

Banking Union; Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism compared

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April 2015

Eddy Wymeersh
University of Gent and ECGI

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Abstract

The Banking Union is based on different components, partly on directives applicable throughout the EU, partly on two regulations applicable only in the euro states introducing the Single Supervisory Mechanism and the Single Resolution Mechanism. These regulations are based on a comparable pattern, with centralisation of decisions at the European level, and involvement of authorities in the member states. However, also for legal reasons, the centralisation is much stronger for prudential supervision than for resolution. Issues of cooperation between the two Mechanisms, and between the European level and the national level reveal some interesting analogies but also differences. Coordination and cooperation will be necessary to avoid conflicts.

Keywords: Banking Union, Banking supervision, Resolution, ECB, SSM

JEL Classifications: G21, G28

Eddy Wymeersch*

Professor at the University of Gent, Financial Law Institute

Universiteitstraat 4

Gent, B-9000, Belgium

phone: +32 9 264 68 27 , fax: +32 9 264 68 55

e-mail: eddy.wymeersch@ugent.be

*Corresponding Author

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Abstract

The Banking Union is based on different components, partly on directives applicable throughout the EU, partly on two regulations applicable only in the euro states introducing the Single Supervisory Mechanism and the Single Resolution Mechanism. These regulations are based on a comparable pattern, with centralisation of decisions at the European level, and involvement of authorities in the member states. However, also for legal reasons, the centralisation is much stronger for prudential supervision than for resolution. Issues of cooperation between the two Mechanisms, and between the European level and the national level reveal some interesting analogies but also differences. Coordination and cooperation will be necessary to avoid conflicts.

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The financial crisis has spurred some significant changes in the field of financial regulation. The number of measures that have been adopted and are still expected are so numerous that it would be almost impossible to list them. Among these two main measures stand out: these are the ones dealing with the centralisation of banking supervision and the organisation of an effective method of dealing with banks in difficulties. The events of the crisis with the numerous banks being caught in insolvency, the effects of these on the state budgets as a consequence of the government decisions to rescue these banks, and finally the wider financial impact and effect on the Western European states' economies and social conditions easily explain why these decisions had to be taken, and this without much further ado.

These two measures are applicable in the euro area only¹ but are tightly interwoven with the initiatives addressing the European Union as a whole. They consist of the introduction in the euro area of centralised decision-making with respect to banking prudential supervision, and with respect to the recovery and especially the resolution of failing banks. They are known as the SSM² or Single Supervisory Mechanism and the SRM or Single Resolution Mechanism³. Both reforms present interesting common institutional aspects but also show some interesting differences.

Politically the two measures are strongly related: after it had been decided to put the ECB in charge of Banking Supervision, under the SSM, the final responsibility for the banking systems had shifted from the national states to the European level. However, at the European level there is no taxpayer to back up for the banks' losses. The ECB therefore insisted very strongly that the SSM could not go ahead except with a coherent and effective system of resolution. At the same time, governments were unwilling to further stand behind failing banks with taxpayers' money, the more so as their budgetary position too became increasingly tight. Hence bank's losses should be imputed to the banks themselves, this is to their shareholders and creditors, at least their unprotected, subordinated or long-term creditors.

1 The applicable legislation

¹ To be mentioned is the extension of these regimes to non-euro Member States that have opted into the SSM; in that case the SRM will automatically apply as well.

² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJEU, 29.October2013, L 287/63 (SSMReg)
³ Regulation (EU) 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 and amending Regulation (EU) No 1093/2010. OJEU, 30 July 2014, L.225/1 (SRM)

Banking regulation in the broad sense is a mix of many types of legal and administrative instruments. At the European level, several directives have been adopted relating to different aspects of banking supervision. Some of these are relatively old; others have been adopted in the last two years raising questions of coherence. Among the older directives that are directly relevant, one should mention: the directives on financial conglomerates, on e-money, on reorganisation and winding-up of banks, or on finality⁴. The more recent ones are: the Capital Requirements directive, or CRD IV and the Capital Requirements Regulation, the CRR and the Deposit Guarantee Directive (DGS)⁵ are the basis for the new Europe-wide regulatory system⁶.

Indirectly other directives or regulations may have an influence on banking supervision and the risks to be addressed, such as Emir⁷, CSD regulation⁸ Mifid and Mifir⁹ or the older instruments on e-money, liquidation and winding up of banks, and finality¹⁰.

These directives have to be transposed into the national legal order, mostly by way of national legislation, sometimes in an ordinance of the supervisory agency, while in other cases transposition takes the form of an agency circular, of a recommendation, Q&As or even of administrative practice. These techniques cannot be regarded as adequate transposition to the extent that they do not create a legally secure and enforceable position what is especially important in a cross border context.

A more recent phenomenon in the field of financial regulation is the use of Regulations that introduce uniform rules in all Member States and therefore contribute to equal conditions of operations and of competition. Regulation comes in different forms: the most important ones are adopted by the European legislature (Council and Parliament, on the proposal of the Commission, so-called level 1 regulations). Other regulations are based on level 1 legislations and are adopted by the Commission in a formal regulation. Usually they contain more detailed provisions in specific matters or in matters that were left open in the level 1 legislation. Some of these regulation are prepared by the European Supervisory Authorities, in this case mostly by the European Banking Authority, whether as Regulatory Technical Standards¹¹ or Implementing Technical Standards, the latter dealing with the conditions of application of the level 1 provisions¹². In both cases these standards should not imply “strategic decisions or policy choices, and are limited to the delegation laid down in the Level 1 act”¹³. The number of regulations in the field of banking supervision is considerable and likely to

4 Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems, OJEU 11 June 1998 L. 166/45 (settlement finality). Directive 2000/46/EC 18 September 2000 on the taking up, pursuit and prudential supervision of e-money, OJ 29 October 2000 L 275/39; Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions, 4 april 2001, OJ 5 May 2001, L.125/5

5 Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes, OJ 12 June 2014, L173/149 (DGS)

6 Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC OJEU 27 June 2013, L.176/338, (CRD IV); Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJEU 27 June 2013, L.176/1 (CRR) 7 Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories(EMIR).OJEU 27 July 2012, L.201/1

8 Regulation 909/2014 of 23 July 2014, on improving securities settlement in the European Union and on central securities depositories(CSDs) and amending Directive 98/26/ECCSD RegOJEU, 28 August 2014, L.257/1

9 Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 12 June 2014 L. 173/349 (Mifid II).Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJEU 12 June 2014 L173/84 (Mifir).

10 Conglomerates directive (Directive 2002/87 of 16 December 2002, OJ 11 Februari 2003, L 35, 1); Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems, OJEU 11 June 1998 L. 166/45 (settlement finality). Directive 2000/46/EC 18 September 2000 on the taking up, pursuit and prudential supervision of e-money, OJ 29 October 2000 L 275/39; Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions, 4 april 2001, OJ 5 May 2001, L.125/5

11 On the basis of article 10, EBA Regulation Regulation No. 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC, as amended.

12 See article 15, EBA Regulation.

13 See Article 10 (1) and 15, EBA Regulation

increase considerably over time. So e.g. do many of the provisions of the CRD IV and especially of the BRRD¹⁴ contain provisions for further technical or implementing standards.

The next level are the regulations adopted by the ECB as banking supervisor: here again significant instruments have been adopted organising the structure of supervision both of the ECB and its relationship with the national supervisors, or the supervisors in the non-participating jurisdictions, including third countries (Framework regulation¹⁵). Other ECB regulation relates to e.g. data communication by national supervisors or internal organisation of the SSM¹⁶. Moreover important matters are dealt with in individual or specific Decisions of the ECB, directly binding on the parties to whom the decision is addressed¹⁷.

Important ECB documents may further be clarified in “frequently asked questions”¹⁸ In some fields Memoranda of Understanding have been agreed, e.g. on the relationship of the ECB with the Council¹⁹ and the Parliament²⁰.

The ECB is working on a SSM Supervisory Manual, parts of which will be made public²¹

In addition account has to be taken of the statements adopted by the EBA which is working on a Single Rulebook that may take the form of an Interactive Rulebook²².

In the field of resolution the situation is still less complex due to the recent nature of the applicable legislative instruments. The basic directive called the BRRD²³ contains about 260 pages in the Official Journal, with innumerable provisions providing for delegated acts. This directive will have to be transposed in the 28 Member States, and quite a lot of variations can be expected. In the euro area, the regulation on the Single Resolution Mechanism will be applicable covering another 260 pages. The number of provisions mandating further delegated acts is reduced to about 5, but that will not prevent the resolution authority to proceed by way of guidelines and general instructions²⁴.

Both sets of rules present some similarities in that in each case the basic regime is laid down in a directive, applicable in the 28 member states while the specific regime applicable in the euro area is the subject of a regulation, ensuring identical rules to be applied and allowing for a single decision making body applying these rules. In both cases the regulation contains a considerable number of provisions that are also part of the directive. This technique has been used to allow the single decision making body to make use of its regulation based powers, without having to resort to the national laws that transpose the directives. In that sense, these provisions

14 Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJEU, 12 June 2014, L.173/190 (BRRD)

15 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation); see also: Regulation (EU) No 673/2014 of the European Central Bank of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure

16 Decision of the European Central Bank of 2 July 2014 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014

17 Decisions of the European Central Bank of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules; Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro; SEE : ECB, List of significant supervised entities and the list of less significant institutions, 4 September 2014.

18 See e.g. the different documents on the Comprehensive assessment and the asset quality review : ECB Documents : Asset Quality review, Phase 2 Manual, March 14; See ECB, Aggregate report on the Comprehensive Assessment, October 2014

19 Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (OJ L 320, 30.11.2013, p. 1).

20 Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism, which entered into force on 12 December 2013.

21 Nouy, D., Single Supervisory Mechanism – Opportunities and Challenges, Speech Dublin, 23 June 2014

22 See www.eba.europa.eu/regulation-and-policy/single-rulebook

23 See BRRD, nt 14

24 Article 93, SRM Reg

become directly applicable, modifying the legal nature of the corresponding directive provisions. Coordination between the two sets of rules may be tricky.

2. The institutional set-up

The two “single mechanisms” that have now been introduced in the euro area aim at central decision-making, whether by the ECB for the prudential matters, or the Single Resolution Board, for the resolution decisions. In both cases decisions will be taken by these bodies that are directly applicable to the bank or other addressees viewed in the Regulation. The way this has been achieved is however significantly different.

In the field of prudential supervision, the Treaty contains a provision that allows supervision to be domiciled at the European Central Bank, a well-established Union institution. Hence the organisation measures mainly concern the internal structuring of the supervision within the ECB. The SSM Regulation introduces a specialised board within the ECB, the Supervisory Board, that will exercise the supervisory function, and prepare decisions that have then to be submitted to the Governing Council of the ECB, the only and ultimate decision making body within the ECB. Although technically the Regulation does not distinguish between the different types of decisions prepared by the Supervisory Board so that all would have to be submitted to the Governing Council, the procedure of “silent consent”, according to which the Council will be presumed to have agreed unless it objects within a short period of time should allow to keep the entire procedure workable.²⁵

Comparing with the structure under the SRM, one will notice that here too a Single Resolution Board has been created, but again the final decision will have to be adopted – “endorsed” - by a Union institution, in this case the European Commission and this only with respect to the “discretionary elements” included in the decision²⁶. In some specific cases the Commission may submit the scheme to the Council, i.e. when it considers that the proposed scheme does not meet the public interest, or more prosaically, that a material modification of the proposed amount of funds to be provided by the Resolution Funds should be adopted, or objected to²⁷. For all other matters, the board will have operational autonomy and have the power to adopt binding decisions, such e.g., on resolution planning, or the assessment of resolvability or whether the bank is “failing or likely to fail”, the core criterion for opening the resolution procedure.²⁸ These decisions will not have to be submitted to the Commission, but only transmitted for information

The differences in treatment between the two “Mechanisms” can best be explained in legal terms: according to the prevailing opinion about delegation of powers within the European Union, the European law as recently (re-) interpreted by the CJEU does not allow for policy or discretionary matters to be delegated to a body that is not a Union institution. By leaning on the Commission for final decision-making, this hurdle was considered satisfactorily overcome. The same difficulty would not arise for the SSM where the powers of the ECB are directly vested in the Treaty and necessarily include discretionary decisions. However, the ECB being the only addressee of the legal provisions, only the Governing Council could formally adopt the decisions.

3. Relations with the national level.

Attention has been drawn to the complex legal set-up, according to which single European institutions would not only apply European law and regulations but be confronted with national law, especially the law transposing the provisions of the applicable directives. The situation is somewhat different under the SSM from the SRM

Under the SSM, the ECB will apply Union law, but with respect to provisions in directives, the national legislation transposing these directives will apply. A good example would be the governance and remuneration rules applicable to banks, where national legislations transposing the CRD IV, have opted for different approaches²⁹. Even for regulations, to the extent that these grant several options to national legislators, the national legislation exercising these options will have to be applied. This provision poses the ECB before a difficult question having to apply different national legislations in a system that aims to achieve “equal treatment of credit institutions with a view to preventing regulatory arbitrage”³⁰. One may add that when applying national law, the ECB shall check to what extent it corresponds to Union law³¹.

²⁵ See article 26 (8) of the SSM Reg.

²⁶ Article 18 (7) SRM Reg

²⁷ Article 18 (7) SRM Reg.

²⁸ Article 18 SRM Reg

²⁹ So for instance does the directive contain a 100% cap for variable remuneration, while the Belgian and Dutch law provide for a 50% or a 20% cap respectively. These will apply on a consolidated basis.

³⁰ Article 1(1) SSM Reg

³¹ See articles 17(6) and 19 (4), EBA Regulation, nt 11.

If a certain matter has not been provided in EU law, the ECB may require that the national supervisor use its national powers in the matter³².

With respect to less significant banks, which are directly supervised by the national authorities, national law will generally apply. However, the national authority will have to take into account the recommendations and guidelines adopted by the ECB, and in cases where the “consistent application of high supervisory standards” would require so, the ECB may take over prudential supervision itself³³.

Under the SRM, the relationship with national law is in general similar in the sense that the SRBoard will delegate the execution of the resolution scheme to the national resolution authorities and these will act in accordance with their national resolution legislation, implementing the BRRD³⁴. This would apply e.g. to the rules on priorities in resolution, or other property rights provisions that have been laid down in the BRRD. But where the SRM regulation contains its own provisions- e.g. on the resolution tools, the Regulation provisions will prevail over the national law that has transposed the BRRD.

The frequency of these potential conflicts is likely to remain quite low: most of the SRM regulation is mainly dealing with the powers of the Board and the way it interacts with the national resolution authorities. The BRRD rules as transposed in national law, are largely applicable by virtue of the SRM Reg.³⁵ This means that the resolution Board does only occasionally have the overriding power with respect to national law if it would make resolution less effective or more costly. By way of example, where the BRRD provides that the resolution authority can “cancel or modify the terms of a contract to which the institution under resolution is a party or substitute a recipient as a party”³⁶, this Objective can be achieved by the Board by including it in the Resolution scheme decision.

The resolution scheme will be adopted by the Commission, on the proposal of the Resolution Board. It will then become a decision of the Commission, hence binding on its addressees. The further implementation of the scheme is however delegated to the national resolution authority involved³⁷. Its implementing action should take account of the BRRD, especially of its safeguards³⁸. By making use of their national powers, these resolution authorities should remain within the strict limits of the resolution scheme as adopted by the Board. In order to ensure the latter objective, the Board has some disciplining powers, addressing itself to the bank under resolution requiring it to adopt any measure ensuring compliance with its decision.

For cross border resolution, there will be several national systems addressed, and the resolution scheme should take account of national peculiarities in the legislation.

4. From Prudential Supervision over Recovery to Resolution

Banking supervision is a continuous process that goes from the constitution of the bank to its final dissolution. Although there may be several subschemes – e.g. as a consequence of mergers, of acquisition of the shares of an existing bank, of partial liquidations... – but the essential one starts with authorisation, over functioning as a going concern, through a initial period of difficulties possibly leading to the final termination of the activity. From the regulatory point of view, these phases correspond to prudential supervision, remedial action under the recovery regime and finally the disappearance of the bank as a consequence of its resolution, its bankruptcy or its mandatory or voluntary winding up.

In most jurisdictions, there is also an institutional division of tasks, as prudential supervision usually starts with authorisation, the going concern phase occupying the largest part of a bank’s life, sometimes interspersed by recovery measures which all belong to the domain of prudential supervision. Only the last phase, i.e. resolution is often entrusted to a separate body, the resolution authority. Bankruptcy and mandatory winding up are off course in the domain of the judiciary.

32 Article 9(1) SSM Reg

33 Article 6 SSM Reg

34 See article 23 SRM referring to national law transposing the BRRD.

35 See article 20. SRM Reg

36 Article 64 (1)(f) BRRD

37 Article 28 SRM Reg

38 Article 29 SRM Reg

Theoretically these four stages in a bank's life are neatly defined and the resulting competences of the bodies in charge of their follow-up clearly distinguished. In practice, and mainly as a consequence of the introduction of a separate regime under the resolution regulation, matters have become more complicated, and overlap and even interference will exist between these two bodies. It is this evolution that will be analysed in this paragraph.

(i) Constitution of the bank

The SSM regulation contains a specific – and obviously politically inspired – division of tasks with respect to authorising a new bank: the initial procedure will be undertaken with the national supervisor, applying its national regulatory provisions, and then submitted to the ECB for approval. The approval will be deemed to have been granted unless the ECB objects within ten days, and then only for not meeting the requirements of Union law.³⁹

Once constituted, the bank passes under prudential supervision: in the euro area this mainly relates to the general supervision exercised according to the SSM, whereby the ECB can apply the supervisory instruments provided for in the SSM Regulation, especially those mentioned under article 4(1), such as compliance with the applicable regulations, supervision on a consolidated basis, and supervisory tasks in relation to recovery plans⁴⁰. In that context the ECB can use all the powers – including sanctions – provided for in the Regulation: this is the basic ongoing supervisory regime applicable to all banks that do not call for special measures. Starting institutions would normally not meet the conditions triggering ECB supervision: it is logical that national supervision would then apply.

(ii) Recovery planning

The recovery plans aim at restoring the financial position of the bank following a significant deterioration of its financial position. These plans – often referred to as “living wills” – will be drawn up by the bank's management as part of its governance duties and follow the guidelines of the EBA. It is up to the prudential supervisors to ensure that these plans are developed⁴¹. The subject of the recovery plan is further elaborated in the BRRD and it is safe to assume that the duties imposed by that directive on the national supervisor would also apply to the ECB⁴². The recovery plan will be submitted to the resolution authority to determine whether any aspect of the plan “may adversely impact the resolvability of the institution”⁴³. As a consequence the resolution authority may issue a recommendation to the prudential supervisor and the latter may adopt a decision providing for changes in the plan⁴⁴.

The powers of the prudential supervisor are listed in the Directive, such as: reducing the risk profile, provide for recapitalisation, reviewing the strategy and structure and changing the governance structure⁴⁵.

(iii) Early intervention

The next stage is that of the “early intervention”⁴⁶.

A next step enters into force once certain signals indicating weaknesses in the application of the supervisory regime have appeared, leading to strengthening the powers and means of intervention of the ECB. This stage of “enhanced awareness” applies as soon as the bank has failed to meet the requirements under the applicable Union law, including its transposition in the national legal order⁴⁷.

This regime is very widely defined in the SSM Regulation and can in practice be applied when the breaches are material and likely to endanger over time the future of the bank, calling at an early stage for the necessary prudential measures addressing relevant problems. These measures can be addressed to the bank, but it is questionable whether they could also include the financial holding company or mixed financial holding company that is controlling the bank. In principle the SSM regulation only applies to banks, but on the basis of the BRRD

³⁹ Article 14, SSM Reg

⁴⁰ See article 4(1) (a) to (i). SSM Reg

⁴¹ Article 74 (4) CRD IV and article 4(1)(i) SSMReg.

⁴² At least with respect to the “significant” banks subject to its supervision.

⁴³ Article 10 (2) SRM Reg

⁴⁴ Article 6(4)BRRD

⁴⁵ Article 6 (6) BRRD.

⁴⁶ See BRRD, article 27 e.s.

⁴⁷ Referring to article 4(3).

the ECB as the consolidating supervisor may extend its action to the Union parent undertaking, after having consulted with the national supervisor in the supervisory college⁴⁸.

According to the Regulation, this “enhanced awareness” can be applied if the ECB considers that a breach has taken place or that there is evidence that a breach is likely to take place within the next 12 months, hence that the bank is on a downward trend in terms of respecting applicable regulations⁴⁹. The same regime can also be applied once the ECB considers that sound management and adequate coverage of risk is not ensured, in terms of own funds, or liquidity, or taking into account the strategies or processes followed by the bank. In these cases the ECB shall be entitled to make use of a long list of powers of intervention, going from requiring additional own funds, or liquidity, strengthening the processes arrangements and strategies, including restricting business operations, or divesting activities. It may also impose provisioning policies, adapt the treatment of assets, require a risk reduction, limit variable remuneration or remove members from the management. This is the regime of “early intervention”⁵⁰ which is also the subject of article 27 of the BRRD, which contains some comparable but less perfunctory supervisory tools, but adds the provision on the temporary administrator⁵¹. The SRM regulation does not explicitly mention this administrator, but there can be little doubt that the national prudential authority – here the ECB - has the right to appoint an administrator on the basis of the national law⁵².

This list of “early intervention” tools corresponds more or less to the usual powers of intervention that national legislation has provided to many national supervisory authorities. According to the Regulation, it seems that the ECB could use other tools than the ones that are listed in the Regulation⁵³ but not before the status of “enhanced awareness” has become applicable. In that case the ECB might require the national supervisor to make use of its wider and not time constrained powers under national law⁵⁴.

These measures may be whether punctual decisions, or be part of a wider “recovery plan”, possibly providing for structural measures aimed at alleviating concerns about financial stress or failure⁵⁵. Early intervention measures usually will be part of that plan. Resolution however is explicitly excluded: it is the next stage in the demise of the bank, based on a finding that the bank is “failing or likely to fail” after which the resolution procedure may enter into force.⁵⁶

When the prudential supervisors – the ECB or the national ones - adopts any of the corrective measures on the basis of the SSM Reg or the BRRD, they will have to inform the Resolution Board, which shall notify the Commission. The regulation does not distinguish in accordance to the gravity of the matter. From that moment on, the Board will co-supervise the banking group: the ECB and the national supervisors will closely monitor in “cooperation” with the Board, the implementation of the measures imposed⁵⁷. The Board may already prepare for resolution, deciding to start the valuation of the bank’s assets and liabilities⁵⁸ while it may require the bank to contact potential purchasers of the bank. At the same time the national resolution authority may be required to draft a preliminary resolution scheme. These steps should be undertaken in strictest confidentiality, as leaks would immediately undermine confidence in the bank.

Differently from the BRRD, the early intervention stage has been translated in the SRM as a pre-resolution phase, leaving little room for measures that would allow the bank to recover. The traditional recovery instruments such as a change in management, restructuring the bank debt, changes in the business strategy or in the legal or operational structures, or the designation of a temporary administrator, all mentioned as part of the early intervention measures according to the BRRD⁵⁹, do not seem to be addressed under the SRM regime. To the extent that these instruments are in the ambit of the prudential supervisors, they should not miss in their toolbox. The SRM Regulation only addresses in this respect the position that the Resolution Board can adopt leading to the imposition of much stronger intervention. The weaker supervisory measures are likely to be crowded out by much stronger, inflexible resolution tool. This is striking as at the time of “early intervention”,

⁴⁸ See article 30 (1) and 2, BRRD

⁴⁹ See article 16 (1) SSMReg

⁵⁰ See article 4(1) (i) SSM Reg

⁵¹ See article 29 BRRD.

⁵² Article 29 (1) SRM Reg

⁵³ See the words “in particular” in article 16 (2)

⁵⁴ On the basis of article 9 (1) 3rd §, SSM Reg

⁵⁵ Article 4(1) (i) SSM Reg; structural changes would only be permitted in cases explicitly provided in Union laws.

⁵⁶ Article 4(1) (i) SSM Reg; for resolution, see further article 18 SRM Reg.

⁵⁷ Article 13(2)SRM Reg; these should apply to the bank and to the parent company as well.

⁵⁸ According to the valuation provisions in Article 20, SRM Reg; compare article 36 BRRD.

⁵⁹ See article 27 to 30 of the BRRD

the rescue of the bank may still be on the cards. Close coordination between the two lines of action will be necessary⁶⁰.

(iv) Resolution planning

Up to this point it would appear that the ECB is the only competent authority in the field and can freely decide about the course of action to be followed. This seems to have been the concept followed in the SSM Regulation. The SRM Regulation has however considerably modified this state of affairs, by allowing the Resolution Authority to impose certain decisions even before resolution has been decided. The European Resolution Board is entitled to step in quite early in the process.

The Board is responsible for the drawing up of the Resolution plans, applicable to the significant banking groups⁶¹. For the other groups, most of the competences with respect to the resolution plan will be exercised by the national resolution authorities⁶².

The ECB or the national prudential supervisors and the national resolution authorities will be consulted about the resolution plans⁶³. The plan will be drawn up by the national resolution authority, in accordance with the guidelines and instructions of the SRM Board. It will determine the resolution actions to be undertaken. The list of measures that the bank would have to include in the plan is very long: at this stage of the process it is still only indicative: the plan will include a “demonstration” of how critical functions and core business lines could be separated to ensure continuity, describe measures allowing payment and clearing services to be preserved, contain a description of the different resolution strategies in the different scenarios, with special mention of the measures for the removal of impediments to resolvability. Several other specific measures have to be described as well⁶⁴. The draft plan is transmitted to the ECB and to the national supervisors concerned.

The next stage is the assessment by the Resolution Board of the resolvability of the group on the basis of the draft resolution plan. Within the exercise of drawing up the resolution plan, the Board, having consulted the ECB or the national supervisors will assess to what extent the group will be resolvable on the basis of the plan but without external, especially public support⁶⁵. The Board deciding on the resolution plan will then assess the resolvability of the banking group, after having consulted the ECB and the national supervisors⁶⁶. If the Board decides that there are substantive impediments to resolvability, it will establish these in a report, in cooperation with the national supervisors⁶⁷, analysing these impediments. This report will recommend to the bank proportionate and targeted measures to remove these impediments. If the bank would not be resolvable, the EBA will be informed⁶⁸. This would normally result in the bank being declared insolvent and liquidated accordingly.

The report will be addressed to the banking group with the request to remove the impediments. The banking group’s response will be assessed by the Board, and if it does not reduce or remove the said impediments, the Board will instruct the national resolution authorities to require the bank to adopt the necessary measures to reduce or remove these impediments, after having indicated that the proposals from the bank would not have been able to achieve that result. The Board when instructing the national resolution authority will identify the measures to be adopted. These measures are very incisive, especially as they are taken at a moment where the banking group is under no special supervisory measures. Therefore some safeguards have been provided: the Board decision should state its reasons, and the measures should be proportionate taking into account their effect on the business of the bank, its stability and its ability to contribute to the economy. Financial stability also is mentioned among the safeguards⁶⁹.

By way of illustration of few of the measures are mentioned here:

⁶⁰ See article 13 (5) SRM Reg, stating that the measures from different authorities should be “consistent”

⁶¹ Article 8, SRM Reg

⁶² Article 5 (1) SRM Reg; see article 9 (1) for the SSM Regulation, assimilating the ECB to a national competent authority.

⁶³ Article 8 (2) SRM Reg

⁶⁴ See for the list article 8(9) of the SRM Reg

⁶⁵ See article 10 (1) SRM Reg

⁶⁶ Defined in article 10 (3) SRM Reg. It should be remembered that the recovery plan, as drawn up by the ECB or by the national supervisor will be provided to the Board in order for the Board to determine which aspects of the recovery plan may have an adverse impact on resolvability.

⁶⁷ The ECB is also mentioned in this case: article 10 (7) SRM Reg

⁶⁸ Article 10 (3). It is unclear what is the purpose of this communication, except warning the other resolution authorities concerned,

⁶⁹ Article 10(10) SRM Reg

- revise intragroup financing arrangements; a subject on which the BRRD contains detailed provisions⁷⁰
- require service agreements for the provisions of critical functions, if applicable on an intragroup basis
- limit exposures, even individual ones
- divest specific assets
- limit or cease specific activities
- restrict - or prevent new - business lines or new or existing products
- require changes to the legal or operational structures, so as to reduce complexity
- issue eligible liabilities (art 12).

There can be little doubt that by using these strong instruments for intervention, the Board will cut across the way prudential supervision will have been carried on. Indeed one should presume that if insufficiencies had appeared in the bank's business, these would have been the subject of action undertaken by the prudential supervisors. It is true that the Board's approach is exclusively that of resolving the bank, while the prudential supervisor starts from a hypothesis of going concern, possibly to be corrected as a consequence of the measures it will decree. The legal nature of the measures to be adopted may be a decisive factor: decisions of the ECB would be directly applicable to the bank to whom they are addressed, while requirements formulated by the Board would be addressed to the national resolution authority which relying on its national law will implement it. It would seem that legally the ECB decision, directly based on EU law would then take precedence,

In order to avoid this type of conflicts but more generally to achieve consistency in the authorities' action, it is necessary that extensive consultation takes place between the two institutions.

(v) The resolution decision

The resolution decision is the core turning point in the procedure leading to a bank's resolution. It is the moment where prudential action has reached its limits and only the final demise of the bank can offer a solution. As mentioned above, several alternatives are available. Before the introduction of the resolution regulation, ailing banks were bought up by other banks, sometimes even by the whole local banking sector to avoid a confidence crisis. In other cases, the good parts of it were sold, and the rest put in voluntary liquidation, or split between a good and a bad bank. If that was not possible, its bankruptcy was declared, usually leading to considerable damage to the creditors of all classes, guaranteed deposits excluded. Finally, in the recent banking crisis, the banks in difficulty were bought up by the states, leading to considerable economic and related social damage. Resolution as a form of orderly liquidation and in some cases leading to the rescue of the bank, or of parts of it was not widely practised. It has proved to be less value destructive than outright bankruptcy, but raised a host of new and interesting questions.

The present analysis will be limited to the relation between the prudential supervision and the resolution regime with respect to the determination when a bank should be resolved. This determination is different from the one undertaken under the bankruptcy regime, while leaving open several options as to the further organisation or liquidation of the bank.

The transition from ongoing banking supervision to the application of the resolution regime has been the subject of quite some debates.

The BRRD puts the point of transition at the moment that the resolution authority has stated that the following three conditions have been met

- 1- there is a determination that the bank is "failing or likely to fail". The controversial point related to who would make this determination, the prudential supervisor or the resolution authority. The directive allows for both, stating that it will be decided by the prudential supervisor, but in certain circumstances may also be made by the resolution authority, provided that it has the necessary tools under national law, including access to the relevant information.
In both cases however, the other authority will be consulted.
- 2- There is no reasonable prospect that private sector measures will bring a solution; this is a matter for the resolution authority only;

⁷⁰ See article 19 BRRD on Intragroup financial support agreements.

3- As determined by the resolution authority, the resolution action is in the public interest.

The SRM Reg is on this point largely in line with the BRRD, except that action by the Resolution Board will require ex ante information to the ECB thereby allowing the ECB to make such a determination within 3 days. In that case both institutions would have adopted the same position, but if that were not the case, the decision of the Resolution Board will prevail. It is presumed that the Resolution Board represent the ultimate public interest in the strongest way.

On the point 2, the resolution authority will decide in “close cooperation” with the ECB⁷¹.

5. Review of SSM or SRM decisions

The SSM Regulation contains provisions dealing with the internal review of decisions by an Administrative Board of Review, while reminding that decisions of the Governing Council are only reviewable before the European Court of Justice⁷².

The review before the Administrative Board is an internal ex ante process open to anyone who is an addressee of an ECB decision or which is of direct and individual concern to him⁷³. It is not open to decisions of the Governing Council, nor to recourse by national supervisors. As the review takes place prior to the Governing Council formally adopting the proposal submitted by the Supervisory Board, this review process is to be considered preliminary. Therefore it is not binding. The Administrative Board will express its opinion on the “procedural and substantive conformity of the decision”⁷⁴ with the SSM Regulation and will submit the case to the Supervisory board for a new decision. The Supervisory board is free to confirm its original decision, or amend its decision in a new reasoned decision.

All decisions adopted by the ECB in the field of prudential supervision will technically be deemed decisions of the Governing Council. Its decision can only be reviewed by the CJEU.

The decisions of the national supervisors dealing with the “less significant banks” are not reviewable before this administrative board of review. Their decisions are based on their national law, including the European regulations applicable in their jurisdiction. A review procedure should therefore be brought before the national jurisdiction. This difference may lead to a different degree of legal protection, and probably to simpler and faster procedures. Also decisions by national courts will be binding, although subject to the CJEU’s final opinion on the basis of a pre- judicial procedure.

National supervisors assisting the ECB in the context of its supervision will not adopt proper decisions, but only prepare decisions for the ECB⁷⁵. Hence their action is not subject to the SSM review procedure, and the decisions they adopt will be attributed to the ECB, preventing a separate review procedure to be applicable at national level. Exceptionally, when the national supervisor acts on the basis of its own competences, its decisions may be subject to review before its national courts, but not before the administrative board of review. This might be the case when a national supervisor acts in lieu of the ECB for matters for which the ECB has no legal competence⁷⁶ or for which the national supervisor has the power to decide independently from the ECB⁷⁷.

Although the SSM Regulation reminds that the rules of due process have to be followed, that the right of defence has to be fully respected and that supervisory decisions shall state their reasons⁷⁸, one must admit that the legal position of individual firms or persons affected by ECB decisions is not organised in a way that guarantees strong protection of individual rights. True, recourse to the CJEU is open against all decisions of the Governing Council, but a procedure before the CJEU is costly and burdensome, while it is not evident that the CJEU as it is

71 Article 18 (1), SRM reg

72 Article 236 of the TFEU, dealing with the legality of acts intended to produce legal effects vis-à-vis third parties (Preamble (60))

73 Decision of the European Central bank of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16)

74 Meaning that discretion is left to the Supervisory board with respect to the “opportunity of those decisions”(Preamble 64) A similar approach is followed in article 13 SSM Reg, dealing with decisions involving on-site inspections, where the national judiciary intervenes.

75 See Framework Regulation, articles 90 and 91.

76 See article 9(1) SSM Reg.

77 Article 14 (3) SSM Reg., in case of a refusal of an authorisation.

78 Article 22, SSM Reg.

nowadays organised will be able to cope with multiple recourses coming directly from 18 or more Member States. This state of affairs contrasts with the position of plaintiffs in the case of banks that are supervised by the national supervisors, as their decisions could still be challenged before the national courts. This state of affairs may be incompatible with the effectiveness called for in the Court's case law⁷⁹.

The SRM regulation has introduced its specific appeal procedure before an Appeal Panel⁸⁰. Any person, including the resolution authorities may bring an appeal against some of the decisions of the Board, such as decisions on removal of "impediments to resolution", or on fines. Appeals may also be brought against decisions relating to the coverage of administrative expenses, or to ex post contributions to the Fund. The Panel will either confirm the Board's decision, or if not, remand it to the Board, but the latter will be bound by the Panel's opinion⁸¹. But for all other decisions, only the CJEU will be competent: so e.g. is no special appeal procedure provided against the decision to put the bank in resolution⁸². For implementing resolution matters, as the implementation of the Board's decision, these will generally be delegated to the national resolution authorities: their decisions could be challenged before national courts. The combination of both levels of jurisdiction will require coordination, usually consisting in the postponement of the national decision until the CJEU has decided.

Recourse against decisions of the Commission, the authority in charge of deciding on resolution schemes, will be governed by the general Treaty rules.

To be mentioned is the provision of the SRM Regulation relating to liability of the Board and its staff: for non-contractual liability the general principles developed by the Court will apply⁸³.

Conclusion

Analysing jointly the SSM and the SRM opens some interesting perspectives, first of an institutional nature, but also in functional terms. Institutionally both "mechanisms" are comparable in the sense that they establish a new and interesting scheme of cooperation of European and national decision-making. In both cases the pre-eminence of the European level is affirmed, more clearly for the SSM than in case of the SRM. In both cases, ample room has been left for national legislation. This diversity will come at a cost in terms of efficiency, transparency and equal treatment. On the medium term further work viewing introduction of identical rules would be very welcome. The European Rulebook project goes in the right direction, but simultaneously action should be undertaken at the highest legislative level.

In functional terms, the overall scheme might have been clearer: the respective zones of action of the prudential supervisors and the resolution authorities might have been more clearly defined and in any case better mechanisms of coordinating action adopted, and this in order to avoid the risk of conflicts. The governance of the overall system is another subject of concern: although the factual reality is likely to be very different, a decisional system based on silent or implicit consent is not very credible. The same applies to the limited involvement of Commission and Council in the SRM governance. The reasons in both cases are well known: the prohibition in EU law to delegate full decision making powers, even after having been made more flexible by recent case law, continues to be a drag on efficiency and effectiveness. It is high time that this matter be taken up by the European institutions in order to work out a well balanced system, allowing for effective delegated decision making without putting in danger the overall coherence of the Union policies.

79 Article 85 SRM Reg.

80 Article 85 SRM Reg.?

⁸¹ Article 85(8) SRM Reg

82 Article 86 SRM Reg.

83 See article 87 SRM Reg esp. (4) and (6)

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