

# SRB and NRAs: the challenges to an effective judicial protection

EBI – EFSA, Tallinn, 29 November 2017

**Yves Herinckx**

Avocat (Brussels) / Solicitor (England)

Independent Arbitrator

Deputy Judge at the Brussels Court of Appeal

Vice-Chair of the SRB's Appeal Panel

# SRB: one of a kind

---

SRM Regulation 806/2014, recital 31:

*the Board should be a specific Union agency with a specific structure [...] which **departs from the model of all other agencies of the Union.***

# SRB, NRAs, Commission, Council

## SRMR, recital 11:

*in the context of the Single Resolution Mechanism (SRM), a centralised power of resolution is established and entrusted to the **Single Resolution Board** [...] and to the **national resolution authorities**.*

## Recital 26:

*the resolution scheme adopted by the Board enters into force only if, within 24 hours after its adoption by the Board, there are no objections from the **Council** or the **Commission** or the resolution scheme is approved by the Commission.*

# SRB's scope of authority

---

In scope (SRMR, Art. 7(2)):

- 142 significant eurozone banks/groups (direct ECB supervision)
- 15 eurozone cross-border groups

NRAs' powers (SRMR, Art. 7(3)):

- all other eurozone banks and groups

# NRAs' structural role within SRB

---

## SRB plenary session:

- Chair, [Vice-Chair], four full-time members
- one representative per NRA

## SRB executive session:

- Chair, [Vice-Chair], four full-time members
- NRA representative[s] of country[ies] concerned – vote[s] ignored if no consensus

Mixed resolution teams

# Allocation of tasks (if in scope) (1)

## SRB decides, NRA implements

*SRMR, Art. 29(1): National resolution authorities shall implement all decisions addressed to them by the Board [...] in accordance with the conditions laid down in national law.*

## If NRA disobeys

- SRB may take back power

## Types of decisions addressed to NRAs:

- resolution scheme (bail-in, sale of business, ...)
- MREL
- removal of impediments to resolvability, ...

# Allocation of tasks (if in scope) (2)

---

## Adoption of resolution scheme (SRMR, Art. 18)

- adopted by SRB
- within 24h, Commission endorses or objects
- Council may endorse or object
- *Meroni*

## Who is responsible for the decision?

- T-570/17 and T-575/17, and others

# Allocation of tasks (if out of scope)

---

NRAs are in charge, but:

- if resolution requires use of SRF money, SRB decides
- SRB may warn NRA and take back power (SRMR, Art. 7(4))
- possibility of upward delegation to SRB (SRMR, Art. 7(5))

# Allocation of tasks

SRB has central role (SRMR, Art. 28(2), 31, 33):

- issues guidelines, instructions and recommendations to NRAs
- must review all draft decisions of NRAs

To be compared with ECB/SSM:

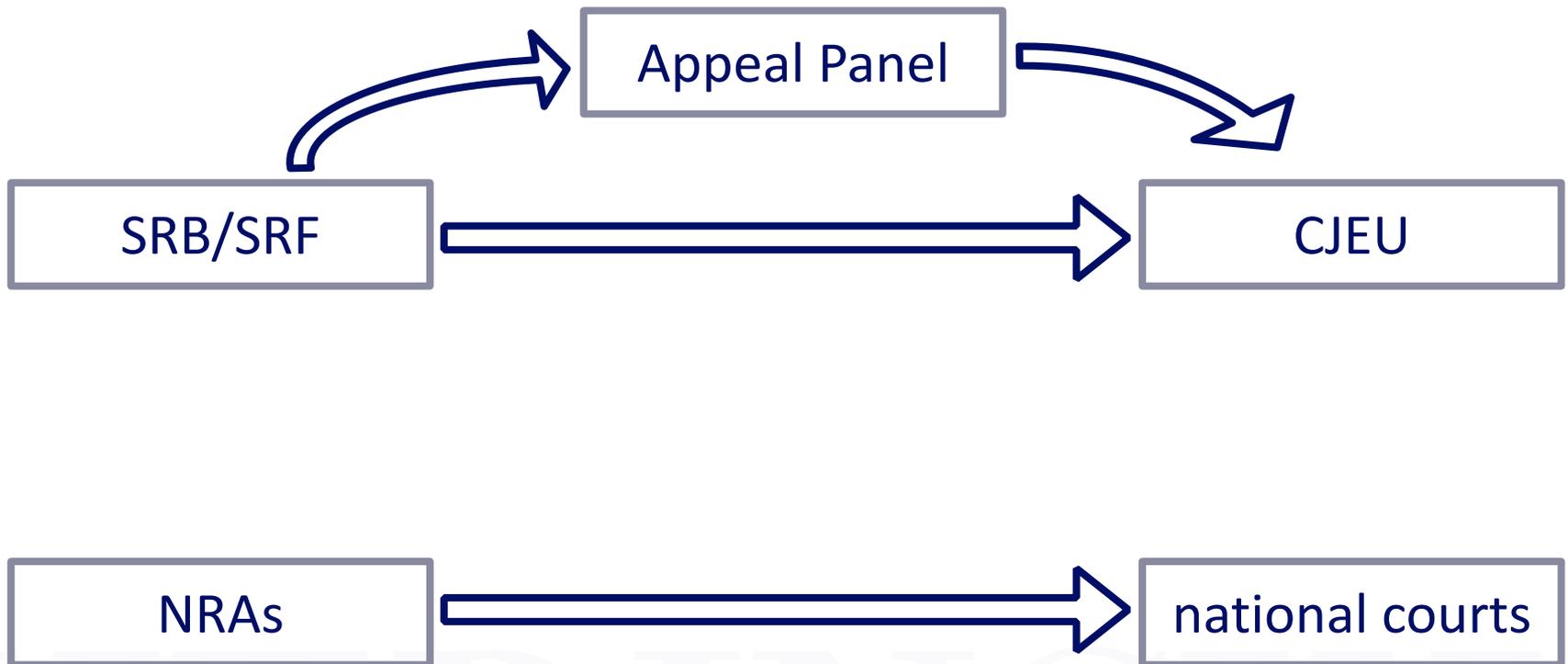
*CJEU, T-122/15, LB Baden-Württemberg v ECB, par. 72:  
under the SSM the national authorities are acting within  
the scope of decentralised implementation of an exclusive  
competence of the Union, not the exercise of a national  
competence*

# Allocation of jurisdiction (1)

## SRMR, recital 120:

The **Court of Justice** has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. **National judicial authorities** should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.

# Allocation of jurisdiction (2)



# Busy...

---

## Appeal Panel

- 2016: 13 cases, of which
  - 12 inadmissible (SRF contributions)
  - 1 (partial) annulment (contributions to SRB budget)
- 2017: 52 cases, of which
  - 36 inadmissible (Banco Popular resolution)
  - 1 withdrawn (access to Banco Popular documents)
  - 15 pending

## CJEU

- 111 pending cases against SRB (SRF contributions and Banco Popular resolution)

# Appeal Panel – scope of jurisdiction (1)

## Jurisdiction limited to:

- MREL – minimum requirement for own funds and eligible liabilities (SRMR, Art. 12(1))
- removal of impediments to resolvability (Art. 10(10))
- simplified obligations (Art. 11)
- penalties – fines and *astreintes* (Art. 38 to 41)
- *ex-post* contributions to the SRF (Art. 71)
- access to documents (Art. 90(3))
- contributions to the administrative expenditures of the SRB (Art. 65(3))

# Appeal Panel – scope of jurisdiction (2)

---

## No jurisdiction in respect of:

- claims for damages
- crisis management measures
  - decision to place a bank under resolution
  - bail-in of creditors
- *ex-ante* contributions to the SRF
- ...

# CJEU – scope of jurisdiction

---

## Actions for annulment

- Art. 263 TFEU, Art. 86 SRMR
- against decisions of the SRB/SRF (Commission/Council?)
- against decisions of the Appeal Panel

## Claims for damages

- Art. 268 and 240 TFEU, Art. 87(3) and (5) SRMR
- against the SRB/SRF (Commission/Council?)

## No jurisdiction against national authorities

- but preliminary references

# Nat'l courts – scope of jurisdiction

---

Annulment actions against decisions of the NRAs

- with incident challenge of validity of SRB decision

Claims for damages against the NRAs

*Ex-ante* approval of crisis management measures

- *e.g.* bail-in, sale of business
- if required by national law, under Art. 85(1) BRRD
- must be “expeditious” (24 hours)

# National courts and SRB decisions

---

Incident challenge before a national court of the validity of an SRB decision:

- may be dismissed by the national court
- may not be accepted without preliminary reference to the CJEU (*Foto-Frost*)

# Admissibility (annulment actions)

## CJEU – Article 263, paragraph 4, TFEU:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act **addressed** to that person **or** which is of **direct and individual concern** to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

## Appeal Panel – SRMR, Art. 85(3):

Any natural or legal person, including resolution authorities, may appeal against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is **addressed** to that person, **or** which is of **direct and individual concern** to that person.

# “addressed to that person”

---

## Simple test

- *C-673/13, European Coalition to End Animal Experiments v ECHA*

## But often not satisfied, *e.g.*:

- MREL decision, not addressed to the bank concerned
- bail-in decision, not addressed to the creditors or the bank concerned

## Was satisfied in Appeal Panel cases:

- 1/16, contributions by a bank to the SRB budget
- 37/17, access to documents (withdrawn)

# or “direct concern” and...

## CJUE, C-666/16, *Lysoform*

*the condition [...] requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, secondly, it must leave **no discretion** to its addressees, who are entrusted with the task of implementing it, such **implementation being purely automatic** and resulting from EU rules without the application of other intermediate rules.*

Varying extent of NRAs discretion when implementing SRB decisions

# ...and “individual concern”

## CJUE, 25/62, *Plaumann*

*Persons other than those to whom a decision is addressed may only claim to be **individually concerned** if that decision affects them by reason of certain **attributes which are peculiar to them** or by reason of circumstances in which they are **differentiated from all other persons** and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*

## Belonging to an affected category is insufficient

- unless “limited class of economic operators”
- SNS Bank bondholders: T-321/13, *Adorisio*
- Trasta Komercbanka shareholders: T-247/16, *Fursin v ECB*

# Hence...

---

Very often, probably:

- no CJEU action for annulment against SRB decision
- but against NRA implementation before national courts
- with possible preliminary reference to CJEU

Pending cases at CJEU should soon clarify

# Valuations

## Successive valuations in resolution:

- pre-resolution provisional valuation (1)
- *ex-post* definitive valuation (2)
- *ex-post* “valuation of difference in treatment” (3)

### (1) and (2) – SRMR, Art. 20(15):

*The valuation [...] may be subject to an **appeal together with the decision** of the Board.*

### (3) – valuation by independent person

- not a decision of the SRB or the NRA – any right of appeal?

# Joint decisions

---

## Joint decisions of SRB and non-eurozone NRAs

- pursuant to BRRD and memoranda of understanding

## Distinct appeal procedures

- CJEU and national courts, or
- national courts and national courts

# Claims for damages

---

SRMR, Art. 87(3): CJEU's jurisdiction against SRB

Potential defendant:

- SRB/SRF?
- Commission? Council?
- NRA? Member State?
- valuer?

Exhaustion of national remedies before access to CJEU?

# Claims for breach of NCWO

---

SRMR, Art. 76(1)(e): SRF to pay compensation if breach of “no creditor worse off” principle

- strict liability, not fault based

Doubtful whether CJEU has jurisdiction

- national courts?

# Thank you!

Yves Herinckx  
Avenue Louise 65, box 14  
1050 Brussels, Belgium  
tel. +32 2 533 5901  
mob. +32 496 239 901

[yves.herinckx@herinckx.be](mailto:yves.herinckx@herinckx.be)  
[www.herinckx.be](http://www.herinckx.be)

*And it goes without saying: these views are mine, not necessarily those of the Appeal Panel, and I am always open to being convinced otherwise...*