

Liability of Resolution Authorities within the Single Resolution Mechanism

Danny Busch



Introduction

- **Liability towards third parties, including**
 - bank deposit holders
 - shareholders and (subordinated) bondholders
- **Liability towards the banks themselves**

Banco Popular Español S.A.

- **By the end of May 2018, out of 103 litigation cases,**
 - (a) 36 applications had sought compensation for alleged damages in addition to their request for annulment of the resolution decision, and**
 - (b) nine applications had brought claims only for damages allegedly suffered.**

Liability of the SRB

Article 87 SRMR Liability of the Board

(...)

3. In the case of non-contractual liability, the Board shall, in accordance with the general principles common to the laws concerning the liability of public authorities of the Member States, make good any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings.

Concern 1

- The standard of liability of the SRB is unclear

General principles common to the laws concerning the liability of public authorities of the Member States?????

Liability of the NRAs

Article 3(12) BRRD

Designation of authorities responsible for resolution

(...)

12. (...) 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.

Concern 2

- **Unlevel playing field**
 - **between banks resolved at SRB level and banks resolved at national level**
 - **between banks resolved at national level depending on their home member state**

Compensation of NRAs by SRB

Article 87 SRMR Liability of the Board

(...)

4. 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.

5. The Court of Justice shall have jurisdiction in any dispute relating to paragraphs 3 and 4. Proceedings in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto.

(...)

Concern 3

- The provision on compensation of NRAs by the SRB is unclear
- It seems as if the SRB should always compensate an NRA that is ordered to pay damages as long as the NRA concerned has not acted intentionally or with manifest and serious error of judgement.
- Whether the SRB itself is somehow committed a sufficiently serious breach of EU law is apparently immaterial (!)

Proposal 1

- **Proposal 1: delete art. 87(3) SRMR and instead adopt the general liability standard for EU institutions and EU agencies, i.e.:**
 - **the rule of EU law infringed must be intended to confer rights on individuals**
 - **the breach must be sufficiently serious**
 - **there must be a direct causal link between the breach of the obligation resting on the SRB and the loss or damage sustained by those affected**

Proposal 2

- **Proposal 2: delete art. 3(12) BRRD and instead subject NRAs to the normal EU Member State liability rules, ie Francovich-liability**
- **Result: levelling the playing field! -> SRB & NRAs subjected to the same liability rules**
- **Is also in line with the fact that the EU Court of Justice recently confirmed that national financial supervisors in breach of EU law are subject to the EU Member State liability rules**

See CJEU, 4 October 2018, ECLI:EU:2018:807 (*Nikolay Kantarev v. Balgarska Narodna Banka*)

Proposal 3

- **Proposal 3: severely amend art. 87(4) SRMR**
- **Pursuant to Proposal 2 NRAs are liable if a claim meets the Francovich-criteria**
- **Pursuant to Proposal 1 the SRB is liable if a claim meets the (identical) general liability criteria for EU institutions and EU agencies**
- **If NRAs and SRB are somehow liable for the same damage (joint and several liability), the claimant may recover the full amount from the SRB and each of the NRAs involved**
- **As a general rule, a joint and several debtor who has performed more than that debtor's share may claim the excess from the other joint and several debtor(s)**
- **These internal matters should be made explicit in a new art. 87(4) SRMR**

Proposal 3

Joint and several liability is not necessarily the general rule!

(1) If the SRB subjects an NRA to binding instructions with no discretion on the part of the NRA, and the NRA complies with these instructions, which causes damage to third parties, the SRB rather than the NRA should be liable

(2) If the SRB subjects an NRA to binding instructions with a certain discretion on the part of the NRA, and the NRA causes damage to third parties by using this discretion, the NRA rather than the SRB should be liable

(3) If the SRB subjects an NRA to binding instructions with no discretion on the part of the NRA, and the NRA does not comply with these instructions, which causes damage to third parties, the NRA rather than the SRB should be liable

Cf. EU Court of Justice, 26 February 1986. - Krohn & Co. Import - Export GmbH & Co. KG v Commission of the European Communities, Case 175/84 [1986]

- **So in such cases: no joint & several liability!**

Proposal 4

- **Proposal 4: amend 87(5) SRMR to the effect that the EU Court of Justice has exclusive jurisdiction in relation to the liability of both the SRB & NRAs**

Thank you for your attention!

Prof. Dr. Danny Busch, M.Jur. (Oxon.)
Chair for Financial Law

Institute for Financial Law
Faculty of Law | University of Nijmegen
T +31 24 361 2190 | M +31 6 1463 4994 | F +31 24 361 1583
E d.busch@jur.ru.nl | <http://www.ru.nl/english/people/busch-d/> | <http://www.ru.nl/ifl>
| [LinkedIn](#)
P.O. Box 9049 | 6500 KK Nijmegen | Montessorilaan 10 | The Netherlands
Think before you print

***Research Fellow of Harris Manchester College and Fellow of the Commercial Law Centre,
University of Oxford***
***Visiting Professor at Université de Nice Côte d'Azur, Università Cattolica del Sacro Cuore di
Milano and Università degli Studi di Genova***