

EBI Stakeholders' Event on Resolution



Liability regimes within the SRM

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Summary

1. **The limitation of liability of the NRAs;**
2. **The liability standard applying to the SRB;**
3. **The liability standard vis-à-vis NRAs after *Kanterev*;**
4. **The distribution of liability between the SRB and the NRAs.**



The *status quo*: 3 provisions explicitly on *liability* to be interpreted...

- Article **3(12) 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”.

- Article **87(3) SRM Regulation**:

“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”

- Article **87(4) SRM Regulation**:

“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”.



The limitation of liability of the NRAs makes sense

- Article 3(12) BRRD
- The Italian example:

Article 3(10) of the Legislative-Decree No 180 of 16 November 2015 (which, in turn, refers to Article 24(6-bis), of Law No 262 of 2005) limits the liability of Banca d'Italia, in its capacity of NRA, to cases of gross negligence and bad faith.

Which are the main drivers and rationales behind?

- **Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions*** (October 2014):
Key Attribute No 2.6: *“the resolution authority and its staff should be protected against liability for actions taken and omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings”*.
- The resolution is under heightened public scrutiny because resolution activities are more intrusive than regular supervisory decisions, and may involve large sums of public money (A. Khan, *Legal Protection: Liability and Immunity Arrangements of Central Banks and Financial Supervisors*, 2018).



The limitation of liability of the NRAs makes sense

Which are the main rationales of a limitation of liability of NRAs?

- The need to preserve the resolution authority's discretionary powers (through which they are supposed to balance conflicting public interests):
 - ❖ Governing different public interests requires the authority to be vested with a sufficient margin of manoeuvre and to enjoy a certain form of limitation of liability.
 - ❖ The NRA are not subject to the Meroni's doctrine
 - ❖ Rules on the legal protection of supervisors are compatible with Article 6 of the European Convention of Human Rights:
 - ❖ Article 6 of the ECHR cannot be used to create civil rights that do not exist under the substantive law of the State concerned (ECtHR, *Z and others v. United Kingdom*, 10 May 2001, Application No. 29392/95, para 87);
 - ❖ Article 6 only applies to procedural rules

The liability standard applying to the SRB

- Article 87(3) SRMR perfectly mimics Article 67 of the EBA Regulation (pursuant to which “*in the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by it or by its staff in the performance of their duties*”):
 - ❖ The Meroni doctrine;
 - ❖ The adoption of the resolution scheme is subject to the Commission-Council endorsement (Article 18(6) SMRR).

- Article 340 TFEU on EU Institutions’ tort liability;
- Recital No 61 of the SSMR on the ECB’s tort liability;
- Liability under EU law according to the ECJ:
 - ❖ the sufficiently serious violation criterion
 - ECJ, C-352/98, *Laboratoires Pharmaceutiques Bergaderm SA*, paras. 39-47;
 - Court of First Instance, T - 212/03, *My Travel Group v Commission*, paras. 40-43 and 83-84 (par. 84: «*The complexity of the situations to be regulated in the control of concentrations, difficulties of application connected with the time constraints imposed on the administration in that regard and **the margin of discretion available to the Commission** must be taken into account in assessing whether the Commission committed a sufficiently serious breach in analysing the effect of the Airtours/First Choice concentration on competition*»).

The liability standard vis-à-vis the NRAs after *Kantarev*

- ECJ, C-571/16, *Nikolay Kantarev v. Balgarska Narodna Bank (BNB)*:
 - ❖ the ECJ was asked, in essence, whether Article 1(3)(i) and Article 10(1) of Directive 94/19 grant depositors the right to claim damages from the State for breach, by the competent authority, of the period for determining the unavailability of deposits of a credit institution;
 - ❖ *“the Court has repeatedly held, concerning the conditions for incurring the non-contractual liability of the State to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which it is responsible, that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the individuals”* (par. 94);
 - ❖ *“Article 1(3)(i) of Directive 94/19 leaves it to the discretion of the Member States to designate the authority responsible for determining whether deposits are unavailable and to the discretion of that authority to assess the financial situation of the relevant credit institution”* (par. 99)
 - ❖ *“However, by stating that the relevant authority must determine whether deposits are unavailable as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable, that provision lays down an unconditional and sufficiently precise obligation with which it is for the BNB, the authority designated for determining whether deposits are unavailable, to ensure compliance within the course of its responsibilities”* (par. 100).
 - ❖ the Law on the Bulgarian Central Bank limited the liability of the BNB for actions taken in the course of its supervisory responsibilities only to harm caused by intentional acts;
 - ❖ *“EU law precludes, in the context of an action such as that in the main proceedings, the right to damages from being subject to the intention of the national authority in question to cause the harm. The liability of the BNB in a case such as that in the main proceedings cannot therefore be determined under the conditions laid down in the Law on the Bulgarian Central Bank”* (par. 128).



The liability standard vis-à-vis NRAs after *Kantarev*

Coordinating Article 3(12) BRRD with *Kantarev*...

– **Option No 1:**

Kantarev does not apply to the activities carried out by the NRAs under the SMRR and the BRRD, because of the special regime provided in this field and, in particular, considering the special rule dictated by Article 3(12) of the BRRD, which expressly allows MS to provide a limitation of liability for the NRA.

Recital No 96 of the SRM Regulation: “*Where a national resolution authority infringes the rules of the SRM by not using the powers conferred on it under national law to implement an instruction by the Board, **the Member State** concerned may be liable to make good any damage caused to individuals, including, where applicable, to the institution or group under resolution, or any creditor of any part of that entity or group in any Member State, in accordance with the relevant case-law*”



The liability standard vis-à-vis NRAs after *Kantarev*

Coordinating Article 3(12) BRRD with *Kantarev*...

– **Option No 2:**

Kantarev applies only to the activities of implementation of EU law (SRMR and BRRD) which imply the exercise of a “circumscribed” discretion by the NRA (see par. 106 of *Kantarev*: “although the BNB has, under Article 1(3)(i) of Directive 94/19 some latitude as regards the determination that a credit institution’s deposits are unavailable, that latitude is nevertheless circumscribed”). In the discharge of this type of activities, the NRA will be potentially subject to the principles of State liability for losses and damages caused to individuals as a result of breaches of European Union law (the criterion of a sufficiently serious breach of EU law, which might result not so dramatically different from the criterion of gross negligence).

On the contrary, by virtue of Article 3(12) BRRD, the discretionary activities performed by the NRA in its capacity of resolution authority may be shielded through a provision limiting the liability to intentional acts.



The distribution of liability between the SRB and the NRAs

- The leading case ECJ, C-175/84, *Krohn&Co Import Export (GmbH & Co KG) v Commission*:

the CJEU ruled that where EU law empowers the Commission to give mandatory instructions to a national authority and this latter complies with the Commission's instructions, the Commission and not the national authority is liable in an action for damages (par. 23: "*moreover, the information submitted by the parties and their arguments before the Court make it clear that the Commission's telex messages of 23 November and 21 December 1982 were intended as an effective exercise of the power conferred upon it by the provisions and that their effect was to instruct the Bundesanstalt to refuse the import licences at issue if no satisfactory reply was given to the requests for information made to Krohn*").
- As a general rule, where the NRA acts under the authority of the SRB, by executing mandatory instructions coming from the latter, which do not leave a material margin of manoeuvre to the former, the SRB – and not the NRA – may be held liable in an action for damages.
- It follows that distribution of liability vis-à-vis third parties essentially depends on the division of tasks within the SRM (Article 7 of the SRMR).
- As a general *caveat*, we have to distinguish: the issue of liability vis-à-vis third parties (allegedly damaged by the activities discharged under the SRMR) from the issue of the allocation within the authorities of the SRM of the costs connected with the non-contractual liability. Article 87(4) pertain to this second issue.



The distribution of liability between the SRB and the NRAs

- The allocation of liability between the SRB and the NRAs vis-à-vis injured parties follows the allocation of the tasks:
 1. the SRB «shall be responsible for drawing up the resolution plans and adopting all decisions relating to resolution» (Article 7(2) SRMR) for significant banks (as defined in the SSM) and for cross border groups, irrespective of whether or not they are classified as significant under the SSM provisions;
 2. the NRAs enjoy the powers to assist the SRB in the performance of its resolution tasks and to take the necessary action to implement the SRB's decisions (Article 29 SRMR);
 3. the NRAs exercise the resolution tasks with regard to the less significant credit institutions (Article 7(3) SRMR) and shall ensure compliance with guidelines, recommendations and instructions adopted by the SRB (Article 31 SRMR and Articles 10 to 13 of the framework for the practical arrangements for the cooperation within the SRM).



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- In light of *Krohn*, in the situations falling under (1), whenever the NRA acts as an executor of decisions adopted by the SRB, with no substantial margin of manoeuvre, the NRA should not be deemed liable vis-à-vis the damaged parties.
- For instance, see Article 18(9) SRMR, according to which “*The Board shall ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme shall be addressed to the relevant national resolution authorities and shall instruct those authorities, which shall take all necessary measures to implement it in accordance with Article 29, by exercising resolution powers*”.
- In those cases, the injured parties shall have the right to appeal to the Court of Justice in order to obtain compensation for damages directly from the SRB.
- Article 87(4) SSMR does not overthrow this settled principle: it does not affect the right of the thirds, but it only regulates the internal relationship between the SRB and the NRAs.

The distribution of liability between the SRB and the NRAs

- In particular, Article 87(4) SSMR, to be referred to the execution by the relevant NRA of a resolution scheme adopted by the SRB, should be read as a rule of functioning of the Mechanism:
 - ❖ Indeed, Article 87(4) SSMR simply provides a sort of redress scheme in favor of the NRA for those cases where it might be held liable vis-à-vis third parties although implementing, under the authority of the SRB, a resolution adopted by the SRB itself.
 - ❖ Indeed, the implementation of the resolution scheme requires that the NRA exercises its powers in accordance with the conditions laid down in national law (Article 29 SRMR; Article 11 Framework). This, in turn, might imply the exercise of a certain degree of discretion by the NRA, by creating the conditions for the NRA to be held liable;
 - ❖ Thus, the rule is basically aimed at removing potential disincentives for NRAs to swiftly implement the resolution scheme decided by the SRB;
 - ❖ The exclusion of the redress obligation, where the act or omission of the NRA constitutes 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, sufficiently safeguards the SRB against possible abuses;
 - ❖ Opining that Article 87(4) SSMR implies that, for all cases falling under that provision, damages actions against the SRB before the EJC are precluded and that compensation can be asked only to the NRA might end up in a *short circuit*. Indeed, in order to assure the enforcement of the right of defence (enshrined by the Convention and the Charter) of the claimant alleging damages, the national court should not simply assess the action of the NRA, but also the behavior of the SRB: but that does not appear compatible with the EU Treaties. In this case, under a different perspective, national courts cannot ensure to the claimant an effective remedy.



The distribution of liability between the SRB and the NRAs

- The allocation of liability between the SRB and the NRAs vis-à-vis injured parties follows the allocation of the tasks:
 3. the NRAs exercise the resolution tasks with regard to the less significant credit institutions (Article 7(3) SRMR) and shall ensure compliance with guidelines, recommendations and instructions adopted by the SRB (Article 31 SRMR and Articles 10 to 13 of the framework for the practical arrangements for the cooperation within the SRM).
- Having in mind *Krohn*, the *comply or explain* mechanism provided under Articles 12 and 13 of the *Framework* with regard to Guidelines, General Instructions and Recommendations addressed by the SRB to the NRAs (with regard to LSIs) seems to rule out the possibility for NRAs (in a possible action for damages) to oppose the lack of a margin of discretion.
- However, the gross negligence of NRA might be excluded if the NRA has executed a crystal clear guideline or instruction or recommendation of the SRB.