

Legal remedies in the SRM

Navigating the maze

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Freshfields Bruckhaus Deringer

Agenda

Introduction

General principles for legal remedies

Legal remedies against acts in the SRM

- EU level
- National level

Conclusion

Introduction (1)

**Banking Union
conference 2015:**

**“How many
authorities are
required to resolve a
bank?”**

**Banking Union
conference 2018:**

**“How many
authorities do you
need to sue after
resolution (or
before)?”**

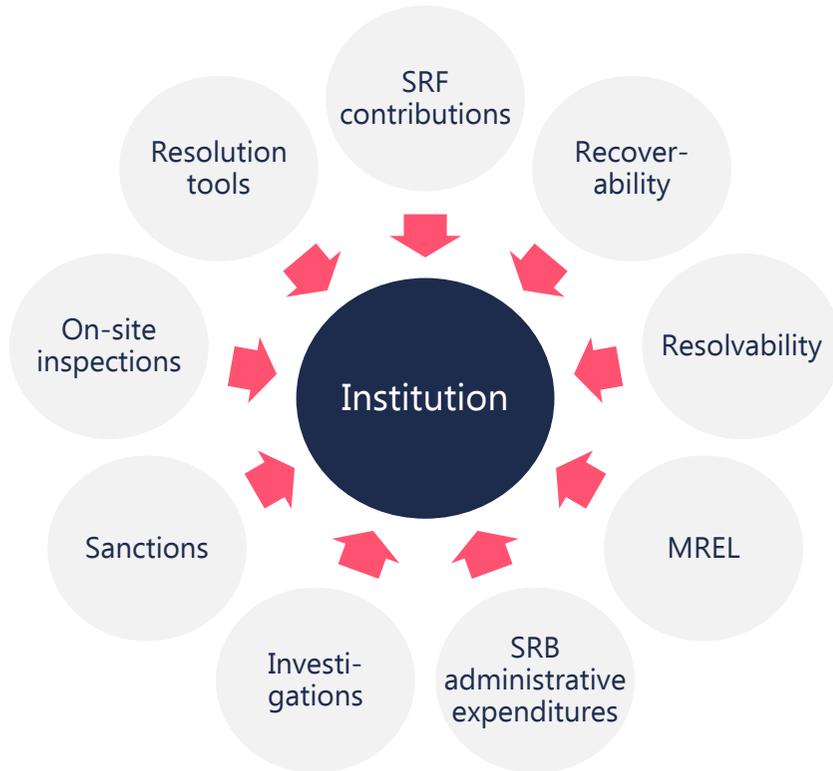
Introduction (2)

Banco Popular Español

- About 100 actions for annulment before General Court regarding SRB decision of 7 June 2017 (resolution scheme)
- About 30 actions for annulment before General Court regarding Commission decision of 7 June 2017 (endorsing the resolution scheme)
- Several actions for damages before General Court against the SRB and the Commission
- Various appeals against SRB decisions denying access to documents decided by SRB Appeal Panel
- Various appeals before General Court against ECB decisions denying access to documents
- More than 100 appeals before FROB (Spanish NRA) and more than 100 lawsuits before Audiencia Nacional (Spanish court)
- Two arbitrations (UNCITRAL and ICSID) against Spain

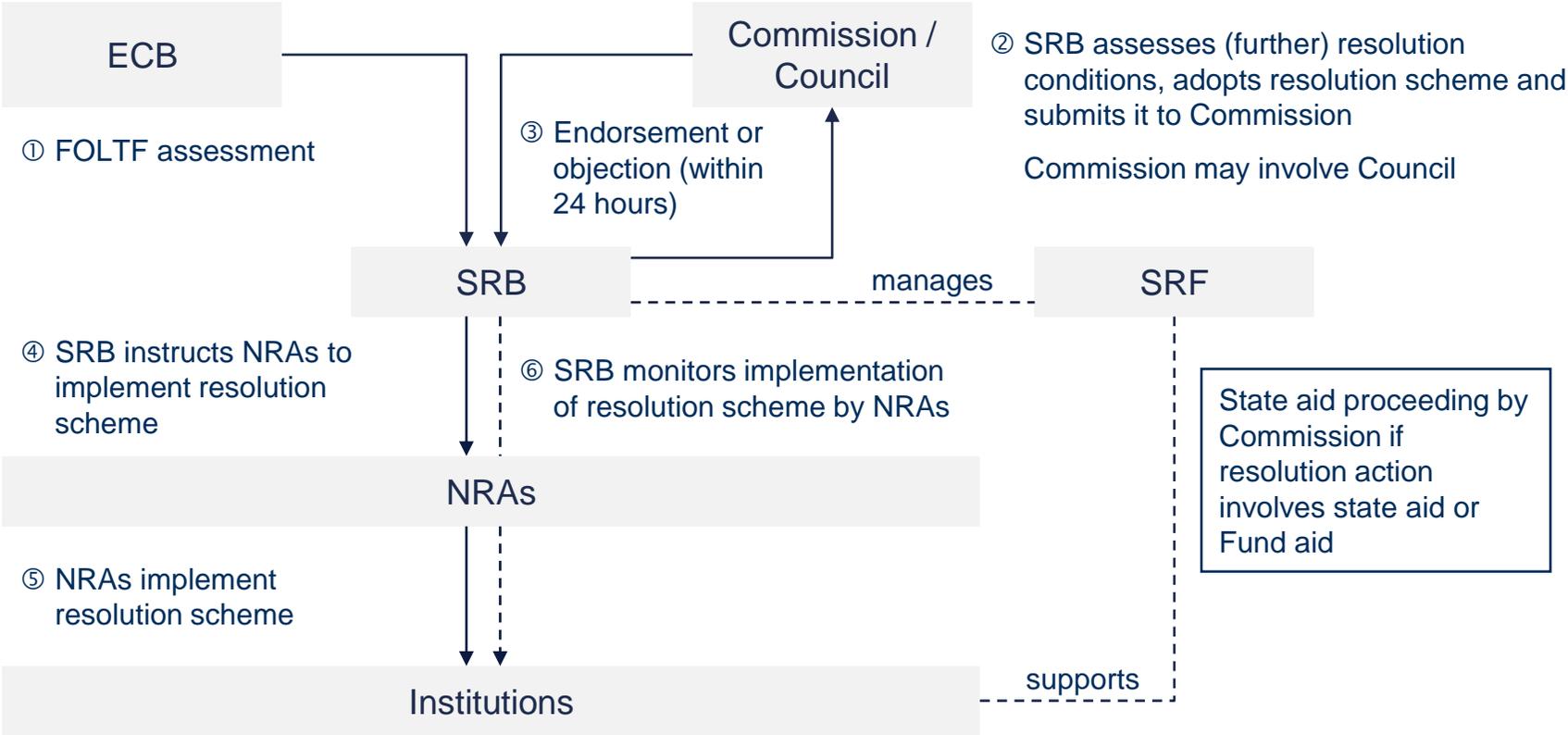
Introduction (3)

Persons affected by SRM action



No right to be heard, no part in decision-making process

Introduction (4)



EU system of legal protection

Theory (ECJ): Complete and coherent system of judicial protection

Case law ECJ

- If **EU institutions** responsible for administrative implementation of measures, **direct action before the Court** against implementing measures
- If implementation by **national authorities**, persons affected may plead the invalidity of EU measures before the national courts and cause the latter to request the Court of Justice for a **preliminary ruling**
- TFEU has “established a **complete system of legal remedies and procedures designed to ensure judicial review** of the legality of acts of the institutions, and has entrusted such review to the European Union judicature”

Recital 120 SRMR

- **Court of Justice** to review the **legality of decisions** adopted by the **Board, the Council and the Commission** and to determine their **non-contractual liability**
- Court of Justice has competence to give **preliminary rulings** upon request of national judicial authorities on the **validity and interpretation of acts of the institutions, bodies or agencies of the Union**
- **National judicial authorities** 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**

Legal remedies in the SRM

Questions

Questions mainly arise as a result of the complex interaction between authorities on the EU and the national level

- Are there any specific remedies provided for in the SRMR?
- If (as is usual) the NRA acts on instruction of SRB, is it sufficient to bring action against the NRA only and to rely on a reference for preliminary ruling by the ECJ?
- Or is it (also) necessary or at least recommendable to bring action against the SRB (and/or the ECB, the Commission and the Council)?
- How long does it take (will an application for interim measures be required (and does it have chances of success))?

Legal remedies in the SRM at EU level (1)

SRB Appeal Panel – SRB decisions

Appeal Panel established by SRB under SRMR

Standing

- Natural and legal persons as well as NRAs

Why use the SRB Appeal Panel?

- SRB Appeal Panel procedure is not optional, but a prerequisite for action against SRB decisions before the CJEU (difference to ECB ABoR)

Limited competence

- Removal of **impediments to resolvability**
- Application of **simplified obligations/waiver** with regard to **resolution plans**
- **MREL**

- **Sanctions** (fines and periodic penalty payments)
- Contributions to the **administrative expenditures of the SRB**
- **Extraordinary ex-post contributions to the SRF**
- **Access to documents** under the framework for public access to documents (Regulation (EC) No 1049/2001)

No competence for

- SRB decisions relating to resolution
- Damages
- Ex-ante SRF contributions

Legal remedies in the SRM at EU level (2)

SRB Appeal Panel – SRB decisions

Standard of review

- Procedural and substantive legality, not opportunity
- “Margin of technical discretion” in case of decision requiring “technical assessment of all specific factual circumstances and a balancing of interests” – clear violations of law and manifest errors of assessment

Evaluation of SRB Appeal Panel

- Can issue decisions binding on SRB (↔ ABoR – only non-binding opinions)
- Several **successful appeals to date** (e.g. access to documents regarding Banco Popular resolution)
- Publication of (anonymised) decisions ensures **transparency**
- Relatively **intensive scrutiny** (according to published decisions)
- **Expertise as specialised jurisdiction** (↔ CJEU – general jurisdiction)
- **Easier access and faster review** than before the CJEU (decision one month after lodging of appeal)

Legal remedies in the SRM at EU level (3)

Court of Justice – SRB decisions

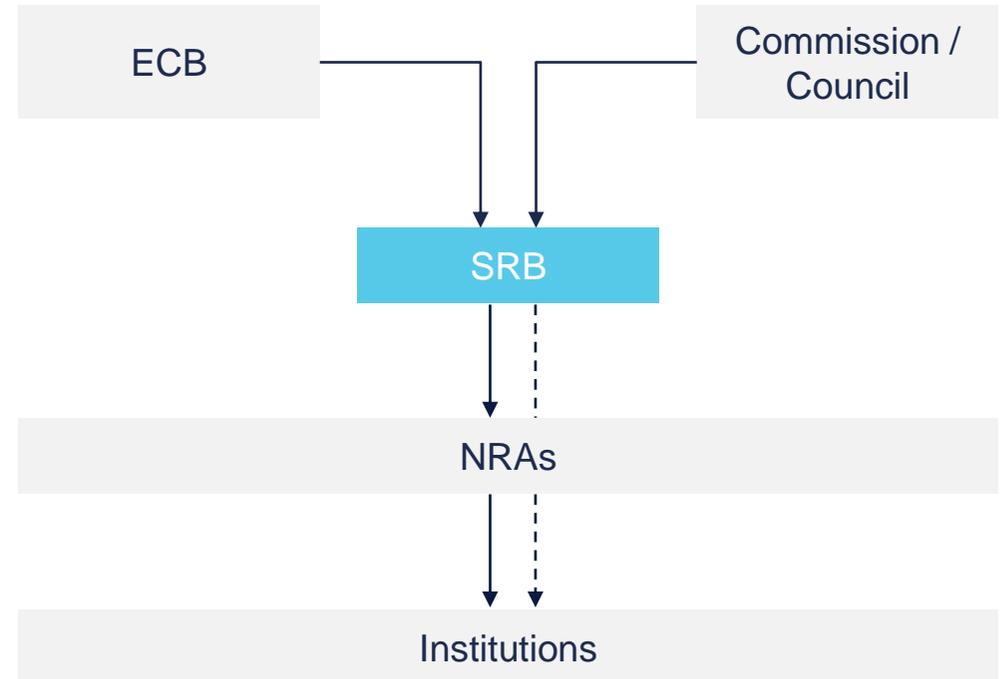
Action for annulment

Necessary if NRAs act and action can be brought at national level?

- Yes, if risk of SRB decision **becoming definitive** (and not subject to review in reference for preliminary ruling)
 - Time limit for action for annulment: 2 months
 - If right to seek annulment “beyond any doubt”
- Preparation facilitation of **action for damages** against SRB

Necessary if direct SRB action (no NRA involved)

- E.g. investigatory powers, sanctions
- Potentially after involvement of SRB Appeal Panel



Legal remedies in the SRM at EU level (4)

Court of Justice – SRB decisions

Can an institution bring an action for annulment against SRB decisions?

- Decision “addressed to that person or of direct and individual concern”
- SRB decision normally **addressed** to NRAs
- To bring action, need to be “**directly and individually concerned**”
- **Direct concern:** direct effect on legal situation of individual and no discretion for addressee (purely automatic implementation)
 - NRAs required to follow SRB decisions
 - SRB decision normally sufficiently granular as to leave no discretion
- **Individual concern:** “peculiar attributes” or “circumstances differentiating applicant from all other persons” (affected as if addressee)
 - Institution?
 - Shareholders, creditors?



The image shows a document from the Single Resolution Board (SRB) titled "DECISION OF THE SINGLE RESOLUTION BOARD IN ITS EXECUTIVE SESSION of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (the 'Institution') with a Legal Entity Identifier: 80H66LPTVDM0P28XF25, Addressed to FROB (SRB/EES/2017/08)". The document is marked as "Non-confidential version" and "SRB-GREEN".

Article 5
Selection of the resolution tools

5.1 The resolution tool to be applied to the Institution shall consist in the sale of business pursuant to Article 24 of the SRMR for transferring shares to a purchaser. The write down and conversion of capital instruments will be exercised immediately before the application of the sale of business tool.

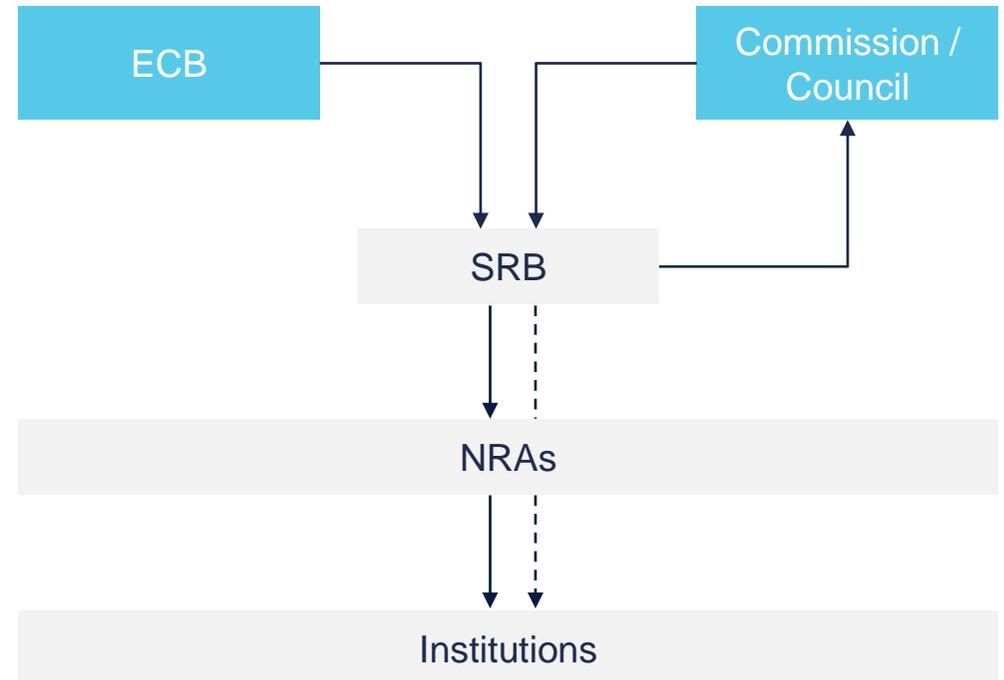
b) Subsequently, to convert all principal amount of Additional Tier 1 Instruments issued by the Institution and outstanding as at the date hereof – that is,

#	Item (ISIN)	Nominal value (in EUR)
1	XS0288613119	5,400,000 €
2	DE0009190702	64,695,000 €
3	DE000A0BDW10	19,115,000 €
4	XS0225590362	7,359,000 €
5	XS0979444402	499,985,000 €
6	XS1189104356	749,988,000 €

Legal remedies in the SRM at EU level (5)

Court of Justice – ECB, Commission, Council

- **ECB:** FOLTF assessment
 - Binding on the SRB?
 - Potential to become definitive (and not subject to review in action against SRB)?
 - Only preliminary/preparatory measure in a procedure involving several stages?
 - No actions against ECB FOLTF assessment in BP
- **Commission:** endorsement of SRB resolution scheme
 - SRB resolution scheme cannot become effective without Commission endorsement
 - Actions against Commission endorsement in BP



Legal remedies in the SRM at EU level (6)

Court of Justice - merits

Standard of review (T-52/16 – Crédit Mutuel Arkea v. ECB)

- “In the case of **complex assessments**, the **EU authorities enjoy**, in some areas of EU law, a **broad discretion**, so that review by the EU judicature of those assessments must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any **manifest error of assessment** or **misuse of powers**.”
- “ECB enjoys such a **broad discretion** in the present case, given the **complexity presented by the assessment of the level of a credit institution’s CET 1 capital requirements** in the light of its risk profile and events likely to have an effect on that profile.”
- Court will mainly review whether facts are accurate, reliable and consistent and whether procedural rights have been observed

Valuation in resolution

- Pre-resolution valuation (informing choice of appropriate resolution action, extent of bail-in, commercial terms for sale of business tool etc.) is “integral part of the SRB decision on the application of a resolution tool” and can (only) be challenged with the SRB decision on resolution scheme” (Article 20(15) SRMR)

Legal remedies in the SRM at EU level (7)

Court of Justice – interim measures

Ancillary nature – main proceedings (normally action for annulment) needs to be brought

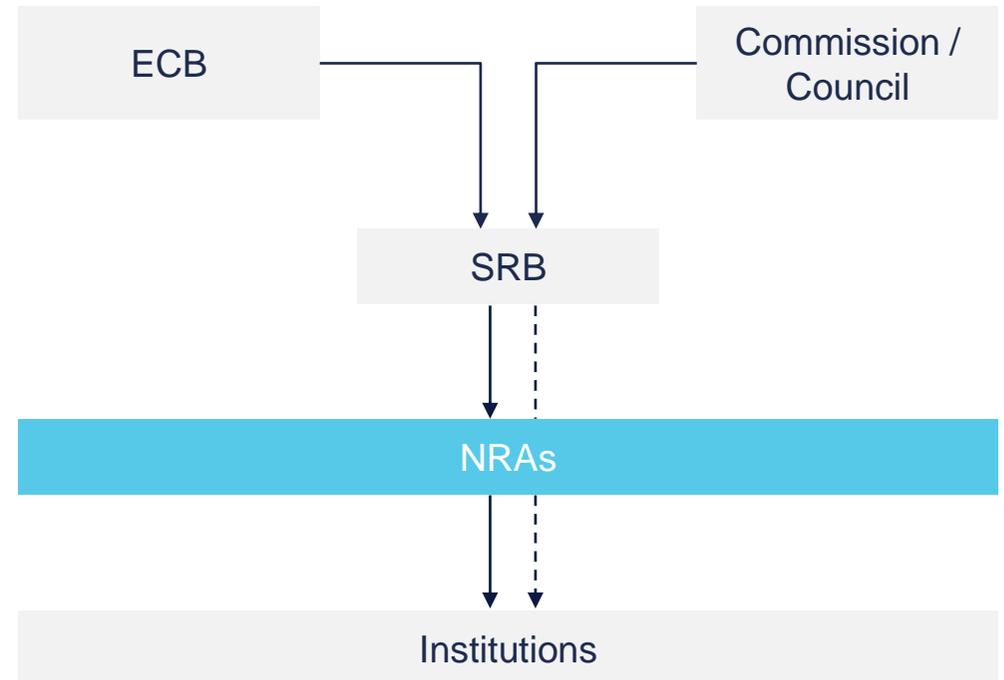
- **Successful application requires that**
 - Application in **main proceedings** is **admissible**
 - **Prima facie case** (*fumus boni juris*): order must be justified, prima facie, in fact and in law, i.e. application in the main proceedings must, at first sight, have a reasonable chance of succeeding
 - **Urgency**: necessary to avoid serious and irreparable harm to the applicant's interests
 - **Weighing of interests**: applicant's interest in the imposition of interim measures must outweigh the other competing interests at stake

Legal remedies at national level (1)

General principles

Necessary to bring action before national court against NRA decision if SRB decision is appealed?

- At least if SRB decision not appealable as not of individual or direct concern
- NRA decision may become definitive and no longer subject to appeal under national law
- Elements of NRA decision may go beyond SRB instruction



Legal remedies at national level (2)

BRRD limitations (Article 85 BRRD)

BRRD limits rights of appeal against NRA “crisis management measures” (resolution actions)

- Litigation can put in doubt effectiveness and reliability of resolution and create legal uncertainty
- Limitations
 - **rebuttable presumption** that a suspension of enforcement would be against the public interest
 - review on **expedited basis**
 - use of **assessment of NRA** as basis for the court’s assessment and
 - annulment of decision shall **not affect subsequent administrative acts or transactions** concluded by NRA based on annulled decision where necessary to protect interests of third parties
 - Only **right of compensation**

Legal remedies at national level (3)

BRRD limitations

No limitations under BRRD for rights of appeal against NRA “crisis prevention measures” (and other measures that are not “crisis management measures”), e.g.

- Measures to ensure recoverability (NCA)
- Measures to ensure resolvability (NRA)
- Early intervention measures (NCA)

Legal remedies at national level (4)

Interim legal protection

Not excluded by Article 85 BRRD even for resolution measures

But (for resolution measures) rebuttable presumption that suspension of enforcement would be against the public interest

Additional requirements where NRA act is based on SRB instruction

- National court has serious doubts as to the validity of the SRB decision
- Referral of the question to the CJEU
- Urgency, i.e. otherwise serious and irreparable damage to the party which could not be made good if the EU act were to be declared invalid at a later stage
- Union interest is taken due account of, in particular damage which the interim measure may cause to the legal regime established by an EU measure for the EU as a whole

Conclusion

A complete and coherent system of judicial protection?

Complex system of legal remedies in the SRM

EU and national authorities interact

Parallel proceedings may be necessary on the national and the EU level, with possibly various defendants at EU level

Cases currently pending before CJEU may bring clarity

Standard of review on EU level often limited

Effectiveness of interim legal protection doubtful