

A LEGAL PERSPECTIVE OF THE SINGLE RESOLUTION MECHANISM

Tomas Ambrasas

Mykolas Romeris University, Lithuania
ambrasas@gmail.com

Abstract

As a result of the crisis it now seems that jurisdictions feel the need to have a special framework to deal with insolvent banks. Banking Union is a key part of the policy, economics, legal measures to put Europe back on the path of economic recovery and growth. It is a crucial step to overcome the current financial fragmentation and uncertainty, also to break the link between the sovereigns and the banks. 2013 July the Commission proposed a Regulation on a Single Resolution Mechanism¹. It also could be said that SRM is a crucial step re-lunch cross-border banking activity in the Single Market to the benefit of both Euro Area and non-Euro Area Member States. The SRM will apply the single rulebook on bank resolution set out in the Bank Recovery and Resolution Directive in respect of ailing banks of the participating Member States in the mechanism. However, notwithstanding the fact that European finance ministers approved a general approach² on the single resolution mechanism (*under the Lithuania Presidency period*) it's still one of the most sensitive and complicated files in EU co-legislators history. The paper reviews the file on the Single Resolution Mechanism (general approach), the legal perspective of that file in the context of Banking Union and identifies a legal perspective of SRM. This paper seeks to provide an overview and preliminary legal assessment of the SRM proposal from the legal perspective.

Purpose– to review the file on the Single Resolution Mechanism in the context of Banking union, the influence of that file and identify legal issues by implementing SRM.

¹ E.C. Proposes Single-Resolution Mechanism' 2013, *Total Securitization & Credit Investment*, p. 42, Business Source Complete, EBSCOhost, viewed 25 June 2014.

² It should be noted that the manuscript was presented for publishing just after the general approach was reached in EU legislation institutions. To add to, the paper was written from the perspective of Single Resolution Mechanism general approach text.

'Resolution finally a reality as EU agrees SRM terms' 2014, *Euroweek*, 1346, p. 3, Business Source Complete, EBSCOhost, viewed 25 June 2014.

Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council. *General Approach*.

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2018070%202013%20INIT>

Design/methodology/approach– purposely to explore the actual meaning of legal norms and legislations as well as content and to analyze the literature the systematic and document analyses, synthesis, comparative, critical thought methods were used.

Findings– potential legal basis problems might go from the degree of the centralization and the appropriation with the primary law. First, SRM proposal might require changes to primary law. Second, it is unclear is proposal in line with the legal basis of Article 114 TFEU (especially suggested comprehensive transfer of executive competences from Member States to the Commission) which allows for the harmonization of law in the EU; Also it could cause the interest of conflict with state of primary law. Another possible legal issue- boundary between the Commission becoming the Resolution Authority. Further, legal risk pertains to resolution decisions that may factually impact on national budgets, it is reliable that much stronger budget protection must be given to participating Member States in order to ensure legitimacy and compliances with constitutional requirements of Member States; Last but not least, the legal issue might be in the context, whether the delegation of powers to the Board envisaged in the proposal is compatible with EU treaties and the general principles of EU law, as interpreted by so-called “Meroni” case law of the Court of Justice of the European Union etc.

Practical implications –Single Resolution Mechanism consisting of a Single Resolution Authority and a Single Resolution Fund, established to operate in tandem with the Single Supervisory Mechanism. SRM will establish a common institutional framework for the application of single rules in the participating Member States. It will encompass codification of supervisory practices and harmonization for national recovery and resolution regimes with a view to safeguarding taxpayers from the need of the future bail outs of banks.

Originality/Value – The single resolution mechanism, which will implement the rules on banking resolution as described in the bank recovery and resolution directive for all banks supervised by the single supervisory mechanism, placed under the responsibility of the European Central Bank, should be up and running by January 2015. However, many interested parties and member states expressed their initial views on the proposal and a few legal issues as legal base, litigation risk, centralization and decision making powers risks, etc. could be identified nowadays. These sensitive issues need to be identified in the scientific level in order to crystallize single resolution mechanism efficiency and credibility. As there is no theoretical framework on the subject yet the author makes the legal assessment of the SRM with the assistance of the relevant legislation, reports and jurisprudence.

Keywords: bank, bank insolvency, bank resolution, single resolution mechanism.

Research type: research paper.

Introduction

The financial crisis, which started in 2008 has shown that there is a significant lack of adequate financial markets regulation. Despite the improvement in funding conditions for sovereigns and banks in the vulnerable Member States, persistent financial fragmentation within the single market is one of the factors hampering bank lending, preventing adequate transmission of monetary policy and delaying economic recovery. Thus, the efficient shape for the financial system, in particular, is needed to prevent the European Union and global markets from recurrence of the crisis. The enhanced financial stability generated by the Banking Union will also boost confidence and the prospects for

growth across the internal market. Central and uniform application of prudential and resolution rules in the Member States participating in the Banking Union will benefit all Member States. The Commission presented on 10 July 2013 a proposal for a Regulation 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 of the European Parliament and of the Council (hereinafter, "the proposal")¹. 2013 12 18 Council agreed general approach² on Single Resolution Mechanism. It called on the presidency to start negotiations with the European Parliament with the aim of agreeing the regulation on the single resolution mechanism (SRM) at first reading before the end of the Parliament's current legislature (May 2014)³. It should be noted that it's the last step in order to create the banking union. The SRM is strongly linked to the directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (hereinafter, "the BRRD proposal").

The proposal is founded on two pillars. *First*, a Single Resolution Mechanism (hereinafter, "the SRM") that will be in charge of applying a set of uniform rules on resolution defined by the proposal itself. Said set of uniform rules constitutes the material law to be applied by the SRM. Powers of resolution are conferred upon the Commission, Council of the European Union and the Board, that would be a newly created EU body with a full legal personality. The European Central Bank or national competent and resolution authorities would be in charge of executing certain resolution actions adopted by the Commission and by the Board. The Board, after its assessment, should adopt resolution scheme. The Council, on the proposal by the Commission, should have a right to object to the entry into force of the resolution scheme or address the directives to the Board in order to reformulate the resolution scheme. The Board should instruct the national resolution authorities⁴. *The second pillar* of the proposal is the Single Resolution Fund (hereinafter, "the Fund"), that would provide the necessary financing to resolution action pursuant to a number of pre-defined criteria. The Fund

¹ Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council. COM(2013) 520 final.

² Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council - *General Approach*.

³ 2013 12 18 Europa- Press releases, Council agrees on the SRM. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/140190.pdf

⁴ Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council - *General Approach*. Recital (16).

would be fed by ex ante and ex post contributions to be paid by the entities covered by the proposal. It would also be able to borrow, under certain conditions, from all other resolution arrangements within non-participating Member States or to contract borrowings or other forms of support from financial institutions or other third parties¹.

Interaction with other Banking Union files

Considering linkages with other elements of the Banking Union² the SRM proposal would complement the Single Supervisory Mechanism (hereafter- SSM), which would be operational since 2014. Pursuant to the SSM the European Central Bank (ECB) will directly supervise banks in the euro area. Other Member States also may join the SSM if they wish so. SRM is closely linked up to the Bank recovery and resolution directive (hereafter-BRRD), on which Council reached a general approach on 26 June 2013. SRM will use the principles and tools (bail-in³ tool) of the resolution pursuant to the BRRD, namely the losses at first should be allocated to the shareholders and creditors, except the covered deposits up to 100 000 euro. Before using the resolution fund for resolution purposes, it would be required that a minimum level of losses equal to 8% of total liabilities of the bank under the resolution including own funds has been imposed on an institution's shareholders and creditors⁴. SRM aims at ensuring efficient management (i.e. supervision and resolution are aligned at central level and backed by the financing arrangements – Single Resolution Fund) of resolution of failing banks in the euro area. If a bank subject to the SSM supervision faced serious difficulties, its resolution could be managed efficiently using privately raised resources with minimal costs to taxpayers and the real economy.

One of the overall aims of legislation and creating a Single Resolution Mechanism is consistent with the BRRD and deposit guarantee scheme directive (hereafter- DGSD). The June 2012 European Council endorsed the commitment to create a Banking Union to strengthen European Monetary Union and break the vicious circle between bank and sovereign vulnerability. The European Council affirmed that it is imperative to break the vicious circle between banks and sovereigns and agreed on a roadmap towards a more

¹ Explanatory memorandum of European Commission proposal for a Regulation of the European Parliament and the Council establishing uniform rules and a uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single resolution Mechanism and a Single Bank Resolution Fund. P., 4

² Commission Communication, “A Roadmap towards a Banking Union”, COM(2012) 510 final (12 September 2012), available at: http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com-2012-510_en.pdf.

³ The bail-in tool would enable resolution authorities to write down or convert into equity the claims of the shareholders and creditors of institutions which are failing or likely to fail.

⁴ 2013 06 28, The Council of the European Union, Proposal for a directive of the European Parliament and the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010. General Approach. Article 38. <http://register.consilium.europa.eu/pdf/en/13/st11/st11148-re01.en13.pdf>

integrated financial framework, including setting up a Single Resolution Mechanism consistent with the BRRD and DGSD. Since the financial crisis, many Member States have established their own special resolution frameworks as a way to preserve financial stability and avoid contagion in the event of the failure of financial institutions and limit use of taxpayer funds. The BRRD will ensure that all Member States have a common minimum set of preventative powers and resolution tools. The DGSD adds to this to ensure a higher level of harmonisation among Deposit Guarantee Schemes in order to minimise distortions created by different levels of depositor protection in the event of bank failure.

Meanwhile the SRM would be a further step towards achieving objectives of financial stability. Even with an established SSM, the development of common resolution tools and harmonisation of depositor guarantees across Member States (achieved by BRRD and the DGSD), the failure of a systemic bank could place excessive burdens on individual sovereigns. This leaves open a channel which contributes to the ‘bank-sovereign’ feedback loop. Evidence over the past three years shows that the risks of such a feedback loop are heightened between the countries sharing a single currency. Therefore, it is argued that establishing an SRM with a common approach to resolution decision making and tools to complement common bank supervision in the SSM would help break the bank-sovereign feedback loop, especially in the euro area. Single Resolution Mechanism with a central decision-making body and a Single Bank Resolution Fund will provide key benefits for Member States, taxpayers, banks, and financial and economic stability in the entire EU:

- strong central decision-making will ensure that resolution decisions across participating Member States will be taken effectively and quickly, avoiding uncoordinated action, minimising negative impacts on financial stability, and limiting the need for financial support;
- a centralised pool of bank resolution expertise and experience will be more able to deal with failing banks in a more systematic and efficient way than individual national authorities with more limited resources and experience;
- a Single Bank Resolution Fund will be able to pool significant resources from bank contributions and therefore protect taxpayers more effectively than national funds, while at the same time providing a level playing field for banks across participating Member States. A Single Fund will prevent coordination problems arising in the deployment of national funds and will be instrumental in eliminating the dependence of banks on sovereign creditworthiness¹.

¹ Explanatory memorandum of European Commission proposal for a Regulation of the European Parliament and the Council establishing uniform rules and a uniform procedures for the resolution of credit institutions and certain investment firms in the framework of a Single resolution Mechanism and a Single Bank Resolution Fund. P., 3-4.

Legal basis and the risk of litigation

The Single Resolution Mechanism must be created within the EU legal and institutional framework. The SRM will consist of uniform rules and procedures to be applied by the Single Resolution Board, together with the Commission and the resolution authorities of the participating Member States. However, the issue arises whether article 114 of the Treaty on the Functioning of the European Union (TFEU) is the suitable legal basis for adopting the proposed Regulation? The legal basis for SRM proposal is Article 114 of the *Treaty on the Functioning of the European Union* (hereafter- TFEU), which allows the adoption of measures for the approximation of National provisions aiming at the establishment and functioning of the internal market. The proposal aims to preserve the integrity and enhance the functioning of the internal market. Also the proposal is based under the *principle of subsidiarity* set out in article 5.3 of the TFEU and under the *principle of proportionality* (the content and the form of Union action should not exceed what is necessary to achieve the objectives of the Treaties). Potential legal basis problems might go from the degree of the centralization and the appropriation with the primary law. *Firstly*, the proposal might require changes to primary law. *Second*, it is unclear is proposal in line with the legal basis of Article 114 TFEU (especially suggested comprehensive transfer of executive competences from Member States to the Commission) which allows for the harmonization of law in the EU so it is necessary to investigate Single Market principles deeper. *Also*, it could cause the interest of conflict with state of primary law. *Another possible legal issue* boundary between the Commission becoming Resolution Authority. It is questionable is Article 114 provide sound legal basis for raising levies from the European banking industry, alternatively it should be provided by and set out by Articles 310,311 or 352 of TFEU. Analyzing alternative legal basis in particular, it should be explored, whether the proposal should be considered as a necessary action in the meaning of TFEU 352 with a view of the aim of preserving financial stability in the participating member states, thus falling within the area of economic and monetary policy laid down in TFEU 119.

Furthermore, legal risk pertains to resolution decisions that may factually impact on national budgets, it is reliable that much stronger budget protection must be given to participating Member States in order to ensure legitimacy and compliances with constitutional requirements of Member States. *Last but not least*, the legal issue might arise in the context whether the delegation of powers to the Board envisaged in the proposal is compatible with EU treaties and the general principles of EU law, as interpreted by so-called “*Meroni*” case law of the Court of Justice of the European Union¹. Council lawyers say single market rules are right¹, as suggested by the

¹ See cases 9/56, *Meroni*, [1957 and 1958] ECR 133,98/80, *Romano* [1981], ECR 1241, and *Alliance for Natural Health*, joined cases C-154/04 and C-155/04 and C-155/04, ECR [2005] P. I-06451. *Meroni* is a long established piece of case law which confirms the ability of the EU Institutions to delegate powers to EU agencies, but which also constrains the delegation of such powers where the use of them would require the exercise of wide discretion. The Court judgement laid down three key principles: 1) An

European Commission, Article 114 (concerning the single market) of the EU Treaty is, under certain conditions, the right legal basis for the single bank resolution mechanism (SRM)². Nevertheless, it is still arguable whether article 114 TFEU may be a suitable legal basis for the establishment of the SRM and Single Resolution Fund and, it's reliable that the legal basis of SRM in the future will be challenged in the court.

If the fundamental decision-making power for resolution of a credit institution remains with the Commission, the Resolution Board will have broad and independent powers to prepare resolution plans³ and resolution schemes⁴ and request their implementation. It is highly important that the SRM's decision-making powers and voting modalities ensure efficient and timely decision-making, particularly during periods of financial crisis. The responsibilities of authorities involved in the resolution process should be more precisely defined to avoid any duplication or overlap of powers. With regard to the Resolution Board's powers, a fuller description of how these powers will be executed would improve compliance with the *Meroni* doctrine, to the extent necessary, with the aim of ensuring, at the same time, that there is sufficient flexibility to deal with each individual resolution case⁵. *Finally*, the proposed regulation has to ensure that any actual resolution decision by the Commission is taken as prompt as necessary. However, it should be taken into account that as long as SRM mechanism responds to a genuine need of uniform application of the rules on resolution that could not be achieved through other methods of harmonization. On the other hand, in order to avoid legal risks it might be a case even to change EU treaties. Changing the EU treaties⁶ is a complicated and lengthy process. And once completed, several countries have a requirement to hold national referendums if there is a substantial transfer of competences from national to EU level.

Institution may not delegate powers that it does not itself possess; 2) A delegation of powers, which “involves clearly defined executive powers [...] which can be subject to strict review in light of objective criteria, determined by the delegating authority”, is permissible; 3) A delegation of powers which “involves a discretionary power, implying a wide margin of discretion, which may [...] make possible the execution of actual economic policy” is impermissible. This is because the power “replaces the choices of the delegator by the choices of the delegate” and thereby “brings about an actual transfer of responsibility”.

¹ 2013 09 19, Brussels, 19/09/2013, Agence Europe
http://ec.europa.eu/internal_market/news/archive/2013_en.htm

² *Supra note*.

³ See Article 7 of the proposed SRM regulation.

⁴ See Article 20 of the proposed SRM regulation.

⁵ European Central Bank, 2013 11 06 opinion on the on a proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (CON/2013/76). www.ecb.europa.eu

⁶ The Lisbon Treaty was created before the financial and economic crisis which itself resulted in several new pacts and reforms.

State aid issue

During the financial crisis, the Commission used the state aid framework to seek to preserve a level playing field across the internal market consistent with maintaining financial stability. According to Commission figures, between 2008 and 2012 nearly €1.5tn of State aid (over €5tn including guarantees) was approved to the banking sector to address the financial crisis. Of that, €950bn was approved for the eurozone (€3.3tn including guarantees)¹.

The establishment of the SRM will potentially have a significant impact on the applicability of the banking State aid framework across the internal market and the current proposal embodies significant serious conflicts of interest given the different roles envisaged for the Commission. The Commission is a collegial body that adopts state aid decisions and will in the context of this Regulation also adopt resolution decisions and decisions concerning Single Resolution Fund aid. As it is stated in the SRM proposal “*the decision on Union aid*” would be “*a separate decision from the one on the resolution framework*”. Such decision would be subject to the general provisions set forth by Article 107 of the TFEU and to the same criteria laid down in the relevant communications adopted by the Commission on those grounds. Therefore, the Commission would assess, on a case by case basis, if the use of the Fund proposed by the Board in the context of a resolution procedure is compatible with the internal market. The Board would only decide on the resolution scheme once the compatibility of the use of public aid would have been positively assessed by the Commission. This approach seems inconsistent with the proposed Regulation as a stand-alone legal regime for banking resolution in the euro area. Indeed, its provisions already seek to find a balance between the objectives of not distorting competition in the internal market and safeguarding financial stability by establishing detailed requirements and conditions for the Single Bank Resolution Fund to intervene in a resolution context. A separate decision of the Commission on a case by case basis seems therefore not necessary, also considering that the Commission would have in any case the final decision making power on resolution.

Once the SRM will be fully operational, an involvement of the Single Bank Resolution Fund should therefore be treated as a form of public aid *per se* compatible with the internal market, provided that it has been approved and implemented in full conformity with the Regulation provisions. Following this option would not prevent the Commission from reviewing *ex post* the resolution scheme adopted to verify whether and to what extent the intervention of the Fund as envisaged in connection with a specific resolution tools, is in practice proportionate and compliant with the internal market, or appropriate corrective measures or additional safeguards (such as specific obligations or restrictions on the beneficiary entity), are to be further adopted by the Board.

¹ DG Competition figures on State aid provided in the context of the financial and economic crisis to the financial sector (2008 – 30/09/2012). http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html

Once the SRM is fully capitalised and has been established in line with the Commission's proposal, SRM interventions which involve the provision of assistance to banks in resolution from the Single Bank Resolution Fund (the Single Fund) would not constitute State aid for the purposes of Article 107(1) TFEU. Such assistance would not, as the proposed Regulation stands, involve "State resources" since the monies in question would not originate from the Member States and because those monies would not transit through a Member State or a body nominated by it for that purpose. Moreover, it is highly doubtful that such assistance could be considered as imputable to a Member State in light of the *Puffer* and *Deutsche Bahn* rulings of the Court and General Court respectively¹. Since such SRM interventions would not involve State aid, Articles 107 and 108 TFEU could not apply directly to them. In terms of the goal of ensuring a level playing field in the internal market, there would be a real risk of perpetuating or exacerbating distortions of competition if banks in resolution were treated differently depending on whether any public support which they obtained were received from the SRM or from a Member State. Such public support from a Member State is more than likely to constitute State aid, while public support from the SRM once it is fully operational would not constitute State aid.

In order to avoid State aid discipline issue, the legislator can decide that in order to ensure equal treatment the same set of substantive rules which ensure the compatibility of State aid with the internal market should be applied to SRM interventions. Without such a framework, there would be a real risk that banks under the SRM would be able to receive public assistance (albeit not State aid within the meaning of Article 107(1) TFEU) on a basis which was less onerous than that which would be applicable to public assistance from Member States to banks outside the SRM. Such a difference in treatment would jeopardise the unity of the internal market.

If extraordinary public financial support is necessary in the resolution of an entity, the Board will invite the relevant Member State to immediately notify it to the Commission under Article 108(3) of the TFEU. The provision of any extraordinary public financial support is decided solely by the Member State concerned. The notification from the Member State to the Commission triggers the assessment under State aid rules of the extraordinary public financial support (the State aid decision). This State aid procedure will run in parallel with the assessment by the Commission of the resolution of the concerned entity (the decision triggering resolution). To ensure consistency between those two decisions, also in this case, the State aid decision is a precondition for the decision triggering resolution, as stated in Article 6(2)(e) of the Commission's proposal. Both decisions are addressed to the Board, which adopts a resolution scheme in accordance with Article 20 of the Commission's proposal. To conclude, this system requires the establishment of a continuous cooperation and exchange of information between the ECB, the national resolution authorities, the Board and the Commission for the competition of both procedures. Because all of the relevant decisions (namely, the

¹ See Case C-460/07 *Sandra Puffer* [2009] ECR I-3251, paragraph 70, on the right to tax deductions under the VAT system set up by the Union, and Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047, paragraph 102, on tax exemptions required by Union law.

decision triggering resolution, the State aid "by analogy" decision and the State aid decision) are taken by the Commission, the goal of ensuring the homogeneous application of the substantive rules on State aid compatibility in relation to bank resolution measures with public support within and outside the SRM can be ensured.

Non contractual liabilities issue

The issue might be arise with the arrangements for the payment of costs and non-contractual liabilities of the Commission and, where relevant, of the Single Resolution Board (hereafter-SRB) when performing tasks under the SRM. By way of Article 340 of the TFEU, similar to other areas of the EU policies, (including those where not all EU Members States are participating), the liabilities of the Commission would be covered by the general EU budget.

Non-contractual liabilities of the SRB arising in the course of the performance of its tasks under the SRM are to be met by the Board. In certain instances the SRB shall compensate national resolution authorities in relation to damages awarded against those authorities when acting in accordance with a decision under the SRM. In both cases the liabilities are to be met from the SRB's budget. However, it is concerned from the legal perspective that no similar provision is made in relation to costs and liabilities of the Commission when performing its tasks under the SRM. Therefore, it could be controversial that general EU budget should be immune from any possible cases of non-contractual liability of the EU bodies or institutions taking decisions in the SRM context. It should be taken into account that it should be clear who bear the cost in case of resolution having in mind that resolution in the one hand is a political decision and it might lead to the litigation. In addition, in case of large banks this may cause serious damages, so it should be considered whether the general EU budget should be immune from such liability.

Conclusions

Co-legislators purpose of the SRM is to safeguard financial stability and ensure an effective framework for resolving financial institutions while protecting taxpayers in the context of banking crises. Only with a legally credible mechanism of a failed bank's creditors can be harness the forces of market discipline and take tax payers from suffering the losses. Some of the issues where tried to solve with the General Approach in the Council, however, some of them are left and still could be disputed by the European Parliament. In both cases, legal issues could reduce the credibility of the SRM.

Powers to be transferred in the SRM proposal imply a high degree of intrusion in the private sphere (ownership, debt obligations) and important financial/fiscal impact. This need to be reflected in the solidity of the legal basis- otherwise it may be risk the

legal certainty of the decisions in respect to the SRM. Despite the fact that Council legal service agrees on solid legal basis of the SRM, litigation risk still remains.

Adopting TFEU 114 as the legal basis of SRM could result into far-reaching consequences for the future interpretations on EU law and particular the relationship between the single market legislation and the European Monetary Union.

The proposed SRM regulation is designed to ensure the preservation of the Commission’s State aid competences in all resolution cases involving support which is treated as State aid due to EU law. This will be achieved by running the State aid procedure in parallel to the resolution procedure. There is risk that resolution powers provided to the Commission would conflict with role of the Commission in exercising state-aid control, this should be more clarified in the proposal. Given decision making model may raise independence issues.

References

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Case 98/80, *Romano v INAMI* [1981] (ECR 1981, p. 1241).

Cases C-154/04 and C-155/04[2005], *Alliance for Natural Health and others* (ECR 2005, p. I-6451).

Case C-460/07 *Sandra Puffer* [2009] ECR I-3251.

Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047.

6. European Central Bank, 2013 11 06 opinion on the on a proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (CON/2013/76) http://www.ecb.europa.eu/ecb/legal/pdf/en_con_2013_76_f_sign.pdf

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