JUDICIAL PROTECTION IN THE SINGLE RESOLUTION MECHANISM

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I. INTRODUCTION

1. The Single Resolution Mechanism ("SRM") is operated by multiple authorities. The Single Resolution Board ("SRB"), the Single Resolution Fund (the "SRF", which is owned by the SRB and does not have a separate legal personality[2]) and the national resolution authorities of each of the 19 euro-zone countries are its main actors. The ECB, the European Commission and the Council also have their role. This leads to an intricate regime of judicial review. Appeals against measures adopted under the SRM are handled, depending on the type and the origin of the measure, by the SRB's Appeal Panel, by the Court of Justice of the European Union ("CJEU") or by national courts.

2. Recital 120 of the SRM Regulation outlines the organisation of the judicial review within the SRM:

> The SRM brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States. 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

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1 www.herinckx.be. It goes without saying that the views expressed by the author in this contribution are his own and do not necessarily reflect those of the Appeal Panel.

2 Article 67(3), Regulation No 806/2014 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 "SRM Regulation").

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.

The reality, as will be seen in this contribution, is more complex than recital 120 suggests.

II. THE APPEAL PANEL

3. The SRM Regulation sets up an Appeal Panel within the SRB, which offers to parties affected by certain types of decisions of the SRB a first layer of legal review prior to a possible appeal to the CJEU.[3] This first review is intended to be simpler, faster and cheaper for appellants than legal proceedings at the CJEU. There is little formalism in the procedure, the appeal must in principle be decided within a month, parties need not be represented by outside counsel and no costs are charged to the appellant. Furthermore, the Appeal Panel, whose membership includes economists as well as lawyers, is supposed to be better equipped to scrutinise decisions involving complex financial considerations.

A. BOARDS OF APPEAL AT EUROPEAN AGENCIES

4. The SRB's Appeal Panel belongs to a set of similar review bodies created within specialised agencies of the European Union, often grouped under the generic designation of "boards of appeal".

In the field of financial supervision, the European Supervisory Authorities have their joint Board of Appeal[4] and the European Central Bank has its Administrative Board of Review ("ABoR").[5] These two bodies are similar to

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3 Article 85, SRM Regulation.

4 Article 58, Regulation No 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority); Article 58, Regulation No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Article 58, Regulation No 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority). These regulations are identified together as the "ESA Regulations" and the European Supervisory Authorities are identified as the "ESAs".

5 Article 24, Regulation 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 "SSM Regulation"); Decision ECB/2014/16 of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules, *OJ*, 14 June 2014, L 175, p. 47.

the SRB's Appeal Panel in many respects, even though the ECB's ABoR only has an advisory power due to the specific status of the ECB under the Treaty on the Functioning of the European Union.[6]

The most active Boards of Appeal are those that deal with intellectual property matters[7]: Boards of Appeal of the European Union Intellectual Property Office (EUIPO, previously called Office for Harmonisation in the Internal Market (trade marks and designs) or OHIM)[8] and Boards of Appeal of the Community Plant Variety Office (CPVO).[9] A number of further appeals from these Boards to the CJEU have given rise to the development of some significant case law in respect of their legal regime.

In other areas, there is also a Board of Appeal at the European Aviation Safety Agency (EASA)[10], at the European Chemicals Agency (ECHA)[11] and at the Agency for the Cooperation of Energy Regulators (ACER).[12] The EU Agency for Railways was recently given its own Board of Appeal which, in addition to a standard power of annulment of decisions of the Agency, has the authority to "arbitrate" certain deadlocks between the Agency and national safety authorities.[13] Not all EU agencies have a board of appeal of course – the vast majority actually do not.[14]

5. Despite a manifest commonality of purpose, these various Boards of Appeal constitute a somewhat disparate class.

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6 On the similarity between the Appeal Panel and the ABoR, see C. Brescia Morra, "The administrative and judicial review of decisions of the ECB in the supervisory field", *Quaderni di Ricerca Giuridica*, Bank of Italy, July 2016, p. 109, at pp. 125 and 126.

7 Beyond the realm of EU agencies properly speaking, the European Patent Office also has its own Boards of Appeal; Articles 21 and 22, European Patent Convention. For a general discussion of boards of appeal in the intellectual property field, see K. Lenaerts, I. Maselis, K. Gutman and J.T. Nowak, *EU Procedural Law*, Oxford University Press, 2014, pp. 700 *et seq*.

8 Articles 135 *et seq*., Regulation No 207/2009 of 26 February 2009 on the European Union trade mark; Article 106, Regulation No 6/2002 of 12 December 2001 on Community designs.

9 Articles 45 *et seq*., Regulation No 2100/94 of 27 July 1994 on Community plant variety rights.

10 Articles 40 *et seq*., Regulation No 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

11 Articles 89 *et seq*., Regulation No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (the "REACH Regulation").

12 Articles 18 and 19, Regulation No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

13 Articles 55 to 62, Regulation No 2016/796 of 11 May 2016 on the European Union Agency for Railways.

14 The EU Agencies Network (https://euagencies.eu) currently consists of 45 agencies.

Their powers, in particular, vary widely. Many of them may, under their constitutive regulation, "either exercise any power within the competence of [the agency] or remit the case to [the agency] for further action". This is the case of the EUIPO, CPVO, EASA, ECHA and ACER boards of appeal.[15] EUIPO's Boards of Appeal, for instance, have the full powers that were available to the trademark examiners whose decisions they review, can substitute their own assessment to that of the examiner and can themselves decide whether to register a trademark. The CJEU considers in these cases that there is a functional continuity between the agency and its board of appeal.[16]

The ESAs' joint Board of Appeal, by contrast, may only set aside the disputed decision and remit the matter to the relevant supervisory authority with a view to a new decision: "The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned."[17] This is similar to the powers of the SRB's Appeal Panel.

The ECB's ABoR may only "express an opinion [...] and remit the case for preparation of a new draft decision to the Supervisory Board. The Supervisory Board shall take into account the opinion", even though "the opinion shall not be binding".[18]

This heterogeneity implies that principles developed by the CJEU with regard to a particular board of appeal cannot necessarily be extended to other boards. EUIPO's Boards of Appeal, in particular, have given rise to some significant case law already and prudence is called for when considering a possible application of that case law to the SRB's Appeal Panel.

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15 Regulation 207/2009, Article 64(1) and Regulation 6/2002, Article 60(1) (EUIPO); Regulation 2100/94, Article 72 (CPVO); Regulation 216/2008, Article 49 (EASA); Regulation 1907/2006, Article 93(3) (ECHA); Regulation 713/2009, Article 19(5) (ACER). The variations in the wording of these various provisions are inconsequential.

16 With regard to EUIPO's Board of Appeal: CJEU, 8 July 1999, T-163/98, *Procter & Gamble v OHIM (Baby Dry)*, paragraph 38; CJEU, 12 December 2002, T-63/01, *Procter & Gamble v OHIM (soap bar shape)*, paragraph 21 (see further about this case in paragraph 20 of this contribution); CJEU, 23 September 2003, T-308/01, *Henkel v OHIM*, paragraph 25; CJEU, 10 July 2006, T-323/03, *La Baronia de Turis v OHIM*, paragraph 57. With regard to EASA's Board of Appeal: CJEU, 11 December 2014, T-102/13, *Heli-Flight v EASA*, paragraph 27. The Court added in *GE Betz v OHIM* that this functional continuity does not detract from the functional independence of the members of the Boards of Appeal: CJEU, 30 June 2004, T-107/02, *GE Betz v OHIM*, paragraph 33.

17 ESA Regulations, Article 60(5).

18 SSM Regulation, Article 24(7); Decision ECB/2014/16, Article 16(5).

B. COMPOSITION AND STATUS

6. The Appeal Panel is composed of five effective members and two alternates. They are appointed by the SRB following a public call for expressions of interest. The term of their appointment is five years; it is renewable once.[19]

The first batch of appointments was made on 6 November 2015 and took effect on 1 January 2016, the date when the SRM Regulation became applicable.[20] The mandate of all current members is, therefore, now scheduled to expire on the same date at the end of 2020. It will of course be preferable for the continuity of the Appeal Panel's operations and for an effective transfer of know-how that its membership be renewed on a staggered basis. This may happen naturally if some members drop out and must be replaced during their term, and if the SRB then decides that the new appointees will run a full term of five years rather than just finish the term of the members whom they are replacing. Neither the SRM Regulation nor the Rules of Procedure of the Appeal Panel expressly require either of these approaches and it seems that the SRB may decide one way or the other when making replacement appointments.

In its initial composition, the Appeal Panel includes – counting the alternate members – four lawyers and three economists. They hold seven different nationalities, all from eurozone countries (this was not a requirement; the SRM Regulation permits the appointment of any Union national). Four members are academics; four members have held leading positions at supervisory authorities. Membership of the Appeal Panel is not a full time position and all members also carry out other activities.

7. The SRM Regulation requires the Appeal Panel to act in full independence from the SRB. Its members "shall not be bound by any instructions" and "shall act independently and in the public interest".[21] They must publish a disclosure statement about conflicts of interests.[22] They may not be current members of the staff of the SRB or of national resolution authorities.

The Rules of Procedure of the Appeal Panel provide that "a member shall recuse himself or herself from sitting in an appeal if circumstances exist that give rise to objective and reasonable doubts as to his or her impartiality or independence". The criterion – objective and reasonable doubts as to his or

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19 Article 85(2), SRM Regulation.
20 Article 99(2), SRM Regulation.
21 Article 85(2) and (5), SRM Regulation.
22 The statements are published on the SRB's website.

her impartiality or independence – is taken from an *obiter* in one of the very few CJEU cases dealing with the recusal of a judge.[23] In case of doubt a disclosure of the circumstances may be made to the parties, who may then waive the ground of recusal or request that the Chair of the Appeal Panel replace the member concerned. A party may challenge a member of the Appeal Panel; the challenge is heard by the remaining members of the Panel.[24]

The Appeal Panel added an express requirement of impartiality to that of independence set out in the SRM Regulation. Although both concepts are closely linked, they are not identical. Independence refers to the absence of any unacceptable relationship or connection between the Panel member and a party (or a party's counsel) and is, thus, essentially factual. Impartiality by contrast is a state of mind: the Panel member is expected to be unbiased, without any predisposition towards a party. It has been argued that impartiality should not be expected from the members of boards of appeal in the same way as it is expected from the judiciary, because "it is inherent in independent administrative review that there should be a community of intent between an agency and its Board".[25] This view may perhaps be correct in those boards of appeal where there is functional continuity between the agency and the board, but it cannot be extended to the Appeal Panel and to those other boards of appeal whose prerogatives consist only in a power of annulment. This is confirmed by the ESA Regulations, of which Article 59, relating to the joint Board of Appeal, is headed "Independence and impartiality".

Taken together, these various rules provide a robust guarantee of independence and impartiality on the part of the Appeal Panel.

The circumstance that the five-year mandate of the members of the Appeal Panel is renewable once and that the renewal decision is made by the SRB, which is the respondent in all appeals handled by the Panel, may give rise to some concern about the apparent impartiality of the members who are up for renewal. In itself this situation should be incapable of successfully

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23 CJEU, 5 December 2012, F-88/09, *Z*, paragraph 75: "le président du Tribunal, statuant d'office, a décidé qu'il n'y avait pas lieu de récuser le juge rapporteur, aucun des arguments et des faits invoqués par la partie requérante n'étant, au terme d'un examen détaillé, de nature à faire douter raisonnablement et objectivement de son impartialité".

24 Article 3, Rules of Procedure.

25 L. Bolzonello, "Independent Administrative Review within the Structure of Remedies under the Treaties: The Case of the Board of Appeal of the European Chemicals Agency", *Eur. Public L.*, 2016, p. 565, at p. 570.

supporting a challenge, however, because it is inherent to the regime set up by the SRM Regulation.[26]

8. The liability regime that is applicable to the members of the Appeal Panel is not expressly set out in the applicable instruments. Immunity from legal proceedings, in respect of acts performed in their official capacity, is granted to "the Board and its staff" pursuant to Article 80 of the SRM Regulation and to "officials and other servants of the Union" by Article 11(a) of Protocol No 7 annexed to the TFEU. The terms "staff" and "officials" must be regarded as synonymous in this context, and the members of the Appeal Panel do not qualify as such.[27]

Query whether they can be regarded as "other servants of the Union" and can derive an immunity directly from Protocol No 7. Article 15 of Protocol No 7 delegates to the Council and the Parliament the power to define the categories of officials and other servants of the Union who can rely on an immunity.[28] This is implemented by Regulation 549/69, which makes the

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26 The standards developed by the European Court of Human Rights with regard to the structural independence of the judiciary (EctHR, 18 July 2013, *Maktouf and Damjanović v Bosnia and Herzegovina*, paragraph 49), even if one were to consider that they are not satisfied by the process of renewal of the term of office of the members of the Appeal Panel, do not apply to the Appeal Panel in any event; see below, paragraph 21.

27 Article 1a(1) of the Staff Regulations (the Staff Regulations constitute the first part of the annex to Regulation No 31 (EEC), 11 (EAEC), of 18 December 1961 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community) provides that " 'official of the Union' means any person who has been appointed [...] to an established post on the staff of one of the institutions of the Union". The French version of the SRM Regulation refers in its Article 80 to the "personnel" of the SRB, and the French version of the Staff Regulations contains the following definition: "Est fonctionnaire de l'Union au sens du présent statut toute personne qui a été nommée [...] dans un emploi permanent d'une des institutions de l'Union". Given the requirement of independence imposed on the members of the Appeal Panel, the word "personnel" seems unable to catch them.
The German versions are inconclusive; they refer to "den Ausschuss und dessen Personal" (Article 80) and the term "Personal" does not seem to be used consistently for "staff" in the Staff Regulations. The Dutch versions appear inconsistent: Article 80 of the SRM Regulation refers to "de afwikkelingsraad en zijn personeelsleden", whilst the term "personeelsleden" in the Staff Regulations – whose Dutch title is "Verordening [...] tot vaststelling van het statuut van de ambtenaren en de regeling welke van toepassing is op de andere personeelsleden [...]" – does not refer to officials but refers instead to the concept of "other servants".

28 The CJEU has stated under an earlier, but similar in all relevant respects, version of Protocol No 7 that this power of the Council and the Parliament is exclusive: "the Council alone is competent, on the basis of Article 16 of the Protocol, to determine the scope *ratione personae* of the tax system laid down in Article 13" (CJEU, 8 September 2005, C-288/04, *AB v Finanzamt*, paragraph 29). The immunities and the tax regime are dealt with in the same chapter of Protocol No 7 and the above statement applies equally to the scope of the immunities (see the opinion of Adv. Gen. Geelhoed, paragraph 24).

immunity available, in particular, to "staff coming under the Conditions of Employment of Other Servants" of the Union.[29] These Conditions identify who is to be regarded as other servants of the Union[30]; the status includes various sub-categories, none of which appears to fit the situation of the members of the Appeal Panel. The classification as "contract staff" under Article 3a(1)(b)[31], in particular, is not appropriate because servants in that category must perform their duties under the supervision of officials or temporary staff[32] and this is inconsistent with the independence of the Appeal Panel and the express requirement that its members may not be bound by any instructions. The "special adviser" category cannot apply either because it only allows for contracts with a maximum duration of two years.[33]

In addition, the appointment decision made by the SRB does not in any way indicate that the members of the Appeal Panel should be regarded as "other servants" (nor of course as "officials") and, in accordance with the case law of the CJEU, the conferment of that status may only reside in a formal act of the appointing body.[34] It appears, therefore, that the members of the Appeal Panel may not benefit from any immunity under the SRM Regulation or Protocol No 7.

This would be an unsatisfactory outcome: the rationale for the immunities under Protocol No 7 is to avoid any interference with the functioning and the independence of the Union institutions and agencies and "to ensure that the official activity of the [Union] and of its servants is shielded from any examination in the light of any criteria based on the domestic law of Member States, so that such activity may be carried out in full freedom in

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29 Article 1(b), Regulation (EURATOM, ECSC, EEC) No 549/69 of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply. The Regulation still cross-refers to Protocol No 7 by using the pre-Lisbon numbering of its provisions; the present Article 11(a) used to be Article 12(a).

30 Articles 1 to 5a, Conditions of Employment of Other Servants ("CEOS"). These CEOS constitute the second part of the annex to Regulation No 31 (see note 27).

31 " 'contract staff' means staff not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned and engaged for the performance of full-time or part-time duties: [...] in the agencies referred to in Article 1a(2) of the Staff Regulations". The SRB is one of those agencies, see Article 1a(2), Staff Regulations; Article 82(1), SRM Regulation.

32 Article 80(2), CEOS.

33 Article 123(1), CEOS.

34 CJEU, 8 September 2005, C-288/04, *AB v Finanzamt*, paragraph 31, and opinion Advocate General Geelhoed, paragraphs 19 and 20.

accordance with the task entrusted to the [Union]".[35] This rationale holds for the Appeal Panel just as much as it does for the SRB itself.

If Protocol No 7 does not apply, then whether the members of the Appeal Panel can invoke an immunity against liability depends on the applicable law that the court seised of a liability claim will select under its rules of conflicts. The possible permutations are manifold – the Rome II Regulation provides as a rule for the application of the law of the country in which the damage occurs, which can be anywhere, and it is not even sure that the Regulation applies in the first place.[36] One can only hope that the applicable law, if ever, will provide for some form of inherent immunity from liability in respect of all judicial and quasi-judicial functions.

C. JURISDICTION

9. The Appeal Panel does not have a general appellate jurisdiction over all of the decisions made by the SRB. Its powers relate only to certain types of decisions, depending on their subject matter. The categories of decisions that may be reviewed by the Appeal Panel are listed in Article 85(3) of the SRM Regulation, by way of cross-references to the provisions which serve as the basis for the reviewable decisions. Their subject matters are as follows:

- MREL – minimum requirement for own funds and eligible liabilities (*i.e.*, decisions made under Article 12(1) of the SRM Regulation),
- removal of impediments to resolvability (Art. 10(10)),
- simplified obligations (Art. 11),
- penalties, *i.e.* fines and *astreintes* (Art. 38 to 41),
- *ex-post* contributions to the Single Resolution Fund (Art. 71),
- access to documents (Art. 90(3)),
- contributions to the administrative expenditures of the SRB (Art. 65(3)).

Crisis management measures, in particular, escape the jurisdiction of the Appeal Panel. The Panel may for instance not hear appeals against a decision to place a bank under resolution, to bail in creditors, to write down

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35 CJUE, 15 October 2008, T-345/05, *Mote v Parliament*, paragraph 27; CJUE, 11 July 1968, 5-68, *Sayag v Leduc*, p. 402.

36 Article 4(1), Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Pursuant to its Article 1(1) the Regulation does not apply to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*); this seems to exclude liability claims in respect of actions or omissions of the Appeal Panel (see note 133).

equity holders or to impose a transfer of assets, liabilities or shares. And whilst *ex-post* contributions to the SRF may be reviewed by the Appeal Panel, *ex-ante* contributions may not be, for no apparent logic.

In its first year of activity the Appeal Panel had to declare twelve appeals inadmissible because they concerned *ex-ante* contributions to the SRF.[37] Various appeals against contributions of this type have also been filed directly at the CJEU, where they are currently pending.

10. Furthermore, the powers of the Appeal Panel are restricted with regard to the available remedies, which are limited to the annulment of the contested decision. Under Article 85(8) of the SRM Regulation the Panel may "confirm the decision taken by the Board, or remit the case to the latter". It may do nothing else. It may not award damages to the appellant, in particular, nor can it modify the contested decision or adopt a substitute decision.

D. PROCEDURE

11. Article 85 of the SRM Regulation sets out a few essential procedural rules with regard to appeals brought before the Panel. For the rest, it provides that "the Appeal Panel shall adopt and make public its rules of procedure".[38] These Rules of Procedure were duly adopted and are published on the SRB's website.[39] They need not be published in the *Official Journal* because, the SRB being an agency and not an institution of the Union, they do not constitute a "decision" of the Union under Article 288, paragraph 1, TFEU and, therefore, do not fall within the scope of Article 297 TFEU. They are, however, a "document of general application" and their website publication is thus made in all languages of the Union.[40]

General rules of European procedural law developed by the CJEU are also relevant. In case 1/16, for instance, the Appeal Panel had to determine whether a refusal by the SRB to reconsider an earlier calculation of contri-

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37 Decisions of 18 July 2016 in cases 2/16, 3/16, 4/16, 6/16, 7/16, 8/16, 9/16, 10/16, 11/16, 12/16, 13/16 and 14/16. Extracts of the decisions are published on the SRB website.

38 Article 85(10), SRM Regulation.

39 The Procedural Order of 10 June 2016 issued by the Appeal Panel in case 1/16 addresses, at paragraph 15, the issue of the intertemporal effect of the Rules with regard to appeals filed before their publication.

40 Article 4, Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community. Article 81(1), SRM Regulation, provides that Regulation No 1 applies to the SRB.

butions to its administrative expenditures constituted a challengeable act; it did so by reference to the CJEU case law relating to the concept of "confirmatory acts".[41]

12. The time limit for filing an appeal before the Panel is six weeks, counted from the date of the notification of the decision to the person concerned or, in the absence of a notification, from the day on which the decision came to the knowledge of the person concerned.[42] This starting point is similar to the one provided for annulment proceedings before the CJEU under Article 263, paragraph 6, TFEU.

The decision of the Appeal Panel is due within one month after the appeal has been lodged.[43] In practice this is often not achievable. No consequence is attached to non-compliance, however; there is in particular no rule to the effect that the appeal would be deemed dismissed, or accepted, in the absence of a decision by the deadline.

The Rules of Procedure attempt to provide some more breathing room by stating that the one-month time limit only starts running when the Chair of the Appeal Panel considers that the evidence is complete and notifies the parties accordingly.[44] This provision is inspired by an identical rule in Article 20 of the Rules of Procedure of the ESAs' joint Board of Appeal. It is doubtful whether this is consistent with the SRM Regulation, which expressly states that time starts running when "the appeal has been lodged".[45] Furthermore, in none of the cases handled by the Appeal Panel in its first year of operations were the parties ever notified that the evidence was complete.

13. The appeal must be filed, and the appeal is conducted, in the language of the contested decision.[46] This rule aims at avoiding as much as possible that multiple languages be used in any one appeal. Financial institutions may select the language of their choice, among the Union languages, for

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41 Decision on admissibility of 23 September 2016, case 1/16, paragraphs 35 *et seq*. The joint Board of Appeal of the ESAs appears to have taken a different view in its decision 2004 05 of 10 November 2014, *Investor Protection Europe v ESMA*: "The automatic application of limitations applicable to proceedings under Articles 263 and 265 TFEU [...] is, in the Board's opinion, inappropriate in the case of a right of appeal under Article 60 of the ESMA Regulation" (paragraph 39).

42 Article 85(3), SRM Regulation.

43 Article 85(4), SRM Regulation.

44 Article 20, Rules of Procedure.

45 Article 85(4), SRM Regulation; "à compter de son introduction", "nadat een beroep is aangetekend" and "nach der Einreichung" in the French, Dutch and German versions.

46 Article 5(2), Rules of Procedure.

their dealings with the SRB.[47] Once they have made that choice they are expected not to change it if and when they exercise a right of appeal.

The internal working language of the Appeal Panel is English. Deliberations are conducted in English and draft decisions are prepared in English, before being translated into the language of the proceedings if different. When proceedings are conducted in another language all documents – including the submissions of the parties and the evidence – must be translated into English. This can be time-consuming and makes the one-month deadline for a decision even less realistic.

A Procedural Order of 10 June 2016 issued by the Appeal Panel in case 1/16, where the choice of language for the proceedings was in dispute, gives an example of the practical measures that the Panel may adopt when a language other than English is used: translations of the record into English are to be provided by the SRB to the Panel, and the appellant is entitled to receive a copy and to check the translations.[48]

Given that English is very much the *lingua franca* within the SRB, one could expect that the requirement to file appeals in the language of the contested decision would lead to a large majority of the appeals being conducted in English. This was not the case during the first year of the Appeal Panel's operation: of the thirteen appeals handled in 2016, English was the language of the proceedings in only two cases. The other cases were filed in German (one instance) or in French (ten instances).[49]

14. Pursuant to Article 85(7) of the SRM Regulation, "if the appeal is admissible, the Appeal Panel shall examine whether it is well founded". The Rules of Procedure provide in their Article 9(1) that "if the Board contends that the appeal is not admissible [...], the Appeal Panel shall determine whether or not it is admissible before examining whether it is well founded".

This does not mean that the proceedings must necessarily take place in two successive phases and that a separate decision on admissibility must be rendered before the merits of the appeal are looked at. A bifurcation of the proceedings may be ordered by the Appeal Panel as a matter of case management and this was done, somewhat coincidentally, in all of the cases handled by the Panel in 2016. In all of these cases a potential objection of inadmissibility was raised *ex officio* by the Appeal Panel, with instructions

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47 Article 2, Regulation No 1; see note 40.

48 Procedural Order of 10 June 2016, case 1/16, paragraph 24.

49 This count is probably not representative of what might be expected in the future, because the ten cases filed in the French language were identical to each other in many respects.

to the parties first to plead their case on the issue of admissibility only.[50] Twelve of those appeals were subsequently declared inadmissible and the parties never filed submissions on the merits. One case led to a decision of admissibility, followed by an exchange of written submissions and a separate decision on the merits.[51]

The admissibility criteria are essentially the same as those for an action for annulment before the CJEU. Standing to appeal is given by the SRM Regulation to "any natural or legal person, including resolution authorities, [...] against a decision of the Board [...] which is addressed to that person, or which is of direct and individual concern to that person".[52] This is almost the same wording as in the first part of Article 263, paragraph 4, TFEU: "Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them [...]". Clearly the case law of the CJEU will be taken into consideration by the Appeal Panel if ever issues arise as to an appellant's standing.[53] As mentioned above[54], the Panel has already referred to the CJEU's body of case law regarding the notion of "confirmatory act" against which no appeal lies. Among the decisions of the types that may be challenged before the Appeal Panel (see paragraph 9), some are "addressed to" to the institution concerned and admissibility should not be a concern in those cases. However, other types of decisions – such as the setting of MREL and the removal of impediments to resolvability – are addressed to the relevant national resolution authority, with the consequence that the intricacies of the *Plaumann* doctrine and the concept of "direct and individual concern" may come into play. These issues are discussed below in paragraphs 34 to 39.

15. A notice of appeal must contain a statement of grounds.[55] A reasoned response from the SRB is due within two or four weeks.[56] One or more

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50 Article 9(2), Rules of Procedure: "The Appeal Panel may, of its own motion, raise any question as to admissibility."

51 Case 1/16, decision on admissibility of 23 September 2016 and final decision on the merits of 23 November 2016.

52 Article 85(3), SRM Regulation.

53 The ECHA Board of Appeal, before which the same standing requirement applies pursuant to Article 92(1) of the REACH Regulation, decided that its interpretation of that requirement must be guided by the case law of the Court of Justice on Article 263, paragraph 4, TFUE (decision A-022-2015 of 30 May 2017, *Manufacture Française des Pneumatiques Michelin*, paragraphs 115 and 116; decision A-022-2013 of 15 March 2016, *REACheck Solutions*, paragraph 69).

54 Paragraph 11.

55 Article 85(3), SRM Regulation; see also Article 5(4)(b), Rules of Procedure.

56 Article 6, Rules of Procedure.

rounds of further observations may follow, in accordance with a timetable to be set by the Chair of the Appeal Panel.[57]

A copy of the contested decision must be attached with the notice of appeal, as well as any evidence on which the appellant wishes to rely. The SRB must similarly attach its evidence with its response. The parties may then request the production of further evidence from each other. In principle no new evidence may be submitted after that point.[58]

An oral hearing is held unless both parties and the Appeal Panel agree otherwise.[59] The Rules of Procedure provide for a confidential hearing *in camera* "unless exceptional circumstances require otherwise".[60] This is different from the rule adopted by the joint Boards of Appeal of the ESAs, whose Rules of Procedure the Appeal Panel has opted to copy in many other respects.[61] The Appeal Panel opted to protect to the maximum extent possible the confidentiality of the appellant's matters, in line with the strict secrecy provisions contained in Article 88 of the SRM Regulation, and not to impose a public hearing which may constitute a disincentive to the filing of appeals.

When the language of the proceedings is not English, a hearing will require appropriate interpretation arrangements. In all the cases brought before the Appeal Panel in 2016 the parties have waived their right to a hearing.

16. An appeal has no suspensive effect. The Appeal Panel may, however, order a suspension of the contested decision "if it considers that circumstances so require", a fairly vague criterion to which one must probably give the same import as the CJEU gives to Article 278 TFEU, given the identical choice of words.[62]

The Rules of Procedure give considerable discretion to the Chair of the Appeal Panel with regard to the timetable for suspension proceedings. In exceptional circumstances, the Panel may order a suspension on a preliminary basis before giving the parties the opportunity to present their arguments; in effect this amounts to the power to order an *ex parte* suspension at the request of the appellant.[63]

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57 Article 85(7), SRM Regulation; Articles 11(1) and 14(4), Rules of Procedure.

58 Articles 5 (3) and (4), 6(2) and 16, Rules of Procedure.

59 Article 85(7), SRM Regulation; Articles 18(1), Rules of Procedure.

60 Article 18(5), Rules of Procedure.

61 Article 18(5), Rules of Procedure of the ESAs' joint Board of Appeal: "The hearing shall be in public, unless the Board of Appeals directs, upon request from a party or on its own initiative, and with good reason, that it should be held in private".

62 Article 85(6), SRM Regulation.

63 Articles 10(2), Rules of Procedure.

17. Decisions are made on the basis of a majority of at least three of the five members of the Appeal Panel.[64] Nothing prevents the alternate members from attending deliberations, but they do not have a vote unless they replace an effective member.

The Rules of Procedure provide that decisions disclose whether they were made by unanimous or majority decision.[65] The Panel does not in practice identify who voted with the majority and who dissented, and does not disclose to the parties nor publish the dissenting opinions that may have been written. This is a hybrid regime between the practice followed in most civil law jurisdictions and at the CJEU, where decisions do not disclose whether they were unanimous or not, and that followed in most common law jurisdictions and at the European Court of Human Rights, where disclosure of the existence of a dissent is accompanied by a disclosure of reasons in the form of dissenting opinions. The Rules of Procedure of the ESAs' joint Board of Appeal, by contrast, provide that in the case of a majority decision the identity of the supporting and dissenting members is disclosed in the decision[66]; all decisions of that Board of Appeal have so far been unanimous and no practice has yet developed as to dissenting opinions.

18. Decisions of the Appeal Panel are published in the form of extracts.[67] The current practice is that the extracts are actually a full copy of the decision, where the name of the appellant and any other information that might allow for its identification are redacted. Again the practice of the Board of Appeal differs from that of the ESAs' joint Board of Appeal, which publishes its decisions in full. The difference in practice may be explained by the difference in the underlying regulations: whilst the ESA Regulations provide that decisions of the joint Board of Appeal "shall be made public by the Authority", the corresponding provision in the SRM Regulation requires instead that decisions of the Appeal Panel be "notified to the parties".[68]

The Appeal Panel's publication practice serves several purposes. It complies with the principle of openness set out in Article 1, paragraph 2, TEU and in Article 15(1) TFEU. Given the independence of the members of the Appeal Panel and the fact that there is no organised process to remove them prior to the expiry of their five-year term, it is virtually the only tool that makes them somewhat accountable. Furthermore, it contributes to the

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64 Article 85(4), SRM Regulation.

65 Article 22(1), Rules of Procedure.

66 Article 22(1), Rules of Procedure of the ESAs' joint Board of Appeal.

67 Articles 24, Rules of Procedure.

68 Article 60(7) ESA Regulations; Article 85(9) SRM Regulation. A mere notification to the parties is also required by Article 24(9), SSM Regulation, in respect of the opinions rendered by the ECB's ABoR; these opinions appear not to be published in any form.

equal treatment of the parties in appeal proceedings: the SRB, as respondent in all appeals, has full access to the Appeal Panel's case law and it would not be fair to appellants if they did not have the same background information.

19. The decisions of the Appeal Panel are themselves subject to appeal before the CJEU. This right of appeal is discussed below in paragraph 28.

E. A QUASI-JUDICIAL BODY

20. The Appeal Panel's function is to adjudicate disputes between an appellant and the SRB regarding a contested decision of the SRB. The Panel is in charge of legal proceedings. Article 85 of the SRM Regulation manifestly adorns the SRB with all the feathers of a legal adjudicative body: designation as an "appeal" body, independence of the members, standing criteria mirrored on those applicable at the CJEU, right of the parties to file observations and to make oral representations, requirement to determine whether the appeal is "admissible" and "well founded", binding effect of the Panel's decisions, requirement to state reasons.

This does not imply, however, that the Appeal Panel is a judicial body properly speaking. It is clearly not a specialised court as contemplated in Article 19(1) TEU and in Article 257 TFEU. The CJEU has stated that EUIPO's Boards of Appeal "cannot be classified as tribunals"[69] nor as "courts"[70] and that proceedings before these boards "are not judicial in nature but administrative".[71] It characterised the CPVO's Board of Appeal as "quasi-judicial".[72] Commentators have extended this characterisation to other boards of appeal as well.[73]

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69 CJEU, 12 December 2002, T-63/01, *Procter & Gamble v OHIM (soap bar shape)*, paragraph 23.

70 CJEU, 8 March 2012, T-298/10, *Gross v OHIM*, paragraph 105.

71 CJEU, 23 September 2003, T-308/01, *Henkel v OHIM*, paragraph 34.

72 CJEU, 18 September 2012, T-133/08, *Schräder v CPVO*, paragraph 137, appeal dismissed by CJEU, 21 May 2015, C-546/12, see paragraph 73.

73 "La solution [*soap bar shape*] est évidemment transposable aux autres agences qui sont dotées de chambre(s) ou de commission de recours", as per L. Coutron, "L'infiltration des garanties du procès équitable dans les procédures non juridictionnelles", *in* C. Picheral (ed.), *Le droit à un procès équitable au sens du droit de l'Union européenne*, Anthémis, 2012, p. 159, at pp. 163-164. The ESAs' Board of Appeal is "in essence, exercising quasi-judicial functions" as per A. Witte, "Standing and Judicial Review in the New EU Financial Markets Architecture", *J. Fin. Reg.*, 2015, p. 226, at p. 239. The ECB's ABoR would be a quasi-judicial body if it were not that its opinions are non binding, as per C. Brescia Morra, *op. cit.* (note 6), at p. 119; proceedings before the ABoR are quasi-jurisdictional according to Ph.-E. Partsch, *Droit bancaire et financier européen*, t. 1, Brussels, Larcier, 2nd ed., 2016, paragraph 982. See further on this question M. Navin-Jones, "A Legal Re-

The Court's reasons for regarding these boards of appeal as something different from a tribunal or a judicial body properly speaking are based on the nature of their powers. The *Procter & Gamble (soap bar shape)* case makes this very clear:

> 21. In that regard, it follows from Baby-Dry, paragraphs 38 to 43, that there is continuity in terms of their functions between the various departments of the Office and that the Boards of Appeal enjoy, in particular, the same powers in determining an appeal as the examiner. Thus, while the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they constitute a department of the Office responsible for controlling, under the conditions and within the limits laid down in Regulation No 40/94, the activities of the other departments of the administration to which they belong.
>
> 22. Since a Board of Appeal enjoys, in particular, the same powers as the examiner, where it exercises them it acts as the administration of the Office. An action before the Board of Appeal therefore forms part of the administrative registration procedure, following an interlocutory revision by the first department to carry out an examination, pursuant to Article 60 of Regulation No 40/94.
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> 23. In the light of the foregoing, the Boards of Appeal cannot be classified as tribunals. Consequently, the applicant cannot properly rely on a right to a fair hearing before the Boards of Appeal of the Office.

This reasoning cannot be simply carried over to the SRB whose Appeal Panel, unlike EUIPO's Boards of Appeal, does not show a functional continuity with the agency. The conclusion of the reasoning nevertheless remains correct: the SRB's Appeal Panel must also be regarded as a quasi-judicial body.[74] It can certainly not be seen as less judicial and more administrative than the boards of appeal whose legal nature was specifically analysed by the CJEU, *i.e.* EUIPO's and CPVO's, since the functional continuity that the Appeal Panel is lacking is precisely the criterion that flipped those other boards of appeal towards the "administrative" end of the spectrum. Conversely, the Appeal Panel should not be regarded as a fully fledged tribunal either because the SRM Regulation fails to provide for some essential features that would be expected if it were a tribunal, in particular the public

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view of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal", *Eur. Public L.*, 2015, p. 143, at pp. 144-145 and 167-168.

74 The European Commission argued in the *SV Capital v EBA* case that the ESAs' joint Board of Appeal "is not a judicial body, but an internal body of the EBA" (CJEU, 9 September 2015, T-660/14, *SV Capital v EBA*, paragraph 62); the argument was not addressed by the Court. The ESAs' joint Board of Appeal is, among all boards of appeal attached to European agencies, the one that most closely resembles the SRB's Appeal Panel.

hearing required by Article 47 of the Charter of Fundamental Rights and the public pronouncement required by Article 6 of the European Convention on Human Rights.[75]

No specific meaning is attached to the "quasi-judicial" concept. It can inform various questions, however, that are discussed in the following paragraphs.

21. In the first place – and this has been stated by the CJEU in *Procter & Gamble (soap bar shape)* already[76] – there is no right to a "fair trial" in accordance with Article 47 of the Charter before the Appeal Panel. Appellants must instead rely on Article 41 of the Charter and the right it confers "to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union".[77] In practice this offers them a largely similar degree of protection.[78]

The Appeal Panel's decisions are subject to a further appeal to the CJEU, which is a judicial body with full jurisdiction; it is not problematic under the European Convention on Human Rights, therefore, that the Appeal Panel itself does not satisfy all of the requirements laid down in Article 6(1) ECHR.[79]

22. It must also follow from the above characterisation that the rules on public access to documents apply to the Appeal Panel. Article 90 of the SRM Regulation makes Regulation 1049/2001 on public access to documents[80] applicable to the SRB. Article 4(2) of Regulation 1049/2001 exempts documents from public access "where disclosure would undermine the protection of [...] court proceedings [...]", and an appeal before the Appeal Panel

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75 According to D. Adamski, "The ESMA Doctrine: A Constitutional Revolution and the Economics of Delegation", *Eur. L. Rev.*, 2014, p. 812, at p. 832, "its [the ESAs' Board of Appeal] actions should not [...] be qualified as judicial review".

76 Paragraph 20 of this contribution and note 69. See also CJEU, 20 April 2005, T-273/02, *Krüger*, paragraph 62.

77 For a similar application of Article 41 in lieu of Article 47 to proceedings before the European Commission in competition matters, see CJEU, 11 July 2013, C-439/11 P, *Ziegler*, paragraph 154.

78 L. Coutron (*op. cit.*, note 73, at p. 178) states that Article 41 "offre ainsi une alternative satisfaisante au droit à un procès équitable".

79 ECtHR, 10 February 1983, *Albert and Le Compte v Belgium*, paragraph 29; ECtHR, 4 March 2014, *Grande Stevens v Italy*, paragraph 138; CJEU, 24 October 2013, C-510/11 P, *Kone*, paragraph 22.

80 Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

cannot be regarded as "court proceedings"[81] if the Appeal Panel is not a judicial body.

Article 90(4) of the SRM Regulation provides that "the right of access to the file shall not extend to confidential information or internal preparatory documents of the Board", and the exception must be read as applying to the Appeal Panel as well. The deliberations of the Appeal Panel fall within this exception – they are confidential by nature and they are preparatory in any event – but it is not clear whether written observations and evidence submitted by the parties would necessarily be protected against disclosure.

23. A more significant consequence of the Appeal Panel not being a judicial body is that it may not rule on an illegality exception. An illegality exception is a plea whereby a party requests a decision maker not to apply a provision of law on the grounds that this provision contravenes a higher ranking rule and is therefore illegal – typically, a delegated regulation being arguably inconsistent with the empowering act. Given the number and the importance, in the areas of competence of the Appeal Panel, of the delegations conferred on the Commission by the SRM Regulation and the BRRD[82] – including many Regulatory Technical Standards that are to be adopted by the Commission in the form of Delegated Regulations upon a proposal of the EBA – one can only expect that occasions will arise where a party will wish to challenge the validity of a delegated act.[83]

Under Union law, however, the power to examine an illegality exception is reserved to the CJEU. The power to declare the invalidity of an act of a Union institution belongs exclusively to the CJEU.[84] This principle prevents national courts, since *Foto-Frost*, from overruling the Union institutions (see paragraph 48 below). It is not limited to delineating the respective powers of national and Union courts, however, and also has implications within Union bodies. A staff appointing authority, for instance, may not leave a regulation unapplied on the grounds that it is illegal[85]; this is also true in the

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81 "procédures juridictionnelles", "gerechtelijke procedures" and "Gerichtsverfahren" in the French, Dutch and German versions.

82 Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms ("BRRD").

83 On the validity of the SRM Regulation itself: K. Alexander ("European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism", *Eur. L. Rev.*, 2015, p. 154, at p. 182) argues that the SRB's powers to order the removal of impediments to resolvability are too broad and breach the *Meroni* doctrine, which was developed by the CJEU on the basis of primary law.

84 CJEU, 6 October 2015, C-362/14, *Schrems*, paragraph 61; CJEU, 22 June 2010, C-188/10 and C-189/10, *Melki and Abdeli*, paragraph 54.

85 CJEU, 30 September 1998, T-13/97, *Losch*, paragraph 99; CJEU, 30 September 1998, T-154/96, *Chvatal*, paragraph 112.

context of an administrative complaint procedure.[86] The Boards of Appeal of EUIPO themselves have been denied the power to decide that a plea of illegality is well founded.[87] There is no doubt that the SRB's Appeal Panel may not do so either – save perhaps in the extreme situations where the illegality exception is raised against "measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Union legal order", which measures must in that case "be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent".[88] The Appeal Panel expressly acknowledged this limitation to its powers in its decision on the merits of 23 November 2016 in case 1/16, where Delegated Regulation 1310/2014 was in issue.[89] The potential illegality concern in that case was resolved by way of an interpretation of the Delegated Regulation that ensured its consistency with the SRM Regulation.[90] The ECHA Board of Appeal took the same view in its *Dow Benelux* decision of 19 June 2013.[91]

F. STANDARD OF REVIEW

24. The standard of review to be applied by the Appeal Panel is a standard of legality, not a standard of opportunity or appropriateness. The Panel may not merely overrule the exercise by the SRB of its discretionary powers. The pleas that can be raised before the Appeal Panel are not different from those that are admissible in an action for annulment before the CJEU: lack of competence, infringement of an essential procedural requirement (including a failure to state reasons), infringement of a rule of law (including a manifest error of assessment and a breach of proportionality), or misuse of powers.

This limitation to the Appeal Panel's powers is inherent to its functions as a quasi-judicial body. It is tasked by Article 85(7) of the SRM Regulation with the duty to examine whether appeals are "admissible" and "well

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86 CJEU, 12 March 2014, F-128/12, *CR v Parliament*, paragraphs 35, 36 and 40.

87 CJEU, 17 September 2008, T-218/06, *Neurim Pharmaceuticals v OHIM*, paragraph 52; CJEU, 12 July 2001, T-120/99, *Kik v OHIM*, paragraph 55.

88 CJEU, 5 October 2004, C-475/01, *Commission v Greece*, paragraph 19; CJEU, 22 November 2011, T-275/10, *mPAY24 v OHIM*, paragraph 26, and the references.

89 Commission Delegated Regulation (EU) No 1310/2014 of 8 October 2014 on the provisional system of instalments on contributions to cover the administrative expenditures of the Single Resolution Board during the provisional period.

90 Final decision of 23 November 2016, case 1/16, paragraphs 12 and 13.

91 ECHA Board of Appeal, 19 June 2013, *Dow Benelux*, A-001-2012, paragraph 58 ("It is [...] not for the Board of Appeal to rule on the legality of the provisions of the REACH Regulation. That is a power which lies exclusively with the Court of Justice of the European Union").

founded"; this points to a legal review, not to a reconsideration of the opportunity of the contested decision. Furthermore, Article 53(3) and (4) of the SRM Regulation organises the involvement in the SRB's decision-making process of representatives of the national resolution authorities of the countries concerned by the decision. This involvement is not, and could not be, replicated at the level of the Appeal Panel and it would make little sense to allow discretionary choices to be reopened in full by a body that does not offer the desired degree of national involvement.

Recital 64 of the SSM Regulation states that "The scope of the review [by the ABoR] should pertain to the procedural and substantive conformity with this regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions". If this is so for the ABoR, which can only issue non binding opinions, then *a fortiori* this must also hold for the SRB's Appeal Panel.

25. A different view has been argued for with regard to the ECHA's Board of Appeal. M. Navin-Jones considers that "as the ECHA Board of Appeal forms part of the ECHA itself and has the same powers of the ECHA, and as the ECHA itself is legally required to consider and balance a number of issues before adopting a particular Decision – not merely the narrow issues regarding lawfulness and legality of a particular Decision itself – but also the broader REACH objectives such as animal welfare, enhancement of competition and innovativeness, etc. – it would seem disjointed to take the view that the ECHA Board of Appeal, in contrast to the ECHA, is restricted in its decision making to reviewing issues of lawfulness and legality alone".[92] This view finds support in the *Honeywell* decision of the ECHA Board of Appeal[93]:

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92 M. Navin-Jones, *op. cit.* (note 73), at p. 150.

93 ECHA Board of Appeal, 29 April 2013, *Honeywell*, A-005-2011, paragraph 117. A subsequent decision of the same Board of Appeal (19 June 2013, *Dow Benelux*, A-001-2012, paragraph 109) seems to reverse its *Honeywell* case law: "The Board of Appeal considers that in the present case, in the context of the compliance check of the registration dossier, the Agency enjoyed a broad discretion. In particular, in order to determine the nature and scope of the measures which the Agency adopted, its examination of a proposal for adaptation of the standard information requirement entailed the assessment of complex scientific and technical facts. Consequently, the Board of Appeal shall consider whether, in the circumstances of the present case, by adopting the Contested Decision, the Agency misused its margin of discretion". See also in the same line ECHA Board of Appeal, 19 December 2016, *BASF Grenzach*, A-018-2014, paragraph 134 ("In the event of an appeal [...] the Board of Appeal subsequently verifies whether [the Agency's] discretion was exercised properly. [...] On its own, a difference of scientific opinion is not capable of calling into question the legality of a contested decision"), appeal pending before the Court of Justice, T-125/17, *BASF Grenzach v ECHA*.

> However, under Article 93(3) of the REACH Regulation, the Board of Appeal 'may exercise any power which lies within the competence of the Agency […]'. Thus, the Board of Appeal can inter alia replace a decision under appeal with a different decision. Moreover, in conducting its administrative review of Agency decisions, the Board of Appeal possesses certain technical and scientific expertise which allows it to enter further into the technical assessment made by the Agency than would be possible by the EU Courts. As a result, when examining whether a decision adopted by the Agency is proportionate, the Board of Appeal considers that it should not be limited by the need to establish that the decision is 'manifestly inappropriate' to the objective pursued.

Whatever the merits of this view[94] in relation to boards of appeal that enjoy a functional continuity with their agency, it cannot be extended to those boards which, like the Appeal Panel, do not have the power to substitute their own decisions to the agency's and may only annul decisions of the agency and remit the matter for further action. As stated by C. Brescia Morra, "considering that the BoA of the ESAs and the Appeal Panel can only confirm or remit the decision to the relevant agency, which then has to take a new decision, the reviews by these two boards seem limited to questions of legality".[95] The point remains unsettled, however.[96]

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94 L. Bolzonello, *op. cit.* (note 25), at p. 572, regards it as "arguably incorrect". See however CJEU, 10 July 2006, T-323/03, *La Baronia de Turis v OHIM*, paragraphs 58 and 59: "It follows from that continuity in terms of their functions [... that the ...] review by the Boards of Appeal is not confined to a review of the legality of the contested decision but, given the devolved nature of the appeal procedure, entails a new assessment of the whole dispute".

95 C. Brescia Morra, *op. cit.* (note 6), at p. 125. See also W. Blair, "Board of Appeal of the European Supervisory Authorities", *Eur. Bus. L. Rev.*, 2013, p. 165, at p. 169: "the Board of Appeal [...] is not a supervisory or policy making committee. It is an appeal board with an adjudicative function. It will [...] be guided by the principles in the case law of the Court of Justice of the EU". For a similar but somewhat more hesitant conclusion, see A. Witte, *op. cit.* (note 73), at p. 245: "It is not entirely clear from the wording of the ESA Regulations whether this assessment by the Board of Appeal is limited to questions of law only or whether it is also entitled to assume discretionary powers and replace the findings of the competent ESA body with its own findings even where the exercise of the discretion by the competent body was not legally flawed. It appears more convincing, however, to argue in favour of the former position".

96 For a different view with regard to the ESAs' joint Board of Appeal and the SRB's Appeal Panel, albeit with some hesitation, see P. Chirulli and L. De Lucia, "Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies", *Eur. L. Rev.*, 2015, p. 832, at pp. 845 and 846: "The legislation applicable in this case does not clarify, however, which review criteria should be used: can the claimant question only the legality of the challenged measure or also the correctness of the relative technical evaluations? The open wording of the specific norms – which refer only to the complaint of the interested party – leads us to believe that they can challenge the first decision from all points of view. If this statement is correct, in such an occurrence these BoAs can review the legal

26. According to settled case law of the CJEU, matters of complex technical or economic assessment are only subject to limited review by the Union judicature. The Court will verify that procedural rules have been complied with, that the facts on which the contested choice is based have been accurately stated and that there has been no manifest error of assessment in the appraisal of those facts or misuse of powers, but it will not reassess whether the technical or economic question was correctly decided.[97] The principle of limited judicial review has been applied in particular in cases challenging decisions of various boards of appeal.[98] It is clear therefore that, at the stage of a further appeal to the CJEU against a decision of the Appeal Panel, the Court will only exercise a limited review in respect of any complex assessments made by the SRB or by the Appeal Panel.[99]

This does not mean, however, that the Appeal Panel itself must necessarily exercise the same restraint. The Panel is composed partly of economists and the point of this expertise is precisely to allow it to dig more deeply into the complex economic assessments that may lie at the basis of the decisions which it is called to review. The role of the members of a board of appeal who hold specific expertise in the relevant field has been expressly recognised by the CJEU in *Schräder v CPVO (Lemon Symphony)*[100]:

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and technical correctness as well the merits of the first decision in the light of the specific points raised by the claimant".

97 For recent illustrations, see CJEU, 2 June 2016, C-31/15, *Photo USA Electronic Graphic*, paragraph 63; CJEU, 1 March 2016, T-79/14, *Secop*, paragraph 29.

98 CJEU, 28 January 2016, C-61/15, *Heli-Flight v EASA*, paragraph 101; CJEU, 11 December 2014, T-102/13, *Heli-Flight v EASA*, paragraph 89; CJEU, 18 September 2012, T-133/08, *Schräder v CPVO (Lemon Symphony)*, paragraphs 142 to 144 and 153, appeal dismissed by CJEU, 21 May 2015, C-546/12; CJEU, 15 April 2010, C-38/09, *Schräder v CPVO (Sumcol 01)*, paragraph 77; CJEU, 19 November 2008, T-187/06, *Schräder v CPVO (Sumcol 01)*, paragraphs 59 to 62.

99 Recital 89 of the BRRD requires national courts to conduct a similar limited review when dealing with decisions of national resolution authorities: "Crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important to ensure that the complex economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom."

100 CJEU, 18 September 2012, T-133/08, *Schräder v CPVO (Lemon Symphony)*, paragraphs 155 and 156.

> 155. As regards, more specifically, the issue of chemical treatment, it must be observed that when the Board of Appeal, which, pursuant to Article 11(2) of the implementing regulation, consists of *technical and legally qualified members*, explained in paragraph 4 of the contested decision that the type of growth regulators used during propagation normally has no lasting effect given that the subsequent reviewing of the plants' growth requires further spraying with growth regulators, it based that assessment not only on the information given by the intervener, which it described as 'persuasive', according to which growth regulators are used only during the start-up phase and their effects wear off after four to six weeks, but also *on the practical experience and technical expertise acquired by its members*.
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> 156. In so far as the applicant seeks to call into question that factual assessment, the onus is on him to provide specific and substantiated information proving its manifest inaccuracy in the particular circumstances of the present case. (Emphasis added)

At the same time, the review by the Appeal Panel must remain a review of the legality of the SRB's decisions, and the members of the Appeal Panel may not be at liberty merely to substitute their own appraisal to that of the SRB. It is submitted that the applicable standard of review at the level of the Appeal Panel is that of the "error of assessment". The error need not be "manifest" in the same manner as it does before the CJEU: because of its mixed composition, the Appeal Panel can be expected to investigate more thoroughly whether the economic assessment made by the SRB was not erroneous. But the contested decision, in order to be set aside, must be based on an assessment that is erroneous. If, given the complexity of the matter, various appraisals can reasonably be made and defended, the Appeal Panel cannot annul the SRB's decision on the grounds that the Panel considers another assessment to be better than the one selected by the SRB. An annulment would require the appraisal adopted by the SRB to be wrong, not just to be the inferior one in the Panel's view. As long as the SRB has not erred, the Appeal Panel must respect its discretion.

Ultimately, the difference between the types of review conducted by the Appeal Panel and by the CJEU is only a matter of degree. An error may more easily manifest itself before the economically trained members of the Appeal Panel than it would before the judges of the Court. Apart from this, both reviews are similar and neither may lead to an annulment unless it has identified an error in the contested decision. L. Bolzonello convincingly said so already with regard to the Board of Appeal of the ECHA: "an error of assessment need not be 'manifest' to lead to the annulment of a contested decision by the Board" and "the review conducted by the ECHA Board of Appeal is essentially a control of legality, although it goes slightly deeper

than the review of the Courts".[101] The same conclusion holds true with regard to the SRB's Appeal Panel.

III. THE COURT OF JUSTICE OF THE EUROPEAN UNION

27. The CJEU can be seised of resolution matters in various ways: appeal against a decision of the Appeal Panel, action for annulment against a decision of the SRB, action for compensation for damages, or preliminary reference from a national court. The first three types of actions are discussed in this chapter; preliminary references will be discussed in the chapter dealing with the national courts (paragraphs 47 *et seq.*).

A. APPEALS AGAINST DECISIONS OF THE APPEAL PANEL

28. Decisions of the Appeal Panel may be further appealed to the CJEU, pursuant to Article 86(1) of the SRM Regulation (technically this is an action for annulment under Article 263 TFUE and the word "appeal" is a misnomer; it is used in this contribution for the sake of clarity). This appeal belongs to the General Court, and a subsequent appeal "on points of law only" may be made to the Court of Justice.[102]

29. An appeal to the CJEU is clearly open to the party that acted as appellant before the Appeal Panel – a bank, usually – and lost its case there. It is not entirely clear whether the SRB itself may also appeal against a decision of the Appeal Panel. Article 85(8) of the SRM Regulation provides that "the Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned", and does not seem to contemplate the possibility for the SRB to challenge the decision. In a comparable setup, the CJEU does not allow appeals by EUIPO against decisions of its own Boards of Appeal.[103] Article 86(1) of the SRM Regulation, however, merely states that "proceedings may be brought before the Court of Justice in accordance with Article 263 TFEU contesting a decision taken by the Appeal Panel", without any suggestion that such proceedings would only be open to the original appellant.

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101 L. Bolzonello, *op. cit.* (note 25), at pp. 574 and 575.

102 Article 256(1) TFEU.

103 CJEU, 12 October 2004, C-106/03 P, *Vedial v OHIM*, paragraph 31; CJEU, 15 May 2014, C-97/12 P, *Louis Vuitton Malletier v OHIM*, paragraph 81.

It is submitted that the SRB may challenge decisions of the Appeal Panel before the CJEU. The reference made by Article 86(1) of the SRM Regulation to Article 263 of the TFEU means that the criterion for access to the CJEU is that the contested act must be "addressed to that person or [be] of direct and individual concern to them"[104]; an adverse decision of the Appeal Panel that remits a matter to the SRB and obliges the SRB to adopt an amended decision meets this criterion. As to the precedents in respect of EUIPO's Boards of Appeal, they are based on a reasoning that cannot be extended to the SRB's Appeal Panel: the reason why EUIPO cannot appeal against decisions of its Boards of Appeal is that "before both the Opposition Division and the Board of Appeal, the dispute is between the applicant for registration [of a trademark] and the party opposing it, without [EUIPO] being a party to the dispute".[105] Before the Appeal Panel, by contrast, the dispute is precisely between the appellant and the SRB. More fundamentally, an annulment ruling by the Appeal Panel may reflect divergences of views between the Panel and the SRB in respect of matters of considerable importance for the regulation of the financial sector – the setting or MREL levels or the identification of obstacles to resolvability, for instance. It would make no sense from a policy perspective to leave the final word on these issues to the Appeal Panel, where the internal checks and balances, the resources available and the appointment process are much less elaborate than at the SRB and at the CJEU. The SRB must be in a position to submit possible errors of judgment made by the Appeal Panel to the review of a higher body.

30. A challenge before the Appeal Panel, where the Panel has jurisdiction, is a mandatory requirement before an appeal can go to the CJEU. Leapfrog appeals to the CJEU are not permitted.[106] This derives from the wording of Article 86(1) of the SRM Regulation: direct appeals to the CJEU against decisions of the SRB may be made only "where there is no right of appeal to the Appeal Panel"; where there is such a right, the appeal to the CJEU must be made against a decision of the Appeal Panel. A similar exhaustion of internal remedies is required at the ESAs, where a proceeding before the Board of

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104 Article 263, paragraph 4, TFEU.

105 CJEU, 12 October 2004, C-106/03 P, *Vedial*, paragraph 29. See however P. Chirulli and L. De Lucia, *op. cit.* (note 96), at p. 853, who consider that this case law, being also based on the idea that the EUIPO's Board of Appeal is part of the agency, could be generally applicable to all boards of appeal organised within EU agencies.

106 Ph.-E. Partsch, *op. cit.* (note 73), paragraph 1194. *Contra*, B.J. Drijber and A. van Toor, "Van ESA's, SSM en SRM: rechtsbescherming in een labyrint van Europese regels voor het financiële toezicht", *Ondernemingsrecht*, 2015, p. 13, paragraph 4.5.

Appeal is a precondition for an appeal to the CJEU[107]; this is not required at the ECB, however, where decisions made under the Single Supervisory Mechanism may be challenged directly before the CJEU pursuant to the Treaties and a prior passage through the ABoR is only optional.[108]

The constitutional basis for this requirement lies in Article 263, paragraph 5, TFEU: "Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".

31. The target of the appeal must be the decision of the Appeal Panel, not the initial decision of the SRB. Article 86(1) of the SRM Regulation provides for proceedings before the CJEU "contesting a decision taken by the Appeal Panel". This was confirmed by the CJEU in a case dealing with decisions of the EASA and its Board of Appeal: "the subject-matter of the action for annulment before the Court must indeed be considered to be the Board of Appeal decision and not the initial decision".[109] If the appeal is mistakenly directed against the initial decision, however, the CJEU will not declare it inadmissible but will instead reclassify it as being directed against the decision of the Board of Appeal.[110]

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107 M. Lamandini, "The ESAs' Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision", *Eur. Comp. L.*, 2014, p. 290, at p. 293; S. Loosveld, "Appeals against decisions of the European Supervisory Authorities", *JIBLR*, 2013, p. 9, at p. 13; M. Van Huffel, "Les voies de recours contre les décisions des autorités européennes de surveillance", *Euredia*, 2011, p. 387, at p. 399; A. Witte, *op. cit.* (note 73), at p. 246. A similar wording ("Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority") appears in the ESA Regulations (Article 61(1)).

108 Article 263, paragraph 1, TFEU; Recital (60) and Article 24(11), SSM Regulation; R. Houben, "The Single Supervisory Mechanism – Banking supervision in the Eurozone since 4 November 2014", *in* R. Houben and W. Vandenbruwaene (eds.), *The New Banking Supervision*, Intersentia, Antwerp – Cambridge, 2016, p. 21, paragraph 76; U. Lettanie, "Rechtsbescherming in het raam van het gemeenschappelijk toezichtsmechanisme", *ibid.*, p. 191, paragraph 13.

109 CJEU, 11 December 2014, T-102/13, *Heli-Flight v EASA*, paragraph 28, appeal dismissed by CJEU, 28 January 2016, C-61/15, paragraph 84: "les décisions prises par les chambres de recours se substituent aux décisions initialement prises par l'AESA et [...], par conséquent, [...] l'objet du recours en annulation doit être regardé comme étant la décision de la chambre de recours ayant rejeté le recours interne introduit contre la décision initiale". The concept of "substitution" of decision is specific to those Boards of Appeal that benefit from a functional continuity with their agency and cannot be transposed to the SRB's Appeal Panel. The conclusion of the analysis is not affected, however.

110 *Ibid.*, T-102/13, paragraph 31.

This implies that the two-month time limit for the filing of the appeal starts on the date of notification of the Appeal Panel's decision, not on the date of the SRB's initial decision.

The defendant before the CJEU is nevertheless the SRB and not the Appeal Panel.[111]

B. ACTIONS FOR ANNULMENT

32. The decisions of the SRB may be the subject of a direct action for annulment before the CJEU "where there is no right of appeal to the Appeal Panel".[112]

33. The time limit is two months, starting from the date of notification of the decision to the appellant.[113]

The appellant must be careful to elect the proper route of appeal: if it mistakenly challenges the decision before the Appeal Panel whilst the decision is of a type over which the Appeal Panel has no jurisdiction, a direct appeal to the CJEU will generally be time-barred by the time the Appeal Panel declares the first appeal inadmissible. In *SV Capital v EBA*, the CJEU added that this is also the case if the Board of Appeal itself mistakenly believes that it has jurisdiction and declares the first appeal admissible[114]:

> 57. [...] the commencement of proceedings before the Board of Appeal did not affect the calculation of the time limit for bringing an action relating to a decision taken previously by the EBA, given its lack of competence.
>
> 61. [...] neither the fact that the EBA failed to object on the ground that the Board of Appeal lacked competence to rule on an EBA decision nor the Board of Appeal's erroneous conclusion that it had competence to do so can be characterised as conducts such as to give rise to a pardonable confusion in the mind of a party.

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111 P. Mengozzi, "Le contrôle des décisions de l'OHMI par le Tribunal de première instance et la Cour de justice dans le contentieux relatif aux droits de la propriété industrielle", *Rev. dr. U. eur.*, 2002, p. 315, at p. 317. It is the consistent practice of the CJEU, when dealing with actions against decisions of boards of appeal, to regard the agency concerned as the defendant. With regard to the ESAs' joint Board of Appeal, for instance, see CJEU, 9 September 2015, T-660/14, *SV Capital v EBA*; CJEU, 14 December 2016, C-577/15, *SV Capital v EBA*; CJEU, 24 June 2016, T-590/15, *Onix Asigurări SA v EIOPA*.

112 Article 86(1), SRM Regulation.

113 Or from the day of publication of the decision or, in the absence of publication and notification, from the day on which the decision came to the knowledge of the appellant; Article 263, paragraph 6, TFEU.

114 CJEU, 14 December 2016, C-577/15, *SV Capital v EBA*, paragraphs 53 to 62.

62. It follows that the General Court was fully entitled to find that there was no excusable error such as to permit a derogation from the requirement to observe the prescribed time limit for instituting proceedings.

In case of doubt the appellant may file parallel appeals before the Appeal Panel and the CJEU. If the proper route is the one to the CJEU, the attempted appeal to the Appeal Panel will be inadmissible, but its existence will have no detrimental effect on the admissibility of the appeal made before the CJEU.[115]

34. The most significant obstacle that many prospective actions for annulment against decisions of the SRB are likely to face will be the *locus standi* requirement imposed by Article 263 TFEU, *i.e.* that the contested decision be either "addressed" to the appellant[116] or "of direct and individual concern" to the appellant[117], as interpreted by the CJEU.

According to the CJEU's so-called *Plaumann* doctrine, a decision "can be of individual concern to natural and legal persons only if it affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee".[118] Merely belonging to the category of persons affected by the decision is not sufficient to obtaining standing in an action for annulment.

As to the requirement of "direct concern", the condition is "first, that the measure in question directly affect the legal situation of the individual and, secondly, that it leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being

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115 CJEU, 15 September 2016, T-587/14, *Crosfield Italia v ECHA*, paragraph 23; CJEU, 15 September 2016, T-620/13, *Marchi Industriale v ECHA*, paragraph 23.

116 With regard to the concept of the "addressee" of a decision made by an agency, see CJEU, 13 March 2015, T-673/13, *European Coalition to End Animal Experiments v ECHA*, paragraph 24.

117 Since the Lisbon Treaty, actions for annulment are also permitted against "a regulatory act which is of direct concern to [the claimant] and does not entail implementing measures". Decisions made by the SRB are in most cases, if not all, unlikely to qualify as regulatory acts.

118 CJEU, 15 July 1963, 25-62, *Plaumann*, p. 107; for recent iterations, see CJEU, 24 November 2016, C-408/15, *Ackermann Saatzucht*, paragraph 30 (quoted above), and CJEU, 21 December 2016, C-524/14, *Hansestadt Lübeck*, paragraph 15. In *Adorisio*, bondholders of the failed Dutch banks SNS Reaal and SNS Bank attempted to challenge the Commission's State aid decision approving the rescue package offered to the two banks, and were unsuccessful in meeting the "individual concern" test. Tellingly, they did not even argue that their status as bondholders would satisfy that test and tried to rely on the argument that they were also competitors of the banks; CJEU, 26 March 2014, T-321/13, *Adorisio*, paragraphs 38 to 48.

purely automatic and resulting only from EU rules, without the application of other intermediate rules".[119]

The case law on these criteria is extensive. Its detailed analysis would by far exceed the scope of this contribution and has already been made brilliantly by other authors.[120]

35. The first limb of the standing requirement, *i.e.* the "individual concern" test as interpreted by *Plaumann*, will not block the financial institution subject to a decision of the SRB from challenging that decision – whether this is, for instance, the setting of the institution's MREL or the placing of the institution under resolution and the adoption of a resolution scheme – because it is manifestly "individually concerned".

Shareholders – at least when the shares of the institution concerned are listed – and creditors of the institution, by contrast, should in most circumstances be regarded as mere members of a class and should therefore not have standing to file an action for annulment before the CJEU.

36. The second limb of the *locus standi* requirement, *i.e.* the "direct concern" test, however, raises an additional difficulty. Many decisions made by the SRB are not addressed to the financial institution concerned but are instead addressed to the relevant national resolution authority, with instructions to implement the decision. The default rule in this respect is set out in Article 29(1) of the SRM Regulation, headed "Implementation of decisions under this Regulation":

> National resolution authorities shall take the necessary action to implement decisions referred to in this Regulation [...]. National resolution authorities shall implement all decisions addressed to them by the Board.
>
> For those purposes, subject to this Regulation, they shall exercise their powers under national law transposing [the BRRD] and in accordance with the conditions laid down in national law. National resolution authorities shall fully inform the Board of the exercise of those powers. Any action they take shall comply with the Board's decisions pursuant to this Regulation.

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119 CJEU, 5 May 1998, C-386/96, *Dreyfus*, paragraph 43; for recent iterations, see CJEU, 15 September 2016, T-76/14, *Morningstar*, paragraph 30, and CJEU, 30 April 2015, T-135/13, *Hitachi Chemical Europe*, paragraph 27 (quoted above).

120 M. Wathelet, *Contentieux européen*, Brussels, Larcier, 2nd ed., 2014, paragraphs 210 to 217; A. Witte, *op. cit.* (note 73), pp. 228 to 232 and 247 to 255.

> When implementing those decisions, the national resolution authorities shall ensure that the applicable safeguards provided for in [the BRRD] are complied with.

In a first analysis, most decisions made and implemented in accordance with that process will fail the "direct concern" test, because – even though they may perhaps affect the legal situation of the financial institution concerned – they will require an implementation by the national resolution authorities that leaves a degree of discretion to these authorities and requires the intermediate application of the rules of national law.

This is typically the case of a decision to place a bank under resolution and to apply resolution tools. Article 18(1) of the SRM Regulation provides that "The Board shall adopt a resolution scheme". Article 18(9) adds:

> 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. [...]

Article 28(2) goes on to say that "the Board may give instructions to the national resolution authorities as to any aspect of the execution of the resolution scheme, and in particular [...] to the exercise of the resolution powers" and potentially takes away all or part of the discretion that was available to the national authority. Article 29 allows the SRB to take back full control from a recalcitrant national authority:

> 2. Where a national resolution authority has not applied or has not complied with a decision by the Board pursuant to this Regulation or has applied it in a way which poses a threat to any of the resolution objectives under Article 14 or to the efficient implementation of the resolution scheme, the Board may order an institution under resolution: [...]
>
> 3. The institution under resolution shall comply with any decision taken referred to in paragraph 2. Those decisions shall prevail over any previous decision adopted by the national resolution authorities on the same matter.

37. The *locus standi* conditions developed by the CJEU appear to be unsuitable to the kind of cooperative process between an EU agency and national authorities put in place by the SRM Regulation. Firstly, there is a continuum between decisions of the SRB that leave a broad implementation discretion to the relevant national authority and those that the national

authority must implement without any meaningful margin of discretion. It will often be very difficult to determine whether any particular decision meets or fails the "direct concern" test and litigants may be tempted to duplicate their actions, before the CJEU and before a national court, in order not to miss the right choice. Secondly, this test is likely to push towards the national courts those disputes that in effect bear in the first place on decisions made by the SRB and in which the input of the national authority was peripheral only. This is not conducive to an efficient judicial protection of the persons affected nor to the development of a consistent jurisprudence.

38. The SRM Regulation, however, provides support to the idea that the application of the "direct concern" test in the context of the Single Resolution Mechanism should be less stringent than it generally is, and that the degree of implementation discretion granted to national authorities should generally be regarded as insufficient to shielding the SRB's decision from direct challenges before the CJEU.[121]

The same requirement of "direct and individual concern" indeed appears in Article 85(3) of the SRM Regulation with regard to access to the Appeal Panel when the appellant is not itself the addressee of the contested decision. The two most important areas in which the Appeal Panel has jurisdiction relate to the setting of MREL and the removal of impediments to resolvability, under Articles 12(1) and 10(10) of the SRM Regulation respectively. These are two types of decisions that are addressed to the national resolution authority rather than to the financial institution concerned.[122] The national resolution authorities themselves, as addressees of the decisions, may of course challenge them before the Appeal Panel. One can hardly imagine, however, that the European legislature would have set up an Appeal Panel with specific jurisdiction to hear challenges in respect of MREL and removals of impediments to resolvability if this were only for the benefit of national resolution authorities and were not meant to be accessible in the first place to the financial institutions concerned. The whole regime would make

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121 A similar point is made, with regard to the admissibility of actions for annulment of decisions of the ECHA, by M. Bronckers and Y. Van Gerven, "Legal Remedies Under the EC's New Chemical Legislation REACH: Testing a New Model of European Governance", *C.M.L. Rev.*, 2009, p. 1823, at p. 1867: "We submit that the Community courts should be favourably disposed towards accepting legal standing of private parties challenging REACH-related decisions of ECHA [...]". See also, for an analysis of the "rigidity of the *Plaumann* test" in the context of the Single Supervisory Mechanism, M. Lamandini, D. Ramos Munoz and J. Solana, "The European Central Bank (ECB) powers as a catalyst for change in EU law. Part 2: SSM, SRM and fundamental rights", *Columbia J. Eur. L.*, 2017, p. 199.

122 Articles 10(10) to (12) and 12(14).

little sense if a financial institution affected by a decision of the SRB setting the level of its MREL, or ordering that it remove certain impediments to its resolvability, were not itself able to file an appeal before the Appeal Panel and were limited to challenging national implementation measures before the national courts. The legislature, therefore, must have taken the view that the financial institution concerned in those cases satisfies the "direct concern" test despite the fact that the SRB decision is formally addressed to the national resolution authority.

The words "direct and individual concern" are the same in Article 85(3) of the SRM Regulation and in Article 263, paragraph 4, TFEU. The legislature's logic must apply to both provisions in the same manner and it arguably follows that a financial institution should be able, for instance, to file an action for annulment before the CJEU against a decision of the SRB to place the institution under resolution and to adopt a resolution scheme, despite the decision being addressed to its national resolution authority.

39. Further support for a relaxation of the "direct concern" test in the context of the SRM appears in Article 20(15) of the SRM Regulation:

> The valuation shall be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments. The valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision of the Board.[123]

This implies that a resolution decision made by the SRB is capable of being appealed and, thus, that at least some of the most likely prospective appellants – the financial institution being placed under resolution, its shareholders and its creditors – must have *locus standi* for the purposes of an appeal. Hence, the role of the national resolution authorities, as addressees of the resolution decision charged with its implementation, should arguably not be regarded as a bar to the resolution decision being of direct concern to these appellants.

40. The weakness of the above analysis, of course, is that the "direct concern" test has its source in primary law. A secondary law instrument, such as the SRM Regulation, should in principle not be able to affect its interpretation.

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[123] Recital 63, SRM Regulation, similarly states that "Such valuation should be subject to a right of appeal only together with the resolution decision".

41. It is totally uncertain at present whether the CJEU will apply its usual case law or will instead follow the line of reasoning set out in paragraphs 38 and 39. This uncertainty is unsatisfactory, all the more so because most of the types of SRB decisions that are likely, by their nature, to attract potential disputes are affected by it. This is for instance the case of the following types of decisions:

a) *Ex-ante contributions to the Single Resolution Fund.* The contributions are calculated annually by the SRB in accordance with Article 70(2) of the SRM Regulation but they are "raised by the national resolution authorities" in accordance with Article 67(4). Several such cases are presently pending before the CJEU and the question should thus hopefully receive a response in the near future.

b) *Write-down or conversion of capital instruments outside resolution.* The power to write down or to convert relevant capital instruments, outside a full resolution procedure, belongs to the SRB pursuant to Article 21(1) of the SRM Regulation, but Article 21(8) provides that the SRB "shall instruct [...] the national resolution authorities to exercise the write-down or conversion powers" and Article 21(11) states that "the national resolution authorities shall implement the instructions of the Board and exercise the write-down or conversion of relevant capital instruments [...]". Article 21(10) requires that the SRB "ensure" that the national authorities exercise their powers "in a way that produces [certain defined] results". The national resolution authorities' margin of discretion may thus vary significantly depending on how directive the SRB opts to be in any particular case.

c) *Adoption of a resolution scheme.* The adoption of a resolution scheme, and the placement of an institution under resolution, belongs to the SRB pursuant to Article 18(1) and (6) of the SRM Regulation. But in accordance with Article 18(9) "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." Again, the margin of discretion of the national authorities may vary significantly depending on the degree of detail of the scheme, and may be more or less extensive for different components of the scheme.

d) *Bail-in of creditors.* The bail-in of creditors is a resolution tool and, as such, forms part of the resolution scheme adopted by the SRB and addressed to the national resolution authorities for implementation. Article 23, paragraph 1, of the SRM Regulation requires that "the resolution scheme adopted by the Board [...] shall establish [...] the details of the

resolution tools to be applied to the institution under resolution concerning at least the measures referred to in Article 24(2) [sale of business tool], Article 25(2) [bridge institution tool], Article 26(2) [asset separation tool] and Article 27(1) [bail-in tool], to be implemented by the national resolution authorities in accordance with the relevant provisions of Directive 2014/59/EU as transposed into national law [...]". The reference to the "details" of the bail-in tool being determined by the SRB seems to suggest that fairly little discretion may often be left to the national authorities.

e) *Sale of business.* As for a bail-in, Article 23, paragraph 1, of the SRM Regulation provides that the "details" of the sale must be defined by the SRB. Article 24(2) adds that the determination of "the instruments, assets, rights and liabilities to be transferred" – *i.e.* the scope of the sale – and "the commercial terms" – *i.e.* the price – must be part of the scheme adopted by the SRB. The selection of a purchaser, by contrast, seems to be left to the national authority; this may perhaps suggest a broader implementation discretion than in the other examples described above.

42. Banking groups falling under the remit of the SRB often have activities that extend outside the eurozone. This will lead to many decisions of the SRB being made in the form of joint decisions with the national resolution authorities of non-eurozone countries. If a eurozone-based banking group has a subsidiary in the United Kingdom, for instance, then the SRB will set the group's consolidated MREL as well as the individual MREL that is applicable to the eurozone subsidiaries, and the Bank of England will set the individual MREL that is applicable to the UK subsidiary.[124] If both authorities can reach an agreement, this will be done by way of a joint decision of the SRB and the Bank of England.[125]

There is no arrangement for a common judicial review of joint decisions of this type. The SRB part of the joint decision is reviewable by the CJEU or, if the "direct concern" test is not satisfied, through a review by the national courts of the implementation given to it by the relevant national resolution authorities. The Bank of England part of the joint decision is reviewable in the United Kingdom before the local courts. This situation is far from ideal.

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124 Article 12(1), (8) and (9), SRM Regulation; Article 45(10), BRRD. This is the current situation, before any implementation of Brexit.

125 The "joint decision" procedure organised by the BRRD (Article 45(10), for instance) does not apply within the eurozone; cooperation between the SRB and non-eurozone national resolution authorities is to be organised by Memorandums of Understanding (Articles 31(2) and 32, SRM Regulation).

C. ACTIONS FOR DAMAGES

43. Article 87(5) of the SRM Regulation grants jurisdiction to the CJEU "in any dispute relating to paragraphs 3 and 4", *i.e.* in relation to claims for non-contractual liability of the SRB under Article 87(3) and claims of national resolution authorities for an indemnification by the SRB under Article 87(4). The constitutional basis of this provision is not entirely clear.

With regard to the SRB's non-contractual liability, Article 87(3) provides that "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 [...]". This is in substance identical to the principle set out in Article 340, paragraph 2, TFEU with regard to the non-contractual liability of the European Union, which the CJEU has extended to agencies and bodies of the Union.[126] The jurisdiction of the CJEU against the SRB in this respect can, thus, be founded on Article 268 TFEU and this implies in turn, in accordance with Article 274 TFEU, that the CJEU's jurisdiction is exclusive and that tort claims against the SRB are not admissible before national courts.

Article 87(4), by contrast, is an indemnity provision which allocates risks between the SRB and the national resolution authorities. It does not deal with liability for unlawful conduct: "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 [...]". This indemnity arrangement is not related to Article 340 TFEU and, as a consequence, neither Article 268 TFEU nor any other provision of the Treaty seems capable to serve as a basis for the CJEU's jurisdiction.

44. When the alleged wrongful actions were taken by both the SRB and a national resolution authority – the latter usually acting on the instructions of the former – there may be joint liability of both the SRB and the national authority. The claim must in such a case be split between the CJEU and the

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126 Article 340, paragraph 2, was for instance regarded as applicable to EUIPO by CJEU, 27 April 2016, T-556/11, *European Dynamics*, paragraphs 264 *et seq.*; to EASA by CJEU, 11 December 2014, T-102/13, *Heli-Flight v EASA*, paragraph 116; and to the European External Action Service by CJEU, 16 December 2015, T-138/14, *Randa Chart*, paragraphs 48 *et seq*. See also the opinion of Adv. Gen. Jääskinen in case C-270/12, *United Kingdom v Parliament and Council (short selling)*, paragraph 73.

national courts, and the CJEU will generally require that the national remedies be exhausted first.[127]

45. The jurisdiction of the CJEU with regard to claims for non-contractual liability of the SRB appears not to extend to claims for compensation made against the SRF by shareholders or creditors of a financial institution under resolution on the grounds of an alleged breach of the "no creditor worse off" principle.

It is a basic principle of the BRRD and the SRM Regulation that resolution actions may not lead to a shareholder or a creditor incurring greater losses than it would have suffered if the institution under resolution had been declared insolvent and wound up.[128] An *ex-post* valuation must be made by an independent person after completion of the resolution actions and, if this valuation shows that a shareholder or a creditor is worse off than it would have been in an insolvency, then that shareholder or creditor is entitled to a compensation payment from the applicable resolution financing arrangement, *i.e.*, in the context of the Single Resolution Mechanism, from the SRF.[129] Expropriated shareholders may for instance claim compensation corresponding to a higher price for their shares, and bailed-in creditors may claim compensation corresponding to a lesser haircut on their debts.

The SRF's obligation to pay compensation in these circumstances is not dependent on any allegation or evidence of wrongdoing by the SRB. It is an objective obligation which has its source in the SRM Regulation and the BRRD, with the aim of avoiding disproportionate interferences with property rights. The circumstance that an *ex-post* valuation shows a breach of the "no creditor worse off" principle does not imply that the SRB was in any way negligent at the time it adopted the resolution scheme and calibrated the resolution tools it chose to apply. A resolution must generally be decided under an intense time pressure and on the basis of incomplete information, and this is precisely why the BRRD and the SRM Regulation require that, separately from the valuations that have informed the resolution decisions, an *ex-post* valuation must be conducted independently once the dust has settled. This liability of the SRF is not fault-based, it is a strict liability.

The CJEU has so far always refused to recognise expressly a principle of strict liability in respect of acts of the Union, without expressly denying such

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127 A.H. Türk, *Judicial Review in EU Law*, Cheltenham, Edward Elgar Publishing, 2009, pp. 246 to 250; H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Union*, The Hague, Kluwer, 2001, § § 1056 to 1071.

128 Recital 62 and Article 15(1)(g), SRM Regulation; recitals 5 and 50, and Articles 34(1)(g) and 73(b), BRRD.

129 Article 76(1)(e), SRM Regulation; Article 75, BRRD.

a principle either.[130] The current state of European Union law seems to be that liability of the Union requires, among other conditions, the existence of an unlawful act.[131] It is highly doubtful, therefore, that the SRF's strict liability in the case of a breach of the "no creditor worse off" principle could be regarded as having its legal basis in Article 87(3) of the SRM Regulation or in Article 340 TFEU. If Articles 87(3) and 340 are not relevant, then neither Article 87(5) of the SRM Regulation ("The Court of Justice shall have jurisdiction in any dispute relating to paragraphs 3 and 4") nor Article 268 TFEU ("The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340") can be invoked to justify the CJEU's jurisdiction. Compensation claims against the SRF would then need to be submitted to the competent national courts, in accordance with Article 274 TFEU[132], and each national court would need to determine whether it has jurisdiction in accordance with its own domestic law.[133] Belgian courts would in any event have jurisdiction, given that the SRB has its seat in Brus-

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130 CJEU, 7 April 2016, C-556/14 P, *Holcim*, paragraph 105; CJEU, 7 October 2015, T-79/13, *Accorinti v ECB*, paragraph 119; CJEU, 14 October 2014, C-12/13, *Buono*, paragraph 43, and opinion Adv. Gen. Cruz Villalón, paragraphs 61 to 71; CJEU, 25 March 2010, C-414/08, *Sviluppo Italia Basilicata*, paragraph 141, and opinion Adv. Gen. Trstenjak, paragraph 236; M. Wathelet, *op. cit.* (note 120), paragraph 307.

131 For recent illustrations, see CJEU, 29 November 2016, T-103/12, *T & L Sugars*, paragraph 40; CJEU, 20 July 2016, T-483/13, *Oikonomopoulos*, paragraph 26. Other cases, however, mention that the unlawfulness of the act is a condition "in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct of its institutions", thereby leaving open the possibility of a liability for lawful conduct in certain circumstances: CJEU, 21 July 2016, T-66/14, *Bredenkamp*, paragraph 17; CJEU, 12 May 2016, T-669/14, *Trioplast Industrier*, paragraph 92.

132 CJEU, 18 April 2013, C-103/11P, *Systran*, paragraph 57.

133 The Brussels I (recast) Regulation (Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) does not apply, pursuant to its Article 1(1), "to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)" and this excludes its application in respect of compensation claims against the SRF. The case law of the CJEU, developed in respect of the various instruments of private international law that contain a similar wording, makes it clear that the reference to the "State" in this provision must be construed broadly and contemplates any public authority acting in the exercise of its public powers (CJEU, 11 June 2015, C-226/13, *Fahnenbrock*, paragraph 50; CJEU, 15 February 2007, C-292/05, *Lechouritou*, paragraph 31; CJEU, 1 October 2002, C-167/00, *Henkel*, paragraph 26; CJEU, 21 April 1993, C-172/91, *Volker Sonntag*, paragraph 20; CJEU, 16 December 1980, 814-79, *Rüffer*, paragraph 8; CJEU, 14 October 1976, 29-76, *LTU Lufttransportunternehmen*, paragraph 4). According to Advocate General Bot in his *Fahnenbrock* opinion (which the Court declined to follow on other grounds), "several decisions, revealing a very clear tendency in favour of rejecting a criterion based purely on the nature of the entity, have established a criterion that draws a distinction according to whether or not the public authority in question has exercised its powers of State authority" (paragraph 52).

sels.[134] If this analysis is correct, then nothing prevents different claimants from filing multiple parallel claims on the same grounds before the courts of different national jurisdictions.

This is of course an unsatisfactory outcome. The uncertainty of the solution, in the first place, is problematic. The lack of centralisation of this type of claims before the European judicature is problematic too and may lead to divergent decisions by national courts and to inconsistent case law.

IV. NATIONAL COURTS

46. Decisions of the national resolution authorities can be challenged before the national courts in accordance with national procedural rules. National courts are also competent to assess the non-contractual liability of their national resolution authorities.

In Belgium, challenges against decisions of the National Bank of Belgium's Resolution College usually belong to the Council of State, by way of an accelerated procedure in the case of a decision ordering the removal of obstacles to resolvability or by way of ordinary proceedings in other circumstances.[135] Certain types of decisions – for instance decisions setting the amount of contributions due by an institution – must be brought before the civil courts.[136]

A. PRELIMINARY REFERENCES

47. As discussed previously in paragraph 36, the role of the national resolution authorities very often consists of implementing the SRB's instructions, with varying margins of discretion. The existence of such an implementation power can mean that the original decision of the SRB is not appealable before the CJEU because it is not of "direct concern" to the financial institution involved. The legal review of the validity of the SRB decision in such a case may still belong to the CJEU, but it can only be conducted by way of a detour through a challenge of the national implementation measures

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134 Article 5, § 1, Code of International Private Law.

135 Article 36/22, law of 22 February 1998 establishing the organic statute of the National Bank of Belgium; Royal Decree of 15 May 2003 setting the rules of an accelerated procedure before the Council of State against certain decisions of the Financial Services and Markets Authority and the National Bank of Belgium; X. Taton, *Les recours juridictionnels en matière de régulation*, Brussels, Larcier, 2010, paragraphs 356 *et seq*.

136 Comp. C.E., 10 February 2005, No. 140,482, *Société Chimique Prayon Rupel*.

before the national courts and a reference for a preliminary ruling (*question préjudicielle / prejudiciële vraag / Antrag auf Vorabentscheidung*) to the CJEU. This construction is meant to result, according to the Court, in a complete system of judicial protection in respect of the acts of the Union[137]:

> 54. Judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States. The FEU Treaty has, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the European Union judicature.
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> 55. In that connection, it must be emphasised that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application, by pleading the invalidity of such an act. [...]
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> 57. In that regard, it must be borne in mind that where a national court or tribunal considers that one or more arguments for invalidity of a European Union act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity, the Court alone having jurisdiction to declare a European Union act invalid.

48. A challenge before a national court of an implementation measure adopted by a national resolution authority can, thus, serve as the occasion – and perhaps the only occasion – for a review of the validity of the underlying decision of the SRB.

The powers of the national courts in this respect, however, are limited and they are not symmetrical.

The national court may decide on its own that the contested decision of the SRB is valid. The national court need not refer the point to the CJEU and the financial institution which is challenging the validity of the SRB decision will not necessarily be able to have its case heard by the CJEU. An obligation to seek a preliminary reference from the CJEU, in such a situation, only bears on the national court if there is no further judicial remedy available under

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137 CJEU, 27 April 2016, T-310/15, *European Union Copper Task Force*, internal citations omitted. See also, in particular, CJEU, 28 April 2015, C-456/13, *T & L Sugars*, paragraphs 30, 31 and 45 to 48; CJEU, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, paragraphs 92 to 96.

national law against judgments of that court.[138] In Belgium, this obligation therefore only applies to the Court of Cassation, the Council of State and the Constitutional Court[139]; courts of first instance and courts of appeal may but need not seek a preliminary reference before ruling that a contested decision of the SRB is valid.

A national court, by contrast, does not have the power to declare that an act of the SRB is invalid. This is a power that belongs exclusively to the Union judicature and the national court, if it considers that the SRB decision may be invalid, must stay its proceedings and refer the issue of the decision's validity to the CJEU for a preliminary ruling. The principle was established in *Foto-Frost* and has been consistently repeated ever since.[140] It must be applied by the national courts irrespective of the existence of further national remedies against their judgments. A preliminary reference is, thus, always mandatory in those circumstances, even in courts of first instance and courts of appeal. Pending the preliminary reference, the national court may provisionally suspend the application of the contested SRB decision, but only if various conditions are satisfied – in particular, the suspension may not lead to that decision being in fact deprived from all effectiveness due to its not being immediately implemented.[141] The BRRD further restricts the courts' suspension powers, with regard to crisis management measures, by providing that "the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be against the public interest".[142]

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138 Article 267, paragraph 3, TFEU.

139 Unless these courts take the view in the circumstances that a preliminary reference is superfluous because the answer to the prospective question can already be derived from settled case law of the CJEU or because there is no reasonable doubt about the question; see K. Lenaerts, I. Maselis, K. Gutman and J.T. Nowak, *op. cit.* (note 7), paragraphs 3.52 to 3.55.

140 CJEU, 22 October 1987, C-314/85, *Foto-Frost*, paragraphs 14 to 17; CJEU, 6 October 2015, C-362/14, *Schrems*, paragraph 64; CJEU, 28 April 2015, C-456/13, *T & L Sugars*, paragraph 48; CJEU, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, paragraph 96; CJEU, 10 January 2006, C-344/04, *IATA*, paragraphs 27 to 32; CJEU, 6 December 2005, C-461/03, *Gaston Schul Douane-expediteur*, paragraphs 17 and 25; CJEU, 21 March 2000, C-6/99, *Association Greenpeace France*, paragraphs 54 and 55.

141 CJEU, 6 December 2005, C-453/03, *ABNA*, paragraphs 103 to 107; CJEU, 9 November 1995, C-465/93, *Atlanta Fruchthandelsgesellschaft*, paragraphs 43 and 51; CJEU, 21 February 1991, C-143/88, *Zuckerfabrik*, paragraphs 17 to 33.

142 Article 85(4)(b), BRRD.

B. *EX-ANTE* JUDICIAL APPROVAL OF CRISIS MANAGEMENT MEASURES

49. Crisis management measures adopted by resolution authorities can be extremely intrusive and can have far-reaching consequences for the shareholders or creditors of the institution placed under resolution: cancellation of existing shares as part of a bail-in or as a result of a write-down[143], expropriation of the shareholders pursuant to the application of the sale of business tool[144], write-down of the debt held by creditors pursuant to the application of the bail-in tool[145], etc. The BRRD therefore allows Member States to "require that a decision to take [...] a crisis management measure is subject to *ex-ante* judicial approval, provided that [...] the procedure relating to the application for approval and the court's consideration are expeditious".[146] Recital 92 clarifies the meaning of expeditiousness and adds that "the court should give its decision within 24 hours". The BRRD permits, but does not mandate, such a national requirement for prior judicial vetting of crisis management measures.

The SRM Regulation is silent on the subject and does not organise any *ex-ante* approval by the CJEU of the crisis management measures imposed by the SRB. It provides, however, that these measures are part of the resolution scheme which is adopted by the SRB and "addressed to the relevant national resolution authorities", and that the national resolution authorities must, for the purposes of implementing the scheme, "exercise their powers under national law transposing [the BRRD] and in accordance with the conditions laid down in national law".[147] This implies that any *ex-ante* judicial approval required by national law in the countries of the relevant national resolution authorities must be obtained before the SRB decision can take effect.

If the SRB adopts a crisis management measure with regard to a Belgian bank, for instance, and if the measure includes a so-called "disposal decision" (*décision de disposition / beschikkingsbeslissing*, a broad category which includes any forced transfer of shares, assets or liabilities and any write-down or conversion), then the measure must be submitted for prior approval to the commercial court of Brussels.[148] The court must assess whether the measure is lawful and whether the compensation proposed

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143 Article 47(1)(a), BRRD.

144 Article 24(1)(a), SRM Regulation; Article 38(1)(a), BRRD.

145 Article 27(1) and (13), SRM Regulation; Articles 43 and 63(1)(e) and (g), BRRD.

146 Article 85(1), BRRD.

147 Articles 18(9) and 29(1), SRM Regulation.

148 Articles 242, 15° and 17°, and 296 to 304, law of 25 April 2014 relating to the status and supervision of credit institutions and securities firms.

appears fair.[149] The law provides for a fairly swift timetable – first hearing to be held within three business days of the application, further hearings if appropriate, and judgment within three business days of the closing of the proceedings – which nevertheless considerably exceeds the 24 hours contemplated by the BRRD.

This regime is inappropriate. The subjection of the SRB's core competence – the rescuing of failing banks in times of crisis – to the approval of national courts is antithetical to the very idea of a "single" resolution mechanism. The need for multiple approvals, when several national resolution authorities are involved, creates a significant risk of delays and inconsistencies. Furthermore, the *Foto-Frost* doctrine obliges the national courts seised of an application for prior approval of resolution measures, in case of doubt about the validity of the SRB decision, to refer the matter to the CJEU for a preliminary ruling, thereby making a swift one-step judicial review impossible.

C. VALUATIONS

50. Valuations of the assets and liabilities of the financial institution concerned play a central role in a resolution. They form the basis for the determination of the height of the haircut or the conversion applied to eligible liabilities in a bail-in, for the commercial terms – *i.e.* in the first place the price – of any transfer of shares, assets or liabilities in a "sale of business" scenario, and for the transfer price to be paid by any bridge bank or bad bank, in particular.[150] They are also the basis for any entitlement to compensation by the SRF on account of a breach of the "no creditor worse off" principle.[151]

Valuations come in two waves: first there is a pre-resolution valuation, and after the event there is a "valuation of difference in treatment". Both valuations are to be carried out by an independent third person (this is

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149 *Ibid.*, Article 301, § 3: "le tribunal vérifie si la décision de disposition est conforme à la loi et, le cas échéant, si les montants compensatoires paraissent justes / gaat de rechtbank na of de beschikkingsbeslissing in overeenstemming is met de wet en of, in voorkomend geval, de compensatoire bedragen billijk voorkomen". On its face the definition of "compensation" (*montant compensatoire / compensatoir bedrag*) in Article 242, 19°, seems not to allow for an assessment of the height of the haircut applied in a bail-in; this appears to be nothing more than a drafting inadvertence, due to the circumstance that the bail-in tool was not yet contemplated by the original version of the law of 25 April 2014 and that the necessary update to this definition was overlooked when the bail-in provisions were added into the law on 18 December 2015.

150 Article 20(5), SRM Regulation; Article 36(4), BRRD.

151 See notes 128 and 129.

likely to be an investment bank or an audit firm). The SRB's duty is to "ensure that a valuation is carried out by an independent person"[152], it is not to valuate itself the assets and liabilities of the financial institution.

The pre-resolution valuation is contemplated in paragraphs 1 to 15 of Article 20 of the SRM Regulation. Ideally, this should be completed before any resolution action is taken[153] but, when this is not possible, the resolution may be decided on the basis of a provisional valuation – in practice, one can expect that this will often be the case. The provisional valuation is to be made by the third-party valuer or, in cases of particular urgency, by the SRB itself.[154] In either case, the provisional valuation must be followed by a so-called "*ex-post* definitive valuation" as soon as practicable.[155]

The second wave valuation is regulated by paragraphs 16 to 18 of Article 20 of the SRM Regulation. It must be carried out "as soon as possible after the resolution action or actions have been effected".[156] The third-party valuer may be the same as for the first valuation and may carry it out simultaneously with that first valuation (assuming that this first valuation was still provisional at the time of the resolution decision and that its process is continued in the form of an *ex-post* definitive valuation); however, the two valuations must remain distinct.[157]

51. The two sets of valuations must be based on different assumptions and they will, thus, usually produce different outcomes: whilst the first valuation must be based "on prudent assumptions, including as to rates of default and severity of losses", the second must assume that no resolution action was taken and that the financial institution "would have entered normal insolvency proceedings".[158]

They also serve different purposes. The first one in essentially a measure to be used by the SRB in order to calibrate the resolution tools that it chooses to apply. As per Article 20(5) of the SRM Regulation, this pre-resolution valuation "informs the decision" on the appropriate resolution action, on the extent of any write-down or conversion, on the value of any consideration to be paid, etc. If the *ex-post* definitive valuation shows that the provisional valuation on which the resolution decision relied was too low, then the SRB "may request the national resolution authority" to write up again instruments that have been written down pursuant to a bail-in, or

152 Article 20(1) and (16), SRM Regulation.
153 Article 20(1), SRM Regulation.
154 Article 20(3) and (10), SRM Regulation.
155 Article 20(11), SRM Regulation.
156 Article 20(16), SRM Regulation.
157 Article 20(11), SRM Regulation; Article 36(10), BRRD.
158 Article 20(6) and (18), SRM Regulation.

to increase the price payable by a bridge bank or a bad bank.[159] It is unclear whether such a write-up is a right which creditors or shareholders are entitled to enforce or whether it is just a discretion of the SRB.[160]

The second valuation, by contrast, serves the purpose of verifying whether the "no creditor worse off" principle has been complied with and, if not, of measuring the compensation that shareholders or creditors are entitled to claim from the SRF.

52. The SRM Regulation expressly sets out that the pre-resolution valuation "shall be an integral part" of the resolution decision made by the SRB and that "the valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision of the Board".[161]

Whether such an appeal directed against the resolution decision and the underlying valuation belongs to the CJEU or to the national courts has been discussed in paragraphs 34 to 41 above: shareholders and creditors must generally sue before the national courts, because they fail to satisfy the "individual concern" test applied by the CJEU, and it is uncertain whether the institution under resolution has direct access to the CJEU or must also rely on the national courts. The national courts may then need to refer the matter to the CJEU for a preliminary ruling on the validity of the SRB decision.

53. The post-resolution valuation of difference in treatment, by contrast, is not subject to any form of endorsement by the SRB. The SRB must "ensure that [it] is carried out by an independent person"[162] but it has no further role in this respect.

The SRM Regulation does not contain any mention of a right of appeal against this valuation. The BRRD, however, states in its recital 51 that "as opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision". Given the principle of effective judicial protection in Article 47 of the Charter, some form of judicial review must be available indeed.

Since neither the SRB nor the national resolution authorities are the author of the valuation, an action for annulment of that valuation directed against the SRB or a national resolution authority appears to be impossible.

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159 Article 20(12), SRM Regulation.

160 Article 46(3) of the BRRD provides that "a write-up mechanism may be applied" in those circumstances and does not offer any more clarity on this matter.

161 Article 20(15), SRM Regulation. Similar statements appear in recital 51 and in Article 36(13) of the BRRD.

162 Article 20(16), SRM Regulation; Article 74(1), BRRD.

A potential procedural route seems to be a claim for payment of compensation directed against the SRB (in its capacity as owner of the SRF) on the grounds of non-compliance with the "no creditor worse off" principle, and an incidental challenge in the course of these proceedings against the valuation of difference in treatment.[163] As discussed in paragraph 45, this is a type of claim that belongs to the national courts – and there seems to be no room for a preliminary reference as to validity to the CJEU in this case, since the object of the challenge is a valuation conducted by an independent third-party and not a decision of a Union agency.

Again, this is not a very desirable outcome. Disputes relating to post-resolution valuations of difference in treatment ultimately deal with spending SRF money. This is a matter of European – or at least eurozone – interest, not just of national interest, and the CJEU should have the final say here.

54. Where a challenge against a valuation comes before the Belgian courts, the Brussels court of appeal has exclusive jurisdiction.[164] Bizarrely, the right to file such a challenge lapses two months after the publication of the relevant resolution actions[165] – *i.e.*, in most cases presumably, before completion of the post-resolution valuation of difference in treatment. Such a time limitation, which can expire before it has even started to run, would in all likelihood not withstand a constitutionality test before the Constitutional Court.[166]

In line with the BRRD, the Belgian law of 25 April 2014 confirms that the judgment of the court of appeal does not affect the validity of the resolution actions taken, and specifically that it has no effect on the validity of any transfers of shares, assets and liabilities that may have taken place pursuant to the resolution scheme.[167] The court may award damages but may not undo the resolution measures.

E. CONCLUSION

55. The Single Resolution Mechanism offers a full regime of judicial protection to financial institutions and other affected persons. No measure

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163 Comp. V.P.G. de Serière and D.M. van der Houwen, " 'No Creditor Worse Off' in Case of Bank Resolution: Food for Litigation?", *JIBLR*, 2016, p. 376, at pp. 382 and 383.

164 Articles 242, 16°, and 305 to 310, law of 25 April 2014.

165 *Ibid.*, Article 306, § 1.

166 See for recent illustrations of similar issues C.C., 11 May 2016, n° 69/2016, and the case law cited in paragraphs B.3 and B.5; C.C., 5 December 2013, n° 165/2013, B.17 and B.19; C.C., 10 July 2014, n° 105/2014, B.9; C.C., 30 May 2013, n° 76/2013, B.4 and B.5.

167 Recital 91 and Article 85(4), BRRD; Article 308, law of 25 April 2014.

adopted under the SRM is immune from review before at least one of the competent bodies – whether the Appeal Panel, the national courts or the Court of Justice of the European Union.

However, the SRM's complex architecture, based on a distribution of tasks between the Single Resolution Board and the national resolution authorities of 19 countries, leads to an even greater complexity of the judicial protection system. In many instances it is unclear whether a particular measure must be challenged before the national courts or before the CJEU. In other instances challenges must be brought before national courts – and may possibly be brought before the courts of multiple countries – whilst the nature of the dispute would rather call for a centralised adjudication by the CJEU. As to crisis management measures adopted by the SRB, they may be subject to a process of prior vetting by one or more national courts which undermines the very idea of a single resolution mechanism.

Time will tell whether this excessive complexity is just a minor flaw without much practical effect, or whether the structure of the SRM's judicial protection regime requires a new design.