMU. This, however, is not true in relation to task (d) in so far as it concerns banking supervision. In fact, the text must now be read in the light of the intervening establishment of the euro area's Banking Union on the basis of European regulations, which are directly applicable and override contrary provisions of national law. As a result of the European provisions, the BoG is now an integral component of the Banking Union's two two-level mechanisms, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), eliminating much of its decision-making autonomy in the fields of banking supervision and resolution.

Corporate form of the BoG. Unusually for a modern central bank, the BoG is set up as a private corporation (Société Anonyme),[76] and its shares are listed

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72 Statute of the BoG, Article 4.

73 Statute of the BoG, Article 2.

74 Statute of the BoG, Article 2.

75 Statute of the BoG, Article 2, with reference to the Statute of the ESCB and the ECB, Article 5.

76 Statute of the BoG, Article 1.

in the Athens Stock Exchange. Given its extensive public (central banking and regulatory) responsibilities, the selection of this corporate form would appear puzzling. The explanation lies in the historical origins of the institution, which was formed by spinning off the issuing department of a private bank (National Bank of Greece) that held hitherto the monopoly on the issuing of banknotes in Greece.[77] As a result, BoG came to life as a privately-owned corporation, and its shareholder structure continues to this day to comprise a majority of private investors.[78] Moreover, the Statute of the BoG caps the aggregate stakes of the state and public enterprises in the BoG's share capital to no more than 35%.[79] Regardless of the BoG's corporate form and shareholding structure, however, the role of the private shareholders in the actual governance of the institution is strictly circumscribed. The Statute of the BoG ensures that its internal organization and the allocation of decision-making responsibilities for its various tasks are fully consistent with its position as an institution performing independently important public functions and as a member of the Eurosystem and the SSM.

Specifically, all shareholders, public and private, are entitled to participate to the *General Meeting of Shareholders*,[80] which is deemed to be the Bank's supreme decision-making body.[81] The General Meeting of Shareholders is convened annually. Extraordinary meetings are also possible if this appears necessary – for instance, to approve urgently needed amendments to the Statute of the BoG).[82] All meetings are convened, and their agenda set, by the General Council (the BoG's top management body, whose role could be compared to that of the Board of Directors of commercial companies). The General Meeting of Shareholders has exclusive competence to decide on a limited set of corporate matters, namely: to approve the BoG's annual report and balance sheet, appropriations to reserves and other special funds, and the determination of dividends and any other disposal of net profits; to elect or remove six of the General Council's twelve members and the BoG's auditors and to determine their compensation; to discharge the members of the General Council and the auditors from personal responsibility; and to approve amendments to the Statute of the BoG, with the exception of capital increases – although, to gain effect, any amendments thus approved require ratification in the form of parliamentary legislation.[83] Proposals on other matters may be submitted to the General Meeting of Shareholders by the General Council; but this is not a usual practice.

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77 Law 3434/1927, Article 1(a), ratifying the Agreement of 27 October 1927 between the Greek state and the National Bank of Greece.

78 On 31 December 2023, the BoG had two qualifying shareholders: the Greek state, with 8,93%; and the national insurance fund (e-EFKA), with 12,44%; BoG, *Annual Financial Report for 2023* (in Greek) (2024), 26.

79 Statute of the BoG, Article 8.

80 Statute of the BoG, Section III (Articles 11-19).

81 Statute of the BoG, Article 11.

82 Statute of the BoG, Article 12.

83 Statute of the BoG, Article 19.

Significantly, despite holding the majority of the share capital, private shareholders are practically unable to determine the outcome of voting in the General Meeting of Shareholders, where the state, represented by the Ministry of Finance, retains effective voting control.[84] What is more, the General Meeting of Shareholders lacks competence to decide on matters related to the design and execution of monetary policy or on regulatory matters, since, as explained in the following paragraphs, the Statute of the BoG entrusts decision-making in these areas to organs of the BoG consisting exclusively of state-appointed persons.[85]

Administration of the BoG and responsibility for decisions entailing the exercise of public authority. In principle, the BoG's management is entrusted to the *General Council*.[86] This body consists of twelve members.[87] Six of them are elected by the General Meeting of Shareholders to serve renewable three-year terms; at least three must be engaged in the fields of industry, commerce, and agriculture.[88] In practice, most elected members are chairs of employer organizations. The other six are state-appointed officials of the BoG, namely, the Governor, the two Deputy Governors, and three other full-time members;[89] they sit *ex officio* on the General Council[90] and at the same time form the membership of a separate decision-making body, the Monetary Policy Council ('MPC').[91] The General Council is responsible for the overall management of the affairs of the BoG and is entitled to take all decisions, except of those which the Statute of the BoG specifically reserves to other organs of the BoG.[92] In particular, the General Council takes decisions on the general conditions and the extent of business conducted by the BoG outside the scope of its ESCB-related tasks, the

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84 The voting control of the Ministry of Finance, which represents collectively the state, public corporations, other public-sector bodies, and public insurance funds in the General Meeting of Shareholders, is unassailable for three reasons: the total shareholdings represented by the state are much higher than its direct stake, thus ensuring its preponderance; the remainder of the share capital is widely dispersed, with individual retail investors (who tend not to participate in the General Meeting of Shareholders) holding most of the free float; and as a safeguard, a special rule limits the voting rights of any private shareholder to 2% of the total capital; Statute of the BoG, Article 13.

85 Beyond the restricted governance rights of private shareholders, the public nature of the institution's activities is also reflected in the disposition of profits, most of which accrue to the state: shareholders are only entitled to a 12% annual dividend on the capital, plus a discretionary percentage of the net profits; Statute of the BoG, Article 71(1).

86 Statute of the BoG, Articles 20-27.

87 Statute of the BoG, Article 21.

88 Statute of the BoG, Article 21.

89 All of them are appointed by presidential decree on the proposal of the Council of Ministers, following a proposal by the General Council (in the case of the Governor and the Deputy Governors) or an opinion of the Governor (in the case of the three other Monetary Policy Council Members); Statute of the BoG, Articles 29 and 35A, respectively. The appointments are staggered.

90 Statute of the BoG, Article 21.

91 Statute of the BoG, Article 35A.

92 Statute of the BoG, Article 20. In addition to identifying the BoG's main tasks in general terms in Article 2, the Statute of the BoG enumerates its various financial and regulatory activities; Statute of the BoG, Section X (Articles 55, 55A-55E, 56-57, 57A, 58-59).

general internal organization of the Bank, and the appointment or dismissal of the directors of the BoG's various Directorates on a proposal by the Governor.[93]

However, the functions of the BoG that entail the exercise of public authority[94] are excluded from the competence of the Governing Council and assigned, depending on the subject matter, to the Governor, the MPC, the Executive Committee (a body consisting of the Governor and the two Deputy Governors[95]), or to persons to which these have delegated particular tasks. In other words, all monetary and regulatory decision of the BoG are taken by, or under the responsibility of, its state-appointed officials.

The *Governor*, in addition to exercising the immediate managerial control over the BoG's operation and general business on behalf of the General Council, is personally responsible for all decisions falling within the tasks of the ESCB, with the exception of the matters specifically assigned to the MPC.[96] The Governor may delegate any of his duties to the Deputy Governors.[97] Specific provisions in the Statute of the BoG assign to the Governor regulatory and sanctioning powers in the field of statistical reporting and information gathering. Thus, without prejudice to the reporting requirements imposed by the ECB in pursuance of its statistical functions,[98] the BoG may require credit institutions and other financial institutions, natural persons and legal entities, and other market participants to submit, in the form and time frame specified by the BoG, any data and information in their possession that it needs for the performance of its various tasks, including the compilation of Greece's balance of payments statistics, financial accounts of the various economic sectors, and international investment position.[99] Non-compliance with the BoG's requests for data and information is sanctioned with fines (or, in the case of supervised institutions, non-interest-bearing deposits with the BoG), which are imposed by act of the Governor, or of an organ to which the Governor has delegated this power. The Governor is empowered to adjust the maximum amounts of these sanctions.[100] Beyond the statistical field, similar sanctions may also be applied – any administrative and criminal sanctions threatened by specific statutory provisions notwithstanding – whenever a credit institution or any other supervised entity fails to comply with the BoG's supervisory requirements.[101] As explained immediately below, however, in the supervisory field the sanctions are imposed under the authority of the Executive Committee, not the Governor.

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93 Statute of the BoG, Article 27.

94 Statute of the BoG, Articles 55, 55A-55D.

95 Statute of the BoG, Article 28.

96 Statute of the BoG, Article 31. The Governor is an *ex officio* member of the ECB's Governing Council and General Council. In this capacity, the Governor exercises personal responsibility under conditions of full personal independence and without receiving any directions by the other organs of the BoG.

97 Statute of the BoG, Article 32.

98 Statute of the ESCB and of the ECB, Article 5.

99 Statute of the BoG, Article 55C.

100 Statute of the BoG, Article 55C.

101 Statute of the BoG, Article 55A.

The *Monetary Policy Council* analyzes economic and monetary developments and examines the implications of the monetary policy of the euro, as formulated by the ECB[102] (although it cannot give instructions on monetary-policy matters to the Governor, who retains full personal independence and decision-making autonomy on these matters in his capacity as member of the ECB Governing Council[103]). It is also responsible for regulatory decision-making in relation to the operation and efficiency of payment systems and means of payment and the issuance of banknotes, always within the parameters of the relevant guidelines and instructions of the ECB, which it transposes into domestic law. The MPC exercises its powers in these areas in the form of acts which are published in the Government Gazette.[104] To ensure compliance with its regulatory acts, the MPC is mandated to establish a framework of administrative sanctions, including fines and exclusions from certain operations, which are imposed on violators through acts of the Governor or of an organ empowered by the Governor to exercise this task.[105]

Finally, the BoG's regulatory and supervisory powers with respect to the financial institutions under its responsibility are exercised either through acts of the *Executive Committee*, a three-member decision-making body consisting of the Governor and the two Deputy Governors,[106] or through decisions of any other internal body of the BoG, to which the Executive Committee has delegated particular tasks.[107] As detailed in the following subsection, the Executive Committee has actually delegated the relevant tasks to two standing committees, also comprising senior staff of the BoG, one of which is responsible for supervisory decision-making, while the other exercises the BoG's decision-making powers in the area of banking resolution.

3.2. Scope and organization of supervisory and resolution functions

Article 55A of the Statute of the BoG vests the central bank with responsibility for the prudential supervision of credit institutions, insurance companies, and various other financial intermediaries (financial leasing, factoring, and mutual guarantee companies, counter guarantee funds, bureaux de change, money-market broker companies, and payment institutions).[108] Additional categories

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102 Statute of the BoG, Article 35A.

103 Statute of the BoG, Article 31.

104 Statute of the BoG, Article 35A.

105 Statute of the BoG, Article 55B.

106 BoG Statute, Article 28. The Executive Committee decides with a quorum and majority of two members, one of which must be the Governor. In the Governor's absence, the Executive Committee is convened and chaired by the Deputy Governor replacing him. Each year, the General Council appoints three of its members who do not participate in the Executive Committee to monitor the exercise of the latter's tasks.

107 Statute of the BoG, Article 55A; and Law 4261/2014, Articles 4(4)-(5) and 127(1).

108 Statute of the BoG, Article 55A.

may be brought under its supervisory responsibility by means of parliamentary legislation, always following consultation with the BoG on the draft provisions.[109]

The BoG is responsible for the licensing and continuous supervision (including on-site inspections) of the financial institutions falling within its supervisory remit. Distinct statutory frameworks, defining the precise scope and content of prudential requirements, apply to the various categories, meaning that their regulatory treatment is not fully uniform.[110] In all cases, however, the supervision exercised by the BoG is aimed at enhancing the stability and effectiveness of the credit system and the wider financial sector. It thus encompasses both macroprudential and microprudential tasks, as well as the transparency of the procedures and terms of business of supervised entities (albeit not their conduct of business as such).[111] As part of its supervision, the BoG is also competent to assess the fitness and propriety of their directors. In case of breach of provisions pertaining to its supervisory responsibilities, the BoG is empowered to impose administrative sanctions (including financial penalties) on supervised entities and their legal representatives and managers.[112]

Scope of BoG's responsibilities for credit institutions. In so far as the supervision of credit institutions is concerned, the precise scope of the BoG's responsibilities and the manner in which they are exercised are shaped by Greece's participation in the SSM and the supervisory tasks that the ECB has assumed with the entry into force of the SSMR[113] since 4 November 2014.[114]

The current statute on banking supervision[115] was adopted in May 2014 with a view to transposing the CRD IV[116] into Greek law. Despite various subsequent amendments, its text has never been amended to make explicit reference to ECB's role in this field. Instead, the statutory provisions confirm the position

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109 Statute of the BoG, Article 55A, in conjunction with Article 5B. For example, in 2015 the BoG was entrusted with the licensing and supervision of credit servicing firms (NPL servicers) and loan purchasing firms; Law 4354/2015 (Government Gazette A'176/2015), Article 1, as amended.

110 See, e.g., Law 4261/2014 (credit institutions), Law 4364/2016 (insurance undertakings), and Law 4537/2018 (payment institutions) (all three constituting measures of national implementation of EU directives).

111 Statute of the BoG, Article 55A.

112 Statute of the BoG, Article 55A. In particular, beyond any other sanctions envisaged in the relevant statute, the BoG may impose on supervised entities that breach statutory or regulatory norms or obstruct the exercise of its supervision non-interest-bearing deposits and fines in favour of the Greek state. The maximum amounts of such non-interest-bearing deposits and fines can be adjusted by act of the Governor of the BoG.

113 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, OJ 2013 L 287/63 ('SSMR').

114 TFEU, Article 127(6); and SSMR, Articles 4-5.

115 Law 4261/2014, as amended. The bulk of that statute's provisions came into effect on 1 January 2014 (retrospectively, since the statute was actually published on 5 May 2014).

116 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ 2013 L 176/338 ('Capital Requirements Directive IV', or 'CRD IV').

of the BoG as the national competent authority (NCA) in the field of prudential supervision of credit institutions.[117] Specifically, the statute confers on the BoG the responsibility for carrying on all the tasks provided for in the CRD IV/CRR[118] framework in relation to credit institutions and financial institutions, with the exception of investment companies and investment holding companies.[119] In addition to its supervisory tasks, the statute vests on the BoG certain regulatory powers, including, in particular, the power to transpose into the Greek legal order any further European measures in the prudential field.[120]

However, in view of the supremacy of European law and the direct effect of EU regulations, from the moment when the ECB started to exercise its supervisory functions, the statutory conferral of administrative responsibilities must be read, and can only be properly understood, in conjunction with the division of supervisory responsibilities between the ECB and the NCAs in the SSMR and the SSM Framework Regulation.[121]

Accordingly, even though the Greek provisions continue to describe the granting and withdrawal of banking authorizations as tasks of the BoG,[122] they are now understood to refer to the ECB, which since 4 November 2014 exercises exclusive decision-making powers with regard to the authorization of credit institutions within the euro area,[123] as well as the approval of the acquisition or increase of qualifying holdings in them.[124] Of course, the BoG continues to play an important role in the licensing of Greek credit institutions, as the SSM's relevant procedural arrangements organize the granting and withdrawal of authorization as 'common procedures', i.e., two-level composite administrative procedures, in which the ECB holds the final decision-making power but the relevant NCA performs critical preparatory tasks.[125] Specifically, under the applicable provisions,[126] Greek institutions seeking authorization must apply

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117 Law 4261/2014, Articles 4, 50 and 104.

118 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176/1 ('CRR').

119 Law 4261/2014, Article 4(1)-(2), as amended.

120 Law 4261/2014, Article 4(3)-(4). BoG is also responsible for exercising national options and discretions under the CRR; Law 4261/2014, Article 4(5).

121 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ 2014 L 141/1.

122 Law 4261/2014, Articles 8(1) and 19.

123 SSMR, Article 4(1)(a).

124 SSMR, Articles 4(1)(c) and 15. 'Qualifying holdings' are defined in CRR, Article 4(1)(36), in conjunction with CRD IV, Article 22(1).

125 SSMR, Articles 14-15; and SSM Framework Regulation, Articles 73-87. The exceptions are the ECB's power to withdraw an authorization on its own initiative (which does not require prior action at the national level) and the NCAs' power to reject an application for authorization, as discussed below (where the procedure is completed without formal involvement of the ECB).

126 SSMR, Article 14(1)-(4); and SSM Framework Regulation, Articles 73-79.

through the BoG in its capacity as the relevant NCA. In this context, the BoG is responsible not only for receiving the application[127] and thereafter acting as a communication conduit between the applicant institution and the ECB, but also for conducting, in cooperation with the relevant ECB staff, an assessment of the applicant institution's compliance with the substantive authorization criteria,[128] which serves as the initial filter of the overall licensing process. This stage of the licensing process ends, in the case of a negative assessment, with a final decision of the BoG whereby the application is rejected or, in the case of a positive one, with the submission by the BoG to the ECB of a draft decision granting authorization. In other words, in the latter case, the 'national' part of the common procedure is followed by a second, European part, which is governed by ECB procedural law and involves the ECB's Governing Council as ultimate decision-maker.[129] In analogous manner, the BoG acting in its capacity as the relevant NCA will always participate in the withdrawal of Greek credit institutions' authorization. Procedurally, its participation will take one of two forms: either it will be the BoG which initiates the withdrawal process by notifying to the ECB the existence of grounds justifying such a move; or the process commences on the ECB's own initiative, in which case the BoG must be consulted before the ECB reaches its final decision on the matter. In both cases, and notwithstanding the wording of the Greek legislation,[130] the effect of the SSMR will be that the withdrawal of the authorization will take the form of a decision of the ECB's Governing Council. A similar regime applies to the approval of acquisitions and increases of qualifying holdings. With regard to continuous supervision, the standard distribution of tasks within the SSM applies. Accordingly, the direct supervisory responsibility for the four Greek SIs is vested in the ECB, while the BoG retains primary responsibility for the supervision of the LSIs (including the fit-and-proper assessment of the members of their management body), which it carries on under the oversight of the ECB.[131] Even with regard to the SIs, however, the BoG is not totally excluded from the supervisory work, since it is under a duty to assist the ECB in the preparation and implementation of the latter's supervisory tasks[132] and its staff participate alongside ECB's staff in the joint supervisory teams (JSTs), which have front-line responsibility for the supervision of SIs.[133]

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127 The law empowers the BoG to determine the form and procedure for the submission of an application for authorization; Law 4261/2014, Article 8(2).

128 These will include the criteria established in the EU instruments, as these have been transposed into its national legal framework, as well as any additional conditions for authorization that the national legislator may have imposed autonomously. In practice, Greek law generally refrains from 'gold-plating' the European regulatory requirements.

129 SSM Framework Regulation, Articles 73-79.

130 Law 4261/2014, Article 19.

131 SSMR, Article 6(4)-(6). The criteria for the classification of credit institutions in the two categories are set out in SSMR, Article 6(4), and further specified in the SSM Framework Regulation, Part IV (Articles 39-72).

132 SSMR, Article 6(2)-(3), (7).

133 SSM Framework Regulation, Articles 3-6.

As a complement to its supervisory role, national provisions confer on the BoG decision-making tasks relating to bank failure management, including the initiation and administrative control of special liquidation proceedings.[134] Moreover, the 2015 statute transposing the BRRD designated the BoG as Greece's national resolution authority (NRA) for credit institutions.[135] In this capacity, the central bank participates in the SRM[136] and is directly responsible for resolution planning and resolution-related decision-making in relation to the Greek LSIs, while since 1 January 2016 the responsibility for the SIs belongs to the SRB.[137]

Organization of BoG's supervisory functions. The BoG is internally divided in 27 departments, called Directorates, Units, or Centres,[138] which are entrusted with the institution's day-to-day work and prepare its various operational, financial, regulatory, and administrative decisions. Each of them is headed by a director, with high-level executive control exercised by the Governor, a Deputy Governor, or (since the introduction of two new posts at director-general level in late 2021[139]) a director general, who in turn reports to the Governor and the Deputy Governors.

The administration of financial supervisory matters is divided among four Directorates, namely: the Banking Supervision Directorate; the Occupational and Private Insurance Supervision Directorate; the Supervised Institutions' Inspection Directorate; and the Financial Stability Directorate. All of these, with the exception of the Occupational and Private Insurance Supervision Directorate, which is exclusively concerned with the insurance industry, are active in the field of banking supervision. A separate Resolution Unit is entrusted with tasks relating to the resolution of credit institutions. Since late 2021, the oversight of, and high-level coordination between, these five structures of the BoG is entrusted to a Director General for Prudential Supervision and Resolution.

The *Banking Supervision Directorate* carries the main responsibility for the prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings and payment and e-money institutions. Its

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134 Law 4261/2014, Part A, Chapter VII (Articles 136-146).

135 Law 4335/2015, Article 2-3(1). In contrast, the same provision assigns the responsibility for the resolution of investment firms to the Capital Market Commission. The two NRAs must keep the Minister of Finance informed of their decisions; and the Minister's consent is required for any decision with direct fiscal impact or systemic consequences Law 4335/2015, Article 2-3(3).

136 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, OJ L 225/1 ('SRMR'), Article 1.

137 SRMR, Article 7.

138 The number includes the BoG's 21 relatively large Directorates and six departments, which due to their smaller size are described as 'Units' or 'Centres'. See *BoG organizational chart*.

139 The new posts were created as part of the BoG's ongoing internal reorganization process; BoG General Council Decision of 1 November 2021, establishing the positions of Chief Operating Officer and Director General for Prudential Supervision and Resolution. A third post at director-general level (Director General for Monetary Policy and Financial Markets) was added in November 2024.

tasks include: the assessment of applications for authorization; the monitoring of authorized entities' ongoing compliance with the conditions for authorization and all applicable capital, liquidity, and other prudential requirements; the assessment of the internal control systems of supervised entities, including risk management and compliance systems; the development of supervisory methodologies and the issuance of guidance to supervised entities in relation to the identification and management of crises, as well as ESG (Environmental, Social and Governance) issues; the development of the regulatory framework for supervised entities; the supervision of the transparency of banking procedures and transactions (but not of their fairness, as to which the BoG has no competence under the legislation in force); the development and monitoring of compliance with the framework for the prevention of money laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction (AML/CTF framework) for all categories of financial institutions; the making of recommendations for the imposition of administrative sanctions on supervised entities and natural persons for breaches of the prudential framework; and, in cases of deterioration of a credit institution's financial condition, the making of recommendations for the imposition of supervisory measures under the CRD IV, early intervention measures under the BRRD, or determining that the institution is failing or likely to fail ('FOLTF').[140]

The *Supervised Institutions' Inspection Directorate* participates in the performance of the BoG's supervisory tasks in various ways: it carries on on-site inspections of supervised entities in relation to all prudential risks,[141] as well as the prevention of money laundering and terrorist financing; assesses supervised institutions' information and communications technology (ICT) and security risks and conducts related on-site audits; supervises payment and e-money institutions, and related services, including digital finance services; provides secretarial support and coordinates the BoG's supervisory decision-making procedures, as well as its representation in the ECB's Supervisory Board; and supervises, including by means on-site inspections, the special liquidation proceedings relating to failed credit institutions and insurance undertakings.[142]

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140 The Banking Supervision Directorate is internally organized in eleven Divisions, with responsibility for: authorizations; supervision of SIs (two Divisions, which cooperate closely with the ECB and whose staff participate in JSTs); supervision of LSIs; supervision of non-bank financial institutions; risk methodologies; prudential reporting; development of the regulatory framework; crisis management and ESG coordination; anti-money-laundering (AML/CTF) regulation and supervision; and supervised institutions' customer complaints.

141 The on-site inspections program is defined on an annual basis in cooperation with the ECB in so far as SIs are concerned, and the competent Directorates of the BoG in the case of LSIs and other supervised entities.

142 The Supervised Institutions' Inspection Directorate comprises eleven Divisions, responsible for: administrative support; ICT risk assessment; on-sight inspections relating to financial risks; on-sight inspections relating to non-financial risks; ICT risk on-sight inspections; AML/CTF on-sight inspections; insurance and occupational pension scheme on-sight inspections; the supervision of payment and e-money institutions; the supervision of digital financial services; supervisory decisions and coordination of BoG's participation in SSM; and the control of, and inspections relating to, credit institutions' and insurance undertakings' special liquidation proceedings.

The *Financial Stability Directorate* is responsible for monitoring systemic risks and implementing macroprudential policy. Under normal conditions, it plays a limited role in the supervision of individual credit institutions. Specifically, its responsibilities include: the analysis of institutions' financial statements and supervisory data; the conduct of stress tests at both micro- and macro-prudential level; and the assessment of internal models and participation in relevant on-site inspections. However, in the event of a bank's failure, it participates in the FOLTF determination and is responsible for the assessment of the systemic implications.

While these Directorates carry on the front-line supervisory work and prepare the decisions of the BoG in the field of banking supervision, final decision-making is reserved for a committee of high-level decision-makers. Specifically, in accordance with Article 55A of the Statute of the BoG, the powers of the BoG in the field of prudential supervision are exercisable by acts of the Executive Committee (which, as already mentioned, comprises the Governor as chair and the two Deputy Governors as members) or of any organs of the BoG to which the Executive Committee has delegated particular functions.[143] Actually, the Executive Committee has delegated the totality of its supervisory powers to a standing committee, the *Credit and Insurance Committee*[144] (although it has reserved for itself the right to exercise them directly whenever it considers fit[145]). As currently constituted,[146] the latter consists of the Governor as chair and seven other members, namely: one of the two Deputy Governors; the Director General for Prudential Supervision and Resolution; the directors of the aforementioned four supervisory Directorates; and the director of the Government Financial Operations and Accounts Directorate.

The Credit and Insurance Committee is responsible for all general (regulatory) and individual administrative decisions and recommendations that the BoG may issue under Article 55A of its Statute.[147] This includes all decisions related to the licensing of supervised institutions, the establishment of operational requirements, the adoption of measures of intervention, and the imposition of administrative sanctions (including financial penalties) on natural and legal persons.[148] Decisions are taken following a recommendation from the Directorate responsible for the matter in question.[149]

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143 Statute of the BoG, Article 55A. Most BoG standing committees are set up in pursuance of decisions of the General Council, which are implemented by means of acts of the Governor. In the area of banking and financial supervision, however, the Statute of the BoG provides that the delegation of decision-making powers is a matter for the Executive Committee, which is thus alone responsible for setting up the relevant bodies.

144 BoG Executive Committee Act No 1/20.12.2012 (Government Gazette B'3410/2012); and BoG Executive Committee Act No 52/2.10.2015 (Government Gazette B'2312/2015), para. A, as amended.

145 BoG Executive Committee Act No 52/2.10.2015, para. C.1.

146 BoG Executive Committee Act No 198/1/13.01.2022 (Government Gazette B'152/2022), amending BoG Executive Committee Act No 52/2.10.2015, para. A.1(a).

147 Like all other regulatory acts of the BoG, the decisions of regulatory nature of the Banking and Credit Committee are published in the Government Gazette (series B).

148 BoG Executive Committee Act No 52/2.10.2015, para. A.2.

149 BoG Executive Committee Act No 52/2.10.2015, para. C.2.

Organization of BoG's resolution functions. While the BRRD permits the designation of a country's central bank and/or NCA as NRA, it nonetheless demands that, where one and the same public institution serves as NCA and NRA, adequate structural arrangements be put in place to guarantee operational independence and the avoidance of conflicts of interest between that institution's supervisory functions and its resolution functions in pursuance of the BRRD.[150] For this purpose, the staff assigned to the resolution functions must be structurally separated from the staff involved in the supervisory tasks and follow separate reporting lines.[151] The Greek statutory provisions implementing the CRD IV and the BRRD entrench the obligation of structural segregation of resolution-related functions within the BoG, stipulating that such functions must be carried on separately from, and independently of, its supervisory and other duties.[152] At the same time, however, the two sides of the BoG are asked to cooperate closely in the preparation, design, and implementation of resolution actions.[153] To ensure compliance with these provisions, the internal organization and procedures of the BoG seek to ensure that the administration of its resolution-related functions takes place separately at the operational (staff) level and that final decision-making is exercised by a body whose membership does not overlap with that of the body responsible for supervisory decision-making, i.e., the Credit and Insurance Committee.

Operationally, a specialist *Resolution Unit* is in charge of all assessments and administrative tasks relating to BoG' performance of its functions as Greece's NRA and its participation in the SRM. Originally established in February 2012 as a relatively small unit,[154] its role was augmented following the national implementation of the BRRD in 2015.[155] More specifically, its functions in relation to Greek LSIs include: the assessment of resolvability; the removal of impediments to resolvability, if any; the determination of MREL and the monitoring of compliance with the requirement; the drafting of resolution plans; the monitoring of financial performance and the potential need for application of resolution measures; the provisional valuation of the assets and the cooperation with the external auditors appointed to conduct the final valuation in the event of resolution; the assessment and monitoring of the implementation of the business reorganization plan in the context of resolution; and the monitoring of the

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150 BRRD, Article 1(3), first subpara.

151 BRRD, Article 1(3), second subpara.

152 Law 4261/2014, Article 4(10); and Law 4335/2015, Article 2-3(2).

153 Law 4335/2015, Article 2-3(2).

154 BoG General Council Decision of 20 February 2012.

155 BoG General Council Decision of 21 December 2015. In pursuance of the BoG General Council Decision of 7 February 2022 on the reorganization of certain Directorates of the BoG, the Resolution Unit is now divided in three Divisions, whose respective responsibilities cover: resolution planning in relation to SIs; resolution planning in relation to LSIs, the collection of contributions to the SRF, and the collection of data from banks; and the implementation of the resolution framework, the execution of resolution schemes, and certain related tasks of the bank liquidation framework (especially, the implementation of the transfer tool of Law 4261/2015, Article 145B, discussed below, section 4.5).

implementation of resolution actions by the competent authorities.[156] In situations where the BoG's supervisory Directorates come to the conclusion that a bank breaches its prudential requirements or, due to a rapid deterioration of its financial condition, is likely to breach them in the near future, thus crossing the threshold for early intervention, they must inform without delay the Resolution Unit, which at this point is specifically authorized to require the bank's management to contact potential acquirers in preparation of its resolution.[157] The Resolution Unit is also responsible for the BoG's close cooperation with the SRB within the SRM, including the provisions of assistance to the SRB in the performance of its tasks relating to the Greek SIs, as well as for all actions necessary for the execution of decisions taken by the SRB in normal circumstances (e.g., concerning the collection of contributions to the SRF) or in the context of a resolution action.[158]

Cooperation and information exchange between the Resolution Unit and the Banking Supervision Directorate takes place in accordance with the terms of the Memorandum of Understanding concluded between the Single Resolution Board and the European Central Bank, which also governs the close cooperation between the NRAs and the NCAs.[159] As part of such close cooperation, the two departments of the BoG exchange supervisory and resolution-related data/templates where relevant, consult each other on recovery and resolution plans, cooperate in relation to the assessment of the Greek banks' annual *ex ante* contributions to the SRF, and exchange relevant decisions.

Since late 2021, the high-level oversight and coordination of the BoG's various tasks as banking authority is entrusted to the Director General for Prudential Supervision and Resolution, who, as already mentioned, oversees all relevant departments, including the Resolution Unit.[160] However, to ensure the independence and functional autonomy of the latter, different reporting lines are followed in its case. Thus, while the supervisory Directorates report to the Deputy Governor who participates in the Credit and Insurance Committee, the Resolution Unit reports to the other Deputy Governor.

Final decision-making also takes place separately. Admittedly, as the Statute of the BoG does not draw a distinction between financial supervision and banking resolution, primary decision-making responsibility in both areas nominally rests

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156 In pursuance of various provisions of the BRRD, as implemented by Law 4335/2015, Article 2.

157 Law 4335/2015, Article 2-27(2).

158 In pursuance of SRMR, Article 31; and SRB Decision of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15) ('*COFRA*'). On the precise arrangements of SRB-NRA cooperation within the SRM, see C. Hadjiemmanuil, *Comment on SRMR, Article 31*, in J.-H. Binder, C. Gortsos, K. Lackhoff, C. Ohler (eds), *European Banking Union* (Beck/Nomos/Hart, 2022), 895-918.

159 SRMR, Article 30(7); and 'Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of Cooperation and Information Exchange' (22 December 2015; revised on 30 May 2018 and 16 December 2022) ('*SRB-ECB MoU*').

160 See above, text to n 139.

with the Executive Committee.[161] As already noted, however, all supervisory decision-making has actually been delegated to the Credit and Insurance Committee. Likewise, the Executive Committee has delegated the responsibility for resolution-related decisions on a permanent and comprehensive basis to another standing committee, the *Resolution Measures Committee*.[162] To ensure the separation of functions, the membership of the latter is designed primarily with a view to avoiding overlap with the Credit and Insurance Committee. Specifically, the Resolution Measures Committee currently consists of: the Deputy Governor to whom the Resolution Unit reports as chair; and the Chief Operating Officer and the directors of the Resolution Unit, the Statistics Directorate, the Payment and Settlement Systems Directorate, and the Financial Operations Directorate as members.[163]

The Resolution Measures Committee is competent to issue all resolution-related regulatory and individual decisions and recommendations of the BoG acting as NRA under the national legislation transposing the BRRD or the SRMR.[164] Additionally, since 2022 it is responsible for the BoG's decision-making relating to the use of a new transfer tool[165] in the context of credit institutions' special liquidation.[166]

3.3. Independence and accountability

Independence. The independence of the BoG is enshrined in its Statute, which, in terms very similar to the Maastricht Treaty's corresponding provision on central bank independence,[167] prohibits the BoG and its decision-making bodies from seeking or receiving instructions from the government or any organization. The same provision further provides that neither the government nor any other political authority shall seek to influence the BoG's decision-making.[168] Reinforcing the principle of central bank independence, another provision specifies that the Bot may not be subjected to regulations issued by the

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161 Statute of the BoG, Article 55A; and Law 4335/2015, Article 2-3.

162 BoG Executive Committee Act No 6/8.1.2013 (Government Gazette B'13/2013); and BoG Executive Committee Act No 52/2.10.2015, para. B, as amended. As in the case of the Credit and Insurance Committee, the Executive Committee has reserved the right to take itself the relevant decisions whenever it considers fit; BoG Executive Committee Act No 52/2.10.2015, para. C.1.

163 BoG Executive Committee Act No 198/1/13.01.2022, amending BoG Executive Committee Act No 52/2.10.2015, para. B.1(a).

164 BoG Executive Committee Act No 52/2.10.2015, para. B.2. The committee acts following a recommendation from the Resolution Unit; BoG Executive Committee Act No 52/2.10.2015, para. C.2.

165 Law 4261/2014, Article 145B, as amended (discussed below, section 4.5).

166 BoG Executive Committee Act No 204/1/21.4.2022 (Government Gazette B'2111/2022), amending BoG Executive Committee Act No 52/2.10.2015, para. B.2.

167 EC Treaty, Articles 107, as replaced by the Treaty on European Union (Maastricht Treaty) (7 February 1992), Article G (see now TFEU, Article 131) (see now TFEU, Article 130).

168 Statute of the BoG, Article 5A, inserted by a BoG General Meeting Decision of 22 December 1997 and ratified by Law 2609/1998, Article 1. The provision implements the requirement of EC Treaty, Article 108, as replaced by the Maastricht Treaty, Article G (see now TFEU, Article 131).

government or other public authorities, beyond what is provided for in its own Statute.[169] These provisions apply to the exercise of all tasks conferred to the BoG, without distinction. Accordingly, they also cover its tasks in the areas of financial supervision, resolution, and bank liquidation.

A set of more specific provisions regulate the relations of the central bank with the Greek state.[170] These cover the BoG's role as fiscal agent (bank of the state), including the prohibition of monetary financing.[171] The only permissible intervention of the state in the decision-making of the BoG under these provisions relates to the power of the Minister of Finance to appoint a General Commissioner of the State, who can attend all General Meetings of Shareholders and meetings of the General Council and may oppose any decisions of these organs on grounds of non-compliance with the Statute of the BoG or any other legal rule.[172] The wording of the Statute leaves no doubt that the Commissioner's oversight is limited to the legality of the decisions, and does not extend to their merits. The Commissioner's objection must be endorsed within two days by the Minister of Finance. In such case, the decision in question is suspended and the matter is referred to arbitration by a three-member panel, appointed at the request of either the Governor of the BoG or the Minister of Finance and consisting of one representative of the government, one representative of the General Council, and a chairperson appointed by mutual agreement of the two sides or, failing that, the President of the Supreme Court.[173] The same system of arbitration applies to any other dispute between the central bank and the state.[174]

These arrangements, which are hardly ever used, are in any case unlikely to affect the exercise of the BoG's responsibilities with respect to credit institutions, since neither the General Meeting of Shareholders nor the General Council has decision-making powers in these areas,[175] thus eliminating the possibility of objections by the General Commissioner of the State. Moreover, the state is prevented from gaining access to the records of the BoG, with the sole exception of the right of the General Commissioner of the State to be shown, in strict secrecy, all the evidence necessary to form an opinion on whether to oppose a proposed decision – a right that is also irrelevant to the banking supervisory and resolution-related tasks under consideration here, for the reason just stated.[176]

Accountability. With regard to accountability,[177] a provision adopted simultaneously with that on its independence requires the BoG to submit to the

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169 Statute of the BoG, Article 50.

170 Statute of the BoG, Section VIII (Articles 45-50).

171 Statute of the BoG, Article 46, reflecting TFEU, Article 123.

172 Statute of the BoG, Article 47.

173 Statute of the BoG, Article 47, second para.

174 Statute of the BoG, Article 49.

175 See above, text to nn 94-95 and 106-107.

176 Statute of the BoG, Article 48.

177 We do not discuss here the financial reporting and regulatory disclosure requirements under general corporate and securities laws to which BoG is subject as a publicly traded corporation.

Greek Parliament and the government (Council of Ministers) an annual report on monetary policy for the previous and current years (which is published every June), plus a supplementary report covering monetary developments within the year (published every December).[178] While these reports relate to the BoG's role qua central bank, an additional provision requires the BoG to also submit to the Greek Parliament an annual report on the exercise of its supervisory functions during the previous year.[179]

Moreover, the BoG Governor may be invited to appear before parliamentary committees when they examine matters within the competence of the BoG; and may ask to be invited to a hearing by submitting a request to the Speaker of the Parliament.[180] The BoG Governor may also be invited to meetings of the Council of Ministers or ministerial committees when these discuss matters relating to the objectives and tasks of the BoG.[181] Finally, the BoG must be consulted on any draft legislation concerning its tasks and can submit legislative proposals.[182] These arrangements enhance the BoG accountability, but primarily serve to enable the central bank to contribute to policy-making and legislation within its field of competence.

While these arrangements also apply to the BoG's tasks in the areas of banking supervision, resolution, and liquidation, they are subject to the duty of professional secrecy, which precludes disclosures of confidential information relating to the affairs of the persons under its jurisdiction. Specifically, all current and former members of the organs and staff of the BoG owe a strict duty of professional secrecy with regard to the statistical and supervisory information that the BoG collects from credit institutions and any other person.[183] The same duty, which is enforced by criminal penalties, also applies to any other person who, for any reason, has gained knowledge of such information. However, the disclosure of the relevant information in aggregate form in a manner that does not permit the identification of the entities or persons to which it relates is permitted. In any event, the duty of professional secrecy hinders full transparency and accountability regarding the concrete exercise of the relevant functions in specific cases.

Judicial review. Despite its private corporate form of Société Anonyme,[184] in view of its various public functions and powers the BoG is treated as a *sui*

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178 Statute of the BoG, Article 5A, first para.

179 Statute of the BoG, Article 5A, first para, third sentence, added by BoG General Meeting Decision of 18 April 2011 and ratified by Law 4021/2011, Article 44.

180 Statute of the BoG, Article 5A, second para.

181 Statute of the BoG, Article 5A, third para.

182 Statute of the BoG, Article 5A, fourth para.

183 Statute of the BoG, Article 55C, with reference to the Criminal Code, Article 371 (sanctioning breaches of the duty of professional secrecy with short imprisonment or a fine).

184 See above, text to nn 76-78.

generis legal person of 'dual character',[185] meaning that, when exercising public authority, it is subject to the usual rules of administrative law applicable to state bodies. Accordingly, its various regulatory and individual administrative decisions must meet the standards of legality, objectivity, impartiality, and proportionality expected of public authorities.

In particular, all supervisory decisions of the BoG can be challenged by bringing an action for annulment (judicial review) before the supreme administrative court (Συμβούλιο της Επικρατείας, or Conseil d'État).[186] This evidently applies to the decisions of the Credit & Insurance Committee, which are amenable to judicial review in the usual way. In this context, the actions of the BoG may be considered illegal, not only when they are tainted by breaches of particular legislative provisions, but also when they amount to a dereliction of the institution's duty of care in the exercise of its statutory duties. This duty of care, which must be individuated in view of the circumstances of each particular case, requires the BoG to pursue its statutory objectives through a diligent employment of the available legal and material means as well as to avoid unnecessary harm to the supervised institutions and third parties. At the same time, it recognizes the discretionary character of the financial supervisory functions and admits the possibility of failure to achieve the final objectives of the regulatory regime; in other words, it is an obligation of careful conduct in the exercise of the statutory duties, not a guarantee of the final result.[187] For instance, in pre-Banking Union case concerning the withdrawal of a credit institution's authorization and its placement in liquidation, an action for annulment brought by certain shareholders failed, because the BoG was able to demonstrate that it had taken a number of supervisory actions prior to the withdrawal of the institution's authorization, after the failure of which it had sufficiently justified its assessment of the institution's non-viability. With regard to the choice of the measures, the Conseil d'État recognized the BoG's wide discretion to make choices of a technical nature, thus limiting its review to the question of whether the decision actually taken was manifestly disproportionate to the objective pursued.[188]

Civil liability. Depending on the legal and factual circumstances, the BoG may also be held liable for damages for illegal actions or omissions in the performance of its supervisory and resolution-related responsibilities, in accordance with the generally applicable norms relating to the civil liability of public authorities.[189]

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185 Conseil d'État (Συμβούλιο της Επικρατείας) 2080/1987; Court of Cassation (Άρειος Πάγος) (Civil) 214/2003; and Court of Cassation (Civil) 1/2006.

186 Law 4261/2014, Article 64, implementing the requirement of right of appeal of CRD IV, Article 72.

187 C.V. Gortsos, E.K Anastopoulou, *Greece*, in D. Busch, C.V. Gortsos, G. McMeel (eds), *Liability of Financial Supervisors and Resolution Authorities* (Oxford University Press, 2022), 235-268, at 254-255.

188 Conseil d'État 3013/2014, concerning the 2012 resolution of the Agricultural Bank of Greece (ATE Bank).

189 Emergency Law 2783/1941, as codified by Presidential Decree 456/1984 (Government Gazette A'164/1984) ('Introductory Law of the Civil Code'), Articles 104-106, in conjunction with the general norms on tortious liability of the Civil Code, Book Two, Chapter Thirty-Nine (Articles 914-938). For

These require the state and all public bodies to provide compensation to persons harmed by their illegal acts or omissions committed in the course of the exercise of their public authority.[190] While acts or omissions in breach of provisions enacted to promote the public interest are in principle excluded from liability, the Greek courts are often willing to accept that the statutory pursuit of the public interest coincides with an intent to protect the private rights of the parties affected by the particular administrative regime. Thus, in the field of financial regulation, the courts have repeatedly held that the applicable statutory provisions, in addition to serving the public interest, are protective of the rights of the regulated enterprises as well as their clients.[191] As a result, both categories will usually have *locus standi* to bring actions for compensation for alleged illegalities in the BoG's performance of supervisory duties (including those relating to the licensing and resolution or special liquidation of supervised entities).

Unlike the tortious liability of private parties, the civil liability of public authorities under Greek law is non-fault.[192] Moreover, the parties harmed by illegal public actions or omissions are generally entitled to full compensation, i.e., damages for their incurred loss, as well as for lost profits (*lucrum cessans*) and, in certain cases, moral harm.[193] In the case of banking and financial regulation, however, the jurisprudence of the Conseil d'État has restricted this liability regime in two significant respects.[194] Firstly, the court held that the special situation of financial authorities, which are required to engage in complex economic and technical assessments with no guaranteed result and are vested with wide discretionary powers, is incompatible with a regime of strict liability for all deficient decisions. Accordingly, compensation is due only in cases of manifest and serious error. And secondly, the compensation owed to the clients of a failed institution for supervisory failures should be limited to reasonable and not full compensation, since to hold otherwise would essentially mean substituting the state's liability for that of the failed institution vis-à-vis its creditors, despite the fact that the latter had willingly assumed a financial

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detailed discussion of the civil liability of the Bob, see C.V. Gortsos, E.K Anastopoulou, *Greece*, cit.

190 Emergency Law 2783/1941, Article 105.

191 See especially Conseil d'État 3783/2014, paras. 18 and 20, in relation to civil liability for deficient insurance supervision. In that pilot case, the Conseil d'État considered that the decision of the ECJ in C-222/02, *Peter Paul v Bundesrepublik Deutschland*, judgment of 12 October 2004, ECLI:EU:C:2004:606, according to which the depositors of a failed bank do not have an automatic right under the European banking legislation (which was enacted in the public interest) to claim compensation for damage resulting from the defective supervision of that bank, did not preclude the Member States from adopting more generous criteria of liability under their national laws; *ibidem*, para. 20.

192 Emergency Law 2783/1941, Article 105, as distinct from Civil Code, Article 914, where, beyond the perpetrator's objectively illegal behaviour, fault (negligence or intentional wrongdoing) is also required to establish liability in tort.

193 Civil Code, Articles 297-299.

194 Conseil d'État 3783/2014.

exposure to the failed institution.[195] Moreover, even this narrower obligation to provide reasonable compensation is deemed to be satisfied where the state has instituted a statutory scheme of automatic partial compensation for the clients of failed financial institutions (such as a deposit guarantee, investor protection, or insurance guarantee scheme).[196] A further limit to the liability of financial authorities is that only parties directly harmed by their actions or omissions have standing to claim compensation, while those indirectly or secondarily hurt can bring an action only when a special statutory provision so provides. This could preclude shareholders from suing for damages related to decisions that adversely affect their institution but not them personally.[197]

It must be noted that, while this caselaw sets the authorities' manifest and serious error as the standard of liability in relation to supervision, a different standard of liability applies in relation to resolution-related decisions by virtue of the statutory provisions transposing the BRRD. Specifically, with regard to the BoG's actions as a resolution authority, civil liability under the rules of corporate and insolvency law is excluded; but the BoG remains liable against third parties for actions or omissions tainted by intentional wrongdoing or gross negligence.[198]

In principle,[199] the officials personally responsible for public bodies' illegal actions or omissions are jointly and severally liable with these public bodies, albeit under a different standard of liability (fault-based as opposed to strict liability).[200] In the case of the BoG, however, the Governor, the Deputy Governors, the members of the various organs, and the staff are granted personal immunity from civil liability to third parties for any action or omission in the performance of their supervisory and other public functions, with the exception of intentional wrongdoing.[201] However, this provision is expressly limited to liability claims brought by third parties and does not preclude the BoG from recovering by way of recourse from the perpetrator of the illegality.

Procedurally, a claim for damages for illegal actions or omissions perpetrated as part of the exercise of the BoG's public responsibilities must be brought before the administrative courts (meaning the Administrative Cour of First Instance of Athens). This applies to claims in connection to decisions made by the BoG's organs within the scope of their official duties (*faute de service public*). If, on the other hand, the claim relates to tortious acts or omissions perpetrated by the

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195 Conseil d'État 3783/2014, para. 29. Based on this rationale, the Conseil d'État held that in this area the basic provision establishing the non-fault civil liability of public authorities (Emergency Law 2783/1941, Article 105) cannot apply directly, but only by analogy; *ibidem*.

196 Conseil d'État 3783/2014, para. 30.

197 Administrative Court of First Instance of Athens 365/2019. However, on a previous occasion the same court had found a similar action to be admissible (albeit unfounded in substance); Administrative Court of First Instance of Athens 17728/2018.

198 Law 4335/2015, Article 2-72(4), transposing BRRD, Article 72(4).

199 See, however, Law 3528/2007 (Government Gazette A'26/2007), Article 38.

200 Emergency Law 2783/1941, Article 105.

201 Law 4335/2015, Article 62(4).

BoG's staff and agents personally during, or on the occasion of, the exercise of their official duties (*faute personelle*), the dispute is not considered to be of administrative nature, and jurisdiction lies with the civil courts. The same applies to the civil liability of the BoG arising from its private transactions and private property.[202]

3.4. Organizational and decision-making arrangements of the Greek DGS (TEKE)

Deposit insurance in Greece is organized as a single, statutory scheme, in which all Greek credit institutions (including the cooperative banks) and branches of non-EU banks participate on a mandatory basis.[203] Originally established in July 1995[204] in pursuance of the original Deposit Guarantee Directive,[205] the scheme is currently governed by a 2016 statute[206] transposing the recast Deposit Guarantee Scheme Directive (DGSD).[207]

The scheme is administered by the Hellenic Deposit and Investment Guarantee Fund (HDIGF, or TEKE).[208] This is set up as a legal person governed by private law[209] and having as shareholders the BoG and the Hellenic Bank Association, which hold, respectively, six tenths and four tenths of the share capital.[210] Despite the fact that, from an institutional and financial viewpoint, TEKE stands outside the Greek public sector[211] and is funded by industry contributions, not public funds,[212] it is nonetheless supervised by the Minister of Finance[213] and its acts in the performance of its statutory mandate are deemed, based on functional criteria, to be administrative decisions, and thus reviewable in public law by the administrative courts. Moreover, for statistical and European

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202 Under Emergency Law 2783/1941, Article 104, not Article 105. See C.V. Gortsos, E.K Anastopoulou, *Greece*, cit., 253-254.

203 Law 4370/2016 (Government Gazette A'37/2016), Article 5. As of end-2024, TEKE's membership comprised the 13 domestically incorporated credit institutions, plus two branches of third-country banks.

204 Law 2324/1995, Part Three (Articles 40-56).

205 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ 1994 L 135/5 ('Deposit Guarantee Directive').

206 Law 4370/2016.

207 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ 2014 L 173/149 ('DGSD'). For detailed analysis, see C.V. Gortsos, *The New EU Directive (2014/49/EU) on Deposit Guarantee Schemes: An Element of the European Banking Union* (Nomiki Bibliothiki, 2014).

208 Law 4370/2016, Article 4. Founded by Law 3746/2009 (Government Gazette A'27/2009), Article 2, the HDIGF is the universal successor of the original deposit insurance fund of Law 2324/1995, Article 41.

209 Law 4370/2016, Article 4(1).

210 Law 3746/2009, Article 2(5).

211 Law 4370/2016, Article 4(1).

212 Law 4370/2016, Articles 25-38, as amended.

213 Law 4370/2016, Article 4(1). The Minister of Finance is also responsible for specifying the internal organizational structure of TEKE; Law 4370/2016, Article 50(1).

economic governance purposes, TEKE is classified as a general government unit.[214]

In addition to providing deposit insurance to the covered depositors of credit institutions,[215] TEKE operates the investor compensation scheme with respect to those credit institutions that offer investment services to their clients,[216] but not with respect to other investment firms, which participate in a separate scheme.[217] In 2011, when at the height of the Greek crisis a set of resolution tools was inserted into the banking regulatory framework for the first time, TEKE was also vested with the responsibility of financing resolution actions in credit institutions, thus turning it into Greece's national resolution fund.[218] To meet its three statutory roles, TEKE operates three distinct and separately funded schemes: the Deposit Coverage Scheme; the Investment Coverage Scheme; and the Resolution Scheme. Each of these schemes has its own financial resources (raised through separately calculated contributions from member institutions),[219] which are earmarked for its specific purposes.[220]

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214 European Commission (Eurostat), Decision on government deficit and debt, *The Statistical Classification of the Hellenic Deposit and Investment Guarantee Fund (TEKE)* (31 July 2020). Based on Eurostat's *European System of Accounts: ESA 2010* (2013), paras. 20.06-20.07, and *Manual on Government Deficit and Debt – Implementation of ESA 2010* (2019 edition) (MGDD), Chapter 1.5 (subsequently superseded by the 2022 edition), Eurostat reaches the conclusion that, as a statutory protection fund set up by the Greek government, carrying out its functions for public policy purposes by exercising authority over selected institutional units, and mainly financed by compulsory contributions defined in the legislation, TEKE should be classified in the general government sector. In Eurostat's view, TEKE's autonomous decision-making is not a crucial factor for its classification, since it is controlled by the government and is a non-market unit (in so far as it is financed mainly by compulsory payments which are not based on the underlying risks and must therefore be treated in national accounts as taxes, and not as insurance premiums or other sales. Interestingly, the decision adds that '[r]esolution activities are also not market activities', because they involve 'actions outside normal liquidation procedures and significant redistribution of wealth (e.g. deciding which creditor would bear the brunt of the resolution)'.

215 In accordance with the DGSD, the Greek scheme covers the deposits of individuals and non-financial entities up to a limit of €100,000 per credit institution, subject to certain exceptions; Law 4370/2016, Articles 8-9. The deadline for payout is set at seven working days after the deposits' unavailability; Law 4370/2016, Article 11(3).

216 Law 4370/2016, Articles 5(2) and 53(2).

217 This is the Investment Guarantee Fund, which operates under Law 2533/1997 (Government Gazette A'228/1997), Articles 61-78, as amended, transposing Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes, OJ 1997 L 84/22. Credit institutions providing investment services which at the time of entry into force of Law 4370/2016 participated in the Investment Guarantee Fund remain members and are exempted from joining TEKE's Investment Coverage Scheme; Law 4370/2016, Article 53(3). The membership of TEKE's Investment Coverage Scheme currently comprises six banks, namely, Greece's four significant institutions (but not their investment firm affiliates, which are members of the Investment Guarantee Fund), alongside two LSIs.

218 Law 4021/2011, Article 7, amending Law 3746/2009. See now Law 4335/2015, Article 2-95.

219 Law 4370/2016, Articles 25-29 (Deposit Coverage Scheme), 30-35 (Investment Coverage Scheme), and 36 (Resolution Scheme). Member credit institutions prefund the Deposit Coverage Scheme with *ex ante* contributions, which are determined according to the size of their covered deposits and their risk profile. The administrative costs of TEKE are covered by a separate membership fee; Law 4370/2016, Article 37.

220 Law 4370/2016, Article 4(3).

Regarding TEKE's Resolution Scheme, it must be noted that under the second economic adjustment programme for Greece its use was suspended for almost three years (from 29 February 2012 to the end of 2014) as the specially formed HFSF took over temporarily the financing of further banking restructuring and resolution measures. Presently, as a result of the mutualization and merger of the financial resources of the euro area's national resolution funds into the SRB-administered Single Resolution Fund (SRF), Greek credit institutions are obliged to make *ex ante* and *ex post* contributions to the latter, not to TEKE's Resolution Fund. These contributions are calculated by the SRB and notified to the institutions concerned through the BoG's Resolution Unit. The contributions are then collected by TEKE, which immediately transfers them to the SRB. Consequently, TEKE's Resolution Scheme has lost almost all its relevance. Its remaining role is strictly limited to the branches of third-country banks.[221] These are still required to make regular contributions, whose amounts are determined domestically by the BoG's Resolution Measures Committee.[222]

TEKE is governed by a seven-member Board of Directors, whose members are appointed by decision of the Minister of Finance for a five-year, renewable term.[223] One of the two Deputy Governors of the BoG is appointed as Chair; of the other members, one is nominated by the Ministry of Finance, three from the BoG, and two from the banking sectors' trade association, the Hellenic Bank Association.[224] If they have not been personally appointed as members, the directors of the Banking Supervision Directorate and the Resolution Unit of the BoG are entitled to attend the Board's meetings without the right to vote.[225] Meetings of the Board of Directors are convened by the Chair, who defines the agenda.[226] The Chair is also responsible for the external representation of TEKE, while the internal day-to-day administration and supervision of its services is entrusted to a Director appointed by the Board.[227] Unless a particular

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221 Non-Greek EU institutions contribute to their home country's national resolution fund or the SRF, as the case may be, and their Greek branches are therefore outside the remit of TEKE, as is the case with deposit insurance contributions.

222 As thing currently stand, just two branches of third-country institutions are subject to this arrangement. In the past, TEKE was empowered to collect contributions from the Greek banks for the purpose of repaying a loan that it had obtained in 2011 to finance resolution actions; Law 4370/2016, Article 36(3). That loan has since been repaid in full, partly through the dividends that TEKE received from the liquidation of the failed banks' residual entities.

223 Law 4370/2016, Article 48(1), (3). The compensation of the Chair and members is also determined by decision of the Minister of Finance and is charged to TEKE, and not to the state budget; Law 4370/2016, Article 48(15).

224 Law 4370/2016, Article 48(1). Of the three members nominated by the BoG, one must be a lawyer; Law 4370/2016, Article 48(5).

225 Law 4370/2016, Article 48(5).

226 Law 4370/2016, Article 48.

227 Law 4370/2016, Article 48(18). The organizational structure of TEKE is determined by decision of the Minister of Finance, adopted upon recommendation of the Board of Directors, while its internal operation and the hiring and status of its staff is governed by byelaws adopted by the Board of Directors; Law 4370/2016, Article 50(1), (3).

matter has been delegated to the Director, all decisions concerning the management and representation of TEKE are taken by the Board of Directors. Decisions are taken by absolute majority of the members physically present or participating by proxy, with the Chair having a casting vote in case of tie.[228] The composition, remit, and decision-making rules of the Board of Directors suggest that the BoG exercises a preponderant influence on TEKE, even though the Board's members are expected to act in their own name and responsibility when exercising their responsibilities in TEKE.

All in all, TEKE serves narrow contribution-collection and 'paybox plus' functions.[229] It does not carry on any regulatory or supervisory tasks and has no powers of intervention in the affairs of its member banks. It collects a limited amount of information as necessary for the calculation of the deposit base, the assessment of contributions, and the verification of the availability of its resources, which are kept in the form of deposit accounts with its own member banks.[230] In order to enforce the collection of contributions and punish the failure of members to comply with their obligations under its three schemes, TEKE must seek the assistance of the BoG, which, in cooperation with TEKE, may impose penalties and adopt measures (including, if necessary, the appointment of a commissioner). Should thesemeasures prove insufficient, TEKE may, with the express agreement of the BoG, set a deadline for the recalcitrant institution to fulfil its obligations. If an institution fails to comply within the deadline, TEKE excludes it from the relevant scheme and its authorization is withdrawn by decision of the ECB.[231]

The Greek legislator has not utilized the national discretion granted by the DGSD, according to which Member States may enable their DGSs to use their available resources for the financing of transactions, known as 'preventive measures', intended to avoid the failure of a credit institution, as long as these preventive measures meet the least-cost criterion, i.e., their cost does not exceed the cost that a DGS would incur by paying out covered deposits if the institution were allowed to fail.[232] On the other hand, the new provisions on the potential use of the transfer tool in the context of bank liquidation proceedings[233] are based on DGSD's closely related national discretion, under which Members States may mobilize their DGS's financial resources for the financing of so-called 'alternative measures', including P&A-style transactions, aimed at preserving the uninterrupted access of depositors to covered deposits in the context of national insolvency proceedings, always subject to the least-cost constraint.[234]

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228 The quorum consists of four members; Law 4370/2016, Article 48(10).

229 See IADI, *IADI Core Principles for Effective Deposit Insurance Systems* (Nov 2014), 10.

230 Law 4021/2011, Article 41.

231 Law 4021/2011, Article 52(1).

232 DGSD, Article 11(3).

233 Law 4261/2014, Article 145B, as amended.

234 DGSD, Article 11(6).

4. Toolbox of bank failure management

4.1. General legal framework and procedural possibilities

Greece's main statute on the prudential supervision of credit institutions was enacted in 2014 with a view to transposing the Capital Requirements Directive IV (CRD IV).[235] For the most part, its provisions correspond closely to that directive's provisions; in addition, the statute contains autonomous national provisions on bank failure management[236] and certain incidental issues of banking and securities law.[237] Under the rubric 'Enhanced supervision; resolution measures; appointment of commissioner; special liquidation of credit institution', a chapter on bank failure management reenacted legislation first adopted in 2011.[238] As originally enacted, the chaptercovered: supervisory interventions in weak banks (under the rubric of 'enhanced supervision');[239] the resolution measures that the BoG could implement under Greek law in the pre-BRRD period;[240] and the special liquidation regime applicable to credit institutions.[241] A systematic reading of these provisions, which the legislation had placed together in a single chapter, might suggest that the Greek legislator had in mind a unified concept of bank failure management and viewed the various powers and procedural paths (supervisory intervention, resolution, and insolvency proceedings) not as self-contained sets of proceedings, but as mutually supportive parts of a continuum. Be that as it may, the provisions on resolution were repealed a year later, when the harmonized and fully-fledged European resolution regime of the BRRD was transposed into Greek law in the form of a distinct statutory framework.[242]

The present structure of European and national legal arrangements makes it necessary to carefully distinguish between three general types of administrative action that the banking authorities may undertake in relation to weak, distressed, or failing credit institutions, namely:

a) supervisory and/or early intervention measures;

b) resolution actions, possibly combined with the special liquidation of the residual entity; and

c) withdrawal of authorization, followed by special liquidation.

Each of the three types raises different substantive and procedural issues and involves the BoG in a different capacity (NCA, NRA, or liquidation authority).

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235 Law 4261/2014.

236 Law 4261/2014, Part A, Chapter VII (Articles 136-146).

237 Law 4261/2014, Part A, Chapter VIII (Articles 147-155).

238 Law 3601/2007, Articles 62A, 63, 63A-63G, and 68, as inserted or replaced by Law 4021/2011, Articles 2-5. See above, n 47.

239 Law 4261/2014, Articles 136-138.

240 Law 4261/2014, Articles 139-144.

241 Law 4261/2014, Articles 145-146.

242 Law 4335/2015, Article 2-130(1).

4.2. Supervisory measures and early intervention

The combined effect of the various provisions currently in force (including those transposing the BRRD) is to confer on the Greek NCA a broad set of powers of intervention whenever a credit institution is found to be in financial distress or in serious breach of its prudential requirements.

As might be expected, the prudential regime includes a system of measures and penalties, the exercise of which enables the NCA to deter or, if it occurs, to deal effectively with non-compliance with its requirements.[243] Every credit institution must comply at all times with the information-related and substantive requirements of the prudential regime. Violations of the norms are punishable by administrative penalties and, if sufficiently serious, may even justify the withdrawal of an institution's authorization. The Greek statutory norms thus vest on the BoG, in its capacity as NCA, the power to adopt supervisory measures and impose penalties in all situations envisaged in the CRD IV relating to breaches of the prohibition on the unauthorized carrying on of banking activities, of the requirements in relation to the acquisition and disposal of qualifying holdings, and of the various prudential requirements of the CRD IV/CRR regime.[244] Closely mirroring the provision of the CRD IV that it transposes, the statutory list of breaches of prudential requirements subject to administrative penalties includes, *inter alia*, failure to comply with information-related requirements, provision of false or incomplete information, breaches of corporate governance norms, breaches of prudential requirements relating to liquidity and large exposures, and failure of parent institutions to comply with their obligations.[245] The envisioned penalties may be applied both to the institution concerned and to the members of its board of directors or any other natural person who, in view of its role in the institution, bears responsibility for the breach.[246] The penalties can take a variety of forms: public statements identifying the breach and its perpetrator; cease-and-desist orders; substantial pecuniary penalties (fines); temporary prohibitions on natural persons to act as directors and managers in credit institutions; and, last but not least, the withdrawal of the institution's authorization.[247] The administrative measures and penalties may be imposed by the BoG acting alone, or in collaboration with, or by delegation to, other authorities, or by application to the

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243 Law 4335/2015, Articles 56-64, as amended, transposing CRD IV, Title VII, Chapter 1, Section IV (arts 64-72).

244 Law 4335/2015, Articles 58(1) and 59(1)-(1A), transposing CRD IV, Articles 66(1) and 67(1), respectively.

245 Law 4261/2014, Article 59(1)-(1A).

246 Law 4261/2014, Article 57(1)-(2), transposing CRD IV, Article 65(1)-(2).

247 Law 4261/2014, Articles 58(2) and 59(2), transposing CRD IV, Articles 66(2) and 67(2), respectively. Over and above this system of administrative penalties, the directors, auditors, managers, and members of staff of credit institutions may be held criminally liable under the Greek banking statute for accounting fraud, submission to the NCA of fraudulent or inaccurate reports or data, and refusal to cooperate cooperation with, or obstruction of, the exercise of supervisory control; Article 59(3). Criminal liability under the provisions of the Criminal Code or other statutory provisions is also possible.

judicial authorities.[248] In all cases, their imposition requires a reasoned decision[249] by the BoG (meaning, in view of what has already been said, a decision of the BoG Credit and Insurance Committee[250]). The imposition of administrative penalties (as opposed to other administrative measures) is subject to publicity requirements. However, the publication of penalties may take place on an anonymized basis, if this is justified on grounds of proportionality, preservation of financial stability, or the secrecy of an ongoing criminal investigation.[251]

Supervisory measures. While these provisions apply to all sorts of regulatory infractions, regardless of when they occurred, a separate set of provisions specifically addresses institutions in a state of financial weakness. These provisions empower the supervisory authority to mandate credit institutions that are already in breach of their prudential requirements or are likely to breach them within the next twelve months, to implement at an early stage appropriate corrective measures.[252] The precautionary measures that a credit institution may be asked to implement on this basis can be quite intrusive, and include: additional own funds requirements, in excess of the minimum level required by the CRR; enhancements of its internal governance and control systems; the submission to the supervisory authority within a specified deadline of a plan for the correction of the situation; restrictions on the institution's business activities, operations or network; mandatory provisions; risk-reduction measures; limits or prohibitions on the distribution of dividends; limits on the variable remuneration of directors and key decision-makers; prior supervisory approval of certain transactions constituting a potential threat to the bank's solvency for a period of up to three months; and a mandatory capital increase.

Most of the supervisory powers in the Greek statute mirror the list in the corresponding Article 104 of CRD IV.[253] The final two, however, are not based on the European text, but 'gold-plate' it with older provisions of national law.[254] Under these purely national provisions, the Greek supervisory authority

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248 Law 4261/2014, Article 56(1), transposing CRD IV, Article 64(2). An application to the judicial authorities may be necessary, for instance, in the event of forcible entry in premises or seizure of documents of an entity or person under investigation; see Law 4261/2014, Article 57(3).

249 Law 4261/2014, Article 56(2), transposing CRD IV, Article 64(3). To ensure that the penalties meet the requisite standards of suitability, reasonableness, and proportionality, the legislation identifies the factors that the decision-makers must take into account when selecting the type and level of the penalty in a particular case; Law 4261/2014, Article 62(1), transposing CRD IV, Article 70.

250 See above, text to nn 143-146.

251 Law 4261/2014, Article 60, transposing CRD IV, Article 68.

252 Law 4261/2014, Articles 94 and 96, transposing CRD IV, Articles 102 and 104, respectively.

253 Law 4261/2014, Article 96(1)(a)-(l), transposing CRD IV, Article 104(1), as amended.

254 When exercising its direct supervisory responsibility in relation to the Greek SIs in accordance with SSMR, Article 4(1), the ECB may apply directly the provisions of Greek law regulating matters within its field of competence, if these transpose European law; if, however, these provisions are of purely national character, it can apply them indirectly, by instructing the relevant national authority to make use of its powers on its behalf. It would thus appear that, while the provisions under discussion may be applied to Greek SIs, their application will require a decision of the ECB instructing the BoG to exercise the relevant supervisory powers. See L. Boucon, D. Jaros, *The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism:*

may order a credit institution to seek its approval before entering into certain transactions which, in the opinion of the authority, may jeopardize the institution's solvency. This possibility may be exercised for a limited period of time, which may not exceed three months.[255] Similarly, the Greek supervisory authority may instruct a credit institution and the members of its board of directors to increase the institution's capital.[256] The capital increase must take place within a fixed time limit and in accordance with the terms set out in the relevant supervisory decision.[257] If the board of directors fails to convene the necessary general meeting,[258] or to implement the decision of the general meeting authorizing the capital increase, the directors who prevented the necessary decisions from being taken may be fined.[259]

Under Article 102 of CRD IV, the imposition of the supervisory measures of Article 104 is not explicitly linked to a crisis situation, but merely to the actual or potential failure of the institution concerned to comply with prudential requirements generally;[260] and the same measures may also be imposed on other grounds in the course of the prudential regime's regular supervisory review and evaluation process (SREP).[261] However, there is little doubt that the use of such measures mostly aims at the correction of the situation (which is to say, the recovery) of distressed credit institutions.[262]

Early intervention measures. The same objective may also be pursued through the measures that supervisors may impose under the rubric of 'early intervention' under the BRRD.[263] The list of early intervention measures in the

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A New Mode of European Integration?, (2018) *European Journal of Legal Studies*, 155-187, at 166-170.

255 Law 4261/2014, Article 96(1)(m).

256 Law 4261/2014, Articles 96(1)(n) and 136, as amended. This power, which concerns the institution's equity, should not be confused with the power subsequently granted to supervisors to impose additional own funds requirements or give guidance on additional own funds to institutions; see CRD IV, Articles 104A-104B, as inserted by Directive (EU) 2019/878, OJ L 150/253; and Law 4261/2014, Article 96A-96B.

257 Law 4261/2014, Article 136(1), as amended. The minimum amount of the capital increase must be set by the supervisory authority at a level that ensures that the credit institution will, upon completion of the process, meet its minimum own funds requirements as defined in the CRR. The raising of new capital may be accompanied by a write down of the institution's existing paid-up share capital. Moreover, the supervisory authority may request that the increase be made by the issuance of preference shares rather than ordinary shares, and that it be accompanied by a reduction in the nominal value of the credit institution's existing share capital. Law 4261/2014, Article 136(1).

258 The general meeting may be convened with the benefit of certain derogations from general company law; Law 4261/2014, Article 136(3)-(4).

259 Law 4261/2014, Article 136(2).

260 CRD IV, Article 102(1); and Law 4261/2014, Article 94(1).

261 CRD IV, Article 104(1); and Law 4261/2014, Article 96(1).

262 This is very clear in the case of the national supervisory power to order capital increases, which is merely mentioned in the list of supervisory powers of Law 4261/2014, Article 96(1), but elaborated in detail in Article 136, which is part of the statutory provisions on bank failure management. There it is clarified that, unlike the other supervisory powers, the power to order capital increases is available solely in athe context of Article 94(1) (= CRD IV, Article 102(1)).

263 BRRD, Title III (Articles 27-30).

Greek statute replicates that of the BRRD, without any national gold-plating. They include the powers of the supervisory authorities to require the directors of the institution, *inter alia*, to implement some or all of the measures envisaged in the institution's recovery plan, to draw up an action plan for the correction of the situation, to convene a general meeting of shareholders with a prescribed agenda, and to implement appropriate changes in the institution's business strategy and/or legal or operational structures.[264] The removal of the directors and/or senior managers of the institution and the appointment of a temporary administrator ('commissioner'[265]) are also envisaged, again in terms that are quasi-identical to those of the BRRD.[266]

One might think that, given the separation of the European prudential and resolution regimes, the supervisory measures that they envisage would relate to different phases or levels of deterioration of a credit institution's financial and business situation, or that the inclusion of the various measures in one or the other directive, and the corresponding national instruments, would imply a progressive escalation of the supervisory responses; but this is not the case. The overlap between the conditions for supervisory interventions under the two regimes is quite obvious. In both cases, the intervention is triggered by an actual or likely breach of the same prudential requirements, even though the time frame is expressed differently (likely non-compliance 'within the following 12 months' in the first case, as opposed to likely non-compliance 'in the near future', due to a 'rapidly deteriorating financial condition' in the second[267]). Moreover, despite the somewhat different phrasing, some of the powers granted to supervisors are the same.[268] At the same time, the characterization of a supervisory intervention as an early intervention is not inconsequential: not only does it allow the supervisory authority to take more diffuse and broadly-ranged measures than those it could adopt under CRD IV, but it also automatically brings the resolution authority into the picture. The latter must be notified without delay once the supervisory authority has determined that the conditions for early intervention are met in relation to an institution; it may then order the institution to contact potential purchasers in preparation for its resolution.[269] In this sense, the classification of a supervisory measure as early intervention places the institution concerned in a distinct pre-resolution phase, with important implications for its fate. This impresses the need for greater legal clarity as to the precise point at which early intervention kicks in. This need is currently openly recognized by the European institutions themselves, as attested by the Commission's proposed amendment

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264 Law 4335/2015, Article 2-27(1), transposing BRRD, Article 27(2).

265 See below, n 272.

266 Law 4335/2015, Articles 2-28 and 2-29, transposing BRRD, Articles 28 and 29, respectively.

267 BRRD, Article 27(1). See also EBA, Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU (EBA/GL/2015/03, 8 May 2015).

268 See, in particular, CRD IV, Article 104(1)(c); and BRRD, Article 27(1)(b).

269 BRRD, Article 27(2).

of the provisions on early intervention in the BRRD and the SRMR.[270] As a result of these amendments, the trigger for early intervention will in the future be defined by reference to the conditions for the application of supervisory measures in Article 102 of CRD IV, i.e., the actual or likely breach of prudential requirements will in the future serve as a trigger for the joint imposition of both sets of measures and the commencement of the pre-resolution phase, while the supervisory measures of Article 104 of CRD IV will still be applicable for the other purposes mentioned therein.

Appointment of a commissioner. Returning to the current state of the legislation, it should be noted that, besides the supervisory measures mentioned above, the Greek banking statute includes in its chapter on bank failure management another possibility, namely, the appointment of a commissioner.[271] Despite its purely national origin,[272] the relevant article must now be read in conjunction with the more recent but coincidentally very similar provisions of the BRRD's harmonized resolution framework, which envisage the appointment of a temporary administrator ('commissioner'[273]) as an early intervention measure.[274]

Reproducing almost verbatim the text of the BRRD, the Greek provisions empower the supervisory authority to appoint one or more commissioners if it considers that the removal of the existing senior management or board of directors is not sufficient to remedy the situation of an ailing credit institution.[275] The appointment is for a term not exceeding one year, which may be exceptionally renewed by reasoned opinion of the supervisory authority if the conditions for

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270 European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action (COM(2023) 227 final, 18 April 2023), draft Article 1(12), replacing BRRD, Articles 27-28 with new text; and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding of resolution action (COM(2023) 226 final, 18 April 2023), draft Article 1(15), replacing SRMR, Article 13 with new text.

271 Law 4261/2014, Article 137.

272 The commissioner system was introduced by Emergency Law 1665/1951, Article 8; see above, text to n 23. The relevant provisions were reenacted in very similar form in 2006; Law 3601/2007, Article 63(2)-(3). In the early phase of the Greek public debt crisis, they were replaced by a new, more detailed text, as part of a broader enhancement of the bank failure management toolbox; Law 3601/2007, Article 63, as replaced by Law 4021/2011, Article 3. Subsequent reenactments, the most recente of which was part of the national transposition of the BRRD, made certain changes but did not affect the core elements of the commissioner system; Law 4261/2014, Article 137, as amended by Law 4335/2015, Article 2-120(4).

273 In the Greek text of BRRD, Article 29, the term 'temporary administrator' is variably translated as 'προσωρινός διαχειριστής' (temporary administrator), 'ειδικός διαχειριστής' (special administrator), και 'επίτροπος' (commissioner). In the national statute transposing the BRRD, however, the term is rendered throughout as 'commissioner'; Law 4335/2015, Article 2-29. The choice of the particular term is not surprising, given the Greek legislator's decision to explicitly graft BRRD's temporary administration onto the preexisting Greek commissioner system; see below, text to nn 283-284.

274 Law 4335/2015, Article 2-29, transposing BRRD, Article 29.

275 Law 4335/2015, Article 2-29(1). To be selected by the supervisory authority, a commissioner must possess the necessary qualifications, skills, and knowledge and free of conflicts of interest.

appointing a commissioner are still met.[276] Depending on the circumstances, the commissioner is appointed either to temporarily replace the institution's board of directors (but not the general meeting, since his appointment may not affect the rights of shareholders[277]) or to temporarily cooperate with it; in the latter case, the supervisory decision appointing the commissioner also determines the duty of the board of directors to seek his opinion or obtain his consent before taking certain decisions or undertaking certain actions.[278] Whenever the commissioner assumes the power of representation of the institution (as will invariably be the case whenever the commissioner replaces the board of directors), his appointment must be made public.[279] In all cases, the precise role and duties of the commissioner are determined and delimited by the decision appointing him.[280] The supervisory authority retains, however, the power to remove or replace the commissioner, or to modify the terms of his appointment, at any time and for any reason.[281] Moreover, the supervisory authority may reserve decision-making on specific matters to itself or require the commissioner to obtain its prior approval before taking certain decisions; and its prior approval is always required whenever the commissioner convenes a general meeting or sets its agenda.[282]

Significantly, the inclusion of these provisions in the early intervention toolbox does not replace the preexisting Greek legislation on the appointment of commissioners. This remains in force,[283] and can be used either independently or to complement the early intervention provisions.[284]

In this sense, the national provisions contribute to the operationalization of the provisions on early intervention, *inter alia*, by detailing the commissioner's duty to report to the supervisory authority,[285] by imposing on the management and staff of the institution the obligation to provide the commissioner with any information that he may request and to facilitate the commissioner in the exercise of his duties,[286] and by specifying that the costs arising from the performance of the commissioner's duties (including the hiring of external consultants and support staff by the commissioner) shall be borne by the credit institution.[287]

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276 Law 4335/2015, Article 2-29(9).

277 Law 4335/2015, Article 2-29(8).

278 Law 4335/2015, Article 2-29(1).

279 Law 4335/2015, Article 2-29(1).

280 Law 4335/2015, Article 2-29(1)-(3). Exercising a national discretion in the BRRD, the Greek legislation limits the commissioner's liability for actions or omissions in the performance of his duties to intentional wrongdoing and gross negligence only; BRRD, Article 29(9); and Law 4335/2015, Article 2-29(9).

281 Law 4335/2015, Article 2-29(4).

282 Law 4335/2015, Article 2-29(5).

283 Subject to minimal amendments, to ensure full consistency with the provisions transposing the BRRD; Law 4261/2014, Article 137, as amended by Law 4335/2015, Article 2-120(4).

284 Law 4335/2015, Article 2-29(10).

285 Law 4261/2014, Article 137(8).

286 Law 4261/2014, Article 137(9).

287 Law 4261/2014, Article 137(10), (12).

Beyond their somewhat more detailed character, however, the main effect of the national provisions is to extend the applicability of the commissioner system to situations not covered by the conditions for early intervention. Specifically, the supervisory authority may appoint a commissioner in pursuance of the supervisory legislation, not only when the conditions of Article 27 of the BRRD are met, but also when:

- the credit institution is unable or refuses to increase its own funds, or obstructs in any manner the BoG's supervision (both of which constitute grounds of withdrawal of authorization under Greek law[288]);
- the credit institution commits serious or continuous breaches of statutory provisions, decisions of the BoG, or its own constitution, or is guilty of serious administrative irregularities, or its course of business casts reasonable doubt on the proper and prudent management of its corporate affairs and jeopardizes its solvency, the interests of its depositors or, more generally, financial stability and the public confidence in the domestic financial system,
- it appears that the credit institution does not have sufficient own funds or is unable to fulfill its obligations, and in particular to guarantee the repayment of the refundable funds entrusted to it by its depositors and other creditors, or
- the credit institution submits a request to this effect.[289]

In addition, the appointment of a commissioner is mandatory for the supervisory authority if the credit institution has not implemented the corrective measures or the mandatory capital increase imposed on it by the supervisory authority under the prudential framework, or has not implemented its recovery plan despite being requested to do so by the supervisory authority in the context of an early intervention measure.[290]

The purpose of the appointment of a commissioner under the prudential framework is also broader than in the context of early intervention, as it may involve either the recovery of the institution concerned or the preparation of its resolution or placement in special liquidation.[291]

The national provisions require that any decision to appoint a commissioner, irrespective of its ground, be notified to the NRA, TEKE, the NCAs of other Member States, and the EBA; and they clarify that the appointment of

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288 Law 4261/2014, Article 19(g)-(h). See below, text to nn 322-325.

289 Law 4261/2014, Article 137(1).

290 Law 4261/2014, Article 137(2). A commissioner may also be appointed to carry on the administration of the credit institution if the legality or validity of the election, composition, or functioning of the board of directors is directly or called into question by a judicial decision; Law 4261/2014, Article 137(14).

291 Law 4261/2014, Article 137(4).

commissioner does not trigger a payout to depositors by TEKE, does not constitute an event of default that would trigger the cancellation, termination, or modification of the credit institution's contractual relationships, and does not activate a moratorium (suspension of enforcement actions against the institution).[292] Under a related national provision, however, if an institution for which a commissioner has already been appointed is afflicted by significantly reduced liquidity and a probable shortfall in own funds, the supervisory authority is empowered to declare a moratorium on the institution's obligations, in order to protect its depositors and other creditors. The moratorium, which does not trigger a payout of depositors by TEKE, may not exceed twenty working days, extendable for another ten more working days by subsequent decision of the BoG.[293]

4.3. Resolution

When a credit institution's financial situation has deteriorated to the extent that, based on the criteria set out in the BRRD and the SRMR, it is deemed to be failing or likely to fail (FOLTF),[294] the relevant resolution authorities must assess whether the institution fulfils the conditions for being placed under resolution. If the conditions are met, the resolution authority must initiate resolution action by adopting a resolution scheme. Otherwise, the failure of the institution must be dealt with by placing it in normal insolvency proceedings.

In the case of a country participating in the Banking Union such as Greece, the introduction of resolution as a distinct procedural stream for bank failure management also raises the issue of the division of resolution-related tasks between the national and supranational levels within the SRM,[295] i.e., the respective responsibilities of, and relationship between, the BoG in its capacity as Greece's NRA, on the one hand, and the SRB, on the other. As in the case of banking supervision, the role of the BoG depends on the classification of credit institutions as SIs or LSIs.[296]

In the case of the Greek SIs, the SRB is directly responsible for drawing up the resolution plans and taking all decision related to their resolution.[297] For its

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292 Law 4261/2014, Article 137(6). While the appointment of a commissioner as an early intervention measure may be kept secret, the appointment of a commissioner under the banking statute must always be published in the Government Gazette and on the website of the BoG on the same day; Law 4261/2014, Article 62(3), as amended.

293 Law 4261/2014, Article 138. The relevant decisions of the BoG are published in the manner described in n 292.

294 BRRD, Article 32(3); SRMR, Article 18(4); and Law 4335/2015, Article 2-32(3). The conclusion that the institution is FOLTF may be reached, and the resolution phase initiated, either by the supervisory authority or by the resolution authority, based on the information that they possess.

295 SRMR, Article 7.

296 Beyond its direct responsibility for SIs supervised by the ECB, the SRB is also directly responsible for cross-border banking groups comprising LSIs; SRMR, Article 7(2)(b). However, no such group is present in Greece.

297 SRMR, Article 7(2)(a).

part, the BoG cooperates closely with the SRB and assists it in carrying out its various tasks by providing relevant information, drafting decisions, and taking implementing actions. In doing so, the BoG must operate within parameters set by the SRB's guidelines and general instructions and follow the general framework of practical arrangements for cooperation between the SRB and the NRAs (COFRA).[298] In the resolution planning phase, the BoG supports the SRB's resolution planning on a day-to-day basis, especially through the participation of its staff in the internal resolution teams (IRTs) that are set up to carry out resolution planning work in relation to specific entities or groups under the SRB's direct responsibility. The IRTs, which are established by decision of the SRB's Restricted Executive Session, after consultation with the relevant NRA (which in the case of Greek SIs is the BoG), are composed of staff members from both the SRB and the relevant NRAs, with a senior SRB staff member as coordinator and one or more relevant NRA staff members as sub-coordinators.[299] During the resolution phase, the BoG assumes a more immediate role, as it is required to exercise its administrative powers under the Greek provisions transposing the BRRD for the purpose of executing faithfully and effectively the SRB's resolution scheme, always in compliance with the safeguards provided for in the BRRD.[300] Thus, immediately after the adoption by the SRB of the resolution scheme in relation to a Greek SI, the BoG must publish an implementing act, detailing the execution of the SRB's decision. The SRB remains responsible throughout for closely monitoring the execution of the resolution scheme and may issue instructions to the BoG on any aspect thereof.[301] To facilitate the SRB's monitoring, the BoG is required to provide at regular intervals accurate, reliable, and complete information on the execution of the resolution scheme, as well as to prepare and submit a final report.[302]

In contrast to its subordinate role in to the case of Greek SIs, in the case of LSIs the BoG exercises direct responsibility within the SRM for the performance of the various resolution-related tasks (resolution planning, setting the MREL, adopting early intervention measures, and deciding on resolution actions, including the adoption of the resolution scheme, the write down or conversion of capital instruments, and the application of the resolution

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298 SRMR, Article 31(1); and COFRA.

299 COFRA, Articles 24-26.

300 SRMR, Article 29(1). While such indirect implementation of the resolution scheme is the rule, the SRB retains reserve powers enabling to intervene directly by addressing orders to the institution under resolution in situations where the BoG fails to implement its decisions, or implements them in a manner inconsistent with its directions or posing a threat to the resolution objectives; SRMR, Article 29(2)-(4). In this case, the SRB acts by decision of its Extended Executive Session. However, before exercising its reserve powers, the SRB must notify the BoG of its intention; and the BoG must provide the SRB with a reasoned statement explaining why it has not followed the SRB's decision; COFRA, Article 11(3).

301 SRMR, Article 28.

302 COFRA, Article 15(3)-(4).

tools).[303] Exceptionally, however, if the envisaged resolution action requires funding by the SRF, the responsibility for adopting the resolution scheme passes to the SRB.[304] In all cases, the BoG must keep the SRB informed of its resolution-related decisions and closely coordinate with it when taking them.[305] For its part, the SRB may issue a warning to the BoG if it considers that a draft decision relating to an LSI does not comply with the European norms or its own general instructions to NRAs;[306] and if such a warning is not heeded, or if the BoG so requests, the SRB may exercise directly its resolution powers also in relation to a Greek LSI.[307]

As already noted, in so far as the BoG's internal arrangements are concerned, all day-to-day resolution-related administrative work, the preparation of all resolution-related decisions, and the cooperation with the SRB are entrusted to the Resolution Unit.[308] In addition, the Director of the Resolution Unit represents the BoG in the SRB and participates as a member in the Plenary Session,[309] as well as in the Extended Executive Session when it takes decisions on the resolution of Greek credit institutions.[310]

Similarly, all resolution-related decisions of the BoG (whether regulatory or individual, and whether relating to the execution of SRB decisions on SIs or to the BoG's performance of its duties in relation to Greek LSIs under its direct responsibility) are taken by the Resolution Measures Committee, following a proposal by the Resolution Unit.[311]

The BoG acts establishing the Resolution Unit and the Resolution Measures Committee confer on them the BoG's resolution-related responsibilities and powers in blanket terms.[312] As of end-2024, no instrument of the BoG had been issued for the purpose of individuating the relevant tasks or establishing more detailed procedures. As a result, administrative practice and decision-making in this area continue to rely solely on the (quite detailed) provisions of the statute transposing the BRRD, supplemented by the guidelines of the SRB. However, the Resolution Unit is currently preparing a handbook detailing the implementation of each of the four resolution tools. All components are expected to be finalised and submitted to the SRB for its approval by the end of March 2025.

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303 SRMR, Article 7(3), first subpara.

304 SRMR, Article 7(3), second subpara.

305 SRMR, Article 7(3), fifth and sixth subparas.

306 SRMR, Article 7(4)(a)

307 SRMR, Article 7(4)(b). A broadly similar power of intervention is granted to the ECB in the context of supervision; SSMR, Article 6(5)(b).

308 See above, text to nn 154-158.

309 In pursuance of SRMR, Article 43(1)(c).

310 SRMR, Article 53(3)-(4).

311 See above, text to nn161-166.

312 BoG General Council Decision of 7 February 2022, and implementing Act of the Governor; and BoG Executive Committee Act No 52/2.10.2015, as amended, para. B.2.

4.4. Special liquidation

As already mentioned, Greek law subjects credit institutions to a purely administrative system of special liquidation. This system dates back to 1951. In the past, it coexisted with the (court-based) collective proceedings of general insolvency (and pre-insolvency) law. Thus, it was possible for a bank to be declared insolvent by the insolvency court on the petition of any of its creditors if the general criteria were met, or to be the subject of reorganization proceedings.[313] However, since 2011, credit institutions have been completely excluded from the general insolvency and pre-insolvency system.[314] Accordingly, the mandatory liquidation of credit institutions (as well as of other financial institutions[315]) can now only take the form of a special liquidation under the main banking statute.[316]

The special liquidation of credit institutions is normally limited to the realization of assets and the satisfaction of claimants[317] through piecemeal liquidation.[318] On the contrary, it excludes the application of the various reorganization measures of general insolvency law, which aim to avoid the dissolution of the institution concerned, since in the case of banks equivalent measures can only be applied in the context of resolution.

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313 It should be noted that, rather confusingly, the Greek legislation uses one and the same word ('εξυγίανση') to describe both the resolution of credit institutions, in the technical sense that this term has acquired under the BRRD, and their reorganization (as opposed to liquidation), in the sense of the Winding-Up Directive (Directive 2001/24/EC); see Law 3458/2006 (Government Gazette A'94/2006).

314 Law 3601/2007, Article 68(1), as replaced by Law 4021/2011 (Government Gazette A'218/2011), Article 5. See now Law 4261/2014, Article 145(1)(a). Similarly, the main insurance statute excludes insurance undertakings from general insolvency proceedings and establishes a sector-specific insurance liquidation regime; Law 4364/2016, Part Four, Chapter III (Articles 235-249). The same statute establishes a special resolution regime for insurance undertakings; Law 4364/2016, Part Four, Chapters I-II (Articles 220-234), transposing the relevant provisions of Directive 2009/138/EC.

315 Law 4261/2014, Article 153(1), in conjunction with Article 3(1)(22), whereby 'financial institution' is defined by reference to CRR, Article 4(1)(26).

316 Law 4261/2014, Article 145, 145A-145B and 146. Voluntary liquidation under general company law is possible, if the credit institution concerned has surrendered its authorizations and its banking portfolio has been transferred to another credit institution by way of spin-off; Article 145(1)(b), as amended by Law 4664/2020 (Government Gazette A'32/2020), Article 5.

317 The order of priority of claims (including those of the Greek DGS) for the purposes of the special liquidation process is regulated in detail in a provision constituting *lex specialis* with respect to the order of priority of general insolvency law; Law 4261/2014, Article 145A, inserted by Law 4335/2015, Article 2-120, as amended. Financial assets belonging to clients are separated from the estate and returned to their owners or, if the credit institution has a counterclaim against them, set off against that claim; Law 4261/2014, Article 145(3). Special provisions apply to the treatment of secured claims; Law 4261/2014, Article 145(4). The costs of the liquidation and the fees of the special liquidator are borne by the institution concerned. If the latter is unable to pay, the BoG may assume the relevant obligation, in exchange for which it acquires a preferential claim on the proceeds of the liquidation, ranking above all other claims. Statute of the BoG, Article 55E, in conjunction with Law 4261/2014, Article 145(1)(h).

318 This does not preclude the sale of pools of assets, as opposed to the collection of assets on an ite-by-item basis; but it does preclude the joint transfer of assets and liabilities as a going concern. Exceptionally, if certain strict conditions are met, it is possible to use a transfer tool in the context of a special liquidation; Law 4261/2014, Article 145B, as amended. See below, section 4.5.

Unlike the liquidation proceedings of general insolvency law, which are triggered by substantive criteria such as illiquidity or balance-sheet insolvency, special liquidation is only indirectly linked to substantive factors. Instead, the sole, and mandatory, statutory ground for placing a credit institution in special liquidation is the withdrawal of its authorization.[319] Thus, once of the ECB's decision to withdraw authorization has been adopted, the BoG (Credit and Insurance Committee) must adopt a separate decision placing the institution in special liquidation and appointing a special liquidator to take over its administration.[320] The only exception is the voluntary surrender of an institution's authorization following the transfer of all of its regulated activities to another institution in the context of a demerger or spin-off.[321] In all other cases, special liquidation is, from a substantive viewpoint, the second-order effect of the supervisory determination that the institution meets one of the substantive grounds for withdrawal of authorization.

Many of these grounds are harmonized at the European level (CRD IV).[322] However, the Greek transposition supplements the European list with four additional grounds of national provenance, namely: the inability or refusal of the credit institution to increase its own funds (presumably following a supervisory request to do so); the obstruction in any way of the exercise of (presumably prudential) control by the BoG; the violation of statutory provisions on the supervision or conduct of business of credit institutions, or of decisions of the BoG, to the extent that this jeopardizes the credit institution's solvency or, more generally, the achievement of the objectives of the supervision; and the development of close links with other natural or legal persons, or the restructuring of the institution's group structure, in a manner that impedes the effective exercise of the supervisory functions.[323] These grounds (which essentially replicate the traditional Greek statutory grounds for withdrawing a bank's authorization[324]) overlap with, and generalize, the grounds set out in the CRD IV, so as to cover

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319 Law 4261/2014, Article 145(1)(b).

320 Law 4261/2014, Article 145(1)(b)-(c).

321 Law 4261/2014, Article 145(1)(b), second sentence, as inserted by Law 4664/2020 (Government Gazette A'32/2020), Article 5.

322 CRD IV, Article 18, as amended. These include: the surrender of the authorization, or non-use of the authorization for more than twelve months, or the cessation of business activities for more than six months; the use of the authorization exclusively for the purpose of carrying out the investment activities of dealing on own account and underwriting of financial instruments if the volume of such activities falls for five consecutive years below the levels prescribed in the CRR, Article 4(1)(1), as amended, so that the classification of the institution as a credit institution is no longer justified; the obtainment of authorization by making false statements or by any other irregular means; a breach of the conditions under which the authorization was originally granted; a breach of the minimum prudential requirements of the CRD IV/CRR package; and a breach of any of the supervisory obligations listed in CRD IV, Article 67(1) as transposed in Law 4261/2014, Article 59(1); Law 4261/2014, Article 19, as amended, points (a), (aa), (b)-(d), (f).

323 Law 4261/2014, Article 19, points (g)-(j). The last of these grounds turns into an ongoing requirement the compliance with the condition for authorization of CRD IV, Article 14(3), as transposed by Law 4261/2014, Article 14(4).

324 Starting with Emergency Law 1665/1951, Article 8(1).

an institution's non-compliance with prudential requirements in almost blanket fashion. Of course, any decision to withdraw an institution's authorization on so broad legal grounds will necessitate a careful proportionality assessment. In all cases, the withdrawal will take the form of an ECB decision to that effect; however, while withdrawals of authorization based on one of the European grounds may be made either on the initiative of the ECB or on a proposal from the BoG as NCA, only the latter is entitled to invoke purely national grounds in order to initiate the relevant common procedure.[325]

Following the withdrawal of authorization, the special liquidation is launched by a decision of the BoG Credit & Insurance Committee, which must be published on the same day in the Government Gazette and on the website of the BoG.[326] From the moment that it receives notice of this decision, the institution concerned is no longer allowed to receive deposits.[327] The BoG may also restrict its other business activities.[328] Significantly, the placement of the institution in liquidation does not affect the BoG's supervisory responsibility or its powers to apply measures and impose penalties.[329]

To administer the institution in liquidation, the BoG Credit & Insurance Committee appoints one or more special liquidators. These may be natural or legal persons.[330] The same person may act as special liquidator of more than one institution if this appears conducive to the objectives of the special liquidation. In this case, the special liquidations may be operationally consolidated, but without affecting the legal and financial separateness of the legal entities in liquidation or the legal position of their creditors.[331] This option was actually used by the BoG in 2016 to appoint a single entity (PQH Single Special Liquidation SA, a private company) as the single special liquidator for all credit institutions in special liquidation at that time,[332] plus one non-bank financial institution.[333] In the

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325 SSMR, Article 14(5).

326 Law 4261/2014, Article 62(3), as amended.

327 Law 4261/2014, Article 145(1)(e). The cessation of the bank's deposit-taking activities activates a payout of the covered deposits by TEKE, which, in turn, is subrogated to their claims for the relevant amounts. Since, according to the currently applicable order of priority, covered deposits enjoy superpriority, the subrogation gives TEKE preferential access to the proceeds of the liquidation; Law 4261/2014, Article 145A(1)(c).

328 Law 4261/2014, Article 145(1)(e).

329 Law 4261/2014, Article 145(1)(i).

330 Law 4261/2014, Article 145(1)(c). The option of appointing a legal person as special liquidator was first introduced in 2013; Law 3601/2007, Article 68(3), as replaced by Law 4172/2013 (Government Gazette A'167/2013), Article 74(9).

331 Law 4261/2014, Article 145(1)(c). Nonetheless, the single special liquidator of more than one credit institution may request from the BoG permission to use temporarily part of one institution's cash reserves for the rapid satisfaction of up to one fifth of the verified claims of certain preferential creditors (employees, legal advisors, social security funds) of another institution under its responsibility; Law 4261/2014, Article 145(6), as inserted by Law 4941/2022, Article 91 (Government Gazette A'113/2022).

332 I.e., the residual part of the 14 institutions resolved during the Greek public debt crisis, plus another bank that was placed in liquidation under special legislation long ago; see above, text to nn 57-59.

333 BoG Credit and Insurance Committee Decision No 182/1/4.4.2016 (Government Gazette B'925/2016).

following years, another credit institution and three small non-bank entities were added to the list, bringing the total number of liquidations under the management of the single special liquidator to 20, with combined assets of around €9 billion, consisting mainly of corporate and retail NPLs.[334]

Special liquidations are conducted under the supervision and control of the BoG, whose Credit and Insurance Committee is empowered to replace the special liquidator at any time.[335] The modalities of the liquidation process are determined by decision of the BoG,[336] while the rules of general insolvency law are applied in addition, in so far as they are compatible with the special provisions.[337]

Currently, the BoG's 'Special Liquidation Regulation' defines the nature of the special liquidation process, the role, duties, and powers of the special liquidator, the procedures to be followed for drawing up an inventory of the estate, the announcement of creditors and the verification of claims, the realization of assets, the distribution of proceeds by way of dividend to the institution's creditors, and the content and frequency of the various data sets and reports that the special liquidator is under a duty to submit to the BoG.[338] A related regulatory instrument of the BoG establishes the terms and conditions for the management of assets by the special liquidator.[339] This instrument provides detailed instructions on the operational plan that the special liquidator must prepare and submit for approval to the BoG Credit and Insurance Committee, initially upon completion of the inventory of the estate and thereafter on an annual basis.[340] It also sets out the conditions, permissible terms, and procedures for transactions involving adjustments of claims, compromises with debtors, discounting of receivables, or sales of real estate and other assets.[341]

Beyond its obligation to comply with these regulatory norms of the BoG, the statutory provisions directly impose on the special liquidator the obligation to obtain the approval of the Special Liquidations Committee, a statutory body whose five members are appointed by the BoG,[342] before entering into certain

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334 PQH, *Who We Are*.

335 Law 4261/2014, Article 145(1)(d).

336 Law 4261/2014, Articles 145(2) and 146(5).

337 Law 4261/2014, Article 145(2). Notwithstanding the administrative nature of the procedure, disputes arising in the course of the special liquidation (e.g., concerning the out-of-time announcement of claims, or the existence or value of the institution's claims) are adjudicated by the insolvency court of the registered seat of the institution in liquidation; BoG Credit and Insurance Committee Decision No 221/3/17.3.2017, Article 1(1).

338 BoG Credit and Insurance Committee Decision No 180/3/22.2.2016 (Government Gazette B'717/2016), as amended.

339 BoG Credit and Insurance Committee Decision No 221/3/17.3.2017, as amended.

340 BoG Credit and Insurance Committee Decision No 221/3/17.3.2017, Article 2.

341 BoG Credit and Insurance Committee Decision No 221/3/17.3.2017, Articles 3-5.

342 The members of the Special Liquidations Committee must be persons of recognized standing having at least ten years' experience in corporate and retail banking and credit management. They are appointed for a three-year term, renewable once, but may be removed by the BoG before the end of their term. The BoG provides secretarial support to the Committee. Law 4261/2014, Article 146(1).

transactions relating to the assets of the estate. For this purpose, the special liquidator must submit to the Special Liquidation Committee a reasoned and detailed request. The relevant transactions include: compromises with borrowers involving partial forgiveness of the amount owed, if the value of the claim, including interest and expenses, exceeds €20,000; arrangements involving the rescheduling or reprofiling of loans or credit agreements, if the claim exceeds €250,000; sales of real estate (which can only take place by auction), unless the property in question is assessed for tax purposes at less than €150,000 and the minimum first-offer price is set at not less than seven tenths of the property's book value; and sales of loan receivables, participations in companies, shares, or bonds, unlees the assets in question have a book value of less than €150,000 and the minimum first-offer price is set at not less than seven tenths of that value, or if the sale takes place on an organized market. In all cases where the approval of the Special Liquidations Committee is required, the sale must be carried out by means of an auction.[343]

The management and staff of the institution in liquidation are obliged to cooperate with the special liquidator, its staff, and TEKE and to follow the instructions of the BoG. In the event of non-compliance, in addition to the supervisory penalties already mentioned,[344] the BoG may impose on the offenders a fine of up to €300,000, which may be doubled in the event of a repeat offence.[345]

The special liquidator is liable only for intentional wrongdoing and gross negligence; and is exempt from any criminal, civil, or administrative liability for debts of the institution in liquidation that accrued prior to its appointment, regardless of the date of their verification. The same applies to the liability of the members of the Special Liquidations Committee.[346]

4.5. Transfer-based liquidation

A recent reform of the special liquidation regime expands the range of solutions that can be applied for the liquidation of smaller banks. Specifically, the insertion of a new provision in the main banking statute makes a transfer-based liquidation strategy, analogous to the sale-of-business tool of BRRD's resolution

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The members of the Committee are subject to a duty of confidentiality; Law 4261/2014, Article 146(4), in conjunction with Article 54.

343 Law 4261/2014, Article 146(2). The Special Liquidation Committee decides with a quorum and a majority of three members if the book value of the relevant claims or assets, as the case may be, does not exceed €1,000,000; when this amount is exceeded, a unanimous decision is required; Law 4261/2014, Article 146(3).

344 See above, text to nn 243-251.

345 Law 4261/2014, Article 145(1)(j).

346 Law 4261/2014, Article 145(1)(g).

toolbox[347] or the purchase and assumption (P&A) transactions of US banking law, available as an alternative to the standard system of piecemeal liquidation.[348]

The new provision applies to failing or likely to fail credit institutions that do not qualify for resolution because they do not meet the BRRD's 'public interest' condition,[349] and therefore must be wound up through special liquidation.[350] While in the past this meant the piecemeal liquidation of the whole entity,[351] it is now also possible for the liquidation to take the form of a bulk transfer of pools of assets, deposit liabilities, and contractual relationships to another authorized credit institution, followed by the piecemeal liquidation of the residual part. However, this option is not available in all cases: its use is limited by the statutory condition that the transfer decision must aim to avoid concentrated and disproportionate negative economic effects on specific geographical areas of the country.[352] In other words, the expected impact of the failure must be predominantly local or regional. This means that the new transfer tool can essentially only be used in relation to small, non-systemic banks (LSIs) with a clear regional base, such as the few remaining cooperative banks.

Procedurally, the transfer is ordered by decision of the BoG, acting upon an opinion of the Systemic Stability Council (Συμβούλιο Συστημικής Ευστάθειας), a macroprudential body chaired by the Minister of Finance.[353] Within the BoG, all decisions related to the activation and application of the tool are entrusted to the Resolution Measures Committee,[354] while the Credit and Insurance Committee

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347 BRRD, Title IV, Chapter IV, Section 2 (Articles 38-39).

348 Law 4261/2014, Article 145B, as inserted by Law 4738/2020 (Government Gazette A'207/2020), Article 306, and subsequently amended by Law 4920/2022 (Government Gazette A'74/2022), Article 207. The purpose of the 2022 amendment was to clarify the manner of application of the new tool and to establish beyond any doubt its compatibility with the European resolution and state aid regimes.

349 BRRD, Article 32(1)(c), (5); and Law 4335/2015, 32(1)(c).

350 Closely following the terminology of the BRRD, the statutory text refers to 'winding up [i.e., liquidation] under normal insolvency proceedings'; Law 4335/2015, 32(5). For Greek banks, however, there is no doubt that this can only mean 'special liquidation',as this is the sole form of collective proceedings applicable to them.

351 At least, until 2011. Between 2011 and 2020, a provision of the special liquidation framework enabled the BoG to order the special liquidator to transfer assets (and implicitly, liabilities) of credit institutions in special liquidation to another credit institution or to a bridge bank, if this appeared likely to protect financial stability and underpin public confidence; Law 3601/2007, Article 68(1)(f), as inserted by Law 4021/2011, Article 5; reenacted as Law 4261/2014, Article 145(1)(f); and eventually repealed by Law 4738/2020, Article 306.

352 Law 4261/2014, Article 145B(1).

353 The Systemic Stability Council, which operates within the Ministry of Finance, is responsible for the high-level macroprudential oversight of the financial system as a whole and the prevention of crises. In addition to the Minister of Finance, its members include the Alternate Minister of Finance (or, if no Alternate Minister has been appointed, the Deputy Minister with responsibility for fiscal affairs), the Deputy Minister of Finance with responsibility for financial policy, the Secretary General for Economic Policy, the Governor of the BoG, the Deputy Governor with relevant responsibilities, the President of the Capital Market Commission, and the Chair of the Public Debt Management Agency. Law 3867/2010 (Government Gazette A'128/2010), Article 20, as amended.

354 BoG Executive Committee Act No 204/1/21.4.2022 (Government Gazette B'2111/2022), amending BoG Executive Committee Act No 52/2.10.2015, para. B.2.

retains its usual responsibility for placing the institution concerned in liquidation, appointing the special liquidator, and supervising the piecemeal liquidation of the residual estate.

According to the statutory text, all deposit liabilities of the failed institution, both insured and uninsured, are eligible for transfer. Other liabilities may also be included in the transfer to the extent that they fall within the description of 'contractual relationships'. Selective transfer of specific assets is also possible.

The BoG's decision must be based on a prudent and realistic valuation of the relevant assets and liabilities by an independent external auditor appointed by the BoG.[355] The provisions on valuation in the context of resolution apply *mutatis mutandis*.[356] Alternatively, the decision may be based on a provisional valuation, to be followed within a period of three months by the external auditor's final valuation, on the basis of which the BoG may decide to amend its original decision retroactively.[357]

If, according to the valuation, the value of the transferred liabilities exceeds the value of the transferred assets, the amount necessary to close the funding gap (but not more than that amount) may be covered by contributions from TEKE's Deposit Coverage Scheme and/or the Greek state,[358] which in return acquire preferential claims against the residual estate.[359] The provision contains detailed guidance on their respective contributions. Thus:

– TEKE's contribution is made in lieu of the payout of the failed institution's covered deposits that it would have to make if the special liquidation were conducted by way of a piecemeal liquidation, thereby failing to ensure the transfer and uninterrupted availability of the deposit liabilities. The amount of the contribution is determined as the difference between the value of the transferred covered deposits and the value of the transferred assets, if this is positive. The deduction of the value of the transferred assets is justified by the need to protect the financial interests of TEKE and to comply with the principles of the DGSD. Under the DGSD, Member States have the discretion to allow, as an alternative to the payout of covered deposits, the financing by their DGSs ofmeasures adopted in the context of bank insolvency proceedings that ensure the continued access of depositors to covered deposits, such as transfers of assets and liabilities or transfers of the failed banks's deposit book – but always subject to a

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355 Law 4261/2014, Article 145B(3).

356 BRRD, Article 36(6)-(7); and Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities, OJ 2017 L67/8.

357 Law 4261/2014, Article 145B(3).

358 Law 4261/2014, Article 145B(4)(a).

359 Law 4261/2014, Article 145B(4)(c).

least-cost condition, whereby the costs borne by the DGS as a result of financing such alternative measures should never exceed the net cost of the payout.[360] In this context, the calculation of the net cost of the counterfactual (payout) must take into account, not only the upfront costs of the DGS from the compensation of depositors, but also its likely recovery as claimant by subrogation in the liquidation. However, the transfer of assets reduces the value of the failed bank's estate, and thus the expected recovery of the DGS, whose claims are likely to be affected almost one-to one by the transfer, given their superpriority ranking. As a safeguard for the correct application of the least-cost condition, the Greek provision thus specifies that the expected net cost to TEKE of a payout must be established in the independent auditor's valuation and calculated as the sum of the upfront payments that would have to be made against covered deposits, plus TEKE's related administrative costs, minus the amounts that TEKE, being subrogated to the rights of the depositors of the covered deposits, would be expected to receive from the proceeds of the piecemeal liquidation, also taking into account any claims with an even higher priority.[361]

– The remaining funding gap may be covered by public funds, if this appears sufficiently justified. The state's contribution is determined by a decision of the Minister of Finance, acting on the basis of an opinion of the Systemic Stability Council establishing that the statutory condition regarding the likelihood of concentrated and disproportionate economic damage to the affected regions of the country is met.

The acquiring credit institution is selected by the BoG through an informal and confidential competitive bidding process (tender).[362] For this purpose, the BoG invites pre-selected credit institutions that it considers to be suitable for the transaction to submit offers, which may take the form of a positive purchase price or a deduction from the funding gap identified by the aforementioned valuation. The statutory provisions require the BoG to ensure that the competitive process is as transparent as possible under the circumstances, to refrain from conferring unfair advantages to certain potential acquirers, but also to take into consideration the need for the intended transfer to be completed expeditiously.[363]

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360 DGSD, Article 11(6).

361 Law 4261/2014, Article 145B(4)(a). If the contributions made by TEKE and the state at the time of the transfer were based on a provisional valuation, the calculation of the relevant amounts is subject to *ex post* verification and adjustment in the final valuation, potentially leading to compensatory payments from TEKE to the state, or *vice versa*, depending on the outcome; Article 145B(4)(b).

362 Law 4261/2014, Article 145B(5).

363 Law 4261/2014, Article 145B(5).

The contract implementing the transfer is executed by the special liquidator, acting as representative of the failed bank, and the acquiring institution.[364] The transfer is valid and may be invoked against third parties without need for prior notification or consent.[365] Significantly, the provision contains an explicit derogation from the rule of the Greek Civil Code, according to which the bulk transfer of an entity's assets or business entails the automatic assumption by the latter of liability for the debts of the transferor up to the value of the assets transferred.[366] Moreover, the failed institution's contracts with its employees are not transferred.[367]

The statute specifically requires that the whole process should respect the European state aid framework.[368] The European Commission had initially expressed some doubts about the Greek provision's compatibility with the European state aid regime, as well as with the requirement of Article 1(2) of the BRRD, according to which the national rules may impose stricter or additional requirements than those laid down in the directive, but not more lenient ones. A view was expressed that the automatic granting of state aid in support of the liquidation of banks that do not meet the public interest test for resolution, and in amounts predetermined by the standing rule itself, could result in creditors (uncovered depositors) being treated more favourably in liquidation than in resolution, especially in view of the BRRD's requirement of a minimum bail-in of 8% of total liabilities, including own funds before public funds (in the form of the SRF) are injected. On this view, any public support should only be granted in the context of an exceptional and temporary state aid programme of prespecified size, linked to a specific serious disturbance in the economy. In order to clarify the manner of application of the tool and to allay fears that it could be used in an automatic and indiscriminate manner, the statutory text was amended in 2022, following extensive dialogue with the Commission. Our personal view is that, notwithstanding the use of public funds, the tool, if properly applied, does not constitute state aid in the technical sense, given that: on the one hand, the failed credit institution is dissolved, and thus permanently exits the market; on the other hand, the envisaged competitive sales process[369] ensures that the eventual transfer takes place in accordance with market principles and at a full and fair market price, thus excluding any element of aid to the acquirer. In support of the tool's compatibility with the European norms, we can refer to the European Commission's decision not to raise any objections to the first use of the tool for the liquidation of Olympus Cooperative Bank, with a brief description of which we conclude our review.[370]

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364 Law 4261/2014, Article 145B(2).

365 Law 4261/2014, Article 145B(2).

366 Greek Civil Code, Article 479.

367 Law 4261/2014, Article 145B(2).

368 Law 4261/2014, Article 145B(6).

369 Law 4261/2014, Article 145B(5).

370 See also State Aid SA.43886 (2021/N) – Greece – Resolution of Cooperative Bank of Peloponnese, C(2015) 9682 final (17 December 2015).

Liquidation of Olympus Cooperative Bank. The new transfer tool was used for the first time in early 2023, when a small cooperative bank, Olympus Cooperative Bank, failed to restore its capital position within the deadline set by the BoG Credit & Insurance Committee. At that point, the BoG, acting in its capacity as NCA, initiated the common procedure for the withdrawal of the institution's authorization by submitting to the ECB a draft FOLTF decision and a draft withdrawal of authorization proposal, following a hearing process with the institution. Simultaneously, it initiated an internal dialogue with the BoG's NRA side on the possible activation of the transfer tool and the various actions that would be required for this purpose. As part of the preparations for the possible use of the tool, the BoG appointed an independent valuer to carry out the provisional valuation and notified TEKE and the Ministry of Finance of the possible use of the transfer tool. In parallel, the BoG, acting in its capacity as NRA, informed the SRB of the draft FOLTF decision and its intention not to proceed to a resolution action, as the case did not meet the public interest criterion. For its part, the Ministry of Finance, assisted by the BoG, proceeded with the notification to the European Commission (DG COMP) of the impending use of public funds to close the funding gap of the potential transfer in liquidation.

Closing the preparatory phase, the BoG Credit and Insurance Committee, after consulting the Resolution Measures Committee, adopted a decision declaring the institution FOLTF. On the same day, the Resolution Measures Committee decided that, as the public interest criterion was not satisfied, no resolution measures would be applied, and the institution should be placed in liquidation. To this end, the Credit and Insurance Committee adopted a decision to submit to the ECB a proposal for the withdrawal of the credit institution's authorization.[371] In the meantime, the valuer had completed the provisional valuation of the items within the perimeter of the expected transfer; and the BoG, acting in its capacity as NRA, drafted a proposal to the Systemic Stability Council for the activation of the transfer tool and conducted the competitive bidding process (tender), in which the four Greek SIs were invited to participate.[372]

A few days later, the ECB adopted the decision to withdraw the institution's authorization, following a hearing.[373] On the same day, the Credit and Insurance Committee decided to put the bank into liquidation and to appoint PQH[374] as special liquidator[375]; and after obtaining the consent of the Systemic Stability

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371 Pursuant to SRMR, Article 14.

372 Foreign institutions were not invited to participate, because the very limited foreign presence in the Greek banking market, as well as the characteristics of the failing institution (namely, a limited range of products and services and a very limited geographical area covered), made it unlikely that the tender would attract the interest of serious foreign bidders, while opening the process to the latter could lead to undue delays. See also State Aid SA.43886, Resolution of Cooperative Bank of Peloponnese, para. 42.

373 Pursuant to Law 4261/2014, Article 19.

374 See above, text to nn 57-59 and 331-334.

375 BoG Credit and Insurance Committee Decision No 456/1/4.2.2023 (Government Gazette B'528/2023).

Council's for the use of the transfer tool,[376] the Resolution Measures Committee adopted a decision instructing the special liquidator to transfer all customer deposits of Olympus to the winner of the competitive bidding process (National Bank of Greece).[377] The claims of shareholders and other creditors and the bulk of the assets, including all NPLs, were left behind in the residual estate for piecemeal liquidation. Based on the provisional valuation, the funding gap of the transfer transaction, amounting to approximatelyy €71.57 million, would be covered mainly by TEKE,[378] with the Greek state contributing the remainder. A definitive valuation was submitted three months later, finalizing the calculation of the respective contributions.[379]

As mentioned above, the European Commission concluded that the use of the tool did not require state aid clearance and informed the Greek Ministry of Finance accordingly.[380]

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376 Systemic Stability Council Concurrent Opinion of 4 February 2023.

377 BoG Resolution Measures Committee Decision No 64 of 4 February 2023.

378 TEKE, *Transfer of "Olympus Cooperative Bank" deposits to the "National Bank of Greece S.A."* (press release, 14 February 2023).

379 BoG Resolution Measures Committee Decision No 66 of 20 April 2023; and Decision of the Minister and the Alternate Minister of Finance No 71098 of 8 May 2023 (Government Gazette B'3050/2023), authorizing the payment to the acquirer of the state's contribution, which amounted to €23.8mn.

380 European Commission, e-mail (comfort letter) of 7 February 2023, to which reference is made in the Ministerial Decision No 71098.

Hungary

Virág Blazsek

Summary. 1. Introduction – 2. Constitutional and Public Finances Aspects of Bank Resolution in Hungary – 3. Central Banking and Bank Supervision Aspects of Bank Resolution in Hungary – 4. An Overview of Bank Resolution Proceedings in Hungary – 5. The Bank Resolution-related Aspects of Hungary's Deposit Insurance and Investor Protection Schemes – 6. The Institutional Issues of Bank Resolution in Hungary – 6.1. The Role and Operation of the MNB's Executive Board – 6.2. The Role and Operation of the Monetary Council – 6.3. The Role and Operation of the Financial Stability Council – 6.4. Financial Independence of the MNB – 6.5. The MNB's Relationship with the Parliament – 6.6. Conflict of Interest-related Provisions – 6.7. Publication of the MNB's Organizational and Operational Rules – 6.8. Legal Remedies Related to the Administrative Decisions Taken by the MNB in its Resolution Function – 6.9. The Role of Soft Laws in the Operation of the MNB – 7. Conclusion

1. Introduction*

In Hungary, besides the transition from a socialist state-planned economy to a capitalist market economy since 1990, other factors have speeded up the legal-regulatory changes regarding the financial sector. First, Hungary's economy has been growing mostly from foreign investments, and foreign investors expect a stable, predictable, and investor-friendly legal environment.[1] Second, the country's 2004 accession to the EU (but not to the euro area) resulted in the adoption of the EU's legal-regulatory framework, the *acquis communautaire*. Third, the international and EU-level legal-regulatory changes following the 2008 global financial crisis re-shaped Hungary's financial legal-regulatory framework, including by the introduction of a new bank resolution regime.[2] Hungary's current financial legal-regulatory system is up-to-date, and it is in line with international recommendations and the EU's legal requirements.[3]

Based on the World Bank's classification, Hungary is a 'high income country'.[4] The IMF lists Hungary among 'emerging market and developing economies', it does not list Hungary among the 'low-income countries'. Consequently, Hungary does not have access to the IMF's financial assistance tools reserved for those countries.[5] These details assist in illustrating that since 1990 Hungary has become a developed economy, even though its GDP is lower than the GDP of its Western European EU member state-peers. On the other hand, there are various areas where Hungary should improve its performance. The OECD argues that *"frequent changes in the regulatory framework undermine investment incentives"* in Hungary.[6] Rapid legal-regulatory changes and a lack of coordination among different policies have created "*regulatory uncertainty and high compliance costs that weigh on investment*".[7] However, this is a general tendency in many jurisdictions (partly, due to exponentially increasing technological changes, in particular, in the financial sector).

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* The answers in this chapter are partly based on her recently published book, Banking Bailout Law: A Comparative Study of the United States, United Kingdom and the European Union (Routledge, 2021), in particular, on pages 56-64 and 140-150. She thanks to dr. Patrícia Polt (Hungary) for her valuable comments. Email: v.i.blazsek@leeds.ac.uk.

1 IMF, *Central, Eastern, and Southeastern Europe Mind the Credit Gap*, CESEE REI SPRING 2015, Regional Economic Issues (May 2015); IMF, *Central, Eastern, and Southeastern Europe* (November 2016).

2 Act XXXVII of 2014 on the further development of the system of institutions strengthening the security of the individual players of the financial mediating system ('Resolution Act').

3 See, the G20 Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* ('KAs') (15 October 2014), and the 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 ('BRRD').

4 World Bank, *Data on Hungary* (23 October 2022).

5 IMF, *Lending to low-income countries* (23 October 2022).

6 See OECD, *OECD Economic Surveys, Hungary*, 11, (May 2016).

7 World Bank Group, Doing Business 2015 - Going Beyond Efficiency, Economic Profile, Hungary.

The issue of corruption-perception is noteworthy in this Introduction as it is highly connected to investor confidence. In terms of the level of corruption perception, Hungary ranked 73/180 in 2021 and 76/180 in 2023.[8] Corruption perception is particularly important in times of economic and financial crisis as it affects how much the society trusts in public bodies in general, and in terms of executing crisis management measures, such as bank resolution or bank bailouts.

2. Constitutional and Public Finances Aspects of Bank Resolution in Hungary

The new Fundamental Law of Hungary (that is the Constitution of Hungary) entered into force on January 1, 2012, and it includes a new chapter on Public Finances with constitutional debt-ceiling rules.[9] Only a year later, the Fundamental Law was amended in order to clarify the Constitutional Court's related review-mandate. The amendment entered into force on April 1, 2013.[10] Simultaneously, the Parliament passed the Act CXCIV of 2011 on the Economic Stability of Hungary that includes detailed rules that implement the constitutional provisions on public debt and deficit.[11] This act is also relevant for the purposes of this report because it includes statutory provisions that authorize the state to lend taxpayer money either directly to banks or to the Resolution Fund.[12] The state is authorized to purchase sovereign bonds that are issued by the central bank of Hungary ('Hungarian National Bank' or 'Magyar Nemzeti Bank' or 'MNB') and it can lend those bonds 'for a rate' to banks that are registered in Hungary, in consultation with the MNB's Governor. The state is also authorized to lend cash to banks that are registered in Hungary, and it can lend to the Resolution Fund.

The above provisions do not require charging a 'penalty rate' for the loan but only a rate, hence it cannot be free-of-charge although the government is free to set any rate. The provisions do not mention any requirements on the collateral or any requirements regarding the financial status of the bank. In the case of lending sovereign bonds to a bank, as part of the above-mentioned consultation with the MNB's Governor, the MNB also provides an opinion on the financial status of the bank, but the act does not require the state lending solely to solvent

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8 Transparency International, *Corruption perceptions index 2021* (23 October 2023); see also European Commission, *Country Report Hungary 2018*, SWD(2018) 215, 1-2 (7 March 2018) ("Progress was limited in strengthening the anti-corruption framework (…) Limited transparency and quality of policy making is a source of uncertainty for investors. There are deficits in evidence-based policy formulation and stakeholder engagement. Social dialogue structures and processes remain underdeveloped. (…) Available indicators point to notable corruption risks, and there are gaps in the anti-corruption framework").

9 Articles 36-44 ('Public Finances') of the Fundamental Law of Hungary.

10 Fourth Amendment of the Fundamental Law of Hungary (*MK 55, 1 April 2013*), in force as of April 1, 2013, Article 17 (amending Article 37).

11 See generally Act CXCIV of 2011.

12 Act CXCIV of 2011, Article 44; see also amending act: Article 159(2) of the Hungarian Resolution Act; Resolution Fund [in Hungarian: Szanálási Alap]; The Resolution Fund was established in accordance with the BRRD.

banks.[13] These provisions give ample latitude for the government in terms of crisis management, if systemic stability is at risk.

3. Central Banking and Bank Supervision Aspects of Bank Resolution in Hungary

Central banking and banking supervision powers are centralized in Hungary (integrated regulatory model). The advantage of this type of organizational structure is that in case of a liquidity crisis, when the central bank needs to act as lender-of-last-resort, as it is the supervisory authority too, it has all information concerning the financial situation of the financially distressed bank. The MNB is both a central bank and the financial supervisory authority (the 'competent authority' in the context of the 2014 BRRD). It also fulfils the 'resolution authority' functions.[14] Additionally, the MNB has temporarily fulfilled ownership functions in several segments of the financial sector. Earlier it was the founder and single owner of the MARK Zrt. (the Hungarian bad asset management company established as part of the 2014 BRRD's implementation), which was sold in 2017 to a Slovakian credit management company, now being the single owner of MARK Zrt.[15] The MNB also became the sole owner of the Budapest Stock Exchange in late 2015, which may raise conflict-of-interest issues.[16] The stock exchange was purchased to revitalize capital markets. The MNB's independence has repeatedly been questioned by the EU Commission, the ECB, the IMF, and credit rating agencies in the past decade.[17] In 2011, this was one of the main reasons for Hungary's downgrading.[18]

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13 Act CXCIV of 2011, Article 44(1)-(2) and Article 44(6)b).

14 Act CXXXIX of 2013, Article 4(8).

15 MARK Hungarian Restructuring and Debt Management Private Company Limited by Shares [in Hungarian: Magyar Reorganizációs és Követeléskezelő Zártkörűen Működő Részvénytársaság], ('MARK' or 'MARK Ltd' or 'MARK Zrt'); the Slovakian-based credit management company APS Investment acquired MARK Zrt in 2017, now it is its single owner (February 2018), see *APS Investment to acquire MARK Zrt*, Budapest Business Journal, 10 April 2017.

16 OECD Economic Surveys, Hungary, 28. ("*In late 2015, the central bank bought the Budapest Stock Exchange from the Vienna Stock Exchange and the Austrian Kontrollbank AG to revitalize capital markets. As the central bank is also the financial market regulator, the purchase may raise a perception of a conflict-of-interest between its ownership and regulatory functions. Thus, the ownership of the stock exchange should be temporary and the stock exchange should return to private ownership over the medium-term."); see also Country Report Hungary 2018, 17. ("The state remains the main shareholder of the Budapest Stock Exchange (BSE) through the central bank. Given that the BSE is also supervised by the central bank, the current ownership setup raises governance issues.*")

17 See P.L. SIKLOS, *No single definition of central bank independence is right for all countries*, (2008) 4 European Journal Of Political Economy, 802-816 (empirical evidence indicates positive correlation between central bank independence and lower inflation); see also Fundamental Law of Hungary; Fifth Amendment of the Fundamental Law of Hungary, (*MK 158, 26 September 2013*) in force as of October 1, 2013, Article 2 and 7(3) (Article 42 of the constitution was overruled and Article 41(2)-(6) were amended).

18 BBC, *Hungary borrowing costs rise on junk downgrade* (22 December 2011). ("*The implied cost of borrowing for Hungary has risen after ratings agency Standard & Poor's downgraded the country's debt to junk status. (…) S&P cited changes to the constitution that had undermined the independence of the central bank and other institutions as part of the reason for the downgrade. "In our view, the*

In 2013, the ECB issued an opinion on the integrated Hungarian supervisory framework and, among others, noted that it is concerning that "*the definition of certain issues related to macro-prudential policy remains in the competence of the Government*".[19] As regards the Law on credit institutions and financial enterprises, the Law on capital markets, and the Law on the protection of consumers, the ECB gave the opinion that they would all "*benefit from the introduction of additional provisions providing for a further transfer of Government competences to the MNB. These could include, for example, provisions relating to defining liquidity requirements for credit institutions and mismatches in the structures of maturity of foreign exchange exposures; the personal, organisational and technical requirements applicable to clearing houses; and the definition of consumer creditworthiness*".[20] The ECB also warned that the MNB was given new supervisory duties without additional funding which "*could cripple its ability to carry out tasks independently*".[21] "*The MNB will therefore be obliged to finance its supervisory activities from existing resources. This raises serious concerns as regards the MNB's financial independence*."[22] The ECB also published an opinion that the Hungarian authorities did not comply with their duty to consult the ECB and they did not give enough time for the ECB for the consultation.[23] The ECB also noted that according to the Act CXXXIX of 2013 on the National Bank of Hungary, the members of the Monetary Council are the Governor of the MNB, as the Chairman of the Monetary Council, the Deputy Governors of the MNB, and other members elected by Parliament for six years.[24] The other members elected by Parliament are members picked by the governing party due to the Government's two-third majority in the Parliament.[25] The ECB has shared similar opinions later too concerning other governmental decrees affecting the MNB's monetary policy.[26]

The MNB has a variety of monetary policy-related tools.[27] If there are circumstances owing to which the operation of a credit institution jeopardizes the stability of the financial system, the MNB may extend an extraordinary credit to the credit institution, complying with the prohibition of monetary financing defined

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predictability of Hungary's policy framework continues to weaken, harming Hungary's medium-term growth prospects," the agency said. Last week, the European Commission and the IMF cut short informal aid talks with Hungary due to worries over the independence of its central bank.")

19 Opinion of the European Central Bank on the integrated Hungarian supervisory framework (CON/2013/71) (7 October 2013), 6.

20 *Ibidem*.

21 *ECB raps Hungary for neglecting central bank independence*, Reuters, 9 October 2013.

22 Supra note 19.

23 Supra note 19.

24 See Article 9(4) of the of the Act CXXXIX of 2013.

25 Supra note 19.

26 G. SZAKACS, A.WLODARCZAK-SEMCZUK, *ECB says Hungary government decree has impaired central bank independence*, Reuters, 26 April 2023.

27 See Article 3(1)-(2) and Article 36-38 of the Act CXXXIX of 2013.

in Article 146.[28] In urgent, extraordinary cases which threaten the stability of the financial system as a whole and the smooth execution of payments, the MNB – considering it independently – "*may grant a credit to the National Deposit Insurance Fund and the Investor Protection Fund at their request*", complying with the prohibition on monetary financing defined in Article 146; "*the maturity of such a loan may not exceed three months*".[29] Further, the performance of the task defined in Articles 31 to 37 shall be without prejudice to the performance of the tasks of the MNB set forth in Article 4(1) and the tasks arising from MNB's membership in the European System of Central Banks.[30]

Beyond the above provisions the MNB, similarly to other central banks in the EU, may provide emergency liquidity assistance ('ELA'). ELA is "*any extraordinary central bank loan not listed under the monetary policy instruments (…) provided under individual conditions*".[31] Also, in line with Article 107(1) of the TFEU 'extraordinary public financial support' can be given that is "*[s]tate Aid within the meaning of Section 107 (1) of the Treaty on the Functioning of the European Union, that is provided in order to preserve or restore the viability, liquidity or solvency of an institution or group*".[32] The MNB conducts regular open market operations, such as collateralized lending to money market counterparties and securities transactions both in HUF and in foreign currencies, under transparent, published conditions.[33]

Beyond lending a helping hand through monetary easing, the MNB introduced 'non-orthodox monetary policy' measures that were proclaimed to stimulate economic growth, especially as corporate lending practically stopped as the 2008 crisis hit Hungary. Companies have struggled with foreign currency-denominated loans but unlike retail debtors they were not 'bailed out.' From April 2013, through the Funding for Growth Scheme ('FGS') the MNB has provided liquidity at zero cost to banks for lending to small- and medium-sized enterprises at a maximum rate of 2.5 percent.[34] The MNB directed liquidity to the funding of small- and medium-sized enterprises.[35] Later, this scheme was complemented by the 'Funding for Growth Scheme Plus,' (the second phase of the FGS) to ensure financing for riskier borrowers that had not benefited from the first scheme. More

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28 Article 146 (prohibition of monetary financing). (The MNB may not extend overdraft facilities or any other type of credit facility to the public sector as defined in Article 123 of the TFEU and shall not purchase debt instruments directly from them with consideration of the provisions of Council Regulation No 3603/93/EC of 13 December 1993 specifying definitions for the application of the prohibitions referred to in TFEU Article 104b(1)).

29 See Article 37 of the Act CXXXIX of 2013.

30 *Ibidem*, Article 38.

31 Hungarian Resolution Act, Article 3 point 45 (ELA); Act CXXXIX of 2013, Articles 18 and 36.

32 Hungarian Resolution Act, Article 3(53) ('extraordinary financial support based on the TFEU's Article 107(1)).

33 MNB, *Terms and Conditions of the Operations of the Central Bank in Forint and Foreign Currency Markets* (1 January 2018); see also Act CXXXIX of 2013, Article 18 (list of monetary policy tools of the MNB).

34 MNB, *Analysis of the first phase of the Funding for Growth Scheme* (April 2013).

35 OECD Economic Surveys, Hungary, 17.

than 30,000 small- and medium-sized enterprises were financed by more than 2,000 billion HUF (*circa* 8 billion USD). This robust amount represents about 6 percent of Hungary's GDP.[36]

The OECD noted in its economic survey on Hungary in 2015 that "*the effectiveness of monetary policy is hampered by a still high share of non-performing loans*".[37] While the above non-orthodox monetary policy measures are positive, Endresz, Harasztosi and Lieli pointed out that "*in the long run central bank lending cannot substitute for the market*".[38] The MNB has launched three phases of the FGS until April 4, 2017.[39] In late 2015, the central bank announced the gradual termination of the Funding for Growth schemes, beginning in 2016, and a new Growth Supporting Program to help banks return to market-based financing through a Market-Based Lending Scheme.[40] These stimulus measures are noted here in order to underline how the MNB has supported the corporate lending activities of banks.

The MNB established the above-mentioned Hungarian Restructuring and Debt Management Ltd. ('MARK Zrt') with a 10-year mandate to purchase bad commercial real estate loans and properties at market prices. MARK Zrt has had access to a 300 billion HUF (*circa* 1.2 billion USD) bridge loan from the MNB. The estimated total bad debt it purchased was about 800 billion HUF (*circa* 3.2 billion USD).[41] In order to incentivize the selling of impaired loans to MARK Zrt, the MNB imposed a systemic risk buffer (additional capital buffer requirement) on commercial real estate loans as of January 1, 2017.[42] Cleaning bank portfolios is now a priority in the EU hence the MARK Zrt operation is in line with that priority.

4. An Overview of Bank Resolution Proceedings in Hungary

Hungary fully implemented the 2014 BRRD.[43] As already mentioned above, in the Introduction, the MNB fulfils both the 'competent authority' (financial supervisory authority) and the 'resolution authority' functions. In the MNB's

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36 *Ibidem.*

37 OECD Economic Surveys, Hungary, 26-27.

38 M. Endresz, P. Harasztosi, R.P. Lieli, *The Impact of the Magyar Nemzeti Bank's Funding for Growth Scheme on Firm Level Investment*, MNB Working Papers No 2015/2.

39 MNB, *Press release on the loans granted in the third phase of the Funding for Growth Scheme*, 4 April 2017. ("*39,253 domestic enterprises have obtained financing amounting to 2,811 billion HUF under the Funding for Growth Scheme since 2013*.")

40 OECD Economic Surveys, Hungary, 27-28.

41 *Ibidem*, 29-30.

42 *Ibidem*, 30.

43 See Hungarian Resolution Act; Act CIV of 2014 on the amendments to certain financial acts in relation to deposit insurance and financial intermediaries [in Hungarian: 2014. évi CIV törvény egyes pénzügyi tárgyú törvényeknek a betétbiztosítást, valamint a pénzügyi közvetítőrendszert érintő módosításáról], (entered in force on January 1, 2015); Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings; Act CXXXIX of 2013.

interpretation, bank resolution is a special insolvency proceeding which aims at the "*restructuring of a financial institution or group, while ensuring the continuity of its basic functions and retaining the stability of the system of financial intermediaries, restoring – whether wholly or in part – the viability of the institution or group concerned and protecting budgetary funds*".[44] The underlying principle of the new bank resolution is that, "*rather than relying on taxpayer bailouts, shareholders and creditors should be the first to bear the costs of handling financial institutions' distress*".[45] In order to ensure the necessary funds for resolution, and to implement the 2014 BRRD's system-wide insurance approach, a Resolution Fund (in Hungarian: Szanálási Alap) was established. The costs of future resolutions are now imposed on credit institutions and investment firms.[46]

Hungary implemented the minimum target level required by the 2014 BRRD hence the participating banks are required to contribute gradually over several years until December 31, 2024, by which date the Resolution Fund will cover 1 percent of their covered deposits.[47] Even though Hungary is a non-euro area member state today, it signed the 'Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund' hence its Resolution Fund gradually merges into the Single Resolution Fund.[48] The reason for this Agreement is "*to achieve the establishment of an integrated financial framework in the European Union of which the banking union is a fundamental part*".[49] Hungary's participation in the EU's system-wide insurance scheme against future bank failures in combination with the clear and ample authorization of its government and central bank for crisis-management provides a relatively strong safety net for future financial instabilities. From among the non-euro area member states, besides Hungary, Romania is also a party to this Agreement.

The MNB argues that the burden sharing of banks "*will also lead to market players taking responsibility for one another*".[50] In line with international practice, banks that make contributions to the Resolution Fund are not members of the Resolution Fund's Board of Directors.[51] This is a difference compared to deposit insurance and investor compensation funds where banks' representatives are usually present. For example, in the Board of Directors of the 'National Deposit Insurance Fund' (in Hungarian: Országos Betétbiztosítási Alap, 'NDIF') from

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44 MNB, *About resolution in brief*, 18 February 2018.

45 *Ibidem.*

46 See Hungarian Resolution Act, Article 126.

47 2014 BRRD, Article 102(1).

48 *Agreement on the transfer and mutualisation of contributions to the Single Resolution fund*, Article 8 ('Contracting Parties whose currency is not the euro').

49 *Ibidem*, Preamble, 2.

50 MNB, *About resolution in brief*, cit.

51 The Resolution Fund's Board of Directors consists of three members; an individual designated by the Minister for National Economy, the Deputy Governors of the MNB in charge of resolutions and the supervision of financial institutions or an individual designated by them from their respective professional areas and the managing director of the National Deposit Insurance Fund ('NDIF').

among the seven, three members are delegated by associations of banks (two by the Hungarian Banking Association and one by the Integrational Organization of Cooperative Credit Institutions).[52] Without the participation of banks' representatives in the management of the Resolution Fund, the contribution can be considered merely as a 'systemic stability-related tax.'

In line with the 2014 BRRD the funds of the NDIF may be used for co-financing the resolution up to a maximum of 0.4 percent of the covered deposits, provided that a continuous access to deposits is maintained.[53] The Resolution Fund cannot be used to finance the NDIF's activities.[54] These limited provisions aim to contribute to having sufficient funding for the resolution but also secure the original deposit insurance function of the NDIF.

The Hungarian Resolution Act defines the resolution tools based on the 2014 BRRD. First, the MNB can "*sell the business*".[55] This means that the authority may transfer the shares issued by the financial institution under resolution, or some or all of its assets, liabilities, rights and obligations to another healthy market participant. Second, the MNB may use the '*bridge institution tool*.' This means "*the transfer of shares issued—or some or all of the assets, liabilities, rights and obligations held—by one or more institutions under resolution to a bridge institution*".[56] Third, the MNB may transfer the assets, liabilities, rights or obligations of an institution under resolution or a bridge institution to one or more asset management vehicles, this is called '*asset separation*'.[57] Fourth, the MNB may use the '*creditor bail-in*' tool.[58] In the frame of the creditor bail-in "*uninsured creditors and bond holders agree to bear, after shareholders have been divested of their shares, the remaining burdens and to have their claims cancelled or converted into equity (and therefore becoming owners themselves)*".[59] Three government decrees include further detailed rules on bank resolution.[60] One can note that the MNB uses a more negotiation-based language compared to the 2014

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52 NDIF, *Members of the Board of Directors*, 28 February 2018.

53 2014 BRRD, Article 109 ('Use of deposit guarantee schemes in the context of resolution').

54 See Hungarian Resolution Act, Articles 143-144 ('Use of the funds of the National Deposit Insurance Fund for resolution').

55 Hungarian Resolution Act, Article 36.

56 *Ibidem*, Article 44.

57 *Ibidem*, Article 53.

58 *Ibidem*, Article 57.

59 MNB, *About resolution in brief*, cit.

60 See Government Decree 363/2014 (XII. 30.) on the eligible costs incurred during the application of resolution tools [in Hungarian: 363/2014. (XII. 30.) Korm. rendelet a szanálási eszközök alkalmazásakor felmerülő, elszámolható költségekről]; Government Decree 217/2014 (VIII. 28.) on the business reorganization plan related to bail-in [in Hungarian: 217/2014. (VIII. 28.) Korm. rendelet a hitelezői feltőkésítéshez kapcsolódó reorganizációs tervről]; Government decree 205/2014 (VIII.15.) on the individual rules regarding the independent valuators and their selection based on the further development of the system of institutions strengthening the security of the individual players of the financial mediating system [in Hungarian: 205/2014. (VIII. 15.) Korm. rendelet a pénzügyi közvetítőrendszer egyes szereplőinek biztonságát erősítő intézményrendszer továbbfejlesztéséről szóló törvény szerinti független értékelőkre, valamint kiválasztásukra vonatkozó egyes szabályokról].

BRRD when it comes to the application of the bail-in tool ("*uninsured creditors and bond holders agree to bear*").

As a bad asset management company, MARK Zrt plays a crucial role (see asset separation) in the bank resolution. A key element of selling bad assets to MARK Zrt is the valuation of those assets. The EU Commission analyzed the methods used by MARK Zrt in the frame of the state aid control, and it concluded that MARK Zrt's methodology to determine the transfer price is based on prudent parameters and generally accepted valuation methods. MARK Zrt hires an independent valuator to perform the valuations and the independent valuator is also checked by a qualified validator. The EU Commission concluded that these safeguards ensure that state aid is not involved.[61]

From the Hungarian recapitalization and resolution cases it is apparent that the 2014 BRRD provides ample latitude and various possibilities for interpretation, and member states can find a way to not resort to the application of the bail-in tool. In the case of state ownership, incentives may become distorted as the state, or its agent acts both as owner and as resolution authority. This issue has not been dealt with in the body of relevant literature, even though it has EU-wide relevance as states have become significant bank-owners in various EU jurisdictions.

5. The Bank Resolution-related Aspects of Hungary's Deposit Insurance and Investor Protection Schemes

Hungary has a separate deposit insurance fund, the above-mentioned NDIF, and an Investor Protection Fund (in Hungarian: Befektető-védelmi Alap, 'IPF'). Both of these schemes aim to strengthen investor confidence through providing *ex ante*, financial sector-funded guarantee of deposits and investments up to a specified limit. In line with EU law, the IPF aims to compensate investors when their brokers and dealers become insolvent. Since 2016, the maximum amount of compensation is 100,000 EUR (earlier it was 20,000 EUR): 100 percent of the first 1,000,000 HUF (*circa* 3,220 EUR) and 90 percent of the amount above 1,000,000 HUF is compensated.[62] Quote: "*The Fund shall compensate investors entitled to compensation for claims up to a maximum amount of one hundred thousand euro per person and per Fund member on the aggregate. The amount of compensation paid by the Fund is one hundred percent up to one million forints, and for amounts over the one-million-forint limit, one million forints and ninety per cent of the amount over one million forints*".[63] Brokers and dealers are required to be members of the IPF, just as deposit accepting banks are obliged to

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61 See Commission Press Release, IP/16/279, (SA.38843, Hungary).

62 See Investor Compensation Scheme Directive; EU-level legislation on deposit insurance and Deposit Guarantee Scheme Directive; see also Act CXX of 2001 on the Capital Market [in Hungarian: 2001. évi CXX. törvény a tőkepiacról] (in force as of 1 January 2016), Article 217(2).

63 Act CXX of 2001 on the Capital Market [in Hungarian: 2001. évi CXX. törvény a tőkepiacról] (in force as of 1 January 2016), Article 217(2).

contribute to the NDIF. Since 2015, the MNB may lend both to the NDIF and to the IPF.[64]

As a consequence of the 2008 crisis the government guarantees the payment obligations of the NDIF towards depositors.[65] Also, the state guarantees non-deposit liabilities in Hungary such as new debt issuance by banks in order to boost economic growth.[66] Hence, the state has extended the guarantees related to the financial sector along several dimensions. The previous point means that in line with EU law the funds of the NDIF may be used for bank resolution purposes within strict limits. If NDIF funds are used for bank resolution purposes, based on the EU Commission's 2013 Communication, the action qualifies as state aid.[67] The Resolution Fund cannot be used to finance the NDIF's activities.[68] Making available the NDIF's and IPF's funds for emergency situations is a positive shift towards a more predictable crisis management strategy. The strict limits do not seem to be apt in crisis situations, and they are in contrast with the ample bailout authorization of the government and the MNB.[69] The limits aim to ensure the primary function of the NDIF which is connected to bank deposits.

The NDIF is an explicit privately funded deposit insurance scheme that was established on March 31, 1993.[70] In 1993, the coverage limit was 1 million HUF (*circa* 3,900 USD) which, in line with EU-law, was gradually increased to 100,000 EUR by 2008. The coverage is calculated per depositor or per insured bank and it covers both retail and corporate deposits. The NDIF does not function as a receiver, but those functions are assumed by the MNB. The NDIF used to be a 'paybox only' type of deposit insurance until its funds became available in a limited manner for bank resolution purposes. All explicit deposit insurance schemes must include a 'paybox' function that provides payouts to depositors in the event of bank insolvency. Countries may decide to combine the deposit

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64 Originally only the NDIF was mentioned in Act CXXXIX of 2013, Article 37 but it was amended by Article 124 of Act LXXXV of 2015 on the Amendment of legislation with a view to promoting the development of the financial intermediary system [in Hungarian: 2015. évi LXXXV. törvény egyes törvényeknek a pénzügyi közvetítőrendszer fejlesztésének előmozdítása érdekében történő módosításáról] (in force as of 7 July 2015).

65 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings.

66 A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, NBER Working Paper No. w20278, July 2014, see *here*, 40-41.

67 Banking Communication (2013), point 64.

68 2014 BRRD, Article 109 ('Use of deposit guarantee schemes in the context of resolution'); See also Hungarian Resolution Act, Articles 143-144 ('Use of the funds of the National Deposit Insurance Fund for resolution').

69 See Fundamental Law of Hungary, 36(6); Act CXCIV of 2011, Article 44 (extraordinary financial support in accordance with Article 107(1) of the TFEU); Act CXXXIX of 2013, Articles 3(1)-(2), 18 and 36 (ELA); see also Hungarian Resolution Act, Article 3(53) ('extraordinary financial support based on Article 107(1) of the TFEU'); Hungarian Resolution Act, Article 3 point 45 (ELA).

70 A. Demirguc-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world: a comprehensive database*, Policy Research working paper No. WPS 3628, see *here* at 20 and 65; A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 32.

insurance scheme function with resolution functions or the deposit insurance scheme function with supervisory or macro-prudential regulatory functions.[71]

As already mentioned above, the NDIF is part of the European Deposit Insurance Scheme.[72] The NDIF is jointly administered by state and financial sector representatives.[73] The membership is compulsory. In the case of a shortfall of funds, the NDIF can issue bonds or receive loans (from the MNB or from banks) guaranteed by the government or it may access funding from the MNB or Ministry of Finance.[74] The NDIF does not pay fees for the state guarantee backing of the above loans.[75] The MNB or banks are not required to ask for collateral beyond the state guarantee.[76]

In Hungary, insurance premiums are defined and differentiated based on the riskiness of banks (this is termed 'risk-adjusted premium').[77] There is no co-insurance element in the system (depositors do not bear losses up to 100,000 EUR).[78] Similarly to its European peers, the NDIF's coverage is not extended to interbank deposits.[79] The NDIF became compulsory both for local subsidiaries and branches of foreign banks in 2014 (except for the case where the branch already has coverage).[80]

The Hungarian NDIF, besides the indemnification of bank depositors, can also provide temporary liquidity assistance from its fund to financially distressed banks. This can occur in any form, such as providing credit, or purchasing shares in the bank.[81] Hungary also extends its deposit insurance to foreign currency deposits but only to currencies of OECD member countries.[82] The NDIF is

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71 A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 6, 12 and 37; the term, 'paybox only' refers to the type of deposit insurance or guarantee schemes which merely administers the payouts to depositors in case of bank insolvency and do not have other (for example, resolution) functions.

72 Act XXIV of 1993 on the National Deposit Insurance Fund; A. Demirgüç-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world*, cit., 20, 65-66; A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 34 and 37.

73 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings, Article 223.

74 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings, Article 232(1)-(4); A. Demirgüç-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world*, cit., 38 and 65; A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 37-39.

75 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings, Article 232(4).

76 *Ibidem.*

77 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings, Article 234(1)(b); A. Demirgüç-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world*, cit., 23 and 35; A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 37.

78 A. Demirgüç-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world*, cit., 6-7 and 33.

79 *Ibidem*, 30; A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 37.

80 Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings, Article 209(3); A. Demirgüç-Kunt, E. Kane, L. Laeven, *Deposit Insurance Database*, cit., 37.

81 S. Ligeti, M. Sulyok-Pap (eds), *Banking* [in Hungarian: *Banküzemtan – egyetemi tankönyv*], Budapesti Közgazdaságtudományi Egyetem – Pénzügyi Intézet, 2006, 328 (Chapter XI, author: Dániel Jánossy).

82 A. Demirgüç-Kunt, B. Karacaovali, L. Laeven, *Deposit insurance around the world*, cit., 5, 65-66.

authorized to intervene directly in the decision of a bank, it has the legal power to cancel or revoke deposit insurance for any participating bank,[83] and it is not authorized to take legal action against bank officials.[84]

6. The Institutional Issues of Bank Resolution in Hungary

There is one resolution authority in Hungary; the MNB, which is the central bank of Hungary, and as such, part of the European System of Central Banks. The MNB fulfils central banking as well as both 'competent authority' (financial supervisory authority) and 'resolution authority' functions.[85] According to Article 4(15) of Act CXXXIX of 2013 on the MNB, "*In performing the function (…) adequate arrangements shall be in place to ensure operational independence of the department responsible for enforcement of resolution functions from other departments of the MNB, including that these functions must be performed under the direct control and supervision of the governor or any of the deputy governors of the MNB*".

Act XXXVII of 2014 on the further development of the system of institutions strengthening the security of the individual players of the financial intermediary system ("Resolution Act") and Act CXXXIX of 2013 on the National Bank of Hungary ("Central Bank Act") are the chief implementing laws of the BRRD in Hungary. Other relevant acts include Act CCXXXVII of 2013 on credit institutions and financial enterprises ("Banking Act") and Act CIV of 2008 on strengthening the stability of financial systems ("Stability Act").

In Hungary, there are no other competent authorities involved in resolution planning and execution. However, resolution colleges can be mentioned here as to the minimum requirement for own funds and eligible liabilities (MREL).[86] "*Resolution colleges are the bodies that ensure cooperation of all parties at all stages of the resolution planning and resolution process of a failing bank*".[87] Pursuant to the provisions of the Resolution Act, in conformity with the BRRD, domestic credit institutions and investment firms are obliged to comply with the

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83 *Ibidem*, 40.

84 *Ibidem*, 44.

85 Article 4(8) of Act CXXXIX of 2013 on the Magyar Nemzeti Bank: "*Within the scope of its powers defined in a separate Act, the MNB shall act as resolution authority*".

86 See BRRD, Article 88(6); see also Article 27 of the Act XXXVII of 2014 on *Further Development of the Institutional Framework to Strengthen the Safety of Certain Actors in the Financial Intermediation System*.

87 Regulatory Technical Standards on resolution colleges, EBA (Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, *C/2016/1691, OJ L 184, 8.7.2016, 1-71*).

MREL continuously. The MREL requires the institutions to hold funds of adequate quantity and quality that can be written off partly or completely or transformed into capital in the case of a crisis situation, thus ensuring the bearing of losses by owners and creditors as well as the continuous performance of the institutions' critical functions during and following the crisis situation. The degree of the MREL requirement for the institutions and groups of institutions headquartered in Hungary is determined by the MNB as resolution authority, while in the case of cross-border institutions – as a main rule – the MREL requirements at consolidated and individual levels are determined by the resolution authorities concerned, within the framework of their cooperation in resolution colleges.[88]

Act CXXXIX of 2013 on the Hungarian National Bank ("Central Bank Act") includes institutional and organizational rules on the MNB. In line with the Central Bank Act, within the MNB (the resolution authority), the organizational unit responsible for the performance of resolution tasks shall be operationally independent of the organizational unit of the MNB performing other tasks.[89] Resolution tasks can only be performed under the direct direction of the MNB Governor or its Vice-Presidents.[90] The MNB is in charge of banking prudential supervision under Act CXXXIX of 2013 on the Hungarian National Bank ("Central Bank Act"). Under the Organizational and Operational Rules of the Magyar Nemzeti Bank – in line with the BRRD –, the resolution function is structurally separated from the supervisory function and is under the direct control of the Deputy Governor responsible for monetary policy, financial stability and lending incentives ("**Deputy Governor Monetary Policy and Financial Stability**").[91] Within the Resolution Directorate which, as mentioned above, is under the direct control of the Deputy Governor Monetary Policy and Financial Stability, there are two sub-units; the Resolution Planning and Reorganization Department and the Resolution Law and Regulation Department.[92]

Besides resolution functions, the MNB has various other functions as listed in the Central Bank Act, which are as follows: monetary policy, minimum reserves, base rate, exchange rates, issuing operations, cash transactions and oversight, central bank information system, credit supply monitoring, measures for preventing the excessive outflows of credit, countercyclical capital buffer, measures for the reduction of systemic liquidity risks, measures for the reduction of the probability of insolvency for systemically important institutions, measures for the reduction of systemic or macroprudential risk, additional tasks relating to the management of systemic risks, and supervisory tasks. Based on the Resolution

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88 See also MNB *here*.

89 See Article 4(15) of Act CXXXIX of 2013.

90 *Ibidem*.

91 See also *here* (18 March 2023).

92 See *the organisational chart of the MNB* (18 March 2023).

Act, it is in charge of powers under Article 33a of the BRRD (after consulting the supervisory authority).[93]

The Resolution Fund (in Hungarian: Szanálási Alap) and the National Deposit Insurance Fund (in Hungarian: Országos Betétbiztosítási Alap or OBA) are the institutions in charge of the administration of national resolution funds. The OBA was established in 1993. The Resolution Fund was established when the BRRD was implemented in Hungary in 2014. The meetings between NRA and supervised institutions are usually called by the NRA, although supervised institutions can ask for meetings and can suggest agenda points too.[94]

The Governor and Deputy Governors of the MNB are appointed by the President of the Republic based on the recommendation of the Prime Minister. The term of office of the Governor of the MNB is six years and one may hold the position for maximum two terms.[95] The MNB shall have at least two deputy Governors and at most three deputy governors. The decision of the President of the Republic on the appointment and dismissal of the deputy Governors of MNB requires the countersignature of the Prime Minister.[96] "*Any person recommended as a member of the Monetary Council shall attend a hearing of the Parliamentary Standing Committee for Economic Affairs*".[97]

6.1. The Role and Operation of the MNB's Executive Board

The MNB's Executive Board is responsible for implementing the decisions of the Monetary Council and the Financial Stability Council and managing the operation of the MNB.[98] The Members of the Executive Board include the Governor of the MNB, as chairman of the Executive Board, and the Deputy Governors of the MNB.[99] The chairman act on behalf of the Executive Board. The Powers of the Executive Board are governed by the Central Bank Act and the rules of procedure of the Executive Board. The rules of procedure approved by the Executive Board set out the division of duties and authority between members of the Executive Board. The Executive Board independently defines its rules of procedure in accordance with the Central Bank Act, other laws, and the Statute of the MNB. The Executive Board holds meetings with the necessary frequency. It holds regular meetings in accordance with meeting times determined in advance in its work schedule. The chairman convenes and chairs the above regular meetings and extraordinary meetings – convened at times other than specified

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93 Act XXXVII of 2014 on Further Development of the Institutional Framework to Strengthen the Safety of Certain Actors in the Financial Intermediation System, cit.

94 *Ibidem*, Article 27-28.

95 Article 10 of the Act CXXXIX of 2013.

96 Article 11(1) of the Act CXXXIX of 2013.

97 Article 9(6) of the Act CXXXIX of 2013.

98 Article 12 of the Act CXXXIX of 2013.

99 Article 12(2) of the Act CXXXIX of 2013.

in the work schedule – of the Executive Board.[100] The Monetary Council may authorize the Executive Board to decide any matter falling within its scope of competence.[101] The Executive Board shall report to the Monetary Council on these decisions. Also, the Governor of the MNB may submit any matter within his scope of competence to the Executive Board for a decision.[102] "*The Executive Board shall adopt its decisions by a simple majority of votes of the members present. In case of a tied vote, the Chairman shall have the casting vote, or, in his absence, the member of the Executive Board designated by the Chairman shall have the casting vote. The Executive Board shall have a quorum if at least two of its members are present*".[103]

6.2. The Role and Operation of the Monetary Council

The Monetary Council is the main decision-making body of the MNB in respect of the duties specified in Article 9 (1) of the Central Bank Act.[104] The Monetary Council also sets the decision-making framework for the Financial Stability Council (see below).[105] The Monetary Council shall consist of at least five and at most nine members. Every year, at its first meeting, the Monetary Council elects, by simple majority of votes of the members present, the Deputy Chairman of the Monetary Council from among the Deputy Governors of the MNB. In the event the appointment of the Deputy Chairman expires, the Monetary Council shall, at its subsequent meeting, elect a new Deputy Chairman. The powers of the Monetary Council are governed by the Central Bank Act and the Internal Rules of Procedure of the Council. The Monetary Council defines its own Rules of Procedure within the limits determined by the Central Bank Act and other laws. The Monetary Council shall meet as frequently as required, but at least once a month. These ordinary meetings and any extraordinary meetings convened at different dates shall be convened and chaired by the Chairman. Any member of the Monetary Council may request the Chairman to convene a meeting.[106]

The members of the Monetary Council (an internal body within the MNB) include the Governor of the MNB (as the Chairman of the Monetary Council), the Deputy Governors of the MNB. The other members of the Monetary Council are elected by the Parliament for six years.[107] The mandate of 'other members elected by the Parliament for six years' shall terminate upon expiration of their term of office, resignation, dismissal, or death.[108] A recommendation for the appointment

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100 See Article 12 of the Act CXXXIX of 2013; see also Chapter 8 of the Statutes of the Magyar Nemzeti Bank ("*Alapito Okirat*"), Consolidated with Changes, MNB (18 March 2023).

101 See Article 12(5) of the Act CXXXIX of 2013.

102 *Ibidem*.

103 See Article 12(6) of the Act CXXXIX of 2013.

104 See also 6.1 of the Statutes of the Magyar Nemzeti Bank, cit.

105 Article 9(1)(d) of the Act CXXXIX of 2013.

106 Chapter 6 of the Statutes of the Magyar Nemzeti Bank, cit.

107 Article 9(4) of the Act CXXXIX of 2013.

108 Article 9(8) of the Act CXXXIX of 2013.

or dismissal of the other, Parliament-elected members of the Monetary Council shall be made by the Parliament Standing Committee for Economic Affairs to Parliament.[109] Currently, there are three Deputy Governors and five other, Parliament-elected members in the Monetary Council.[110]

As mentioned above, the President of the Republic has the power to dismiss the Governor and the Deputy Governors of the MNB and the Parliament has the power to dismiss the other, Parliament-elected members of the Monetary Council. Dismissal can take place only for the reason specified in Article 14.2 of the Treaty on the Functioning of the European Union on the Statute of the European System of Central Banks and of the European Central Bank.[111] Article 14.2 (National Central Banks) includes that the term of office of a Governor of a national central bank shall be no less than five years. The current Governor has been appointed for six years, similarly to the Deputy Governors and all other members of the Monetary Council.[112] "*A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*."[113] The dismissed, Parliament-elected member of the Monetary Council may seek remedy in court under the Labor Code in addition to the right of seeking remedy as defined in the above-mentioned Article 14.2.[114]

The required professional background of the members of the Monetary Council is defined in the Central Bank Act; "*Hungarian citizens with outstanding theoretical knowledge and practical professional expertise in issues related to monetary, financial or credit institution activities may be appointed or elected as members of the Monetary Council*".[115] The current Monetary Policy members' professional background is in line with this requirement.[116]

6.3. The Role and Operation of the Financial Stability Council

The Financial Stability Council consists of members of the Monetary Council and the Executive Board. The Financial Stability Board – as the organ

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109 Article 9(10) of the Act CXXXIX of 2013.

110 See MNB, *Members of the Monetary Council* (18 March 2023).

111 Article 9(10) of the Act CXXXIX of 2013.

112 See MNB, Members of the Monetary Council, cit.

113 *Treaty on the Functioning of the European Union Protocol (No 4) in the Statute of the European System of Central Banks and of the European Central Bank*.

114 Article 9(10)-(12) of the Act CXXXIX of 2013.

115 Article 9(5) of the Act CXXXIX of 2013.

116 MNB, Members of the Monetary Council, cit.

of the MNB – shall act on behalf of the MNB, within the strategic framework determined by the Council, in the proceedings related to the duties specified in Article 4 (5) and (7)-(9) of the Central Bank Act. The Financial Stability Board consists of at least three and at most ten members: the Governor of the MNB, as chairman of the Financial Stability Board, the Deputy Governors supervising certain specific tasks, as stipulated in the Central Bank Act, and the executives appointed by the Governor of the MNB. The powers of the Financial Stability Board are governed by the Central Bank Act and the rules of procedure of the Financial Stability Board. It monitors and analyses financial stability-related risks and renders resolution decisions and decisions on taking resolution actions.[117]

The Financial Stability Council defines its Rules of Procedures independently. The Financial Stability Board shall meet as frequently as required, but at least every two months. The Chairman shall convene and chair the meetings of the Financial Stability Board and make proposal for the agenda. The meeting shall be attended by the representative of the Minister responsible for the control of the money, capital, and insurance markets, and by external guests invited by the Governor of the MNB, with negotiating right. The Board shall have a quorum if the majority of its members are present. The Financial Stability Board shall pass its decisions with simple majority of the votes of the members present in the case of a tied vote the Chairman's vote shall decide.[118]

6.4. Financial Independence of the MNB

The Preamble of the Central Bank Act makes a reference to Articles 41 and 42 of the Fundamental Law when enacting the Central Bank Act, which includes the legal norms at to the tasks, and the institutional, organizational, personal, and financial independence of the MNB, among others. In accordance with the Central Bank Act, the company name of the MNB need not be registered in the company register.[119] "*The MNB is a legal entity operating as a company limited by shares. Based on the MNB Act, the form of the company (closed company limited by shares) and/or its abbreviation need not be indicated in the company name of the MNB*."[120] The arrangements as to the operational independence of the resolution functions and to avoid conflicts of interest with other functions are made in the Central Bank Act and the Statute of the MNB ("Statute").[121]

The annual reports of the MNB are available online; they include a detailed breakdown of the incomes and expenses of the MNB.[122] Incomes mostly come from interest and interest-related income, income arising from exchange rate

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117 Article 13(2) a)-l) of the Act CXXXIX of 2013.

118 Article 13 of the Act CXXXIX of 2013. *Organisation Chart of Magyar Nemzeti Bank*, 16 December 2022 (18 March 2023); Chapter 9 of the Statutes of the Magyar Nemzeti Bank, cit.

119 Article 5 (2) of Act CXXXIX of 2013, see also 1.1 of the Statutes of the Magyar Nemzeti Bank, cit.

120 1.3 of the Statutes of the Magyar Nemzeti Bank, cit.

121 *The Statute of the Magyar Nemzeti Bank, May 2014*.

122 See MNB, *Annual Report 2021*, Income Statement, 103.

changes, realized gains arising from financial operations, fees and commissions, and income from supervisory activities. The 2021 annual report of the MNB reveals, "*in 2021, the MNB recorded a loss of HUF 57.1 billion. The net interest and interest-related income turned into a loss due to the balance sheet-expanding effect of the central bank measures aimed at addressing the economic impact of the coronavirus pandemic and restarting the economy, and to rising interest rates. Income arising from exchange rate changes declined compared to the high values seen in the recent periods. The MNB paid HUF 250 billion as a dividend from its retained earnings to the central budget in 2021*".[123]

6.5. The MNB's Relationship with the Parliament

The Central Bank Act includes legal norms on the MNB's relationship with the Parliament.[124] The Parliament may request ad hoc information, written or oral, from the Governor of the MNB. The Governor of the MNB shall report to the Parliamentary Standing Committee for Economic Affairs in writing every six months on the MNB's semi-annual activity with the same content as the annual account. At the request of the Parliamentary Committee for Economic Affairs, the Governor of the MNB shall be required to attend in person and supplement the report verbally. At the request of the Speaker of the Parliament or the Chairman of the Parliamentary Standing Committee for Economic Affairs, the Governor of the MNB shall be subject to an exceptional reporting obligation. Upon request the Governor of the MNB shall provide information to the competent committee of the Parliament.

The MNB shall compile a detailed annual plan covering its operating costs and investments before the start of the financial year, with a separate plan made for its basic and other tasks. Following closure of the financial year, it shall compile a comparative analysis of planned and actual developments in operating costs and investment expenses. The MNB shall forward the analysis, including the auditor's opinion, in conjunction with the annual account to the Parliamentary Standing Committee for Economic Affairs and to the Állami Számvevőszék (State Audit Office).

The MNB may, contemporaneously with compiling the detailed annual plan, present its proposal for determining the rate of the supervision fee as provided for in specific other legislation, and shall submit it to the Parliamentary Standing Committee for Economic Affairs and to the minister in charge of the money, capital, and insurance markets. "*The above-mentioned reporting obligations of the Governor of the MNB shall not result in interference in the independence of the members of the MNB's decision-making bodies, shall not affect the status of*

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123 See *ibidem*, Article 3.12, 70.

124 See Article 131 of Act CXXXIX of 2013.

the Governor of the MNB as a member of the Governing Council of the ECB, and shall not affect the obligation of confidentiality stemming from the Statute."[125]

The independence of the MNB in financial management also means that the central bank is to provide financing not only from the revenues from fines imposed, but also from any other funds at its disposal for the purposes of implementing its social responsibility strategy.[126] Pursuant to the Central Bank Act, without prejudice to its primary objective, the central bank shall support the economic policy of the Government using the instruments at its disposal, geared towards full employment and growth. "*The wording of the Central Bank Act clearly indicates that supporting the Government's economic policy is not a choice, but rather a statutory obligation for the MNB.*"[127] The Statute of the MNB includes that "*In terms of the central bank's organisational structure and control, the internal audit department of the Magyar Nemzeti Bank is an independent unit, but functionally it is an integral part of the central bank's control system. In compliance with international criteria, the Magyar Nemzeti Bank provides the following guarantees to ensure the independence of the internal audit department:*

- *the internal auditors are independent of the activities they audit and all internal processes;*
- *the conclusions and evaluations made during the audits are independently compiled and transmitted to the organisational units involved;*
- *the internal auditors perform their work within the organisation, including all units and functions, based on their own initiatives and with approval by the Executive Board and the Board of Directors. The work performed in internal audits is based on a work plan covering a period of several years and broken down to each year. This plan is compiled by the Magyar Nemzeti Bank based on the expected financial, operating, compliance and other risks*".[128]

As mentioned above, the Governor's and Deputy Governors' dismissal can take place only for the reason specified in Article 14.2 of the Treaty on the Functioning of the European Union on the Statute of the European System of Central Banks and of the European Central Bank.[129] Recently, the Governor has been very critical about the Government's policies in various speeches he held in the Parliament ("*The [Governor of MNB], who had already criticised the government's economic policy, concluded his speech by saying that he was*

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125 Article 131(7) of the Act CXXXIX of 2013; see also 1.3.1 of the Statute of the MNB ("Statute") is available *here* [not to be confused with the "Statutes" / "Alapito Okirat"].

126 See 1.2 of the Statute of the MNB.

127 See Article 3(2) of the Act CXXXIX of 2013 and 2.6 of the Statute of the MNB (quoted).

128 See 3.3 of the Statute of the MNB.

129 Article 9(10) of the Act CXXXIX of 2013.

not offended, frustrated or at odds with the prime minister. He said, however, that there was a difference of principle between the central bank and the government").[130] According to the Statutes of the MNB, the Executive Board independently defines its Rules of Procedure in accordance with the MNB Act, other legislation, and the Statutes hereunder.[131] Likewise, the Financial Stability Board independently defines its Rules of Procedures.

The rules on conflict of interest relating to the staff of the MNB are governed by the provisions of the Central Bank Act.[132] Members of the Monetary Council and the Financial Stability Council shall not have any membership or ownership share in, and shall not enter into and shall not maintain an employment relationship or work-related contractual relationship with, or a relationship as an executive officer or member of the supervisory board of an organization covered by the acts enumerated in organizations supervised by the MNB. There are exceptions to this rule, for example, as to membership in voluntary mutual insurance fund, private pension fund, credit institutions set up as cooperative societies or in a mutual association, or to holding a seat on the supervisory board of a nonprofit business association.[133]

MNB employees, except by way of inheritance, may not acquire securities, with the exception of government bonds, certificates of deposit, collective investment instruments, mortgage bonds.[134] Membership or ownership shall be terminated within three months from the time of the commencement of employment with the MNB, or of the grant of probate taking legal effect in the case of inheritance.[135] There are further rules as to notification obligation of the employee if a close relative living in the same household enters into an ownership or shareholder relationship covered by the above legal norms.[136] There are further limitations as to employment relationship, work-related contractual relationship with, or a relationship as an executive officer or member of the supervisory board of a financial institution – other than the ones in which the MNB holds a share –, or at other legal entities engaged in activities auxiliary to financial services, investment firms, or the Országos Betétbiztosítási Alap (*National Deposit Insurance Fund*) or the Befektetővédelmi Alap (*Investor Protection Fund*).[137]

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130 See various press articles: M. Hetzmann, *Central bank president: Orbán is wrong, government has no plans for the future*, Daily News Hungary, 8 March 2023; see also G. Szakacs, *Hungary's sticky inflation exposes rift between government and central bank*, Reuters, 8 March 2023; Z. Simon, *Orban's Rift With Central Bank Widens in New Risk in Hungary Central bank governor slams Premier for 'strategic mistakes' Matolcsy takes aim at Orban over spending, state intervention*, Bloomberg UK, 8 March 2023.

131 See 8.4 of the Statutes of the Magyar Nemzeti Bank (founding deed), cit.; see 9.4 of the Statutes of the Magyar Nemzeti Bank, cit.

132 Article 152-156 of the Act CXXXIX of 2013.

133 Article 39 and 152(1)-(2) of the Act CXXXIX of 2013.

134 Article 152(3) of the Act CXXXIX of 2013.

135 Article 152(5) of the Act CXXXIX of 2013.

136 Article 152(6) of the Act CXXXIX of 2013.

137 Article 153 of the Act CXXXIX of 2013.

With some exceptions, certain MNB employees may not hold any interest in a financial institution, legal entity engaged in activities auxiliary to financial services or in an investment firm under the Central Bank Act. Members of the Monetary Council and MNB employees shall be allowed – exempted from the requirement of prior notification – to enter into and to maintain a relationship, other than employment relationship, for holding a seat in the board of directors or supervisory board of a business association under majority MNB ownership, or a membership, other than employment relationship, in the management, board of trustees or supervisory board of a foundation established by the MNB.[138]

Members of the Monetary Council may only engage in any other activities which are compatible with their decision making duties under the Central Bank Act.[139] Such members shall not hold office in political parties, may not carry out public activities on behalf of or in the interest of political parties, shall not be Members of Parliament or representatives of a local government, and shall not be senior officers or public officials in the national or in a local government. Members of the Monetary Council shall not be executive officers or supervisory board members of a business association.[140]

"*The Governor and Deputy Governors of the MNB shall not enter into any other employment relationship or other work-related contractual relationship*."[141] The Parliament-elected members of the Monetary Council may – subject to notification requirement – enter into another employment relationship or work-related contractual relationship if such does not constitute conflict of interest with their membership in the Monetary Council.[142] Members of the Monetary Council may enter into other work-related contractual relationships for the performance of scientific, educational, artistic, editorial and revisory activities, intellectual activities protected by copyright and the activities of registered foster carers. Such relationships shall be reported in advance.[143]

6.6. Conflict of Interest-related Provisions

In respect of members of the Monetary Council, the conflict of interest provisions shall remain in effect for a period of six months following termination of the employment relationship with the MNB, with the exception of any membership or ownership, employment relationship or work-related contractual relationship, holding an executive office or a seat on the supervisory board with any supervised organization in which the Hungarian State or the MNB has a majority stake.[144] The conflict of interest of the Governor and Deputy Governors

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138 Article 153(6) of the Act CXXXIX of 2013.

139 Article 156(1) of the Act CXXXIX of 2013.

140 Article 156(2) of the Act CXXXIX of 2013.

141 Article 156(3) of the Act CXXXIX of 2013.

142 Article 156(4) of the Act CXXXIX of 2013.

143 Article 156(5) of the Act CXXXIX of 2013.

144 Article 156(7) of the Act CXXXIX of 2013.

shall be declared by the President of the Republic by recommendation of the Prime Minister, and conflict of interest of the Parliament-elected members of the Monetary Council shall be declared by the Speaker of the Parliament by recommendation of the Parliamentary Standing Committee for Economic Affairs. If the circumstances underlying the conflict of interest cease to exist before the declaration of conflicts of interest, no declaration of conflict of interest shall be made.[145]

6.7. Publication of the MNB's Organizational and Operational Rules

The internal rules are made public on the website of the MNB.[146] The detailed rules of the organization and operations of the Magyar Nemzeti Bank are laid down in the Central Bank Act. Under the MNB's Organizational and Operational Rules, – in line with the EU directive – the resolution function is structurally separated with the supervisory function and is under the direct control of the Deputy Governor responsible for monetary policy, financial stability, and lending incentives. The organization chart of the MNB is also available on its website.[147] In line with EU law, the Central Bank Act also includes reference to the extensive mandatory disclosure requirements the MNB shall comply with vis-à-vis the bodies of the European Union.[148]

6.8. Legal Remedies Related to the Administrative Decisions Taken by the MNB in its Resolution Function

The shares of the MNB are owned by the state. The state, as a shareholder, is represented by the minister responsible for public finances. The auditor and the State Audit Office check the legality of the MNB's operations. The powers and duties of the auditor are contained in the MNB Act, the Civil Code, and the Statutes of the MNB.

Articles 116-119 of the Resolution Act include the main provisions regarding legal remedies against administrative decisions taken by the MNB in its resolution function.[149] The application shall be lodged within 8 days of the date of notification of the decision. The MNB shall forward the application to the court within 5 days. The court may order that the application has a suspensive effect or an interim measure if (i) it is justified in the public interest and (ii) it does not lead to a situation that threatens the stability of the financial intermediary system or jeopardizes the achievement of the resolution objectives.[150] If a hearing is to be

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145 Article 156(8)-(9) of the Act CXXXIX of 2013.

146 See *here*; Organisational and Operational Rules of the MNB ("*SzMSz*" in Hungarian) (29 January 2021). The Organisation Chart is annexed to the Organisational and Operational Rules of the MNB.

147 See *here*.

148 Article 140 of the Act CXXXIX of 2013.

149 Article 116 of the of the Act XXXVII of 2014 on Further Development of the Institutional Framework to strengthen the Safety of Certain Actors in the Financial Intermediation System ("Resolution Act"), cit.

150 Article 116(1) of the of the Act XXXVII of 2014.

held, the hearing shall be scheduled for no later than the fifteenth day following the date of receipt of the application. When preparing for the judgment on the contested decision, the court shall assess in evidence the economic and financial analyses and calculations made by the MNB, acting in its resolution function. The court shall give its decision within sixty days of the date on which the application is lodged and shall record its decision in writing until it is published. These time limits shall also apply to appeal proceedings.

Proceedings concerning a decision ordering and applying a resolution measure shall not be referred to a single judge. There shall be no change in the administrative procedure against a list of decisions specified by the Resolution Act, including the decision terminating the resolution procedure, the decision approving the provisional assessment, the decision approving the ex-post final assessment, the decision ordering the transfer back of assets, liabilities, rights or obligations transferred in the context of a sale of business or a separation of assets, the decision approving the reorganization plan, the decision requiring the provision of a service or facility, the decision to exclude certain contractual terms in the course of resolution, the decision to suspend certain obligations, the decision limiting the enforcement of credit securities, the decision on the temporary suspension of the right of termination, and the decision to appoint a resolution commissioner.[151]

To the judicial review of the decisions made by the MNB, acting in its resolution function, and by the resolution commissioner in the exercise of ownership or management rights in relation to the institution under resolution, the rules of Chapter XI of Book III of the Civil Code and the general procedural rules of the Code of Civil Procedure shall apply, with some exceptions.[152] The annulment or alteration of a decision of the MNB, acting in its resolution function, or of a corporate decision taken by the resolution commissioner in the exercise of ownership or management rights in relation to an institution under resolution shall not affect the validity of transactions carried out on the basis of the annulled decision on or before the date of notification of the court's judgment, if it affects the rights acquired by a third party who, in good faith and for valuable consideration, holds a participation in the assets, liabilities, rights or obligations of the institution under resolution. If the decision of the MNB, acting in its resolution function, is found by a court to be in breach of the law, the MNB shall be liable to pay a compensation for the damage directly caused.[153]

If necessary for the effective application of resolution tools and prerogatives, the MNB, acting in its resolution function, may request the suspension of pending court proceedings until the resolution procedure is completed where the institution under resolution is the party. This application

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151 Article 116(3) of the of the Act XXXVII of 2014.

152 Article 117(1)-(2) of the of the Act XXXVII of 2014.

153 Article 118(1)-(2) of the of the Act XXXVII of 2014.

by the MNB, acting in its resolution function, shall be assessed within 3 working days of its receipt.[154] The Resolution Act includes further provisions ensuring the effectiveness and legal effect of bail-in. If the MNB, acting in its resolution function, writes down the value of a liability item to zero, the liability concerned and any accrued but unpaid or uncapitalized interest or any similar liability relating to it shall cease to exist by virtue of this Act and no claim may be brought in relation to it in any judicial or insolvency proceedings.[155]

6.9. The Role of Soft Laws in the Operation of the MNB

With respect to soft law (guidelines etc.) from relevant EU bodies (ECB, EBA, SRB), the NCAs are required to report on compliance with guidelines. The MNB or its organs, such as the Financial Stability Council, also publishes guidelines itself, some of which are implementations of the EBA guidelines.[156] Under the Central Bank Act, the MNB "*In carrying out its tasks provided for in Subsections (7)-(9) of Section 4 [including macro-prudential policy framework, systemic risk, resolution authority, and supervision] the MNB shall take due account of the guidelines and recommendations issued by the European Banking Authority pursuant to Article 16 of 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, and the warnings and recommendations issued pursuant to Article 16 of Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board*".[157]

7. Conclusion

There is one resolution authority in Hungary; the MNB, which is the Central Bank of Hungary, and as such, part of the European System of Central Banks. The MNB fulfills central banking as well as both 'competent authority' (financial supervisory authority) and 'resolution authority' functions. The advantage of this type of organizational structure is that in case of a liquidity crisis, when the central bank needs to act as lender-of-last-resort, as it is the supervisory authority too, it has all information concerning the financial situation of the financially distressed bank. Hungary has a separate deposit insurance fund (NDIF) and an

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154 Article 119(1)-(2) of the Act XXXVII of 2014 on Further Development of the Institutional Framework to strengthen the Safety of Certain Actors in the Financial Intermediation System ("Resolution Act"), cit.

155 Article 72(3) of the Act XXXVII of 2014.

156 Article 13(2) i) of the Act CXXXIX of 2013.

157 Article 44(6) of the Act CXXXIX of 2013.

Investor Protection Fund. Both schemes aim to strengthen investor confidence through providing ex ante, financial sector-funded guarantee of deposits and investments up to a specified limit. In line with EU law, the funds of the NDIF and the Investor Protection Fund may be used for bank resolution purposes within strict limits. Hungary's participation in the EU's system-wide insurance scheme against future bank failures in combination with the clear and ample authorization of its government and central bank for crisis management provides a relatively strong safety net for future financial instabilities.

Ireland

Kevin Fee[*]

Summary. 1. Overview – 2. Irish resolution framework – 2.1. Resolution legal framework – 2.1.1. The Bank Recovery and Resolution Regulations – 2.1.2. Central Bank and Credit Institutions (Resolution) Act 2011 – 2.1.3. European Union (Recovery and Resolution of Central Counterparties) Regulations 2022 (S.I. No. 547 of 2022) (the "CCP Regulations") – 2.2. Organisation of the Bank and its resolution authority functions – 2.2.1. Organisation of the Bank – 2.2.2. Organisation of resolution authority functions of the Bank – 2.2.3. Structural separation of resolution authority functions from other functions – 2.2.4. Information flows between supervisory and resolution functions, and with external stakeholders – 2.3. Resolution planning and execution, and financing of resolution authority functions – 2.4. Resolution funds – 2.4.1. Credit Institutions Resolution Fund (the 'CIRF') – 2.4.2. Bank and Investment Firm Resolution Fund (BIFR Fund) – 2.4.3. Single Resolution Fund (SRF) – 2.4.4. Deposit guarantee scheme – 2.5. Management and oversight of liquidations – 2.6. Points of interest in relation to the current resolution authority institutional framework – 2.7. Reform of the resolution framework at national level – 3. Independence, separation, accountability – 3.1. Meetings – 3.2. Appointment and Dismissal – 3.2.1. Appointment – 3.2.2. Dismissal – 3.3. Operational independence of resolution functions and avoidance of conflicts of interest with other functions – 3.4. Exercise of BRRD early intervention powers, including powers to appoint temporary administrators – 3.5. Accountability – 3.5.1. Resolution accountability framework – 3.5.2. General accountability framework of the Bank – 3.6. Strategic plan – 3.7. Statement of accounts – 3.8. Examination by Comptroller and Auditor general – 3.9. Report of operations – 3.10. Performance statement – 3.11. International Peer review – 3.12. Attendance before the Oireachtas – 3.13. Secondary legislation regulating financing service providers – 3.14. Miscellaneous – 3.15. Soft law – 3.16. Limitations on liability – 4. Summary

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[*] With thanks to colleagues in the Legal division, and Resolution and Crisis Management division of the Central Bank of Ireland, for their input.

1. Overview

The Central Bank of Ireland (the 'Bank') was established by way of primary legislation under the Central Bank Act 1942 and is the resolution authority designated under Irish law for the purposes of Directive 2014/59/EU (the 'BRRD'). As Ireland is a participating Member State for the purposes of Regulation (EU) No 806/2014 (the 'Single Resolution Mechanism Regulation'), these resolution authority functions apply subject to the responsibilities of the Single Resolution Board.

The Bank is also conferred with resolution authority functions under the Central Bank and Credit Institutions (Resolution) Act 2011 (the '2011 Act'). The 2011 Act was the resolution legislative framework that applied to Irish banks and building societies, prior to transposition of the BRRD into Irish law. However, since transposition of the BRRD, the 2011 Act applies to credit unions only. This is subject to the Bank's role in respect of liquidation oversight under the 2011 Act, which remains applicable to Irish banks and building societies.[1]

It may be further noted that the Bank is designated as resolution authority for the purposes of Regulation (EU) 2021/23 (the 'CCP Recovery and Resolution Regulation').[2]

The Bank's resolution authority functions are in addition to the Bank's wide range of other functions, which include financial regulation (prudential and financial conduct), and central banking functions amongst others. However, this article focuses on the resolution framework in Irish law and the organisation of the Bank and its resolution authority functions. The article also outlines how independence and separation of resolution authority functions is maintained in Irish law and summarises the accountability mechanisms to which the Bank is subject.

2. Irish resolution framework

2.1. Resolution legal framework

2.1.1. The Bank Recovery and Resolution Regulations

The Bank's designation as resolution authority for the purposes of the BRRD was implemented by way of secondary legislation made by the Minister for Finance i.e. the European Union (Bank Recovery and Resolution) Regulations 2015 (the 'Bank Recovery and Resolution Regulations'). The Bank Recovery and Resolution Regulations largely came into operation on 15 July 2015

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1 For the purposes of this article, use of the term "resolution", when referring to resolution powers of the Bank, does not refer to the Bank's powers of liquidation oversight under Part 7 of the 2011 Act. These powers are referred to distinctly.

2 European Union (Recovery and Resolution of Central Counterparties) Regulations 2022 (S.I. No. 547 of 2022), Regulation 4. This role is not discussed in detail.

(bail-in coming into operation on 1 January 2016) and transposed the BRRD into Irish law. Under the Bank Recovery and Resolution Regulations, the Bank is designated as the resolution authority in the State that carries out all functions and duties of a resolution authority provided for in the BRRD.[3] As such, the Bank is the national resolution authority in the Irish State for the purposes of the Single Resolution Mechanism Regulation.

2.1.2. Central Bank and Credit Institutions (Resolution) Act 2011

Credit unions are not institutions to which the Bank Recovery and Resolution Regulations apply and instead are governed by the resolution framework prescribed in the 2011 Act. The resolution regime in the 2011 Act, when it came into force, was intended to be the resolution framework applicable to banks, building societies and credit unions. However, this framework was not immediately applicable to banks licensed in Ireland that had received financial support from the State, as well as building societies and credit unions. These institutions were instead subject to the Irish government's emergency reorganisation and restructuring powers under the Credit Institutions (Stabilisation) Act 2010. This reorganisation regime largely ceased to have effect on 31 December 2014, subject to certain provisos.

The 2011 Act provides the Bank with the power to direct a credit union to prepare and implement a recovery plan and the power to prepare a resolution plan for the credit union. The Bank also has the power to make a 'proposed transfer order' transferring assets and liabilities to a transferee, which may be a bridge-bank, and the power to make a 'proposed special management order'. These transfers and appointments must be given effect by the Irish High Court. However, the 2011 Act does not provide for bail-in or the establishment of asset management vehicles. Now, since transposition of the BRRD, the resolution powers of the Bank under the 2011 Act apply to credit unions only.

2.1.3. European Union (Recovery and Resolution of Central Counterparties) Regulations 2022 (S.I. No. 547 of 2022) (the "CCP Regulations")

In December 2022, the Bank was designated as the resolution authority in the State that carries out the functions and duties of a resolution authority provided for in the CCP Recovery and Resolution Regulation. This designation was implemented by way of secondary legislation made by the Minister for Finance i.e. the abovementioned CCP Regulations.

2.2. Organisation of the Bank and its resolution authority functions

There are two aspects to this point: (i) the organisation of the Bank, and (ii) the organisation of Bank resolution authority functions.

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[3] Bank Recovery and Resolution Regulations, Regulation 4(1), S.I. No. 289 of 2015. This includes the resolution authority power to suspend payment or delivery obligations under Article 33a BRRD.

2.2.1. Organisation of the Bank

The Central Bank Act 1942 states that except as expressly provided otherwise by that Act, the affairs and activities of the Bank shall be managed and controlled by the Central Bank Commission (the 'Commission).[4] The Commission consists of the Governor and two Deputy Governors of the Bank, the Secretary General of the Department of Finance, and six members appointed by the Minister for Finance.[5] The Governor is chairperson[6] and decisions are taken by majority vote.[7] Day to day management has been delegated by the Commission to the relevant employees of the Bank in line with a plan of assignment.

2.2.2. Organisation of resolution authority functions of the Bank

By contrast with the preceding paragraph, the resolution authority functions of the Bank are assigned by resolution legislation to the Governor. Under the Bank Recovery and Resolution Regulations, the Bank is designated as the resolution authority in the State that carries out the functions and duties of a resolution authority provided for in the Bank Recovery and Resolution Directive. Responsibility for exercising the functions of the resolution authority is expressly assigned to the Governor.[8] The Governor may delegate any of those functions to the Deputy Governor (Monetary and Financial Stability) or the Deputy Governor (Financial Regulation), or an officer or employee of the Bank.[9] In practice, the functions are largely managed by the Governor by way of delegating responsibility to the Deputy Governor (Monetary and Financial Stability), as well as, subject to certain exceptions, to the Director of Financial Stability.[10]

2.2.3. Structural separation of resolution authority functions from other functions

The Bank Recovery and Resolution Regulations require the Bank to ensure that adequate structural arrangements are in place to ensure operational independence and to avoid conflicts of interest between the Bank's – (a) functions as a resolution authority for the purposes of the BRRD, and (b) other functions (including, in particular, its supervision functions pursuant to Regulation (EU) No 575/2013 (the 'Capital Requirements Regulation') and Irish legislation transposing Directive 2013/36/EU (the European Union (Capital Requirements)

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4 Central Bank Act 1942, section 18B(1).

5 Central Bank Act 1942, section 18CA(1).

6 Central Bank Act 1942, section 18CA(2).

7 Schedule 1, paragraph 4 of the Central Bank Act 1942 provides that: "A decision supported by a majority of the votes cast at a meeting of the Commission at which a quorum is present is the decision of the Commission".

8 Bank Recovery and Resolution Regulations, Regulation 7(2). See also Central Bank and Credit Institutions (Resolution) Act 2011, Section 5(1). See further, Regulation 7(1) of the CCP Regulations.

9 Bank Recovery and Resolution Regulations, Regulation 7(3)). See also Central Bank and Credit Institutions (Resolution) Act 2011, Section 5(2). See further, Regulation 7(2) of the CCP Regulations.

10 In certain circumstances, the functions of the Director of Financial Stability may be exercisable by the Head of the Resolution and Crisis Management Division.

Regulations 2014 (S.I. No. 158 of 2014)). The Bank is required to ensure that adequate structural arrangements for these purposes are in place such that the staff involved in carrying out the functions as a resolution authority for the purposes of the BRRD shall be structurally separate from and subject to separate reporting lines from the staff involved in carrying out the supervision tasks of the competent authority or other functions of the Bank.[11] In practice, the Resolution and Crisis Management division of the Bank is responsible for the day-to-day management of resolution authority functions. The Resolution and Crisis Management division reports to the Governor of the Bank separately from the prudential and financial conduct supervisory divisions of the Bank. With regard to the 2011 Act, similar arrangements apply.[12]

2.2.4. Information flows between supervisory and resolution functions, and with external stakeholders

Regulation 7(5) of the Bank Recovery and Resolution Regulations provides that the requirement on the Bank to ensure adequate structural arrangements shall not limit – (a) the exchange of information necessary for the performance of functions under the BRRD and the Bank Recovery and Resolution Regulations, or (b) the performance of functions in relation to the preparation, planning and application of resolution decisions. Information exchange between the resolution and supervisory functions takes place in line with this requirement. Information is generally received from the ECB at the level of the operation of internal resolution teams established for the purposes of the single resolution mechanism (the 'SRM'). In terms of the aim of recital (10) of the Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange,[13] the perceived impact is that, from an operational perspective, sharing of information has become more efficient and that national competent authorities and national resolution authorities can obtain information necessary to allow them to perform their role in timely manner. With regard to working with the European Banking Authority (the 'EBA'), the perceived impact is that the SRM has ensured that a close relationship is

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11 Bank Recovery and Resolution Regulations, Regulation 7(1) and 7(4). Regulation 7(4)). See also Section 5(3) of the Central Bank and Credit Institutions (Resolution) Act 2011, which requires the Governor, in delegating a relevant function under that Act, to endeavour to ensure that the performance of that function is operationally separate from the regulatory and supervisory responsibilities of the Bank. See further, Regulation 7(3) of the CCP Regulations: in accordance with Article 3(3) and (7) of the CCP Recovery and Resolution Regulation, the Bank is required to ensure adequate structural arrangements are in place to ensure operational independence and to avoid conflicts of interest between the (a) functions of the Bank as a resolution authority for the purposes of the CCP Recovery and Resolution Regulation, and (b) other functions of the Bank (other than those functions conferred on the Bank as the resolution authority for the purposes of BRRD).

12 Central Bank and Credit Institutions (Resolution) Act 2011, Section 5.

13 Recital (10) provides: "This MoU does not prevent the exchange of information within the SSM and SRM. Information received from the SRB by the ECB can be shared with the national competent authorities involved in the respective joint supervisory team and information received from the ECB by the SRB can be shared with the national resolution authorities involved in the respective internal resolution team".

maintained by the EBA and national resolution authorities in providing their relevant inputs into the EBA Resolution committee and EBA work groups.

2.3. Resolution planning and execution, and financing of resolution authority functions

Under the Bank Recovery and Resolution Regulations, the main authorities involved in resolution planning / execution are the following:

i. The Bank, which is conferred with the following roles

- Resolution authority (subject to the responsibilities of the Single Resolution Board within the SRM).
- Competent authority (subject to the responsibilities of the ECB within the Single Supervisory Mechanism (SSM)).[14]
- National central bank within the Eurosystem.
- Designated authority for the purposes of Directive 2014/49/EU (the 'Deposit Guarantee Scheme Directive').[15]
- National macroprudential authority.

ii. The SRB and ECB, as appropriate to their competence and functions under governing EU law.

iii. The Irish Minister for Finance, who is required to be notified / give consent in certain circumstances in the context of resolution execution.[16]

iv. The Irish courts, in the context of resolution execution.

v. Other EU and national authorities to the extent applicable.[17]

The Bank Recovery and Resolution Regulations require the Bank to provide the resolution authority with funds raised by way of levies paid by entities

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[14] Regulation 3(1) of the Bank Recovery and Resolution Regulations defines "competent authority" as meaning "… as the context requires (a) the authority designated under Regulation 4 of [Irish law transposing Directive 2013/36/EU], or (b) the European Central Bank with regard to specific tasks conferred on it by Council Regulation (EU) No 1024/2013". The Bank is the authority referred to in (a) and is therefore competent authority for the purposes of Directive 2013/36/EU. The competent authority functions of the Bank apply subject to the specific tasks of the ECB conferred on it by the SSM Regulation.

[15] The Bank is designated as the authority in the State that carries out the functions and duties of a designated authority for the purposes of Directive 2014/49/EU (European Union (Deposit Guarantee Schemes) Regulations 2015 (S.I. No. 516 of 2015), Regulation 4(1)).

[16] The Minister for Finance is designated as responsible for the exercise of the functions of a competent ministry referred to in Article 3(5) of the Bank Recovery and Resolution Directive (Bank Recovery and Resolution Regulations, Regulation 4(6)).

[17] For example, in the context of the Single Resolution Mechanism Regulation, the European Commission and Council of the European Union have a role in the resolution procedure.

regulated by the Bank. The funds to be provided are those funds considered necessary by the Governor to enable the resolution authority to perform and exercise its functions. However, the levy must be fixed so that the total amount of levy collected or recovered does not exceed the total costs incurred by the resolution authority in performing its functions and exercising its powers under those regulations.[18] With regard to meeting the Bank's expenses in discharging its resolution functions in respect of credit unions, a fund is established. The fund is required to be constituted by the contributions made by credit unions and other sources,[19] and credit unions are required to contribute to the fund in accordance with regulations made by the Minister for Finance.

2.4. Resolution funds

There are two resolution funds established under Irish law:

2.4.1. Credit Institutions Resolution Fund (the 'CIRF')

The purpose of the CIRF is to provide a source of funding for the resolution of financial instability in, or an imminent serious threat to the financial stability of, a credit union, and in particular

- to provide funds for certain specified payments in the course of a resolution process,[20]
- with the written consent of the Minister for Finance, to provide capital for a bridge-bank, and
- to meet the Bank's expenses in discharging its functions under the 2011 Act.

The Bank is required to manage and administer the CIRF[21] and the CIRF is constituted as described in the previous paragraph.

2.4.2. Bank and Investment Firm Resolution Fund (BIFR Fund)

The BIFR Fund was established by the Bank Recovery and Resolution Regulations for the purpose of ensuring the effective application of the resolution tools and powers under the BRRD.[22] The BIFR Fund is required to be managed and administered by the Bank as resolution authority and is to be used only in accordance with the prescribed resolution objectives and principles. Since the

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18 Bank Recovery and Resolution Regulations, Regulation 5. Central Bank Act 1942, Section 32D(3A).

19 Central Bank and Credit Institutions (Resolution) Act 2011, Section 10(3). The other sources include sums paid by the Minister for Finance, surplus assets, after all liabilities have been discharged, arising on the winding-up of a bridge-bank, and interest on those sums, contributions and assets.

20 For example, provision, directly or indirectly, of a financial incentive, on terms and conditions that the Minister considers appropriate, to a person to become a transferee.

21 Central Bank and Credit Institutions (Resolution) Act 2011, Section 11(1).

22 Bank Recovery and Resolution Regulations, Regulation 163.

establishment of the Single Resolution Fund (SRF), the BIFR Fund applies subject to the role of the SRF and therefore the BIFR Fund no longer applies to institutions within the scope of the Single Resolution Mechanism Regulation.

The following two funds are also relevant in this context:

2.4.3. Single Resolution Fund (SRF)

As national resolution authority, the Bank participates in raising contributions from relevant credit institutions (and any other relevant entities) established in the Irish State. Such contributions are transferred to the SRF in accordance with the agreement on the transfer and mutualisation of contributions to the SRF.

2.4.4. Deposit guarantee scheme

The Bank is designated authority for the purposes of the Deposit Guarantee Scheme Directive. Prior to this, the Bank had been required to establish and maintain a deposit protection account[23] and was competent authority for the purposes of the First Deposit Guarantee Scheme Directive (Council Directive 94/19/EC).

2.5. Management and oversight of liquidations

In relation to management and oversight of insolvency proceedings, the 2011 Act modifies ordinary company law to provide the Bank with certain functions of oversight in respect of the liquidation of an authorised bank, building society or credit union. The Bank is provided with the power to present a petition to the High Court for the winding up of such an institution on any of the following grounds:

a) that in the opinion of the Bank, the winding-up of that institution would be in the public interest;

b) that that institution is, or in the opinion of the Bank may be, unable to meet its obligations to its creditors;

c) that that institution has failed to comply with a direction of the Bank

   – in the case of the Irish holder of a banking licence, under specified law providing for a direction to suspend banking activity,[24] or

   – in the case of a building society, under specified law providing for a direction to suspend certain activities of the building society,[25] or

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23 Central Bank Act 1989, Section 54.

24 Central Bank Act 1971, Section 21.

25 Building Societies Act 1989, Section 40(2).

– in the case of a credit union, under specified law providing for a direction in relation to restricting / regulating certain activities of the credit union;[26]

d) that that institution's licence or authorisation (as applicable) has been revoked and (in the case of the Irish holder of a banking licence) that it has ceased to carry on banking business;

e) that the Bank considers that it is in the interest of persons having deposits (including deposits on current accounts) with that institution that it be wound up.

Only a liquidator approved by the Bank may be appointed to such an institution and the liquidator has two prescribed objectives. The first prescribed objective of the liquidator is to facilitate the Bank in ensuring that eligible depositors receive the amount payable from the deposit guarantee scheme (or to facilitate the Bank in transferring that amount from the deposit guarantee scheme to another such institution, to hold that amount on behalf of the eligible depositors). The liquidator also has a second prescribed objective to wind up the institution so as to achieve the best results for that institution's creditors as a whole. However, in the event of conflict, the first objective takes precedence.[27]

After the High Court makes a winding up order, the Bank nominates two individuals and the Minister for Finance nominates one individual to comprise a liquidation committee, in order to ensure that the liquidator properly carries out his or her functions under the relevant provisions of the 2011 Act. The committee is required to make recommendations to the liquidator on appropriate ways of achieving the first objective and the liquidator is required to comply with any such recommendation.[28] The liquidator is then required to report to the liquidation committee on request and may report to that committee about any matter which the liquidator thinks is likely to be of interest to the committee.[29] However, where the committee has received notice from the liquidator that the first objective has been achieved entirely (or so far as reasonable practicable), the liquidation committee is required to make a "full payment resolution" (or apply to court to have questions determined). If a "full payment resolution" is passed by the committee, the committee ceases to exist.[30]

Other legislation also provides a role for the Bank in applying to court to appoint an insolvency practitioner in respect of other financial service providers (e.g. insurance companies and investment firms) but without the above oversight framework. In February 2020, the Bank presented a petition to the Irish High Court for the winding up of an insurance company (CBL Insurance Europe Dac

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26 Credit Union Act 1997, Section 87.

27 Central Bank and Credit Institutions (Resolution) Act 2011, Section 80(1) and (2).

28 Central Bank and Credit Institutions (Resolution) Act 2011, Section 87(1).

29 Central Bank and Credit Institutions (Resolution) Act 2011, Section 84(1).

30 Central Bank and Credit Institutions (Resolution) Act 2011, Section 84.

(Under Administration)). An order for the winding-up, and the appointment of joint liquidators, was subsequently made in March 2020.

2.6. Points of interest in relation to the current resolution authority institutional framework

There does not appear to be any reported expression of judicial or political tension in relation to the resolution authority institutional framework of the Bank.[31] Indeed, the IMF has stated that in respect of the Resolution and Crisis Management Division, there is clear institutional and procedural separation from the Bank's supervisory functions.[32]

As regards other points of interest, however, the IMF has noted that the Minister's potential role in authorising resolution action in the context of the government's ownership stakes in potential resolution candidates gives rise to the perception of a potential conflict of interest.[33] Separately, the overlay of Irish court process on the resolution framework, when the resolution authority is taking resolution action, is a matter which requires preparations which may be individual to the Irish framework as compared with other euro area Member States.

2.7. Reform of the resolution framework at national level

In terms of recent reform considered at a national level, on 1 September 2021, the Department of Finance in collaboration with the Bank launched a public consultation on the development and scope of a possible domestic resolution framework for insurers. The consultation indicated that feedback to the national law consultation, along with any EU wide legislative proposal from the European Commission, would assist in the consideration of the way forward on this issue. On 22 September 2021, the Commission adopted a proposal for an Insurance Recovery and Resolution Directive (IRRD) and any new national regime would therefore be subject to consideration in light of the requirements of the IRRD.

3. Independence, separation, accountability

To recap, there are two aspects to the organisation of the Bank as resolution authority: (a) the organisation of the Bank, and (b) the organisation of Bank resolution authority functions. The affairs and activities of the Bank are managed and controlled by the Commission, while the resolution authority functions of the Bank are assigned by resolution legislation to the Governor. This part discusses

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31 A discussion of the Irish banking crisis, including the various measures taken by the Irish State in relation to Irish banks, is beyond the scope of this note.

32 IMF Country Report No. 22/239, Technical Note on Financial Safety Nets and Crisis Management (July 2022).

33 *Ibidem*.

how independence, separation and accountability of the resolution authority is maintained.

3.1. Meetings

The procedure for the calling of meetings of the Commission and for the conduct of business at those meetings is determined by the members. If a member of the Commission has a direct or indirect pecuniary (financial) interest in a matter being considered or about to be considered at a meeting, and the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter, the member is required to disclose the nature of the interest at a meeting of the Commission or to the Secretary of the Commission. After a member has disclosed the nature of an interest in a matter, he or she may not, unless the other members otherwise determine, be present during any deliberation of the Commission with respect to the matter, or take part in any decision of the Commission with respect to the matter. Minutes of meetings are published on the Bank website.

As mentioned above, resolution authority functions are conferred by law on the Governor, and delegated to the Deputy Governor (Monetary and Financial Stability), as well as, subject to certain exceptions, to the Director of Financial Stability.[34] A committee of the Bank (the 'Resolution Committee') advises the Governor on the Bank's resolution mandate and to that end considers various matters of importance in relation to resolution policy and operations. The committee is established under internal procedure and meets periodically throughout the year. The Chair of the committee is the Deputy Governor (Monetary and Financial Stability) and the Committee's other members are involved in resolution authority operations e.g. the Director of Financial Stability and the Head of the Resolution and Crisis Management Division. Members of the committee can suggest items for inclusion on the agenda.

3.2. Appointment and Dismissal

Appointment and dismissal of the Governor, Deputy Governors and members of the Commission, is governed by the Central Bank Act 1942.

3.2.1. Appointment

Section 19(1) of the 1942 Act provides that the "Governor shall be appointed by the President [of Ireland] on the advice of the Government". A person will, however, not be eligible for appointment as Governor if the person

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[34] In certain circumstances, the functions of the Director of Financial Stability may be exercisable by the Head of the Resolution and Crisis Management Division.

– is a member of either House of the Oireachtas (parliament), or is nominated as a candidate for election as such a member or is nominated as a member of Seanad Éireann (upper house of parliament); or

– is a member of the European Parliament or is nominated as a candidate for election as such a member or to fill a vacancy in the membership of that Parliament; or

– is a member of a local authority or is nominated as a candidate for election as such a member.

A person appointed as Governor can hold office for seven years from the date of appointment, and the President of Ireland, on the advice of the Government, may appoint the person holding office as Governor for a further period of seven years. In terms of the appointment of the Deputy Governor (Financial Regulation) and Deputy Governor (Monetary and Financial Stability), the Central Bank Act 1942 requires the Commission, with the consent of the Minister for Finance, to appoint suitably qualified persons".[35] Similar to the provisions that relate to the appointment of the Governor, a person is not eligible for such appointment if they hold or are nominated for a position of political office/power. These Deputy Governors can hold office for up to five years, and are eligible for reappointment provided that the total term in office does not exceed ten years.

With regard to the appointment of members of the Commission, the Central Bank Act 1942 provides that the Minister for Finance may appoint a person as a member if the Minister is of the opinion that the person has relevant knowledge of the following: accountancy, actuarial science, banking, consumer interests, corporate governance, economics, financial control, financial regulation, financial services, insurance, law, social policy or systems control.[36] An appointed member of the Commission can hold office for a period of up to five years, and can serve two such terms in office. A person will not be eligible for appointment as member if he or she:

– is a member of the Houses of the Oireachtas (etc), ineligible on similar grounds to those that apply for appointment as Governor, described above.

– performs a pre-approval controlled function (a function in respect of a regulated financial service provider, appointment to which requires approval of the Bank e.g. chief executive, executive director etc) or has what in the opinion of the Minister constitutes a significant shareholding in a regulated financial service provider,

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35 Central Bank Act 1942, Section 23B(1). Whereas, Section 23B(1) refers to "Heads of Function", which in turn refers to the "Head of Central Banking" and "Head of Financial Regulation", these roles are currently entitled "Deputy Governor (Monetary and Financial Stability)" and "Deputy Governor (Financial Regulation)" respectively - Iris Oifigiúil (1 July 2022).

36 Central Bank Act 1942, Section 24(1).

– has been adjudged bankrupt or has entered into a composition with his or her creditors, or

– has been convicted of an offence and sentenced to serve a term of imprisonment for the offence.[37]

3.2.2. Dismissal

The President of Ireland may, on the advice of the Government, remove the Governor from office on one or more specified grounds of serious misconduct and on the ground that the Governor has, because of ill-health, become permanently incapacitated from carrying out the responsibilities of Governor.[38] With regard to the removal of the Deputy Governor (Financial Regulation) and Deputy Governor (Monetary and Financial Stability), the Commission may remove or suspend such a person from office, but only for reasons previously notified in writing to the Deputy Governor concerned.[39] In terms of the removal of a Commission member, the Minister for Finance may remove an appointed member of the Commission from office for proven misconduct or incompetence, or if in the Minister's opinion it is necessary or desirable to do so to enable the Commission to function effectively.[40]

3.3. Operational independence of resolution functions and avoidance of conflicts of interest with other functions

The Commission may delegate to the Governor, the Deputy Governor (Monetary and Financial Stability), the Deputy Governor (Financial Regulation), or an employee of the Bank any function or power of the Commission, if the Commission considers it appropriate to do so in the interests of the efficient and effective management of the Bank and the exercise of its powers and functions.[41] However, legislation may confer responsibility for certain matters on specific persons e.g. the Governor has sole responsibility for the performance of the functions imposed, and the exercise of powers conferred, on the Bank by or under the Treaty on the Functioning of the European Union or the ESCB Statute.[42] Similarly, the Bank Recovery and Resolution Regulations, the 2011 Act and the CCP Regulations confer the Governor with statutory responsibility for relevant resolution authority functions, which are delegated by the Governor. Structural separation of resolution authority functions from other functions of the Bank is discussed further in Part II above and internal rules on separation of supervision and resolution are made public on the Bank's website.[43]

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37 Central Bank Act 1942, Section 24(2).

38 Central Bank Act 1942, Section 21(1) and (2).

39 Central Bank Act 1942, Section 23C(7).

40 Central Bank Act 1942, Section 25(3).

41 Central Bank Act 1942, Section 18F(1).

42 Central Bank Act 1942, Section 19A(2).

43 See *here* and further *here*.

3.4. Exercise of BRRD early intervention powers, including powers to appoint temporary administrators

The early intervention powers, including the temporary administrator powers, arising under the BRRD are, in line with that Directive, conferred by the Bank Recovery and Resolution Regulations on the competent authority. The Bank Recovery and Resolution Regulations define "competent authority" as meaning: "… as the context requires – (a) the authority designated under Regulation 4 of the Capital Requirements Regulations [i.e. the Bank as competent authority designated for the purposes of Directive 2013/36/EU], or (b) the European Central Bank with regard to specific tasks conferred on it by Council Regulation (EU) No 1024/2013". Where the Bank is the competent authority, the functions of the competent authority are delegated by the Commission.

3.5. Accountability

3.5.1. Resolution accountability framework

Under the Bank Recovery and Resolution Regulations, the resolution authority is accountable to the Irish courts insofar as the application of the resolution tools is subject to the High Court's approval.[44] This model followed the procedure introduced under the 2011 Act.[45] While the Bank Recovery and Resolution Regulations are expressly required not to be construed in a manner that would operate to prevent the Single Resolution Mechanism Regulation having full force and effect in the Irish State,[46] the prescribed court process is not subject to an exception in circumstances where the Bank is implementing an SRB decision.

The role of the resolution authority is to make a proposed resolution order and apply ex parte to the Irish High Court for an order in the terms of the proposed resolution order. The resolution authority is required to make a proposed resolution order in relation to a credit institution or relevant investment firm where it decides that: (a) the resolution conditions are fulfilled in relation to that institution, (b) if required, the prior written consent of the Minister has been obtained, and (c) where the institution is part of a cross-border group, the group resolution procedure, as applicable, has been complied with.[47]

As soon as may be after making a proposed resolution order the resolution authority is required to apply ex parte to the Irish High Court for an order in the terms of the proposed resolution order. The Court, when hearing an application, is required, if satisfied that the decision of the resolution authority was reasonable

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44 It is important to note that the resolution authority is required to oversee the implementation of the resolution action and exercise control over the institution under resolution for the duration of the resolution period (Bank Recovery and Resolution Regulations, Regulation 114(1)).

45 Given similarities, the procedure under the 2011 Act is not outlined here.

46 Bank Recovery and Resolution Regulations, Regulation 3(3).

47 Bank Recovery and Resolution Regulations, Regulation 104(1).

and was not 'vitiated' (impaired) by any error of law, to make a resolution order in the terms of the proposed resolution order. The resolution order has immediate effect, except to any extent that the resolution order provides otherwise, and can be changed by way of application of the resolution authority to the Irish High Court.[48]

The institution or entity in relation to which a resolution order is made, a shareholder of that institution or entity or a holder of a relevant capital instrument or liability affected by the resolution order may apply to the High Court not later than 48 hours after the publication of the resolution order, for the setting aside of the resolution order. The High Court in hearing an application is required to act as expeditiously as possible consistent with the proper administration of justice and can set aside the resolution order only where the High Court is satisfied that the decision of the resolution authority was unreasonable or vitiated by an error of law.[49] Under certain conditions the High Court may, instead of setting aside the resolution order, make an order varying or amending the order in the manner it considers appropriate.[50] In terms of other avenues of appeal, permission to take judicial review proceedings of a resolution action, or the appointment of a special manager, is limited, and appeals from the High Court to the Irish Court of Appeal are also limited. Moreover, a stay or temporary injunction preventing the implementation of a resolution order is restricted.[51]

Separately to the above, the resolution authority is accountable to the Minister for Finance in certain circumstances. The resolution authority is required to obtain the Minister's prior written consent before making a proposed resolution order where the resolution authority forms the view that:

a) both (i) the use of the BIFR Fund will be required for the effective application of the resolution tools, and (ii) there are insufficient monies available in the Fund to meet these requirements;

b) the decision will have a direct fiscal impact, other than the use of the BIFR Fund, or

c) the decision is likely to have systemic implications.[52]

Accountability to the Minister is further maintained in the context of making regulations (secondary legislation) prescribing ex ante and extraordinary ex post contributions for the BIFR Fund. The resolution authority is required to consult the Minister and provide him or her with a draft of the proposed regulations. The resolution authority may also consult such other persons as the resolution authority considers appropriate to consult in the circumstances. These regulations

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48 Bank Recovery and Resolution Regulations, Regulations 105 and 108.

49 Bank Recovery and Resolution Regulations, Regulation 110(1) to (3).

50 Bank Recovery and Resolution Regulations, Regulation 110(7).

51 Bank Recovery and Resolution Regulations, Regulations 148 to 150.

52 Bank Recovery and Resolution Regulations, Regulation 9.

are required to be laid before each House of the Oireachtas as soon as may be after they are made.[53]

No specific provision is made in the Bank Recovery and Resolution Regulations for accountability towards the European court of auditors or the European parliament.

3.5.2. General accountability framework of the Bank

The accountability framework generally applicable to the Bank includes the following.

3.6. Strategic plan[54]

At least 3 months before the beginning of each period of 3 financial years, the Bank is required to prepare for the period a strategic plan and submit the plan to the Minister for Finance. A strategic plan is required to specify (a) the objectives of the Bank's activities for the relevant period, (b) the nature and scope of the activities to be undertaken, (c) the strategies and policies for achieving those objectives, (d) targets and criteria for assessing the performance of the Bank, and (e) the uses for which the Bank proposes to apply its resources. If the Minister has notified the Bank in writing of any requirements with respect to the form in which a strategic plan is to be prepared, the plan is required to comply with those requirements. As soon as practicable after receiving the Bank's strategic plan, the Minister is required to arrange for the plan to be laid before each House of the Oireachtas. When the strategic plan has been laid before both Houses of the Oireachtas, the Bank is required to publish the strategic plan and take all reasonably practical steps to implement it.

3.7. Statement of accounts[55]

Within 6 months after the end of each financial year, the Bank is required to prepare and transmit to the Comptroller and Auditor General a statement of accounts for the financial year concerned. The statement is required to be in a form approved by the Minister for Finance after consulting the Bank. The statement is required to show separately (a) receipts from funds raised from levies and fees prescribed by relevant regulations and expenditure on the performance of its functions and the exercise of its powers, and (b) other receipts and expenditure. The Comptroller and Auditor General is required to audit, certify and report on the statement of accounts and, as soon as practicable after completing the report, give it and the statement of accounts to the Minister. As soon as practicable after being given the report and statement of accounts, the Minister is required to arrange for copies of those documents to be laid before each House of the Oireachtas.

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53 Bank Recovery and Resolution Regulations, Regulation 199.

54 Central Bank Act 1942, Section 32B.

55 Central Bank Act 1942, Section 32J.

The Central Bank Act 1942 also provides that the accounts of the Bank may be audited in accordance with Article 27 of the ESCB Statute and, for that purpose, the Bank is required to provide any auditors appointed in accordance with that Article with full information, books and records.

3.8. Examination by Comptroller and Auditor general[56]

The Comptroller and Auditor General may also, in relation to the Bank, carry out such examinations as he or she considers appropriate for the purposes of ascertaining (a) whether and to what extent the resources of the Bank (i) have been used, and (ii) if acquired or disposed of by the Bank, have been so acquired or disposed of, economically and efficiently, and (b) whether any such disposal has been effected upon the most favourable terms available. The Comptroller and Auditor General may, if he or she considers it appropriate to do so, prepare a special report in writing in relation to an examination carried out by him or her or any general matters arising in relation to any such examination. He or she is required to submit a copy of the report to the Minister for Finance and, as soon as may be, to the Bank. The Minister is required to cause a copy of such a report to be laid before the lower house of the Oireachtas (Dáil Éireann) not later than three months after the date of submission to him or her.

3.9. Report of operations[57]

Within 6 months after the end of each financial year, the Bank is required prepare a report of its operations during the year and present the report to the Minister for Finance. The report is required to include a statement of the role of each advisory group established by the Bank, and a summary of the work of each such advisory group during the relevant financial year. As soon as practicable after being given the report and statement of accounts, the Minister is required to arrange for copies of those documents to be laid before each House of the Oireachtas, together with any other reports required to be included in or attached to the report.

3.10. Performance statement[58]

No later than 30 April in each year, the Bank is required to prepare a statement relating to the Bank's performance in regulating financial services. The performance statement includes a statement on resolution activities in this regard. A performance statement is to be in 3 parts – (a) details, including the aims and objectives, of regulatory activity planned for the current year (a 'Regulatory Performance Plan'), (b) a review of the Bank's regulatory performance during the preceding year having regard to the Regulatory Performance Plan for that

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56 Central Bank Act 1997, Section 77.

57 Central Bank Act 1942, Section 32K.

58 Central Bank Act 1942, Section 32L.

year and any other relevant matters, and (c) the report of any international peer review carried out during the preceding year. The performance statement does not relate to the exercise by the Governor of his or her functions under the ESCB Statute. Within one month after receiving a performance statement, the Minister will lay it before each House of the Oireachtas. The Governor, and the Deputy Governors (Financial Regulation and Monetary and Financial Stability) may be required to attend before a relevant Committee of the Oireachtas and provide information in relation to the performance statement.[59]

3.11. International Peer review[60]

At least every 4 years the Bank is required to make appropriate arrangements for (a) another national central bank, or (b) another person or body certified by the Governor, after consultation with the Minister for Finance, as appropriate, to carry out a review of the Bank's performance of its regulatory functions.

3.12. Attendance before the Oireachtas[61]

The Governor and relevant Deputy Governors are required, if requested to do so, to attend before the Joint Committee of the Oireachtas that is responsible for examining matters relating to the Bank, and provide that Committee with information. This applies subject to the TFEU, ESCB Statute, and any restrictions imposed on the person under the Central Bank Acts, or indeed any other enactment, in relation to appearing before the Joint Committee.

3.13. Secondary legislation regulating financing service providers

Under section 48 of the Central Bank (Supervision and Enforcement) Act 2013, the Bank has the power to make secondary legislation in various specified areas for the proper and effective regulation of regulated financial service providers. These areas mainly relate to conduct of business, but also include provision relating to other areas. For example, the Bank is enabled to make regulations to require regulated financial service providers to establish and maintain (i) plans for recovery from any deterioration in specified financial circumstances, in particular by setting out actions that could be taken to facilitate the continuation of the business or part of the business when experiencing financial instability, and (ii) plans for the orderly winding-up or transfer of business in specified financial circumstances.[62] Before making such regulations under section 48, the Bank is required to consult with the Minister for Finance and for that purpose is required to provide to the Minister a draft of

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59 Section 33AM. This is subject to the TFEU and the ESCB Statute, and any restrictions that are imposed on a person to whom this section applies by or under the Central Bank Acts, or any other enactment, in relation to appearing before the Joint Committee.

60 Central Bank Act 1942, Section 32M.

61 Central Bank Act 1942, Section 33AM.

62 Central Bank (Supervision and Enforcement) Act 2013, Section 48 – see Section 48(2)(w).

the proposed regulations. In relation to authorised credit unions, before making such regulations, the Bank is required to also consult with (i) the Credit Union Advisory Committee and (ii) any other body that appears to the Bank to have expertise or knowledge of credit unions.[63]

3.14. Miscellaneous

Some further areas of accountability include

- As an NCB within the ESCB: the Bank is subject to the framework of accountability within the ESCB.
- Decisions of the Bank are subject to judicial review by the Irish courts.
- Certain decisions are subject to review by the Irish Financial Services Appeals Tribunal, a tribunal independent of the Bank (established as an informal and expeditious procedure).
- The exercise by the Bank of its powers to form and acquire a company under section 23 of the Central Bank Act 1997 are subject to the consent of the Minister for Finance.
- In relation to the Bank's power to acquire, hold or dispose of shares in a bank or other institution formed wholly or mainly by banks that are the principal currency authority in their respective countries, the Minister for Finance's approval is required.[64]

3.15. Soft law

There are no specific rules under Irish law of which we are aware that address how the Irish authorities should address non-binding soft law rules from the ECB, EBA and SRB. Therefore, this soft law would need to be considered on an individual basis and applied as appropriate. By way of example, the Bank's Resolvability Assessment Framework is aligned with the SRB's resolvability assessment policy and refers to the requirements set out in the SRB's Expectations for Banks, thus ensuring a consistent approach on resolvability within the SRM. Also, in its "Approach to Resolution" document, the Bank outlines the overall approach with regard to the "public interest assessment", which is aligned to the SRB's public interest assessment approach policy document. SRB guidance notes are used extensively by the Bank as part of its work with the SRB in internal resolution teams and by Irish banks within the remit of the SRB.

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63 Central Bank (Supervision and Enforcement) Act 2013, Section 49.

64 Central Bank Act 1942, Section 5B(b).

3.16. Limitations on liability[65]

A limitation on liability is conferred on the Bank, its employees, office holders and agents.[66] Such persons are not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of their functions or powers, unless it is proved that the act or omission was in bad faith. This limitation of liability applies to the Bank without distinction as to its supervisory or resolution functions. There is no restriction specified in this regard in respect of functions or powers exercised by the Bank in the context of the SRM.

4. Summary

In summary, Irish resolution legislation houses resolution authority functions within the Bank. The resolution authority function is one of a number of functions conferred on the Bank by law. In order to maintain separation of resolution authority functions from other functions, resolution authority functions are specifically conferred by law on the Governor and delegated accordingly. This is by contrast with supervisory (competent authority) functions, which are generally delegated by the Commission. The Resolution and Crisis Management Division of the Bank is responsible for day to day resolution-related tasks while relevant supervisory divisions carry out supervisory tasks. Accountability of the resolution authority is largely maintained by requiring the resolution authority to obtain court sanction before implementing a resolution tool and to obtain the approval of the Minister for Finance in certain circumstances. Institutional accountability mechanisms applicable to the Bank as a whole, also apply. While certain credit unions have been subject to the resolution powers of the Bank under the 2011 Act no Irish institution has as yet been subject to resolution action under Irish law transposing the BRRD (or indeed under the Single Resolution Mechanism Regulation). The BRRD / SRM resolution process has therefore not been applied to larger and more complex Irish credit institutions. Given the overlay of Irish court process, certain required preparations may be individual to the Irish resolution framework.

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65 Central Bank Act 1942, Section 33AJ.

66 The full list of relevant persons is the Bank; the Governor; the Deputy Governors; the Secretary General of the Department of Finance, in his or her capacity as an ex-officio member of the Commission; the appointed members of the Commission; the Registrar of Credit Unions; the Registrar of the Appeals Tribunal; employees of the Bank; agents of the Bank.

Italy

Michele Cossa

Summary. 1. Introduction – 2. Institutional issues – 2.1. The Bank of Italy in the Italian institutional set-up – 2.2. The designation of the Bank of Italy as the Italian National Resolution Authority – 2.3. Brief outline of the Bank of Italy's governance – 3. The designation of the Bank of Italy as the Italian NRA – 3.1. Organisational arrangements – 3.2. The Resolution Unit in the Bank of Italy's organisation – 3.3. Relations with the supervisory function – 3.4. Other crisis-related functions – 4. Independence and accountability – 4.1. Independence – 4.2. Accountability – 4.3. Accountability and judicial review – 5. Conclusions

1. Introduction

The Italian legal system has long recognised the specific requirements of a banking crisis and the demand for ad hoc regulation to deal with its particular consequences. The subtraction of banks' crisis management from private law and its subjection to special rules began as early as the end of the 19th century and was brought to a more mature completion with the Consolidated Savings Bank Act of 1929 and, above all, with the Banking Act of 1936. The latter introduced the procedures of special administration ('*amministrazione straordinaria*') and compulsory administrative liquidation ('*liquidazione coatta'*, hereinafter also 'CAL') that have survived, with a few substantial variations, to the present day.[1]

For almost a century, the Bank of Italy (hereinafter, also 'BI'), as the supervisory authority for the banking system, has managed banking crises, mainly by using these instruments and gaining great experience and preparation in carrying out these tasks.

This background had two repercussions when the Banking Union was launched, namely:

1) the choice of identifying the Bank of Italy as the national resolution authority, within the BRRD-SRMR framework, was logical and almost necessary for the national legislator;
2) from a substantive point of view, the national instruments have been implanted into the new European framework, either by finding a correspondent in the legal arrangements of the BRRD (e.g. special administration) or by remaining to preside over areas deliberately not covered by the architecture of the Banking Union (liquidation, as the procedure for winding-down non-systemic failing banks). What was really new, and therefore included by the Italian legislator in a dedicated law (Legislative Decree 180/2015), was the resolution procedure.

The previous decade was marked by the advent of the new framework and, at the same time, by the unfolding in the Italian banking system of the effects of the systemic crisis that began in 2007-2008. That juncture was an almost complete test for the options that can open up for the public authorities when facing a banking crisis: public intervention, and its problematic compatibility with European law (bailout of Banca Monte dei Paschi di Siena, 2016); the role of depositor guarantee schemes (Tercas case, 2014); 'national' resolution (the 'four banks', collectively subjected to resolution in 2015, in the aftermath of the

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[1] For a diachronic overview of Italian banking legislation, see E. Galanti, *Le Banche*, in E. Galanti, R. D'Ambrosio, A.V. Guccione, *Storia della legislazione bancaria, finanziaria e assicurativa dall'unità d'Italia al 2011* (Marsilio, 2012), pp. 3 ff.

transposition of the BRRD); and finally, the confirmation of the centrality of the compulsory liquidation (the cases of the 'Venetian banks', 2017).[2]

This last aspect is relevant because, aside from the new role that the Bank of Italy has assumed in the context of the second pillar of the Banking Union, the residual character of the resolution procedure, a tool that was truly considered as a solution 'for the few',[3] has imposed the need to resort to pre-existing national special procedures to solve the crisis of important institutions as well, in cases where however the SRB found that the public interest requirement was not fulfilled.

The Bank of Italy therefore maintains a dual role: that of NRA within the SRM and that of the authority responsible for the management of 'less significant' crises, addressed with the national, special, administrative-based procedure. Such an arrangement was certainly an organisational challenge for the Bank of Italy, which also combines the functions of central bank and national competent authority within the SSM and performs additional functions under different frameworks.

2. Institutional issues

2.1. The Bank of Italy in the Italian institutional set-up

As anticipated, even in the absence of a specific acknowledgment by the Italian Constitution,[4] the Bank of Italy has historically assumed a central position in the Italian economic and financial system. From the standpoint of its legal nature, the Bank of Italy is a 'non-economic public body'. Its nature as a 'public law institution' was defined by the 1936 banking law[5] and is still confirmed as such by Article 19 of l. 262/2005.[6]

The Bank of Italy is primarily the central bank of the Italian Republic. The only Italian institution in charge of issuing banknotes since 1926, with the advent of the Monetary Union it is now an integral part of the European System of Central Banks (ESCB*)* (see Article 19 of Law 262/2005); thus, 'it shall perform the tasks and functions entrusted to it in that capacity in compliance with the statute of the ESCB. It shall pursue the objectives assigned to the ESCB under

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2 Reference is made to the banking crises of Banca Monte dei Paschi di Siena, Tercas, CariChieti, Banca Marche, Cassa di Risparmio di Ferrara, Banca Popolare dell'Etruria e del Lazio, Veneto Banca, Banca Popolare di Vicenza. For summary information on those cases, see *the official Bank of Italy website*, under the section 'Approfondimenti'.

3 As literally stated by the Chair of the SRB in a famous 2020 article, available *here*.

4 The Italian Constitutional Charter does not mention the BI. However, Article 47 envisages that '[t]he Republic encourages and safeguards savings in all forms. It regulates, co-ordinates and oversees the operation of credit'.

5 Article 20 of the Royal Law Decree 375/1936.

6 Law 262/2005, the 'Law on the protection of savings'. See also the judgment of the Joint Chambers of the Italian Supreme Court (Corte di Cassazione), no. 16751, 21 July 2006.

Article 127(1) of the Treaty on the Functioning of the European Union' (Article 1.3 of the Statute of the Bank of Italy).[7]

As a consequence, the BI contributes to the decisions on the single monetary policy of the euro area and performs the operations related to Eurosystem tasks. The Bank of Italy's power to grant emergency liquidity assistance (ELA) may be traced back to its monetary policy implementation powers as well.

Moreover, the BI is entrusted with prudential supervisory functions in the banking and financial sector. The Consolidated Banking Act, Legislative Decree 385/1993 (Testo Unico Bancario, TUB) states that '[t]he Bank of Italy, in the exercise of its supervisory functions, is part of the ESFS and the SSM and participates in their activities, taking into account the convergence of supervisory instruments and practices in the European context' (Article 6(3)). Article 1 para. 4 of the Statute confirms that the Bank of Italy is the competent national authority under the Single Supervisory Mechanism referred to in Article 6 of Council Regulation (EU) No 1024/2013 of 15 October 2013 (SSM Regulation; SSMR).[8] Therefore, the BI directly supervises less significant banks and banking groups; it cooperates with the ECB, assisting it in its direct supervision of significant banks.

However, the Bank of Italy also has significant prudential supervisory functions vis-à-vis other entities in the economic and financial sector: investment firms, asset management companies, financial institutions and payment institutions.

As part of its supervisory powers, the BI adopts regulations and decisions, may request and gather information, conduct on-site inspections, and has intervention and sanctioning powers.

In addition to these core functions, it assumes other very important ones: supervision of the effective functioning of payment systems (Article 146 TUB); banknotes production, according to the rules and within the limits set by the Eurosystem; some competences in markets supervision; and macroprudential supervision and financial stability.

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7 The current version of the Statute of the Bank of Italy was approved by Presidential Decree of 27 June 2022. Notwithstanding its formal nature (decree), which implies the collocation at a sub-legislative level in the hierarchy of sources, amendments to the Statute are possible only through a complex procedure. The amendments to the Statute are firstly approved by the shareholders' meeting in an extraordinary session (see below § 2.3) Subsequently, the new version is approved by the President of the Republic by their own decree, upon the proposal of the Prime Minister, in agreement with the Minister of the Economy, after deliberation by the Council of Ministers. See Article 10(2) Legislative Decree 43/1998. Thus, while the initiative is conferred on the internal organs of the Bank of Italy, the endorsement of the government – and thus of a democratically elected body – is necessary for the changes to be adopted. The Decree is published in the Official Journal of the Italian Republic.

8 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 (OJ L 287, 63).

In addition, the BI has consumer protection tasks with regard to banking and financial services (Articles 116 and ff. TUB), with the exception of those relating to investment services, which are conferred upon the Italian market authority, i.e. CONSOB (*Commissione Nazionale per le società e la borsa*). The BI has also competences in anti-money laundering matters; within the organisation of the Bank of Italy, but in a position of autonomy, is the Italian FIU (Financial Intelligence Unit).

In addition to these assorted competences, the BI is entrusted with the power of managing banking crises within and outside the EU framework.

2.2. The designation of the Bank of Italy as the Italian National Resolution Authority

Pursuant to Article 1 of Legislative Decree 180/2015, transposing the BRRD Directive,[9] '[t]he Bank of Italy shall perform the functions and exercise the powers envisaged by this decree as resolution authority with respect to the entities referred to in Article 2, when they have their registered office in Italy, unless otherwise indicated. In the cases provided for in this Decree, the same functions and powers are exercised with respect to branches established in Italy of non-EU banks […] The Bank of Italy shall exercise resolution powers in harmony with the provisions of the European Union and shall be the national resolution authority for the purposes of the provisions of the SRM; it shall cooperate with the European Central Bank, with the authorities and committees that make up the ESFS and the SRM and with the other authorities and institutions indicated by the provisions of the European Union…'.

In fact, such an explicit designation of the BI as the Italian NRA was only included in the provision in 2021, following the enactment of Legislative Decree 191/2021, one of the purposes of which is precisely that of adapting the Italian system to the SRM Regulation. Nonetheless, even previously, there was no doubt that the Bank of Italy was the national resolution authority, also under BU Pillar 2 rules.

Such a conclusion could be drawn from Legislative Decree 72/2015, implementing EU Directive 2013/36 (CRD IV),[10] which explicitly provides in Article 3 that '[t]he Bank of Italy shall be designated as the national resolution authority, pursuant to Article 3 of Directive [BRRD] … for the purposes of participation in the

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9 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 (OJ L 173, 190).

10 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 338).

EBA Resolution Committee provided for in Article 127 of that Directive, as well as for the purposes of the application of Article 99(3) and (4) of Regulation [SRM], and is vested with the powers and tasks that the provisions of the Regulation referred to in those paragraphs attribute to national resolution authorities'.

In any case, the European Delegation Law for 2014,[11] in laying down the guiding principles and criteria for the Government to transpose the BRRD, also provided that the Bank of Italy should be designated as the national resolution authority and given all the powers assigned to it by the BRRD (Article 8(1)(d)).

The Bank of Italy was already defined as the 'resolution authority' by Article 1(1)(a-bis) TUB, as amended by Legislative Decree 181/2015, which also transposed the BRRD, focusing on the adaptation of the pre-existing regulations.

As already noted, when designating the national authority vested with powers under the new European framework, the Italian legislator valued the competence and experience of the authority that had long performed similar tasks. The Italian framework displayed – long before the introduction of bank resolution at EU level – a tailor-made insolvency procedure for ailing banks, run by an administrative authority.

In the framework in place prior to the reforms brought about by the CRD IV/ BRRD plexus, the exercise of authoritative powers for the settlement or resolution of banking crises was seen as a continuation, in a problematic phase, of the prerogatives of ongoing supervision.

The BRRD (Article 3(1)) did not entirely disavow the value of conferring supervisory and resolution competences on a single authority by allowing this option, albeit exceptionally and under certain conditions.

Moreover, the Bank of Italy is the only resolution authority in the Italian legal system. It is true that Title II of Legislative Decree No. 180/2015, under the heading 'Authorities', also contains a rule concerning the Ministry of Economy and Finance, recalling its most important competence, i.e. the power to approve the resolution measure. However, far from making the Minister a parallel 'resolution authority', this rule simply seeks to implement the provisions of Article 3(5) and (6) BRRD, i.e. the indication of the 'competent minister', who shall be informed and must grant their 'approval before implementing decisions that have a direct fiscal impact or systemic implications'.

Nevertheless, the Italian legislator went beyond the BRRD guidance, making the approval of the Minister of Finance a prerequisite for any decision to adopt and amend the resolution scheme (see Articles 4 and 32 Legislative Decree 180/2005). It seems then that such a decision is considered ex ante to be particularly relevant and deserving of scrutiny by a political body. In any case, the development and implementation of the resolution scheme remain the exclusive responsibility of the Bank of Italy.

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[11] Law 114/2015.

2.3. Brief outline of the Bank of Italy's governance

Before outlining the organisational arrangements put in place in the Italian legal system to ensure the independent and efficient exercise of the resolution functions, it seems necessary to dwell on the governance of the institution that hosts the structure dedicated to those tasks, namely the Banca d'Italia.

The Governing Board

The Governing Board (*Direttorio*) is composed of the Governor, the Senior Deputy Governor and three Deputy Governors, positions that have a special status of independence and stability. Following the reform carried out by Law 262/2005, the members of the Governing Board remain in office for six years, with the possibility of a single renewal (Article 19(7)); special and strengthened procedures are provided for their appointment.

Indeed, the appointment of the Governor, the renewal of their term of office and their revocation shall be arranged by a decree of the President of the Republic, upon the proposal of the President of the Council of Ministers and after a deliberation by the Council of Ministers, having heard the opinion of the Board of Directors (Article 19 l. 262/2005). On the other hand, for the Deputy Governors, their appointment, revocation or renewal is ordered by the Board of Directors, upon the Governor's proposal; nevertheless, such resolutions must be approved by a decree of the President of the Republic, promoted by the Prime Minister in agreement with the Minister of Economy and Finance, after consulting the Council of Ministers (Article 18 of the Statute).

Moreover, both the Governor and the Deputies can only be dismissed in the cases provided for in Article 14.2 of the Protocol in the Statute of the ESCB.

There are no specific rules concerning the requirements for the members of the Governing Board; nevertheless, the particular methods of appointment, and in particular the involvement of a large number of different bodies and individuals, contribute to the identification of profiles endowed with particular authority, competence and credibility. In practice, there is a strong prevalence of members who have attained top positions by traversing all levels of an internal career in the Bank, and have thus acquired expertise in its areas of intervention. Nevertheless, there have been and still are examples of members of the Governing Board who were not previously employees of the Bank of Italy.

The functioning of the Governing Board is regulated by the law (Article 19 of Law 262/2005) and mainly by the Statute of the BI (Articles 22-24).

Meetings are convened and chaired by the Governor (or by the Senior Deputy Governor in the event of the Governor's absence or impediment), who sets the agenda, whenever they deem it necessary or it is requested by one of the members with a motivated request.

The constitutive quorum is three members; resolutions are taken by a majority vote and the Governor has the casting vote.

In cases of necessity and urgency, measures of external significance may be taken by the Governor, or by one of the other members in accordance with the substitution criteria; such measures are submitted to the Governing Board for ratification at the earliest meeting scheduled.

Article 24 provides for the possibility of written approval procedures.

Other bodies

The other two main internal bodies[12] – i.e. the Board of Directors (*Consiglio Superiore*) and the Shareholders (*Assemblea dei partecipanti*) – are excluded from the exercise of the Bank of Italy's institutional functions.

The Board of Directors is responsible for general administration, personnel management and internal control of the Bank (Articles 15-19, Statute). The preclusion of any competence or role whatsoever of the Board of Directors with regards to the BI's institutional tasks is stated both in the law (Article 5 of Decree Law 133/2013) and in the Statute (Article 19(2)). The former requires the Shareholders and the Board of Directors not to interfere in any way in matters pertaining to the exercise of the public functions assigned by the Treaty, by the Statute of the ESCB and of the ECB, and by EU law and national law to the Bank of Italy or to the Governor for the pursuit of the Bank's institutional purposes.

The Board of Directors consists of the Governor and 13 other members. The latter[13] are appointed at the Shareholders' Meeting, which brings together the participants in the capital of the Bank of Italy. Due to a century-old legacy, dating back to the manner of its foundation, the shares in the capital of the Bank of Italy are held by private entities; in particular, most recently, Decree Law 133/2013 specified that the acquisition and holding of BI capital shares is restricted to Italian banks, insurance and reinsurance companies, pension funds and banking foundations.

Despite the fact that the issue is periodically raised, often speciously, in the public debate, the holding of capital by private entities does not affect the independent performance of the functions of the Bank of Italy. As already noted for the Board of Directors, the narrow perimeter of tasks and powers granted to the Shareholders inhibits any intrusion in the decisional process regarding central banking, supervision and resolution, and the exercise of any other public prerogative assigned to the BI.

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12 Internal bodies also include the Board of Auditors (*Collegio Sindacale*), which performs controls on the administration of the Bank in order to verify compliance with law and regulations. It consists of five members and somehow mimics the internal control body provided for by Italian corporate law for the (majority of the) Italian limited companies. The annual accounts are audited by independent external auditors for the purposes laid down in Article 27 of the Statute of the ESCB. As of 2023, the auditing firm is also responsible for checking the proper keeping of the accounts and the correct entry of operations in the accounts, activities previously falling within the tasks of the Board of Auditors.

13 Candidates for the position are selected from among personalities with significant experience in the business sector, freelance professional activity, university teaching or senior management in public administration, who also meet the requirements of reputation and independence.

Indeed, apart from the fact that there is a limit (currently set at 5 per cent) on the amount of capital that can be held by each participant,[14] the Shareholders Meetings have limited tasks to perform. In particular, the annual ordinary meeting of shareholders approves the financial statements and the allocation of net profits,[15] and the appointment or dismissal of the Board of Directors' members; the extraordinary shareholders' meetings approve amendments to the statutes.

The presence of the participants in the governance of the Bank of Italy, as well as that of the Directors, does not hamper its public-law regime and nature; above all, as has been reiterated, the performance of institutional activities is substantially impermeable to the ownership structure and can be imputed exclusively, in its final decisions, to the Governing Board.

The Bank of Italy also enjoys financial autonomy in the sense that it provides autonomously for the financing of its activities; it does not receive public funding from the State, nor does it receive contributions from participants in the markets in which it performs regulatory or supervisory functions. As can be seen in the balance sheets of the BI,[16] its sources of income originate from the redistribution of monetary income and the net interest margin deriving from its assets.

As recalled previously, pursuant to Article 1(2) of the Statute, the BI and the members of its bodies operate with autonomy and independence in compliance with the principle of transparency, and may not request or accept instructions from other public or private entities, including in the management of its finances.

In addition, the rules on profit distribution are intended to ensure a safeguard against interference by the participants and any utilitarian reasoning on the part of the latter.

Pursuant to the Statute (Article 37(2)), capital resources and the allocation of net income must ensure safeguards consistent with the Bank's independence.

The annual account is approved by the Shareholders' meeting but pursuant to the Statute (Article 38 (2)), the net profit is, in principle, earmarked. Indeed, it is allocated: a) to the legal reserve, up to a maximum amount of 20 per cent; b) to the participants, up to a maximum amount of 6 per cent; c) to the extraordinary reserve and to any special funds, up to a maximum amount of 20 per cent; and d) to the State, for the remaining amount.

Lastly, with regard to the performance of resolution and liquidation activities, it should be emphasised that national legislation does not provide for any intervention by or involvement of other public or private entities. In the field of transparency and consumer protection in the banking sector, some residual

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14 Excess shares do not give the right to vote or to dividends.

15 It should be noted that, as will be repeated further on, there is a limit to the dividends that can be distributed to participants (6 per cent of the capital).

16 Available *here*.

regulatory competences of a governmental body[17] remain; and the regions have retained some constitutional attributions in the area of banking supervision.[18] In contrast, when it comes to dealing with banking crises, the Bank of Italy operates in full independence and autonomy. The only exceptions are represented, as for the resolution procedure, by the attributions of the Minister of the Economy as the 'competent minister' (and therefore in accordance with the BRRD framework) and, for the national insolvency procedure, i.e. compulsory liquidation, by the power to decide its initiation, which also lies within the competence of the Minister of the Economy (see below).

3. The Bank of Italy as the Italian NRA

3.1. Organisational arrangements

As we have already seen, the choice of the Italian legislator was to gather the functions of central bank, banking, financial system supervisor and resolution authority in a single institution. For the allocation of the banking crisis management functions to the authority that was already responsible for banking supervision, the Italian system had to respect the conditions dictated by Article 3(3) BRRD, namely: the presence of adequate structural arrangements to ensure operational independence and avoid conflicts of interest; and the 'structural separation' of the staff involved in carrying out the tasks relating to banking resolution.

The last sentence of Article 3(6) of Legislative Decree 180/2015, entrusts the Bank of Italy itself, after designating it as the NRA, with identifying adequate forms of separation between the functions relating to crisis management and the other functions it performs, so as to ensure its operational independence, and to institute forms of collaboration and coordination between such structures.

The rule constitutes both an instruction addressed to the Bank of Italy, and the recognition of its organisational autonomy, enshrined in Article 2(3) of the Statute, which states that the organisational structure of the BI is defined in its regulations and is inspired by principles of functionality and efficiency. Moreover, the said provision of Article 3(6) also acknowledges the experience already gained in reference to other cases of internal structural separation. The most meaningful example, characterised by a regime of marked independence

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17 Reference is made to the Interministerial Committee on Credit and Savings (*Comitato Interministeriale per il Credito e il Risparmio, CICR*).

18 According to Italian Constitution (Article 117), certain Regions with special statutes have regulatory and administrative powers in banking matters (more precisely, over banks of a 'regional kind' or of 'regional interest'). Regions with an ordinary statute have concurrent legislative powers on regional banks. The issue is complex, but, in a nutshell, it can be said that these competences have gradually been eroded, mainly due to the significant transfer of responsibilities to the banking system implemented with the Banking Union and to the *primauté* of the Union law, which imperatively allocated significant competences to the EU and to national authorities (which, as for Italy, do not include the Regions).

and autonomy, is that of the Financial Intelligence Unit, operating since its establishment in 2007 within the organisational structure of the Bank of Italy.[19]

The establishment of the organisational unit entrusted with the exercise of the tasks envisaged by the framework on banking resolution was therefore carried out by means of a Bank of Italy Decision, issued on 22 September 2015, following a resolution of the Board of Directors. In compliance with the BRRD, the Decision is public, since it is available on BI's official website.[20] The Decision established the Resolution and Crisis Management Unit (*Unità di Risoluzione e Gestione delle Crisi,* URGC), placing it directly under the highest body of the Bank of Italy, i.e. the Governing Board.

As already noted, a dedicated internal structure for the management of banking crises was already in place, within the BI's organisational chart, since such competences had already been allocated to the Bank of Italy for decades. However, this structure did not enjoy any autonomy or separation with respect to the structures responsible for banking supervision; on the contrary, it was traditionally included in the organisational area of banking supervision,[21] testifying to the fact that crisis management was considered a functional continuation of ongoing supervision, i.e. the specific application of public powers at the terminal and most problematic juncture in the life of credit institutions.

With the 2015 reform, in compliance with EU law obligations, the Resolution Unit gained organisational independence, being directly attached to the Governing Board, and no longer reported to the Head of the Supervisory Department.

In addition, the Unit was to lose all competences in matters of special administration: the decision and the related procedure were moved, again according to the dictates of the BRRD, into the area of 'early intervention' measures and referred to the competent structures for supervision.[22] The measure therefore realised a new internal division of functions, leaving the Unit, in addition to its competences in the area of resolution, with the sole competences relating to compulsory administrative liquidation procedures and to supervision of deposit guarantee schemes.

Together with the Decision, the establishment of the new authority entailed the amendment of the General Regulations (*Regolamento Generale*) of the Bank of Italy,[23] which, together with the Statute, represents the main act by which the organisation of the Authority is regulated and the tasks of the different structures are identified. While the Statute – which emanates from political institutions –

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19 See Article 6 of Legislative Decree 231/2007, implementing Directive 2005/60/EC.

20 Establishment of the Crisis Resolution and Management Unit: administrative procedures and regulatory measures, 22 September 2015, available *here*.

21 At the time of the reform, specifically, the Unit at hand was part of the Licensing and Crisis Management Service within the Supervision Department.

22 As a transitional rule, the Decision stated that the special administration procedures pending as of 21 September 2015 would be managed by the Unit until their conclusion.

23 Regulation of the Governing Board of the Bank of Italy of 21 December 1989 as amended.

sets out the basic rules for the BI's structure and administration, the General Regulations – which are adopted and amended by the Governing Board according to the Statute and are thus a subordinate legal source lay down more thorough and detailed provisions on the BI's organisation.[24]

3.2. The Resolution Unit in the Bank of Italy's organisation

As anticipated, with Update no. 36 of 21 September 2015, the BI's General Regulations were amended, introducing, in Article 97 (now Article 99), among the structures reporting to the Governing Board, the new Resolution and Crisis Management Unit, whose tasks are described by dividing them into three main activities: activities envisaged as a national resolution authority; compulsory administrative liquidation and voluntary liquidation procedures; and cooperation with the Supervisory Department Services.

Placing the Unit directly under the Governing Board has two major consequences. Firstly, any modification or the suppression of the Unit requires a resolution of the Board of Directors, upon the proposal of the Governor (Article 36 of the General Regulations); secondly, the head of the Unit (Director) is appointed by the Board of Directors, again upon the proposal of the Governor.

Of course, such a (hypothetical) suppression would be internal in nature; as has been seen, the investiture of the Bank of Italy as the national resolution authority derives from the primary legislation and could not be modified by secondary legislation or delegated acts, nor could the obligation to ensure organisational separation from the other functions performed by the BI.

The Director of the Unit is appointed by the Governor, after consulting the Governing Board. According to general rules, any measure with external significance lies within the competence of the Governing Board, and some cases of delegations are in any case envisaged.[25]

The rules mentioned so far are public. They are supplemented and specified by a number of internal organisational acts, which go under the name of Circulars. They contribute to completing the organisation chart of the Bank of Italy and provide for other transversal and bridging structures.

At the time of its inception, the URGC consisted of three basic units (Divisions), two of which shared the tasks arising from the participation in the SRM and one of which was dedicated to the management of compulsory liquidation, as well as being in charge of the tasks relating to resolution funds and the supervision of depositor guarantee schemes. Recently, an organisational

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[24] The Regulation is available *here* and consists of four Titles: Capital and corporate bodies; Organization (regulating the organisation of the central offices and of the branches and specifying the functions, powers and duties of the heads of the offices); Operations and services, and Directorates of the Central Offices (laying down the tasks and the activities of such organisational units).

[25] Article 22(5) Statute, which allows for this possibility with regard to decisions not implying discretionary assessments.

change was launched, with the establishment of an additional Division, which is now responsible, in liaison with Prudential Supervision, for regulatory activities at national and international level in the field of crisis management, liquidation and resolution, as well as for defining policy methodologies.

The Advisory Committee for Crisis Resolution and Management

Internal regulations (and in particular Circular No. 150 of 1991, as subsequently amended) include, among the planning and coordination bodies, a committee with advisory functions, namely the Advisory Committee for Resolution and Crisis Management. With respect to the responsibilities entrusted to the Bank of Italy as the NRA, the Committee formulates opinions on proposals to be submitted to the Governing Board by the Resolution and Crisis Management Unit, particularly as regards measures relating to resolution and liquidation powers and tools, resolution financing, and the adoption of internal methodologies.

The Committee may also convey assessments of the position to be taken by BI representatives in the SRB bodies and, in general, may indicate the need for additional investigations to the URGC. It also promotes cooperation between the resolution and supervisory functions.

The Committee is composed of senior representatives of the legal, supervisory and resolution functions and chaired by the General Counsel; it decides by majority vote and meets periodically, when convened by the President or at the request of a member.

It is an advisory and liaison structure, aimed on the one hand at providing competent advice to the Unit and the Governing Board, and on the other hand at fostering dialogue between the supervisory and resolution functions.

3.3. Relations with the supervisory function

Implementing the provisions of the last sentence[26] of Article 3(6) of Legislative Decree 180/2015 and the overriding imperative of Article 3 of the BRRD, the BI after having ensured, as seen, the necessary organisational separation has adopted and published an internal framework for the cooperation between the supervisory and resolution functions.

With the Decision of 5 February 2019, the ‘organisational measures for cooperation and coordination between the Banking and Financial Supervision and the Bank of Italy’s Resolution and Crisis Management Unit’ were therefore issued.[27]

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[26] The Bank of Italy, in the exercise of its organisational autonomy, shall provide for adequate forms of separation between the functions relating to crisis management and the other functions it performs, so as to ensure their operational independence, and shall establish forms of cooperation and coordination between the relevant structures. It shall make public the measures adopted to achieve the objectives set out in this paragraph.

[27] The Decision is available *here*.

The Decision, which applies to the exercise of functions relating to institutions within the scope of the BRRD (Article 1),[28] recalls both the general principles of operational independence between the structures, and, at the same time, of cooperation and coordination (Article 2). It is stipulated that the Unit and the Supervision Directorate shall consult and exchange 'timely and complete information before their assessments are made' and 'communicate to each other the early intervention, resolution and liquidation measures they intend to promote'. In order to minimise the burdens on the supervised entities, each structure is called upon to verify that any information and data are not already available from the other department before requesting them from the entities.

Among the detailed provisions aimed at regulating information exchanges and consultations at the various stages of the supervisory activity and the planning of a potential crisis procedure (see Articles 4-7), Article 8 concerns early intervention measures. While they are in the remit of the Supervision Directorate, it is obliged to feed the Unit with information both in advance and during the implementation of the measures, so that any preparatory measures for resolution/ liquidation procedure could be adopted. This is particularly relevant for special administration (para. 4), whose decision is, in line with the BRRD framework, in the responsibility of the Supervisory Authority (Article 70 TUB, which, however, refers in general to the 'Bank of Italy') but which might not prevent the deterioration of the entity's situation, imposing the adoption of a more intrusive measure, i.e. resolution or liquidation. It is then prescribed that the Unit must be informed on the development of the special administration procedure.

Another key test for the Supervision-Resolution collaboration is the resolution decision. Article 9 of the Decision provides, in line with the higher-level legislation, that: i) the Failing or Likely to Fail (FOLTF) assessment is carried out 'as a rule' by the Supervision Directorate, in consultation with the Unit, to which all relevant information must be forwarded. The assessment may also be carried out by the Unit, which for this purpose shall notify the Supervision Unit of its intention and ask it to forward any further information it deems relevant. The Unit shall carry out the assessment if the Supervision Directorate fails to do so within three calendar days of its communication; ii) the assessment regarding the second condition for resolution (the absence of alternative measures to overcome the failure or risk of failure) shall be carried out by the Unit, after consulting with the Supervision Directorate, which shall again provide complete information to its counterpart; and iii) where the Unit considers proposing to the Director the writedown and/or conversion of capital instruments, independently of the commencement of the resolution or liquidation, the Unit must take into account in the proposal any observations made by the Supervision Directorate on the suitability of the measures identified to overcome the failure or risk of failure.

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[28] Pursuant to the same Article 1, certain principles are also applicable with respect to non-BRRD institutions; in particular, they are those contained in the rules on early intervention (Article 8) and winding-up proceedings other than resolution (Articles 17 and 23).

Section III of the Decision (Articles 12-22) then regulates the coordination between the two functions for a whole series of further activities in which the two areas of competence may overlap.[29]

Some provisions are highlighted here due to their relevance.

Article 17 reiterates the general competence of the Unit for crisis procedures other than resolution, and in particular for the compulsory liquidation of banks and other supervised entities, as well as for the proceedings for the withdrawal of the authorisation of banks (within the SSM framework) and – with some exceptions – other entities. Article 18 requires the Supervision Directorate to cooperate with the Unit for duties relating to the supervision of the Depositors' Guarantee Funds, as well as to the collection of contributions to the Single Resolution Fund.

Finally, Article 20 regulates the inspection power attributed to the Authority by Article 60 of Legislative Decree 180/2015; without prejudice to the duty to cooperate, it is provided that the inspections are carried out by the Supervision Directorate staff, to which Unit staff may be attached. It is also established that for intermediaries with less favourable assessments and for which, in any case, facts detrimental to sound and prudent management are found, the Supervision Directorate shall make the inspection reports available to the Unit.

With regard to the duties relating to participation in the SSM and the SRM, Article 22, on data exchange, states that the two structures shall exchange all the necessary information available in order to fulfil their respective reporting obligations to the ECB, the SRB and the EBA, or in order to respond fully to requests from them or from other international bodies. Of course, information collected by the Internal Resolution Teams (IRTs) and the Joint Supervisory Teams (JSTs) cannot be imputed to the national authorities. From this point of view, while Recital 10 of the ECB-SRB Memorandum of Understanding in respect of cooperation and information exchange, regulates the horizontal EU flow (SRB to/from ECB) and the vertical intra-Mechanism data flow (JSTs to NCAs; IRTs to NRAs), the BI's Decision only considers the horizontal internal flow (NCA to/from NRA), thereby granting free circulation and exchange of data between the two structures.

3.4. Other crisis-related functions

As mentioned, the Bank of Italy is also in charge of tasks other than resolution, but relating to it, or in any case relating to the crisis management of banking and financial institutions.

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[29] These include, among other things and in addition to those mentioned in the text, the rules laying down obligations to cooperate, in some cases also through the establishment of joint working groups, on regulatory matters (Article 16), the definition of operational methods (Article 13), complaints management (Article 14), relations with the judiciary and other authorities (Article 16), sanctions (Article 21), and access and data exchange (Article 22).

Firstly, in its capacity as NRA, the Bank of Italy is also responsible for the management of the National Resolution Fund, as provided for by Title V of Legislative Decree 180/2015[30] and, on behalf of the Single Resolution Board, collects the contributions to the Single Resolution Fund. In this regard, it should be recalled that it was precisely a case between an Italian bank and the Bank of Italy that gave rise to the ICCREA ruling of the Court of Justice, brought in under Article 267 TFEU.[31] According to this judgment, after the adoption of a decision of the Board on the calculation of the ex-ante contributions to the SRF, the task of the national resolution authorities is solely to notify and give effect to that decision. Consequently, only the EU Courts are entrusted with the power to review the legality of a decision of the Board setting the amount of the individual contribution to the SRF. In contrast, there is no room for the national courts to review the national executive act, whatever form this may take.

Moreover, the Bank of Italy has retained the powers of proposal, implementation and control of compulsory liquidation procedures (CAL, *liquidazione amministrativa coatta)*, i.e. the national ad hoc winding-down procedure for banks and other financial institutions. The procedure is mandatorily triggered by the two first conditions for resolutions – i.e. failing or likely to fail and the absence of public and private alternatives – and by the recognition of the absence of the third condition, i.e. the public interest in carrying out a resolution procedure (Article 32 BRRD and Article 80 TUB). It has been anticipated that the decision to initiate the procedure falls within the competence of the Minister of Economy and Finance, albeit, as mentioned, upon the mandatory but non-binding proposal of the Bank of Italy (Article 80 TUB).

The reason for this allocation of competences, which is a legacy of the pre-TUB framework,[32] is the involvement of a third party in the adoption of a measure

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30 The National Resolution Fund was established by Order No. 1226609 of 18 November 2015. In view of the expiry of the transitional period provided for by the Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (IGA), Legislative Decree 193/2021 repealed Title V of Legislative Decree 180. Article 8 of Legislative Decree 193 provides that '[t]he provisions of Title V of Legislative Decree 180 of 2015, repealed by the present decree, shall continue to apply until the conclusion of the resolution procedures initiated by the Bank of Italy before the date of entry into force of the present decree or of the operations arising from or relating to them. Upon their conclusion, the resolution fund established by the Bank of Italy shall be wound up; any remaining assets shall be distributed among the member banks'.

31 Judgment of 3 December 2019, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia*, C-414/18, EU:C:2019:1036. See M. Markakis, *Composite Procedures and Judicial Review in the Single Resolution Mechanism: Iccrea Banca*, (2021) 4 Review of European Administrative Law, 109-125.

32 Before 1993, it was the Interministerial Committee for Credit and Savings (CICR) that had the competence to order extraordinary administration and administrative compulsory liquidation, upon the proposal of the Bank of Italy. In 1993, the TUB replaced the CICR with the Minister of Economy and Finance. The shift of competences and the inclusion in a unified or harmonised institutional and regulatory framework resulted in the substantial loss of the CICR's competences in the area of bank supervision and crisis resolution; the Committee currently retains some secondary regulatory powers in the area of transparency and fairness in bank/customer relations. Special administration, as we have seen, is now fully in the remit of the Bank of Italy (or the ECB in the case of significant institutions),

of significant intrusiveness by second-checking the action of the Supervisory Authority. Nonetheless, the role of the supervision and resolution authorities – be it EU or national ones – remains crucial: they carry out the assessment on the existence of the conditions and, as for the Bank of Italy, it formulates the mandatory proposal to the Minister. The latter cannot order autonomous verifications of the institution's situation, as it does not enjoy any of the related powers, but can only accept or reject the proposal. In practice, the Minister has consistently complied with the requests of the Bank of Italy, whose reasons have often been accepted in full, incorporating, by the way of an all-round reference, the reasoning for the proposal in the decision (*ob relationem* reasoning).

Following a decision, the Bank of Italy is responsible for the general supervision of the liquidation procedure and for the appointment and dismissal of its bodies (see Articles 80 ff. TUB). Compulsory administrative liquidation is an insolvency proceeding, which entails the exit of the entity from the market and aims at the liquidation of the assets of the failing entity and the payment of all its creditors.

In the authority's experience, a common optimal outcome – in order to avoid piecemeal liquidation – of the CAL is the use of a transfer tool (allowed by Article 90 TUB) i.e. the implementation of a 'purchase and assumption' (P&A) strategy through the sale of assets and liabilities of the bank in distress at the same time as the start of the procedure. In many cases, the Deposit Guarantee Schemes have intervened with the aim of filling the negative unbalance between the bank's assets and liabilities.

Finally, the Bank of Italy is the national designated authority under Directive 2014/49 (implemented in Italy by Legislative Decree 30/2016) and therefore it exercises supervisory powers over deposit guarantee schemes. In Italy, the (two)[33] existing depositor guarantee schemes are consortia of a private nature, funded by the member banks and with respect to which the Bank of Italy, as the supervisory authority, exercises approval, control, and regulatory powers. The private law regime governing the Italian DGSs was confirmed by European courts in the well-known Tercas case,[34] which denied that the financial support offered by a DGS to a failing bank (Tercas), in the form of a capital injection, in order to help it emerge from the crisis and be purchased by another intermediary, could be attributed to the Italian State, as maintained by the Commission. The assumptions at the basis of the General Court's judgment, confirmed by the Court of Justice, precisely detailed the private nature of the fund as a consortium composed of private banks, as also confirmed by the organisational rules and composition of the bodies in question. On the contrary, the EU courts recognised the BI's role as being marginal and its intervention as purely

as an early intervention measure which pertains, according to the BRRD framework, to the authority in charge of supervision.

33 These are the Fondo Interbancario di Garanzia dei Depositanti, and the Fondo di Garanzia dei Depositanti del Credito Cooperativo (FDCGG), which group cooperative banks together.

34 See General Court, 19 March 2019, joint cases T-98/16-, T-196/16- and T-198/16-, *Tercas*, EU:T:2019:167; Court of Justice, 2 March 2021, C-425/19 P, *Tercas*, EU:C:2021:154.

external, since BI acts as a 'mere observer' at the meetings of the DGS's governing bodies. Moreover, the powers entrusted to the BI (approval of the DGS statutes and review of compliance with Italian law) do not involve, in the courts' view, 'influence or control' over the Scheme. Therefore, the DGS's alternative interventions, such as the one under scrutiny, cannot be imputed to a public entity and do not trigger the application of (nor do they violate) the EU State aid rules.

4. Independence and accountability

4.1. Independence

The independence of the Italian Resolution Authority derives from the regime governing the Institution in which it is embedded.[35]

Starting with the European provisions, as a member of the European System of Central Banks (ESCB), the Bank of Italy benefits from the guarantees of independence provided for by Article 130 of the TFEU and Article 7 of the ESCB Statute. For banking supervision, the relevant provisions are contained in paragraphs 4 and 7 of Article 4 of the CRD; paragraph 7 in particular requires Member States to provide that the banking supervision functions 'and any other functions' of the competent authorities are 'independent and separate' from the resolution function. Article 19 of the SSMR subjects the actions of NCAs to the principle of independence.

A similar rule is provided for NRAs in Article 47 of the SRMR. Also worth mentioning is Article 3 of the BRRD, mentioned above, which imposes operational independence between the resolution function and the supervisory or other functions of the relevant authority.

Against this backdrop, the most relevant national provision is Article 19(3) l. No. 262/2005, which states that the primary and secondary national provisions must ensure that the Bank of Italy and the members of its bodies have the independence required by Union Law for the best exercise of the powers attributed to them as well as for the performance of their functions. The provision goes on to emphasise how the Bank of Italy, in the exercise of its functions, and with particular (but not exclusive) reference to those of supervision, operates in compliance with the principle of transparency, a 'natural complement' to its independence.

As can be seen, this provision, in addition to not being particularly exhaustive in its description of the characteristics of the independence requirement, is rooted in primary legislation and thus may be amended through the ordinary legislative procedure.

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[35] For the aspects relating to the independence and accountability of the Bank of Italy, in the context of SSM and SRM, see R. D'Ambrosio, *Unione bancaria e requisiti di indipendenza, accountability e organizzativi della Banca d'Italia*, in M.P. Chiti, V. Santoro (eds), *Il diritto bancario europeo* (Pacini, 2022), 195 ff.

Moreover, Decree Law 133/2013 (converted with amendments by Law 5/2014) states openly that the Bank of Italy is independent in the exercise of its powers and in the management of its finances, without any further specification.

Even the Statute of the Bank of Italy recognises independence as one of the Institution's main attributes providing in Article 1(2) that it, and the members of its bodies, shall operate, in the exercise of their functions and in the management of its finances, with autonomy and independence in compliance with the principle of transparency, and may not request or accept instructions from other public or private entities.

There is no constitutional recognition, on the other hand, of the independence of the Bank of Italy, due to the fact that, as already noted, the Bank of Italy is not mentioned in the Italian Constitutional Charter; however, there is no doubt that it performs functions of constitutional importance, operates in the interests of the general public and protects goods recognised by the Constitution (in particular, savings: Article 47 of the Constitution).

Nonetheless, even if the national rules affirming independence are only anchored in ordinary laws, it is obvious that a change that would place the safeguards of independence below the standards imposed by the aforementioned European legislation would be contrary to EU law and would not be lawful.

From the point of view of its internal organisation, the independence of the Bank of Italy is ensured by ascribing the power to issue decisions with external relevance, in the name and on behalf of the Authority, solely to the Governing Board, with the exception of the decision-making powers provided for by the ESCB, which are devolved, in line with the related framework, to the Governor alone (Articles 22 ff. of the Statute).

As a general rule, it is also stipulated that neither the members of the Governing Board nor any employee may perform activities in the interest of banks, financial institutions or other supervised entities, engage in commerce, be a director, agent or member of the board of auditors of any company, participate in a general partnership, or, as a general partner, in a limited partnership (Article 41 of the Statute).

4.2. Accountability

As recognised by scholars, the first form of accountability is considered to be the predetermination of the objectives of resolution, as a constraint on the authorities' powers.[36] From this perspective, it is worth recalling the BRRD and SRMR Articles identifying the purpose of resolution as the protection of banks' essential functions, financial stability, the safeguarding of public funds, and the

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[36] See R. D'Ambrosio, *Il Meccanismo di Vigilanza Unico: profili di indipendenza e di accountability*, in R. D'Ambrosio (ed), *Scritti sull'Unione Bancaria*, Quaderni di Ricerca Giuridica della Consulenza legale della Banca d'Italia, No. 81, July 2016, 81 ff. and further references therein.

protection of depositors, investors and customers (Articles 31 BRRD and 14 SRMR). In Italian legislation, Article 21 of Legislative Decree 180/2015 merely restates the wording of such EU provisions.

As far as accountability to national parliaments is concerned, it should first be noted that the latter have the possibility of direct interlocution with the SRB, according to Article 46 of the SRMR. In the words of Recital 43 of the SRMR, 'such a role for national parliaments is appropriate given the potential impact that resolution actions may have on public finances, institutions, their customers and employees, and the markets in the participating Member States'.

However, Article 46(3) of the SRMR states that the SRB-national parliaments dialogue is without prejudice to national rules on the liability of NRAs towards national parliaments, in accordance with national law 'for the performance of tasks not conferred on the Board, the Council or the Commission by this Regulation' and for the performance of activities carried out by them in accordance with the SRMR and with regard to the institutions not included in the scope of the SRB's powers.[37]

As regards the Bank of Italy, as already seen, Article 19(3) of Law 262/2005 requires compliance with the principle of transparency, as a 'natural complement' to the attribute of independence.

The main obligation in which this transparency duty is represented is the submission of an annual report to Parliament and the Government on the activity performed throughout the year (*Relazione al Parlamento e al Governo*) (Article 19(4), L. 262/2005).[38]

In greater detail, the Bank of Italy publishes an Annual Report (*Relazione Annuale*), which contains a broader analysis of the developments in the Italian and international economies, and a Report on the Operations and Activities of the Bank of Italy. Since 2013, this latter Report has replaced the former Report to the Parliament and the Government while serving the same purpose: illustrating to the democratic bodies and to the general public the activities carried out during the past year and giving an account of the results achieved and the resources deployed.[39] The Report includes a chapter on crisis management activities, in which both resolution and other activities relating to banking crises management are covered.

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37 As R. D'Ambrosio (*Unione bancaria e requisiti di indipendenza, accountability e organizzativi della Banca d'Italia*, cit.) notes, the provision is not very clear. However, it should also include tasks performed outside the scope of the SRM, but closely related to it. In practical terms, as will be seen below, the Bank of Italy also includes references to national crisis procedures in its annual report (compulsory administrative liquidation), for which it is also responsible.

38 With more specific reference to the supervisory activity, Article 4 of the TUB requires the annual publication of a report on such activity. However, references to the performance of those tasks are incorporated in the main Report, which encompasses all the fields of BI intervention.

39 All these documents are available *here*.

Furthermore, with reference to transparency and accountability obligations, it is also worth mentioning the Annual Report of the National Resolution Fund, which is published together with the Bank's financial statements, pursuant to Article 8 of the Decree establishing the Fund. The Report includes the balance sheet and the profit and loss account.

With regard to the potential accountability of the Bank of Italy to other bodies, it should be noted that the BI, as in the exercise of its institutional functions, with the exception of the performance of treasury services, is not subject to control by the Italian Court of Auditors. Such control is considered detrimental to the functional independence of the BI in its capacity as central bank participating in the ESCB, in accordance with the rules of the TFEU and the ESCB Statute, as noted above.

A different issue is whether instead, at least indirectly, some aspects of the activity and management of the BI as NRA may be scrutinized by the European Court of Auditors (ECA), at least indirectly, in the context of the control carried out under Article 45(2) of the SRMR on the SRB and with reference to the oversight activity carried out by the latter on the NRAs in order to ensure the efficient functioning of the Mechanism.

It does not seem to be possible to conclude in the affirmative, in the absence of a rule that explicitly provides for the submission of the NRA to the control of the European Auditors; nor has the ECA in practice gone so far as to control the national authority (at least, in the BI's experience). This also applies to the implementation of national decisions by the NRA (in the various legal forms in which such implementation may take place). Nevertheless, it is possible that the ECA may also request information from the NRAs, as part of its SRB audit activities.[40]

Finally, a reference to accountability towards the recipients of resolution-related decisions seems pertinent. The Bank of Italy adopted the principles of better regulation in its regulatory activities some time ago. Indeed, Article 23 of Law 262/2005 introduced the obligation of prior consultation of the addressees of regulatory and general acts, the analysis of the impact of regulation, the obligation to justify the choices adopted, the general canon of proportionality, and periodic reviews.

The reason for this provision can be found in the absence of direct democratic legitimacy on the part of the Authority, due to its independence, and therefore in the need to provide – in the context of the single regulatory process – a series of guarantees for the recipients of the acts.

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[40] Or alternatively, request information from the Board, which will in turn request it from the NRAs, pursuant to Article 28 of the SRMR.

These principles have been detailed in secondary regulations. Currently, a 2019 Decision[41] identifies the obligations of the Bank of Italy in the adoption of 'regulatory' acts, including those concerning banking crises matters. Article 8 provides for exceptions to the obligations of better regulation; the provision of paragraph 2 is relevant to the extent that it excludes from all obligations – except for the statement of reasons –, the cases in which the Bank of Italy merely implements or transposes the content of acts, including non-binding, content of other European Authorities that have already undergone consultation procedures or cost/benefit analysis, or merely adapts acts of other Authorities that are directly applicable or binding.

Reference to the proposed technical standards and to the EBA's Recommendations and Guidelines[42] is, amongst other things, evident here. With a Communication of 2019, the Bank of Italy disclosed the procedures it intends to follow when it decides to comply with the Guidelines and Recommendations addressed, in whole or in part, to supervised entities (and therefore not those addressed to the Authorities) and originating from the ESAs.[43] The aim is to ensure rapid adjustment of the regulatory framework and regulatory certainty and predictability.

In particular, the Bank of Italy, when it has declared its willingness to comply with the soft law of the ESAs, in the context of the 'comply or explain' procedure, may comply either with the issuance of an act of a regulatory nature (and therefore binding) or with supervisory guidelines, which contain indications that are not mandatory for the addressees. It is expressly stated that the supervisory guidelines adopted by the Bank of Italy represent the Bank of Italy's 'expectations' as to how intermediaries should fulfil their obligations under the regulatory provisions, and that the conduct deviating from the guidelines will be assessed in order to verify whether the supervised entity is nonetheless able to adequately meet the requirements of the relevant regulations.

For each Guideline or Recommendation, the means for their implementation in Italy are made known on the Bank of Italy's website.

Lastly, forms of publicity (in the Bank of Italy's Supervisory Bulletin, available on the official website, and in the Italian Official Journal) are envisaged for all acts with general supervisory and resolution content, regardless of their regulatory nature, as well as other relevant measures relating to supervised entities or to those that may be subject to resolution (Articles 8 of the TUB and 3 of Legislative Decree 180/2015).

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41 Provision of 9 July 2019. Regulation governing the adoption of acts of a regulatory nature or of general content by the Bank of Italy in the exercise of its supervisory functions, pursuant to Article 23 of Law 262/2005.

42 See Articles 10 to 16 of Regulation 1093/2010.

43 Communication on how the Bank of Italy complies with the European Supervisory Authorities' Guidelines and Recommendations, available *here*.

4.3. Accountability and judicial review

In the Italian legal system, a limitation on liability for the Bank of Italy, in the exercise of its supervisory functions over the banking and financial sector, already existed prior to the European provisions and, in particular, as far as it is of interest here, that of Article 3(12) BRRD[44] and that of Article 87(4) SRMR.

In particular, Article 24(6a) l. 262/2005 provides that 'in the exercise of their control functions, the Authorities referred to in paragraph 1 [including the Bank of Italy] … the members of their bodies as well as their employees shall be liable for damages caused by acts or conduct committed with malice or gross negligence'.

This rule could certainly be considered to refer to the Bank of Italy's 'control' tout court in the sectors assigned to its competence, and therefore also to the activities relating to the final stage in the life of supervised institutions, i.e. the management of banking crises. In any case, Legislative Decree 180/2015 reaffirmed and clarified the Bank of Italy's responsibility regime with regard to the exercise of resolution and early intervention tasks, albeit by means of a simple reference to the provision of Article 24 para. 6a (Article 3(10)).

The more favourable regime of liability is intended to ensure peace of mind for the resolution authority in its performance of sensitive and technically complex tasks, exposing it to liability only in cases of the most serious and inexcusable, if not deliberate, misconduct.

This regime also applies, by virtue of the aforementioned Article 87(4) of the SRMR, where the NRA implements decisions of the SRB, but only to the extent that there is room for discretion in the NRA's activity. Where, on the other hand, the NRA has no choice but to comply with the SRB's instructions, because they are clear-cut, the SRB must indemnify the NRA for the damages which it has been ordered to pay as a consequence of an act or omission committed in the course of the resolution action.

With regard to the standards of the review, relevant principles can be drawn from the case law of administrative courts, i.e. the courts having jurisdiction over measures stemming from the exercise of the public powers of the Bank of Italy. The courts consistently recognise that the judge's review, in 'technically complex' cases or in any case characterised by broad discretionary powers for the administrative authority, cannot be entirely substitutive for the authority's decision. This means that judges, while having full access to the facts, must limit themselves to assessing the reliability, logicality and consistency of the

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[44] The limitation of Article 3(12) also applies to the Supervisory Authority, in view of the latter's competences in the pre-crisis phase and in particular for early intervention measures. See R. D'Ambrosio, *Unione bancaria e requisiti di indipendenza, accountability e organizzativi della Banca d'Italia*, cit.

authority's assessment, but once they have ascertained compliance with the technical rules, they cannot touch upon the merits of the decision.[45]

In addition to this, Article 95 of Legislative Decree 180/2015, implementing Article 85 of the BRRD, states: i) a rebuttable presumption that the suspension of any administrative measure concerning crisis management would be contrary to the public interest; and ii) that in the interests of third parties, the court can decide that the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority and the remedy for a wrongful decision or action by the resolution authorities shall be limited to compensation.

5. Conclusions

As seen, the legislator's choice at the time of adapting the internal institutional layout to the start-up of the SRM was in line with the need for continuity and recognizedthe Bank of Italy's decades of experience in managing banking crises. The identification of the Bank of Italy as the NRA then obliged the adoption of internal organisational measures that would guarantee the necessary separation of the structure entrusted with resolution tasks from the other functions. However, the separation did not go as far as the establishment of an autonomous decision-making body; moreover, it did not exclude – but rather implied – a complex and detailed system of collaboration between internal structures, and in particular between supervision and resolution functions. The preservation of a single decision-making body favours the functioning of the system, the exploitation of synergies and the balancing of the different instances.

In addition, the retention in the Unit of tasks akin to resolution (first and foremost, that of managing the compulsory liquidation procedure) strengthens the competences relating to the exit of a supervised institution from the market.

Such an arrangement has so far not caused any particular criticalities, either from an internal perspective (cooperation between different functions), or from the viewpoint of the efficient management of the banking crises, which occurred from 2015 onwards.[46] There does not appear to be any change in sight in the allocation of resolution powers; the national debate, which has also been channelled into the appropriate fora, mainly concerns substantive aspects of the BRRD framework, i.e. possible refinements to the regulation of resolution tools and, in particular, a possible greater recognition of the role of depositor guarantee

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45 See for instance the Council of State (Consiglio di Stato), judgment no. 6254 of 19 July 2022, in a case concerning a collective manager removal measure.

46 Although the crisis of the four banks resonated greatly in terms of the consequences on shareholders and creditors – due to the first application of the principles of the BRRD framework and in particular of the write-down and capital conversion power, also in consideration of the strong dissemination of the capital instruments among the general public and households – it does not seem – at least at the present time – that the subsequent events, and especially the judicial proceedings relating to such a case, have cast doubt on the substantial correctness of the Bank of Italy's actions.

schemes. Moreover, the long and overall positive history of crisis management through the instrument of compulsory liquidation allows the Italian authorities to actively participate in the ongoing discussion on the possible reform of the EU crisis management framework with regard to the rules for small and mid-sized banks.

Latvia

Mārtiņš Rudzītis

Summary. 1. Introduction – 2. Institutional issues – 2.1. Resolution and related tasks – 2.1.1. Crisis prevention – 2.1.2. Crisis management – 2.2. Structural separation of resolution and related tasks – 3. Independence and accountability – 3.1. Independence – 3.1.1. Personal independence – 3.1.2. Financial independence – 3.2. Accountability mechanisms – 3.2.1. Democratic accountability – 3.2.2. Administrative accountability – 3.2.3. Judicial accountability

1. Introduction

The global financial crisis of 2007-2008 not only had a significant impact on the development of the legal framework for crisis prevention and management at the European Union ('EU') level but also at a national level. Before the financial crisis, Latvia had only a rudimentary regulation of the recovery and resolution of credit institutions. The institutional framework for crisis management included the Bank of Latvia, the Financial and Capital Markets Commission ('FCMC'), at the time Latvian financial supervisory authority, and the Cabinet of Ministers. The Bank of Latvia acted as a 'lender of last resort', while the FCMC and the Cabinet of Ministers were jointly responsible for intervention in failing credit institutions.[1]

The deficiencies of the crisis management framework were revealed by the failure of Parex banka AS ('Parex') at the peak of the financial crisis. Parex had emerged as the second largest bank in Latvia with a local capital structure and a substantial non-resident deposit portfolio. In the autumn of 2008, the bank's financial standing was rapidly deteriorating due to the increasing outflow of liquidity and the inability to refinance its syndicated loans. Considering that the bank was 'too-big-to-fail', the Government decided to take over 85 per cent shareholding in Parex. The bank was subsequently bailed out through a contribution to the bank's subordinated capital and a guarantee for its liabilities under syndicated loans. In addition, the State Treasury placed multiple deposits with the bank in order to maintain its liquidity.[2] The State aid provided to Parex reached EUR 1,734 billion, out of which less than half has been recovered.[3]

The bail-out of Parex highlighted the nexus between bank instability and sovereign credit risk. In the context where the country was suffering from a sudden stop in capital inflows, the pressure on its foreign exchange reserves was increasing and the initial response to growing liquidity problems in Parex failed to contain the deposit run, the Government was forced to request multiple loans from the international lenders. The financial assistance program was co-financed by the International Monetary Fund ('IMF'), the EU, Nordic countries, and other neighbouring countries and was made subject to the implementation of an austerity program. From 2008 to 2012, Latvia borrowed a total of 7.5 billion euros from international lenders.[4]

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1 Articles 113 and 114 of the Credit Institutions Law (in the wording effective until 31.12.2008).

2 State Audit Office, audit report of 30 September 2016 *Was the sales process of State-owned shares in "Citadele banka" AS such as to maximise the sales returns?* ('SAO Audit Report on the sale of Citadele banka'), 18.

3 Final report of the parliamentary investigatory committee of 25 December 2015 regarding the progress of the sale of State-owned 75% shareholding in "Citadele banka", criteria for the determination of sales price and the term of the prohibition of on-sale of shares, terms of the share sales agreement, costs of sales consultants and the use of public relations services during the sales ('*Final Report on the sale of State participation in Citadele banka*'), paras. 20 and 21.

4 IMF, *Ex Post Evaluation of Exceptional Access Under the 2008 Stand-By Arrangement*, 19 December 2012; European Commission, *Financial assistance to Latvia*.

The take-over and restructuring of Parex also demonstrated that the existing legal framework for crisis management was deficient in several regards.[5] At the time, there was no expeditious procedure for taking over a failing credit institution. Article 105 of the Latvian Constitution (*Satversme*) authorised the expropriation of property for public needs in exceptional cases based on a specific law and in return for fair compensation. The procedure was however considered to be too lengthy for public take-over of a credit institution whose liquidity position was rapidly deteriorating. The Cabinet of Ministers, therefore, mandated the Minister of Finance to negotiate an agreement with the two principal shareholders of the bank. The FCMC also lacked adequate powers to intervene in and restructure the bank.

In order to address immediate issues arising from the take-over of Parex, several legislative initiatives were taken. In December 2008, the Parliament adopted the Law on the Take-over of Banks[6] which provided for a public take-over of shares, assets, rights or liabilities of a bank either on the basis of a contract (voluntary take-over) or on the basis of a special law (forced take-over). This law could be hardly seen as a major improvement since the take-over procedure was long, and complex and provided scope for political discretion. The FCMC or the Bank of Latvia had the right to initiate the take-over of the bank if its failure was threatening or could threaten the stability of the Latvian banking system. In case of a common agreement that a take-over was expedient, the Minister of Finance was authorised to negotiate a take-over with the shareholders of the failing bank. If the parties failed to reach an agreement within 5 business days, the Parliament could adopt a special statute authorising a take-over of the bank.

In the anticipation of the restructuring of Parex, a special legal regime was introduced in the Credit Institutions Law under which the Latvian supervisor may authorise the transfer of a credit institution's undertaking as an aggregation of assets and/or liabilities to another entity.[7] In 2010, this tool was used in order to transfer the performing asset portfolio of Parex to a newly established State-owned Citadele banka.[8] In 2014, the State participation in Citadele banka was sold to a group of private investors in order to comply with the conditions attached to the European Commission decision authorising State aid to Parex.[9]

A comprehensive legal framework for the recovery and resolution of credit institutions and investment firms came into being only with the transposition

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5 SAO Audit Report on the sale of Citadele banka, 31-36.

6 Effective until 15.07.2015.

7 M. Rudzītis, *Transfer of Credit Portfolios in Latvia*, in D. Campbell (ed), *Comparative Law Yearbook of International Business* (Kluwer Law International, 2016).

8 75% and 25% of the shareholding was held by the Latvian State and European Reconstruction and Development Bank, respectively.

9 Commission decision of 15 September 2010 on the State aid C 26/09 (ex N 289/09) which Latvia is planning to implement for the restructuring of AS Parex banka, L 163/28, 23.6.2011, esp. para. 52.

of the Bank Recovery and Resolution Directive[10] ('BRRD') into the Law on the Recovery and Resolution of Credit Institutions and Investment Brokerage Companies ('Resolution Law'). The introduction of a new legal framework coincided with the institutional changes resulting from Latvia's accession to the Euro area in 2014. As a result, the Bank of Latvia became a national central bank ('NCB') of the Euro area, while the FCMC was designated as a national competent authority ('NCA') and a national resolution authority ('NRA') acting within the Single Supervisory Mechanism ('SSM') and the Single Resolution Mechanism ('SRM'), respectively. The European Central Bank ('ECB') and the Single Resolution Board ('SRB') assumed the responsibility for the supervision and resolution of the three largest Latvian banks in terms of assets, whereas the FCMC remained responsible for the remaining Latvian banks.

The Latvian banking sector has been undergoing a significant consolidation since the institution of the Banking Union. From 2014 to 2024 the number of credit institutions established in Latvia has decreased from 17 to 10, while the number of local branches of foreign credit institutions has decreased from 7 to 4. In the same period, the total volume of the deposit portfolio of Latvian banks has not substantially changed, but the ratio of the non-resident deposit portfolio decreased from around 50 to 16 per cent.[11] This contraction of the banking sector has been the result of increased scrutiny of the supervisor over the compliance of the banks with anti-money laundering and counter-terrorism financing (AML/CTF) requirements and with prudential requirements.[12] This has particularly affected the so-called 'non-resident' banks which were historically active in servicing non-resident clients from the countries belonging to the Commonwealth of Independent States.

These structural market changes were accompanied by the consolidation of institutional architecture. In 2021, the Parliament adopted a new Law on the Bank of Latvia providing for the integration of the FCMC into the Bank of Latvia.[13] The new institutional framework became operational on 1 January 2023, when the Bank of Latvia assumed the responsibility for the supervision and resolution of financial institutions, and the FCMC was liquidated.

The purpose of this report is to present this new Latvian institutional framework for resolution and related tasks. Its first part will introduce the

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10 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 (as amended) ('BRRD'), OJ L 173, 12.6.2014, 190.

11 Annual and Activity Report of the Financial and Capital Market Commission for 2014, 17; Annual and Activity Report of the Financial and Capital Market Commission for 2021, 9.

12 On the interaction between the AML supervisory policy and prudential requirements see GC, 30 November 2022, *Trasta Komercbanka and Ors. v ECB*, T-698/16, EU:T:2022:737, paras. 200-204.

13 Section 3 of the Transitional Provisions of the Law on the Bank of Latvia (effective from 19.05.1992 to 31.12.2022).

institutional set-up for resolution and related tasks, while its second part will focus on the governance mechanisms. As the institutional reform has only recently become operational, the report will draw on the experience of the FCMC in order to highlight the problematic issues which have arisen in connection with the application of the resolution and insolvency framework.

2. Institutional issues

The tasks and powers of the Bank of Latvia have been significantly expanded as a result of the institutional reform. The Bank of Latvia is in charge not only of monetary policy and other central bank tasks, but also of macro and micro-prudential supervision,[14] and bank resolution. It is also responsible for the administration of compensation schemes (deposit guarantee scheme ('DGS'), insurance guarantee scheme, and investor protection scheme) and national resolution fund ('NRF'). This multiplication of the mandates entails the risk of a potential conflict of interest that may arise from the exercise of these tasks by the same institution. In order to ensure that each of these tasks is exercised according to its respective mandate, the resolution and related tasks (2.1.) are structurally separated from the other tasks of the Bank of Latvia (2.2.).

2.1. Resolution and related tasks

Latvian law confers resolution and related tasks on the Bank of Latvia in relation to credit institutions and investment firms. These tasks broadly consist of crisis prevention (2.1.1.) and crisis management tasks (2.1.2.)

2.1.1. Crisis prevention

The crisis prevention regime is integrated into the ongoing supervision of financial institutions aiming to avert failure or to facilitate an orderly resolution of failing financial institutions. The Bank of Latvia assumes the responsibility for the assessment of recovery plans, for the preparation of resolution plans, for the assessment of resolvability, and for the authorisation of intra-group financial support arrangements.[15] Subject to the allocation of responsibilities between the SRB and the NRAs, this regime applies to all credit institutions, investment firms, and groups within the ambit of the BRRD.

The Bank of Latvia is also vested with early intervention powers which allow it to intervene before an institution's financial situation has deteriorated to a point where resolution or insolvency are the only viable alternatives. In line

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[14] The Bank of Latvia is responsible for the supervision of all the regulated financial institutions. However, the Consumer Rights Protection Centre is responsible for the supervision of non-bank consumer credit service providers and out-of-court debt collection service providers.

[15] Articles 6, 11, 17, and 25 of the Resolution Law.

with the general trend across the EU Member States,[16] the Latvian supervisor has so far preferred relying on its supervisory powers under the Capital Requirements Directive[17] ('CRD') instead of using its early intervention powers under the BRRD.[18] The main reason for this is that these powers overlap to a certain degree. Furthermore, in cases where the Latvian banks have had structural problems, the early intervention measures were considered to be unable in themselves to increase the available capital and liquidity of these banks. This was, for instance, the case of PNB Bank which was declared by the SRB to be FOLTF on 15 August 2019[19] after the ECB had taken over its direct supervision.[20] The bank had been breaching its Pillar 2 capital requirements since the end of 2017 due to idiosyncratic weaknesses resulting mainly from a highly concentrated non-performing asset portfolio, a structural decrease in its operating income from its international business and high administrative expenses. Despite repeated requests by the supervisory authorities, the bank had not been to replenish its capital and restore its compliance with prudential requirements.[21] The bank and its main shareholder presented however attempts to improve the nominal capital position of the bank. On 1 October 2018, PNB Bank notified the FCMC of its intention to acquire a majority shareholding in another Latvian bank which would be largely financed by means of a share exchange between the main shareholder of PNB Banka and certain shareholders of the target bank. PNB Banka estimated that this exchange of shares would result in a contribution to its capital which would improve its capital ratios. In April 2019, PNB Banka presented a capital conservation plan which also envisaged the acquisition of a majority shareholding in the target bank and the transfer of a part of the assets from the latter onto its balance sheet.[22] The ECB decided nevertheless to oppose the proposed transaction on the ground that the acquiring bank had not demonstrated its financial soundness and its ability to ensure, at the level of the new banking group, compliance with prudential requirements. Indeed, the new banking group would have a low level of capital, posing a high risk of breach of prudential requirements. More generally, the ECB

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16 EBA Report on the application of early intervention measures in the European Union in accordance with Articles 27-29 of the BRRD, EBA/REP/2021/12, paras. 37-39.

17 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, 338.

18 The information on early intervention measures is not disclosed publicly, except for the appointment of a temporary administrator and imposition of sanctions.

19 Decision of the SRB of 15 August 2019 concerning the assessment of the conditions for resolution in respect of AS PNB Banka (SRB/EES/2019/131) (non-confidential version) ("SRB decision regarding PNB Banka").

20 Regarding the circumstances which prompted the ECB to rely on Article 6(5)(b) of the SSM Regulation in order to assume direct supervision of this less important credit institution see GC, 7 December 2022, *PNB Banka v ECB*, T-301/19, EU:T:2022:774.

21 Section 3.1.1 of *ECB Annual Report on supervisory activities 2019*; SRB decision regarding PNB Banka, paras. 17 to 27.

22 SRB decision regarding PNB Banka, para. 26(c).

considered that the strategy of the proposed acquirer vis-à-vis the target bank was unclear.[23]

A major challenge over the past years has been the calibration of intervention measures with respect to the ailing 'non-resident' banks. On the one hand, the supervisor has increased scrutiny over the compliance of the banks with the AML/CTF requirements which has resulted in the imposition of higher sanctions and restrictions on a number of banks (e.g. limitations to offer services to non-residents or change of management board members). On the other hand, these measures might have contributed to the aggravation of the financial difficulties of the banks whose profitability had already been affected by the outflow of non-resident deposits. This has been a contentious issue in the case of PrivatBank. The FCMC had repeatedly fined this bank for the violations of Latvian AML/CTF regulations and deficiencies in its internal control system.[24] In 2018, the FCMC found new infringements of AML/CTF regulations and imposed on the bank a fine and a number of requirements. One of these requirements banned the bank from establishing a business relationship with anyone who is found to have no links with Latvia and to have a monthly account turnover exceeding a certain threshold.[25] This decision was based, among others, on Latvian banking regulations under which the supervisor may impose restrictions on the rights and activities of a credit institution, including a suspension of all or a part of its financial services.[26] The Bank's shareholders appealed the decision arguing, among others, that the restriction constituted an unjustified restriction of the bank's freedom to provide services and free movement of capital since it applies to any person located abroad regardless of his risk profile. The national court has requested a preliminary reference from the European Court of Justice ('ECJ') on this matter.

The ECJ affirmed that these restrictions constitute a restriction of the freedom to provide services and free movement of capital.[27] Nevertheless, the court accepted the argument of the Latvian Government that the measure in question was appropriate and necessary for attaining the objective of preventing ML/TF risks associated with the servicing of persons having no ties with Latvia. The ECJ also considered that the restriction was proportional since the alternative, in the light of repeated infringements of AML/CTF regulations, would have been the withdrawal of the banking license.[28] Unable to implement a viable business strategy, the bank's shareholders eventually decided to wind down the activities of the bank. At the end of 2022, PrivatBank transferred a part of its asset portfolio

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23 Cf. GC, 7 December 2022, *PNB Banka v ECB*, T-330/19, EU:T:2022:775.

24 Supreme Court of Latvia, Administrative Law Department, 18 March 2020, SKA-830/2020; 10 March 2021, SKA-70/2021, para. 1; FCMC, *press release*, 21.07.2017.

25 ECJ, 2 March 2023, *PrivatBank e.a.*, C-78/21, EU:C:2023:137.

26 Articles 99[1] and 113(1)(4) of the Credit Institutions Law.

27 Articles 56, 63(1) and 65(1)(b) of the TFEU.

28 ECJ, 2 March 2023, *PrivatBank e.a.*, C-78/21, EU:C:2023:137, paras. 72 to 99; opinion of AG J. Kokott, 29 September 2022, ECJ, *PrivatBank*, C-78/21, EU:C:2022:738, paras. 84, 87 and 90.

to another credit institution[29] and commenced its reorganisation into a non-banking entity.[30]

2.1.2. Crisis management

Apart from crisis prevention tasks, the Bank of Latvia is responsible for resolving failures of financial institutions without serious risks to financial stability. As a central bank, it may provide emergency liquidity assistance to solvent credit institutions with short-term liquidity problems if such assistance is necessary in order to avoid knock-on effects on other financial market participants.[31] In the capacity of a supervisory and resolution authority, it is also responsible for the resolution, the administration of financing schemes, and the oversight of liquidation and insolvency proceedings of banks.

Resolution

The Bank of Latvia is vested with the power to take resolution action with respect to credit institutions and investment firms. To this end, it has to inform the Ministry of Finance about its decisions and has to obtain its prior approval of the decisions which have a direct fiscal or systemic impact.[32] For instance, this would be the case where the implementation of a resolution measure requires public financial support or could adversely affect the stability of the financial system. The Ministry of Finance is responsible both for the appropriation of the State budget and for the initial assessment of the compatibility of public support with the EU treaties. State aid may be nevertheless granted to the respective institution only after the European Commission has validated the compatibility of such aid with the internal market.[33] In case the provision of public support requires additional State budget resources, prior approval of the Cabinet of Ministers is necessary.[34]

Since the institution of the SRM, the Latvian resolution authority has not placed any failing credit institution under resolution. In 2016, the FCMC, in its double capacity of NCA and NRA, concluded that Trasta Komercbanka AS was failing or likely to fail[35] ('FOLTF') and proposed to withdraw its banking license.[36] The bank was not performing critical functions in the Latvian financial

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29 FCMC, *FCMC authorises AS Industra Bank to take over part of the assets and liabilities of AS PrivatBank*, press release, 10.08.2022.

30 FCMC, *FCMC authorises the reorganisation of AS PrivatBank, the business of the commercial company will no longer be linked to the provision of credit institution services*, press release, 25.11.2022.

31 Article 34 of the Law on the Bank of Latvia.

32 Article 3(3) of the Resolution Law.

33 Articles 39(4), 43(7) and 81(2) of the Resolution Law.

34 Article 12 of the Law on the Administration of Budget and Finances.

35 FCMC, *Single Resolution Board Member Joanne Kellermann pays a visit to Latvia today*, press release, 24.10.2016.

36 ECJ, 30 November 2022, *Trasta Komercbanka and Ors. v ECB*, T-698/16, EU:T:2022:737, paras. 4 and 5.

system and, hence, its resolution was not in the public interest. In 2022, the FCMC concluded that Baltic International Bank SE was FOLTF and that its resolution was not in the public interest. The bank had had idiosyncratic problems over a prolonged period and had not been able to implement a viable business strategy and remedy serious deficiencies in its governance framework.[37]

Administration of financing schemes

The Bank of Latvia is responsible for the administration and the use of the contributions accumulated in the NRF.[38] To this end, it has the power to determine the amount of *ex-ante* contributions on an annual basis, as well as *ex-post* extraordinary contributions if the funds accumulated in the NRF are not sufficient to cover losses or expenses of resolution proceedings.[39] The Bank of Latvia is entitled to contract borrowings or other forms of support from institutions, financial institutions, or other third parties if the funds accumulated in the NRF are not immediately accessible or sufficient to cover the losses or expenses incurred by the use of the financing arrangements, or additional extraordinary *ex-post* contributions are not immediately accessible or sufficient.[40] It may also make a borrowing request from financing arrangements of other EU Member States if the funds accumulated in the NRF or *ex-post* contributions are not immediately accessible or alternative financing is not accessible.[41]

The Central Bank is also responsible for the administration of the DGS, declaration of the unavailability of the deposits, and pay-outs of compensations from the DGS to covered depositors.[42] The funds accumulated in the DGS can only be used for repaying the guaranteed amount to depositors and for the financing of resolution measures.[43] In case a failing bank has sufficient liquidity, the DGS may order this bank to pay out the covered deposits from its liquid assets. If, however, the covered deposits need to be paid from the DGS, the latter has the right of subrogation against the failing credit institution.[44]

Three alternative sources of funding may be used in a cascade if the funds accumulated in the DGS are not sufficient to cover all its liabilities toward the covered depositors. The Bank of Latvia may first borrow the necessary funds on the financial markets or from the DGSs of other EU Member States. If it cannot secure the necessary financing within two business days from the unavailability of deposits or the borrowing terms are not economically attractive, it may request

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37 FCMC, *FCMC decides to suspend the provision of financial services by Baltic International Bank SE*, press release, 12 December 2022.

38 Article 5(6) of the Law on the Bank of Latvia and Article 121.[1] of the Resolution Law.

39 Article 121.[2](3) of the Resolution Law.

40 Article 121.[3] of the Resolution Law.

41 Article 121.[4] of the Resolution Law.

42 Articles 5(6) and 53(1) of the Law on the Bank of Latvia; Article 2(8) of the Law on Deposit Guarantee Schemes.

43 Article 19(1) of the Law on Deposit Guarantee Schemes.

44 Articles 6(1), 22 and 25(1)(4) of the Law on Deposit Guarantee Schemes.

the affiliated credit institutions to provide a loan to the DGS. If the financial means available to the DGS are still not sufficient, the Bank of Latvia may request the Ministry of Finance to provide a State budget appropriation or request the State Treasury to provide a loan.[45] Some of these alternatives have been used in the past. In 2011, the DGS had to borrow additional funding from the State Treasury in order to pay out the guaranteed compensation to the covered depositors of Latvijas Krājbanka. The DGS was again under strain in 2019 when the FCMC initiated insolvency proceedings of PNB Bank AS. In order to cover a potential shortage of funds, the DGS entered into credit facilities with several Latvian banks.[46]

Oversight of liquidation and insolvency proceedings

The Bank of Latvia is responsible for the oversight of liquidation and insolvency proceedings of credit institutions and investment firms. In case the banking license has been withdrawn or the bank is *de facto* insolvent, it has to initiate liquidation or insolvency proceedings, respectively, and has to nominate a candidate for the administrator of these proceedings.[47] Upon the receipt of the application to the Bank of Latvia, the court has to take a decision regarding the commencement of the liquidation or insolvency proceedings and has to appoint the administrator.[48] Both of these proceedings are deemed to constitute 'normal insolvency proceedings' within the meaning of Article 2(1)(47) of BRRD.[49]

The oversight powers of the Bank of Latvia vary depending on the type of proceedings. In liquidation proceedings, the supervisor's powers are limited to the right to receive an administrator's report after the completion of these proceedings.[50] In insolvency proceedings, the Bank of Latvia is entitled to request the administrator to provide all the necessary information and explanations about the insolvency proceedings.[51] In case it does not trust any more the administrator, it may request the court to discharge the administrator from his duties and nominate a new candidate for this position.[52] As AML/CTF supervisor, the Bank of Latvia also controls the compliance of the administrator with the AML/CTF regulations in the course of the liquidation or insolvency proceedings.[53]

In case the banking license has been withdrawn or the bank is *de facto* insolvent, the Bank of Latvia is obliged to initiate liquidation proceedings. In contrast, the triggers for the FOLTF decision under EU law and the triggers for

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45 Article 21 of the Law on Deposit Guarantee Schemes.

46 *Financial Statements of Deposit Guarantee Fund for 2019*, 3 and 14.

47 Article 129 of the Credit Institutions Law.

48 Articles 365(4), 374(1), 376(2) of the Civil Procedure Law.

49 Decision of the SRB of 15 August 2019 concerning the assessment of the conditions for resolution in respect of AS PNB (SRB/EES/2019/131) (non-confidential version), para. 42.

50 Article 136 of the Credit Institutions Law.

51 Article 132.^{1}(3) of the Credit Institutions Law.

52 Article 168(1) of the Credit Institutions Law.

53 Article 126.^{2} of the Credit Institutions Law.

the commencement of liquidation proceedings under national law are not entirely aligned.[54] This was highlighted by the ABLV Bank case.[55] In early 2018, the US Department of the Treasury's Financial Crimes Enforcement Network ('FinCEN') announced a draft measure[56] to designate *ABLV Bank*, at the time the third largest Latvian bank subject to direct supervision of the ECB, as a financial institution of primary money laundering concern which would prohibit the bank from opening or maintaining of correspondent accounts in the US.[57] This raised doubts about the soundness of the bank's business model, causing a sudden drop in the bank's credibility and withdrawal of funds. The ECB instructed the Latvian FSA to impose a five-day moratorium on the withdrawals from the bank and requested the bank to secure EUR 1 billion in cash in order to have sufficient liquidity to cover the expected withdrawals after the possible lifting of the moratorium. As the bank was not able to raise the requested amount of liquidity until the expiry of the moratorium, the ECB determined that the bank was FOLTF,[58] and the SRB subsequently found that its resolution was not in the public interest.[59]

ABLV Bank was nevertheless considered to be solvent under Latvian insolvency law.[60] The liquidity problems of the bank were imminent, not actual. The FOLTF assessment stated that the bank would not, 'in the near future, be able to pay its debts or other liabilities as they fell due within the meaning of Article 18(4)(c) of [SRM] Regulation'.[61] The Latvian law requires however that the bank has real liquidity problems in order to declare it insolvent. Furthermore, even though the bank was prevented from accessing the financial markets, it was still authorised to carry out banking activities.[62] Hence, the legal conditions for initiating a forced liquidation of the bank[63] were not fulfilled. In these circumstances, the shareholders decided to commence a voluntary liquidation of ABLV Bank,[64] and this course of action was approved by the FCMC.[65] This enabled it to overcome legal uncertainty about the bank's legal status after the SRB decision not to place it under resolution.

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54 Section 3.1 of ECB Annual Report on supervisory activities 2019.

55 GC, 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429.

56 FinCEN, *Proposal of Special Measure against ABLV Bank, as a Financial Institution of Primary Money Laundering Concern - 31 CFR Part 1010-RIN - 1506-AB39*, 12 February 2018 ('FinCEN Proposal') prepared under Section 311 of the USA Patriot Act.

57 See further discussion of the events preceding the FinCEN announcement in Section 3.1 (A).

58 ECB, *ECB determined ABLV Bank was failing or likely to fail*, press release, 24 February 2018.

59 Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank Luxembourg S.A, SRB/EES/2018/10 (non-confidential version).

60 Article 146(2) of the Credit Institutions Law.

61 GC, 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429, para. 111.

62 The ECB withdrew the banking license only on 11 July 2018 on the ground that ABLV Bank had commenced a voluntary liquidation procedure.

63 Under Latvian law, forced liquidation proceedings may be initiated either in case the banking license has been withdrawn by the ECB or the bank is de *facto* insolvent.

64 The decision was made in accordance with Article 126(1)(1) of the Credit Institutions Law.

65 The ECB withdrew the banking license of ABLV Bank on 18 July 2018 on the ground that the bank was subject to a liquidation procedure, available *here*.

It has been argued that this misalignment of the FOLTF regime and the national insolvency regime may be prejudicial to the effectiveness of the resolution regime. The resolution regime is based on the implicit idea that a failing bank whose resolution is not in the public interest should be wound up in an orderly manner in accordance with the applicable national law.[66] The preamble of the BRRD directive recalls in that respect that 'a failing institution should in principle be liquidated under the normal insolvency procedure'.[67] The conditions for opening a forced liquidation procedure are nevertheless defined by national law. It has been also observed that it is questionable whether a resolution authority can correctly assess the objectives of bank resolution when deciding that the resolution of the bank was not in the public interest within the meaning of Article 18(5) of the SSM Regulation or Article 32(5) of the BRRD.[68] As a part of this assessment, a resolution authority needs to perform a counterfactual analysis in order to evaluate whether the resolution action is necessary for the achievement of one or more resolution objectives, such as continuity of critical functions and avoidance of adverse consequences for financial stability, and whether winding up of a failing institution in 'normal insolvency proceedings' would not meet those resolution objectives to the same extent. If it was accepted that a voluntary liquidation procedure or similar procedure available under national law constitutes a 'normal insolvency procedure', this might have implications for the control of the lawfulness of the decision of the resolution authority.

The EU legislator has sought to remedy the misalignment between the triggers for the FOLTF process and the triggers for the liquidation proceedings by introducing a new Article 32b to the BRRD.[69] The Latvian transposing provision provides that a failing institution whose resolution action is not in the public interest shall be wound up.[70] The wording of this provision is broadly framed so as to cover both voluntary liquidation proceedings and forced liquidation proceedings.[71] The Latvian banking regulations further provide that the Bank of Latvia is obliged to initiate forced liquidation proceedings in cases where the ECB has withdrawn the banking license or where the credit institution is insolvent.[72] In contrast, there is no obligation to commence a forced liquidation of a solvent financial institution which has been declared to be FOLTF.[73] It follows that voluntary liquidation proceedings will continue to be available in

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66 Recs. 45 and 46 of the BRRD and Article 18(8) of the SRM Regulation.

67 Rec. 45 of the BRRD.

68 A. Steiblyté, *Public interest for resolution action in the light of the ABLV cases*, in C. Zilioli, K.-P. Wojcik, *Judicial Review in European Banking Union* (Edward Elgar 2021), 568-569, paras. 316-317.

69 Article 1(10) of the directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150, 7.6.2019, 296.

70 Article 39.^{2} of the Resolution Law.

71 Article 126 of the Credit Institutions Law.

72 Articles 129, 27(1) to (3), and (7) to (9) of the Credit Institutions Law.

73 Articles 129 and 27(10) of the Credit Institutions Law.

this scenario, and the misalignment between the European FOLTF regime and the Latvian insolvency law regime will persist in the future.

2.2. Structural separation of resolution and related tasks

The Bank of Latvia has a single tier governance structure in which the Council is the sole decision-making body for ESCB-related tasks.[74] The Council is composed of seven members. It is chaired by the Governor, who has two deputies.[75] Apart from participating in collegial decision-making, each member of the Council is vested with an individual sphere of responsibility. The Governor is in charge of monetary policy and sits on the Governing Council of the ECB.[76] One of his Deputies is in charge of other central bank functions, whereas the other Deputy is responsible for the supervision of financial institutions and sits on the ECB Supervisory Board. He shares the responsibility for financial supervision with another Council member, and they both represent the Bank of Latvia at the three European Supervisory Authorities (ESAs). Furthermore, another Council member is in charge of the banking resolution and administration of compensation schemes and acts as a member of the Single Resolution Board.[77] The separation of supervisory, resolution and monetary functions is also implemented at the level of the administration. The internal organisation of the Bank of Latvia is based on a committee structure under which supervisory and resolution tasks are delegated to separate committees (2.2.1.). This separation does not however prejudice close cooperation between the supervisory and resolution committees in the resolution planning and implementation of resolution measures (2.2.2.).

2.2.1. Resolution Committee

The operational independence of the resolution function requires not only that the Bank of Latvia is insulated from external interference but also that adequate safeguards exist to avoid conflicts of interest arising from the exercise of competing mandates by the same institution.[78] By Article 3(3) of the BRRD,[79] operational independence has to be guaranteed through structural separation of the resolution function from other potentially competing functions of the Bank of Latvia. This provision allows designating a banking supervisor as resolution authority only exceptionally and only subject to adequate structural arrangements being in place to ensure operational independence of competing mandates.[80] Similarly, the ECB has considered that resolution tasks may be conferred on a

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74 Explanatory Memorandum of the Law on the Bank of Latvia, para. 22, 28.

75 Article 11 of the Law on the Bank of Latvia.

76 Article 283(1) TFUE and Article 10.1 of the Statute of ESCB and of ECB.

77 Explanatory Memorandum of the Law on the Bank of Latvia, para. 22, 29.

78 Cf. EBA Report, Section 2.3, 20-24; Article 4(4) of the CRD.

79 See also Rec. 19 of the BRRD.

80 See also Key Attribute 2 of FSB Key Attributes Assessment Methodology for the Banking Sector, 19 October 2016; EBA, Interpretation of the requirement of structural separation of the competent (supervisory) and resolution, Q&As, 24 July 2015, available *here*.

NCB only if they do not undermine its independence under Article 130 TFEU.[81] More specifically, the conferral of resolution tasks on a NCB must 'not interfere financially and operationally with the performance of its ESCB-related tasks'.[82]

The Bank of Latvia has a committee structure with seeks to ensure that its monetary policy, supervisory and resolution functions are carried out by separate internal units with separate reporting lines and delimitation of the powers of the decision-making bodies and their members.[83] Two separate committees are established for supervisory and resolution matters which operate according to the rules of procedure adopted by the Council of the Bank of Latvia. Each of these committees is chaired by a different Council member. The Resolution Committee does not constitute a decision-making body within the meaning of Article 130 of the TFEU and Article 7 of the Statute of the European System of Central Banks and of the European Central Bank ('Statute of ESCB and of ECB'). It is responsible for preparing proposals for decisions that are to be submitted to the Council for approval. However, in order to ensure an operational separation of its competing mandates, the Council of the Bank of Latvia has adopted regulations[84] under which most of its tasks related to the resolution and administration of compensation schemes are delegated to the Resolution Committee. Structural separation of the personnel responsible for financial supervision and resolution is achieved through rules under which the members of the Resolution Committee cannot act as members of the Supervisory Committee and *vice versa*. In the same vein, the personnel responsible for the monetary policy cannot act as members of either of these two committees. The personnel of the Resolution Committee reports to the chairman of this committee.

The Resolution Committee has extensive powers which range from planning to implementation of resolution actions and sanctioning of infringements. This committee is responsible, among others, for the approval of resolution plans, determination of a minimal requirement for own funds and eligible liabilities, removal of obstacles for the resolvability of entities, approval of on-site and off-site inspection plans of market participants and sanctioning of financial institutions. It is also vested with the power to determine that a financial institution is FOLTF, to establish that a market participant fulfils the conditions for opening a resolution procedure, to approve and supervise the implementation of a reorganisation plan of an entity subject to resolution, to decide on the measures needed to implement the decision of the Council on the resolution tools or on the initiation of insolvency proceedings. Nonetheless, the Council

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81 Para. 2.3 of Opinion of the ECB of 30 May 2011 on financial market supervisory reform in Lithuania (CON/2011/46).

82 Opinion of the ECB of 26 February 2021 on the reform of Latvijas Banka (CON/2021/9), para. 5.2.3.

83 Article 5(2) of the Law on the Bank of Latvia; see more generally on the arrangements used to ensure structural separation of supervisory mandates: S. Kirakul, J. Yong, R. Zamil, *The universe of supervisory mandates – total eclipse of the core?*, FSI Insights on policy implementation No. 30, March 2021, 20 et seq.

84 Regulations of the Bank of Latvia No. 229 of 14 November 2022 'The Regulations of the Resolution Committee of the Bank of Latvia'.

retains the power to decide to commence resolution proceedings or to initiate insolvency proceedings of the failing institution. Furthermore, the Council has the power to adopt regulations elaborated by the Resolution Committee in the area of resolution and administration of compensation schemes.[85]

The Resolution Committee consists of five members: the member of the Council in charge of resolution and compensation schemes (Chairman of the Resolution Committee), the member of the Council in charge of payment systems, the Director of the Resolution and Protection Schemes Directorate, the Director of Legal Services and the Deputy Director of the Financial Stability and Macroprudential Supervisory Policy Directorate.[86] The Chairman of the Resolution Committee is in charge of organising the work of the committee.[87] He convenes, sets the agenda and presides over the meetings of the Resolution Committee. Each member of the Resolution Committee has the right to request convening the meeting of the committee by submitting a proposal and agenda of the meeting to the Chairman of the Resolution Committee.[88] The Resolution Committee has a quorum if at least three members are present at the meeting, and its decisions are taken with a majority vote. In case of a split vote, the chairman of the meeting has the casting vote.[89]

The Resolution Committee has to regularly inform the Council about its work, including its decisions and their implementation.[90] The Council does not have powers of instruction vis-a-vis the Resolution Committee. Nevertheless, it retains the decision-making power on matters relating to the commencement of resolution proceedings, application of resolution tools, and initiation of insolvency proceedings.

2.2.2. Overlapping of tasks and powers of supervisory and resolution committees

Despite the institutional arrangements to separate resolution from financial supervision and monetary policy, it is hardly possible to make these functions completely independent from each other.[91] Several points of interaction between the supervisory and resolution tasks can be identified.

Recovery and resolution planning and early intervention constitute an integral part of a framework for financial supervision with a focus on resolvability. The supervisory process may thus seamlessly proceed to crisis

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85 Article 2 of the Regulations of the Resolution Committee of the Bank of Latvia.

86 Article 4 of the Regulations of the Resolution Committee of the Bank of Latvia.

87 Article 5 of the Regulations of the Resolution Committee of the Bank of Latvia.

88 Article 8 and 9 of the Regulations of the Resolution Committee of the Bank of Latvia.

89 Articles 11 and 12 of the Regulations of the Resolution Committee of the Bank of Latvia.

90 Article 3 of the Regulations of the Resolution Committee of the Bank of Latvia.

91 See more generally on the intertwinement of the functions: M. Goldmann, *United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union*, SAFE Working Paper No. 178, December 2017, 14-15; S. Eijffinger, R. Nijskens, *Monetary policy and banking supervision*, Vox, CEPR Policy Portal, 19 December 2012.

management and resolution.[92] In case the financial standing of a credit institution is deteriorating, it is placed under enhanced supervision of both committees. The need for coordinated action is also implicit in the legal framework under which the intervention powers of both committees are overlapping to a certain degree: the Supervisory Committee is responsible for taking supervisory measures under Article 104 of the CRD, while the Resolution Committee is responsible for adopting early intervention measures under the BRRD.

Instead of a complete separation of supervisory and resolution functions, the regulations of the Bank of Latvia seek to establish operational separation of these functions with appropriate 'checks and balances'. Similarly to the ECB 'triggering power' under Article 18(1) of the SRM Regulation, the Supervisory Committee has the primary responsibility for determining that a financial institution is FOTLF.[93] If, however, the Supervisory Committee has not exercised this power, the Resolution Committee has the power to make such a determination and to propose a resolution action with respect to that institution. This diarchy is intended to reduce undue forbearance in case the supervisor hesitates to act in relation to a failing financial institution.[94] The experience since the institution of the SRM suggests that this might not be an entirely theoretical risk. The fact that Trasta Komercbanka[95] and PNB Bank[96] were declared to be FOLTF at the moment when they were already insolvent suggests that the supervisor was too slow to exercise the 'triggering power'. Once a FOLTF declaration has been made, the Council has to take a decision regarding the resolution action or the initiation of winding-up proceedings with respect to that institution.

The functioning of this diarchic system presupposes effective information exchange between supervisory and resolution committees. To this end, the Law on the Bank of Latvia authorises the exchange of information between the internal units of the Bank of Latvia, subject to confidentiality arrangements.[97] More specifically, the exchange of certain categories of information is allowed between internal units of the institutions involved in the resolution planning and implementation, namely, the information about recovery and resolution plans, assessment results, and resolution actions, including information about the resolution procedure and the resolution tools. In light of these links between the

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92 M. Krimminger, R. Lastra, *Early Intervention*, in R. Lastra (ed), *Cross-Border Bank Insolvency* (Oxford University Press, 2011), 57-58.

93 Para. 2.10 of the Regulations of the Supervisory Committee of the Bank of Latvia.

94 M.K. Brunnermeier, H. Gersbach, *True independence for the ECB: Triggering power - no more, no less*, Vox, CEPR Policy Portal, 20 December 2012.

95 FCMC, *FCMC submits to a court application on "TRASTA KOMERCBANKA" insolvency*, press release, 28 February 2017.

96 Section 3.1.1 of ECB Annual Report on supervisory activities 2019.

97 The safeguards applicable to the exchange of confidential information between the internal units of the Bank of Latvia have not so far been set out in external regulations.

supervisory and resolution committees, a strict separation between the tasks and powers of both committees has to be relativised.[98]

3. Independence and accountability

The relationship between independence and accountability is at the core of the governance of the resolution authorities. In a democratic system governed by the rule of law, the independence of the resolution authority (3.1.) has to be accompanied by adequate accountability mechanisms (3.2.).

3.1. Independence

According to Article 47(1) of the SRM Regulation,[99] the NRAs shall act independently and in the general interest in the performance of their tasks. It is generally recognized that the principle of independence requires that a NRA enjoys institutional, operational, personal, and financial independence guarantees in the performance of its tasks.[100] As the first two aspects were already dealt with in Section 2.2. above, this part of the report will focus on personal independence (3.1.1.) and the financial independence of the Bank of Latvia in the performance of resolution tasks (3.1.2.).

3.1.1. Personal independence

The Chairman of the Resolution Committee, in his capacity as a member of the Council of the Bank of Latvia, enjoys similar personal independence guarantees to the Governor of the Bank of Latvia. This implies a high standard of personal independence which prevails over other legitimate interests.

A high standard of independence

The independence guarantees afforded to the Chairman of the Resolution Committee were designed with a view to accommodate the constraints arising both from the Latvian Constitution and the EU treaties. The Latvian Constitutional Court has ruled that a democratic legitimation of the members of the collective decision-making body of an independent institution is a precondition for the delegation of regulatory power to such an institution. This question was raised in the context of a constitutional complaint introduced by a bank that sought to challenge the regulations adopted by the Council of the FCMC which provided for an increase of the bank supervisory fees. The applicant alleged that banks

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98 Also Article 3(4) of the BRRD requires to ensure cooperation between the supervisory and resolution authorities.

99 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, OJ L 225, 30.7.2014, 1.

100 EBA Report on the supervisory independence of competent authorities, EBA/REP/2021/29, 18 October 2021, 13-18.

were obliged to cross-subsidize supervision of other financial market participants in violation of his property rights and the principle of equality. The Constitutional Court found that the regulations in question can interfere with the property rights of the applicant. In assessing whether such restriction was based on law, it recalled that the FCMC regulations would qualify as a 'law' if they meet not only formal but also qualitative requirements. The exercise of delegated regulatory powers by an independent institution is conditioned on the democratic legitimation of its decision-making body. At the time of the judgment, only two out of five members of the Council of the FCMC were appointed by the Parliament. Considering the scope and importance of the regulatory power conferred on the FCMC, the Constitutional Court concluded that its Council did not have a proper democratic legitimisation in order to adopt the contested regulations and, hence, the regulations were declared to be unconstitutional.[101] As the Council of the Bank of Latvia is vested with equally important delegated regulatory powers as its predecessor, the Law on the Bank of Latvia provides that all of its members are elected by the Parliament. More precisely, the Chairman of the Resolution Committee is elected by the Parliament[102] upon the proposal of the Governor of the Bank of Latvia.[103]

Furthermore, it follows from a systemic reading of Article 14.2 of the Statute of the ESCB and of the ECB and Article 130 TFEU that personal independence guarantees are afforded to 'members of decision-making bodies' of NCBs, rather than to Governors specifically. The ECB has argued in that regard that the personal independence of the NCB would be jeopardised if the rules relating to the security of tenure and the grounds for dismissal of Governors were not to apply to members of NCB decision-making bodies involved in the performance of ESCB-related tasks.[104] The Law on the Bank of Latvia therefore provides that the rules regarding the security of tenure and grounds for relieving from office apply to all the members of the Council of the Bank of Latvia. The term of office of the Chairman of the Resolution Committee is limited to five years and two consecutive mandates. He can be relieved from his office before the expiry of his term of office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct in accordance with Article 14.2 of the Statute of ESCB and of ECB.[105] On the other hand, the remaining three members of the Resolution Committee are appointed

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101 Constitutional Court of Latvia, 20 February 2020, No. 2019-09-03, English summary of the judgment is available *here*.

102 According to Article 12(4) of the Law on the Bank of Latvia, a member of the Supervisory Council has to be a citizen of Latvia, has to possess at least a master's degree or an equivalent degree, impeccable reputation, adequate professional experience and should be entitled to receive a permit to access State secrets.

103 Article 12(2) of the Law on the Bank of Latvia.

104 Opinion of the ECB of 25 October 2019 on amendments to the Law on Latvijas Banka (CON/2019/36), para. 2.3.3.

105 Article 13 and 14 of the Law on the Bank of Latvia.

and relieved from their office by the Governor or by a member of the Council appointed by the Governor.[106]

Prevalence over other legitimate interests

A very high standard of independence entails however the risk of neglecting other legitimate interests. This has been highlighted by the criminal proceedings instituted against the former Governor of the Bank of Latvia on suspicion of bribery in relation to events that had taken place in 2013 and 2014. He was suspected of having taken a bribe from a member of the management board of a bank, in exchange for 'helping to resolve the bank's problems with the FCMC'. According to this management board member, the bribe was given in the context where the FCMC had requested the bank to increase its capital but the shareholders had been unable to do so.[107] Although at the time of events the Bank of Latvia was not responsible for the supervision and resolution of credit institutions, the case is instructive of the scope of personal independence guarantees afforded to the members of the Council.

In 2018, the Latvian law enforcement authority ordered a number of measures in regard to the Governor, including his suspension from office. Being invited to examine the compatibility of this decision with the second subparagraph of Article 14.2 of the Protocol on the ESCB and of the ECB, the ECJ annulled it insofar as it had banned the applicant from performing his duties as Governor of the Central Bank of Latvia.[108] The ECJ considered that the mere suspicion of criminal conduct on the part of the Governor does not amount to 'serious misconduct' within the meaning of this Article as it was not supported with sufficient evidence of such misconduct.[109] In the absence of the authority to revoke or suspend the Governor from office other than on the ground of a judgment establishing a serious misconduct, the Parliament could only address a public statement to the Governor inviting him to resign from office.[110] The Parliament underlined that, in the circumstances where the Governor was declared a suspect

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106 Article 16 of the Law on the Bank of Latvia.

107 See ECtHR, 10 November 2022, *Rimšēvičs and the ECB v Latvia*, app. no. 56425/18, paras. 7 and 8. The first instance court sentenced the ex-Governor to 6 years of imprisonment and confiscation of property. The ex-Governor has appealed the judgment.

108 ECJ, 26 February 2019, *Rimšēvičs and the ECB v Latvia*, joined cases C-202/18 and C-238/18, EU:C:2019:139; see also ECJ, 30 November 2021, *LR Ģenerālprokuratūra*, C-3/20, EU:C:2021:969.

109 The failure to present sufficient evidence could be also explained by the fact the Government adopted the strategy of not disclosing all the evidence to the ECJ considering that Articles 131(4) and 191a(3) of the Rules of Procedure of the Court of Justice do not ensure confidentiality of information obtained during criminal proceedings instigated against the Governor. It was concerned that the information, which under national criminal law was not available to the suspect at the stage of the investigation, would be disclosed in the course of the proceedings before the ECJ (I. Reine, *Par EST spriedumu Ilmāra Rimšēviča lietā*, Jurista Vārds, 5 March 2019, No. 9 (1067)). This information was however provided (at the indictment stage) to the European Court of Human Rights in the context of a complaint alleging the violation of Article 5(1) of the European Convention of Human Rights. Cf. ECtHR, 10 November 2022, *Rimšēvičs and the ECB v Latvia*, app. no. 56425/18.

110 Statement of the Parliament of Latvia of 3 March 2019 'Invitation to the Governor of the Bank of Latvia Ilmārs Rimšēvičs to resign from office'.

in criminal proceedings, a continuous exercise of the Governor's functions would discredit future decisions of the Bank of Latvia, cause doubts about its capacity to act, and harm the interests and reputation of the Latvian State. The Governor considered however that this invitation constituted political pressure[111] and continued exercising his functions until the expiry of the term of his office.

This case also raised a question about the construction of the first limb of the second subparagraph of Section 14.2 of the Statute of ESCB and of ECB under which a member of the decision-making body of NCB may be relieved from office on the ground that he does not fulfil the conditions for the performance of his duties. Under Latvian law, the right to access information containing state secrets is one of the eligibility conditions for members of the Council.[112] A couple of months after the commencement of criminal proceedings the Latvian competent authority revoked the access of the Governor to the information classified as a state secret. The combined effect of the ECJ ruling and the national decision was however peculiar: the Governor could continue exercising his office but was prevented from accessing classified information that might be necessary for the performance of the 'national tasks' of the Bank of Latvia.

The question of whether the ineligibility of a member of the Council to access classified information may constitute a valid ground for discharging him from office has not been yet settled. At the time the ECJ ruling was delivered, there was no political consensus for exploring the possibility of relieving the Governor from office on the ground that he does not fulfil the conditions for the performance of his duties. It is also likely that the ECJ would consider that reference in the second subparagraph of Article 14.2 of the Statute of ESCB and of ECB to 'conditions required for the performance of his duties' should be given an autonomous meaning. Such construction could require distinguishing between the access to classified information that is necessary for the performance of 'national tasks' of the Bank of Latvia, like financial supervision and resolution, and the information that is necessary for the performance of ESCB-related tasks. The effective performance of resolution tasks may indeed require access to sensitive financial data and contracts which are often confidential. On the other hand, access to such information might be useful, but not necessarily critical for the performance of monetary policy tasks.

The ability of the supervisory and resolution authorities to effectively address the concerns about the integrity of the members of their decision-making bodies remains essential for safeguarding the public trust. This is highlighted by the attempt of Latvian banks to instrumentalise the investigations into corruption for the purposes of challenging the ECB and the SRB decisions elaborated with the assistance of the FCMC.[113] In the context of annulment proceedings directed

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111 LSM.LV, Saeima aicina Rimšēviču atkāpties no amata, available *here*.

112 Article 12(3) and (4) of the Law on the Bank of Latvia. According to Article 12(3)(12) of the Law on State Secrets, the Governor has access to State secrets, but such access may nevertheless be revoked.

113 GC, 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429, paras. 202 to 207; GC, 30 November 2022, *Trasta Komercbanka and Ors. v ECB*, T-698/16, EU:T:2022:737, paras. 223 to 259.

against a decision of the BCE, PNB Banka has argued that suspicion of corrupted practices calls into question the impartiality of the FCMC and, more generally, the integrity of the decision-making within the SSM. It submits,[114] 'although the ECB defends its independence against any interference by the Latvian authorities, it does not fulfil its role of ensuring that the SSM is not distorted by corruption, even though that role is all the more essential because the ECB and its officials enjoy special protection and privileges vis-à-vis the competent national law enforcement authorities'.[115] It may not come as a surprise that the General Court rejected these arguments judging that the ECB is not competent to carry out an investigation into these alleged acts and that its duties are limited to cooperation in that regard with the national authorities.[116] These allegations raise nevertheless the question of whether the ECB and the SRB have adequate powers in order to ensure the effective and consistent functioning of the SSM[117] and the SRM, respectively.[118] Although the senior officials of the national supervisory and resolution authorities are vested with a European mandate, they remain organically attached to the national institutional framework[119] and, hence, subject to national disciplinary measures. The question of the professional conduct of members of its high-level bodies has also attracted the attention of the ECB which has recently adopted a revised Code of Conduct for high-level ECB Officials.[120] The code sets out a single set of professional conduct rules for the members of the Governing Council and for the members of the Supervisory Council when exercising their duties in this capacity. Nevertheless, the powers to investigate into misconduct of the members of its high-level bodies and the enforcement mechanisms at the disposal of the ECB remain relatively limited.[121]

3.1.2. Financial independence

Article 130 TFEU and Article 7 of the Statute of ESCB and of ECB require that a NCB has sufficient financial resources not only to perform monetary

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114 The argument was made in the context of annulment action directed against the ECB decision opposing the acquisition of a qualified holding in another Latvian seeking, among others, to replenish the capital of PNB Banka. See Section 2.1.1 above.

115 GC, 7 December 2022, *PNB Banka v ECB*, T-330/19, EU:T:2022:775, para. 224.

116 *Ibidem*, paras. 223 and 224.

117 Similar issue has been raised in P. Dermine, *La Banque centrale européenne et le principe d'exclusivité. Les compétences de l'Union européenne en matière de politique monétaire et de surveillance financière et leurs limites*, (2021) 3 Cahiers de droit européen, 715-716, 718-720.

118 Article 6(1) of the SSM Regulation and Article 7(1) of the SRM Regulation.

119 On the hybrid legal status of the governor of a national central bank see ECJ, 26 February 2019, *Rimšēvičs and the ECB v Latvia*, joined cases C-202/18 and C-238/18, EU:C:2019:139, paras. 70-72; CJUE, 30 November 2021, *LR Ģenerālprokuratūra*, C-3/20, EU:C:2021:969, paras. 43-45; CJUE, 13 September 2022, C-45/21, *Banka Slovenije*, EU:C:2022:670, point 52.

120 ECB, Code of Conduct for high-level ECB officials, 2022/C 478/03, OJ C 478, 16.12.2022, 3.

121 According to Article 18 of the Code of Conduct for high-level ECB officials, non-compliance with these conduct rules can be sanctioned either by moral suasion of the Ethics Committee or by the reprimand of the Governing Council.

policy tasks but also its national tasks, including bank resolution.[122] The financial independence of the ECB is specifically addressed in the third sentence of Article 282(3) TFEU which provides that it is independent 'in the management of its finances'.[123] The EU treaties do not afford the NCBs equivalent guarantees. The ECJ has nonetheless taken the view that the financial independence guarantee prohibits the Member States from placing a NCB in a situation where it does not have sufficient financial resources in order to carry out independently its ESCB-related tasks.[124] In line with this principle, Latvian law prescribes a full-cost recovery from market participants and the prohibition of monetary financing.

Full cost recovery from financial market participants

In order to participate in the implementation of the Euro area monetary policy, the establishment of reserves by the NCBs is essential, in particular in order to be able to offset any losses resulting from monetary policy operations and to finance open market operations. A NCB should always be adequately capitalised. The reason for this is that, if a central bank is placed in a situation where it has very low or negative capital for a prolonged period of time due to a legal restriction on its ability to build up sufficient reserves, it may be incentivised to use monetary policy operations for the purpose of generating revenue to counter the perception of instability and to maintain market confidence.[125] Such a situation may affect the credibility not only of the NCB but also of the ESCB's monetary policy at large.

Latvian law sets out detailed provisions seeking to guarantee the financial independence of the Bank of Latvia in discharging its tasks. The Bank of Latvia has a separate budget which is annually approved by its Council.[126] In line with the principle of full cost recovery, financial market participants bear all the costs related to the supervision and resolution of the financial institutions. These functions are financed by the contributions of the financial market participants, and the amount of such contributions is determined by the Bank of Latvian on an annual basis.[127] In addition, the assets of the Bank of Latvia cannot be used for covering any liabilities arising from the performance of resolution tasks.

Prohibition of monetary financing

The independence of the Bank of Latvia is reinforced by the prohibition of monetary financing which seeks to protect it from the government pressure to

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122 ECB Convergence Report, June 2022, 26; Opinion of the ECB of 11 May 2018 on the governance and financial independence of the Central Bank of Cyprus (CON/2018/23).

123 Cf. ECJ, 10 July 2003, *Commission* v *ECB*, C-11/00, EU:C:2003:395, paras. 130 and 132.

124 ECJ, 17 December 2020, *Commission v Slovenia (ECB archives)*, C-316/19, EU:C:2020:1030, para. 80; ECJ, 13 September 2022, *Banka Slovenije*, C-45/21, EU:C:2022:670, paras. 97 and 100; ECB Convergence Report, June 2022, 26.

125 ECB Convergence Report, June 2022, 26.

126 Article 21 of the Law on the Bank of Latvia.

127 Article 24 of the Law on the Bank of Latvia.

finance government deficits via central bank credit.[128] Latvian law reaffirms that the Bank of Latvia is prohibited from providing monetary financing in accordance with Article 123 TFUE and Article 21 of the Statute of ESCB and of ECB.[129] These treaty provisions prohibit the ECB and NCBs from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the EU and of Member States and from purchasing directly from them their debt instruments.[130] Even though resolution tasks are considered to be related to those referred to in Article 127(5) TFUE, the financing of resolution funds or financial arrangements as well as deposit guarantee or investor compensation schemes are considered to be government tasks for the purposes of the prohibition of monetary financing.[131]

The reaffirmation of the prohibition of monetary financing provides for additional safeguards that financial resources of the Bank of Latvia will not be used for the financing of the NRF and a DGS. More specifically, Latvian law provides that the funds of the Bank of Latvia other than those of the DGS cannot be used for making pay-outs to covered depositors or for the financing of the implementation of resolution tools.[132] The general prohibition of monetary financing also prevents the Bank of Latvia from assuming any liability of a financial institution in resolution or from financing any obligation of either a bridge institution or an asset management vehicle.[133] The law also specifies that the Bank of Latvia, in its role as the administrator of DGS and of NRF, may claim from the institution under resolution or from third parties the reimbursement of reasonable costs incurred in connection with the implementation of a resolution tool.[134]

3.2. Accountability mechanisms

The performance of resolution and related tasks is subject to the accountability mechanisms generally applicable to the Bank of Latvia. The concept of accountability here is used in a broad sense to refer to the explanation and justification of autonomous decision-making.[135] According to a widely

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128 R. Lastra, *International Financial and Monetary Law* (2nd ed., Oxford University Press, 2015), para. 2.130.

129 Article 6 of the Law on the Bank of Latvia.

130 For the definition of the terms 'overdraft facilities' and 'other type of credit facilities' see Article 1(1) (a) and (b) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty OJ L 332, 31.12.1993, 1. Cf. ECJ, 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, para. 102.

131 ECB Convergence Report, June 2022, 31.

132 Article 19(2) of the Law on Deposit Guarantee Schemes.

133 ECB Convergence Report, June 2022, 34 and 35.

134 Article 43(5) of the Resolution Law.

135 T. Padoa-Schioppa, *An institutional glossary of the Eurosystem*, presented at the conference on 'The Constitution of Eurosystem: the Views of the EP and the ECB', 8 March 2000.

accepted classification,[136] this Section will distinguish between democratic (3.2.1.), administrative (3.2.2.), and judicial accountability mechanisms (3.2.3.).

3.2.1. Democratic accountability

The Bank of Latvia is a derived legal person of public law. It is independent in decision-making and implementation, and it is not institutionally or functionally subordinated to State institutions.[137] This implies that the Bank of Latvia is placed outside the hierarchically organised public administration with the Cabinet of Ministers at its apex. The independence of the Bank of Latvia needs to be however reconciled with the principle of democracy.[138] The parliamentary scrutiny is all the more important 'given the potential impact that resolution actions may have on public finances, institutions, their customers and employees, and markets'.[139] To this end, the Parliament is vested with oversight and inquiry powers over the Bank of Latvia.

Parliamentary oversight

The Bank of Latvia derives its democratic legitimacy through two principal channels. First, it was established by a statute under which the Parliament has conferred on the Central Bank certain executive functions which require specific competence and autonomy. Second, this statute prescribes a special appointment procedure under which all the members of the Council of the Bank of Latvia are elected by the Parliament.[140] In counterparty, several accountability mechanisms are made at the disposal of the Parliament to ensure that the powers conferred on the Bank of Latvia are exercised appropriately.

According to the Law on the Bank of Latvia, the central bank is subject to the oversight of the Parliament. The main channel through which the Bank of Latvia could be held accountable is the possibility for at least five Members of the Parliament to address written questions to the Governor.[141] If these Members of the Parliament are not satisfied with a written reply, the Governor or his designated Deputy Governor has to also present the answer verbally during a

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136 G. Ter Kuile, L. Wissink, W. Bovenschen, *Tailor-made accountability within the Single Supervisory Mechanism*, (2015) 1 Common Market Law Review, 155-190; M. Lamandini, D.R. Muñoz, *SSM and SRB accountability at European level: What room for improvements?*, Directorate-General for Internal Policies, April 2020, 12-13; BCBS, Report on the impact and accountability of banking supervision, July 2015, 25.

137 Article 3(1) of the Bank of Latvia.

138 According to Article 1 of the Constitution of the Republic of Latvia, Latvia is an independent democratic republic.

139 Cons. 43 of the Preamble of the SRM Regulation.

140 Constitutional Court, 2 March 2016, No. 2015-11-03, para. 21; 16 October 2006, No. 2006-05-01, paras. 16.3 and 16.4.

141 Article 83 of the Law on the Bank of Latvia; Article 119 of the Law on the Rules of Procedure of the Parliament; on the right to ask questions see also Opinion of the ECB of 29 October 2012 on amendments to the Law on Latvijas Banka (CON/2012/80), para. 3.2.

parliamentary sitting.[142] The verbal explanations together with the written answers are published in the official newspaper.[143] Additionally, the Bank of Latvia is subject to reporting duties under which it has to provide an annual report to the Parliament and a biannual overview of its activities to the Budget and finance commission of the Parliament. Overall, the strong institutional independence of the Bank of Latvia has translated into soft democratic accountability mechanisms. The Parliament has nevertheless been active in the past in making use of its power to mandate *ad hoc* investigatory committees to inquire into the performance of supervisory and resolution tasks.

Parliamentary investigations

In accordance with Article 26 of the Constitution, an investigatory committee may be established 'for specific matters' upon a request of one-third of the Members of the Parliament. Due to this relatively low threshold, most of the investigatory committees have been so far set up upon the request of the political opposition. Their purpose is to politically assess the quality of the Government action in a certain policy area or to investigate certain incidents.[144] Since the restoration of the independence of Latvia, seven investigatory committees have been set up in order to inquire into banking incidents, including insolvencies of credit institutions.[145]

The investigatory committees are entitled to request information and explanations from public institutions, summon public officials and other persons, and hold a public hearing.[146] The conclusions and proposals of the investigatory committee are summarised in a report which has to be approved by the majority of its members. The final report is discussed in the parliamentary sitting and published in the official newspaper.[147] The competent authorities indicated in the final report have to assess the report and take measures to remedy the deficiencies identified therein.[148] The conclusions of parliamentary investigations are political in nature[149] and cannot substitute the examination of the competent authorities or the court.[150] The investigatory committees may nevertheless ask

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142 Articles 121 and 122 of the Procedural Rules of Saeima.

143 Articles 121(5) of the Procedural Rules of Saeima. Verbal explanations together with written answers are also published on *the website of the Parliament*.

144 R. Balodis, *Parlamentāru (parlamentārisku) izmeklēšanas komisiju statuss un to loma valsts pārvaldībā*, Jurista Vārds, 12 May 2015, No. 19 (871), 10-25.

145 Parliamentary commissions were, among others, set up to investigate the banking crisis in 1995, the bankruptcy causes of Banka Baltija AS in 1996, the resolution and restructuring of Parex AS in 2011 and the bankruptcy causes of Krājbanka AS in 2011. Reports of the parliamentary commissions are available *here*.

146 Article 6 of the Law on Parliamentary Investigatory committees (*Parlamentārās izmeklēšanas komisiju likums*).

147 Articles 13 and 14 of the Law on Parliamentary Investigatory committees.

148 Article 16(2) of the Law on Parliamentary Investigatory committees.

149 Cf. Constitutional Court, 1 October 1999, No. 03-05(99), para. 2.

150 According to Article 16 of the Law on Parliamentary Investigatory committees, the report of the investigatory committees and facts established therein are not binding on the courts and other persons.

a designated public prosecutor to assist with its inquiry. He may participate in the investigatory committee's meetings and, with the consent of the chairman, ask questions to the invited persons. This does not however alter the political nature of the inquiry carried out by a parliamentary committee. The role of a public prosecutor is limited to verifying whether the information at the disposal of the investigatory committee contains indications of a criminal offence.[151] Despite frequent criticism that these committees have often failed to produce tangible results,[152] parliamentary inquiries have proved to be a useful instrument for mobilising public opinion and exerting pressure on the government. In some cases, they have led to the resignation of senior officials of the FCMC.

In 2009, the Parliament established an investigatory committee in order to enquire into possible irregularities in the take-over and restructuring of Parex.[153] A number of its members were however denied access to information classified as state secret (e.g. the investment agreement under which the State took over Parex).[154] This might explain the fact that the conclusions of the investigatory committee were limited to a broad endorsement of the audit report of the State Audit Office[155] ('SAO') which had highlighted multiple irregularities in the course of the take-over and reorganisation of Parex.

Another parliamentary investigatory committee was established in 2014 with a view to scrutinising the sale of the public participation in Citadele banka. Similarly to its predecessor, the investigatory committee was vested with an atypical mandate to enquire into the sales process, the determination of the sales price and other contractual terms of the sales contract. It could be reasonably expected that administrative and judicial authorities would have been better placed than a political body to assess whether there had been any irregularities in the sales process. Nevertheless, the political opposition considered that the public importance of the subject matter justified parliamentary scrutiny of the sales process.[156] The report of the investigatory committee concluded that the Government had not properly assessed the risks related to the take-over of Parex[157] and that the sales process of Citadele banka had failed to maximise the sales price of its shares.[158]

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151 Article 8 of the Law on Parliamentary Investigatory committees.

152 R. Balodis, *Parlamentāru (parlamentārisku) izmeklēšanas komisiju statuss un to loma valsts pārvaldībā*, cit.

153 Report of the parliamentary investigatory committee of 24 May 2011 regarding possible irregularities in the take-over and restructuring of Parex A/S, available in Latvian *here*.

154 Report of the parliamentary investigatory committee of 24 May 2011 regarding possible irregularities in the take-over and restructuring of Parex A/S, 2.

155 See Subsection B(1) below.

156 Final Report on the sale of State participation in Citadele banka, paras. 20 and 21.

157 *Ibidem*, paras. 17, 19, 27.

158 *Ibidem*, paras. 29 to 61, 118, 120.

The parliamentary committee encountered similar difficulties as its predecessor in terms of access to confidential information.[159] The FCMC refused to provide information on the outcome of supervisory investigations concerning the risk exposures, the quality of the credit portfolio, the calculation of liquidity, and own funds requirements of Citadele banka which was requested by the investigatory committee with a view to assessing potential irregularities in the estimation of the sales price of the shares. The ECB and the FCMC also invoked their duty of professional secrecy in order to justify their refusal to provide information about the assessment of the reputation of the acquirers of the shares.[160] The ECB relied on Article 27(2) of the SSM Regulation to argue that it is entitled to disclose confidential information to a parliamentary inquiry committee only in compliance with Article 59(2) of the CRD.[161] The ECB considered however that the Latvian parliamentary investigatory committee did not meet the conditions set out in this provision since the Latvian Constitution and the Rules of Procedure of the Parliament confer on parliamentary investigatory committees only general investigatory tasks. The ECB appears to have been referring to the requirements of Article 59(2)(a) of the CRD under which the Member States may authorise the disclosure of certain prudential supervisory information to parliamentary inquiry committees which 'have a precise mandate under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions or for laws on such supervision'.[162] The ECB concluded that, due to the lack of a national legal basis, it was not able to derogate from strict secrecy provisions and disclose the requested information.[163]

The position of the ECB and the FCMC is not entirely convincing. Although the ECB is authorised to apply national law transposing directives,[164] it is subject to doubt whether it is competent to interpret Latvian law provisions of a constitutional nature. Indeed, the interpretation of the provisions setting out the mandate and powers of parliamentary investigatory committees is a prerogative of Latvian courts. A purposeful reading of these provisions, in the light of the principle of democratic accountability, would militate in favour of a broader construction of the mandate of parliamentary investigatory committees. The ECB and the FCMC might have overlooked the fact that the broad and general statutory mandate of the investigatory committees is consistent with their *ad hoc* nature under the Latvian Constitution. The mandate of a specific investigatory

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159 *Ibidem*, para 122.

160 The assessment was carried out according to Article 15 of the SSM Regulation 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, OJ L 287, 29.10.2013, 63 ('SSM Regulation').

161 See also Article 84(5)(a) of the BRRD.

162 Article 59(2)(a) of the CRD.

163 Final Report on the sale of State participation in Citadele banka, paras. 83 and 84; Annex 2 to the Final Report on the sale of State participation in Citadele banka, 8.

164 Article 4(3) of the SSM Regulation.

committee is specified in the decision of the Parliament to establish a committee for a specific matter.[165]

The new Law on the Bank of Latvia reinforces nevertheless the argument in favour of a narrow construction of the exceptions from the duty of professional secrecy. The law provides that the Bank of Latvia may disclose information, which has been obtained in the course of the performance of its supervisory and resolution tasks, only to persons and in the manner specified in the relevant financial regulations.[166] The transposing provisions of the CRD do not however entitle the Bank of Latvia to disclose supervisory information to a parliamentary investigatory committee.[167] This suggests that, despite their broad mandate, the means made at their disposal of parliamentary investigatory committees might not be sufficient to effectively exercise this mandate.

3.2.2. Administrative accountability

Contrary to democratic accountability, the Bank of Latvia is administratively accountable both at the national and the EU level. Administrative accountability mechanisms consist of audit control at the national level[168] and the obligation to explain to its EU counterparts any deviations from the EU soft law instruments.

Audit of the resolution tasks

The SAO is in charge of auditing the legality, effectiveness, and efficiency of the performance of resolution tasks and the use of public finances. Its legal status is guaranteed by Article 87 of the Constitution which provides that the SAO is an 'independent collegial institution'. Auditors General are appointed to their office and confirmed pursuant to the same procedures as judges, but only for a fixed period, during which they may be removed from office only by a court judgment.[169] The independence of the SAO implies that it is entitled to determine an audited entity, the time, type, and objective of the audit.

The SAO is vested with the power to carry out compliance and performance audits of the supervisory and resolution tasks performed by the Bank of Latvia. The compliance audits are carried out with a view to assessing whether the governance framework, programs, and activities of public authorities comply in all material respects with the law, policies, and best practices, whereas performance audits are intended to assess the economy, efficiency, and effectiveness of public action

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165 Article 3(2) of the Law on Parliamentary Investigatory Committees.

166 Article 77(2) of the Law on the Bank of Latvia.

167 Under Article 77(3) of the Law on the Bank of Latvia, confidential information other than that obtained in the course of the performance of supervisory or resolution tasks may be disclosed to a parliamentary investigatory committee if (i) it is necessary for the performance of its tasks and (ii) it is provided in a manner which allows to identify the financial market participant or to obtain information about internal procedures and measures implemented by the Bank of Latvia.

168 Audit of the accounts of the Bank of Latvia is carried out by an independent external auditor approved by the Governing Council of the ECB.

169 Article 88 of the Constitution of Latvia.

in a given area. The audit reports are in principle public. If, however, it contains confidential information, a redacted version of the report is made public.

The broad mandate of the SAO has to be nevertheless reconciled with the duty of professional secrecy of the Bank of Latvia. Latvia has not introduced the option provided in Article 59(2) of the CRD under which the Member States may authorise, subject to certain conditions, the disclosure of confidential information to courts of auditors. This restriction effectively delimits the subject matter of the audits to the evaluation of the adequacy of policies, the organisation of the resolution tasks, and the use of public funds to finance bank resolution. This latter question has been the subject matter of the two audits carried out by the SAO in connection with the bail-out and the restructuring of Parex.

In 2009 and 2010, the SAO assessed the use of public funds in the bail-out of Parex in the context of a financial audit of the execution of the public budget for the previous financial year.[170] The SAO concluded that at the time of intervention in the bank public authorities did not have an action plan for dealing with failing banks and the legal framework for crisis management was deficient. The FCMC and the Cabinet of Ministers had failed to intervene promptly in order to prevent the deterioration of the bank's financial standing. The FCMC had proposed to impose restrictions on the activities of Parex only two months after outflows of deposits from Parex had started to cause liquidity concerns.[171] The financial instability of the bank was further aggravated by the fact that the Cabinet of Ministers had imposed such restrictions only 24 days after the receipt of the proposal of the FCMC. In the meantime, more than half a billion euros had been withdrawn from the bank and the capital adequacy ratio of the bank had decreased from 8 to 6,42 per cent.[172] The SAO also concluded that the Cabinet of Ministers had taken the decision to take over the failing bank without an adequate analysis of the implications of this decision for the Latvian economy. As a result, the decision to provide public support to Parex had been taken without fully appreciating the amount of needed financial support and sources of funding,[173] and it had resulted in considerable losses for taxpayers.[174]

In 2016, the SAO performed a compliance audit of the sales process of Citadele banka with a view to assessing whether it was conducted in a way to maximise the sales price and, hence, the recoveries of the public support to Parex and Citadele banka. Similarly to the 2009 report, the audit reports pointed at several irregularities in the course of the take-over and restructuring of Parex.

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170 SAO, Financial audit of the 2008 annual statement of the Republic of Latvia regarding the execution of the State budget and the budgets of municipalities.

171 The FCMC has published its observations on the audit report on *its website*.

172 SAO, Audit Report No. 5.1-2-47/2008 of 15 September 2009 'Financial audit of the of the 2008 annual statement of the Republic of Latvia regarding the execution of the State budget and the budgets of municipalities', paras. 20-25.

173 *Ibidem*, paras. 26-28.

174 *Ibidem*, paras. 29-32.

Compliance with EU soft law instruments

The Bank of Latvia, in its capacity of supervisor and regulator, enjoys wide discretion in deciding whether to comply or not with the EU soft law instruments. Its margin of discretion has to be nonetheless exercised in accordance with Article 16(3) of the EBA Regulation[175] under which it has to 'make every effort to comply with those guidelines and recommendations'. The Bank of Latvia has to either comply or explain why it does not intend to comply with the respective soft law instrument. In the past, the FCMC has generally manifested a commitment to comply with the EBA guidelines. In case of deviations, the FCMC has usually argued that EBA guidelines are not adapted to specific characteristics of the business model of the Latvian banks (e.g. higher liquidity risk due to on-demand non-resident deposits).[176]

The Bank of Latvia enjoys wide discretion as to the choice of instrument for incorporating the EBA guidelines in its supervisory practices. It is entitled to adopt regulations in accordance with the purpose and scope of application of the Resolution Law and in observation of the EBA guidelines.[177] It may also rely on its enforcement powers in order to translate the EBA guidelines into binding requirements for financial institutions.[178] In choosing the most appropriate course of action, the Latvian authority is usually differentiating between the EBA guidelines which are addressed to the market participants and those which are addressed to the national competent authorities.

In case the EBA guidelines are addressed to national authorities, the FCMC has taken the view that they are directly applicable in the national legal order deriving their normative value from the provisions they intend to clarify. For instance, EBA Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU are implemented in the internal procedures, policies and practices of the supervisor.[179] The ECJ has nevertheless implicitly admitted that an EU soft law instrument becomes binding on the Member State where the national competent authority has declared that it will comply with this instrument and has published a notice to this effect.[180] In order to comply with the latter condition, the Latvian authority publishes a notice on its website that it intends to follow the respective EU soft law instrument.[181] Once

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175 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, OJ L 331, 15.12.2010, 12.

176 Cf. Guidelines compliance table, EBA/GL/2015/Appendix 1, Guidelines on methods for calculating contributions to deposit guarantee schemes, 22 September 2015.

177 Article 3(4) of the Resolution Law.

178 Article 50(2) of the Credit Institutions Law.

179 Guidelines compliance table, EBA/GL/2015/03 Appendix 1, 29 September 2015 (updated 2 October 2020).

180 Cf. ECJ, 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, para. 26 et seq.

181 Cf. Paziņojums par Eiropas Banku iestādes pamatnostādņu EBA/GL/2021/09 piemērošanu, available *here*.

this notice has been published, the Latvian authority may rely on the enforcement powers in order to ensure the compliance of market participants by constructing the relevant legal provisions in light of the guidelines.[182]

If, however, EBA guidelines are addressed to market participants, the Latvian supervisor usually uses its regulatory powers in order to transform them into hard law.[183] The supervisor has considered the upgrade of the normative force of the EU soft law instruments is appropriate since, under Article 16(3) of the EBA Regulation, the EBA guidelines and recommendations have only limited enforceability against financial institutions which are required to 'make every effort to comply' with these legal acts. Soft law instruments can be thus invoked against their addressees insofar as they accompany a binding legal norm, such as an EU secondary law provision.[184] For instance, the FCMC has transposed the EBA 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 into its binding regulations.[185]

It is not however always easy to draw a clear line between the transposition of directives and the incorporation of EU soft law instruments into national supervisory practices.[186] Indeed, EU soft law instruments, such as the abovementioned EBA Guidelines, accompany directives by clarifying or complementing their provisions. It could be theoretically argued that national regulations implementing these guidelines are intended to transpose the relevant provision of the BRRD by detailing and clarifying its meaning in the national legal order. In the context of a decision of another EU Member State to delegate the power to the Ministry of Finance to transpose directives and accompanying EBA guidelines, the ECB has warned against fragmentation of the legal framework that 'would result in a considerable additional burden not only on the SSM, which would have to consider and enforce at worst 19 different prudential regimes for credit institutions but also on bank groups themselves'.[187] The practice could also

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182 Cf. Opinion of AG Bobek, 15 April 2021, CJEU, *FBF*, EU:C:2021:294, para. 48: once the decision of the national authority to comply with guidelines is made, 'the initially non-binding nature becomes very much binding, as the 'nominal addressee' (the competent supervisory authority) becomes an effective 'enforcer''.

183 The information on the implementation of EBA guidelines is available in Latvian *here*.

184 J. Sirinelli, *L'incertitude normative en droit de l'Union européenne*, Annuaire de droit de l'Union européenne, 2011, 113.

185 Bank of Latvia Regulations No. 1304 of 8 July 2024 'Normative Regulations on Establishing the Circumstances when an Institution shall be Considered as Failing or Likely to Fail'.

186 For instance, in the context of reviewing the legality of the ECB decision opposing the proposal of PNB Banka to acquire qualified participation in another Latvian bank, the General Court is referring to the FCMC regulations transposing the Joint Guidelines of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, published on 20 December 2016 (JC/GL/2016/01). The General Court considers that these regulations form part of the national law transposing Articles 22 and 23 of the CRD that the ECB has to apply pursuant to Article 4(1) of the SSM Regulation. Cf. GC, 7 December 2022, *PNB Banka v ECB*, T-330/19, EU:T:2022:775, para. 93.

187 Opinion of the ECB of 2 September 2015 on bank resolution (CON/2015/31), para. 3.1.4.

impinge on the power of the ECB, in its role as a direct supervisor of important credit institutions,[188] to decide whether to comply or not with the relevant EBA guidelines. Indeed, 'regulations issued by the [national authority] may conflict with the ECB's discretion under the EBA Regulation to incorporate the guidelines into its supervisory practices: the regulations, which would qualify as national legislation transposing directives,[189] could vitiate the measure of discretion available to the ECB under the 'comply or explain' procedure'.[190] In the light of these considerations, the ECB concluded that 'Member States should refrain from setting obstacles both to uniform supervisory practice and to the exercise of supervisory discretion by the ECB within the SSM. In view of the principle of supremacy of Union law and the ECB's status as an independent institution, the ECB will not be bound by any governmental regulations or similar measures which may affect its independence or the smooth functioning of the SSM'.[191]

3.2.3. Judicial accountability

Article 92 of the Latvian Constitution guarantees the right of everyone to defend his rights and lawful interest in a fair trial. This right entails not only the right to challenge acts of the Bank of Latvia before the court but also the right to claim losses arising from its unlawful conduct.

Judicial review

With the institution of the SRM, the Latvian legislator has embraced the idea of shifting important resolution tasks from courts to the administrative authority. Under the bank insolvency regime, the courts have the power to commence and end insolvency proceedings and to review the lawfulness of the decisions of the insolvency administrator. The institution of a legal framework for bank recovery and resolution has nevertheless shifted these powers to the resolution authority and limited the role of the judge to *ex post* control of crisis prevention and management measures. This shift of powers has been justified by the fact that the court review is time-consuming and reactive in nature. It has also been argued that resolution authorities are also better equipped than courts to consider the economic implications of bank failures for the rest of the economy.[192]

A number of derogations from the generally applicable administrative judicial review process have been made in order to ensure expeditious and

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188 Article 9(1) of the SSM Regulation.

189 According to Article 4(3) of the SSM Regulation, 'the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives'.

190 Opinion of the ECB of 2 September 2015 on bank resolution, para. 3.1.6.

191 *Ibidem*, para. 3.1.8.

192 IMF and World Bank, *An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency*, 17 April 2009, 23-24; S. Cassese, *A new framework of administrative arrangements for the protection of individual rights*, ECB Legal Conference 2017 'Shaping a new legal order for Europe: a tale of crises and opportunities', 4-5 September 2017, 239; P. Hakkarainen, *Restructuring, resolution and insolvency: shift of tasks from judicial to administrative authorities*, *ibidem*, 313.

effective judicial review.[193] The access to court is being made subject to a prior internal administrative review of the decisions of the Resolution Committee. A person adversely affected by a decision of the Resolution Committee has to first challenge this decision to the Council of the Bank of Latvia.[194] The decisions of the Council (e.g. the decision to apply a resolution measure) may be immediately appealed to the court. In reviewing the decision of the Resolution Committee, the Council has to act as a functionally independent body[195] and ensure the respect of procedural guarantees available in administrative review procedures.

In the interest of an effective resolution process, and contrary to the generally applicable procedure,[196] the application to the Council or to the court has no suspensive effect. The decision of the Bank of Latvia to take a crisis management measure is immediately enforceable.[197] The applicant may however apply to the court for the suspension of the enforcement of the measure, which is unlikely to be successful in the crisis situation. In addition, contrary to the generally available judicial review in three instances (district administrative courts, regional administrative courts and Administrative Law Department of the Supreme Court), the decisions of the Bank of Latvia may be reviewed in two instances only. These decisions may be appealed to the Regional Administrative Court which decides the case on its merits. The judgment of the Regional Administrative Court is subject to appeal (cassation) on a point of law to the Supreme Court of Latvia.[198] Despite these statutory guarantees, some of the practices of the supervisor may obstruct the effective exercise of the right to effective legal remedy in practice.

The first difficulty concerns access to court in cases where the supervisory and resolution authority has acted informally in exercising its early intervention powers. In the past, the FCMC had the practice of requesting the management board of banks to sign a statement of commitment (self-declaration) not to engage, on behalf of the bank, in certain banking activities until the regularisation of its situation (e.g. raising of additional capital, complying with large exposure limits). For instance, such statements could provide a commitment of each member of the management board not to extend loans to non-residents or loans exceeding a certain threshold, not to enter into transactions with certain categories of financial instruments and not advertise savings products with interest rates exceeding the average interest rate in the local market. The reliance on such informal acts in order to procure acceptance by the banks of restrictions on their activities is however problematic from a legal point of view.

There is some uncertainty as to the legal qualification of the statements of commitment under Latvian law. In accordance with the Law on Administrative

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193 Cf. Article 85(3) of BRRD.

194 Article 54(5) of the Law on the Bank of Latvia.

195 Explanatory Memorandum (Annotation) to the Proposal of the Law on the Bank of Latvia, paras. 9.4 and 89.9.

196 Articles 80(1) and 185(1) of the Administrative Procedure Law.

197 Article 131(1) to (5) of the Resolution Law.

198 Article 32 of the Law on Deposit Guarantee Schemes.

Procedure, the supervisory and resolution authority has to adopt an administrative act in order to impose restrictions on the banks and their management board.[199] Decision-making in a formalised procedure is also supposed to ensure that the supervisory and resolution authority respects substantive and procedural law guarantees in determining the nature and the scope of restrictions applicable to banks. It could be theoretically argued that unilateral statements of commitment do not establish any public law relationship and the concerned management board members can unilaterally withdraw such statements. It is however more likely that a statement of commitment would be classified as an implementing act of an informal administrative act of the supervisor.[200] If this qualification was retained, the signatories of the statements would have the right to request the FCMC to formalise its act in writing within one month from the date of request.[201] The addressee would then have the right to appeal this formalised act within one month from the date of notification.[202] The risk resides in the fact that the signatory of the statement could miss the one-month deadline for requesting the formalisation of the administrative act and, therefore, would be time-barred from lodging an appeal against the formalised act.

The access to the court may be also obstructed where the right of representation of the bank passes, by operation of law, from its management bodies to an administrator of the resolution or liquidation proceedings. Under Latvian law, the administrator assumes all the powers, rights and obligations of the managing bodies of the bank,[203] including the right to introduce and maintain an action against a decision of the supervisory and resolution authority. The administrator might nevertheless be reluctant to appeal the decision of the supervisor not to undermine his relationship with this authority. This issue was at the heart of the *Trasta Komercbanka*[204] case in which the insolvency administrator revoked the power of attorney issued by the former management of the bank to an attorney-at-law representing the bank in the proceedings directed against the ECB decision on the withdrawal of the banking license. The national court had also rejected the request of the former management board to maintain its right of representation for the purposes of lodging an appeal against the acts of the ECB, SRB, and of FCMC.[205]

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199 According to the law on administrative procedure, public authorities may exercise their public functions in relation to private parties only by the legal instruments envisaged by law. There is a limited number of such instruments: an administrative act, operative action and public law contract.

200 Article 1(3) of the Administrative Procedure Law.

201 Article 69(2) of the Administrative Procedure Law.

202 Article 70 of the Administrative Procedure Law.

203 Article 322(1) of the Commercial Law.

204 ECJ, 5 November 2019, *ECB v Trasta Komercbanka*, joined cases C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923 (ECJ, *Trasta Komercbanka*). M. Rudzītis, *Legal Standing in Annulment Actions for the Withdrawal of the Banking License*, (2020) 3 Review of European Administrative Law.

205 Riga City Court (Vidzeme District), the decision of 14 March 2016; a similar issue has arisen in the context of the insolvency proceedings of PNB Bank AS. Cf. Riga District Court, the decision of 12 September 2019, No. C30710019; ICSID, proc. order No. 9 of 9 August 2021, *AS PNB Banka and Ors. v Republic of Latvia*, ARB/17/47.

The ECJ concluded that, due to a conflict of interest of the administrator, the bank could be deprived of an effective legal remedy. A potential conflict of interest could arise, on the one hand, from the involvement of the FCMC in the decision-making procedure leading to the withdrawal of the banking license, on the other hand, from the specific links between the FCMC and the administrator. The appointment and removal procedure of an administrator implies a relationship of mutual trust between the FCMC and the administrator. The administrator is appointed by the court on the proposal of the FCMC and may also be discharged from his duties if the FCMC no longer has confidence in him.[206] The administrator might not exercise the right, on behalf of the bank, to appeal a decision of the supervisor if the latter could request the court to discharge the administrator from his functions. Furthermore, if the administrator's challenge of the supervisor's decision was successful, this could deprive the liquidation proceeding of any legal basis. This course of action would conflict with his mandate to bring about the total cession of the bank's activities.[207] In order to ensure the respect of effective judicial protection, the courts have recognised that the former management board of a bank in liquidation maintains the right of representation insofar as it is necessary to appeal the acts of the supervisory and resolution authority.[208]

Non-contractual liability

In accordance with Article 92 of the Latvian Constitution, everyone, whose rights are violated without justification, has a right to commensurate compensation. Similarly, the principle of good administration[209] requires that the Latvian supervisory and resolution authority, when acting within the framework of the SSM or of the SRM, compensates losses incurred by third parties in the performance of its duties. Such liability may either incur for the Latvian State under EU or international law[210] or directly for the Bank of Latvia under the national liability regime. Nevertheless, the non-contractual liability of the Bank of Latvia for supervisory and resolution acts remains relatively limited due to a qualified liability standard under national law.

Latvian legislator has made use of the possibility, available under Article 3(12) of the BRRD, to limit the liability of the NRA and its respective staff for acts and omissions in the course of discharging their functions.[211] Latvian law

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206 Articles 377(2) and 387(2) of the Civil Procedure Law.

207 ECJ, *Trasta Komercbanka*, paras. 70-76.

208 *Ibidem*, paras. 78-79; GC, 7 December 2022, *PNB Banka v ECB*, T-275/19, EU:T:2022:781, paras. 59-62; GC, 7 December 2022, *PNB Banka v ECB*, T-301/19, EU:T:2022:774, paras. 47-51; GC, 7 December 2022, *PNB Banka v ECB*, T-330/19, EU:T:2022:775, paras. 62-66.

209 Article 41(3) of the EU Charter of Fundamental Rights.

210 PNB Bank its UK shareholders have brought a claim against the Republic of Latvia before the International Centre for the Settlement of Investment Disputes under the bilateral investment treaty concluded between the United Kingdom and Latvia and the Energy Charter Treaty. ICSID, *AS PNB Banka and Ors. v Republic of Latvia*, ARB/17/47.

211 See also Principle 2.6 of FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014.

provides that the Bank of Latvia is liable for the losses caused by the members of its Council, its employees, and representatives in performing of their duties only if these members, employees, and representatives have committed willful misconduct or gross negligence.[212] Furthermore, employees and representatives appointed by the Bank of Latvia (e.g. temporary administrator or special manager of an entity under resolution) are not personally liable for the losses, and any third party claims for the compensation of such losses need to be directed against the Bank of Latvia.[213] The same liability regime applies to the losses arising from the performance of resolution, supervisory, monetary and other tasks of the Bank of Latvia.

The prohibition of monetary financing is further detailed in provisions seeking to insulate the resources of the Bank of Latvia from the losses arising from the exercise of its non-central bank functions. Any court decision against the Bank of Latvia for the compensation of losses incurred as a result of the exercise of its supervisory or resolution functions is not enforceable, and other post-judgment constraint measures cannot be taken, against the assets that are used for monetary and other central bank operations.[214] The losses are to be compensated from the budget of the Bank of Latvia which is made from the supervisory fees of the market participants.

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212 Article 26 of the Law on the Bank of Latvia.

213 On the limits arising from the prohibition of monetary financing see ECJ, 13 September 2022, *Banka Slovenije*, C-45/21, EU:C:2022:670, paras. 56 and 57.

214 Article 26(2) of the Law on the Bank of Latvia.

Lithuania

Ingrida Večerskytė

Summary. 1. Introduction – 2. The Bank of Lithuania – 2.1. Institutional arrangements for resolution in Lithuania – 2.2. Governance arrangements at the BoL – 2.3. Supervision and Resolution functions – 2.4. Soft law and SRB decisions

1. Introduction

The Ministry of Finance of the Republic of Lithuania decided to appoint the Bank of Lithuania (BoL) as the national resolution authority (NRA) in 2015. It was done by the Law on the Bank of Lithuania (The Bank of Lithuania (8) perform the functions assigned by laws of the Republic of Lithuania to the financial sector resolution authority, except in cases where such functions are performed by the Single Resolution Board in accordance with the provisions of 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 (OJ 2014 L 225, 1); it shall also perform the functions assigned to a national resolution authority in accordance with Regulation (EU) No 806/2014).

Since then, there have been no significant changes in this matter.

Before the transposition of BRRD, there was no resolution authority in Lithuania. However, since 2009 August 4 the Government of the Republic of Lithuania had the right to apply financial stability strengthening measures: (1) state guarantees; 2) redemption of bank assets; 3) state participation in bank capital; 4) takeover of bank shares for public needs. The Government could apply these measures when the following conditions were: (1) the bank had liquidity problems and (2) it was concluded that the stability and reliability of the banking system would threaten without application of these measures. The participation of the BoL in application of financial stability strengthening measures was basically related to the advisory role of the BoL as the supervisory authority, i.e. in case of the application of these measure the BoL should issue a conclusion whether the appropriate bank had liquidity problems. The BoL had also the right to submit its proposals regarding the selection of the appropriate measure to be applied to strengthen financial stability in a specific case and the conditions for the application of this measure.

2. The Bank of Lithuania

The BoL belonging by the right of ownership to the State of Lithuania, is an independent institution, the central bank of the Republic of Lithuania. It has been established by the Constitution of the Republic of Lithuania and carries out its activities in compliance with the Law on the Bank of Lithuania and other applicable laws.

According to the Law on the Bank of Lithuania, in accordance with the Treaty on the Functioning of the European Union, the primary objective of the BoL shall be to maintain price stability. Without prejudice to its primary objective, the BoL shall, within the range of its competence, support the general economic policies in the European Union with a view to contributing to the

achievement of the objectives of the European Union established in the Treaty on the Functioning of the European Union, and support the economic policy carried out by the Government of the Republic of Lithuania, without prejudice to the primary objective of the BoL and to the extent this meets the objectives of the European Central Bank and of the European System of Central Banks.

In implementing the provisions of the Treaty on the Functioning of the European Union and acting as an integral part of the European System of Central Banks, the Bank of Lithuania performs also the following functions:

a) issues banknotes and perform other related activities;

b) implements monetary policy;

c) manages, uses and disposes of the official foreign reserves of the Bank of Lithuania;

d) encourages stable and efficient operation of payment and securities settlement systems;

e) collects statistical information necessary for the performance of the tasks of the European System of Central Banks from state and municipal institutions and economic entities.

The BoL also exercises financial market supervision, settles disputes between the consumers and financial market participants out of court, issues coins, implements a policy that aims to contribute to the protection of the stability of the entire financial system, including strengthening the resilience of the financial system and the reduction of systemic risks in order to ensure sustainable financial sector's contribution to economic growth and, as already mentioned above, performs the functions assigned by laws of the Republic of Lithuania to the financial sector resolution authority, except in cases where such functions are performed by the Single Resolution Board in accordance with the provisions of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014.

2.1. Institutional arrangements for resolution in Lithuania

De jure the national resolution authority is the BoL, but de facto it is a Resolution Division. This Resolution Division was established in January 2016 and is within the Financial Stability Department (FSD).

The entire organisation structure of the BoL you can find *here*.
The Resolution Division is responsible for the preparation of all decisions in the field of resolution delegated by the BRRD:

a) drafts the resolution plans together with colleagues from Single Resolution Board (SRB) and other NRAs for significant institutions

and significant branches and is also responsible for preparing plans for less significant institutions.

b) collects standardized at EU and Banking Union level information packages (LDR template, CF template) and other information needed for resolution planning or collection of contributions.

c) submits proposals to the Board of the BoL regarding the determination of the MREL targets for the LSIs and participates in determination process of the MREL targets for the significant institutions.

d) collects administrative contributions for the resolution function and also helps the SRB to collect contributions to the Single Resolution Fund.

e) takes action to be prepared for crisis situations (for example, drafts Crisis Management Manual) and in case of crisis it is responsible for the proposals how to resolve it. Currently, the NRA has no powers in the field of bankruptcy, except for the exclusive right to initiate bankruptcy proceedings by applying to the court for the entities being under resolution.

f) is involved in the drafting of the laws (for example, in the transposition of BRRD2) and in the drafting of secondary legislation. The division prepares also the draft of the decisions of the Board of the BoL related with the Resolution Division responsibilities (for example, adoption of resolution plans, determination of the MREL and etc.).

g) represents the BoL as NRA in the EBA, the SRB, as well as in the Council of the European Union and the European Commission on issues related to resolution.

The division has five employees, including Head of the Division: two lawyers and three economists.

The state company "Deposit and Investment Insurance" is responsible for the administration of three funds and acts on its behalf:

1) the national Resolution Fund,
2) the Deposit Insurance Fund,
3) the Insurance Fund of Liabilities to Investors.

This state company is established by the Government of the Republic of Lithuania on the basis of state-owned property in accordance with the procedure laid down by laws of the Republic of Lithuania. The rights and duties of this company is realised by the Ministry of Finance of the Republic of Lithuania.

The resolution authority sets the annual percentage of regular (ex ante) contributions to the National Resolution Fund each year, and the state company "Deposit and Investment Insurance" collects them and administers the fund itself.

2.2. Governance arrangements at the BoL

The BoL is governed by the Board of the BoL. The Board is comprised of a Chairperson, two Deputy Chairpersons, and two Members of the Board. The Members of the Board oversee certain functions and fields of activities of the BoL that are divided into 10 areas: monetary policy, financial stability, economics, supervision, banking, payment systems, research, statistics, cash, and organisational management (administration). Each member is responsible for certain areas.

The Board of the BoL makes decisions on matters of competence of the BoL. Meetings of the Board of the BoL are held, when necessary, but at least once a month. The procedure for holding board meetings is determined by the work regulations of the Board of the BoL. The Board meetings are convened and chaired by the Chairperson of the Board or, on his behalf, by the Deputy Chairperson of the Board. The meeting of the Board must also be called if at least three members of the Board demand it. Board meetings are legal when at least three Board members participate in them. Decisions of the Board of the BoL should be taken by a majority of at least three votes.

According to the Law on the Bank of Lithuania, the Chairperson of the Board of the BoL is appointed for a term of five years and dismissed prior to the expiration of his/her term of office by the Seimas (the Parliament) of the Republic of Lithuania, on the recommendation of the President of the Republic. Deputy Chairpersons and Members of the Board of the BoL are appointed for a term of six years and dismissed prior to the expiration of their term of office by the President of the Republic on the recommendation of the Chairperson of the Board of the BoL. The Chairperson of the Board of the BoL may be appointed to his/her position for unlimited number of terms of office. The Deputy Chairpersons and Members of the Board may be appointed to their respective positions for no more than two consecutive terms.

The Chairperson of the Board of the BoL, his deputies and members of the Board can only be citizens of the Republic of Lithuania, if they are under the age of 65 by the date of appointment.

Article 12 of the Law on the Bank of Lithuania sets the dismissal criteria of the Members of the Board of the BoL (if they do not fulfil the conditions required for the performance of their duties or they have been found guilty of serious misconduct).

2.3. Supervision and Resolution functions

As already mentioned above, the supervisory authority is also within the BoL. In 2011 three state institutions that supervised separate financial market segments (banking, insurance and capital markets) were merged and the responsibility for the supervision of the whole financial market was shifted to the BoL. Since 1 January 2012 the BoL is the only supervisor of financial market in Lithuania. The

amendment of the Law on the Bank of Lithuania was the legal basis by which the supervisory functions were delegated to the BoL.

The supervisory authority consists of 3 departments: Financial Services and Markets Supervision Department, Banking and Insurance Supervision Department and Legal and Licensing Department.

So, both authorities (the resolution authority and supervisory authority) are in different structural units of the BoL. Furthermore, both authorities are accountable to different members of the Board of the BoL.

The cost of both authorities is borne in principle by financial market participants. However, the resolution authority and the supervisory authority collect their administrative contributions separately and in accordance with their own rules.

As the supervisory authority and resolution authority is within one institution, there are timely and more efficient cooperation between authorities:

– these authorities have quarterly meetings to discuss current issues in the banking sector.

– there are established resolution workshop group with representatives from the supervisory and the resolution authorities. In this workshop, they discuss and look for the solution needed to implement resolution measures.

– these authorities have agreed on the scope and timing of exchange of the supervisory and resolution information. This agreement is approved by the order of the Chairperson of the Board.

As stated in the MoU between the SRB and the ECB in respect of cooperation and information exchange the information received from the SRB by the ECB is shared with the national competent authorities involved in the respective joint supervisory team and information received from the ECB by the SRB is shared with the national resolution authorities involved in the respective internal resolution team. This is done by organizing regular meetings of these teams.

As already mentioned above, the resolution authority is within the Financial Stability Department, which performs also macroprudential authority functions. If the Resolution Division disagrees with the opinion of the Department Director, decisions of this division may be approved by the Board without the consent of the director. This is regulated by the internal legal acts of the Bank of Lithuania (these acts are not public).

2.4. Soft law and SRB decisions

As for the implementation of soft law from relevant EU bodies, this is done either by declaring the intention to comply or not to comply with them by the internal legal act which depending on the addresses to which that soft law applies

can be public or non-public or by transferring the relevant provisions of soft law to legal acts issued by the BoL.

As for the implementation of the SRB decisions, then national resolution authorities should implement all decisions addressed to them by the SRB. The Lithuanian national resolution authority implements the SRB decisions by adopting implementing acts, which are addressed to the respective credit institution. Implementing legal acts are prepared by the Resolution Division and approved by the Board of the BoL, as in the case of other decisions in the field of resolution. After making such a decision, both the credit institution in respect of which this decision was taken and the SRB are informed about its adoption. Also, the NRA has the duty in such cases to cooperate with and assist the SRB in the performance of its monitoring duty.

Luxembourg

Frédéric Allemand

Summary. 1. The institutional framework for resolution in Luxembourg – 1.1. The 'Commission de surveillance du secteur financier', Luxembourg's resolution authority – 1.2. The 'Fonds de Résolution Luxembourg' – 1.3. The Fonds de Garantie des Dépôts Luxembourg and the Council for the Protection of Depositors and Investors – 1.4. The Systemic Risk Board – 1.5. The Consultative Committee for Resolution – 1.6. The Luxembourg prudential supervisory authority – 2. The legal regime for the independence and accountability of the resolution board – 3. Concluding remarks

1. The institutional framework for resolution in Luxembourg

The Law of 18 December 2015 on *the resolution, reorganisation and winding up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes* (hereinafter "BRR Act") transposes into national law Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014[1] (hereinafter "BRRD"), as well as Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on *deposit guarantee schemes* (hereinafter "DGSD").[2] The presentation of the BRR Law in October 2015 followed the opening of infringement proceedings by the Commission in May 2015 (Commission, 2015).[3] In accordance with Article 130 of Directive 2014/59/EU, Luxembourg, like the other Member States, had until 31 December 2014 to transpose this Directive.

The BRR Act includes all the substantive and procedural rules and instruments applicable to the resolution, reorganisation and winding-up of credit institutions and certain investment firms. It also defines the legal and institutional framework for depositor and investor protection. Part IV of the BRR Law makes a series of amendments to Luxembourg financial legislation (in particular the Law of 5 April 1993 on the financial sector,[4] the Law of 5 August 2005 on financial collateral arrangements,[5] the Law of 24 May 2011 on the exercise of certain rights by shareholders at meetings of listed companies),[6] in order to ensure the compatibility of these texts with the new resolution framework. On an institutional level, Article 207 of the BRR Law introduces a new Article 2(2) and a new Section 4-1 entitled "Resolution Board", consisting of nine articles (Articles 12-1 to 12-9), to the Law *establishing a financial sector supervisory commission* (hereinafter "CSSF Act").[7] The legal framework governing the resolution authority in Luxembourg is thus split between the BRR Act for material and procedural aspects and the CSSF Act for institutional aspects.

The BRR Act and the CSSF Act have been amended several times since 2015. The changes to the institutional framework are essentially limited to extending the resolution powers of the resolution authority to central counterparties in Luxembourg.[8] The institutional arrangements to avoid any conflict of interest

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1 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, *Official Journal of the EU* (hereafter 'OJ') L 173/190, 12.6.2014.

2 Mémorial A no. 246, 24 December 2015; last amended by the law of 15 July 2024 on the transfer of non performing loans (Mémorial A no. 292, 18 July 2024).

3 Directive 2014/59/EU had to be transposed by 31 December 2014 and Directive 2014/49/EU, depending on the provisions, either by 3 July 2015 or 31 May 2016.

4 Mémorial A no. 27, 10 April 1993; last amended by the law of 15 March 2023 (Mémorial A no. 147, 17 March 2023).

5 Mémorial A no. 128, 16 August 2005.

6 Mémorial A no. 109/2011, 27 May 2011.

7 Law of 23 December 1998 establishing a financial sector supervisory commission. Mémorial A no. 112, 24 December 1998; last amended by the law of 20 July 2022 (Mémorial A no. 371, 20 July 2022).

8 See also Articles 5 and 6 of the Act of 20 July 2022, cited above.

between the new functions entrusted to the CSSF and all the other functions with which it is entrusted have been strengthened.

In the remainder of this study, all references to the amended versions of the BRR Act, the CSSF Act and the law on the financial sector are made to the French and English versions of the texts proposed, for information purposes, by the CSSF on its website. Unless otherwise stated, references to the BRR, CSSF and financial sector acts are deemed to refer to the latest amended French version of these acts.[9]

1.1. The 'Commission de surveillance du secteur financier', Luxembourg's resolution authority

In accordance with Article 3(1) of the BRR Act and Article 2-2(1) of the CSSF Act the 'Commission de surveillance du secteur financier' (Financial sector supervisory commission, hereinafter "CSSF") is designated as "the resolution authority within the meaning of Article 3(1) of the BRRD in Luxembourg". The reference in Luxembourg legislation to the BRRD was unnecessary. As noted by the Council of State,[10] the correct transposition of Article 3 BRRD requires determining the resolution authority, without necessarily having to refer to the Directive.[11] By cross-reference effect of Regulation (EU) No 806/2014 (hereinafter "SRMR") to Article 3(1) of the BRRD, the CSSF also constitutes the "national resolution authority in Luxembourg" for the purposes of the application of the SRMR. This status of national resolution authority is repeated in Article 3(1) of the BRRD, as well as in Article 2-2(2) of the CSSF Act, although the SRMR is mandatory and directly applicable.

In addition, since a law of 20 July 2022,[12] the CSSF is also the resolution authority for central counterparties in Luxembourg, within the meaning of Article 3(1) of Regulation (EU) 2021/23 of the European Parliament and of the Council.[13]

The Single Resolution Board (hereinafter referred to as the "SRB") has jurisdiction over some credit institutions established in Luxembourg. Therefore, this EU body and the CSSF are referred to as the "Luxembourg resolution authorities".[14]

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9 All the consolidated versions of the laws applicable to the resolution of credit institutions and investment firms are available on *the CSSF website*.

10 Council of State ('Conseil d'Etat'), Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 6.

11 As for the obligation of a reference to the directive in the transposition measures or at the time of the official publication of the transposition measures (see Article 130 of the BRRD), the Court of Justice has ruled that this type of obligation (regular for directives of a certain complexity) means that the Member States must adopt a positive transposition act (CJ, *Commission v Poland*, case C-29/14, point 49; CJ, *Commission v Romania*, case C-549/18, point 13).

12 Precited.

13 Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2021 on a framework for the recovery and resolution of central counterparties, OJ L 22/1, 22.12.2021.

14 Article 59-15 of the Financial Sector Act.

The CSSF was set up in 1998 as an "establishment governed by public law", with the initial task of exercising prudential supervision over most financial sector players (credit institutions, UCITS,[15] investment firms, financial transaction advisers, brokers, market makers, professional depositories of securities or other financial instruments, stock exchanges). The BRR Act of 18 December 2015 extended the CSSF's functions to the resolution of credit institutions.[16] Although the BRRD accepts that Member States may entrust resolution functions to already existing public authorities (e.g. national central bank, competent ministry or any other administrative authority), it specifies that this possibility must be "exceptional" when it concerns an authority exercising prudential supervision functions, due to the risks of conflict. The BRRD therefore requires that "adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between [all those functions]".[17] In the absence of any precision as to the nature of these "structural arrangements", it must be assumed that they refer to any legal rule or administrative practice which ensures or has the effect of guaranteeing the independence of the decision-making of the authority concerned when carrying out its resolution functions. In the case of Luxembourg, the small size of the country does not allow for a proliferation of administrative authorities. Furthermore, the creation of a new public institution would have resulted in additional operating costs and a duplication of tasks already carried out by the CSSF, particularly with regard to information collected from credit institutions.[18] Accordingly, the CSSF shall exercise the tasks and powers conferred on it as the resolution authority by the BRR Act *through* a new internal body – the Resolution Board.[19] By way of derogation from the CSSF's internal organisational rules, the Resolution Board is the CSSF's "highest executive authority" for the purposes of exercising the tasks and powers conferred on the CSSF as resolution authority.[20] This means that the Resolution Board has the powers of assessment, decision, administration, external representation (including judicial and extra-judicial) normally vested in the management of the CSSF. Therefore, any reference to the Resolution Board in the BRR Act should be read as a reference to the CSSF in its resolution capacity. The Luxembourg Council of State has emphasised the special nature of this institutional arrangement: although the CSSF is *legally* the national resolution authority, the exercise of resolution tasks is carried out by an administrative structure and an *ad hoc* decision-making body.[21] It should be noted that the same approach was applied to establish the depositor and investor protection board (see below).

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15 Undertakings for Collective Investments in Transferable Securities.

16 Article 2 of the CSSF Act.

17 Article 3(3), 2nd sentence, of the BRRD.

18 Chambre des députés, Report from the Committee on Finance and the Budget on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, no. 6866, 2015-2016 ordinary session, 14 December 2015, 5.

19 Article 3(1), 2nd paragraph, of the BRR Act.

20 Article 12-1 (2) of the CSSF Act.

21 Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10.12.2015, 6.

The legal nature of the CSSF

Article 128 of the Constitution of the Grand Duchy of Luxembourg[22] provides the basis for the creation of a public establishment by law. By "public establishment" (*établissment public*, in French) is meant any legal person governed by public law entrusted by a legislative provision with the management of one or more specific public services under the supervision of the State.[23] Within the limits of its remit, the power to make regulations may be granted by law to a public establishment. The law may provide that these regulations are subject to the approval of the supervisory authority or even provide for their annulment or suspension by the supervisor, without prejudice to the powers of the judicial or administrative courts?[24] This legal status is distinct from that of an independent administrative authority (such as the Competition Council), as the latter is not subject to the hierarchical supervision of a ministry or other administration.[25]

The resolution tasks entrusted to the CSSF contribute to a public service mission and are therefore of an administrative nature. The majority of staff should logically be recruited as civil servants. The CSSF law only provides for a civil servant status for the members of the management. The other members of staff are recruited as employees under public law contract (i.e. 'employés d'Etat'), assimilated to civil servants.[26] This public-sector staff may be supplemented, as required, by employees under private contract law (i.e. 'salariés').[27] This choice in staff management is to be understood in the light of the conditions linked to recruitment: access to the civil service requires a command of the country's three administrative languages (Luxembourgish, French and German), and resolution activities require staff with a high level of technical expertise not necessarily available on the Luxembourg labour market (internationalised, very narrow and under pressure in the financial sector).

In addition to the institutional provisions inserted by the BRR Act into the CSSF Act, the internal operation of the CSSF is detailed in the rules of procedure. In accordance with Article 12-4 (5) of the CSSF Act, the Resolution Board

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22 As amended by the law of 17 January 2023. Mémorial A no. 27, 18 January 2023. Any local authority, alone or with other local authorities, may also create public establishments, within the limits and in the manner determined by the law.

23 Instruction of the Government in Council of 11 June 2004, the purpose of which is to set out guidelines and general rules for the creation of public establishments. Mémorial A no. 115, 12 July 2004; repealed by the Government Instruction in Council of 10 February 2017, and replaced by the Government Decision of the same day. Mémorial A no. 207, 21 February 2017.

24 Article 129(2) of the Constitution (as of 1 July 2023).

25 Judgment of the Administrative Court ('Tribunal administratif') of 13 June 2007, *Société … c conseil de la concurrence*, no. 21870.

26 Article 1 of the law of 16 April 1979 establishing the general status of civil servants. Mémorial A no. 31, 17 April 1979; last amended by the law of 19 May 2003. Mémorial A no. 78, 6 June 2003. The status of civil servant and employee of the State generally implies a lack of independence and submission to the political authorities (Chamber of Civil servants, Opinion on the draft law establishing the CSSF, 4 December 1998).

27 Article 13 of the CSSF Act. Employees with public status are subject to the general status of civil servants, while employees with private status are subject to the ordinary rules of the Labour Code.

adopted its own internal regulations at its meeting on 27 July 2016. These rules were last amended on 14 December 2020.

Powers of the Resolution Board

The Government and the national legislator favoured a literal transposition of the BRRD into Luxembourg law.[28] Under Article 38(1) of the amended BRR Act, the Resolution Board has the necessary powers to apply resolution instruments to credit institutions that meet the conditions for triggering a resolution procedure. The list of resolution powers conferred on the Resolution Board in Article 61(1) of the amended BRR Act reproduces word for word the list in Article 63(1) of the BRRD. On the other hand, Luxembourg has not made use of the option opened in Article 37(9) of the BRRD to grant additional instruments and powers to the Resolution Board (Conseil d'Etat, 2015: 10). The possibility for a resolution authority to call on alternative sources of financing in the event of a highly exceptional situation of systemic crisis is not formally included in the BRR Act either.

With regard to the power to suspend payment or delivery obligations under safeguard measures, Luxembourg transposed Directive (EU) 2019/879 by a law dated 20 May 2021. The content of Article 33a of the amended BRRD is included in Luxembourg law in Article 34-1 of the amended BRR Act. Once again, the content of the BRR Act is a copy-paste of the BRRD. The national legislator has set at 250 euros the minimum daily amount to which depositors have access when the Resolution Board exercises its power to suspend eligible deposits.

Internal organisation of the Resolution Board and the Resolution Department

The internal organisation of the Resolution Board is defined in article 12-2 of the CSSF Act. It is characterised by the great simplicity of its organisation chart. The Resolution Board is the highest executive authority for the purpose of exercising the resolution tasks and powers attributed to the CSSF.

Its internal composition meets the standard requirements applicable to public establishment.[29] It is made up of five members, three of whom are appointed *ex officio*: a representative of the supervisory ministry (ie. The Ministry of Finance[30]); the Director General of the 'Banque centrale du Luxembourg' (Central Bank of Luxembourg, hereafter 'BCL'); and the Director of the CSSF responsible for banking supervision. The other two members are the Resolution Director and a

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28 Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 2.

29 Government decision of 10 February 2017 cited above.

30 Until a reform was adopted and came into force in July 2024, the Ministry of Finance was represented by the Director of the Treasury. From now on, the only requirement is that the Ministry be represented by "a civil servant of the ministerial department of the Ministry of Finance" (Article 12-2(1), letter b), of the CSSF Act). This change was introduced by government amendments during the legislative procedure before the Chamber of Deputies. As the Government explains, it "aims to provide greater flexibility in the appointment of the member [representing the Ministry of Finance]". See Government's amendment of 6 March 2024 to the Draft law on the transfer of non-performing loans, doc. no. 8185/03, amendment 4.

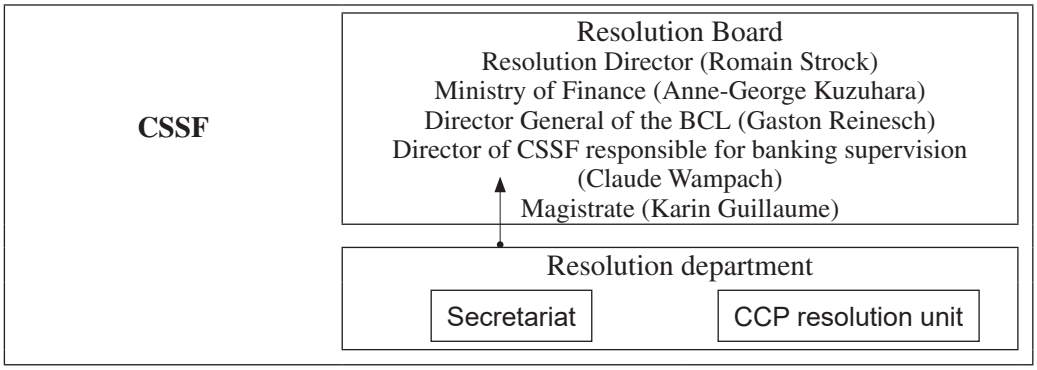
magistrate, both appointed by the Grand Duke on a proposal from the Government for a five-year term that shall be renewable.[31] The magistrate's deputy is appointed in accordance with the same procedure, while the Resolution Director is responsible for choosing his own deputy from among the staff of the Resolution Department. The Resolution Director chairs the Resolution Board; if he or she is unable to attend, this role is assumed by the Director of the Treasury. The Resolution Director is not a member of the CSSF Executive Board but may attend meetings of the CSSF Executive Board as an observer. The Chamber of Deputies does not intervene in the procedure for appointing the members of the Resolution Board.

A CSSF department (the Resolution department) is set up within the Resolution Board to carry out the day-to-day tasks related to the resolution function. The secretariat of the Resolution Board is provided by a member of the Resolution department appointed by the Board.

It should be added that this scheme has become slightly more complex since a reform in 2022 which entrusted the CSSF with resolution tasks relating to central counterparties.[32] This new task must be exercised through the Resolution Board. In the absence of central counterparties established in Luxembourg,[33] the implementation of these tasks remains hypothetical. On the other hand, the day a CCP establishes its headquarters in Luxembourg, the Resolution Board will have to adopt the appropriate institutional arrangements to avoid any conflicts of interest between the resolution functions concerning CCPs and all other functions – including the resolution functions applicable to credit institutions. To this end, when it comes to resolving CCPs, it will be necessary to ensure that the Resolution department has "effective operational independence", its own staff, separate reporting lines and a decision-making process that is distinct from the other tasks entrusted to the Resolution Board.[34] A priori, this will also involve separate agendas.

Chart 1

Organisation chart of the Resolution Board (2021)



Source: CSSF, *List of members of the Resolution Board updated on 12 November 2024*

31 Article 10(1), by reference to article 12-7(3) of the CSSF Act; and Article 12-2(1), letter e), of the CSSF Act.

32 Article 7(2) of the law of 20 July 2022 implementing Regulation (EU) 2021/23, cited above.

33 See European Securities and Markets Authority, List of Central Counterparties authorized to offer services and activities in the Union, 10 November 2022.

34 Article 12-4(5) of the CSSF Act.

The other Luxembourg authorities involved in resolution matters

Other Luxembourg public bodies have been entrusted with specific tasks in resolution matters: the 'Fonds de Résolution Luxembourg' (Luxembourg Resolution Fund, hereinafter "FRL"), the 'Fonds de Garantie des Dépôts Luxembourg' (Luxembourg Deposit Guarantee Fund, hereinafter "FGDL"), the Council for the Protection of Depositors and Investors ('Conseil de protection des déposants et des investisseurs', hereinafter "CPDI"), the Systemic Risk Board, the Consultative Committee for Resolution ('Comité consultatif de la résolution') and the Consultative Committee for Prudential Regulation (hereinafter "CCPR").

1.2. The 'Fonds de Résolution Luxembourg'

The FRL was set up by article 105 of the BRR Act, in the form of a public establishment, with legal personality and placed under the supervision of the ministry responsible for the financial centre (i.e. the Ministry of Finance).

The purpose of the FRL is to collect contributions from credit institutions authorised in Luxembourg, to manage the financial means and to participate in the financing of the resolution of a credit institution at the request of the Resolution Board.[35] To this end, the FRL has the power to raise ex-ante contributions, ex-post extraordinary contributions, contract borrowings and other forms of support, and to recover any reasonable expenditure properly incurred in connection with the use of resolution tools or the exercise of resolution powers.[36] The Resolution Board may also invite the FRL to make a contribution to offset or absorb losses of a credit institution which have not been covered by the internal bail-in.[37] Only the Resolution Board is empowered to trigger the use of the FRL.

The FRL manages its assets and, where appropriate, takes out loans or borrowings when it is called upon to participate in the financing of a resolution measure and its assets are insufficient to meet the financing requirements linked to the resolution measure in question.

The creation of the FRL in the form of a public establishment separate from the CSSF may come as a surprise, given the recurrent concern of the Luxembourg Government and legislator to limit the number of administrative structures. In the present case, the purpose of this structural arrangement was to separate the contributions collected from the credit institutions from the assets of the CSSF so as to reserve their use solely for the resolution measures decided by the Resolution Board. In this way, any risk of conflict of interest was avoided between the CSSF's resolution function and the FRL's contributions to the financing of the resolution of a credit institution.

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35 Article 105(2) of the BRR Act.

36 See Article 105-14) and Article 38(5) of the BRR Act.

37 Article 45(4) and (5) of the BRR Act.

The FRL is managed by an Executive Board. In order to facilitate decision-making and to ensure the most efficient exchange of information and cooperation between the FRL and the Resolution Board, the members of the Resolution Board are also the members of the FRL Executive Board. Thus, the Chairman of the Executive Board is the Resolution Director referred to in article 12-7 of the amended CSSF Act. If the Resolution Director is unable to attend, the representative of the Ministry of Finance will chair the FRL Executive Board. In addition, in order to minimize the operating costs of the FRL, the CSSF is responsible for carrying out its operational tasks. A member of the CSSF's Resolution department acts as the FRL's secretariat. The Resolution department assists the FRL Executive Board in the operational tasks of the FRL.[38]

1.3. The Fonds de Garantie des Dépôts Luxembourg and the Council for the Protection of Depositors and Investors

The creation of a public deposit guarantee scheme, the 'Fonds de Garantie des Dépôts Luxembourg', is one of the major innovations introduced into Luxembourg law by the BRR Act. Like the FRL, the FGDL is set up as a public body. Credit institutions incorporated under Luxembourg law and Luxembourg branches of credit institutions headquartered in third countries are required to join the fund and pay annual contributions.[39] The decision to set up a fund separate from the CSSF ensures, on the one hand, that the CSSF is not legally bound by the obligations of the FGDL and, on the other hand, to create separate assets that can only be used to reimburse depositors in the event of a credit institution going into liquidation or to protect guaranteed deposits in the event of the resolution of a credit institution. This institutional arrangement is part of Luxembourg's efforts to strengthen the credibility of its deposit protection scheme and, in so doing, to guarantee the attractiveness and competitiveness of Luxembourg as a financial centre.[40] At the end of 2023, the FGDL had 88 member institutions against 95 in 2021[41] and its available financial means, including the buffer of additional financial means, amounted to EUR 516.3 million. The covered deposits decreased by 2.3% over a year to EUR 37.3 billion.[42]

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38 Article 105(5) of the BRR Act.

39 Article 154 of the BRR Act.

40 Article 179 of the BRR Act. Following the same approach, the Government has accelerated the implementation of the FGDL. Under the DGSD, the fund was to reach its target level on 3 July 2024. The BRR provided that the target level would be reached by 31 December 2018. In addition, there is a buffer of additional financial means equal to 0.8% of guaranteed deposits to be financed by annual contributions to be paid by the banks over a period of 8 years, once the target level defined in the DGSD has been reached. A Grand-Ducal regulation may extend the 8-year period depending on the economic situation and in order to avoid pro-cyclical effects linked to the payment of contributions.

41 The current total number of members amounts to 84 in November 2024. The full list of credit institutions authorised or registered in Luxembourg is available on the *FGDL's website*. See also: CSSF, *Annual Report 2023*, September 2024, 119.

42 *Ibidem*.

Before the BRR came into force, the deposit guarantee function was carried out by a non-profit association, the 'Association pour la garantie des dépôts Luxembourg', to which credit institutions operating in Luxembourg were obliged to belong. Resources were contributed *ex post* by members according to the needs.[43]

Under the BRR Act, the CSSF has set up a new internal executive body called the "Council for the Protection of Depositors and Investors"[44] (CPDI), which is responsible for performing both the functions assigned by the DGSD to deposit guarantee schemes and those assigned by Directive 97/9/EC to investor compensation schemes. The CPDI comprises 4 to 5 members.[45] In order to facilitate decision-making and the reimbursement of depositors, the members of the CPDI are also members of the FGDL's management committee.

The CPDI, represented by its chairman, is involved as an *ex officio* member of the colleges of resolution authorities, in cases where the resolution board acts as resolution authority at group level.[46] The CPDI is responsible for the administration and operational tasks of the Luxembourg Deposit Guarantee Fund (FGDL).[47] The CSSF shall carry out the operational tasks related to the duties of the CPDI and the operational tasks of the FGDL.[48]

1.4. The Systemic Risk Board

The Systemic Risk Board is a "college of authorities",[49] i.e. an administrative structure[50] with no legal personality, regulatory powers or resources of its own. It may be consulted by the Resolution Board when assessing the impact of the failure of a credit institution on the financial system.[51] It may also, on its own initiative, issue opinions, warnings and recommendations to the CSSF, as well as to the Government, the *Commissariat aux assurances* and the BCL as part of its duties to monitor liquidity and supervise financial systems.[52]

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43 Bank for International Settlements, Deposit Protection Schemes in Basel Committee Member Countries, June 1998.

44 Article 12-10 of the CSSF Act.

45 As of now, only four people are members of the CPDI: the Director of the CSSF responsible for the operational tasks related to the duties of the CPDI and of the FGDL (Claude Wampach), a representative of the Ministry of Finance (Anne-George Kuzuhara), the Director General of the BCL (Gaston Reinesch) and a magistrate appointed by the Grand Duke (Karin Guillaume).

46 Article 88(3) of the BRR Act.

47 Article 154 of the BRR Act.

48 Articles 2-3, 12-10 and 12-15 of the CSSF Act.

49 Article 1(2) of the law creating a systemic risk committee.

50 A. Smoleńska, *Multilevel cooperation in the EU resolution of cross-border bank groups: lessons from the non-euro area Member States joining the Single Resolution Mechanism (SRM)*, (2022) Journal of Banking Regulation, 42-53.

51 Article 59-26 of the CSSF Act.

52 Article 7 of the law of 1 April 2015 establishing a Systemic Risk Board. Mémorial A no. 64, 3 April 2015. The creation of this structure ensures the implementation of the ESRB recommendation of 22 December 2011 on the macroprudential mandate of national authorities. OJ C 41/1, 14 February 2011.

The Systemic Risk Board comprises the Minister responsible for the financial centre, who chairs the Committee, the Director General of the CSSF, the Director of the Commissariat aux assurances and the Director General of the BCL. The Secretariat of the Committee, which is responsible in particular for drafting and publishing the recommendations, opinions and warnings issued by the Committee, is provided by the BCL, under the direct authority of its Director General (BCL, 2016: 2).

1.5. The Consultative Committee for Resolution

Finally, another body of the CSSF fulfils an advisory function with regard to resolution. Not provided for in the BRRD, the Consultative Committee for Resolution was established by the BRR law in 2015. This committee may issue opinions to the government on any draft law or grand-ducal regulation concerning regulation in the field of resolution falling within the remit of the CSSF. It may also be consulted by the Resolution Board for advice on any draft CSSF regulation relating to resolution.[53] This committee is composed of the Minister responsible for the financial centre (or his representative), the Resolution Board represented by its director, the CSSF director in charge of the CPDI, four representatives of credit institutions and investment firms appointed by the Minister responsible for the financial centre, and a member of the 'Institut des réviseurs d'entreprises' (Institute of external auditors).[54]

1.6. The Luxembourg prudential supervisory authority

Since 1998, the CSSF has been the authority responsible for supervising the financial sector. In its initial version, article 2 of the CSSF Act entrusted the CSSF with the prudential supervision of all legal entities carrying out one of the following financial activities: credit institutions, UCITS, investment firms, financial transaction advisers, brokers, market makers, professional depositories of securities or other financial instruments, and stock exchange activities. Subsequently, the transformation of the financial sector and developments in European legislation have led to regular revisions of the CSSF Act and an extension of its prudential remit.

Today, the CSSF is the competent authority for the prudential supervision of the following entities: credit institutions, financial professionals (whether they are support agents, such as operators of IT and communication systems in the financial sector, or specialised agents, such as registrars, professional custodians of financial assets or instruments, operators of a regulated market authorised in Luxembourg, etc.), investment firms, central securities depositories, payment/electronic money institutions, account information service providers, investment fund managers, real estate credit intermediaries, data communication service

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53 Article 15-2(1) of the CSSF Act.

54 Article 15-2(3) of the CSSF Act.

providers, virtual asset service providers and the audit profession. The very broad scope of the CSSF's tasks could lead to a misunderstanding regarding the inclusion of the BCL – and other public authorities intervening on the financial markets – among the entities supervised by the prudential supervisory authority (ECB, 1998: 3; BCL, 1998: 4). Article 2(1) of the CSSF Act explicitly excludes the exercise of prudential powers in respect of the BCL, but also in respect of the European Investment Bank, the European Investment Fund and European financial assistance schemes.[55]

In addition, the CSSF has been entrusted with a set of complementary tasks in connection with the prudential supervision of the financial sector. For example, it is the competent authority to ensure that all persons subject to its supervision comply with professional obligations relating to the fight against money laundering and terrorist financing.[56] It is also the competent authority for consumer protection, overseeing the implementation of European legislation on credit rating agencies. It also has a general remit, within the limits of its powers, to promote transparency, simplicity and fairness in the markets for financial products and services.[57]

Following the European reforms aimed at establishing a Banking Union, the CSSF's missions have been extended to the field of resolution. In addition to the missions and powers provided for under the BRRD and SRBR, the CSSF carries out the operational tasks of several new public entities: the FRL, the FGDL and the CPDI (see previous sections).

Until the creation of the CSSF, the supervision of the financial sector was ensured by a 'Commissariat au contrôle des banques' (1945-1983),[58] then by the 'Institut monétaire luxembourgeois' (1983-1998, hereinafter "IML")[59] – the attribution of prudential tasks to the new monetary institution followed in this respect the model of the Bank of England.[60] The Law of 5 April 1993 on the financial sector modernised the rules governing prudential supervision of the financial sector and strengthened the IML's responsibilities in prudential matters, as well as in the reorganisation and liquidation of the institutions under its supervision.[61] The supervision of stock exchanges remained under the

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55 The European Financial Stability Facility and the European Stability Mechanism.

56 Article 2(4) of the CSSF Act.

57 Article 2(5) of the CSSF Act.

58 Set up in 1945, the Commissariat au contrôle du secteur bancaire was radically overhauled in 1965. See: b. Zenner, *75 years of Banking Supervision in Luxembourg*, in C. Marx, M. Limpach, B. Majerus, *Supervision, independence and integrity. 75th anniversary of prudential supervision and supervision of the financial centre in Luxembourg* (University of Luxembourg (C2DH), CSSF, 2020), 129-139.

59 Article 2(1) of the law of 20 May 1983 establishing an Institut Monétaire Luxembourgeois. Mémorial A no. 38, 28 May 1983. The IML then took over the prudential, statistical and international representation functions of the 'Commissariat au contrôle des banques'.

60 Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 15 December 1995, 5.

61 Articles 60 et seq. of the Law of 5 April 1993.

responsibility of a separate institution, the *Commissariat aux bourses*, placed under the responsibility of the Minister in charge of the financial centre (i.e. the Minister of Finance).[62]

With a view to Luxembourg's participation in the third stage of the Economic and Monetary Union, the government wanted to reorganise the financial institutional landscape and assign prudential supervision of the financial sector and stock market control to a single body.[63] There were several reasons for this step backwards. The first was the exceptional proportional importance of the financial sector in relation to the size of the country and its economy. The development of the financial centre is the result of innovative legislation, a niche policy and a concentration of financial and technical expertise.[64] In this context, "it was probably not intended by anyone that the prudential supervision of banks should be organised as a mere ancillary function to that of a central bank".[65] On the contrary, the structure of the banking supervisory authority was intended to reflect the specific characteristics of the Luxembourg financial centre. In addition, the allocation of prudential supervision tasks to the IML in 1983 was criticised from the outset by the Conseil d'Etat. For this consultative body of the Government, the exercise of prudential supervision and monetary functions within the same authority exposed it to the risk of conflicts of interest. Consequently, organising the monetary function and prudential supervision under the same roof required that "the supervisory functions be clearly distinct from the other functions, particularly monetary functions, of the IML".[66] Implicitly, the Conseil d'Etat stressed that this solution was purely transitory and imposed by "the circumstances of the time". The application of the obligation of independence of national central banks from the 2nd stage of EMU (1er January 1994) hardly suited the influence that the Minister of Finance wished to retain in the supervision of the financial sector, given the economic, financial and, possibly, public finance issues specific to this sector. A reorganisation of the IML's operations and structures was recommended.[67] By implementing an institutional separation of the functions of prudential supervision and monetary supervision, "the Luxembourg government intended to create a clear situation in which the independence of

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62 Law of 21 September 1990 on the supervision of certain professional activities in the financial sector and on stock exchanges. Mémorial A, no. 52, 5 October 1990.

63 Supervision of the insurance sector is the responsibility of a separate public body, the Commissariat aux assurances, created in 1991. See also Law of 6 December 1991 on the insurance sector. Mémorial A no. 84, 23 December 1991; replaced by the Law of 7 December 2015 on the insurance sector. Mémorial A no. 229, 9 December 2015.

64 See: J.-M. Kreins, *Histoire du Luxembourg* (PUF, 2015, Coll. Que Sais-Je), 104-113; M. Limpach, N. Humbert, *Chronologie de l'évolution de la place financière du Luxembourg et de sa surveillance*, in C. Marx, M. Limpach, B. Majerus, *Supervision, independence and integrity*, cit., 17-102.

65 Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 30 January 1995, 9.

66 Council of State, Opinion on draft law no. 2575 on the creation of the Institut Monétaire Luxembourgeois, 16 July 1982.

67 Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 3.

the Central Bank would be complete and prudential supervision exercised under the direct responsibility of the competent Minister".[68] The Conseil d'Etat fully supported this proposal.[69]

These political considerations met with practical opposition. The multiplication of administrative structures could come up against Luxembourg's limited human and financial resources. The physical separation of the monetary institution and the institution responsible for prudential supervision would require regular collaboration, which could complicate the fluidity of the decision-making and implementation processes in the financial sector and make governance less transparent and predictable for the companies concerned. In addition, the question arose as to the scope of concentrating the prudential missions of credit institutions, but also of stock exchange and insurance supervision within a single entity.[70] In the end, it took five years of debate before the law creating the CSSF was adopted.

The allocation and coordination of the tasks of the Resolution Board with the other Luxembourg authorities

The CSSF, acting *through* the Resolution Board, is the resolution authority in Luxembourg, without prejudice to the tasks and powers of the SRB established by Regulation (EU) No 806/2014. Pursuant to Article 12-1(3) of the CSSF Act, the Resolution Board is competent to decide on resolution measures and to ensure their implementation. The other national authorities intervene only on a complementary basis, either to transmit information (or carry out assessments), or to be informed of measures envisaged or decided by the Resolution Board.

Article 3(4) of the BRRD requires Member States to ensure that supervisory authorities and resolution authorities, as well as the persons performing these functions on their behalf, cooperate closely in the preparation, planning and implementation of resolution decisions, including where the functions are performed within the same entity. In application, article 12-9 of the CSSF law retains the principle of exchange of information and cooperation between the Resolution Board and the management of the CSSF for the purposes of the exercise of their respective duties. This requirement for close cooperation makes perfect sense in Luxembourg, given the asymmetry of human resources and expertise that exists within the CSSF for the exercise of these functions. With only sixteen staff members, the Resolution Board is undersized compared to the CSSF acting as a supervisory authority, which has nearly 1,000 staff members, or compared to the BCL and its 435 staff members (for the year 2021).

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68 Chamber of Deputies, Report by the Finance and Budget Committee on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 16 March 1998.

69 Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 1-2.

70 Chamber of Deputies, Report by the Finance and Budget Committee on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 2.

Cooperation between the CSSF and the Resolution Board

More specifically, the CSSF, as a supervisory authority, is called upon to contribute to the exercise of resolution functions: it must cooperate with the Resolution Board to provide it with the information necessary to draw up the resolution plans, where it already has all or part of this information.[71] It also has an advisory role, at the request of the Resolution Board. The latter must consult it when it identifies substantive impediments to the resolvability of a group,[72] to trigger a resolution measure,[73] to suspend certain payment or delivery obligations,[74] to authorise/refuse the transfer of assets to the acquirer of the activities of a credit institution under resolution procedure,[75] to grant temporary authorisation to a bridge institution,[76] to determine the minimum capital requirement and eligible liabilities for resolution entities,[77] to assess the reorganisation plan of a credit institution (assessment carried out in agreement between the Resolution Board and the supervisory authority).[78] Inheriting the powers of the Commissariat aux bourses (responsible for the supervision of the Luxembourg Stock Exchange), the CSSF may also be requested by the Resolution Board to withdraw or suspend the admission to trading on a regulated market or to official listing of financial instruments issued by a credit institution subject to a resolution measure.[79]

With regard to early intervention powers and special administration functions, the measures laid down in Articles 27 to 29 BRRD were transposed into Luxembourg law by the BRR Act of 18 December 2015, in Articles 59-43 to 59-45 of the law of 5 April 1993 on the financial sector. The national legislator did not go beyond what the BRRD provides for: the CSSF, as prudential supervisor, must notify the Resolution Board without delay when the conditions are met for the adoption of early intervention measures with regard to a credit institution, and as soon as possible of the measures taken. On the other hand, no notification is required where the CSSF requires the dismissal en bloc or individually of the management or a management body of the credit institution concerned. The same applies to the appointment of a temporary administrator by the CSSF. Nor does the applicable legislation provide for any obligation to notify the CSSF when the resolution board decides to appoint a special administrator.[80] The absence of a notification obligation does not exempt either the CSSF or the Resolution

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71 Article 8(2) of the BRR Act.

72 Article 30 of the BRR Act.

73 Article 33(1) of the BRR Act.

74 Article 34-1(1) of the BRR Act.

75 Article 39(7)-(8) of the BRR Act.

76 Article 42(1) of the BRR Act.

77 Article 46(4) of the BRR Act.

78 Article 53(6) of the BRR Act.

79 Article 62(1) of the BRR Act.

80 In addition, the CSSF, acting as the resolution authority, applies to the Luxembourg District Court for a stay of payment in respect of a credit institution, which leads to the appointment of an administrator.

Board from the general obligation to exchange information with each other for the purposes of carrying out their respective duties.[81]

The allocation of responsibilities and powers relating to early intervention measures, including temporary administration measures, did not give rise to any specific comments during the legislative work relating to the transposition of the BRRD. By the end of 2022, no early intervention measures had been adopted by the CSSF.[82]

Cooperation with other Luxembourg authorities involved in resolution

As for the other entities involved in the resolution tasks, the Ministry of Finance, as the competent ministry, the FRL, the CPDI and the FGDL are involved to varying degrees. In terms of procedural obligations, all of them (with the exception of the CPDI) must be informed, by way of notification, of the existence of the conditions for triggering a resolution procedure.[83] The Resolution Board must notify them of any resolution measure within a reasonable period of time.[84]

The scope of these exchanges and cooperation must be specified in the rules of procedure of each public body or institution concerned. In practice, the rules of procedure do not provide much detail and leave a wide margin of discretion to the various authorities: each authority exchanges with the other authorities "duly and in a timely manner, all information necessary for the performance of their respective tasks, either upon request or on a voluntary basis in the absence of any explicit request".[85] The information that may be transmitted is determined from a functional perspective: the information must be linked to the tasks entrusted to the authority making the request. However, the detailed description of the information to be included in the recovery plans or the information that the Resolution Board may request from credit institutions as part of the preparation and updating of the resolution plans enables the precise identification of the information that may be requested and exchanged between national authorities and the Resolution Board. This limits the risk of debate as to whether a request for information is justified. To date, no disputes have arisen as a result of a refusal to exchange information.

In addition, the small size and the professional and cultural proximity of the members of management and their teams ensure that cooperation and exchanges are fluid. Relations between the various authorities in charge of the financial

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81 Article 59-50(4) of the amended law on the financial sector; Article 12-9 of the CSSF Act.

82 This situation is not unique to Luxembourg. In 2020, EBA reported that only nine prudential supervisors had adopted early intervention measures. See EBA, 2020.

83 Article 81(3) of the BRR Act.

84 Article 83(2) of the BRR Act.

85 Point 5 of the Rules of Procedure of the Resolution Council of 27 July 2016, as amended on 14 December 2020; Article 13 of the Rules of Procedure of the CPDI of 17 January 2017; Article 33(2) of the amended Law of 23 December 1998 on monetary status and the Banque centrale du Luxembourg. Mémorial A no. 112, 24 December 1998.

sector, as well as between their managers, have long been characterised by their commitment, their competence and their spirit of consultation and conciliation.[86]

Table 1

Voting participation of Resolution Board members in the decision-making bodies of other authorities involved in resolution

Members / Authorities	Resolution Council	Management of the CSSF	CPDI	FRL	FGDL
Resolution director	X			X	
Director of the Treasury (Ministry of Finance)	X		X	X	X
Director General of BCL	X		X	X	X
Director of the CSSF (banking supervision)	X	X	X	X	X
Other Director of the CSSF		X	X		X
Magistrate appointed by the Grand Duke	X		X	X	

Source: Frédéric Allemand. Data: Websites of the Luxembourg authorities (CSSF, FRL, FGDL).

Information exchanged in financial matters between Luxembourg authorities is covered by the confidentiality regime of the law of 5 April 1993 and compliance with this regime is mandatory for staff with access to such information, under administrative sanctions. The obligation of professional secrecy and confidentiality do not preclude the exchange of information between staff and experts of the Resolution Board and other national bodies or entities.[87]

As regards relations between the Resolution Board and the BCL, exchanges of information may not undermine the independence of the monetary institution and must comply with the confidentiality regime applicable to the BCL under Article 37 of the Statute of the ESCB[88] (ECB, 2015: 4). Arrangements for coordination and cooperation in the area of monitoring the general liquidity situation on the markets and the assessment of market operators are the subject of agreements between the BCL and the CSSF. The same applies to promoting the smooth operation of payment systems. An agreement (not published) has been concluded in this respect between the two authorities and revised when the Resolution Board was set up.

Relationships with other institutions/committees

The Resolution department represents the CSSF as resolution authority within international bodies, for matters relating to resolution in the financial sector.

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86 Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 9.

87 Article 59-50(4) of the law of 5 April 1993 on the financial sector.

88 Article 12-9(2) of the CSSF Act.

Thus, the Resolution department staff participate in the work of the following permanent sub-committees of the SRB: SRB Resolution Committee (and its sub-groups MREL Task Force and National Handbooks Expert Network), SRB Fund Committee, SRB Administrative and Budget Committee and SRB Legal Network. The CSSF also participates in the SRB ICT Network.[89]

In a cross-border context outside the SRB framework, the Resolution department is responsible for the management of four resolution colleges (three colleges relating to credit institutions for which the CSSF is the resolution authority at group level and one so-called "European" college relating to sister banks in several EU Member States which are subsidiaries of an entity from a third country).

The staff of the Resolution department also participate in the work of the European Banking Authority (EBA). In particular, the Resolution department is represented on the EBA's Resolution Committee (ResCo), which was set up in January 2015 for the purpose of taking decisions and carrying out the tasks devolved to the EBA and the national resolution authorities under the BRRD. The voting members of this committee are the directors of the NRAs, namely the Resolution Director for Luxembourg. When it was set up in 2016, the Resolution Department also participated in the work of the Subgroup on Crisis management, a joint subgroup of the Standing Committee on Regulation and Policy (SCRePol) and the Resolution Committee. Since 2018, it has participated in the work of the Subgroup on Resolution Planning and Preparedness (SGRPP), a subgroup of the Resolution committee.[90]

Political or judicial tension or dispute arisen in relation to the framework in place

The most sensitive debates in the financial sector took place in the second half of the 1990s, when the BCL and the CSSF were created (see above). The launch of the Banking Union in 2012 and the establishment of the SSM and then the SRM between 2014 and 2016 did not give rise to any particular political tensions. Luxembourg welcomed the new governance of these two systems, insofar as each preserved the influence of national authorities in the prudential supervision or resolution of credit institutions.

On the substance, the adoption of the law transposing the BRRD provoked little debate. At most, the question of the functional independence of the Resolution board from the CSSF was the subject of a formal reservation by the Conseil d'Etat. The Chamber of Deputies followed the opinion of the Conseil d'Etat and specified in Article 3(2) of the BRRD that "[t]he Resolution Board shall carry out the resolution functions independently from the supervisory functions of the CSSF".

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89 CSSF, *Annual Report 2016*, September 2017, 146; CSSF, *Annual Report 2021*, cit., 145.

90 CSSF, *Annual Report 2018*, September 2019, 146; CSSF, *Annual Report 2021*, cit., 144-145; CSSF, *Annual Report 2023*, cit., 117.

A more critical point concerned the financing of the FGDL. Luxembourg is keen to maintain the competitiveness of its financial centre. The introduction of the SSM has had a significant financial impact on companies in the financial sector. As the Minister for the Economy stated in 2015, "[t]he total annual cost of supervision charged by the CSSF to all the market players amounted to EUR 77.5 million in 2013. The SSM share to be financed by the banks based in Luxembourg is 7 million".[91] This cost and the concern to preserve the financial sector in relation to the financing of the FRL and FGDL were probably important factors in justifying Luxembourgs late transposition of the BRRD and DGSD. This issue was at the heart of the criticism made by the Chamber of Commerce in its opinion on the draft law transposing the BRRD – the strictly institutional aspects were not discussed. The Government was criticised for having opted to allocate additional financial cushions to the FGDL once the target level had been reached. In the Chamber's view, this choice was detrimental to the interests of the financial centre, insofar as the cash contributions paid by Luxembourg banks would amount to approximately EUR 600 million (i.e. 1.6% of guaranteed deposits) instead of the EUR 300 million (i.e. 0.8% of guaranteed deposits) constituting the minimum level provided for by the DGSD. Although "this EUR 600 million would be divided into two compartments (half by the end of 2018, the rest within 8 years), [it] would nonetheless represent a significant cost for the Luxembourg financial centre, especially as this would be in addition to the EUR 1.2 billion to be paid by the banks to the compensation fund".[92] The legislator favoured the argument of the credibility of the deposit guarantee scheme over that of the cost of financing for the financial sector and confirmed the Government's position.

To date, there have been no disputes concerning the establishment of the Resolution Board. However, the decisions taken by the Resolution Board in the ABLV Bank Luxembourg S.A. case have been the subject of a legal challenge and have drawn criticism from Luxembourg politicians. As a reminder, in February 2018, ABLV Bank, the parent company of ABLV Bank Luxembourg, was accused of money laundering by the US Treasury and was even suspected of being involved in illegal weapons development programmes in North Korea. Faced with depositors' concerns and liquidity risks, the ECB implemented the moratorium instrument with regard to ABLV Bank and instructed the CSSF, as supervisory authority, to do the same with regard to ABLV Bank Luxembourg.[93] Following this, the CSSF referred the matter to the commercial chamber of the Luxembourg District Court to request the suspension of payments by the Luxembourg subsidiary.[94] However, on 24 February, the ECB declared ABLV Bank "failing or likely to fail", given the sharp deterioration in its financial

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91 KPMG, *Luxembourg Banking Insights 2015*, 12.

92 Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit. 5.

93 ECB, *ECB instructs national supervisors to impose moratorium on ABLV Bank*, press release, 19 February 2018.

94 CSSF, Press release concerning ABLV Bank Luxembourg, no. 18/07, 19 February 2018.

situation. The ECB also considered that ABLV Bank Luxembourg was in "actual or foreseeable default".[95] The SRB confirmed the ECB's assessment and concluded that there were no supervisory or private sector measures that could prevent the banks from failing. Furthermore, it considered that the functions performed by ABLV Bank Luxembourg were not critical and that the failure of the bank was not likely to have significant adverse effects on financial stability in Luxembourg or in other Member States. The SRB concluded that, as a result, the bank should be liquidated in accordance with Luxembourg law and its decision for liquidation implemented by the Resolution Board.[96] The shareholders of the parent company decided to proceed with the voluntary liquidation of the bank. In the case of ABLV Bank Luxembourg, the FGDL was activated for the first time for the benefit of depositors[97] and the CSSF, acting as the resolution authority, again referred the matter to the Luxembourg District Court to request, primarily, that the subsidiary be put into compulsory liquidation and, secondarily, that a suspension of payment procedure be initiated. The Public Prosecutor, representing the State of Luxembourg, took the view that ABLV did not meet the conditions for winding up and liquidation and did not oppose the suspension of payment obligations. In its ruling of 9 March, the Court rejected the application to place the Luxembourg subsidiary in liquidation and declared that the bank's payments were suspended for a period of six months, "in a protective manner". The measure was then renewed twice, before the bank was finally wound up on 2 July 2019.

The March 2018 judgment is interesting because the judge refuses to consider that the assessments and findings made by the ECB and the SRB are binding on the national authorities. In addition, the Court criticised the CSSF for failing to give sufficient reasons for its winding-up request: "the CSSF does not provide a single document to detail and explain the financial situation of ABLV Bank Luxembourg. It merely submits findings and assessments which do not even show what factual elements they are based on".[98] Following this legal setback, the CSSF was criticised by the opposition parties in the Chamber of Deputies for having prevented the bank from finding a buyer – all the more so as it was overcapitalised (€15.9 million in equity, i.e. double the legal minimum). Commentators were also surprised that the CSSF did not appeal against the ruling. During the debates, the Minister of Finance reiterated the autonomy enjoyed by the CSSF as a resolution authority: "I believe that the CSSF is working in an absolutely correct manner, and not only in this case. It acts completely autonomously […] I am not the boss of the CSSF, I am the minister in charge of supervising it!".[99]

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95 ECB, *ECB determined ABLV Bank was failing or likely to fail*, 24 February 2018.

96 SRB, *The Single Resolution Board does not take resolution action in relation to ABLV Bank, AS and its subsidiary ABLV Bank Luxembourg S.A.*, 24 February 2018.

97 At the end of 2021, the total amount repaid by the FGDL to holders of guaranteed deposits with ABLV Bank Luxembourg was €10 million (CSSF, 2022: 147).

98 Tribunal d'arrondissement, *CSSF v ABLV Bank Luxembourg*, docket number: TAL-2018-01570, 9 March 2018.

99 The quote reads in French: "Je suis d'avis que la CSSF travaille de manière absolument correcte et pas uniquement dans ce dossier-ci. Elle agit de manière complètement autonome […] Je ne suis pas le patron

Prospects for reform of the institutional framework for resolution in Luxembourg

A number of concerns have been expressed by the Chamber of Deputies regarding the CSSF's power to impose administrative sanctions, whether it is acting under its prudential supervision or resolution powers. Criticism focused on the inadequate procedural framework for the power to impose sanctions, particularly with regard to the rights of defence and respect for the adversarial principle. In the spring of 2021, the Ministry of Finance indicated that a "sanctions bill" was being prepared "but given the complexity of the subject, it is not possible for the time being to put forward a date for its introduction".[100] Three years later, no bill has been tabled in the Chamber of Deputies. The holding of a general election in the autumn of 2023 slowed down any plans for reform.

2. The legal regime for the independence and accountability of the resolution board

In the event that resolution functions are assigned to an already existing authority (national central banks, competent ministries, or other administrative authorities), "[a]dequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive".[101] The wording "Adequate structural arrangements" is unusual in EU law: it is used for the first time in the BRRD and is reproduced in Regulation (EU) No 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties.[102] The opinions adopted by the ECB on Member States' draft laws on the institutional aspects of resolution provide little clarification on the nature of these "structural arrangements". For the most part, they refer to amendments to the national legislative framework or to the statutes of the authority responsible for resolution functions.[103] As for the independence regime detailed in BRRD, it is characterised by its modesty. Recital 15 of the BRRD insists on the sole requirement of guaranteeing the independence of the resolution authority from "economic actors", and Article 3(3) of the Directive limits the independence regime to the operational dimension, i.e. to the internal operating procedures, in order to avoid any conflict of interest between the resolution functions and

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de la CSSF, je suis le ministre de tutelle!" (*ABLV: les questions en suspens; la commission des finances s'est penchée sur le rôle de la CSSF dans la gestion du dossier*, Luxembourg Wort, 24 July 2018).

100 Chamber of Deputies, Minutes of the meeting of the Committee on Finance and the Budget of 15 March 2021, P.V. FI 37, 19 March 2021.

101 Article 3(3) BRRD.

102 OJ L 22/1, 22.1.2021, spec Article 3(3).

103 See for example: Opinion of the ECB of 20 July 2015 on recovery and resolution of credit institutions and investment firms (CON/2015/25), point 3.2.1.

the other functions that the competent authority performs.[104] In practical terms, operational independence is ensured if "the reporting lines for staff involved in carrying out resolution tasks are kept separate from those used by staff involved in supervision activities".[105] Regulation (EU) No 806/2014 complements the BRRD independence regime: when performing the tasks entrusted by this regulation, the SRB and national resolution authorities "shall act independently and in the general interest".[106] In order to ensure "the full autonomy and independence of the SRB", Regulation (EU) No 806/2014 specifically provides for it to have its own budget, financed by mandatory contributions from institutions in participating Member States.[107] Similar requirements are not included in the BRRD. However, the issue of financial means is regularly addressed by the ECB in its opinions on national draft legislation, when resolution functions are assigned to a national central bank (NCB). The ECB approves the allocation of these additional functions to an NCB if "they do not interfere financially and operationally with the performance of the NCB's ESCB-related tasks".[108]

The Luxembourg Government and legislator have ensured that the independence of the Resolution Board goes beyond the requirements of the BRRD.

In accordance with Article 3(2) of the amended BRR Act, "the Resolution Board shall carry out the resolution functions independently from the supervisory functions of the CSSF". This paragraph was absent from the initial draft law and was added following the opinion of the Conseil d'Etat. The latter wanted the operational independence of the Resolution Board from the CSSF's general management and other departments, in particular those responsible for banking supervision, to be more clearly indicated. In the absence of any explicit mention, it was feared that the obligation for the Resolution Board to cooperate and exchange information would place the resolution authority at a disadvantage in its relations with the other internal bodies of the CSSF or the ECB.[109]

The independence of the Resolution Board is guaranteed in institutional, financial, personnel and operational terms.

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104 This independence regime is also much more modest than that applied to the national authorities responsible for prudential supervision. Article 4(4) of Directive 2013/36/EU of the European Parliament and of the Council requires Member States to ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in Directive 2013/36/EU and in Regulation (EU) No 575/2013.

105 See Opinion of the ECB of 12 September 2014 on the implementation of the European Bank Recovery and Resolution Directive (CON/2014/67), point 4.

106 Article 47(1) of Regulation (EU) No 806/2014.

107 Recital (97) and Article 58 of Regulation (EU) No 806/2014.

108 See for example: Opinion of the ECB of 26 February 2021 on the reform of Latvijas Banka (CON/2021/9).

109 Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 6.

Institutional and financial independence

The Resolution Board directly exercises the resolution tasks and powers conferred on the CSSF on the basis of the BRR law or the SRMR. The Resolution Board does not need to seek instructions from the management or the Board of the CSSF in order to decide on the measures to be implemented in the area of its competence. To this end, it has regulatory and instructional powers, as well as internal organisational powers.[110]

In order to carry out its tasks, the Resolution Board is responsible for drawing up its budget,[111] which covers staff costs and, in all likelihood, equipment costs and travel costs associated with carrying out its tasks, etc. The Resolution Board's budget is transmitted to the Executive Board of the CSSF to be included into the budget of the CSSF without any possible change.[112] The CSSF budget "which includes the budget drawn up by the Resolution Board" is then submitted by the Executive Board to the CSSF Board for approval.[113] Although presented together, the budget relating to resolution tasks is "specific"[114] and is not part of the CSSF's general budget. The expenditure appropriations provided for the execution of resolution tasks may not be reallocated to other tasks. Financial commitments relating to resolution tasks are decided by the Resolution Director. The financial independence of the Resolution Board and the Resolution department is without prejudice to the integration of the staff in charge of the resolution missions in the CSSF's organization chart, as decided annually by the CSSF Board when adopting the annual budget.[115]

The various tasks of the CSSF are financed by taxes levied on the financial sector.[116] In order to cover the expenses relating to resolution for the year 2023, credit institutions incorporated under Luxembourg law and branches of credit institutions in a third country which are located in Luxembourg must pay an annual lump sum equal to 40,000 euros, 72,000 euros and 160,000 euros, depending on the size of the balance sheet of the companies.[117] Each year, a Grand-Ducal regulation sets the amount of fees per task that the CSFF is authorised to levy on the financial sector.[118]

The budgetary autonomy of the CSSF in general and of the Resolution Board in particular must be considered in the light of the five-year contract

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110 Article 12-1(1)-(3) of the CSSF Act.

111 Article 12-1(4) of the CSSF Act.

112 Article 12-6 of the CSSF Act.

113 Article 22(1) of the CSSF Act.

114 Article 12-6 of the CSSF Act.

115 Article 13(4) of the CSSF Act.

116 Article 24(1) of the CSSF Act.

117 Point XXIX of the Grand-Ducal Regulation of 23 December 2022 on the fees to be charged by the CSSF. Mémorial A no. 662, 23 December 2022. When the Resolution Council was set up, the annual lump sum was set at 25,000 euros, 45,000 euros and 100,000 euros.

118 Article 24(2) of the CSSF Act.

of objectives concluded between the CSSF and the Ministry of Finance. This contractual document establishes the objectives to be pursued by the authority and determines the progression of its financial resources over the period. It serves as a reference for the definition of the general policy, as well as the annual and multiannual investment programmes. When drawing up and adopting these documents, the CSSF Board must "take into account the needs of the Resolution department".[119] In addition, the CSSF's budget, financial accounts and management report must be approved by the Government following their adoption by the CSSF Board. Significant increases in the CSSF's budget could give rise to debate if not duly justified (e.g. due to an increase in the number of tasks entrusted to the CSSF) – or even the budget could be rejected by the Government, thus requiring the CSSF to present a new budget. While such a possibility has not yet arisen, the increase in levies on the financial sector since 2014/2015 has led to regular criticism from the Conseil d'Etat[120] and parliamentary questions to the Government (Etgen, 2022). It is feared that the repeated increases in levies will affect or risk affecting the attractiveness of Luxembourg as a financial centre. At the same time, the Conseil d'Etat recognises that these increases reflect the multiplication of the tasks entrusted to the CSSF and the need to recruit more and more experienced staff to deal with the complexity of banking and financial regulation[121] (Paperjam, 2023). Incidentally, strengthening the CSSF's human resources to guarantee credible and effective supervision of the financial centre was part of the Government's 2018-2023 coalition agreement (Government, 2018: 125).

At the level of the CSSF itself, the right of the Resolution Board to draw up its budget is limited by the power of the CSSF Board to adopt annually the general budget, "including the budget of the resolution board". Although neither the CSSF law nor the internal rules of the CSSF board and the resolution board refer to this hypothesis, the CSSF Board retains the right to oppose the budget prepared by the Resolution Board. In such an eventuality, the resolution board and the CSSF board will have to cooperate to find an agreement.

Personal independence: rules for appointing and dismissing members of the Resolution Board

The Resolution Board has five members, three of whom are appointed *ex officio*: the Director of the Treasury, the Director General of the BCL and the CSSF Director responsible for banking supervision. The appointment of the other

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119 Article 5 of the CSSF Act.

120 Council of State, Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. CE 52.560, 15 December 2017; also: Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. 53.211, 15 February 2019, and Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. 60.973, 22 April 2021.

121 80% of the budget corresponds to staff costs (*CSSF watchdog in massive fee hike to cover deficit*, Luxembourg Times, 23 December 2021.).

two members of the Resolution Board, the Resolution Director and a magistrate, follows two separate procedures defined in the CSSF Act.

In accordance with Article 35 of the Constitution, the power of appointment to civil posts lies with the Grand Duke.

The appointment and dismissal of the Resolution Director are governed by the rules applicable to the members of the CSSF's Executive Board.[122] The Resolution Director is appointed by the Grand Duke on the proposal of the Government in Council, for a renewable term of five years. He takes up his duties after having sworn, before the Minister of Finance, "an oath of loyalty to the Grand Duke and obedience to the Constitution and the laws of the State", and having "promised to fulfil his duties with integrity, thoroughness and impartiality and to preserve the secrecy of the deliberations".[123] His dismissal is decided by the Grand Duke, acting on a proposal from the Government, after consultation with the CSSF Board. Dismissal is pronounced in cases where the director "no longer fulfils the conditions necessary for his duties" or if he is "guilty of serious misconduct".[124] These conditions are taken from those applicable to the Director General of the BCL,[125] pursuant to Article 14(2) of the Statute of the ESCB.[126] In the event of non-renewal or revocation of his mandate, the Resolution Director (like the members of the CSSF management) becomes a general adviser to the CSSF, maintaining his status and level of remuneration. This statutory and salary guarantee reduces the negative effect of non-renewal or dismissal and helps to strengthen the independence of the Resolution Director.

The representative of the Ministry of Finance is appointed by Grand Ducal decree adopted by the Government in Council.[127] No specific conditions are imposed on the appointment or dismissal of the Director of the Treasury.

The appointment and dismissal of the Director General of the ECB are governed by the Law of 23 December 1998 on the BCL. Once again, the power of appointment lies with the Grand Duke acting on a proposal from the Government in Council. The term of office is six years, renewable. Removal from office is decided by the Grand Duke on a proposal from

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122 Article 10(2), (3) and (5) and Article 11, by reference to Article 12-7(3) of the CSSF Act. All civil servants must swear an oath before the Minister or his delegate before taking up their duties. The oath taken is valid for the entire career of the official, unless the law expressly prescribes the oath for special functions, as is the case for appointment to a management function within the CSSF.

123 Article 10(5) of the CSSF Act.

124 Article 10(3) of the CSSF Act.

125 Council of State, Opinion on the draft law on monetary status and the Banque centrale du Luxembourg, 1 December 1998, 4.

126 These conditions are enshrined in Luxembourg law in Article 12(3) of the Law of 23 December 1998 on monetary status and the BCL. Mémorial A no. 112, 24 December 1998; last amended by the law of 21 July 2021. Mémorial A no. 563, 26 July 2021.

127 Article 6 of the law of 16 April 1979 establishing the general status of civil servants. Mémorial A no. 31, 17 April 1979; last amended by the law of 6 January 2023. Mémorial A no. 16, 12 January 2023.

the Government, after consultation with the BCL Board, if the Managing Director no longer fulfils the conditions required for his duties (i.e. long-term physical or mental incapacity) or if he is guilty of a serious misconduct. In both cases, there must be sufficient evidence that one or other of these conditions has been met.[128]

Finally, the director of the CSSF in charge of banking supervision is appointed and dismissed according to the same procedure and conditions as the Resolution Director. His term of office is also five years, renewable.[129] The same applies to the appointment of a magistrate to the Resolution Board.[130]

A fundamental disagreement between the Government and the management of the CSSF on the policy and the execution of the mission of the CSSF constitutes grounds for dismissal of the entire management. This possibility is not included in the case of the Resolution Board: although the conditions for the appointment and dismissal of the Resolution Director refer to those applicable to the CSSF's Executive Board, the Resolution Director is not a member of the Executive Board.[131] Furthermore, the collective dismissal procedure of the Resolution Board is incompatible with the *ex officio* participation of the Director of the Treasury and the General Manager of the BCL and the specific rules governing their dismissal conditions.

Table 2

Members of the Board of Directors at 31 December 2022

Chair			
Romain Strock	Resolution Director	01.04.2021-31.03.2026	5 years (2nd mandate)
Members			
Anne-George Kuzuhara	Ministry of Finance	01.11.2024-30.10.2029	5 years (1st mandate)
Gaston Reinesch	Director General of the BCL	01.01.2019-31.12.2025	6 years (2nd mandate)
Claude Wampach	Director of the CSSF in charge of banking supervision	01.01.2019-31.12.2024^p	5 years (1st mandate)
Karin Guillaume	President of Chamber at the Court of Appeal	01.04.2021-31.03.2026	5 years (2nd mandate)

Source: CSSF's website, List of members, updated on 12 November 2024.

128 Court of Justice, *Ilmārs Rimšēvičs v Latvia*, joined cases C-202/18 and C-238/18, ECLI:EU:C:2019:139, 26 February 2019.

129 Article 10(2), (3) and (5) of the CSSF Act.

130 Article 12-2(1) and (2) of the CSSF Act.

131 Article 12-7(1) of the CSSF Act.

Operational independence: internal operating rules of the Resolution Board

The BRR Act and the CSSF Act give the Resolution Board the power to define its internal organization.[132] The internal operating rules are defined in its rules of procedure. The Resolution Council is run by a Resolution Department made up of staff with financial expertise.

Resolution Board meetings

The Resolution Board meets "at least" once every six months. A provisional annual calendar of meetings, drawn up at the beginning of the calendar year, is proposed by the secretariat and sent to the members of the Resolution Board for approval. The Resolution Director chairs the Resolution Board. If he is unable to attend, the duties associated with chairing the Resolution Board (convening meetings, drawing up the agenda, organising debates) are carried out by the Director of the Treasury.

The Resolution Director convenes meetings either on his own initiative or in the following circumstances. One on hand, the Minister of Finance, the Director General of the BCL, the Director General of the CSSF or the Resolution Director may refer the situation of an institution to the Resolution Board with a view to the possible adoption of resolution measures. The other circumstance occurs when the Resolution Board is seized or warned by the ECB, the SRB or the European Commission about the situation of an institution – this was the case when the ECB informed the Resolution Board of the moratorium it had decided on with regard to ABLV Bank in February 2018.

Meetings are convened with due diligence and within a sufficient time frame, in principle 30 calendar days prior to the meeting, except in urgent cases to be assessed by the Resolution Director. As a general rule, meetings are held at the CSSF's registered office. In case of urgency identified by the Resolution Director, the Resolution Board may hold a meeting using a voice telecommunication system or take a decision using a written procedure.

The Resolution Director sets the agenda for Resolution Board meetings. It is approved by the Resolution Board at the beginning of the meeting. Although neither the CSSF Act nor the rules of procedure mention this, it must be assumed that one or more members of the Resolution Board may request that additional items be added to the agenda.

The agenda for a meeting and the related meeting documents are sent to the members of the Resolution Board – preferably by e-mail – in principle at least eight calendar days before the date set for the meeting, except in cases of urgency to be determined by the Director of Resolutions.

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[132] Article 12-1(1)-(3) of the amended CSSF law.

The agenda for meetings convened following a referral to the Resolution Board due to the situation of a credit institution shall contain the items indicated by the person requesting that the meeting be convened.

The agenda distinguishes between general issues and individual issues, and divides each of these categories into "A" and "B" items, depending on the nature and, where applicable, the importance of the issue. "A" items will be discussed at the meeting and may be the subject of a decision, whereas "B" items will only be the subject of a decision without prior discussion, unless a member of the Resolution Board so requests. The agenda may also include "C" items which are notified to the Resolution Board for information purposes.

Table 2

List of meetings over the period 2016-2021

	2016	2017	2018	2019	2020	2021
Number of meetings	[n/a]	5 (+decisions by written procedure)	6 (+decisions by written procedure)	4 (+decisions by written procedure)	2 (+decisions by written procedure)	4
Meeting dates	[n/a]	[n/a]	[n/a]	25/2/2019 13/5/2019 30/9/2019 [n/a]	15/6/2020 14/12/2020	09/11/2021 [n/a] [n/a] [n/a]

Source: Frédéric Allemand. Data: CSSF annual reports; diaries of the BCL's Chief Executive Officer.

Decision-making at the Resolution Board

The Resolution Board takes its decisions as a college.[133] The rules governing decision-making within the Resolution Board are defined in article 12-4 of the CSSF Act, and detailed in article 2.6 of the Resolution Board's rules of procedure. The deliberations of the Resolution Board, at physical meetings or at meetings held using a voice telecommunication system, are valid if the majority of the members are present or represented by their substitute. If the quorum is not reached at the beginning of the meeting, the Chairman shall suspend the meeting and convene a new meeting with the same agenda within a reasonable time frame.

Voting is by show of hands, unless at least one member requests a secret ballot. Decisions of the Resolution Board are taken by a majority of the votes cast, except for the decisions on information requests addressed to the BCL, which shall be taken unanimously – this guarantees the right of veto of the Director General of the monetary authority. Abstentions are not taken into account when determining the majority of votes cast. Each member has one vote. In the event of

133 Article 12-4(1) of the CSSF Act.

a tie, the Chairman of the Resolution Board has the casting vote, or if he is unable to attend, the Director of the Treasury.

A member of the Resolution Board who, in the performance of his duties, is called upon to give an opinion on a matter in which he may have a direct or indirect personal interest such as to compromise his independence, must inform the Resolution Board and may not take part in the deliberation or decision in question.

If a decision is taken by voice telecommunication, the decision is adopted by a majority of the votes cast, provided that the voice telecommunication procedure allows real-time communication and collegial deliberation involving the majority of the members of the Resolution Board.

If a decision is taken by written procedure, the draft decision is approved by the Resolution Board if, within the time limit specified in the communication, a majority of the members have given their agreement in writing. Any member who fails to express his or her opinion within the time limit specified shall be deemed to have abstained.

Operational support for the Resolution department

The day-to-day operation of the Resolution Board is carried out by the staff of the Resolution department (16 employees at 31 December 2022). Although operating under the aegis of the CSSF, this department is detached from the other departments from an operational point of view: it is headed by the Resolution Director.

The Resolution Director recruits, appoints, promotes, changes the assignments of and dismisses the agents of the Resolution department.[134] Each member of staff recruited takes an oath before the Resolution Director and reports directly to him. This operational independence does not exclude cooperation with other CSSF departments – in particular the departments in charge of support functions (resources department, legal department, IT department, communication).

The CSSF's staff, all departments taken together, is composed of civil servants, possibly supplemented by employees assimilated to State employees ('employés d'Etat'), as well as salaried employees ('salariés'). The staff is characterised by its very high national diversity: more than half of the CSSF's staff (51.2%) are nationals of other Member States, representing a total of 17 nationalities. The average age is constantly rising and was almost 41 at the end of 2021. The ageing of the staff reflects both the strategy of recruiting experienced staff and a high level of retention within the authority. At the end of November 2023, there were 19 vacancies: 47% of them (9) were for candidates with 5 years' experience or more and at least a Master's degree. Women account for 45.75% of the total workforce; however, only 31.5% of them hold positions of responsibility.

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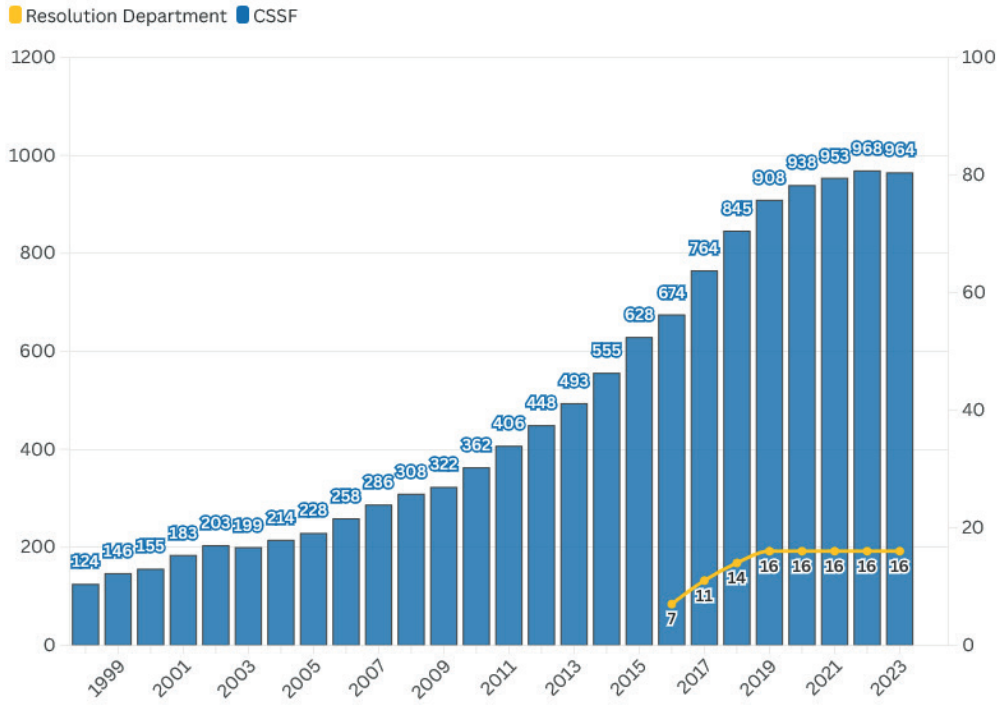
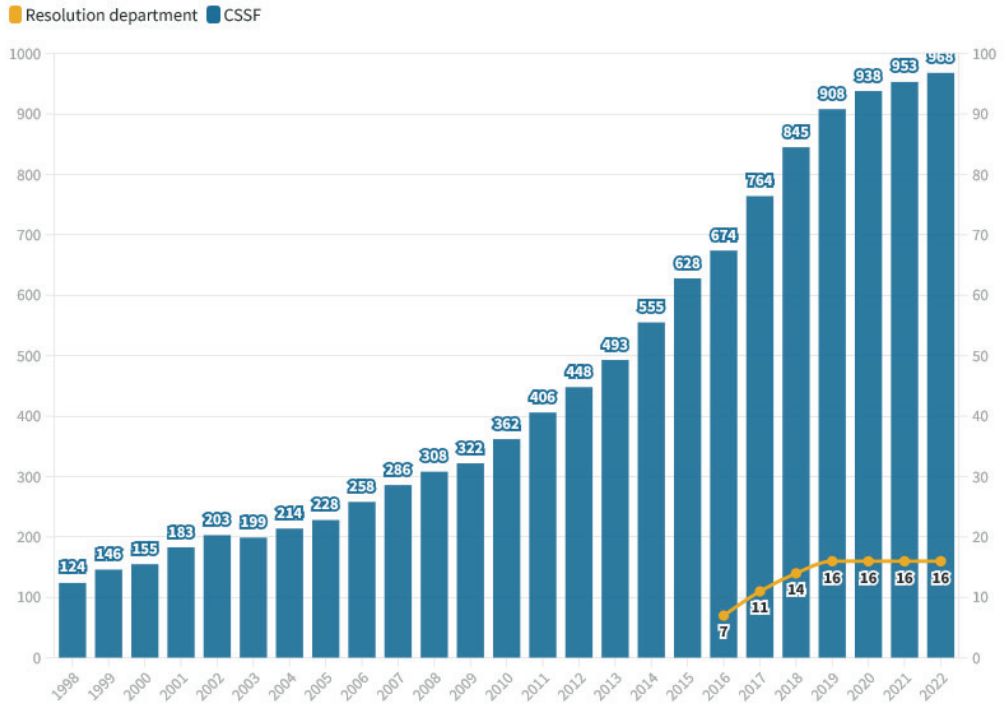
134 Articles 12-6 and 14(2) of the CSSF Act.

Chart 2

Movements in staff number: CSSF vs Resolution department

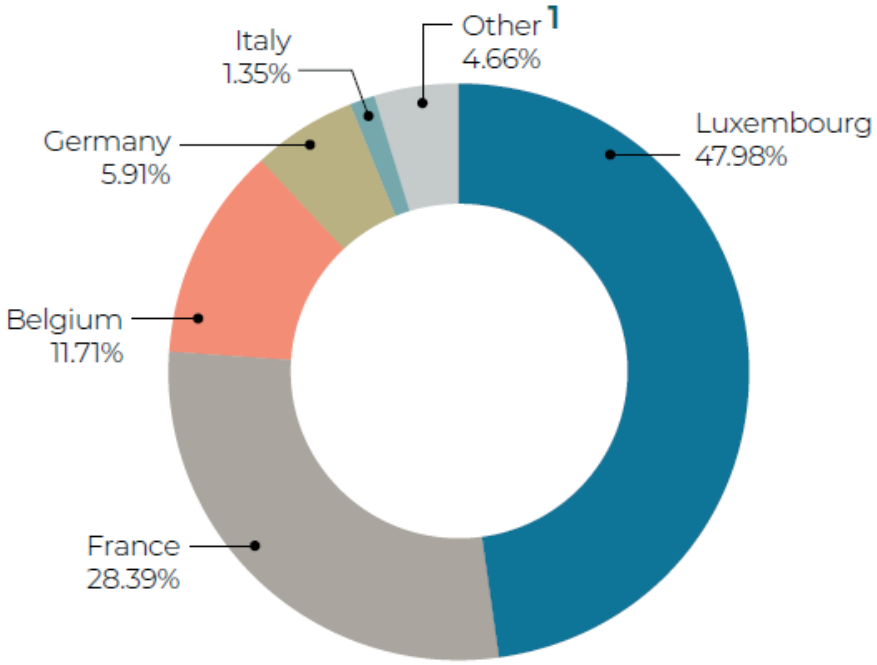




Source: Frédéric Allemand. Data: CSSF, Annual Report 2023.

Figure 2

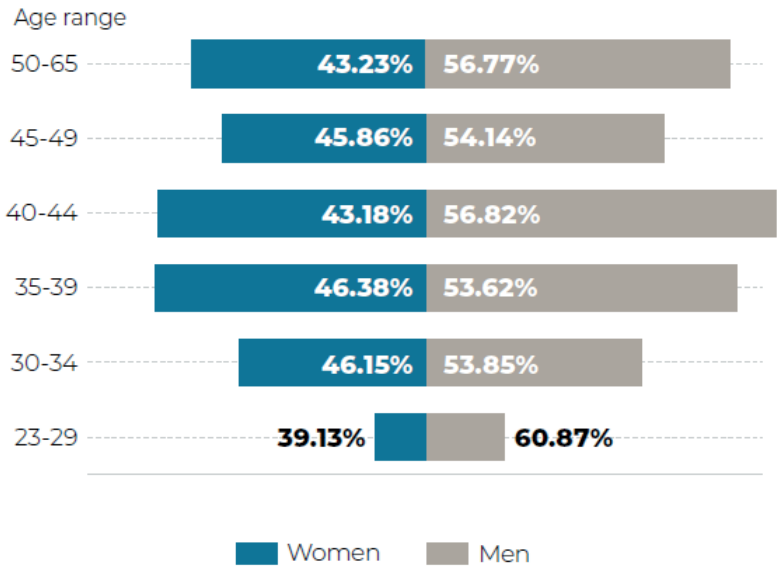
Breakdown of staff by nationality



Source: CSSF, Annual Report 2023.
(1) Others: Portugal (0.83%), Spain (0.74%), Austria (0.62%), the Netherlands (0.52%), Poland (0.41%), Romania (0.41%), Bulgaria (0.31%), Greece (0.31%), Ireland (0.21%), Finland (0.10%), Sweden (0.10%) and Slovakia (0.10%).

Figure 3

Breakdown of staff by age



Source: CSSF, Annual Report 2023.

Table 4

CSSF hierarchy structure

	Women	Men	Total
Director general	0	1	1
Directors	1	3	4
Resolution director	0	1	1
Heads of Department	12	19	27
Deputy heads of Department	19	22	41
Heads of division	20	67	87
Total	**52**	**113**	**165**
In % of	**31.52%**	**68.48%**	**100%**

Source: CSSF, Annual Report 2023.

The CSSF does not produce detailed data by department. However, the analysis of six profiles of Resolution department agents on professional social networks provides some information. Their professional experience at the time of recruitment averages over twelve years. All had previously worked in the private sector, either in a banking institution or a law firm. One agent had worked for the SSM for two years. Five of them had a master's degree.

Table 5

Profile of the Resolution Department staff

Gender	Function	Diploma	Professional experience	Previous occupation
M	Economist	Master Wealth Management	6	Banking sector SSM ECB (2 years)
Me	Lawyer	Master in Law	14	Law firm Banking sector
M	Economist	BA in Banking and Finance	23	Banking sector
F	Lawyer	Master in Banking law	6	Law firm
M	Economist	Master in Finance & Banking	13	Banking sector
M	Finance	Master in Accounting and Finance	11	Banking sector

Source: Frédéric Allemand. Data source: LinkedIn.com.

The Resolution Board's democratic accountability obligations

As a standard practice, Luxembourg law limits the *accountability* obligations of public institutions to the submission of an activity report on the essential aspects of their operation to their supervisory ministry.[135]

[135] Instruction of the Government in Council of 11 June 2004, cited above; Chapter 4, point 4, of the Decision of the Government in Council of 10 February 2017, cited above.

General accountability obligations

According to Article 5 of CSSF Act, the CSSF Board submits the CSSF's financial accounts (balance sheet, profit and loss account) and the management report to the Government for approval on an annual basis. In addition, the management submits the report of the external auditor ('réviseur d'entreprises agréé'). In the light of these documents, the Government is called upon to decide on the budgetary discharge to be given to the CSSF bodies. In addition, each year, the Executive Board of the CSSF sends the Minister of Finance a report on developments in the part of the financial sector.[136] In practice, the CSS's annual activity report includes a two-page chapter on resolution, drafted under the responsibility of the Resolution department. It presents the institutional aspects of the Resolution board and the activities carried out over the past year. The annual activity report is published on the CSSF website.

The organic law of the CSSF does not provide for any obligation to submit the annual report to the Chamber of Deputies. The only obligations to submit an annual activity report concern the CPDI and the FRL, taking into account their possible impact on the budget of the Luxembourg State and on the financial sector. Thus, during the discussion of the bill concerning the annual budget, the Director General of the CSSF, accompanied by the Director in charge of the supervision of the financial sector, are invited to present the evolution of the financial sector.

The Chamber of Deputies has the power to invite extra-parliamentary persons or bodies to hearings and discussions.[137] In fact, since the Resolution Board was set up (2016), a representative of the CSSF has been invited on sixteen occasions to exchange views with parliamentarians. Banking resolution policy has never been discussed and the Resolution Director has never been invited to a debate. The CSSF is represented either by its Director General or by the Director responsible for banking supervision, or by both.

Actually, the CSSF's accountability obligations are similar to those applied to other public bodies, such as the Commissariat aux Assurances.[138] Conversely, each year, the FGDL's Management Committee must send a report on its activities over the past year to the Government in Council and to the Chamber of Deputies.[139] The Systemic Risk Committee is also required to send a report on its activities over the past year to the Government Council and the Chamber of

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136 Article 9(3) of the CSSF Act.

137 Article 29(1) of the Rules of Procedure of the Chamber of Deputies (updated to 22 March 2023).

138 Articles 27 and 28 of the law of 7 December 2015 on the insurance sector. Mémorial A no. 229, 9 December 2015; last amended by the law of 30 March 2022 on dormant accounts. Mémorial A no. 149, 1er April 2022.

139 Article 154 of the BRR Act.

Deputies. In addition, at the request of the Chamber, the Committee presents the report to the relevant committee of the Chamber.[140]

Audit by the Court of Auditors

According to Article 105 of the Constitution, the Court of Audit is responsible for auditing the financial management of State bodies, administrations and departments; the law may entrust it with other tasks of auditing the financial management of public funds. Legal entities governed by public law may be subject to audit by the Court of Audit,[141] provided that they are not already subject to audit by their supervisory ministry.[142] Article 23(5) of the CSSF Act expressly provides that the CSSF is subject to audit by the Court of Auditors as to the proper use of the public funds allocated to it. No reservation is made with regard to the budget of the resolution service: all the tasks entrusted to the CSSF are therefore subject to the control of the Court of Auditors. At the end of 2022, the CSSF had not been subject to any recurring or special audit by the Court of Auditors.

Resolution litigation

Pursuant to Article 118 of the BRR Act, the Administrative Court ('Tribunal administratif') has jurisdiction to hear appeals against crisis prevention measures,[143] decisions relating to the reduction or removal of obstacles to the resolvability of a credit institution,[144] resolution measures,[145] administrative sanctions and other administrative measures.[146] Appeals must be lodged within one month of notification or publication of the measure, otherwise they will be time-barred. Appeals do not have suspensive effect.

The number of administrative appeals remains very low compared to the importance of Luxembourg as a financial centre. Questioned on this subject in the Chamber of Deputies, the Director General of the CSSF justified the rarity of appeals against CSSF decisions by the meticulousness and seriousness demonstrated by CSSF staff and, secondly, by the possible impact of appeals on the reputation of institutions.[147] Between 2016 and 2022, the administrative courts (Administrative Court and Administrative Court of Appeal) handed down 20 judgments following appeals against the CSSF. None of them concerned the CSSF's tasks or the exercise of its resolution powers.

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140 Article 9 of the law of 1er April 2015 establishing the Systemic Risk Board. Mémorial A no. 64, 3 April 2015.

141 Article 2(3) of the law of 8 June 1999 on the organisation of the Court of Audit. Mémorial A no. 68, 11 June 1999; last amended by the law of 26 July 2010. Mémorial A no. 125, 30 July 2010.

142 Council of State, Opinion on the draft law revising article 105 of the Constitution, 2 March 1999.

143 Article 59-48 of the BRR Act.

144 Article 29(6) of the BRR Act.

145 Article 118(1) of the BRR Act.

146 Article 119 of the BRR Act.

147 Chamber of Deputies, Minutes of the meeting of the Committee on Finance and the Budget, cit., 4.

Table 6

Judgments handed down by the administrative courts concerning the CSSF (2016-2022)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	Total
Administrative court of Appeal	1	1	-	1	-	1	1	2	4	11
Administrative tribunal	3	1	4	4	2	2	-	4	2	22
Grand total	**4**	**2**	**4**	**5**	**2**	**3**	**1**	**6**	**6**	**33**

Source: Frédéric Allemand. Data: CSSF annual reports; diaries of the BCL's Chief Executive Officer.

The justiciability regime for CSSF acts does not distinguish according to the origin of the rules implemented by the Resolution Board. In the *ABLV Bank Luxembourg* case decided in March 2018, the CSSF argued that, as the Luxembourg resolution authority, it was obliged to implement the SRB's decision at national level on the basis of the SRMR. The *Tribunal d'arrondissement de Luxembourg* ruled that the question of whether or not the CSSF was obliged to refer a request for dissolution or liquidation to the Luxembourg courts was irrelevant to the resolution of the dispute.[148]

The civil liability regime of the CSSF in respect of its resolution functions

The ordinary law governing the civil liability of public bodies is set out in the Act of 1er September 1988.[149] As a matter of principle, the State and other legal persons governed by public law must be held liable, each within the scope of its public service missions, for any damage caused by the defective operation of their services, whether administrative or judicial, subject to *res judicata*. The faulty operation that caused the damage may be the result of a fault or minor negligence on the part of the public authorities.

The CSSF Act derogates from ordinary law. It provides in article 20(2) and (3) that the civil liability of the CSSF or of its officials and agents intervening in the exercise of its missions, may only be engaged for individual damages suffered by supervised undertakings or professionals, by their clients or by third parties, provided that it is proved that the damage was caused by gross negligence in the choice and application of the means implemented for the accomplishment of the CSSF's public service mission. The requirement of "gross negligence" rather than minor negligence reduces the possibilities of the CSSF incurring civil liability in an area marked by its complexity. This derogatory liability regime is extended to the operation of the CSSF as a resolution authority. Article 12-5 of the CSSF Act specifies that this regime applies to the Resolution Board, its members, their deputies and the staff of the Resolution department. Defence

148 Tribunal d'arrondissement, *CSSF v ABLV Bank Luxembourg*, docket number: TAL-2018-01570, 9 March 2018.

149 Mémorial A no. 51, 26 September 1988.

costs are borne by the CSSF, which may claim reimbursement in the event of a final conviction for gross negligence.

This choice of limited liability is understandable in the light of the debates that accompanied, in the early 1990s, the liquidation of the *Bank of Credit and Commercial International* (BCCI), whose holding company and the headquarters of one of the group's banks are in Luxembourg. The opening of a drug money laundering investigation by the US authorities against a Florida-based subsidiary of the group revealed an elaborate system of large-scale fraud over several years through the group's various banks. The weak effectiveness of banking supervision and the fight against money laundering practised by the supervisory authorities in the United Kingdom and Luxembourg was highly criticized.[150] Given the financial stakes at play and the risk of litigation that threatened the Institut Monétaire Luxembourgeois – the authority responsible for supervising banks at the time – the Government and the legislature decided to tighten up the conditions under which the Institut could incur civil liability.[151] When the BCL and the CSSF were set up in 1998, this derogatory regime was adopted in identical terms and applied to these two new public institutions, against the advice of the Chamber of Commerce.

3. Concluding remarks

The Resolution Board is a young structure in Luxembourg's institutional environment. It remains difficult to assess its performance. With the exception of the ABLV Luxembourg case, the Resolution Board did not really have the opportunity to make full use of its procedures and powers to intervene in the resolution of credit institutions, nor of its ability to coordinate its action effectively with the other structures concerned with the stability of the Luxembourg financial system (other CSSF departments, the BCL, the Ministry of Finance, the FRL, the FGDL and the CPDI). However, the limited human resources allocated to the Resolution Council raise questions about its ability to react should a major banking crisis strike the Luxembourg financial center.

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150 French National Assembly, Rapport d'information par la mission d'information commune sur les obstacles au contrôle et à la répression de la délinquance financière et du blanchiment de capitaux en Europe, by Mr Arnaud Montebourg, vol. 5: *The Grand Duchy of Luxembourg*, no. 2311, 30 March 2000, 48-52.

151 Article 65 of the law of 5 April 1993 on the financial sector. This provision introduces two new paragraphs to article 30 of the Organic Law establishing the Institut Monétaire du Luxembourg of 20 May 1983.

Malta

Ivan-Carl Saliba and Lynn Spiteri Dalmas

Summary. 1. The Institutional Set-up for banking resolution in general – 1.1. The MFSA – 1.2. Composition of the Resolution Committee – 1.3. Institutional Set-up of the Resolution Unit – 1.4. Functions and powers of the Authority – 2. Banking prudential supervision – 3. Accountability and judicial review

1. The Institutional Set-up for banking resolution in general

1.1. The MFSA

The Malta Financial Services Authority (MFSA) is an autonomous public institution established as the single regulator for financial services, which was constituted back in 2002 (Article 3(1) MFSA Act[1]). Pursuant to Article 3(1) MFSA Act, "*[…] the Authority shall act independently and shall not seek or take instructions from any other body or person*". The MFSA regulates banking, financial institutions, insurance companies and insurance intermediaries, investment services companies and collective investment schemes, securities markets, recognized investment exchanges, trust management companies, company services providers and pension schemes. Since 2018, it is also responsible for regulating Virtual Financial Assets. In terms of banking Resolution, the National Resolution Authority (NRA) is established under Article 7B of the MFSA Act. The Board of Governors of the MFSA shall also act as the NRA pursuant to Article 7B(1) MFSA Act.

The Resolution Committee is appointed by the Resolution Authority (in the terms defined by Article 7B of the MFSA Act), whose composition, powers and functions are governed by provisions set out in the First Schedule to the MFSA Act[2] and the Recovery and Resolution Regulations (RRR). In this respect, Article 7C of the MFSA Act provides that "[*f]or the better carrying out and implementation of the provisions of the First Schedule and the BRRD, the Authority, through the Resolution Committee, may, from time to time, issue and publish Recovery and Resolution Rules which shall be binding on institutions and others as may be specified therein. Such Rules may lay down additional requirements and conditions in relation to the recovery and resolution of institutions, the conduct of their business, their responsibilities, and any other matters as the Resolution Committee may consider appropriate*". The Resolution Committee shall ensure full and complete adherence to the requirements and obligations prescribed by regulations made under this Act, either directly or in collaboration with European and third-country resolution authorities, and may, for such purposes, exercise any of its powers under this Act and any regulations made thereunder.[3]

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1 Malta Financial Services Authority Act (MFSA Act) of 20th January, 1989; 30th June 1989, 89 ACT XXXIV of 1988, as amended by Act XV of 1989; Legal Notice 167 of 1989; Legal Notice 79 of 1990; Act XXXI of 1990; Legal Notice 183 of 1990; Acts XIII of 1994, XXV of 1995, XVII of 2002, IV of 2003, XIII of 2004, XII of 2006, XX of 2007; Legal Notice 424 of 2007; Acts III of 2009, II, XIX of 2010, X of 2011; Legal Notice 426 of 2012; Acts XX of 2013, XXII of 2014, XXI of 2015, XVI, XXXI of 2017, VI of 2018, VIII of 2019. XXVI of 2019, V of 2020, VIII of 2020 and LXII of 2020 and XII of 2021, Legal Notice 225 of 2021, Acts XLVI, LXXI of 2021 and LXXII of 2021, Chapter 330, available *here*.

2 Pursuant to Article 7B(2) MFSA Act.

3 Pursuant to the First Schedule Recovery and Resolution, Article 7B 2. (1) MFSA Act.

Although the Board of Governors of the MFSA is the Resolution Authority, the Board has delegated all powers and functions emanating from the BRRD to the Resolution Committee. The Resolution Authority and the Resolution Committee operate independently from each other and from the supervisory arm of the MFSA to ensure that the statutory responsibilities are achieved in a transparent and credible way and are in line with the provisions of the BRRD. It is also enshrined within Maltese law that "*[…] The Resolution Authority and the Resolution Committee shall be operationally independent and shall act independently of each other and of the Executive Committee*" (Article 7B(2) MFSA Act). The reporting lines of the Resolution Function are different from those of the Supervisory Functions within the MFSA. Whilst the Supervisory Function within the MFSA reports to the Executive Committee (ExCo) on all matters (be thez regulatory or operational), the Resolution Function reports directly to the Resolution Committee on matters pertaining to resolution. Pursuant to the First Schedule Recovery and Resolution of Article 7B 4. (2) (b) and (c) MFSA Act, the Resolution Committee shall ensure no conflict of interest arise with the supervisory functions of the Authority. As a Function, Resolution liaises with ExCo on operational matters and with the Resolution Authority (which is the Board of Governors of the MFSA) on matters relating to policy. The Resolution Function within the NRA, is headed by a Head of Unit who is in turn assisted by two Deputy Heads on resolution planning and policy and legal together with their respective teams. All the work is carried out within the Function and approval is then sought before the Resolution Committee.

The Resolution team interacts on an on-going basis with European institutions and local Authorities to carry out its work. The finances of the NRA fall within the responsibility and budget of the MFSA. Apart from the fact that Article 22 of the MFSA Act contains the financial provisions of the MFSA, further details are provided with the MFSA's Annual Report.

Both the Resolution Committee and the Resolution Function execute and implement the requirements emanating from the BRRD, the Single Resolution Mechanism Regulation (SRMR), the Recovery and Resolution Regulations (RRR) and the Intergovernmental Agreement (IGA) on the transfer and mutualisation of contributions to the Single Resolution Fund.

The Resolution Function is currently responsible for the resolution of banks, certain investment firms and central counterparties. In terms of Article 33a BRRD, it has the power to suspend any payment or delivery obligations but it is not the Listing Authority or the Authority responsible for payment platforms such as TARGET2. The MFSA is currently in the process of shifting responsibility of bank liquidation from the Supervisory arm to the Resolution Function. Moreover, as a Function it is involved in matters pertaining to crisis management. In this respect, the Head of Function chairs the Crisis Management Task Force. In addition, a team member within the Function also acts as the secretary to the Management Committee of the Depositor Compensation Scheme.

The NRA and the National Resolution Fund were established in 2015 pursuant to Malta's transposition of the BRRD. No reforms have taken place with the exception of the shifting of responsibility of bank liquidation from Banking Supervision to Resolution following an IMF recommendation.[4] There was no resolution authority prior to the adoption of the BRRD in Malta.

1.2. Composition of the Resolution Committee

The Resolution Committee shall be composed of three persons, who shall be a person appointed by the Central Bank of Malta, a person appointed by the Authority, and a person appointed by the Ministry responsible for Finance, who have distinguished themselves in banking and financial related matters or have the relevant experience in financial supervision, regulation, resolution and insolvency of institutions.[5] The appointment of such persons shall be for such term, being a period of not more than three years, as may be specified in the letter of appointment, and shall be eligible for reappointment for a maximum period of two terms or otherwise for a maximum period of six years, whichever is the higher.[6] Such persons shall receive such remuneration as the Authority may from time to time determine. The Resolution Authority has assigned all its powers, which emanate from the Bank Recovery and Resolution Directive (BRRD) to the Resolution Committee which has all the necessary powers in order to carry out its functions. The Resolution Committee is ultimately responsible for taking resolution decisions pursuant to the MFSA Act and the RRR. The Resolution Committee sets its meetings which are held once a month. The items on the agenda are discussed between the members of the Resolution Committee and the Resolution Unit. Each member has an equal voting right. The Resolution Committee also interacts and collaborates closely with the Single Resolution Board (SRB) which is responsible for resolution matters at Banking Union level as established in the Single Resolution Mechanism Regulation.[7]

1.3. Institutional Set-up of the Resolution Unit

The Resolution Unit[8] which shall carry out the functions assigned to it under the MFSA Act, and as may be assigned to it by the Resolution Committee. The Resolution Unit shall periodically report to the Resolution Committee on the activities and developments within its area of competence. The Resolution Unit shall be composed of the Director of the Office, and any number of employees as may be required in order to carry out its functions properly.

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4 International Monetary Fund, Malta Financial Sector Assessment Program Technical Note - Bank Resolution and Crisis Management, IMF Country Report No. 19/346.

5 Pursuant to the First Schedule Recovery and Resolution, Article 7B 2. (2) MFSA Act.

6 Pursuant to the First Schedule Recovery and Resolution, Article 7B 2. (3) MFSA Act.

7 See Article 4(2) MFSA Act

8 Pursuant to the First Schedule Recovery and Resolution, Article 7B 8. MFSA Act.

The functions[9] of the Resolution Unit are to:

a) assess whether an institution is failing or is likely to fail, after consulting the Authority;

b) draw up resolution plans, after consulting the Authority, on how to deal with financial stress or failure of institutions, including at group level;

c) carry out resolvability assessment of institutions;

d) cooperate, liaise and exchange information, as necessary, with the Units respectively responsible for supervision of credit institutions and investment firms within the Authority.

1.4. Functions and powers of the Authority

In addition to the powers assigned to the Authority under this Act, the Banking Act,[10] and the Investment Services Act,[11] the Authority shall have the power[12] to:

a) determine the administrative penalties payable by institutions for failure to comply with any decisions issued by the Authority and addressed to them;

b) impose administrative penalties on any person whose conduct, in the opinion of the Authority, amounts to a breach of any of those provisions of this Act or any regulations or Rules issued thereunder transposing the BRRD in which an institution has an obligation towards the Authority;

c) impose an administrative penalty on any person who has failed to comply with a directive issued by the Authority under this Act or any regulations or Rules issued thereunder transposing the BRRD;

d) publish, collect and recover any administrative penalties imposed by it Provided that in exercising the powers listed in sub-paragraphs (a) to (d), the provisions of paragraphs 4(5), 4(6) and 5 shall apply and provided further that any reference to 'the Resolution Committee' shall be deemed to be a reference to "the Authority", and any reference to "the Court of Civil Jurisdiction" or "the Court" shall be deemed to be references to "the Tribunal";

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9 Pursuant to the First Schedule Recovery and Resolution, Article 7B 8. (4) MFSA Act.

10 Banking Act, Chapter 371, 15th November 1994, Act XV of 1994, available *here*.

11 Investment Act, Chapter 370, 19th September 1994, Act XIV of 1994, available *here*.

12 Pursuant to the First Schedule Recovery and Resolution, Article 7B 11. (1) MFSA Act.

e) issue, by notice inwriting, such directives on any person as it may deem appropriate in the circumstances in order to carry out the functions and duties prescribed by this Act and any regulations or Rules issued thereunder transposing the BRRD, and in exercising such power, the provisions of paragraph 7 of Schedule 1 of the MFSA Act, shall apply mutatis mutandis, and any reference to "the Resolution Committee" shall be deemed to be a reference to "the Authority"; and

f) bring proceedings before the Court of Civil Jurisdiction to recover as a debt an amount of administrative penalty due to it under the above-cited Schedule.

The Authority shall have all the powers that are necessary to enable it to perform its functions under this paragraph to ensure the effective implementation of the provisions of the BRRD imposing rights and obligations on competent authorities, and, accordingly the powers of the Authority in terms of this paragraph shall be interpreted and applied in accordance with the provisions of the BRRD.

2. Banking prudential supervision

The MFSA, in its supervisory capacity, through Article 4B of the Banking Act was granted with the power to act as the National Competent Authority responsible for licensing, regulating, and supervising credit institutions, electronic institutions, and financial institutions in Malta.

The European Central Bank (ECB) carries out the direct ongoing supervision of the Banks that are considered as significant institutions, whereas for those Banks that are considered as less significant, direct ongoing supervision is carried out by the MFSA. In general, the MFSA is still being monitored by the ECB to guarantee the proper implementation of EU Banking Legislation. The MFSA is also responsible for the off-site and on-site inspections of Credit and Financial institutions in Malta.

Early intervention and the power to appoint a temporary administrator fall within the responsibility of the supervisory functions. There are good communication lines between the Resolution Function and the Banking Supervision Function. Both Functions keep each other abreast with all the relevant updates. Moreover, from a Resolution Function perspective, any pertinent update is presented to the Executive Committee for their information.

3. Accountability and judicial review

Depending on the classification of the information, information is normally exchanged during Joint Supervisory Teams-Internal Resolution Teams meetings / calls based on the MoU between the SRB and the ECB. As an NRA, in order to obtain certain information, we would need to wait for the ECB to pass on this information to the SRB and obtain clearance for the SRB to share it with the NRA.

Accountability is present since the decisions of the Resolution Committee are scrutinised by the SRB and are subject to appeal before the local courts/tribunals. The MFSA is a public authority and therefore subject to audits of the national audit office. Any decision taken by the Resolution Committee shall be subject to an appeal brought before the Financial Services Tribunal. The awards of this Tribunal are subject to appeal (on points of law) before the Court of Appeal.

Moreover, pursuant to the First Schedule Recovery and Resolution of Article 7B 4. (2) (b) and (c) MFSA Act, the Resolution Committee shall seek the approval in writing of the Minister after informing the Resolution Authority and the Central Bank of Malta prior to decisions of direct fiscal impact or with systemic implications and notify the minister after information to the Resolution Authority of any decision pursuant to the MFSA Act.

Netherlands

Gijsbert ter Kuile and Laura Wissink

Summary. 1. Institutional Issues – 1.1. Resolution authority & organization and division of functions within DNB – 1.1.1. The Dutch resolution authority – 1.1.2. The different functions of the Dutch Central Bank – 1.1.3. The legal personality and internal organization of the Dutch Central Bank – 1.2. Additional functions of NRA (NRF, DGS, other than resolution functions) – 1.3. Involvement of other authorities in resolution process & their respective roles – 2. Independence, separation, accountability – 2.1. Composition of NRA board – 2.1.1. Executive Board – 2.1.2. Resolution Board – 2.1.3. Professional background in law and practice – 2.2. Agenda setting and decision-taking within NRA – 2.3. Operational independence – 2.4. Financial independence – 2.5. Independence in practice – 2.6. Information exchange between NRA and other authorities – 2.6.1. Between different functions – 2.6.2. DNB and Union authorities – 2.7. Democratic accountability and other forms of accountability – 2.7.1. Accountability to government – 2.7.2. Accountability to court of auditors – 2.7.3. Liability arrangements – 2.8. Judicial review

1. Institutional Issues

1.1. Resolution authority & organization and division of functions within DNB

1.1.1. The Dutch resolution authority

The Dutch Central Bank (*De Nederlandsche Bank*, 'DNB') is appointed as the national resolution authority in the Netherlands pursuant to Article 3a of the Decree execution EU-regulations financials markets (*Besluit uitvoering EU-verordeningen financiele markten*). The general resolution tasks are allocated to DNB in accordance with Article 4(1)(e) Bank Act 1998 (*Bankwet 1998*), while the specific provisions of the BRRD are implemented in the Financial Supervision Act (*Wet op het Financieel Toezicht*, 'FSA').

1.1.2. The different functions of the Dutch Central Bank

DNB is also the central bank for the Netherlands, the prudential supervisor for banks, insurers and pension funds, and the administrator of the Dutch Deposit Guarantee Scheme.

Pursuant to Article 1, paragraph 2, Bank Act 1998, DNB is an integral part of the European System of Central Banks (ESCB) with respect to the tasks and obligations that the Treaty allocates to the ESCB. Its monetary objectives and tasks are laid down in Articles 2 and 3 of the Bank Act 1998.

It is appointed as prudential banking supervisor on the basis of Article 1:24 FSA.[1] Its prudential supervisory tasks are included in Article 4, paragraph 1, subparagraph a and c, of the Bank Act 1998.

The decision to appoint the banking supervisor, DNB, also as resolution authority was motivated by the fact that this way (i) the existing expertise already present within DNB could be used, (ii) a close and effective coordination and information exchange between the supervisory and resolution task would be possible, and (iii) the existing infrastructure, staff, and support within DNB could be used and costs could thus be reduced.[2] At the same time, the resolution authority's independence is considered and is ensured by means of the various measures as described in section II below. In order to make it possible for DNB to combine the tasks of prudential supervisory authority (national competent authority) and national resolution authority, the Articles of Association of DNB have been amended in order to separate those tasks, as also required under Article 3(3) BRRD.[3]

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1 The conduct supervision is allocated to the Dutch Authority for the Financial Markets (*Autoriteit Financiele Markten*, AFM), cf. Article 1:25 FSA.

2 Letter of Minister of Finance to Parliament, Tweede Kamer, vergaderjaar 2013-2014, 32 013, nr.77, 4.

3 *Ibidem*.

1.1.3. The legal personality and internal organization of the Dutch Central Bank

DNB is a public limited company (*naamloze vennootschap*) incorporated under Dutch law, of which the Dutch State is the sole shareholder. The Dutch State is represented by the Minister of Finance.[4] With regard to carrying out its tasks as a prudential supervisor (of credit institutions, insurance companies and pension funds), as a national resolution authority, and as the administrator of the Dutch Deposit Guarantee Scheme, DNB is an independent administrative body and subject to a marginal supervision by the minister of Finance (in the Netherlands often referred to as 'remote supervision'). This is further discussed in Section II (accountability to government) below.

DNB is governed by an Executive Board, Supervisory Board, General Meeting of Shareholders, and Bank Council.

The Executive Board governs DNB and is responsible for the execution of DNB's tasks. It consists of a president and at least three and maximum five board members.[5]

The Supervisory Board[6] supervises, within the limits of the Treaty and the ESCB's Articles of Association, DNB's general course of business and the Executive Board's policies with respect to carrying out its task under Article 4 Bank Act 1998, including tasks related to supervision, payment transactions, and resolution.[7]

The General Meeting of Shareholders is the official meeting with DNB's (sole) shareholder, i.e. the Dutch state. Lastly, the Bank Council is a group of external stakeholders who discuss DNB's policy with the Executive Board, and the Treasurer General of the Ministry of Finance can participate in the deliberations.[8]

Without prejudice to the collective responsibility of the Executive Board, the carrying out of DNB's prudential supervisory tasks is allocated to the 'Executive

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4 Pursuant to Article 5 of the Articles of Association, DNB has an authorized capital, fully subscribed and paid-up of EUR 500,000,000. The shares are registered, and the Executive Board keeps a register in respect of the holders of shares. The Dutch State is the sole shareholder (cf. *DNB's Annual report of 2021*, 102).

5 Article 12, paragraph 1, Bank Act 1998.

6 Article 13, paragraph 1, Bank Act 1998. The Supervisory Board consists of at least seven members and maximum ten members. One of the supervisory board members will be appointed by the government (*bij overheidswege*), and the chair and other members will be appointed by the shareholders following a nomination of three persons for each available place prepared by the Supervisory Board (Article 13, paragraphs 1-3, Bank Act 1998).

7 Article 13, paragraph 6, Bank Act 1998. The Supervisory Board also assists the Executive Board by advising it, and approves the annual account.

8 Cf. respectively Article 16 DNB Articles of Association and 15 Bank Act 1998.

Board Members of Supervision' within the Executive Board, who can legally adopt decisions on behalf of DNB in this respect.[9]

Pursuant to Article 12b Bank Act 1998, the resolution tasks are allocated to one of the members of DNB's board (the 'Executive Board Member of Resolution'), and this board member shall not also be responsible for carrying out tasks related to the European System of Central Banks (ESCB) or banking supervision.[10] The Executive Board Member of Resolution is in charge of performing the duties related to DNB's resolution tasks.[11]

In line with this division of responsibilities, the DNB's Executive Board has a Prudential Supervision Council and a Resolution Board.[12] The Prudential Supervision Council is responsible for preparing the deliberations and decision-making of the Executive Board Members of Supervision. It consists of the Executive Board Members of Supervision, the directors of the various supervision divisions, and the directors of the financial stability, legal services, and resolution divisions.[13] The Resolution Board shall prepare the deliberations and decision-making of the Executive Board for the performance of their resolution tasks, as referred to under Article 4, first paragraph, subparagraph 3, Bank Act 1998.[14] The composition of the Resolution Board is elaborated upon in section II below.

This division of tasks and responsibilities within the Executive Board is reflected in DNB's organizational structure.[15] DNB has separate divisions for its monetary tasks, pension- and insurance supervision, banking supervision, and its resolution tasks.[16] The latter includes DNB's task with respect to the deposit guarantee system. The Executive Board Member of Resolution is also responsible for internal operations, including HR, ICT, Finance, Audit, second line risk management, Procurement and Communications.[17]

1.2. Additional functions of NRA (NRF, DGS, other than resolution functions)

Pursuant to Article 3a:68 FSA, a national resolution fund (NRF) is established, which has legal personality and is allocated with the task to manage the financial

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9 Article 6a, paragraph 1, DNB Articles of Association in conjunction with Article 12a, paragraph 1, Bank Act 1998. Article 6a DNB Articles of Association together with Article 9a of DNB Rules of Procedure set forth the division of tasks and responsibilities between the Executive Board members, together with the specific decision-making procedures in this respect.

10 Cf. Article 6a, paragraph 8, DNB Articles of Association.

11 Article 6a, paragraph 8, DNB Articles of Association.

12 Articles 17a and 17b respectively of DNB Articles of Association.

13 Article 22a, first paragraph, DNB Rules of Procedure in conjunction with Article 17a, second paragraph, DNB Articles of Association. The Executive Board Members may also invite other officers of DNB to the meetings.

14 Article 17b, first paragraph, DNB Articles of Association.

15 For an overview of the internal positioning of the resolution tasks within DNB, see p. 24 of the Netherlands Court of Audit (*Nederlandse Rekenkamer*), available in Dutch *here*.

16 For the complete organizational chart, see: *Organogram DNB Extern NL augustus 2022*.

17 See: *Executive Board*.

means to finance resolution measures with respect to entities outside of the scope of the SRM and branches of banks or investment firms established in a state other than an EU or EEA Member State.[18] The NRF was established in 2015 as a legal entity under public law by means of the law implementing the BRRD.[19]

The NRF is represented by a board consisting of three members, including its chair. DNB is responsible for the appointments, suspensions, and dismissal of the NRF's board members.[20] The NRF's board members are appointed for a period of four years, with the option of reappointment.[21] An official of DNB, interviewed for this publication, stated that there are good candidates for these positions. One reason may be that the restriction of liability of which DNB benefits when executing its legal tasks extends to the NRF board members (further discussed in Section II, 'liability arrangements').[22]

DNB shall assist the NRF in the carrying out of its tasks and provides the NRF with the necessary financial means in this respect.[23] The NRF does not have any employees. The arrangements are laid down in a cooperation agreement between the NRF and DNB.[24] Each year, before the 15th of March, the NRF shall send its annual account and annual report to the Dutch Central Bank.[25]

A comparable structure is established for the execution of the deposit guarantee scheme and a deposit guarantee fund ('DGF'). The division within DNB that is responsible for resolution is also responsible for carrying out the tasks related to the Deposit Guarantee Scheme. Additionally, a separate deposit guarantee fund ('DGF') was established in 2015,[26] which has legal personality and is allocated with the tasks to manage the financial means for the implementation of the deposit guarantee scheme. DNB decides upon the allocation of the DGF's financial means.[27]

The DGF is represented by a board consisting of three members, including its chair. Again, DNB decides upon the appointment, suspension and dismissal of the board members, and provides the necessary assistance and financial means

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18 Article 3a:68, paragraph 1 and 2, FSA.

19 Implementatiewet Europees kader voor herstel en afwikkeling van banken en beleggingsondernemingen (Staatsblad 2015, 43).

20 Article 3a:68, paragraph 3, FSA.

21 Article 7g, paragraph 1, Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees FSA (*Besluit bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie Wft*).

22 Cf. Article 1:25d, paragraph 3, subparagraph b, FSA.

23 Article 3a:68, paragraph 3, FSA.

24 Cf. *here*.

25 Article 7g, paragraph 3, DSPM in conjunction with Articles 18(1) and 34(1) Framework Act Independent Administrative Bodies.

26 Implementatiewet Europees kader voor herstel en afwikkeling van banken en beleggingsondernemingen (Staatsblad 2015, 43). Cf. *Annual report DGF 2021*, 5.

27 Article 3:259a, paragraph 1 and 2, FSA.

to the DGF to carry out its tasks.[28] Board members are appointed for a period of four years, with the option of reappointment,[29] and they too benefit of a restriction of liability when executing their legal tasks.[30] Similar to the accountability requirements of the NRF, the DGF shall send its annual accounts and annual report to DNB.[31]

1.3. Involvement of other authorities in resolution process & their respective roles

Before 2012, DNB could request a bankruptcy of a bank before court if supervision did not have the desired results and a bank was in an emergency situation. In 2012, an additional part was added to the FSA with respect to special measures regarding the stability of the financial system, which is often referred to as the Intervention Law (*Interventiewet*).[32]

The national legislator considered DNB's toolkit for banks that got into trouble too limited, since it was mainly focused on a possible bankruptcy of the bank involved. Other possibilities to actively aim for a timely and orderly winding-up of a bank, or for another possibility than a bankruptcy that would be less costly for society, were largely lacking. The legislature did not want to wait for European resolution regulations given the great importance of a stable financial system, and proposed a national scheme to ensure timely and orderly winding-up in the form of expropriation/nationalization of a bank.[33] The Intervention Law provided for more possibilities to intervene for DNB and the Minister of Finance to act in cases of emergency of banks and insurers.[34]

Upon the implementation of the European resolution regime, an important part of this Intervention Law remained unamended. The Minister of Finance maintained its power to nationalize banks in the interest of the stability of the financial system. However, it is not clear to what exceptional emergency situations, in which the resolution regime would not be applicable, this procedure would still be relevant.[35] It seems that the legislature preferred to keep the instruments of the Intervention Law precisely because of an as of yet 'unknown scenario', where the resolution powers might be lacking to effectively deal with a failing bank. For the moment, the Intervention Law may seem obsolete in the light of the existing resolution powers, and indeed its instruments were used only once in February 2013 when nationalizing SNS bank and not since,[36] but it could possibly function

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28 Article 3:259a, paragraph 3 and 4, FSA.

29 Article 29.10, paragraph 1, DSPM.

30 Cf. Article 1:25d, paragraph 3, subparagraph a, FSA.

31 Article 29.10, paragraph 3, DSPM in conjunction with Articles 18(1) and 34(1) Framework Act Independent Administrative Bodies.

32 Part 6 FSA.

33 Kamerstukken 33059, Nr. 3, 2011-2012, paras. 1.1. and 1.3.

34 Report Netherlands Court of Audit, 13.

35 Report Netherlands Court of Audit, 22.

36 See for information, *the website of the Netherlands Court of Audit*.

as a safety net if all else fails. The official interviewed for this article, confirmed that this apparent approach of the legislature seems likely.

2. Independence, separation, accountability

2.1. Composition of NRA board

2.1.1. Executive Board

The members of the Executive Board, DNB's governing body, are appointed by Royal Decree[37] for a period of seven years, and they can be re-appointed once for the same position.[38]

For an appointment of an Executive Board member, the Supervisory Board shall, after having heard the Executive Board, draft a job profile and, subsequently, a list of three people it recommends for that position.[39] Suspension or removal of a member of the Executive Board is only possible in case a board member does not meet the requirements for the performance of its duties or if it has committed serious misconduct. Such decision must be adopted by Royal Decree. Also, board members may be dismissed from their duties at their own request.[40]

The Royal Decrees adopting an appointment, suspension, or removal of an Executive Board member are published in the Dutch state journal (*Staatscourant*) by the minister of Finance.

2.1.2. Resolution Board

The Executive Board has a separate Resolution Board, composed of the Executive Board Member of Resolution, who is also chair of the Resolution Board, and the Executive Board Member responsible for the supervision of banks.[41] The Resolution Board consists furthermore of officers of DNB who are designated pursuant to Article 22b of the Rules of Procedure of DNB.[42] The aforementioned Executive Board Members of the Resolution Board may also invite other DNB officers to attend the meetings of the Resolution Board.[43]

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37 A royal decree is a decree from the Government, signed by the monarch. Parliament is not involved.

38 Article 12, paragraph 2, Bank Act 1998. Cf. Article 6, paragraph 7, DNB Articles of Association.

39 Article 12, paragraphs 2 and 3, Bank Act 1998. Cf. Article 6, paragraphs 6-8, DNB Articles of Association.

40 Article 12, paragraph 4, Bank Act 1998. Cf. Article 6, paragraph 9, DNB Articles of Association.

41 Article 17b, paragraph 2, DNB Articles of Association.

42 The following officers are designated to be part of the Resolution Board: the Director of the European Banks Supervision Division; the Director of the National Institutions Supervision Division; the Director of the Horizontal Functions and Integrity Supervision Division; the Director of the Supervision Policy Division; the Director of the Resolution Division; the Director of the Financial Stability Division, and the Director of the Legal Services Division (Article 17b, paragraph 2, Articles of Association DNB in relation to Article 22b DNB Rules of Procedures).

43 Article 22b, paragraph 1, DNB Rules of Procedure.

2.1.3. Professional background in law and practice

The members of the Executive Board must have 'recognized reputation and professional experience'. The interpretation of 'recognized reputation and professional experience' is based on the tasks and responsibilities following from the relevant EU laws, the Bank Act, DNB's Articles of Association, DNB's Rules of Procedure, DNB's internal rules regarding integrity, and the division of tasks amongst the various directors as laid down in their function profiles. Furthermore, the member of the Executive Board must at least meet the requirements that are imposed on board members of supervised entities.[44]

The current Executive Board Member of Resolution, Nicole C. Stolk-Luyten, holds the position of head of the Dutch NRA, and is thus also member of the Single Resolution Board, since July 2018. She studied history and law, and has a background in the public sector. Prior to her appointment as Executive Board Member, she was Secretary-Director at DNB, and before that role she was Deputy Secretary General at the Ministry of Security and Justice.[45]

2.2. Agenda setting and decision-taking within NRA

As aforementioned, DNB is managed by its Executive Board.[46] The Executive Board in its entirety as well as each Executive Board member individually may represent DNB.[47] The adoption of resolutions requires the presence or representation of at least the majority of the Executive Board's members, unless otherwise provided for by the law or the Articles of Association. If only half of the members are present, the Executive Board may also adopt resolutions at a meeting if its chair is present or represented.[48] With respect to resolutions for the performance of DNB's resolution tasks, as referred to in Article 4, first paragraph, sub 3, Bank Act 1998, the Executive Board Member of Resolution must be present at the meeting.[49]

The Executive Board passes resolutions by acclamation, and only votes on resolutions in case one of its members objects against the acclamation procedure.[50] The official interviewed for this article confirmed that it is common practice to strive for consensus. An absolute majority of votes cast is required to adopt a regular decision, and, if it is a tie, the chair's vote is decisive.[51] The chair

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44 See Job Profiles for members of the Executive Board of DNB (in Dutch only, available *here*).

45 See her profile/introduction available *here*.

46 Article 12, first paragraph, Bank Act 1998; Article 6 DNB Articles of Association.

47 Article 7, first paragraph, DNB Articles of Association.

48 Article 4, first and second paragraph, DNB Rules of Procedure. Notwithstanding these provisions, the Executive Board may also adopt resolutions in order to safeguard the continuity of DNB's operations, and put such resolutions on the agenda for discussion at its next meeting (fifth paragraph).

49 Article 4, third paragraph, DNB Rules of Procedure.

50 Article 5, first and second paragraph, DNB Rules of Procedure.

51 Article 5, fourth paragraph, DNB Rules of Procedure.

may determine whether the voting shall take place by means of sealed ballots or orally.[52]

The Executive Board's voting ratio has been amended in case of decisions related to DNB's resolution tasks. The Executive Board Member of Resolution has as many votes as the other board members together. In case of a tie vote, the former has a decisive vote.[53] This deviating voting procedure does not apply in case of decisions regarding the preparation of resolution outside of the SRM (i.e. preparation of resolution plans, assessment of resolvability, and imposition of resolution measures outside of the SRM).[54]

The Executive Board's meeting, deliberations and decision-making may take place both in a meeting in person or, unless a member opposes this, in a teleconference.[55] Resolutions may be adopted either in a meeting, which includes teleconferences, or outside a meeting. In case of the latter, resolutions are adopted unanimously by all members and in writing, which includes e-mail or any other electronic message, provided that none of the members opposes this decision-making procedure.[56]

Executive Board members who are not attending the meeting may, with the chair's consent, authorize other members to take part in the deliberations and the decision-making. That member is deemed to be present at the meeting for the quorum, as described above, to be able to adopt resolutions.[57]

Persons who are not members of the Executive Board may attend one or more meetings if the chair so decides. They may take part in the deliberations but are excluded from decision-making.[58]

The Executive Board is free to decide how often a year or with what frequency its meetings are held, unless the law, Articles of Association or Rules of Procedure provide otherwise. Meetings are held if its chair or the majority of the Executive Board's members considers it necessary.[59] The company secretary is responsible for convening meetings.[60]

The Resolution Board shall prepare the deliberations and decision-making of the Executive Board for the performance of DNB's resolution tasks.[61] It

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52 Article 5, third paragraph, DNB Rules of Procedure.

53 Article 12b, second paragraph, Bank Act 1998. Cf. Article 9, paragraph 7, DNB Rules of Procedure.

54 Article 12b, third subparagraph, Bank Act 1998. Cf. Article 9, paragraph 8, DNB Rules of Procedure.

55 Article 5, fifth paragraph, DNB Rules of Procedure.

56 Article 5, sixth paragraph, DNB Rules of Procedure.

57 Article 5, ninth paragraph, DNB Rules of Procedure.

58 Article 6 DNB Rules of Procedure.

59 Article 2 DNB Rules of Procedure.

60 Article 3 DNB Rules of Procedure.

61 Article 17b, paragraph 1, DNB Articles of Association.

shall meet as often as the Executive Board Member for Resolution considers necessary.[62]

Matters ensuing from non-resolution tasks are put on the Executive Board meetings' agenda for discussion if they have a material impact on the resolution duties.[63]

The Delegation of Powers Regulation 2018 (*Bevoegdheidsregeling DNB 2018*) sets forth the exact competences of the different functions within DNB to represent DNB and their mandates to take decisions on behalf of DNB. Every member of the Executive Board is granted the mandate, within the limits set by the division of tasks as laid down in DNB's Articles of Association, the Rules of Procedure and the Banking Act, to take decisions on behalf of DNB that can be adopted by DNB under the relevant laws. Also, each Executive Board member is granted the power to carry out the investigation powers allocated to DNB by or under the relevant laws.[64] Similarly, powers are granted to division directors and head of sections of each division.[65] However, decisions with respect to DNB's resolution tasks under Article 4, first paragraph, subparagraph 3, of the Bank Act 1998 are excluded from this delegation of powers.[66] This underscores the special and protected nature of resolution powers held within DNB.

2.3. Operational independence

The operational independence of the Dutch NRA is embedded by means of the separation of tasks from the supervisory divisions, and the separate staffing, reporting lines, and decision-making procedures, including voting rights, as aforementioned. Both the separation of tasks and the voting rights are laid down in the Bank Act 1998, which is a formal law, and elaborated upon in the Articles of Association and Rules of Procedures of DNB.[67]

2.4. Financial independence

Each year, before the 1st of January, the Executive Board compiles a budget of DNB's expected expenditure for the coming year. The budget requires prior approval of the Supervisory Board.[68] Additionally, since DNB is an independent administrative body, it requires ministerial approval from both the minister of Finance and the minister of Social Affairs and Employment for adopting its

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62 Article 22b, paragraph 2, DNB Rules of Procedure.

63 Article 6a, paragraph 9, DNB Articles of Association.

64 Article 3, first paragraph, Delegation of Powers Regulation 2018.

65 Article 3, second and third paragraph, Delegation of Powers Regulation 2018.

66 Article 3, fifth paragraph, Delegation of Powers Regulation 2018.

67 Article 12b Bank Act 1998.

68 Article 19, paragraph 2, DNB Articles of Association.

annual budget. It, therefore, shall send its budget for the coming year to both ministers before the 1st of December each year.[69]

DNB's overall budget consists of two parts: one part covers the monetary tasks and the other part covers DNB's tasks as a supervisor, national resolution authority and as the administrator of the Dutch Deposit Guarantee Scheme. With respect to the latter, DNB acts in its capacity of independent administrative body (*zelfstandig bestuursorgaan, ZBO*) and that part of the budget is referred to as the "ZBO-budget".[70]

In its budget, DNB includes separate items for each of the supervised categories as listed in Annex 2, part a, of the Decision Funding Financial Supervision (*Besluit bekostiging financieel toezicht*). Resolution for banks and investment firms is a separate category, and will thus be a separate item of DNB's budget.[71]

Furthermore, the Executive Board shall draw up the annual accounts and annual report, each year within three months after the end of the financial year,[72] and both the annual account and annual report will be presented to the Supervisory Board.[73] The Supervisory Board has to adopt the annual account, and the adopted annual accounts require in turn the shareholders' approval (i.e. from the Dutch state in this case).[74] In its report, DNB shall indicate the difference between the realized income and expenses for each supervision category, for which 'resolution: banks and investment firms' is again a separate category.[75]

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69 Article 26 and 29 Framework Act Independent Administrative Bodies (Kaderwet ZBO) in conjunction with Article 3 Financial Supervision Funding Act. Cf. Evaluation DNB, Final Report, 8 November 2021, 16 (Dutch version available *here*). For the procedure in case of an objection, see Articles 29(2) Framework Act Independent Administrative Bodies and 6 Financial Supervision Funding Act.

70 For a short explanation in this respect, and the published budgets, annual accounts and annual reports, see *here*.

71 Article 3 Decision Funding Financial Supervision.

72 Article 19, paragraph 3, DNB Articles of Association.

73 Article 19, paragraph 5, DNB Articles of Association. With the approval of the Minister of Finance and after consultation with the Supervisory Board, the Executive Board may, after determination of the profit, create reserves. Also, transfers to and from these reserves are made after consultation with the Supervisory Board and with the approval of the Minister of Finance (Article 19, paragraph 4, DNB Articles of Association). The allocation of the profits is covered by Article 22 DNB Articles of Association.

74 Article 13, paragraph 6, Bank Act 1998; Article 7, paragraph 3, Financial Supervision Funding Act; Article 19, paragraphs 6 and 8, DNB Articles of Association; Article 11, paragraph 1, DNB Rules of Procedures. The recommendations and decisions relating to the adoption of the annual accounts are prepared by the Supervisory Body's Audit Committee in accordance with Article 15 DNB Rules of Procedure. In case the Supervisory Boards has objections to the annual account, the procedure laid down in Article 21 of the Articles of Association will be followed. For the procedure in case of objects from the ministers, see Article 34, paragraph 3, Framework Act Independent Administrative Bodies and Article 9, paragraph 1, Financial Supervision Funding Act.

75 Article 5 Decision Funding Financial Supervision.

The costs related to DNB's resolution tasks are covered by the banks and relevant investment firms.[76] The amount to be charged annually is determined on the basis of the total assets on the balance sheet as reported by banks and investment firms to DNB.[77]

2.5. Independence in practice

Even though the NRA is part of DNB's organization, the separation that was intended when the resolution function was attributed to DNB has indeed been achieved in practice. In the early years, the DNB officials working for the NRA business area were physically in a different building, across the street from the headquarters of DNB. This situation now has ceased and all colleagues are in one building. The official that we interviewed stated that DNB colleagues from various business areas may be working on for instance the winding-down of a bank, the approach that the colleagues take will depend on the task of their business area. As such, the DNB officials working for the NRA bring almost automatically a different perspective to the discussions. In spite of this separation of approach, the exchange of information goes smoothly, the official confirmed.[78] Perhaps this is because ultimately all colleagues work for DNB and aim to protect the financial stability of The Netherlands and the safety and soundness of the Dutch financial system. The cooperation between the NRA and the other business areas of DNB can therefore be seen as one that works smoothly in practice.

2.6. Information exchange between NRA and other authorities

2.6.1. Between different functions

DNB is both national competent authority and national resolution authority. A general duty to exchange information at national level follows from Article 90 BRRD: "resolution authorities and competent authorities shall provide one another on request with all the information relevant for the exercise of the other authorities' tasks under this Directive". It is also encouraged in Article 3(4) BRRD.[79]

This duty to exchange information at national level also follows from the Resolution regulation in which it says in Article 30(2) SRMR, in which it is even

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76 Article 13, paragraph 1, Financial Supervision Funding Act; Article 8 Decision Funding Financial Supervision.

77 Article 8, paragraph 2, Decision Funding Financial Supervision in conjunction with Annex 2, part B, of this Decision.

78 Article 1:90 of the FSA provides the possibility and conditions for exchanging information between different authorities, which conditions are also adhered to in case of information exchanges between the different authorities that are part of DNB.

79 "4. Member States shall require that authorities exercising supervision and resolution functions and persons exercising those functions on their behalf cooperate closely in the preparation, planning and application of resolution decisions, both where the resolution authority and the competent authority are separate entities and where the functions are carried out in the same entity."

phrased more pro-actively: "In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks". This suggests that the information should also be provided without being requested by the other national authority. Indeed, in a memorandum of understanding, signed between DNB, the ministry of Finance, and the AFM (financial markets authority) it is agreed that if developments at a financial institution may threaten financial stability, these three authorities will engage immediately in deliberation and an information exchange.[80]

The possibilities to exchange information between the national authorities is laid down in national law in Article 1:90 FSA. This provision provides the possibility for DNB to exchange confidential data and information with, amongst others, other supervisors, the Deposit Guarantee Fund, the Resolution Fund, and supervisory or resolution authorities of other Member States, subject to the specific conditions set out in this provision. These conditions include for instance the requirement that the purpose for which the confidential data or information will be used is sufficiently clear, the intended use of the data or information is in line with the supervision of the financial markets or of the persons operating on those markets, the confidentiality of the data or information is sufficiently guaranteed, and it is sufficiently guaranteed that the confidential data or information will not be used for other purposes than those that they are provided for.[81] This provision is equally applicable to the exchange of information between DNB's organisational units charged with different tasks, and to the information exchange with, for instance, the European Commission, European supervisory authorities, and the Resolution Board.[82]

Within DNB, the information as supervisor and resolution authority would be held in different divisions.[83] It is therefore essential that the resolution division obtains the information from the supervisory division when drafting resolution plans and (of course) when deciding on resolution. In the 2019 report of the Court of Auditors, it was highlighted that DNB has created a 'decision flowchart' on the steps to take when drafting a resolution plan.[84] Input from the other divisions is explicitly part of this 'decision flowchart'. During this process, there are both formal and informal moments of information exchange between the various divisions within DNB. The formal exchange of information

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80 Article 4.1 'Afspraken tussen De Nederlandsche Bank, de Autoriteit Financiële Markten en de minister van Financiën over informatie-uitwisseling en overleg inzake financiële stabiliteit en crisismanagement', Kamerstukken II, 2019-2020, 32 013, nr 229; see also *here*.

81 See Article 1:90, paragraph 1, FSA for the exact conditions.

82 Article 1:90, paragraphs 6 and 7, FSA.

83 G. TER KUILE, *Informatiestromen bij resolutie*, (2015) 1 Tijdschrift Financieel Recht in de Praktijk, 51-58.

84 Rapport Netherlands Court of Audit, para. 3.3.1, 32.

happens in the 'Resolutieraad' (Resolution Board), both when drafting the plan as when deciding on resolution, if need be. The informal exchange happens on a daily basis since the divisions supervision and resolution are closely working together when drafting the resolution plan and, according to the Court of Auditors, this leads to a 'continuous adjustment of knowledge and activities' of the two divisions.[85] The conclusion of the Court of Auditors was that there was ample time for the many divisions of DNB to give their input on the resolution plans. They mentioned the divisions for supervision, financial stability, and legal affairs. It saw this as bringing the intended advantages: internally, the division resolution was critically challenged, knowledge was shared and various interests were taken into account. A disadvantage was that this process was time-consuming, which may explain why in Q1 of 2019 not all resolution plans were in place.[86] The official that we interviewed confirmed that the exchange of information occurs smoothly, because all DNB officials work 'under one roof', and perhaps also because Article 1:90 Wft facilitates the exchange of information within DNB.

Another aspect worth mentioning, is that the Division resolution also focuses on the implementation of the resolution plans within the credit institutions. With an English word, this is called a 'playbook' and is created in discussion with the credit institution. Instead of a constant annual update of the resolution plans, the two-year update is applied[87] thereby creating space for these playbooks.[88]

2.6.2. DNB and Union authorities

In the aforementioned report of the Court of Auditors, the working relationship between DNB and SRB is called 'ambivalent'. There are various reasons given for this. On the one hand, there are opportunities to influence the policies of the SRB. On the other hand, the SRB needs assistance (which takes away capacity for DNB's own work) and policies are not ready in time or reversed, which may mean that DNB itself has to change a taken course.[89] However, the official with whom we spoke, highlighted that DNB in its official comments on the report, did not recognize any ambivalence and found the working relationship with the SRB a good one ('clear and constructive').[90]

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85 Kennis én activiteiten van de divisies Toezicht en Resolutie worden hierdoor voortdurend op elkaar afgestemd. Report Netherlands Court of Audit, para. 3.3.2, 33.

86 Report Netherlands Court of Audit, para. 3.3, 31.

87 As allowed by Article 1(1) of the Commission Delegated Regulation (EU) 2019/348 of 25 October 2018 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions, C/2018/6901, OJ L 63, 4.3.2019, 1-11.

88 Report Netherlands Court of Audit, para. 3.3.1, 31.

89 Report Netherlands Court of Audit, para. 3.3.4, 34.

90 Letter from DNB to Netherlands Court of Audit, Administrative Response – draft report 'Banking resolution in the Netherlands', 18 November 2019, 5 and 6.

2.7. *Democratic accountability and other forms of accountability*

2.7.1. Accountability to government

The Dutch central bank, in its supervisory and resolution roles, is an 'independent administrative body' (*zelfstandig bestuursorgaan*). Such bodies are not hierarchically subordinated to a government minister, which is why they are called 'independent'.[91]

The minister of Finance is, however, still responsible for the fulfilment of the public task and bears accordingly a system responsibility. It remains responsible for the functioning of the supervision system and, in line with this responsibility but without prejudice to DNB's independence, it carries out remote supervision of DNB.[92] The ministerial responsibility is related to the (supervisory and resolution) tasks that DNB carries out in its capacity as independent administrative body, and for which tasks DNB is subject to the Framework Act Independent Administrative Bodies.[93]

An independent administrative body must provide the minister with all information needed for their task.[94] It is noted that the minister of Finance cannot give instructions to DNB in a specific case nor can it annul decisions from DNB.[95] But the minister is responsible for the general functioning of the supervisory system, although this is limited by EU norms such as the SSM regulation and SRM regulation. It has created a rather complex relation between DNB and the ministry of Finance. On the one hand, the minister has an overall responsibility, but on the other hand the minister does not get involved with individual cases, which (especially with resolution) could be essential for the general functioning of the financial system. This tension in the minister's role may explain why the Court of Auditors found that the minister was 'limited' in their involvement with DNB's new resolution function and did not have a good overview of the general approach to resolution planning.[96] However, the ministry found its more limited involvement in line with its tasks and responsibilities towards a 'ZBO' that is implementing the new (European) task of resolution.

Every five years, the minister sends a report to parliament on the efficiency and effectiveness of the independent administrative body that is DNB when it comes to its supervisory and resolution tasks.[97] Two things can be derived from this. DNB, as supervisor and resolution authority, is not obliged to report directly

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91 Article 1(a) *Framework Act Independent Administrative Bodies*.

92 Cf. Report on remote supervision and the relation between the Minister of Finance and DNB: Toezicht op afstand, De relatie tussen de minister van Financiën en de zelfstandige bestuursorganen De Nederlandsche Bank (DNB) en de Autoriteit Financiële Markten (AFM), June 2019 (available *here*).

93 Article 1:30 FSA.

94 Article 20 Framework Act Independent Administrative Bodies.

95 Article 1:30(1)(b) FSA juncto Article 21 and Article 22(1) Framework Act Independent Administrative Bodies.

96 See *here*, para. 4.1, 37.

97 Article 39 Framework Act Independent Administrative Bodies.

to parliament. Yet parliament receives indirectly a report on DNB's efficiency and effectiveness in its supervisory and resolution roles.

In December 2021, parliament received a report from the ministry of Finance on the functioning of DNB in 2016-2020.[98] In general, the verdict was a positive one. A research bureau investigated DNB (and the *Autoriteit Financiële Markten*, the supervisor for the financial markets) looking amongst others for transparency, professionalism, effectiveness and efficiency, and independence.[99] Documents were studied, a 'self-evaluation' was filled out and interviews were held. DNB was considered a thorough and professional supervisor, exercising its tasks (of supervision and resolution) at a good level, in spite of having received important new tasks and during a time of upheaval. The independence of DNB is considered properly ensured in statutes and by its internal and external governance.

Even though DNB as an independent administrative body does not have a direct reporting relation to parliament, it has occasionally conducted so-called 'round table conversations' with parliament. For instance, DNB participated in such a 'conversation' (also called hearing) in February 2020[100] on its supervisory tasks and in June 2022[101] more on financial stability. In 2020, matters were discussed such as the relationship with other national and international (European) supervisors, its internal organisation and the use of digitalisation and artificial intelligence. The 'round table conversations' seem to be a form of goodwill to provide parliament with information, as they are not a common occurrence in parliament's manner of scrutiny, without bringing DNB officially before a parliamentary committee.

2.7.2. Accountability to court of auditors

The Dutch Court of Auditors has reported on the resolution function of DNB in 2019 and submitted this report to the Dutch parliament's lower house in December 2019.[102] Similar reports were also drafted by the courts of auditors of Austria, Estonia, Finland, Germany, Portugal, and Spain. The reason for this reporting was twofold: the courts found that there were discrepancies in the application of policies of the Single Supervisory Mechanism (the first pillar of the banking union) and that their work for their external control function was impeded.[103] A similar hindrance was being experienced for the resolution task

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98 Ministry of Finance, Nota aanbieding rapporten Kaderwetevaluaties AFM en DNB (2016-2020), 3 December 2021, Nota nr 2021-0000238546; and Brief van de minister van Financiën, 14 december 2021, Kamerstukken II, 2021-2022, 25 268, nr 202.

99 Kwink groep, Evaluatie DNB, Eindrapport, 8 november 2021, Kamerstukken II, 2021-2022, 25 268, nr 202.

100 DNB, Position paper DNB t.b.v. hoorzitting/ rondetafelgesprek 'Wettelijk kader en toezicht' d.d. 17 februari 2020, 13 februari 2020, Kenmerk A034-1175186779-161.

101 Macro-economische risico's voor het financiële stelsel, Verslag van een rondetafelgesprek, 1 juni 2022, Kamerstukken II, 2021-2022, 33 283, nr 26.

102 See *here*.

103 Report Netherlands Court of Audit, 5.

of DNB; whereas the use of instruments of the Intervention Law might have been an object for scrutiny by the Court of Auditors,[104] the resolution instruments being implemented on behalf of the SRB would fall outside the Court's remit. (For instance, the SRB imposed conditions on the sharing of SRB documents that were being held by DNB with the Court of Auditors, which the court rejected.[105])

The need for conducting the research and drafting the report underscores that there is no formal accountability relationship between DNB and the Netherlands Court of Auditors when it comes to resolution: it was very much an initiative of the Court of Auditors because it felt it was being hindered in its work.

As discussed above, the ministry of finance has an overall responsibility for the functioning of supervision and resolution, but it tends to approach this responsibility with reticence. The thinking behind this seems to be that the ministry wants to respect DNB's independence in decision-making, as it should for individual cases of supervision and resolution. Yet the individual cases can shape the overall functioning, and in fact the stability of the Dutch financial system, which might be ground for the ministry to become more involved. The Dutch Court of Auditors stated that it had expected a more pro-active involvement of the minister.[106]

2.7.3. Liability arrangements

In 2012, the Act on financial supervision was amended to limit the liability of DNB (and the financial markets authority) in its supervisory and resolution tasks.[107] This provision is equally applicable to board members of the NRF and DGF.[108] The central bank and its board members and employees are not liable for damage that is caused by an act or omission when they exercise their statutory tasks and competences, unless the damage to an important extent is caused by an intended improper exercise of tasks or competences, or to an important extent is due to gross negligence. The amendment was made to provide a solution for a dilemma of the supervisor: acting too early may harm the relevant institutions whereas acting too late may harm the citizens. Reducing the risk of claims that

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104 The Court of Auditors follows the developments on SNS bank, which was nationalized using the instruments of the Intervention Law. See *here*, and Brief van de Algemene Rekenkamer aan de voorzitter van de Tweede Kamer der Staten-Generaal, 18 mei 2016, Kamerstukken II, 2015-2016, 31 941, nr 12.

105 Report Netherlands Court of Audit, para. 5.1, 47. DNB in its formal response stated that it had shared all relevant SRB documents for the audit, even though these documents would fall outside of the Court's mandate. Letter from DNB to Netherlands Court of Audit, 'Administrative Response – draft report 'Banking resolution in the Netherlands', 18 November 2019, 6.

106 See *here*, 7; para. 4.1, 37; and para. 4.4.2, 45.

107 Article 1:25d FSA; compare G. TER KUILE, J. PALSTRA, *Sancties, rechstbescherming en aansprakelijkheid bij informatieplichten onder het SRM*, (2015) 3 Tijdschrift voor financieel recht in de praktijk, 47-48.

108 Article 1:25d, paragraph 3(a) and (b), FSA.

may be filed by either of these parties should give the supervisor more freedom to assess the appropriate course of action.[109]

In the aforementioned five-year report for the years 2016-2020, no firm conclusions were given on the effects of this newly introduced limitation of liability. The interviews that were held with DNB employees for this five-years report suggested that the supervisory interventions did not change – DNB was not more hesitant nor more active in applying supervisory instruments. As such, the minister of Finance felt that the practice was bearing out the legislative intention, but he announced further research in 2022 into this aspect.[110]

It is worth noting that the limited liability also applies to the people that are involved in the various resolution tools that could be applied by DNB. For instance, the board members and employees of a bridge bank created by DNB in its resolution function are equally covered by this limitation of liability.[111] This is because they can be seen as an 'outpost' of the national resolution authority.[112]

2.8. Judicial review

In principle, DNB as an independent administrative body is subject to the General Act on Administrative Law (*Algemene wet bestuursrecht, AWB*). This Act lays down rules on judicial review. There is a two-step approach for challenging decisions of public authorities or administrative bodies.[113] First, a 'statement of objections' can be lodged with the public authority itself. Second, if this objection is rejected, an appeal can be lodged with the administrative courts.[114] An objection or appeal should be lodged within six weeks after the challenged decision has been adopted.[115] If the appeal has not been successful, a further appeal can be lodged,[116] which in the case of DNB is a special administrative court in The Hague.[117]

However, in the case of resolution, different rules apply due to the nature of the measures taken under resolution. The main difference is that the timelines for judicial review are shortened, as stipulated in Section 3A.1.6 of the FSA (titled 'judicial protection'). The applicant has ten days (instead of six weeks) to object or appeal against a decision on resolution, or on the write-down and conversion

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109 Brief van de minister van Financiën, 14 december 2021, Kamerstukken II, 2021-2022, 25 268, nr 202, 4-5.

110 *Ibidem*; as yet unpublished.

111 Article 1:25d(3) FSA.

112 Kamerstukken II, 2014-2015, 34 208, nr 3, 31.

113 Article 6:4 General Act on Administrative Law.

114 Article 3:17 General Act on Administrative Law; Article 8:1 General Act on Administrative Law.

115 Articles 6:4 and 6:7 General Act on Administrative Law.

116 Article 3:29 General Act on Administrative Law.

117 College van Beroep voor het bedrijfsleven (CBb), as per Annex 2, Article 4 General Act on Administrative Law, listing both the SRM Regulation and the relevant articles on resolution in the FSA.

of capital instruments.[118] The statement of appeal should contain all grounds and no respite is to be given to adjust or amend the grounds.[119] A ruling should be given ultimately on day fourteen after the appeal has been lodged[120] and the court shortens all procedural steps.[121] Requests for injunctions or temporary measures are presumed to be against the public interest.[122] Even though the court might rule in favour of the applicant, it can decide that the legal consequences of the annulled resolution decision remain in place in order to protect third parties that acted in good faith and e.g. acquired assets and liabilities of the entity that initially had been placed in resolution.[123]

118 Article 3A:64 FSA.
119 Article 3A:64(2) and (3) FSA.
120 Article 3A:64(6) FSA.
121 Article 3A:64(5) FSA.
122 Article 3A:65 FSA.
123 Article 3A:66 FSA.

Poland

Jakub Kerlin[*]

Summary. 1. The Establishment and Legal Framework of the Bank Guarantee Fund in Poland – 2. Authorities Involved in Financial Sector Resolution Planning and Execution in Poland – 3. Organizational Structure and Governance of BGF – 4. Banking Prudential Supervision in Poland – 5. Functions of the Polish Bank Guarantee Fund (BGF) beyond resolution – 6. Managing Deposit Guarantee Scheme and National Resolution Funds for Financial Stability in Poland – 7. Stability of Legal Framework for Financial Sector Resolution and Supervision in Poland – 8. The Impact of the Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) on the Relationship between NRAs/NCAs and the EBA: A Perspective from Poland – 9. Potential Reforms to the Regulatory Financial Framework in Poland – 10. Restrictions on Activities of Members and Employees of Fund's Bodies – 11. Governance Structure of the BGF: Constituent Documents – 11.1. Statute of the BGF – 11.2. Rules of Procedure of the Supervisory Council – 12. The BGF's sources of financing (of its operations) – 13. Lack of Formal Separation Guarantees for the Polish National Resolution Authority and Deposit Guarantee Scheme – 14. Selection of deposit insurer to host the NRA function and criteria for selection (in compliance with Article 3 BRRD) – 15. Democratic Accountability of the Bank Guarantee Fund in Poland – 16. Cooperation of BGF with the SRB and ECB – 17. Liability Provisions for BGF as DGS and NRA – 18. Legal review of BGF acts

[*] The views expressed in this article are exclusively those of the authors and cannot be attributed to the institution that employs them.

1. The Establishment and Legal Framework of the Bank Guarantee Fund in Poland

In Poland, the Bank Guarantee Fund (BGF) serves as the sole resolution authority responsible for planning and executing the resolution of distressed financial institutions, including banks and investment firms. BGF is an independent public law authority. It was established more than thirty years ago through the Act of 14 December 1994 on the Bank Guarantee Fund,[1] also known as the "First BGF Act", and became a member of the financial safety net of Poland in 1994 with a limited function of deposit guaranteeing.

Following the introduction of the Bank Recovery and Resolution Directive (BRRD), the BGF was re-established under the Act of 10 June 2016 on the Bank Guarantee Fund, the Deposit Guarantee System, and Mandatory Restructuring, also known as the "Second BGF Act".[2] Under this act, the BGF not only continues to operate as a deposit guarantee scheme (as before) but also gained the responsibility of bank resolution in the BRRD sense.

Overall, the Second BGF Act serves as the legal foundation for over forty Ordinances of the Minister of Finance that regulate the BGF's functions as a resolution authority or deposit guarantee scheme relating to reporting, valuation, resolution planning, etc.

The BGF's institutional connection to the Minister of Finance is demonstrated through two important legal acts: the Statute of the BGF, formally introduced by the "Ordinance of the Minister of Finance on granting a statute to the Bank Guarantee Fund",[3] which regulates the internal organization of the BGF, its body functions, and the principles of creating and using its own funds; and the Ordinance of the Minister of Finance on establishing the internal rules of procedure of the Supervisory Council of the BGF,[4] which governs the frequency and mode of convening meetings, among other things.

2. Authorities Involved in Financial Sector Resolution Planning and Execution in Poland

Apart from the BGF, several other authorities play a crucial role in the resolution planning and (resolution) execution process. These include the Ministry of Finance (MF), the National Competent Authority (KNF), and the National Bank of Poland (NBP), which together form the institutional financial safety net

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1 USTAWA z dnia 14 grudnia 1994 r. o Bankowym Funduszu Gwarancyjnym, Dz.U.1995 Nr 4 poz. 18, see *here*.

2 USTAWA z dnia 10 czerwca 2016 r. o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji, Dz.U.2022.2253, see *here*.

3 Rozporządzenie Ministra Finansów z dnia 15 marca 2022 r. zmieniające rozporządzenie w sprawie nadania statutu Bankowemu Funduszowi Gwarancyjnemu, Dz.U. 2022 poz. 686, see *here*.

4 Rozporządzenie Ministra Rozwoju i Finansów z dnia 20 grudnia 2016 r. w sprawie ustalenia regulaminu Rady Bankowego Funduszu Gwarancyjnego, Dz.U. 2016 poz. 2146, see *here*.

in Poland. While these institutions uphold their conventional roles as prescribed by the separation of authority, their decision-making roles are clearly defined in the resolution planning and execution process. Nonetheless, their functions are intricately intertwined in the resolution process.

The specific roles of these authorities are defined in legal statutes, and their coordination is formally ensured through the implementation of a crisis management legal framework. This framework[5] establishes a Financial Stability Committee (FSC), comprising representatives from the Ministry of Finance, the NBP, and the BGF. The FSC is as a cooperation platform to coordinate actions undertaken to support and maintain stability of the domestic financial system. The legal framework gave FSC a dual mandate. It is responsible for shaping Poland's macroprudential policy as well as for coordinating actions within crisis management. It works within the area of macroprudential supervision are chaired by the governor of central bank, while crisis management actions (including resolution oriented) are chaired by the Minister of Finance. In summary, FSC may be seen as responsible for coordinating and managing financial sector crisis situations in terms of the overall strategy however still the resolution execution and planning in the BRRD sense remains the sole responsibility of the BGF.

While the Second BGF Act mentions the roles of other stakeholders in resolution, their roles are subsidiary in nature, primarily focused on resolution planning, execution, or financing. The following examples from the Second BGF Act illustrate the various roles and interactions of the different authorities of the financial safety net with the BGF:

- According to Article 5(6), the KNF may establish the BGF as a curator in a financial institution upon request from the BGF,
- The MF determines the maximum amount of monthly remuneration for members of the Supervisory Council of the BGF by ordinance after consulting with the President of the NBP and KNF, as stated in Article 7(11).
- The MF exercises supervision over the activities of the BGF based on the criteria of legality and compliance with the statute, as described in Article 14.
- In accordance with Article 42(5), the BGF must immediately inform the KNF of any irregularities discovered during on-site inspections related to deposit insurance.
- When the BGF determines that the use of supervisory instruments of early intervention or capital support from the parent entity is feasible and can remove the threat of bankruptcy within a reasonable time, it

[5] USTAWA z dnia 5 sierpnia 2015 r. o nadzorze makroostrożnościowym nad systemem finansowym i zarządzaniu kryzysowym w systemie finansowym, Dz.U.2022.2536, see *here*.

must apply to the KNF for adoption of such measures, as stated in Article 70(10) and (11).

– Article 73 requires the BGF to consult with the KNF in the development of a resolution plan and for the KNF to provide an opinion on the draft resolution plan by the BGF.

– According to Article 101, the KNF informs both the BGF and the NBP about 'failing or likely to fail' triggers and determination.

– In the case where the economic situation of an institution may adversely affect the critical functions of the institution, financial stability, or protection of depositors' interests, the NBP or MF must inform the BGF and KNF, as stated in Article 108.

– Article 112(7) allows the BGF to provide a guarantee of repayment of loans to the NBP.

– The BGF is required by Article 153(3) to provide information about the appointment of an administrator to the KNF, NBP, and the institution under resolution.

– In the event of a threat to financial stability, the NBP may grant the BGF a short-term loan upon request from the BGF, provided that appropriate financial collateral is established, according to Article 306.

– As per Article 313, the BGF presents a report on its activities for the previous year and financial statements to the Council of Ministers, with the opinion of the MF. The Council of Ministers approves or refuses to approve the BGF reports. The refusal by the Council of Ministers to approve the annual report of the BGF for the previous year is equivalent to the expiration of the mandate of the members of the BGF's bodies (see also in point 3 below), with the reservation that they perform their functions until new members of the BGF's bodies are appointed.

– In order to obtain funds for the implementation of its tasks, the BGF may issue bonds, as outlined in Article 316a. However, the issue of bonds requires the consent of the MF and the approval of the terms of issue by the minister responsible for the budget.

3. Organizational Structure and Governance of BGF

The Act on BGF establishes the Supervisory Council and the Management Board as two key bodies responsible for the oversight and management of the BGF. For details of their composition please consult point 10 below.

While the Supervisory Council (Rada) oversees the overall performance of the BGF and supervises the activities of the Management Board (Zarząd), the Management Board is responsible for the day-to-day management of the BGF and the implementation of its tasks.

In addition to the Supervisory Council and the Management Board, there is an internal structure in place that serves as the basis for the principal function of the BGF. This internal structure includes various departments and units that work together to carry out the BGF's tasks related to the guarantee scheme and resolution of financial institutions. The departments and units are responsible for tasks such as risk management, asset recovery, and financial analysis. Together, these bodies and internal structures ensure that the BGF operates effectively and efficiently in fulfilling its mandate.

The main tasks of the Supervisory Council include:

- appointing and dismissing (in total all) members of the Management Board,
- supervising the activities of the Management Board, including the implementation of the BGF's tasks and the management of its assets,
- approving the annual budget and financial statements of the BGF,
- ensuring compliance with the provisions of the Act on BGF.

On the other hand, the Management Board is an executive body responsible for the day-to-day management of the BGF and the implementation of its tasks.

The main tasks of the Management Board include:

- preparing and implementing the BGF's budget and work plan,
- managing the BGF's assets and implementing its tasks related to the resolution of financial institutions (planning, execution),
- representing the BGF in legal proceedings and negotiations, and
- ensuring compliance with the provisions of the Act on BGF.

The BGF has several departments that are responsible for different tasks related to its mandate, including:

- Resolution Planning Department – responsible for preparing and updating resolution plans for financial institutions.
- Resolution Implementation Department – responsible for implementing resolution plans in the event of a financial institution's failure.
- Risk Management Department – responsible for monitoring and assessing the risks to the BGF's financial stability and developing strategies to mitigate those risks.

– Legal Department – responsible for providing legal advice to the BGF on matters related to its mandate.

– Financial Department – responsible for managing the BGF's financial resources and ensuring that it has sufficient funds to carry out its tasks.

– Communication and International Cooperation Department – responsible for managing the BGF's relationships with other resolution authorities and communicating with stakeholders.

In addition to these departments, the BGF has an audit committee that is responsible for overseeing the BGF's operations and ensuring compliance with legal and regulatory requirements.

Overall, the BGF's internal organization is designed to ensure that it can effectively carry out its mandate to protect the stability of the Polish financial system (NRA mandate) and safeguard depositors' interests in the event of a financial institution's failure (DGS mandate).

4. Banking Prudential Supervision in Poland

In Poland, the organ in charge of banking prudential supervision is the Polish Financial Supervision Authority (KNF), also known as the Komisja Nadzoru Finansowego in Polish. The KNF is an independent public institution responsible for supervising and regulating the financial market in Poland, including banks, insurance companies, investment firms, and pension funds.

The legal basis for the KNF's activities is primarily the Act on Financial Supervision,[6] which was introduced in 2006 and amended several times since then. This Act provides the KNF with broad powers to supervise, regulate, and intervene in the activities of financial institutions to ensure their stability and protect the interests of depositors and investors.

In addition to the Act on Financial Supervision, the KNF's activities are also governed by various other legal acts, including the Banking Act,[7] the Insurance Activity Act,[8] the Capital Market Act,[9] and others. These acts provide more detailed regulations and requirements for specific sectors of the financial market, which the KNF must enforce and oversee.

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6 USTAWA z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym, Dz.U.2023.753, see *here*.

7 USTAWA z dnia 29 sierpnia 1997 r. Prawo bankowe, Dz.U.2022.2324, see *here*.

8 USTAWA z dnia 11 września 2015 r. o działalności ubezpieczeniowej i reasekuracyjnej, Dz.U.2023.656, see *here*.

9 USTAWA z dnia 29 lipca 2005 r. o nadzorze nad rynkiem kapitałowym, Dz.U.2023.188, see *here*.

5. Functions of the Polish Bank Guarantee Fund (BGF) beyond resolution

The BGF (Bank Guarantee Fund) in Poland is primarily responsible for the resolution of distressed financial institutions, specifically those that are likely to fail or have already failed. However, the BGF does not have any responsibilities for managing the normal insolvency proceedings (which in Poland are reserved for the courts).

In Poland, the National Court Register is responsible for registering insolvency proceedings, while the Polish Financial Supervision Authority (KNF) is the sole responsible for supervising the activities of the entities undergoing the proceedings.

Regarding the use of the moratorium tool, the BGF can only use this instrument in the context of bank resolution proceedings. The moratorium is a temporary suspension of payments by a distressed institution to allow for its restructuring or orderly winding down.

The BGF may apply the moratorium tool if it deems that the use of supervisory instruments of early intervention or capital support from the parent entity is feasible, and they are likely to remove the threat of bankruptcy within a reasonable time. In such cases, the BGF shall apply to the KNF for the adoption of such supervisory measures (Article 70(10) and (11) of the Act on BGF).

In summary, the BGF does not have any functions other than resolution-related functions, and it can only use the moratorium tool in the context of bank resolution proceedings.

6. Managing Deposit Guarantee Scheme and National Resolution Funds for Financial Stability in Poland

The administration of the funds used for the stability of the financial sector in Poland is a crucial aspect of the country's financial landscape. The establishment of public funds to stabilize the markets is a relatively new concept in Poland, as the country transitioned from a state-owned, centrally planned economy to a market-oriented economy in the early 1990s. Prior to this transition, there was no need to establish stabilization measures for financial institutions, as they were limited in number and state-owned.

However, with the emergence of private banks and their failures, which were often sponsored by state resources, the need for a deposit guarantee scheme (DGS) became apparent in 1994. This led to the creation of the DGS function, which was initially located within the Bank Guarantee Fund (BGF). The BGF was responsible for administering the funds in a function known as 'paybox plus,' which allowed for support from the DGS funds to be given for the purchase and sale of failing banks, rather than deposit payouts.

The success of the DGS function in the BGF led to the housing of the national resolution funds (NRF) function in the same institution (see also point 14 below). The NRF function was established after the Bank Recovery and Resolution Directive (BRRD) was introduced in the Polish legal order in 2016. The BGF was deemed the most suitable institution to administer the NRF function, as it had the necessary expertise and experience in managing financial stabilization funds in the mentioned above 'paybox' function.

It is important to note that there are several DGS funds and several NRF funds in Poland, each with a clear separation between them but with some degree of mutualisation / fungibility. There is a separate fund for deposit insurance and separate fund for resolution of commercial banks, as well as respectively separate funds for credit unions. These funds can be borrowed or mutualized if necessary, in order to facilitate resolution action.

In total, there are four separate 'intervention' funds in Poland: two DGS funds and two NRF funds. The administration of these funds is considered critical to maintaining financial stability in Poland and ensuring that financial institutions can operate effectively in a market-oriented economy. As such, the BGF plays a vital role in managing these funds and ensuring that they are used appropriately to stabilize the financial sector in times of crisis.

7. Stability of Legal Framework for Financial Sector Resolution and Supervision in Poland

The legal framework for the resolution and supervision of the financial sector in Poland is an essential component of ensuring financial stability in the country. It provides a solid foundation for the cooperation and coordination among key financial sector players, such as the members of the financial safety net: supervisory authorities, the bank guarantee fund, and the NBP. These institutions have demonstrated a commendable level of stability in their interactions with one another, with disputes and tensions resolved through established legal channels but not leading to any litigation or visible tension between them.

It is worth noting that there have been no significant political or judicial controversies in Poland's institutions of the financial sector in recent years. While litigations between members of the institutional safety-net can sometimes arise over issues such as competencies or fund settlements, this has not been the case in Poland. Instead, the legal disputes that have arisen have largely been related to actions taken by these public institutions and their impact on natural persons or other stakeholders (e.g. litigation in the aftermath of resolution actions).

These cases have predominantly involved allegations of financial fraud, mismanagement, and other forms of financial irregularities. It is important to note that the outcomes of these cases have varied widely, making it challenging to provide a comprehensive overview or identify any discernible trends.

Nevertheless, these legal disputes underscore the critical role of ensuring that regulatory and supervisory agencies of public law in the financial sector are independent and transparent in their decision-making processes. By doing so, the risks of financial irregularities and legal disputes can be minimized, thereby strengthening the overall stability of the financial sector.

In conclusion, Poland's legal framework for financial sector supervision has overall proven to be stable and effective, with the institutions tasked with maintaining financial stability working closely together.

8. The Impact of the Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) on the Relationship between NRAs/ NCAs and the EBA: A Perspective from Poland

The SSM and SRM were introduced in response to the financial crisis in Europe, with the primary goal of enhancing the supervision and resolution of banks in the European Union but mainly Eurozone. These regulatory bodies have had a significant impact on the relationship between the institutions of the financial safety net, and have further dynamised their interactions and cooperation.

The SSM, responsible for supervising significant banks in the Eurozone, works closely with the SRM to ensure a consistent approach to bank supervision and resolution across the EU. The SRM, on the other hand, is responsible for ensuring an orderly resolution of failing banks in the Eurozone. Although the SSM and SRM cooperate with the national safety nets established by national regulatory authorities, such as DGSs, NRAs, supervisors, and central banks, they play a prominent role in overseeing the supervision and resolution of banks in the EU.

Poland is less exposed to the SSM and SRM but as a member of the European Banking Authority (EBA), participates in the development of consistent regulatory and supervisory standards across the EU, which are not strictly related to the Eurozone. The EBA provides guidance to National Competent Authorities (NCAs) in their supervision of banks and plays a key role in promoting the convergence of supervisory practices across the EU. However, for countries like Poland that are not part of the Eurozone, the impact of the SSM and SRM can only be indirect.

Poland cooperates with the SSM and SRM on specific issues related to recovery and resolution planning, as required under the Capital Requirements Directive (CRD) and the Bank Recovery and Resolution Directive (BRRD). This cooperation has had an impact on the relationship between the Polish Financial Supervision Authority (KNF), the Bank Guarantee Fund (BGF), and the National Bank of Poland (NBP). These institutions are required to provide similar or aligned positions at supervisory / resolution colleges concerning the development of recovery and resolution plans for the banking groups under their remit. In other words, Polish public authorities need to provide their

single coherent stance to the authorities of the other Member States of the EU when a situation of a particular cross-border group is deliberated. Despite the potential for different perspectives, all regulatory institutions from Poland are obliged to cooperate to provide a coherent Polish stance to the SSM and SRM over the banks of their competence. The national framework of cooperation is not formalized, but discussions occur at the level of working groups dealing with the plans of recovery and resolution.

In conclusion, while the impact of the SSM and SRM on Poland is indirect, the regulatory bodies have had a significant impact on the supervision and resolution of banks in the EU, and have further dynamized the interactions between the institutions of the financial safety net. The cooperation between the SSM, SRM, and national safety nets has resulted in the development of consistent supervisory and regulatory standards across the EU.

9. Potential Reforms to the Regulatory Financial Framework in Poland

The regulatory financial framework in Poland has been a topic of ongoing discussion and debate in recent years. While major reforms were carried out in the early 2000s as Poland was joining the EU, the country has continued to explore potential changes to its regulatory structure, particularly with respect to the role of the Polish Financial Supervision Authority (KNF) and the National Bank of Poland (NBP), while debate over the NRA and DGS was rather stable.

The KNF is responsible for overseeing banks, insurance companies, and other financial institutions in Poland. In recent years, there have been proposals to restructure the KNF or to create a separate regulator for the insurance industry. Some experts have also called for enhancing the KNF's powers and resources to better detect and address financial risks. However, no significant reforms have been enacted thus far.

There have also been discussions about potential changes to the regulatory framework governing the NBP. Some proposals have called for greater coordination between the NBP and the KNF, as well as for reforms to the NBP's governance structure and decision-making processes. However, these proposals have not gained significant momentum.

As a member of the EU, Poland has been involved in discussions about potential reforms to the regulatory framework for the financial industry at the EU level. These discussions have been particularly focused on responding to the aftermath of the global financial crisis. However, as a non-Eurozone member, Poland's influence in these discussions has been limited.

In conclusion, while there have been ongoing discussions and debates about potential reforms to the regulatory financial framework in Poland, these have not yet resulted in significant changes. The relative small gravity of the domestic problems has not triggered significant momentum for reforms, but the

topic remains important for policymakers as they seek to balance oversight and economic growth.

10. Restrictions on Activities of Members and Employees of Fund's Bodies

As mentioned earlier (see point 3) the two governing bodies formally recognized by the Second Act on BGF are: the Supervisory Council and the Management Board.

Members and employees of these bodies are restricted from engaging in activities that could raise suspicions of bias. This includes buying, selling, or holding stocks, bonds, or other financial instruments issued by certain entities, as well as holding positions or employment within those entities. However, they are allowed to work for asset management vehicles, bridge institutions, or entities related to a company undergoing restructuring, among other things, which are naturally related to the resolution activity of the NRA.

The Supervisory Council consists of six members. The member of the Supervisory Council may be a person who meets all of the following conditions: (i) has full legal capacity; (ii) has higher education; (iii) has not been finally convicted of an intentional crime or a fiscal offense; (iv) has professional knowledge and experience in the functioning of the financial market.

The members of the Supervisory Council are:

- three representatives of the minister responsible for financial institutions, including the Chairperson of the Council;
- two representatives of the National Bank of Poland delegated by the President of the National Bank of Poland;
- one representative of the KNF delegated by the Chairman of the Financial Supervision Commission.

The term of office of the Supervisory Council is 3 years, and at the end of the term, the mandates of all its members expire. The mandate of a member of the Supervisory Council expires at the end of the term of the Fund Council, as a result of death, resignation, or dismissal from the Supervisory Council. Contrary to the dismissal of the member of the Management Board, the grounds for dismissal of the Member of the Supervisory Council are not provided for in the legal framework.[10] Such decision remains a discretionary decision of the Minister of Finance.

The legal framework clearly outlines the responsibilities of the Supervisory Council, which include monitoring the activities of the Management Board, approving the annual financial report and activity report of the BGF, and

[10] Article 7(6) of the Second BGF Act.

accepting quarterly reports from the Board. The Council is also responsible for accepting loan agreements and deciding on the allocation of funds between the BGF own funds. It can also lower the target level of deposit guarantee system funds, determine the amount of mandatory contributions to the guarantee funds, and decide on the rules for restructuring of financial institutions. The Council also sets detailed internal rules for the BGF's activities, such as the principles for granting support and securing and recovering funds for resolution. It also determines the principles for conducting estimates for resolution and defines the principles for providing loans from the guarantee funds.

The Management Board of the BGF consists of three to five members, including the President of the Board and his Deputy. The members of the Board of the Fund are appointed and dismissed by the Supervisory Council.

A member of the Board of the Fund may be a person who meets all of the following conditions: (i) holds Polish citizenship; (ii) has full legal capacity; (iii) has higher education; (iv) has not been convicted of a deliberate crime or a fiscal offense; (v) has at least five years of professional experience in a managerial position in the financial market sector.

The Supervisory Council selects from among the members of the Board of the Fund: (i) the President of the Board of the Fund; (ii) the Deputy President of the Board of the Fund at the request of the President of the Board of the Fund. The term of office of the Management Board of the BGF lasts 5 years from the date of appointment.

The Supervisory Council may dismiss[11] a member of the Board of the Fund, including the President or his Deputy, before the end of their term of office only in the event of:

i. a final conviction for a deliberate crime or a fiscal offense;

ii. resignation from the position;

iii. loss of Polish citizenship;

iv. loss of full legal capacity;

v. failure to provide adequate guarantees of proper performance of assigned duties.

The Supervisory Council may dismiss a member of the Management Board, including the President or his/her Deputy, before the end of their term of office in the event of losing the ability to perform assigned duties due to a long-term illness lasting more than 3 months.[12]

The term of office of a member of the Management Board expires on:

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11 Article 10(6) of the Second BGF Act.

12 Article 10(6a) of the Second BGF Act.

i. the expiry of the term of office of the Management Board;

ii. the death of a member of the Management Board;

iii. dismissal from the position.

The President of the Fund's Management Board performs duties until the appointment of his/her successor. After the expiry of the term of office of the Management Board, members of the Management Board continue to perform their duties until the appointment of a new Management Board.

11. Governance Structure of the BGF: Constituent Documents

The governing bodies of the BGF are not subject to specific regulations under the Second Act on BGF. Nevertheless, this act references two fundamental documents for the BGF that are provided to it by the Minister of Finance. These documents hold the status of ordinances, which are considered laws of general application under Polish law. The first document is the "Statute of the BGF", and the second is the "Rules of Procedure of the Supervisory Council".

11.1. Statute of the BGF

The Statute is a constituent document, which outlines the general provisions and organization of the Bank Guarantee Fund.

It mentions that the Supervisory Council and Management make decisions and issue opinions in the form of resolutions in carrying out tasks specified in the laws or statute. The Supervisory Council determines the rules for the remuneration of the Management Board. The Council and Management are supported in their functions by the Fund's Office, which is responsible for technical and substantive support related to the Fund's tasks. The Office also conducts legal support, administrative matters, financial management, and accounting of the Fund, and is involved in information and promotional activities related to the Fund's operation and international cooperation. The draft organizational regulations of the Fund's Office are presented to the Fund's Council by the Management for comments on its content.

According to the law, the Supervisory Council can issue recommendations to the Management Board, suspend or revoke any Management Board's resolution that violates the law or the Council's resolution (with some exceptions) and dismiss or suspend the Management Board's members.

Furthermore, the Supervisory Council is responsible for determining the total amount of contributions due from domestic entities and foreign bank branches separately for the Bank Guarantee Fund, the Credit Union Guarantee Fund, the resolution fund for banks, and the resolution fund for credit unions for each calendar year. The Council's resolutions are made public through publication on the Fund's website. Additionally, the Council, on the Management Board's

recommendation, decides on covering obligations resulting from guaranteed funds from the Fund's own resources.

The Statute also outlines situations in which the Fund Council's prior opinion is required, including decision-making related to certain articles of the Act, adopting restructuring plans for significant institutions, creating or acquiring shares in transitional institutions, and obtaining obligations associated with Fund benefits. The Fund Board can request the Fund Council's opinion on matters other than those specified in point 1. In cases of acquiring or creating a transitional institution or appointing a management entity, the Fund Board requests acceptance from the Fund Council.

It also regulates the functioning of the Management Board of the BGF. The management board of the Fund is required to present to the Fund Council, by February 15th of each calendar year, proposals concerning the determination of the total amounts of contributions to be paid in the current calendar year. This includes specifying the deadlines for their payment and the share of contributions paid in the form of an obligation to pay.

The Fund's management board calculates the amount of contributions due for each quarter from individual banks and foreign bank branches, as well as savings and credit unions. This is done in accordance with the method of determining contributions to the bank guarantee fund, taking into account the total amount of contributions determined by the Fund Council for a given calendar year. The management board informs the banks, foreign bank branches, and savings and credit unions of the amount of the contributions due and the deadlines for payment. They also provide information on the difference in contributions calculated in accordance with the method and the estimated amount of contributions if the bank did not participate in the protection system. Finally, they inform these institutions of the amount of the extraordinary contribution and the deadline for payment according to the Fund Supervisory Council's decision.

The Statute states that the Fund Management shall provide information regarding the extraordinary contributions by either electronic communication with acknowledgment of receipt or registered letter with acknowledgment of receipt. The same provisions apply to the transmission of information necessary for the payment of extraordinary contributions. It allows the Fund Management to request the appointment of a curator for the Fund in cases specified in the bankruptcy law as well as to designate a representative of the Fund as referred to in the law on financial market supervision.

The Fund Management must also verify whether the deposit guarantee system in the home country of a foreign bank branch present in Poland ensures payouts within the limits set by the law.

The Fund Management is obliged to continuously collect and analyze information on the financial situation of national entities and foreign bank branches to carry out the tasks of the Fund.

The Statute outlines the financial management of the BGF, stating that the basis of its financial management is the annual financial plan, which should include separate parts related to the planned amount of the Fund's own funds, the planned amount of funds for the protection of guaranteed funds, the planned financial result, the planned state of the Fund's assets and liabilities, and the planned total value of obligations that will be incurred as a result of agreements made in the year covered by the financial plan. It also mentions that changes to the annual financial plan can be made and that the Fund's quarterly and annual activity reports are prepared and presented to the Fund's Board. The Fund's financial statements for the fiscal year are also prepared and presented to the Board along with the results of the audit.

11.2. Rules of Procedure of the Supervisory Council

The "Rules of Procedure of the Supervisory Council" is a legal document outlining the rules and procedures for the operation of the Bank Guarantee Fund Supervisory Council (Rada Bankowego Funduszu Gwarancyjnego).

The Council establishes a schedule of work to carry out its statutory and statutory tasks. Meetings are called by the Chairperson of the Council in accordance with the work schedule, at least once a month, or by another member of the Council designated in writing by the Chairperson. Meetings may also be called in certain exceptional cases without a previously established work schedule. Meetings are also called when the Bank Guarantee Fund requires the Council's opinion, approval, or other position.

In addition, meetings can be called upon the written request of at least two members of the Council or at least two members of the Management Board of the Bank Guarantee Fund, or the President of the Management Board of the Bank Guarantee Fund. Such a request must specify the subject matter of the Council meeting, and the meeting should take place no later than ten days after the request is received.

The notification of the meeting and relevant materials must be sent to each member of the Council at least seven days before the meeting date, and in certain exceptional cases, the notification period can be shortened to one day. The Chairman of the Council leads the work of the Council and is authorized to represent the Council, particularly in relations with the Management Board of the Bank Guarantee Fund and to undertake actions regarding the employment of members of the Management Board of the Bank Guarantee Fund.

The Chairperson of the Council leads the meetings, and in their absence, the oldest member of the Council presides over the meeting. The agenda of the meeting can be changed by a resolution passed in the presence of all Council members, except for minor changes. Only Council members can perform their duties, and a protocol employee from the Bank Guarantee Fund also attends meetings. The Council can also invite non-voting members of the Board of the

Bank Guarantee Fund and other individuals to attend meetings. The Council can vote in open or secret ballot, during meetings or in circulation, but in cases of secret voting, decisions cannot be made by remote communication means or in a circulation vote. The Chairman of the Council or another designated member can call for a secret ballot, especially in cases related to personnel decisions or overturning unlawful decisions.

The "Rules of Procedure of the Supervisory Council" outline also the procedures for decision-making and record-keeping in the meetings of the Fund's Supervisory Council. The decisions made by the Council should be signed by all members who participated in the voting. The member who participated in the voting may express a separate opinion about the decision after the voting.

The quorum requirement is typically three members. In the absence of a quorum, a subsequent meeting shall be scheduled, with absent members duly informed of the time and location.The section also outlines the procedures for making decisions in writing or via email. In both cases, the members must be informed of the proposed decision and the deadline for submitting their vote. The decisions made via email are considered to be made on the last day of the voting period or the day when the last member submitted their vote.

The minutes of the meeting should be recorded and signed by the member who chaired the meeting and the secretary. The minutes should include the agenda, the list of attendees, the proceedings, the voting results, the separate opinions expressed, and the materials presented. The minutes should be approved at the next meeting, and any objections or separate opinions should be noted.

Lastly, the given text describes that any decision taken by the Fund Supervisory Council in a circulating manner must be included in the minutes of the nearest Fund Council meeting.

It specifies that the minutes of the Fund Council meetings and documents related to the Fund Council's activities are kept at the headquarters of the Bank Guarantee Fund. The signed minutes are collected in a set of minutes and are immediately sent to the Fund Council members in electronic form via email. Additionally, a summary of the minutes of the Fund Council meeting can be made available to a member of the Management Board of the Bank Guarantee Fund upon request.

The Fund Council may assign duties between its members. The Fund Council can also establish task forces from among its members to address specific issues. The Fund Council exercises these powers collectively, but can delegate one or more of its members to conduct individual checks on the activities of the Bank Guarantee Fund. The delegated member(s) must submit a report on the performed check at the next Fund Council meeting, including any requests for action that may be necessary as defined by law.

12. The BGF's sources of financing (of its operations)

The sources of operational financing of the functioning of the BGF are mentioned in the Second BGF act (Article 271, 285(4)). There is a special "statutory fund", which serves as a basis for the operational spending of the BGF.

The statutory fund is created from the subsidies granted at the request of the Fund from the state budget on the terms set out in the provisions on public finance and from the investment profits from previous years.

At the end of 2021 the statutory fund account for around 350 million euros and was financed from the BGF profits of previous years. There are no special contributions of institutions for the financing of the BGF as it finances itself fully from the profits which are mainly interests accrued on the pool of funds it manages.

13. Lack of Formal Separation Guarantees for the Polish National Resolution Authority and Deposit Guarantee Scheme

The Polish National Resolution Authority (BGF) is officially situated with the Deposit Guarantee Scheme (DGS) and is not associated with any supervisory functions, as the NCA is an independent public body which is separate. However, there seems to be no explicit legal provisions in place that would be the implementation of Article 3 BRRD and as a result provide for clear separation guarantees of both functions which are complementary at the end but could also have opposite interests. This is because the same supervisory and management board of the BGF is responsible for making decisions regarding the same institution.

While separate funds are maintained for the DGS and the National Resolution Fund (NRF), they are not fully interchangeable. Nevertheless, decision-making, particularly regarding the activation of Article 109 BRRD trigger and determining the payment amount of DGS in resolution, is made by the same board but in their dual roles. There are also different departments e.g. responsible for resolution planning and execution while DGS function has separate department. At the same time the economic analysis are shared, the same investments as well as recoveries from insolvencies which are common for both functions.

14. Selection of deposit insurer to host the NRA function and criteria for selection (in compliance with Article 3 BRRD)

As observed by the Polish legislator, the BRR Directive leaves it up to Member States to choose the authority responsible for carrying out resolution. Article 3(3) of the BRRD specifies that the authorities responsible for resolution may be central banks, relevant ministries, other public administration institutions or institutions to which public authority has been delegated. At the same time, in the same provision, due to the requirement mentioned above to avoid conflicts

of interest, the BRRD allows the role of the supervisory authority to be entrusted with the resolution authority only in exceptional circumstances.

In Poland, in the documents introducing the Second BGF Act, it was specified that the requirements regarding the resolution authority set out in Article 3 of the BRRD fulfil the FSB recommendations contained in the Key Attributes of Effective Resolution Regimes for Financial Institutions, particularly in Key Attribute 2.1 ("KA 2.1"). In the explanatory note (Explanatory Note) 2.1(a) to KA 2.1, central banks, supervisory authorities, deposit guarantors, finance ministers or dedicated administrative authorities were listed as potential resolution authorities.

The appointment of the Bank Guarantee Fund (deposit insurer) as the resolution authority, in the opinion of the legislator, meets the requirements set out in the BRRD provisions. According to the proposed Article 11(4) and (5) of the Second BGF Act, the BGF is the authority that will make administrative decisions (issue administrative decisions) in the field of resolution tasks as provided by the BRRD. These decisions are subject to the provisions of the Administrative Proceedings Code.

As explained in the documents accompanying the introduction of the new law, already under the law on DGSs, the Bank Guarantee Fund was a separate, independent public entity carrying out public tasks and possessing legal personality. The indication of the BGF as the resolution authority making a decision to initiate the resolution process also fulfils the condition of avoiding conflicts of interest leading to the risk of forbearance, which consists of postponing decisions on the initiation of resolution proceedings. The resolution procedure, whose primary objective is to maintain the performance of critical functions, including access to funds held in accounts, and the protection of guaranteed deposits, constitutes a substitutive action in relation to the payment of guaranteed funds. According to Article 109 of the BRR Directive, deposit guarantee funds in Member States should also finance resolution proceedings, and natural economic incentives exist in deposit guarantee institutions to undertake early effective and efficient restructuring actions regarding institutions threatened with bankruptcy. It is a clear position of the Polish legislator which emphasizes the synergy effect of DGS and NRA function.

As mentioned by the legislator, entrusting the Bank Guarantee Fund with this function also fulfils the recommendations of the International Association of Deposit Insurers contained in the Core Principles for Effective Deposit Insurance Systems and the Compliance Assessment Methodology (Core Principles). Criterion 8 for principle 14 (Sources and uses of funds) indicated that the deposit insurer should have a clear legal mandate to manage deposit insurance funds and exercise its functions in an independent, transparent and accountable manner.

The Bank Guarantee Fund was identified as the recommended NRA at the stage of preparing the legal framework concept for mandatory bank restructuring in Poland, even before the publication of the BRR directive. The Working Group of the Financial Stability Committee for developing legal solutions regarding

bank restructuring and mandatory bank restructuring conducted an analysis of possible solutions in the institutional framework for mandatory bank restructuring. The key issues were to ensure that the authority had the appropriate experience, resources, and competencies to perform mandatory restructuring functions. Along with the Bank Guarantee Fund (DGS), the Polish Financial Supervision Authority (NCA), the National Bank of Poland (central bank), and a new entity that would be created under the Ministry of Finance were among the potential entities analyzed for performing the mandatory restructuring authority function.

The Working Group took into account several factors when preparing the recommendation. One of the issues was to ensure coherence between the possibility of using funds collected in the Bank Guarantee Fund to finance mandatory restructuring activities and the performance of guaranteed fund payment functions. Separating the deposit guarantee and mandatory restructuring functions into different institutions would lead to situations where decisions and the financial consequences of those decisions would be attributed to different institutions, weakening the role of economic efficiency criteria in the decision-making process and could lead to inefficient choices. According to the Working Group of the Financial Stability Committee, the solution that provides the highest degree of coherence of competence and responsibility division (including economic responsibility) and ensures compliance with IADI recommendations was to combine the deposit guarantee function with the mandatory restructuring process in one entity, the Bank Guarantee Fund.

In addition, the natural economic incentives make the Bank Guarantee Fund the most interested entity in effective and efficient implementation of the mandatory restructuring process, which speaks for choosing the recommendation to entrust the Bank Guarantee Fund with the role of the mandatory restructuring authority. Failure to take action in the mandatory restructuring process at an appropriately early stage or ineffective implementation of the mandatory restructuring process can, as a consequence, lead to insolvency, bankruptcy applications, and payment of guaranteed funds, which directly burden the Fund. The differences in the amount of funds necessary to carry out the mandatory restructuring process, primarily support provided to entities taking over the activities of a threatened entity, and the funds required for payment of guaranteed funds are significant and constitute strong economic premises for the actions taken.

The synergy between funds and experience in managing them, with the existing infrastructure base, makes entrusting the BGF with the mandatory restructuring authority function a cost-effective solution, taking into account the necessary expenses for creating and financing the mandatory restructuring authority's activities.

During the work of the KSF Working Group, the experience in the processes of restructuring banks was also analyzed. In accordance with the then applicable law on the DGSs the BGF could, at its own request, be appointed as a curator in a bank covered by a recovery program, if the entity benefited from assistance granted by the BGF in its DGS function as a paybox plus. The BGF has used this

right several times and repeatedly supported the restructuring processes of banks with financial assistance and monitored the course of these processes, among others, in order to secure the return of the granted financial assistance. The Bank Guarantee Fund supported in particular the consolidation processes of smaller cooperative banks. By the end of 2013 (in 2015 BGF was selected as an NRA), the BGF had granted a total of 101 loans from the aid fund, including 44 to commercial banks and 57 to cooperative banks, for a total amount of around 1 billion euros.

It is also worth noting that the BGF as an institution was actively involved in the development of legal solutions in the field of mandatory restructuring conducted in the European Union. Fund representatives participated, among others, in meetings of the Early Intervention Working Group, which was responsible for preparing the BRR Directive project, and in meetings of the Working Party on Financial Services of the Council of the EU, which was working on the project of the directive at the trilogue stage between the European Commission, the Council of the European Union and the European Parliament. The BGF was also actively involved in the preparation of guidelines and technical standards of the European Banking Authority (EBA) for the BRR and DGS Directives, as well as delegated acts of the European Commission for the BRR Directive and SRM Regulation establishing a uniform procedure for resolution for a Banking Union.

15. Democratic Accountability of the Bank Guarantee Fund in Poland

In Poland, there are several mechanisms in place to ensure the democratic accountability of the Bank Guarantee Fund.

Firstly, the Bank Guarantee Fund is an independent agency, but it remains accountable to the Polish Parliament, as it is controlled by the government through the Minister of Finance. The Supervisory Council of the BGF is responsible for overseeing its activities and ensuring that it operates in accordance with the law. The Supervisory Council is appointed by the Minister of Finance and other players of the financial safety net, but the Minister of Finance has the majority of appointments and casting vote. This mechanism ensures that the appointment of the Board is subject to democratic scrutiny and approval.

Secondly, the Bank Guarantee Fund is required by law to submit an annual report on its activities during the previous year. The report must include information on the BGF's financial position, its operations, and its achievements in fulfilling its statutory tasks.

Thirdly, the Bank Guarantee Fund is subject to external audits by independent auditors. The auditors are required to report their findings and oversee the Fund's operations.

However, the Supreme Audit Office, which is the highest control authority in Poland, regularly conducts controls at the Ministry of Finance, the National Bank of Poland, and the Polish Financial Supervision Authority. But it does

not have the authority to audit the Bank Guarantee Fund, as its tasks related to Deposit Guarantee Scheme and resolution are not related to the use of state or local government assets or funds and therefore are out of control scope.

16. Cooperation of BGF with the SRB and ECB

As Poland is not a member of the Banking Union, its collaboration with the Single Resolution Board (SRB) and the European Central Bank (ECB) is severely restricted. Poland participates in resolution and supervisory colleges and takes part in the procedure of joint decisions. However, every decision that is agreed upon at the European level must subsequently be implemented at the national level, in compliance with the national law that transposes the BRRD or CRD directives. The SRM or SSM Regulations do not have direct applicability in Poland.

17. Liability Provisions for BGF as DGS and NRA

There are several provisions that regulate the liability of the Banking Guarantee Fund (BGF) when operating as a Deposit Guarantee Scheme (DGS) or a compulsory restructuring authority (NRA). In the case of the DGS, the law specifies the extent of liability of the BGF in various situations. In summary, the BGF is not responsible for payments made to an unauthorized person or incorrect payments based on the list of depositors, or for failure to make payments to an unlisted authorized person. The BGF is also not responsible for payments made to an unauthorized person or in an incorrect amount based on data provided by IT systems. Additionally, if the BGF fails to perform its duties or make payments within the time limit due to force majeure, it is not liable.

Regarding the NRA function, the BGF is not responsible for any damage caused by its actions or omissions related to its powers and tasks, nor for damage caused by its use of resolution tools or damages caused to third parties. The law stipulates that the BGF's liability is limited to the actual amount of the damage caused, and that its liability for the actions or omissions of its employees does not fall under the provisions of the law on the liability of public officials.

18. Legal review of BGF acts

A selected categories of the BGF decisions are reviewable acts. Article 104 of the Second BGF Act outlines the procedure for submitting a complaint to the administrative court. The complaint is first submitted to the BGF which is then responsible for forwarding the complaint, complete and ordered case documentation, and a response to the complaint to the competent administrative court within 14 days of receiving it. The administrative court is required to consider the complaint within 30 days of receiving it, along with the case files and response. The Supreme Administrative Court considers cassation appeals

within two months of receiving them. The time periods do not include any periods for specific activities or any delays caused by the parties or the court. Article 105 states that the court issues a decision based on the factual and legal situation existing on the day of the decision's issuance, and that a legally binding court ruling on a decision's issuance with legal infringement does not affect the validity of any legal acts carried out based on it. The compensation for issuing a decision with a legal infringement is limited to the amount of loss incurred, and the compensation is limited to a monetary payment.

In the publicly available registers there are traces of around 240 court cases directed against the BGF.

Portugal

Martinho Lucas Pires

1. Introduction and disclaimers

The present paper is the response to a questionnaire regarding the institutional setting of National Resolution Authorities ("NRAs") in the EU Member States. The paper presents the institutional setting of the Portuguese NRA, as well as some practical issues concerning resolution activity in Portugal. Following the questions generously prepared by the editors of this work, the paper attempts to describe what the current situation concerning the structure and exercise of banking resolution powers in Portugal is and the consequences such exercise has had.

As an introductory note, it is important to stress that Portugal is a country that, since the financial crisis, had to deal with the resolution of two banks, one of which was a significant financial institution. Furthermore, the Portuguese experience with resolution shows very interesting characteristics, given the way and the time in which the legal resolution framework was enacted, the motives behind it, and the challenges it had to face almost instantaneously. Furthermore, the application of banking measures put the Portuguese NRA, Banco de Portugal ("BdP"), which also serves as the prudential and conduct supervisor authority regarding banking activity, on the public spotlight, drawing scrutiny andleading to innovative forms of parliamentary accountability regarding the way BdP exercises its mandate.

The paper is organized in three sections, concerning respectively the past, present, and future of banking resolution. The first section considers the origins of the banking resolution framework in Portugal, and difficult birth. The second section considers the current state of the resolution framework, by analyzing the institutional setting (*who* exercises the activity), the practical setting (*how* resolution activity is exercised), the accountability setting (*means of control and response to the activity of the* resolution authority) and the European setting of relations between the NRA and EU institutions. The text is both descriptive and analytical, attempting to present the elements of the framework and to provide critical input regarding the framework and its more complex characteristics. The third section considers the future of the framework by looking at the proposed reforms made in the past years. A fourth and final section reflects on the system that is in place.

A short methodological disclaimer: this paper was written based on information that is publicly available, most of it taken from the websites of the BdP and of the Fundo de Resolução ("Portuguese Resolution Fund", or hereinafter "PRF" or "Fund"). Notes on the academic background of directors of departments of the Banco de Portugal were taken from their respective LinkedIn profiles. All translations from Portuguese to English are my own.

2. Past: a short history of banking resolution in Portugal

Banking resolution had a convoluted birth in Portugal. Prior to the financial crisis there were no national rules on banking resolution, nor was there a resolution

authority in place. BdP, the institution responsible for banking supervision, had powers for dealing with the insolvency and liquidation of credit institutions, but it lacked powers enabling more direct intervention in the administration of a bank facing a liquidity crisis or in risk of defaulting. This situation was denounced by members of the supervisory department of the BdP, that criticized the capacity of regulatory tools at their disposal to tackle possible issues of bank mismanagement when questioned by the shortcomings of banking supervision.[1]

The Portuguese banking sector pre-crisis depended heavily on ECB provisions of liquidity.[2] Furthermore, troubles affecting two small banks – Banco Português de Negócios ("BPN"), that was nationalized, and Banco Popular Português ("BPP"), ultimately liquidated – hinted at vulnerabilities in the market.[3] To guarantee the stability of the banking sector was a priority for government and lenders (the IMF and the EU) when negotiating the package of financial international assistance that Portugal requested, given the pressure on Portuguese bonds seen in financial markets.[4]

To guarantee such stability, a framework for banking resolution was deemed essential. The Memorandum of Understanding for Financial Assistance signed between Portugal and its creditors established as a condition for financial assistance the enactment of a legal system for the resolution of banks.[5] The condition was implemented in 2012, by an act of national law amending the national code on banking supervision (the "Regime Geral das Instituições de Crédito e Sociedades Financeiras" or just "RGICSF").[6] Following the amendment, the BdP became the resolution authority, with competence to enact resolution measures and manage the process of banking resolution.[7]

The enactment of national legislation (even if that measure can be considered an external "imposition") was the first step in the creation of a resolution framework. The second step came with the transposition of the Banking Recovery

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1 According to one of its directors, the BdP could only choose between firing "small missiles" (i.e., imposing fines) or launching "the atomic bomb" (i.e., to revoke the bank's license and take care of its liquidation) but could not take any intervention in between. Parlamento Português, *Relatório final da CPI sobre a situação que levou à nacionalização do BPN e sobre a supervisão bancária inerente*, 2010, 114, available *here*.

2 See, in general, M. Crosignani, M. Faria e Castro, L. Fonseca, *The Portuguese Banking System during the Sovereign Debt Crisis*, in NYU Stern Bulletin, 2015; and T. Cardão-Pito, D. Baptista, *Portugal's banking and financial crises: unexpected consequences of monetary integration?*, in Journal of Economic Policy Reform, 2017, 165-191.

3 For a description of these cases see M Lucas Pires, *Portugal and the banking union: searching for the spirit of supervision and resolution*, in D. Fromage (ed), *EU financial integration since the Great Financial Crisis: Consequences for EU and national authorities*, Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia, No. 102, September 2024, 117-136.

4 V. Stadheim, *Banks 1 – Portugal 0? Financial player entanglements in the Eurozone crisis*, in Competition and Change, 2021, 401-427.

5 Portugal, *Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding with the IMF*, available *here*.

6 The act was Law-Decree No. 142/2013 of October 18th.

7 See Article 17-A of the BdP's Organic Law ("Lei Orgânica do Banco de Portugal" or "LOBdP").

and Resolution Directive ("BRRD"), enacted in May 2014.[8] The Portuguese legislators opted to transpose the Directive in two times: the first, through a national law enacted on August 1, 2014;[9] and the second, through a national law enacted in March 2015.[10] The second legal act of transposition was enacted within the deadline for implementing the BRRD. As for the first transposition law, it came into force two days before the application of the first resolution measure in Portugal, to Banco Espírito Santo ("BES"),[11] making this one the case of the first applications of BRRD rules in Europe.[12]

BES was a complex situation that had significant impact in Portuguese society.[13] The resolution measure was challenged in national administrative courts[14] and in an English court, due to a choice of law clause inserted in a contract.[15] There were also three decisions that were either directly or indirectly connected with the case, in the Court of Justice of the European Union.[16] The most significant of these decisions, BPC Sarl Lux 2, concerned the compatibility of the resolution measure with the right to property established in the Charter of Fundamental Rights (no violation was found), as well as the assessment of the Portuguese way to transpose the BRRD in light of EU law rules principles (the Court did not find it problematic either).[17] An investment arbitration under ICSID rules has been recently initiated, with two Mauritian companies challenging the Portuguese state due to the application of the resolution measure to BES and its effect in their investments.[18]

The BdP applied a second resolution measure, this time to Banco International do Funchal ("BANIF").[19] The situation was less dramatic than BES, but also proved controversial. The experience of the resolutions and its complex

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8 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.

9 Law Decree No. 114-A/2014 of August 1st.

10 Law No. 23-A/2015 of March 26th.

11 Banco de Portugal, *Deliberação do Conselho de Administração de 3 de agosto de 2014 sobre a aplicação de uma medida de resolução ao Banco Espírito Santo, S.A.*, August 3, 2014.

12 A. Rita Garcia, *Banco Espírito Santo, S.A.: Resolution Via A Bridge Bank Including A Re-Transfer*, in World Bank Working paper "Bank Resolution and "Bail-In" in the EU: Selected Case Studies Pre and Post BRRD", 2017, 52-60, available *here*.

13 See A. de Jesus, J. Poças Esteves, *Caso BES – O Impacto da Resolução na Economia Portuguesa* (Clube do Autor, 2018).

14 The Portuguese procedure is still ongoing in the Supreme Administrative Court: Procedure 2586/14.3BELSB.

15 *Goldman Sachs International and others v. Novo Banco SA*, UKSC 34, 2018.

16 Case C-396/19, *ECB v Espírito Santo Financial Group SA*, 2020; Case C-504/19, *Banco de Portugal v VR*, 2021; and C-83/20, *BPC Lux 2 Sarl and others v Banco de Portugal, BES and Novo Banco*, 2022.

17 For an analysis, see M. Lucas Pires, *Unforgetable late admissions: the Court of Justice decides on bank resolution in BPC Lux 2 Sàrl (C-83/20)*, in EU Law Live, 2022.

18 See S. Moody, *Creditors of collapsed bank bring first treaty claim against Portugal*, in Global Arbitration Review, 2022.

19 Banco de Portugal, "Deliberação do Conselho de Administração do Banco de Portugal", December 20, 2015.

aftermaths led to calls for an overarching reform of the supervisory and resolution regime, with changes to the resolution authority and its separation from the entity exercising supervisory powers. I shall discuss this further in sections two and three.

The last reform to the resolution regime came in November 2022, with the enactment of Parliamentary Decree 14/XV in law.[20] The law was a transposition of two Directives[21] and did not change any element of the institutional structure of resolution that is currently in place.

3. Present: institutional and dynamic aspects of banking resolution

3.1. Institutional structure

3.1.1. The BdP as the Portuguese NRA

The Portuguese NRA is the BdP. The BdP is a centenary institution and the oldest financial regulator in the country.[22] It is incorporated as a legal person of public law with financial and administrative autonomy.[23] Its headquarters are in Lisbon, and it has a work-force of 1741 people.[24]

The BdP is ruled by a Governor and a Board of Directors, composed by the former, one to two Vice-Governors, and three to five Directors.[25] Its other governing bodies are the Audit Council and the Consultive Council. Both the Governor and the Directors are appointed, among people "with recognized good standing, sense of public interest, professional experience, management ability, knowledge and technical competence relevant and appropriate to the exercise of their functions".[26] and without incompatibilities,[27] by decision of the Council of Ministers, based on a proposal from the Minister of Finances, and after the commission responsible for financial affairs of the Portuguese Parliament issues a

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20 At the time of writing of this article the Decree was awaiting publication.

21 Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures and Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC.

22 See Banco de Portugal, "História", available *here*.

23 Article 1 of LOBdP.

24 Banco de Portugal, *Relatório do Conselho de Administração: Atividade e Contas*, 2021, 60.

25 Article 33(1) LOBdP.

26 Article 27(1) LOBdP.

27 People who worked for or held more than 2% of share capital of entities supervised by the BdP or the SSM, or worked for or held more than 2% of share capital of auditing and consulting firms in the three years prior to the nomination cannot be appointed to the BdP's board of directors, according to article 27(8) LOBdP.

reasoned opinion.[28] The Parliamentary commission shall make an audition to the appointees before issuing the decision, at the request of the Government.[29] Parity rules (minimum of 40% representation for either sex in the Board of Directors) apply for the composition of the Board.[30]

The Board of Directors serves a five-year term that can be renewed once, by decision of the Council of Ministers.[31] The Board of Directors is independent from other national and European political institutions and cannot be removed, except for situations envisaged in the Statute of the ESCB and the ECB.[32] The Board of Directors meets at least once a week, convened by the Governor, if not decided otherwise.[33] The Governor, when chairing a meeting of the board, has a quality vote.[34] Furthermore, any decision by the board of directors likely to affect either the Governor's decision-making autonomy in the ECB's General Council or BdP's compliance with the European System of Central Banks must have his or her favorable vote.[35]

The current board of directors of the BdP is composed by Governor Mário Centeno, former Minister of Finance and President of the Eurogroup (and beforehand an university professor and member of the Department of Studies of the BdP); by Vice-Governors Luís Máximo dos Santos, a lawyer, lecturer and former member of the BdP's legal department, and Clara Raposo, an academic and former president of the Lisbon School of Economics and Management; and by directors, Helena Adegas (a worker of the Bank since 1985 who was formerly director of the markets' department), Francisca Guedes de Oliveira (associate university professor of economics) and Rui Pinto (former director of the Portuguese Commission of Financial Markets – "Comissão do Mercado de Valores Mobiliários" or "CMVM" and Luis Morais Sarmento (former adjunct director of the BdP's department of statistics).[36]

Although independent from the Government, both institutionally and politically,[37] it is common for the governorship of the BdP to be occupied by former ministers or secretary of States. In fact, of the fifteen Governors of the bank since its inception in 1887, only three did not exercise high-level political functions at a government level. Another common factor between the background of Governors is that they tend to have been during a period in their career members of the board of directors of public and private banks

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28 Article 27(2) and (3) LOBdP.

29 Article 27(3) LOBdP.

30 Article 27(6) LOBdP.

31 Article 33(2) LOBdP.

32 Article 27(7) and Article 33(3) LOBdP.

33 Article 36(1) LOBdP.

34 Article 32(1) LOBdP.

35 Article 32(2) LOBdP.

36 The information is available *here*.

37 The BdP, however must have its accounts approved by the Ministry of Finance every year. See article 54 LOBdP.

or financial institutions, and / or holding university positions in the areas of economics and finance.[38] Most workers of the resolution department and of the resolution unit (and of other BdP departments, such as prudential supervision and conduct supervision) either have a degree in law or a degree in economics, and their labor situation is ruled according to the rules of individual labor contracts.[39]

As for the Audit Council of the BdP, it is composed by three members appointed by the Ministry of Finance.[40] One member is the president, the other member a chartered accountant, and the third member is a "personality of recognized competence in economic matters".[41] Members serve for three years (renewable once), and they can exercise other professions that are not deemed incompatible with auditing functions.[42] At least one member of the Audit Council must be present in all ordinary meetings of the Board of directors.[43]

3.1.2. The Portuguese Resolution Fund

The only authority that collaborates with the BdP in resolution matters is the Portuguese Resolution Fund ("PRF" or "Fund"). The PRF was established in 2012 and is a legal person of public law with financial and administrative autonomy.[44] It is located in Lisbon and works with the BdP.[45] The purpose of the PRF is to provide financial support to the application of resolution measures by the BdP.[46]

The PRF's capital is composed by contributions from all credit institutions headquartered in Portugal, investment companies, branches of credit institutions, relevant payment institutions and branches of financial institutions.[47] The participants are obliged to contribute periodically to the Fund's capital.[48] The Fund can also make use of loans and other resources to raise capital for its activity.[49]

The Fund is managed by a tripartite board of directors. One director is appointed by the BdP, while a second is by the Minister of Finances, and the third by agreement between the BdP and the Minister of Finances.[50] In this way,

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38 The information is available *here*.
39 Article 56(1) LOBdP.
40 Article 41(1) LOBdP.
41 Article 41(2) LOBdP.
42 Article 42 LOBdP.
43 Article 45 LOBdP.
44 Article 153-B(1) RGICSF.
45 Article 153-B(2) RGICSF.
46 Article 153-C RGICSF.
47 Article 153-D RGICSF.
48 Article 153-H RGICSF.
49 Article 153-F(4) and (6) RGICSF.
50 Article 153-E(1) RGICSF.

there is a balance in the board between two politically appointed members and an independent member. The member appointed by the BdP is the president of the Fund. The mandate of the directors lasts three years and can be renewed up to three times, to a total of four mandates.[51] Directors can exercise other posts and functions, be them public or private, as long as they are authorized to do so in the legal act that appoints them.[52] They are not remunerated for their functions, and they meet at least once a month, in a meeting convened by the president of the board of directors.[53]

The Fund also has a consultive council, composed of representatives of the participating institutions, that advises the board of directors.[54] It was not possible to find the list of the members of this consultive council online. Furthermore, PRF's board of directors may choose to appoint a secretary-general to help the board with organizational meetings. The secretary-general must be chosen by proposal of the BdP and be part of the former's working staff.[55] Finally, from an operational perspective, the Fund relies on the BdP's Unit of Support; it has no workers of its own.[56] The auditing of the PRF is ensured by the BdP's Audit Council[57] and by a financial external entity (currently this entity is BDO Portugal).[58]

So far, the Fund has had three presidents, with the last one, Luís Máximo dos Santos (Vice-Governor of the BdP) serving his second mandate, having been first appointed in 2017. The same is true for director Pedro Miguel Nascimento Ventura (Sub-general director at the Ministry of Finance and Member of the Board of Directors of Parpública, a public wealth management fund), who was appointed by the Ministry of Finance. No third director has been appointed; the last director was a law professor (Ana Perestrelo de Oliveira) whose mandate finished in 2020.[59] There is no public known reason for not having a third director appointed since then.

The current President of the PRF is also the current president of the Portuguese Deposit Guarantee Fund ("PDGF").[60] Like the PRF, the PDGF is a legal institution with financial and administrative autonomy, but operationally dependent of the BdP.[61]

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51 Article 153-E (4) RGICSF.

52 *Ibidem*.

53 Articles 153-E(5) RGICSF and Article 7(2) of the PRF's Regiment, approved by Portaria 420/2012 of December 21.

54 Article 153-E(7) and (8) RGICSF.

55 Article 11 PRF's Regiment.

56 Article 153-P RGICSF.

57 Article 153-S RGICSF.

58 Fundo de Resolução, *Relatório e Contas*, 2021, 85-90.

59 Information available *here*.

60 Information available *here*.

61 Article 154(1) RGICSF.

3.2. Practical aspects

3.2.1. Separation between resolution and supervisory activities

The BdP has four main competences.[62] The first is its competence regarding monetary and exchange policy, within the euro system. The second is its macroprudential competence with powers to identify and evaluate systemic risks and to adopt preventive and mitigating measures regarding such risks. The third is a supervisory competence (prudential and conduct) regarding credit institutions and financial companies. The fourth competence is the application of resolution measures to credit and financial institutions. The BdP also has competence in procedures of insolvency and liquidation of banks, and with the enactment of Decree 14/XV it has powers to suspend obligations of a credit institution according to the terms set in article 33a of the BRRD. According to the BdP's Organic Law, resolution competences are operationally independent from supervisory functions, in what is a clear transposition of article 33 of the BRRD.[63] There are no rules restricting the BdP's liability in the application of resolution measures, nor concerning acts within the context of the action of the Single Resolution Mechanism ("SRM").

Internally, the exercise of each competence is organized in different departments: there are nineteen departments and one support unit for the PDGF and the PRF.[64] The BdP's board of directors decides, following a proposal by the Governor, on the distribution of competences among its members.[65] Currently, the member of the BdP's board of directors responsible for resolution competences is the Vice-Governor, Luís Máximo dos Santos. The director of the BdP's resolution department is João Filipe Freitas, who is also the secretary-general of the PRF and of the PDGF (and an economist by training who made his career in the bank's supervision department).[66] As for Luís Máximo dos Santos, he is also the President of the PRF and, more problematically, he was the member of the board of directors responsible for the department of conduct supervision ("supervisão comportamental", concerning the business conduct of credit and financial institutions) and the department of investigation and sanctioning action ("averiguação e ação sancionatória").[67] Director Luís Máximo dos Santos stopped having competence over conduct supervision in December 31, 2022,[68] and currently the responsible board member for this matter is director Francisca

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62 See sections I to V, Chapter IV of LOBdP.

63 Article 17-A(2) LOBdP.

64 Information on the internal organization of the BdP is available *here*.

65 Article 35 LOBdP; current distribution is available *here*.

66 Information available *here*.

67 Máximo dos Santos was the responsible for the departmentof conduct supervision since 2017, according to Deliberação do Conselho de Administração do Banco de Portugal n.º 909/2017, de 3 de outubro de 2017.

68 See Boletim Oficial do Banco de Portugal, Dezembro 2022, 3º Suplemento, 11, available *here*.

Rodrigues Sarmento Guedes de Oliveira.[69] Competence of prudential supervision is the responsibility of director Rui Pinto.

Having the same member of the board of directors at the helm of both the supervisory and resolution departments seems to conflict with the requirements of operational independence set in Article 3(3) of the BRRD and in article 17-A of the Organic Law of BdP. Operational independence requires that there is no entanglement between the functions of resolution and other functions of the resolution authority; according to the European Banking Association, the concept broadly refers to "the duty of the supervisor to operate independently, without external interference, maintaining its objectivity and fairness, and avoiding any deterioration of its integrity".[70] The second paragraph of article 3(3) presents one situation for maintaining operational independence: staff involved in the exercise of resolution functions should be subject to "separate reporting lines" from the staff exercising other functions of the NRA. This does not happen in the BdP.

There is no publicly available information regarding how the function of resolution operates independently from the activity of supervision. Therefore, the risk of conflict of interests between the exercise of the two functions affects the situation of integrity of the supervisor's action and, consequently, can generate market tensions. The example of what happened in BES is a case in point, where the superimposition of the functions of supervision and resolution authority had controversial effects.[71]

The resolution measure applied by the BdP in August 2014 created a bridge institution called Novo Banco (literally, "New Bank") to where all assets and activities not considered as liabilities were transferred to. All assets considered "toxic" remained with BES, that went into liquidation. The capital of Novo Banco was totally owned by the PRF, making the former the *de facto* shareholder of the bank. The plan was to sell Novo Banco to a third party; however, until a sale could be completed (which happened in 2016, two years after the resolution measure) the Fund had to manage the bank, as if it was a private bank competing for business with the other Portuguese banks that are supervised by the BdP. The PRF sold seventy-five per cent of Novo Banco's share capital to Lone Star, remaining a shareholder with twenty-five per cent of the share capital. The situation remains to this day.

The PRF and the NRA are two distinct and separate entities in form. However, the PRF depends on the technical support provided by the BdP to act, while the second-most important figure in the BdP, and responsible for monitoring the banks' activity and the application of sanctions, is the head of the PRF. This creates a situation where the PRF is a qualified shareholder of one of the biggest Portuguese banks, while at the same time having to supervise that bank and all its

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69 See Boletim Oficial do Banco de Portugal, Maio 2024, Suplemento, 11-13, available *here*.

70 European Banking Authority, *Report on Supervisory Independence of Competent Authorities*, 2021, 19.

71 For a more complete version of the situation, see M. Lucas Pires, *Portugal and the banking union*, available *here*.

competitors. Given the personal connection between the PRF and the BdP, there is a conflict of interests in place. The lack of publicly available descriptions of the operational division between supervisory and resolution functions does not help.

Controversies surrounding Novo Banco's execution of its business plan, agreed between shareholders upon the sale of the bank (a plan made in part for Portugal to comply with EU state aid rules, given the application of the resolution measure and capitalization of the bridge bank[72]) are evidence of the problematic situation.[73] The critical aspect has been mentioned in the White Paper on the regulation and supervision of the Financial System, requested by the Governor to a group headed by a BdP consultant.[74] The White Paper recommended "greater segregation, within the organizational chart of Banco de Portugal, of the national resolution authority function, through the setting up of an entity endowed with own statutes, regulations and governance structure".[75] The Portuguese Court of Auditors also expressed unfavorable opinions on the super-imposition of the BdP's role as national competent authority for supervision purposes and its NRA functions.[76]

The BdP stated in two documents (one, a commentary to a proposal for changing the institutional framework of financial supervision in Portugal[77], and the second a response to an audit report of the Portuguese Court of Auditors[78]) that the current institutional framework of resolution complies with the setting of the BRRD. The BdP declares that it "has implemented and has been reinforcing, within its internal organization, mechanisms for segregating functions, assigning the resolution function to an organizational structure separate from the others, currently called the Resolution Department, coordinated by a manager with management level functions, thus ensuring the administrative autonomy, decision-making capacity and allocation of resources of this structure, as well as separate hierarchical lines".[79] Therefore, it does not consider that there is a conflict between both functions; in fact, the BdP states that as long as operational independence is internally established (and, according to the BdP's opinion, it is) the fact that supervision and resolution functions are exercised by the same entity

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72 European Commission decision on Case M.8487, July 7, 2017, available *here* and European Commission Decision on State aid n° SA.49275 (2017/N) – Portugal, October 11, 2017, available *here*.

73 C. Ferreira, *Novo Banco: a anatomia do negócio que capturou o Estado na teia de Vieira*, in Público, 2022.

74 Banco de Portugal, *White Paper on the Regulation and Supervision of the Financial System*, 2016.

75 *Ibidem*, 28.

76 Tribunal de Contas, *Prevenção da Resolução Bancária em Portugal*, Relatório de Auditoria 12/2020, 2ª secção, 2020, 15-34.

77 Banco de Portugal, *Desenvolvimento da análise do Banco de Portugal ao Relatório sobre a Reforma do Modelo de Supervisão Financeira, elaborado pelo Grupo de Trabalho nomeado pelo Despacho n.º 1041-B/2017*, 2017, available *here*.

78 Banco de Portugal, "Contraditório", available *here*.

79 Banco de Portugal, *Desenvolvimento da análise do Banco de Portugal ao Relatório sobre a Reforma do Modelo de Supervisão Financeira*, cit., 39-40.

does not generate problems of conflict of interest.[80] The BdP justifies this position with reference to the example of other European NRAs and to the conclusions of a report produced by the Contact Committee of the Supreme Audit Institutions of the European Union on the Preparation for resolution of medium-sized and small banks in the euro area.[81]

Minutes of the board of directors of the BdP are not publicly available, except for the minutes of the meetings where the board of directors decided on the application and amendment of the resolution measures applicable to BES and BANIF, because of their public interest. The number of ordinary meetings of the BdP's board of directors is presented in the annual report of the Audit Council (in 2021, the Board met 49 times).[82] There is also no publicly available information regarding meetings and activity of the resolution department, nor of the PRF (according to the report of the Audit Council of 2021, there were four meetings with the board of directors of the PRF; there were no meetings of the Audit Council with the resolution department of the BdP, which is interesting, since the Council meets with several other departments of the BdP[83]). The Accounting and Activity Reports of both the BdP and the PRF do not state the number of meetings of their respective board of directors and the departments. Finally, as mentioned previously, there is no publicly available document establishing the terms for the operational segregation of supervisory and resolution functions.

3.2.2. Funding of resolution measures

The PRF provides financial support to the application of resolution measures by the NRA.[84] The legal regime of banking resolution is not completely clear in stating if the PRF is the principal or the only source of financial support to a resolution measure – according to the law, the BdP "may determine that the PRF (…) provides the necessary financial support". The objective of setting up a resolution fund is to protect the NRA or other public institutions (such as, for example, the government) from being financially liable in the event of a resolution measure. Article 153-J(2) of the RGICSF, stating that "[w]ithout prejudice to the provisions of the preceding paragraph, the State shall not be under any obligation to provide exceptional financial support to the Fund, nor will the State have any responsibility for financing the application of resolution measures" shows this need of protecting the State from financial liability. Therefore, it does not seem that, in practice, the BdP would wish to recur to an entity (national or supra-national) other than the PRF. In the two resolutions measures applied in Portugal, both consisting of the incorporation of a bridge institution to where part of the assets of the resolved banks were transferred, the PRF served as the sole financer.

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80 Banco de Portugal, "Contraditório", cit.

81 Contact Committee of the Supreme Audit Institutions of the European Union, *Preparation for resolution of medium-sized and small banks in the euro area,* 2020.

82 See Conselho de Auditoria, "Súmula do Relatório do Conselho de Auditoria", 2021, available *here*.

83 *Ibidem*, Annex.

84 Article 145-AA(1) RGICSF.

The Fund's capital is composed of periodical contributions from the participating institutions (according to the Fund's latest annual report, there were 44 participating institutions as of December 31, 2021).[85] The BdP is competent to set the amounts and limits of contributions by the participating institutions,[86] while the PRF has powers to provide instructions to participating institution regarding payment proceedings.[87]

Additionally, the PRF's funding can be composed of loans, made by participating institutions or other entities, proceeds from investment, donations, or any other amount generated by its activity or attributed to the Fund by law or contract.[88] Such loans must be previously approved by the BdP.[89] The Fund can also request funding from the Single Resolution Mechanism ("SRM").[90] The BdP is prohibited from loaning capital to the PRF.[91]

The Fund can also receive extraordinary financial support by the State, in the form of a loan or guarantee.[92] The Minister of Finance can also determine that participating institutions make extraordinary contributions to the PRF in case of funds being insufficient for the exercise of supporting resolution measures;[93] the PRF can suggest this action to the Government but must first present a reasoned proposal to the Minister of Finances.[94] Finally, the Fund can invest its available resources in financial operations, following an investment plan designed by the BdP.[95]

When the application of the resolution measure to BES occurred, the PRF's resources were 377 million euros. It was necessary for the Fund to request a loan from the Portuguese State of 3900 million euros to capitalize the bridge institution (Novo Banco). Participating institutions had also to make a special contribution in the total amount of 135 million euros, and there was a loan made by a set of participating institutions in the amount of 500 million euros. In the resolution measure of BANIF, the PRF also requested a loan to the Portuguese State, to cover the cost of liabilities of the resolved institutions.[96]

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85 Fundo de Resolução, *Relatório Anual*, 2021, 93-95.

86 Articles 153-G(1) and 153-H(1) RGICSF.

87 Article 12 of PRF's Regiment.

88 Article 153-F(1) RGICSF.

89 Article 15(3) PRF's Regiment.

90 Article 153-F(6) RGICSF.

91 Article 153-F(5) RGICSF.

92 Article 153-J(1) RGICSF.

93 Articles 153-I(1) and 153-L RGICSF.

94 Artigo 14(1) PRF's Regiment.

95 Article 153-N(1) RGICSF.

96 All information is available *here*.

3.3. Accountability aspects

The BdP and the PRF are the only Portuguese public authorities acting in the field of banking resolution in Portugal. As public institutions, their activity is subject to review by internal and external bodies.

Internally, the actions of the BdP and of the PRF are subject to the review of the former's Audit Council, published yearly in the form of a report separate from the BdP's annual report.[97] The BdP has also an internal audit department, responsible for providing evaluation and consulting services, in an independent and objective manner.[98] The director responsible for the audit department is the Governor of the BdP.[99] The reports of the audit department are not made public.

The BdP can also, exceptionally, establish *ad hoc* internal audit commissions to evaluate the actions of the Bank regarding a specific subject. This was the case of the "Comissão de Avaliação às Decisões e à Atuação do Banco de Portugal na Supervisão do Banco Espírito Santo S.A.", concerning the BdP's performance in the supervision of BES.[100] This *ad hoc* commission was chaired by the President of the Audit Council and composed by two consultants of the BdP and two external members, both of which lawyers and university professors, and with the support of a private consulting company. The report was never made public, although the chair of the commission has mentioned some of its findings and made critics to the BdP when inquired about the former's action in Parliament.[101] The BdP only published the recommendations made by the commission, and not the full report, invoking professional secrecy. The full report was eventually handed to the Portuguese Parliament, but its content could not be made public according to a decision of the Portuguese Supreme Court of Justice.[102]

Externally, the BdP and the PRF are subject to formal and informal modes of accountability. Formal modes of accountability concern the review of public action by an administrative institution with auditing or supervisory functions and following pre-established legal procedures. Informal modes of accountability, on the other hand, concern the review of public action by a political institution that does not have as primary functions competences for auditing and review of public action.

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97 Article 43(1)(c) of LOBdP.

98 See Banco de Portugal, *Carta de Auditoria Interna*.

99 Information available *here*.

100 See the answer to the report in Banco de Portugal, *Comissão de Avaliação às Decisões e à Atuação do Banco de Portugal na Supervisão do Banco Espírito Santo S.A*, 2015, available *here*.

101 A. Teixeira, *As 5 revelações do relatório secreto de Costa Pinto sobre o BES*, in ECO, 2021; and on the report see E. Caetano, N. Vinha, A. Suspiro, *Banco de Portugal podia ter feito mais no BES. As críticas violentas do relatório secreto que nunca saiu da gaveta de Carlos Costa*, in Observador, 2022, available *here*.

102 See the news in A. Suspiro, *Supremo mantém em segredo relatório Costa Pinto sobre BES (cujas conclusões o Observador revelou)*, in Observador, 2021, available *here*.

Regarding formal modes of accountability, the BdP and the PRF's action are subject to review of the Portuguese Court of Auditors. The Court of Auditors has competences to check financial responsibility of public institutions: its objective is to inspect, according to its statutory law, "the legality and regularity" of public finances.[103] Both the BdP and the PRF are public institutions with financial and administrative autonomy, and therefore must submit their accounts to the Court of Auditors for the former to assess their financial management.

However, the Court of Auditors can also produce audit reports, on its own initiative or at the request of the Parliament or the Government on events or actions of any public institution subject to its powers of inspection.[104] Between 2020 and 2022 the Court of Auditors produced three reports: the first, on the prevention of banking resolution in Portugal;[105] the second, on the public financing of Novo Banco;[106] and the third, on the management of Novo Banco with public funds.[107] The last two reports, requested by the Portuguese Parliament, present a very critical assessment of the role played by the PRF and the BdP in the exercise of their supervisory and resolution functions, due to the conflicts of interests abovementioned in 3.2.1.

Another formal mode of accountability regards judicial review of the BdP's action. Resolution measures are public law acts, and therefore subject to the jurisdiction of Portuguese administrative courts[108] (if the actions consisted of sanctions, judicial competence would rest with a specialized court, the Court of Competition, Supervision and Regulation[109]). Since the legal framework of resolution is a national transposition of EU law, there is the possibility of reviewing the national act vis-à-vis EU law terms.

Arguably, the most interesting characteristic of the Portuguese case regards the use of informal modes of accountability, thanks to the review of measures of banking supervision and resolution by the Portuguese parliament, through the setting of Parliamentary Inquiry Commissions. The purpose of such Commissions is to review acts of Government and of the public administration and can cover any matter of public interest that is relevant for the exercise of Parliamentary powers.[110] According to the Portuguese Constitution, Inquiry Commissions have investigative powers equivalent to judicial authorities.[111] The Commissions are

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103 Article 1(1) of the Lei de Organização e Processo do Tribunal de Contas (Law 98/97 of August 26th).

104 Article 55(1) of the Lei de Organização e Processo do Tribunal de Contas (Law 98/97 of August 26th).

105 Tribunal de Contas, *Prevenção da Resolução Bancária em Portugal*, cit.

106 Tribunal de Contas, *Financiamento Público do Novo Banco*, Relatório de Auditoria 7/2021, available *here*.

107 Tribunal de Contas, *Gestão do Novo Banco com Financiamento Público*, Relatório de Auditoria 18/2022, available *here*.

108 Article 39 of LOBdP.

109 Article 112(1)(f) of Lei da Organização do Sistema Judiciário (Law 62/2013 of August 26th).

110 Article 1 of Regime Jurídico dos Inquéritos Parlamentares (Law 5/93 of March 1st).

111 Article 178(5) of the Portuguese Constitution and article 13(1) and (2) of Regime Jurídico dos Inquéritos Parlamentares (Law 5/93 of March 1st).

composed by Members of Parliament ("MPs") and convened on their initiative.[112] Public officers convened for inquiry cannot refuse themselves, under penalty of being charged with a crime for disobedience.[113]

From 2010 to 2021, MPs convened seven Parliamentary Inquiry Commissions to investigate actions of public institutions in the banking sector.[114] The initial justification was the nationalization of Banco Português de Negócios, a small private bank that became insolvent. Afterwards, more Inquiry Commissions were convened to discuss political interference in the management of public bank Caixa Geral de Depósitos and, more importantly for this paper, the fall of the resolved banks BES and BANIF.[115] The purpose of these Commissions was to scrutinize the action of public officers and public institutions, such as the Government, but also the banking supervisor and resolution authority, the BdP. MPs called experts, members of the BdP's board of directors, directors of the supervisory departments, as well as Ministers, creditors, former members of the board of directors, and current directors of the resolved entities (amongst other people) for questioning. The sessions of these commissions were, in general, public, and broadcasted by the Parliament's TV channel. In the end, the Commissions produces a report, made available to the public in the Parliament's website.

The reports provide important information regarding the motivations and actions of the BdP as supervisor and as NRA. Such information is not typically available since minutes of the BdP's Board of Director's are not published, nor is there any access to the action of resolution and supervisory departments of the Bank. Furthermore, Parliamentary Inquiry Commissions are examinations of the NRA's action and interaction with resolved institutions, bridge institutions, government officials, European institutions, and all other actors that have any impact in the procedure of applying a resolution measure. In this sense, the reports are an important instrument of political accountability, made through a democratically legitimized process, that can have important consequences, both practical and political, but also legal, as section 4 of this work shall refer to.

3.4. European aspects

The BdP, as the Portuguese NRA, participates in the Single Resolution Board ("SRB"), where it is represented by the director responsible for resolution functions – in this case, Vice-Governor Luís Máximo dos Santos or, in case he is not available, the director of the BdP's resolution department.[116]

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112 Article 2 of Regime Jurídico dos Inquéritos Parlamentares (Law 5/93 of March 1st).

113 Article 17 of Regime Jurídico dos Inquéritos Parlamentares (Law 5/93 of March 1st).

114 There were two Inquiry Commissions regarding Banco Português de Negócios (2010 and 2012), two regarding BES (2015 and 2021), two regarding Caixa Geral de Depósitos (2017 and 2019) and tone regarding BANIF (2016).

115 For an explanation of the cases, please see M. Lucas Pires, *Portugal and the banking union*, cit.

116 Information available *here*.

There is no public information available regarding the ways in which the SRM and the BdP interact. It is also not possible to ascertain how the creation of the SRM affected the direct relationship between BdP and the EBA. There is also no information available to assess how information is exchanged between the different BdP departments on resolution and supervision when it comes from or is addressed to the ECB or to the SRB. It is not possible to ascertain the impact of the MoU between the ECB and the SRB on the exchange of information between the NCAs and the NRAs.

According to article 93(5)(c) of the RGICSF, the BdP shall make all efforts to comply, in the exercise of its supervisory functions, with orientations and recommendations issued by the EBA. No similar provision exists regarding soft law acts issued by the SRM or the SSM. It is also not clear to whom is the NRA accountable where it is called to implement SRB decisions: the law is silent in this regard. The BES resolution was applied before the set-up of the SRM, while the resolution of BANIF was applied by the BdP because Banif was not a significant bank for the purposes of the SRM. Therefore, Portugal has yet to deal with the SRM in a resolution procedure.

4. Future: prospective reforms

Given the tribulation surrounding what was understood publicly as supervisory failures in the banking sector, and the controversy regarding the application of resolution measures and its consequences, there was a lot of political interest in Portugal to reform banking supervision and resolution mechanisms and structures. The BdP participated actively in this debate by commissioning studies and reflections (condensed, mostly, in the White Paper). There were two political initiatives, one concerning financial supervision and banking resolution, and the other concerning banking rules and the BdP's powers as banking supervisor and resolution authority.

The first initiative came from the Government, in the form of a law proposal for the setting of a National System of Financial Supervision ("Sistema Nacional de Supervisão Financeira" or "SNSF").[117] The proposal, based on report produced by a working group coordinated by Carlos Tavares, former head of the CMVM, had three structural points of reform: first, to strengthen coordination among supervisors while setting the National Council of Financial Supervision ("Conselho Nacional de Supervisão Financeira" or "CNSF") – a body currently with informal powers where the three Portuguese financial supervisors meet – as the country's macroprudential authority (currently, this entity is the BdP); second, to institutionally separate banking resolution from banking supervision; and third, to create the SNSF.

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[117] See Law Proposal 190/XIII, available *here*. A technical note elaborated by the Parliament's services can be found *here*.

The second point is the most important for the purpose of this paper. This proposal follows an opinion mooted previously by the Court of Auditors regarding the problematic mixture of resolution and supervisory powers under the same entity. The Government's view, following the opinion of the working group, was to take resolution competences from the BdP and create a new NRA, named Resolution Authority and Manager of Guarantee Systems ("Autoridade de Resolução e Administração de Sistemas de Garantia" or "ARASG"). This authority would also incorporate the PRF and the PDGF, and it would have competences for applying resolution measures not only for banking entities but also for insurance entities. The rationale behind the setting of the ARASG was to avoid conflicts of interest between the exercise of supervisory and resolution competences. According to the proposal, the BdP would remain competent to plan the application of a resolution measure and to provide technical and operational support to the ARASG.

The BdP provided a comment on the report and a comment on the law proposal.[118] In synthesis, the BdP considered that the current framework where the NRA is also the banking supervisor is in line with most solutions found in the EU. Furthermore, the BdP questioned the solution of separating the planning of resolution measures from their application (a division deemed "artificial" by the Bank), as well as the difficulty and confusion in having a separate entity dealing with resolution measures that is not part of any other institution and lacks the experience of the BdP.

In a way, the Government's proposal seemed to have as a goal taking the formal responsibility of application of resolution measures from the BdP and transferring it to the new authority, while maintaining substantive control of resolution procedures (through planning and operational support powers) in the hands of the Bank. The BdP seems right in its response when it says that this situation generates organizational and procedural complications that could make the resolution framework more inefficient. Furthermore, it is also not clear how much control the BdP would still have regarding the application of resolution measures, since it would be the designer and the technical enactor in case of applying a resolution measure.

The proposal was not adopted, having been presented very closely to end of the Parliamentary session (March 2019) in a year with scheduled elections for the fall (October 2019). Once a new Parliament took office, the proposal expired, and was not re-submitted by the new Government. The reasons for this abandonment are unknown.

The second legislative initiative took place during the next Parliamentary session. It was a project initiated by the BdP to reform the legal framework

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118 See Banco de Portugal, *Parecer do Banco de Portugal sobre o Projeto de Proposta de Lei que cria e regula o Sistema Nacional de Supervisão Financeira*, 2019, available *here* and also Banco de Portugal, *Desenvolvimento da análise do Banco de Portugal ao Relatório sobre a Reforma do Modelo de Supervisão Financeira*, cit.

of rules on banking supervision and resolution, set in RGICSF, to update it and systematize it in what was to be known as the Code of Banking Activity ("Código de Atividade Bancária").[119] A preliminary draft of the Code was submitted to public consultation and then reformed and sent to the Government to be submitted as a law proposal for Parliamentary approval as law.[120] However, political disagreement in the budget discussion for 2022 led to the dissolution of Parliament by the President of the Republic and to a snap election, thus preventing the Government from submitting the law proposal. After the new Parliament (and Government) took office, some of the reforms proposed in the Code (that were transpositions of EU Directives) were introduced as amendments to RGICSF, in the already mentioned Parliamentary Decree 14/XV.

The reforms inserted did not change the institutional structure of resolution, nor the distribution of competences between the BdP and other authorities, including the PRF. In fact, the transposition of EU rules as amendments to the RGICSF, similar to previous legislative amendments, seems to indicate the end of the reformist trend previously seen regarding banking resolution and supervision.

5. Conclusion: a view on the Portuguese regime of banking resolution

The Portuguese regime of banking resolution came to existence due to external pressure, in a time of financial crisis and vulnerability of Portugal's banking sector. The regime was enacted shortly after the liquidation of a bank, the nationalization of another, and with concerns regarding the misuse of funds by the country's public bank. Such events left the BdP, as banking supervisor, in a problematic position, having to answer for the complicated state of the Portuguese banking sector. Despite representing compliance with the conditions for financial assistance, the reforms were also a political response to the problems arising in the Portuguese banking sector, by providing the BdP with more powers to intervene in banks. It is fair to say that the framework of financial stability in Portugal improved with these reforms.

At the same time, the development of the EU's Banking Union was advancing, with the setting of the Single Supervisory Mechanism ("SSM") and the SRM. The BRRD came into force, with its transposition developing the national structure of resolution principles and powers that had been in force for just over two years. The day after part of the BRRD's transposition came into force in national law, the first resolution measure was applied to BES, a significant bank in the system in terms of dimension, size, and with shareholders and directors that held an important position in Portugal's business and social circles. The resolution was applied while the BRRD implementation was still

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119 Banco de Portugal, *Anteprojecto de Código da Atividade Bancária*, 2021, available *here*.

120 M. Teixeira Alves, *Centeno envia proposta de lei de autorização legislativa do Código da Atividade Bancária*, in Jornal Económico, 2021.

incomplete, and with the country still in the period of financial assistance, under heavy scrutiny from EU institutions.

The resolution measure applied to BES – i.e., its terms, enactment, and effects – had a profound impact not only on Portuguese politics, society and businesses, but particularly in the way the role and action of the BdP was considered, even by itself, as the internal audit reports admit. The Parliamentary Inquiry Commissions contributed heavily to show the complexity of exercising banking supervision and managing a resolved bank. The events occurred before the implementation of the SSM and the SRM; if the mechanisms had already been in place, BES would have been subject to their action, given its status as a significant credit institution. Instead, the BdP was the sole "owner" and administrator of the resolution measure, and therefore responsible for its effects. With this said, the BdP had to learn the hard way how to be a resolution authority. The fact that – at least so far – judicial challenges to the resolution measure have largely failed has at least provided some respite to the Bank.

The most significant issue of the resolution framework is the super-imposition between supervision and resolution. Although there is operational separation at the BdP's internal level, the fact that the Vice-Governor, head of the Resolution Fund, was also responsible for banking conduct supervision seemed to be in contradiction with the criteria set in the BRRD. The red flags have been issued both at the BdP level and by other personalities and institutions. It would be better for the BdP to have the resolution department under the competence of a different director – something that is about to happen, given the transitional duration of the competence of conduct supervision in Luís Máximo dos Santos – and for a public manual describing the terms of separation between the resolution and supervisory departments to exist. It is still unclear whether such reform will occur. The fear is that, now that the reformist impetus has disappeared, new changes shall only occur once another banking crisis occurs. Future developments will tell.

Romania

Mihai Cîrjă

Summary. 1. The Romanian Institutional Framework of Resolution – 1.1. National Bank of Romania (NBR) – 1.2. The Financial Supervisory Authority (FSA) – 1.3. Other national authorities involved in the resolution planning and/or execution – 2. National Bank of Romania as a Resolution Authority – 2.1. Resolution Powers – 2.2. The Governance and The Activity of the Resolution Body – 3. Conclusions

1. The Romanian Institutional Framework of Resolution

In Romania there are two national resolution authorities (NRAs), designated by the Romanian Bank Resolution Act,[1] which transposed BRRD1[2] and BRRD2[3]: **National Bank of Romania (NBR)** and **Financial Supervisory Authority (FSA)**. The two NRAs have the same powers, but there is a split between the entities within the scope of their resolution powers. The split of resolution entities follows the same approach used when transposing into the national legislation the CRD[4] and MiFiD[5] by establishing the competent supervision authorities for each type of financial institution. Therefore, one market player will interact with the same authority (NBR or FSA), which has a double capacity, as competent authority and resolution authority. As a consequence, each NRA is a single process owner, which will conduct and execute the resolution process end to end (e.g. resolution planning, applying simplified measures, applying resolution tools etc.).

1.1. National Bank of Romania (NBR)

NBR is the resolution authority for the following entities:

a) Credit institutions, Romanian legal entities;

b) Romanian branches of credit institutions from third countries;

c) other entities which are part of a group subject to consolidated supervision, of which the parent company is a credit institution or which, if the parent company is a financial holding company or a mixed financial holding company, also includes a credit institution.

1.2. The Financial Supervisory Authority (FSA)

FSA is a recently established institution through Government Emergency Ordinance No. 93/2012 on the establishment, organization and functioning of the Financial Supervisory Authority, which created the FSA as an autonomous,

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1 Law No. 312/2015 on the recovery and resolution of credit institutions and investment firms, as well as for amending and supplementing some normative acts in the financial field.

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.

3 Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalization capacity of credit institutions and investment firms and Directive 98/26/EC.

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

5 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

specialized administrative authority, with legal personality, independent, self-financed, which exercises its powers according to the provisions of this emergency ordinance, by taking over and reorganizing all powers and prerogatives of the National Securities Commission (NSC), Insurance Supervisory Board (ISB) and the Private Supervisory Board (PSB).

This major change of the institutional architecture was aiming to create a more efficient setting. In view of this objective, ASF had intensive consultations with the National Bank of Romania and benefited from the specialized support of the World Bank, as well as of well-known consulting companies (PricewaterhouseCoopers, Deloitte, Hay Group) regarding the definition of the institutional structure, the personnel requirements and the system of remuneration. In this sense, the new organization integrates support functions and IT operations, legal, human resources, communication, financial-administrative, centralizes the function of consumer protection and processing petitions, establishes the Directorate of Strategy and Financial Stability and strengthens the functions of supervision and control at the level of all 3 regulated sectors (insurance, capital market, private pensions). As a consequence, the ASF reorganization plan lead to a reduction of annual personnel expenses by 27% in 2015 compared to 2014, representing 58% of total expenses in 2015 (compared to 76% in 2014 and 81% in 2013).[6]

FSA is the resolution authority for the following entities:

a) Investment companies, Romanian legal entities;

b) Romanian branches of investment firms from third countries;

c) Other entities, which are part of a group subject to consolidated supervision, whose parent company is an investment firm or which, if the parent company is a financial holding company or a mixed financial holding company, does not include a credit institution.

1.3. Other national authorities involved in the resolution planning and/or execution

According to the Bank Resolution Act, the following authorities are involved in the resolution planning and/or execution:

a. The competent authority, according to the definition from Article 4, para. (1) point 40 of CRR, including the European Central Bank in the exercise of the specific powers conferred by Regulation (EU) no. Council Regulation (EC) No 1,024/2013 of 15 October 2013 conferring specific powers on the European Central Bank with regard to policies relating to credit institutions' prudential supervision;

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[6] The numbers are public, and can be consulted *here*.

b. NBR, which is responsible to exercise the functions of the competent authority[7] for credit institutions in Romania;

c. FSA, which is responsible to exercise the functions of the competent authority[8] for investment companies in Romania;

d. Competent ministries – ministries of finance or other ministries of the Member States, responsible for economic, financial and budgetary decisions at national level in accordance with national competences, designated by Member States to exercise the functions of the competent ministry according to the national law of the Member States transposing Article 3, para. (5) BRRD1;

e. Ministry of Finance, which is responsible to exercise the functions of the competent ministry in Romania. The Ministry of Finance applies the public financial stabilization instruments of extraordinary public financial support, which can be used in case of resolution. This state intervention takes the following form:

   – Financial support instrument through capital contribution;

   – The instrument of temporary transfer to state ownership.

   According to the provisions of Article 352, para. 1 Bank Resolution Act, the aforementioned instruments are used "under the leadership of the Ministry of Public Finance as a competent ministry in close collaboration with the National Bank of Romania as a resolution authority". In order to implement those instruments, the Ministry of Public Finance has, according to the law, specific resolution powers.

f. The bank deposit guarantee fund set up according to the provisions of Government Ordinance no. 39/1996 on the establishment and operation of the Deposit Guarantee Fund in the banking system, and Law No. 311/2015 on deposit guarantee schemes and the Bank Deposit Guarantee Fund which transposed Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes;

g. Trade Registry Office – The bridge institution tool is registered within an emergency procedure, only on the basis of the constitutive act and, as the case may be, of the establishment authorization, within 24 hours from submission of documents to the Trade Register Office where the headquarters of the bridge institution is located;

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[7] According to Government Emergency Ordinance 99/2006 on credit institutions and capital adequacy, which transposed CRD.

[8] According to Law No. 126/2018 on markets of financial instruments, which transposed MiFID.

h. The Court, which through the syndic judge, conducts the insolvency proceedings. The Tribunal 9 in whose jurisdiction the debtor's main office or professional office is located is competent to resolve the application for opening and administration of insolvency. The Court of Appeal is the court of appeal for the decisions pronounced by the president of the court or by the syndic judge, as the case may be. The decisions of the court of appeal are final.

i. The Court, for appealing the administrative acts issued by the resolution authorities. Any person affected by a decision of the National Bank of Romania to take a crisis management measure can appeal the decision. The first appeal is a preliminary procedure in front of the NBR Board. The decision of the board of the NBR can be appealed to the High Court of Cassation and Justice, within 15 days of communication.

2. National Bank of Romania as a Resolution Authority

The National Bank of Romania (NBR) was established by an organic law, "Law for the establishment of a discount and circulation bank", published in the Official Gazette of Romania, Part I, no. 90 of April 17, 1880 (which currently is out of force). Nowadays, the NBR operates under a modern framework, according to The Statute of the National Bank of Romania,[10] which mainly regulates its classical central bank activities. In recent years, the NBR had acquired a wide array of competences in various areas such as: prudential supervision,[11] anti-money laundering,[12] oversight of the payments and payment instruments,[13] bank resolution and recovery, critical infrastructures,[14] covered bonds supervision,[15] monitoring of financial market infrastructures[16] etc. All these competences were conferred by transposing EU Directives into national legislation, and each transposing law establishes a set of powers and tools for NBR. However, the

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9 The Romanian judicial system has 4 types of courts: 176 District Courts, 42 Tribunals, 15 Courts of Appeal and The High Court of Cassation and Justice.

10 Law No. 312 / 28.06.2004 on the Statute of the National Bank of Romania.

11 An unofficial translation in English of the *Statute of the National Bank of Romania* can be found *here*.

12 Law No. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing some normative acts, which transposed AML Directives.

13 According to Law No. 209/2019 and Law No. 210/2019 which transposed PSD2 and EMD.

14 According to the Government Emergency Ordinance no. 98/2010 on the identification, designation and protection of critical infrastructures, which transposed the Directive 2008/114/EC on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.

15 Law No. 233/2022 on guaranteed obligations, as well as for the amendment and completion of some normative acts in the financial field, which transposed Covered Bonds Directive (Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU).

16 According to Law No. 126/2018 on financial instruments markets, which transposed MiFID2 and implemented MiFIR and EMIR.

NBR Statute was not amended, in order to depict in a consistent manner all powers and attributions.

2.1. Resolution Powers

Before 2015, the year when BRRD1 was transposed, the Department of Financial Crisis Management used to function within NBR. This department performed activities that are similar to the ones established by BRRD1 framework, such as:

- Developing plans for unforeseen situations and permanently updating them, in accordance with emerging needs and financial market developments;
- Developing financial crisis simulation exercises at central bank and national level.

However, it is hard to say that before the transposition of BRRDs, NBR was a true resolution authority, but rather it was trying to cater the resolution needs and objectives in a merely theoretical way, missing out the resolution tools. The activity and the legal background of its activity was built around the idea of financial stability, the concept of resolution not being very clearly defined at that time.

The national framework for resolution represented by The Bank Resolution Act is completed with the provisions of the Insolvency Act,[17] which contains some special insolvency provisions for credit institutions, which transposed The Reorganisation and Winding up of Credit Institutions Directive[18] and also the Bank Creditor Hierarchy Directive.[19]

With respect to a credit institution that is failing or likely to fail, the NBR has all the resolution powers (e.g. applying resolution tools), unless there is a lack of public interest, case in which the insolvency proceedings are not carried out. The NBR does not have the powers to conduct any insolvency proceedings, but it has the power[20] to suspend any payment or delivery obligations arising from any contract to which a credit institution is a party, if the credit institution is likely to enter a state of major difficulty.

Also, the opening of bankruptcy proceedings at the request of the debtor credit institution or its creditors can only be ordered with the consent of the

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17 Law No. 85/2014 on insolvency prevention and insolvency procedures.

18 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding up of credit institutions.

19 Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy.

20 As per Article 186^1 of Bank Resolution Act.

National Bank of Romania, as resolution authority, according to Article 219[1] of Insolvency Act.

The resolution fund is administrated by Bank Deposit Guarantee Fund;[21] however, the level of annual and extraordinary contributions of credit institutions to the bank resolution fund is established by the NBR. Also, NBR can postpone, in whole or in part, the obligation of a credit institution to pay the extraordinary contribution to the bank resolution fund in the event that the payment of the contribution would endanger the liquidity or solvency of that credit institution.

2.2. The Governance and The Activity of the Resolution Body

The governance setting of the resolution activity was configured by adapting the existing framework, in such a way as to satisfy the specific requirements of the resolution function as it results from the BRRD and CRD. Also, the decision process and the activity flows were designed in order to be smoothly integrated into the statutory framework of the NBR.

a. Structural separation between competent (supervisory) and resolution functions

Today, within NBR[22] there is a Bank Resolution Department (the former Department of Financial Crisis Management), and also a Supervision Department. Both the supervisory and resolution decisions are taken by the NBR Board. Each department is headed by a director and by a member of the Board, who acts as executive management in order to ensure for each structure a separate reporting and decision flow. The legal ground for the separation of supervision function and resolution functions within the NBR is laid down in Article 4, para. (6),[23] of the Credit Institutions Act.[24] Also, the provisions of Article 2, point 91 of the Bank Resolution Act, defines the resolution function as "a structural organization within the National Bank of Romania, including governance structures and distinct reporting lines, which ensures the fulfilment of the resolution attributions of the National Bank of Romania". Article 4, para. (6) from The Bank Resolution Act defines the supervision function in the same way and furthermore states that "the supervisory duties arising from this act and from Regulation (EU) no. 575/2013, as well as any other attributions conferred by law on it are exercised distinctly and independently from the attributions regarding the resolution of credit institutions".

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21 See *here*.

22 For further details, the NBR's Organization Chart can be consulted *here*.

23 In exercising its powers, the National Bank of Romania ensures that the supervisory powers arising from this emergency ordinance and from Regulation (EU) no. 575/2013, with subsequent amendments, as well as any other attributions conferred by law to it **are exercised distinctly and independently** from the attributions regarding the resolution of credit institutions provided for in Article 4, para. (1) point 1 letter (a) of the same regulation.

24 Government Emergency Ordinance No. 99/2006, which transposed CRDs.

The requirement of structural separation between competent (supervisory) and resolution functions is assured at the level of NBR by applying the interpretation provided by the EBA.[25] According to the EBA's Single Rulebook by "operational independence" between the resolution function and the "other functions", it is meant that the resolution authority should be able to operate in an independent manner from the other functions carried out by the relevant authority. In this respect, within the NBR, the Supervisory function has no decision power over the Resolution function and vice versa, as it stems from the Regulation on the organization and operation of the National Bank of Romania,[26] according to which the Supervisory department has exclusive attributions on supervisory function and the Resolution Department has exclusive attributions on resolution function. Also, the departments are "structurally separated", meaning that the personnel working within the resolution function is separate from the personnel working within other functions. Moreover, the staff employed in the different functions have "separate reporting lines". This means that the staff engaged in the different functions should report to the hierarchy of the relevant authority through a different reporting line than those staff who work on other issues. In this regard, the Resolution Department and the Supervision Department are conducted by different executive board members, in order to comply with this requirement. The Supervision Department is coordinated by the First-Deputy Governor, and the Resolution Department of NBR is coordinated by a deputy-governor as an executive management, and it has a Director, a Deputy Director, and 4 Heads of Division, who coordinate the follow divisions:

i. Resolution Strategies and Policies Coordination Division;

ii. Resolution Decisions Preparation and Implementation Division;

iii. Monitoring of the Implementation of Measures for Resolvability Enhancement Division;

vi. Resolution Planning and Decisions Implementation Division.

b. The decision-making process

The NBR Board holds its meetings, and goes through the agenda that includes topics related to all the NBR powers, resolution topics included. The NBR Board consists of 9 members, who are appointed by the Parliament, at the proposal of the permanent specialized commissions of the two Chambers of the Parliament, for a 5-year mandate, which can be renewed any number of times. Each Board member has a vote. There are 5 Board Members with executive powers, who are expressly nominated: the governor, the first-deputy-governor, and 2 deputy governors. The President of the Board is the Governor of the National Bank of Romania. The executive members represent the executive management of NBR,

25 See *here*.

26 See *here*.

which coordinates the activity of all the 29 Departments, each member being in charge of a number of departments.

However, in order to simplify the decision process, the law[27] provides for the NBR Board the possibility to delegate some of the resolution competences to the member of the executive management, coordinator of the structure that exercises the resolution function (i.e. the deputy-governor). The competences that can be delegated are related to: recovery and resolution planning, the application and calculation of the MREL, the exemption from MREL, establishing resolution colleagues.

The resolution activity is reflected through NBR Board decisions having as object the establishment of a resolution plan, determining and imposing MREL, applying simplified measures etc. The main challenges regarding the legal setting of resolution function activity was represented by the lack of legal effects of the joint decisions taken by resolution colleges in which the NBR took part of. Neither the resolution college, nor the joint decision is regulated under Romanian law as being legally effective for the Romanian entities.[28] The joint decision does not qualify as an individual legal act, which addresses a specific recipient as the subject to a series of obligations established by that act, which can be challenged by its recipient. Moreover, resolution colleges have no legal capacity to stand in courts as a defendant and a challenge would also raise problems on determination of competent jurisdiction. The NBR approach is to issue for each resolution entity an individual legal act (i.e. an Order for imposing MREL), which resumes the aspects decided by the resolution college, practically realizing a transfer of the joint decision into national law circuit. Consequently, the Order can be challenged and sent under judicial review at national level.

In general, each binding decision[29] taken by NBR in its capacity of resolution authority can be put under judicial review, regardless of the legal instrument in which the decision is materialized (e.g. Board decision, Order). Depending on its legal effects a decision can be challenged by its recipient (i.e. the credit institution) or any person harmed by it.[30]

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27 According to Article 4 (1^2), Bank Resolution Act: "the Board of Directors of the National Bank of Romania may delegate the exercise of any of its attributions, provided in Title II, in article 295^5-295^{56} and at articles 458-468, which belong to the National Bank of Romania, as a resolution authority, to the member of the executive management, coordinator of the structure that exercises the resolution function, according to the internal decisions and regulations. In this case, the member of the executive management, coordinator of the structure exercising the function of resolution may adopt any act in order to exercise the respective attributions and may issue orders for the imposition of the necessary measures".

28 The joint decisions have no effects for third parties, but only for those who have concluded the decisions.

29 For instance, the informative MREL targets in 2023 provided by BRRD2, they could be challenged but they are not binding, therefore, in terms of judicial procedure, the action would have been rejected as lacking interest.

30 Article 454, Bank Resolution Act: "Any person affected by a decision of the National Bank of Romania regarding a crisis management measure may appeal the decision [...]".

c. EBA's mediation in relation to the SRB and the NBR. College resolution activity aspects

A big part of the resolution activity is carried out at the level of resolution colleges, where the collaboration among NRAs is an important characteristic of the activity. However, it is of paramount importance that all resolution authorities have the same outlook on the resolution entity, respectively how certain concepts can be applied from case to case.

Each year, resolution authorities have to review the resolution plans they have made for EU banking groups under their jurisdiction and decide on any updates. For cross-border groups, this decision is taken jointly by the group level resolution authority and the resolution authorities of the group's subsidiaries. The main point of the yearly review is the assessment of the group resolvability, which is decisive for determining the resolution approach, which can be a multiple point of entry (MPE) strategy or single point of entry (SPE) strategy. The BRRD and the Delegated Regulation[31] provide how the assessment shall be made, but in practice there is a multitude of aspects to be taken into account (e.g. the integration of group business model, the level of integration of critical services, extent of intragroup transactions).

Therefore, there is no fixed criteria in order to establish a resolution approach, but rather a case-by-case scenario analysis, within the college resolution. As the understanding of some operational aspects, respectively their transposition into resolution capacities is subjective, the BNR and the SRB failed to reach a common decision in the case of a cross-border group. Since no decision was issued and the college activity came to a dead end, as a last resort solution the EBA was requested to mediate the dispute between the NBR (the resolution authority for the subsidiary in Romania) and the SRB (the group-level resolution authority for the Group). The mediation process was closed by issuing a mediation decision by the EBA. Surprisingly, the EBA had no binding input on the substantive issue that was brought to the discussion, but rather on how the resolution authorities should work within the resolution college more precisely how the assessment should be made (e.g. the detailed description in the group resolution plan shall also include an assessment of any variant strategy considered necessary[32]).

Another interesting situation that raised difficulties among the resolution college activity, and even raised the question of whether the college should be

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31 Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent values, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges. OJ L 184, 8.7.2016, 1.

32 Article 1 of *Decision of the European Banking Authority on the settlement of a disagreement, Addressed to: Single Resolution Board and Banca Națională a României. 27 April 2018*, see *here*.

dissolved was the case of two resolution entities, one of which was under the simplified obligations according to Article 4 BRRD. The simplified measures established that the resolution plan updates were to be made every two years. Thus, the question arose as to how the resolution plan should be updated, considering that the update concerned only one entity. In the end, the resolution authority that proposed the college dissolution gave in, and understood that the activity of the resolution college is configured as an obligation of collaboration as per Article 88 BRDD.

d. The regime of NBR staff & Board Members

The NBR Board members, including the members with executive management attributions, are not part of the category of public officials or any assimilated category. Also, the NBR staff members are not civil servants, nor contractual staff deemed as civil servants, and, as a consequence, the administrative legal regime of civil servants is not applicable to NBR staff, but just the common labour law regime. However, the NBR Statute is not clear on this matter, and does not qualify in any way the legal regime applicable to NBR Board members, as well as to NBR staff with management and execution functions, which led to a series of wrongful practices.

Thus, either within the legislating process of some laws applicable to the public sector, or in that of implementing some legal provisions, the legal status of the NBR conferred by the TFEU, the SECB Statute and the BNR Statute Act were not taken into account, considering that measures addressed to budgetary institutions are applicable to the central bank, and the regime of civil servants or, as the case may be, contractual staff from public authorities is applicable to the staff of the central bank. The simple qualification of the NBR as an independent public institution, referred to in Article 1, para. (2) of NBR Statute Act, without any special provisions applicable to its staff, adopted in accordance with the principles of functional and personal independence of the central bank, repeatedly required NBR to issue clarifying legal opinions, in which the provisions of the Treaty on the Functioning of the European Union (TFEU) or of the ESCB Statute were invoked.

One example is the incorrect application of Budget Balance Act[33], under which a 25% salary cut-off was imposed to different categories of public employees, with the unlawful consequence of a 25% reduction in the salaries of the NBR staff. With regard to the provisions of this law, the ECB has shown, through Opinion CON/2010/51[34] that both the principle of central bank independence and the prohibition of monetary financing were violated.

A more recent example is "Law No. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic", which prohibited

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33 Law No. 118/2010 regarding some measures necessary to restore the budget balance.

34 Opinion of the European Central Bank of 1 July 2010 on the remuneration of the staff of Banca Naţională a României (CON/2010/51), see *here*.

the organization of recruitment exams to fill in vacant positions "in public institutions and authorities" during the state of alert, according to Article 27, para. (3) of Law No. 55/2020.

In terms of legal liability, the the NBR's Board and staff charged with prudential supervision tasks shall not be subject to any civil or penal sanctions, as the case may be, if the Court finds that these persons fulfilled or failed to fulfil in good faith and with due care any action or fact related to the discharge, by law, of prudential supervision tasks.[35]

3. Conclusions

The National Bank of Romania is probably one of the oldest Romanian institutions, dating since 1880, but it carries out one of the newest attributions in terms of financial stability, by being resolution authority for the banking market. Every year, on behalf of the Board, the governor presents to the Parliament the annual report of the NBR, which includes all the activities of the NBR, including its activity as a resolution authority, the annual financial statements and the audit report. The annual report is debated in the joint meeting of the two Chambers of the Parliament.

The NBR can be audited by the Romanian Court of Accounts, which has a limited scope in what regards NBR's activity: the Romanian Court of Accounts can exercise the performance audit on the management of NBR resources. Through its findings and recommendations, the performance audit aims to reduce costs, increase the efficiency of the use of resources and meet the proposed objectives.

While the field of resolution is still new, and fortunately NBR has not had to apply any resolution instrument so far, the central bank has an important risk resilience culture perfectly adequate to carry out resolution activities.

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[35] Article 25 alin. (3) NBR Statute.

Slovakia

Dominik Králik

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1. Overview*

The National Bank of Slovakia[1] (further also referred as "NBS") was established on 1 January 1993 by the Act of the National Council of the Slovak Republic No. 566/1992 Coll. on the National Bank of Slovakia as the independent central bank of the Slovak Republic. According to Article 56 Paragraph 1 of the Slovak Constitution, the National Bank of Slovakia is an independent central bank of the Slovak Republic. The National Bank of Slovakia may, within its scope of power, issue generally binding legal regulations if it is so empowered by a law.

The wording of Article 56 of the Constitution of the Slovak Republic underlines the central bank's independence. The Article 56 of the Constitution of the Slovak Republic takes into account the requirements of the European Union with regard to the position of central banks, which follow from the basic documents of the European Union including the Protocol on the Statute of the European System of Central Banks and of the European Central Bank. At the same time, this wording respects the Europe Agreement establishing an association between the European Union and its Member States, on the one part, and the Slovak Republic, on the other part (Announcement No. 158/1997 Coll.).[2] Under Articles 69 and 70 of the Europe Association Agreement, the law of the Slovak Republic, including the banking law (relating to both central and commercial banking), must be approximated to the law of the European Union, and should not depart from it.

The provision of Article 56 Paragraph 2 of the Slovak Constitution stipulates, in line with the existing legal status, that the Bank Board of the National Bank of Slovakia is the supreme governing body of the National Bank of Slovakia.

From the euro introduction date, i.e. from 1 January 2009, Slovakia became the part of the Eurosystem which forms the system of central banking in the euro area within the European System of Central Banks. NBS is involved in the common monetary policy determined by the European Central Bank for the whole euro area. NBS issues euro banknotes and coins, promotes the smooth operation of payment systems and clearing systems, maintains and disposes of foreign reserve assets and implements foreign exchange operations according to separate regulations applicable to Eurosystem operations and conducts other activities resulting from its participation in the European System of Central Banks.[3]

NBS, in the financial market area, contributes to the financial system stability as a whole, as well as to the safe and sound financial market functioning in order

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* NBS kindly provided some background information. However, any factual mistakes or inaccuracy are the sole responsibility of the author.

1 In Slovak language Národná banka Slovenska.

2 See *here*.

3 See *here*.

to sustain the financial market credibility, clients´ protection and complying with competition rules. Concurrently, NBS conducts financial market supervision, i.e. it conducts supervision of banks, branch offices of foreign banks, investment firms, intermediaries of investment services, stock exchanges, management companies, mutual funds and collective investment undertakings, reinsurance undertakings, pension fund managing companies, pension funds, supplementary pension fund managing companies and other supervised entities of the Slovak financial market.[4] As such, within the Banking Union, it acts both as NCA and NRA.

This report on the one hand focuses on the resolution framework under Slovak law and the organisation of the National Bank of Slovakia and Resolution Council as the legally independent resolution authority. On the other hand, the report outlines how independence and separation of resolution authority functions is maintained under Slovak law and summarises the accountability mechanisms to which the National Bank of Slovakia and Resolution Council are subject to.

2. Organisation of the National Bank of Slovakia

2.1. The National Bank of Slovakia as macroprudential authority

Past developments in financial markets have shown that the traditional exercise of financial market supervision, focused on the stability of individual financial institutions, is insufficient for ensuring the stability of the financial system as a whole. This is because such supervision cannot comprehensively address the combined, common behaviour of financial institutions, their shared exposure to risks, the linkage between institutions, and possible cross-border effects of national measures.[5] This recognition has led to the creation of a macroprudential policy concept in which the analysis of risks to financial stability is complemented with the powers and responsibility of authorities to take measures to mitigate these risks. Macroprudential policy can, therefore, be defined as an ongoing process of identifying, monitoring, assessing and mitigating risks that pose a threat to financial stability. By preventing and mitigating these risks, the policy contributes to strengthening the entire financial system's resilience.[6]

The organ in charge of banking prudential supervision, the supervisory authority, is the National Bank of Slovakia anchored in the act No 566/1992 Coll. on the National Bank of Slovakia) and its supervisory competences are based on Act No 747/2004 Coll. on financial market supervision.

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4 *Ibidem*.

5 See *here*.

6 *Ibidem*.

The National Bank of Slovakia is mandated by the NBS Act[7] (Section 2(3)) to contribute to the stability of the financial system. In addition, the Financial Market Supervision Act (Section 1(2) and (3)(b)) mandates NBS to identify monitor, assess, and actively mitigate risks to financial stability. All of the Bank's activities in this area are referred to collectively as macroprudential policy.

In conducting macroprudential policy, NBS focuses mainly on two areas.[8] First, NBS formulates rules on lending. The aim is to make lending sustainable in the long term and make it more secure for both borrowers and lenders. The statutory framework for such rule-making comprises the Housing Loan Act and Consumer Credit Act. The rules themselves, including limits on certain loan parameters, are laid down in the Housing Loan Decree and Consumer Credit Decree.

Second, the NBS focuses on increasing banks' resilience. Banks build up different types of reserves that allow them to deal with contingencies and risks when they arise. These reserves notably include capital buffers whose rates are set in accordance with the EU's Capital Requirements Regulation (CRR) and Slovakia's Banking Act.

As a Member State of the European Union (EU), Slovakia is subject to EU law, whether directly applicable regulations (e.g. the CRR), or other pieces of legislation transposed into Slovak law (e.g. the Capital Requirements Directive, the Directive on credit agreements for consumers relating to residential immovable property, and the Directive on credit agreements for consumers).

The stability of the European financial stability is also supported by the European Systemic Risk Board (ESRB), which issues recommendations and warnings on current risks as appropriate. These recommendations and warnings may be addressed either to all EU countries or specifically to certain countries.

2.2. The Bank Board

Given the organisational and personnel interconnectedness of the National Bank of Slovakia and the Resolution Board, we will discuss how the NBS operates. According to Paragraph 2 of the Article 56 of the Slovak Constitution, the highest administration body of The National Bank of Slovakia is the Bank Council (also referred as Bank Board) of the National Bank of Slovakia.

The supreme governing body of the NBS is the Bank Board. The Bank Board ought to consist of six members (pursuant to Section 7 of the Act on the National Bank of Slovakia). Members of the Bank Board shall be the Governor, two Vice-Governors and three other members.

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[7] Act of the National Council of the Slovak Republic of 18 November 1992 on the National Bank of Slovakia.

[8] See *here*.

The Governor and Vice-Governors shall be appointed and dismissed by the President of the Slovak Republic upon the recommendation of the Government and with approval of the National Council of the Slovak Republic (Parliament). Three other members of the Bank Board shall be appointed and dismissed by the Government upon recommendation of the Governor of NBS. The members of the Bank Board shall be appointed for a term of six years. A natural person with appropriate expertise and experience in monetary or financial matters, who has full legal capacity and is of good character, may be appointed as a member of the Bank Board. Relevant expertise and experience shall be deemed to include a full university degree and at least five years' experience in a managerial, scientific or teaching capacity in the monetary or financial field. Such qualifications for appointment as a member of the Bank Board are quite general and in practice do not cause difficulties in fulfilling them.

2.3. The Resolution Council as microprudential authority

There is only one national resolution authority (NRA) in Slovakia and it is the Resolution Council. From the legal point of view, the Resolution Council (or the Council) is a stand-alone resolution authority whose functioning, we mean staff and operations, is secured by the National Bank of Slovakia (NBS). The legal basis in which the NRA is anchored is Act No. 371/2014 Coll. on resolution in the financial market.

The NRA does not fulfil any functions other than resolution functions. The NRA is not in charge of the national insolvency proceedings. If a bank is liquidated, only the NBS is entitled to submit a proposal for the appointment and dismissal of a liquidator. The liquidator conducts the liquidation of the bank, in particular he is obliged to enforce the delivery of the benefits from invalid legal acts or contradictory legal acts by which the bank or its creditors have been deprived.[9]

There was no resolution authority before the BRRD came into force. The Resolution Council has been operational since 1.1.2015.

The documents underpinning the activity of the Council are, pursuant to Section 5(1)(h) of the Act on resolution in the financial market, the Statutes and the Rules of Procedure of the Council.

The Council is established as a legal person authorised to act in the area of public administration as a resolution authority for selected institutions. The Council has a registered office in Bratislava but is not recorded in the Commercial Register.

The performance of tasks needed to create professional and organisational conditions for the Council to exercise its functions and powers is ensured by the NBS. Within the NBS a special organisational unit is set up for the performance

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[9] Section 66 of the Slovak Act 546/2006, on Banks.

of resolution tasks with the aim of avoiding conflicts of interest and ensuring the performance of these tasks independently of the other tasks of the NBS.

The staff members of the NBS performing the resolution tasks may not be involved in the exercise of supervision over selected institutions in matters that do not fall within the Council's remit.

The Statutes of the Council govern matters concerning the establishment and composition of the Council, including its headquarters. They also specify the Council's remit, the confidentiality obligations of its members, and rules for mutual cooperation between the Council, NBS, and the Ministry of Finance of the Slovak Republic.

No other authorities such as competent ministry or other administrative authority are involved in the resolution planning phase. On the other hand, several authorities, similarly as in other jurisdictions, are engaged in resolution execution (Ministry of Finance, Deposit Protection Fund, NBS as supervisory authority, FMIs). Their roles and activities are defined and coordinated by respective Slovak and EU legislation, SRB's and national policies and guidance (National resolution handbook).

2.4. Organisation of the Resolution Council

Internally, the functioning of the Resolution Council is governed by Rules of procedure and the Statutes. Distribution of tasks is governed by the Act on Resolution. The Council is composed of ten members. Four members are managers from NBS, with at least one of them being a member of the Bank Board of NBS and one being a manager in charge of the organisational unit referred to in Section 3(2) of the Act on Resolution. Four members are managers from the Ministry of Finance, with at least one of them being a state secretary authorised to act as deputy-minister. The Council members representing NBS are nominated and recalled by the Governor of NBS and those from the Ministry are nominated and recalled by the Minister of Finance of the Slovak Republic. Further members of the Council are the director of the Debt and Liquidity Management Agency and the director of the State Treasury. The Act on Resolution further clarifies the roles and tasks of the Chairman of the Council, Vice-chairman and the Executive member of the Board.

The Resolution Council conducts its activities impartially and independently of the state authorities, municipal authorities, other public authorities, and other legal or natural persons; state authorities, municipal authorities, other public authorities, and other legal or natural persons may not influence the Council in its activities. When performing tasks, the Council and the person it has designated shall proceed with due care and prudence.

The Council members perform their tasks with due professional care and in accordance with this Act and other legislation of general application, while using and taking into account any available information concerning the performance

of their tasks and powers. When performing their tasks, the Council members may not give preference to their personal interests over the public interests and restrain from anything that may be in conflict with a Council member's office.

The Chairman of the Council is a state secretary of the Ministry. Only a person of good repute and due professional competence may be appointed as a member of the Council. The Chairman of the Council performs the functions and tasks of the Council's statutory body, including management of the Council's activities and the signing of decisions affirmed by the Council in plenary meetings.

In order to ensure the performance of some of its tasks, the Council appoints one of its members as executive member. The executive member of the Council has the power to decide in matters such as the adoption of substitute measures by selected institutions, the minimum requirement for own funds and eligible liabilities held by selected institutions, the obligation to calculate and observe the minimum requirement, the exemption of subsidiaries from the obligation to observe the minimum requirement on an individual basis, the extent to which selected institutions may meet the minimum requirement, the imposition of remedial measures or fines, the mounting of an impartiality challenge against a designated staff member performing tasks in first-instance proceedings and against a person invited and other matters assigned by the Council to the executive member of the Council.

For the purpose of exercising its powers in resolution proceedings, including the power to execute decisions imposing resolution measures, the Council may appoint up to three special administrators. In appointing a special administrator, the Council specifies the range of powers that will be delegated to the special administrator.

2.5. The Resolution Council and its relationship to National Bank of Slovakia

As already mentioned, four members of the Resolution Council are NBS staff members. They are appointed to the Council, and may be removed, by the Governor of NBS. NBS is also responsible for providing expertise to the Council and organising its functioning.

NBS is responsible for advising and organising the work of the Resolution Council, which also includes the Council's communication with media and the public. These tasks are carried out by NBS's Resolution Section, which has been established for this purpose.[10]

2.6. The relationship between the Resolution Council and other Slovak public authorities

NBS, state authorities, territorial self-governments and other public authorities, the Notarial Chamber of the Slovak Republic, the Slovak Chamber

[10] See *here*.

of Auditors, notaries, auditors, audit firms, the Central Securities Depository, members of the Central Securities Depository, the stock exchange, and other entities whose services relate to selected institutions that fall within the remit of the Council, if requested, cooperates with the Council in the performance of tasks under this Act and other legislation.

2.7. The relationship between the Resolution Council and the Single Resolution Board

The Resolution Council is the national resolution authority established in Slovakia. The Single Resolution Board (SRB) is the common resolution authority for all EU Member States participating in the Single Resolution Mechanism (SRM), i.e. the euro area countries and those EU Member States that have opted to participate in the SRM. The Resolution Council cooperates closely with the SRB, mainly with regard to financial institutions incorporated in Slovakia.

The Act on Resolution in the financial market enacts in Slovak law the EU's Bank Recovery and Resolution Directive (BRRD). This Directive harmonises across the EU the approach to resolution in the financial sector.

2.8. International cooperation in resolution proceedings

The Resolution Council, when exercising its powers, may make available or provide information to the European System of Financial Supervision, other resolution authorities, foreign supervisory authorities, auditors, audit firms, the Deposit Protection Fund, foreign deposit guarantee schemes, the potential purchaser whom the Council addressed in connection with the transfer of shares or other instruments of ownership or the assets, rights and liabilities of a selected institution, and other public authorities and persons whose activities are related to the resolution of selected institutions or persons, and to draw their attention to any shortcomings revealed, especially those to which the solution or expert assessment applies.

For the purpose of transferring shares or other instruments of ownership, assets, rights or liabilities located in another Member State or rights or obligations governed by the law of another Member State, the Council may require cooperation from the relevant authorities of that Member State.

According to Section 20 of the Act on resolution, the resolution authority of another Member State may operate in the territory of the Slovak Republic as a resolution authority in relation to a branch of a foreign selected institution or a subsidiary of a foreign selected institution, while the foreign selected institution is subject to supervision by the competent foreign supervisory authority.

The Council is a participant in the Single Resolution Mechanism. The Council ensures the performance of tasks arising for the Council from the legally binding acts of the European Union.

2.9. Competencies of the Council

In resolution proceedings, the Council has the following competences.

First, it may exercise decision-making powers, shareholder rights, the rights of other owners and those of the statutory body or of the supervisory board of the selected institution.

Second, it may transfer shares or other instruments of ownership issued by the selected institution.

Third, it may transfer the rights, assets or liabilities of the selected institution to a third party with the institution's consent.

Fourth, it may reduce or remit the principal or balance payable of the eligible liabilities of the selected institution.

Fifth, it may convert the selected institution's bail-inable liabilities into shares or other instruments of ownership held by the selected institution, parent company or bridge institution, to which the assets, rights or other liabilities of the given selected institution are assigned.

Sixth, it may cancel debt instruments issued by the selected institution, and instruments giving rights to acquire debt instruments, except for secured liabilities.

Seventh, it may reduce to zero the nominal value of the selected institution's shares, other instruments of ownership or bail-inable liabilities, and cancel its shares or other instruments of ownership.

Eighth, it may place the selected institution or its parent institution under the obligation to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments.

Ninth, it may change or adjust the maturity of debt instruments and bail-inable liabilities issued by the selected institution or change the amount of due interest on the basis of these instruments and other bail-inable liabilities or the date of yield payment, even though a temporary suspension of payments, except for secured liabilities.

Tenth, it may take measures to ensure that no additional liabilities arise from derivative agreements for the selected institution and that such liabilities are compensated and terminate financial agreements or derivative agreements.

Eleventh, it may recall or appoint the members of the statutory body and of the supervisory board of the selected institution, and its managers.

Twelfth, it may request NBS to assess the acquisition of a qualifying holding within a shorter period of time under other legislation.

Lastly, it may request any person to provide the Council with the information that the Council needs to select an appropriate resolution tool and to prepare for resolution, which also requires that the information provided in resolution plans be updated and supplemented. The information so requested is provided within the scope of on-site inspections.

2.10. Resolution colleges

The Council as a group-level resolution authority shall establish a resolution college to carry out the tasks and to ensure cooperation and coordination with the resolution authorities of third countries.

The resolution college shall be established to perform exchanging information needed to for the preparation of group resolution plans, exercising preparatory and preventive powers in relation to groups of institutions under resolution, drawing up group resolution plans and other tasks.

Where a third-country institution or a third-country parent institution has subsidiaries established in the Slovak Republic and in one or more Member States, or two or more branches that are regarded as significant in the Slovak Republic and in one or more Member States, the Council shall, in agreement with the resolution authorities of the Member States where those subsidiaries are established or where those significant branches are located, establish a European resolution college.

The Council, other competent resolution authorities, Národná banka Slovenska, and the supervisory authorities of Member States shall provide one another on request with all the information relevant for the performance of tasks, while maintaining confidentiality.[11]

2.11. Decisions making in plenary meetings of the Council

In matters that fall outside the competence of the Council's executive member, the Council is eligible to act and take decisions in plenary meetings. The Council is eligible to decide in the following matters such as the commencement of resolution proceedings, the assets, liabilities, rights and obligations of participants in resolution proceedings, and decisions to write down or convert capital instruments, the write-down or conversion of capital instruments or the financing of resolution solutions.

The Council shall decide in plenary meetings by voting. Plenary meetings shall be attended by all the members of the Council. The Council has a quorum in a plenary meeting if more than half of its members are present. The Council decides in a plenary meeting by a majority of the votes cast. In the case of an equality of votes, the Chairman's vote decides. The member of the Council who

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[11] Act No. 483/2001 of 5 October 2001 on banks as amended.

is responsible for financial market supervision as a member of the Bank Board of NBS has no voting right in the Council's plenary meetings. When acting and taking decisions in plenary meetings, the Council has the same position, powers and obligations as the financial market supervision unit.

3. Slovak resolution framework

3.1. Resolution under Slovak law

Resolution in the financial sector means the restructuring of a financial institution or group which is failing or likely to fail. It is undertaken in the public interest, in order to preserve financial stability and to protect client assets of the institution or group.

The Act on Resolution in the financial market regulates the procedure to be followed by selected institutions and other entities in regard to resolution in the financial market of the Slovak Republic, the preparation and approval of resolution plans in the financial market of the Slovak Republic by the Resolution Council, the establishment, remit, activities and tools of the Council in regard to resolution in the financial market in the Slovak Republic and the establishment and functioning of the national resolution fund and the management and use of the monies raised by the national fund (Section 1 Paragraph 1 of this Act).

According to Section 1 Paragraph 2 of the Act, the Act has the following objectives. First, to ensure the continuous performance of critical functions by selected institutions and other entities. Second, to avoid any significant adverse effect on the financial stability of the Slovak Republic, in particular by preventing the spreading of contagion and financial instability across financial markets and by maintaining market discipline. Third, to protect public finances by minimising reliance on extraordinary public financial support. Fourth, to protect depositors whose deposits are subject to protection under other legislation, and the clients of investment firms who are eligible to compensation for their inaccessible assets under other legislation. And fifth, to protect the money and other assets of clients other than the clients.

Under the rules of the resolution framework, a bank crisis can be considered resolvable if it can be realistically and credibly resolved in insolvency proceedings, or resolved in resolution, without causing significant negative impacts on financial stability. The resolution authority shall decide which of the above resolution approaches to take, following a declaration of failure in relation to the institution concerned and in the absence of timely alternative remedies, on the basis of the public interest test.[12]

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[12] T. Gajdoš, *Použitie zdrojov Fondu ochrany vkladov v kontexte revízie rámca krízového manažmentu a ochrany vkladov (CMDI)*, (2021) 11 Justičná revue, 1303-1311.

The aim of resolution is to preserve financial stability and ensure the continuity of the critical functions of the financial system. This entails, for example, ensuring unlimited access to deposits and the functioning of payment systems. At the same time, the main task is to provide depositors with the highest protection possible. The aim is therefore not to rescue or wind down the financial institution. Nevertheless, the resolution process may result in the sale of the institution, or parts of its business, or in it being fully or partially wound down.[13]

In order to maintain the critical functions of a failing institution, resolution may involve the transfer of some or all of the business (including certain liabilities) to a third party. It may therefore happen that the original institution is divided into a 'good' part, which continues functioning under the ownership and administration of a third party, and a 'bad' part, which is wound down under normal insolvency proceedings.

In contrast to this option, the bail-in tool results in the preservation of the original institution, albeit with a change in the shareholders structure and with a reduction in the overall size of the balance sheet owing to the write-down of losses. The bail-in tool is a resolution tool that allows an institution on the verge of insolvency to be recapitalised without using taxpayers' money. Failing institutions are not to be bailed out with public funds, but instead their losses are to be absorbed first by shareholders and, at a later stage by unsecured creditors (including bondholders), whose claims will be written down or converted into equity (possibly resulting in a change in control). In this way it is possible to prevent the institution (or its part) from being wound down and to safeguard its operation and the assets of its clients.[14]

The current resolution framework applies to banks and to those investments firms that have share capital of at least € 730,000, as well as to financial institutions subject to consolidated supervision. The European Commission is at present considering the possibilities for expanding the scope of the resolution framework to include other types of financial institutions, particularly in the areas of insurance, asset management, and financial infrastructure.

3.2. Resolution planning

After consultation with NBS and the resolution authority of the Member State in which the selected institution has a significant branch, the Resolution Council, insofar as is relevant to the significant branch, prepares a resolution plan for the selected institution, which is not part of any consolidated group over which supervision is exercised by the supervisory authority of the Member State or third country concerned (Section 21 of the Act on Resolution, also referred as follows). In the resolution plan, the Council outlines the procedure to be followed during the resolution of the selected institution.

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13 See *here*.

14 More detailed *here*.

The Council submits the resolution plan of a selected institution and any changes thereto to NBS as soon as the plan is drawn up. The Council as a group-level resolution authority submits a group-level resolution plan and any changes thereto to NBS.

After consulting NBS and the competent resolution authority of the jurisdiction in which a significant institution is located, the Council assesses the extent to which the selected institution is resolvable.

If the Council finds that an institution is unresolvable, it shall notify the European Banking Authority without undue delay.

Slovakia is a country where most banks operate as foreign subsidiaries. For this reason, it is also relevant to deal with the legal regulation of groups. A group resolution plan must include all the entities and groups that are subject to resolution. The Council as a group-level resolution authority shall draw up a group resolution plan in cooperation with the resolution authority of the entities that are part of the relevant group, after consulting the resolution authorities of the selected institution's significant branches, insofar as is relevant to these branches.

EU parent institutions established in the Slovak Republic shall submit to the Council any information required for the preparation and implementation of a group resolution plan, including information on each of the group entities (Section 27 of the Act on Resolution).

The Council shall transmit the information received to the European Banking Authority in the range needed for the exercise of powers in connection with resolution at group level, to the competent resolution authority of the jurisdiction in which a subsidiary is located insofar as is relevant to that subsidiary, to the competent resolution authority of the jurisdiction in which a significant branch is located insofar as is relevant to that significant branch, to the members of the college of supervisory authorities insofar as is relevant to the subsidiaries and significant branches and to the competent resolution authorities of the jurisdictions in which the entities are located.

If any of the authorities requests assistance from the European Banking Authority to reach a joint decision to approve the group resolution plan in question, the Council shall defer its decision and awaits any decision the European Banking Authority may take in the matter. The Council shall decide in accordance with the decision of the European Banking Authority.

3.3. Resolution proceedings

According to Section 32 resolution proceedings shall be instituted in the public interest, as appropriate. Resolution proceedings shall be instituted in the public interest where necessary for the achievement of at least one of the goals set out and where the liquidation or placement into bankruptcy of an institution that is failing, or is likely to fail in the near future, would not lead to the attainment of that goal.

The Council shall assess whether the conditions for the commencement of resolution proceedings are met. In so doing, it shall assess whether the institution is failing or is likely to fail in the near future, resolution is necessary in the public interest and there is no reasonable prospect that any alternative measures taken in respect of the institution would prevent its failure within a reasonable timeframe.

The key participant in resolution proceedings shall be the institution that is under resolution.

The Council shall decide, in a decision to apply a resolution tool, to apply a resolution tool to an institution placed under resolution.

The Resolution Council as a group-level resolution authority, working closely with the resolution authorities of subsidiaries and having consulted NBS, the competent supervisory authorities of such subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to those branches, shall assess the extent to which the relevant group is resolvable.

3.4. Contributions to resolution financing arrangement

Institutions under resolution shall pay annual contributions and extraordinary contributions (Section 88 of the Resolution Act). The amount of the annual contribution for a given year is determined by the Council, after consultation with the Ministry and the Deposit Protection Fund, for each of the selected institutions. The amount of the annual contribution for selected institutions under other legislation is determined by the Single Resolution Board through a procedure according to other legislation (Section 89 of the Resolution Act).

3.5. Resolution execution

The Council shall decide on the imposition of a resolution measure on the selected institution by means of a decision on the imposition of the measure. If the Council assumes that a group is unresolvable, it shall notify the European Banking Authority. In making its decisions, the Board shall act independently, impartially and independently and shall not be bound by the proposals of the parties or others. The Council may appoint up to three special administrators for the purpose of exercising its powers in the resolution procedure, including the execution of decisions imposing measures.

3.6. Insolvency proceedings and liquidation of the bank

Resolution is preferred to insolvency proceedings only where it is necessary in the public interest. If the winding-down of a failing institution in insolvency proceedings were to result in wider economic and financial instability and heavy losses, the preference would be for resolution.

If the result of the public interest test does not show the need to save the institution in the resolution, then such institution will be liquidated in bankruptcy. This insolvency scenario, the rules of which are still not harmonised in the EU, applies to the vast majority of banks, but especially to small and medium-sized banks.[15] An insolvent bank is then the subject to insolvency proceedings.

An important difference between insolvency and resolution is that resolution proceedings are faster (ideally taking place over the course of a weekend).

The liquidation of the bank is regulated by the Act on banks.[16] According to Section 66 of this Act when a bank is wound up by liquidation, only Národná banka Slovenska is entitled to appoint a liquidator.

The Resolution Council is in charge of powers under Article 33a BRRD.

3.7. Provision of the Deposit Guarantee Fund as a form of State aid

Resolution proceedings are conducted in compliance with the European Union's state aid framework. Article 107 TFEU provides that, unless otherwise provided by the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The Commission communicated its position on whether the granting of Deposit Guarantee Fund resources constitutes State aid in the 2013 Banking Communication,[17] where, referring to case C-460/07 Puffer,[18] it points out that the mere use of deposit protection fund resources to pay depositors for unavailable deposits does not constitute State aid. Any other allocation of funds to the deposit protection fund may constitute State aid, despite the fact that the FOV is privately financed. This is because these funds are under the control of the state and the decision to use them can be attributed to the state.[19] If the alternative use of the deposit protection fund constitutes State aid, the Commission must be notified of the plans to grant or alter the aid in sufficient time to enable it to comment and to consider whether such plans are incompatible with the internal market under Article 107 TFEU. As the organisation, decision-making powers and control of the Deposit Guarantee Fund in Slovakia presuppose the participation of public elements, sufficient attention should also be paid to the issue of the

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15 T. Gajdoš, *Použitie zdrojov Fondu ochrany vkladov v kontexte revízie rámca krízového manažmentu a ochrany vkladov (CMDI)*, cit.

16 Act No. 483/2001 Coll. of 5 October 2001 on banks.

17 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 ('Banking Communication').

18 Judgment of the Court (Third Chamber) of 23 April 2009, C-460/07 – Puffer.

19 See *here*.

Commission's intervention in deciding on the use of the Deposit Guarantee Fund when considering the use of its resources.[20]

3.8. The national resolution fund and its relation to the Deposit Protection Fund

The national resolution fund is financed by financial contributions from financial institutions, i.e. from banks and certain investment firms. The maturity of the contributions to the resolution fund for the relevant year is set at 31 May of the relevant year.

The Deposit Protection Fund is in charge of the DGS (Fond ochrany vkladov) and also the administration of national resolution fund.

The fund is to be used under strictly defined conditions in the event of resolution. The national resolution fund in Slovakia was established in 2015. The fund's financial means are held in an account with NBS and do not constitute part of the government budget. Deposit Protection Fund is a legal entity established by the Deposit Protection Act (National Council of the Slovak Republic Act No. 118/1996 Coll.), representing the institutional part of the statutory deposit protection system in the Slovak Republic. Main task of DPF is the protection of deposits held by private individuals and legal entities in banks participating in the Slovak deposit protection system and the disbursement of compensation for claims resulting from inaccessible legally protected deposits in the event that a bank becomes unable to pay out deposits to deposit holders.[21]

In accordance with § 59 par. 1 of the Act on crisis management in the financial market, bail-in tool cannot be applied to covered deposits. Covered deposits (as defined in § 3 par. 3 of the Deposit Protection Act) are deposits, which in the case of insolvency proceedings against bank are paid to their owners by the Deposit Protection Fund (Slovak DGS).

All institutions under resolution shall participate in their resolution by making financial contributions to the financing of the effective use of resolution tools and the exercise of resolution powers (Section 87 of the Act on Resolution). For the collection of contributions from institutions and for their use for resolution purposes, a national fund shall be set up for the Resolution Council. The national fund shall not have legal personality and its resources shall not constitute part of the state budget, nor part of any other public sector budget. The national fund's resources shall be managed and used as decided by the Resolution Council. The national fund's resources may only be used in a range needed for financing the effective resolution of institutions.

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[20] T. Gajdoš, *Použitie zdrojov Fondu ochrany vkladov v kontexte revízie rámca krízového manažmentu a ochrany vkladov (CMDI)*, cit.

[21] More information *here* (30.1.2024).

Mutualisation relates to the use of the fund's financial means for group-level resolution involving an institution incorporated in Slovakia. Mutualisation refers to the use of multiple national resolution funds for this purpose.

3.9. The national resolution fund and its relation to the Single Resolution Fund

One of the core features of the Single Resolution Mechanism (SRM) is the fact that tasks arising under the SRM are divided between the EU's Single Resolution Board (SRB) and national resolution authorities (NRAs). Provisions aimed at ensuring consistency in their mutual cooperation are laid down in 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 (the BRRD), in 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 (the SRMR), in a number of technical regulations, and in the COFRA agreement. Nevertheless, the implementation of SRB decisions is left largely to the discretion of NRAs.[22]

The Regulation (EU) No 806/2014 is directly applicable in EU Member States and taking precedence over national law. In 2015, contributions constituted income of the resolution fund, and from 2016 they had been transferred to the Single Resolution Fund in accordance with the methodology of the Single Resolution Board.

In addition to the national resolution fund, established in 2015, a Single Resolution Fund (SRF) has begun operation from 1 January 2016. The SRF is a common fund for euro area countries and those EU Member States that have voluntarily opted to participate in the Single Resolution Mechanism. The participating countries have agreed that for a transition period lasting until 1 January 2024 at the latest, the SRF will be divided into 'national compartments'. Each country involved will transfer to the SRF the financial contributions raised at the national level, which will then be allocated to the corresponding national compartments and used primarily for resolution activities in the given country.[23]

The creation of the SSM and/or the SRM had not any impact for the direct relationship between NRAs/NCAs and the EBA.

3.10. Political or judicial tension in relation to the current resolution authority institutional framework

No political or judicial tension or dispute have arisen in relation to the framework in place.

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22 T. Gajdoš, *Selected legal aspects of the implementation of Single Resolution Board decisions*, (2018) 4 Biatec, 17-21.

23 See *here*.

3.11. Reform of the resolution framework at national level

No reform is under discussion at the moment.

3.12. Other authorities involved

No other authorities are involved in resolution planning concerning an institution (i.e. credit institution pursuant to Article 4(1)(1) of the Regulation No 575/2013 and investment firm pursuant to Article 4(1)(22) of the Regulation No 2019/2033, which is required to have a minimum initial capital of at least EUR 750,000).

4. Independence, separation, accountability

4.1. NBS as part of European System of Central Banks

From Articles 127 TFEU and Articles 2 and 7 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, it follows that the European Central Bank, in its capacity as an independent institution, is required to maintain price stability and perform the scope of authority and activities in the interest of maintaining such stability. In Articles 282 (3) TFEU and Articles 14 and 34 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank it is concurrently stipulated that the European Central Bank, in its capacity as a central bank, has the right, as part of its scope of authority, to directly issue generally binding legislation (regulations), whereas the legal position of national central banks is to be compatible with the legal position of the European Central Bank.

Under Article 282 (3) TFEU and Article 7 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, neither a national central bank, nor any members of its decision-making bodies are allowed, when exercising their authorities, in performing the tasks and activities of the national central bank, to seek or take instructions from the national government, or any other authorities.

This means that the National Bank of Slovakia, as an independent institution, is required to maintain price stability and exercise its scope of authority and activities in the interest of maintaining such stability. To this end, the NBS as a central bank has to have the right to issue generally binding legislation as part of its scope of authority, where empowered to do so by law. The said right of the National Bank of Slovakia as a central bank, may only be enacted through the Constitution of the Slovak Republic. NBS has its own legal personality. This respects Articles 282 (3) TFEU and and Articles 9(9.1) and 14 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, according to which national central banks shall have legal personality.

4.2. Meetings

A regular meeting of the Council is convened by the chairman by means of an invitation. The delivery of the invitation to each member of the Council shall be provided with a secretary. A draft invitation with a draft agenda is delivered electronically to the Council member's email address. There is also a possibility to convene a special meeting of the Council, which may be held in particularly urgent cases. There is no prescribed numbers of yearly meetings.

4.3. Appointment and Dismissal

Only a trustworthy person of professional competence may be appointed a member of the Council. For the purposes of this Act, a trustworthy person means a person of good repute, certified as eligible to have access to information classified at least as 'Confidential'. A person is considered to be of good repute if they have never been convicted of a property-related criminal offence or of a criminal offence committed in a managerial position, or of any intentional criminal offence; these facts are to be proved with a clean criminal record check certificate. To prove their good repute and to allow its verification, a natural person shall provide, prior to their appointment, data necessary to apply for this person's criminal record check certificate, along with a copy of their identity document and a copy of their birth certificate, to be used to verify their identity and the accuracy of the provided data; the provision and verification of these data, the verification of identity, and the application, issuance and sending of a criminal record check certificate are subject to other legislation; the application for a criminal record check certificate may be submitted by the Ministry, in the case of persons appointed by the Minister of Finance of the Slovak Republic, and by NBS, in the case of persons appointed by the Governor of NBS. For the purposes of this Act, 'professional competence' means completed university education and at least three years' experience in a senior position in banking or in another financial field.

The term of office of a Council member ends: (a) on the day when the member's recall from the Council takes effect; (b) on the day when the office to which the member was appointed or to which the member's tasks are related is cancelled; (c) on the day when: 1. a decision on the member's ineligibility to be granted access to classified information under other legislation takes effect; 2. a decision on cancelling the member's certificate of eligibility for access to classified information under other legislation takes effect; or 3. six calendar months have elapsed since the expiry of the certificate of eligibility for access to classified information under other legislation, unless a new certificate of eligibility for access to classified information has been issued within this period; (d) on the day when a court's decision pronouncing the member guilty of a property-related criminal offence or of a criminal offence

committed in a managerial position, or of any intentional criminal offence, takes effect; (e) on the day when the member dies or is declared dead.

4.4. Decision making process

The Council has a quorum in a plenary meeting if more than half of its members are present. The Council decides in a plenary meeting by a majority of the votes cast. In the case of an equality of votes, the Chairman's vote decides. Although the law does not explicitly state this, it can be inferred that the office of a Council member also ceases on expiry of the term of office.

4.5. Operational independence of resolution functions and avoidance of conflicts of interest with other functions

There are some general provisions within the Act on Resolution: The performance of tasks needed to create professional and organisational conditions for the Council to exercise its functions and powers is ensured by NBS, while NBS ensures that a special organisational unit is set up for the performance of these tasks with the aim of avoiding conflicts of interest and ensuring the performance of these tasks independently of the other tasks of NBS. The staff members of NBS performing the tasks referred to in the previous sentence may not be involved in the exercise of supervision over selected institutions in matters that do not belong to the Council's jurisdiction. The staff members of NBS performing the tasks referred to in the first sentence may, however, exercise supervision under this Act or perform tasks in matters assigned to the Council under this Act, provided they are designated by the Council or by a member of the Council under this Act (hereinafter 'designated staff members').

The Council members perform their tasks with due professional care and in accordance with this Act and other legislation of general application, while using and taking into account any available information concerning the performance of their tasks and powers. When performing their tasks, the Council members may not give preference to their personal interests over the public interests and restrain from anything that may be in conflict with a Council member's office.

The rank of the rules that guarantee operational independence is laws (specification in Rules of procedure, Statute).

The Resolution Council does not have its own budget. It is not clear what specific resources the Resolution Council may have at its disposal in a particular case. As mentioned above, operational costs of staff and technical equipment is provided and financed by the NBS.

The resolution authority is separated from the Supervisory authority and has its own managerial bodies.

No tensions have arisen as a result of or regarding this separation.

4.6. Exercise of BRRD early intervention powers, including powers to appoint temporary administrators

The Supervisory authority applies early intervention measures and the Resolution authority is in charge of the designation of a special administrator.

4.7. Confidentiality and Accountability of the Resolution Council

The members of the Council, the persons invited, and the relevant employees of Národná banka Slovenska, keep confidential any facts the disclosure of which may jeopardise the operation of the Council in a proper and efficient manner, the interests of the Slovak Republic or another Member State in the area of financial, economic or monetary policy, the guarding of trade and bank secrets, the exercise of supervision by the Council and NBS and the conduct of resolution proceedings.

There are several provisions on confidentiality and information exchange within the Act on resolution that are further specified in the Rules of Procedure and Statutes. The Council has the power to cooperate and exchange information in the range and under the conditions stipulated by the Act on Resolution with the competent resolution authorities, the participants in the European System of Financial Supervision, the public authorities of the Slovak Republic, the public authorities of other countries, and other entities that have information about the selected institutions or whose activities are related to these institutions.

Members of the Board for the National Bank of Slovakia are appointed and dismissed by the Governor of the National Bank of Slovakia and members of the Board for the Ministry are appointed and dismissed by the Minister of Finance of the Slovak Republic. The Director of the Debt and Liquidity Management Agency and the Director of the State Treasury shall be additional members of the Board (Section 4 Paragraph 1 of the Resolution Act). There are no other forms of accountability, e.g. in relation to the Court of auditors or other bodies.

The Resolution Council as a public authority is liable for damage incurred in the performance of its duties.

4.8. Information Exchange

How is information exchanged between the different functions (supervisory and resolution) when it comes from/is addressed to Union authorities (ECB or SRB)? NBS, state authorities, territorial self-governments and other public authorities, the Notarial Chamber of the Slovak Republic, the Slovak Chamber of Auditors, notaries, auditors, audit firms, the Central Securities Depository, members of the Central Securities Depository, the stock exchange, and other entities whose services relate to selected institutions that are within the competence of the Council, if requested, cooperates with the Council in the performance of tasks under this Act and other legislation.

In so doing, they supply the Council free of charge with the requested statements, explanations, or with data and information they have obtained during their activities, including data from their records and registers. The authorities and entities in question may refuse to supply such data and information only if this would lead to a breach of confidentiality or to the provision of information in contrast with the applicable law or with an international agreement by which the Slovak Republic is bound and which is above the laws of the Slovak Republic. The Council may cooperate and exchange information, in a range needed for the performance of its activities under Act on Resolution and other legislation, with the public authorities of the Slovak Republic and of other countries, with the Deposit Protection Fund, the Investment Guarantee Fund, and with international organisations.

4.9. Administrative and judicial review

The Rules of Procedure (Rokovací poriadok Rady pre riešenie krízových situácií)[24] regulate the Council's meetings, in particular laying down rules on participation in the Council's meetings and on its decision-making procedures. To support transparency, they also stipulate rules on the drafting of minutes of the Council's meetings and on the disclosure of information about the meetings.

The Council shall decide on the matters under discussion at the meeting in the form of a decision of the Council, the final wording shall be formulated by the presiding officer. Decisions of the Council shall be binding on all members of the Council. The proceedings of the Board under this Act and the special regulation shall not be subject to the Slovak Administrative Procedure Code.[25]

An appeal against a first-instance decision is to be lodged to the Council within 15 calendar days of the delivery date of that decision. Such an appeal has no suspensory effect. Action and decision-making in the second-instance in respect of an appeal against a first-instance decision falls within the remit of the Council. There is no judicial remedy against a decision taken by the Council in respect of an appeal. A petition for judicial review of a decision taken by the Council in a matter that falls outside the competence of the Council's executive member may be filed to the competent administrative court under other legislation. A petition for judicial review of a decision taken by the Council in respect of an appeal may also be filed to the competent administrative court under other legislation.

The legality of the Board's decisions is reviewable under the Administrative Judicial Code.[26] It means that decisions of the Resolution Council are subject to judicial review before the administrative courts.

There are no rules restricting the NRA's liability in application of Article 3 BRRD. There are neither restrictions applied to resolution functions, nor any

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24 See *here*.

25 Act of 29 June 1967 on administrative procedure (Administrative Procedure Code).

26 Act of 21 May 2015 Administrative Procedure Code.

which are extended to supervisory functions provided for under the BRRD (recovery plans, early interventions measures). National law does not restrict its general rules on public liability where the NRAs acts in the context of the SRM.

4.10. Application of European soft law

Section 5 of the Act on Resolution reacts only to EBA guidelines and recommendations. The Resolution Council performs, in cooperation with the Ministry and NBS, the directives and recommendations and guidelines of the European supervisory authority (European Banking Authority) under other legislation, except when it does not observe and has no intention to observe the directives and recommendations in question, and to inform the European Banking Authority.

5. Summary

In summary, Slovak resolution legislation houses resolution authority functions within the Resolution Council. The resolution is not conferred to the NBS by law, but to an independent legal body – the Resolution Council.

The Resolution Council, as the national resolution authority in Slovakia, was established as a completely new public institution. Establishing the Council as a separate institution ensured compliance with the independence requirement and with the requirement that resolution activities be kept separate from the supervision function. It is the task of NBS to provide expertise to the Council and organise its functioning. On this basis, it can be said that the independence of the Resolution Council is given at a high level, notwithstanding the fact, that the members of Resolution Council are sent from NBS or Ministry of Finance.

Slovenia

Vanessa Aichstill[*]

Summary. 1. The Banking Landscape in Slovenia – 2. Institutional Setting of Banka Slovenije – 3. Banka Slovenije's Structure and Accountability – 4. Cooperation with relevant EU bodies

[*] Michele Cossa (Banca d'Italia) kindly reviewed the information. However, any factual mistakes or inaccuracy are the sole responsibility of the author.

1. The Banking Landscape in Slovenia

This paper examines the current situation of the resolution authority in Slovenia concerning the structure and exercise of banking resolution powers. Slovenia joined the European Union in 2004 and Banka Slovenije, the central bank of Slovenia, became a member of the European System of Central Banks. Following the Euro adoption in 2007, Slovenia entered the Euro area. As member of the Banking Union, Slovenia transferred the supervision and resolution authority to its central bank. After the Cyprus bail-out in Spring 2013, the Slovenian banking sector underwent a comprehensive asset quality review and stress test, concluded in 2013.[1] This led to recapitalizations through state aid and asset transfers to the Bank Asset Management Company. Nova Ljubljanska Banka and Nova Kreditna Banka Maribor, the two biggest banks in Slovenia, were fully recapitalized by the Slovenian State, also Abanka received partial recapitalization in 2013 with a possible merger with Banka Celje in 2014. Additionally, two small banks, Probanka and Factor Banka, received partial recapitalization from the Slovenian State to prevent bankruptcy, facilitating an orderly wind-down in 2013. The State provided EUR 3.647 million (EUR 2.524 million in cash and EUR 1.123 million in bonds), with supplementary funding from banks' own capital. Distressed assets, primarily loans but also some equity, were identified and priced for transfer to Bank Asset Management Company as part of the process. Only recently after the establishment of the Banking Union, Sberbank Europe AG, headquartered in Austria, a fully owned subsidiary of Sberbank of Russia, and its subsidiaries in the Banking Union, i.e. Sberbank d.d. in Croatia and Sberbank banka d.d. in Slovenia were found to be failing or likely to fail.[2] The Sberbank group in the Banking Union fell under the scope of the European Central Bank (ECB) in terms of banking supervision and the Single Resolution Board (SRB) in terms of banking resolution. Furthermore, the SRB concluded for the existence of a public interest in resolving the two subsidiaries in Croatia and Slovenia for the protection of the financial stability, whereas the same condition was not found to be met in respect of the Austrian establishment. Therefore, after assessing the conditions for resolution, the SRB adopted a resolution decision in respect of Sberbank banka d.d., identifying the sale of business tool in the form of the transfer of shares as the resolution tool to be applied[3] Consequently, on 1 March 2022, the Banka Slovenjie issued a decision, in accordance with Article 116 Zakon o reševanju in prisilnem prenehanju bank – ZRPPB[4] (Resolution and Compulsory Winding-Up of Banks Act), to use the resolution tool in respect of the sale of 100% shares.[5]

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1 See for the following World Bank Group, *Bank Resolution and "Bail-in" in the EU: Selected Case Studies pre and post BRRD*.

2 ECB notice, available *here*.

3 SRB decision, available *here*.

4 Available *here*.

5 See *here*.

The shares were transferred to the largest domestic bank NLB d.d.[6] In August 2022, Sberbank filed an action for annulment of the SRB decision inter alia on the grounds of infringement of essential procedural requirements, of the obligation to state reasons, the breach of the right to effective judicial protection, alleging manifest error of assessment in the overall evaluation of the conditions related to the resolution scheme and the infringement of the fundamental right to property and of the freedom to conduct a business.[7]

2. Institutional Setting of Banka Slovenije

At the national level, the Banka Slovenije is responsible for the banking supervision[8] and resolution[9]. Therefore, the supervisory and resolution tasks lay in the hand of one authority and no further competent authorities were created. Pursuant to Article 1 (1) Zakon o Banki Slovenije – ZBS-1[10] (Bank of Slovenia Act), Banka Slovenije is the central bank of the Republic of Slovenia and was established on 25 June 1991 by the ZBS-1, adopted on 25 June 1991. Since 1991, the Banka Slovenije possesses legal personality under public law and disposes of its own assets freely and independently.[11] More specifically, the Bank remains under exclusive state ownership but enjoys autonomy in finances and governance.[12] The national resolution authority within Banka Slovenjie was established pursuant to the Zakon o reševanju in prisilnem prenehanju bank – ZRPPB[13] (Resolution and Compulsory Winding-Up of Banks Act) which transposed Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the BRRD) into Slovenian law and entered into force on 25 June 2016.[14] This Act implements the details for the Regulation (EU) No 806/2014 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 (SRM-Regulation). The ZRPPB regulates (1) the powers of the Banka Slovenjie and the procedures it conducts as the bank resolution authority, (2) bank resolution planning, (3) resolution procedures and authorizations in connection with the implementation of resolution measures, (4) the procedure for the compulsory winding up of a bank and (5) a mechanism for the collection and transfer of ex-ante and extraordinary ex-post contributions by banks established in Slovenia to the Single Resolution Fund (SRF). Pursuant to

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6 See *here*.

7 See Case T-527/22, *Sberbank of Russia v SRB*, retrieved from *here*.

8 Pursuant to Article 23 Zakon o Banki Slovenije – ZBS-1 (Bank of Slovenia Act).

9 Pursuant to Article 7 (1) Zakon o reševanju in prisilnem prenehanju bank – ZRPPB (Resolution and Compulsory Winding-Up of Banks Act).

10 Official Gazette of the Republic of Slovenia, No. 92/2021, with amendments; available *here*.

11 Information retrieved from *here* and *here*.

12 Pursuant Article 1 (2) and (3) ZBS-1.

13 Available *here*.

14 See *here*.

Article 22 ZRPPB, the Banka Slovenije cooperates with the Securities Market Agency in the implementation of tasks and authorizations related to resolution, strives for effective resolution planning and the implementation of resolution measures and to unify practices for the comparability of the methodological approach as well as provide each other with all necessary information. The central bank shall forward information on the resolution measures taken to the competent ministry if it concerns measures or decisions with potential consequences for public funds.[15] In some cases notification, consultation or consent is required: in accordance with Article 23 (2) ZRPPB, prior consent is compulsory concerning the use of additional public financial resources and in general, a notification becomes necessary with the application of resolution measures. In the event of systemic crises or other unforeseeable trends that might threaten the liquidity of the market or the stability of the financial system, the Banka Slovenije shall notify the competent ministry if necessary (Article 23 (3) ZRPPB).

The Bank Asset Management Company d.d. Slovenia was established in March 2013 as State-owned company tasked with the facilitation of restructuring of banks with systemic importance that were facing severe solvency and liquidity problems. According to Article 36 (1) Zakon o ukrepih Republike Slovenije za krepitev stabilnosti bank – ZUKSB (Act Regulating Measures of the Republic of Slovenia to Strengthen the Stability of Banks[16]), the Bank Asset Management Company ceased to exist as a legal entity in 2022. As per Article 36 (3) ZUKSB, all assets, rights, and obligations of the Bank Asset Management Company were transferred to Slovenian Sovereign Holding. Slovenian Sovereign Holding acting as the universal successor, will assume all legal relationships previously established between the Company and third parties.[17] In Accordance with Article 6 SSM-Regulation, Banka Slovenije takes over the banking supervision for less significant institutions. Pursuant to Article 23 (1) ZBS-1, "*The Bank of Slovenia shall supervise banks, savings banks and other persons pursuant to the act regulating banking, and shall on that basis define, implement and control a system of rules ensuring the standards for the prudent operation of banks and savings banks*".[18] Additionally, it shall take account of the relevant standards and recommendations from competent domestic and international institutions.[19] It is also responsible for the submission of supervisory data and information of their supervision findings to the ECB. Currently, the distinction between significant institutions and less significant institutions in Slovenia holds up as follows:[20]

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15 Pursuant Article 22 (1) ZRPPB.

16 Available *here*.

17 See *here*.

18 Retrieved from the unofficial consolidated version in English.

19 Pursuant to Article 24 (2) ZBS-1.

20 Current data and table retrieved from *here*.

Significant banks (Sis)	Less significant banks (LSis)
NLB d.d.	*Deželna banka Slovenije d.d.*
Nova KBM d.d.	*Delavska hranilnica d.d.*
Unicredit banka Slovenija d.d.	*Hranilnica Lon d.d.*
Banka Intesa Sanpaolo d.d.	*Primorska hranilnica Vipava d.d.*
Sberbank banka d.d.	*SID - Slovenska izvozna in razvojna banka d.d.*
Banka Sparkasse d.d.	*SKB banka d.d.*
Addiko Bank d.d.	
Gorenjska banka d.d.	

Pursuant to Article 2 ZBS-1, the "*Bank of Slovenia and members of its decision-making bodies shall be independent, and in performing tasks pursuant to this Act shall not be bound by any decisions, views or instructions issued by the State or any other authorities, nor shall they seek any instructions or guidelines from them*". Consequently, the independence of the central bank is guaranteed by National Law. Moreover, Article 7 (2) ZRPPB requires the Banka Slovenije to establish an internal organization in order to ensure operational independence and prevent conflict of interests in the implementation of tasks and powers related to resolution on the one hand and in the implementation of tasks and powers in connection with the prudential supervision of banks on the other hand. Operational independence requires separate reporting and drafting of proposals for decisions of the Banka Slovenije as national resolution authority and as national supervisory authority. The resolution and supervision tasks in the central bank are entrusted to separate organizational units led by different members of the Governing Board.[21] Financially, Banka Slovenije levies annual compensation from banks and EU branches established in Slovenia in connection with its resolution tasks.[22] Costs incurred during the implementation of resolutions measures and measures for forced winding up of the banks are reimbursed in total.[23]

The deposit guarantee scheme is operated by the Banka Slovenije. The Directive 2014/49/EU is transposed into the Slovenian legal system by the Zakon o sistemu jamstva za vloge – ZSJV (Deposit Guarantee Scheme Act)[24] and is in force since 12 April 2016. Currently, the total guaranteed deposits count EUR 25.3 billion.[25] The Banka Slovenije main tasks in this area[26] are (1) the establishment and management of the deposit guarantee fund, (2) the collection of the banks' regular and ad hoc contributions to the deposit guarantee fund, and entrance into

21 See the organisation chart available *here*.

22 Pursuant to Article 14 (1) ZRPPB.

23 Purusant to Article 15 ZRPPB.

24 Official Gazette of the Republic of Slovenia, No. 27/16; available *here*.

25 As of 31 December 2022.

26 Information retrieved from *here*.

agreements on other forms of financing the fund, (3) the establishments of vets and updates of the procedures and arrangements for the repayment of coverage of guaranteed deposits (including stress testing), (4) the conduct of activities for using the deposit guarantee fund to finance resolution and compulsory winding-up measures, which ensure that depositors retain access to guaranteed deposits and (5) the supervision of members of the deposit guarantee scheme (all banks and savings banks established in Slovenia, and branches of third-country banks included in the scheme in Slovenia) with regard to their fulfilment of the obligations of membership. Along these powers and tasks, the Banka Slovenije cooperates with EU Member States' deposit guarantee authorities, resolution authorities and other relevant authorities. The Deposit Guarantee Fund[27] was established by the ZSJV at the end of 2016 and is funded by contributions from banks and saving banks established in Slovenia. After the first contribution in 2016, the fund amounted up to EUR 16 million and the target level stands at 0.8% of the total amount of all guaranteed deposits in Slovenia pursuant to Article 28 ZSJV.[28] The aim is to fund repayments of deposits covered and finance resolution or compulsory winding-up measures. If the fund lacks sufficient coverage at its disposal, the banks will provide extraordinary contributions pursuant to Article 32 ZSJV. Further means are provided by the Republic of Slovenia in form of a short-term loan[29] and by the Banka Slovenije in form of a liquidity facility subject to appropriate collateral.[30] The Governing Board must establish the general framework of the deposit guarantee fund's investment policy, and the scope, calculation and billing of the fund's management costs via the Regulation on the investment policy and management cost of the deposit guarantee fund[31].Another national resolution financing arrangement[32], called Bank Resolution Fund, was introduced to provide funding for the execution of the resolution strategy by the Banka Slovenije in March 2015. The structure and funds' collection follows the same approach as the Deposit Guarantee Fund, although the target level amounts to 2.3% of the total deposits covered by guarantee at all banks in Slovenia. Moreover, banks must be prepared to provide cash to the fund in the amount of 1%, which requires them to hold liquid assets as set out by the Regulation on liquid investments for the purpose of the resolution fund[33].[34] According to the ZBS-1, the fund will cease its operations on 31 December 2024. Since 2019, the central bank holds one single fund, together with the assets of the bank resolution fund.

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27 Information retrieved from *here*.

28 This level must be achieved through ordinary annual contributions by 3 July 2024 purusant to Article 60 ZSJV.

29 Pursuant to Article 30 (3) ZSJV.

30 Pursuant to Article 35 ZSJV.

31 See *here*.

32 Pursuant to Articles 99 ff BRRD.

33 Official Gazette of the Republic of Slovenia, No. 87/22.

34 The current contributions are available *here*.

3. Banka Slovenije's Structure and Accountability

In the constitutional structure of the Banka Slovenije, the Governor and the Governing Board hold the decision-making power.[35] The Governor's powers range from the operational and organisational work of the Banka Slovenije and its representation over the execution of decisions taken by the Governing Board and the adoption of individual and general legal acts to the issuance of instructions for the implementation of decisions adopted by the Board.[36] Additionally, the Governor is a member of the Governing Council of the ECB.[37] The Governing Board consists of five members, chaired by the Governor whereas one of the Vice-Governors is authorised as Governor's deputy.[38] Concerning the powers of the Board, it decides on matters within the scope of the powers of the Bank and on matters within its field of work in meetings. Furthermore, the Board adopts its own rules of procedure, and a decision shall be adopted if at least three members vote in favour.[39] The appointment of the Governor and the Vice-Governors is conducted by the National Assembly on the proposal of the President for an office term of six years with the possibility of re-appointment.[40] Positions as members of the Board are established as an full time occupation, moreover, members are expected to lay down their work as functions and work in State bodies or other political/trade bodies, memberships in managements or supervisory bodies of banks and other commercial companies and other activities or work that might affect their independence or conflict with the banks' interest.[41] As for their removal, members can be terminated early on their request or grounds for incompatibility or if they no longer fulfil the conditions required for the performance of duties or have been guilty of a serious violation.[42] A decision of dismissal adopted by the National Assembly can be disputed with an administrative dispute pursuant to Article 39 (3) ZBS-1.

For the Banka Slovenije's individual acts, judicial redress procedure is guaranteed pursuant to Article 46 ZBS-1. The Banca Slovenije and persons acting on its behalf shall act and are considered to have acted with due care and the Bank remains liable for damages caused on the basis of authorization of the Bank except if it is the result of intentional conduct or gross negligence.[43] However, the central bank is not liable for damages resulting of the implementation of the instructions addressed to it by the SRB and of activities for the planning or implementation of resolution measures, which are adopted within the scope of their powers by the SRB or a resolution authority from another member State, and

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35 Pursuant to Article 28 ZBS-1.

36 Pursuant to Article 29 ZBS-1.

37 Pursuant to Article 56 ZBS-1.

38 Pursuant to Article 30 ZBS-1.

39 Pursuant to Article 31 (3) and (4) ZBS-1.

40 Pursuant to Articles 35 and 36 ZBS-1; for the appointment procedure see Article 37 ZBS-1.

41 Pursuant to Article 38 ZBS-1; exceptions apply for non-conflicting scientific and research work.

42 Pursuant to Article 39 ZBS-1; the procedure is adopted by the Bank in agreement with the responsible minister.

43 Pursuant to Article 16 (1)-(4).

which are the result of the actions of the Banka Slovenjie in compliance with the requirements of other resolution authorities.[44] The internal audit is organised as independent organisational unit that underlies the direct authority of and reports to the Governor at least once a year.[45]

4. Cooperation with relevant EU bodies

According to Article 9 (1) ZRPPB, Banka Slovenije takes into account the possible impact of its decisions on the stability of the financial system of Member States where the bank in resolution operates and pursuant to Article 9 (2) further takes into account (1) regulatory and implementing technical standards adopted by the Commission in accordance with the EBA-Regulation, (2) guidelines, recommendations and other acts issued by the EBA, (3) warnings and recommendations issued by the ESRB and (4) other applicable regulations and international standards and recommendations regarding the resolution and termination of credit institutions. Concerning soft law instruments, the central bank decides independently on the application of EBA guidelines and recommendations to banks in Slovenia. Banka Slovenije publishes the decision on the application in the Official Gazette of the Republic of Slovenia and in case of non-compliance states valid reasons.[46] However, Banka Slovenije can issue guidelines containing general and more detailed rules for these regulations.[47]

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44 Pursuant to Article 16 (5) ZRPPB.

45 Pursuant to Article 41 ZBS-1.

46 Pursuant to Article 9 (3) ZRPPB.

47 Pursuant to Article 9 (4) ZRPPB.

Spain

Francescopaolo Chirico

Summary. 1. Introduction – 2. The Spanish legislation on resolution and the public authorities involved – 3. Early intervention, preventive resolution, executive resolution. Allocation of competencies between the Banco de España and the FROB – 4. The preventive resolution function within the Banco de España. The principle of independence – 5. Institutional set-up of the FROB – 5.1. Administrative and commercial powers – 6. Cooperation mechanisms between the Banco de España and the FROB – 6.1. Cooperation in the adoption of the resolution scheme – 6.2. National cooperation within the Single Resolution Mechanism – 7. Liability regime – 8. Concluding remarks and reform perspectives

1. Introduction*

In the Spanish legal system, the resolution functions are organized according to a dual model,[1] which entrusts the relevant tasks and responsibilities regarding credit institutions to the Banco de España, as preventive resolution authority, and to the FROB, as executive resolution authority.

Indeed, Article 3(1) of Directive 2014/59/EU (Bank Recovery and Resolution Directive, BRRD) 'exceptionally' allows Member States to designate more than one resolution authority empowered to apply the resolution tools and exercise the resolution powers.[2]

This model leads to a plural set-up based on the coexistence of authorities with distinct competencies, called upon to cooperate to achieve the common objectives underpinning the resolution framework. In addition to the existence at the national level of two different public authorities involved in the exercise of resolution functions, the complexity stemming from the establishment of the Single Resolution Mechanism (SRM) should also be considered, as it entails the conferral of responsibilities for significant institutions and cross-border groups to the Single Resolution Board (SRB), which is called upon to exercise the relevant functions in cooperation with the national authorities, in accordance with the rules established by Regulation (EU) No. 806/2014 (SRM Regulation).

This report focuses mainly on the organization of the resolution functions in the Spanish law regarding credit institutions,[3] taking into account the bipartition of competencies briefly mentioned before and investigating the coordination mechanisms aimed at ensuring at the national level the fulfilment of the functions regulated, in EU law, by the BRRD and the SRM Regulation.

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* The paper benefits from the author's research at the Banco de España and FROB and the valuable suggestions of Cristina Pérez and Lucía Piazza as well as those of Amaia Rivas and Ignacio Caparroso, lawyers at Banco de España and FROB respectively. The opinions expressed are solely those of the author and do not necessarily reflect the views of Banca d'Italia, Banco de España and FROB. The author also wishes to express his gratitude to José Luis Colino, Professor of Commercial Law at the Faculty of Law of the Complutense University of Madrid, for his precious insights and exchanges of views on the main research topics.

1 M. Deprés Polo, R. Villegas Martos, J. Ayora Aleixandre, *Manual de regulación bancaria en España* (Funcas, 2022), 552.

2 Article 3 of the BRRD states the resolution authority shall be a public administrative authority entrusted with public administrative powers. Resolution authorities may be national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers.

3 Notwithstanding some references to the National Securities Market Commission (CNMV) for the sole purpose of outlining the division of competencies with the Banco de España, it is beyond the scope of this paper to discuss resolution powers with regard to investment firms.

2. The Spanish legislation on resolution and the public authorities involved

In Spanish law, the BRRD's implementing legislation is contained in Law No. 11/2015 of 18 June 2015, on the recovery and resolution of credit institutions and investment firms and in Royal Decree No. 1012/2015 of 6 November 2015, which implements said law.[4]

According to Article 1, Law No. 11/2015 aims to regulate the early intervention and resolution processes for credit institutions and investment firms established in Spain and to lay down the legal regime applicable to the FROB, as executive resolution authority, in order to safeguard the stability of the financial system while minimizing the use of public funds in the context of crisis management.

Compared with other legal systems, such as the Italian one, the Spanish legislator has transposed into Law No. 11/2015 the whole set of provisions of the BRRD aimed at managing the crisis of financial institutions, including recovery plans and early intervention measures falling within the competence of the supervisory authority.[5]

At the level of secondary legislation, Royal Decree No. 1012/2015 complements the national transposition of the BRRD, regulating, inter alia, the content of recovery plans and resolution plans, as well as the detailed rules on the functioning of resolution tools, the resources of the National Resolution Fund and the Minimum Requirements of own funds and Eligible Liabilities (MREL).

In the complex institutional architecture resulting from Union Law and, at the national level, from Law No. 11/2015, identifying the different authorities involved is of paramount importance. In this perspective, Article 2 of Law No. 11/2015 stipulates that:

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4 Royal Decree 1012/2015 of 6 November 2015 implementing Law 11/2015 of 18 June 2015 on the recovery and resolution of credit institutions and investment services companies, and amending Royal Decree 2606/1996 of 20 December 1996 on deposit guarantee funds for credit institutions. Generally, references to provisions in the Spanish legislation contained in this paper rely on the English translation Banco de España has made available for the benefit of the general public *here*.

5 Following to a large extent the structure of the BRRD, Law No. 11/2015 is divided into chapters that reflect the phasing of the crisis management process. In particular, Chapter I sets out the 'General provisions' and Chapter II covers the early intervention phase, within which recovery plans (Article 6), intra-group financial support agreements (Article 7), and early intervention measures (Articles 8 to 12) are regulated. Chapter III is devoted to the preventive phase of resolution and regulates the resolution plans (Articles 13 and 14), the assessment of resolvability and the removal of related impediments (Articles 15 to 18). Chapter IV deals with resolution, in particular with regard to the preconditions and procedure for the adoption of the resolution plan (Articles 19 to 24), followed by Chapters V and VI, respectively devoted to resolution tools (Articles 25 to 34) and bail-in (Articles 35 to 51). Chapter VII includes the regulation of the FROB, its governing bodies, and related powers (Articles 52 to 70d), while Chapter VIII contains the discipline of the procedural regime of the acts adopted in the context of the exercise of the resolution functions (Articles 71 to 73). To conclude, Chapter IX is devoted to the sanctions regime (Articles 75 to 93).

i. for credit institutions, the Banco de España and the ECB act as competent supervisory authorities, within the allocation of tasks and powers provided for by Regulation (EU) No. 1024/2013 (SSM Regulation); for investment firms, the authority entrusted with the supervisory competencies is the National Securities Market Commission (CNMV);

ii. the Banco de España and the CNMV also act as preventive resolution authorities for credit institutions and investment firms, respectively; both authorities are called upon to perform their functions through bodies operationally independent of those entrusted with supervisory tasks;

iii. the executive resolution functions are instead assigned to the FROB, which is competent for both credit institutions and investment firms.

Within this context, the establishment of the SRM entails a narrowing of the competencies of the national resolution authorities, which are now limited to credit institutions not falling under the remit of the SRB.

Indeed, as the fourth additional provision specifies, Law No. 11/2015 must be applied in conjunction with the SRM Regulation, taking into account the functions of the European authorities within the framework of the Single Resolution Mechanism and the duty of national authorities to cooperate with them in the enforcement of their decisions. Consequently, taking into account the allocation of tasks and powers resulting from the SRM Regulation, with regard to entities falling under its remit, the SRB combines the functions distinguished at the national level in preventive and executive resolution.

3. Early intervention, preventive resolution, executive resolution. Allocation of competencies between the Banco de España and the FROB

Following to a large extent the structure of the BRRD, Spanish legislation on bank recovery and resolution distinguishes the different stages or phases of the crisis planning and management process. It also determines the competencies of the authorities involved, within the duty of cooperation incumbent on them aimed at achieving the common objectives underpinning the resolution framework.

In line with EU law, a distinction is made between the preventive or planning phase, the early intervention phase, and the resolution phase.

Compared with other legal systems, a particular feature of the Spanish legislation is that the distinction between the preventive and the resolution phases, already envisaged on a functional level by Union law, also becomes a criterion for the distribution of competencies among the two national resolution authorities.

Up to the stage of the failing or likely to fail declaration (FOLTF), the competencies provided for by Law No. 11/2015 generally fall within the remit of

the Banco de España, in its capacity as either supervisory authority or preventive resolution authority, although the involvement of the FROB is envisaged at several stages.

As known, the precautionary perspective adopted in the EU legislation on crisis management and reflected in the Spanish legislation results in the provision of a set of obligations on credit institutions and of powers of the competent authorities which are not linked to the actual occurrence of a crisis or, more generally, of an actual capital deterioration.

In its capacity as national supervisory authority, the Banco de España is responsible for reviewing the recovery plans drawn up by credit institutions, with the aim of verifying that their implementation would be reasonably likely to maintain or restore the viability and financial situation of the institution concerned,[6] as well as the authorization of intra-group financial support agreements.[7]

Where an institution infringes or is likely to infringe the relevant solvency, regulatory, and disciplinary rules, and is, however, in the position to return to compliance through its own means, it is also up to the Banco de España to adopt the early intervention measures that apply to entities not directly supervised by the ECB, in accordance with the choice of Union law to entrust such competencies to the supervisory authority.[8]

In its capacity as preventive resolution authority, the Banco de España is also responsible for drawing up resolution plans, conducting the assessment of resolvability, addressing the relevant impediments, and calibrating MREL.[9] Further, with regard to entities falling under the remit of the SRB, it also implements the SRB's decisions related to the preventive resolution, under Article 29 of the SRM Regulation. As explained in the following paragraph, the Banco de España must exercise its supervisory and preventive resolution functions through bodies operating in accordance with the principle of separation between supervisory and resolution functions.

The dividing line between the competencies of the resolution authorities generally lies in the adoption of the failing or likely to fail declaration, which marks the transition to the executive resolution phase, devolved to the FROB.

The executive resolution function assigned to the FROB includes, inter alia: (i) the exercise of resolution powers for institutions not under the SRB's responsibility; (ii) the implementation of the SRB's decision pertaining to the executive resolution for entities under the SRB's responsibility; (iii) the

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6 See Article 6(1) of Law No. 11/2015.

7 See Article 7(1) of Law No. 11/2015.

8 In Spanish law, early intervention measures are regulated in Articles 8 et seq. of Law No. 11/2015, including the appointment of temporary administrators or the replacement of the management body in accordance with the provisions of Articles 70 et seq. of Law No. 10/2014, of 26 June 2014 on the regulation, supervision, and solvency of credit institutions.

9 See Articles 13 to 18, and 44 to 46 of Law No. 11/2015.

collection of contributions to the Single Resolution Fund and the management of the National Resolution Fund; (iv) the representation of the Spanish resolution authorities in the SRB and the performance of the functions of contact and coordination authority at the international level.[10]

It is worth noting, however, that the close connection between the functions of supervision, preventive and executive resolution has led the legislator to provide for several cases of participation in the proceedings conducted by the authority in charge of the relevant function by the other authorities, in accordance with the cooperation mechanisms that will be examined in paragraph 6 below.

4. The preventive resolution function within the Banco de España. The principle of independence

Article 1 of Law No. 13/1994[11] (Law of autonomy) provides that the Banco de España is a public law entity with its own legal personality and full public and private capacity, acting autonomously from the General Administration of the State.

The Law of autonomy states that, when performing its functions, the Banco de España is subject to private law, except when it exercises its administrative powers, in which cases the rules on common administrative procedure apply.[12] Acts adopted in the context of its supervisory functions are considered by law as having an administrative nature.

The decision-making bodies of the Banco de España are the Governor, the Deputy Governor, the Governing Council, and the Executive Commission, whose competencies are set out in Articles 17 to 23 of the Law of autonomy.

Under Article 50 of Law No. 10/2014, the Banco de España is responsible for the supervision of credit institutions and other entities envisaged in Article 56.[13] Following the establishment of the Single Supervisory Mechanism, micro-

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10 The FROB is not entrusted with the task of managing the national DGS. In the Spanish legal system, the Deposit Guarantee Fund of Credit Institutions, established by Royal Decree-Law No. 16/2011 of 14 October, has its own legal personality and full capacity to fulfil its functions, under private law. The Fund is governed and managed by a Management Committee comprising the following eleven members: a representative from the Ministry of Economy and Competitiveness, one from the Ministry of Finance and Public Administrations, four appointed by the Bank of Spain, and five designated by the associations representing the member credit institutions (see Article 7 of Royal Decree-Law No. 16/2011).

11 Law 13/1994, of 1 June, on the autonomy of the Banco de España.

12 See Article 1(2) of Law No. 13/1994. The rules on common administrative proceedings were formerly contained in Law 30/1992, of 26 November, on the Legal Status of Public Administration and Common Administrative Proceedings. Currently, the rules governing administrative proceedings are contained in Law 39/2015, of 1 October, on the Common Administrative Proceedings of Public Administrations.

13 Article 56(1) of Law No. 10/2014 states the Banco de España shall supervise Spanish credit institutions, consolidated groups of credit institutions with a parent company in Spain and branches of credit institutions of non-European Union countries. Similarly, where the parent company of one or several credit institutions is a financial holding company or a mixed financial holding company,

prudential supervision is exercised jointly with the ECB in accordance with the rules set out in Regulation (EU) No. 1024/2013 (SSM Regulation), under which the ECB is responsible for the supervision of significant institutions, while the national competent authorities remain responsible for the supervision of less significant institutions.

Beyond the functions carried out within the SSM, the Banco de España is responsible for the supervision of, inter alia, branches of credit institutions of non-European Union countries, payment institutions, electronic money institutions, foreign exchange institutions, banking foundations and agents of credit and payment institutions.[14]

Transposing the BRRD into Spanish law, Law No. 11/2015, on the one hand, enriches the range of powers of the supervisory authority, mainly through the provision of recovery plans and early intervention measures. On the other hand, the same Law establishes a new set of competencies, defined as preventive resolution, aimed at addressing the risk related to the entities' crisis in advance. As noted above, in the Spanish legal system, such preventive resolution functions are distinct from the executive one and conferred on the Banco de España for credit institutions.

As known, to prevent conflicts of interest, EU law enshrines the principle of independence between supervisory and resolution functions.[15] In Spanish law, the principle of independence is fully observed as to executive resolution functions, institutionally devolved to the competence of the FROB, which is a separate authority from the supervisor. As to the preventive resolution functions, their conferral to the Banco de España raises the issue of ensuring their exercise in accordance with the principle of independence.[16]

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the Banco de España, as the party responsible for authorizing and supervising said credit institutions, shall supervise said company with the limits and specificities as may be provided by law.

14 In this regard, see G. Menéndez Menéndez, *La arquitectura institucional del sistema financiero*, in Id. (dir.), *Estado y Mercado. Un vistazo global a la regulación económica* (Aranzadi, 2021).

15 Article 3(3) of the BRRD provides that "Member States may exceptionally provide for the resolution authority to be the competent authorities for supervision for the purposes of Regulation (EU) No 575/2013 and Directive 2013/36/EU. Adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive, without prejudice to the exchange of information and cooperation obligations […]. In particular, Member States shall ensure that, within the competent authorities, national central banks, competent ministries or other authorities there is operational independence between the resolution function and the supervisory or other functions of the relevant authority. The staff involved in carrying out the functions of the resolution authority pursuant to this Directive shall be structurally separated from, and subject to, separate reporting lines from the staff involved in carrying out the tasks pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or with regard to the other functions of the relevant authority".

16 On the principle of independence, the Preamble of Law No. 11/2015 emphasizes that "[s]upervisors' traditional mandate consists of ensuring compliance with the law governing institutions' activity and, in particular, with solvency law, with the ultimate aim of protecting financial stability. To this traditional mandate another has been added, which is intended to ensure that if an institution becomes incapable of continuing to operate by its own means, despite traditional supervision and regulation,

To this end, the First additional provision of Law No. 11/2015 entrusts the Banco de España with the task of adopting the organizational measures necessary for guaranteeing the principle of independence, also with a view to the prevention of conflicts of interest. In particular, it provides that the performance of the preventive resolution functions has to be functionally and hierarchically separated from the exercise of supervisory functions. Therefore, the supervisory authority is requested to adopt specific rules to manage potential conflicts of interest, ensuring that they are duly identified, controlled, and eliminated, where appropriate.

In order to implement the aforementioned principles, the performance of the preventive resolution functions has been entrusted to the Directorate General Financial Stability and Regulation, which has consequently assumed the name of Directorate General Financial Stability, Regulation and Resolution. The supervisory functions continue to be performed by the Directorate General Banking Supervision.[17]

5. Institutional set-up of the FROB

The FROB, whose name originates historically from the establishment of the Fondo de Reestructuración Ordenada Bancaria by Royal Decree-Law No. 9/2009,[18] is a public law entity with its own legal personality and full public and private capacity, whose institutional purpose is the exercise of resolution

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its closure will take place with minimum adverse impact on the financial system as a whole and, in particular, without any impact whatsoever on public finances. Now is the time to create a new public function the aim of which is to ensure that financial institutions can, de facto, be wound up without having a knock-on economic impact of such a magnitude as to damage the economy as a whole. It is not, therefore, simply a novel supervisory approach, but rather a new area of public intervention that will, independently, require that institutions carry on their activities in such a way that their resolution is practicable and respectful of the general interest, in the event that traditional supervision is insufficient" (quotation from the English translation of Law No. 11/2015, available on the Banco de España website).

17 On the functions of Directorates General of the Banco de España, see Resolution of 29 July 2021 of the Executive Commission of the Banco de España approving the description of the functions of the Directorates General and the General Secretary's Office, available *here*.

18 The Fondo de Reestructuración Ordenada Bancaria (FROB) was established by Royal Decree-Law No. 9/2009 of 26 June 2009, on bank restructuring and strengthening the capital base of credit institutions, with the aim to manage the restructuring processes of credit institutions and to contribute to strengthening their capital, in addition to the deposit guarantee funds existing at the time. Following the escalation of the financial crisis, the Memorandum of Understanding on Financial-Sector Policy Conditionality, signed on 25 July 2012, imposed as a condition for the financial assistance requested by the Spanish government the modification of the resolution framework, enhancing the powers of the FROB and taking into account 'the EU regulatory proposal on crisis management and bank resolution'. The obligations under the MoU were fulfilled by Royal Decree-Law No. 24/2012 of 31 August 2012, on the restructuring and resolution of credit institutions, later replaced by Law No. 9/2012 of 14 November 2012, on the restructuring and resolution of credit institutions. Through this reform, the FROB became a genuine resolution authority, independent from the banking supervisor. The completion of the BRRD approval process and the establishment of the Single Resolution Mechanism subsequently led to the adoption of Law No. 11/2015 (see the report "10 Years of FROB, 2009 – 2010", available on the FROB website at *the following link*).

functions in the executive phase.[19] The twentieth additional provision of Law No. 40/2015,[20] on the legal regime of the public sector, qualifies the FROB as an independent administrative authority.[21]

The legal regime of the FROB is established by Law No. 11/2015, which provides that, in performing its institutional functions, the FROB is subject to private law, except when it exercises administrative powers conferred on it by national or Union law.[22] As the legal doctrine suggests, despite the wording of the latter provision, the exercise of administrative powers plays a pivotal role in the performance of the FROB's functions, which could not be adequately pursued through the instruments of private law.[23]

The governing body of the FROB is the Governing Committee, composed of the following eleven members:[24]

- The Chair;
- Four members appointed by the Banco de España, one of whom is by law the Deputy Governor, who acts as First Deputy Chair of the Governing Committee;[25]
- Three representatives from the Ministry of Economic Affairs and Competitiveness[26] appointed by the Minister, having at least the rank of Director General;
- The Deputy Chair of the National Securities Market Commission (CNMV);
- Two representatives from the Ministry of Finance and Public Administration[27] appointed by the Minister, having at least the rank of Director General.

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19 See Article 52 of Law No. 11/2015.

20 See the twentieth additional provision of Law No. 40/2015, of 1 October 2015, on the Legal Regime of the Public Sector.

21 In accordance with Article 110 of Law No. 40/2015, the independent administrative authorities are governed by their establishing Law, their statutes, and the special legislation of the economic sectors subject to their supervision and, in addition and insofar as it is compatible with their nature and autonomy, by the other administrative law provisions. They are also subject to the principle of financial sustainability in accordance with the provisions of Organic Law No. 2/2012 of 27 April 2012.

22 See Article 52(3) of Law No. 11/2015.

23 See G. Alés Hermosa, J.A. Carillo Donaire, *El FROB y su papel tras la puesta en marcha del Mecanismo Único de Resolución*, in A. Ruiz Ojeda, J.M. López Jiménez, *Estudios sobre resolución bancaria* (Aranzadi, 2020).

24 See Article 54 of Law No. 11/2015.

25 The First Deputy Chair of the Governing Committee stands in for the Chair in the event of absence, illness, or if the office falls vacant.

26 Currently named Ministerio de Asuntos Económicos y Transformación Digital.

27 Currently named Ministerio de Hacienda y Función Pública.

A representative appointed by the General Comptroller of the State Administration and another by the Attorney General-Director of the State Legal Service also attend the work of the Committee, with no right to vote. In addition, the Committee may authorize other observers to participate in its meetings, provided that such participation does not cause any conflicts of interest that may interfere with the performance by the FROB of its functions.

The Chair of the FROB, who performs the functions of representation, administration, and day-to-day management of the National Resolution Fund and the other functions delegated to it by the Governing Committee,[28] is appointed among candidates with sufficient expertise, technical training, and experience by Royal Decree of the Council of Ministers, at the proposal of the Minister of Economic Affairs and Competitiveness, after consulting the supervisory authorities, and following an appearance of the proposed candidate before the Spanish Parliamentary Committee on Economic Affairs and Competitiveness in order to recount the experience, training, and expertise that render the candidate fit for the position.[29]

The Chair's term of office lasts five years and is not renewable.[30] It may end early only in the event of (i) resignation accepted by the Government; (ii) occurrence of an incompatibility event; (iii) supervening incapacity to discharge the office's functions; (iv) conviction for deliberate crime; (v) gross breach of duties pertaining to the office. In this latter case, the removal has to be ordered by the Government, following a proceeding conducted by the Ministry of Economic Affairs and Competitiveness, in which the other members of the Governing Committee shall be heard. A report must be provided to the Spanish Parliamentary Committee on Economic Affairs. As for the other members of the Governing Committee, their mandates end when they cease to hold their respective posts. Termination of a member appointed by the Banco de España, other than the Deputy Governor, may also be deliberated by the Executive Commission of the Banco de España.[31]

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28 See Article 55 of Law No. 11/2015. More specifically, the Chair of the FROB is responsible for (i) chairing the Governing Committee and promoting and supervising all operations to be performed by the FROB; (ii) steering the day-to-day, economic and administrative management of the FROB, including the administration of the National Resolution Fund, and acting as its legal representative; (iii) preparing the FROB's annual accounts and submitting them to the auditor for verification and to the Governing Committee for approval; (iv) proposing decisions to be adopted by the Governing Committee, without prejudice to the power of the latter to take decisions of its own motion; (v) implementing the resolutions of the Governing Committee and performing any delegated functions; (vi) reporting to the Governing Committee on the exercise of their functions; (vii) representing the FROB in international organizations and Single Resolution Board.

29 The Chair, who has to perform their functions on an exclusive basis, is subject to the rules governing incompatibilities for senior central government officials. The office is incompatible with the performance of any public or private professional activity, irrespective of whether it is remunerated, unless such activities are inherent to the function of the FROB Chair (Article 55(2) of Law No. 11/2015).

30 In accordance with Article 55(3)(a), the Chair continues to serve until the appointment of their successor.

31 See Article 54(3) and 55(3) of Law No. 11/2015.

The Governing Committee, which meets whenever called by its Chair, at his own initiative or whenever requested by any of the members, is entitled to make decisions in relation to the powers and functions entrusted to the FROB, without prejudice to the delegations it may approve.[32]

For the Governing Committee to be validly constituted, meetings must be attended by at least half its members with voting rights. Its decisions shall be adopted by a majority of the attending members. In the event of a tie, the Chair has the casting vote.[33]

To ensure parliamentary control over the exercise of FROB's functions, the Chair of the FROB has to appear at least half-yearly before the Spanish Parliamentary Committee on Economic Affairs and Competitiveness to report on the activities of the FROB, the essential elements of its economic and financial actions, and the management of the financing arrangements. In addition, the Chair of the Governing Committee of the FROB shall appear, on the terms determined by the Spanish Parliamentary Committee on Economic Affairs and Competitiveness, to report specifically on resolution actions taken by the FROB.

Moreover, the Governing Committee has to submit a quarterly report to the Minister of Finance and Public Administration and the Minister of Economic Affairs and Competitiveness on the management and actions of the FROB, giving due account, *inter alia*, of the most significant actions in terms of their economic and budgetary impact performed by the FROB. The Minister of Economic Affairs and Competitiveness shall pass this report on to the Spanish Parliamentary Committee on Economic Affairs and Competitiveness.[34]

The annual account of the FROB, approved by the Governing Committee on a Chair's proposal, must be submitted each year to the Minister of Economic Affairs and Competitiveness and to the National Audit Office, to be included

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32 In accordance with Article 54(5) of Law No. 11/2015, the Governing Committee may not delegate the following competencies: (a) the decision-making functions assigned to the FROB in respect of the resolution plans of institutions, the write-down of capital instruments and bail-in; (b) the approval of the decision to enter into the financing transactions provided for in Article 53(1) of Law No. 11/2015; (c) the approval of the annual accounts of the FROB which must be submitted each year to the Minister of Economic Affairs and Competitiveness and to the National Audit Office, to be included in the General Accounts of the State and passed on to the Spanish Court of Auditors, and of the report that must be submitted to the Minister of Economic Affairs and Competitiveness to be sent to the Spanish Parliamentary Committee on Economic Affairs and Competitiveness; (d) the adoption of the decisions necessary to use the National Resolution Fund; (e) the decisions whereby the FROB orders the disposal or divestment at an institution of the instruments provided for in Article 32(4) of Law No. 11/2015.

33 However, when adopting decisions affecting the State budget, the Governing Committee shall be composed of: (a) The Chair; (b) The three representatives of the Ministry of Economic Affairs and Competitiveness; (c) The two representatives of the Ministry of Finance and Public Administration (Article 54(6) of Law No. 11/2015).

34 Article 56 of Law No. 11/2015. The same Minister receives the notification of the FROB's decision to initiate a resolution process after assessing the relative conditions provided by Article 19 of Law No. 11/2015.

in the General Accounts of the State and passed on to the Spanish Court of Auditors.[35]

In accordance with Article 61 of Law No. 11/2015, in the exercise of its powers, the FROB, as well as the competent preventive resolution authority and the competent supervisory authority, may take into consideration the recommendations and other initiatives implemented internationally in the area of resolution, provided that they do not conflict with the prevailing legislation. The Minister of Economic Affairs and Competitiveness may also incorporate into Spanish legislation the recommendations and guidelines on resolution issued by international organizations, committees, or authorities or authorize the competent preventive resolution authority and the competent supervisory authority to do so.

In the exercise of its powers, the FROB, as well as the preventive resolution authority, shall collaborate with the European Union institutions, including the Single Resolution Board, the European Central Bank, and the European Banking Authority with a view to concluding cooperation agreements, and requesting and exchanging information.

The FROB has also been designated as the Spanish liaison and coordination authority for the purposes of cooperation with the pertinent international authorities and, in particular, those of the other European Union Member States.[36]

5.1. Administrative and commercial powers

For the exercise of its resolution functions, Law No. 11/2015 entrusts the FROB with commercial and administrative powers, which correspond to a different regime applicable to judicial review.

As for the first type of powers, under Article 63 of Law No. 11/2015, the FROB takes on the powers generally granted under commercial law: (i) to the management body of the institution, where it acquires such a status; (ii) to the shareholders or holders of any securities or financial instruments, where the FROB has subscribed or acquired such securities or instruments; (iii) to the general meeting or assembly, where such internal organs of the entity obstruct or rejects the adoption of the decisions needed to implement the resolution, and where, for reasons of special urgency, it is not possible to meet the conditions required by law for the valid convening of, and adoption of resolutions by, the general meeting or assembly.

In other words, the FROB's commercial powers consist of the power to take the decisions typically falling within the remit of governing bodies, thus exercising a substitute function.

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35 See Articles 54(5)(c) and 55(4)c of Law No. 11/2015.

36 See Article 58(1) of Law No. 11/2015.

Under Article 64 of Law No. 11/2015, the FROB is also vested with several administrative powers. The list of these powers is particularly broad and includes, by way of example, the powers: (i) to request from any person the information needed to prepare and apply a resolution decision; (ii) to transfer or order the transfer of shares, contributions to share capital or, in general, equity instruments or securities convertible into them, whosoever their holders, and of other financial instruments, assets and liabilities of the institution; (iii) to increase or reduce capital, to issue or redeem, in full or in part, bonds and any other securities or financial instruments; (iv) to write down or convert capital instruments or apply the bail-in tool; (v) to determine the tools to be used to implement the resolution actions, including, in particular, actions that entail structural modifications to the institution and winding-up and liquidation measures; (vi) to defer, suspend, eliminate or modify certain rights, obligations, terms and conditions of all or some of the debt instruments issued and of other eligible liabilities issued by the institution under resolution; (vi) to terminate or amend the terms and conditions of an agreement to which the institution under resolution is party or to be subrogated to the rights of the acquirer. The FROB is also vested with the power to suspend or restrict any payment or delivery obligations in accordance with Article 33a of BRRD.[37]

As for the decisions adopted by the FROB when exercising its commercial powers, they may only be challenged in accordance with the rules and procedures envisaged for corporate resolutions of limited companies on the grounds that they are contrary to the law, within fifteen days from the publication. Shareholders, members, bondholders, creditors, or any other third parties who consider that their legitimate interests and rights have been infringed by any decision adopted by the FROB (either directly or through its representatives) in its role as administrator of the entity, may file an individual action for liability.[38] No corporate action for liability may be brought with regard to the actions by the FROB in the context of a resolution.[39]

As for the administrative acts adopted by the FROB in the executive phase of the resolution, they are subject to appeal before the Contentious-Administrative Appeal Division of the National High Court.[40] The same regime applies to the acts adopted by the supervisor or the preventive resolution authority in the context of early intervention and preventive resolution, as well as to the approval of the recovery and resolution plans.[41]

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37 See Article 70 of Law No. 11/2015.

38 In accordance with Article 241 of Royal Legislative Decree 1/2010, of 2 July 2010, approving the Consolidated Text of the Corporate Enterprises Act.

39 See Article 71 of Law No. 11/2015. In the instance of an administrative appeal being lodged against a FROB's administrative decision which constitutes the ground of a contested decision adopted in the exercise of a commercial power, the judge of the latter case has to stay the proceedings until the decision of the administrative appeal, being bounded by the decision adopted by the administrative court.

40 Sala de lo Contencioso-Administrativo de la Audiencia Nacional.

41 See Article 72 of Law No. 11/2015.

Under Article 74(1) of Law No. 11/2015, in the event of an appeal against a resolution decision, the resolution authority may plead to the court the existence of grounds rendering it materially impossible to enforce a judgment declaring the contested decision unlawful. In such a case, the court shall assess whether or not these grounds exist and, if applicable, set the compensation that must be paid.[42]

In line with Article 85 of the BRRD, Article 74(1) provides that the compensation awarded shall be, at most, the difference between the loss actually suffered by the appellant and the loss the latter would have sustained if, at the time of the resolution, the institution had been wound up under insolvency proceedings, which appears to echo the 'no creditor worse off' principle.[43]

Moreover, Article 74(2) states that the existence of legitimate interests or rights of other shareholders, members, bondholders, creditors, or other third parties constitutes only an element that the court should take into account when assessing the material impossibility of enforcing the annulment, suggesting that such an impossibility may also derive autonomously from the complexity or large scale of the operations affected and the potential loss or damage caused to the institution and the stability of the financial system.

6. Cooperation mechanisms between the Banco de España and the FROB

In the event of the designation of more than one resolution authority, to ensure the efficiency of the overall system, EU law requires the Member State to 'allocate functions and responsibilities clearly between those authorities', providing 'adequate coordination between them', and designating 'a single authority as a contact authority for the purposes of cooperation and coordination with the relevant authorities of other Member States'.[44]

In this regard, Law No. 11/2015 requires the national supervisor and the preventive and executive resolution authorities to cooperate with each other, which includes entering into collaboration agreements and exchanging any information needed to exercise their powers.[45]

Accordingly, the Banco de España and the FROB have entered into a Collaboration agreement on the recovery and resolution of credit institutions

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42 The said provision seems to be applicable also to the acts and decisions adopted by the supervisor and the preventive resolution provided for in Article 72 of Law No. 11/2015 (such as early intervention measures and the approval of the recovery and resolution plans).

43 See Article 85 of the BRRD.

44 See Article 3(10) of BRRD.

45 See Article 57(1) and the First additional provision of Law No. 11/2015. In a broad sense, it could be argued that a first coordination mechanism is inherent to the FROB's institutional set-up in itself, in whose Governing Committee, as already illustrated, sit representatives of both the Banco de España and the CNMV. Such an institutional structure facilitates coordination and cooperation at the highest level of all authorities involved and enables an efficient exchange of information between them.

(CA)[46] to establish the terms of the cooperation between the two authorities in the field of the recovery and resolution of credit institutions. Considering that the existence of two resolution authorities also affects the cooperation within the Single Resolution Mechanism, the CA deals not only with powers related to the institutions under the direct national responsibility but also with the national functions related to the SRB's responsibilities.[47]

Relations between the preventive and executive resolution authorities are governed by the general principles of institutional competence and loyalty, cooperation, coordination, effectiveness, and efficiency. In particular, to avoid the duplication of reporting obligations on institutions, the CA establishes the general principle that the parties undertake to verify whether the information necessary for the exercise of the resolution functions is already in possession of the Banco de España, as supervisory authority, in which case it is the latter's obligation to make it available to the executive resolution authority.[48]

The CA establishes a Collaboration Committee, composed of representatives of both authorities,[49] which meets at least once every six months to verify the effective implementation of the collaboration relationship and with the power to set up joint working groups to examine specific issues.

The provisions of Law No. 11/2015 and the CA develop in detail the procedural cooperation between the Banco de España and the FROB in relation to the supervisory and resolution functions.

As already noted, in line with the allocation of competencies established by EU law, the review of recovery plans prepared by credit institutions and their updates is the responsibility of the Banco de España, in its capacity as supervisor. However, the recovery plans are submitted by the supervisor to the resolution authorities and, in particular, to the FROB for entities falling within its remit, and the FROB may make proposals for amendments when it deems that the content of the plan may adversely impact the resolvability of the institution.[50] In this

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46 Convenio de colaboración entre el Banco de España y el FROB, en materia de recuperación y resolución de entidades de crédito, del 27 de noviembre de 2017, published with the Resolution of 21 February 2018, of the Presidency of the FROB (BOE, no. 48 of 23 February 2018). Most recently, the Agreement has been amended by the Adenda de prórroga y modificación del Convenio de colaboración con el Banco de España, en materia de recuperación y resolución de entidades de crédito, published with the Resolution of 29 November 2021, of the Presidency of the FROB (BOE, No. 293 of 8 December 2021). It is a cooperation agreement between public administrations within the meaning of Articles 47 et seq. of Law 40/2015, of 1 October, on the legal regime of the public sector. A similar agreement has also been entered into the FROB and the CNMV with regard to the latter's supervisory and preventive resolution functions.

47 See Clause I of the CA

48 See Clause II of the CA.

49 See Clause IX of the CA. The Collaboration Committee is composed of the President of the FROB and two other members designated by the latter, as well as, as representatives of the Banco de España, the director general for supervision and the director general for financial stability, regulation and resolution, each of whom appoints two additional members.

50 See Article 6(4) of Law No. 11/2015.

regard, the CA stipulates that any proposals for amendments to the recovery plan formulated by the FROB, where possible, should be shared with the supervisory authority before formal submission, and defines the relevant timelines to ensure the swift completion of the review activities.[51]

In the early intervention phase, extensive reporting and coordination obligations apply to the supervisory authority, essentially to ensure that the resolution authority is duly informed of the decisions taken. In particular, it is the responsibility of the Banco de España, as supervisory authority, to inform the FROB of the exercise of early intervention powers, the reasons thereof, together with the information periodically provided by the credit institution on compliance with the measures taken. Furthermore, the resolution authority may require the transmission of any information necessary to prepare for a possible resolution, and, to this end, the Cooperation Committee or the working groups established by it may provide for the use of fluid information channels that enable the timely transmission of information.[52]

In turn, the FROB is obliged to inform the supervisory authority of any action taken in preparation for resolution, such as the valuation of assets and liabilities, taking into account the Banco de España's need to ensure the effectiveness of the early intervention measures.

Where the supervisory authority makes use of the power of intervention or temporary replacement of the management body, under Article 71 of Law No. 10/2014, the Banco de España and the FROB may collaborate in selecting the persons to appoint.

With regard to resolution plans, Article 13 of Law No. 11/2015 assigns the relevant responsibility to the Banco de España, in its capacity of preventive resolution authority. Thus, the latter authority is required to identify ex-ante the resolution measures that the FROB, faced with a situation of failing or likely to fail, may be called upon to apply. Also on account of the institutional autonomy of the executive resolution authority, said Article 13(1) specifies that the adoption of the resolution plan cannot affect the FROB's power to apply other measures in light of the existing circumstances at the time of the FOLTF.

The conferral to the preventive resolution authority of the responsibility for drawing up the resolution plans is counterbalanced by the significant involvement of the FROB in determining its content, in addition to the participation of the competent supervisory authority. More precisely, the resolution plan is drawn up further to a report by the FROB, as well as by the supervisory authority.

The assessment of resolvability also falls within the competence of the preventive resolution authority, following a report from the competent

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51 See Clause XI of the CA.

52 See Article 11 of Law No. 11/2015 and Clause XI of the CA.

supervisor and the FROB,[53] in accordance with Article 15 of Law No. 11/2015. The competent supervisor and the FROB may request the preventive resolution authority to carry out a new assessment if they deem that there may be substantive impediments to resolution. Further, the CA specifies that any request to carry out a new resolvability assessment must be made in writing, stating the facts on which the request is based and the reasons why they give rise to the request.[54]

The procedure for removing the impediments to resolvability is likewise conducted by the Banco de España, in its capacity as preventive resolution authority, but with the significant involvement of the FROB, as well as the supervisory authority.[55] To this end, the CA provides that where the Banco de España detects the existence of impediments to resolvability, it is required to inform the FROB of such impediment, as well as the of the measures it proposes in order to overcome them.

The setting of the MREL falls under the responsibility of the preventive resolution authority, following a report from the FROB and the competent supervisor.[56] The CA provides that the Banco de España must provide the FROB with all the information necessary to draw up the report.

In line with the provisions of the CA, Article 67(3) of the Rules of Procedure of the Banco de España, as amended in 2018[57], establishes that, when matters relating to the recovery or resolution of credit institutions are discussed, the FROB's Chair may be invited to attend meetings of the Executive Committee of the Banco de España, with no voting right.

6.1. Cooperation in the adoption of the resolution scheme

The decision to put an entity under resolution, although falling within the remit of the FROB, requires the participation of the supervisory authority and the preventive resolution authorities.[58]

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53 See Article 15 of Law No. 11/2015.

54 See Clause XIV of the CA.

55 See Article 17 of Law No. 11/2015.

56 See Article 44 of Law No. 11/2015.

57 Decision of 24 April 2018 of the Governing Council of the Banco de España approving the amendment of the Rules of Procedure of the Banco de España of 28 March 2000.

58 On the purposes of resolution, being an administrative procedure of crisis management of the credit institution alternative to liquidation under normal insolvency proceedings, which has a judicial nature in Spanish law, see the Preamble of Law No. 11/2015, where it is highlighted that "[o]ne of the law's basic principles is that traditional judicial insolvency proceedings are not, in many cases, useful for restructuring or closing failing financial institutions. Given their size, the complexity and uniqueness of their sources of financing, which include legally guaranteed deposits, and their interconnectedness with other institutions, the ordinary winding up of financial institutions tends to cause irreparable damage to a country's financial system and economy. Therefore, it is necessary to establish a special and simultaneously strict and flexible procedure that enables the public authorities to avail themselves of extraordinary powers vis-à-vis the institution in difficulty and its shareholders and creditors […]. The preceding paragraph distinguishes between winding up and resolution. The winding up of a financial institution refers to the finalisation of its activities in the context of an ordinary court

Following the division of competencies established by the BRRD, the FOLTF assessment ordinarily falls within the competence of the supervisory authority, after consulting the preventive resolution authority and the FROB.[59] The CA establishes that when the Banco de España, as the competent supervisor, determines the existence of the conditions for the FOLTF declaration (or when it has been so informed by the management body of a credit institution), it has to notify the FROB as soon as possible to seek its opinion.[60]

The FROB also has the power to request the supervisory authority to carry out the FOLTF assessment based on the information provided by the latter. The competent supervisor must respond within three days with the reasons for its decision.[61] Indeed, the Spanish legislator has not exercised the option, provided for in Article 32(2) of the BRRD, to give the resolution authority the power to carry out its own assessment, as is also provided for in Article 18(1) of the SRM Regulation for entities falling under the direct responsibility of the SRB. Instead, the Spanish legislator has opted to provide the FROB with the mere power to urge the supervisory authority to make the assessment, thus enhancing the supervisor's role and capabilities as the best-qualified authority to evaluate the FOLTF. In order to ensure the effectiveness of the FROB's power of solicitation, the CA provides that the Banco de España is required to make available to the FROB any supervisory information that may be necessary to this end.[62]

In close cooperation with the supervisory authority, the FROB is responsible for assessing whether there are any alternative measures to overcome the crisis. However, the supervisory authority may inform the resolution authority that it considers that such a condition for initiating the resolution has been met.[63] Instead, the assessment of the public interest in taking a resolution action is the exclusive responsibility of the FROB.[64]

After ascertaining that all the conditions provided for in Article 19 have been met, the FROB shall order the immediate initiation of the resolution procedure, notifying the Minister of Economic Affairs and Competitiveness, the competent

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proceeding. This proceeding will be appropriate mainly in the case of institutions that, because of their reduced size and complexity, can be wound up in this way without any detrimental effect on the public interest. The resolution of a financial institution, on the other hand, is a unique administrative process to address the failure of credit institutions and investment firms, when an insolvency proceeding is not appropriate on general interest and financial stability grounds. Consequently, the regime established in this Law constitutes a special, complete administrative procedure that ensures that intervention in an institution takes place as swiftly as possible in order to facilitate the continuity of its basic functions, while at the same time minimising the impact of its failure on the economic system and on public funds" (quotation from the English translation of Law No. 11/2015, available on the Banco de España website).

59 See Article 21(1) of Law No. 11/2015.

60 See Clause XVI of the CA.

61 See again Article 21(1) of Law No. 11/2015.

62 See Clause XVI of the CA.

63 See Article 21(2) of Law No. 11/2015.

64 See Article 21(3) of Law No. 11/2015.

supervisor, and the competent preventive resolution authority of its decision and the reasons therefor.

Mirroring the early intervention phase, the FROB shall notify the Banco de España, as the competent supervisor, of its decision to replace the administrative body and general or similar directors of the institution, including the appointment of the natural or legal person or persons who, on its behalf and under its control, shall exercise the functions and powers inherent to their position, as well as the renewal of any of the above decisions. The Banco de España and the FROB may collaborate in choosing the persons who will assume the management functions based on the experience acquired by both institutions.[65]

An information duty is also provided for in relation to the resolution tools. More specifically, the FROB is obliged to inform the Banco de España of the date from which the measures adopted will concretely take effect. Furthermore, if the adoption of a resolution tool requires the intervention of the Banco de España in any of its supervisory competencies, the supervisory authority has to do its best to ensure that the exercise of its functions is carried out in the shortest time possible, so as not to delay the adoption of the relevant resolution tool or prevent it from achieving the resolution objectives pursued. The same principle also applies with reference to the sale of business and the bridge institution tools, in relation to the role of the Banco de España in the common procedures for granting the authorization to take up the business of a credit institution or withdrawing it,[66] with the aim of favouring the necessary coordination with the ECB.[67]

6.2. National cooperation within the Single Resolution Mechanism

The dual set-up of resolution functions in Spanish law gives rise to the need to establish cooperation and coordination mechanisms between the FROB and the Banco de España for participation in supranational bodies.

As already noted, Law No. 11/2015 designates the FROB as the Spanish liaison and coordination authority for the purposes of cooperation with the relevant international authorities and, in particular, those of the other European Union Member States.

As regards the participation in the Single Resolution Board, Law No. 11/2015 assigns the FROB the role of representative of the Spanish resolution authorities, whereas the Banco de España, in line with Article 43(4) of the SRM Regulation, participates as an observer without voting rights.[68]

The CA lays down some relevant principles for the exercise of the FROB's representative role, stating that, with respect to the preventive resolution

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65 See Clause XVII of the CA.

66 See Article 14 of the SSM Regulation.

67 See Clause XVIII of the CA.

68 See the eighth additional provision of Law No. 11/2015.

functions, the FROB should exercise its function on the basis of the Banco de España's criteria, without prejudice to the overriding obligation of the members of the Board to act independently and in the general interest and in pursuit of the principles and objectives of resolution. At the same time, the Banco de España, participating in the work of the Board as an observer, should favour the FROB's representation function as far as possible.[69]

As regards the Internal Resolution Teams (IRTs),[70] the CA provides that both the staff of the Banco de España, as the preventive resolution authority, and the staff of the FROB, take part in them in the different phases of resolution. However, the role of the Sub-coordinator is held by a representative of the Banco de España in the context of preventive resolution functions and by a representative of the FROB in the context of executive resolution functions. Taking into account the need for coordination between the Spanish resolution authorities, the CA also provides that the staff designated by the Spanish authorities cooperate closely in the context of the IRTs, sending all relevant information through the Sub-coordinator in a timely fashion. Moreover, regardless of who acts as Sub-Coordinator, communications to the Coordinator on relevant decisions has to be made after dialogue between the two resolution authorities.

With reference to the contribution to the Single Resolution Fund, in order to enable the FROB to carry out its activities in the context of the procedure laid down by Article 70 of SRM Regulation[71], the CA requires the Banco de España to provide the FROB with the information needed for the calculation of the contributions due by each institution and the notification of the decision determining the annual contribution.

7. Liability regime

Beyond the aforementioned Article 74(1) of Law No. 11/2015,[72] Spanish law does not seem to contain provisions expressly limiting the liability of resolution authorities, in particular with regard to the subjective element of such liability.[73]

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69 See Clause XXIII of the CA.

70 Article 83(3) of the SRM Regulation entrusts the SRB with the power to establish internal resolution teams composed of its own staff and staff of the national resolution authorities, as well as observers from non-participating Member States' resolution authorities, where appropriate. In this regard, see also Articles 24 et seq. of the SRB's Decision of 17 December 2018, establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15, or Cooperation Framework).

71 In such a procedure the national resolution authorities play merely an operational support role in the decision-making process of the Single Resolution Board. They are also in charge of notifying the entities concerned of the determination made by the Board. See, in this regard, Court of Justice, judgment of 3 December 2019, C-414/18, *Iccrea*.

72 See paragraph 5.1.

73 As stated in 3(12) of BRRD, "without prejudice to Article 85, Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive".

In the Spanish legal system, the public administration's liability is a constitutional principle enshrined in Article 106(2) of the Constitution.[74] The legal regime of such liability is currently contained in Articles 32 et seq. of Law 40/2015.[75]

Based on this constitutional principle, the Spanish courts generally hold that the public administration's liability constitutes an objective liability, i.e. not requiring the ascertainment of the wilful misconduct or negligence of the authority concerned.[76] Such an interpretation may explain why Law No. 11/2015, unlike other legal systems, such as the Italian one, does not contain a provision expressly anchoring the liability of resolution authorities to a qualified subjective element (e.g., wilful misconduct or gross negligence).

However, the same case-law recognizes that the administration's liability cannot become a generalized form of insurance against any damage caused by the performance of public functions.[77] Notwithstanding the formal adherence to the thesis of objective liability, in certain circumstances, the damage cannot be considered unlawful, and consequently, the private party is under a legal duty to bear it,[78] even in the face of an event causally attributable to the public administration.

As noted by some (legal) scholars, departing from the pure model of objective liability, the case-law ends up linking public liability to elements seeming to have a subjective nature.[79] As a result, the public administration's liability, especially if related to discretionary powers, remains limited to macroscopic violations, such as in the case of acts manifestly arbitrary or lacking in motivation or which stem from an irrational and unreasonable application of the regulatory framework.[80]

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74 In accordance with Article 106(2) of the Spanish Constitution, private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services. See also Article 9(3), which includes the accountability of the public authorities within the principles guaranteed by the Constitution.

75 Instead, the administrative procedure for the recognition of liability is regulated by Law No. 39/2015.

76 The objective nature of administrative liability in Spanish law has been confirmed by Constitutional Court, 12 October 2018, ECLI:ES:TC:2018:112. Some legal scholars adhere to a different reconstruction based on the assumption that the Constitution does not impose the adoption by the primary law of an objective liability model. See, in this regard, C. Checa Gonzáles, *La falacia de la tesis de que la responsabilidad patrimonial de las administraciones públicas es, en todo caso, objetiva*, (2021) 2 Nueva fiscalidad, 25.

77 See, for instance, Spanish Supreme Court, 17 June 2014, RJ 2014/4372.

78 See Article 32(1) of Law No. 40/2015.

79 See in this regard L. Medina Alcoz, *El problema de la culpa en la responsabilidad patrimonial por acto administrativo. Análisis crítico de la jurisprudencia del Tribunal Supremo*, (2020) 213 *Revista de Administración Pública*, 80, where the author higlights that "si un profesor o juez francés, italiano o alemán habla con un juez contencioso español sobre la antijuridicidad del daño en la responsabilidad resarcitoria, lo más probable es que se produzca un diálogo de sordos, pues las cuestiones reales subyacentes al vocablo son radicalmente distintas, según el interlocutor; para los primeros, hablar de antijuridicidad es hablar del daño resarcible; para el segundo, hablar de antijuridicidad es en buena medida hablar de lo que los franceses, italianos o alemanes llaman culpa".

80 R. Fernandez, *¿Existe un deber jurídico de soportar los perjuicios producidos por un acto administrativo declarado nulo por sentencia firme?*, (2018) 205 Revista de Administración Pública, 231 ss.

The same principles apply to the liability of public authorities in the financial sector, leading some legal scholars to highlight that such a liability de facto occurs only in the case of serious violations of the applicable framework, being essentially a theoretical possibility.[81]

On this matter, the relevant case-law reflects the principle that the functioning of the financial markets is based on the freedom of enterprise and investment of the persons operating therein. Therefore, the existence of a public supervisory mechanism cannot lead to excluding the risks that investors freely assume through their decisions, nor does it create a general guarantee obligation on the Administration with regard to such investments.[82] At the same time, the mere inaction of the authority concerned does not in itself constitute a tort unless in the case of a breach of a duty to act set out in sufficiently precise terms by the law.[83] Where the supervisory authority is vested with discretionary powers, its liability only arises if it has acted arbitrarily, unjustifiably or contrary to the applicable regulatory framework.[84]

The Spanish courts have upheld the same principles regarding the liability arising from the exercise of the resolution functions, as allocated in Spanish law between the Banco de España and the FROB. More specifically, the EU law principle according to which the shareholders bear first losses, establishes, on the side of liability under Spanish law, a legal duty on the same shareholders to bear the damages deriving from the resolution, as long as the decisions taken by the resolution authority do not violate the applicable legal framework.[85]

8. Concluding remarks and reform perspectives

The Spanish model of resolution functions, based on the allocation to separate authorities of the functions of preventive and executive resolution, appears to be unique in the Banking Union.

The rationale behind such an arrangement is to ensure a balance between the principle of independence in the performance of resolution functions and awareness of the close connection between such functions and supervision.

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81 M.A. Salvador Armendáriz, *La responsabilidad de los reguladores bancarios en el ejercicio de sus potestades de ordenación y supervisión*, in J.C. González Vázquez, J.L. Colino Mediavilla (dir.), *Regulación bancaria y actividad financiera* (Wolters Kluwer, 2020), 141. See also J. Narbón Fernández, *Algunas consideraciones sobre la eficacia jurídica de la supervisión bancaria*, 10.

82 See Spanish Supreme Court, 25 April 1988, ECLI:ES:TS:1988:2972 and National High Court, Contentious-Administrative Appeal Division, 20 December 2000, ECLI:ES:AN:2000:7841.

83 See Spanish Supreme Court, 16 May 2008, ECLI:ES:TS:2008:2396, and 1 June 2010, ECLI:ES:TS:2010:2709. See also National High Court, Contentious-Administrative Appeal Division, 5 February 2010, ECLI:ES:AN:2010:299.

84 National High Court, Contentious-Administrative Appeal Division, 9 September 2020, ECLI:ES:AN:2020:2397; 26 February 2020, ECLI:ES:AN:2020:27; 24 April 2019, ECLI:ES:AN:2019:1706.

85 See National High Court, Contentious-Administrative Appeal Division, 11 April 2018, ECLI:ES:AN:2018:1699, and 25 May 2016, ECLI:ES:AN:2016:2244.

The current model, aiming at taking full advantage of the specific capacities of each authority involved, relies, for the preventive phase, on the knowledge and information available to the authority also entrusted with the supervision, and for the executive phase, on the specific skills and experience of an independent administrative authority.[86]

Although this arrangement has proven effective over time, it has become increasingly clear that there is room for improvement,[87] mainly because the distinction between preventive and executive resolution functions might be perceived as artificial, generating confusion in the allocation of responsibilities and, operationally, procedural complexity. Therefore, in a medium-term perspective, the integration of the preventive and executive resolution functions in the same authority is being considered.[88]

Such integration has also been pointed out by the International Monetary Fund in a 2017 report on the Spanish financial sector, where it has been highlighted that, although coordination and information sharing between resolution authorities has proven adequate over time, the consolidation of the two functions into a single authority could improve the overall effectiveness of the system. Such consolidation could occur either by merging the FROB into the Banco de España, still respecting the principles of independence and operational autonomy, or by incorporating the Banco de España's resolution unit into the FROB, maintaining it as an independent agency and extending its competencies to preventive resolution.[89]

The advantage of integrating supervisory and resolution functions in the Banco de España lies in improving the flow of information and optimizing resources, following the example of the majority of Member States. If such an

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86 See the speech of Paula Conthe Calvo, Chair of the FROB, at the hearing before the Commission for the audit of democratic quality, the fight against corruption, and institutional and legal reforms of the Congress of Deputies, of 12 May 2021, 4, available *here*.

87 Indeed, the Preamble of Law No. 11/2015, in giving account of the Spanish legislator's choice to distinguish between preventive and executive resolution competencies, significantly highlights that "once the processes currently underway have been completed, this institutional model will be assessed in order to achieve greater efficiency, by taking into account the experience of the Single Resolution Mechanism and of the resolution authorities of the euro area Member States and the evolution of the financial situation" (quotation from the English translation of Law No. 11/2015, available on the Banco de España website).

88 See again the speech of Paula Conthe Calvo cited above. In the same vein, see also the speech by Pablo Hernández de Cos, Governor of the Banco de España, before the Commission for the audit of democratic quality, the fight against corruption, and institutional and legal reforms of the Congress of Deputies, of 22 December 2020, 11, available *here*, where it is highlighted that the Spanish model of resolution functions is a more complex scheme than the one in place in other countries, where the two resolution functions, with rare exceptions, are unified under the same body responsible for banking supervision. According to the Governor, the unified scheme under the banking supervisor is justified by arguments of efficiency, cost savings, and consistency in the assessment of the implications for financial stability.

89 See the Technical Note on Bank Resolution and Crisis Management Frameworks in Spain by the International Monetary Fund (Monetary and Capital Markets Department), November 2017, 12, available *here*.

organizational model were to be followed, it might be necessary to consider stronger measures for separating supervisory and resolution functions (such as establishing separate decision-making mechanisms).

On the other hand, assigning all the resolution functions to a specialized authority, following the SRB model, would allow the principle of independence and functional separation to be more clearly safeguarded without altering or affecting the supervisory authority's decision-making mechanisms. Although such a model carries the risk of a potential higher costs and operational duplication, the organizational set-up of the FROB, in which the representatives of the supervisory authorities sit on the governing body, can facilitate the operational coordination, which would also benefit from the many years of experience of cooperation between the existing authorities.

Sweden

Frida-Louise Göransson

Summary. 1. Administrative authorities involved in resolution planning and execution – 1.1. The Debt office and its Resolution board – decision making in resolution planning and procedure – 1.2. Finansinspektionen – the supervision of credit institutions – 1.3. Central bank – The Riksbank – 2. Independence, separation of powers and accountability – 2.1. Political and legal accountability – 2.2. Legal accountability

In Sweden, just like in many other member states of the European Union, legislation on management of credit institutions in crises was adopted to deal with different crises in the financial market, in the banking and the housing sector. Sweden did have an experience of crises in the beginning of 1990s, which was an internal crisis as well as the Global Financial Crisis in 2008.[1]

1. Administrative authorities involved in resolution planning and execution

The Swedish National Debt Office is the resolution authority of Sweden. The main act regulating resolution is the Resolution Act[2] but the Debt office is also the supporting authority under the Precautionary State Aid to Credit Institutions Act.[3] These laws were adopted to implement the Banking Recovery and Resilience Directive (BRRD). From 2008 until 2015 the main legislation corresponding to BRRD was a law on state aid to credit institutions.[4] The Debt office was the competent authority to apply the legislation.

The Resolution Act regulates cooperation and the exchange of information between the three competent authorities involved in the resolution procedure. The other two authorities are Finansinspektionen, the national authority responsible for supervision of credit institutions[5] and Riksbanken, the central bank responsible to secure an efficient payment system. All three of them have a responsibility to contribute to the financial stability, that responsibility was explicitly mentioned when the BRRD was implemented in Sweden and continues to be an important guiding light for all the authorities mentioned.[6]

The Council on financial stability should also be mentioned in this context, it is composed of representatives of the three authorities mentioned as well as the ministry of finance. The Council meets on a regular basis to discuss but not to take decisions.

1.1. The Debt office and its Resolution board – decision making in resolution planning and procedure

The Resolution Board within the Debt office is responsible for making decision that are examined by the Debt office under several acts. In the process of resolution planning the Debt office is also responsible for analysing which credit institutions fall under the resolution regime and set up resolution plans for each and one of them. The updated EU-legislation on minimum requirement

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1 Committee inquiry on financial crisis, publication SOU 2013:6, 81.

2 2015:1016.

3 2015:1017.

4 2008:814.

5 Lag (2014:968) om särskild tillsyn över kreditinstitut och värdepappersbolag. Lag (2004:297) om bank- och finansieringsrörelse. Lag (2014:966) om kapitalbuffertar. Lag (2007:528) om värdepappersmarknaden.

6 Government proposition, implementation of BRRD 2015/16:5.

on own funds and eligible liabilities (MREL) is implemented in the Resolution Act. The Debt office publishes a report every three month on the MREL-criteria of Swedish credit institutions to which the legislation applies.[7] Part of the information that the Debt office needs in order to make their resolution plan emanates from Finansinspektionen, in particular pillar 2-criteria. The Debt office as well as Finansinspektionen may impose fines and restrictions on credit institutions that do not fulfil the criteria, each in its own field of responsibility. However, none of these authorities are responsible for insolvency procedures (or procedure following the bankruptcy of a credit institution) in Sweden which is a procedure that takes place at a court of first instance (Tingsrätt). The resolution procedure is first and foremost a procedure to be applied for the systematically important credit institutions, the same logic seems to be applied in the rest of the EU. However, the Swedish inquiry on the possible participation of Sweden in the Banking union did highlight the (unanswered!) question of what the consequences would be if within the Banking Union, the Single Resolution Board and a national competent authority would come to different conclusion as concerns the need to apply resolution procedure to an institute that is not considered systematically important.

Another issue that was brought up was the scope of "resolution action necessary in the public interest" which refers to the resolution objectives in Article 31 BRRD which is an expression of the need to preserve financial stability. In this context it was noted that it is unclear if the public interest referred to concerns of the financial stability of one member state, a region, the euro area or the whole European union.[8]

Within the Swedish National Debt office, the resolution board that set up as a consequence of the Resolution Act 2015. It is composed of 5 persons, designated by the government for a period that can be different for each member. At present, the board members are the director general of the Debt office, a judge from the supreme administrative court, a Finance Director at Swedish Armed Forces, a former Advisor to the Executive Board at the Riksbank and a former bank director. The public inquiry that analysed the implementation of the BRRD in Sweden discussed the different options of where to place the resolution competence, at the level of the government, at the Finansinspektionen or the Debt office.

1.2. Finansinspektionen – the supervision of credit institutions

Finansinspektionen is responsible for the supervision of credit institutions, ensuring that they meet capital adequacy requirements. Finansinspektionen is also responsible for the supervision of credit institutions in resolution. In order to

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7 Kravet på kapitalbas och kvalificerade skulder, beslutspromemoria, 12 October 2021, DNR RGR 2021/26 and quarterly report 2021-2023 published on the web site of the Debt office.

8 Committee inquiry on the possible participation of Sweden in the Banking union. Publication SOU 2019:52, 190-192, available *here*.

keep an arm's length between the supervision and the resolution procedure, the responsibility of decisions in the resolution process was placed at the Debt office instead of at the Finansinspektionen.

1.3. Central bank – The Riksbank

The Riksbank is responsible for price stability as well as for promoting a safe and efficient payment system. To achieve this, the central bank can in exceptional circumstances supply liquidity to individual institutions (i.e. emergency liquidity assistance). The central bank does of course have an independent status that is expressed in the Swedish constitution, the Instrument of government (regeringsformen).

2. Independence, separation of powers and accountability

All Swedish authorities under the government are independent from the government when the authority applies laws and regulations, in Sweden a minister or the government is prevented from influencing decisions adopted by the authorities.[9] The government is limited to give guidance on an annual basis to the authorities. This regime does not apply only to the government, no public authority may determine how another authority is to decide in a particular case involving the exercise of public authority vis-à-vis a private subject or a local authority, or the application of law. In the context of resolution of credit institutions, it is the Debt office and Finansinspektionen that work very closely but at the same time with the independence as just described. To give an example, when the Finansinspektionen participates in the European Banking Authority, it does so on its own mandate, the Ministry of Finance does not have a role in giving detailed guidance of how the Finansinspektionen should act.

In the implementation of the BRRD the decision was made to give the Debt office the responsibility for the resolution procedure, since it also did have the responsibility for the deposit guarantee. There is an exception to this rule. If the Debt office considers that the proposed measure might have budget effects or a systematic effect, it is the task of the government to decide.[10] This is, according to the government bill, particularly the case concerning decision involving agreements with other countries. However, a decision concerning credit institutions with no cross-border activity shall not be decided by the government but by the Debt office.[11] The government takes the decision in the case the national resolution fund should be used as well as on the use of the stabilisation tools, on initiative from the Debt office.[12]

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9 The Instrument of government (Regeringsformen), Chapter 12, Article 2.

10 Resolution Act, Chapter 1, paragraph 3.

11 Government proposition, implementation of BRRD, 2015/16:5, 181.

12 Resolution Act, Chapter 1, paragraph 5.

The Finansinspektion has the responsibility for the supervision of credit institutions in general, including those who are the subject of a resolution procedure, therefore it would not be appropriate to place the responsibility for the resolution procedure at the Finansinspektionen. This authority does have a role in the pre-resolution phase as it is responsible for the application of Article 32.1 BRRD, to make the assessment, by its own initiative or on the initiative of the Debt office, if a credit institution is failing or likely to fail. In its assessment, consultation with the Debt office and the Riksbank before making its decision is mandatory.[13]

2.1. Political and legal accountability

Just like in the institutional setting of the Banking Union, several organs are involved in different phases of the resolution procedure. Decisions by the Finansinspektionen as well as by the Debt office are their own decisions, the board including the director general of the respective authority take the responsibility of the decision made. Only the government can end the mandate of the board or a director general of one of the governmental authorities. This can only take place in particular circumstances that are not connected to a particular decision made by the authority. The background to this rule is the Instrument of government already mentioned in footnote 9, and the independent status of the governmental authorities vis-à vis the government. The committee on constitutional affairs at the Swedish parliament can also criticise one of the authorities' actions but is rare that they pronounce themselves on the neglect of a governmental authority, and if they do. The critic does have to be directed towards the government and the minister responsible for the governmental authority. In Sweden the government act as one which limits the possibility for a minister to act.

The two authorities mentioned, as well as the Riksbank and the government, are present at the Swedish parliament committees to explain the decision and long-term plan, especially for financial stability. Special hearings on financial stability are often public and all hearing in the plenary of the parliament are of course always public. One can argue that it is positive that all organs involved in resolution in a wide sense can be requested to explain their action in parliament. If the accountability procedure in parliament works well, as many as four organs will give their fair view of the situation in a transparent and responsible way. However, there is a risk that those involved are inclined to blame each other while being asked by parliamentarians. This positive side as well as the risk was highlighted the committee that analysed a possible accession of Sweden to the Banking union.[14]

Close coordination takes place between all authorities involved in resolution planning but each of them have their own responsibility.

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[13] Resolution Act, Chapter 6, paragraph 31.

[14] SOU 2019:52, 142-144.

2.2. Legal accountability

The access to effective legal remedies is part of the founding principles of the Instrument of government as well as of the Administrative act.[15] Judicial procedures in the context of a resolution procedure are quite uncommon in Sweden but anyone affected by a decision according to the Administrative act has the right to take the decision to court. The inquiry on the possible participation of Sweden in the Banking union claimed that legal procedures would probably increase would Sweden participate in the Banking Union. One of the reasons would be that the case-law regulation the Banking union still is developing but also the fact the individuals, being natural persons or companies, seem to have easier access to the annulment procedure at the Court of justice of the EU compared to the national procedure. The time length could also be diminished in a procedure at EU level compared to the national level. However, requests for preliminary rulings to the Court of Justice of the EU in national resolution cases imply a risk of prolonging the national procedure. The only risk that was highlighted was the one of possible parallel procedures in Sweden as well as at the Court of justice of the EU, is Sweden would join the Banking Union.

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[15] Administrative Act, Förvaltningslagen (2017:900).

PART II.

Reports of EU institutions and bodies

European Banking Authority

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1. What is the role if any of the EBA towards NCAs, NRAs and their institutional embodiment within Member States' institutional frameworks?

According to Article 8 of 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) (the **EBA's Founding Regulation**), the EBA's task and powers are directed towards to the contribution to "*the establishment of high-quality common regulatory and supervisory standards and practices*" and "*the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2), preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors and taking actions, inter alia, in emergency situations*".

In this respect, the EBA is vested with a general regulatory power. In the regulatory field, in the cases specifically set out in the legislative acts referred to in Article 1(2) of the EBA's Founding Regulation, it drafts technical standards (regulatory or implementing) which require endorsement by the Commission to become legally binding (arts. 10-16 of the EBA's Founding Regulation). However, in practice, the draft standards are adopted by the voting members of the EBA Board of Supervisors ('**BoS**'), comprising the heads of the NCA responsible for supervision of credit institutions, while the Commission would only amend them in case they were incompatible with Union law, did not respect the principle of proportionality or ran counter the fundamental principles of the internal market for financial services as reflected in the *acquis* of Union financial services legislation.

On the other hand, the EBA plays also an important role in the supervisory area. Although NCAs and NRAs exercise the role of supervisors or resolution authorities, respectively, the EBA has at its disposal a range of powers that can be broadly categorised as:

i. coordination powers: the EBA can issue guidelines, recommendations or opinions addressed to NCAs or NRAs, although coordination can also take the form of peer reviews, non-binding mediation between NCAs or NRAs, issuance answers to questions from NCAs/NRAs, adoption of supervisory/resolution handbooks, training programmes, etc;

ii. intervention powers: under certain circumstances the EBA can intervene at national level and exercise binding or non-binding powers over national authorities (e.g. settling disagreements between NCAs or NRAs, providing recommendations addressed to NCAs or NRAs in cases of breaches of Union law by NCAs or NRAs or adopt binding decisions in emergency situations under certain conditions).

Specifically, according to 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 (**BRRD**), the EBA is mandated to develop a wide range of technical standards, guidelines and reports with the aim of ensuring effective and consistent procedures across the Union, in particular with respect to cross-border financial groups.

These regulatory products continue to build on the primary legislative provisions of the directive and establish a cohesive EU framework for dealing with any failing bank or investment firm. As a framework, it provides the foundation for delivering common practices across Member States and within it the EBA also seeks to minimise divergent approaches that may emerge among NCAs/NRAs.

In this respect, the EBA's strategy for an efficient EU resolution framework is two-pronged and foresees: (i) the provision of training, technical assistance and other support services to NCAs/NRAs; and (ii) the regular monitoring of how requirements are being applied pragmatically (e.g.: by attending resolution colleges or carrying out peer reviews). Where an institution fails, primary responsibility for dealing with it rests with the relevant NRA.

2. Does the EBA monitor national institutional frameworks and their evolution? If this is not the case, why not?

In line with its mission, the EBA proactively drives convergence in resolution practices through the selection of topics deserving European traction. These topics are identified based on the EBA's expertise in EU-wide policy development, its role in colleges and on the practical experience of resolution authorities. Mirroring the approach of the EBA annual convergence plans for supervisory practices, the EBA will monitor – through a dedicated European resolution program (EREP – see the EBA 2023 *European Resolution Examination Programme*) – some relevant aspects for effectively progressing resolution planning (among which on how NRAs monitor potential shortfalls and divergences for intermediate MREL targets and will try to identify best practices in this work). Through this work, which the EBA carries out in close coordination with NCAs/NRAs, the EBA is aware of the national institutional frameworks including how they evolve over time.

To fulfil its role of monitoring the implementation of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (**DGSD**), national authorities must notify the EBA of any relevant information as well as of any actions taken. The EBA publishes the non-confidential elements of these notifications on its website (*i.e.*: notifications on resolution, liquidation cases with DGS payouts and other DGS interventions), which can be accessed here. Similarly, Member States must periodically report to the EBA data relating to the funding levels of their national DGS.

It should be borne in mind that further to Article 8(1)(b) of the EBA's Founding Regulation, the EBA has an obligation to foster and monitor supervisory independence. Indeed, the EBA plays a role in advising on national legislative changes and in this respect, in advising the Commission on legislative changes needed to foster supervisory convergence. On 18 October 2021, the EBA published, along with its two sister ESAs, its individual report on the supervisory independence of competent authorities. On 23 May 2022, the Commission issued a *Report on the operations of the ESAs* whereby it encouraged the three ESAs to further develop principles of independence and drawing-up cross-sectoral criteria. The joint non-binding ESAs' independence criteria were published on 25 October 2023 and can be found on the website of each ESA (here the *EBA website: Joint ESAs Supervisory Independence Criteria*).

3. Has it ever considered this question/adopted soft law on this matter?

As already mentioned, the EBA is equipped with various soft-law tools (guidelines and recommendations, peer reviews, supervisory handbooks) should it be necessary to harmonise the application of the European legislation. However, this legislation itself leaves to Member States the ability to manoeuvre amongst their own institutional arrangements with quite some freedom. The mere fact that the number of NCAs and division of responsibilities between them is left to Member States to decide is a good example for that. In the absence of requirements relating to the national institutional framework in the Level 1 text, the harmonisation of such frameworks by the EBA may be difficult to justify as necessary to ensure the effective and consistent application of the Level 1 text.

EBA peer reviews do consider adequacy of resources, degree of independence and governance arrangements of competent authorities even if the focus of such reviews is typically on the effectiveness of supervisory practices. This may lead to follow-up measures being communicated to CAs. Those follow-up measures are then reviewed after two years by the EBA and a follow-up report published.

Coming back to the EBA side, the selection of the tool to be used in each case should be examined as an *ad hoc* policy decision to be made by the EBA driven by the nature of the supervisory convergence involved. Here are some relevant considerations:

- If the product is to be addressed only or also to financial institutions, then guidelines or recommendations seem more appropriate as a handbook cannot address institutions (e.g. *Guidelines on the range of scenarios to be used in recovery plans*);
- For NCAs/NRAs, on the other hand, the EBA has more of a choice whether to develop guidelines or recommendations which are perhaps best aimed at harmonising the framework to be operated by NCAs/NRAs (*e.g.*: SREP), a Handbook because the EBA has detailed good

practices that it wants front-line NCAs/NRAs to follow (e.g Valuation Handbook), or both.

To determine the best tool in each case, the EBA should also consider the existence or not of national rules in the relevant area where regulatory or supervisory convergence is sought: too many diverging national rules or practices (because the Level 1 text had provided for wide national discretions or was of minimum harmonisation) might argue in favour of guidelines or recommendations rather than a handbook.

The choice of the appropriate convergence tool, except where the issuance of a particular product is envisaged or mandate in sectoral legislation, rests with the EBA but the product chosen should remain fully compliant with Level 1 and 2 Union texts meaning that before its development, a good understanding of the relevant Union legislative and regulatory provisions, inclusive of the particularities of the national rules and practices, constitutes a necessary prerequisite.

Regarding handbooks, Articles 8(1)(ab) and 25(2) of the EBA's Founding Regulation provide for the possibility for the EBA to issue products generally aiming at setting out best practices and high quality methodologies and processes taking into account, *inter alia*, the work of the Single Resolution Board, changing business practices and business models and the size of financial institutions and markets. For instance, the EBA has issued a valuation handbook under a BRRD heading addressed to NRAs, available *here*.

Also, Article 30 of the EBA Founding Regulation, provides that the EBA shall conduct peer reviews of some or all of the activities of competent authorities in accordance with a two-year work plan.

It is worth mentioning that in its pre-cited *Report on the operations of the ESAs* dated 23 May 2022, the Commission mentioned that it will consider the need for a targeted change to governance of the EBA in order to ensure a more consistent separation of its resolution and prudential functions (see esp. on p10).

Finally, we could point out that in the same Report and in relation to the Banking Package, p10 footnote n30 states: "*Minimum requirements would be introduced to prevent conflicts of interest in the supervisory tasks of competent authorities, their staff and governance bodies. The EBA would also be mandated to develop guidelines in that regard, taking into account international best practices. These measures respond to problems that emerged in the Wirecard case in particular*".

4. Has the creation of the SSM and/or the SRM had any impact for the EBA and its direct relationship to NCAs/NRAs? How should the obligation to comply or explain be understood in these cases? Are the NCAs/NRAs always directly responsible towards the EBA, or does the ECB/SRB convey the positions of the NCAs/NRAs, maybe in an attempt to reach a common position among them beforehand?

The creation of the ECB/SRB have strengthened the leadership of the EBA as a regulator in the supervisory area and the sole handler of the single rulebook within the entire Union. The EBA continues to work closely with NCAs/NRAs (both those within and outside Banking Union) as well as with the Union-level authorities.

As mentioned above and especially regarding cross-border supervision and resolution, the EBA issues products which serve the implementation of the ECB and SRB's missions. In this regard, both the ECB and the SRB are included in the definition of competent authorities under Article 4(2) of the EBA Founding Regulation and as such are required to apply these products. For instance, guidelines are addressed to them and they should in return subject themselves to the comply or explain mechanism set out in Article 16(3) of the EBA Founding Regulation. NCAs/NRAs retain their own responsibilities for compliance with EBA guidelines. In practice the ECB restricts its notifications to its direct supervisory responsibilities under the SSM framework, and not to areas where NCAs retain responsibility in relation to less significant institutions. Similarly, the SRB takes measures to comply with EBA Guidelines in relation to the banks under its remit; please refer in this respect to *the SRB's expectations for banks*.

5. Have any particular issues related to the institutional embodiment of NCAs or NRAs (or the combined function of a national institution) arisen in the past?

It is worth noting that the scope of NCAs/NRAs under the remit of the EBA in accordance with Article 4(2) of the EBA Founding Regulation goes beyond the national public authorities competent for the supervision of credit institutions in each Member State (the heads of which are the actual members of the EBA's BoS), and also includes DGSs, NRAs, consumer protection authorities and AML/CFT authorities, (these latter until 31 December 2025, following the establishment of the Authority for Anti-Money Laundering and Countering the Financing of Terrorism, AMLA), amongst others. Given the potentially large number of NCAs/NRAs within the EBA's scope, coordination of input to the EBA's work from the different authorities at national level lies with the BoS respective member (e.g. in identifying the relevant people to contribute to the EBA's work, ensuring awareness at domestic level of the EBA's work and regulatory products). While it is difficult to identify specific issues that have arisen, the complexity of domestic supervisory/resolution structures may have an impact on the efficiency and effectiveness of distribution of input and information for those authorities not represented at BoS level.

6. How is the relationship to the ECB defined and regulated? How about the relationship to the SRB?

In accordance with Article 4(3), second subparagraph, of 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, the ECB shall adopt guidelines and recommendations, and take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU. It shall in particular be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation. It is worth mentioning that one representative nominated by the Supervisory Board of the ECB is a non-voting member of the BoS.

By the same token, Article 5(2) of 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, establishes that the Board, the Council and the Commission and, where relevant, the national resolution authorities, shall take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative acts, including those referred to in Articles 290 and 291 TFEU.

Moreover, the same Article 5(2) further states that the Board, the Council and the Commission shall be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Articles 10 to 15 of Regulation (EU) No 1093/2010 and to any guidelines and recommendations issued by EBA under Article 16 of that Regulation. They shall make every effort to comply with any guidelines and recommendations of EBA which relate to tasks of a kind to be performed by those bodies. Where they do not comply or do not intend to comply with such guidelines or recommendations EBA shall be informed thereof in accordance with Article 16(3) of that Regulation. The Board, the Council and the Commission shall cooperate with EBA in the application of Articles 25 and 30 of that Regulation. The Board shall also be subject to any decisions of EBA in accordance with Article 19 of Regulation (EU) No 1093/2010 where Directive 2014/59/EU provides for such decisions.

In accordance with Article 127 of the BRRD, a resolution committee has been set up at EBA level (*ResCo*) which promotes the development and coordination of resolution plans and develops methods for the resolution of failing financial institutions.

ResCo is entrusted with the preparation of the EBA's decisions to be taken in accordance with Article 44 of the EBA Regulation in matters relating to the tasks that BRRD confers on NRAs. It is composed of a Chairperson and the heads of the 27 EU NRAs, with Observers from Resolution Authorities of the EEA EFTA countries represented in the BoS, representatives of the European Commission, the SRB, the European Systemic Risk Board, the SSM, the European Securities

and Markets Authority and the European Insurance and Occupational Pension Authority.

Its independence is safeguarded by Article 127 BRRD which provides that the EBA shall ensure structural separation between ResCo and the other functions entrusted to the EBA by the EBA Founding Regulation. To maximise structural separation, the BoS has delegated to ResCo the adoption of certain specified decisions which concern resolution matters, subject to the BoS retaining the responsibility to approve or reject those proposals in accordance with a reverse voting procedure.

Further to Article 40(6), third subparagraph of the EBA Founding Regulation, the Chair of the SRB sits as an observer at the BoS. Other non-voting members to the EBA's BoS, include amongst others, ESRB and a representative of the Supervisory Board of the ECB. This ECB representative may be accompanied by a representative of the ECB with expertise in central banking tasks.

More generally, the composition rules to the EBA's BoS are set out in the EBA's Founding Regulation. Article 40(6) therein states that the "*Board of Supervisors may decide to admit observers*". It stems from this provision that there is no obligation to have observers or to have specific authorities as observers to the board itself or in standing committees, other than what is de facto 'dictated' by the nature of the topic or by cross-sectoral cooperation.

On a separate point, at EBA ResCo level, the ECB and ESRB are considered '*observers*'.

Reciprocity applies to EBA's presence for most boards and standing committees' meetings, where relevant.

Single Resolution Board

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Summary. 1. The principle of independence under Article 3 BRRD and the role of the SRB – 2. The principle of independence: the SRM Regulation and the requirements of Article 3 BRRD – 3. The SRB coordinating and information sharing function for the implementation of EBA Guidelines – 4. Cooperation between ECB (SSM) and SRB – 4.1. Information exchange – 4.2. Cooperation in the context of resolution planning phase, early intervention and resolution phases – 5. Cooperation and information sharing with NRAs

[*] The opinion expressed are personal and do not necessarily represent the views of the SRB.

Without any claim to be exhaustive, the following sections describe the role played by the principle of independence, cooperation and exchange of information with the European Central Bank and the National Resolution Authorities in the context of the legal mandate of the Single Resolution Board.

1. The principle of independence under Article 3 BRRD and the role of the SRB

Article 3 of the Directive 2014/59/EU ("**BRRD**") allows the embodiment of resolution authorities within national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers (among which also competent authorities), subject to adequate structural arrangements.

The Single Resolution Board ("**SRB**") has not been mandated with any margin of appreciation on the national implementation of Article 3 BRRD, which remains a matter left to the Member States under the general control of the European Commission. A more prominent role in this respect is played by the European Banking Authority ("**EBA**"), which, pursuant to Article 8(1)(b) of Regulation (EU) 1093/2010 of the European Parliament and of the Council (hereinafter "**the EBA Regulation**") has an obligation to foster and monitor supervisory independence.[1]

Consequently, the SRB has not developed so far an ad-hoc guide/document for the implementation of the separation of supervision and resolution functions within national resolution authorities ("**NRAs**").[2] However, the principle of structural separation pursuant established in Article 3(3) of the BRRD is recalled in certain documents framing the governance and the exercise of decision-making powers by the SRB.

Recital O. and Section IV of the "*Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism*" (hereinafter "**Interinstitutional Agreement**"),[3] adopted pursuant to Article 45(7) and (8) of the Regulation (EU) No 806/2014 of the European Parliament and of the Council (hereinafter, "**the SRM Regulation**"), state that, when acting as members of the SRB, pursuant to Article 3(3) BRRD, the representatives appointed by participating Member States should ensure the operational independence and avoid conflict of interest between the resolution

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1 See "EBA Report on the Supervisory Independence of competent authorities" of 18 October 2021 available *here*.

2 As defined in Article 3(1)(3) of the SRM Regulation.

3 Publicly available *here*.

function of the national authority and the other functions that the same national authority may be vested with.

As foreseen in the Interinstitutional Agreement, the aforementioned principle have been reflected in the decision of the SRB establishing the Code of Conduct adopted by the SRB in accordance with Article 50(1)(j) of the SRM Regulation,[4] which applies to the members and observers of the SRB Plenary as well as Executive Session.[5] Where explicitly provided for, it also applies to accompanying persons and alternates. Besides framing the overarching principle of independence (Article 4) and of professional secrecy (Article 14) stemming from Articles 47 and 88 of the SRM Regulation respectively, Article 3 of the said decision states that "[i]*n the performance of their tasks, Members of the Board and their alternates shall take into account the objectives set by Regulation (EU) No 806/2014 and perform their tasks respecting the operational independence and the avoidance of conflicts of interest between any other functions of the relevant authorities and the functions of the NRAs in accordance with Article 3(3) of Directive (EU) 2014/59/EU*".

Further, since the principle of independence plays an important role in the context of the cooperation between the SRB and the NRAs, it is worth recalling also the decision of the SRB adopted in accordance with Article 31(1) and 50(1)(q) of the SRM Regulation, for the purpose of establishing the so-called cooperation framework (hereinafter "**CoFra**").[6]

The CoFra establishes a clear link between the principle of independence and the principle of cooperation to ensure, among others, that the SRB and the NRAs: (i) act independently and in the general interest when performing tasks conferred on them by the SRM Regulation (recital 8 of CoFra); and (ii) cooperate closely and in good faith in the exercise of their respective powers (recital 9 and Article

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4 "The decision of the Single Resolution Board of 24 June 2020 establishing the code of conduct of the Single Resolution Board", publicly available *here*.

5 Depending on the tasks, the SRB convenes in different compositions. The '**restricted' Executive Session** is composed of the Chair and the four further full-time Board Members. The Vice-Chair participates in the 'restricted' Executive Session as a non-voting member, but carries out the functions of the Chair in his/her absence. In case the Executive Session deliberates on a specific entity, the Executive Session is extended (**'extended' Executive Session**) to include the Board Members that represent relevant NRAs. Hence, the composition of the 'extended' Executive Session depends on the individual entity concerned by the decision at stake. If the 'extended' Executive Session is not able to reach a joint agreement by consensus, the Chair and the four further full-time Board Members take a decision by simple majority. See Articles 53-55 of the SRM Regulation and the "Decision of 24 June 2020 adopting the rules of procedure of the Board in its Executive Session" available *here*.
The **Plenary Session** is composed of the Chair, the four further full-time Board Members and the Board Members representing all NRAs. Similar to the Executive Session, the Vice-Chair participates in the Plenary Session as a non-voting member, but carries out the functions of the Chair in her absence. The list of competences of the Plenary Session is established in Article 50 of the SRM Regulation. See also Articles 51 and 52 of the SRM Regulation and the "Decision of 24 June 2020 adopting the rules of procedure of the Board in its Plenary Session" available *here*.

6 "The decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and the National Resolution Authorities", publicly available *here*.

3 of the CoFra), exchanging without undue delay all the relevant information, the confidentiality of which should be maintained. Against this background, the SRB expects NRAs to act in accordance with Article 3(3), 84 of the BRRD (or 88 of the SRM Regulation) and 90(1) BRRD, which provide for the necessary structural arrangements and professional secrecy requirements to be respected when the same authority performs different functions.

2. The principle of independence: the SRM Regulation and the requirements of Article 3 BRRD

The overarching principle of independence, as framed under Article 47 of the SRM Regulation and further clarified in the Interinstitutional Agreement and in Article 4 of the Code of Conduct, plays an important role in the SRM and should therefore be interpreted having also regard to the requirements under Article 3 BRRD and especially in those circumstances where NRAs and the national competent authorities ("**NCAs**") are embodied within the same authority.

To the above purpose, the SRB takes into account the interpretation given by the European Commission[7] of "operational independence" between the resolution function and the "other functions", which requires that the resolution authority should be able to operate in an independent manner from the other functions carried out by the relevant authority. Whilst the resolution function can use information from other functions and give information to other functions (in both cases subject to the relevant confidentiality requirements), it should not be constrained in its actions by decisions that are taken by other functions of the relevant authority, e.g. if the resolution function is situated in the same institution that is also the supervisory authority, decisions of the supervisory function should not constrain the decisions of the resolution function. Operational independence is ensured when resolution functions (i) are structurally separated from other functions of the same authority; and (ii) have separate reporting lines.

By "structurally separated" it is meant that the staff working on the resolution function must be separate from the staff working on other functions (e.g. they are not the same people, have their own structure, separate departments or units, etc.). The separate structuring, however, does not mean that the different functions should not exchange information, consult each other and cooperate, whenever such exchange, consultation or cooperation is required by BRRD/SRM Regulation or is otherwise necessary in the circumstances.

Having "separate reporting lines" means that the staff involved in carrying out one of the functions attributed to the same authority should report to the hierarchy of the said authority through a different reporting line than those staff who work on any of the authority's other functions. In this respect, it does not seem compatible with Article 3 that the resolution function would be in the same

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7 EBA Interactive Single Rulebook, Q&A 2015_2074, available *here*.

reporting line as the supervisory or the macro-prudential functions. It should have its own reporting line to the hierarchy. The reporting lines to the hierarchy should be separate and the staff working on resolution issues should be separate from the staff working on other functions. The reporting lines may join at a certain level of management (ideally the level immediately below the highest decision making body, but this depends on the structure and internal organisation of the authority), so that the highest decision making body can receive a draft decision on resolution issues, which is the outcome of the consultation and coordination process between the relevant separate internal functions.

3. The SRB coordinating and information sharing function for the implementation of EBA Guidelines

Pursuant to Article 5(2) second subparagraph of the SRM Regulation the "*Board shall be subject* […] *to any guidelines and recommendations issued by EBA under Article 16 of the EBA Regulation*". Pursuant to the same provision, the SRB should also cooperate with the EBA in the application of Articles 25 to 30 of the EBA Regulation, which establish, among others, the obligation of the EBA to:

- participate actively and contribute to the development of and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to minimise the systemic impact of any failure (Article 25 of the EBA Regulation);
- adopt guidelines and recommendations which shall apply to deposit guarantee schemes (Article 26 of the EBA Regulation);
- contribute to developing methods for the resolution of failing financial institutions (Article 27 of the EBA Regulation);
- play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union (Article 29 of the EBA Regulation);
- organise and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes (Article 30 of the EBA Regulation).

Further, pursuant to Article 7(1) SRM Regulation, the SRB shall ensure the consistent implementation and smooth functioning of the SRM. When exercising the powers provided under the framework, the SRB strives to ensure the consistent application of high resolution standards (Article 7(4) of the SRM Regulation).

To that purpose, the SRB performs its tasks in close cooperation with the NRAs by developing uniform practices, standards and frameworks (Recital (7)

of the CoFra). High resolution standards should respect the objectives, conditions and general principles stemming from the SRM Regulation and the BRRD, including the implementing and delegated Commission acts, and should be in line with good practices as may be further elaborated in Legal instruments of the SRB and guidelines and recommendations of the EBA (Recital (8) of the CoFra).

The SRB is therefore mandated to exercise a coordinating function aimed, among others, to ensure consistency in the implementation of the SRM, taking into account any resolution-related guidelines developed by the EBA. This takes place in the context of Internal Resolution Teams ("**IRTs**"), which are established pursuant to Article 83(3) of the SRM Regulation and act as forum of day-to-day cooperation with the NRAs on bank-specific matters, but as well as by other means, such as the cooperation and exchanges with the NRAs with respect to SRB legal instruments (such as guidelines, general and specific instructions, warnings), decisions, and guidance notes, as laid down in Title II of the CoFra.

4. Cooperation between ECB (SSM) and SRB

Multiple provisions of Union law establish the legal basis for the cooperation between the ECB and the SRB for the performance of their respective tasks.

With specific focus on the provisions of the SRM Regulation, certain paragraphs of Article 30 SRM Regulation govern aspects of the cooperation between the ECB (SSM) and the SRM. In particular, the general cooperation obligation for the ECB and the SRB is contained in Article 30(2) of the SRM Regulation, which provides that:

"*In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks*".[8]

Further, Article 30(7) of the SRM Regulation enables the ECB and the SRB to conclude a Memorandum of Understanding (MoU) on how they cooperate under paragraphs 2 and 4 of the same provision in the performance of their resolution-related tasks under Union law.

The provision of Article 30(7) overlaps to a great extent with Article 34(5) of the SRM Regulation, which enables the same authorities to establish an MoU for the exchange of information between them. Therefore, both provisions have been

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[8] These general cooperation obligations in the SRM Regulation and the SSM Regulation are supplemented by Article 3(4) of BRRD.

implemented by means of a single comprehensive bilateral MoU for cooperation and exchange of information between the ECB and the SRB, which has been in place since 2015 and has been revised twice, with the latest revision published on 19 December 2022.[9]

As clarified in paragraph 1 thereof, the purpose of the MoU is to establish the general terms for cooperation,10 including the exchange of information, between the two parties in order to ensure and enhance efficient, effective and timely cooperation between them in the performance of their respective resolution tasks and supervisory tasks under Union law.[11]

The paragraphs of the MoU establish clear commitments taken by the SRB and the ECB to ensure a close cooperation in all relevant phases relating to the recovery and resolution, in particular in the recovery planning and resolution planning activities, early intervention and resolution phases, and the tasks of the Single Resolution Fund ("**SRF**").[12]

4.1. Information exchange

Focusing first on the exchange of information, by signing the MoU, the SRB and the ECB have committed to provide each other with all information necessary for the performance of their respective tasks, and they undertake to ensure that they provide each other access to information needed and available to them in their functions as supervisory and resolution authority respectively.[13]

To reduce the reporting burden on institutions, while ensuring the ready availability of relevant data for resolution purposes, and in accordance with Article 31(1) of the SRM Regulation, the MoU foresees that the SRB may access on a continuous basis all the supervisory information available to the ECB.

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9 Available *here*.

10 In accordance with its paragraph 2, the MoU covers the cooperation and the exchange of information between the SRB and the ECB in the areas where: (a) both have direct responsibilities with regard to entities in accordance with Article 4(1) of the SSM Regulation and Article 7(2), point (a), of the SRM Regulation respectively; (b) the ECB is exclusively competent to carry out, for prudential supervisory purposes, the tasks in accordance with Article 4(1), points (a) and (c), of the SSM Regulation in relation to the entities and groups under the direct responsibility of the SRB in accordance with Article 7(2), point (b), of the SRM Regulation, and Article 7(4), point (b) and Article 7(5) where the conditions for the application of those provisions are met.
Notwithstanding points (a) and (b), where explicitly provided, the MoU also covers the cooperation and the exchange of information between the SRB and the ECB in connection with any entity or group under the direct responsibility of a national resolution authority in accordance with Article 7(3) of the SRM Regulation. 2.2 Notwithstanding the paragraphs of thes MoU, both the SRB and the ECB may commonly agree on further cooperation and exchange of information on a regular or case-by-case basis, including in other areas, where deemed necessary by both Participants.

11 Paragraph 1.1. of the SRB-ECB MoU.

12 Paragraph 1.2. of the SRB-ECB MoU.

13 Paragraph 1.3. of the SRB-ECB MoU.

The detailed provisions on information exchange envisage the automatic sharing of a long list of data and information, which becomes even more thorough in the case of institutions in distress.[14] In so far as some available piece of information is not shared automatically, its communication requires the submission of a formal written request.[15] Finally, both parties have the duty to inform the other proactively of any information that it deems to be necessary for the performance of that other party's responsibilities.[16]

When it comes to the permissible use of the information and confidentiality requirements, any confidential information requested or received by any of the two authorities will be exchanged in compliance with relevant Union law, and will be used exclusively for lawful purposes and only in relation to the exercise by the parties of their respective duties and tasks.[17] The confidentiality of the information exchanged should be preserved as well.[18]

Further, if either the SRB or the ECB is considering disclosure to a third party of any confidential information received by any of the two under the MoU, they will seek to (a) obtain the express agreement in writing of the originating party to disclose the confidential information, (b) ensure that the disclosed confidential information, including personal data, will be used by the third party solely for the purposes for which the originating party gave its agreement, and (c) ensure that the third party is subject to professional secrecy requirements, including data protection requirements, equivalent to those applicable to them by the relevant Union law.[19] It should be noted, however, that, in light of the architectural structure of both the SSM and the SRM, the MoU clarifies that confidential information shared between the ECB and the SRB under the MoU may be forwarded to the Commission, the Council, the NCAs and NRAs without the need for additional consent from the originating party.[20]

4.2. Cooperation in the context of resolution planning phase, early intervention and resolution phases

Switching now the focus on the implementation of the principle of cooperation, it is implemented throughout all the different phases of the resolution-related

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14 Paragraph 7.2 and Annex of the SRB-ECB MoU.

15 Paragraph 7.3 and Annex of the SRB-ECB MoU.

16 Paragraph 7.4 of the SRB-ECB MoU.

17 Paragraph 13.2 of the SRB-ECB MoU.

18 Paragraph 13.3 of the SRB-ECB MoU. To this purpose, they will keep confidential all information obtained in accordance with Union law or under the MoU, directly or indirectly, if the information communicated has been qualified as confidential by the sending party or is related to an issue of a confidential nature. They will ensure that all persons under their responsibility dealing with or having access to confidential information are bound by the obligation of professional secrecy in accordance with the general principle of professional secrecy stated in Article 339 of the Treaty on the Functioning of the European Union and in compliance with relevant Union law.

19 Paragraph 13.4. of the SRB-ECB MoU.

20 Always paragraph 13.4. of the SRB-ECB MoU.

tasks framed under the SRM Regulation, i.e. the resolution planning phase, the early intervention phase, the resolution phase, the post-resolution phase.

Resolution planning activities represent the daily business of the SRB, and are conducted on a continuous basis. They require close and multiple interactions with the ECB on a quite large variety of topics.[21] Among others, the SRB and the ECB must consult each other with regard to: the content of recovery plans[22] and of resolution plans;[23] the decision to apply simplified obligations and waivers in recovery and resolution planning; the determination of the MREL;[24] the exercise of the power to prohibit certain distributions;[25] the resolvability assessment;[26] the identification of substantive impediments to resolvability[27] and the imposition of measures to address impediments to resolvability;[28] the calculation and collection of the *ex-ante* contributions to the SRF;[29] the on-site inspections necessary for the performance of their respective tasks under the SSM Regulation and the SRM Regulation.[30]

During the so-called early intervention phase, the ECB closely monitors, in cooperation with the SRB, the conditions of the concerned entity and its compliance with any measures mentioned in Article 13(1) of the SRM Regulation; the ECB provides the SRB with its assessment regarding early intervention conditions and measures, independently of whether an early intervention measure is taken, and, if applicable, the draft decision which would impose measures on the concerned entity to address a situation in which the conditions for early intervention are fulfilled, as referred to in Article 13(1) of the SRM, also after a hearing of the entity. The ECB continues to keep the SRB informed thereafter including by sending a notification once the relevant decision has been adopted pursuant to Article 13(1) of the SRM Regulation. When the SRB intends to impose requirements upon an Entity in the context of Article 13(2) and (3) of the SRM Regulation, the SRB will have due regard to the ECB's need to ensure the effectiveness of any measures taken by the ECB as referred to in Article 13(1) of the SRM Regulation. Finally, the SRB and the ECB should ensure that any additional measure mentioned in Article 13(4) of the SRM Regulation and any action of the SRB aimed at preparing for resolution in accordance with Article 13(2) and Article 13(3) of the SRM Regulation are consistent.[31]

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21 Paragraph 8.2. of the SRB-ECB MoU.

22 Article 10(2) of the SRM Regulation and Article 6(4) and Article 7(3) of the BRRD.

23 Article 8(2), 8(12), and 13(2) of the SRM Regulation.

24 Article 12(1) of the SRM Regulation. See also Article 12c(9), Article 12d(1), (3), (6), Article 12f(2), Article 12g(1) and Article 12j(2) of the SRM Regulation.

25 Article 10a SRM Regulation, in particular paragraphs (2) and (3) thereof.

26 Article 10(1) and (3) of the SRM Regulation.

27 Article 10(7) and (10) of the SRM Regulation.

28 Article 10(10) and (11) of the SRM Regulation.

29 Article 70(2) of the SRM Regulation.

30 Article 36 of the SRM Regulation and Article 12 of the SSM Regulation.

31 Paragraph 8.3, (a)-(d) of the SRB-ECB MoU.

In the context of the actual resolution phase, the cooperation between the ECB and the SRB becomes even more intense and frequent. In that context, among others, the ECB shall consult the SRB before making a 'failing or likely to fail' assessment with regard to an entity or group[32] in accordance with Article 18(1) of the SRM Regulation[33] and it communicates the outcome of the said assessment the SRB without delay. Pursuant to Article 18(1), 2nd subparagraph of the SRM Regulation, the SRB in its executive session may also make such an assessment, after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make the FOLTF assessment. To these purposes, the ECB and the SRB should exchange any relevant information.[34] Similarly, pursuant to Article 18(1), 4th subparagraph of the SRM Regulation, cooperation between the SRB and the ECB takes place for the purpose of assessing the condition under Article 18(1)(b). The SRB shall also communicate an assessment that the conditions for resolution mentioned in Article 18(1) of the SRM Regulation are met in relation to entities of group referred in Article 7(3) thereof.[35]

Cooperation in the context of the resolution phase also entails exchanges and consultations for the purpose of: (i) assessing the conditions mentioned in Article 21(1)(a), (c) and (d) of the SRM Regulation concerning the exercise of the write-down or conversion powers; (ii) assessing the business reorganisation plan in in accordance with Article 27(16) of the SRM Regulation the SRB; (iii) exercising the so-called moratorium powers in accordance with Article 33(a) of the BRRD.[36]

Moreover, cooperation between the SRB and the ECB takes place also in the so-called implementation phase (i.e. the phase following the adoption of the resolution scheme, for the purpose of monitoring the implementation of the resolution actions set therein), in the context of the SRB and ECB's participation in supervisory colleges and (European) resolution colleges (and any related joint

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32 See also Article 18(1a) of the SRM Regulation for central bodies and their affiliated credit institutions.

33 This provision has been recently interpreted by the Court of Justice and the General Court. Reference is made to Judgment of 6 May 2021, *ABLV Bank v ECB and Others*, C-551/19 P and C-552/19 P, EU:C:2021:369 and Judgment of 7 December 2022, *PNB Banka AS v ECB*, T-230/20, EU:T:2022:782.

34 See also the EBA 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), paragraphs 36 to 42.

35 Paragraph 8.3, (e)-(j) of the SRB-ECB MoU.

36 Paragraph 8.3, (k)-(n) of the SRB-ECB MoU.

decision-making process in accordance with Articles 88 and 89 of the BRRD),[37] as well as in the context of cooperation with third-country authorities.[38]

Finally, in the context of the decision-making, the ECB participates as an observer to the SRB Executive and Plenary Sessions meetings, while the SRB Chair is also invited as observer in the meetings of the ECB Supervisory Board for items relating to the tasks and responsibilities of the SRB.[39]

5. Cooperation and information sharing with NRAs

Article 88 of the SRM Regulation states that the Members of the Board, including the four permanent Members and the Vice-Chair, as well as the SRB staff and staff exchanged with or seconded by participating Member States carrying out resolution duties, are subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislations, even after their duties have ceased.

In particular: "*They shall* […]*be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with their functions under this Regulation, to any person or authority,* […]".[40]

Those or equivalent requirements shall also apply to: (i) potential purchasers contacted in order to prepare for the resolution of an entity pursuant to Article 13(3) of the SRM Regulation;[41] individuals who provide any service, directly or indirectly, permanently or occasionally, including officials and other persons authorised by the Board or appointed by the national resolution authorities to conduct on-site inspection;[42] (iii) observers who attend the Board's meetings and observers from non-participating Member States who take part in internal resolution teams.[43]

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37 As supplemented by the Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution, C/2016/1691, OJ L 184, 8.7.2016, 1-71. See paragraph 11 of the SRB-ECB MoU.

38 Paragraph 12 of the SRB-ECB MoU and the bilateral cooperation agreement established by the SRB with certain third-country authorities, where information exchanged between the SRB and the ECB is ensured in a privileged manner: available here. For further details, please refer to section 5. of this paper.

39 Article 30(4) of the SRM Regulation and paragraph 5 of the ECB-SRB MoU.

40 Article 88(1) of the SRM Regulation.

41 Second subparagraph of Article 88(1) of the SRM Regulation.

42 Article 88(2) of the SRM Regulation.

43 Article 88(3) of the SRM Regulation.

The same standing of professional secrecy applies, among others, to all the resolution authorities, competent authorities and EBA, competent ministries, bodies which administer deposit guarantee schemes, bodies which administer investor compensation schemes, the body in charge of resolution financing arrangements, central banks and other authorities involved in the resolution process, special managers or appointed temporary administrators.[44]

It has to be noted, however, that the duty of professional secrecy outlined in Article 88 of the SRM Regulation does not lead to an absolute prohibition on disclosure by the SRB of confidential information covered by the obligation of professional secrecy. In this respect, Article 88 of the SRM Regulation stipulates that the SRB shall be authorised to exchange/disclose confidential information where the disclosure:

– "*[…] is in the exercise of their functions under this Regulation or in summary or collective form such that entities referred to in Article 2 cannot be identified or with the express and prior consent of the authority or the entity which provided the information*";

– "*[…] is due for the purpose of legal proceedings*".

Furthermore, Article 88(6) of the SRM Regulation recites that: "[…] *the Board, the Council, the Commission, the ECB, the national resolution authorities or the national competent authorities, including their employees and experts, [shall not be prevented] from sharing information with each other and with competent ministries, central banks, deposit guarantee schemes, investor compensation schemes, authorities responsible for normal insolvency proceedings, resolution and competent authorities from non-participating Member States, EBA, or, subject to Article 33,*[45] *third-country authorities that carry out functions equivalent to those of a resolution authority, or, subject to strict confidentiality requirements, with a potential purchaser for the purposes of planning or carrying out a resolution action*".

Coherently, pursuant to Article 30(1) of the SRM Regulation, "[w]*ith regard to any information received from the Board, the members of the Council, the Commission, as well as the Council and the Commission staff shall be subject to the requirements of professional secrecy laid down in Article 88* [SRM Regulation]".

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44 Please refer in particular to Article 84(1) and (3) BRRD.

45 The provision of the SRM Regulation concerning the recognition and enforcement of third-country resolution proceedings. The reference to Article 33 SRM Regulation is not clear, since this provision empowers the SRB to issue a recommendation on the recognition and enforcement of third-country resolution proceedings. It does not contain rules on the exchange of confidential information. Therefore, this note takes the similar BRRD provision as a starting point. In addition, this reference might be a typo and that it aimed to refer to Article 32 of the SRM Regulation. Article 32(1) of the SRM Regulation clearly makes a cross reference to Articles 88-92 BRRD and Article 88(3) cross-refers to Article 98 BRRD.

More in general, the issue of cooperation and prompt information exchange is of key importance for the effective and consistent functioning of the SRM, especially in light of the variety of actors (both at European and national level) involved in the resolution process,[46] which includes NRAs, the Commission, the Council, the ECB and national competent authorities, the EBA and, in the context of groups having a cross-border dimension, also resolution authorities and competent authorities of non-participating Member States, as well as third-country authorities.

In fact, Article 30(2) SRM Regulation stipulates that, with regard to the exercise of the responsibilities allocated to them under the Regulation, "[…] *the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks*".

Cooperation within the SRM is regulated in Article 31 SRM Regulation, which instructs the SRB to perform its tasks in close cooperation with NRAs and, to this purpose, to approve and make public a framework to organise the necessary practical arrangements (i.e. the CoFra), the adoption of which falls within the responsibility of the SRB in its Plenary Session (see Article 50(1)(q) SRM Regulation), which includes representatives of all NRAs as voting members. The CoFra builds on the provisions of the SRM Regulation on cooperation and decision-making. It enunciates the general principles of cooperation between the SRB and the NRA for the performance of their respective tasks and the exercise of their powers. Among others: the NRAs must support the SRB in the performance of the tasks concerning entities under the direct remit of the latter;[47] they must inform in advance and coordinate closely with the SRB before the final adoption of measures in respect of entities under their direct responsibility (the so-called LSIs);[48] the SRB and the relevant NRAs shall cooperate closely, including keeping each other informed in a timely manner, in the preparation of their participation in resolution colleges, European resolution colleges and other groups or colleges as referred to in Article 88(6) of the BRRD.[49]

Further, building up on various provisions of the SRM Regulation,[50] the CoFra establishes that, for the smooth functioning of the SRM, the cooperation between the SRB and the NRAs should be full and transparent, requiring a constant flow of information from the former to the latter, and *vice versa*, for the performance of their respective tasks in each one of the different phases framed by the SRM Regulation (resolution-planning phase, early intervention and crisis

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46 Here in the broader sense, including both the resolution planning phase and the run-up to resolution.

47 Article 3(2) of the CoFra.

48 Article 3(3) and Articles 32-35 of the CoFra.

49 Article 3(4) and Articles 36a-38 of the CoFra.

50 See for instance (with no intention of being exhaustive) Articles, 7(3), 8(4), 11, 12(2), 28(1), 29, 30(2), 34(3) and (6), 36 of the SRM Regulation.

preparedness phase, resolution and post resolution phase).[51] At the same time, in accordance with Article 88 of the SRM Regulation/Article of the 84 BRRD, as transposed in the national legislation, the SRB and the NRAs should ensure that the confidentiality of information exchanged is maintained.

The above principle plays an important role also with regard to the cooperation with third-country authorities and, usually, they are clearly reflected in the non-binding cooperation arrangements which, in accordance with Article 32(4) of the SRM Regulation, the SRB may conclude, on behalf of the NRAs, in line with framework cooperation arrangements concluded by the EBA pursuant to 97(2) of the BRRD.

In light of the above, and the FSB Key Attributes of Effective Resolution Regime for Financial Institutions, the SRB is entitled to enter into two different types of cooperation instruments: (bilateral) general cooperation arrangements ("**CAs**") with third countries' resolution authorities, and (multilateral) institution-specific cooperation arrangements ("**CoAgs**") underpinning the functioning of crisis management group. In line with Article 97(5) of the BRRD, CAs and CoAgs share the same purpose: they establish general principles of cooperation, exchange of information and assistance regarding resolution of banks with cross-border operations. They allow the SRB and the signatories third-country authorities to exchange confidential information and cooperate both during normal business-as-usual circumstances and during periods of financial stress.[52]

In particular, the CAs and the CoAgs set out the information sharing framework and confidentiality requirements applicable to all authorities which are signatories/parties. As a rule, each signatory seeking ad-hoc confidential information originated by another signatory/party will make a request in writing to the latter, specifying the information sought, the purpose for which it is required, and the urgency of the request. Each signatory/party receiving a request for confidential information will make all reasonable efforts to respond in a timely manner, taking into consideration the urgency of the request.

In accordance with Article 88(1) of the SRM Regulation and Article 98(2) of the BRRD, all the cooperation instruments entered by the SRB establish the possibility to onward share confidential information with authorities that are not signatories/parties, subject to the prior written consent from the signatory/party that originated such confidential information.

In line with the applicable legal framework, a first exception to the above rule concerns situations where a party to the CA/CoAg is legally required to disclose confidential information to another authority (which is not a signatory/party),

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51 Reference is made in particular to Articles 1(a)(iii) and (b), 3(7), 9, 10, 15, 28(2) and (4), 30, 31(2), 35, 41(7) and 42 of CoFra.

52 In both cases, for concluding CAs and CoAgs, the SRB assesses the equivalence of the confidentiality and professional secrecy regimes of all the concerned third-country authorities as required by Articles 84 and 98 of the BRRD and Article 88 SRM Regulation. For an overview of the CAs signed so far by the SRB with certain third-country authorities see *here*.

requiring the concerned party to inform in advance the originating authority and, eventually, to take reasonable steps to resist disclosure.

Due to the unique nature and features of the SRM, a second exception to this rule usually applies also to the sharing of confidential information by the SRB within the SRM with relevant NRAs on a need-to-know basis: for such exchanges, a notification/prior information requirement to the originating authority applies [i.e. the SRB is not required to seek for the prior written consent of the originating authority]. Such exception applies also in all the instances where the SRB has to share confidential information originated by another signatory/party with the ECB, the European Commission and the Council of the European Union, for the performance of their functions under the SRM Regulation. This provision is included in all bilateral cooperation arrangements.

In addition, of particular importance for the mutual and daily cooperation and exchange of all the relevant information are the IRTs which, as briefly mentioned also in section III above, pursuant to Article 83(3) of the SRM Regulation are composed of SRB's staff members as well as staff of the NRAs (eventually, where appropriate also observers from non-participating Member States).[53]

Finally, similarly to the considerations expressed above when describing the SRB-ECB cooperation and mutual exchange of information, it should be noted that the representative of the NRAs play also an important role in the formal decision-making procedures of the SRB, because they are entitled to attend the meetings of the relevant decision-making bodies (Extended Executive Session and Plenary Session) as voting members.[54]

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[53] Articles 24-26 of the CoFra further detail the features of IRTs, the scope of their activities and staffing.

[54] See footnote 2 above.

European Central Bank

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Summary. 1. Introduction – 2. Cooperation between ECB and SRB – 2.1. ECB and SRB responsibilities within the SSM and the SRM – 2.2. Legal basis for the cooperation – general provisions as well as specific cooperation and information duties – 2.2.1. General cooperation obligations – 2.2.2. Specific cooperation obligations – 2.2.3. Cooperation in the context of resolution planning – 2.2.4. Cooperation in the context of a resolution procedure – 2.2.5. Cooperation after the SRB's decision whether or not to resolve an entity – 2.3. Operational aspects of day-to-day ECB-SRB cooperation – 2.4. Accountability of the ECB and the SRB – 2.5. Judicial review of the acts of the ECB and the SRB – 2.6. ECB cooperation with the Commission and the EBA in the context of resolution – 3. ECB Opinions – 3.1. ECB opinions prior to the adoption of the BRRD – 3.2. Economic and Monetary Union and Banking Union: the ECB's advisory role – 3.3. National laws within the Banking Union – key themes in ECB opinions

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1. Introduction

No assessment of resolution authorities and their institutional settings in EU Member States would be complete without also considering the European dimension of supervision and resolution, in particular the roles of the European Central Bank (ECB) and the Single Resolution Board (SRB), which form the first two pillars of the Banking Union.

This section focuses, first, on the role of the ECB as the single European banking supervisor, outlining the framework for cooperation between the ECB and the SRB. The section elaborates on the allocation of responsibilities between the ECB and SRB and explains both the legal framework and the operational aspects of day-to-day ECB-SRB cooperation. It also considers the accountability arrangements for the ECB and SRB and judicial review of their actions. In addition, the section outlines the framework for cooperation between the ECB and the Commission and the EBA in the context of resolution.

Second, this section examines the ECB's advisory role under Articles 127(4) and 282(5) of the TFEU, which has played a role in shaping the development of national resolution authorities, and Union and national resolution frameworks more broadly, both before and after the adoption of the Bank Recovery and Resolution Directive (BRRD), and the Single Resolution Mechanism (SRM). ECB opinions have sought to provide guidance on the optimal design of resolution frameworks, ensuring a high level of cooperation and information exchange, with a strong emphasis on the need for single European banking supervision and a common deposit insurance and resolution framework. Moreover, ECB opinions have provided advice to ensure the compliance of resolution frameworks with Treaty-based principles, such as central bank independence and the prohibition on monetary financing.

2. Cooperation between ECB and SRB

The ECB is a Union institution established in the Treaties. The Single Supervision Mechanism Regulation (SSMR)[1] conferred on the ECB prudential supervisory tasks, which were previously exercised by national competent authorities, in accordance with the Single Rulebook.

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[1] 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 (OJ L 287, 29.10.2013, 63).

The Single Resolution Mechanism (SRMR)[2] established the SRB as a Union agency[3] which has been conferred with drawing up the resolution plans and adopting all decisions relating to resolution for the relevant credit institutions.[4]

More generally, resolution authorities were created in an already well-developed supervisory landscape. Resolution authorities capitalise on this landscape. It is therefore no surprise that, by design, resolution authorities are called upon to cooperate very closely with competent authorities which are responsible for day-to-day supervision of the relevant credit institutions. This also translates into the specific, very comprehensive cooperation between the ECB and the SRB described below.

2.1. ECB and SRB responsibilities within the SSM and the SRM

The scope of ECB and SRB responsibilities within the SSM and the SRM is not fully symmetrical. Both the ECB and the SRB have direct responsibilities for certain entities and in relation to certain tasks. The delineation of responsibilities between the ECB and the SRB and the respective national (competent and resolution) authorities is made in the SSMR and the SRMR, respectively. While the ECB is the supervisory counterpart for many of the SRB's tasks, there are also some cases in which the SRB cooperates with the relevant national competent authorities (NCAs). In this regard it is useful to briefly describe the delineation of responsibilities within the SSM and the SRM.

Within the SSM, the ECB is responsible for the direct supervision of significant credit institutions (SIs) with regard to their day-to-day supervision.[5] This entails that the ECB is also competent for the failing-or-likely-to-fail (FOTLF) assessment for Sis.[6] Conversely, with regard to all less significant credit institutions (LSIs) the NCAs are responsible for day-to-day supervision. Likewise, NCAs are responsible for the adoption of crisis management measures in relation to LSIs as well as for conducting the assessment that an LSI is FOLTF.[7]

At the same time, the ECB is exclusively competent for the tasks of granting and withdrawal of authorisations as well as for the assessment of the acquisition of qualifying holdings for all credit institutions in the SSM, except in the case of bank resolution.[8]

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2 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 (OJ L 225, 30.7.2014, 1).

3 Article 42(1) of the SRMR.

4 Article 7(2) of the SRMR.

5 Article 6(4) of the SSMR.

6 The SRB may also conduct the FOLTF assessment, subject to the procedure described in the second subparagraph of Article 18(1) SRMR.

7 ECB Opinion CON/2017/47, paragraph 6.

8 Article 4(1)(a) and (c) of the SSMR.

The ECB also collects supervisory fees from all credit institutions in the SSM.[9]

Within the SRM, the distribution of competences is slightly different. Whereas the SRB is directly responsible for all SIs directly supervised by the ECB,[10] it is also responsible for resolution and resolution planning for additional, less significant entities, from several categories.[11] In addition, the SRB has certain direct responsibilities for all credit institutions in the SSM, for example with regard to ex-ante contributions[12] and administrative expenditures.[13]

This asymmetry in the competences of the ECB and the SRB entails a more complex landscape for cooperation arrangements, since the ECB is not always the main supervisory counterpart of the SRB.[14] And in relation to some LSIs for which the ECB exercises exclusive competences, it is the national resolution authorities (NRAs) (and not the SRB) which draw up the resolution plans and adopt resolution decisions.

2.2. Legal basis for the cooperation – general provisions as well as specific cooperation and information duties

The legal bases for the cooperation between the ECB and the SRB for all of their relevant tasks are well-established in Union law. The legal bases are spelled out in general provisions, as well as in specific cooperation obligations in relation to specific tasks. This cooperation comprises both the procedural interaction in the context of specific tasks, as well as the exchange of relevant information.

2.2.1. General cooperation obligations

The general cooperation obligation for the ECB and the SRB is contained in Article 30(2) of the SRMR, which provides that:

> "*In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks*".

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9 Article 30 of the SSMR.

10 Article 7(2)(a) of the SRMR.

11 See Article 7(2)(b), Article 7(4)(b) and Article 7(5) of the SRMR. Broadly, these can be referred to as other cross-border LSI groups, LSIs for which the SRB has decided to take over direct responsibility and LSIs for which a Member State has requested the SRB to take over direct responsibility. In addition, in accordance with Article 7(3) of the SRMR, if the resolution action requires the use of the Single Resolution Fund, the SRB shall adopt the resolution scheme.

12 Article 70 of the SRMR.

13 Article 65 of the SRMR.

14 See, for example, ECB Opinion CON/2017/47, paragraph 6.

Also, the SSMR, which confers on the ECB its prudential supervisory tasks, enshrines a cooperation obligation vis-à-vis resolutions authorities, in Article 3(4):

"*The ECB shall cooperate closely with the authorities empowered to resolve credit institutions, including in the preparation of resolution plans*".

These general cooperation obligations in the SRMR and the SSMR are supplemented by Article 3(4) of the BRRD,[15] which provides that:

> "*Member States shall require that authorities exercising supervision and resolution functions and persons exercising those functions on their behalf cooperate closely in the preparation, planning and application of resolution decisions, both where the resolution authority and the competent authority are separate entities and where the functions are carried out in the same entity*".

These general cooperation obligations are also supplemented by Article 4(8) of the CRD,[16] which sets out this general cooperation duty:

> "*Member States shall ensure that where authorities other than competent authorities have the power of resolution, those other authorities cooperate closely and consult the competent authorities with regard to the preparation of resolution plans and in all other instances where such cooperation and consultation is required by this Directive, by Directive 2014/59/EU or by Regulation (EU) No 575/2013*".

These provisions, as well as other provisions of the CRD and BRRD, apply to the cooperation between the ECB and the SRB by virtue of those provisions being part of Union directives within the substantive field of the ECB's and SRB's tasks, as well as by virtue of the explicit prescriptions of Article 4(3) of the SSMR and Article 5(1) of the SRMR.

Also, in the context of general cooperation obligation, it should be mentioned that the CRR[17] sets out a general duty to exchange information in Article 2(4), which provides that:

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15 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 (OJ L 173, 12.6.2014, 190).

16 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, 338).

17 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, 1).

> "*For the purpose of ensuring compliance within their respective competences, the Single Resolution Board established by Article 42 of Regulation (EU) No 806/2014 of the European Parliament and of the Council, and the European Central Bank with regard to matters relating to the tasks conferred on it by Council Regulation (EU) No 1024/2013, shall ensure the regular and reliable exchange of relevant information*".

Finally, one should note the general provision of Article 430(10) of the CRR, aiming to avoid a dual reporting burden, which provides that competent authorities, resolution authorities and designated authorities shall make use of data exchange wherever possible to reduce reporting requirements.

In addition to these general cooperation obligations, a number of additional provisions establish the possibility and, in some cases, the duty for the ECB and the SRB to exchange information, including confidential information,[18] which is necessary for the performance of their respective tasks.[19]

These explicit general legal bases for cooperation and exchange of information are supplemented in the SRMR by the provisions inviting the ECB and the SRB to conclude a Memorandum of Understanding (MoU) on how they cooperate.[20] A comprehensive bilateral MoU for cooperation and exchange of information between the ECB and the SRB has been in place since 2015 and has been revised twice, with the latest revision published on 19 December 2022.[21] The MoU covers, among others, the matters of institutional representation, information exchange, and cooperation in various matters. With regard in particular to information exchange, the MoU contains an Annex listing the information which is automatically exchanged between the ECB and the SRB and introduces a streamlined framework for efficient exchange of further relevant information.[22]

2.2.2. Specific cooperation obligations

In addition to these general provisions on cooperation and exchange of information, a number of additional specific provisions in various Union acts have spelled out the cooperation duties between the ECB and SRB in relation to specific tasks. While it was noted that the SRB is an agency, rather than an institution, the ECB cooperates and exchanges information with the SRB in accordance with Union law.

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18 See in this regard recital 117, Article 34(5) and Article 88 of the SRMR. See also Article 84 of the BRRD and Article 56 of the CRD.

19 See for example recital 93, Article 34(1) and Article 34(6) of the SRMR. See also Article 90(1) of the BRRD.

20 Article 30(7) and Article 34(5) of the SRMR.

21 Available *here*.

22 See in this regard Paragraph 13.4 of the ECB-SRB MoU.

The main legislative sources of the cooperation duties are the provisions of the SRMR, the BRRD, the Delegated and Implementing Acts adopted by the Commission as well as the relevant EBA Guidelines. Also, the CRD and CRR set out specific cooperation obligations. For the interpretation of those provisions also the relevant case-law from Union courts is to be taken into account.

In addition to the above-mentioned legislative provisions, the bilateral MoU between the ECB and the SRB governs the cooperation between the two authorities in relation to their specific tasks. The bilateral MoU is in place between the ECB and the SRB. This does not mean that the cooperation introduced by the MoU cannot benefit also NCAs and NRAs. For example, all the information shared under the MoU may be forwarded to NCAs and NRAs without the need for additional consent from the originating participant.[23]

Some examples of the specific cooperation obligations between the ECB and the SRB are discussed in the specific chapters below. They are grouped in three temporal stages – the resolution planning stage, the resolution procedure and the period after the decision in the resolution procedure. Given the large number of specific cooperation obligations in various contexts, the below may only be a non-exhaustive presentation of the most prominent examples of cooperation arrangements.

2.2.3. Cooperation in the context of resolution planning

The resolution planning stage is an important cooperation stage between the ECB and the SRB. Cooperation takes place day-to-day, meaning that it is in general conducted continuously and irrespective of specific crisis situations. The cooperation in the resolution planning stage encompasses multiple credit institutions and various topics. Below is a non-exhaustive presentation of the cooperation arrangements, organised by topic.

(a) Assessment of recovery plans

The ECB and the SRB cooperate in the context of the recovery planning. The ECB is required to transmit to the SRB the recovery plans which the ECB receives from Sis,[24] with the SRB verifying the presence of any actions in the recovery plan which may adversely impact the resolvability of the institution.

(b) Drafting of resolution plans

The ECB is consulted by the SRB on the draft resolution plans for Sis.[25] This is a formal consultation requirement. The ECB is required to provide the SRB with all information necessary to update the resolution plan.[26]

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23 See in particular Paragraph 7.2.2 of the ECB-SRB MoU.

24 Article 10(2) of the SRMR and Article 6(4) and Article 7(3) of the BRRD.

25 Article 8(2) of the SRMR.

26 Article 8(12) and Article 13(2) of the SRMR.

(c) Resolvability assessment

In the context of resolution planning, and more specifically in the conduct of resolvability assessment,[27] in the identification of substantive impediments to resolvability,[28] and in the imposition of measures to address impediments to resolvability,[29] the ECB is also consulted by the SRB.

(d) Setting of a minimum requirement for own funds and eligible liabilities (MREL)

The ECB is consulted on the MREL setting by the SRB.[30] Also, with regard to MREL, the ECB is involved in those situations where the SRB contemplates the prohibition of distributions because an SI fails to meet the combined buffer requirement, when considered in addition to MREL.[31]

(e) Approval of distributions and reduction of MREL eligible liabilities

The ECB and the SRB have been conferred with the task to control, respectively, the reduction of own funds and MREL eligible liabilities. With regard to prior permission for distributions on instruments, the ECB consults the SRB.[32] With regard to the permission to reduce MREL eligible instruments, the SRB consults the ECB.[33]

(f) Early intervention

The ECB is required to notify the SRB upon determining that the conditions for early intervention have been met,[34] which in turn permits the SRB to start preparing for resolution.[35] The ECB provides the SRB with all of the information necessary in order to update the resolution plan and to prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution.[36]

(g) Ex-ante contributions to the SRF

Another important aspect of resolution planning is the calculation and collection of ex-ante contributions to the SRF. The ECB is consulted by the SRB before the calculation is completed.[37] The ECB is also required to

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27 Article 10(1) and (3) of the SRMR.

28 Article 10(7) and (10) of the SRMR.

29 Article 10(10) and (11) of the SRMR.

30 Article 12(1) of the SRMR. See also Article 12c(9), Article 12d(1), (3), (6), Article 12f(2), Article 12g(1) and Article 12j(2) of the SRMR.

31 Article 10a(2) and (3) of the SRMR.

32 Article 73(2) of the CRR.

33 Article 78a(1) of the CRR.

34 Article 27(2) of the BRRD and Article 13(1) of the SRMR.

35 Article 13(2) of the SRMR.

36 Article 13(2) of the SRMR.

37 Article 70(2) of the SRMR.

supply the SRB with the necessary underlying data to calculate the ex-ante contributions.[38]

(h) Cooperation in relation to decision-making for banking groups

Union law provides for a number of joint decisions to be taken by the resolution authorities responsible for the different entities in a cross-border banking group. Examples of such joint decisions include the adoption of a group resolution plan,[39] the decisions to address or remove impediments to resolvability,[40] the setting of MREL for group entities[41] and the adoption of a group resolution scheme.[42] The ECB, which is the consolidating supervisor for many banking groups with SSM presence, would be involved in the respective joint decision processes, as required by the respective BRRD provisions.

While joint decisions are taken by the relevant authorities and not by the resolution college as a separate entity, the latter is still an important forum where also the ECB and the SRB discuss matters and cooperate. The modalities of such cooperation are in particular detailed in the written arrangements adopted by the respective resolution college.[43]

Finally, it should be mentioned that the consolidating supervisor may also decide to involve the group level resolution authority in the college of supervisors in specific emergency situations.[44]

2.2.4. Cooperation in the context of a resolution procedure

The cooperation in the conduct of the resolution procedure is mandated by SRMR and has also been developed in the Union courts' case-law. In accordance

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38 See Article 19 of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ L 11, 17.1.2015, 44).

39 Article 13(4) of the BRRD.

40 Article 18(2) of the BRRD.

41 Article 45h(1) of the BRRD.

42 Article 91(7) and Article 92(3) of the BRRD.

43 Article 54 of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ L 184, 8.7.2016, 1).

44 Article 18(4) of Commission Delegated Regulation (EU) 2016/98 of 16 October 2015 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards for specifying the general conditions for the functioning of colleges of supervisors (OJ L 21, 28.1.2016, 2) and Article 13(4) of Commission Implementing Regulation (EU) 2016/99 of 16 October 2015 laying down implementing technical standards with regard to determining the operational functioning of the colleges of supervisors according to Directive 2013/36/EU of the European Parliament and of the Council (OJ L 21, 28.1.2016, 21).

with Article 18(1) of the SRMR, the ECB conducts the assessment that an entity is failing or likely to fail (FOLTF) and the ECB may also assess the second resolution condition – whether there are alternative measures to prevent the failure of the institution within a reasonable timeframe. The SRB may also conduct the FOLTF assessment, subject to the procedure described in the second subparagraph of Article 18(1) of the SRMR. In accordance with the relevant EBA Guidelines, the ECB and the SRB should exchange information in the context of the conduct of the FOLTF assessment.[45]

The Court of Justice has clarified the respective roles of the ECB and the SRB in relation to the FOLTF assessment. In particular, the Court of Justice has explained that "as regards the first [resolution] condition, the second subparagraph of Article 18(1) of Regulation No 806/2014 gives the ECB a primary – albeit not exclusive – role, since it is the ECB which, as a general rule, is required to carry out FOLTF assessments".[46] Building on this ruling, the General Court has explicitly confirmed, in a specific resolution case, that the SRB was entitled to rely on the ECB's assessment to conclude that the first resolution condition has been met.[47]

Also, the assessment of the substantive conditions for the FOLTF assessment hinges on the cooperation with the supervisor. The consideration that a bank is breaching prudential requirements in a way that would justify withdrawal of the banking licence[48] is one of the four FOLTF circumstances. It is also in view of the existence of such consideration that the ECB is required to consult the SRB before withdrawing the licence of an SI,[49] so as to enable the SRB to verify that a resolution is not a more appropriate course of action. It should be clarified, as the General Court has done, that with regard to SIs the ECB is required to coordinate on these points not with NRAs, but with the SRB.[50]

Beyond the circumstance in Article 18(4)(a) of the SSMR, also the assessment of the circumstances in letters (b) and (c) of Article 18(4) of the SRMR necessitate access to supervisory data and analyses.

In terms of decision-making, the ECB is fully involved as an observer to the SRB Executive Sessions meeting, where the decisions on a resolution procedure are made.[51] Whether this concerns the adoption of a resolution scheme by the SRB, to be further submitted to the Commission, or of a decision that the resolution

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45 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), paragraphs 36 to 42.

46 Judgment of 6 May 2021, *ABLV Bank v ECB and Others*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 62.

47 Judgment of 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429, paragraphs 103 to 108.

48 Article 18(4)(a) of the SRMR.

49 Article 14(5) of the SSMR.

50 Judgment of 7 December 2022, *PNB Banka AS v ECB*, T-230/20, EU:T:2022:782, paragraph 53.

51 Article 43(3) of the SRMR.

conditions are not met, the ECB participates in the decision-making procedure, albeit without a vote. The SRB Chair is also invited as observer in the meetings of the ECB Supervisory Board for items relating to the tasks and responsibilities of the SRB.[52]

2.2.5. Cooperation after the SRB's decision whether or not to resolve an entity

The SRB and ECB cooperate also after the SRB's decision whether or not to resolve an entity.

In case a resolution scheme has been adopted, the ECB's and the SRB's cooperation is determined by the resolution tools that are being applied and the modalities of their implementation. In particular, the SRB and NRAs may require in certain cases the support and cooperation from the supervisor in the implementation of resolution tools.

First, with regard to the establishment of a bridge bank, the ECB, as the competent authority for granting of authorisations in the SSM, is the counterpart of the SRB and the NRAs for implementing the resolution scheme. Bridge banks have to be established within a short timeframe, which emphasises the need to ensure smooth cooperation. In fact, the BRRD even recognises that it may be necessary to temporarily waive certain requirements for a short period of time at the beginning of the operation of a bridge bank.[53] For this purpose, the resolution authority must submit a request in that sense to the ECB.

Second, certain resolution actions could also lead to the situation where persons, who were previously not holders of a qualifying holding, do acquire a qualifying holding in an SSM credit institution. One example is the application of the bail in tool, where through conversion, certain creditors of the credit institution can become equity holders. Another example is the application of the sale of business tool, where the credit institution under resolution is sold to a purchaser.[54] A third example relates to the initial setting up of a bridge institution[55] as well as its subsequent sale.[56] At both stages of the existence of a bridge institution, a qualifying holding may be acquired by one or several persons. With regard to these examples, while Article 4(1)(c) of the SSMR confers on the ECB exclusive task for the assessment of the acquisition of qualifying holdings in credit institutions in the SSM, that same provision also explicitly excludes cases of bank resolution. This entails that if the qualifying holding is acquired in an entity which is deemed to be an 'entity under resolution' in accordance with BRRD, the NCA will be competent to conduct the qualifying holding assessment. This is the case, for example, in the application of a bail in or of a sale of business

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52 Article 30(4) of the SRMR and Paragraph 5 of the ECB-SRB MoU.

53 See Article 41(1) of the BRRD.

54 See Article 38 of the BRRD.

55 See Article 40 of the BRRD.

56 See Article 41(2) of the BRRD.

which have resulted in a newly acquired qualifying holding in the institution under resolution. On the other hand, a bridge bank is not an institution under resolution and therefore this limitation does not apply.

Third, the ECB and the SRB may need to cooperate in the period after the implementation of the sale of business tool. While the sale is effected by the resolution scheme, the sold entity usually will continue to be the subject of ECB supervision and of the SRB's powers. The ECB and the SRB will both organise cooperation along the usual lines, as long as the SI continues to exist. In some cases[57] the entity will be merged into an existing entity and will cease to be a separate SI. Yet, in other cases, the sold entity may be reclassified as an LSI.

A specific case of cooperation concerns the period after an SRB determination that the conditions for resolution are not met. Subsequent to such determination the SRB and ECB cooperation is not explicitly regulated by the law and is arguably more limited in scope. The entity subject to the SRB's determination remains under the ECB's supervision, as long as it retains its banking licence. However, the SRB's responsibilities are limited to the collection of contributions to the SRF.[58] The period is in practice limited in time, as shown by recent examples.[59]

2.3. Operational aspects of day-to-day ECB-SRB cooperation

In practice the ECB and the SRB cooperate in an operationally efficient way, as pinpointed in the ECB-SRB MoU.

Communication between the participants takes place directly between the relevant units and responsible persons[60] also on the basis of a list of relevant units and responsible persons as well as general contact points to which requests may be directed.[61]

The ECB and the SRB also strive to align the annual work cycles on recovery planning and resolution planning to the maximum extent possible.[62]

It should also be mentioned that the ECB and the SRB have established enhanced cooperation arrangements for the so-called Priority Entities.[63] These cooperation arrangements are described in the MoU in detail and in relation

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57 As for example in the case of Banco Popular Español.

58 See also in this context, judgment of 20 January 2021, *ABLV Bank AS v SRB*, T-758/18, EU:T:2021:28, paragraphs 84 and 85.

59 ABLV Latvia was determined not to meet resolution conditions on 23 February 2018 and its licence was withdrawn on 11 July 2018, PNB Banka AS was determined not to meet the resolution conditions on 15 August 2019 and its licence was withdrawn on 17 February 2020, Sberbank Europe AG was determined not to meet resolution conditions on 1 March 2022 and its licence lapsed on 15 December 2022.

60 Paragraph 6.1.1 of the ECB-SRB MoU.

61 Paragraph 6.1.2 of the ECB-SRB MoU.

62 Paragraph 8.1 of the ECB-SRB MoU.

63 Paragraph 3.2(g) of the ECB-SRB MoU.

to various crisis management steps.[64] Given the short time available in crisis situations, such close cooperation is key to both the ECB and the SRB fulfilling their respective tasks.

Information is exchanged between the ECB and the SRB through several main established work streams.

In steady day-to-day tasks, the ECB and the SRB exchange automatically substantial amounts of relevant information as specified in the Annex to the ECB-SRB MoU. In this vein also other relevant information is automatically shared in accordance with specific provisions of the MoU, such as for example notifications that the ECB has granted and withdrawn authorisations of credit institutions,[65] notifications that the ECB has decided on the establishment, suspension or termination of close cooperation[66] or SRB information about irrevocable payment commitments of institutions within the scope of the SRF.[67]

As an ancillary work stream, the ECB and the SRB exchange additional information through a simplified procedure, subject only to a simple request.[68] If the requested information is confirmed to belong to one of several predetermined categories, it is assumed to be necessary for the performance of the receiving participant's tasks and is forwarded without delay.

In a crisis situation the SRB Chair attends the ECB Supervisory Board meetings and receives all the relevant documentation.[69] Conversely, the ECB designates a representative to participate in the SRB Executive Session meetings[70] and thereby receives all documents prepared in this regard.

Finally, to the extent specific information is not covered by the mentioned work streams, it is also possible for the ECB and the SRB to make a formal written request to receive that information.[71]

2.4. Accountability of the ECB and the SRB

The democratic accountability of the ECB (in its supervisory function) and the SRB is prescribed by the SSMR and SRMR.

The ECB, in its supervisory function, is accountable to the European Parliament and to the Council, submitting an annual report to them.[72] In addition, the Chair of the ECB Supervisory Board appears before the European Parliament

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64 Paragraph 8.3 of the ECB-SRB MoU.

65 Paragraph 9.5.1 of the ECB-SRB MoU.

66 Paragraph 10.4 of the ECB-SRB MoU.

67 Paragraph 9.2 of the ECB-SRB MoU.

68 Paragraph 7.2.2 of the ECB-SRB MoU.

69 Paragraphs 5.1 and 5.2. of the ECB-SRB MoU.

70 Article 43(3) of the SRMR.

71 Paragraph 7.3 of the ECB-SRB MoU.

72 Article 20 of the SSMR.

three times a year: once to present the annual report, and twice to explain the ECB's supervisory actions to the Parliament's Committee on Economic and Monetary Affairs (ECON) and to answer questions from ECON members.[73] The ECB also shares the report with national parliaments and it may reply to questions posed by national parliaments.[74]

The SRB is accountable to the European Parliament, the Council and the Commission.[75] The accountability to the Commission also stems from the SRB's constitution as a Union agency. The SRB also produces an annual report to the three Union institutions and, like the ECB, submits its report also to national parliaments which can pose questions.[76] The SRB Chair also attends hearings with the ECON for the purpose of presenting the annual report and also on an ad hoc basis.[77]

As can be seen from the above, the accountability duties of the ECB and the SRB are independent of one another and not explicitly linked. Each of the ECB and the SRB are accountable in their own respective roles.

Intrinsically linked with democratic accountability is also the transparency of decision-making by both the ECB and the SRB. That transparency is guaranteed by two distinct, yet consistent legal acts. For the ECB, this is the Decision ECB/2004/3 on public access to ECB documents,[78] for the SRB that is the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents,[79] as confirmed in Article 90(1) of the SRMR.

2.5. Judicial review of the acts of the ECB and the SRB

Judicial accountability of the actions by the ECB and SRB in relation to supervision and resolution is also clearly established in the Treaties, but also inferred in the SSMR and the SRMR.[80]

The objects of judicial review can be the various different acts adopted by the ECB and the SRB. For the purposes of the present examination possibly most relevant is the judicial review of acts adopted in composite procedures where both the ECB and the SRB participate. In this regard there is judicial review by the General Court especially for the resolution decisions (whether a

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73 See *here*.

74 Article 21 of the SSMR.

75 Article 45 of the SRMR.

76 Article 46 of the SRMR.

77 See *here*.

78 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, 42). See also recital 59 of the SSMR.

79 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, 43).

80 See rectal 60 of the SSMR and Article 86(2) of the SRMR.

resolution scheme or a decision that not all resolution conditions are met), as exemplified by the judgments in the ABLV[81] and the Banco Popular[82] cases. As confirmed by the Court of Justice in ABLV, the SRB's no resolution decision is a reviewable act,[83] as is the resolution scheme endorsed by the Commission's (and possibly also by the Council).[84] Also, in this context it has been confirmed that the FOLTF assessment by the ECB is a preparatory act in the resolution procedure. Therefore, that FOLTF assessment is not independently reviewable, but rather as part of the review of the final act in the resolution procedure.[85] In practice the ECB has intervened in support of the SRB and the Commission in several cases questioning the legality of the ECB's FOLTF assessment.[86]

The General Court has also confirmed that the SRB's resolution-related assessments are complex economic assessments[87] with the consequences for the intensity of judicial review derived from this finding.

For the avoidance of doubt, it should be mentioned that it is not possible to bring an action challenging the legality of the ECB's and the SRB's acts before a national court.[88]

One should also mention that both the ECB and the SRB may in principle incur liability for their unlawful actions, in accordance with Treaty principles.[89]

More generally, the ECB and the SRB are separately judicially accountable. However, successful action annulling their acts can have consequences of fact for the other institution. For example, the outcome of an action for annulment of an ECB decision to grant or to withdraw a banking licence may have an impact on the ex-ante contributions already charged by the SRB.

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81 Judgment of 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429.

82 Judgment of 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*, T-481/17, EU:T:2022:311 and judgment of 18 June 2024, *Commission v SRB*, C-551/22 P, EU:C:2024:520.

83 Judgment of 6 May 2021, *ABLV Bank v ECB and Others*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 56.

84 Judgment of 18 June 2024, *Commission v SRB*, C-551/22 P, EU:C:2024:520, paragraph 96.

85 Judgment of 6 May 2021, *ABLV Bank v ECB and Others*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 66 and and judgment of 18 June 2024, *Commission v SRB*, C-551/22 P, EU:C:2024:520, paragraph 92.

86 See for example judgment of 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429 and order of 4 January 2022, *PNB Banka AS v SRB*, T-732/19, EU:T:2022:8.

87 Judgment of 6 July 2022, *ABLV Bank v SRB*, T-280/18, EU:T:2022:429, paragraphs 91 to 96, judgment of 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*, T 481/17, EU:T:2022:311, paragraph 169.

88 Judgment of 22 October 1987, *Foto-Frost*, C-314/85, EU:C:1987:452, paragraphs 17 and 18 and opinion of Advocate General Ćapeta of 17 November 2022, C-123/21 P, EU:C:2022:890, point 35.

89 See for example judgment of 1 June 2022, *Eleveté Invest Group, SL and Others v European Commission and SRB,* T-523/17, EU:T:2022:313, paragraphs 587 to 675.

2.6. ECB cooperation with the Commission and the EBA in the context of resolution

As noted above, Article 30(2) of the SRMR establishes a general cooperation and exchange of information obligation in the context of resolution matters. That provision also refers to cooperation between the ECB and the Commission and their respective tasks.

The tasks of the Commission in the SRMR context refer broadly to the adoption of a resolution scheme[90] and the assessment of State aid aspects.[91] With regard to both of these tasks, the main counterpart of the Commission is the SRB. The two cooperate closely on the basis of a comprehensive MoU agreed in 2019.[92] Like the ECB, the Commission also participates as an observer to the SRB Executive Sessions meeting, where the decisions on a resolution procedure are made.[93] In addition, in accordance with the ECB-SRB MoU all the information shared under the MoU may be forwarded to the Commission without the need for additional consent from the originating participant.[94]

The ECB also interacts with the EBA, although less prominently, in relation to resolution matters. The ECB is considered a competent authority in accordance with Article 2(2)(f) of the EBA Regulation.[95] The ECB is therefore represented on the EBA Board of Supervisors and participates in the adoption of draft technical standards, guidelines, opinions and reports. The ECB also supplies the EBA with the relevant supervisory data,[96] notably with its participation in the EUCLID project.[97]

3. ECB Opinions

The ECB's advisory role under Articles 127(4) and 282(5) of the TFEU has played an important role in shaping the development of national resolution authorities, and Union and national resolution frameworks more broadly, both before and after the adoption of the Bank Recovery and Resolution Directive (BRRD), and the Single Resolution Mechanism (SRM). This section outlines some key considerations outlined by the ECB in respect of resolution authorities.

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90 See Article 18 of the SRMR.

91 See Article 19 of the SRMR.

92 See *here*.

93 Article 43(3) of the SRMR.

94 See Paragraph 13.4 of the ECB-SRB MoU.

95 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 (OJ L 331, 15.12.2010, 12).

96 See Article 35 of the EBA Regulation.

97 Decision of the European Banking Authority of 05.06.2020 concerning the European Centralised Infrastructure of Data (EUCLID) (EBA/DC/2020/335).

3.1. ECB opinions prior to the adoption of the BRRD

Following the onset of the Global Financial Crisis, and prior to the adoption of the BRRD in 2014, the ECB was consulted on the introduction or amendment of bank resolution frameworks in 12 Member States, giving rise to 24 ECB opinions.[98] Those opinions demonstrate the development of the ECB's doctrine on the matter of resolution frameworks more generally, rather than specifically on resolution authorities, reflecting the nascent nature of such frameworks at the time, and the ECB's focus as central bank. In particular, the ECB's opinions focused on topics such as the introduction and amendment of resolution powers and instruments, and on the establishment of prototype asset separation tools or 'bad banks', such as the National Asset Management Agency (NAMA) in Ireland,[99] and the Asset Management Company for Assets Resulting from Bank Restructuring (SAREB) in Spain.[100]

In these opinions, the ECB emphasised that resolution tools should be used only when necessary and in the public interest.[101] Moreover, the ECB noted that **central banks should be involved in the resolution process, due to their responsibility for macro-prudential and financial stability, as well as expertise on financial markets.**[102] In addition, the ECB encouraged coordination among Member States and consistency with the Eurosystem's operational framework and liquidity management.[103]

On the question of the financing of resolution funds, deposit guarantee schemes and other arrangements, the ECB emphasised that resolution costs should in principle be borne by shareholders and creditors and, where these funds are not sufficient, by financing arrangements. Such financing agreements should promote additional market discipline and address moral hazard risk.[104] **Moreover, the ECB outlined that, in line with the monetary financing prohibition, NCBs may not fund these financing arrangements and replenish the resolution fund by providing credit to it.**[105] In particular, the ECB stressed the limited and specific circumstances in which financing can be provided to deposit guarantee schemes,[106] and emphasised that no overdraft facilities or other types of credit facilities to or direct purchase of debt instruments from asset management companies qualifying as public undertakings within the meaning of

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98 BE (1), CY (1), DE (3), DK (1), EL (5), ES (2), FR (1), IE (4), LV (3), NL (1), PT (1), SI (1).

99 See ECB opinion CON/2009/68 (IE).

100 See ECB opinion CON/2012/108 (ES).

101 See ECB opinions CON/2013/73 (SI); CON/2012/99 (EU); CON/2011/83 (PT); CON/2013/3 (ES); CON/2013/10 (CY); CON/2012/106 (FR); CON/2011/84 (IE).

102 See ECB opinions CON/2012/99 (EU); and CON/2012/14 (EL).

103 See ECB opinions CON/2010/92 (IE); CON/2012/88 (DE).

104 See ECB opinions CON/2012/99 (EU); CON/2012/88 (DE); CON/2011/72; CON/2010/83 (DE); CON/2009/68 (IE); CON/2010/83 (DE).

105 See ECB opinions CON/2011/103 (BE); CON/2008/59 (SE); CON/2011/39 (IE); CON/2011/93 (EL).

106 CON/2011/84 (IE); CON/2011/83 (PT); CON/2011/60 (NL).

Council Regulation No 3603/93.[107] Likewise, the ECB highlighted the distinction between liquidity- and solvency-related tasks. It noted that while liquidity support to illiquid but solvent institutions is an inherent central banking task, solvency support is a government task.[108]

The ECB also advised in respect of asset valuation, noting that asset valuation should be mostly risk-based and determined by market conditions,[109] and provided guidance on the need to strike a balance between the need to ensure financial stability and fundamental rights.[110]

3.2. Economic and Monetary Union and Banking Union: the ECB's advisory role

As a result of the turmoil arising from the Global Financial Crisis, and in particular the need to **break the vicious circle between banks and sovereigns**, the ECB played a crucial role in the development of the Banking Union, in particular through its contribution to the reports of the Four and Five Presidents, and through ECB opinions on the SSM, the BRRD, the SRM and EDIS, and later through its opinion on the proposed reform of the ESM.

First, the ECB's President contributed as co-author to the report of Herman van Rompuy, 'Towards a Genuine Economic and Monetary Union'.[111] That report first presented the vision of an integrated financial framework to ensure financial stability – in particular in the euro area – and minimise the cost of bank failures to European citizens. **The report called for the creation of single European banking supervision and a common deposit insurance and resolution framework.** It noted that a European resolution scheme should be primarily funded by contributions of banks and set up under the control of a common resolution authority. The ECB reiterated its support for the creation of both the SSM and SRM in its opinion on the SSM Regulation.[112] In particular, it supported the rapid adoption of provisions related to the harmonisation of national resolution frameworks.

Second, in its opinion on the proposal for a BRRD, **the ECB took the opportunity to emphasise a number of features relevant to resolution authorities.**[113] The ECB reiterated several points expressed in its pre-BRRD opinions, in particular that resolution tools should be used only when necessary and in the public interest, and that the aim of resolution is not to preserve the failing institution as such, but to ensure the continuity of its essential functions.

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107 CON/2009/68 (IE); CON/2012/108 (ES).

108 CON/2012/30 (DK).

109 CON/2009/68 (IE).

110 CON/2011/39 (IE); CON/2010/92 (IE).

111 26 June 2012 (*Link*). See also the Final Report by Herman van Rompuy of 5 December 2012 (*Link*) and the Five Presidents' Report of 22 June 2015 (*Link*).

112 CON/2012/96.

113 CON/2012/99.

The ECB noted that responsibilities for determining whether an institution is failing or likely to fail should be clearly allocated to the relevant competent authority.

The ECB also emphasised that it was necessary that Member States ensure that, where the central bank is not itself the resolution authority, the competent authority and the resolution authority engage in an **adequate exchange of information with the central bank.** This would serve the purpose of allowing central banks to contribute to the achievement of resolution objectives while minimising the risks of unintended side effects in the performance of central bank tasks and on the operation of payment and settlement systems. For instance, central banks may play a role in the assessment of recovery and resolution plans from a financial stability perspective. Along similar lines, the ECB opinion encouraged the involvement of national designated authorities in the macroprudential domain in the assessment of recovery plans, to ensure consideration of relevant systemic considerations, including the overall impact of simultaneous implementation of recovery plans, which may lead to procyclical or herding behaviour.

The ECB also made a number of important points in respect of the **prohibition on monetary financing.** First, the ECB emphasised that provisions regarding consideration of central bank facilities in resolution plans should not affect the competence of central banks to decide independently and at their full discretion, both in standard monetary policy operations as well as emergency liquidity assistance, within the limits imposed by the monetary financing prohibition. Second, the ECB noted that where a bridge institution or asset management vehicle is established, a central bank can in no event assume or finance any obligation of these entities, and that a central bank's role as owner of such an entity must remain consistent under all circumstances with the prohibition on monetary financing, and must be performed without prejudice to central bank independence, in particular its financial and institutional independence.

Third, in the ECB's opinion on the SRMR,[114] the ECB emphasised that the Single Resolution Mechanism is **better placed to guarantee optimal resolution action, including adequate burden-sharing, than a network of national resolution authorities**, noting that coordination between national resolution systems has not proved sufficient to achieve the most timely and cost-effective resolution decisions, particularly in a cross-border context. To that end, it encouraged that a strong and independent Single Resolution Board be established, with adequate powers, tools and financial resources to resolve institutions. The ECB encouraged that the SRMR should provide for close coordination between the SRM's resolution function, and the SSM's supervisory function, while adhering to and respecting the respective institutional responsibilities.

In terms of the governance and accountability of the Single Resolution Board, the ECB emphasised that it is of the utmost importance that the SRM's decision-

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[114] ECB opinion CON/2013/76.

making capacity and voting modalities ensure efficient and timely decision-making, particularly during periods of crisis. To that end, it encouraged that the **responsibilities of authorities involved in the resolution process should be more precisely defined, to avoid any duplication or overlap of powers.**

On the topic of cooperation between resolution and supervisory authorities, the ECB encouraged **close cooperation and exchange of information**, while also emphasising the importance of ensuring that the **respective roles and responsibilities of resolution authorities and supervisory authorities are kept distinct before any crisis is envisaged.** The ECB noted first that, during the early intervention phase, sole responsibility with regard to actions or measures taken lies with the supervisor. Second, as regards the assessment of the conditions triggering resolution, it should be clear that the supervisor is best placed to assess whether a credit institution is failing or likely to fail, and whether there is no reasonable prospect that any alternative private sector or supervisory action would prevent its failure within a reasonable time frame. Third, the ECB noted that the supervisor is also best placed to assess whether an entity or a group will no longer be viable without a capital write down or conversion, or whether extraordinary public support is required. Finally, the ECB emphasised that the ECB, national supervisory authorities, the SRB and the Commission are under a reciprocal duty related to the provision of information.

In respect of the ECB's involvement in the SRB, and general involvement of central banks, the ECB encouraged their involvement in the SRB, with respect to the financial stability and macro-prudential responsibilities, and to assess the systemic impact of any resolution action.

Moreover, the ECB encouraged further legal clarity in respect of the **judicial review of resolution decisions**, given the interaction between judicial review of the SRB and Commission's resolution decisions and the Commission's decisions on State aid rules before the CJEU, and the judicial review of national authorities' resolution actions before national courts.

Finally, the ECB encouraged the creation of a European Deposit Insurance Scheme (EDIS) as the necessary third pillar to complete the Banking Union.[115]

3.3. National laws within the Banking Union – key themes in ECB opinions

Following the creation of the SSM and the SRM, the ECB continued to be consulted, and adopt opinions, on national laws related to resolution. A number of key themes arose in the context of those opinions relevant to the role of national competent authorities, in particular in respect of the interaction between national legislation and EU law affecting the role of the ECB as prudential supervisor, and in respect of national laws conferring resolution tasks on NCBs.

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[115] CON/2016/26.

In adopting these opinions, the ECB has emphasised that it is not its role to assess the implementation of the Directives such as the BRRD into national law, but rather to assess national provisions that may impact the role and tasks of central banks,[116] including the ECB in its role within the SSM. For instance, the ECB has emphasised that national implementation needs to be in line with the objectives of the Banking Union, and **to take into account its potential impact on the effectiveness of the SSM and on the ECB's mandate to carry out prudential supervision with full regard for the unity and integrity of the internal market.**[117] Likewise, the ECB has also signalled that national rules aimed at aligning the national banking supervision and resolution structure with the SRMR should not narrow or amend the scope of the SRMR, which is directly applicable.[118]

Along those lines, the ECB has emphasised that the powers conferred on it as supervisory authority by the relevant Union legislation must also be exercised by it in the context of national resolution frameworks implementing the BRRD. This includes the ECB's competences for determining whether significant institutions are failing or likely to fail, for granting authorisation and temporary waiver for bridge institutions, and for the assessments of qualifying holdings that are attributed to the ECB.[119]

In respect of ECB opinions relevant to national resolution authorities, one of the most significant aspects relates to circumstances where a role in the resolution framework is newly conferred on an NCB, or where an existing NCB task in the field of resolution is substantially amended. In such circumstances, the ECB has made an assessment as to **whether such task conferred on a NCB is compatible with the monetary financing prohibition.** In particular, the ECB has examined whether such task can be considered a central banking task or a government task.[120] This assessment, and the advice provided by the ECB in its opinions, has thus been influential in shaping the role and powers of national resolution authorities, where this task is conferred on an NCB.

The ECB has noted, on the one hand, that **administrative resolution tasks** will be considered central bank tasks which can be carried out by NCBs.[121] In that respect, the ECB has recalled that a number of Member States have conferred on their NCBs a significant role in the resolution of financial institutions, whether as the resolution authority or as a competent authority in the decision-making process for resolution. The ECB has welcomed the allocation of such tasks to NCBs **provided they do not interfere financially and operationally with the**

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116 CON/2015/22 (CZ)

117 CON/2015/31 (DE); CON/2016/53 (DE).

118 *CON/2015/47* (AT).

119 *CON/2015/35* (IT); *CON/2016/5* (CY); CON/2015/25 (EL).

120 CON/2015/22 (CZ)

121 Convergence report 2022.

performance of the NCB's ESCB-related tasks.[122] The ECB has applied the same assessment methodology in respect of the conferral on an NCB of supervisory tasks in respect of financial institutions.[123] In conducting its assessment, the ECB has looked at factors such as whether the NCB's **financial independence** is not impeded, insofar as they have sufficient financial resources to carry out their ESCB- or Eurosystem-related tasks. The ECB has also looked at factors such as how **conflicts of interest** with existing central banking tasks are addressed,[124] whether the proportionality of the performance of such task to the **financial and organisational capacity of the NCB can be ensured**,[125] and how the task fits **within the NCB institutional set-up**, in the light of central bank independence and accountability considerations.[126] The ECB **has also assessed whether the substantial financial risks stemming from the new task are addressed, for instance through appropriate provisions on the NCB's liability.**[127]

By contrast the ECB has continued to reiterate that **tasks relating to financing resolution funds or financial arrangements will be considered government tasks**, which, by virtue of the prohibition on monetary financing, cannot be conducted by the NCB.[128] Thus, the ECB has emphasised where an NCB acts as resolution authority, it should not, under any circumstances, assume or finance any obligation of either a bridge institution or an asset management vehicle. To this end, national legislation should clarify that the NCB will not assume or finance any of these entities' obligations.

Indeed, the issue of an NCB's liability and the prohibition on monetary financing and financial independence became central in a recent request to the CJEU for a preliminary reference ruling by the Slovenian Constitutional Court. Case C-45/21 *Banka Slovenije v. Državni zbor Republike Slovenije*,[129] may affect how the ECB assesses compliance of resolution frameworks with the prohibition on monetary financing and financial independence going forward, as it provides

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122 CON/2015/22 (CZ). See also CON/2015/25 (EL), CON/2015/33 (LT), CON/2015/35 (IT), CON/2016/5 (CY), CON/2016/28 (SI).

123 CON/2021/9 (LV).

124 CON/2015/22 (CZ). See also CON/2015/33 (LT), CON/2015/35 (IT), CON/2016/5 (CY), CON/2016/28 (SI).

125 CON/2015/22 (CZ).

126 CON/2015/22 (CZ).

127 CON/2016/28 (SI).

128 Convergence Report 2022.

129 Judgment of 13 September 2022, Case C 45/21, *Banka Slovenije v. Državni zbor Republike Slovenije*, EU:C:2022:670. The main proceedings concern the legal situation prior to the establishment of a single resolution mechanism at EU level in 2014 and the introduction of a single resolution fund. At that time, Banka Slovenije was entrusted under national law with the task of reorganising and resolving banks in Slovenia whose insolvency might endanger the stability of the financial system. However, under the old Slovenian legal situation, there was no financing mechanism for the costs of bank resolution. Rather, a law that entered into force at the end of 2019 retroactively obliges Banka Slovenije to compensate from its own resources, under certain circumstances, the shareholders and creditors of banks that were affected by a public reorganisation or resolution measure in 2013 and 2014.

the first detailed consideration of these matters by the CJEU.[130] In its judgment, the CJEU held that the burdens of reorganisation financing, if they are to be borne by an NCB, infringe the prohibition on monetary financing (i) where the **liability is incurred solely because the NCB has exercised a function conferred on it by national law**[131] or (ii) where the **liability is incurred because of the infringement of relevant rules but has an effect equivalent to the direct financing of the public sector's obligations vis-à-vis third parties.**[132] In addition, the CJEU ruled that the burdens of reorganisation financing, if they are to be borne by an NCB, impair central bank independence, where the covering of the costs arising from the application of the liability places an NCB in a situation where it is potentially exposed to political pressure.[133]

On that basis, the ECB has already applied key lessons from the CJEU ruling to advise on compliance with the prohibition on monetary financing and central bank independence in the context of the designation of certain NCBs as resolution authorities for central counterparties.[134]

The ECB's views regarding the **conferral of tasks in NCBs relating to financing deposit guarantee or investor compensation schemes** is more nuanced. The ECB suggests that national legislation setting out that such an NCB task could be compatible with the monetary financing prohibition under strict conditions, in particular if it were short term, addressed urgent situations, systemic stability aspects were at stake, and decisions were at the NCB's discretion.[135]

ECB opinions have also emphasised the importance of the **separation of supervisory and resolution functions** within the national authorities. The ECB has emphasised that the BRRD 'exceptionally' allows one authority to carry out both resolution and supervisory functions on condition that adequate structural arrangements are put in place to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions.[136] That separation should not, however, prevent the resolution function from having access to any necessary information which is available to the supervisory function.

ECB opinions have also given careful consideration to the **role of the competent ministry (often the Ministry of Finance) in resolution.** The ECB has repeatedly noted that, if the Ministry's prior consent is required by national

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130 See, as a first step, CON/2022/39 (SI).

131 Judgment of 13 September 2022, Case C 45/21, *Banka Slovenije v. Državni zbor Republike Slovenije*, EU:C:2022:670, paragraphs 80 et seq.

132 Judgment of 13 September 2022, Case C 45/21, *Banka Slovenije v. Državni zbor Republike Slovenije*, EU:C:2022:670, paragraphs 44 et seq.

133 Judgment of 13 September 2022, Case C 45/21, *Banka Slovenije v. Državni zbor Republike Slovenije*, EU:C:2022:670, paragraphs 91 et seq.

134 CON/2023/17 (BE) and CON/2024/31 (PT).

135 Convergence Report 2022.

136 CON/2015/2 (BE); see also CON/2020/10 (HR), CON/2015/25 (EL), CON/2015/19 (ES), CON/2015/3 (SK).

law for all decisions pursuant to the BRRD, or in a broad range of circumstances, regardless of direct fiscal impact or systemic implication, the question arises whether this goes beyond the relevant provision of the BRRD (Article 3(6) BRRD), and whether the Ministry may be considered to be a second resolution authority alongside the one designated in accordance with the BRRD, in which case the Ministry would need to ensure the operational independence of its resolution function.[137]

The ECB has also remarked on the **competence of central banks to provide liquidity to solvent institutions in the context of the Banking Union.** The ECB has noted that resolution plans,[138] and negative credit assessments by other authorities,[139] do not affect the competence of central banks to decide independently and at their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and in emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty. Moreover, the ECB has emphasised that the use of emergency liquidity assistance cannot be treated as a pre-condition to the use of the government stabilisation tool, as provided for by Article 56 BRRD.[140]

Unrelated to the design of national resolution authorities, ECB opinions have also covered other considerations related to the design of national resolution frameworks. For instance, the ECB has also emphasised a number of points regarding the ranking of creditor claims in bail in and insolvency, most notably with reference to the necessity to fully and clearly implement the depositor preference in national legislation;[141] has called for a common framework at Union level on the degree of subordination of senior unsecured bank debt instruments to other senior unsecured bank liabilities in bank resolution and/or insolvency proceedings;[142] and has commented on the **effects of statutory subordination under national law on eligibility of debt instruments as collateral for Eurosystem credit operations.**[143]

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137 CON/2015/22 (CZ), CON/2015/25 (EL).

138 CON/2014/67 (DE); see also CON/2020/3 (DE), CON/2015/22 (CZ), CON/2015/25 (EL), CON/2015/33, CON/2015/35 (IT), CON/2015/48 (LU), CON/2016/5 (CY).

139 CON/2009/10 (LV).

140 CON/2015/43 (SK).

141 CON/2014/62 (HU). See also CON/2016/28 (SI), CON/2015/48 (LU), CON/2021/15 (EU), CON/2012/99 (EU).

142 CON/2015/31 (DE). See also CON/2016/28 (SI), CON/2016/7 (FR).

143 *CON/2015/31* (DE). See also *CON/2016/7* (FR).

Some concluding remarks

Donato Messineo

The present volume results from a research project on how member States have transposed EU obligations concerning the organisational set-up of national resolution authorities (NRAs) and their positions *vis-à-vis* other public players, such as national central banks (NCBs), national competent authorities (NCAs) and governments.

Not only do the collected reports analyse the situation in the member States, but they also deal with the EU itself, shedding a light on the dense network of relationships among the three relevant European actors in this area: the European Central Bank (ECB), the Single Resolution Board (SRB) and the European Banking Authority (EBA).

This rich collection prompts a number of reflections. They can be introduced by pointing to one element of the historical context, relating to the starting point from which the current institutional framework developed.

When the European System of Central Banks (ESCB) was established, in 1998, the principle of member States' freedom to organize the governance of their central banks was enshrined in the Treaty, subject to the rule of legal convergence. Today, under Article 131 TFEU, Member States are still generally free to organize their NCBs as they wish, as long as they comply with a set of legal rules, that is constantly being developed and adjusted. Among these rules, the requirement for the independence of the ECB and the NCBs, enshrined in the Statute of the ESCBs and the ECB, is key.

In the context of the European Banking Union (EBU), a similar scheme also applies to the Single Supervisory Mechanism (SSM), as per EU Regulation No. 1024/2013 of 15 October 2013 (SSMR): national legislators are free to arrange the organization and operations of their NCAs, provided that certain basic rules are observed, foremost among them the independence of the NCAs under Article 19 of the SSMR.

As mentioned in the introductory contribution to this edited collection, the EU legal framework also establishes only a few basic principles regarding the set-up of the NRAs: namely, EU Directive No. 2014/59 of 15 May 2014 (BRRD) provides for the "operational independence" of the NRAs from other public authorities, requiring the structural separation of (the staff involved in) the resolution function from (that involved in) the banking supervisory function and other functions of the relevant authority, in cases where the authority entrusted with the resolution function is a NCB, the relevant Ministry or another public administrative authority.

However, despite the similarity between the three legal arrangements indicated above, when it comes to resolution authorities, the legal notion of "independence" has distinctive features that are worth highlighting.

In this regard, one needs to recall that with reference to the central banks of the ESCBs four main dimensions of independence have been identified and

elaborated (based on the Treaty provisions), that is functional, personal, financial, and institutional independence.

Functional independence requires that central banks' mandate to pursue price stability as their primary objective be clearly enshrined in legislation. A similar requirement applies to RAs, as resolution objectives are clearly listed by EU sources of law (Article 14 SRMR; Article 31 BRRD).

Personal independence, both for central banks' and RAs' board members, still boils down to the terms of appointment and removal, needed to ensure that these individuals – and the governing bodies in which they sit – make responsible and objective decisions.

As for the financial aspect of independence, which implies that authorities have sufficient resources to pursue their institutional tasks, and the power to determine how to use them, the process of internalizing the costs of banking supervision and resolution with the industry must be mentioned. These costs are now borne by the supervised entities, which are required to pay contributions to finance the performance of the two said public functions.

The institutional aspect of independence warrants a few more words: to this end, it is useful to return to the comparison with central banking and banking supervision.

It has long been recognized that the Governing Council of the ECB must be fully insulated from political pressures in its decision-making (in line with the international best practice of separating the authority that "prints" money from the one that spends money – i.e., the government). The issue has become topical in the European institutional debate in recent times, since national constituencies have been criticizing some of the monetary policy choices of the ECB, and even challenging them in court.

In contrast, the full independence of banking supervisors is a more recent achievement. Nowadays, the requirement for the independence of NCAs is clearly enshrined in the SSMR, in line with the Basel Core Principles for effective banking supervision (BCPs). However, the "institutional" dimension of the independence of banking supervisors has developed as a complement to the "substantive" dimension of banking regulation.

It is generally understood that banking supervision should be conducted in line with a strictly technical framework, and according to rules that are fully accepted at the international level, such as the metioned standards set by the Basel Committee on Banking Supervision, which, at the EU level, flow into the EU single rulebook.

Although, on the substantive side, a similar technical benchmark also exists in the case of bank resolution – primarily, the Key Attributes of Effective Resolution Regimes for Financial Institutions (KAs) adopted by the Financial Stability Board (FSB) – on the institutional side it would not be safe to say that

resolution authorities and their decision-making bodies are expected to entertain a comparable level of independence.

In the European model, the SRB takes resolution decisions that must necessarily go through the Commission and, where appropriate, the Council. Eventually, such decisions need to be endorsed by institutions created by the Treaties, which can also object and request changes to the resolution schemes drawn up by the SRB.

This is certainly a mitigation in the degree of independence of the resolution authority: however, such mitigation has been accepted in order to comply with the well-known *Meroni* doctrine. In the legal framework of the European Union, the *Meroni* doctrine does not allow the attribution of broadly discretionary powers to agencies established by EU regulations; the institutions created by the Treaties still need to have the final say on widely discretionary assessments (despite a recent strand of case-law of the ECJ is fine-tuning a softer version of the *Meroni* requirements).

Moreover, the independence of resolution authorities in the EU is also affected by another limitation.

As a matter of fact, every bank crisis gives rise to questions of confidence, as also shown by the recent cases in the U.S. and Switzerland, i.e. in the Silicon Valley Bank and the Crédit Suisse cases. The confidence of investors and savers can be undermined by bank crises. And bank crises cast doubts on the overall stability of the system. This is why bank crises often call for the intervention of political players, and governments often need to step in and play a role in the game.

Of course, this does not mean that each and every bank crisis requires public intervention; on the contrary, the European framework is aimed precisely at avoiding intervention with public money as much as possible. More generally, the international standards recommend that public money is used to deal with a bank crisis only as a last resort and on a temporary basis. And yet, governments must always – at least – keep an eye on banking crises management operations, with a view to preserving public confidence in the banking system, in the interest of the stability, integrity and transparency of a country's financial system.

This is one more factor leading to the application of a milder version of the principle of independence to the resolution authorities and their institutional set-ups (then the one applicable to central banks and bank supervisors).

In light of the above, it is understandable that the "hard" rules on the independence of NCAs and their governing bodies in the SSM are not reflected in the context of the SRM; and that, in turn, the BRRD strikes a balance between the need to have independent NRAs and the necessary recognition of a role for national governments: the language of Article 3 BRRD in fact requires that whereas the resolution authority in a member State is not the competent Ministry,

it shall inform the latter and seek its approval before implementing decisions having a direct fiscal impact or systemic implications.

It might be useful to recall the Italian experience in this regard: under the domestic act transposing the BRRD (that is, Legislative Decree No. 180 of 2015), all resolution measures taken by the Bank of Italy are subject to the approval of the Ministry of Economy. The Italian legislator considered – in general – that a decision to put a bank under resolution may always have a direct fiscal impact or systemic implications. Therefore, under the Italian law, the adoption of a resolution scheme for a failing institution by the Bank of Italy is always subject to the approval of the Ministry of Economy.

Whether this arrangement can be considered consistent with the spirit of the BRRD probably depends on the standpoint of the observer.

One the one hand, one might look ahead to the future, namely to the ultimate goal of the completion of the European Banking Union. One day, it can be expected that full-fledged independence will also be attributed to resolution authorities, to the same extent as the one afforded to central banks and banking supervisors.

On the other hand, however, one must also recognize that involving the government in the resolution process may have a silver lining. The integration of the assessments made by different public players may in fact enhance the stability of the resolution decisions.

The example of the resolution of the four banks in Italy in 2015 (Banca Marche, Banca Popolare dell'Etruria e del Lazio, CariChieti, Cassa di Risparmio di Ferrara) sheds a light on this practical benefit. On that occasion, the resolution schemes adopted by the Bank of Italy were approved by the Ministry of Economy and Finance, as provided for in the Italian law implementing the BRRD.

Litigation-wise, this implied that the affected parties – that is: disgruntled shareholders and creditors of the four banks, who had been written down in the context of the resolution – had to challenge not only the decisions of the Bank of Italy, but also the approval of the Ministry of Economy, which is a separate administrative decision itself. As a consequence, before the administrative courts, the Italian government had to back up the resolution schemes and the Bank of Italy: the Italian government and the resolution authority were side to side until the very final stage of that complex litigation (at the end of the day, the Council of State upheld the resolution schemes and the implementing decisions).

Having the government on the same side as the Bank of Italy in court was not something that could have been taken for granted, if a formal approval of the resolution action by the government had not been required by the law, given the unpopularity of the resolution measures.

In the resolution of the four banks, the principle of burden sharing was implemented and losses were imposed not only on shareholders but also on

subordinated creditors. This approach was new in Italy. It was the first time since the 1930s that bond holders had suffered losses in a banking crisis, and certain sectors of the public opinion were shaken by this novelty, and rose up against the Bank of Italy. Some journalists and some politicians suggested that the Bank of Italy had not done enough to prevent the crises of the four banks in the years before – or that however alternative solutions existed to spare investors from bearing losses after the crises materialized. Thus, the resolution of the four banks became a very controversial topic in the public debate, in Italy.

In July 2017, a parliamentary enquiry committee on the banking and financial system was even established. At that time, the litigation against the acts of the resolution was already pending (as the first claims were notified to the Bank of Italy already on January 2016). The parliamentary committee, among other things, was called upon to look into the quality of the banking supervision performed by the Bank of Italy during the financial crisis, with a specific focus on the four banks.

It is widely known that bank supervisors and resolution authorities sometimes have to take tough, unpopular decisions. And this provides the case for making them independent of the government and of Parliament. Politicians are naturally subject to the pressure from their constituencies and might be biased by the wrong incentives (such us electoral concerns). Linked to this, competent authorities and resolution authorities are made accountable to parliaments, and parliaments are entitled to look into the way such authorities handled their files.

Somehow opposite to this trend, the BRRD assumes that the Ministries of Economy in the member States should have the final say on the economic implications of resolution decisions. This is consistent with the fiscal responsibility of governments: although one of the resolution objectives is to minimize the use of public funds, shutting down a bank however brings about a numbers of economic consequences. Thus, in the case of the four banks, the Bank of Italy needed to obtain the approval from the government, and later the government could not back out when some measures turned out to be displeasing: those measure were actually envisaged in the resolution schemes, and the resolution schemes had been endorsed by the Ministry of Economy, as provided for by the law.

Another founding principle of the EBU, above only mentioned in passing, is the separation of banking supervision, on the one hand, and bank crises management, on the other hand.

In this respect, as a starting point one should bear in mind that – also irrespective of the possibility that central banks and supervisory authorities are charged with direct resolution responsibilities (under the conditions laid down in Article 3 of the BRRD) – NCAs are however involved in crises management, and even in the resolution process.

To begin with, bank supervisors have all the relevant information concerning the supervised entities.

But there is more, since several fundamental responsibilities closely linked to crises prevention, management and resolution however rest with supervisors, that is: (*i*) to assess the solvency of credit institutions as a pre-condition to precautionary recapitalisations; (*ii*) to adopt early intervention measures; (*iii*) to assess at least one of the resolution triggers, that is the «failing or likely to fail».

Central banks, in turn, remain responsible for providing emergency liquidity assistance, as needed (to solvent financial institutions facing temporary liquidity problems, outside of normal monetary policy operations).

Finally, most of the resolution objectives under Article 31 BRRD boil down to the protection of financial stability, which is also a typical element of NCBs/NCAs' mandates.

All the elements indicated so far show that – to some extent – it is not possible to eliminate the overlapping between central banking, banking supervision, and bank resolution. A degree of entanglement among the main players in the financial safety net and their tasks is unavoidable. It is not by chance that the BRRD, at the same time as it requires the separation of functions (under the "operational independence" requirement), also provides for information exchange and cooperation. Therefore, while it is not possible to disentangle completely the three functions, legislators need to address the occasional conflicts of interests which may arise among central banking, bank supervision and resolution functions because of the said entanglement.

The comparative analysis carried out in the collected reports deals with this issue.

As pointed out in the introduction to this edited collection, the preferred organisational model under Article 3 BRRD is that of an autonomous resolution authority, in line with the choice made in the European Banking Union at the level of the EU (whereby the ECB is the competent authority for banking supervision and the SRB is the resolution authority). However, as also shown by the reports contained in this volume, most Member States took advantage of the discretion afforded to them by the BBRD, and the solution in place in most national jurisdictions is that of incorporating the NRA into the relevant NCB and/or the relevant NCA.

The ECB was initially concerned that a monetary financing issue might have arisen as a consequence of one such institutional arrangement: two ECB opinions of 21.1.2015 (No. 2 and No. 3) argued that resolution in the financial market is neither a Eurosystem related task, nor a traditional central banking task. Rather, it was considered by the two ECB opinions as a government task, performed in the interest of the State. Therefore, according to the said opinions, if an NCB were to be entrusted with resolution tasks, it would have needed to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition laid down in Article 123 TFUE.

However, only some months later, such stance was overturned by a further opinion of the ECB. The ECB finally reached the conclusion that the exercise of resolution tasks contributes to the pursuit of the objective of financial stability (ECB Opinion 1.7.2015, CON/2015/22, § 2.3.2). As a consequence, it deemed that resolution tasks can be understood as central banking tasks, provided that they do not involve resolution financing and do not undermine the (financial) independence of a NCB.

This being said as regards its compliance with the European Treaties, the incorporation model can be implemented in different ways. The first variant consists in the incorporation of the NRA into a NCA which is separate from the NCB. The second possibility is the incorporation of the NRA into a NCB which is also the NCA of that particular jurisdiction. The third possible configuration is the incorporation into the NCB/NCA of only the preventive resolution functions (such as the drawing-up of resolution plans, the assessment of resolvability, identifying impediments to resolvability, calibrating the MREL), with the executive resolutions functions (that is, the adoption and the implementation of the resolution schemes) entrusted to a different specific authority.

As far as the EBU is concerned, the third model, based on the devolution to separate authorities of the functions of preventive resolution (on the one hand) and executive resolution (on the other hand) is only followed in Spain. This model seems to be cumbersome in some respects, especially insofar as it separates the drafting of the resolution programme from the adoption of the resolution scheme, with one authority in charge of the former, and another authority responsible for the latter. It is not by chance that discussions are actually taking place in Spain, also following observations by the International Monetary Fund (IMF), on the possibility to overcome this institutional arrangement and embrace a simpler one, as highlighted in the relevant country report.

More generally, under the incorporation model (whatever the variant), the concern for possible conflicts of interests is more serious; Article 3 of the BRRD seeks to manage such conflict by way of imposing at least an organisational separation between the structures in charge of the respective functions.

To this end, two different settings are possible, which can be considered as sub-variants of the incorporation model. Under the first possible arrangement, a single decision-making body is in place for all the functions of the entity resulting from the incorporation of the NRA into the NCB/NCA, and a mere organisational separation is implemented. But a second solution is also possible, whereby separate decision-making bodies (such as a Supervisory Committee and a Resolution Committee) exist within the same authority (this is the case with the French *Autorité de contrôle prudentiel et de résolution*, ACPR).

At the end of the day, in several countries, the two functions (banking supervision and crises management/resolution) are assigned to separate bodies, while in others such functions are concentrated in a single body; in Italy, for instance, both functions are entrusted to the central bank. This is a viable

choice under the BRRD, provided that the fact-finding, supervisory and crisis management functions are separated, even though there is a single decision making body on top.

One might wonder whether it is fair to say that one arrangement is better than the others. However, given the room for choice afforded to Member States under the EU legal framework, it does not seem that one such claim can be made. As mentioned above, Member States enjoy organizational freedom, provided that certain general limits are respected.

More generally, the most common opinion in the field of banking supervision is that there is not a single model which is better than the others.

For instance, it would not be safe to assume that separating the supervisory functions from the central bank functions (as it is the case in some major European countries) will ensure more efficient supervision than if supervision is assigned to the central bank.

The case of the United Kingdom can be recalled in this regard, since supervision was at first shifted from the central bank (the Bank of England) to an external authority; but afterwards, it was brought back in the face of the severe financial crisis that hit that country, on the long wave of the US-born financial crisis, also on grounds of the coordination failures between the Financial Services Authority and the Bank of England (and the UK Treasury) occurred in the Northern Rock episode.

In the European Union, there is very little experience with resolution decisions, so far: resolution measures were, indeed, taken in Portugal and in Italy, while in Spain resolution schemes were implemented, which had been adopted at the European level; but it is not possible to rely on such a few cases to draw indications in favour of one solution over another.

Although some years have already passed since the set-up of the second pillar of the EBU, the experience is still too limited. For the time being, one needs to take note of the presence in the European space of different institutional arrangements, each however in line with the founding principles of the second pillar of the EBU.

For sure, in the institutional design of the EU, a clear preference can be found for the enhancement of the independence of the resolution function: the full separation between banking supervision entrusted to the ECB, and resolution tasks entrusted to the SRB. Two separate bodies, with the SRB operating in close connection and coordination with the European Commission.

It is also worth mentioning the case-law of the Court of Justice of the EU (ECJ), according to which a failing or likely to fail declaration by the ECB cannot be challenged on its own, and its possible flaws will be grounds for appeal against the final action taken by the SRB. Once again, this position of the ECJ shifts the focus of the judicial review from the activity of the ECB to that of the SRB: as a

result, the resolution scheme is placed under the spotlight, and the autonomy of the resolution function is emphasized.

However, for the sake of the argument, the point could also be made that entrusting the resolution function to the central bank might enhance the independence of bank resolution, since central banks are already granted full independence under the European Treaties (as reminded above). As a consequence, NRAs incorporated into NCBs could benefit from (the privileged status of) central bank independence.

All in all, given the uncertainty of the picture at this stage, it will be necessary to update the comparative analysis over time, to see whether there will be a rapprochement of the different European legislations on this issue as already seems to be the case, or whether a diverse picture will remain.

Summary tables

1. National Banks (Part 1)

Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary

Questions	Belgium	Bulgaria	Croatia	Cyprus	Czech Republic	Greece	Hungary
NRA	National Bank of Belgium	Bulgarian National Bank	Croatian National Bank	Central Bank of Cyprus	Czech National Bank	Bank of Greece	Hungarian National Bank
Abbreviation	NBB	BNB	CNB	CBC	CNB	BoG	MNB
Official Name	Banque Nationale de Belgique	Българска народна банка	Hrvatska narodna banka	Κεντρική Τράπεζα της Κύπρου	Česká národní banka	Τράπεζας της Ελλάδος	Magyar Nemzeti Bank
Legal form	N/A	Public body, legal entity	State-owned	Public body, legal entity	Institution of State	Société Anonyme (private corporation)	Shares are State owned
Legal Basis NRA	Belgian Bank Law, Organic Law NBB	Law on the BNB, LRRCIIF	Article 53 Constitution, Act on the CNB, Act on the Resolution of Credit Institutions and Investment Firms	Resolution law	Act No. 374/2015 Coll.	Law 4335/2015	Resolution Act
Other Authorities	Minister of Finance	Financial Supervision Commission for investment firms, Ministry of Finance	for investment firms HANFA, HAOD Ministry of Finance	National Macroprudential Authority, Ministry of Finance	Ministry of Finance	Ministry of Finance, TEKE	N/A
Since	2014	2015	2021 (as a single NRA)	2013	2016	2015	2014
Supervisory Authority	NBB	BNB	CNB	CBC	CNB	BoG	MNB
Legal Basis NCA	Belgian Bank Law, Organic Law NBB	Law on the BNB, Law on Credit Institutions	Article 53 Constitution, Act on the CNB, Credit Institutions Act	Article 2B of the Business of Credit Institutions Law	Act No. 6/1993 Coll.	Statute of the BoG, Article 55A; Law 4261/2014	Central Bank Act
Internal Organisation	Resolution College	Resolution of Credit Institutions Directorate	Resolution Office	Resolution Unit	Resolution Department	Resolution Unit	Financial Stability Council
DGS	Guarantee Fund (part of the Treasury)	Bulgarian Deposit Insurance Fund	N/A	Deposit Guarantee and Resolution of Credit and other Institutions Scheme Laws	Financial Market Guarantee System	Hellenic Deposit and Investment Guarantee Fund (TEKE)	National Deposit Insurance Fund (OBA)
In charge of NRF	Resolution Fund (part of the Treasury)	BNB	HAOD	Committee appointed by the Governor of the CBC	Financial Market Guarantee System	TEKE	Financial Stability Council
Decision-making in…	Resolution College	Governing Council	Council Meeting	Governor/Board of Directors	Resolution Department	Resolution Measures Committee	Financial Stability Board
Quorum	Majority	More than ½ of the members and the Governor	2/3 of members	Five members	N/A	N/A	3-10 members (quorum if the majority of its members are present)
Voting Rights	Simple majority	Majority of members present but no less than 4 votes	2/3 of members present	Simple majority	Simple majority	Majority	Simple majority
Members of/ Body	Resolution College	Governing Council	Council	Governor/Board of Directors	Bank Board	One Deputy Governor, one Director General, four Directors of BoG	Governor of the MNB, as chairman of the Financial Stability Board, the Deputy Governors supervising certain specific tasks, as stipulated in the Central Bank Act, and the executives appointed by the Governor of the MNB

Appointment	By Royal Decree	By National Assembly and President	By Parliament	By the President (for the Governor) and Council of Ministers of the Republic of Cyprus (for the other members of the Board)	By President	Ex officio	By President/ Parliament
Term of Office	4 years, renewable	6 years, unlimited renewable	6 years, renewable	5 years, renewable	6 years	N/A	6 years, renewable for maximum two terms
Removal	By Royal Decree	Pursuant to ESCB Statute	Pursuant to ESCB Statute	As regards the Governor, by decision of a Council established under the eighth paragraph of Article 153 of the Constitution, if the Governor no longer fulfils the conditions required for the performance of the Governor's duties or is guilty of serious misconduct. As regards the other members of the Board, by decision of the Council of Ministers on recommendation from Minister of Finance and after hearing of the Governor of CBC	N/A	N/A (The Committee's responsibilities are delegated, and may be withdrawn at any time, by act of the Executive Committee, comprising the Governor and two Deputy Governors of the BoG)	By President/ Parliament
Professional background	Based on expertise	Prominent professional in the areas of economics, finance and banking	High personal reputation, and professional experience in monetary, financial, banking and/or legal matters	Recognised professional qualifications and/or recognized economic and business experience	Economic and legal background	N/A	No conflict of interests, Hungarian citizens with outstanding theoretical knowledge and practical professional expertise in issues related to monetary, financial or credit institution activities (Monetary Council)
Independence stipulated in…	Royal Decree	National law	Constitutional law	National law	National law	EU law	Fundamental law
Financial Independence	Repayment from institutions	Independent budget, annual fees by the institutions	Independent budget, annual fees by the institutions	Repayment from institutions	Budget of CNB	N/A	Interest income, from supervisory activities
Democratic Accountability	Before Federal Parliament	Annual report to National Assembly	Semi-annual information to Parliament	N/A	N/A	Before Hellenic Parliament	Report to Parliament
Administrative Accountability	Decision and approval of Minister	N/A	N/A	Consultation with other authorities	Approval of the Ministry of Finance, Bank Board as superior administrative authority	State through Ministry of Finance	Shareholder represented by minister responsible for public finances
Internal/ external Audit	N/A	Outside the scope of Court of Auditors, only internal audit	Internal and external audit	Internal Audit	Outside the scope of Court of auditors	Internal and external auditors	State Audit Office
Judicial Review	Court of Appeal of Brussels	Supreme Administrative Court	Administrative courts	Supreme Constitutional Court	Court	Supreme Administrative Court (Συμβούλιο της Επικρατείας, or Conseil d'État)	Courts

2. National Banks (Part 2)

Italy, Ireland, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovenia

Questions	Italy	Ireland	Latvia	Lithuania	Netherlands	Portugal	Romania	Slovenia
NRA	Bank of Italy	Central Bank of Ireland	Bank of Latvia	Bank of Lithuania	Dutch Central Bank	Bank of Portugal	National Bank of Romania	Bank of Slovenia
Abbreviation	BI	CBI	N/A	BoL	DNB	BdP	NBR	N/A
Official Name	Banca d'Italia	Central Bank of Ireland	Latvijas Banka	Lietuvos Bankas	De Nederlandsche Bank	Banco de Portugal	Banca Națională a României	Banka Slovenije
Legal form	Public law Institution	Body corporate established by statute	Legal person of public law	Public Institution	Public Limited Company	Legal person of public law	Public Institution	Public law
Legal Basis NRA	Article 1 Legislative Decree no. 180	Central Bank act 1942, 2011 Act, Bank Recovery and Resolution Regulations, CCP Regulations	Law on the Bank of Latvia	Law on the Bank of Lithuania	Article 3a of the Decree execution EU-regulations financials markets	Legal Framework of Credit Institutions and Financial Companies	Romanian Bank Resolution Act The Statute of the National Bank of Romania	Zakon o reševanju in prisilnem prenehanju bank
Other Authorities	Ministry for Finance	Irish Minister for Finance, Irish Courts	Ministry of Finance	Government	Minister of Finance, Bank Council as group of external stake-holders	N/A	For investment firms FSA Ministry, Trade Registry Office	Competent Ministry
Since	2015	2011	2023	2015	N/A	2012	N/A	N/A
Supervisory Authority	BI	CBI	Bank of Latvia	Bank of Lithuania	DNB	BdP	Autoritatea de Supraveghere Financiară	Bank of Slovenia
Legal Basis NCA	Banking Act, Legislative Decree No. 385	Central Bank Act 1942 and relevant supervisory legislation	Law on the Bank of Latvia	Law on the Bank of Lithuania	Financial Supervision Act	Organic Law of the BdP	N/A	Zakon o Banki Slovenije
Internal Organisation	Resolution Unit	Resolution and Crisis Management division	Resolution Committee	Resolution Division	Resolution Board and Division	Resolution Department	Bank Resolution Department	Resolution Unit
DGS	Private nature funds supervised by BI	Fund maintained by Central Bank	Bank of Latvia	State company "Deposit and Investment Insurance"	DNB	BdP	NBR	Banka Slovenije, Zakon o sistemu jamstva za vloge
In charge of NRF	BI, Resolution Unit	Central Bank	Bank of Latvia	State company "Deposit and Investment Insurance"	DNB	NRF with tripartite board of directors	Bank Deposit Guarantee Fund	N/A
Decision-making in…	Governing Board	Governor or delegate (resolution authority functions)	Committee	Board	Executive and Supervisory Board	Board of Directors	Board	N/A
Quorum	Three members	N/A	Three members	Three members	All members	Two members	N/A	N/A
Voting Rights	Simple majority	N/A	Simple majority	Majority of at least three votes	Absolute majority, strive for consensus	Simple majority, with the President of the Board of Directors having a casting vote	N/A	N/A
Members of/ Body	Governor	Governor	Council/ Committee	Board	Executive Board	Board and Unit	Board	Governor
Appointment	By Decree by President upon the proposal of the President of the Council of Ministers and after a deliberation by the Council of Ministers, having heard the opinion of the Board of Directors	By President on advice of the Government	By Parliament upon proposal Governor of the Bank of Latvia	By Parliament on recommendation of President; members by President on recommendation of Chair-person	By Royal Decree	One member by the Minister of Finances, another member is a Board Director of the BdP, and the third is chosen by agreement of the BdP and the Minister of Finances	By Parliament	By National Assembly

Term of Office	6 years, once renewable	7 years, renewable	5 years, renewable (not more than 2 consecutive terms)	5 years (Chair) – unlimited renewable, 6 years other Members – twice renewable	7 years, renewable	3 years, renewable up to four times	5 years, unlimited renewable	6 years, renewable
Removal	The same rules as for the appointment apply respectively	By President on advice of the Government	Parliament	Pursuant to Article 12 Law on the Bank of Lithuania	By Royal Decree	By the Minister of Finances (in case of the member initially chosen), by the Council of Ministers under proposal of the Minister of Finances (in case of a Board Director of the BdP), and by the BdP and the Minister of Finances	N/A	By National Assembly
Professional background	N/A	As relevant	Citizen of Latvia, master or equivalent degree, impeccable reputation, professional experience, right to access classified information	N/A	Recognized reputation and professional experience	Recognized good standing, sense of public interest, experience, management ability, knowledge and technical competence	N/A	N/A
Independence stipulated in…	National laws and EU law	National and EU law	National and EU law	Constitutional law	Formal Law	Internal rules	National law	National Law
Financial Independence	No funding from state or market participants	Levies paid by entities regulated by the Central Bank / Credit Institutions resolution Fund	Funded by supervisory fees	Stipulated in National law	ZBO-budget, resolution covered by institutions	Funded by periodical contributions from participants	Self-financed	Annual compensation from banks, reimbursement
Democratic Accountability	Transparency duty to Parliament	Attendance before the Oireachtas	Oversight by Parliament	N/A	Report every five years to Parliament	Parliamentary Inquiry Commissions	N/A	N/A
Administrative Accountability	N/A	Notification/ consent of Irish Minister for Finance for certain resolution decisions	State Audit Office	N/A	Marginal supervision by the minister of Finance	N/A	N/A	Notification, consultation or consent by competent ministry
Internal/ external Audit	Internal Board of Auditors, external audit	Comptroller and Auditor General	Internal Audit Committee/ State Audit Office	N/A	Court of Auditors	Audit Council of the BdP, Court of Auditors	N/A	Internal Audit
Judicial Review	Administrative courts	Courts, independent tribunal for certain decisions (IFSAT)	Internal administrative review, then courts	N/A	Administrative courts	Administrative courts	Courts	Courts

3. Other Authorities (Part 1)

Austria, Denmark, Estonia, Finland, France, Germany

Questions	Austria	Denmark	Estonia	Finland	France	Germany
NRA	Financial Market Authority	Financial Supervisory Authority, The Financial Stability Company	Financial Supervision and Resolution Authority	Financial Stability Authority	Prudential Supervision and Resolution Authority	Federal Financial Supervisory Authority
Abbreviation	FMA	FSA/FSC	FI	FFSA	ACPR	BaFin
Official Name	Finanzmarktaufsichts-behörde	Finanstilsynet Finansiel Stabilitet	Finantsinspektsioon	Rahoitusvakausvirasto	Autorité de Contrôle Prudentiel et de Résolution	Bundesanstalt für Finanzdienstlei-stungs-aufsicht
Legal form	Public law, State-owned	FSA is an independent State authority FSC is an Independent public company	Acts in the name of the state, formally part of Eesti Pank	Independent State authority	Independent institution without legal personality leaning against the NCB, public law	Federal institution governed by public law
Legal Basis NRA	BaSAG	Act on restructuring and resolution of financial institutions	Finantsinspektsiooni seadus	Act on Financial Stability Authority	Act on the separation and the regulation of banking activities	Article 6 (1) KWG, 4 (1) SAG
Other Authorities	Austrian National Bank, Ministry of Finance (BMF)	Ministries, Central Bank	Central bank (Eesti Pank) and the Ministry of Finance	N/A	The Treasury, and the FGDR (involvement)	Ministry of Finance (BMF), Bundesbank, Finance Agency GmbH
Since	2015	2015	2002	2015	2013	2018
Supervisory Authority	FMA	FSA	FI	Finanssivalvonta	ACPR	BaFin
Legal Basis NCA	FMABG	Financial Business Act	Finantsinspektsiooni seadus, FI	Act on Financial Supervisory Authority	Ordinance on the fusion of the licencing and the supervisory authorities in the banking and the insurance sectors	FinDAG
Authority	Supervisory Authority	Supervisory Authority	Supervisory Authority	Resolution Authority	Supervisory Authority	Supervisory Authority
Internal Organisation	Resolution Department	Two authorities Going/gone concern	Resolution Department	Separate Authority	Resolution Board (Collège de résolution) supported by a Resolution Directorate	Resolution Unit
DGS	ESAEG	FSC	Head of the Resolution Department	FFSA	FGDR	BaFin
In charge of NRF	FMA (NRA)	FSC	Guarantee Fund	FFSA	FGDR	BaFin
Decision-making in…	Executive Board/ Supervisory Board Meetings	Director/Board of FSA	Management Board	Management Group/ Advisory Board	Resolution College	BaFin President, Allocation to departments
Quorum	Supervisory Board: Four members	N/A	Four members	N/A	Half of the members	N/A
Voting Rights	Executive Board: unanimously, Supervisory Board: simple majority	Simple majority	Simple majority	N/A	Simple majority	N/A
Members of/ Body	Executive Board	Director of FSA	Management Board	Director General	Resolution College	Board
Appointment	Nomination by BMF and OeNB, appointed by Federal President upon proposal from Federal Government	By Minister of business after hearing of the Board Board of FSA by Minister	By Supervisory Board, chaired by Minister of Finance	By Government	Members are designated *ex officio* and thus appointed following procedures in the framework of their primary functions	By Federal President on proposal of Federal Government
Term of Office	5 years, renewable	FSC for one year, renewable	4 years	5 years, renewable	Follows the one of their primary functions	5 years, renewable
Removal	By BMF	By Minister of business after recommendation from a majority of the Board	N/A	By Government	Same as appointment	N/A

Professional background	Experts in at least one branch of the FMA, not excluded from right to be elected to the Austrian National Assembly	In the appointment competencies within financial regulation, broader legal and economic insights are valued	Active legal capacity, academic degree, impeccable professional and business reputation, 5 years experience	Same as for the public officials stipulated in the Act on Public Officials in Central Government and knowledge of financial markets	Same as appointment	N/A
Independence stipulated in…	Constitutional law	Law (Financial Business Act)	Law	Federal law	Law	Parliamentary law in internal rules
Financial Independence	Federal budget and contributions by supervised entities	By fees collected from institutions	By the supervision fees and procedure fees	By fees collected from institutions	Separate budget; fees collected from institutions and possible top up by NCB	Covers own costs, contributions by institutions
Democratic Accountability	Finance Committee of National Assembly; Indirect accountability to National Assembly via BMF	Parliamentary mandates for EU negotiations	Before Estonian Parliament (Riigikogu)	Performance agreement by Ministry, Parliament's power to overview	Possible hearings and parliamentary inquiries	Approval BMF, instructions by president, Before German Parliament
Administrative Accountability	Information to BMF, supervised by BMF consulting with OeNB	The board of the DFSA	Monitored by the Supervisory Board, chaired by Minister of Finance	Within the administrative scope of the Ministry of Finance	Audit Committee	Direct administrative line of BMF
Internal/ External Audit	Internal Audit Unit/ external auditing firm/ Federal Court of Auditors	Both internal and external audit (the National Audit Company)	State Audit Office	National Audit Office	Court of auditors	N/A
Judicial Review	Administrative courts and Civil Law Courts for Public Liability	Company Appeals Board for FSA, Court (especially FSC)	Administrative courts	Administrative courts	Administrative courts	Administrative courts, state liability

4. Other Authorities (Part 2)

Luxembourg, Malta, Poland, Slovakia, Spain, Sweden

Questions	Luxembourg	Malta	Poland	Slovakia	Spain	Sweden
NRA	Financial Sector Supervisory Commission	Malta Financial Services Authority	Bank Guarantee Fund	Resolution Council	Executive Resolution Authority	National Debt Office
Abbreviation	CSSF	MFSA	BGF	N/A	FROB	N/A
Official Name	Commission de surveillance du secteur financier	Malta Financial Services Authority	Bankowy Fundusz Gwarancyjny	Rada pre riešenie krízových situácií	Fondo de Reestructuración Ordenada Bancaria	Riksgälden
Legal form	Public establishment	Public Institution	Public Institution	Legal person authorised to act in the area of public administrations	Public law	Public Authority
Legal Basis NRA	BRR Act, CSSF Act	MFSA Act	Second BGF Act	Act on resolution, the Statutes and the Rules of Procedure of the Council	Law No. 11/2015	Resolution Act
Other Authorities	Central Bank of Luxembourg, Conseil de protection des déposants et des investisseurs	N/A	Ministry of Finance, Financial Supervision Authority (KNF), National Bank of Poland	Only in resolution execution	Bank of Spain, CNMV	Riksbanken
Since	1998, tasked in 2015	2015	2016	2015	2015	1789, Resolution Board since 2015
Supervisory Authority	CSSF	MFSA	Financial Supervision Authority (KNF)	National Bank of Slovakia	Bank of Spain	Finans-inspektionen
Legal Basis NCA	CSSF Act	Article 4B of the Banking Act	Act on Financial Supervision	Act No 566/1992, Act No 747/2004	Law No. 10/2014	N/A
Central Bank / Authority	Supervisory Authority	Supervisory Authority	Resolution Authority	Resolution Authority	Resolution Authority	Resolution Authority
Internal Organisation	Resolution Board	Resolution Committee/ Unit	Resolution Department	Separate Authority	Separate Resolution Execution	Resolution Board
DGS	Fonds de Garantie des Dépôts Luxembourg,	N/A	BGF	Deposit Protection Fund	N/A	N/A
In charge of NRF	Fonds de Résolution Luxembourg	N/A	BGF	Fond ochrany vkladov	FROB	N/A
Decision-making in…	Resolution Board	Committee	Supervisory Board	Plenary meeting	Governing Committee	N/A
Quorum	Majority present	Three members	Three Members	Half of its members	Half of voting members	N/A
Voting Rights	Majority	N/A	All must sign but dissenting opinion Chair has a casting vote	Majority, executive member has sole decision-making power for certain competences	Simple majority	N/A
Members of/ Body	Resolution Board	Committee	Management Board/ Supervisory Council	Resolution Council	Governing Committee	Director general
Appointment	Three ex officio, three by Grand Duke on proposal from Government	N/A	Supervisory Council: representatives of ministry, National Bank and KNF; ManagementBoard by Council	By the Governor of NBS, nominated and recalled by the Minister of Finance	Chair by Council of Ministers; others by Bank, Ministry of Economic Affairs and Deputy Chair of CNMV, two representatives from the Ministry of Finance	By Government
Term of Office	5 years, renewable	3 years, renewable	3 years	N/A	5 years, not renewable	N/A
Removal	N/A	N/A	Decision by Minister of Finance	Like appointment	By Government	By Government
Professional background	Previously worked in the private sector, either in a banking institution or a law firm	N/A	i) full legal capacity; (ii) higher education; (iii) no final conviction of an intentional crime or a fiscal offense; (iv) professional knowledge and experience in the functioning of the financial market	four managers from NBS, four from the Ministry of Finance, director of Debt and Liquidity Management Agency and director of the State Treasury	Candidates with sufficient expertise, technical training, and experience	N/A
Independence stipulated in…	National law	National law	National law	Constitutional law	National law	N/A

Financial Independence	Own budget drawn by Resolution Board, financed by taxes levied on financial sector	Own budget	Own budget composed of the financial profits of previous years	Annual contributions and extraordinary contributions by institutions	N/A	N/A
Democratic Accountability	Report and financial accounts to Government	N/A	Before Polish Parliament	N/A	Half-yearly before the Spanish Parliamentary Committee	Explain to parliament committees
Administrative Accountability	Report to Ministry of Finance	Approval and inform of minister	Controlled by Minister of Finance	N/A	Autonomous from the General Administration of the State; report to the Ministers	Independent but responsible to the Ministry of Finance
Internal/ External Audit	Court of Auditors	National Audit Office	Audit Committee	N/A	National Audit Office, Spanish Court of Auditors	Report
Judicial Review	Administrative Court	Appeal before the Financial Services Tribunal	Administrative courts	Administrative court	National High court	Right to take decision to court see Administrative act

Questionnaire: Resolution Authorities and their institutional settings in EU Member States

General information

Please answer the questions below if and as appropriate in your individual cases (please kindly note that sections I and II concern individual Member States/ NRAs whilst sections III, IV and V regard the SRB, the ECB and the EBA, respectively. As such, whilst you are naturally welcome to share any thought you may have on any of the issues considered here, we anticipate that national reports will focus mostly on the questions contained in sections I and II whereas the SRB's, the ECB's and the EBA's answer will focus mostly on the questions included in their respective sections).

We would welcome answers drafted as stand-alone texts as opposed to individual answers to the single questions.

Please naturally feel free to add any information that might not be covered by the questions but is relevant in your individual case.

Although there is naturally some flexibility, to ensure some uniformity across the contributions we would welcome answers of around 30 pages maximum (Times New Roman, 11).

In as far as this is possible, we would welcome your reports by 15 September 2022.

I. Institutional issues

Is there one or more resolution authorities in your Member State?

What is the legal basis in which the NRA is anchored?

What other types of authorities (competent ministry, other administrative authority) are involved in resolution planning and/or execution?

If more than one authority is involved, how are their respective roles defined and coordinated?

Is the resolution authority included in the central bank and/or supervisory authority?

Where this is the case, how are the different functions organized/divided?

How is your NRA organized internally (composition, distribution of tasks etc.)?

Which is the organ in charge of banking prudential supervision and what is its legal basis?

Does the NRA fulfil functions other than resolution functions? For instance, is the NRA in charge of the management of specific national insolvency proceedings other than resolution and what are the relevant triggers? Is it in charge of powers under Article 33a BRRD?

Which is the institution in charge of the administration of national resolution funds and is there a long-term tradition in this regard? Which is the institution in charge of the DGS?

How long have the existing arrangements been in place? Have they undergone any reforms and if so, what was/were the trigger/s for these reforms? Was there any resolution authority before the BRRD was adopted?

Have any (political or judicial) tension or dispute arisen in relation to the framework in place?

Has the creation of the SSM and/or the SRM had any impact for the direct relationship between NRAs/NCAs and the EBA?

Is any reform under discussion at the moment?

II. Independence, separation, accountability

Who calls the meetings of the NRAs and how often doC they take place? Who decides on the agenda?

How are members of their (respective) internal bodies appointed and how may they be removed from office?

What is the professional background of the members in the law and in practice?

How are decisions taken? (voting rights for permanent members/academic members/members of supervisory authorities if any difference exists)

What are the arrangements in place to ensure the operational independence of the resolution functions and to avoid conflicts of interest with other functions?

What is the rank of the rules that guarantee operational independence (laws, regulations, other)?

How are NRAs financed/how is financial independence guaranteed? What is the form of publicity given to the internal rules on separation of supervision and resolution/are they public at all?

What is the level of separation that has been achieved (separate apical supervisory and resolution bodies, single apical body and internal organisational separation only, other)?

Have any tensions arisen as a result of or regarding this separation?

How do the early intervention and special administration functions fit into this division?

How is information exchanged between the different functions and are there mechanisms and/or protocols in place between the different functions?

How is information exchanged between the different functions (supervisory and resolution) when it comes from/is addressed to Union authorities (ECB or SRB)?

What is the impact, if any, of the MoU between the ECB and the SRB on the exchange of information between the NCAs and the NRAs (recitals 10)?

(How) is democratic accountability guaranteed? [this could be articulated with accountability of supervisory decisions]

Are there other forms of accountability (Court of auditors)?

How is judicial review guaranteed?

Which rules (if any) does national law provide for national authorities' reaction to soft law (guidelines etc.) from relevant EU bodies (ECB, EBA, SRB), e.g. obligatory compliance or justification of non-compliance?

Towards whom is the NRA accountable where it is called to implement SRB decisions? Please describe the procedure(s) in place. Is accountability to/control by the ECA and the EP conceivable for the national implementation phase, or do accountability instruments remain confined to the national level?

Are there any rules restricting the NRA's liability in application of Article 3 BRRD? Do said restrictions apply to resolution functions only or do they extend to supervisory functions provided for under the BRRD (recovery plans, early interventions measures)? Does national law restrict its general rules on public liability where the NRAs acts in the context of the SRM and, if so, in which way?

III. SRB-specific questions

Since Article 3 BRRD allows the embodiment of the NRA within the NCA and the NCB, subject to certain organisational arrangements, is there a margin of appreciation for the SRB in this respect in order to ensure the proper functioning of the SRM, or should it be considered that this is a matter left to the Member States but under the general control of the Commission?

If the answer to the previous question is positive, is there any SRB guide or other document for the implementation of the separation of supervision and resolution functions within the NRAs?

What is its legal basis, if any, in the SRM Reg.? Does the SRB's check go beyond a formal check?

Has the SRB been in contact with the European Commission regarding this matter? Has the Commission examined this aspect of Member States' duty to transpose the BRRD?

Should the independence provided for in the SRM Regulation also be interpreted in relation to the requirements of Article 3 BRRD?

Does the SRB exercise any coordinating function/does any initiative of coordination or information sharing among NRAs take place within the SRB in the context of the implementation of EBA guidelines?

How is the SRB's relationship to the ECB organised?

How is information sharing organised with the ECB (in its supervisory capacity), and with regard to information received from the ECB, with the NRAs?

IV. ECB-specific questions

How is the ECB's relationship (in its quality as banking supervisor) to the SRB organised: generally in the legal framework in place, and practically within the ECB/on a daily basis? In particular, how is the necessary regular and timely exchange of information between supervisory and resolution authority guaranteed and could the existing arrangements be viewed as best practices for the cooperation between national supervisory and resolution authorities where these are hosted by two separate entities? Does the SRB's quality as an EU agency have any impact? [*this question regards the MoU between the ECB and the SRB*]

How do the SRB and the ECB interact in resolution planning?

How is democratic and judicial accountability guaranteed [of crisis management functions]?

How is the ECB's relationship to the European Commission in resolution matters organised? Have any tensions arisen in this regard? [this regards State aid – extraordinary public support]

How is the ECB's relationship with the EBA organised and regulated: generally in the legal framework in place and practically within the ECB/on a daily basis? Have any tensions arisen in this regard?

The ECB is called upon to give its opinion on EU and national draft legislation:

– Has it been called to assess the embodiment of national resolution authorities in that context (that could be the case, for instance, of monetary financing issues where they are placed within NCBs)?

– Has this been the case for supervision authorities? Has the existence of the SSM had any impact in this regard in the assessment performed by the ECB? Has the ECB's quality as Central Bank and responsible of banking supervision in the Banking Union raised any specific issues/ had specific consequences?

– Has the ECB examined this question from an EU perspective when the Single Rulebook and/or the Banking Union were established?

V. EBA-specific questions

What is the role if any of the EBA towards NCAs, NRAs and their institutional embodiment within Member States' institutional frameworks?

Does the EBA monitor national institutional frameworks and their evolution? If this is not the case, why not?

Has it ever considered this question/adopted soft law on this matter?

Has the creation of the SSM and/or the SRM had any impact for the EBA and its direct relationship to NCAs/NRAs? How should the obligation to comply or explain be understood in these cases? Are the NCAs/NRAs always directly responsible towards the EBA, or does the ECB/SRB convey the positions of the NCAs/NRAs, maybe in an attempt to reach a common position among them beforehand?

Have any particular issues related to the institutional embodiment of NCAs or NRAs (or the combined function of a national institution) arisen in the past?

How is the relationship to the ECB defined and regulated? How about the relationship to the SRB?

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