

Under the Single Resolution Mechanism the Single Resolution Board has many authorities. How are the involved entities protected against decisions by the Single Resolution Board regarding them.

## Legal protection against actions under the Single Resolution Mechanism - or the lack of it

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**PAPER**

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## 1. INTRODUCTION

During the 2007-2013 financial crisis it became apparent that some banks were "too big to fail" meaning that the failure of one bank led to a systemic risk for the financial sector as a whole. This systemic risk was caused by cross-shareholdings in the banking world and the interconnectedness between public finance and banks. To prevent systemic failures, national governments have rescued banks through financial aid measures and even their acquisition and expropriation.

For the European Economic and Monetary Union ("EMU") this problem was exacerbated by the fact that systemic risks are not confined to single countries but affect all EMU countries. At the time of the EMU's introduction, there was no political union between its member countries, each of which had its own budgetary policy. Therefore, the consequences of the crisis in Greece, for example, were felt throughout the EMU. Furthermore, banking supervision - unlike the banks themselves - was bound by national borders which limited the possibilities for a European monetary policy. The supervision was directed towards individual undertakings and did not offer a solution for the systemic risks. The public rescue costs for banks in distress, incurred to prevent systemic crises, were unprecedented.<sup>1</sup>

The first step in addressing this problem was the introduction of the European System for Financial Supervision ("ESFS") on 1 January 2011. The ESFS consists of the European Systemic Risk Board ("ESRB") and three European Supervisory Authorities ("ESA"): the European Insurance and Occupational Pensions Authority ("EIOPA"), the European Banking Authority ("EBA") and the European Securities and Markets Authority ("ESMA"). The ESFS is an integrated network of national and European supervisory authorities, created to provide the necessary links between the macro and micro prudential levels, leaving day-to-day supervision to the national level.

The introduction of the banking union was the second phase in addressing the systemic-risk problem. The banking union consists of three pillars: the Single Rule Book, the Single Supervisory Mechanism ("SSM") and the Single Resolution Mechanism ("SRM"). The European Commission ("EC") illustrates the relationship between the Single Rule Book, the SSM and the SRM as follows<sup>2</sup>:

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<sup>1</sup> According to the IMF estimates, crisis-related losses incurred by European banks between 2007 and 2010 are close to €1 trillion or 8% of the EU GDP. Between October 2008 and December 2012, the Commission approved €591.9 billion or 4.6% of EU 2012 GDP in state aid measures in the form of recapitalisation and asset relief measures.

<sup>2</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-294\\_nl.htm](http://europa.eu/rapid/press-release_MEMO-14-294_nl.htm)



The Single Rule Book contains common rules intended to prevent bank crises. These rules, which are aimed at turning banks that are "too big to fail" into banks that are "too safe to fail", have been incorporated mainly in the Capital Requirements Directive<sup>3</sup> ("CRD")<sup>4</sup> and Regulation<sup>5</sup> ("CRR"). The Bank Recovery and Resolution Directive<sup>6</sup> ("BRRD") sets out a common framework for the procedures to be followed if a bank does end up in difficulty, including a means to wind it down in an orderly way. The third part of the common rules are the rules regarding the deposit guarantee scheme ("DGS").

The BRRD should have been implemented before 1 January 2015<sup>7</sup>. It is aimed at preparing banks for the possibility of failure and giving national authorities a broad range of powers and tools to ensure that any failing bank can be restructured and resolved in a way which preserves financial stability and protects taxpayers. The BRRD also provides for cooperation among resolution authorities in different member states when dealing with the failure of cross border banks. Among other things, the BRRD constitutes a harmonised rulebook for allocating the costs of a bank failure— starting with shareholders and creditors, and backed by financial support from resolution funds sourced from the banking sector and not taxpayers. Deposits under EUR 100,000 will be covered by the DGS, and deposits of natural persons and small and medium-sized enterprises above EUR100,000 will benefit from preferential treatment ensuring that they do not suffer any loss before all other secured creditors' claims are absorbed. The bail-in tool will apply as from 1 January 2016. The Dutch Central Bank ("DNB") has been appointed as the Dutch resolution authority.<sup>8</sup> Within DNB this function is separated from

<sup>3</sup> Directive 2013/36/EU of the European Parliament and of the Council 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 (CRDIV).

<sup>4</sup> The law implementing this directive in the Netherlands has come into effect on 1 August 2014.

<sup>5</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

<sup>6</sup> Directive 2014/59/EU of the European Parliament and of the Council 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. This Directive should be implemented before 1 January 2015

<sup>7</sup> The Dutch consultation was closed on 19 December 2014. The legislative proposal is expected to be submitted shortly.

<sup>8</sup> Kamerstukken II, 32013, nr. 77, p. 4-5.

banking supervision to comply with the BRRD which demands that structural arrangements are in place to ensure operational independence and to avoid conflicts of interest between the functions of supervision and resolution.

The Single Rule Book however establishes minimum harmonisation rules and does not lead to centralisation of decision making. The BRRD leaves discretion to national authorities in the use of resolution tools and powers and in the use of national financing arrangements in support of resolution procedures. The banking union eliminates this discretion in several supervision areas. The banking union introduces a SSM for centralised, uniform supervision of compliance with the Single Rule Book. Under the SSM, the supervision of banks is elevated to the European level: the ECB will be the supervisor of all 6000 banks in the euro area in the framework of the SSM as of November 2014.<sup>9</sup>

Furthermore, the banking union introduces a centralised uniform resolution mechanism: the SRM. Under the SRM bank resolution is managed by a European Single Resolution Board ("**SRB**") and a European Single Resolution Fund ("**SRF**").<sup>10</sup> Its structure reflects the division of tasks under the SSM. The SRB will be the resolution authority for significant and cross border groups and will exercise the powers under the BRRD. DNB will have to implement decisions by the SRB and will be the resolution authority for other banks under the SRB's supervision, except where a resolution scheme foresees the use of the SRF.

Upon notification from the ECB that a bank is failing or likely to fail, the SRB will adopt a resolution scheme including relevant resolution tools and any use of the SRF. The EC and the Council can object to the resolution scheme within 24 hours. If approved, the resolution plan will be executed by the SRB with assistance from the national resolution authority. If not approved, the SRB must adapt its decision within 8 hours.

The banking union was created without any amendments to the treaties of the European Union. Supervision under the SSM is assigned to an already existing European institution, the ECB. The authorities needed for European supervision are based on existing authorities that were established by separate regulations.<sup>11</sup> The SRM was created by Regulation 806/2014. This regulation is based on Article 114 of the Treaty of the Functioning of the European Union ("**TFEA**") which allows the adoption of

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<sup>9</sup> 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.

<sup>10</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council 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.

<sup>11</sup> The ESRB was established by Regulation 1092/2010, EBA was established by Regulation 1093/2010, the EIOPA was established by Regulation 1094/2010 and ESMA was established by Regulation 1095/2010.

measures for the approximation of national provisions aiming at the establishment and functioning of the internal market. This legal basis has led to several questions regarding the admissibility of the delegation of authorities laid down in the regulation.

In this paper I will first describe the functioning of the SRM, because the legal protection of the SRM can only be described per phase and action under the SRM since there is no general legal protection procedure applicable to every action under the SRM. After this description I will discuss the possibilities for legal protection against these actions and the uncertainties the SRM has created for involved parties.

## 2. WHY AN SRM?

Resolution occurs at the point when the authorities determine that a bank is failing or likely to fail, that there is no other private sector intervention that can restore the entity back to viability within a short timeframe. A standard "insolvency situation".

In normal solvency procedures, the primary objective is to maximise the value of assets of the failed firm in the interest of creditors. This may take many years for complex entities and therefore leads to uncertainty. This uncertainty in case a bank would fail, is incompatible with the character of banks. Banks operate on the basis of public trust. The loss of confidence by depositors and creditors might lead to a bank run which could lead to the failure of the bank. Briefly summarized, this means that the possibility of failure and regular insolvency procedures itself might be the trigger of this failure.

Another problem is that the failure of a large bank may undermine the confidence in other banks, affect their finances and create instability across the financial system as a whole. Through this "contagion effect", the value and viability of many or all banks can be rapidly eroded and the entire financial system could be destabilised in case of the failure of one bank.

To prevent these consequences, the primary objective of bank resolution is to respond in a rapid and decisive manner to a bank in financial distress to maintain financial stability and minimise losses for society, in particular in relation to taxpayers, while ensuring similar results to those of normal insolvency proceedings in terms of allocation of losses to shareholders and creditors. Resolution thus aims to protect certain critical stakeholders and functions of the failing bank (such as depositors and payment systems). Other parts, which are not considered key to financial stability, may be allowed to fail in the normal way.

Because divergences between national resolution rules have an impact on the perceived credit risk, financial soundness and solvency, these differences created an unlevel playing field. This undermines public confidence in the banking sector and obstructs the exercise of the freedom of establishment and the free provision of services within the internal market because financing costs would be lower without such differences.<sup>12</sup> That is the reason for the introduction of a European resolution mechanism. Moreover, because the high national rescue costs lead to unilateral ring-fencing activities and the imposition of higher national liquidity and capital requirements by national supervisors to prevent fi-

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<sup>12</sup> Recital 3 Regulation 806/2014.

nancial risks, it was also necessary to establish a European fund in conjunction with the resolution mechanism.

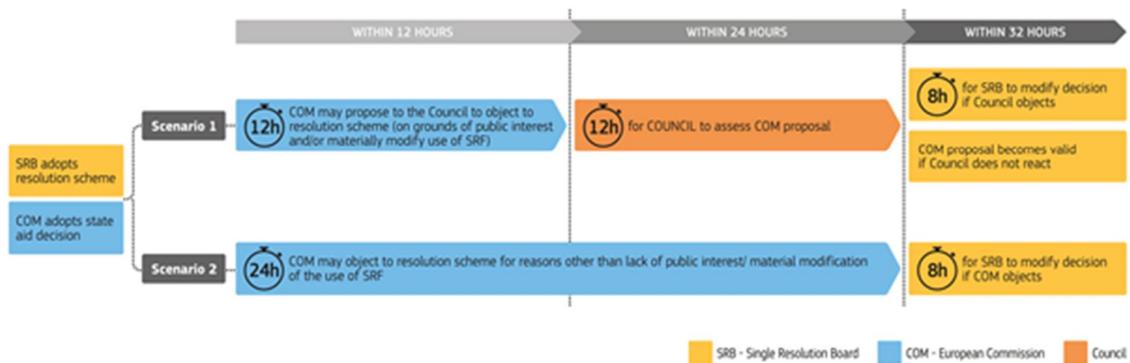
The financial crisis in Cyprus highlighted the need for an SRM. The resolution decisions taken in that case became a blue print for the SRM. This crisis showed that only swift and decisive action backed by EU-level funding arrangements could avoid a disproportionate impact on the real economy, curb uncertainty and prevent bank runs and contagion of other parts of the euro area and the Single Market.

### 3. FUNCTIONING OF SRM

'Resolution' means the restructuring of a bank by a resolution authority, through the use of resolution tools, to ensure the continuity of its critical functions, preservation of financial stability and restoration of the viability of all or part of that entity, while the remaining parts are put into normal insolvency proceedings.

The working of the resolution procedure is illustrated by the EC<sup>13</sup> as follows:

#### Resolution procedure in the banking union



This resolution procedure will apply to:

1. significant banks in accordance with Article 6(4) of Regulation (EU) No 1024/2013 that are not a group;
2. not-significant banks in relation to which the ECB has decided to exercise directly all of the relevant powers in accordance with Article 6(5)(b) of Regulation (EU) No 1024/2013;
3. other cross border groups;
4. the resolution of banks where the resolution action requires the use of the SRF;
5. resolution after a decision by the SRB to exercise directly all of the relevant powers in accordance with Article 7(4)(b) of the Regulation;
6. resolution after a decision by a participating Member State that the SRB will exercise all of the resolution powers in relation to entities established in that Member State's territory in ac-

<sup>13</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-294\\_nl.htm](http://europa.eu/rapid/press-release_MEMO-14-294_nl.htm)

cordance with Article 7(5) of the Regulation .<sup>14</sup>

### Phase 0

- Drawing up resolution plans
- After SRB-report: institution must propose possible measures within 4 months
- If unsatisfying: decision SRB and instruction to national authority

The preliminary phase of recovery under the SRM for a significant bank is the drawing up of resolution plans for all banks under the responsibility of the SRB. This resolution plan must set out the options for applying the resolution tools and exercising resolution powers.<sup>15</sup> These plans will be reviewed at least annually and after material changes. If the SRB, after consultation with the ECB, determines that there are substantive impediments to the resolvability of that entity or group, the Board of the SRB must prepare a report and send it to the entity.<sup>16</sup> The entity must propose possible measures to address or remove the substantive impediments within four months.<sup>17</sup> The SRB assesses the proposal and can decide that the proposal does not effectively reduce or remove the impediments and in this decision instruct the national resolution authority to require the entity to take any of the measures mentioned in Article 10 (11).<sup>18</sup> The national resolution authority is obliged to follow this instruction.

### Phase 1

- Consultation ECB and SRB
- Determination failing or likely to fail by ECB or SRB
- Information requests SRB
- Requirement to contact potential purchasers: early intervention

The first phase of recovery under the SRM is the determination of whether an entity is failing or likely to fail. This determination is the competence of the ECB.<sup>19</sup> If the ECB, after consultation with the SRB, concludes that this criterion is met, the ECB will notify the SRB and the EC. However, the SRB is authorized to inform the ECB about its own intention to make this determination. If the ECB does not make the determination within three days after the SRB notice, the SRB has the power to do so.<sup>20</sup>

The SRB may request any information from the ECB to be able to make such determination. The ECB also has the right to request information, but this right is not based on the provisions regarding the SRM but on the provisions regarding the SSM. The SRB remains ultimately responsible to deter-

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<sup>14</sup> Article 7 Regulation (EU) No 806/2014.

<sup>15</sup> Article 8(5) Regulation (EU) No 806/2014.

<sup>16</sup> Article 10(7) Regulation (EU) No 806/2014.

<sup>17</sup> Article 10(9) Regulation (EU) No 806/2014.

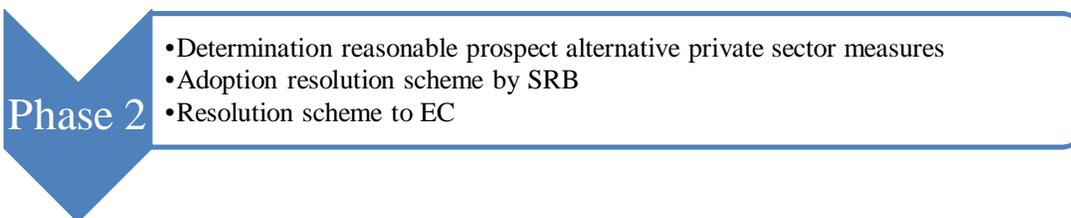
<sup>18</sup> Article 10(10) Regulation (EU) No 806/2014.

<sup>19</sup> Article 18(1) Regulation (EU) No 806/2014.

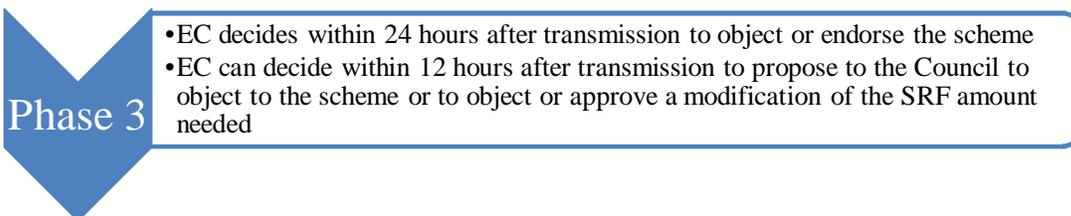
<sup>20</sup> Article 18(1) Regulation (EU) No 806/2014.

mine whether resolution action is necessary in the public interest.

The recovery process can also be triggered by certain supervisory measures. Article 13 of the Regulation summarizes measures that the SRB must be informed about by the ECB or the national authority. Based on this information the SRB is authorised to prepare for the resolution of the entity involved. In this case the SRB must have the power to require the entity to contact potential purchasers in order to prepare for the resolution of the entity.<sup>21</sup> These measures are called "early intervention". Given that use of the SRF is to be minimised, the SRM can be expected to focus on preparations and readiness for resolutions and if necessary early intervention measures.



The second phase is the determination of whether or not there are prospects for alternative private sector solutions. This determination is made by the SRB, in close cooperation with the ECB.<sup>22</sup> The ECB may inform the Board that this second condition for resolution is met. If the SRB concludes that resolution action is necessary in the public interest, it adopts a resolution scheme, including relevant resolution tools and any use of the SRF, after consultation with the ECB or the relevant national resolution authorities.<sup>23</sup> Immediately after adoption, the SRB transmits the resolution scheme to the EC.<sup>24</sup> Depending on the total amount needed from the SRF in the course of one year, the SRB will convene a meeting of its plenary or executive session.



In the third phase, within 24 hours after transmission by the SRB, the EC must either endorse the resolution scheme, or object to it. The EC's decision is directed to the SRB. The decision to object must state the grounds. In the same third phase, within 12 hours after transmission by the SRB, the EC may propose to the Council to object, within 12 hours after receiving the proposal, to the resolution scheme or to approve or object to a material modification of the amount of Fund provided for in the

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<sup>21</sup> Article 13(3) Regulation (EU) No 806/2014.

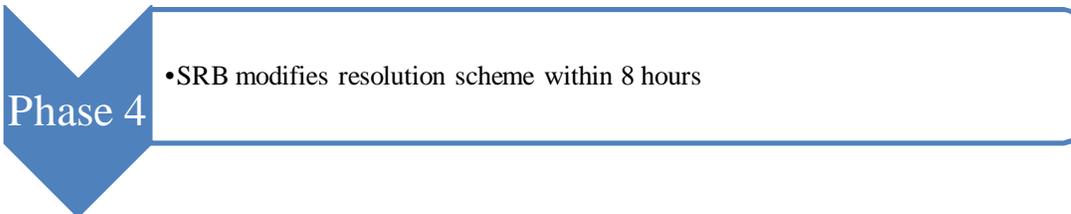
<sup>22</sup> Article 18(1) Regulation (EU) No 806/2014.

<sup>23</sup> Article 18(6) Regulation (EU) No 806/2014.

<sup>24</sup> Article 18(7) Regulation (EU) No 806/2014.

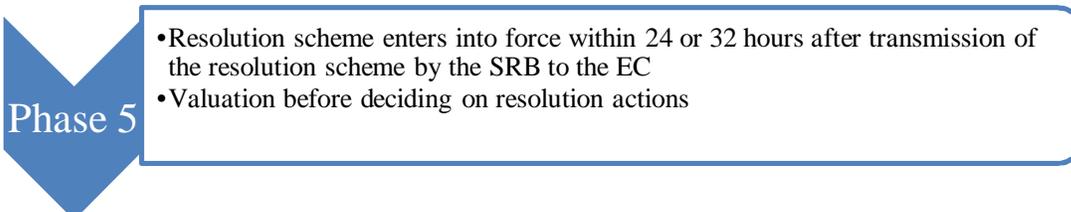
resolution scheme. The Council must provide reasons for the exercise of its power of objection.

The objection by the Council can only be based on the judgment that resolution is not necessary in the public interest. In that case the entity is orderly wound up in accordance with the applicable national law.<sup>25</sup> The objection by the EC can be based on all other discretionary aspects of the resolution scheme.<sup>26</sup>



The fourth phase only takes place after objections by the EC and/or the approval by the Council of material modifications of the amount of Fund that should be provided in the resolution scheme. In this phase the SRB will modify the resolution scheme in accordance with the reasons expressed by the EC or the Council within 8 hours.<sup>27</sup>

The SRB has the authority to amend and update the resolution scheme after it enters into force if this is appropriate in light of the circumstances of the case.<sup>28</sup>



After the modification or after the third phase if there are no objections, the resolution scheme may enter into force. This is the fifth phase. The purpose of these very tight deadlines, in total 32 hours, is to allow a bank to be resolved over the weekend.

The resolution scheme is addressed to the national resolution authorities and instructs these authorities to take all necessary national measures to implement it using their resolution powers in line with national company and insolvency law.<sup>29</sup>

The SRB must ensure a "fair, prudent and realistic" valuation of the assets and liabilities of the entity under resolution before deciding on resolution action or the exercise to write down or convert relevant

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<sup>25</sup> Article 18(8) Regulation (EU) No 806/2014.

<sup>26</sup> Article 18(7) Regulation (EU) No 806/2014.

<sup>27</sup> Article 18(7) Regulation (EU) No 806/2014.

<sup>28</sup> Article 23 and 28(3) Regulation (EU) No 806/2014.

<sup>29</sup> Article 18(9) Regulation (EU) No 806/2014.

capital instruments. The valuation must be carried out by an independent person.<sup>30</sup> The valuation is 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.<sup>31</sup> Valuations must be updated if necessary and possible.<sup>32</sup>



### Phase 6

- National resolution authority implements resolution scheme by using national resolution powers
- National resolution authority notifies all relevant persons

The national resolution authorities must comply with the applicable procedural obligations based on Article 83 the BRRD.<sup>33</sup> This means that they must notify the institution under resolution and several authorities in a prescribed order by sending a copy of any order or instrument by which the relevant powers are exercised and an indication of the date by which the resolution action or actions will be effective. The authority will publish a copy of the order or instrument.<sup>34</sup>

The SRB monitors the execution by the national resolution authorities of its decisions at national level. The SRB may give instructions to the national resolution authorities as to any aspect of the execution of the resolution scheme<sup>35</sup> and, should a national resolution authority not comply with its decision, can directly address executive orders to the bank in resolution.<sup>36</sup> These measures are published by the SRB.



### All phases Supervision

- SRB may request information
- SRB may conduct general investigations
- SRB may perform on-site inspections

The SRB has the power to obtain any information necessary for it to prepare and decide upon a resolution action from the involved entity, its employees and third parties to whom the entities have out-

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<sup>30</sup> Article 20(1) Regulation (EU) No 806/2014.

<sup>31</sup> Article 20(15) Regulation (EU) No 806/2014.

<sup>32</sup> Article 20(14) Regulation (EU) No 806/2014.

<sup>33</sup> Article 29(5) Regulation (EU) No 806/2014.

<sup>34</sup> Article 83 Directive 2014/59/EU.

<sup>35</sup> Article 28(2) Regulation (EU) No. 806/2014.

<sup>36</sup> Article 29(2) Resolution (EU) No. 806/2014.

sourced functions or activities. These persons have an obligation to comply with the request.<sup>37</sup> The information request must be based on a decision.<sup>38</sup>

The SRB may also conduct investigations of the same parties: the involved entity, employees and third parties. This authority means that the SRB may require the submission of documents, examine and take copies of books and records, obtain explanations and interview persons. Such an investigation must be based on a decision of the SRB.<sup>39</sup>

The SRB may also perform on-site inspections at the business premises of the involved entity and third parties. The SRB must give a prior notification of the inspection to the person involved unless the proper conduct and efficiency of the inspection require otherwise. An on-site inspections must be based on a decision of the SRB.<sup>40</sup>

All phases  
Sanctions

- SRB may impose a fine
- SRB may redommend national resolution authorities to take enforcement action
- SRB may impose periodic penalty payments
- SRB publishes fines and periodic penalty payments

The SRB may impose an administrative fine on companies under the scope of the Regulation in cases where:

- a person does not supply information requested by the SRB;
- a person does not submit to general investigations or on-site inspections by the SRB;
- a person does not comply with a decision regarding instructions based on the resolution scheme addressed to him by the SRB.<sup>41</sup>

The basic amount of the fine is a percentage between 0.05% and 0.5% of the total annual net turnover of the fined person. These amounts can be adjusted by applying mitigating and aggravating coefficients in situations described in the Regulation, but the fine may not exceed 1% of the entity's annual turnover.

For infringements other than the ones that can be fined, the SRB may recommend that the national resolution authorities take enforcement action in accordance with Article 110 and 114 of Directive

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<sup>37</sup> Article 34(2) Regulation (EU) No. 806/2014.

<sup>38</sup> Article 39(1) Regulation (EU) No. 806/2014.

<sup>39</sup> Article 35 Regulation (EU) No. 806/2014.

<sup>40</sup> Article 36 Regulation (EU) No. 806/2014.

<sup>41</sup> Article 38(2) Regulation (EU) No. 806/2014.

2014/59/EU and any relevant national legislation.<sup>42</sup>

The SRB may impose a periodic penalty payment to compel the entity or person to:

- comply with an information request by the SRB;
- submit to general investigations or on-site inspections.

The amount of a periodic penalty payment will be 0.1% of the average daily turnover, but that amount can be adapted to make sure the sanction is effective and proportionate. A periodic penalty payment will be imposed on a daily basis until the relevant decision has been complied with but may not be imposed for a period longer than six months.<sup>43</sup>

Before a decision is taken to impose a fine or periodic payment penalty, the addressee will be able to express its views. The addressee will have access to the SRB's file, subject to the legitimate interest of other persons in the protection of their business secrets and with the exception of confidential information and internal preparatory documents of the Board of SRB.<sup>44</sup> In principle the decisions imposing fines or periodic penalty payments will be published.<sup>45</sup> Enforcement of fines and periodic payments is governed by the applicable national procedural rules.

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<sup>42</sup> Article 38(8) Regulation (EU) No. 806/2014.

<sup>43</sup> Article 39 Regulation (EU) No. 806/2014.

<sup>44</sup> Article 40 Regulation (EU) No. 806/2014.

<sup>45</sup> Article 41 Regulation (EU) No. 806/2014.

#### 4. LEGAL BASIS

The SRM Regulation is based on Article 114 TFEU. The SRB is an EU agency and has legal personality.<sup>46</sup>

It has been questioned whether this legal basis suffices for the powers of the SRB under the SRM. Therefore, although the decision to adopt a resolution scheme will be prepared and endorsed by the SRB, either in its plenary or executive session, the discretionary parts of the decision will be adopted by the EC and/or the Council as Treaty-based institutions. The reason for this is that it was concluded from case law that there can be no conferral of discretionary powers on EU agencies.<sup>47</sup> Furthermore an additional legal basis for the SRF was decided upon in December 2013, namely an intergovernmental agreement.<sup>48</sup>

In the meantime, the EU Court of Justice has rendered an important judgment in this regard. The UK sought the annulment of an Article of a Regulation which confers on an EU agency, namely ESMA, the power to intervene, by way of legally binding acts, in Member State financial markets in the event of a “threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union”.<sup>49</sup>

The main findings of the judgment of the Court of Justice are:

1. The Union legislature may, in an area which requires the deployment of specific technical and professional expertise, confer discretionary implementing powers upon a Union agency if these powers are clearly defined and limited by various conditions and criteria;
2. Article 114 TFEU serves as a legal base for the establishment of a mechanism which would enable measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in financial markets.

This judgment has major implications for the assessment of the legal basis of the SRM. The Court of Justice made it clear in this judgment that measures which are needed for the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU serve the functioning of the internal market under Article 114 TFEU, in particular where consistency between Member States is of importance and the continuing application of divergent measures by Member States may

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<sup>46</sup> Article 42 Regulation (EU) No. 806/2014.

<sup>47</sup> Case 9/56 Meroni v High Authority (1957 and 1958) ECR 133.

<sup>48</sup> Recital 19 Regulation (EU) No. 806/2014.

<sup>49</sup> Court of Justice 22 January 2014, Case C-270/12, United Kingdom v Council and European Parliament

create obstacles to the internal market.

In fields with complex technical features and which require highly technical and specialist analyses - which is the case with banking resolution - Article 114 TFEU does provide a legal basis for establishing Union agencies and for conferring the necessary implementing powers upon those agencies even though these powers may be discretionary.

The Court has set<sup>50</sup> certain conditions for the referral:

- the conferred powers have to be clearly defined by the empowering act with respect to substantive and procedural requirements;
- the conferred powers have to be effectively controlled by the delegating authority (political control);
- the conferred powers have to be subject to a legal review (legal control);
- political responsibility cannot be conferred upon executive bodies.

The ESMA judgment is important for the legal protection under the SRM. Before this judgment it was questioned whether the conferring of powers on the SRB met the criteria for this under the EU treaties. If not, a resolution decision of the SRB, with far reaching consequences, could be annulled by the Court of Justice. This would create legal uncertainty. This legal uncertainty has been substantially reduced by the ESMA judgment.

This paper analyses the legal protection from the powers conferred to SRB under the SRM. The main basis for legal protection is an action for annulment before the Court of Justice. This right was extended to - among others - agencies of the Union by the Lisbon Treaty.<sup>51</sup>

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<sup>50</sup> Court of Justice 22 January 2014, Case C-270/12, United Kingdom v Council and European Parliament and 13 June 1958, Case C-9/56, Meroni v High Authority.

<sup>51</sup> Article 263(1) TFEU.

## 5. LEGAL PROTECTION

### 5.1 Articles 85 and 86 Regulation

The Regulation contains two articles on legal protection: Article 85 and Article 86. I will discuss these articles before discussing the legal protection for the actions and decisions described above.

Any natural or legal person, including resolution authorities, may appeal with the Appeal Panel against the following decisions by the SRB addressed to that person, or decisions which are of direct and individual concern to that person:

- a decision indicating that the measures proposed by the entity do not effectively reduce or remove the impediments to resolvability, and instructing the national resolutions authorities to require the entity to take any of the measures listed in Article 10(11) of the Regulation;
- a decision to apply simplified obligations in relation to the drafting of resolution plans based on Article 11 of the Regulation;
- a decision regarding the minimum requirement for own funds and eligible liabilities based on Article 12(1) of the Regulation;
- a decision to impose a fine or a periodic penalty payment;
- a decision setting or increasing the contributions owed by an entity to the SRB based on Article 65(3) of the Regulation;
- a decision on extraordinary ex-post contributions to the SRF;
- a decision on confirmatory applications - i.e. applications filed after failure by the entity to reply within the prescribed time-limit - for access to a document.<sup>52</sup>

The appeal must be filed within six weeks of the date of notification of the decision and will be decided within one month. The appeal has no suspensive effect, but the Appeal Panel may suspend the application of the contested decision<sup>53</sup>

Recital 120 of the Regulation relates to the competence of the Court of Justice:

*"[...] 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*

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<sup>52</sup> Article 85 Regulation (EU) No. 806/2014.

<sup>53</sup> Article 85 of Regulation (EU) No. 806/2014.

*validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability."*

This recital has led to Article 86 of the Regulation on actions before the Court of Justice. The Court of Justice may review a decision by the Appeal Panel or, if there is no right of appeal, by the Board in accordance with Article 263 TFEU. Member States, Union institutions, as well as any natural or legal person may institute proceedings against decisions of the Board in accordance with Article 263 TFEU.

Furthermore, Article 86 provides that proceedings for failure to act may be brought before the Court of Justice in accordance with Article 265 TFEU in the event that the SRB has an obligation to act and fails to take a decision.

## **5.2 Article 263 TFEU**

The Court of Justice is only competent in the cases determined by the EU-treaties. Article 274 TFEU explicitly provides that disputes to which the Union is a party must not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member State, save where jurisdiction is conferred on the Court of Justice by the Treaties. If the Court of Justice is competent, the competence is exclusive.<sup>54</sup> The most important Article that confers jurisdiction to the Court of Justice for appeals by legal or natural persons is Article 263 TFEU.<sup>55</sup>

Article 263 TFEU is not limited to "decisions" but gives the Court of Justice authority to review "acts" of agencies. The difference, however, is not a big as it seems because, according to case law, only acts that produce legal effects which are binding on and capable of affecting the interests of the individual fall within the scope of judicial review based on Article 263 TFEU. Confirmatory measures and implementing measures, mere recommendations and opinions and, in principle, internal instructions do not meet this criterion.<sup>56</sup> In other cases several acts were considered to have binding, legal effects: the rejection of a complaint, a letter detailing the reasons for not following up on a complaint, the decision to grant or refuse a third party access to a file, the refusal to hear interested parties. Fur-

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<sup>54</sup> Court of Justice 9 October 2001, Case C-214/08, Guigard v. Commission.

<sup>55</sup> R. Barents, EU-procesrecht, Deventer, 2010, p. 65.

<sup>56</sup> Court of Justice 12 September 2006, Case C/242/04, Reynolds Tobacco/Commission.

thermore, to be challengeable an act must be definitive. A preparatory act which only constitutes one of the steps towards a legal decision cannot be challenged on the basis of Article 263 TFEU.<sup>57</sup> If a decision from an agency leaves some leeway to the national authority to determine the content of the final measure, the decision of the agency cannot be regarded as directly affecting the legal situation of the person concerned and therefore cannot be challenged before the Court of Justice.<sup>58</sup> In that case the matter can be raised only before the national court having jurisdiction. The national court may, if necessary, raise questions concerning the validity of the decision concerned and submit these for a preliminary ruling to the Court of Justice.<sup>59</sup>

Proceedings based on Article 263 TFEU must be instituted within two months after the publication of the action. If an action was eligible for proceedings, but no proceedings were filed (timely), the action becomes definitive and the illegality can no longer be plead.

### 5.3 Article 265 TFEU

Article 265 TFEU gives the right to a natural or legal person to complain to the Court of Justice that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion. This right is limited to the supposed addressees. And this right is furthermore limited to the same actions that are subject to an appeal based on Article 263 TFEU. Therefore it is limited to actions that - if they were taken - have legal effect.

### 5.4 Legal protection in resolution phases

It seems almost impossible to discuss the legal protection against any possible action under the SRM. Below the most important ones will be discussed phase by phase.

**Phase 0**

- Drawing up resolution plans
- After SRB-report: institution must propose possible measures within 4 months
- If unsatisfying: decision SRB and instruction to national authority

In the preliminary phase resolution plans are drawn up and reviewed periodically. The SRB may decide based on this plan, that there are substantive impediments to the resolvability of that entity. This opinion will be in writing (in a report), addressed to the entity. The report contains recommendations

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<sup>57</sup> Court of First Instance 6 May 2003, Case T-45/02. DOW Agrosciences v. Parliament and Council.

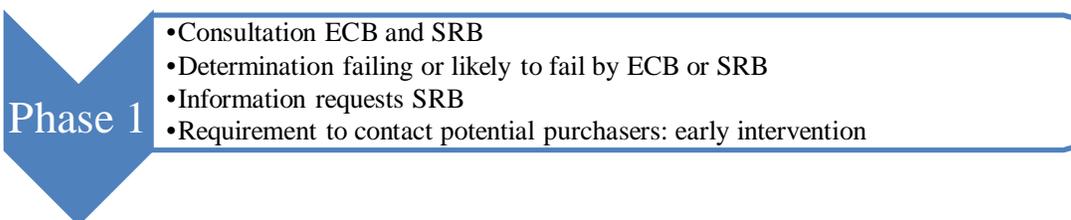
<sup>58</sup> Court of First Instance 12 December 2007, Case T-109/06. Vodafone España and Vodafone Group v Commission

<sup>59</sup> Court of Justice 16 March 1987, Case 123/77, UNICME and Others v Council.

on the necessary measures. The entity must propose possible measures to the SRB within four months.

In the Regulation this report is not qualified as a decision. And Article 10(7) and (8) Regulation are not mentioned in the list of decisions open for appeal to the Board of Appeal in Article 85(3) Regulation. Because the SRB gives recommendations instead of instructions, I believe the report will not be considered to have legal effect and therefore it will not be possible to request the annulment of the report by the Court of Justice based on Article 263 TFEU.

If the SRB decides that the proposal does not effectively reduce or remove the impediments, it gives a decision. This decision contains an instruction to the national resolution authority to require the entity to take any of the measures mentioned in Article 10 (11). The national resolution authority is obliged to follow this instruction. This decision is specified in Article 85(3) Regulation as a decision open for appeal to the Board of Appeal. Because the instruction is addressed to the national resolution authority, the national resolution authority can appeal. The question is whether the involved entity can also appeal the decision. An appeal can only be lodged by a person for whom the decision is of "direct and individual" concern. Since the decision must be implemented by measures to be taken by the national resolution authority and this authority has a discretionary authority in choosing the resolution measures to be used, it is questionable whether the entity will be able to appeal the decision.

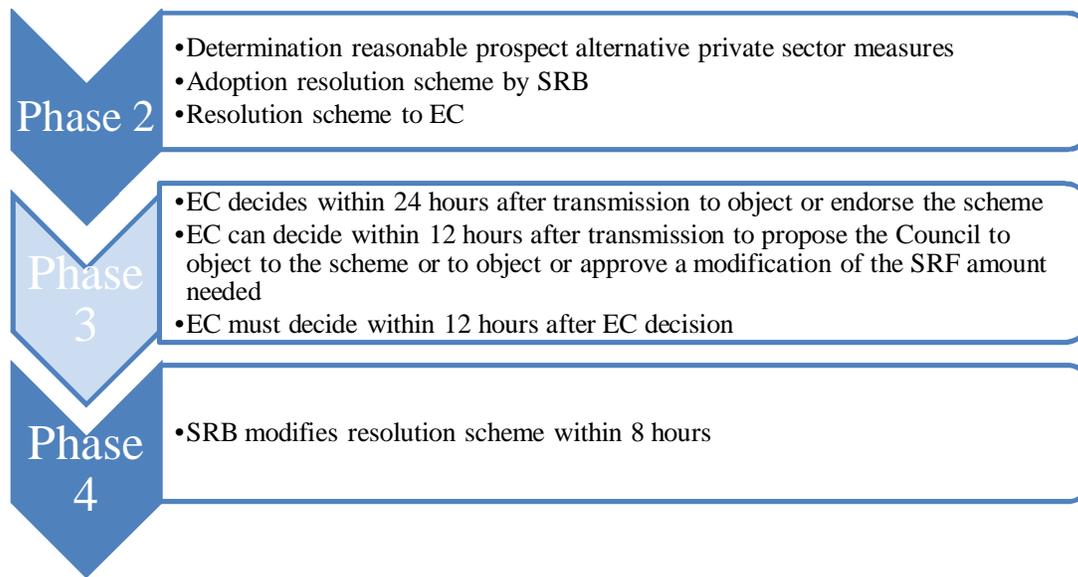
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**Phase 1**

- Consultation ECB and SRB
- Determination failing or likely to fail by ECB or SRB
- Information requests SRB
- Requirement to contact potential purchasers: early intervention

The actions in the first phase are based on Articles 18 or 13 Regulation. Decisions based on these Articles are not mentioned in Article 85 Regulation and therefore not open to appeal at the Board of Appeal.

The early intervention measures from Article 13 Resolution give the SRB the authority to require certain actions from the entity. If the entity does not meet the requirement, the SRB does not have the authority to impose a fine or periodic penalty payment. Therefore it is not likely that an action from the SRB based on Article 13 Resolution will be considered to have legal consequences.



Phases one, two, three and four consist of many consecutive decisions that ultimately lead to the adoption of the resolution plan. The ultimate decision is made by the Commission or the Council by endorsing the scheme or not object to it. The resolution plan places the entity under resolution when it enters into force. This might be considered to be a legal consequence, although the consequences for the entity will depend on the resolution measures to be taken based on the resolution scheme. The resolution scheme is addressed to the national resolution authorities and instructs these authorities to take all necessary national measures to implement it using its resolution powers in line with national company and insolvency law.<sup>60</sup> The national authorities will have some discretionary power by implementing the resolution scheme. Therefore it is not likely that the adoption and entry into force of the resolution scheme will be considered to have direct legal consequences for the involved entity. Furthermore, since the adoption of a resolution scheme based on Article 18(1) Resolution is not mentioned as a decision subject to appeal, it is likely that this decision is not meant to be considered to have direct legal consequences for the entity involved. This might be problematic, because it is likely that the fact that an entity is placed under resolution, will at least have several contractual consequences. Furthermore with the adoption of the resolution scheme, the contribution from the SRF is determined. It is important to have clarity on the legal protection against the adoption of a resolution scheme as soon as possible. And it is also important to choose a legal protection procedure that is able to decide on an appeal in a very short period of time.

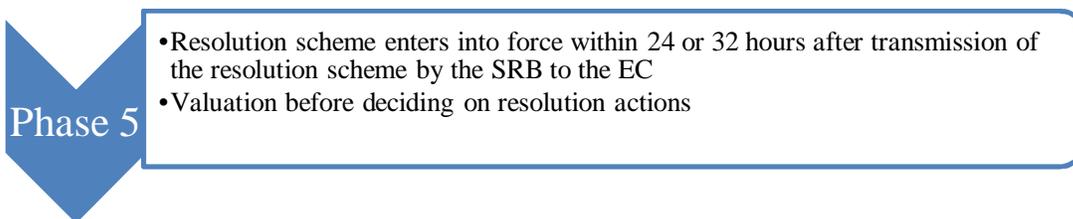
If it is not possible to request annulment to the Court of Justice based on Article 263 TFEU, it might be possible to address the national court and the national court can ask a preliminary ruling by the

<sup>60</sup> Article 18(9) Regulation (EU) No 806/2014.

Court of Justice. In the Netherlands this could be the administrative court or the civil court. In the legal history of the General Administrative Law Act ("**Awb**") it was explicitly mentioned that decisions from institutions from the EU based on EU regulations cannot be reviewed by the national administrative court.<sup>61</sup> Therefore the only competent judge could be the civil court if Article 263 TFEU does not apply to the adoption of a resolution scheme by the SRB. If the annulment of the decision to adopt a resolution scheme cannot be requested to the Court of Justice based on Article 263 TFEU, the failure to adopt a resolution scheme cannot be subject of an Article 265 TFEU procedure. Since the Regulation does not determine a time limit for the drawing up of a resolution scheme, this might lead to a deficit in legal protection.

Article 42(2) Regulation prescribes that the SRB must enjoy the most extensive legal capacity accorded to legal persons under national law and explicitly mentions that the SRB may be a party to legal proceedings. However, the final decision will be made by the Commission or the Council. Since the authority of the Commission and the Council is based on the assumption that discretionary implementing powers can only be conferred to an EU institution, and apparently the power to adopt a resolution scheme is considered to be (partly) a discretionary power, I believe the decision to be challenged should be the decision by the Commission or the Council.

The SRB has the authority to amend and update the resolution scheme after entering into force if this is appropriate in light of the circumstances of the case.<sup>62</sup> Decisions to do so can only be reviewed by the Court of Justice if the adoption of the scheme can be reviewed. If not, the amendments can only be reviewed by the national - in the Netherlands probably civil - court.

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Phase 5

- Resolution scheme enters into force within 24 or 32 hours after transmission of the resolution scheme by the SRB to the EC
- Valuation before deciding on resolution actions

The possibility to challenge the entry into force of a resolution scheme is discussed above.

The SRB must ensure a "fair, prudent and realistic" valuation of the assets and liabilities of the entity under resolution before deciding on resolution action or the exercise to write down or convert relevant capital instruments.<sup>63</sup> The legal basis for the validation is Article 20 Regulation, which is not mentioned in the list of decisions subject to appeal. Article 20(15) Regulation provides that the validation is an integral part of the decision on the application of a resolution tool or on the exercise of a resolu-

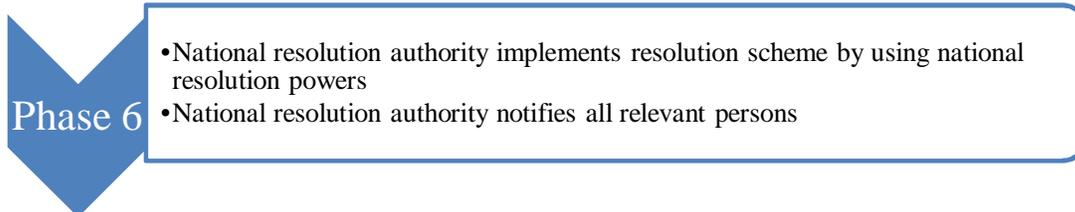
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<sup>61</sup> *Kamerstukken II* 1988/89, 21 221, nr. 3, p. 29.

<sup>62</sup> Article 23 and 28(3) Regulation (EU) No 806/2014.

<sup>63</sup> Article 20(1) Regulation (EU) No 806/2014.

tion power or the decision on the exercise of the write-down or conversion power of capital instruments. Therefore the validation can only be appealed in an appeal to the decisions based on the regulation scheme, addressed to the involved entity. These decisions are usually taken by national authorities as will be described below in phase 6.



The resolution scheme instructs the national resolution authority to implement the resolution scheme by using resolution powers. The national legislator will have to provide adequate legal protection to these decision by the national resolution authority. In the Netherlands most of these decisions can be reviewed by the administrative court since they are decisions pursuant to the Awb.

The national authority will not only send the implementing decision to the involved entity, but will also notify several authorities and will publish a copy of the order or instrument. These actions will be subject to legal protection according to national law. In the Netherlands the publication of a decision is usually considered not to have legal consequences and therefore cannot be reviewed by an administrative court but only by the civil court. In the Netherlands an exception to this rule has been made by law for the publication of several enforcement measures pursuant to the Financial Law Act. Furthermore, non-financial supervisors that publish enforcement measures, base the authority to do so on the Government Information (Public Access) Act ("**Wob**"), and according to recent jurisprudence, this kind of publication can also be reviewed by the administrative court.<sup>64</sup> The Wob however is not applicable to DNB when exercising authorities based on the Wft. DNB is the resolution authority and the resolution powers and measures are part of the Wft. Therefore the Wob will probably not be considered applicable to the publication of resolution measures. This means only the civil court will be competent to judge the publication of resolution measures.

The SRB monitors the execution by the national resolution authorities of its decisions at national level. The SRB may give instructions to the national resolution authorities as to any aspect of the execution of the resolution scheme. These instructions have to be carried out by the national authority before they have legal consequences for the involved entity. Therefore the involved entity will probably not be able to request the Court of Justice to judge an instruction by the SRB to the national resolution authority.

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<sup>64</sup> P.e. ABRS 7 September 2011, AB 2011, 324.

Should a national resolution authority not comply with the instruction by the SRB, the SRB can directly address executive orders to the bank in resolution. These measures are published by the SRB. These measures have legal consequences for the involved entity and can therefore probably be reviewed by the Court of Justice. According to Article 85 Regulation these measures are not subject to appeal to the Appeal Panel.

All phases  
Supervision

- SRB may request information
- SRB may conduct general investigations
- SRB may perform on-site inspections

Information requests, general investigations and on-site inspections are based on a decision.<sup>65</sup> According to Article 85 Regulation these decisions are subject to appeal to the Appeal Panel. And based on Article 86 Regulation the decision of the Appeal Panel may be brought before the Court of Justice. Since non-compliance with any of these decisions can be sanctioned by a fine or a periodic penalty payment, these decisions would also have been regarded as actions as described in Article 263 TFEU.

This means that the European legal protection is better than the national legal protection in the Netherlands. In the Netherlands decisions containing an information request or decisions to perform general investigations or on-site inspections are not considered to be decisions pursuant to the Awb.<sup>66</sup> Therefore they can only be reviewed by the national civil court. And the civil court judges mostly exercises restraint in judging these decisions because the administrative court will be able to judge these decisions at a later moment indirectly by judging the decision based on the findings of these requests, investigations and inspections.<sup>67</sup>

All phases  
Sanctions

- SRB may impose a fine
- SRB may redommend national resolution authorities to take enforcement action
- SRB may impose periodic penalty payments
- SRB publishes fines and periodic penalty payments

The SRB can impose an administrative fine or a periodic penalty payment to entities and to legal persons. Before the decision is made, the SRB is obliged give the involved person the opportunity to be heard on the findings of the SRB that will be the basis for imposing a fine or a periodic penalty pay-

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<sup>65</sup> Articles 39(1), 35, 36 Regulation (EU) No. 806/2014.

<sup>66</sup> Pe CBb 21 July 1998, AB 1998, 437.

<sup>67</sup> Pe CBb 28 August 2008, AB 2008, 344.

ment. And the SRB must base its decision to impose a fine or periodic penalty payment only on findings on which the person subject to the proceedings has had the opportunity to comment. A fine or a periodic penalty payment is always imposed by a decision and this decision is subject to appeal before the Appeal Panel. The decision of the Appeal Panel can be contested before the Court of Justice.

Enforcement of fines and periodic payments imposed by the SRB is governed by the applicable national procedural rules. The courts of Member States have jurisdiction over complaints that enforcement is being carried out in an irregular manner, but only the Court of Justice can suspend enforcement.<sup>68</sup>

For other infringements than the ones that can be fined, the SRB may recommend the national resolution authorities to take enforcement action in accordance with Article 110 and 114 of Directive 2014/59/EU and any relevant national legislation. This recommendation has no legal effect for the entity involved because a discretionary decision from the national resolution authority is necessary to implement the recommendation.

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<sup>68</sup> Article 41(3) Regulation (EU) No. 806/2014.

## **6. CONCLUSION**

EBA is still drafting the guidelines that will give guidance on the functioning of the SRM. According to the EBA website the Implementing Technical Standards on procedures, forms and templates for resolution planning, the Regulatory Technical Standards on notifications and notice of suspension, the Regulatory Technical Standards on resolution colleges and the Regulatory Technical Standards on minimum requirement for own funds and eligible liabilities (MREL) are all under development. The guidelines and standards will give more material legal certainty to the involved entities and persons.

In this paper the focus is on procedural certainty for the involved entities and persons. It is concluded that in some cases the legal protection appears to be at least unclear. It is important to reduce these uncertainties as soon as possible. Furthermore, there appears to be little protection from actions by the SRB. Most actions from the SRB will result in decisions from the national resolution authority with legal protection according to the national rules. The decisions of the SRB can be judged in these proceedings by preliminary rulings from the Court of Justice. The consequence of this system is that many, important actions and decisions cannot be contested in an early phase because they are not intended to have "legal effect". However, these early actions and decisions are very likely to have contractual consequences for the involved entity before the national resolution authority can or will take a decision based on the actions or decisions by the SRB. Therefore the question will be if the legal protection will be available before passing a "point of no return" in the resolution of an entity.